

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

I.A. NO. _____ OF 2020

IN

SPECIAL LEAVE PETITION [C] NO.20370 OF 2012

IN THE MATTER OF

Chief Master Sargeant Massimiliano
Latorre & ors.

... Petitioners

Versus

Union of India & ors.

... Applicant /
Respondent

{ Application For Direction }

(For Index Please See Inside)

ADVOCATES FOR THE APPLICANT :

B. V. BALARAMDAS

INDEX

Sr No	Particulars	Page No
1.	Copy of the application for direction on behalf of Union of India	1 – 9
2.	<u>Annexure A-1</u> Copy of the judgment dated 18.01.2013 reported in (2013) 4 SCC 721 titled as Republic of Italy & Ors. v. Union of India & Ors.	10 – 64
3.	<u>Annexure A-2.</u> Copy of the order dated 28.03.2014 passed by this Hon'ble Court.	65 – 68
4.	<u>Annexure A-3</u> Copy of the order dated 26.8.2015 passed by this Hon'ble Court.	69 – 70
5.	<u>Annexure A-4.</u> Copy of the order dated 2.09.2015 passed by this Hon'ble Court.	71
6.	<u>Annexure A-5</u> Copy of the order dated 6.03.2017 passed by this Hon'ble Court.	72 – 73
7.	<u>Annexure A-6</u> Copy of the Award dated 21.5.2020 passed by the tribunal constituted under United Nation Convention on the Law of Sea [UNCLOS].	75 – 481

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APPLICATION FOR DIRECTIONS

To

Hon'ble the Chief Justice and his
Hon'ble Companion Justices of the
Hon'ble Supreme Court of India.

The humble Application of the
Petitioner/Applicant abovenamed-

MOST RESPECTFULLY SHEWETH :

1. The caption matter is pending consideration before this Hon'ble court. At the outset I respectfully state and submit that the captioned SLP is connected and tagged along with (i) Writ Petition (Civil) No. 135 of 2012 titled as Republic of Italy & Ors Vs. Union of India & Ors.; (ii) Writ Petition (Civil) No 236 of 2014 titled as Chief Master Sargeant Massim Lat. vs. Union Of India; (iv) Writ Petition (Civil) No. 919 titled as Kilsariyan vs. Union Of India. The present application filed by Union of India may, therefore, be treated as an application filed in all the connected matter.

2. The Applicant-Union of India, is filing this Application in pursuance of order dated 6.3.2017 passed by this Hon'ble Court whereby the parties are required to place on record the Award passed by the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which

was taken note of by this Hon'ble Court in the present proceedings. The brief facts leading to this Application are as under:-

- 2.1** The petitioners filed WP No. 4542 of 2012 before the Hon'ble Kerala High Court, challenging the jurisdiction of the State of Kerala to conduct investigation on the incident involving Italian Ship *Enrica Lexie* . The Hon'ble Kerala High Court heard the matter and directed the Petitioners to file their additional written submissions, which were duly filed on 2nd April, 2012, whereupon, the Hon'ble High Court reserved its judgement.
- 2.2** It is respectfully submitted that since there was a delay in the pronouncement of the judgment by the Ld Single Judge, the petitioners filed an Article 32 Writ Petition before this Hon'ble court bearing Writ Petition (Civil) No. 135 of 2012 titled as Republic of Italy & Ors Vs. Union of India & Ors.), *inter-alia* praying for a mandamus to declare that any action by all the Respondents in relation to the alleged incident, under the Criminal Procedure Code or any other Indian law, would be illegal and ultra vires and violative of Article 14 and 21 of the Constitution of India; and to declare that the continued detention of Marines by the State of Kerala is illegal and ultra vires being violative of the principles of sovereign immunity and also violative of Articles 14 and 21 of the Constitution of India. It is submitted that this writ petition was filed before the passing of the judgment by the Ld Single Judge of the Kerala High Court in Writ Petition (Civil) No. 4542 of 2012.
- 2.3** It is submitted that during the pendency of the said Writ Petition [WP 135 of 2012] before this Hon'ble court, the Kerala Police filed a charge sheet dated 18.05.2012 against the Marines under Sections 302, 307, 427 read with Section 34 Indian Penal Code and Section 3 of the SUA Act.
- 2.4** It is submitted that on 29th May, 2012, the Ld Single Judge of the Kerala High Court dismissed Writ Petition (Civil) No. 4542 of 2012 on two grounds. The learned Single Judge held that under the Notification No. SO 67/E dated 27th August, 1981, the

entire Indian Penal Code had been extended to the Exclusive Economic Zone and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The learned Single Judge also held that under the provisions of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 [SUA Act], the State of Kerala has jurisdiction upto 200 nautical miles from the Indian coast falling within the Exclusive Economic Zone of India.

- 2.5** It is respectfully submitted that the Ld Single Judge also observed that the Marines were under the control of the Captain of the ship and hence, were to act only under his orders. There is nothing on record to show that the Italian marines were allowed absolute freedom to shoot and kill any person, even in cases of piracy attacks. Since, there is nothing on record to come to a conclusion that the Captain had given them any instruction to open fire at the boat, it has to be inferred that they did so at their own whim, and not under the command of either the Captain or of their superior officer in the Navy, so as to be able to claim sovereign immunity. The act of shooting the fishermen was observed to be neither an action in defence of the State nor one in defence of the vessel, but a private, illegal and criminal act. Therefore, it was held that the two marines had no immunity.
- 2.6** Aggrieved by the aforesaid judgment dated 29th May, 2012, passed by the Ld Single Judge of the Hon'ble Kerala High Court dismissing the Writ Petition (Civil) No. 4542 of 2012, the petitioners preferred the SLP in question bearing Special Leave Petition (Civil) No. 20370 of 2012.
- 2.7** It is submitted that since the subject matter of the S.L.P. (C) No. 20370 of 2012 (challenging the judgement of the Kerala High Court) as well as the relief sought in Writ Petition (Civil) No. 135 of 2012 were overlapping and inextricably linked therefore this Hon'ble court was pleased to tag the said two matters together.

2.8 It is respectfully submitted that in the meanwhile, the petitioners prayed for the stay on further proceedings in the criminal matter pending before the Session Court Kollam District, Kerala pending hearing and disposal of the SLP and, pass appropriate interim order staying operation and effect of the impugned final judgement (dated 29.05.2012) passed by the learned single Judge Hon'ble High Court of Kerala in WP No. 4542 of 2012. And, pass such any other order or such further order as this Hon'ble Court may deem fit or proper in the facts and circumstances of the case. The petitioners also filed various other miscellaneous application for seeking certain interim reliefs. The details of the said application are not necessary for the purpose of the present application therefore as advised the Applicant/UOI is not placing the same in the present application.

2.9 It is respectfully submitted that in the meanwhile vide order dated 18.01.2013, reported in (2013) 4 SCC 721 titled as Republic of Italy & Ors. v. Union of India & Ors., this Hon'ble court held that the State of Kerala had no jurisdiction to investigate into the incident, till such time it is proved that the provisions of Article 100 of the UNCLOS apply to the facts of the present case. This Hon'ble court vide the said order further held that the Union of India had the requisite jurisdiction to proceed with the investigation and trial of the Marines. Furthermore this Hon'ble court also directed the Union of India to set up a Special Court to try this case and dispose of the same. The pending proceedings before the CJM, Kollam was therefore transferred to the Special Court to be constituted in terms of this judgment. A copy of the judgment dated 18.01.2013 passed by this Hon'ble court is annexed hereto and marked as **Annexure A-1.**

2.10 That thereafter the petitioners filed another writ petition before this Hon'ble court bearing W.P. (C) No. 236/2014 registered on 08-03-2014, *inter-alia* challenging the legality and validity of investigation/prosecution instituted by the National

Investigation Agency (NIA) on the subject matter. In the said writ petition the Petitioners' made the following prayers:-

- (a) *declaring the NIA's investigation and prosecution without any jurisdiction as illegal and invalid, null and void;*
- (b) *quashing the MHA's notification S.O. 964 (E) Notification No. S.O. 671 dated 27-08-1981 issued under section 7(7) of the Maritime Zones Act, 1976 extending the applicability of the IPC and Cr.P.C. to the Exclusive Economic Zone;*
- (c) *declaring the MHA Order dated 06.02.2014 establishing Special Court ceased to have effect; and*
- (d) *Petitioners are Italian Military and Judicial officials have functional and enjoy sovereign immunity from being prosecuted in India.*

2.11 That on 28.03.2014, this Hon'ble court was pleased to stay the proceedings pending before the Special Court. A copy of the order dated 28.03.2014 is annexed hereto and marked as **Annexure A-2.**

3. The Applicant states and submits that thereafter various interim applications were filed essentially concerning the bail and bail conditions of Italian marine, with which the present proceedings may not be concerned at this stage.

4. The Applicant, however, respectfully submits that on 24 August 2015, International Tribunal on Law of the Sea (ITLOS), on the request of Italy, rendered an Order prescribing provisional measure stating that Italy and India shall both suspend all court proceedings. Vide order dated 26.8.2015, this Hon'ble Court, in view of the pendency of the issue before International Tribunal on Law of the Sea (ITLOS), was pleased to stay the proceedings pending before it and before other Court. A copy of the order dated 26.8.2015 is annexed hereto and marked as **Annexure A-3.**

5. It is respectfully submitted that this Order was later modified on 02-09-2015 by this Hon'ble Court to the effect that ITLOS shall be read as "Annex VII Arbitral Tribunal" thereby the proceedings

pending in the Courts shall remain stayed/deferred till further orders. A copy of the order dated 2.09.2015 is annexed hereto and marked as **Annexure A-4**.

6. That vide order dated 6.03.2017 this Hon'ble court directed the parties to place on record the Award passed by the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and list the matter once the same is placed on the record of this Hon'ble Court. A copy of the order dated 6.03.2017 is annexed hereto and marked as **Annexure A-5**.

7. The Applicant states and submits that the Arbitration under United Nation Convention on the Law of Sea [UNCLOS], which was instituted on a request from the Republic of Italy has delivered its Award dated 21.5.2020. Salient features of the said Award are as under:-

- The Tribunal upheld the conduct of Indian authorities with respect to the incident and highlighted the material and moral harm suffered by the Indian fishermen on board the St. Antony on 15 February 2012. It held that the actions of the Italian Marines breached India's freedom and right of navigation under UNCLOS Article 87(1)(a) and 90.
- As argued by India, the Tribunal observed that, in principle, India and Italy had concurrent jurisdiction over the incident and a valid legal basis to institute criminal proceedings against the Marines. However, it found that the immunities enjoyed by the Marines operate as an exception to the jurisdiction of the Indian courts and, hence, preclude India from exercising its jurisdiction over the Marines. The Tribunal also rejected Italy's claim to compensation for the detention of the Marines.
- The Tribunal took note of the commitment expressed by Italy to resume its criminal investigation into the events of 15 February 2012 and decided that India must take necessary steps to cease to exercise its criminal jurisdiction over the marines.

- The Tribunal decided that India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property and moral harm suffered by the captain and other crew members of "St. Antony". The Tribunal also held that the Parties are invited to consult with each other with a view to reaching agreement on the amount of compensation due to India. The Tribunal also decided that it 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, and that, should no such application be received within one year after the date of the present Award, the proceedings shall be closed.
- India being a Party to the UNCLOS, in accordance with the provisions of the UNCLOS and the Rules of Procedure agreed by the Parties, the Award is final and without appeal and shall be complied with by the parties to the dispute (Article 11, Annex VII, UNCLOS).

8. The applicant states and submits that the Republic of India has taken a decision to accept and abide by the Award passed by the said Tribunal which would have the bearing on the continuance of present proceedings before this Hon'ble Court.

9. The Applicant states and submit that the Applicant is, therefore, placing this Award on record with a prayer that the proceedings with regard to the incident dated 15.2.2012 be disposed of in conformity with the Award passed by the aforesaid Tribunal on 21.5.2020. Copy of the said Award is annexed hereto and marked as **Annexure A-6.**

PRAYER

On the facts and circumstances of the case, this Hon'ble Court may be pleased to:-

- a) dispose of the captioned proceedings in conformity with the Award dated 21.5.2020;

- b) pass such other and further order or orders as may be deemed just and proper by this Hon'ble Court on the facts and in the circumstances of the case.

Drawn by –
Rajat Nair, Advocate

Filed by

Date :- 2.07.2020

B. V. Balaramdas

Place :- New Delhi.

Advocate for Union of India

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

I.A. NO. _____ OF 2020

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Latorre & ors.

...Petitioners

Versus

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...Applicant /
Respondent

Affidavit

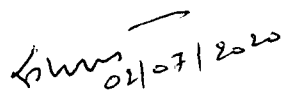
I, Dr. Sanjay Kumar S/o Late Dr. Ram Lakhan Verma aged 56 Years, having my office at Room no 270B, South Block, New Delhi , do hereby solemnly affirm and state as under :-

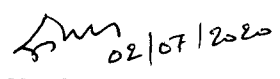
2. That I am working as Under Secretary in the Ministry of External Affairs and as such well aware of the facts and circumstances of the matter. Furthermore, I have been duly authorized to swear this affidavit.
3. That I have read the accompanying Application for direction and understood the contents thereof. I say that what is stated therein is true to my knowledge.
4. The documents filed along with the accompanying application are true copies of their respective originals.

VERIFICATION:

I, the deponent abovenamed, do hereby verify that the contents of paras 1 to 4 of my above affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this the 02 day of July 2020.


DEPONENT
(DR. SANJAY KUMAR)
अवर सचिव (यूरोप पश्चिम)
Under Secretary (Europe West)
विदेश मंत्रालय, नई दिल्ली
Ministry of External Affairs
New Delhi


DEPONENT
(DR. SANJAY KUMAR)
अवर सचिव (यूरोप पश्चिम)
Under Secretary (Europe West)
विदेश मंत्रालय, नई दिल्ली
Ministry of External Affairs
New Delhi

REPUBLIC OF ITALY v. UNION OF INDIA

721

(2013) 4 Supreme Court Cases 721

(Record of Proceedings)

a

(BEFORE ALTAMAS KABIR, C.J. AND J. CHELAMESWAR, J.)

Writ Petition (C) No. 135 of 2012[†]

REPUBLIC OF ITALY THROUGH AMBASSADOR
AND OTHERS

.. Petitioners;

b

Versus

UNION OF INDIA AND OTHERS

.. Respondents.

With

SLP (C) No. 20370 of 2012

c

MASSIMILANO LATORRE AND OTHERS

.. Petitioners;

Versus

UNION OF INDIA AND OTHERS

.. Respondents.

Writ Petition (C) No. 135 of 2012 with SLP (C) No. 20370 of 2012,
decided on January 18, 2013

d

**A. Criminal Procedure Code, 1973 — Ss. 154, 179, 183 and 188-A —
Contiguous zone of India — Offences committed within, by persons not
being citizens of India — Republic of India whether has jurisdiction or Flag
State i.e. State whose flag, vessel on which offenders were, was flying at time
of incident — Incident occurring purportedly due to discharge of Sovereign
function of Flag State concerned by persons concerned — Relevance of —**

e

**Determination of whether acts concerned were in discharge of Sovereign
function — Stage at which to be considered**

— Held (*per curiam*), Indian police and courts ordinarily have
jurisdiction to investigate and try offences committed even by non-citizens
within contiguous zone of India as IPC and CrPC have been duly extended
to contiguous zone — Thus, India exercises rights of sovereignty over
contiguous zone in respect of penal jurisdiction under criminal law — This
however is subject to any exception(s) in international law, including any
claims of Sovereign immunity in respect of acts concerned — Applicability
of any such exception(s) have to be established by leading evidence in Indian
court seized of the matter — This position of law is entirely in consonance
with international law [*See also Shortnote K*]

f

g

— Offence allegedly committed by persons (Italian marines deputed to
prevent piracy) aboard Italian ship within contiguous zone of India but
outside territorial waters of India — Said marines shooting dead two
Indians aboard Indian fishing vessel (not flying any flag) allegedly
mistaking them for pirates, within contiguous zone of India — Jurisdiction

h

[†] Under Article 32 of the Constitution of India

722

SUPREME COURT CASES

(2013) 4 SCC

of Indian courts and police vis-à-vis jurisdiction of Republic of Italy, to investigate, prosecute and try said offence — Petitioner-accused Italian marines had been deputed on Italian ship pursuant to Italian law to protect that ship — Relevance of

— Held (*per curiam*), provisions of Arts. 33, 55, 56, 57, 86 and 89 of UNCLOS are in harmony with provisions of Ss. 5 and 7 of Maritime Zones Act, 1976 — Present case not covered by Art. 97 of UNCLOS — Meaning of expression “incident of navigation” occurring in said Art. 97, explained — Trichotomy of (1) “complete sovereignty” exercised over territorial waters; (2) “rights of sovereignty” exercised over contiguous zone of India; and (3) “sovereign rights” exercised over exclusive economic zone of India, explained — Thus, incident of firing in the present case having occurred within its contiguous zone, held, India is entitled to proceed with investigation, prosecution and trial of petitioner-accused Italian marines in accordance with Indian criminal justice system till Italian marines prove on evidence applicability of Art. 100 of UNCLOS — Though fact that Indian vessel was not flying Indian flag not relevant at this stage, it could be relevant when considering applicability of Art. 100 of UNCLOS — If petitioners establish applicability of Art. 100 at trial then order passed herein may be reconsidered — If it is found that both Republic of Italy and Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good — Union of India directed to set up a special court in consultation with CJI to try present case in accordance with provisions of Maritime Zones Act, 1976, IPC, CrPC and UNCLOS, and present proceedings transferred to that court — United Nations Convention on the Law of the Sea, 1982 (UNCLOS, 1982) — Arts. 33, 55, 56, 57, 59, 86, 89, 94, 97 and 100 — Geneva Convention on the Law of the Seas, 1958 — Art. 11 — Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 — Ss. 13, 5, 7(1), (4) & (7) and 6 — Constitution of India — Arts. 1, 14, 21, 245(2) and 297 — Penal Code, 1860 — Ss. 2, 4 (before and after its amendment in 2009), 302, 307, 427 and 34 — Words and Phrases — “Incident of navigation” — Italy Law No. 130 of 2011, Art. 5

B. Constitutional Law — Sovereignty — Trichotomy of (1) “complete sovereignty” exercised over territorial waters; (2) “rights of sovereignty” exercised over contiguous zone of India; and (3) “sovereign rights” exercised over exclusive economic zone of India, explained — Constitution of India — Preamble and Arts. 1 and 245(2) — Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, Ss. 3, 5 and 7

C. Criminal Procedure Code, 1973 — Ss. 188-A, 154, 179 and 183 — Extension of CrPC and IPC to exclusive economic zone of India vide Noti. S.O. 671(E) dt. 27-8-1981 — Effect of — Held, the same confers jurisdiction on Indian police and courts in respect of any offence committed in any part of contiguous zone of India, since India exercises rights of sovereignty over its contiguous zone in respect of penal jurisdiction under criminal law as per

- S. 5 of Maritime Zones Act, 1976, subject to any exceptions in international law, but which exceptions have to be established upon trial — However, in**
- a* **exclusive economic zone beyond 24 nautical miles from baseline (i.e. beyond contiguous zone), said notification confers jurisdiction on Indian police and courts in respect of any offence committed only in respect of areas declared as “designated areas” under 1976 Act — These “designated areas” are confined to installations and artificial islands created for purpose of exploring and exploiting natural resources in and under the sea, which also**
- b* **includes the area comprising the continental shelf of a country, to the extent of 200 nautical miles — Exclusive economic zone apart from “designated areas” thus continues to be part of the high seas over which sovereignty cannot be exercised by any nation except for right of “hot pursuit” in certain limited circumstances — Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 — Ss. 13, 5**
- c* **and 7 — Penal Code, 1860, Ss. 2 and 4**
- D. Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 — Ss. 5, 7 and 13 — Fact that contiguous zone of India is contained within exclusive economic zone of India — Effect — Hence, laws applicable to exclusive economic zone would be applicable in contiguous zone — But not the other way around — Penal Code, 1860, Ss. 2**
- d* **and 4**
- E. Criminal Procedure Code, 1973 — Ss. 188-A, 154, 179 and 183 — Contiguous zone of India and exclusive economic zone of India — Extent to which S. 2 IPC applicable — Held, only to the extent not displaced by UNCLOS, 1982 — Penal Code, 1860 — Ss. 2 and 4 — Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones**
- e* **Act, 1976, Ss. 13, 5 and 7**
- F. Maritime Laws — High Seas — Regime of law governing, explained — Flag jurisdiction — Meaning, nature and scope — Discussed — “Hot pursuit”, when permitted — Ship not being a pirate ship, not flying its national flag when outside territorial waters, but within contiguous zone of flag nation — When relevant — Extra-territorial jurisdiction of nation**
- f* **States over high seas — When available — When legitimate interests of nation State concerned affected**
- G. Penal Code, 1860 — S. 4 — Offences committed beyond Indian territorial waters by persons not being Indian citizens — Extra-territorial applicability of Indian laws — Fact that legitimate interests of India were affected in incident — Incident occurring purportedly due to discharge of Sovereign function of Flag State concerned by persons concerned —**
- g* **Relevance — State of Kerala conceding issue re S. 4 IPC before High Court — Union of India not pressing the same before Supreme Court — Question left open, *per Kabir, C.J.* — Held *per Chelameswar, J.*, petitioner-accused Italian marines’ challenge to authority of Indian Parliament to extend its laws beyond territory of India and their claim on that ground of not being amenable to jurisdiction of India, is rejected in view of Art. 245(2) of**
- h* **Constitution of India — Moreover, protection of Arts. 14 and 21 of Constitution of India being available even to aliens, as a necessary**

724

SUPREME COURT CASES

(2013) 4 SCC

concomitant thereof India has authority to apply and enforce its laws against persons and things beyond its territory when its legitimate interests are affected — Various such Indian statutory provisions instantiated to illustrate that Parliament has always asserted its authority to make laws applicable to persons not corporeally present within territory of India (whether citizen or non-citizen) when India's legitimate interests are affected — Practice and Procedure — Concession — Concession of law — If binding — Jurisdictional issue — Jurisdiction available on other grounds — Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 — Ss. 13 and 5 — Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 — Ss. 1(2), 2(h) and 3 — Anti-Hijacking Act, 1982 — Ss. 3 and 6 — Geneva Conventions Act, 1960 — S. 3 — Constitution of India, Arts. 245(2), 1, 14 and 21 (Paras 64 to 66 and 109)

H. International Law — International Law vis-à-vis Municipal Law — International law when applicable in India — When there is no conflicting Indian statute — Relevance of ratification of Treaty/Convention concerned by India

Pursuant to the provisions of Article 5 of Italy Law No. 130 of 2-8-2011, Petitioners 2 and 3 in the writ petition filed under Article 32 who were also Petitioners 1 and 2 in the SLP, were deployed along with certain others on board the vessel *MV Enrica Lexie* to protect the same and to embark thereon on 11-2-2011, from Galle in Sri Lanka. On 15-2-2012, the said vessel, while heading for Djibouti, came across an Indian fishing vessel, *St Antony*, which it allegedly mistook to be a pirate vessel, at a distance of about 20.5 nautical miles from the Indian coast off the State of Kerala, and on account of firing from the Italian vessel, two persons in the Indian fishing vessel were killed. After the said incident, the Italian vessel continued on its scheduled course to Djibouti. When the vessel had proceeded to about 38 nautical miles on the high seas towards Djibouti, it received a message asking it to return to Cochin Port to assist with the enquiry into the said incident. The vessel responded and docked at Cochin. An FIR was filed at *N*, District *K*, Kerala, under Section 302 read with Section 34 IPC in respect of the firing incident. Petitioners 2 and 3 were arrested and produced before the Magistrate at *K* to seek their judicial custody. Challenging the same, a writ petition was filed before the High Court. Before the High Court, the Republic of Italy claimed that it had exclusive jurisdiction over the writ petitioners and invoked sovereign and functional immunity.

In view of the delay in the High Court's judgment in the said writ petition, the petitioners filed the present writ petition under Art. 32 of the Constitution of India. Meanwhile, the State Police filed a charge-sheet against Petitioners 2 and 3 herein under Sections 302, 307, 427 read with Section 34 IPC and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (the SUA Act). Dismissing the writ petition, the High Court held that under Notification No. SO 67/E dated 27-8-1981, the entire IPC had been extended to the exclusive economic zone of India and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only i.e. up to Indian territorial waters only. It also held that

REPUBLIC OF ITALY v. UNION OF INDIA

725

a under the provisions of the SUA Act, the State of Kerala had jurisdiction up to 200 nautical miles from the Indian coast, falling within the exclusive economic zone of India. The petitioners then filed the present SLP which was heard together with the writ petition filed in the Supreme Court as the subject-matter of both the proceedings was the same.

b Two issues, both relating to jurisdiction fell for determination by the Supreme Court: (i) whether the State Police had jurisdiction to investigate the said incident of shooting, and (ii) whether in view of public international law, the courts of the Republic of Italy or the Indian courts have jurisdiction to try the accused.

Holding that Indian police and courts had jurisdiction, and disposing of the SLP and writ petition in the terms below, the Supreme Court

Held :

Per Kabir, C.J.

c The legal order on the high seas is based primarily on the rule of international law which requires every vessel sailing the high seas to possess the nationality of, and to fly the flag of, one State, whereby a vessel and persons on board the vessel are subjected to the law of the State of the flag and in general subject to its exclusive jurisdiction. The scope of flag jurisdiction means that jurisdiction in the high seas is dependent upon the maritime flag under which vessels sail, because no State can extend its territorial jurisdiction to the high seas. The aforesaid principle is subject to the right of “hot pursuit”, which is an exception to the exclusiveness of the flag jurisdiction over ships on the high seas in certain special cases. (Para 105)

Oppenheim on International Law (9th Edn., Vol. 1), adopted as law on this point

e The answer to the question raised by the writ petitioners as to what makes the present case different from any other case that may involve similar facts so as to merit exclusion from the operation of Section 2 IPC, is the intervention of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) which sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. UNCLOS which was signed by India in 1982 and ratified on 29-6-1995, encapsulates the law of the sea and is supplemented by several subsequent resolutions adopted by the Security Council of the United Nations. In addition thereto, is the presence of Article 11 of the Geneva Convention on the Law of the Seas, 1958. (Paras 96, 98 and 99)

f The Union of India has submitted that in view of the concession made on behalf of the State of Kerala, the question of the scope of Section 4 IPC could be left open to be decided in an appropriate case. In light of this submission, the applicability of Section 4 is no longer in question in this case. (Paras 65 and 109)

g [Ed.: Hon’ble Kabir, C.J. has found that India has jurisdiction in respect of the incident concerned as they were committed in an area over which India does exercise rights of sovereignty: hence, the question of extra-territorial applicability of Indian laws has been left open. Hon’ble Chelameswar, J. while fully concurring with Kabir, C.J., has additionally considered the question of extra-territorial applicability of Indian laws in respect of the incident concerned and held that since India’s “legitimate interests” are affected India would even have extra-territorial jurisdiction in the matter, and that this is also entirely in consonance with international law.]

h

726

SUPREME COURT CASES

(2013) 4 SCC

From Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (the Maritime Zones Act, 1976), it is quite clear that the contiguous zone of India as defined in Section 5 of the said Act is within the exclusive economic zone of India and the laws governing the exclusive economic zone would also govern the incident which occurred within the contiguous zone. The provisions of UNCLOS are in harmony with and not in conflict with the provisions of the Maritime Zones Act, 1976 in that regard. Article 33 of UNCLOS is in complete harmony with the provisions of the 1976 Act. Similarly, Articles 56 and 57 thereof are also in consonance with the provisions of the 1976 Act. The area of difference between the provisions of the Maritime Zones Act, 1976 and UNCLOS occurs in Article 97 of UNCLOS which relates to the penal jurisdiction in matters of collision or any other *incident of navigation*. (Para 100)

The present case does not involve any collision between the Italian vessel and the Indian fishing vessel. As regards the expression “incident of navigation”, the context in which it has been used in Article 97 of UNCLOS indicates that the same refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An incident of navigation as intended in the said article cannot involve a criminal act in whatever circumstances. In what circumstances the incident occurred may be set up as a defence in a criminal action that may be taken, which legal position is accepted by both the countries which have initiated criminal proceedings against the two marines. Even the provisions of Article 100 of UNCLOS may be used for the same purpose. If at all, Article 100 of the Convention may stand attracted if and when the defence version of apprehension of a pirate attack is accepted by the trial court. Whether the accused acted on the misunderstanding that the Indian fishing vessel was a pirate vessel which caused the accused to fire, is a matter of evidence which can only be established during a trial. The *St Antony* was not flying an Indian flag at the time when the incident took place. The above fact is not very relevant at this stage, and may be of some consequence if the provisions of Article 100 of UNCLOS, 1982 are found to be applicable. (Paras 101 to 103)

S.S. Lotus (France v. Turkey), 1927 PCIJ (Series A) No. 10, *relied on*
Oppenheim on International Law (9th Edn., Vol. 1), *relied on*

The exercise of sovereignty amounts to the exercise of all rights that a sovereign exercises over its subjects and territories, of which the exercise of penal jurisdiction under the criminal law is an important part. In an area in which a country exercises sovereignty, its laws will prevail over other laws in case of a conflict between the two. On the other hand, a State may have sovereign rights over an area, which stops short of complete sovereignty as in the instant case where in view of the provisions both of the Maritime Zones Act, 1976 and UNCLOS, 1982 the exclusive economic zone is extended to 200 nautical miles from the baseline for measurement of territorial waters. Although the provisions of Section 188-A CrPC have been extended to the exclusive economic zone, the same are extended to areas declared as “designated areas” under the 1976 Act. These “designated areas” are confined to installations and artificial islands created for the purpose of exploring and exploiting the natural resources in and under the sea to the extent of 200 nautical miles, which also includes the area comprising the continental shelf of a country. However, the exclusive economic zone continues to be part of the high seas over which sovereignty cannot be exercised by any nation. (Para 106)

REPUBLIC OF ITALY v. UNION OF INDIA

727

a Since India is a signatory thereto, she is obligated to respect the provisions of UNCLOS, 1982 and to apply the same if there is no conflict with the domestic law. In this context, both the countries may have to subject themselves to the provisions of Article 94 of UNCLOS and, in particular, clause (7) which provides that each State shall cause an inquiry to be held into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State. It is also stipulated that the Flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation. (Para 107)

Starke's International Law, considered

c Undoubtedly, the incident took place within the contiguous zone of India over which, both under the provisions of the Maritime Zones Act, 1976 and UNCLOS, 1982, India is entitled to exercise rights of sovereignty. However, Section 7(4) of the Maritime Zones Act, 1976 provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of the natural resources, both living and non-living, as well as for producing energy from tides, winds and currents, which cannot be equated with rights of sovereignty over the said areas in the exclusive economic zone. It also provides for the Union of India to exercise other ancillary rights which only clothes the Union of India with sovereign rights and not rights of sovereignty in the exclusive economic zone. The said position is reinforced under Sections 6 and 7 of the Maritime Zones Act, 1976, which also provides that India's sovereignty extends over its territorial waters while, the position is different in respect of the exclusive economic zone. Therefore, it is not possible to hold that Article 59 of UNCLOS, 1982 permits States to assert rights or jurisdiction beyond those specifically provided in UNCLOS. (Para 109)

Aban Loyd Chiles Offshore Ltd. v. Union of India, (2008) 11 SCC 439, relied on

e [Ed.: It is worth setting out the relevant portions of Sections 3, 5 and 7 of the Maritime Zones Act, 1976 to better appreciate the trichotomy of "sovereignty", "rights of sovereignty" and "sovereign rights" as applicable to territorial waters, the contiguous zone of India and the exclusive economic zone of India, respectively. Section 3, inter alia, states that "*the sovereignty of India extends and has always extended to the territorial waters of India...*" Section 5, inter alia, states that "the Central Government may exercise such powers and take such measures in or in relation to the contiguous zone as it may consider necessary with respect to ... the security of India... The Central Government may, by notification in the Official Gazette ... extend with such restrictions and modifications as it thinks fit, any enactment, relating to [the security of India]... for the time being in force in India or any part thereof, to the contiguous zone, and any enactment so extended shall have effect as if the contiguous zone is a part of the territory of India." Section 7, inter alia, states that "in the exclusive economic zone, the Union has ... *sovereign rights*" (emphases supplied).]

h Therefore, it is held that while India is entitled both under its domestic law and public international law to exercise rights of sovereignty up to 24 nautical miles from the baseline on the basis of which the width of the territorial waters is measured, it can exercise only sovereign rights within the exclusive economic zone for certain purposes. The incident of firing from the Italian vessel on the Indian fishing vessel having occurred within the contiguous zone, the Union of

728

SUPREME COURT CASES

(2013) 4 SCC

India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in India. However, the same is subject to the provisions of Article 100 of UNCLOS, 1982. (Para 110)

Therefore, till such time as it is proved that the provisions of Article 100 of UNCLOS, 1982 apply to the facts of the present case, it is the Union of India which has jurisdiction to proceed with the investigation and trial of Petitioners 2 and 3 in the writ petition. The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, IPC, CrPC and most importantly, the provisions of UNCLOS, 1982, where there is no conflict between the domestic law and UNCLOS, 1982. The pending proceedings before the Magistrate at K shall stand transferred to the said Special Court. This will not prevent the petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS, 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and of the courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good. (Paras 111 and 112)

Massimilano Latorre v. Union of India, WP (C) No. 4542 of 2012, order dated 29-5-2012 (Ker), referred to

Maganbhai Ishwarbhai Patel v. Union of India, (1970) 3 SCC 400; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 : 1997 SCC (Cri) 932; *Gramophone Co. of India v. Birendra Bahadur Pandey*, (1984) 2 SCC 534 : 1984 SCC (Cri) 313; *Hukumchand Mills Ltd. v. State of M.P.*, AIR 1964 SC 1329; *N. Mani v. Sangeetha Theatre*, (2004) 12 SCC 278; *Trendtex Trading Corp. v. Central Bank of Nigeria*, 1977 QB 529 : (1977) 2 WLR 356 : (1977) 1 All ER 881 (CA); *Mobarik Ali Ahmed v. State of Bombay*, AIR 1957 SC 857 : 1957 Cri LJ 1346; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)*, (2000) 1 AC 147 : (1999) 2 WLR 827 : (1999) 2 All ER 97 (HL); *Berubari Union (1), In re*, AIR 1960 SC 845, cited

Per J. Chelameswar, J. (concurring)

India asserts its authority not only on the land mass of the territory of India specified under Article 1, but also over the areas specified under Article 297 of the Constitution of India. The preponderance of judicial authority appears to be that the sovereignty of the coastal State extends to the territorial waters. Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists (Paras 120 and 121)

Grisbadarna case (Norway v. Sweden), (1909) 11 R Int'l Arb Awards 155; *Corfu Channel (Merits) case*, 1949 ICJ Rep 4; *Anglo-Norwegian Fisheries case*, 1951 ICJ Rep 116; *North Sea Continental Shelf case*, 1969 ICJ Rep 3, relied on

B.K. Wadeyar v. Daulatram Rameshwarlal, AIR 1961 SC 311, referred to

P.C. Rao: *The New Law of Maritime Zones*, p. 22; Malcolm N. Shaw: *International Law* (6th Edn.), pp. 569-70, referred to

When the application of "any enactment for the time being in force in India" (like the Indian Penal Code and the Code of Criminal Procedure) is extended to the contiguous zone by notification in the Official Gazette, the enactment whose application is so extended "shall have effect as if" the contiguous zone or exclusive economic zone, as the case may be, "is part of the territory of India". Creation of such a legal fiction is certainly within the authority of the sovereign

REPUBLIC OF ITALY v. UNION OF INDIA

729

a legislative body. In exercise of the power conferred by Section 7(7) of the Maritime Zones Act, the Government of India has in fact extended the application of both IPC and CrPC to the exclusive economic zone by a Notification dated 27-8-1981. By the said notification, Section 188-A came to be inserted in CrPC. (Paras 127 and 128)

b Article 245(2) of the Constitution of India is a fetter on the jurisdiction of the municipal courts including constitutional courts to either declare a law to be unconstitutional or decline to give effect to such a law on the ground of extra-territoriality. The first submission of the petitioners that the incident in question occurred beyond the territory of India and Parliament could not extend the application of the laws made by it beyond the territory of India and that consequently, the two marines are not amenable to the jurisdiction of India, must, therefore, fail. (Paras 130 to 132 and 115.1)

Macleod v. Attorney General of New South Wales, 1891 AC 455 (PC); *Huntington v. Attrill*, 1893 AC 150 (PC), *relied on*

c Malcolm N. Shaw: *International Law* (6th Edn.) pp. 578-79; P.C. Rao: *Indian Constitution and International Law*, p. 42, *cited*

d The protection of Articles 14 and 21 of the Constitution of India is available even to an alien when sought to be subjected to the legal process of this country. As a necessary concomitant, India ought to have the authority to apply and enforce its laws against the persons and things beyond its territory when its *legitimate interests* are affected. (Para 133)

Hans Muller of Nuremberg v. Supt., Presidency Jail, AIR 1955 SC 367 : 1955 Cri LJ 876; *Railway Board v. Chandrima Das*, (2000) 2 SCC 465, *followed*

e From Section 2 read with Section 4 IPC (as amended in 2009); Sections 1(2), 3 and 2(h) of the SUA Act; Sections 3 and 6 of the Anti-Hijacking Act, 1982; and Section 3 of the Geneva Conventions Act, 1960, it is amply clear that Parliament always asserted its authority to make laws which are applicable to persons who are not corporeally present within the territory of India (whether or not they are citizens) when such persons commit acts which affect the legitimate interests of this country. Section 188 CrPC prescribes the jurisdiction to deal with such offences. Such assertion is not peculiar to India, but is also made by various other countries. (Paras 134 to 141)

f Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. At any rate, it is not open for any municipal court including the Supreme Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law. Sovereignty is not “given”, but it is only asserted. (Paras 143 and 145)

Mobarik Ali Ahmed v. State of Bombay, AIR 1957 SC 857, *relied on*

R. v. Baxter, (1972) 1 QB 1 : (1971) 2 WLR 1138 : (1971) 2 All ER 359 (CA), *approved*

h *Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439, *clarified*

730

SUPREME COURT CASES

(2013) 4 SCC

Malcolm N. Shaw: *International Law* (6th Edn. Cambridge University Press, Cambridge 2008) p. 665, *cited*

In view of Articles 86, 89 and 55 of UNCLOS, irrespective of the meaning of the expression “incident of navigation”, Article 97 has no application to the exclusive economic zone. Moreover, in view of Articles 55 and 57 UNCLOS, it is held that declaration under Section 7(1) of the Maritime Zones Act, which stipulates the limit of the exclusive economic zone, is perfectly in tune with the terms of UNCLOS. Therefore, Article 97 of UNCLOS has no application to the exclusive economic zone, of which the contiguous zone is a part and that is the area relevant, in the context of the incident in question. (Para 148)

I. Criminal Procedure Code, 1973 — Ss. 154, 156, 179, 183 and 188-A — Incident giving rise to alleged offences occurring beyond Indian territorial waters but within contiguous zone of India — Acts concerned committed by persons not being Indian citizens, purportedly in discharge of Sovereign function of Flag State concerned, while said persons were aboard ship flying flag of said Flag State — Investigation and prosecution of such offences — Power to investigate and prosecute in such circumstances, held, vested in Central Government and not in State Government

— Italian marines deputed on Italian ship pursuant to Italian law, firing and killing some persons in Indian fishing vessel, not within territorial waters off coastline of State of Kerala but within contiguous zone near coast of Kerala — In such circumstances, held, Kerala State had no jurisdiction to investigate into the said firing incident — Even with extension of S. 188-A CrPC to exclusive economic zone and hence contiguous zone, by which provisions of CrPC and IPC have been extended to contiguous zone, that entitles Central Government alone and not State of Kerala to take cognizance of, investigate and prosecute persons committing any infraction of Indian laws within contiguous zone — Even the facts that Indian fishing vessel had initially started from *N* (District *K*) in Kerala, returned thereto after said incident, and FIR was lodged under S. 302 r/w S. 34 IPC at *N*, did not vest Kerala Police with jurisdiction to investigate into FIR as cause of action for filing FIR had occurred outside jurisdiction of Kerala Police, in contiguous zone of India — Lastly, this was more so when the dispute involved Governments of two countries — Italy having already asserted its right to try the marines concerned, Kerala as a unit of a federal State could not have any authority to try the accused for offence committed outside its jurisdiction — Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 — Ss. 13, 3(1) & (2), 5(1), 7(7) — Noti. No. S.O. 671(E) dt. 27-8-1981 — Penal Code, 1860 — Ss. 302, 307, 427 and 34 — Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 — S. 3 — Italy Law No. 130 of 2011 (Paras 93 to 95, 110 to 114, 2 and 15)

J. Maritime Laws — Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 — Ss. 13, 5 and 3 — Police/Government which has jurisdiction in respect of criminal offences — Contiguous zone of India contrasted with Indian territorial waters —

REPUBLIC OF ITALY v. UNION OF INDIA

731

Positions, contrasted — Criminal Procedure Code, 1973 — Ss. 188-A, 154, 156, 179 and 183 — Penal Code, 1860, Ss. 2 and 4 (Paras 93 to 95 and 114)

- a* **K. International Law — Sovereign Function/Immunity — Proceedings where conduct of a foreign nation in exercise of its sovereign functions is questioned — Jurisdiction to try — Held, the same has to be conducted only at level of Federal or Central Government and cannot be subject-matter of proceeding initiated by a Provincial/State Government — U.N. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations (Paras 93, 95, 110, 111, 2 and 15)**

- b* **L. Criminal Procedure Code, 1973 — Ss. 154, 188-A and 190(b) — Italian marines case — Additional directions in — Pursuant to decision in present case that State of Kerala did not have, and, Union of India did have jurisdiction to try the Italian marines involved in the present case, consequential directions issued — Directed, inter alia, that said marines should be removed to Delhi and kept on same terms and conditions of bail as granted by High Court, and that till the constitution of Special Court as directed herein, they would be under custody of Supreme Court (Paras 150 to 154)**

H-D/51291/CR

- d* Advocates who appeared in this case :
Gourab K. Banerji and Ms Indira Jaising, Additional Solicitors General, Harish N. Salve, Suhail Dutt and V. Giri, Senior Advocates (Diljeet Titus, Viprav Sharma, Baljit Singh Kalha, Ujjwal Sharma, Abhixit Singh, Achint Singh Gyani, Ankur Manchanda, Jagjit Singh Chhabra, Raghav Shankar, Jaswant Perraye, S.A. Haseeb, Ms Parul Kumar, Sahil Tagotra, Ms Jhuma Sen, Ms Supriya Jain, D.S. Mahra, B. Krishna Prasad, Gautam Jha, Arjun Krishnan, Ramesh Babu M.R., Mohammed Sadique T.A., Sushrut Jindal, Ms Rekha Pandey, Ms Rashmi Malhotra, R. Malhotra, Jayesh Gaurav and Vibhav Sharma, Advocates) for the appearing parties.

- | | <i>Chronological list of cases cited</i> | <i>on page(s)</i> |
|----------|--|--|
| | 1. WP (C) No. 4542 of 2012, order dated 29-5-2012 (Ker), <i>Massimlano Latorre v. Union of India</i> | 734f-g, 757g |
| <i>f</i> | 2. (2008) 11 SCC 439, <i>Aban Loyd Chiles Offshore Ltd. v. Union of India</i> | 740g, 741c, 741f, 741f-g, 747b-c, 748b-c, 748c, 763a, 773d, 773e, 774a |
| | 3. (2004) 12 SCC 278, <i>N. Mani v. Sangeetha Theatre</i> | 749h |
| | 4. (2000) 2 SCC 465, <i>Railway Board v. Chandrima Das</i> | 770c-d |
| <i>g</i> | 5. (2000) 1 AC 147 : (1999) 2 WLR 827 : (1999) 2 All ER 97 (HL), <i>R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)</i> | 754d |
| | 6. (1997) 6 SCC 241 : 1997 SCC (Cri) 932, <i>Vishaka v. State of Rajasthan</i> | 743f-g |
| | 7. (1984) 2 SCC 534 : 1984 SCC (Cri) 313, <i>Gramophone Co. of India v. Birendra Bahadur Pandey</i> | 747c |
| <i>h</i> | 8. 1977 QB 529 : (1977) 2 WLR 356 : (1977) 1 All ER 881 (CA), <i>Trendtex Trading Corpn. v. Central Bank of Nigeria</i> | 752f-g |

732 SUPREME COURT CASES (2013) 4 SCC

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| 9. | (1972) 1 QB 1 : (1971) 2 WLR 1138 : (1971) 2 All ER 359 (CA), <i>R. v. Baxter</i> | 772c | |
| 10. | (1970) 3 SCC 400, <i>Maganbhai Ishwarbhai Patel v. Union of India</i> | 743f, 756b | a |
| 11. | 1969 ICJ Rep 3, <i>North Sea Continental Shelf case</i> | 766e-f | |
| 12. | AIR 1964 SC 1329, <i>Hukumchand Mills Ltd. v. State of M.P.</i> | 749h | |
| 13. | AIR 1961 SC 311, <i>B.K. Wadeyar v. Daulatram Rameshwarlal</i> | 767a | |
| 14. | AIR 1960 SC 845, <i>Berubari Union (1), In re</i> | 755g-h | |
| 15. | AIR 1957 SC 857 : 1957 Cri LJ 1346, <i>Mobarik Ali Ahmed v. State of Bombay</i> | 753c, 770e | b |
| 16. | AIR 1955 SC 367 : 1955 Cri LJ 876, <i>Hans Muller of Nuremberg v. Supt., Presidency Jail</i> | 770c-d | |
| 17. | 1951 ICJ Rep 116, <i>Anglo-Norwegian Fisheries case</i> | 765d | |
| 18. | 1949 ICJ Rep 4, <i>Corfu Channel (Merits) case</i> | 765d | |
| 19. | 1927 PCIJ (Series A) No. 10, <i>S.S. Lotus (France v. Turkey)</i> | 742b-c, 743b, 752d-e, 761a-b, 761c, 762f | |
| 20. | (1909) 11 R Int'l Arb Awards 155, <i>Grisbadarna case</i> | 765d | c |
| 21. | 1893 AC 150 (PC), <i>Huntington v. Attrill</i> | 770a | |
| 22. | 1891 AC 455 (PC), <i>Macleod v. Attorney General of New South Wales</i> | 770a | |

The Judgments[†] of the Court were delivered by

ALTAMAS KABIR, C.J.— The past decade has witnessed a sharp increase in acts of piracy on the high seas off the coast of Somalia and even in the vicinity of the Minicoy Islands forming part of the Lakshadweep archipelago. In an effort to counter piracy and to ensure freedom of navigation of merchant shipping and for the protection of vessels flying the Italian flag in transit in international seas, the Republic of Italy enacted Government Decree No. 107 of 2011, converted into Law of Parliament of Italy No. 130 of 2-8-2011, to protect Italian ships from piracy in international seas. Article 5 of the said legislation provides for deployment of Italian Military Navy Contingents on Italian vessels flying the Italian flag, to counter the growing menace of piracy on the seas.

2. Pursuant to the said Law of Parliament of Italy No. 130 of 2-8-2011, a Protocol Agreement was purportedly entered into on 11-10-2011, between the (Italian) Ministry of Defence—(Italian) Naval Staff and Italian Shipowners' Confederation (Confitarma), pursuant to which Petitioners 2 and 3 in the writ petition, who are also Petitioners 1 and 2 in the special leave petition, were deployed along with four others, as "Team Latorre", on board the *MV Enrica Lexie* on 6-2-2012, to protect the said vessel and to embark thereon on 11-2-2011, from Galle in Sri Lanka. The said Military Deployment Order was sent by the Italian Navy General Staff to the military attachés concerned in New Delhi, India and Muscat, Oman. A change in the disembarkation plans, whereby the planned port of disembarkation was shifted from Muscat to Djibouti, was also intimated to the Attachés concerned.

[†] Ed.: J. Chelameswar, J. delivered a concurring judgment.

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

733

3. While the aforesaid vessel, with the Military Protection Detachment on board, was heading for Djibouti on 15-2-2012, it came across an Indian fishing vessel, *St Antony*, which it allegedly mistook to be a pirate vessel, at a distance of about 20.5 nautical miles from the Indian sea coast off the State of Kerala, and on account of firing from the Italian vessel, two persons in the Indian fishing vessel were killed. After the said incident, the Italian vessel continued on its scheduled course to Djibouti.

4. When the vessel had proceeded about 38 nautical miles on the high seas towards Djibouti, it received a telephone message, as well as an e-mail, from the Maritime Rescue Coordination Centre, Mumbai, asking it to return to Cochin Port to assist with the enquiry into the incident. Responding to the message, *MV Enrica Lexie* altered its course and came to Cochin Port on 16-2-2012. Upon docking in Cochin, the Master of the vessel was informed that First Information Report (FIR) No. 2 of 2012 had been lodged with the Circle Inspector, Neendakara, Kollam, Kerala, under Section 302 read with Section 34 of the Penal Code, 1860 (IPC) in respect of the firing incident leading to the death of the two Indian fishermen. On 19-2-2012, Massimilano Latorre and Salvatore Girone, Petitioners 2 and 3 in Writ Petition No. 135 of 2012, were arrested by the Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, from Willington Island and have been in judicial custody ever since.

5. On 20-2-2012, Petitioners 2 and 3 were produced before the Chief Judicial Magistrate (CJM), Kollam by the Circle Inspector of Police, Coastal Police Station, Neendakara, who prayed for remand of the accused to judicial custody.

6. The petitioners thereupon filed Writ Petition No. 4542 of 2012 before the Kerala High Court, under Article 226 of the Constitution, challenging the jurisdiction of the State of Kerala and the Circle Inspector of Police, Kollam District, Kerala to register the FIR and to conduct investigation on the basis thereof or to arrest Petitioners 2 and 3 and to produce them before the Magistrate. The writ petitioners prayed for quashing of FIR No. 2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District, as the same was purportedly without jurisdiction, contrary to law and null and void. The writ petitioners also prayed for a declaration that their arrest and detention and all proceedings taken against them were without jurisdiction, contrary to law and, therefore, void. A further prayer was made for the release of Petitioners 2 and 3 from the case.

7. Between 22-2-2012 and 26-2-2012, several relatives of the deceased sought impleadment in the writ petition and were impleaded as additional Respondents 4, 5 and 6.

8. During the pendency of the writ petition, the Presenting Officer within the Tribunal of Rome, Republic of Italy, intimated the Ministry of Defence of Italy on 24-2-2012, that Criminal Proceedings No. 9463 of 2012 had been initiated against Petitioners 2 and 3 in Italy. It was indicated that punishment for the crime of murder under Section 575 of the Italian Penal Code is imprisonment of at least 21 years.

734

SUPREME COURT CASES

(2013) 4 SCC

9. After entering appearance in the writ petition, the Union of India and its investigating agency filed joint statements therein on 28-2-2012, on behalf of the Union of India and the Coast Guard, with the Kerala High Court, along with the Boarding Officers Report dated 16-2-2012 to 17-2-2012, as an annexure. On 5-3-2012, the Consul General filed a further affidavit on behalf of the Republic of Italy, annexing additional documents in support of its claim that the accused had acted in an official capacity. In the affidavit, the Consul General reasserted that Italy had exclusive jurisdiction over the writ petitioners and invoked sovereign and functional immunity.

10. The Kerala High Court heard the matter and directed the petitioners to file their additional written submissions, which were duly filed on 2-4-2012, whereupon the High Court reserved its judgment. However, in the meantime, since the judgment in the writ petition was not forthcoming, the petitioners filed the present writ petition under Article 32 of the Constitution of India on 19-4-2012, inter alia, for the following reliefs:

“(i) Declare that any action by all the respondents in relation to the alleged incident referred to in Paras 6 and 7 above, under the Criminal Procedure Code or any other Indian law, would be illegal and ultra vires and violative of Articles 14 and 21 of the Constitution of India; and

(ii) Declare that the continued detention of Petitioners 2 and 3 by the State of Kerala is illegal and ultra vires being violative of the principles of sovereign immunity and also violative of Articles 14 and 21 of the Constitution of India; and

(iii) Issue writ of mandamus and/or any other suitable writ, order or direction under Article 32 directing that the Union of India take all steps as may be necessary to secure custody of Petitioners 2 and 3 and make over their custody to Petitioner 1.”

11. During the pendency of the said writ petition in this Court, the Kerala State Police filed charge-sheet against Petitioners 2 and 3 herein on 18-5-2012 under Sections 302, 307, 427 read with Section 34 of the Penal Code and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (hereinafter referred to as “the SUA Act”). On 29-5-2012, the learned Single Judge of the Kerala High Court dismissed¹ Writ Petition (Civil) No. 4542 of 2012 on two grounds. The learned Single Judge held that under Notification No. SO 67/E dated 27-8-1981, the entire Indian Penal Code had been extended to the exclusive economic zone and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The learned Single Judge also held that under the provisions of the SUA Act, the State of Kerala has jurisdiction up to 200 nautical miles from the Indian coast, falling within the exclusive economic zone of India.

12. Aggrieved by the aforesaid judgment of the Kerala High Court, the petitioners filed Special Leave Petition (Civil) No. 20370 of 2012,

1 *Massimlano Latorre v. Union of India*, WP (C) No. 4542 of 2012, order dated 29-5-2012 (Ker)

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

735

challenging the order of dismissal of their writ petition by the Kerala High Court.

a **13.** As will be evident from what has been narrated hereinabove, the subject-matter and the reliefs prayed for in Writ Petition (Civil) No. 4542 of 2012 before the Kerala High Court and SLP (C) No. 20370 of 2012 are the same as those sought in Writ Petition (Civil) No. 135 of 2012. Accordingly, the special leave petition and the writ petition have been heard together.

b **14.** Simply stated, the case of the petitioners is, that Petitioners 2 and 3, had been discharging their duties as members of the Italian Armed Forces, in accordance with the principles of public international law and an Italian national law requiring the presence of armed personnel on board commercial vessels to protect them from attacks of piracy. It is also the petitioners' case that the determination of international disputes and responsibilities as well as proceedings connected therewith, must necessarily be between the Sovereign
c Governments of the two countries and not constituent elements of a federal structure. In other words, in cases of international disputes, the State units/Governments within a federal structure, could not be regarded as entities entitled to maintain or participate in proceedings relating to the sovereign Acts of one nation against another, nor could such status be conferred upon them by the federal/Central Government. It is also the case of
d the writ petitioners that the proceedings, if any, in such cases, could only be initiated by the Union at its discretion. Consequently, the arrest and continued detention of Petitioners 2 and 3 by the State of Kerala is unlawful and based on a misconception of the law relating to disputes between two sovereign nations.

e **15.** Appearing for the writ petitioners, Mr Harish N. Salve, learned Senior Advocate, contended that the acquiescence of the Union of India to the unlawful arrest and detention of Petitioners 2 and 3 by the State of Kerala was in violation of the long-standing customary international law, principles of international comity and sovereign equality amongst States, as contained in the United Nations General Assembly Resolution titled "Declaration on Principles of International Law Concerning Friendly Relations and
f Cooperation between States in accordance with the Charter of the United Nations". Mr Salve contended that these aforesaid principles require that any proceeding, whether diplomatic or judicial, where the conduct of a foreign nation in the exercise of its sovereign functions is questioned, has to be conducted only at the level of the federal or Central Government and could not be the subject-matter of a proceeding initiated by a Provincial/State
g Government.

h **16.** Mr Salve submitted that the incident which occurred on 15-2-2012 was an incident between two nation States and any dispute arising therefrom would be governed by the principles of international legal responsibility under which the rights and obligations of the parties will be those existing between the Republic of India and the Republic of Italy. Mr Salve submitted that no legal relationship exists between the Republic of Italy and the State of

736

SUPREME COURT CASES

(2013) 4 SCC

Kerala and by continued detention of the members of the armed forces of the Republic of Italy, acting in discharge of their official duties, the State of Kerala had acted in a manner contrary to public international law, as well as the provisions of the Constitution of India. a

17. The learned counsel submitted that the scheme of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (hereinafter referred to as “the Maritime Zones Act, 1976”) contemplates limited jurisdiction of the Central Government over each of the maritime zones divided into the “territorial waters”, the “contiguous zones” and the “exclusive economic zones”. The learned counsel also submitted that Sections 3, 5, 7 and 15 of the Act contemplate the existence of such division of zones as a direct consequence of rights guaranteed under public international law including the United Nations Convention on the Law of the Sea (hereinafter referred to as “UNCLOS”). b

18. Mr Salve submitted that the extent of jurisdiction of a State beyond its coastline is provided in Section 3 of the Maritime Zones Act, 1976. Sub-section (2) of Section 3 indicates that: c

“3. (2) The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.”

Section 5 of the aforesaid Act provides that: d

“5. *Contiguous zone of India.*—(1) The contiguous zone of India ... is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of Section 3.”

Section 7 of the Act defines “exclusive economic zone” as an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in sub-section (2) of Section 3. In respect of each of the three abovementioned zones, the Central Government has been empowered whenever it considers necessary so to do, having regard to international law and the State practice, alter, by notification in the Official Gazette, the limit of the said zones. e

19. Mr Salve pointed out that Section 4 of the Maritime Zones Act, 1976, specially provides for use of territorial waters by foreign ships and in terms of sub-section (1), all foreign ships (other than warships including submarines and other underwater vehicles) are entitled to a right of innocent passage through the territorial waters, so long as such passage was innocent and not prejudicial to the peace, good order or security of India. f

20. Apart from the above, Mr Salve also pointed out that Section 6 of the aforesaid Act provides that: g

“6. *Continental shelf.*—(1) the continental shelf of India ... comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in sub-section (2) of Section 3 h

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

737

where the outer edge of the continental margin does not extend up to that distance.”

- a Sub-section (2) provides that India has and always had full and exclusive sovereign rights in respect of its continental shelf.

21. According to Mr Salve, the incident having occurred at a place which was 20.5 nautical miles from the coast of India, it was outside the territorial waters though within the contiguous zone and the exclusive economic zone, as indicated hereinabove. Accordingly, by no means could it be said that the incident occurred within the jurisdiction of one of the federal units of the Union of India. Mr Salve urged that the incident, therefore, occurred in a zone in which the Central Government is entitled under the Maritime Zones Act, 1976, as well as UNCLOS, to exercise sovereign rights, not amounting to sovereignty. Mr Salve submitted that the Act nowhere contemplates conferral of jurisdiction on any coastal unit forming part of any maritime zone adjacent to its coast. Accordingly, the arrest and detention of Petitioners 2 and 3 by the police authorities in the State of Kerala was unlawful and was liable to be quashed. Mr Salve also went on to urge that notwithstanding the provisions of the Maritime Zones Act, 1976, India, as a signatory of UNCLOS, is also bound by the provisions thereof. Submitting that since the provisions of the 1976 Act and also UNCLOS recognise the primacy of Flag State jurisdiction,
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- d Petitioner 1 i.e. the Republic of Italy, has the pre-emptive right to try Petitioners 2 and 3 under its local laws.

22. Mr Salve submitted that provisions, similar to those in the Maritime Zones Act, 1976, relating to the extent of territorial waters and internal waters and the right of “innocent passage”, are provided in Articles 8, 17 and 18 of the Convention. Mr Salve submitted that Article 17 sets down in clear terms that subject to the Convention, ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea.
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23. “Innocent passage” has been defined in Article 18 to mean navigation through the territorial sea for the purpose of:

- “18. (1)(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
- f (b) proceeding to or from internal waters or a call at such roadstead or port facility.”

- The said definition has been qualified to indicate that such passage would be continuous and expeditious, but would include stopping and anchoring, only insofar as the same are incidental to ordinary navigation or are rendered necessary for force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. Mr Salve pointed out that Article 19 describes innocent passage to be such so long as it is not prejudicial to the peace, good order or security of the coastal State and takes place in conformity with the Convention and other rules of international law.
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24. The learned counsel pointed out that Article 24 of the Convention contained an assurance that the coastal States would not hamper the innocent
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738

SUPREME COURT CASES

(2013) 4 SCC

passage of foreign ships through the territorial sea, except in accordance with the Convention.

25. As to criminal jurisdiction on board a foreign ship, Mr Salve referred to Article 27 of UNCLOS, which provides that the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in cases where the consequences of the crime extend to the coastal State; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if the assistance of the local authorities has been requested by the Master of the ship or by a diplomatic agent or consular officer of the Flag State, or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. Mr Salve, however, urged that none of the aforesaid conditions were attracted in the facts of this case so as to attract the criminal jurisdiction of a State within the federal structure of the Union of India.

26. Another article of some significance is Article 33 of the Convention under Section 4, which deals with contiguous zones. Mr Salve submitted that Article 33 provides that in a zone contiguous to its territorial sea, a coastal State may exercise the control necessary to:

- “33. (1)(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.”

However, the contiguous zone may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. Accordingly, since the incident occurred outside the territorial waters, the State of Kerala exceeded its jurisdiction and authority in acting on the basis of the FIR lodged against Petitioners 2 and 3 at Neendakara, Kollam, and in keeping them in continued detention.

27. Referring to Part V of the Convention, which deals with exclusive economic zones, Mr Salve pointed out that Article 56 under the said Part indicates the rights, jurisdiction and duties of the coastal State in the exclusive economic zone so as to include the State’s sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. The said article also indicates that the State has jurisdiction in regard to:

- “56. (1)(a)(i) the establishment and use of artificial islands, installations and structures;
(ii) marine scientific research;
(iii) the protection and preservation of the marine environment;”

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

739

and other rights and duties provided for in the Convention. In regard to artificial islands, Mr Salve pointed out that under clause (8) of Article 60, artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

28. Dealing with the concept of high seas, contained in Part VII of the Convention, Mr Salve submitted that Articles 88 and 89 of the Convention provide that the high seas have to be reserved for peaceful purposes and that no State may validly purport to subject any part of the same to its sovereignty. Mr Salve submitted that under Articles 91, 92 and 94 of the Convention, every State is entitled to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Article 91 provides that ships have the nationality of the State whose flag they are entitled to fly and there must exist a genuine link between the State and the ship. Mr Salve pointed out that Article 94 casts several duties on the Flag State and one of the most significant clauses of Article 94 is clause (7) which provides that each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or *incident of navigation* (emphasis supplied) on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The Flag State and the other State shall cooperate in the conduct of any inquiry held by the State concerned into any such marine casualty or incident of navigation. The same provisions are also reflected in Article 97 of the Convention, in which it has been indicated that:

“97. Penal jurisdiction in matters of collision or any other incident of navigation.—(1) In the event of a collision or any other *incident of navigation* concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the Flag State or of the State of which such person is a national.”
(emphasis supplied)

29. Lastly, Mr Salve referred to Article 100, which may be of relevance to the facts of this case, as it requires all States to cooperate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

30. Mr Salve submitted that the publication of a Notification by the Ministry of Home Affairs on 27-8-1981, under sub-section (7) of Section 7 of the Maritime Zones Act, 1976, extending the application of Section 188 of the Code of Criminal Procedure, 1973 to the exclusive economic zone, created various difficulties, since the said notification was a departure from the provisions of Part V of UNCLOS which provides that a coastal State

740

SUPREME COURT CASES

(2013) 4 SCC

enjoys only sovereign rights and not sovereignty over the exclusive economic zone.

31. Referring to the interim report of the Ministry of Shipping, Government of India, in respect of the incident, Mr Salve pointed out that the fishing boat, *MFB St Antony*, about 12 metres long, was owned by one Mr Freidy, who was also working as the Sarang of the boat, which is registered at Colachel, Kanyakumari District, Tamil Nadu, by the Assistant Director of Fisheries. The crew of the boat were issued identity cards by the Trivandrum Matsyathozhilali Forum, but the fishing boat is not registered under the Indian Merchant Shipping Act, 1958, and was not flying the Indian flag at the time of the incident. Furthermore, at the time of the incident, the ship was at a minimum distance of about 20 nautical miles from the Indian coast. The ship was coasting in Indian territorial waters in order to avoid any encounter with pirate boats as the area was declared to be a high risk area of piracy. Mr Salve urged that in the report it was also indicated that the area comes under the high alert zone for piracy attacks, as declared by UKMTO, and the Watch Officers were maintaining their normal pirate watch. Apart from the normal navigational watch-keepers, the ship also had NMP marines on the bridge on anti-pirate watch as stated by the Second Mate and Master. The NMP marines were keeping their own watch as per their schedule and it was not the responsibility of the Master to keep track of their regimen. The NMP marines were supposed to take independent decisions as per Article 5 of the agreement between the Italian Defence Ministry and the Italian Shipowners Association. The report also indicated that the fishing boat came within a distance of 100 metres of the Italian ship, causing the crew of the ship to believe that they were under pirate attack and in the circumstances of the moment the marines, who are independent of the orders of the Master, opened fire, killing the two Indian fishermen. Subsequently, while the ship was moving away, it received a phone call from MRCC, Mumbai Duty Controller, instructing the ship to proceed towards Kochi anchorage to give a statement and witness with regard to the incident. Mr Salve submitted that pursuant thereto the Italian vessel, instead of proceeding further into the high seas, returned to Cochin Port and was, thereafter, detained by the Kerala police authorities.

32. Mr Salve submitted that it was necessary to construe the provisions of the Maritime Zones Act, 1976, in the light of UNCLOS, which gives rise to the question as to which of the provisions would have primacy in case of conflict.

33. Referring to the decision of this Court in *Aban Loyd Chiles Offshore Ltd. v. Union of India*², Mr Salve submitted that in the said decision, this Court had held that (at SCC p. 467, para 74) from a reading of Sections 6 and 7 of the Maritime Zones Act, 1976, it is clear that India has been given only certain limited sovereign rights in respect of its continental shelf and exclusive economic zone, which cannot be equated to extending the

2 (2008) 11 SCC 439

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

741

sovereignty of India over its continental shelf and exclusive economic zone, as in the case of territorial waters. However, Sections 6(6) and 7(7) of the
a Maritime Zones Act, 1976 empower the Central Government, by notification, to extend the enactment in force in India, with such restrictions and modifications which it thinks fit, to its continental shelf and exclusive economic zone and also provides that an enactment so extended shall have effect as if the continental shelf or the exclusive economic zone, to which the Act has been extended, is a part of the territory of India. Sections 6(6)
b and 7(7) create a fiction by which the continental shelf and the exclusive economic zone are deemed to be a part of India for the purposes of such enactments which are extended to those areas by the Central Government by issuing a notification.

34. Mr Salve submitted that it was also held in *Aban Loyd Chiles case*² that the coastal State has no sovereignty in the territorial sense of dominion
c over the contiguous zone, but it exercises sovereign rights for the purpose of exploring the continental shelf and exploiting its natural resources. It has jurisdiction to enforce its fiscal, revenue and penal laws by intercepting vessels engaged in suspected smuggling or the other illegal activities attributable to a violation of the existing laws. The waters which extend beyond the contiguous zone are traditionally the domain of high seas or open
d sea which have, juristically speaking, the status of international waters where all States enjoy traditional high seas freedoms, including freedom of navigation. The coastal States can exercise their right of search, seizure or confiscation of vessels for violation of its customs or fiscal or penal laws in the contiguous zone, but it cannot exercise these rights once the vessel in question enters the high seas, since it has no right of hot pursuit, except
e where the vessel is engaged in piratical acts, which make it liable for arrest and condemnation within the seas. Accordingly, although, the coastal States do not exercise sovereignty over the contiguous zone, they are entitled to exercise sovereign rights and take appropriate steps to protect its revenue and like matters.

35. Relying on the aforesaid observations made by this Court in *Aban Loyd Chiles case*², Mr Salve submitted that the provisions of the Maritime Zones Act, 1976, would have to be read in harmony with the provisions of UNCLOS. Mr Salve submitted that the reference made in paras 77 and 99 of the judgment in *Aban Loyd Chiles*² dealt with policing powers in the designated areas of the contiguous zone for the application of the Customs Act and not as a reference to general policing powers exercised by the State
f police within the Union of India. Mr Salve submitted that it would thus be clear, that if an offence was committed beyond the contiguous zone, the State concerned could not proceed beyond 24 nautical miles from the baseline in
g pursuit of the vessel alleged to have committed the offence. Mr Salve submitted that it was not contemplated under the Maritime Zones Act, 1976, that the policing powers of a coastal State would proceed beyond the
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² *Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439

742

SUPREME COURT CASES

(2013) 4 SCC

contiguous zone and into the exclusive economic zone or high seas, though certain provisions of the Customs Act and the Customs Tariff Act had been extended to areas declared as “designated areas” under the said Act.

36. Mr Salve contended that the stand of the Union of India has been that the provisions of UNCLOS cannot be applied in the facts of the case, since the Maritime Zones Act, 1976, which is a domestic Act, is a departure from UNCLOS, and Article 27 of UNCLOS was not a part of the Indian domestic law. Further, in anticipation of the submissions on behalf of the respondents, Mr Salve urged that the judgment of the Permanent Court of International Justice in *S.S. Lotus (France v. Turkey)*³ which involved claims between France and Turkey continued to be good law, save and except to the extent it had been overridden, but only in relation to collisions under Article 97 of UNCLOS.

37. Mr Salve submitted that the aforesaid contentions made on behalf of the Union of India were misconceived, because they were not taken earlier and were not to be found in the affidavit affirmed by the Union of India. Mr Salve submitted that the Maritime Zones Act, 1976, far from being a departure, is in complete conformity with the principles of UNCLOS. The Act is limited to spelling out the geographical boundaries of the various zones, namely, the territorial waters, the contiguous zone, the exclusive economic zone, and the continental shelf, etc. and the nature of rights available to India in respect of each of the zones is spelled out in the Act in a manner which is in complete conformity with UNCLOS. Mr Salve urged that India was not only a signatory to but had also ratified the Convention. The learned counsel submitted that the Maritime Zones Act, 1976, was based, to a large extent, on the draft of UNCLOS which had been prepared before 1976, but it is settled law in India that once a convention of this kind is ratified, the municipal law on similar issues should be construed in harmony with the convention, unless there were express provisions to the contrary.

38. Simply stated, Mr Salve’s submissions boil down to the question as to whether the sovereignty of India would extend to the exclusive economic zone, which extends to 200 nautical miles from the baseline of the coast of the State of Kerala.

39. Mr Salve then urged that if sub-section (2) of Section 4 IPC was to be invoked by the Union of India for exercising jurisdiction over a person present on a vessel flying the Indian flag, it must respect a similar right asserted by other jurisdictions indicating that Article 21 of the Convention recognises the right of innocent passage which is to be respected by all nations who are signatories to UNCLOS. As a result, if a vessel is in innocent passage and an incident occurs between two foreign citizens which has no consequences upon the coastal State, it is obvious that no jurisdiction could be asserted over such an act on the ground that it amounts to violation of the Indian Penal Code or that the Indian courts would have jurisdiction to try such criminal offences. Mr Salve submitted that the acceptance of such an assertion would negate the rights of innocent passage.

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

743

40. Mr Salve submitted that once it is accepted that it must be Parliament's intention to recognise the exclusive economic zone and to create a legal regime for exercise of the sovereign rights in respect of the said zone, then, it must necessarily follow that a parliamentary intent has to be read in conjunction with Article 55 of UNCLOS. It must then follow that the sovereign rights in the said zone must be read subject to the specific legal regime established in Part V of UNCLOS.

41. As far as the *Lotus*³ decision is concerned, Mr Salve contended that such decision had been rendered in the facts involving the collision of a French vessel with a Turkish vessel, which ultimately led to the 1952 Geneva Convention for the unification of certain rules relating to penal jurisdiction in matters of collisions, which overruled the application of the principles of concurrent jurisdiction over marine collisions. Mr Salve urged that a reading of Articles 91, 92, 94 and 97 of UNCLOS clearly establishes that any principle of concurrent jurisdiction that may have been recognised as a principle of public international law stands displaced by the express provisions of UNCLOS. The learned counsel pointed out that it was not in dispute that the *St Antony*, the Indian vessel involved in the incident, was registered under the Tamil Nadu fishing laws and not under the Indian Merchant Shipping Act, 1958, which would allow it to travel beyond the territorial waters of the respective State of the Indian Union, where the vessel was registered.

42. Mr Salve lastly contended that the stand of the Union of India that since no specific law had been enacted in India in terms of UNCLOS, the said Convention was not binding on India, was wholly misconceived. Mr Salve urged that in earlier matters, this Court had ruled that although Conventions, such as these, have not been adopted by legislation, the principles incorporated therein, are themselves derived from the common law of nations as embodying the felt necessities of international trade and are, therefore, a part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.

43. Mr Salve also relied on the Constitution Bench decision of this Court in *Maganbhai Ishwarbhai Patel v. Union of India*⁴, in which this Court had inter alia held that unless there be a law in conflict with the Treaty, the Treaty must stand. Also citing the decision of this Court in *Vishaka v. State of Rajasthan*⁵, this Court held that international conventions and norms are to be read into constitutional rights which are absent in domestic law, so long as there is no inconsistency with such domestic law.

44. Mr Salve urged that Section 3 of the Maritime Zones Act, 1976, recognises the notion of sovereignty, but, limits it to 12 nautical miles from the nearest point of the appropriate baseline.

45. The essence of Mr Salve's submissions is focussed on the question as to whether the sovereignty of India and consequently the penal jurisdiction of

³ *S.S. Lotus (France v. Turkey)*, 1927 PCIJ (Series A) No. 10

⁴ (1970) 3 SCC 400

⁵ (1997) 6 SCC 241 : 1997 SCC (Cri) 932

744

SUPREME COURT CASES

(2013) 4 SCC

the Indian courts, extends to the exclusive economic zone or whether India has only sovereign rights over the continental shelf and the area covered by the exclusive economic zone. A reading of Sections 6 and 7 of the Maritime Zones Act, 1976, makes it clear that India's sovereignty extends over its territorial waters, but the position is different in the case of the continental shelf and exclusive economic zone of the country. The continental shelf of India comprises the seabed beyond the territorial waters to a distance of 200 nautical miles. The exclusive economic zone represents the sea or waters over the continental shelf. Mr Salve submitted that the language of the various enactments and the manner in which the same have been interpreted, has given rise to the larger question of sovereign immunity.

46. Mr Salve submitted that while Italy signed UNCLOS in 1973 and ratified it in January 1995, India signed the Convention in 1982 and ratified the same on 29-6-1995. Referring to Sections 2 and 4 of the Penal Code read with Section 179 of the Code of Criminal Procedure, Mr Salve urged that the same would stand excluded in their operation to the domestic courts on the ground of sovereign immunity.

47. Mr Salve lastly urged that in order to understand the presence of the Italian marines on board the *MV Enrica Lexie*, it would be necessary to refer to the Protocol Agreement entered into between the Italian Ministry of Defence, Naval Staff and Italian Shipowners' Confederation (Confitarma) on 11-10-2011. Mr Salve pointed out that the said agreement was entered into pursuant to various Italian legislative and presidential decrees which were issued on the premise that piracy and armed plundering were serious threats to safety in navigation for crew and merchandise carried, with significant after-effects on freights and marine insurance, the commercial costs of which may affect the national community. Accordingly, it was decided to sign the protocol agreement, in order that the parties may look for and find all or any measure suitable to facilitate that the embarkation and disembarkation of Military Protection Squads (hereinafter referred to as "NMPs", onto and from ships in the traffic areas within the area defined by the Italian Ministry of Defence by Ministerial Decree of 1-9-2011. Mr Salve pointed out that the said Agreement provides for the presence of Italian marines, belonging to the Italian Navy, to provide protection to private commercial ships against the surge of piracy. Mr Salve submitted that, in fact, the Italian Navy was of the view that the activity covered by the Agreement/Protocol could also be offered to national ship-owners other than Confitarma and other class associations, following acceptance of the Convention.

48. Mr Salve pointed out that Article 3 of the Convention provided for the supply of the protection service, in which on an application for embarkation of the Military Protection Squads, the Italian Ministry of Defence would consider several aspects, including the stipulation that the ship's Master would remain responsible only for choices concerning safety of navigation and manoeuvre, including escape manoeuvres, but would not be responsible for the choices relating to operations involved in countering a piracy attack. Mr Salve submitted that, in other words, in case of piracy

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

745

attacks, the Master of the ship would have no control over the actions of the NMPs provided by the Italian Government.

- a* **49.** Mr Salve submitted that the deployment order of the team of marines, including Writ Petitioners 2 and 3, is contained in OP 06145Z FEB 12 ZDS from the Italian Navy General Staff to the Italian Defence Attaché in New Delhi, India and several other Italian Defence Attachés in different countries, which has been made Annexure P-3 to the special leave petition. In this regard, Mr Salve referred to a Note Verbale No. 95/553 issued by the
- b* Embassy of Italy in New Delhi to the Ministry of External Affairs, Government of India, referring to the case involving the vessel in question. Since the same encapsulates in a short compass the case of the petitioners, the same in its entirety is extracted hereinbelow:

*“Embassy of Italy
New Delhi*

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Note Verbale

95/553

The Embassy of Italy presents its compliments to the Ministry of External Affairs, Government of India and has the honour to refer to the case of the ship *Enrica Lexie* as per Note Verbale No. 71 dated 18-2-2012.

d

The Embassy of Italy would like to recall that according to principles of customary international law, recognised by several decisions of the International Courts, the State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions. The Italian Navy Military Department that operated in international waters on board of the ship *Enrica Lexie* must be considered as an organ of the Italian State.

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Their conduct has been carried out in the fulfilment of their official duties in accordance with national regulations (Italian Act No. 107 of 2011), directives, instructions and orders, as well as the pertinent rules on piracy contained in the 1982 UN Convention on the Law of the Sea and in the relevant UN Security Council Resolutions on the Piracy off the Horn of Africa.

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The Embassy of Italy welcomes the steps taken by the Chief Judicial Magistrate in Kollam in order to protect the life and honour of the Italian Military Navy personnel currently held in judicial custody on remand. The Embassy of Italy also welcomes the cooperative approach on the issue of the examination of the weapons taken by the Magistrate.

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The Embassy of Italy nevertheless reasserts the Italian exclusive jurisdiction in respect of the said military personnel. It wishes to inform that investigations by both the Italian ordinary and military judicial authorities have already been initiated. Therefore, it urges for the release of the Italian Navy Military personnel and the unimpeded departure from the Indian territory. They have entered Indian territorial waters and harbour simply as a Military Force Detachment officially embarked on the Italian vessel *Enrica Lexie* in order to cooperate with Indian authorities in the investigation of an alleged piracy episode. The entry in Indian territorial waters was upon initial invitation and then under direction of Indian authorities.

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746

SUPREME COURT CASES

(2013) 4 SCC

The Embassy of Italy, while reiterating the sovereign right of a State to employ its military personnel in ongoing antipiracy military protection of national flagged merchant ship in international waters, underlines that the same right is not impaired by the ongoing national investigations involving Italian Navy Military personnel.

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The Italian Navy Military personnel, currently held in judicial custody on remand, was carrying out official functions for the protection of the vessel from piracy and armed robbery in the extraterritorial maritime zones which at the relevant time were considered as 'risk area', taking also in consideration information provided by IMO and other relevant multinational organisation. Thus, while acknowledging the obligations of Italy under international law, including the obligation to cooperate with Indian authorities for the most comprehensive and mutually satisfactory investigation of the event, the Embassy of Italy recalls that the conduct of Italian Navy Military personnel officially acting in the performance of their duties should not be open to judgment scrutiny in front of any court other than the Italian ones.

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The Embassy of Italy, New Delhi, avails itself of this opportunity to renew to the Ministry of External Affairs, Government of India, the assurances of its highest consideration.

New Delhi, 29-2-2012.

Consulate General of Italy, Mumbai.”

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50. In fact, shorn of all legalese, the aforesaid note emphasises the stand of the Italian Government that the conduct of Petitioners 2 and 3 was in fulfilment of their official duties in accordance with national regulations, directives, instructions and orders, as well as the rules of piracy contained in UNCLOS and the relevant UN Security Council Resolutions on Piracy off the Horn of Africa.

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51. Mr Salve submitted that in the special facts of the case, the petitioners were entitled to the reliefs prayed for in the writ petition and the special leave petition.

52. Mr Gourab Banerji, Additional Solicitor General, who appeared for the Union of India, focussed his submissions on two issues raised by the petitioners, namely:

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52.1. Whether the Indian courts have territorial jurisdiction to try Petitioners 2 and 3 under the provisions of the Penal Code, 1860?

52.2. If so, whether the writ petitioners are entitled to claim sovereign immunity?

53. Mr Banerji submitted that stripped of all embellishments, the bare facts of the incident reveal that on 15-2-2012, FIR No. 2 of 2012 was registered with the Coastal Police Station, Neendakara, Kollam, under Section 302 read with Section 34 IPC alleging that a fishing vessel *St Antony*, was fired at by persons on board a passing ship, as a result of which, out of the 11 fishermen on board, two were killed instantaneously. It was alleged that the ship in question was *MV Enrica Lexie*. The detailed facts pertaining to the incident could be found in the statement dated 28-2-2012, filed by the

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REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

747

Coast Guard before the Kerala High Court and the charge-sheet filed on 18-5-2012.

a **54.** The defence of the petitioners is that Petitioners 2 and 3 were members of the Military Protection Detachment deployed on the Italian vessel and had taken action to protect the vessel against a pirate attack.

b **55.** Mr Banerji submitted that it had been urged on behalf of the petitioners that the Union of India had departed from its pleadings in urging that the Maritime Zones Act, 1976, was a departure from and inconsistent with UNCLOS. Mr Banerji submitted that the legal position in this regard had already been clarified in paras 100 to 102 of the decision in *Aban Loyd case*² wherein this Court had re-emphasised the position that the Court could look into the provisions of the international treaties, and that such an issue is no longer *res integra*. In *Gramophone Co. of India v. Birendra Bahadur Pandey*⁶ this Court had held that even in the absence of municipal law, the treaties/conventions could not only be looked into, but could also be used to interpret municipal laws so as to bring them in consonance with international law.

c **56.** Mr Banerji urged that as far as the Union of India was concerned, an attempt must necessarily be made in the first instance to harmonise the Maritime Zones Act, 1976 with UNCLOS. If this was not possible and there was no alternative but a conflict between the municipal law and the International Convention, then the provisions of the 1976 Act would prevail. Mr Banerji urged that primacy in interpretation by a domestic court, must, in the first instance, be given to the Maritime Zones Act, 1976 rather than UNCLOS. Questioning the approach of the petitioners in relying firstly on UNCLOS and only, thereafter, on the provisions of the Maritime Zones Act, 1976, Mr Banerji submitted that such approach was misconceived and was contrary to the precepts of public international law.

d **57.** Mr Banerji submitted that the case of the petitioners that the Indian courts had no jurisdiction to take cognizance of the offence which is alleged to have taken place in the contiguous zone, which was beyond the territorial waters of India, as far as India was concerned, was misconceived. The contiguous zone would also be deemed to be a part of the territory of India, inasmuch as the Penal Code and the Code of Criminal Procedure had been extended to the contiguous zone/exclusive economic zone by virtue of the Notification dated 27-8-1981, issued under Section 7(7) of the Maritime Zones Act, 1976. Mr Banerji submitted that according to the Union of India, the domestic law is not inconsistent with the international law and in fact even as a matter of international law, the Indian courts have jurisdiction to try the present offence. The learned Additional Solicitor General submitted that in order to determine the issue of territorial jurisdiction, it would be necessary to conjointly read the provisions of Section 2 IPC, the Maritime Zones Act, 1976 and the 27-8-1981 Notification and all attempts had to be

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h ² *Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439
⁶ (1984) 2 SCC 534 : 1984 SCC (Cri) 313

748

SUPREME COURT CASES

(2013) 4 SCC

made to harmonise the said provisions with UNCLOS. However, if a conflict was inevitable, the domestic laws must prevail over the international conventions and agreements.

58. In this regard, Mr Banerji first referred to the provisions of Section 2 of the Penal Code which deals with punishment of offences committed within India. In this context, Mr Banerji also referred to the Maritime Zones Act, 1976, and more particularly, Section 7(7) thereof, under which the Notification dated 27-8-1981, had been published by the Ministry of Home Affairs, extending the provisions of Section 188-A of the Code of Criminal Procedure, 1973 to the exclusive economic zone.

59. Mr Banerji urged that it appears to have slipped the notice of all concerned that the notifications which had been applied in *Aban Loyd case*² were under Section 7(6) of the 1976 Act and there appeared to be some confusion on the part of the petitioners in regard to the scope of sub-sections (6) and (7) of Section 7 thereof. Mr Banerji urged that the judgment in *Aban Loyd case*² has to be understood in the light of the facts of that case where the issue was whether oil rigs situated in the exclusive economic zone were foreign going vessels and, therefore, entitled to consume imported stores without payment of customs duty. In the said set of facts it was held by this Court that the territory of India for the purpose of customs duty was not confined to the land and territorial waters alone, but also notionally extended to the “designated areas” outside the territorial waters. Mr Banerji urged that the Notification dated 27-8-1981, issued by the Ministry of Home Affairs which had been relied upon by the Union of India, has not been issued for designated areas alone, but for the entire exclusive economic zone to enable it to exercise and protect Indian sovereign rights of exploitation of living natural resources, and more specifically its fishing rights, therein.

60. Mr Banerji submitted that the Notification of 27-8-1981, had been promulgated in exercise of powers conferred by Section 7(7) of the Maritime Zones Act, 1976. Mr Banerji also submitted that the Penal Code and the Code of Criminal Procedure had been extended by the Central Government to the exclusive economic zone. The Schedule to the notification is in two parts. Part I provides the list of enactments extended, whereas Part II provides the provision for facilitating the enforcement of the said Acts. Accordingly, while Part I of the Schedule to the notification is relatable to Section 7(7)(a) of the Act, Part II of the Schedule is relatable to Section 7(7)(b) thereof.

61. The learned Additional Solicitor General submitted that the case of the Union of India rests on two alternative planks. According to one interpretation, the bare reading of Section 7(7) and the notification suggests that once the Penal Code has been extended to the exclusive economic zone, which includes the contiguous zone, the Indian courts have territorial jurisdiction to try offences committed within the contiguous zone. Another plank of the case of the Union of India, involves a contextual interpretation of Section 7(7) and the 1981 Notification. Mr Banerji submitted that presuming

² *Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

749

a that the notification provides for the extension of the Indian law relating to only those matters specified in Section 7(4) of the Act, the Indian courts would also have territorial jurisdiction in respect of the present case. Mr Banerji submitted that notwithstanding the submission made on behalf of the petitioners that such an interpretation would be contrary to the provisions of UNCLOS, particularly, Article 56 thereof, the same failed to notice Article 59 which permits States to assert rights or jurisdiction beyond those specifically provided in the Convention. Alternatively, even in terms of the contextual interpretation of Section 7(7) of the Act, the same would also establish the territorial jurisdiction of the Indian courts. Mr Banerji submitted that even on a reading of Section 7(4) of the Maritime Zones Act, 1976, the petitioners had laid emphasis on clause (b), although various other rights and privileges had also been reserved to the Indian Union. It was urged that the importance of the other clauses, and, in particular, clauses (a) and (e) would fully establish the territorial jurisdiction of the Indian courts to try the offence involving the unlawful killing of two Indian citizens on board an Indian vessel. Mr Banerji also urged that reading Section 7(4) of the Act in harmony with Section 7(7) thereof, would include within its ambit the power to extend enactments for the purposes of protecting exploration, exploitation, conservation and management of natural resources which include fishing rights. Accordingly, if the provisions of the Penal Code and CrPC have been extended throughout the exclusive economic zone, inter alia, for the purpose of protecting fishing rights under Section 7(4)(a), the same would include extending legislation for the safety and security of the Indian fishermen. By opening fire on the Indian fishing vessel and killing two of the fishermen on board the said vessel within the contiguous zone, Petitioners 2 and 3 made themselves liable to be tried by the Indian courts under the domestic laws.

e **62.** On the question as to whether the State of Kerala had jurisdiction to try the offence, since the incident had taken place in the zone contiguous to the territorial waters off the coast of Kerala, Mr Banerji submitted that the Kerala courts derived jurisdiction in the matter from Section 183 of the Code of Criminal Procedure, which has also been extended to the exclusive economic zone by the 1981 Notification and relates to offences committed on journeys or voyages. Mr Banerji submitted that when such an offence is committed, it could be inquired into or tried by a court through or into whose local jurisdiction the person or thing passed in the course of that journey or voyage. Mr Banerji submitted that the voyage contemplated under the said provision is not the voyage of the *Enrica Lexie*, but the voyage of *St Antony*.

g **63.** Apart from the above, the main case of the Union of India is that on a plain reading of the language of Section 7(7) or on a contextual interpretation thereof, the Republic of India has jurisdiction to try Petitioners 2 and 3 in its domestic courts. Even the 1981 Notification could be read down and related to Section 5 of the 1976 Act. Referring to the decision of this Court in *Hukumchand Mills Ltd. v. State of M.P.*⁷ and *N. Mani v. Sangeetha Theatre*⁸,

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7 AIR 1964 SC 1329
8 (2004) 12 SCC 278

750

SUPREME COURT CASES

(2013) 4 SCC

Mr Banerji urged that if the executive authority had the requisite power under the law, and if the action taken by the executive could be justified under some other power, mere reference to a wrong provision of law would not vitiate the exercise of power by the executive, so long as the said power exists.

64. Regarding the applicability of Section 4 of the Penal Code to the facts of the case, Mr Banerji urged that the provisions of the Penal Code would, in any event, apply to any citizen of India in any place without and beyond India or to any person on any ship or aircraft registered in India, wherever it may be. Mr Banerji submitted that the Explanation to the section makes it clear that the word “offence” includes every act committed outside India which, if committed in India, would be punishable under the said Code.

65. Mr Banerji submitted that although the learned Advocate General of the State of Kerala had conceded before the learned Single Judge of the Kerala High Court that Section 4 IPC would not apply to the facts of the case, the Union of India was not a party to such concession, which, in any event, amounted to a concession in law. Mr Banerji urged that the words “aboard” or “on board” are not used in Section 4(2) IPC and an unduly restrictive interpretation of the said section would require both the victim and the perpetrator to be aboard the same ship or aircraft, which could lead to consequences where pirate, hijacker or terrorist, who fires upon an innocent Indian citizen within an Indian ship or aircraft, would escape prosecution in India. Mr Banerji contended that the provisions of Section 4(2) IPC has to be read with Section 188 CrPC, which subsequently stipulates that:

“**188. Offence committed outside India.**—Where an offence is committed outside India—

- (a) by a citizen of India, whether on the high seas or elsewhere; or
- (b) by a person not being such citizen, on any ship or aircraft registered in India,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:”

Mr Banerji submitted that in view of the concession made on behalf of the State of Kerala, the question of the scope of Section 4 IPC could be left open to be decided in an appropriate case.

66. Mr Banerji submitted that, although a good deal of emphasis had been laid by the petitioners on the observation contained in the Shipping Ministry’s Interim Report that the fishing vessel was not registered under the Merchant Shipping Act, 1958, but under a local law pertaining to the State of Tamil Nadu, the same was only a red herring, as the Kerala State fishing laws do not permit fishing vessels to sail beyond the territorial waters of their respective States. Mr Banerji urged that such a submission may have been relevant in the context of Section 4(2) IPC, wherein the expression “registered in India” had been used, but the same would have no significance to the facts of this case, since the said provisions were not being invoked for the purposes of this case. The learned ASG contended that even if the fishing vessel had sailed beyond its permitted area of fishing, the same was a matter of evidence, which stage had yet to arrive.

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

751

67. Mr Banerji contended that, on the other hand, what was more important were the provisions of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, wherein in the Statement of Objects and Reasons of the Act it has been indicated that the Act was in the nature of umbrella legislation and it was envisaged that separate legislation for dealing in greater detail with the regulation, exploration and exploitation of particular resources in the country's maritime zones and to prevent poaching activities of foreign fishing vessel to protect the fishermen who were citizens of India, should be undertaken in due course. In this context, Mr Banerji further urged that the provisions of the Merchant Shipping Act dealing with the registration of the Indian ships, do not include fishing vessels, which are treated as an entirely distinct and separate category in Chapter XV-A of the said Act.

68. Mr Banerji urged that the right of passage through territorial waters is not the subject-matter of dispute involved in the facts of this case. On the other hand, Article 56 of UNCLOS, which has been relied upon by the petitioners indicate that the rights given to the coastal States are exhaustive. However, while the petitioners have laid emphasis on Article 56(1)(b), the Union of India has laid emphasis on Article 56(1)(a) read with Article 73 of UNCLOS to justify the action taken against the accused. Mr Banerji urged that even if Article 56 of UNCLOS is given a restrictive meaning, the action of the Indian courts would be justified, inasmuch as, the action seeks to protect the country's fishermen.

69. Mr Banerji contended that Article 59 of UNCLOS, which deals with the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone, contemplates rights beyond those which are attributable under the Convention. However, even if it could be assumed that the rights asserted by India are beyond those indicated in Article 56 of UNCLOS, such conflict would have to be resolved on the basis of equity and in the light of all circumstances. Accordingly, even if both the Republics of Italy and India had the power to prosecute the accused, it would be much more convenient and appropriate for the trial to be conducted in India, having regard to the location of the incident and the nature of the evidence and witnesses to be used against the accused.

70. Responding to the invocation of Article 97 of UNCLOS by the petitioners, Mr Banerji urged that whether under the international law Italy has exclusive jurisdiction to prosecute Petitioners 2 and 3 is a question which would be relevant in the event the Court found it necessary to invoke Section 7(4)(e) of the Maritime Zones Act, 1976. Mr Banerji urged that in order to claim exclusive jurisdiction, the Republic of Italy had relied upon Article 97 of UNCLOS which, however, dealt with the collision of shipping vessels and was unconnected with any crime involving homicide.

71. The learned Additional Solicitor General pointed out that the title of Article 97 reads that it provides for *penal jurisdiction in matters of collision or any other incident of navigation* and that, as had been pointed out by Mr Harish Salve appearing for the petitioners, Article 97(1), inter alia, provides that in the event of collision or any other incident of navigation concerning a

752

SUPREME COURT CASES

(2013) 4 SCC

ship on the high seas, involving the penal or disciplinary responsibility of the Master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the Flag State or of the State of which such person is a national. Mr Banerji urged that the expression “incident of navigation” used in Article 97, did not contemplate a situation where a homicide takes place and, accordingly, the provisions of Article 97 of UNCLOS would not have any application to the facts of the present case.

72. On Article 11 of the Geneva Convention on the Law of the Seas, 1958, Mr Banerji submitted that the killing of an Indian national on board an Indian vessel could not be said to be an incident of navigation, as understood under the said article which deals mainly with collision on the high seas. Referring to *Oppenheim on International Law* (9th Edn., Vol. 1), Mr Banerji submitted that the phrase “accident of navigation” has been used synonymously with “incident of navigation”. Consequently, the meaning of the expression “accident of navigation” provided in the dictionary defines the same to mean mishaps that are peculiar to travel by sea or to normal navigation; accidents caused at sea by the action of the elements, rather than by a failure to exercise good handling, working or navigation of a ship. Furthermore, if Article 97 of UNCLOS is to include a homicide incident, Article 92 thereof would be rendered otiose. Mr Banerji submitted that the decision in *Lotus case*³ continued to be good law in cases such as the present one. It was urged that under the passive personality principle, the States may claim jurisdiction to try an individual where actions might have affected nationals of the State. Mr Banerji submitted that various articles of UNCLOS do not support the case attempted to be made out by the Republic of Italy, either on merits, or on the question of exclusive jurisdiction.

73. On the claim of sovereign immunity from criminal prosecution, Mr Banerji submitted that Petitioners 2 and 3 were not entitled to the same. Mr Banerji submitted that while the international law was quite clear on the doctrine of sovereign immunity, the important question to be considered in this case is the extent of such sovereign immunity which could be applied to the facts of this case. In support of his submissions, Mr Banerji referred to certain observations made by Lord Denning, M.R. in *Trendtex Trading Corpn. v. Central Bank of Nigeria*⁹, wherein it was observed as follows: (QB p. 552 F)

“The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign State should not be impleaded in the courts of another sovereign State against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. All nations agree upon it. So it is part of the law of nations.”

3 *S.S. Lotus (France v. Turkey)*, 1927 PCIJ (Series A) No. 10
9 1977 QB 529 : (1977) 2 WLR 356 : (1977) 1 All ER 881 (CA)

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

753

Lord Denning, M.R. however, went on to observe that notion of a consensus was merely fictional and there was no agreed doctrine of sovereign immunity.

a However, this did not mean that there was no rule of international law on the subject. It only meant that there is difference of opinion as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it.

b 74. In this line of reasoning, Mr Banerji submitted that the provisions of Section 2 IPC and its impact would have to be considered before the impact of the customary international law could be considered. Mr Banerji pointed out that Section 2 IPC begins with the words “every person” which makes all offenders, irrespective of nationality, punishable under the Code and not otherwise, for every act or omission contrary to the provisions thereof, of which he is found to be guilty within India. Reference was made by Mr Banerji to the decision of this Court in *Mobarik Ali Ahmed v. State of Bombay*¹⁰, wherein this Court had held that the exercise of criminal jurisdiction depends on the location of the offence, and not on the nationality of the alleged offender or his corporeal presence in India. This Court pointed out that the plain meaning of the phrase “every person” is that it embraces all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed, except such as may be specially exempted from criminal proceedings or punishment by virtue of specific provisions of the Constitution or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

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e 75. Going a step further, Mr Banerji also referred to the United Nations (Privileges and Immunities) Act, 1947 and the Diplomatic Relations (Vienna Convention) Act, 1972, which gave certain diplomats, missions and their members diplomatic immunity even from criminal jurisdiction. Mr Banerji submitted that the 1972 Act had been enacted to give effect to the Vienna Convention on Diplomatic Relations, 1961. The effect of Section 2 of the Act is to give the force of law in India to certain provisions set out in the Schedule to the Act.

f 76. Mr Banerji specifically referred to Article 31 of the Convention, which is extracted hereinbelow:

“31. (1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

g (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

h (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

¹⁰ AIR 1957 SC 857 : 1957 Cri LJ 1346

754

SUPREME COURT CASES

(2013) 4 SCC

(2) A diplomatic agent is not obliged to give evidence as a witness.

(3) No measure of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paras (a), (b) and (c) of Para 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

(4) The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.”

77. Mr Banerji urged that as per the policy of the Government of India, no foreign arms or foreign private armed guards or foreign armed forces personnel, accompanying merchant vessels, are allowed diplomatic clearance. Nor is it the policy of the Government of India to enter into any Status of Forces Agreement (SOFA) by which foreign armed forces are given immunity from criminal prosecution. Mr Banerji sought to emphasise the fact that the United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004 had not come into force. Accordingly, the petitioners’ case that the said Convention reflects the customary international law, cannot be accepted.

78. Also referring to the decision in *Pinochet Case No. 3*¹¹, Mr Banerji submitted that the said case concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The learned ASG submitted that even though the Republic of Italy may claim sovereign immunity when sued in an Indian court for damages for the unlawful acts of its citizens, it was clear that even if it is assumed that Petitioners 2 and 3 were acting under orders of the Italian Navy, there is no basis for any claim of immunity from criminal jurisdiction in the face of Section 2 IPC. Mr Banerji submitted that the action of Petitioners 2 and 3 was not *acta jure imperii* but *acta res gestionis* and hence the scope of the various Italian laws would have to be established by way of evidence. Mr Banerji submitted that since the claim of functional immunity from criminal jurisdiction was not maintainable, the special leave petition was liable to be dismissed.

79. On the filing of the writ petition before this Court, being Writ Petition (Civil) No. 135 of 2012, Mr Banerji urged that Writ Petition (Civil) No. 4542 of 2012, for the selfsame reliefs had been filed by the same petitioners before the Kerala High Court and the same being dismissed, was now pending consideration in the special leave petition. Mr Banerji submitted that the writ petition was wholly misconceived since the petitioners were not entitled to pursue two parallel proceedings for the selfsame reliefs. It was submitted that the writ petition under Article 32 was, therefore, liable to be rejected.

80. Appearing for the State of Kerala and the investigating officer of the case, Mr V. Giri, learned Senior Advocate, submitted that on account of the

¹¹ *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)*, (2000) 1 AC 147 : (1999) 2 WLR 827 : (1999) 2 All ER 97 (HL)

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

755

a death of Valentine alias Jelastine and Ajeesh Pink, two of the crew members on board the Indian fishing vessel, *St Antony*, Crime No. 2 of 2012, was registered by Neendakara Coastal Police Station for offences alleged to have been committed under Sections 302, 307 and 427 read with Section 34 IPC and Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (SUA Act). On the return of the Italian vessel to Kochi, Petitioners 2 and 3 were placed under arrest by Kerala Police on 19-2-2012, in connection with
b the said incident and are now in judicial custody.

81. Mr Giri submitted that the Maritime Zones Act, 1976, was enacted by Parliament after the amendment of Article 297 of the Constitution by the 40th Constitution (Amendment) Act of 1976, which provides for the vesting in the Union of all things of value within territorial waters or the continental shelf and resources of the exclusive economic zone. Mr Giri urged that the
c concept of territorial waters or continental shelf and exclusive economic zone originated in Article 297 and the 1976 Act in relation to the municipal laws of India.

82. Mr Giri submitted that the Maritime Zones Act, 1976, and the Notification dated 27-8-1981, extending the provisions of Section 188-A CrPC to the exclusive economic zone, were prior in point of time to UNCLOS, 1982 and the date on which India ratified the said Convention. Mr Giri submitted that despite the legislative competence of Parliament under
d Article 253, read with Schedule VII List I Entry 14, conferring on Parliament the power to enact laws to give effect to the provisions of a treaty, agreement or convention, to which India is a party, the provisions of UNCLOS have not as yet been made part of the municipal law of India. Mr Giri urged that
e several international conventions have been ratified by the Indian Republic to give effect to the provisions of the Conventions to which India is a signatory, such as the Diplomatic Relations (Vienna Convention) Act, 1972 to give effect to the provisions of the Vienna Convention on Diplomatic Relations, as also the Carriage by Air Act, 1972 to give effect to the provisions of the Warsaw Convention. In the instant case, however, the Indian Parliament has
f not enacted any law to give effect to the provisions of UNCLOS, 1982.

83. Mr Giri, however, conceded that the international conventions could not be ignored while enforcing the municipal law dealing with the same subject-matter and in any given case, attempts were required to be made to harmonise the provisions of the international law with the municipal law. However, in the case of conflict between the two, it is the municipal law
g which would prevail. In this regard, reference was made to the decision of this Court in what is commonly referred to as *Berubari case*¹², which was, in fact, a Presidential Reference under Article 143(1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement relating to Berubari Union and exchange of Enclaves. In the said Reference, the issue
h involved was with regard to an agreement entered into between India and

¹² *Berubari Union (1), In re*, AIR 1960 SC 845

756

SUPREME COURT CASES

(2013) 4 SCC

Pakistan on 10-9-1958 to remove certain border disputes which included the division of Berubari Union No. 12 and another. In the said Reference, this Court was, inter alia, called upon to consider the question as to how a foreign treaty and agreement could be given effect to. The said Reference was answered by this Court by indicating that foreign agreements and conventions could be made applicable to the municipal laws in India, upon suitable legislation by Parliament in this regard. a

84. Reference was also made to the decision of this Court in *Maganbhai Ishwarbhai Patel v. Union of India*⁴, where the subject-matter was the claim to a disputed territory in the Rann of Kutch, which the petitioners claimed was a part of India. It was noted that the petitioners' claim had originated from the very creation of the two dominions. It was also the petitioners' claim that India had all along exercised effective administrative control over the territory and that giving up a claim to it involved cession of Indian territory which could only be effected by a constitutional amendment and not by an executive order. b

85. Other judgments were also referred to, to which we may refer if the need arises. Mr Giri submitted that if a treaty or an agreement or even a convention does not infringe the rights of the citizens or does not in the wake of its implementation modify any law, then it is open to the executive to come to such treaty or agreement and the executive was quite competent to issue orders, but if in consequence of the exercise of the executive power, rights of the citizens or others are restricted or infringed or laws are modified, the exercise of power must be supported by legislation. c

86. It was also submitted that in the event the provisions of UNCLOS were implemented without the sanction of Parliament, it would amount to modification of a municipal law covered by the Maritime Zones Act, 1976. Mr Giri contended that the 1976 Act, which was enacted under Article 297 of the Constitution, is a law which applies to the territorial waters, contiguous zone, continental shelf and the exclusive economic zone over the seas in which the incident had taken place. If, therefore, the provisions of the Convention were to be accepted as having conferred jurisdiction on the Indian judiciary, such a situation would be contrary to the provisions of the Maritime Zones Act, 1976, which contemplates the extension of domestic penal laws to the exclusive economic zone in such a manner that once extended, it would, for all applicable purposes, include such zone to be a part of the territory of India. d

87. Mr Giri submitted that adoption or implementation of the provisions of UNCLOS would not only affect the rights of the citizens of this country, but also give rise to a legal regime, which would be inconsistent with the working of the Maritime Zones Act, 1976, read with the notifications issued thereunder. Consequently, neither the Indian Penal Code nor the Code of Criminal Procedure or the notifications issued, making them applicable to the exclusive economic zone, as if they were part of the territory of India, could be kept inoperative by UNCLOS, 1982. e

⁴ (1970) 3 SCC 400 f

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

757

88. On the question of conflict between the provisions of the Maritime Zones Act and UNCLOS, Mr Giri reiterated the submissions made by Mr Gourab Banerji, on behalf of the Union of India, and contended that even if there are similarities between some of the clauses of the 1976 Act and of UNCLOS, Article 97 of UNCLOS restricts the operation, otherwise contemplated under the Territorial Waters Act, 1976. Mr Giri also reiterated that in case of conflict between a treaty or a convention and a municipal law, the latter shall always prevail, except in certain given circumstances.

89. Regarding the jurisdiction of the State of Kerala to prosecute the accused, Mr Giri submitted that the State of Kerala and its officers were exercising jurisdiction as provided in the Indian Penal Code and the Code of Criminal Procedure. Mr Giri submitted that the jurisdiction of Neendakara Police Station, situated in the district of Kollam in the State of Kerala, and the courts concerned, is reserved under Sections 179 and 183 CrPC. It was urged that at this stage the jurisdiction of the Indian courts would have to be ascertained on the premise that the version pleaded by the prosecution is correct and that the fishing boat, *St Antony*, which was berthed at Neendakara, had commenced its voyage from within the jurisdiction of Neendakara Police Station and had come back and berthed at the same place after the incident of 15-2-2012, and that the said facts brought the entire matter within the jurisdiction of Neendakara Police Station and, in consequence, Kerala State Police.

90. Mr Giri lastly contended that the fact that *St Antony* is not registered under the Merchant Shipping Act, 1958, and is only a fishing boat, is of little consequence, since a fishing boat is separately registered under Section 435-C, Part XV-A of the aforesaid Act. In this case, the fishing boat was registered at Colachel in the State of Tamil Nadu under Registration No. TN/15/MFB/2008. According to Mr Giri, the question as to whether the fishing vessel was registered under the Merchant Shipping Act or not was irrelevant for the purpose of this case and, since the incident had taken place within 20.5 nautical miles from the Indian coastline, falling within the contiguous zone/exclusive economic zone of India, it must be deemed to be a part of the Indian territory for the purpose of application of the Indian Penal Code and CrPC by virtue of Section 7(7) of the Maritime Zones Act read with Notification S.O. 671(E) dated 27-8-1981. Mr Giri submitted that the case made out in the special leave petition did not merit any interference with the judgment¹ of the learned Single Judge of the Kerala High Court, nor was any interference called for in the writ petition filed by the petitioners in this Court. The learned counsel submitted that both the petitions were liable to be dismissed with appropriate costs.

91. Two issues, both relating to jurisdiction, fall for determination in this case. While the first issue concerns the jurisdiction of Kerala State Police to investigate the incident of shooting of the two Indian fishermen on board their fishing vessel, the second issue, which is wider in its import, in view of

¹ *Massimiliano Latorre v. Union of India*, WP (C) No. 4542 of 2012, order dated 29-5-2012 (Ker)

758

SUPREME COURT CASES

(2013) 4 SCC

the public international law, involves the question as to whether the courts of the Republic of Italy or the Indian courts have jurisdiction to try the accused.

92. We propose to deal with the jurisdiction of Kerala State Police to investigate the matter before dealing with the second and larger issue, the decision whereof depends on various factors. One such factor is the location of the incident. a

93. Admittedly, the incident took place at a distance of about 20.5 nautical miles from the coastline of the State of Kerala, a unit within the Indian Union. The incident, therefore, occurred not within the territorial waters off the coastline of the State of Kerala, but within the contiguous zone, over which the State police of the State of Kerala ordinarily has no jurisdiction. The submission made on behalf of the Union of India and the State of Kerala to the effect that with the extension of Section 188-A of the Criminal Procedure Code to the exclusive economic zone, the provisions of the said Code, as also the Indian Penal Code, stood extended to the contiguous zone also, thereby vesting Kerala Police with the jurisdiction to investigate into the incident under the provisions thereof, is not tenable. The State of Kerala had no jurisdiction over the contiguous zone and even if the provisions of the Indian Penal Code and the Code of Criminal Procedure Code were extended to the contiguous zone, it did not vest the State of Kerala with the powers to investigate and, thereafter, to try the offence. What, in effect, is the result of such extension is that the Union of India extended the application of the Indian Penal Code and the Code of Criminal Procedure to the contiguous zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction of the domestic laws within the contiguous zone. However, such a power is not vested with the State of Kerala. b
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94. The submissions advanced on behalf of the Union of India as well as the State of Kerala that since the Indian fishing vessel, *St Antony*, had proceeded on its fishing expedition from Neendakara in Kollam District and had returned thereto after the incident of firing, the State of Kerala was entitled to inquire into the incident, is equally untenable, since the cause of action for the filing of the FIR occurred outside the jurisdiction of the Kerala Police under Section 154 CrPC. The FIR could have been lodged at Neendakara Police Station, but that did not vest Kerala Police with jurisdiction to investigate into the complaint. It is the Union of India which was entitled in law to take up the investigation and to take further steps in the matter. f

95. Furthermore, in this case, one has to take into account another angle which is an adjunct of public international law, since the two accused in the case are marines belonging to the Royal Italian Navy, who had been deputed on *MV Enrica Lexie*, purportedly in pursuance of an Italian Decree of Parliament, pursuant to which an agreement was entered into between the Republic of Italy on the one hand and the Italian Shipowners' Confederation (Confitarma) on the other. This takes the dispute to a different level where the Governments of the two countries become involved. The Republic of Italy g
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REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

759

a has, in fact, from the very beginning, asserted its right to try the two marines and has already commenced proceedings against them in Italy under penal provisions which could result in a sentence of 21 years of imprisonment if the said accused are convicted. In such a scenario, the State of Kerala, as one of the units of a federal unit, would not have any authority to try the accused who were outside the jurisdiction of the State unit. As mentioned hereinbefore, the extension of Section 188-A CrPC to the exclusive maritime zone, of which the contiguous zone is also a part, did not also extend the authority of Kerala State Police beyond the territorial waters, which is the limit of its area of operations.

b **96.** What then makes this case different from any other case that may involve similar facts, so as to merit exclusion from the operation of Section 2 of the Indian Penal Code, as urged by Mr Salve? For the sake of reference, Section 2 of the Indian Penal Code, is extracted hereinbelow:

c **“2. Punishment of offences committed within India.**—Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.”

d The answer to the said question is the intervention of UNCLOS, 1982 which sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. The said Convention which was signed by India in 1982 and ratified on 29-6-1995, encapsulates the law of the sea and is supplemented by several subsequent resolutions adopted by the Security Council of the United Nations.

e **97.** Before UNCLOS came into existence, the law relating to the seas which was in operation in India, was the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 which spelt out the jurisdiction of the Central Government over the territorial waters, the contiguous zones and the exclusive economic zone.

f **98.** In addition to the above was the presence of Article 11 of the Geneva Convention on the Law of the Seas, 1958, and the interpretation of the expression “incident of navigation” used therein, in its application to the firing resorted to by Petitioners 2 and 3 from on board the *MV Enrica Lexie*.

g **99.** What is also of some relevance in the facts of this case is Resolution No. 1897 of 2009, adopted by the Security Council of the United Nations on 30-11-2009, wherein while recognising the menace of piracy, particularly off the coast of Somalia, the United Nations renewed its call upon States and regional organisations that had the capacity to do so, to take part in the fight against piracy and armed robbery off the sea of Somalia in particular.

h **100.** The provisions of the Maritime Zones Act, 1976 take note of the territorial waters, the contiguous zone, the continental shelf and the exclusive economic zone. Section 7 of the said enactment deals with the exclusive economic zone of India and stipulates the same to be an area beyond and adjacent to the territorial waters extending up to 200 nautical miles from the nearest point of the baseline of the Kerala coast. It is quite clear that the contiguous zone is, therefore, within the exclusive economic zone of India

760

SUPREME COURT CASES

(2013) 4 SCC

and the laws governing the exclusive economic zone would also govern the incident which occurred within the contiguous zone, as defined under Section 5 of the aforesaid Act. The provisions of UNCLOS are in harmony with and not in conflict with the provisions of the Maritime Zones Act, 1976 in this regard. Article 33 of the Convention recognises and describes the contiguous zone of a nation to extend to 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. This is in complete harmony with the provisions of the 1976 Act. Similarly, Articles 56 and 57 describe the rights, jurisdiction and duties of the coastal State in the exclusive economic zone and the breadth thereof extending to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. This provision is also in consonance with the provisions of the 1976 Act. The area of difference between the provisions of the Maritime Zones Act, 1976 and the Convention occurs in Article 97 of the Convention which relates to the penal jurisdiction in matters of collision or any other *incident of navigation*.
(emphasis added)

101. The present case does not involve any collision between the Italian vessel and the Indian fishing vessel. However, it has to be seen whether the firing incident could be said to be covered by the expression “incident of navigation”. Furthermore, in the facts of the case, as asserted on behalf of the petitioners, the incident also comes within Article 100 of the Convention which provides that all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State. If Article 97 of the Convention applies to the facts of this case, then in such case, no penal or disciplinary proceeding can be instituted against the Master or any other person in service of the ship, except before the judicial or administrative authorities either of the Flag State or of the State of which such person is a national. Article 97(3) stipulates in clear terms that no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the Flag State. In this case, the Italian vessel *MV Enrica Lexie*, was flying the Italian flag. It may be recalled that the *St Antony* was not flying an Indian flag at the time when the incident took place. In my view, the above fact is not very relevant at this stage, and may be of some consequence if the provisions of Article 100 of UNCLOS, 1982 are invoked.

102. The next question which arises is whether the incident of firing could be said to be an “incident of navigation”. The context in which the expression has been used in Article 97 of the Convention seems to indicate that the same refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An “incident of navigation” as intended in the aforesaid article, cannot, in my view, involve a criminal act in whatever circumstances. In what circumstances the incident occurred may be set up as a defence in a criminal action that may be taken, which legal position is accepted by both the countries which have initiated criminal proceedings against the two marines. Even the provisions of Article 100 of UNCLOS may be used for the same purpose. Whether the

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

761

a accused acted on the misunderstanding that the Indian fishing vessel was a pirate vessel which caused the accused to fire, is a matter of evidence which can only be established during a trial. If the defence advanced on behalf of Petitioners 2 and 3 is accepted, then only will the provisions of Article 100 of the Convention become applicable to the facts of the case.

b **103.** The decision in *Lotus case*³ relied upon by the learned Additional Solicitor General would accordingly be dependent on whether the provisions of Article 97 of the Convention are attracted in the facts of this case. As already indicated hereinbefore, the expression “incident of navigation” in Article 97 cannot be extended to a criminal act, involving the killing of two Indian fishermen on board an Indian fishing vessel, although, the same was not flying the Indian flag. If at all, Article 100 of the Convention may stand attracted if and when the defence version of apprehension of a pirate attack is accepted by the trial court.

c **104.** In *Lotus case*³, the question relating to the extent of the criminal jurisdiction of a State was brought to the Permanent Court of International Justice in 1927. The said case related to a collision between the French steamship the *Lotus* and the Turkish steamship the *Boz-Kourt*, which resulted in the sinking of the latter ship and the death of eight Turkish subjects. Once the *Lotus* arrived at Constantinople, the Turkish Government commenced criminal proceedings both against the Captain of the Turkish vessel and the French Officer of the Watch on board the *Lotus*. On both being sentenced to imprisonment, the French Government questioned the judgment on the ground that Turkey had no jurisdiction over an act committed on the open seas by a foreigner on board a foreign vessel, whose flag gave it exclusive jurisdiction in the matter. On being referred to the Permanent Court of International Justice, it was decided that Turkey had not acted in a manner which was contrary to the international law since the act committed on board the *Lotus* had effect on the *Boz-Kourt* flying the Turkish flag.

d **105.** In the 9th Edn. of *Oppenheim’s International Law*, which has been referred to in the judgment under consideration, the nationality of ships in the high seas has been referred to in Para 287, wherein it has been observed by the learned author that the legal order on the high seas is based primarily on the rule of international law which requires every vessel sailing the high seas to possess the nationality of, and to fly the flag of, one State, whereby a vessel and persons on board the vessel are subjected to the law of the State of the flag and in general subject to its exclusive jurisdiction. In Para 291 of the aforesaid discourse, the learned author has defined the scope of flag jurisdiction to mean that jurisdiction in the high seas is dependent upon the maritime flag under which vessels sail, because, no State can extend its territorial jurisdiction to the high seas. Of course, the aforesaid principle is subject to the right of “hot pursuit”, which is an exception to the exclusiveness of the flag jurisdiction over ships on the high seas in certain special cases.

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³ *S.S. Lotus (France v. Turkey)*, 1927 PCIJ (Series A) No. 10

762

SUPREME COURT CASES

(2013) 4 SCC

106. This takes us to another dimension involving the concept of sovereignty of a nation in the realm of public international law. The exercise of sovereignty amounts to the exercise of all rights that a sovereign exercises over its subjects and territories, of which the exercise of penal jurisdiction under the criminal law is an important part. In an area in which a country exercises sovereignty, its laws will prevail over other laws in case of a conflict between the two. On the other hand, a State may have sovereign rights over an area, which stops short of complete sovereignty as in the instant case where in view of the provisions both of the Maritime Zones Act, 1976 and UNCLOS, 1982 the exclusive economic zone is extended to 200 nautical miles from the baseline for measurement of territorial waters. Although the provisions of Section 188-A CrPC have been extended to the exclusive economic zone, the same are extended to areas declared as “designated areas” under the Act which are confined to installations and artificial islands, created for the purpose of exploring and exploiting the natural resources in and under the sea to the extent of 200 nautical miles, which also includes the area comprising the continental shelf of a country. However, the exclusive economic zone continues to be part of the high seas over which sovereignty cannot be exercised by any nation.

107. In my view, since India is a signatory, she is obligated to respect the provisions of UNCLOS, 1982 and to apply the same if there is no conflict with the domestic law. In this context, both the countries may have to subject themselves to the provisions of Article 94 of the Convention which deals with the duties of the Flag State and, in particular, clause (7) which provides that each State shall cause an inquiry to be held into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State. It is also stipulated that the Flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

108. The principles enunciated in *Lotus case*³ have, to some extent, been watered down by Article 97 of UNCLOS, 1982. Moreover, as observed in *Starke’s International Law*, referred to by Mr Salve, the territorial criminal jurisdiction is founded on various principles which provide that, as a matter of convenience, crimes should be dealt with by the States whose social order is most closely affected. However, it has also been observed that some public ships and armed forces of foreign States may enjoy a degree of immunity from the territorial jurisdiction of a nation.

109. This brings me to the question of applicability of the provisions of the Indian Penal Code to the case in hand, in view of Sections 2 and 4 thereof. Of course, the applicability of Section 4 is no longer in question in this case on account of the concession made on behalf of the State of Kerala in the writ proceedings before the Kerala High Court. However, Section 2 of the Penal Code as extracted hereinbefore provides otherwise. Undoubtedly, the incident took place within the contiguous zone over which, both under

³ *S.S. Lotus (France v. Turkey)*, 1927 PCIJ (Series A) No. 10

REPUBLIC OF ITALY v. UNION OF INDIA (*Kabir, C.J.*)

763

a the provisions of the Maritime Zones Act, 1976 and UNCLOS, 1982, India is entitled to exercise rights of sovereignty. However, as decided by this Court in *Aban Loyd Chiles Offshore Ltd. case*², referred to by Mr Salve, sub-section (4) of Section 7 only provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of the natural resources, both living and non-living, as well as for producing energy from tides, winds and currents, which cannot be equated with rights of sovereignty over the said areas in the exclusive economic zone.

b It also provides for the Union of India to exercise other ancillary rights which only clothes the Union of India with sovereign rights and not rights of sovereignty in the exclusive economic zone. The said position is reinforced under Sections 6 and 7 of the Maritime Zones Act, 1976, which also provides that India's sovereignty extends over its territorial waters while, the position is different in respect of the exclusive economic zone.

c I am unable to accept Mr Banerji's submissions to the contrary to the effect that Article 59 of the Convention permits the States to assert rights or jurisdiction beyond those specifically provided in the Convention.

d **110.** What, therefore, transpires from the aforesaid discussion is that while India is entitled both under its domestic law and the public international law to exercise rights of sovereignty up to 24 nautical miles from the baseline on the basis of which the width of the territorial waters is measured, it can exercise only sovereign rights within the exclusive economic zone for certain purposes. The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the contiguous zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country. However, the same is subject to the provisions of Article 100 of UNCLOS, 1982. I agree with Mr Salve that the "Declaration on Principles of International Law Concerning Family Relations and Cooperation between States in accordance with the Charter of the United Nations" has to be conducted only at the level of the Federal or Central Government and cannot be the subject-matter of a proceeding initiated by a Provincial/State Government.

e **111.** While, therefore, holding that the State of Kerala has no jurisdiction to investigate into the incident, I am also of the view that till such time as it is proved that the provisions of Article 100 of UNCLOS, 1982 apply to the facts of this case, it is the Union of India which has jurisdiction to proceed with the investigation and trial of Petitioners 2 and 3 in the writ petition. The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS, 1982, where there is no conflict between the domestic law and UNCLOS, 1982. The pending proceedings before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court to be

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² *Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439

764

SUPREME COURT CASES

(2013) 4 SCC

constituted in terms of this judgment and it is expected that the same shall be disposed of expeditiously. This will not prevent the petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS, 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and of the courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good.

112. It is made clear that the observations made in this judgment relate only to the question of jurisdiction prior to the adducing of evidence and once the evidence has been recorded, it will be open to the petitioners to reargue the question of jurisdiction before the trial court which will be at liberty to reconsider the matter in the light of the evidence which may be adduced by the parties and in accordance with law. It is also made clear that nothing in this judgment should come in the way of such reconsideration, if such an application is made.

113. The special leave petition and the writ petition, along with all connected applications, are disposed of in the aforesaid terms.

J. CHELAMESWAR, J. (concurring)— I agree with the conclusions recorded in the judgment of the Hon'ble Chief Justice. But, I wish to supplement the following.

115. The substance of the submission made by Shri Harish Salve, learned Senior Counsel for the petitioners is:

115.1. The incident in question occurred beyond the territory of India to which location the sovereignty of the country does not extend; and Parliament cannot extend the application of the laws made by it beyond the territory of India. Consequentially, the two marines are not amenable to the jurisdiction of India;

115.2. Alternatively it is argued that the incident, which resulted in the death of two Indians is an “incident of navigation” within the meaning of Article 97¹³ of the United Nations Convention on the Law of the Sea (hereinafter referred to as “UNCLOS”) and therefore, no penal proceedings may be instituted against the two marines except before the judicial authorities of the “Flag State” or the State of which the marines are nationals.

13 “**97. Penal jurisdiction in matters of collision or any other incident of navigation.**—(1) In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the Flag State or of the State of which such person is a national.

(2) In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

(3) No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the Flag State.”

REPUBLIC OF ITALY v. UNION OF INDIA (*Chelameswar, J.*)

765

116. The authority of the Sovereign to make laws and enforce them against its subjects is undoubted in the constitutional theory. Though written
a Constitutions prescribe limitations, either express or implied on such authority, under our Constitution, such limitations are with respect to territory [*Article 245(1)*] or subject-matter [*Article 246*] or time-span of the operation of the laws [*Articles 249 and 250*] or the inviolable rights of the subjects (fundamental rights), etc. For the purpose of the present case, we are concerned only with the limitation based on territory.

b **117.** That leads me to the question as to what is the territory of the Sovereign Democratic Republic of India?

118. The territory of India is defined under Article 1:

“1. Name and territory of the Union.—(1) India, that is Bharat, shall be a Union of States.

c (2) The States and the territories thereof shall be as specified in the First Schedule.

(3) The territory of India shall comprise—

(*a*) The territories of the States;

(*b*) The Union Territories specified in the First Schedule; and

(*c*) such other territories as may be acquired.”

d But that deals only with geographical territory. Article 297 deals with “maritime territory”¹⁴.

119. Article 297(3) authorises Parliament to specify from time to time the limits of various maritime zones such as, territorial waters, continental shelf,

e ¹⁴ As early as 1927, Philip C. Jessup, who subsequently became a Judge of the International Court of Justice, stated that the territorial waters are “as much a part of the territory of a nation as is the land itself”. Hans Kelsen in *General Theory of Law and State* declared that “the territorial waters form part of the territory of the littoral State”. In *Grisbadarna case*, (1909) 11 R Int'l Arb Awards 155, between Norway and Sweden, the Permanent Court of Arbitration referred to the territorial waters as “*the maritime territory*” which is an essential appurtenance of the adjacent land territory. In *Corfu Channel (Merits) case*, 1949 ICJ Rep 4, the International Court of Justice clearly recognised that, under international law, the territorial sea was the “territory” of the coastal State over which it enjoyed “exclusive territorial control” and “sovereignty”. Lord McNair, who subscribed to the majority view of the Court in the above case, observed in *Anglo-Norwegian Fisheries case*, 1951 ICJ Rep 116:

f To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory.... International law does not say to a State: “You are entitled to claim territorial waters if you want them.” No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

g Sir Gerald Fitzmaurice, writing before he became a Judge of the International Court of Justice, quoted McNair’s observation with approval, and considered that it was also implicit in the decision of the Word Court in *Anglo-Norwegian Fisheries case*, 1951 ICJ Rep 116. It follows, therefore, that the territorial waters are not only “territory” but also a compulsory appurtenance to the coastal State. Hence the observation by L.F.E. Goldie that “it has long been accepted that territorial waters, their superambient air, their seabed and subsoil, vest in the coastal State *ipso jure* (i.e. without any proclamation or effective occupation being necessary)”. See *The New Law of Maritime Zones* by P.C. Rao, p. 22.

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766

SUPREME COURT CASES

(2013) 4 SCC

etc. Clauses (1) and (2) of the said article make a declaration that all lands, minerals and other things of value and all other resources shall vest in the Union of India.

“297. Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.—(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.”

120. Two things follow from the above declaration under Article 297: firstly, India asserts its authority not only on the land mass of the territory of India specified under Article 1, but also over the areas specified under Article 297. It authorises Parliament to specify the limits of such areas (maritime zones). The nature of the said authority may not be the same for the various maritime zones indicated in Article 297. However, the preponderance of judicial authority appears to be that the sovereignty of the coastal State extends to the territorial waters¹⁵.

121. The sovereignty of a nation/State over the landmass comprised within the territorial boundaries of the State, is an established principle of both constitutional theory and international law. The authority of the Sovereign to make and enforce laws within the territory over which the sovereignty extends is unquestionable in constitutional theory. That the sovereignty of a “coastal State” extends to its territorial waters, is also a well-accepted principle of international law¹⁶ though there is no uniformly shared legal norm establishing the limit of the territorial waters — “maritime territory”. Whether the maritime territory is also a part of the national

¹⁵ The territorial sea appertains to the territorial sovereignty of the coastal State and thus belongs to it automatically. For example, all newly independent States (with a coast) come to independence with an entitlement to a territorial sea. There have been a number of theories as to the precise legal character of the territorial sea of the coastal State, ranging from treating the territorial sea as part of the *res communis*, but subject to certain rights exercisable by the coastal State, to regarding the territorial sea as part of the coastal State’s territorial domain subject to a right of innocent passage by foreign vessels....

Articles 1 and 2 of the Convention on the Territorial Sea, 1958 provide that the coastal State’s sovereignty extends over its territorial sea and to the airspace and seabed and the subsoil thereof, subject to the provisions of the Convention and of international law.... See *International Law* by Malcolm N. Shaw (6th Edn.) pp. 569-70.

¹⁶ It is well established that the coastal State has sovereignty over its territorial waters, the seabed and subsoil underlying such waters, and the air space above them, subject to the obligations imposed by international law. Recently, in *North Sea Continental Shelf case*, 1969 ICJ Rep 3 the International Court of Justice declared that a coastal State has “full sovereignty” over its territorial sea. This principle of customary international law has also been enshrined in Article 1 of the Geneva Convention, and remains unaffected in the draft convention. See *The New Law of Maritime Zones* by P.C. Rao, p. 22.

REPUBLIC OF ITALY v. UNION OF INDIA (*Chelameswar, J.*)

767

territory of the State is a question on which difference of opinion exists. Insofar as this Court is concerned, a Constitution Bench in *B.K. Wadeyar v. Daulatram Rameshwarlal*¹⁷ held at para 8 as follows: (AIR p. 314)

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“8. ... These territorial limits would include the territorial waters of India.”

122. Insofar the Republic of India is concerned, the limit of the territorial waters was initially understood to be three nautical miles. It had been extended subsequently up to six nautical miles by a Presidential Proclamation dated 22-3-1952 and to twelve nautical miles by another Proclamation dated 30-9-1967. By Act 80 of 1976 of Parliament, it was statutorily fixed at 12 nautical miles. The Act also authorises Parliament to alter such limit of the territorial waters.

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123. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 80 of 1976 (hereinafter referred to as “the Maritime Zones Act”), was made by Parliament in exercise of the authority conferred under Article 297. Except Sections 5 and 7, rest of the sections of the Act, came into force on 26-8-1976. Sections 5 and 7 came into force, subsequently, on 15-1-1977, by virtue of a notification contemplated under Section 1(2).

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124. Section 3(1) declares that the sovereignty of India extends, and has always extended, to the territorial waters of India:

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“**3. Sovereignty over, and limits of, territorial waters.**—(1) The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as the territorial waters) and to the seabed and subsoil underlying, and the air space over such waters.”

Under sub-section (2), the limit of the territorial waters is specified to be twelve nautical miles from the nearest point of the appropriate baseline:

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“**3. (2)** The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.”

Sub-section (3) authorises the Government of India to alter the limit of the territorial waters by a notification approved by both the Houses of Parliament, with due regard to the international law and State practice:

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“**3. (3)** Notwithstanding anything contained in sub-section (2), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the territorial waters.”

125. Section 5 defines “contiguous zone” to be an area beyond and adjacent to the territorial waters extending up to twenty-four nautical miles from the nearest point of the appropriate baseline:

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“**5. Contiguous zone of India.**—(1) The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of Section 3.”

h

768

SUPREME COURT CASES

(2013) 4 SCC

This limit also can be altered by the Government of India, in the same manner as the limit of the territorial waters. Section 6 describes the “continental shelf”, whereas Section 7 defines the “exclusive economic zone”. While Parliament authorises the Government of India¹⁸ under Sections 3(3), 5(2) and 7(2) respectively to alter the limits of territorial waters, contiguous zone and exclusive economic zone with the approval of both the Houses of Parliament, the law does not authorise the alteration of the limit of the continental shelf.

126. While Section 3 declares that “the sovereignty of India extends, and has always extended, to the territorial waters”, no such declaration is to be found in the context of contiguous zone. On the other hand, with reference to continental shelf, it is declared under Section 6(2) that “India has, and always had, *full and exclusive sovereign rights* in respect of its continental shelf”. (emphasis supplied) With reference to exclusive economic zone, Section 7(4)(a) declares that:

“7. (4) In the exclusive economic zone, the Union has—

(a) *sovereign rights* for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents;” (emphasis supplied)

127. Whatever may be the implications flowing from the language of the Maritime Zones Act and the meaning of the expression “sovereign rights” employed in Sections 6(2), 6(3)(a)¹⁹ and 7(4)(a), (whether or not the sovereignty of India extends beyond its territorial waters and to the contiguous zone or not)²⁰, in view of the scheme of the Act, as apparent from Section 5(5)(a)²¹ and Section 7(7)(a)²², the application of “any enactment for the time being in force in India” (like the Indian Penal Code and the Code of Criminal Procedure), is not automatic either to the contiguous zone or exclusive economic zone. It requires a notification in the Official Gazette of

18 “7. (2) ... Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of...”

19 “6. (3)(a) sovereign rights for the purposes of exploration, exploitation, conservation and management of all resources;”

20 ... the jurisdiction of the coastal State has been extended into areas of high seas contiguous to the territorial sea, albeit for defined purposes only. Such restricted jurisdiction zones have been established or asserted for a number of reasons....

... without having to extend the boundaries of its territorial sea further into the high seas....

... such contiguous zones were clearly differentiated from claims to full sovereignty as parts of the territorial sea, by being referred to as part of the high seas over which the coastal State may exercise particular rights. Unlike the territorial sea, which is automatically attached to the land territory of the State.... See *International Law* by Malcolm N. Shaw (6th Edn.) pp. 578-79.

21 “5. (5)(a) extend with such restrictions and modifications as it thinks fit, any enactment, relating to any matter referred to in clause (a) or clause (b) of sub-section (4), for the time being in force in India or any part thereof, to the contiguous zone....”

22 “7. (7)(a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof in the exclusive economic zone or any part thereof;”

REPUBLIC OF ITALY v. UNION OF INDIA (*Chelameswar, J.*)

769

India to extend the application of such enactments to such maritime zone. The Maritime Zones Act further declares that once such a notification is issued, the enactment whose application is so extended “shall have effect as if” the contiguous zone or exclusive economic zone, as the case may be, “is part of the territory of India”. Creation of such a legal fiction is certainly within the authority of the sovereign legislative body.

128. In exercise of the power conferred by Section 7(7) of the Maritime Zones Act, the Government of India extended the application of both the Indian Penal Code and the Code of Criminal Procedure to the exclusive economic zone by a Notification dated 27-8-1981. By the said notification, the Code of Criminal Procedure also stood modified. A new provision—Section 188-A—came to be inserted in the Code of Criminal Procedure, which reads as follows:

“188-A. Offence committed in exclusive economic zone.—When an offence is committed by any person in the exclusive economic zone described in sub-section (1) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in any place in which he may be found or in such other place as the Central Government may direct under Section 13 of the said Act.”

129. Under the Constitution, the legislative authority is distributed between Parliament and the State Legislatures. While the State Legislature’s authority to make laws is limited to the territory of the State, Parliament’s authority has no such limitation.

130. Though Article 245²³ speaks of the authority of Parliament to make laws for the territory of India, Article 245(2) expressly declares “No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.” In my view the declaration is a fetter on the jurisdiction of the municipal courts including constitutional courts to either declare a law to be unconstitutional or decline to give effect to such a law on the ground of extra-territoriality. The first submission of Shri Salve must, therefore, fail.

131. Even otherwise, territorial sovereignty and the ability of the sovereign to make, apply and enforce its laws to persons (even if not citizens), who are not corporeally present within the sovereign’s territory, are not necessarily coextensive.

132. No doubt that with respect to criminal law, it is the principle of 19th century English jurisprudence that:

²³ **“245. Extent of laws made by Parliament and by the legislatures of State.**—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.”

770

SUPREME COURT CASES

(2013) 4 SCC

“... All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed...”²⁴

But that principle is not accepted as an absolute principle any more. The increased complexity of modern life emanating from the advanced technology and travel facilities and the large cross-border commerce made it possible to commit crimes whose effects are felt in territories beyond the residential borders of the offenders. Therefore, States claim jurisdiction over:

(1) offenders who are not physically present within; and

(2) offences committed beyond the territory of the State whose “legitimate interests” are affected.

This is done on the basis of various principles known to international law, such as, “the objective territorial claim, the nationality claim, the passive personality claim, the security claim, the universality claim and the like”²⁵.

133. The protection of Articles 14 and 21 of the Constitution is available even to an alien when sought to be subjected to the legal process of this country. This Court on more than one occasion held so on the ground that the rights emanating from those two articles are not confined only to or dependent upon the citizenship of this country²⁶. As a necessary concomitant, this country ought to have the authority to apply and enforce the laws of this country against the persons and things beyond its territory when its *legitimate interests* are affected. In assertion of such a principle, various laws of this country are made applicable beyond its territory.

134. Section 2 read with Section 4 of the Penal Code²⁷ makes the provisions of the Code applicable to the offences committed “in any place without and beyond” the territory of India: (1) by a citizen of India, or (2) on any ship or aircraft registered in India, irrespective of its location, *by any person* not necessarily a citizen²⁸. Such a declaration was made as long back as in 1898. By an amendment in 2009 to the said section, the Code is

²⁴ See *Macleod v. Attorney General of New South Wales*, 1891 AC 455, p. 458 (PC) and *Huntington v. Attrill*, 1893 AC 150 (PC).

²⁵ P.C. Rao, *Indian Constitution and International Law*, p. 42.

²⁶ See *Hans Muller of Nuremberg v. Supt., Presidency Jail*, AIR 1955 SC 367 : 1955 Cri LJ 876 also *Railway Board v. Chandrima Das*, (2000) 2 SCC 465, pp. 482-83, paras 28-32

²⁷ “**2. Punishment of offences committed within India.**—Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

* * *

4. Extension of Code to extra-territorial offences.—The provisions of this Code apply also to any offence committed by—

- (1) any citizen of India in any place *without and beyond India*;
- (2) any person on any ship or aircraft registered in India *wherever it may be*;
- (3) any person in any place without and beyond India committing offence targeting a computer resource located in India.” (emphasis supplied)

²⁸ *Mobarik Ali Ahmed v. State of Bombay*, AIR 1957 SC 857, p. 870, para 28

“28. ... on a plain reading of Section 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside.”

REPUBLIC OF ITALY v. UNION OF INDIA (*Chelameswar, J.*)

771

extended to any person in any place “without and beyond the territory of India”, committing an offence targeting a computer resource located in India.

a **135.** Similarly, Parliament enacted the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (Act 69 of 2002). Under Section 1(2), it is declared as follows:

b “**1. (2)** It extends to the whole of India *including* the limit of the territorial waters, *the continental shelf*, the *exclusive economic zone* or any other maritime zone of India within the meaning of Section 2 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976).” (emphasis supplied)

Thereby expressly extending the application of the said Act beyond the limits of the territorial waters of India.

c **136.** Section 3 of the said Act, insofar it is relevant for our purpose is as follows:

d “**3. Offences against ship, fixed platform, cargo of a ship, maritime navigational facilities, etc.**—(1) Whoever unlawfully and intentionally—
(a) commits an act of violence against a person on board a fixed platform or a ship which is likely to endanger the safety of the fixed platform or, as the case may be, safe navigation of the ship shall be punished with imprisonment for a term which may extend to ten years and shall also be liable to fine;” (emphasis supplied)

137. The expression “ship” for the purpose of the said Act is defined under Section 2(h):

e “**2. (h) ‘ship’** means a vessel of any type whatsoever not permanently attached to the seabed and includes dynamically supported craft, submersibles, or any other floating craft.”

f **138.** Parliament asserted its authority to apply the penal provisions against persons, who “hijack” (described under Section 3²⁹ of the Anti-Hijacking Act, 1982) an aircraft. The Act does not take into account the nationality of the hijacker. The Act expressly recognises the possibility of the commission of the act of hijacking outside India and provides under Section 6 that the person committing such offence may be dealt with in respect thereof as if such offence had been committed in any place within India at which he may be found. Similarly, Section 3 of the Geneva Conventions Act,

g 29 “**3. Hijacking.**—(1) Whoever on board an aircraft in flight, unlawfully, by force or threat of force or by an other form of intimidation, seizes or exercises control of that aircraft, commits the offence of hijacking of such aircraft.

(2) Whoever attempts to commit any of the acts referred to in sub-section (1) in relation to any aircraft, or abets the commission of any such act, shall also be deemed to have committed the offence of hijacking of such aircraft.

h (3) For the purposes of this section, an aircraft shall be deemed to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, and in the case of a forced landing, the flight shall be deemed to continue until the competent authorities of the country in which such forced landing takes place take over the responsibility for the aircraft and for persons and property on board.”

772

SUPREME COURT CASES

(2013) 4 SCC

1960 provides that “any person commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions”, either “within or without India”, shall be punished. a

139. Thus, it is amply clear that Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether or not they are citizens) when such persons commit acts which affect the legitimate interests of this country.

140. In furtherance of such assertion and in order to facilitate the prosecution of the offenders contemplated under Sections 4(1) and (4)(2) of the Penal Code, Section 188 of the Code of Criminal Procedure³⁰ prescribes the jurisdiction to deal with such offences. Each one of the aboveresferred enactments also contain a provision parallel to Section 188. b

141. Such assertion is not peculiar to India, but is also made by various other countries. For example, the issue arose in *R. v. Baxter*³¹. The accused posted letters in Northern Ireland to football pool promoters in England falsely claiming that he had correctly forecast the results of football matches and was entitled to winnings. He was charged with attempting to obtain property by deception contrary to Section 15 of the Theft Act, 1968. The accused contended that when the letters were posted in Northern Ireland the attempt was complete and as he had never left Northern Ireland during the relevant period, the attempt had not been committed within the jurisdiction of the English courts. It was held: c

“The attempt was committed within the jurisdiction because an offender could be said to be committing an attempt at every moment of the period between the commission of the proximate act necessary to constitute the attempt and the moment when the attempt failed; accordingly the accused was attempting to commit the offence of obtaining by deception when the letter reached its destination within England and thus the offence was committed within the jurisdiction of the English courts; alternatively it could be said that the accused made arrangements for the transport and delivery of the letter, essential parts of the attempt, within the jurisdiction; *the presence of the accused within the jurisdiction was not an essential element of offences committed in England.*” d
(emphasis supplied) e

30 “**188. Offence committed outside India.**—When an offence is committed outside India— g

(a) by a citizen of India, whether on the high seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found:

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.” h

31 (1972) 1 QB 1 : (1971) 2 WLR 1138 : (1971) 2 All ER 359 (CA)

REPUBLIC OF ITALY v. UNION OF INDIA (*Chelameswar, J.*)

773

142. The United States of America made such assertions:

- a "... the provision extending the special maritime and territorial jurisdiction of the US to include any place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States. In 1986, following the *Achille Lauro*[†] incident, the US adopted the Omnibus Diplomatic Security and Anti-Terrorism Act, inserting into the criminal code a new section which provided for US jurisdiction over homicide and physical violence outside the US where a national of the US is the victim..."³²

- b
- 143.** Therefore, I am of the opinion that Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. At any rate, it is not open for any municipal court including this Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law.

- c
- 144.** Before parting with the topic, one submission of Shri Salve is required to be dealt with: Shri Salve heavily relied upon the decision in *Aban Loyd Chiles Offshore Ltd. v. Union of India*² for the purpose of establishing that the sovereignty of this country does not extend beyond the territorial waters of India and therefore, the extension of the Indian Penal Code beyond the territorial waters of India is impermissible.

- d
- 145.** No doubt, this Court did make certain observations to the effect that under the Maritime Zones Act: (*Aban Loyd Chiles case*², SCC p. 467, para 74)

- e
- "74. ... India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and exclusive economic zone cannot be equated to extending the sovereignty of India over the continental shelf and exclusive economic zone as in the case of territorial waters."

- f
- With great respect to the learned Judges, I am of the opinion that sovereignty is not "given", but it is only asserted. No doubt, under the Maritime Zones Act, Parliament expressly asserted sovereignty of this country over the territorial waters but, simultaneously, asserted its authority to determine/alter the limit of the territorial waters.

- g
- 146.** At any rate, the issue is not whether India can and, in fact, has asserted its sovereignty over areas beyond the territorial waters. The issue in the instant case is the authority of Parliament to extend the laws beyond its

[†] An Italian Cruise ship.

h 32 Malcolm N. Shaw, *International Law* (6th Edn. Cambridge University Press, Cambridge 2008) p. 665.

2 (2008) 11 SCC 439

774

SUPREME COURT CASES

(2013) 4 SCC

territorial waters and the jurisdiction of this Court to examine the legality of such exercise. Even on the facts of *Aban Loyd Chiles case*², it can be noticed that the operation of the Customs Act was extended beyond the territorial waters of India and this Court found it clearly permissible although on the authority conferred by the Maritime Zones Act. The implications of Article 245(2) did not fall for consideration of this Court in that judgment.

147. Coming to the second issue: whether the incident in issue is an “incident of navigation” in order to exclude the jurisdiction of India on the ground that with respect to an “incident of navigation”, penal proceedings could be instituted only before the judicial authorities of the “Flag State” or of the State of which the accused is a national.

148. The expression “incident of navigation” occurring under Article 97 of UNCLOS is not a defined expression. Therefore, necessarily the meaning of the expression must be ascertained from the context and scheme of the relevant provisions of UNCLOS. Article 97 occurs in Part VII of UNCLOS, which deals with “*high seas*”. Article 86 stipulates the application of Part VII. It reads as follows:

“86. Application of the provisions of this Part.—The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58.”

149. Further, Article 89 makes an express declaration that:

“89. Invalidity of claims of sovereignty over the high seas.—No State may validly purport to subject any part of the high seas to its sovereignty.”

From the language of Article 86 it is made very clear that Part VII applies only to that part of the sea which is not included in the exclusive economic zone, territorial waters, etc. “Exclusive economic zone” is defined under Article 55 as follows:

“55. Specific legal regime of the exclusive economic zone.—The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”

That being the case, I am of the opinion that irrespective of the meaning of the expression “incident of navigation”, Article 97 has no application to the exclusive economic zone. Even under UNCLOS, Article 57 stipulates that:

“57. Breadth of the exclusive economic zone.—The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”

It follows from a combined reading of Articles 55 and 57 that within the limit of 200 nautical miles, measured as indicated under Article 57, the authority of each coastal State to prescribe the limits of exclusive economic zone is internationally recognised. The declaration under Section 7(1) of the

² *Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439

REPUBLIC OF ITALY v. UNION OF INDIA (*Chelameswar, J.*)

775

- Maritime Zones Act, which stipulates the limit of the exclusive economic zone, is perfectly in tune with the terms of UNCLOS. Therefore, Article 97 of
- a UNCLOS has no application to the exclusive economic zone, of which the contiguous zone is a part and that is the area relevant, in the context of the incident in question. For that reason, the second submission of Shri Salve should also fail.

DIRECTIONS ISSUED BY COURT

- b **150.** Pursuant to the decision rendered by us in Writ Petition (C) No. 135 of 2012 and SLP (C) No. 20370 of 2012, certain consequential directions are required to be made, since Petitioners 2 and 3 had been granted bail by the Kerala High Court.

- c **151.** Since we have held that the State of Kerala as a unit of the federal Union does not have jurisdiction to try the matter, we are of the view that till such time as the Special Court is constituted in terms of our judgments, the said petitioners should be removed to Delhi and be kept on the same terms and conditions of bail, as was granted by the High Court, except for the following changes:

- d **151.1.** The orders passed by the Kerala High Court restricting the movement of the said petitioners is lifted, but the same conditions will stand reinstated as and when the said petitioners come to Delhi and they shall not leave the precincts of Delhi without the leave of the Court.

151.2. Instead of reporting to the police station at the City Commissioner at Kochi, they will now report to the Station House Officer of Chanakya Puri Police Station, New Delhi, once a week, subject to further relaxation as may be granted.

- e **151.3.** Once the said petitioners have moved to Delhi, they shall upon the request of the Italian Embassy in Delhi, remain under their control. The Italian Embassy, in Delhi, also agrees to be responsible for the movements of the petitioners and to ensure that they report to the trial court, as and when called upon to do so.

- f **151.4.** Since their passports had been surrendered to the trial court in Kollam, the same are to be transferred by the said court to the Home Ministry, immediately upon receipt of a copy of this judgment.

- g **152.** Let the copies of these judgments/orders be made available to the learned advocates of the respective parties and also to a representative of Petitioner 1. In addition, let the copies of these judgments be also sent to the High Court of Kerala, as also the trial court at Kollam, who are to act on the basis thereof immediately on receipt of the same.

153. Till such time as the Special Court is set up, Petitioners 2 and 3 will be under the custody of this Court.

- h **154.** Let the copies of these judgments/orders be communicated to the Kerala High Court and the Court of the Magistrate at Kollam and also to the City Police Commissioner, Kochi and DCP, Kochi Airport, by e-mail, at the cost of the petitioners.

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REVISED

ITEM NO.19 COURT NO.4 SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS
WRIT PETITION (CIVIL) NO(s). 236 OF 2014
(For prel. hearing)

CHIEF MASTER SARGEANT MASSIM. LAT.& ANR Petitioner(s)

VERSUS

UOI & ORS Respondent(s)

(With appln(s) for interim Relief and office report)

Date: 28/03/2014 This Petition was called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE B.S. CHAUHAN
HON'BLE MR. JUSTICE J. CHELAMESWAR

For Petitioner(s) Mr. Mukul Rohatgi, Sr. Adv.
Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet Titus, Adv.
Mr. Viprav Sharma, Adv.
Mr. Ujjwal Sharma, Adv.
Mr. Baljit Singh K., Adv.
Mr. Akshat Bhatnagar, Adv.
Mr. Neeraj Chhabra, Adv.
Ms. Chahat Kakani, Adv.
Mr. Ninad Laud, Adv.
Mr. Ashutosh K. Singh, Adv.
Ms. Devanshi Singh, Adv.
Mr. Jagjit Singh Chhabra, Adv.

For Respondent(s)

UPON hearing counsel the Court made the following
O R D E R

Issue notice returnable in four weeks. Tag with
SLP(C)NO.20370/2012.

In the meantime, we request the trial Court to keep the
proceedings in abeyance.

(DEEPAK MANSUKHANI)
COURT MASTER

(M.S. NEGI)
ASSISTANT REGISTRAR

ITEM NO.19 COURT NO.4 SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS
WRIT PETITION (CIVIL) NO(s). 236 OF 2014
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CHIEF MASTER SARGEANT MASSIM. LAT.& ANR Petitioner(s)

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UOI & ORS Respondent(s)

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Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet Titus, Adv.
Mr. Viprav Sharma, Adv.
Mr. Ujjwal Sharma, Adv.
Mr. Baljit Singh K., Adv.
Mr. Akshat Bhatnagar, Adv.
Mr. Neeraj Chhabra, Adv.
Ms. Chahat Kakani, Adv.
Mr. Ninad Laud, Adv.
Mr. Ashutosh K. Singh, Adv.
Ms. Devanshi Singh, Adv.
Mr. Jagjit Singh Chhabra, Adv.

For Respondent(s)

UPON hearing counsel the Court made the following
O R D E R

Issue notice.

In the meantime, we request the trial Court to keep the proceedings in abeyance.

(DEEPAK MANSUKHANI)
COURT MASTER

(M.S. NEGI)
ASSISTANT REGISTRAR

@

REVISED

ITEM NO.19

COURT NO.4

SECTION X

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

WRIT PETITION (CIVIL) NO(s). 236 OF 2014
(For prel. hearing)

CHIEF MASTER SARGEANT MASSIM. LAT.& ANR Petitioner(s)

VERSUS

UOI & ORS Respondent(s)

(With appln(s) for interim Relief and office report)

Date: 28/03/2014 This Petition was called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE B.S. CHAUHAN
HON'BLE MR. JUSTICE J. CHELAMESWAR

For Petitioner(s) Mr. Mukul Rohatgi, Sr. Adv.
Mr. Suhail Dutt, Sr. Adv.
Mr. Diljeet Titus, Adv.
Mr. Viprav Sharma, Adv.
Mr. Ujjwal Sharma, Adv.
Mr. Baljit Singh K., Adv.

Mr. Akshat Bhatnagar, Adv.
 Mr. Neeraj Chhabra, Adv.
 Ms. Chahat Kakani, Adv.
 Mr. Ninad Laud, Adv.
 Mr. Ashutosh K. Singh, Adv.
 Ms. Devanshi Singh, Adv.
 Mr. Jagjit Singh Chhabra, Adv.

For Respondent(s)

UPON hearing counsel the Court made the following
 O R D E R

Issue notice returnable in four weeks. Tag with
 SLP(C)NO.20370/2012.

In the meantime, we request the trial Court to keep the
 proceedings in abeyance.

(DEEPAK MANSUKHANI)
 COURT MASTER

(M.S. NEGI)
 ASSISTANT REGISTRAR

ITEM NO.19 COURT NO.4 SECTION X

S U P R E M E C O U R T O F I N D I A
 RECORD OF PROCEEDINGS
 WRIT PETITION (CIVIL) NO(s). 236 OF 2014
 (For prel. hearing)

CHIEF MASTER SARGEANT MASSIM. LAT.& ANR Petitioner(s)

VERSUS

UOI & ORS Respondent(s)

(With appln(s) for interim Relief and office report)

Date: 28/03/2014 This Petition was called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE B.S. CHAUHAN
 HON'BLE MR. JUSTICE J. CHELAMESWAR

For Petitioner(s) Mr. Mukul Rohatgi, Sr. Adv.
 Mr. Suhail Dutt, Sr. Adv.
 Mr. Diljeet Titus, Adv.
 Mr. Viprav Sharma, Adv.
 Mr. Ujjwal Sharma, Adv.
 Mr. Baljit Singh K., Adv.
 Mr. Akshat Bhatnagar, Adv.
 Mr. Neeraj Chhabra, Adv.
 Ms. Chahat Kakani, Adv.
 Mr. Ninad Laud, Adv.
 Mr. Ashutosh K. Singh, Adv.
 Ms. Devanshi Singh, Adv.
 Mr. Jagjit Singh Chhabra, Adv.

For Respondent(s)

UPON hearing counsel the Court made the following
 O R D E R

Issue notice.

In the meantime, we request the trial Court to keep the proceedings in abeyance.

(DEEPAK MANSUKHANI)
COURT MASTER

(M.S. NEGI)
ASSISTANT REGISTRAR

ITEM NO.302

COURT NO.3

SECTION X

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

I.A. 3/2015 in Writ Petition(s) (Civil) No(s).236/2014

CHIEF MASTER SARGEANT MASSIM. LAT.& ANR

Petitioner(s)

VERSUS

UOI & ORS

Respondent(s)

(For directions and office report)

Date : 26/08/2015 This application was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ANIL R. DAVE
HON'BLE MR. JUSTICE KURIAN JOSEPH
HON'BLE MR. JUSTICE AMITAVA ROY

For Petitioner(s) Mr.Soli J.Sorabjee, Sr.Adv.
Mr.KTS Tulsi, Sr.Adv.
Mr.Sohail Dutt, Sr.Adv.
Mr.Diljeet Titus, Adv.
Mr.Ujjwal Sharma, Adv.
Mr.Baljit Singh, Adv.
Mr.Raj Kamal, Adv.
Mr.Ninad Laud, Adv.
Mr.Akshat Kulshrestha, Adv.
Mr. Jagjit Singh Chhabra, Adv.

For Respondent(s) Mr.P.S.Narsimha, ASG
Mr.Prateek Jalan, Adv.
Mr.S.A.Haseeb, Adv.
Mr.S.Potaraju, Adv.
Mr. B. Krishna Prasad, Adv.
Ms. Sushma Suri, Adv. (NP)

Upon hearing the counsel the Court made the following
O R D E R

It has been agreed by both the parties that during the pendency of the matter before the International Tribunal for the Law of the Sea (ITLOS), the following proceedings pending in the Courts shall remain stayed/deferred till further orders:

1. Writ Petition (C)No.236 of 2014 (tagged with Special Leave Petition (C)No.20370 of 2012 by order dated 28th March, 2014).
2. I.A.No.5 of 2014 in Special Leave Petition (C)No.20370 of 2012
3. Writ Petition (C)No.919 of 2014 (tagged with I.A.No.5 of 2014 in Special Leave Petition (C)No.20370 of 2012 by order dated 10th November, 2014).
4. R.C.No.04/2013/NIA/DLI pending before the Special Designated Court, Patiala House Courts, New Delhi.

I.A.No.3 of 2015 stands disposed of in view of the above order.

List the main case on 13.01.2016 at 2.00 P.M.

(SATISH KUMAR YADAV)
AR-CUM-PS

(SNEH BALA MEHRA)
ASSISTANT REGISTRAR

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G SI.A.No. 3 of 2015
in
Writ Petition(s) (Civil) No(s). 236/2014

CHIEF MASTER SARGEANT MASSIM. LAT.& ANR Petitioner(s)

VERSUS

UOI & ORS Respondent(s)

Date : 02/09/2015 This petition was mentioned today.

CORAM : HON'BLE MR. JUSTICE ANIL R. DAVE
HON'BLE MR. JUSTICE ADARSH KUMAR GOELFor Petitioner(s) Mr. Sohail Dutt, Sr. Adv.
Mr. Ninad Laud, Adv.
Mr. Ujjwal Sharma, Adv.
Mr. Jagjit Singh Chhabra, Adv.For Respondent(s) Mr. P.S. Narasimha, ASG (Mentioned by)
Mr. Ishaan George, Adv.UPON hearing counsel the Court made the following
O R D E R

Taken on board.

The order dated 26.08.2015 is modified to the effect that
"International Tribunal for the Law of the Sea (ITLOS)" shall
be read as "Annex VII Arbitral Tribunal".

Rest of the order shall remain as it is.

(Jayant Kumar Arora)
Sr. P.A.(Mala Kumari Sharma)
Court Master

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) No.20370 OF 2012

MASSIMILANO LATORRE AND ORS.PETITIONERS

VERSUS

UNION OF INDIA AND ORS.RESPONDENTS

O R D E R

1. This Court, by its order dated 28.09.2016, *inter alia* directed as under:

"It is further directed that the Union of India shall submit a Report to this Court after every three months as to the progress made in the matter before the Arbitral Tribunal and the same shall be placed before the concerned Court."

2. In compliance of the above direction, a status report was filed in this Court, in December 2016.

3. During the course of hearing today, an "amended time schedule", in connection with the proceedings pending before the Arbitral Tribunal, constituted under Annex VII of the 1982 UN Convention on the Law of the Sea, has been submitted. A relevant extract of the same, is reproduced hereunder:

Date	Description
30 September 2016	Memorial to be filed by Italy
14 April 2017	Counter-Memorial to be filed by India
11 August 2017	Reply to be filed by Italy
15 December 2017	India's Rejoinder
16 February 2018	Italy's Rejoinder on jurisdiction-admissibility (if any)
May-June 2018 (tentative)	Final hearing
December 2018 (tentative)	Award of the Tribunal is expected

4. In view of the submission of the aforementioned schedule, we are of the view, that the direction to furnish a report to this Court every three months, is uncalled for. We hereby discharge the above-stated liability, recorded by this Court in its order dated 28.09.2016. In its place, we direct the parties to forthwith bring to the notice of this Court, any breach of the schedule extracted hereinabove. The petitioners, as also, the Union of India, shall be liable to meticulously adhere to the instant direction.

5. Learned Additional Solicitor General states, that the progress of the proceedings before the Arbitral Tribunal, shall be regularly intimated to the State of Kerala.

6. Put up for hearing, as and when the final award is placed on the record of the case, by the parties.

.....CJI.
(JAGDISH SINGH KHEHAR)

.....J.
(Dr.D.Y.CHANDRACHUD)

.....J.
(SANJAY KISHAN KAUL)

NEW DELHI;
MARCH 6, 2017.

ITEM NO.9

COURT NO.1

SECTION XIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s).20370/2012

(Arising out of impugned final judgment and order dated 29/05/2012 in WPC No.4542/2012 passed by the High Court of Kerala at Ernakulam)

MASSIMILANO LATORRE AND ORS.

Petitioner(s)

VERSUS

UNION OF INDIA AND ORS.

Respondent(s)

(Office report for direction)

Date : 06/03/2017 This petition was called on for hearing today.
CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

For Petitioner(s) Mr.Suhail Dutt, Sr.Adv.
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Mr.R.Vishal Dass, Adv.
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For Respondent(s) Mr.P.S.Narasimha, ASG
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Mr.S.Potaraju, Adv.
Mr. B. Krishna Prasad, Adv.

For State of Kerala Mr.Balagopal K.N., Sr.Adv.
Mr. G. Prakash, Adv.
Mr.Jishnu M.L., Adv.
Mrs.Priyanka Prakash, Adv.
Mrs.Beena Prakash, Adv.
Mr.Manu Srinath, Adv.
Ms.Nitya Nambiar, Adv.

Upon hearing the counsel the Court made the following

O R D E R

Put up for hearing, as and when the final award is placed on the record of the case, by the parties.

(SATISH KUMAR YADAV)

AR-CUM-PS

(RENUKA SADANA)

ASSISTANT REGISTRAR

(Signed order is placed on the file)

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

21 May 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

TABLE OF CONTENTS

I.	HISTORY OF THE PROCEEDINGS	1
A.	INSTITUTION OF THE PROCEEDINGS	1
B.	PROCEEDINGS AT ITLOS ON PROVISIONAL MEASURES	2
C.	CONSTITUTION OF THE ARBITRAL TRIBUNAL AND NOTIFICATION OF AGENTS AND COUNSEL	4
D.	ADOPTION OF THE RULES OF PROCEDURE.....	6
E.	PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL ON PROVISIONAL MEASURES	6
F.	PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL ON JURISDICTION AND MERITS.....	7
1.	Revision of the Rules of Procedure	7
2.	Written Pleadings	8
3.	Preparation of Hearing on Jurisdiction and Merits.....	9
4.	Hearing on Jurisdiction and Merits.....	13
II.	THE PARTIES' SUBMISSIONS	17
A.	SUBMISSIONS IN THE PARTIES' WRITTEN PLEADINGS	17
1.	Submissions of Italy.....	17
2.	Submissions of India.....	18
B.	FINAL SUBMISSIONS AT THE CLOSE OF THE HEARING.....	19
1.	Submissions of Italy.....	19
2.	Submissions of India.....	21
III.	FACTUAL BACKGROUND	21
A.	THE VOYAGE OF THE "ENRICA LEXIE" IN FEBRUARY 2012	22
B.	CHRONOLOGICAL ACCOUNT OF THE EVENTS THAT LED TO THE INCIDENT....	24
1.	Events as Seen from the "Enrica Lexie"	24
2.	Events as Seen from the "St. Antony"	29
C.	CHRONOLOGICAL ACCOUNT OF THE IMMEDIATE AFTERMATH OF THE INCIDENT.....	33
1.	Events Prior to the "Enrica Lexie"'s Change of Course towards Kochi....	33
2.	The "Enrica Lexie"'s Change of Course	37
3.	Arrival of the "Enrica Lexie" at Kochi Anchorage.....	40
D.	THE INDIAN INVESTIGATION AND PROCEEDINGS	42
1.	Investigations within the Kochi Anchorage Position.....	42
2.	Investigations within Kochi Port and Indian Land Territory	45
3.	India's Judicial Process in Relation to the Marines	47

(a) Conditions of Detention of the Marines.....	47
(b) Writ Petitions Filed by the Marines.....	48
(c) Bail Conditions of the Marines.....	51
E. THE ITALIAN INVESTIGATION AND PROCEEDINGS	52
1. The Piroli Report.....	53
2. Criminal Proceedings by the Rome Military Prosecutor and the Rome Public Prosecutor.....	55
3. Consolidation of Italian Criminal Proceedings under the Rome Public Prosecutor.....	57
IV. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW.....	58
A. IDENTIFICATION OF THE DISPUTE FOR THE PURPOSE OF ASCERTAINING WHETHER THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE DISPUTE	58
1. Existence of a Dispute.....	59
2. Characterisation of the Dispute.....	59
(a) Positions of the Parties	59
(b) Characterisation of the Dispute by the Arbitral Tribunal.....	62
3. Conclusion	65
B. OBLIGATION TO EXCHANGE VIEWS	65
C. ADMISSIBILITY OF ADDITIONAL CLAIM OF ITALY	66
D. ADMISSIBILITY OF COUNTER-CLAIMS OF INDIA	66
E. APPLICABLE LAW.....	68
V. CLAIMS OF ITALY REGARDING ALLEGED BREACHES BY INDIA OF UNCLOS AND VIOLATIONS OF RIGHTS OF ITALY UNDER UNCLOS	68
A. COMPATIBILITY WITH UNCLOS OF INDIA'S 1976 MARITIME ZONES ACT AND 1981 NOTIFICATION	69
1. Jurisdiction and Admissibility.....	70
(a) Existence of a Dispute at the Relevant Time in Respect of the 1976 Maritime Zones Act and 1981 Notification	70
i. Position of India	70
ii. Position of Italy	73
(b) Admissibility of Claim of Italy	75
i. Position of India	76
ii. Position of Italy	77
2. Alleged Breaches by India of Provisions of UNCLOS.....	79
(a) Position of Italy	80
i. Alleged Aspects of Incompatibility between the 1976 Maritime Zones Act and 1981 Notification, and the Convention.....	81
ii. India's Alleged Bases for Exercising Jurisdiction over the Marines.....	85

(b) Position of India	90
i. Alleged Aspects of Incompatibility between the 1976 Maritime Zones Act and 1981 Notification, and the Convention.....	92
ii. India’s Alleged Bases for Exercising Jurisdiction over the Marines.....	93
3. Analysis of the Arbitral Tribunal	97
B. ALLEGED BREACHES AND VIOLATIONS BY INDIA OF PROVISIONS OF PART VII (HIGH SEAS) OF UNCLOS	101
1. Alleged Breaches by India of Articles 87, paragraph 1, subparagraph (a), and 92 of UNCLOS	103
(a) Circumstances of the Alteration of the Course of the “Enrica Lexie” to Proceed to Kochi	104
i. Position of Italy	104
ii. Position of India	114
(b) Interpretation and Application of Article 87, paragraph 1, subparagraph (a) (Freedom of Navigation)	120
i. Position of Italy	120
ii. Position of India	127
iii. Analysis of the Arbitral Tribunal	132
(a) <i>The concept of freedom of navigation</i>	132
(b) <i>Examination of India’s conduct vis-à-vis the “Enrica Lexie”</i>	134
(c) Interpretation and Application of Article 92 (Flag-State Jurisdiction)	145
i. Position of Italy	145
ii. Position of India	146
iii. Analysis of the Arbitral Tribunal	149
(a) <i>The concept of exclusive jurisdiction of the flag State</i>	149
(b) <i>Examination of India’s conduct vis-à-vis the “Enrica Lexie”</i>	150
2. Alleged Breaches by India of Article 97 of UNCLOS	152
(a) Risk of Collision between the “Enrica Lexie” and the “St. Antony” ...	153
i. Navigation of the “Enrica Lexie” and the “St. Antony”.....	153
(a) <i>Position of Italy</i>	153
(b) <i>Position of India</i>	157
ii. Compliance with International Regulations	160
(b) Interpretation and Application of Article 97, paragraph 1 (Penal Jurisdiction)	163
i. Position of Italy	163
(a) <i>Interpretation and application of “incident of navigation” under Article 97</i>	163

(b) Interpretation and application of “person in the service of the ship” under Article 97, paragraph 1	170
ii. Position of India	171
(a) Interpretation and application of “incident of navigation” under Article 97	171
(b) Interpretation and application of “person in the service of the ship” under Article 97, paragraph 1	176
(c) Interpretation and Application of Article 97, paragraph 3	178
i. Position of Italy	178
ii. Position of India	180
(d) Analysis of the Arbitral Tribunal.....	181
i. The Definition of “Incident of Navigation” under Article 97 of the Convention	182
ii. Application of Article 97, paragraph 1, of the Convention to the Incident of 15 February 2012	185
iii. Application of Article 97, paragraph 3, of the Convention in the Case of the Incident of 15 February 2012	186
3. Alleged Violations by India of Articles 100 and 300 of UNCLOS.....	187
(a) Reasonable Apprehension of a Threat of Piracy	188
i. Piracy Situation off the Coast of Kerala.....	188
ii. Navigation of the “Enrica Lexie” with Respect to Perceived Risk of Piracy	190
iii. Appearance and Movement of the “St. Antony”	191
(a) Position of Italy.....	191
(b) Position of India.....	193
iv. The Reaction on Board the “Enrica Lexie”	197
(b) Interpretation and Application of Article 100 (Duty to Cooperate), in Conjunction with Article 300 (Good Faith and Abuse of Rights)	199
i. Position of Italy	199
ii. Position of India	202
(c) Analysis of the Arbitral Tribunal.....	204
4. Remedies.....	206
C. ALLEGED VIOLATION BY INDIA OF THE IMMUNITY OF THE MARINES	207
1. Jurisdiction.....	207
(a) Jurisdiction pursuant to Article 288, paragraph 1, in Conjunction with Article 2, paragraph 3, Article 56, paragraph 2, and Article 58, paragraph 2, of UNCLOS.....	207
i. Position of India	208
ii. Position of Italy	215

(b) Jurisdiction pursuant to Article 297, paragraph 1, of UNCLOS	221
i. Position of India	222
ii. Position of Italy	224
(c) Analysis of the Arbitral Tribunal.....	225
2. Immunity <i>Ratione Materiae</i> of the Italian Marines as Applicable in the Context of UNCLOS.....	229
(a) Position of Italy	229
(b) Position of India.....	236
(c) Analysis of the Arbitral Tribunal.....	239
i. Immunity <i>Ratione Materiae</i> under Customary International Law	240
ii. Immunity <i>Ratione Materiae</i> of the Marines as Applicable in the Context of the Present Case	241
(a) <i>Qualification of the Marines as State officials</i>	241
(b) <i>Exercise by the Marines of official functions</i>	243
(c) <i>Applicability of the territorial tort exception</i>	246
(d) <i>Conclusion</i>	248
3. Remedies.....	249
(a) Position of Italy	249
(b) Position of India.....	250
(c) Analysis of the Arbitral Tribunal.....	252
D. APPLICABILITY OF ARTICLE 59 OF UNCLOS.....	252
1. Position of Italy	252
2. Position of India.....	254
3. Analysis of the Arbitral Tribunal.....	255
VI. COUNTER-CLAIMS OF INDIA REGARDING ALLEGED BREACHES BY ITALY OF UNCLOS AND VIOLATIONS OF RIGHTS OF INDIA UNDER UNCLOS	256
A. ALLEGED BREACHES BY ITALY OF PROVISIONS OF PARTS V (EXCLUSIVE ECONOMIC ZONE) AND VII (HIGH SEAS) OF UNCLOS.....	256
1. Alleged Violation by Italy of India's Rights under Article 56 (Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone) of UNCLOS	258
(a) Position of India.....	258
(b) Position of Italy	263
(c) Analysis of the Arbitral Tribunal.....	266
2. Alleged Breach by Italy of its Obligations under Article 58 (Rights and Duties of Other States in the Exclusive Economic Zone) of UNCLOS	269
(a) Position of India.....	269
(b) Position of Italy	271

(c) Analysis of the Arbitral Tribunal.....	273
3. Alleged Violation by Italy of India’s Right and Freedom under Article 87 (Freedom of the High Seas) and Article 90 (Right of Navigation) of UNCLOS.....	276
(a) Position of India.....	277
(b) Position of Italy.....	282
(c) Analysis of the Arbitral Tribunal.....	287
i. The Status of the “St. Antony”.....	288
ii. Consequences of Exemption from Registration under the Indian Merchant Shipping Act, 1958.....	290
iii. Exercise of Freedom of the High Seas by Small Vessels not Registered under the Indian Merchant Shipping Act, 1958.....	291
iv. Examination of Italy’s Conduct <i>vis-à-vis</i> the “St. Antony”.....	292
4. Alleged Infringement by Italy of India’s Rights under Article 88 (Reservation of the High Seas for Peaceful Purposes) of UNCLOS.....	294
(a) Position of India.....	294
(b) Position of Italy.....	298
(c) Analysis of the Arbitral Tribunal.....	301
B. REMEDIES.....	303
1. Position of India.....	303
2. Position of Italy.....	303
3. Analysis of the Arbitral Tribunal.....	304
VII. COSTS.....	306
VIII. DISPOSITIF.....	307

GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

1976 Maritime Zones Act	The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, of the Republic of India
1981 Notification	Notification of the Ministry of Home Affairs of the Republic of India, No. S.O. 671(E), dated 27 August 1981
ILC Draft Articles Concerning the Law of the Sea	Draft Articles Concerning the Law of the Sea, with Commentaries, adopted by the International Law Commission at its eighth session, in 1956
ILC Draft Articles on State Responsibility	Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the International Law Commission at its fifty-third session, in 2001
BMP4	Best Management Practices for Protection against Somalia Based Piracy, August 2011, produced and supported by, <i>inter alia</i> , International Chamber of Shipping, International Association of Independent Tanker Owners, the Society of International Gas Tanker and Terminal Operators, Operation Ocean Shield, and the United Kingdom Maritime Trade Operations
Boarding Party	A boarding party constituted of Commandant Rohitesh Kumar and 36 police officers of the Republic of India, which boarded the “Enrica Lexie” on 16 February 2012
Captain Fredy	Mr. Fredy J., on 15 February 2012, captain and owner of the “St. Antony”
Captain Noviello	Mr. Carlo Noviello, on 15 February 2012, Master Supernumerary of the “Enrica Lexie”
Captain Vitelli	Mr. Umberto Vitelli, on 15 February 2012, Master of the “Enrica Lexie”
CET	Central European Time
CGAE	Coast Guard Air Enclave at Kochi, Republic of India
CINCNV	Commander in Chief of the Naval Squadron, Operational Headquarters of the Italian Navy
COLREGS	Convention on the International Regulations for Preventing Collisions at Sea, done at London on 20 October 1972
Commandant Kumar	Commandant Rohitesh Kumar, on 15 February 2012, Assistant Commandant and Boarding Officer of the Indian Coast Guard Ship “Lakshmbai”
Convention or UNCLOS	United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982
CSO	Company Security Officer
DIG	Deputy Inspector General, Republic of India
DIG Negi	DIG Alok Negi, on 15 February 2012, Commandant and Staff Observer at Coast Guard Air Enclave at Kochi
ILC Draft Articles on Immunity of State Officials	Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted by the International Law Commission at its sixty-sixth session, in 2014, and at its sixty-eighth session, in 2016
Hearing	Hearing on Jurisdiction and Merits before the Arbitral Tribunal, held from 8 to 20 July 2019 at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands
ICGS	Indian Coast Guard Ship

ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organisation
India	Republic of India
India's Counter-Memorial	Counter-Memorial, dated 14 April 2017
India's Rejoinder	Rejoinder on the Merits – Reply on Jurisdiction – Reply to Italy's Counter on India's Counter-Claims, dated 15 December 2017
India's Written Observations on Italy's Request for the Prescription of Provisional Measures	Written Observations of the Republic of India on the Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea, dated 26 February 2016
INS	Indian Naval Ship
IST	Indian Standard Time
Italian Law on VPDs	Law Decree No. 107 of 12 July 2011, of the Italian Republic: Extension (of international missions of the Armed Forces and Police available for implementing Resolutions 1970 (2011) and 1973 (2011) adopted by the Security Council of the United Nations and intervention by way of cooperation in the development and support of peace and stabilisation processes). Urgent anti-piracy measures. (11GO148)
Italy	Italian Republic
Italy's Memorial	Memorial, dated 30 September 2016
Italy's Rejoinder	Rejoinder on Jurisdiction and on India's Counter-Claims, dated 9 March 2018
Italy's Reply	Reply on the Merits – Counter-Memorial on Jurisdiction – Counter-Memorial on India's Counter-Claims, dated 11 August 2017
Italy's Request for the Prescription of Provisional Measures	Request by Italy to the Arbitral Tribunal for the Prescription of Provisional Measures under Article 290, Paragraph 1, of the United Nations Convention on the Law of the Sea, dated 11 December 2015
ITLOS	International Tribunal for the Law of the Sea
ITLOS Request	Request by Italy to the International Tribunal for the Law of the Sea for the prescription of provisional measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, dated 21 July 2015
Log Book	Log Book maintained by Captain Vitelli
Marines	Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone
MRCC	Maritime Rescue Coordination Centre
MSCHOA	Maritime Security Centre – Horn of Africa
NIA	National Investigation Agency of the Republic of India
NIA Report	Investigation Report of the National Investigation Agency in RC No 04/2013/NIA/DLI, dated 4 April 2013
Notification and Statement of Claim	Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based, dated 26 June 2015
Parties	Italy and India
PCA or Registry	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice

Pirolì Report	Summary Investigation Report by Division Admiral Alessandro Pirolì entitled “Attempted Pirate Attack against Merchant Vessel Enrica Lexie – 15 February 2012. Death of Indian Citizens”, dated 11 May 2012
Provisional Measures Order	Order of the Arbitral Tribunal on the Request for the Prescription of Provisional Measures, dated 29 April 2016
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia
Resolution 2077	United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867 th meeting, on 21 November 2012, UN Doc. S/RES/2077
Rules of Procedure	Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 19 January 2016 (as amended)
SMT	Ship Mean Time
Special Operations Group of the Carabinieri	Special Operations Group, Anti-Crime Unit, of the Carabinieri of Rome
SSAS	Ship Security Alarm System
SUA	Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, of the Republic of India
Supreme Court	Supreme Court of India
Template Agreement	Template Agreement between the Ministry of Defence of Italy and the Ship Owner
Tribunal Witnesses	Persons called to give evidence at the Hearing as witnesses of the Arbitral Tribunal
UKMTO	United Kingdom Marine Trade Operations
UTC	Coordinated Universal Time
VCLT	Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969
VDR	Voyage Data Recorder
VPD	Vessel Protection Detachment
VPD Manual	Manual for Vessel Protection Detachments on Board Italian Merchant Vessels, 2011

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(AS NOTIFIED BY THE PARTIES)**

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I. HISTORY OF THE PROCEEDINGS

A. INSTITUTION OF THE PROCEEDINGS

1. The present Arbitration was instituted on 26 June 2015 when the Italian Republic (hereinafter “Italy”) served on the Republic of India (hereinafter “India”) a “Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based” (hereinafter the “Notification and Statement of Claim”) in respect of “the dispute concerning the Enrica Lexie Incident”.
2. Italy and India (hereinafter the “Parties”) are States Parties to the United Nations Convention on the Law of the Sea (hereinafter the “Convention” *or* “UNCLOS”).¹ While, subsequent to its ratification of the Convention, on 26 February 1997, Italy made a declaration pursuant to Article 287 of the Convention accepting the jurisdiction of the International Tribunal for the Law of the Sea (hereinafter “ITLOS”) and the International Court of Justice (hereinafter the “ICJ”), India has not made any such declaration. Therefore, as Italy and India have not accepted the same procedure for the settlement of disputes concerning the interpretation or application of the Convention, pursuant to Article 287, paragraphs 3 and 5, of the Convention, any dispute that may arise between the Parties in this regard may be submitted only to arbitration instituted in accordance with Annex VII to the Convention, unless the Parties agree otherwise. The Parties have not agreed on any other procedure.
3. According to Italy, the Parties’ dispute 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, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, who were on official duty on board the “Enrica Lexie” at the time of the incident (hereinafter the “Marines”).
4. According to India, the “incident” in question concerns the killing of two Indian fishermen on board an Indian vessel named the “St. Antony”, allegedly by rifle fire from the two aforementioned Marines stationed on the “Enrica Lexie”. India contends in this regard that, while the present case has been labelled the “‘Enrica Lexie’ Incident”, it should more accurately be referred to as the “‘St. Antony’ Incident”.

¹ Italy ratified the Convention on 13 January 1995. India ratified the Convention on 29 June 1995.

5. As the case, when it was instituted by Italy, was registered by the Registry of the Permanent Court of Arbitration (hereinafter the “PCA” or the “Registry”) as the arbitration concerning “the ‘Enrica Lexie’ Incident” in the absence of any objections from the Parties at the first procedural meeting, and given that during the proceedings and in the Arbitral Tribunal’s Order on Provisional Measures the case was continuously referred to as the arbitration concerning the “Enrica Lexie” Incident, the Arbitral Tribunal, without prejudice to the nature of the incident, will do likewise in the present Award.
6. In its Notification and Statement of Claim, Italy requested the Arbitral Tribunal, once constituted, 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.²

B. PROCEEDINGS AT ITLOS ON PROVISIONAL MEASURES

7. On 21 July 2015, pending the constitution of this Arbitral Tribunal, Italy filed with ITLOS a “Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea” (hereinafter “ITLOS Request”).
8. In its final submissions before ITLOS, Italy requested that ITLOS 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 necessary measures to ensure that restrictions on the liberty, security and movement of the Marines be immediately lifted to enable Sergeant

² Notification and Statement of Claim, para. 33.

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.³

9. On 6 August 2015, India filed “Written Observations of the Republic of India” with ITLOS. In its final submission before ITLOS, India requested ITLOS 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”.⁴
10. On 10 and 11 August 2015, a hearing on provisional measures was held at the headquarters of ITLOS in Hamburg, Germany.
11. On 24 August 2015, ITLOS rendered an Order in which it prescribed the following provisional measure:

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.⁵

12. In addition, ITLOS decided:

Italy and India shall each submit to the Tribunal 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.⁶

13. Both Parties submitted their reports within the time limit stipulated by ITLOS. Italy informed ITLOS that the Italian Public Prosecutor had decided to stay the investigation into the “Enrica Lexie” incident and refrain from commencing any other connected investigation during the pendency of the Annex VII Arbitral Proceedings.⁷ India informed ITLOS that the Supreme Court of India (hereinafter the “Supreme Court”) had ordered that proceedings with regard to the incident that were pending in Indian courts be “stayed/deferred [...] till further orders”.⁸

³ *The “Enrica Lexie” Incident* (Italy v. India), ITLOS, Provisional Measures, Order of 24 August 2015, para. 29 (**Annex IT-35**).

⁴ *The “Enrica Lexie” Incident* (Italy v. India), ITLOS, Provisional Measures, Order of 24 August 2015, para. 30 (**Annex IT-35**).

⁵ *The “Enrica Lexie” Incident* (Italy v. India), ITLOS, Provisional Measures, Order of 24 August 2015, para. 141 (**Annex IT-35**).

⁶ *The “Enrica Lexie” Incident* (Italy v. India), ITLOS, Provisional Measures, Order of 24 August 2015, para. 141 (**Annex IT-35**) [emphasis in original].

⁷ Report of the Italian Republic pursuant to paragraph 141(2) of the ITLOS Order and Article 95(1) of the Rules of the Tribunal, 23 September 2015 (**Annex IT-37**).

⁸ Report of the Republic of India pursuant to paragraph 141(2) of the ITLOS Order and Article 95(1) of the Rules of the Tribunal, 18 September 2015, p. 2 (**Annex IT-36**).

C. CONSTITUTION OF THE ARBITRAL TRIBUNAL AND NOTIFICATION OF AGENTS AND COUNSEL

14. In its Notification and Statement of Claim, Italy appointed Professor Francesco Francioni as arbitrator pursuant to Annex VII, Article 3, subparagraph (b), to the Convention.⁹
15. By *note verbale* dated 24 July 2015, India appointed H.E. Judge Patibandla Chandrasekhara Rao as arbitrator pursuant to Annex VII, Article 3, subparagraph (c), to the Convention.
16. Pursuant to Italy's request dated 8 September 2015, having consulted the Parties on 30 September 2015 during a meeting in Hamburg, the President of ITLOS appointed H.E. Judge Jin-Hyun Paik and H.E. Judge Patrick Robinson as arbitrators, and H.E. Judge Vladimir Golitsyn as arbitrator and President of the Arbitral Tribunal pursuant to Annex VII, Article 3, subparagraphs (d) and (e), to the Convention.
17. By letter dated 9 October 2015, the President of the Arbitral Tribunal informed the Secretary-General of the PCA that the Parties had agreed that the PCA should act as Registry in the present Arbitration. By letter of 12 October 2015, the Secretary-General of the PCA confirmed that the PCA was prepared to act in this capacity.
18. Italy appointed the following Agent and lead counsel for the present proceedings:

Agent

H.E. Minister Plenipotentiary Francesco Azzarello
Ministry of Foreign Affairs and International Cooperation, Italy

Counsel

Sir Daniel Bethlehem KCMG QC, Member of the Bar of England and Wales; 20 Essex Street Chambers
Dr. Ben Juratowitch QC, Solicitor Advocate, England and Wales; Solicitor of the Supreme Court of Queensland; Partner, Freshfields Bruckhaus Deringer

19. India appointed the following Agent and lead counsel for the present proceedings:

Agent

Dr. Neeru Chadha
Former Additional Secretary and Legal Adviser
Ministry of External Affairs, India

Co-Agent

H.E. Mr. J.S. Mukul
Ambassador of India to the Netherlands

⁹ Italy's Notification and Statement of Claim, para. 3.

Deputy Agent

Dr. Vishnu Dutt Sharma
 Director and Head (Legal and Treaties)
 Ministry of External Affairs, India

Counsel

Professor Alain Pellet, Emeritus Professor, University Paris Nanterre; Former Chairman of International Law Commission; Member of the Institut de Droit International
 Mr. Rodman Bundy, Member of the New York Bar; former avocat à la Cour d'appel de Paris; Partner, Eversheds Harry Elias LLP, Singapore

20. On 7 August 2017, India informed the Arbitral Tribunal of the following appointments in place of Dr. Chadha, Mr. Mukul, and Dr. Sharma as Agent, Co-Agent, and Deputy Agent, respectively:

Agent

Dr. Vishnu Dutt Sharma
 Additional Secretary (Legal and Treaties) (as of 19 December 2018)
 Joint Secretary (Legal and Treaties) (until 18 December 2018)
 Ministry of External Affairs, India

Co-Agent

H.E. Mr. Venu Rajamony
 Ambassador of India to the Netherlands

Deputy Agent

Dr. Luther M. Rangreji
 Director (Legal and Treaties)
 Ministry of External Affairs, India

21. By letter dated 12 October 2018, the Arbitral Tribunal informed the Parties that H.E. Judge Patibandla Chandrasekhara Rao had passed away on 11 October 2018. The Arbitral Tribunal invited India to appoint a substitute arbitrator pursuant to Article 6 of the Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 19 January 2016 (as amended) (hereinafter the "Rules of Procedure").
22. By letter dated 26 November 2018, India conveyed to the Arbitral Tribunal, Italy, and the Registry the appointment of Dr. Pemmaraju Sreenivasa Rao as arbitrator pursuant to Annex VII, Article 3, subparagraph (f), to the Convention, and Article 6 of the Rules of Procedure.
23. By letter dated 7 June 2019, India informed the Arbitral Tribunal that it appointed Mr. G. Balasubramanian, Joint Secretary (Europe West), Ministry of External Affairs, as Agent in place of Dr. Vishnu Dutt Sharma.
24. By letter dated 23 April 2020, India informed the Arbitral Tribunal that it appointed Mr. Sandeep Arya, Joint Secretary (Europe West), Ministry of External Affairs, as Agent in place of Mr. G. Balasubramanian.

D. ADOPTION OF THE RULES OF PROCEDURE

25. On 18 January 2016, a first procedural meeting with the Parties was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. At that meeting, the procedure to be followed in the Arbitration, including the procedural timetable, were considered.
26. On 19 January 2016, taking account of the discussion at the first procedural meeting, the Arbitral Tribunal, pursuant to Annex VII, Article 5, to the Convention, adopted its Rules of Procedure.¹⁰ On the same date, the Arbitral Tribunal adopted Procedural Order No. 1 concerning the procedural timetable for provisional measures.¹¹

E. PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL ON PROVISIONAL MEASURES

27. On 11 December 2015, Italy submitted to the Arbitral Tribunal a “Request for the Prescription of Provisional Measures under Article 290, Paragraph 1, of the United Nations Convention on the Law of the Sea” (hereinafter “Italy’s Request for the Prescription of Provisional Measures”).
28. On 26 February 2016, India filed the “Written Observations of the Republic of India on the Request of the Italian Republic for the Prescription of Provisional Measures under Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea” (hereinafter “India’s Written Observations on Italy’s Request for the Prescription of Provisional Measures”).
29. On 30 and 31 March 2016, a hearing on provisional measures was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands.
30. On 29 April 2016, the Arbitral Tribunal, having considered the Parties’ oral and written pleadings and the Parties’ responses to questions posed by the Arbitral Tribunal during the hearing, delivered its Order on the Request for the Prescription of Provisional Measures (hereinafter the “Provisional Measures Order”), unanimously prescribing the following provisional measures:
- (a) Italy and India shall cooperate, including in proceedings before the Supreme Court of India, to achieve a relaxation of the bail conditions of Sergeant Girone so as to give effect to the concept of considerations of humanity, so that Sergeant Girone, while remaining under the authority of the Supreme Court of India, may return to Italy during the present Annex VII arbitration.

¹⁰ Rules of Procedure for the Arbitration adopted by the Arbitral Tribunal, dated 19 January 2016 (as amended).

¹¹ Procedural Order No. 1 (Procedural Timetable for Provisional Measures), adopted by the Arbitral Tribunal on 19 January 2016.

- (b) The Arbitral Tribunal confirms Italy’s obligation to return Sergeant Girone to India in case the Arbitral Tribunal finds that India has jurisdiction over him in respect of the “Enrica Lexie” incident.
 - (c) The Arbitral Tribunal decides that Italy and India each shall report to the Arbitral Tribunal on compliance with these provisional measures, and authorizes the President to seek information from the Parties if no such report is submitted within three months from the date of this Order and thereafter as he may consider appropriate.¹²
31. On 26 May 2016, on the application of Italy pursuant to the Provisional Measures Order, the Supreme Court of India ordered that “Sergeant Girone while remaining under the authority of the Supreme Court of India is permitted to return to Italy during the Annex VII arbitration” subject to conditions prescribed by the Supreme Court.¹³
32. On 27 July 2016, Italy filed the “Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016”, indicating:
- Following completion of the necessary requirements and formalities as prescribed by the Supreme Court’s Order, Sergeant Girone departed India on 27 May 2016, surrendering his passport on doing so, arriving in Italy on 28 May 2016. In compliance with the prescribed bail conditions, Sergeant Girone reported to the Comando Provinciale Carabinieri in Bari on Wednesday, 1 June 2016.¹⁴
33. On the same date, India filed the “Report of the Republic of India on Compliance with the Provisional Measures Order of the Arbitral Tribunal dated 29 April 2016 concerning the ‘Enrica Lexie’ Incident (The Italian Republic v. Republic of India – PCA Case No. 2015-28)”, indicating that, “[p]ursuant to the Order of the Supreme Court, Sergeant Girone after fulfilling the necessary formalities left India on 27th May 2016 and reached Italy on 28th May 2016”.¹⁵

F. PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL ON JURISDICTION AND MERITS

1. Revision of the Rules of Procedure

34. On 7 September 2016, Italy requested an extension of the time limit for the submission of Italy’s Memorial as originally set out in Article 9 of the Rules of Procedure, from 16 September to 30 September 2016. On 8 September 2016, India confirmed that it had no objection to Italy’s

¹² Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 132.

¹³ *Massimiliano Latorre and Ors v. Union of India and Ors* (For relaxation of bail conditions of Sergeant Major Salvatore Girone and office report), Order of 26 May 2016.

¹⁴ Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016, 27 July 2016, para. 7.

¹⁵ Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016, 27 July 2016, para. 7.

- request. On 9 September 2016, the Arbitral Tribunal adopted Procedural Order No. 2, granting Italy's request and extending the subsequent time limits accordingly.¹⁶
35. By letter dated 19 May 2017, Italy submitted to the Arbitral Tribunal a proposal as to the procedural calendar for further written pleadings in respect of India's counter-claims. By letter dated 23 May 2017, India confirmed its agreement with Italy's proposal. On 1 June 2017, the Arbitral Tribunal adopted Procedural Order No. 3, ordering that the calendar for the submission of written pleadings set out in Article 9 of the Rules of Procedure, as amended by Procedural Order No. 2, be maintained with further amendments to account for India's counter-claims.¹⁷
36. By letter dated 6 February 2018, Italy requested the Arbitral Tribunal to extend the time limit for the filing of its Rejoinder on Jurisdiction and India's Counter-Claim from 16 February 2018 to 9 March 2018 due to the disclosure by India on 5 February 2018 "of 66 witness statements and 133 additional documents that were the subject of a disclosure request by Italy". By letter dated 8 February 2018, India confirmed that it had no objection to Italy's request. On 12 February 2018, the Arbitral Tribunal adopted Procedural Order No. 4, granting the extension requested by Italy.¹⁸
37. By letter dated 30 April 2019, Italy proposed a modification of Article 23, paragraphs 2 and 3, of the Rules of Procedure on the basis of discussions between the Parties. On the same date, India confirmed its concurrence with Italy's proposed modification. On 16 May 2019, the Tribunal issued Procedural Order No. 7, amending the Rules of Procedure in accordance with the modification proposed by the Parties.

2. Written Pleadings

38. On 30 September 2016, Italy submitted its Memorial (hereinafter "Italy's Memorial"), with an expert report prepared by Justice Deepak Verma on Indian law annexed to the Memorial.
39. On 14 April 2017, India submitted its Counter-Memorial (hereinafter "India's Counter-Memorial"). In its Counter-Memorial, in addition to responding to Italy's Memorial, India also presented counter-claims.

¹⁶ Procedural Order No. 2 (Extension of the Due Dates for Written Submissions), adopted by the Arbitral Tribunal on 9 September 2016.

¹⁷ Procedural Order No. 3 (Procedural Calendar for Pleadings in respect of India's Counter-Claim), adopted by the Arbitral Tribunal on 1 June 2017.

¹⁸ Procedural Order No. 4 (Amendments to the Procedural Calendar), adopted by the Arbitral Tribunal on 12 February 2018.

40. On 11 August 2017, Italy submitted its “Reply on the Merits – Counter-Memorial on Jurisdiction – Counter-Memorial on India’s Counter-Claims” (hereinafter “Italy’s Reply”), with a second expert report prepared by Justice Deepak Verma on Indian law annexed to the Reply.
41. On 15 December 2017, India submitted its “Rejoinder on the Merits – Reply on Jurisdiction – Reply to Italy’s Counter on India’s Counter-Claims” (hereinafter “India’s Rejoinder”).
42. On 9 March 2018, Italy submitted its “Rejoinder on Jurisdiction and on India’s Counter-Claims” (hereinafter “Italy’s Rejoinder”).

3. Preparation of Hearing on Jurisdiction and Merits

43. By letter dated 1 December 2018, the Arbitral Tribunal requested the Parties to consult with each other and to submit a joint proposal regarding the dates of the hearing. On 4 January 2018, the Parties were invited to submit a joint proposal by 19 January 2018.
44. By letter dated 19 January 2018, Italy submitted to the Arbitral Tribunal a proposal in respect of dates and a schedule for the hearing, which India on the same date confirmed as representing the Parties’ “joint proposal”.
45. By letter of 1 February 2018, the Arbitral Tribunal confirmed the hearing dates and schedule set out in Italy’s letter dated 19 January 2018.
46. By letter of 8 June 2018, the Arbitral Tribunal informed the Parties of the names of persons whose testimony the Arbitral Tribunal “presently regards as particularly significant”, and invited the Parties to inform it by 22 June 2018 “whether they intend to request leave from the Tribunal to present or call these persons as witnesses at the hearing pursuant to Article 13, paragraphs 3 and 4, of the Rules of Procedure”.
47. By letter of 22 June 2018, Italy submitted its comments, concluding that “it could not properly seek leave from the Tribunal to procure the oral testimony of some or all of those whose Statements have been exhibited as part of the written record”. Italy indicated that this was because first, the statements were provided “for a materially different purpose, in materially different circumstances, with the Statements in question being subject to and governed by principles of domestic criminal law”; second, adducing such oral testimony would present considerable practical challenges, as “[n]either Party has presented any of the putative ‘witnesses’, in the sense of taking responsibility for them and for their evidence”; and, third, there was “an insurmountable obstacle” to the calling as witnesses in the present proceedings of persons whose statements were

produced for purposes of criminal investigation in Italy or India, which would raise significant issues going to the due process rights of the defence of the Marines.

48. By letter of the same date, India submitted its comments, stating that it intended to request “the Tribunal’s leave for presenting witnesses”, and requesting that “the witnesses identified in the Letter from the Italian side be called and made available for testimony/examination, with further request of allowing, if the need be, to call additional witnesses from the Italian side”.
49. By letter dated 6 July 2018, India submitted additional comments in response to Italy’s comments of 22 June 2018, stating that it did “not consider that any of [Italy’s] concerns are well-founded”. India argued that “the Arbitral Tribunal is fully entitled to request the oral testimony of the individuals who have been identified in the Secretariat’s letter of 8 June”, and disagreed with Italy’s proposal that “the Arbitral Tribunal identify the precise issues on which it would like oral testimony and request the Parties to produce new, sworn and supported witness statements”. India also took the view that there was no risk that the calling of witnesses would taint criminal proceedings against the Marines.
50. By letter dated 18 July 2018, Italy responded to India’s comments of 6 July 2018, arguing, first, that “[s]tatements taken by or made to the Indian Police and other Indian criminal investigation authorities as part of a criminal investigation have a special status under Indian criminal law”, which testimony in the present arbitration would not enjoy, and, second, that “the Indian provenance of these Statements holds the remarkable prospect, if witness testimony is adduced, of India endeavouring, through cross-examination, to impeach the evidence of witnesses whose Statements India has itself recorded as part of its own criminal investigation processes”.
51. By letter dated 26 July 2018, India reacted to Italy’s comments of 18 July 2018, pointing out that “under Article 12 of the Rules of Procedure, each Party has the burden of proving the facts it relies on, and that the Tribunal is empowered to determine the admissibility, relevance, materiality and weight of the evidence adduced”. It also asserted that “[t]his obviously extends to assessing the probative value of the witness statements that each Party has submitted, an exercise that would undoubtedly benefit by hearing the testimony of certain of these individuals at the hearing”. It added that “[m]oreover, Article 23(2) of the Rules of Procedure enables the Tribunal, after consultation with the Parties, to make such arrangements as may be necessary for the protection of information and the maintenance of confidentiality for parts of the oral hearings”.
52. On 30 July 2018, the Arbitral Tribunal, taking into account the Parties’ views, and having regard to Annex VII, Article 6, to UNCLOS, adopted Procedural Order No. 5. The Tribunal observed that it was empowered to call witnesses and hear their evidence at the hearing, should it deem so

appropriate, and noted that the Parties had “acknowledged the Arbitral Tribunal’s authority to that effect”. The Arbitral Tribunal stated that, on the basis of statements adduced by the Parties with their written pleadings, it had determined that the following persons would be called as witnesses of the Arbitral Tribunal (hereinafter “Tribunal Witnesses”) to give evidence at the hearing: (i) Mr. Umberto Vitelli, on 15 February 2012, Master of the “Enrica Lexie” (hereinafter “Captain Vitelli”); (ii) Mr. Carlo Noviello, on 15 February 2012, Master Supernumerary of the “Enrica Lexie” (hereinafter “Captain Noviello”); (iii) Mr. Fredy J., on 15 February 2012, captain and owner of the “St. Antony” (hereinafter “Captain Fredy”); (iv) Deputy Inspector General (hereinafter “DIG”) Alok Negi, on 15 February 2012, Commandant and Staff Observer at Coast Guard Air Enclave at Kochi (hereinafter “DIG Negi”); and (v) Commandant Rohitesh Kumar, on 15 February 2012, Assistant Commandant and Boarding Officer of the Indian Coast Guard Ship (hereinafter “ICGS”) “Lakshmibai” (hereinafter “Commandant Kumar”). In the Arbitral Tribunal’s view, the oral testimony of these persons could “assist it in further clarifying the events that have given rise to the present arbitration conducted pursuant to Annex VII to UNCLOS”.

53. The Arbitral Tribunal clarified that its decision to call Tribunal Witnesses was “without prejudice to the Parties’ rights pursuant to Article 13, paragraphs 3 and 4, of the Rules of Procedure to call witnesses of their own”. In addition, noting Italy’s concern that the statements in question “were not ‘provided’ specifically to the Arbitral Tribunal”, it concluded that this did not exclude that they might “form the basis of the examination of witnesses called by the Arbitral Tribunal”. The Tribunal stated that it would welcome receiving from the Tribunal Witnesses, “a short supplemental statement setting out their recollection of the events of 15 February 2012 for purposes of the present proceedings”.
54. In the Order, the Arbitral Tribunal also gave directions as to the examination of Tribunal Witnesses at the hearing, and amended the hearing schedule to accommodate the examination of Tribunal Witnesses. Finally, the Arbitral Tribunal invited the Parties to consult with each other in respect of the implementation of the Procedural Order, in particular, in respect of contacting and transmitting the Tribunal Witnesses; examination of the Tribunal Witnesses; and the confidentiality arrangements that may be necessary at the hearing in respect of witness testimony.
55. By letter dated 31 August 2018, the Parties reported to the Tribunal on the results of their consultations pursuant to Procedural Order No. 5 in respect of the implementation of the Order. In the letter, the Parties presented their joint views as to the detailed procedure for calling and examining Tribunal Witnesses at the hearing. The Parties also informed the Tribunal that they disagreed as to whether witness testimony should take place in confidential session, and whether

the Parties should be precluded from using the witness testimony for any purpose in connection with post-Award criminal proceedings.

56. On 14 September 2018, the Arbitral Tribunal, taking into account the Parties' views, adopted Procedural Order No. 6 addressing the modalities of making contact with Tribunal Witnesses before the hearing, examination of the Witnesses at the hearing, and the confidentiality arrangements to be adopted. The Arbitral Tribunal confirmed that, in accordance with the Parties' agreement, Italy would make initial contact with Captain Vitelli and Captain Noviello, and India would make initial contact with DIG Negi, Commandant Kumar, and Captain Fredy, "to transmit to these individuals the Tribunal's request to testify at the hearing as Tribunal witnesses". The Arbitral Tribunal directed the Parties that, following that initial correspondence, any contact with the Tribunal Witnesses in respect of their attendance of the hearing should occur through the Registry. The Arbitral Tribunal also directed that the Parties should not discuss with the Tribunal Witnesses the positions espoused by Italy or India in the present arbitration in respect of questions of fact or law. The Arbitral Tribunal finally determined the sequence of examination of the Tribunal Witnesses.
57. With respect to confidentiality arrangements, the Arbitral Tribunal directed that "the portion of the hearing during which witnesses are examined shall not be open to the public". Regarding the confidentiality of the transcripts of portions of the hearing dedicated to witness examination, the Arbitral Tribunal resolved to make a determination in this regard following the completion of the hearing.
58. By letter dated 27 September 2018, the Arbitral Tribunal informed the Parties that the hearing, which was scheduled to take place in autumn 2018, had been postponed. By letter dated 26 October 2018, the Arbitral Tribunal requested the Parties to keep in reserve the period from 8 July 2019 to 20 July 2019 as tentative dates for the hearing. On 30 November 2018, the Arbitral Tribunal confirmed these dates.
59. As noted in paragraph 37 above, in light of subsequent communications from the Parties, the Arbitral Tribunal, by Procedural Order No. 7 dated 16 May 2019, amended Article 23, paragraphs 2 and 3, of the Rules of Procedural concerning the transparency regime for the hearing. On the same date, the Tribunal issued Procedural Order No. 8, confirming that the hearing would take place from 8 July 2019 to 20 July 2019.

4. Hearing on Jurisdiction and Merits

60. The Hearing on Jurisdiction and Merits took place from 8 to 20 July 2019 (hereinafter the “Hearing”) at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. In accordance with Procedural Order No. 7, the Hearing was not generally open to the public. The opening statements presented by the agents for the Parties, however, were webcast live on the Internet and published on the PCA case repository after the Hearing.
61. The following were present at the Hearing:

Arbitral Tribunal

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

Italy

H.E. Minister Plenipotentiary Francesco Azzarello
 Director, National Authority for Armament Licensing and Controls-UAMA
 Ministry of Foreign Affairs and International Cooperation

as Agent;

Lieutenant Commander Alessandro Crocetta
 Ministry of Defence of the Italian Republic

as Advisor;

Sir Daniel Bethlehem KCMG QC
 Member of the Bar of England and Wales; Twenty Essex Chambers

Dr. Paolo Busco
 Member of the Rome Bar and Registered EU Lawyer with the Bar of England and Wales; Twenty Essex Chambers

Dr. Ida Caracciolo
 Professor of International Law, University of Campania “Luigi Vanvitelli”; Member of the Rome Bar

Dr. Ben Juratowitch QC
 Solicitor Advocate, England and Wales; Solicitor of the Supreme Court of Queensland; Partner, Freshfields Bruckhaus Deringer, Paris

Mr. Sudhansu Swaroop QC
 Member of the Bar of England and Wales; Twenty Essex Chambers

Professor Guglielmo Verdirame QC

Professor of International Law, King's College, London; Member of the Bar of England and Wales; Twenty Essex Chambers

Dr. Philippa Webb

Reader in Public International Law, King's College, London; Member of the New York Bar and Member of the Bar of England and Wales; Twenty Essex Chambers

Sir Michael Wood KCMG

Member of the International Law Commission; Member of the Bar of England and Wales; Twenty Essex Chambers

as Counsel and Advocates;

Mr. Suhail Dutt

Senior Advocate, Member of the Delhi Bar

Ms. Callista Harris

Solicitor admitted in New South Wales, Australia

Mr. Kevin Lee

Advocate of the Supreme Court of Singapore; Member of the Bar of England and Wales

Dr. Daniel Müller

Member of the Paris Bar; Associate, Freshfields Bruckhaus Deringer, Paris

Dr. Mauro Politi

Professor of International Law, University of Trento; former Member of the United Nations Human Rights Committee

Dr. Attila Tanzi

Professor of International Law, University of Bologna; Associate Member, 3VB Chambers, London

Mr. Diljeet Titus

Advocate, Titus & Co Advocates; Member of the Delhi Bar, India

as Counsel;

Ms. Francesca Lionetti

Freshfields Bruckhaus Deringer, Paris

as Legal Assistant.

India

Mr. G. Balasubramanian

Joint Secretary (Europe West), Ministry of External Affairs, Government of India

as Agent;

H.E. Mr. Venu Rajamony

Ambassador of India in The Hague, the Netherlands

as Co-Agent;

Mrs. Uma Sekhar
Joint Secretary, Legal and Treaties Division, Ministry of External Affairs,
Government of India

as Co-Agent;

Dr. Luther M. Rangreji
Counsellor (Legal), Embassy of India, The Hague

as Deputy Agent;

Mr. Donny Michael
Deputy Inspector General, Indian Coast Guard, Government of India

Dr. Sanjay Kumar
Under Secretary, Europe West Division, Ministry of External Affairs, Government
of India

Mr. S. Senthil
Legal Officer, Legal and Treaties Division, Ministry of External Affairs,
Government of India

Mr. P. Vikraman
Deputy Superintendent of Police, National Investigation Agency, Government of India

as Advisors;

Professor Alain Pellet
Emeritus Professor, University Paris Nanterre; Former Chairman of International
Law Commission; Member of the Institut de Droit International

Mr. Rodman R. Bundy
Member of the New York Bar; former avocat à la Cour d'appel de Paris; Partner,
Eversheds Harry Elias LLP, Singapore

Dr. Vishnu Dutt Sharma
Senior Counsel & Additional Secretary (Retd), Ministry of External Affairs,
Government of India

Mr. Benjamin Samson
Centre de droit international de Nanterre (CEDIN), University Paris Nanterre

Mr. Alvin Yap
Advocate and Solicitor of the Supreme Court of Singapore; Eversheds Harry Elias
LLP, Singapore

as Counsel and Advocates;

Mr. Ludovic Legrand
Centre de droit international de Nanterre (CEDIN), University Paris Nanterre;
Advisor in International Law

Ms. Héloïse Bajer-Pellet
Member of the Paris Bar

Ms. Joyce Ng
Advocate and Solicitor of the Supreme Court of Singapore; Eversheds Harry Elias
LLP, Singapore

as Counsel.

Tribunal Witnesses

Captain Umberto Vitelli
(Formerly) Master of the “Enrica Lexie”

Captain Carlo Noviello
(Formerly) Master Supernumerary of the “Enrica Lexie”

Captain Fredy John Bosco
(Formerly) Captain and Owner of the “St. Antony”

DIG Alok Negi
(Formerly) Commandant and Staff Observer at Coast Guard Air Enclave Kochi

Commandant Rohitesh Kumar
(Formerly) Assistant Commandant and Boarding Officer of the ICGS
“Lakshmibai”

Permanent Court of Arbitration

Dr. Dirk Pulkowski
Registrar

Ms. Christel Y. Tham
Legal Counsel

Ms. Susan Kimani
Legal Counsel

Ms. Willemijn van Banning
Case Manager

Court Reporter

Mr. Trevor McGowan

Interpreters

Ms. Daniela Ascoli
Ms. Marzia Sebastiani

English - Italian

Ms. Rohini Thevananth
Mr. Navaratnam Thevananth

English - Tamil

62. On 8 July 2019, the agents for both Parties delivered brief opening statements. The opening statements were followed by the first round of oral argument of Italy from 8 through 10 July 2019.
63. India presented its first round of oral argument from 11 through 13 July 2019.
64. On 15 July 2019, the Tribunal heard the witness testimonies of Captain Vitelli, Captain Noviello, and Captain Fredy. Captain Vitelli and Captain Noviello gave their witness testimonies in Italian, while Captain Fredy gave his testimony in Tamil. The testimonies were simultaneously interpreted into English.
65. On 16 July 2019, the Tribunal heard the witness testimonies of DIG Negi and Commandant Kumar. The witnesses gave their testimonies in English.
66. The witness testimonies were followed by a second round of oral argument and closing statements of the Parties, which were delivered on 18 and 20 July 2019, respectively.

II. THE PARTIES' SUBMISSIONS

67. The Parties, in their written and oral pleadings, have made the following submissions to the Arbitral Tribunal.

A. SUBMISSIONS IN THE PARTIES' WRITTEN PLEADINGS

1. Submissions of Italy

68. In its Memorial, Italy requests the Arbitral Tribunal to adjudge and declare that:
 - (a) By the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and 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 UNCLOS with regard to Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89.
 - (b) By directing the *Enrica Lexie* to change course and proceed into India's territorial sea, India violated Italy's freedom of navigation, in breach of UNCLOS Article 87(1)(a).
 - (c) By interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy's exclusive jurisdiction over the *Enrica Lexie*, in breach of UNCLOS Article 92.
 - (d) India violated, and continues to violate, Italy's exclusive right to institute penal or disciplinary proceedings against the Marines, in breach of UNCLOS Article 97(1).
 - (e) By ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India violated the prohibition contained in UNCLOS Article 97(3).
 - (f) The assertion and continued exercise of criminal jurisdiction by India over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone is in violation

of India's obligation to respect the immunity of the Marines under UNCLOS Articles 2(3), 56(2), 58(2) and 100 as Italian State officials exercising official functions.

- (g) By failing to cooperate in the repression of piracy, India violated UNCLOS Article 100, read with UNCLOS Article 300.
- (h) India's assertion of jurisdiction in the present case was and is contrary to UNCLOS.¹⁹

69. Italy also requests the Arbitral Tribunal to 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 in paragraphs 1(a), (d), (f), (g) and (h), above. 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 1(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*.²⁰

70. In its Reply and Rejoinder, Italy also requests the Arbitral Tribunal:

- (1) To dismiss India's objections to the jurisdiction of the Tribunal with respect to Italy's Claims 1(a), 1(f), and 1(h); and
- (2) To dismiss India's counter-claims in their entirety and all requests consequential on them.²¹

2. Submissions of India

71. In its Counter-Memorial, with the *caveat* that it reserves the right to amend or supplement its Submissions, India requests the Arbitral Tribunal to:

- (1) adjudge and declare that it has no jurisdiction with respect to Italy's Claims 1(a), 1(f) and 1(h), and/ or to dismiss and reject those Claims; and
- (2) dismiss and reject all other requests and submissions of Italy.²²

72. Regarding its counter-claims, India requests the Arbitral Tribunal to adjudge and declare that:

- (3) India's counter-claims are admissible; and
By firing at the St Antony and killing two Indian fishermen on board, Italy:

¹⁹ Italy's Memorial, p. 188.

²⁰ Italy's Memorial, p. 189.

²¹ Italy's Reply, para. 11.3; Italy's Rejoinder, para. 6.6.

²² India's Counter-Memorial, p. 125.

- (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, India reserves the right to request that the Tribunal order that:

- (8) Italy make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS.²³

73. In its Rejoinder, with the *caveat* that it reserves the right to amend or supplement its submissions, India requests the Arbitral Tribunal to:

- (1) adjudge and declare that it has no jurisdiction with respect to Italy's Claims 1(a), 1(f) and 1(h), and to dismiss and reject those Claims; and
- (2) dismiss and reject all other requests and submissions of Italy.²⁴

74. Regarding its counter-claims, India also requests the Arbitral 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.²⁵

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:

²³ India's Counter-Memorial, p. 125.

²⁴ India's Rejoinder, p. 131.

²⁵ India's Rejoinder, p. 131.

- (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.

III. FACTUAL BACKGROUND

77. The Arbitral Tribunal will now summarise the factual background of the case to provide context to the subsequent discussion. Many of the facts giving rise to the present Arbitration are undisputed between the Parties, as is evident from concurrent factual statements made by the Parties in their pleadings or statements made by one Party that are not contested by the other Party.

78. In outlining the factual background, the Arbitral Tribunal also restates selected documentary evidence and excerpts of testimony given before the Arbitral Tribunal at the Hearing. The Arbitral Tribunal will summarise the Parties' positions in respect of disputed facts in Parts V and VI.

A. THE VOYAGE OF THE “ENRICA LEXIE” IN FEBRUARY 2012

79. The “Enrica Lexie” was an Italian-flagged oil tanker, owned by Dolphin Tanker SRL, a company incorporated in Milan, Italy, and operated by Fratelli D’Amato SpA of Naples, Italy. The port of registry of the “Enrica Lexie” was Naples.²⁶
80. The “Enrica Lexie” had an overall length of 243.8 metres, a moulded breadth of 42 metres,²⁷ a draught²⁸ of 14.822 metres and a keel-to-mast height of 49 metres.²⁹ Its height from sea level to the bridge when unloaded was 26 metres.³⁰ Its maximum speed was 14 knots.³¹
81. On 4 February 2012, the “Enrica Lexie” departed Singapore after stopping there for bunkering.³² It had no cargo on board. On 12 February 2012, a six-member Vessel Protection Detachment (hereinafter “VPD”) boarded the “Enrica Lexie” at Galle, Sri Lanka. The six members of the VPD, all Italian nationals, were Chief Master Sergeant Massimiliano Latorre, Sergeant Salvatore Girone, Sergeant Renato Voglino, Corporal Massimo Andronico, Lance Corporal Antonio Fontana, and Lance Corporal Alessandro Conte.³³ Sergeant Latorre commanded the VPD.
82. The presence of the six members of the Italian Marines on board the “Enrica Lexie” was regulated by Law Decree No. 107 of 12 July 2011, of the Italian Republic³⁴ (hereinafter “Italian Law on VPDs”). Article 5(1) of the Italian Law on VPDs provided that “the Ministry of Defence may enter into framework agreements with private Italian ship-owners [...] related to the protection of

²⁶ Italy’s Memorial, paras 4.4-4.5, *referring to* Characteristics and description of the “Enrica Lexie” (**Annex IT-217**); Hearing Transcript, 8 July 2019, 148:11-16.

²⁷ Italy’s Memorial, para. 4.6. Italy explains that the moulded breadth is the maximum breadth measured inside the vessel’s plating, usually measured amidships.

²⁸ Italy explains that the “draught” is the distance from the bottom of the keel to the waterline.

²⁹ Italy’s Memorial, para. 4.6, *referring to* Characteristics and description of the “Enrica Lexie” (**Annex IT-217**).

³⁰ Italy’s Memorial, para. 4.6, *referring to* Description of the “Enrica Lexie” prepared by R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 26 February 2012 (**Annex IT-149**).

³¹ Italy’s Memorial, para. 4.6, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012”, 12 March 2012, p. 2 (**Annex IT-161**). *See also* Hearing Transcript, 8 July 2019, 148:17-149:1.

³² Italy’s Memorial, para. 4.7, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012”, 12 March 2012, p. 3 (**Annex IT-161**).

³³ Italy’s Memorial, para. 4.7, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 1 (**Annex IT-14**).

³⁴ Law Decree No. 107 of 12 July 2011, of the Italian Republic: Extension (of international missions of the Armed Forces and Police available for implementing Resolutions 1970 (2011) and 1973 (2011) adopted by the Security Council of the United Nations and intervention by way of cooperation in the development and support of peace and stabilisation processes). Urgent anti-piracy measures (11GO148).

- ships flying the Italian flag in transit in international maritime spaces at risk of piracy”.³⁵ Accordingly, the role of the VPDs on board the vessel was to protect the safe navigation of the vessel.³⁶ The expenses of the VPDs, according to Article 5(1), were borne by the ship owners. These expenses however “did not constitute the salary of the marines, nor fees to the Ministry of Defence for the services rendered by the marines to shipowners”.³⁷
83. Article 5(6bis) of the Italian Law on VPDs amended the Italian Military Code to include amongst the competences of the Italian Navy “safeguarding and protection of national interests and maritime sea-lines beyond the outer limit of the territorial sea, including as regards the fight against piracy”.³⁸ Flowing from this, under Article 5(2), VPDs were serving members of the Italian Navy or other Italian Armed Forces who operated in conformity with the directives and the rules of engagement issued by the Italian Ministry of Defence.³⁹
84. In June 2015, Italy repealed the provisions that allowed Italian ship owners to request protection from VPDs, following the decline in the number of piracy attacks.⁴⁰
85. The Master of the “Enrica Lexie” was Captain Umberto Vitelli, joined by Master Supernumerary Captain Carlo Noviello. Captain Noviello had more than 30 years of experience as a mariner.⁴¹ Captain Noviello had been asked to join the “Enrica Lexie” so that the command of the vessel would meet the requirements of oil companies for experience.⁴² Other relevant crew aboard were “Second Officer Sahil Gupta, Chief Mate and Ship Security Officer James Mandley Samson Victor, and Able Seamen Ayyaz Yusuf Kumandan and Narendrakumar Fulbaria”.⁴³
86. On 14 February 2012, the “Enrica Lexie” left Galle and was destined for Port Said, Egypt.⁴⁴

³⁵ Italy’s Memorial, para. 3.14, *referring to* Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**). *See also* Hearing Transcript, 8 July 2019, 131:12-132:2.

³⁶ Hearing Transcript, 8 July 2019, 132:6-7.

³⁷ Hearing Transcript, 8 July 2019, 132:17-24.

³⁸ Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**).

³⁹ Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**).

⁴⁰ Italy’s Memorial, para. 3.10, *referring to* Italian Law Decree no. 7, 18 February 2015, converted by Law no. 43, 17 April 2015, Article 15 (**Annex IT-207**). *See also* Hearing Transcript, 8 July 2019, 127:21-24.

⁴¹ Italy’s Memorial, para. 4.8, *referring to* Statement of Carlo Noviello, 28 February 2012 (**Annex IT-151**).

⁴² Italy’s Memorial, para. 4.8, *referring to* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**). *See also* Hearing Transcript, 8 July 2019, 149:14-150:7; Hearing Transcript, 15 July 2019, 104:7-21.

⁴³ Italy’s Memorial, para. 4.9, *referring to* Crew List of the “Enrica Lexie”, p. 1 (**Annex IT-218**). *See also* Hearing Transcript, 8 July 2019, 150:15-18.

⁴⁴ Italy’s Memorial, para. 4.10, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); Italy’s Reply, para. 4.13.

B. CHRONOLOGICAL ACCOUNT OF THE EVENTS THAT LED TO THE INCIDENT

1. Events as Seen from the “Enrica Lexie”

87. On 15 February 2012, at 15:45 Ship Mean Time (hereinafter “SMT”) (16:15 Indian Standard Time (hereinafter “IST”)),⁴⁵ the “Enrica Lexie” was approximately 20 nautical miles from Alleppey (Alappuzha), India, navigating at a speed of 12 knots.⁴⁶ At around that time, Captain Vitelli was seated at the computer position on the bridge corresponding with the charterer and shipowner.⁴⁷ Second Officer Sahil Gupta monitored the controls under the supervision of Captain Noviello.⁴⁸
88. Captain Noviello testified that the “Enrica Lexie” had veered off course by 8 degrees to starboard.⁴⁹ Second Officer Gupta therefore steered the “Enrica Lexie” 8 degrees to port to return to the original course.⁵⁰
89. Towards the end of Mr. Gupta’s four-hour watch duty lasting from 12:00 SMT/12:30 IST to 16:00 SMT/16:30 IST, an “unidentified craft” appeared on the radar screen at a distance of approximately 2.8 nautical miles from the “Enrica Lexie”.⁵¹ The craft was on the starboard side of the ship.⁵² Once the craft was spotted, Second Officer Gupta steered an additional 2 degrees to

⁴⁵ IST is 30 minutes ahead of the local time on the “Enrica Lexie” – SMT. *See* India’s Counter-Memorial, 14 April 2017, para. 2.11. In its pleadings, Italy refers to the time of the events of 15 February 2012 occurring at sea in SMT, while India refers to them in IST. Unless otherwise indicated, in Sections B and C, the Arbitral Tribunal will chronologically recount events in both SMT and IST, while in Sections D and E, since the “Enrica Lexie” was no longer at sea, events will be recounted in IST only.

⁴⁶ Italy’s Memorial, para. 4.13, *referring to* Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**).

⁴⁷ Hearing Transcript, 15 July 2019, 26:25-27:3.

⁴⁸ Hearing Transcript, 15 July 2019, 27:13-15, 105:12-20.

⁴⁹ Hearing Transcript, 20 July 2019, 4:22-5:16; Hearing Transcript, 20 July 2019, 5:1-16; Hearing Transcript, 15 July 2019, 123:18-124:5.

⁵⁰ Hearing Transcript, 15 July 2019, 123:18-124:24.

⁵¹ Italy’s Memorial, para. 4.13, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Summary Investigation Report by Division Admiral Alessandro Piroli entitled “Attempted Pirate Attack against Merchant Vessel Enrica Lexie – 15 February 2012. Death of Indian Citizens”, dated 11 May 2012 (hereinafter the “Piroli Report”) (Confidential Annex), p. 2-14 (**Annex IT-233**). *See also* Italy’s Reply, para. 4.13(1); India’s Rejoinder, para. 4.16; (Confidential Annex) (**Annex IT-261**); Hearing Transcript, 8 July 2019, 154:10-15; Hearing Transcript, 11 July 2019, 66:23-67:1; Hearing Transcript, 15 July 2019, 27:8-15; 105:12-24.

⁵² India’s Counter-Memorial, para. 2.19 *referring to* Piroli Report (Confidential Annex), pp 2-15-2-19 (**Annex IT-233**).

port.⁵³ Captain Noviello further testified that “in the meanwhile the helm had been switched to manual steering to allow for evasive manoeuvres”.⁵⁴

90. Captain Noviello informed Sergeant Girone, the VPD member on duty on the bridge at the time, of the craft on the radar. Captain Noviello and Sergeant Girone, together with Sergeant Latorre, Mr. Gupta, and Mr. Fulbaria monitored the craft through binoculars.⁵⁵
91. The entry made in the Log Book maintained by Captain Vitelli (hereinafter the “Log Book”) reads that the craft “seemed to be a fishing boat”.⁵⁶ In a declaration made four days after the incident by Captain Noviello, he stated that the craft “appeared to be a fishing boat about 12 meters in length”.⁵⁷ In addition, Sergeant Latorre stated in the context of a naval investigation in India a few days after the incident that the craft:

was of a faded blue colour, small dimensions (less than 10 meters), with a small superstructure (wheel-house) set to the fore, white. The wheel-house had openings fitted with glass/plexiglass... [V]arious tires had been placed along the skiff as makeshift bumpers. An awning propped on two struts joined the wheel-house to the aft.⁵⁸

92. According to Captain Noviello, when the small craft was between 1 and 1.5 nautical miles away, the “Enrica Lexie” attempted to establish contact by way of a call on channel 16 of the VHF communication system, to no avail.⁵⁹
93. According to Sergeant Latorre’s written statements, at approximately 16:00 SMT/16:30 IST, he donned his personal protection equipment, activated radio communication with other members of the VPD, and positioned himself on the starboard wing of the bridge.⁶⁰ Sergeant Girone and Lance

⁵³ Hearing Transcript, 15 July 2019, 123:18-124:18; Hearing Transcript, 20 July 2019, 4:22-5:16; 5:1-16. *See also* Hearing Transcript, 18 July 2019, 135:20-21, *referring to* Hearing Transcript, 15 July 2019, 124:14-18; Statement of Sahil Gupta, 19 February 2012 (**Annex IT-140**).

⁵⁴ (Confidential Annex) (**Annex IT-238**). *See also* Hearing Transcript, 15 July 2019, 32:3-8; Statement of Umberto Vitelli (**Annex IT-216**); Italy’s Memorial, para. 4.14; Italy’s Reply, para. 4.14.

⁵⁵ Italy’s Memorial, para. 4.15, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); (Confidential Annex) (**Annex IT-240**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); (Confidential Annex) (**Annex IT-238**); Hearing Transcript, 15 July 2019, 107:21-108:20.

⁵⁶ Italy’s Memorial, para. 4.16, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**). *See also* India’s Counter-Memorial, para. 2.25, and Annex to Chapter 2, p. 33.

⁵⁷ Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**). *See also* Italy’s Memorial, para. 4.16.
⁵⁸ (Confidential Annex), p. 2 (**Annex IT-236**).

⁵⁹ Hearing Transcript, 18 July 2019, 36:17-20; 130:1-16, *referring to* Hearing Transcript, 15 July 2019, 111:10-24; 149:21-22.

⁶⁰ Italy’s Memorial, para. 4.18, *referring to* (Confidential Annex) (**Annex IT-240**); (Confidential Annex) (**Annex IT-236**).

Corporal Fontana (the VPD member who was about to replace Sergeant Girone on the command bridge) also wore their protection equipment.⁶¹

94. Sergeant Latorre states that, when the craft was approximately 800 metres from the “Enrica Lexie”, he “implemented various and continued visual signals”, including flashing a search light, “in order to warn the craft”.⁶² He also waved his weapon, in order “to signal the presence of military personnel onboard”.⁶³ According to Sergeant Girone, “[t]his caused no alteration in the craft’s course, which continued to clearly head toward our vessel, with a 30° approach angle to starboard, relative to our stern”.⁶⁴ Sergeant Girone joined Sergeant Latorre in showing his weapon by holding it above his head,⁶⁵ while Lance Corporal Fontana, “continued to monitor the approaching craft on the navigation radar”.⁶⁶
95. Further, according to Sergeant Latorre, when the craft was at a distance of approximately 500 metres, he and Sergeant Girone each fired four rounds of a mix of tracer and ordinary bullets.⁶⁷
96. The small craft maintained its course and speed, approaching the “Enrica Lexie”.⁶⁸ Sergeant Girone claims that, when it was at a distance of 300 metres, he saw through his binoculars that “at least two members of the crew were equipped with long-barrel rifles slung over their shoulders, with a posture clearly aimed at boarding [the “Enrica Lexie”]”.⁶⁹ Captain Noviello also testified that he saw two men aboard the small vessel with “a black belt across their shoulders

⁶¹ Italy’s Memorial, para 4.18, *referring to* (Confidential Annex) (**Annex IT-236**). *See also* (Confidential Annex) (**Annex IT-237**).

⁶² Italy’s Memorial, para. 4.18, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the “Enrica Lexie” (**Annex IT-14**). *See also* India’s Counter-Memorial para. 2.22 and Annex to Chapter 2, p. 32; Italy’s Reply, para. 4.13(4); Hearing Transcript, 8 July 2019, 156:1-5; Hearing Transcript, 15 July 2019, 110:11-24.

⁶³ (Confidential Annex) (**Annex IT-236**).

⁶⁴ (Confidential Annex) (**Annex IT-237**).

⁶⁵ Italy’s Memorial, para. 4.19, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

⁶⁶ (Confidential Annex) (**Annex IT-236**).

⁶⁷ Italy’s Memorial, para. 4.21, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); India’s Counter-Memorial, para. 2.23 and Annex to Chapter 2, p. 32, *referring to* Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**). *See also* Italy’s Reply, para. 4.13(5); Hearing Transcript, 8 July 2019, 156:10-11; Hearing Transcript, 18 July 2019, 129:8-10; Hearing Transcript, 8 July 2019, 16: 2-4.

⁶⁸ Italy’s Memorial, para. 4.23, *referring to* (Confidential Annex) (**Annex IT-236**); India’s Counter-Memorial, para. 2.20; India’s Rejoinder, para. 4.25. *See also* Hearing Transcript, 11 July 2019, 69:24-70:1; Hearing Transcript, 18 July 2019, 129:12-13.

⁶⁹ (Confidential Annex), p. 2 (**Annex IT-237**)

[...] like the ones that hunters use to go hunting”.⁷⁰ In his statement before the Deputy Public Prosecutor of Rome in 2012, Captain Noviello stated that “the boat had a dozen fenders on the outside” which made him wonder “how come they have the fenders on when sailing so far out”.⁷¹ He further notes that “since I could not see any fishing net or fish containers, I didn’t understand why such a small boat was 20 miles from the coast”.⁷²

97. When the craft was at a distance of 300 metres from the “Enrica Lexie”, Sergeant Latorre fired four rounds of a mix of tracer and ordinary bullets.⁷³
98. According to Captain Vitelli, at 16:00 SMT/16:30 IST, while he was “sending routine mid-day messages to the charterer and ship owner [...] at the computer on the bridge”,⁷⁴ he heard shouting on the starboard side.⁷⁵ Captain Vitelli stated that he “rushed to the control panel to ensure that the ship is on hand steering”,⁷⁶ and that he “saw a vessel that looked like a fishing boat at 80 to 100 metres, as if it wanted to collide”.⁷⁷ Captain Vitelli also “heard shots and saw a large amount of water rise up”.⁷⁸
99. Captain Vitelli “sounded the general emergency alarm by bell, by foghorn and announced” three times on the public address system: “We are under pirate attack. This is not a drill”.⁷⁹ He sent the “Enrica Lexie” crew into the engine room, known as the citadel, for shelter,⁸⁰ and warned the

⁷⁰ Hearing Transcript, 15 July 2019, 125:10-14.

⁷¹ (Confidential Annex), p. 1 (**Annex IT-261**). *See also* Hearing Transcript, 15 July 2019, 125:17-20.

⁷² Hearing Transcript, 15 July 2019, 125:15-17; Hearing Transcript, 18 July 2019, 131:11-19.

⁷³ Italy’s Memorial, para. 4.23, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); India’s Counter-Memorial, para. 2.26 and Annex to Chapter 2, p. 32. *See also* Italy’s Reply, para. 4.13(6); Hearing Transcript, 8 July 2019, 157:9-11; Hearing Transcript, 18 July 2019, 129:8-12; Hearing Transcript, 20 July 2019, 16:2-5.

⁷⁴ (Confidential Annex), p. 1 (**Annex IT-262**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**).

⁷⁵ Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of “Enrica Lexie”, 9 August 2013, p. 42 (**Annex IN-28**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); (Confidential Annex), p. 1 (**Annex IT-262**); Statement of Umberto Vitelli (**Annex IT-216**).

⁷⁶ Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of “Enrica Lexie”, 9 August 2013, p. 42 (**Annex IN-28**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Hearing Transcript, 15 July 2019, 28:19-20.

⁷⁷ Hearing Transcript, 15 July 2019, 28:24-25; Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Statement of Umberto Vitelli (**Annex IT-216**).

⁷⁸ (Confidential Annex), p. 1 (**Annex IT-262**). *See also* Hearing Transcript, 15 July 2019, 30:15-21.

⁷⁹ Italy’s Memorial, para. 4.21, *referring to* Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Italy’s Reply, para. 4.19. *See also* Hearing Transcript, 8 July 2019, 156:11-18; Hearing Transcript, 15 July 2019, 29:15-18; 30:8-10; 32:18-19.

⁸⁰ Italy’s Memorial, para. 4.22, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**). *See also* Hearing Transcript, 15 July 2019, 22:10-16.

crew on the bridge “not to go near the glass windows”.⁸¹ The “Enrica Lexie” crew withdrew into the citadel, and only the VPD marines, Captain Vitelli, Captain Noviello, Mr. Victor (SSO), and Mr. Kumandan (Sailor Helmsman) remained on the bridge.⁸²

100. Captain Vitelli increased the speed of the “Enrica Lexie” from 12 to 14 knots, the maximum speed of the vessel.⁸³ More precisely, Captain Vitelli states in this regard:

I increased the speed to maximum power. I increased the speed before pressing SSAS. Boat was very near to midship. If I turned the ship to starboard side it will be very near to boat or collide. If I moved the ship to the portside definitely collide. Therefore I increased the speed at straight line. Before the incident the speed was 12 knots (Nautical mile per hour) and I increased it to 14 knots.⁸⁴

101. When the craft, which continued to approach the “Enrica Lexie”, was at a distance of approximately 80-100 metres from the “Enrica Lexie”, Sergeant Latorre and Sergeant Girone, each fired four further rounds of a mix of tracer and ordinary bullets.⁸⁵ Following this third burst of shots, the small craft, which was then approximately 30 metres from the “Enrica Lexie”, changed its course away from the “Enrica Lexie”.⁸⁶
102. At 16:23 SMT/16:53 IST, Captain Vitelli sent a Ship Security Alarm System (hereinafter “SSAS”) message, communicating the “nature of distress” as a “piracy/armed attack”.⁸⁷ The “Enrica Lexie” was positioned at 09° 20.54’ N 075° 59.31’ E. Its course was 331°, and its speed was 14 knots.⁸⁸

⁸¹ Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Hearing Transcript, 15 July 2019, 31:12-15; 38:1-13.

⁸² Italy’s Memorial, para. 4.22, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**). *See also* Italy’s Reply, paras 4.14, 4.19; Hearing Transcript, 8 July 2019, 157:3-8.

⁸³ Italy’s Memorial, para. 4.20, *referring to* Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**); India’s Counter-Memorial, para. 2.17. *See also* Hearing Transcript, 8 July 2019, 156:5-8; Hearing Transcript, 15 July 2019, 37:5-8.

⁸⁴ Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**).

⁸⁵ Italy’s Memorial, para. 4.24, *referring to* (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); India’s Counter-Memorial, para. 2.27 and Annex to Chapter 2, p. 33; Italy’s Reply, para. 4.13(7). *See also* India’s Rejoinder, paras 4.21-4.22; Hearing Transcript, 8 July 2019, 157:11-13; Hearing Transcript, 18 July 2019, 129:8-12; Hearing Transcript, 20 July 2019, 16:2-6.

⁸⁶ Italy’s Memorial, paras 4.25-4.26, *referring to* Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCPNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**); (Confidential Annex) (**Annex IT-236**). *See also* India’s Counter-Memorial, para. 2.33 *referring to* (Confidential Annex) (**Annex IT-261**) and Annex to Chapter 2, p. 33; Italy’s Reply, paras 4.13(8), 4.16; Hearing Transcript, 8 July 2019, 158: 11-13; Hearing Transcript, 15 July 2019, 113:16-26.

⁸⁷ Italy’s Memorial, para. 4.28, *referring to* Ship Security Alarm System Message sent out by the “Enrica Lexie” on 15 February 2012 (**Annex IT-3**); India’s Counter-Memorial, para. 2.33 and Annex to Chapter 2, p. 33. *See also* Italy’s Reply, paras 4.13(10), 4.16; Hearing Transcript, 8 July 2019, 70:4-8; Hearing Transcript, 15 July 2019, 41:5-6.

⁸⁸ Italy’s Memorial, para. 4.28, *referring to* Ship Security Alarm System Message sent out by the “Enrica Lexie” on 15 February 2012 (**Annex IT-3**); India’s Counter-Memorial, para. 2.33 and Annex to Chapter 2,

103. As will be described in more detail in Section C below, Captain Vitelli maintained the “Enrica Lexie” on alert and on manual steering for one hour following the incident, originally staying left of the ship’s charted course to avoid a “high-traffic, a high-density area for fishing boats”, before returning to the vessel’s original course once the alert ended.⁸⁹
104. At 16:30 SMT/17:00 IST, Captain Vitelli considered the situation as “under control”. Later, at 17:00 SMT/17:30 IST, Captain Vitelli ended the alert, and Sergeant Latorre “declared the incident closed”. The “Enrica Lexie” crew left the citadel.⁹⁰

2. Events as Seen from the “St. Antony”

105. While the “Enrica Lexie” was navigating off the coast of Alleppey (Alappuzha), India, on 15 February 2012, a fishing boat named the “St. Antony” was also navigating off the coast of India, in more or less the same area.⁹¹ The “St. Antony”⁹² had an overall length of 13.72 metres, “weighing about 7.5 to 8 tons including its net and other accessories”, and had a 106 horsepower engine.⁹³ It was owned by Captain Fredy, an Indian national from the State of Tamil Nadu.⁹⁴ The boat was registered in the State of Tamil Nadu under Registration Number TN/15/MFB/208⁹⁵ but apparently flew no visible Indian flag.⁹⁶

p. 33. *See also* Italy’s Reply, paras 4.13(10), 4.16; Hearing Transcript, 8 July 2019, 70:4-8; Hearing Transcript, 15 July 2019, 41:5-6.

⁸⁹ Hearing Transcript, 15 July 2019, 39:18-25.

⁹⁰ Italy’s Memorial, para. 4.30, *referring to* E-mail from the Master of the “Enrica Lexie” to Fratelli D’Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Log Book of the Master of the “Enrica Lexie” (**Annex IT-14**); (Confidential Annex), p. 3 (**Annex IT-236**); India’s Counter-Memorial, para. 2.34 and Annex to Chapter 2, p. 33. *See also* Italy’s Reply, para. 4.13(12); Hearing Transcript, 15 July 2019, 43:11-16.

⁹¹ *See* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**); Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

⁹² It appears that there was another boat, also known as the “St. Antony”, that was owned by a Mr. Prabhu. *See* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**).

⁹³ Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**); Additional Statement of Shri Freddy s/o John Bosco, owner of the “St. Antony” (**Annex IN-39**).

⁹⁴ Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

⁹⁵ India’s Rejoinder, para. 5.30 *referring to* Certificate of Registration for the “St. Antony” issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**).

⁹⁶ Italy’s Reply, paras 5.5, 5.22-5.24 *citing* *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 93 and see para. 29 (**Annex IT-19**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012”, 12 March 2012, p. 4 (**Annex IT-161**); India’s Rejoinder, paras 5.26, 5.29.

106. In addition to Captain Fredy, ten other persons were on the boat as crew members: Mr. Killary, Mr. Francis, Mr. Johnson, Mr. Kinsariyan, Mr. Clemence, Mr. Muthappan, Mr. Martin, Mr. Michael, Mr. Valentine Jelastine and Mr. Ajeesh Pinku.⁹⁷ On the same day, as will be described below, the Indian Coast Guard would identify the “St. Antony” as the small craft involved in the shooting incident with the “Enrica Lexie”.⁹⁸
107. In a statement given on the day of the incident, Captain Fredy states that, “while we were proceeding on a distance of 40 Nautical miles, the time was 04.30 PM when we reached west of Kayamkulara. All others barring Jelastin and Pinku were asleep at that time. It was Jelastin who took the helm. Pinku was at the bow”.⁹⁹
108. In an affidavit sworn on 27 April 2012, Captain Fredy states:

My boat was in the waters for 8 days and I and my workers were fishing in Indian waters. I and my workers after a long night of fishing were in deep sleep, except for two people, who were supposed to be awake. On 15.2.2012 at about 4.30 pm, I got up from deep sleep after hearing noise of firing.¹⁰⁰

109. According to Captain Fredy’s testimony at the Hearing, he had been steering until 16:00 SMT/16:30 IST, at which point, “Jelastine replace[d] [him] from the steering and ask[ed] [him] to sleep”.¹⁰¹ Mr. Jelastine did not have a licence to drive the boat.¹⁰² Captain Fredy adds that “it was 4.10 when [he] lay down”.¹⁰³ Captain Fredy further states:

It was exactly in five minutes. I was not yet in deep sleep, I had just then lay down. I had told [Jelastine] before lying down, “If anything happens, please call me”. The VHF sound also I put in high volume and then only lay down. When I got up and saw – I heard the noise and then only I got up. When I got up and saw, Jelastine was bleeding from ears and eyes.¹⁰⁴

⁹⁷ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**).

⁹⁸ India, in this Arbitration, adopts this conclusion (India’s Counter Memorial, para. 2.1), and Italy does not materially challenge it (Italy’s Reply, para. 4.13: “an incident occurred that involved the *Enrica Lexie* and the *St Antony*”). The Marines, however, appear to contest that the small boat that approached the “Enrica Lexie” was in fact the “St. Antony” (Italy’s Memorial, para. 1.4. *See also* Declaration of Massimiliano Latorre, 18 Feb 2012 (**Annex IT-136**); (Confidential Annex) (**Annex IT-236**)).

⁹⁹ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 149:14-15; Hearing Transcript, 20 July 2019, 17:2-9.

¹⁰⁰ Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

¹⁰¹ Hearing Transcript, 15 July 2019, 149:13-16.

¹⁰² Hearing Transcript, 15 July 2019, 167:13-15.

¹⁰³ Hearing Transcript, 15 July 2019, 149:16-22.

¹⁰⁴ Hearing Transcript, 15 July 2019, 149:18-24.

110. Captain Fredy states that “[b]ullets were being shot into the boat” and that the “firing was done from the ship, which passed us by the right side, heading to the north-west”.¹⁰⁵ In his statement on the day of the incident, Captain Fredy stated that “[n]o alarm sounded or mi[c] announcement made or a warning shot fired, nothing of the sort was done before firing bullets”.¹⁰⁶ In his affidavit sworn of 27 April 2012, Captain Fredy stated that he “saw/heard continuous firing in air, blowing of horns, siren and flashing of lights”.¹⁰⁷ In his testimony at the Hearing, Captain Fredy distanced himself from the affidavit of 27 April 2012 and affirmed that no sirens or alarms were sounded or warning shots fired.¹⁰⁸
111. According to Captain Fredy’s testimony, none of the persons on the “St. Antony” was carrying arms.¹⁰⁹ At the Hearing, when the Arbitral Tribunal asked Captain Fredy: “what kind of visible equipment was the St. Antony carrying on 15th February”,¹¹⁰ he replied: “[a] small knife to cut the fish”.¹¹¹
112. According to Captain Fredy, two crew members of the “St. Antony”, Mr. Jelastine and Mr. Pinku, were hit and killed by bullets.¹¹² Captain Fredy explains that he “was suddenly aroused from [sleep] to see that Jelastin was bleeding from his nose and ear” and that “[b]ullets were being shot into the boat at that time”.¹¹³ Captain Fredy states that he then ordered the other crew members aboard the “St. Antony” to “[l]ie down wherever you are, the ship people are shooting at us”.¹¹⁴ At the same time, Captain Fredy describes that “Pinku, who was onboard the stern, was heard howling ‘amme’,” and that “[b]lood was oozing out from the right side of his chest”.¹¹⁵ He adds

¹⁰⁵ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 150:5-7; Hearing Transcript, 20 July 2019, 17:13-16.

¹⁰⁶ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 153:17-19.

¹⁰⁷ Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

¹⁰⁸ Hearing Transcript, 15 July 2019, 153:17-19; 165:6-166:5.

¹⁰⁹ Hearing Transcript, 15 July 2019, 168:25-169:2.

¹¹⁰ Hearing Transcript, 15 July 2019, 163:25-164:1.

¹¹¹ Hearing Transcript, 15 July 2019, 164:3.

¹¹² Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**), *referred to in Italy’s Memorial*, para. 4.27. *See also* India’s Counter-Memorial, paras 2.28, 2.30; First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2; Hearing Transcript, 15 July 2019, 150:9-15; 150:26-151:4.

¹¹³ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 149:22-24.

¹¹⁴ Hearing Transcript, 15 July 2019, 150:7-8.

¹¹⁵ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2.

that “[t]here was a little inflammation on the right side of the lower limb of Jelastin[e]”, but that he “did not examine how deep Jelastin’s wounds were, out of fear and apprehension”.¹¹⁶

113. Captain Fredy adds that “[t]he firing had continued approximately for two minutes”, when the ship was approximately 200 meters away from the “St. Antony”, and that “[o]n firing, gas leaked out from the cylinders, which were kept atop the boat and in the wheel house, as the firing broke the hose of the same”.¹¹⁷
114. Captain Fredy testified that he then took over the steering,¹¹⁸ and “abruptly helmed the boat away”.¹¹⁹ He steered the “St. Antony” at high speed, and only when he “realized [the bullets] were not hitting the boat” but rather “falling into water” did he slow the boat to “find out what had happened to the two people who were shot”.¹²⁰
115. After slowing down, Captain Fredy explains, he “checked Jelastine first, [and] when [he] held Jelastine[’s] hand and saw, he had died”.¹²¹ Then, Captain Fredy states that he went to see Mr. Pinku “at the back [and found that] he was still alive, he three times took deep breath, “amma” he told and then he died”.¹²²
116. According to Captain Fredy’s affidavit, “had [he] not intervened, there was a risk of collision between the said [b]oat and the other vessel”.¹²³ In his testimony before the Arbitral Tribunal, however, Captain Fredy stated that the reason he steered away was not because the “St. Antony” and the “Enrica Lexie” would have “moved closer together”, but because “there would have been more casualties”.¹²⁴

¹¹⁶ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2.

¹¹⁷ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**); Hearing Transcript, 15 July 2019, 157:8-11.

¹¹⁸ Hearing Transcript, 15 July 2019, 150:9-10.

¹¹⁹ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**), para. 2. *See also* Hearing Transcript, 15 July 2019, 150:16-17; 161:24-26; Hearing Transcript, 18 July 2019, 149: 17-20.

¹²⁰ Hearing Transcript, 15 July 2019, 150:16-25.

¹²¹ Hearing Transcript, 15 July 2019, 150:26-151:1.

¹²² Hearing Transcript, 15 July 2019, 151:2-4.

¹²³ Affidavit of Fredy J., 27 April 2012, para. 1 (**Annex IT-168**).

¹²⁴ Hearing Transcript, 15 July 2019, 162:7-11.

117. After slowing down, Captain Fredy informed other boats through VHF that “[t]here was firing on our boat”.¹²⁵ He also informed other persons, including his brother-in-law, and asked them to report the matter to the police.¹²⁶

C. CHRONOLOGICAL ACCOUNT OF THE IMMEDIATE AFTERMATH OF THE INCIDENT

118. The Arbitral Tribunal will now set out the chronology of events occurring in the aftermath of the shooting incident. Some of these events, and in particular the circumstances causing the “Enrica Lexie” to change course to head to Kochi, are disputed between the Parties. The Parties’ positions in this regard are summarised in detail in Part V, Section V.B.1(a) below.

1. Events Prior to the “Enrica Lexie”’s Change of Course towards Kochi

119. After the craft headed towards the open sea, Captain Noviello called the Company Security Officer (hereinafter “CSO”) of the company that operated the “Enrica Lexie”, Fratelli D’Amato SpA.¹²⁷
120. At 16:23 SMT/16:53 IST, Captain Vitelli sent an SSAS message, communicating the “nature of distress” as a “piracy/armed attack”.¹²⁸
121. At 16:24 SMT/16:54 IST, the CSO of the operating company of the “Enrica Lexie” reported the incident to the Operations Centre of the Italian Port Captaincy Headquarters and to the Italian Ministry of Foreign Affairs.¹²⁹
122. At 16:28 SMT/16:58 IST, by telephone, Sergeant Latorre “reported the attempted attack by suspect pirates” to the Commander in Chief of the Naval Squadron, Operational Headquarters of the Italian Navy (hereinafter “CINCNAV”).¹³⁰

¹²⁵ Hearing Transcript, 15 July 2019, 151:5-8.

¹²⁶ Hearing Transcript, 15 July 2019, 151:5-152:5.

¹²⁷ Italy’s Memorial, para. 4.28, *referring to* (Confidential Annex) (**Annex IT-261**). *See also* Hearing Transcript, 12 July 2019, 5:12-16.

¹²⁸ Italy’s Memorial, para. 4.28, *referring to* Ship Security Alarm System Message sent out by the “Enrica Lexie” on 15 February 2012 (**Annex IT-3**); India’s Counter-Memorial, para. 2.33 and Annex to Chapter 2, p. 33. *See also* Italy’s Reply, paras 4.13(10), 4.16; Hearing Transcript, 8 July 2019, 70:4-8; Hearing Transcript, 15 July 2019, 41:5-6.

¹²⁹ Italy’s Memorial, para. 4.29, *referring to* (Confidential Annex) (**Annex IT-247**); (Confidential Annex) (**Annex IT-261**).

¹³⁰ India’s Counter-Memorial, para. 2.33 and Annex to Chapter 2, p. 33, *referring to* Piroli Report (Confidential Annex), p. 2-8 (**Annex IT-233**); Hearing Transcript, 12 July 2019, 5:16-20.

123. At 16:30 SMT/17:00 IST, Captain Vitelli considered the situation to be “under control”.
124. Subsequently, at 16:43 SMT/17:13 IST, CINCPAC informed the United Kingdom Marine Trade Operations (hereinafter “UKMTO”) by e-mail that “Italian merchant vessel Enrica LEXIE in PSN 09°20N – 075°59E has been approached by a boat with 5 armed suspect pirates”.¹³¹
125. At 17:00 SMT/17:30 IST, Captain Vitelli ended the alert, and Sergeant Latorre “declared the incident closed”. The “Enrica Lexie” crew left the citadel.¹³² At this point, “once the alarm time was over”, the “Enrica Lexie” resumed its intended journey.¹³³ At the same time, CINCPAC reported the incident involving the “Enrica Lexie” to various officials “including the Office of the Chief of Staff of the Italian Navy (MARISTAT)”.¹³⁴
126. At an unspecified time, Captain Fredy called the owner of another boat, also named the “St. Antony”, to inform him of the incident and the deaths of two of his boat’s crew members, Mr. Pinku and Mr. Jelastine.¹³⁵ Thereafter, Captain Fredy contacted his brother-in-law by VHF, directing him to alert the police that there had been a fatal shooting upon his boat.¹³⁶ He further described the ship that had fired at the “St. Antony” and gave its general course coordinates, stating that “there is a ship moving towards north, black colour ship, on the back side it is written Napoli” and that “in four hours, the ship will cross Kochi”.¹³⁷ At 17:00 SMT/17:30 IST, the “death of two fishermen following firing from a ship” was reported to the Coastal Police Station, Neendakara, and the Coastal Police Station, Fort Kochi.¹³⁸

¹³¹ Hearing Transcript, 12 July 2019, 6:9-13, *referring to* Piroli Report (Confidential Annex), p. 2-9 (**Annex IT-233**).

¹³² Italy’s Memorial, para. 4.30, *referring to* E-mail from the Master of the “Enrica Lexie” to Fratelli D’Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Log Book of the Master of the “Enrica Lexie” (**Annex IT-14**); (Confidential Annex), p. 3 (**Annex IT-236**); India’s Counter-Memorial, para. 2.34 and Annex to Chapter 2, p. 33. *See also* Italy’s Reply, para. 4.13(12).

¹³³ Italy’s Memorial, para. 4.31, *referring to* Additional Statement of Umberto Vitelli, 2 March 2012, p. 93 (**Annex IT-157**). *See also* India’s Counter-Memorial, para. 2.34; Italy’s Reply, paras 4.13(14), 4.29; Hearing Transcript, 9 July 2019, 1:15-17; 4:26-5:1; Hearing Transcript, 15 July 2019, 43:25-44:1.

¹³⁴ Italy’s Memorial, para. 4.32, *citing* Commander in Chief of the Naval Squadron (CINCPAC) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012 (**Annex IT-109**). *See also* Hearing Transcript, 8 July 2019, 73:13-16; 74:17-75:16; Hearing Transcript, 12 July 2019, 6:13-17.

¹³⁵ Italy’s Memorial, para. 4.33, *referring to* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**). *See also* Hearing Transcript, 15 July 2019, 151:5-18.

¹³⁶ Hearing Transcript, 15 July 2019, 151:20-24.

¹³⁷ Hearing Transcript, 15 July 2019, 152:10-15.

¹³⁸ Italy’s Memorial, paras 4.34-4.35, *referring to* General Diary Extract of Coastal Police Station, Neendakara, Kollam, 15 February 2012 (**Annex IT-113**); General Diary Abstract of Coastal Police Station, Fort Kochi, Ernakulam, 15 February 2012 (**Annex IT-114**). *See also* Italy’s Reply, para. 4.29; Hearing Transcript, 9 July 2019, 5:6-8; Hearing Transcript, 12 July 2019, 7:22-25.

127. At 17:10 SMT/17:40 IST, the Coastal Police Station, Neendakara, informed Coast Guard District HQ 4, Kochi, of a “firing by merchant vessel on fishing boat Saint Antony” at “1630” at position “190 Kochi Lt 45 NM (09 deg 16 min N 076 deg 02 min E)”.¹³⁹ Coast Guard District HQ 4 then passed on the information to the Maritime Rescue Coordination Centre (hereinafter “MRCC”) Mumbai.¹⁴⁰
128. At 17:20 SMT/17:50 IST, Coast Guard District HQ 4 informed DIG Negi of the Coast Guard Air Enclave at Kochi (hereinafter “CGAE”), who flew the Dornier aircraft stationed at Indian Naval Ship (hereinafter “INS”) “Garuda”, to “stand by ready for a launch”.¹⁴¹ The Coast Guard District HQ 4 also informed Commandant Kumar aboard ICGS “Lakshmibai”, and the ICGS “Samar”, which was already at sea, of the incident and instructed them to “stand by”.¹⁴²
129. At 17:40 SMT/18:10 IST, the Coast Guard District HQ 4 informed DIG Negi “that a fishing boat was fired by a merchant vessel at sea” and directed him to “conduct search for suspected vessel between Kollam and Kadungalloor”.¹⁴³ The ICGS “Samar” “was diverted to proceed with best speed to areas of incident”.¹⁴⁴ According to the Boarding Officer’s Report, the “ICGS Samar was directed to divert from area patrol and proceed with maxspeed to reach area and render assistance for apprehension of suspect vessel”.¹⁴⁵

¹³⁹ Italy’s Memorial, para. 4.36, *citing* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 1 (**Annex IT-9**). *See also* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 177 (**Annex IT-131**); Hearing Transcript, 9 July 2019, 5:8-9.

¹⁴⁰ Italy’s Memorial, para. 4.36, *referring to* Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**). *See also* Hearing Transcript, 12 July 2019, 8: 3-7.

¹⁴¹ Italy’s Memorial, para. 4.39 *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**); India’s Counter-Memorial, para. 2.35. *See also* Hearing Transcript, 16 July 2019, 15:21-24.

¹⁴² Italy’s Memorial, para. 4.37, *referring to* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 2 (**Annex IT-9**); India’s Counter-Memorial, para. 2.35. *See also* Hearing Transcript, 9 July 2019, 5:9-10; Hearing Transcript, 16 July 2019, 133:14-20; 134:13-19.

¹⁴³ Italy’s Memorial, para. 4.59, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**). *See also* Italy’s Reply, para. 4.44; Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 2 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 16:10-14; 16:17-21.

¹⁴⁴ Hearing Transcript, 9 July 2019, 5:11-13, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

¹⁴⁵ Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 1 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 137:6-20.

130. At 17:47 SMT/18:17 IST, by e-mail, Captain Vitelli reported the incident to Fratelli D’Amato SpA, to the nearest Italian naval vessel in the area (the “Grecale”), to UKMTO, and to the Maritime Security Centre – Horn of Africa (hereinafter “MSCHOA”).¹⁴⁶
131. At approximately 18:30 SMT/19:00 IST, MRCC Mumbai communicated with the “Enrica Lexie” by telephone and spoke to Captain Noviello and Mr. Gupta. The Log Book records in this regard:
- After the event, at approximately 1830 hrs, we were contacted by phone by Bombay MRCC Command and, through 2nd Officer Sahil GUPTA, told us that they had been informed about the suspect pirate attack and, as a result, had seized two crafts. Having enquired about our course and speed, they asked me to change course and head toward Cochin (India) to take stock of events and bear witness. I asked for, and received, a written message. At 1915 hrs we changed course, heading toward Cochin.¹⁴⁷
132. At 18:30 SMT/19:00 IST, the copy of the SSAS message issued by the “Enrica Lexie” as well as the vessel’s technical description were communicated by MRCC Rome to the Presidency of the Council of Ministers of Italy, the Ministry of Transport, the Ministry of Foreign Affairs, the Ministry of Interior, and the Office of the Rome Public Prosecutor. As noted above, the message indicated the “nature of distress” as “[p]iracy/armed attack”.¹⁴⁸
133. By 18:40 SMT/19:10 IST, MRCC Mumbai, using the “AIS [Automatic Identification System] and LRIT [long-range identification and tracking]”, had indicated that the “Enrica Lexie” was the “suspected vessel” and found that the “Enrica Lexie” was at position “243 Kochi Lt 37 [nautical] miles, about 34 [nautical] miles” from the position of the incident.¹⁴⁹

¹⁴⁶ Italy’s Memorial, para. 4.31, *referring to* E-mail from the Master of the “Enrica Lexie” to Fratelli D’Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**). *See also* Hearing Transcript, 9 July 2019, 5:14-20; Hearing Transcript, 12 July 2019, 6:19-23, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**).

¹⁴⁷ Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**). *See also* Italy’s Memorial, para. 4.60 *citing* Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**); India’s Counter-Memorial, paras 2.36-2.37 and p. 33, Annex to Chapter 2; Italy’s Reply, para. 4.30; Hearing Transcript, 9 July 2019, 5:21-6:3; Hearing Transcript, 12 July 2019, 9:3-11; 9:23-10:13; Hearing Transcript, 15 July 2019, 44:17-45:20; Hearing Transcript, 18 July 2019, 159:21-160:12; Hearing Transcript, 20 July 2019, 27:8-12.

¹⁴⁸ Italy’s Memorial, para. 4.40, *referring to* Communication from MRCC Rome to the Presidency of the Council of Ministers of Italy and various Ministries, 14:30 (CET), 15 February 2012 (**Annex IT-107**). *See also* India’s Counter-Memorial, para. 2.35, and p. 33, Annex to Chapter 2; Hearing Transcript, 9 July 2019, 6:4-7.

¹⁴⁹ Italy’s Memorial, para. 4.38, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 9 July 2019, 6:8-11; Hearing Transcript, 12 July 2019, 8:18-26.

134. At 18:50 SMT/19:20 IST, the CGAE received “the name and type of vessel involved in the firing” from Coast Guard District HQ 4.¹⁵⁰
135. At 19:00 SMT/19:30 IST, Sergeant Latorre called CINCNAV regarding the “request for collaboration” that MRCC Mumbai had submitted via telephone to the Master of the “Enrica Lexie”.¹⁵¹ At 19:05 SMT/19:35 IST, Captain Vitelli also communicated by telephone with CINCNAV.¹⁵²
136. At 19:05 SMT/19:35 IST, from INS “Garuda”, DIG Negi and two other crew members took off on the Indian Coast Guard Dornier aircraft CG760 for “sea-air coordinated search”.¹⁵³ At the same time, Commandant Kumar of ICGS “Lakshmbai” received directions to sail “with dispatch” and “interrogate/identify all the merchant vessels in the area” in search of the vessel involved in the firing.¹⁵⁴ INS “Kabra” also sailed out.¹⁵⁵

2. The “Enrica Lexie”’s Change of Course

137. The Log Book records that, “at 1915 hrs we changed course, heading toward Cochin”.¹⁵⁶
138. At 19:15 SMT/19:45 IST, Captain Vitelli received a VHF call from the CGAE aboard the Dornier aircraft requesting his “route and speed” and confirming whether the “Enrica Lexie” was heading to Kochi.¹⁵⁷ In DIG Negi’s statements, he asserts that during this phone call, he “directed” the “Enrica Lexie” to amend course further so as to proceed to Kochi.¹⁵⁸

¹⁵⁰ Italy’s Memorial, para. 4.62, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**). *See also* Hearing Transcript, 16 July 2019, 16:25-17:8.

¹⁵¹ India’s Rejoinder para. 4.51; Hearing Transcript, 12 July 2019, 11:22-12:1, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

¹⁵² India’s Rejoinder para. 4.52; Hearing Transcript, 12 July 2019, 12:9-14, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

¹⁵³ Italy’s Memorial, para. 4.63, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Italy’s Reply, para. 4.31.

¹⁵⁴ Italy’s Memorial, para. 4.64, *referring to* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 46 (**Annex IT-134**). *See also* Hearing Transcript, 9 July 2019, 7:2-4; Hearing Transcript, 16 July 2019, 89:16-90:1; 90:14-24.

¹⁵⁵ Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**). *See also* Hearing Transcript, 9 July 2019, 7:2-4.

¹⁵⁶ Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**). *See also* Statement of Umberto Vitelli (**Annex IT-216**); Hearing Transcript, 12 July 2019, 16:21-22.

¹⁵⁷ (Confidential Annex), p. 3 (**Annex IT-262**).

¹⁵⁸ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 78 (**Annex IT-7**); Statement of Witness in connection with the NIA investigation, Statement of Commandant Alok

139. DIG Negi reports that the “Enrica Lexie”’s charted course was “supposed to be 345” but at this point, the vessel was instead “doing a east-northeasterly course... [at] about 040”.¹⁵⁹ Captain Vitelli states, “at the moment [that the CGAE called] I was changing route”.¹⁶⁰ However, Captain Vitelli avers that while, indeed, the “Enrica Lexie” was turning, it was not yet navigating directly for Kochi; rather, the ship directed course toward a point “across from Kochi; that is to say, when the course with respect to the port of Kochi was on the side of the ship”.¹⁶¹
140. At 19:20 SMT/19:50 IST, the Indian Coast Guard Dornier aircraft located and arrived above the “Enrica Lexie” at 09° 51.6’ N 075° 37.5’ E, “beyond India’s territorial sea”.¹⁶² The Dornier aircraft “encircled” and “contacted” the “Enrica Lexie” over VHF in channels 16 and 10.¹⁶³
141. At 19:20 SMT/19:50 IST, four Indian policemen “reported [to] DHQ-4 for embarking onboard” the ICGS “Lakshmbai” in advance of setting sail.¹⁶⁴ According to the testimony of Commandant Kumar, prior to setting sail, the ICGS “Lakshmbai” was “not aware of the name of the ship” and had no orders to intercept any specific vessel.¹⁶⁵ Rather, the ICGS “Lakshmbai” was under general orders to interrogate vessels at sea. According to Commandant Kumar, police officers were brought on board because there had been a “firing incident”, which made it a “police matter, not a Coast Guard matter”.¹⁶⁶ At 19:30 SMT/20:00 IST, the ICGS “Lakshmbai” set sail out of Kochi, and approximately fifteen minutes thereafter, conducted mock “boarding drills” which lasted around two to three minutes.¹⁶⁷

Negi, Coast Guard, 750 Squadron, Coast Guard Air Station, Daman, 19 September 2013, p. 37 (**Annex IT-279**). *See also* Hearing Transcript, 18 July 2019, 163:15-164:1.

¹⁵⁹ Hearing Transcript, 16 July 2019, 55:22-56:4.

¹⁶⁰ India’s Rejoinder, para. 4.54, *referring to* (Confidential Annex), p. 3 (**Annex IT-262**). *See also* Hearing Transcript, 15 July 2019, 46:12-47:5; 78:6-12; Hearing Transcript, 18 July 2019, 163: 11-15.

¹⁶¹ Hearing Transcript, 15 July 2019, 92:7-12. *See also* Hearing Transcript, 18 July 2019, 163:2-4.

¹⁶² Italy’s Memorial, para. 4.65, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 4 (**Annex IT-9**); India’s Counter-Memorial, para. 2.41 and Annex to Chapter 2, p. 34; Italy’s Reply, para. 4.3(4), *referring to* Statement of Witness in connection with the NIA investigation, Statement of Shri N.V. Rama Rao, Commandant, Coast Guard, Officer In-Charge, MRCC Mumbai, 16 July 2013, p. 129 (**Annex IT-277**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Hearing Transcript, 9 July 2019, 6:12-15.

¹⁶³ Italy’s Memorial, para. 4.66, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

¹⁶⁴ Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 104:6-12.

¹⁶⁵ Hearing Transcript, 16 July 2019, 98:25-3; Hearing Transcript, 20 July 2019, 39:5-41:1.

¹⁶⁶ Hearing Transcript, 20 July 2019, 41:15-24. *See also* Hearing Transcript, 16 July 2019, 96:18-22.

¹⁶⁷ Italy’s Memorial, para. 4.67, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 94:13-26.

142. At 19:30 SMT/20:00 IST, Sergeant Latorre sent an Action Report to CINCNAV, the Italian Ministry of Defence, and the Office of the Chief of Staff of the Italian Navy, “informing them of the incident with the craft and the measures taken by the VPD in response”.¹⁶⁸ At the same time, Italy’s Interforce Operations High Command issued a Flash Report to “recipients including the Office of the President of the Italian Republic, the Ministry of Foreign Affairs, and several offices of the Ministry of Defence” regarding the shooting incident.¹⁶⁹
143. At 19:45 SMT/20:15 IST, the “Enrica Lexie” responded to radio calls from the ICGS “Lakshmibai”, repeating the direction given by the CGAE that the “Enrica Lexie” should continue on to Kochi.¹⁷⁰
144. By approximately 20:00 SMT/20:30 IST, the “Enrica Lexie” arrived at the point across from Kochi (a true course of 79°) and, at that point, proceeded to turn towards the port of Kochi.¹⁷¹
145. At around that time, the following message from MRCC Mumbai was received by the “Enrica Lexie”:

Dear Master [...] Refer to telecon todote at around 1330 hrs UTC [Coordinated Universal Time] with MCC Mumbai, duty controller, understand there has been a piracy incident/firing incident by your vessel on a suspicious skiffs at around 1600 hrs LT off allepey in position 09 16 N, 076 02 E. You are requested to head for Kochi and establish communication with Indian Coast Guard, VHF 16 and telephone 91 482 2217164 and 2218969 for further deposition/clarification. Request ETA Kochi. Regards, MRCC Mumbai¹⁷²

146. As set out in Part V, Section B.1 below, Italy and India disagree as to whether the message from MRCC Mumbai was received before or after the “Enrica Lexie” had changed course.
147. Captain Vitelli forwarded the message to MSCHOA and UKMTO, with a copy to Fratelli D’Amato SpA. In the covering e-mail, Captain Vitelli noted: “[p]lease be advised that with reference to the below message from MRCC Mumbai we have altered course and are now

¹⁶⁸ Italy’s Memorial, para. 4.41, *referring to* Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**).

¹⁶⁹ Italy’s Memorial, para. 4.42, *referring to* Interforce Operations High Command Flash Report no. 016/SO to the Presidency of the Republic of Italy and various Ministries, 15:30 (CET), 15 February 2012 (**Annex IT-115**).

¹⁷⁰ Italy’s Memorial, para. 4.68, *referring to* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 46 (**Annex IT-134**); Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant Rohithesh Kumar, Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Hearing Transcript, 16 July 2019: 110:12-16.

¹⁷¹ Hearing Transcript, 20 July 2019, 34:13-21, *referring to* Log Book of the Master of the “Enrica Lexie” (**Annex IT-14**).

¹⁷² Italy’s Memorial, para. 4.69, *referring to* E-mail from MRCC Mumbai to Master of the “Enrica Lexie”, 15 February 2012 (**Annex IT-8**); E-mail from MRCC Mumbai to the Master of the “Enrica Lexie”, 16:10 (CET), 15 February 2012 (**Annex IT-123**).

proceeding towards Cochin. We will revert when we resume the voyage”.¹⁷³ At 20:40 SMT/21:10 IST, MRCC Rome sent a copy of the report received from Captain Vitelli to the Presidency of the Council of Ministers of Italy, the Ministry of Transport, the Ministry of Foreign Affairs, the Ministry of Interior, and the Office of the Rome Public Prosecutor.¹⁷⁴

3. Arrival of the “Enrica Lexie” at Kochi Anchorage

148. From the first point of contact with the “Enrica Lexie” until the ship arrived and anchored at Kochi anchorage, the Dornier aircraft remained in communication with and in the vicinity of the “Enrica Lexie”. According to DIG Negi: “We contacted them continuously over VHF. The ship altered the course towards Kochi and we shadowed it to Kochi anchorage till 22.30 hrs”.¹⁷⁵ At approximately 21:00 SMT/21:30 IST, ICGS “Lakshmbai” arrived at the location of the “Enrica Lexie” and sailed alongside it to the “outer anchorage of Kochi”.¹⁷⁶
149. The “Enrica Lexie” arrived at Kochi anchorage at 21:18 SMT/21:48 IST and began to drop anchor at that time, at position 09° 56.0’ N 076° 04.1’ E, “within India’s territorial sea”.¹⁷⁷ The “Enrica

¹⁷³ Hearing Transcript, 12 July 2019, 14:25-15:1; 15:18-23, *referring to* Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**); E-mail from the Shipmaster of the “Enrica Lexie” to MSCHOA and UKMTO dated 15 February 2012 at 19:47 IST (**Annex IN-36**). *See also* E-mail from the Master of the “Enrica Lexie” to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**). The time stamp on Annex IT-120 is different from the one in Annex IN-36.

¹⁷⁴ Italy’s Memorial, para. 4.43, *referring to* Communication from MRCC Rome to the Presidency of the Council of Ministers of Italy and various Ministries, 16:40 (CET), 15 February 2012 (**Annex IT-116**).

¹⁷⁵ Italy’s Memorial, para. 4.66, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**); Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**). *See also* India’s Rejoinder, para. 4.62; Hearing Transcript, 15 July 2019, 52:3-25; 93:11-26; Hearing Transcript, 16 July 2019, 6:10-19; 19:14-20:16; Hearing Transcript, 18 July 2019, 167:12-16.

¹⁷⁶ Italy’s Memorial, para. 4.71, *referring to* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**). *See also* India’s Counter-Memorial, para. 2.42; Italy’s Reply, paras 4.54-4.55, 4.59; India’s Rejoinder, para. 4.62; Hearing Transcript, 9 July 2019, 7:13-15; Hearing Transcript, 18 July 2019, 168:3-15; Hearing Transcript, 20 July 2019, 42:15-16; 43:5-13.

¹⁷⁷ Italy’s Memorial, para. 4.72, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); Extract from the “Enrica Lexie” Log Book for 15 February 2012 (**Annex IT-121**); Statement of Umberto Vitelli (**Annex IT-216**). *See also* Italy’s Reply, para. 4.32.

Lexie” finished anchoring at 22:05 SMT/22:35 IST, 4.5 nautical miles off the shore of Kochi, at position 09° 56.19’ N 076° 07.06’ E.¹⁷⁸ ICGS “Samar” also reached the area that night.¹⁷⁹

150. Captain Noviello testified that the Indian Coast Guard assured the “Enrica Lexie” through VHF immediately prior to mooring that they would not “waste more than six hours’ time”.¹⁸⁰ According to him, however, the Coast Guard failed to board the “Enrica Lexie” that night, stating that the sea was too rough.¹⁸¹
151. The Dornier aircraft remained above the “Enrica Lexie” until 22:45 SMT/23:15 IST.¹⁸² At 23:09 SMT/23:39 IST, Captain Vitelli informed MRCC Mumbai by e-mail that the “Enrica Lexie” had instructions to resume its voyage “not later than 06:00 on 16 February 2012”. In response, MRCC Mumbai requested that the “Enrica Lexie” “be in the anchored position” until the completion of the investigation by Indian authorities of “the firing incident”.¹⁸³
152. At 22:45 SMT/23:15 IST, once the “St. Antony” had reached the shore at Kollam, Captain Fredy informed the Kerala Police (District of Kollam, Coastal Police Station, Neendakara) of the firing “in the vicinity of the [“St. Antony”]” and “the deaths of two fishermen aboard the vessel, Mr. Pink[u] and Mr. Jelastine, at between approximately 31 and 33 nautical miles north-west of Neendakara”.¹⁸⁴

¹⁷⁸ Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**); Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 6 (**Annex IT-9**); Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant Rohitesh Kumar, Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 33 (**Annex IT-278**). *See also* Hearing Transcript, 20 July 2019, 43:23-25; Hearing Transcript, 18 July 2019, 171:19-22; Hearing Transcript, 16 July 2019, 79:22-80:3.

¹⁷⁹ Italy’s Memorial, para. 4.72, *referring to* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 5 (**Annex IT-9**); India’s Counter-Memorial, para. 2.43 and Annex to Chapter 2, p. 34. *See also* Hearing Transcript, 16 July 2019, 148:6-22. After the “Enrica Lexie”’s anchorage at Kochi, from 16 February 2012, Italy in its pleadings refers to events in IST, although it explains that the “Enrica Lexie” did not adjust its clocks to IST until 01:00 IST on 17 February 2012. *See* Italy’s Memorial, para. 4.75, n. 295.

¹⁸⁰ Hearing Transcript, 15 July 2019, 117:14-17.

¹⁸¹ Hearing Transcript, 15 July 2019, 117:18-23.

¹⁸² Italy’s Memorial, para. 4.74, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

¹⁸³ Italy’s Memorial, paras 4.75, 4.77, *referring to* E-mail from the Master of the “Enrica Lexie” to MRCC Mumbai, 23:39 (IST), 15 February 2012, and E-mail from MRCC Mumbai to the Master of the “Enrica Lexie”, 21:14 (CET), 15 February 2012 (**Annex IT-122**).

¹⁸⁴ Italy’s Memorial, para. 4.45, *referring to* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-110**); First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-117**).

153. The “Enrica Lexie” was monitored for the rest of the night by Coast Guard patrols. At 12:50 SMT/1:20 IST, the Chairman of the Cochin Port Trust received a fax from the Coast Guard District HQ 4 instructing that the “Enrica Lexie should not be permitted to leave Kochi Anchorage without permission of State Police/Coast Guard”.¹⁸⁵
154. The next day, on 16 February 2012, Italy and India, respectively, commenced investigations and subsequently initiated proceedings in relation to the “Enrica Lexie” incident. The Indian investigation and proceedings are set out in Section D below, followed by the Italian investigation and proceedings in Section E.

D. THE INDIAN INVESTIGATION AND PROCEEDINGS

1. Investigations within the Kochi Anchorage Position

155. On 15 February 2012, through the registration of a First Information Report at the Coastal Police Station in Neendakara, Kollam, the Kerala Police initiated investigation into a complaint by the owner and captain of the “St. Antony” concerning the killing of two Indian fishermen. The First Information Report referred to Section 302 of the Indian Penal Code, which addresses the crime of murder.¹⁸⁶
156. On 16 February 2012, at 9:30 IST, the ICGS “Lakshmbai” was instructed to board the “Enrica Lexie” with a “boarding party” constituted of Commandant Kumar, 36 police officers, including the assistant commissioner of police, and three commandos (hereinafter the “Boarding Party”).¹⁸⁷
157. Between 10:30 and 11:30 IST,¹⁸⁸ the Boarding Party boarded the “Enrica Lexie” and commenced their investigation. According to the testimony of Commandant Kumar, the Boarding Party

¹⁸⁵ Italy’s Memorial, para. 4.76, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Italy’s Reply, paras 4.61-4.62; Hearing Transcript, 16 July 2019, 145:21-146:7.

¹⁸⁶ Italy’s Memorial, paras 6.20-6.21, *referring to* First Information Report no. 2 of 2012, Kerala Police, 15 February 2012 (**Annex IT-117**).

¹⁸⁷ Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 6 (**Annex IT-9**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 152:10-20.

¹⁸⁸ The exact time of boarding is uncertain. *See* Italy’s Memorial, para. 4.79, *referring to* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, p. 129 (**Annex IT-9**) (stating that the boarding occurred at about 10:30 IST); Log Book of the Master of the “Enrica Lexie”, p. 3 (**Annex IT-14**) (stating that the boarding took place at around 10:45 SMT). *See also* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**) (stating that the boarding occurred at 11:28 IST); Commandant Kumar’s testimony in Hearing Transcript, 16 July 2019, 154:24-155:1 (stating that the boarding took place “by” 11:30 IST).

boarded the “Enrica Lexie” unarmed, except for a gunnery sailor.¹⁸⁹ He also testifies that at approximately one hour later, another police officer boarded the “Enrica Lexie” armed with a pistol.¹⁹⁰

158. According to the Log Book, the Coast Guard asserted that the incident came “under the jurisdiction of their territorial waters”.¹⁹¹ Further, the Coast Guard “informed [those on the “Enrica Lexie”] that they were under investigation for the murder of the two fishermen”.¹⁹² Captain Vitelli and Sergeant Latorre declined to provide details of the incident “until the Italian Consul General arrived from Mumbai”.¹⁹³
159. According to the testimony of Commandant Kumar, he engaged in a ten to fifteen minute discussion with the Marines attempting to convince them to come inside the harbour for investigation.¹⁹⁴ Sergeant Latorre indicated that the VPD is “exclusively answerable to Italian Judicial Authorities” and that the Italian authorities were investigating the incident.¹⁹⁵ Sergeant Latorre submitted to the Boarding Party a written statement that the Marines aboard the ship were answerable solely to Italian judicial authorities.¹⁹⁶ The document contains the following language:

Please be informed that on board of this Vessel there is a duly appointed Protection Detachment acting as Law Enforcement Detachment. The Detachment belongs to Italian Navy and is exclusively answerable to Italian Judicial Authorities.

Under International Law, the detachment is afforded with judicial immunities as internationally recognized in respect of military forces in transit. The presence of the detachment under Indian Jurisdiction is solely due to the diversion of the vessel.

The events occurred which the Indian Authorities are investigating are currently investigated by Italian authorities which are the sole competent judicial authorities under article 97 of the United Nations Convention on the High Seas.

The weapons and the witnesses material to the investigations are under exclusive Italian judicial authority.

¹⁸⁹ Hearing Transcript, 16 July 2019, 168:8-169:-8; 170:8-13.

¹⁹⁰ Hearing Transcript, 16 July 2019, 169:21-170:3.

¹⁹¹ Log Book of the Master of the “Enrica Lexie”, p. 3 (**Annex IT-14**).

¹⁹² Italy’s Memorial, para. 4.81, *referring to* “Coast Guard, fishermen made a smart move”, The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

¹⁹³ Log Book of the Master of the “Enrica Lexie”, p. 3 (**Annex IT-14**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 9 (**Annex IT-9**).

¹⁹⁴ Hearing Transcript, 16 July 2019, 160:10-15.

¹⁹⁵ Italy’s Memorial, para. 4.82, *referring to* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, paras 10-11 (**Annex IT-9**); Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**).

¹⁹⁶ Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**). *See also* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 9 (**Annex IT-9**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Hearing Transcript, 16 July 2019, 162:11-165:15.

I'm not authorized to provide any information on ongoing investigations nor to hand over any evidence nor surrender any component of the detachment without authorization of the Italian Authorities.¹⁹⁷

160. However, upon further “interrogation” by the Boarding Party, Captain Vitelli submitted the crew list, the Last Port clearance, Seamen books of the crew, and the identification cards of the Italian marines.¹⁹⁸ An accounting of the weapons aboard the ship was also taken by the Boarding Party, and, according to the Boarding Officer’s Report, “[c]ontinuous pressure was maintained on the crew and master to furnish details of the weapons and surrender them”.¹⁹⁹
161. According to Captain Vitelli, the Kerala Police seized and copied the Voyage Data Recorder (“VDR”) hard disk.²⁰⁰
162. According to the inspection/detention memorandum completed by Commandant Kumar, by 11:30 IST, Commandant Kumar had “formally detained” the “Enrica Lexie”.²⁰¹ At 17:32 IST, the Indian Ministry of External Affairs sent a facsimile message to Commandant Kumar with instructions to bar the “Enrica Lexie” from leaving the Kochi anchorage and to bring the ship into port.²⁰²
163. Soon thereafter, at 18:18 IST, Consul of Italy Giampaolo Cutillo arrived at the “Enrica Lexie”, and negotiations between the Boarding Party and the crew and Marines began. During these negotiations, the Indian authorities invited the “Enrica Lexie” to come into port. Following the meeting, Captain Vitelli indicated that the “Enrica Lexie” intended to stay moored where it was. However, the Log Book indicates that it was “made clear that the invitation” to enter Kochi port “is actually an order”.²⁰³ The Italian authorities advised the Master, crew, and VPD of the “Enrica Lexie” to cooperate with the Indian agencies in the investigation.²⁰⁴ It is Italy’s position that the

¹⁹⁷ Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**).

¹⁹⁸ Hearing Transcript, 16 July 2019, 166:12-167:5. *See also* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 10 (**Annex IT-9**).

¹⁹⁹ Hearing Transcript, 16 July 2019, 167:9-24. *See also* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, paras 10-11 (**Annex IT-9**).

²⁰⁰ Hearing Transcript, 18 July 2019, 137:8-12; Hearing Transcript, 20 July 2019, 23:11-19, *referring to* (Confidential Annex), p. 4 (**Annex IT-262**). *See also* Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of “Enrica Lexie”, 9 August 2013, pp 46-47 (**Annex IN-28**); Statement of Witness in connection with the NIA Investigation, Statement of Shri Victor James Mandley Samson, p. 50 (**Annex IN-31**).

²⁰¹ Inspection/Detention Memo for Boarding Officer, 16 February 2012 (**Annex IT-285**). *See also* Hearing Transcript, 16 July 2019, 157:18-22.

²⁰² Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 176 (**Annex IT-131**); Hearing Transcript, 16 July 2019, 172:10-173:1.

²⁰³ Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 11 (**Annex IT-9**); Log Book of the Master of the “Enrica Lexie”, p. 3 (**Annex IT-14**).

²⁰⁴ Italy’s Memorial, paras 4.86, 4.88, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 3 (**Annex IT-14**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 2 (**Annex IT-9**).

VPD Marines, therefore, “could not ‘freely accept or decline’ to enter into India’s territorial sea or to be brought into its internal waters and land territory”.²⁰⁵

2. Investigations within Kochi Port and Indian Land Territory

164. After declining several times the Indian authorities’ request that it enter the port of Kochi, the “Enrica Lexie” eventually entered the port, “weighed anchor” at 22:35 IST, and subsequently, with the help of an Indian pilot, navigated to Kochi Oil Terminal.²⁰⁶ At approximately 1:40 IST on 17 February 2012, the “Enrica Lexie” “came alongside” Kochi Oil Terminal.²⁰⁷ Subsequently, at 3:30 IST, the Indian Coast Guard and the Boarding Party, after waiting for the arrival of a vehicle from the base, disembarked from the “Enrica Lexie”.²⁰⁸

165. The Indian authorities took the following documents from the “Enrica Lexie”:

(1) Ship Particulars of M.T. ENRICA LEXIE (IMO No: 9489297) – 2 sheets; (2) Crew List (24 Persons) – 1 sheet; (3) Crew List of Security Persons [6 persons] – 1 sheet; (4) Drawn-to-scale of midship section – 1 sheet; (5) Notice for Crew in Connection with Company Security officer – 1 sheet; and (6) Notice for crew in connection with Designated Person ashore – 1 sheet.²⁰⁹

166. On 18 February 2012, Captain Vitelli and Sergeant Latorre each signed on board the “Enrica Lexie” a statement that they did “not recognize the photo published by the media of the vessel ‘M/P St. Antony’ as the boat with which [they] had dealings on 15 Feb 2012”.²¹⁰ Similarly, in his testimony, Captain Noviello questioned whether the “St. Antony” was the craft encountered by the “Enrica Lexie”.²¹¹

167. On the morning of 19 February 2012, the Indian police disembarked Captain Vitelli for questioning, which did not result in any details of the incident of 15 February 2012 being provided

²⁰⁵ Hearing Transcript, 18 July 2019, 118:10-13.

²⁰⁶ Italy’s Memorial, paras 4.89-4.90, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 3 (**Annex IT-14**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 12 (**Annex IT-9**).

²⁰⁷ Italy’s Memorial, para. 4.90, *referring to* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 12 (**Annex IT-9**); Log Book of the Master of the “Enrica Lexie”, p. 3 (**Annex IT-14**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 176 (**Annex IT-131**). *See also* Hearing Transcript, 16 July 2019, 173:13-16.

²⁰⁸ Italy’s Memorial, para. 4.90, *referring to* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 12 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 174:1-8.

²⁰⁹ Italy’s Memorial, para. 4.94, *referring to* Inventory of documents seized, prepared by R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Kollam, 17 February 2012 (**Annex IT-129**).

²¹⁰ Italy’s Memorial, para. 4.97, *referring to* Declaration of Umberto Vitelli, 18 February 2012 (**Annex IT-135**); Declaration of Massimiliano Latorre, 18 February 2012 (**Annex IT-136**).

²¹¹ Hearing Transcript, 15 July 2019, 135:14-25.

by the Captain.²¹² At 10:15 IST, the Indian Mercantile Marine Department,²¹³ boarded the “Enrica Lexie” to commence its investigations. R. Jayaraj, of the Coastal Police Station in Neendakara, Kollam, prepared an inventory listing documents produced by Captain Vitelli and seized by Indian police, namely:

(1) port clearance certificate; (2) certain pages of the Enrica Lexie log book; (3) pages from the bell book; (4) oil loading and unloading details; (5) email dated 15 February 2012; (6) English version of “Protocol of Agreement between Ministry of Defence, Naval Staff and Italian Shipowner’s Confederation”; and (7) pages from the passage planning of the Enrica Lexie.²¹⁴

168. At 16:00 IST on the same day, the Kerala Police escorted the Marines from the “Enrica Lexie” and arrested them at Wellington Island, Kochi Oil Terminal Berth, “on an allegation of murder”.²¹⁵ India contends that it was only at the point of their arrest, and not before, that the Marines claimed for the first time that their “asserted immunities were violated”.²¹⁶ In the Log Book, Captain Vitelli recorded the following regarding the arrest:

Upon request of W.O. Class 1 Massimiliano Latorre the following statement, issued before the Kerala State Police authorities tasked with forcibly taking him ashore, is put on record: “I am a member of the Italian Armed Forces, subject exclusively to National jurisdiction in compliance with the principle of Immunity of Military Forces in Transit. I consider this coercive attempt at excluding Italian jurisdiction illegal”.²¹⁷

169. Several Indian policemen remained aboard the “Enrica Lexie”, undertaking their investigation, including investigations by a “ballistic expert” and the preparation of a “seizure memo”.²¹⁸

²¹² Italy’s Memorial, para. 4.99, *referring to* (Confidential Annex) (**Annex IT-248**).

²¹³ The mandate of the Indian Mercantile Marine Department is “to administer the various Merchant Shipping Laws” and rules including those relating to safety of ships and life at sea, inquiries into shipping casualties and wrecks, Global Maritime Distress and Safety Systems, and navigational aids. *See* Italy’s Memorial, para. 4.100, *citing* Mercantile Marine Department, Mumbai, website <<http://www.dgshipping.gov.in/Content/mumbai.aspx>> (**Annex IT-232**).

²¹⁴ Italy’s Memorial, para. 4.100, *referring to* Inventory of documents seized by the Indian police, prepared by R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 19 February 2012 (**Annex IT-143**).

²¹⁵ Italy’s Memorial, paras 4.101, 6.22, *referring to* Remand Report in Crime 02/2012 U/S 302 IPC, Coastal Police Station, Neendakara, Kollam, 20 February 2012, p. 28 (**Annex IT-144**); Log Book of the Master of the “Enrica Lexie” (**Annex IT-14**); Affidavit of R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 1 March 2012, para. 16 (**Annex IT-153**); Kerala Charge Sheet, 18 May 2012, pp 1, 9 (**Annex IT-171**).

²¹⁶ Hearing Transcript, 20 July 2019, 59:23-60:2; 60:10-15.

²¹⁷ Italy’s Memorial, para 4.102, *citing* Log Book of the Master of the “Enrica Lexie”, p. 4 (**Annex IT-14**).

²¹⁸ Italy’s Memorial, paras 4.102-4.103, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 4 (**Annex IT-14**); (Confidential Annex) (**Annex IT-248**). *See also* Kerala Charge Sheet, 18 May 2012 (**Annex IT-171**); Hearing Transcript, 10 July 2019, 49:20-25.

170. On 20 February 2012, the “Enrica Lexie” moved from Kochi Oil Terminal to a mooring position in Indian internal waters, approximately 6.2 nautical miles from Kochi, with approximately fifteen Indian policemen remaining on board.²¹⁹

3. India’s Judicial Process in Relation to the Marines

171. On 21 February 2012, “a search warrant was sought” to permit a search of the “Enrica Lexie”, which was conducted on 25 February 2012 in the presence of officials of the Italian Government.²²⁰
172. On 2 May 2012, the Supreme Court of India ordered that “the Government of Kerala and its authorities shall allow the [“Enrica Lexie”] to commence her voyage”.²²¹ The “Enrica Lexie” “[sailed] out of Indian waters” on 5 May 2012.²²²

(a) Conditions of Detention of the Marines

173. On 1 March 2012, the Marines sought to challenge the conditions of their detention with the Chief Judicial Magistrate in Kollam on grounds of safety concerns and their immunity as “military personnel of a Sovereign country performing state functions of protecting the interest of vessels of Italy flying Italian flags as agents and representatives of State”.²²³ On 5 March 2012, following a subsequent application by the Marines, the Chief Judicial Magistrate ordered that the Marines be transferred to “judicial custody” in the Central Prison and separated from other prisoners.²²⁴
174. On 9 May 2012, the Supreme Court of India gave leave for the Marines to apply for bail. The bail application was rejected by the Chief Judicial Magistrate in Kollam on 11 May 2012.²²⁵

²¹⁹ Italy’s Memorial, para. 4.103, *referring to* (Confidential Annex) (**Annex IT-248**).

²²⁰ Kerala Charge Sheet, 18 May 2012 (**Annex IT-171**); Hearing Transcript, 10 July 2019, 50:13-15.

²²¹ Italy’s Memorial, para. 4.104, *citing* *M.T. Enrica Lexie and Another v. Doramma and Others* (2012) 6 SCC 760, p. 769, para. 29 (**Annex IT-181**).

²²² Italy’s Memorial, para. 4.104, *referring to* “Italian ship allowed to leave Kochi on execution of bond”, *The Hindu*, 6 May 2012 (**Annex IT-169**). *See also* Italy’s Reply, para. 4.64.

²²³ Italy’s Memorial, para. 6.25, *citing* Application for Directions filed on behalf of Massimiliano Latorre and Salvatore Girone before the Chief Judicial Magistrate, Kollam, 1 March 2012, p. 4 (**Annex IT-155**).

²²⁴ Italy’s Memorial, para. 6.25, *referring to* Application for Directions filed on behalf of Massimiliano Latorre and Salvatore Girone before the Chief Judicial Magistrate, Kollam, 5 March 2012 (**Annex IT-158**); Order of the Chief Judicial Magistrate, Kollam, 5 March 2012 (**Annex IT-159**).

²²⁵ Italy’s Memorial, para. 6.28, *referring to* Order of the Supreme Court of India, 9 May 2012, para. 10 (**Annex IT-170**); Order of the Sessions Judge, Kollam, 19 May 2012, p. 8 (**Annex IT-172**).

175. On 18 May 2012, the Kerala Police concluded their investigation and “filed in court a ‘Final Report’ (or ‘Charge Sheet’) against the Marines”, including the crime of murder under Indian law.²²⁶
176. On 19 May 2012, the Court of the Sessions Judge, Kollam, rejected another bail application by the Marines stating that, as the investigation by the Kerala Police had been completed and the Charge Sheet filed, the “proper remedy” was to expedite the trial.²²⁷
177. The Marines were detained in custody until 30 May 2012, when they were granted bail by the High Court of Kerala which contained the conditions that the Marines:²²⁸
- (1) surrender their passports; (2) remain within “the territorial limits of the City Police Commissioner, Kochi”, except to attend Court in Kollam; (3) “stay in a building within a distance of 10 kms from the office of the City Police Commissioner, Kochi”; and (4) appear before the “City Police Commissioner, Kochi” every day between 10:00 and 11:00.²²⁹
178. The Marines remained in Kerala, save for a two-week period in December 2012 and January 2013 when they returned to Italy. Following the Supreme Court Judgment of 18 January 2013, which found that the Union of India, rather than the State of Kerala, had jurisdiction over the Marines, they moved to Delhi.²³⁰

(b) Writ Petitions Filed by the Marines

179. On 22 February 2012, Italy and the Marines filed Writ Petition 4542 of 2012 in the High Court of Kerala, contending that “India did not have jurisdiction under its own domestic law; that Italy had exclusive jurisdiction under UNCLOS; and that in any event, under international law, the Marines had immunity from Indian criminal jurisdiction”.²³¹ Subsequently, on 19 April 2012, Italy and the Marines filed Writ Petition 135 of 2012 in the Supreme Court of India, contending that the dispute in question was “between two sovereign States” and seeking a declaration that (i) any action by India in relation to the “alleged incident under any Indian law was illegal”; (ii) “the continued detention of the two Marines [...] was illegal”; and (iii) India will “take all steps as

²²⁶ Italy’s Memorial, para. 6.26, *referring to* Kerala Charge Sheet, 18 May 2012 (**Annex IT-171**).

²²⁷ Italy’s Memorial, para. 6.28, *citing* Order of the Sessions Judge, Kollam, 19 May 2012, p. 8 (**Annex IT-172**).

²²⁸ Italy’s Memorial, para. 6.24.

²²⁹ Italy’s Memorial, para. 6.29, *referring to* Order of the High Court of Kerala, 30 May 2012, para. 7 (**Annex IT-173**).

²³⁰ Italy’s Memorial, para. 6.30, *referring to* Order of the High Court of Kerala, 20 December 2012 (**Annex IN-3**); *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 100-103 (**Annex IT-19**).

²³¹ Italy’s Memorial, para. 6.31, *referring to* Writ Petition No. 4542 of 2012, 22 February 2012 (**Annex IT-15**); India’s Counter-Memorial, para. 3.21.

may be necessary to secure custody of the two Marines and transfer them to the Italian Republic”.²³²

180. On 29 May 2012, the High Court of Kerala dismissed Writ Petition 4542 of 2012, finding that India and the Kerala authorities had jurisdiction on the basis that, even though the incident occurred outside India’s territorial waters and within India’s contiguous zone, the Notification of the Ministry of Home Affairs of the Republic of India, No. S.O. 671(E), dated 27 August 1981 (hereinafter the “1981 Notification”) made the Indian Penal Code and the Indian Code of Criminal Procedure “applicable to the entirety of India’s exclusive economic zone”. It also held that this conclusion was “not incompatible with the provisions of [the Convention]”.²³³ The Court stated:

In this case there was no ‘entry’ by the Italian Marines to the territory of India, but a merciless attack of gunshots at fishermen, while passing through the CZ/EEZ of India, bre[a]ching all established guidelines and norms, and without any cause. It can be treated only as a case of brutal murder and can in no way be masqueraded as a discharge of the sovereign function.²³⁴

181. On 11 July 2012, Italy and the Marines filed an appeal through a Special Leave Petition 20370 of 2012 to the Supreme Court against the decision of the High Court of Kerala. The appeal was joined with Writ Petition 135 of 2012.²³⁵
182. On 18 January 2013, the Supreme Court delivered its judgment, in which it, *inter alia*, found that the Union of India, as opposed to the State of Kerala, “had federal criminal jurisdiction over the Marines”, ordered that a “Special Court” be established to try the Marines, and stated that the question of jurisdiction could be “re-agitated” before the Special Court.²³⁶ Italy notes that the Supreme Court “left Article 100 of UNCLOS unaddressed, with the possibility that Italy’s assertion of flag-state jurisdiction rights may be vindicated through Article 100”.²³⁷

²³² Italy’s Memorial, para. 6.32, *citing* Writ Petition No. 135 of 2012, 19 April 2012 (**Annex IT-16**); India’s Counter-Memorial, para. 3.21.

²³³ Italy’s Memorial, paras 6.33-6.34, *citing* Judgment of the High Court of Kerala, 29 May 2012, paras 18-33 (**Annex IT-17**).

²³⁴ Italy’s Memorial, para. 6.35, *citing* Judgment of the High Court of Kerala, 29 May 2012, para. 48 (**Annex IT-17**).

²³⁵ Italy’s Memorial, para. 6.36, *referring to* Special Leave Petition 20370 of 2012, 11 July 2012 (**Annex IT-18**); India’s Counter-Memorial, para. 3.21.

²³⁶ Italy’s Memorial, para. 6.39, *citing* *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 100-103 (**Annex IT-19**); India’s Counter-Memorial, para. 3.22.

²³⁷ Hearing Transcript, 18 July 2019, 231:24-232:3.

183. Subsequent to its judgment, the Supreme Court ordered that the Marines be moved to Delhi subject to similar bail conditions as those required by the High Court of Kerala.²³⁸
184. On 1 April 2013, the investigation and prosecution of the case against the Marines was entrusted by the Indian Ministry of Home Affairs to the National Investigation Agency of India (hereinafter the “NIA”). Such investigation would, as the NIA indicated, cover offences under the Indian Penal Code as well as offences under Section 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (hereinafter the “SUA”). On 15 April 2013, the Ministry of Home Affairs identified “the Court of Additional Sessions Judge-01, Patiala House, New Delhi” as the “Special Designated Court” to try the Marines.²³⁹ In September 2013, the NIA took statements from the crew members of the “Enrica Lexie” regarding the incident.²⁴⁰
185. On 13 January 2014, the Marines filed an application in the Supreme Court contesting “India’s attempt to invoke the provisions of SUA”.²⁴¹ On 24 February 2014, N.S. Bisht, Under Secretary in the Ministry of Home Affairs, provided the opinion of the Law Ministry that “the provisions of the SUA Act are not attracted to this case” and stated that “appropriate steps will be taken to ensure that the charge sheet reflects this opinion”,²⁴² which was recorded in an Order of the same date by the Supreme Court.²⁴³
186. On 6 March 2014, the Marines filed a Writ Petition under Article 32 of the Constitution of India before the Supreme Court challenging the jurisdiction of the NIA under Indian law, the legality of the Special Court, and the jurisdiction of India, as well as reasserting their immunity.²⁴⁴ Following this, by Order dated 28 March 2014, the Supreme Court placed the Special Court’s

²³⁸ Italy’s Memorial, para. 6.57, *referring to Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, pp 2-4 (**Annex IT-19**).

²³⁹ Italy’s Memorial, paras 6.59-6.60, *referring to* Order of the Ministry of Home Affairs of India of 1 April 2013 (**Annex IT-190**); Indian Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, Section 3 (**Annex IT-71**); Notification of the Ministry of Home Affairs of India of 15 April 2013 (**Annex IT-44**).

²⁴⁰ Hearing Transcript, 18 July 2019, 127:23-128:5.

²⁴¹ Italy’s Memorial, para. 6.64 *referring to* Application for Directions, 13 January 2014, p. 4 (**Annex IT-51**); India’s Counter-Memorial, para. 3.27.

²⁴² Italy’s Memorial, para. 6.65, *citing* Application for Directions, 13 January 2014, p. 4 (**Annex IT-51**); Affidavit of N.S. Bisht, Under Secretary, Ministry of Home Affairs of India, 24 February 2014, paras 2-3 (**Annex IT-54**).

²⁴³ Italy’s Memorial, para. 6.67, *referring to* Order of the Supreme Court of India of 24 February 2014 (**Annex IT-55**).

²⁴⁴ Italy’s Memorial, paras 6.68-6.69, *referring to* Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014 (**Annex IT-56**); India’s Counter-Memorial, para. 3.28.

proceedings in abeyance. The period of adjournment was later extended by subsequent Orders.²⁴⁵ The Writ Petition was not finally decided.²⁴⁶

(c) **Bail Conditions of the Marines**

187. On 22 February 2013, the Supreme Court of India allowed both Marines to travel to Italy for a four-week period to enable them to vote in the European Union elections.²⁴⁷
188. On 5 September 2014, Sergeant Latorre applied for permission to travel to Italy for medical reasons. On 12 September 2014, the Supreme Court granted him permission to return for a three-month period. On 9 December 2014, he applied for an extension, which the Supreme Court granted at a hearing on 14 January 2015, and then at further hearings on 9 April 2015, 13 July 2015, 13 January 2016, and 26 April 2016.²⁴⁸ After the hearing on 26 April 2016, the Supreme Court extended Sergeant Latorre's time in Italy to 30 September 2016.²⁴⁹
189. On 7 September 2016, Sergeant Latorre applied to the Supreme Court of India to remain in Italy on bail. A hearing was scheduled before the Supreme Court on 28 September 2016 to address this application.²⁵⁰ Sergeant Latorre was allowed to remain in Italy during the present Arbitration to undergo rehabilitation, treatment, and therapy following a brain stroke and heart surgery.²⁵¹
190. On 9 December 2014, Sergeant Girone made an application to the Supreme Court to be allowed to return to Italy.²⁵² He later withdrew the application.²⁵³

²⁴⁵ India's Counter-Memorial, para. 3.29; Italy's Memorial, para. 6.71, *referring to* Order of the Supreme Court of India of 28 March 2014 (**Annex IT-57**); Order of the Special Designated Court of 31 March 2014 (**Annex IT-58**).

²⁴⁶ Italy's Memorial, para. 6.72; India's Counter-Memorial, para. 3.30.

²⁴⁷ Italy's Memorial, para. 6.74, *referring to* Order of the Supreme Court of India of 22 February 2013 (**Annex IT-48**).

²⁴⁸ Italy's Memorial, para. 6.75, *referring to* (Confidential Annex) (**Annex IT-21**); (Confidential Annex) (**Annex IT-23**); Supreme Court of India Order of 9 April 2015 granting a further extension to Sergeant Latorre (**Annex IT-31**); Order of the Supreme Court of India of 13 July 2015 (**Annex IT-41**); Order of the Supreme Court of India, 13 January 2016 (**Annex IN-5**); Order of the Supreme Court of India, 26 April 2016 (**Annex IT-213**).

²⁴⁹ Order of the Supreme Court of India, 26 April 2016 (**Annex IT-213**).

²⁵⁰ Italy's Memorial, para. 6.75.

²⁵¹ Italy's Request for the Prescription of Provisional Measures, paras 48-49.

²⁵² Italy's Memorial, para. 6.76, *referring to* (Confidential Annex) (**Annex IT-22**).

²⁵³ "Supreme Court disallows Italian marines' plea", DNA India, 16 December 2014 (**Annex IT-42**). *See* Italy's Memorial, para. 6.76.

191. Following the issuance by ITLOS of an Order on Provisional Measures (*see* Part I, Section B), the Supreme Court and Special Court respectively, on 26 and 28 August 2015, ordered that the relevant proceedings be stayed.²⁵⁴
192. On 7 December 2015, Ambassador Enzo Angeloni, Ambassador of Italy in India, submitted an affidavit to the Supreme Court of India on behalf of Italy, concerning the developments in this Arbitration.²⁵⁵
193. Following the rendering by the Arbitral Tribunal on 29 April 2016 of the Provisional Measures Order,²⁵⁶ the Supreme Court ordered on 26 May 2016 that “Sergeant Girone while remaining under the authority of the Supreme Court of India is permitted to return to Italy during the Annex VII arbitration” subject to conditions prescribed by the Supreme Court (*see* Part I, Section E).²⁵⁷ Sergeant Girone returned to Italy on 28 May 2016 and remained in Italy during the present Arbitration.²⁵⁸

E. THE ITALIAN INVESTIGATION AND PROCEEDINGS

194. Italy contends that following receipt by CINCNAV of the initial reports²⁵⁹ from Sergeant Latorre, CINCNAV issued two “flash reports”²⁶⁰ to the Interforce High Command, and Italy began exercising its jurisdiction over the “Enrica Lexie” and the Marines with respect to the “Enrica Lexie” incident.²⁶¹ “[W]ithin hours”²⁶² thereafter, pursuant to Decree no. 90/2010 of the President of the Italian Republic, a “summary investigation” was initiated by the Italian Navy for the

²⁵⁴ Italy’s Memorial, para. 6.77, *referring to* Order of the Supreme Court of India of 26 August 2015 (**Annex IT-37(c)**); Order of the Supreme Court of India of 2 September 2015 (**Annex IT-37(d)**); Order of the Special Designated Court of 25 August 2015 (**Annex IT-37(b)**).

²⁵⁵ Italy’s Memorial, para. 6.78, *referring to* Additional Affidavit of Ambassador E. Angeloni, Ambassador of Italy in India, 7 December 2015 (**Annex IT-43**).

²⁵⁶ Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 132. *See* Part I, Section E.

²⁵⁷ *See* Order of the Supreme Court of India, 26 May 2016 (**Annex IT-214**).

²⁵⁸ Report of the Republic of India on Compliance with the Provisional Measures Order of the Arbitral Tribunal dated 29 April 2016 concerning the “Enrica Lexie” Incident (*The Italian Republic v. Republic of India-PCA Case No. 2015-28*), para. 7; Report of the Government of the Italian Republic on Compliance with the Provisional Measures Order of 29 April 2016, para. 7.

²⁵⁹ Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**).

²⁶⁰ Commander in Chief of the Naval Squadron (CINCNAV) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012 (**Annex IT-109**); Interforce Operations High Command Flash Report no. 016/SO to the Presidency of the Republic of Italy and various Ministries, 15:30 (CET), 15 February 2012 (**Annex IT-115**).

²⁶¹ Hearing Transcript, 8 July 2019, 202:19-203:12.

²⁶² Hearing Transcript, 8 July 2019, 200:18-21.

purpose of collecting relevant information and evidence.²⁶³ The administrative aspect of the investigations was undertaken by the Italian Ministry of Defence, while the Rome Public Prosecutor and the Rome Military Prosecutor executed investigations at the judicial level.²⁶⁴

1. The Piroli Report

195. On 17 February 2012, Division Admiral Alessandro Piroli, Chief III Division GP (General Planning) – Navy Staff, was appointed as Investigating Officer. His investigation took place both in Kochi, between 18 February and 8 March 2012, and in Italy, in the subsequent two months.²⁶⁵ It is Italy’s position that Admiral Piroli’s investigation “was not constrained or shaped” by the reports to CINCPAC, which described the incident with reference to a pirate attack.²⁶⁶ The objectives of his investigation were

to collect information relating to the incident and its causes; to review existing documents and statements made by those involved in the incident; to verify the technical and operational reference framework as well as the juridical one (Italian law and international law); to inspect the vessels and other evidence relating to the incident, including the weapons and ammunition assigned to the VPD team on board the *Enrica Lexie*, along with the ship logs; and to acquire statements from those involved and relevant photographic and other evidence.²⁶⁷

196. Subsequently, he produced the results of his investigation in a Summary Investigation Report entitled “Attempted Pirate Attack against Merchant Vessel *Enrica Lexie* – 15 February 2012. Death of Indian Citizens”, dated 11 May 2012 (hereinafter the “Piroli Report”), and submitted it to the Italian Government.²⁶⁸
197. In issuing the Piroli Report, Admiral Piroli was instructed to therein “highlight considerations concerning objective and subjective causes that originated the incident; also to assess whether technical and organisational corrective measures may possibly be adopted in order to prevent similar circumstances from occurring again; and to ‘contribute, where possible, to clarify the

²⁶³ Italy’s Memorial, para. 5.4, referring to Decree no. 90 of the President of the Italian Republic, 15 March 2010, Consolidated text of the Regulations in the Field of Military Organisation (**Annex IT-80**). This Decree provides for “summary investigations” to be conducted following an event that involves the administration of Defence.

²⁶⁴ Hearing Transcript, 8 July 2019, 200:21-26.

²⁶⁵ Hearing Transcript, 8 July 2019, 206:12-20.

²⁶⁶ Hearing Transcript, 18 July 2019, 7:22-8:4.

²⁶⁷ Italy’s Memorial, paras 5.6-5.7. See also Hearing Transcript, 8 July 2019, 206:21-207:6.

²⁶⁸ Italy’s Memorial, paras 5.8-5.9, explaining that the contents of the Piroli Report are confidential, given their potential relevance to ongoing criminal proceedings in Italy. The Piroli Report is reproduced as a confidential Annex to Italy’s Memorial (Piroli Report (Confidential Annex) (**Annex IT-233**)), in accordance with Article 23(2) of the Tribunal’s Rules of Procedure. The Piroli Report has not been provided to Sergeant Latorre or Sergeant Girone.

responsibilities, if any, of VPD personnel concerning the incident’.”²⁶⁹ The findings of the Piroli Report were expressed in the form of “preliminary conclusions”, which were based on the limited evidence available at the time. Before setting out the conclusions, as a matter of general considerations, the Report observes:

It is therefore evident that events can be clarified only when further evidence will be made available by Indian authorities and when judicial proceedings will be finalized. Assessments made in this document are based on information acquired from vessel documentation, statements by involved personnel and investigations conducted in *loco*. That is why said assessments must be considered as guidelines to develop assumptions and conjectures, waiting for further details regarding the other party to be provided [...]. Only then we will be able to give a precise assessment of statements made by the other party, since such statements are crucial to decide, on the one hand, whether the respondents are innocent (lack of correspondence between bullet calibres) or, on the other hand, whether they were actually involved in the event (correlation between bullet calibres, involved weapons), considering the discriminating factor linked to the fishing boat having been used only for fishing or also for armed robbery purposes.²⁷⁰

198. With these caveats in mind, the Piroli Report presents *inter alia* the following preliminary conclusions.
199. The deployment of VPD Latorre on the “Enrica Lexie” was in accordance with Italian national legislation to counter piracy attacks.²⁷¹ The incident “took place in the high seas, well outside Indian territorial waters [...] within the high piracy risk area”.²⁷²
200. While the VPD were informed of an approaching suspicious craft, which was “sailing on a near-collision course” with the “Enrica Lexie”, the latter

did not facilitate the implementation of further coordination actions with the VPD and did not seek to implement all possible passive measures of protection against pirate attacks. In particular, the ship did not change her course and speed to give way to the craft that had the right of way, or to move away and be in a safe position (given her higher speed) from a piracy/armed robbery threat.²⁷³

Accordingly, Captain Vitelli and the VPD “did not do their best to enhance closer cooperation opportunities between the parties involved in the action”.²⁷⁴

²⁶⁹ Hearing Transcript, 8 July 2019, 207:9-16, *citing* Piroli Report (Confidential Annex), p. 1-6 (**Annex IT-233**).

²⁷⁰ Piroli Report (Confidential Annex), p. 4-13 (**Annex IT-233**).

²⁷¹ Piroli Report (Confidential Annex), p. 4-14, para. 1 (**Annex IT-233**).

²⁷² Piroli Report (Confidential Annex), p. 4-14, para. 2 (**Annex IT-233**).

²⁷³ Piroli Report (Confidential Annex), p. 4-14, para. 3 (**Annex IT-233**).

²⁷⁴ Piroli Report (Confidential Annex), p. 4-14, para. 4 (**Annex IT-233**).

201. The “approaching manoeuvre” of the craft, and its failure to change speed or course despite the visual and sound warnings and warning shots from the VPD “had been perceived as a threat against the ship and its crew”.²⁷⁵
202. Taking into account the statements of the VPDs, their “tactical decisions” were “quick, effective and appropriate in connection with the incident and the assigned mission”.²⁷⁶
203. Finally, according to the Piroli Report, the way in which the “Enrica Lexie” was diverted subsequent to the incident

indicate[s] lack of good faith by the Indian authorities, who knew the content of their communications to the ship were untrue, and that they hadn’t tried to contact Italian governmental authorities in order to request *flag state consent* for the diversion to an Indian port of an Italian- flagged vessel transiting in the high seas.²⁷⁷

2. Criminal Proceedings by the Rome Military Prosecutor and the Rome Public Prosecutor

204. On 15 February 2012, pursuant to Article 347(1) of the Italian Code of Criminal Procedure, the Special Operations Group, Anti-Crime Unit, of the Carabinieri of Rome (hereinafter the “Special Operations Group of the Carabinieri”)²⁷⁸ reported the incident as “a piracy attack against an Italian-flagged merchant vessel” to the Rome Public Prosecutor. The Rome Public Prosecutor was thereby informed of the presence of a VPD, comprising members of the Italian Navy, on board the vessel.²⁷⁹
205. On 16 February 2012, Sergeant Latorre sent a criminal offence report under Article 331(1) of the Italian Code of Criminal Procedure to the Rome Public Prosecutor, accompanied by supporting documentation including photographs and statements from both the crew and the VPD marines.²⁸⁰ The Rome Public Prosecutor opened criminal proceedings “against persons unknown for the offences of piracy and suspicion of piracy under Article 1135 of the Italian Code of Navigation,

²⁷⁵ Piroli Report (Confidential Annex), p. 4-14, para. 5 (**Annex IT-233**).

²⁷⁶ Piroli Report (Confidential Annex), p. 4-15, para. 6 (**Annex IT-233**).

²⁷⁷ Piroli Report (Confidential Annex), p. 4-15, para. 7 (**Annex IT-233**) [emphasis in original].

²⁷⁸ In Italian, the full title is “Raggruppamento operativo speciale, Unità anti crimine, dei Carabinieri”. See Italy’s Memorial, para. 5.25, n. 371.

²⁷⁹ Italy’s Memorial, para. 5.25, referring to Italian Code of Criminal Procedure, Article 347(1) (**Annex IT-224**).

²⁸⁰ Italy’s Memorial, para. 5.26, referring to Italian Code of Criminal Procedure, Article 331(1) (**Annex IT-224**). See also Hearing Transcript, 8 July 2019, 213:1-3.

and Article 56 of the Italian Penal Code, committed in the Indian Ocean, at around 30 nautical miles off the Indian coast”.²⁸¹

206. On 17 February 2012, the Rome Military Prosecutor also opened a criminal case against unknown military personnel “for the military criminal offences under Articles 120 and 47(2)-(4) of the Italian Peacetime Military Penal Code, and Article 165 of the Italian Wartime Military Penal Code in relation to Article 185 of the same Code”.²⁸² The Rome Military Prosecutor requested the Special Operations Group of the Carabinieri to conduct a preliminary investigation concerning the incident.²⁸³
207. On 19 February 2012, in accordance with orders from the Rome Military Prosecutor, Captain Vitelli seized VPD marine Lance Corporal Conte’s camera, with which he had taken photographs of the incident.²⁸⁴ On 20 February 2012, the Rome Military Prosecutor ordered the seizure of two assault rifles AR SC 70/90, serial numbers respectively 07386 and 45479H, together with the loader and leftover ammunition for each rifle.²⁸⁵ The next day, the Rome Military Prosecutor suspended the seizure until such a point as the “Enrica Lexie” would be released from the custody of the Indian authorities, and appointed Captain Vitelli as guardian of the evidence.²⁸⁶
208. On 20 February 2012, the Special Operations Group of the Carabinieri sent an assessment of the incident to the Rome Military Prosecutor, based on the report of Sergeant Latorre, and communicated the fact that the Rome Public Prosecutor had instituted criminal proceedings.²⁸⁷
209. On 22 February 2012, the Rome Military Prosecutor ordered that charges be amended, to be “against Sergeant Latorre and Sergeant Girone for the offences of aggravated failure to obey orders, of violence resulting in murder of private individuals during military operations abroad, and of dispersion of military equipment (bullets)” in connection with the “Enrica Lexie” incident.²⁸⁸ On the same day, the Rome Public Prosecutor registered the Marines as “suspects for

²⁸¹ Italy’s Memorial, para. 5.27, referring to Italian Code of Navigation, Article 1135 (**Annex IT-225**); Italian Penal Code, Article 56 (**Annex IT-223**).

²⁸² Italy’s Memorial, para. 5.29, referring to Italian Peacetime Military Penal Code, Articles 47(2)-(4) and 120 (**Annex IT-227**); Italian Wartime Military Penal Code, Articles 165 and 185 (**Annex IT-226**).

²⁸³ Italy’s Memorial, para. 5.31, referring to (Confidential Annex) (**Annex IT-243**).

²⁸⁴ Italy’s Memorial, para. 5.32, referring to (Confidential Annex) (**Annex IT-246**); (Confidential Annex) (**Annex IT-245**). See also Hearing Transcript, 8 July 2019, 216:9-17.

²⁸⁵ (Confidential Annex) (**Annex IT-244**).

²⁸⁶ Italy’s Memorial, para. 5.35, referring to (Confidential Annex) (**Annex IT-252**); Italian Code of Criminal Procedure, Article 253 (**Annex IT-224**). See also Hearing Transcript, 8 July 2019, 217:14-218:2.

²⁸⁷ Italy’s Memorial, para. 5.36, referring to (Confidential Annex) (**Annex IT-249**).

²⁸⁸ Italy’s Memorial, para. 5.37, referring to Italian Peacetime Military Penal Code, Article 125 (**Annex IT-227**); Italian Wartime Military Penal Code, Articles 165(3) and 185 (**Annex IT-226**); Italian Peacetime

the offence of murder and complicity in murder against unknown persons committed on the high seas in the Indian Ocean”.²⁸⁹

3. Consolidation of Italian Criminal Proceedings under the Rome Public Prosecutor

210. On 23 February 2012, the Rome Military Prosecutor relinquished jurisdiction over the incident in favour of the Rome Public Prosecutor, who thereafter continued the preliminary investigation.²⁹⁰
211. On 15 March 2012, through “letters rogatory” to the Indian Government, the Rome Public Prosecutor stated that “[it] was investigating the Marines in relation to the death of two Indian fishermen, Mr. Jelastine and Mr. Pink, based on the alleged crime of murder under Article 575 of the Italian Penal Code”.²⁹¹ The letters also asserted that the Rome Public Prosecutor had jurisdiction over the matter,²⁹² requested that the Indian authorities provide certain documents and evidence,²⁹³ and communicated “the need for the Italian authorities to examine Sergeant Latorre and Sergeant Girone, Captain Vitelli, and other persons aboard the *Enrica Lexie* and the *St Antony*.”²⁹⁴
212. On 9 May 2012, the Rome Public Prosecutor examined four members of the VPD who, on the same day, had returned to Italy: Sergeant Voglino, Corporal Andronico, Lance Corporal Fontana, and Lance Corporal Conte.²⁹⁵ During the examination, the Special Operations Group of the Carabinieri seized Corporal Andronico’s laptop.²⁹⁶ Subsequently, Captain Vitelli, Captain Noviello, and Pio Schiano Lomoriello, managing director of Fratelli D’Amato SpA, appeared for examination.²⁹⁷

Military Penal Code, Article 169 (**Annex IT-227**). See also Hearing Transcript, 8 July 2019, 218:14-219:4.

²⁸⁹ Italy’s Memorial, para. 5.38, referring to Italian Penal Code, Articles 110 and 575 (**Annex IT-223**); (Confidential Annex) (**Annex IT-255**). See also Hearing Transcript, 8 July 2019, 219:5-13.

²⁹⁰ Italy’s Memorial, paras 5.39-5.40.

²⁹¹ Letter from the Office of the Public Prosecutor of the Republic attached to the Court of Rome to the competent Judicial Authority of the Republic of India, 15 March 2012, p. 2 (**Annex IT-38**); Hearing Transcript, 8 July 2019, 209:11-17.

²⁹² Italy’s Memorial, paras 5.46-5.47, referring to Italian Penal Code, Article 577(2) (**Annex IT-223**).

²⁹³ Italy’s Memorial, paras 5.48-5.49.

²⁹⁴ Italy’s Memorial, para. 5.50.

²⁹⁵ Hearing Transcript, 8 July 2019, 220:22-221:4.

²⁹⁶ Italy’s Memorial, para. 5.42, referring to (Confidential Annex) (**Annex IT-258**); (Confidential Annex) (**Annex IT-263**).

²⁹⁷ Italy’s Memorial, para. 5.43, referring to (Confidential Annex) (**Annex IT-259**); (Confidential Annex) (**Annex IT-260**); (Confidential Annex) (**Annex IT-261**); (Confidential Annex) (**Annex IT-262**); (Confidential Annex) (**Annex IT-264**).

213. On 3 January 2013, the Marines made voluntary declarations regarding the “Enrica Lexie” incident before the Rome Public Prosecutor. They were informed that “they were under investigation for offences under Articles 110 and 575 of the Italian Penal Code for the crimes of murder and complicity in murder”.²⁹⁸
214. On 17 September 2012 and 11 January 2013, the Indian Ministry of External Affairs sent *notes verbales* referring to “the possibility of allowing Italian representatives to participate in the interrogation by India of the two accused and during the deposition of the Ship’s master and maritime personnel” and requesting the names of these representatives.²⁹⁹
215. On 13 March 2013 and 19 April 2013, the Rome Public Prosecutor sent further “letters rogatory”, repeating earlier requests for documents and evidence, but did not receive a response.³⁰⁰
216. The Italian criminal proceedings are currently stayed in accordance with the ITLOS Order on Provisional Measures.³⁰¹

IV. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

217. This Arbitral Tribunal was constituted in accordance with Article 287, paragraphs 1, 3, and 5, of the Convention and Annex VII to the Convention. In accordance with Articles 286, 287, paragraph 1, and 288, paragraph 1, of the Convention, the Arbitral Tribunal, so constituted, has jurisdiction over any dispute concerning the interpretation or application of the Convention.

A. IDENTIFICATION OF THE DISPUTE FOR THE PURPOSE OF ASCERTAINING WHETHER THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

218. In its Provisional Measures Order, the Arbitral Tribunal concluded that *prima facie* it had jurisdiction over the dispute.³⁰² The Arbitral Tribunal considered that, as Italy had alleged the violation by India of various rights conferred upon Italy under the provisions of the Convention,

²⁹⁸ Italy’s Memorial, para. 5.44.

²⁹⁹ Italy’s Memorial, para. 5.51, referring to *Note Verbale* T-4417/17/2012 from India to Italy, 17 September 2012 (**Annex IT-177**); *Note Verbale* T-4417/17/2012 from India to Italy, 11 January 2013 (**Annex IT-183**) [Internal citations omitted]. See also Hearing Transcript, 8 July 2019, 226:1-11.

³⁰⁰ Italy’s Memorial, para. 5.52, referring to Letter from the Office of the Public Prosecutor at the Court of Rome to the Competent Judicial Authority of India, 19 March 2013 (**Annex IT-187**); Letter from the Office of the Public Prosecutor at the Court of Rome to the Competent Judicial Authority of India, 19 April 2013 (**Annex IT-193**). See also Hearing Transcript, 8 July 2019, 226:12-17.

³⁰¹ Italy’s Memorial, para. 5.53, referring to Report of the Italian Republic pursuant to paragraph 141(2) of the ITLOS Order and Article 95(1) of the Rules of the Tribunal, 23 September 2015, para. 3 (**Annex IT-37(a)**). See above, Part I, Section B. See also Hearing Transcript, 8 July 2019, 227:10-22.

³⁰² Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 55.

and India had contested such violations, the dispute between them concerned the interpretation or application of the Convention.

219. At this stage the Arbitral Tribunal must, therefore, first ascertain whether there is a dispute between the Parties, and second, determine whether such dispute concerns the interpretation or application of the Convention.

1. Existence of a Dispute

220. The concept of a dispute is well-established in international law. In international proceedings, a dispute exists when the parties have “a disagreement on a point of law or fact, a conflict of legal views or of interests”.³⁰³
221. Italy claims, as stated in its submissions, that India has acted in a manner inconsistent with several provisions of the Convention and violated Italy’s rights under the Convention (*see* Part II, Sections A.1 and B.1). India rejects all of Italy’s claims on the merits. India, on its part, counter-claims, as stated in its submissions, that Italy has violated India’s rights under the Convention and breached its obligation to have due regard to India’s rights under the Convention (*see* Part II, Sections A.2 and B.2). Italy rejects all of India’s counter-claims on the merits (*see* Part II, Sections A.1 and B.1).
222. It is thus evident that there is a dispute between the Parties which has given rise to the present proceedings. The Parties differ, however, in their characterisation of that dispute.

2. Characterisation of the Dispute

(a) Positions of the Parties

223. Italy submits that the “real issue in the case” and “object of the claim” is the determination of which State is entitled, under the Convention, to exercise jurisdiction over the incident of 15 February 2012 and “over the two marines in relation to the incident”.³⁰⁴

³⁰³ Order, Request for the Prescription of Provisional Measures of 29 April 2016, para. 53, *citing Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, P.C.I.J. Series A, No. 2, p. 11.

³⁰⁴ Hearing Transcript, 9 July 2019, 58:17-24.

224. In its Memorial, Italy claims that as a result, and in the course, of this incident, India has acted in a manner that is incompatible with certain provisions of the Convention, and that breached or violated other provisions of the Convention. Italy states in the introductory part of the Memorial:

The dispute between the Italian Republic (“Italy”) and the Republic of India (“India”) concerning the “Enrica Lexie” is a dispute about who has jurisdiction over the *M/V Enrica Lexie*, an Italian-flagged oil tanker, and over the two Italian Marines stationed on the board the *Enrica Lexie*, in respect of an incident that occurred on 15 February 2012 about 20.5 nautical miles off the Indian coast of Kerala. The incident occurred when the *Enrica Lexie* was exercising the freedom of navigation *en route* from Galle in Sri Lanka to Port Said, Egypt.³⁰⁵

225. During the Hearing, counsel for Italy, Sir Daniel Bethlehem KCMG QC, in setting out Italy’s case, stated the following:

The central questions before you [the Arbitral Tribunal] in these proceedings are whether India was entitled to circumvent and oust Italy’s flag state jurisdiction; and whether India was entitled to ignore the immunity of Italian state officials and, by doing so, to exercise its own jurisdiction over the marines. [...] Italy has sought from the very outset to exercise its jurisdiction, as prescribed by international law.

[...]

Italy roots its claims to jurisdiction squarely in UNCLOS, both in the system of flag-state jurisdiction established by UNCLOS and in its specific provisions.³⁰⁶

226. India, on the other hand, submits that “the core issue, the real subject matter of the dispute” is the question whether the Marines are entitled to immunity from criminal proceedings arising out of the “Enrica Lexie” incident.³⁰⁷ This, in India’s view, means that the dispute is not one concerning the interpretation or application of the Convention,³⁰⁸ and is therefore outside the jurisdiction of the Arbitral Tribunal, because it “is essentially based on a set of rules extraneous to UNCLOS, belonging to general (customary) international law on immunities of States officials”.³⁰⁹
227. During the Hearing, counsel for India, Professor Alain Pellet, provided the following explanation regarding the position of India in the dispute between the Parties:

Since the ITLOS and this Tribunal had not accepted our view *prima facie* during the written phase of the proceedings, we have only stressed the lack of jurisdiction of the Tribunal concerning, more precisely, the issue of the claimed immunities of the marines and the Italian request that the Tribunal order India to “cease to apply the provisions of the 1976 Maritime

³⁰⁵ Italy’s Memorial, para. 1.1.

³⁰⁶ Hearing Transcript, 8 July 2019, 45:22-46:4, 46:20-23.

³⁰⁷ Hearing Transcript, 13 July 2019, 107:5-110:8.

³⁰⁸ India’s Counter-Memorial, para. 5.9, citing PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220.

³⁰⁹ India’s Rejoinder, para. 3.14.

Zones Act and the 1981 Notification”.... [U]pon reflection, India has decided to maintain its initial view concerning the more general lack of jurisdiction of the Tribunal in this case.³¹⁰

[...]

[S]upposing yet that you [the Arbitral Tribunal] do not decline to globally exercise your jurisdiction on Italy’s claims, as we think you should, it remains that India of course maintains, in the alternative, its objection to the jurisdiction of the Tribunal concerning : (1) the cessation of the application of India’s Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976 and Ministry of Home Affairs notification dated 27th August 1981; and (2) the objection to jurisdiction concerning the immunities of the marines.³¹¹

228. In its Counter-Memorial, India stressed:

While the case has been labeled the “*Enrica Lexie Incident*”, it should more accurately be referred to as the “*St Antony Incident*”. The consequences of the incident all related to the *St Antony*. The shots fired by the Marines killed two Indian nationals. [...] The centre of gravity of the incident thus rests with India, and India’s courts thereafter exercised jurisdiction over the Marines after they had entered Indian territory.³¹²

229. Italy objects to the late stage at which India raised this general objection to the Arbitral Tribunal’s jurisdiction, particularly after India had accepted said jurisdiction subsequent to the provisional measures phase.³¹³ In any event, Italy maintains that the Arbitral Tribunal does have general jurisdiction over this dispute because the “real claim” concerns the interpretation and application of provisions of the Convention.³¹⁴

230. In its Counter-Memorial, India also introduced counter-claims alleging that, when the Marines shot at the “St. Antony” and killed the two fishermen on board, who were legitimately exercising their right to fish in India’s exclusive economic zone, Italy violated India’s rights and breached Italy’s obligations under a number of provisions of the Convention.

³¹⁰ Hearing Transcript, 13 July 2019, 106:8-15, 107:2-4.

³¹¹ Hearing Transcript, 13 July 2019, 112:18-113:6.

³¹² India’s Counter-Memorial, para. 1.3 [emphasis added by India].

³¹³ Hearing Transcript, 18 July 2019, 88:24-89:18, citing *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4 at p. 15; *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland)*, Judgment of 26 April 1928, P.C.I.J. Series A, No. 15, p. 25.

³¹⁴ Hearing Transcript, 18 July 2019, 89:21-90:18.

(b) **Characterisation of the Dispute by the Arbitral Tribunal**

231. In order to determine the nature of the dispute submitted to it by the Parties, the Arbitral Tribunal is required, on an objective basis,³¹⁵ to “isolate the real issue in the case and [...] identify the object of the claim”.³¹⁶
232. In *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)* (hereinafter “*South China Sea Arbitration*”), the arbitral tribunal observed:
- Where a dispute exists between parties to the proceedings, it is further necessary that it be identified and characterized. The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to “isolate the real issue in the case and to identify the object of the claim”.³¹⁷
233. A dispute may be characterised in many ways. However, in identifying the real issue in dispute, the applicant’s notification and statement of claim instituting the proceedings have particular significance. In *Fisheries Jurisdiction (Spain v. Canada)*, the ICJ observed that, in order to identify its task in any proceedings, the court “must begin by examining the Application”³¹⁸ and “look at the Application as a whole”.³¹⁹ At the same time, the ICJ observed that, “while giving particular attention to the formulation of the dispute chosen by the Applicant”, “it is for the Court itself, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties”.³²⁰ The ICJ further pointed out in that judgment that, where “uncertainties or disagreement arise with regard to the real subject of the dispute [...] or the exact nature of the

³¹⁵ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

³¹⁶ *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30. See also PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208.

³¹⁷ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, I.C.J. Reports 1995, p. 288 at p. 304, para. 55.

³¹⁸ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para. 29.

³¹⁹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 207, para. 70.

³²⁰ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, paras 29-30.

claims submitted to it”, a tribunal “cannot be restricted to a consideration of the terms of the Application alone”.³²¹

234. Thus, while giving particular attention to the formulation of the dispute chosen by the applicant, the position of both parties and their pleadings must be considered. In doing so, a distinction must be made “between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute”.³²²
235. The Arbitral Tribunal observes that, notwithstanding their differences in characterising the dispute, the Parties’ disagreements on points of law or fact and conflicts of legal views or interests, as they are expressed in the submissions, are related to which State may exercise jurisdiction over the incident involving the “Enrica Lexie” and the “St. Antony” which led, as claimed by the Parties, to the alleged violations of various provisions of the Convention referred to in their respective final submissions.
236. In its Notification and Statement of Claim instituting the present proceedings, Italy refers to “the dispute concerning the Enrica Lexie Incident”,³²³ and provides the following introductory summary of the dispute:

This Notification and Statement of Claim addresses the dispute between the Italian Republic (“Italy”) and the Republic of India (“India”) over “the Enrica Lexie Incident”. This concerns an incident 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 criminal jurisdiction over two Italian Marines from the Italian Navy (“Italian Marines”) in respect of that incident. India’s exercise of criminal jurisdiction over the Italian Marines violates the 1982 United Nations Convention on the Law of the Sea (“UNCLOS” or “the Convention”), to which Italy and India are party.³²⁴

237. The Arbitral Tribunal also recalls Italy’s description of the dispute contained in Italy’s Memorial, quoted in full in paragraph 224 above.
238. On the basis of these facts, Italy has consistently maintained in its pleadings that the dispute is one “regarding the legality under UNCLOS of India’s exercise of criminal jurisdiction over the

³²¹ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para. 29.

³²² *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 449, para. 32. See also PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150; PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208.

³²³ Notification and Statement of Claim, Title, Section II, para. 2.

³²⁴ Notification and Statement of Claim, para. 1.

Italian Marines”.³²⁵ To the extent that Italy refers to issues of immunity in defining its dispute in its pleadings, it is with respect to its relevance as an *exception* to India’s exercise of criminal jurisdiction over the Marines, and as one out of several bases on which Italy alleges such exercise to be unlawful.³²⁶

239. Turning to Italy’s submissions as presented in the Notification and Statement of Claim, the Arbitral Tribunal notes that Italy sought specific declaratory relief in respect of the question of immunity.³²⁷ That request, however, was but one of several bases upon which Italy substantiated its more general request for a finding that, “by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines”, India violated the Convention. Indeed, the asserted immunity of the Marines was not the only basis upon which Italy alleges India’s exercise of jurisdiction to be contrary to the Convention. On Italy’s case, it was conceivable that the dispute between the Parties would be decided without a determination on the question of immunity (such as by a finding by the Arbitral Tribunal that Italy has exclusive jurisdiction over the incident under Articles 87 or 97 of the Convention).
240. For its part, India, in its account of the facts giving rise to the present case, places greater emphasis on the “*St. Antony*” and its crew, and the events that occurred on board that fishing vessel as a consequence of the conduct of the Marines. The Arbitral Tribunal recalls India’s response to Italy’s characterisation of the dispute in its Counter-Memorial, quoted in full in in paragraph 228.
241. In a section of the Counter-Memorial entitled “What the Case Is Really About: The Killing of Its Nationals on the *St Antony*”,³²⁸ India elaborates further on that characterisation, making no reference to questions of immunity.

³²⁵ Notification and Statement of Claim, para. 25. *See e.g.*, Italy’s Memorial, paras 1.1 (“a dispute about who has jurisdiction over the MV *Enrica Lexie*, an Italian-flagged oil tanker, and over two Italian Marines stationed on board the *Enrica Lexie*, in respect of an incident”), 1.5 (“the dispute ... about which of Italy and India has jurisdiction over the *Enrica Lexie* and over the Marines to investigate and take whatever action is required under the law in respect of the conduct of the ship and of the Marines”), III.2 (“[t]he dispute before the Tribunal is a dispute as to whether Italy or India has jurisdiction over the *Enrica Lexie* and the Marines”); Italy’s Reply, paras 1.2 (“the heart of the dispute before the Tribunal is whether it is Italy or India that has jurisdiction over two Italian Marines ... for purposes of any penal or disciplinary proceedings against them that may be warranted arising out of the ‘*Enrica Lexie*’ Incident”; 2.9 (“the central question in the present dispute is which State may exercise jurisdiction over the two Marines”).

³²⁶ Italy’s Memorial, paras 1.14 (“[r]educed to its core, the dispute between the Parties is a dispute about jurisdiction and immunity from jurisdiction”); 8.12 (“[t]he core question in the present dispute is which State may exercise jurisdiction over the two Marines. Whether the Marines are entitled to immunity from Indian criminal jurisdiction is part of this core question.”); 8.18 (“[t]he dispute between Italy and India is in essence a dispute about jurisdiction, and immunity is about immunity from jurisdiction”) [emphasis added].

³²⁷ Notification and Statement of Claim, para. 33, subparagraph (b).

³²⁸ India’s Counter-Memorial, p. 3.

242. The Arbitral Tribunal observes, in light of the foregoing, that at no point in their written pleadings in this Arbitration does either Party characterise the dispute between them as one primarily relating to immunity.
243. Having analysed and established the nature of the dispute between the Parties in the present proceedings, the Arbitral Tribunal concludes that the Parties' dispute is appropriately characterised as a disagreement as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the "Enrica Lexie" and the "St. Antony", which raises questions under several provisions of the Convention, including Articles 56, 58, 59, 87, 92, 97, 100, and 300, the interpretation or application of which the Parties have different views. The dispute may raise, but is not limited to, the question of immunity of the Marines.
244. The Arbitral Tribunal thus finds, as it had already concluded on a *prima facie* basis in the proceedings on provisional measures,³²⁹ that there is a dispute between the Parties concerning the interpretation or application of the Convention in the present case.

3. Conclusion

245. The Arbitral Tribunal concludes that as the dispute between the Parties relates to the interpretation or application of the Convention, it has jurisdiction over the dispute underlying the present Arbitration, subject to its decision on the specific objections to jurisdiction raised by India, including with respect to the question of the immunity of the Marines, which will be addressed by the Arbitral Tribunal in conjunction with the claims of Italy to which they relate.³³⁰

B. OBLIGATION TO EXCHANGE VIEWS

246. Article 283, paragraph 1, of the Convention provides:

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.

³²⁹ Order, Request for the Prescription of Provisional Measures of 29 April 2016, paras 52-55.

³³⁰ See Part V, Section A.1 for Italy's claims regarding the compatibility with UNCLOS of India's 1976 Maritime Zones Act and 1981 Notification; and Part V, Section C.1 for the alleged violation by India of the immunity of the Italian Marines.

247. The Arbitral Tribunal notes that, when the dispute arose between the Parties, they expeditiously proceeded to an exchange of views at various diplomatic³³¹ and political³³² levels, aimed at settling the dispute by negotiations or other peaceful means. The Arbitral Tribunal further notes that both Parties agree that these efforts did not lead to an agreement regarding the settlement of the dispute. The Arbitral Tribunal is consequently of the view that the requirements of Article 283, paragraph 1, of the Convention are satisfied.

C. ADMISSIBILITY OF ADDITIONAL CLAIM OF ITALY

248. As India contests the timeliness, and therefore admissibility, of the submission of Italy's claim concerning the alleged incompatibility of The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (hereinafter the "1976 Maritime Zones Act") and the 1981 Notification, under the Convention, the Arbitral Tribunal must examine whether this particular claim of Italy forms part of the dispute in respect of which the Parties have proceeded to an exchange of views, in terms of Article 283, paragraph 1, of the Convention. The Arbitral Tribunal shall consider this question in the context of the discussion of this claim (*see* Part V, Section A.1).

D. ADMISSIBILITY OF COUNTER-CLAIMS OF INDIA

249. In its Counter-Memorial, India raised several counter-claims, to which Italy responded in subsequent written and oral pleadings. Before addressing the merits of these counter-claims, the Arbitral Tribunal must satisfy itself that such counter-claims fall within its jurisdiction, and that they are admissible in the present proceedings.

250. India submits in this regard that its counter-claims are admissible.³³³ India argues that, while the Rules of Procedure do not specifically address counter-claims, they do set out the principle that the Parties enjoy equal treatment and have a full opportunity to present their case.³³⁴ India submits

³³¹ See *e.g.*, Letter from the Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 10 April 2012 (**Annex IT-166**); Letter from the Minister of Foreign Affairs of Italy to the Minister of External Affairs of India, 18 December 2012 (**Annex IT-179**); *Note Verbale* No. 415/6/2012 from India's Ministry of External Affairs to the Embassy of Italy in India, 13 May 2013 (**Annex IN-23**); *Note Verbale* No. 415/6/2012 from India's Ministry of External Affairs to the Embassy of Italy in India, 5 June 2013 (**Annex IN-24**); Italy's Memorial, para. 7.11; India's Counter-Memorial, para. 3.41.

³³² See *e.g.*, *Note Verbale* 112/656 from Italy to India, 9 March 2012 (**Annex IT-160**) recalling a telephone conversation between the Prime Minister of India, Dr. Manmohan Singh and Prime Minister of Italy, Prof. Mario Monti; "PM's telephonic conversation with Italian PM Matteo Renzi", Press Information Bureau of the Indian Prime Minister's Office, 11 August 2014 (**Annex IT-203**); Italy's Memorial, paras 7.9, 7.42.

³³³ India's Counter-Memorial, paras 8.2-8.6.

³³⁴ India's Counter-Memorial, para. 8.2.

that this principle extends to its right to present counter-claims, as it argues is reflected in the practice of the ICJ and ITLOS.³³⁵ India refers to Article 98 of the ITLOS Rules, which states that a “party may present a counter-claim provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal”.³³⁶

251. According to India, its “counter-claims arise out of the same factual matrix as Italy’s claims”. India states that its counter-claims “concern the same events that occurred on 15 February 2012 that are the subject-matter of the claims [...] although they focus on what happened with respect to the *St Antony*, which is really at the heart of the case, not the *Enrica Lexie*”.³³⁷
252. India clarifies that it submits its counter-claims without prejudice to its arguments regarding the lack of jurisdiction over Italy’s claims, both generally and individually.³³⁸
253. Italy, in its written and oral pleadings, has not raised objections to the Arbitral Tribunal’s jurisdiction over, or the admissibility of, India’s counter-claims.³³⁹
254. While the Rules of Procedure adopted by the Arbitral Tribunal in consultation with the Parties at the beginning of the proceedings do not expressly provide for, and regulate, the right to present counter-claims, the Arbitral Tribunal has no doubt that arbitral tribunals established pursuant to Annex VII to the Convention have the inherent power to hear counter-claims. This is consistent with the view previously taken by arbitral tribunals in the Annex VII arbitrations of *Barbados v. The Republic of Trinidad and Tobago*³⁴⁰ and *Guyana v. Suriname*.³⁴¹
255. The Arbitral Tribunal recalls in this regard that Annex VII, Article 5, to the Convention empowers an arbitral tribunal to “determine its own procedure, assuring each party a full opportunity to be heard”. The Arbitral Tribunal further observes that the rules of procedure in both alternative fora for the compulsory settlement of disputes under the Convention, the ICJ and ITLOS, make express provision for the filing of counter-claims by respondent States, and there is no reason why respondent States should be in any different position in Annex VII arbitrations. Finally, the Arbitral Tribunal notes that all major arbitral rules of procedure, including the PCA Arbitration

³³⁵ India’s Counter-Memorial, paras 8.3-8.4, referring to I.C.J. Rules of Court, Article 80(1); citing ITLOS Rules of the Tribunal, Article 98.

³³⁶ India’s Counter-Memorial, para. 8.3, citing ITLOS Rules of the Tribunal, Article 98.

³³⁷ India’s Counter-Memorial, para. 8.4.

³³⁸ India’s Counter-Memorial, para. 8.5.

³³⁹ See India’s Counter-Memorial, para. 8.1; Italy’s Reply, paras 10.1-10.5.

³⁴⁰ PCA Case No. 2004-02: *Barbados v. The Republic of Trinidad and Tobago*, Award of 11 April 2006, RIAA Vol. XXVII, p. 147 at pp 208-09, paras 213-17.

³⁴¹ PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1.

Rules 2012 and the PCA Optional Rules for Arbitrating Disputes between Two States, envisage the submission of counter-claims.

256. It is a general principle of procedural law, consistently applied by international courts and tribunals, that a counter-claim may be admitted only if it comes within the jurisdiction of the court or tribunal concerned and is directly connected with the subject-matter of the claim of the other party. The Arbitral Tribunal finds that these conditions are met in the present case. India's counter-claims raise questions in respect of several provisions of the Convention – notably Articles 56, 58, 90, and 88 – and therefore concern the interpretation or application of the Convention pursuant to Article 288, paragraph 1, of the Convention. Moreover, the counter-claims arise directly from the incident of 15 February 2012 involving the “Enrica Lexie” and the “St. Antony”, which forms the basis of Italy's claims. India's counter-claims are accordingly admissible.

E. APPLICABLE LAW

257. The Arbitral Tribunal observes that Article 293 of the Convention defines the law applicable in the present case. This Article states:

Article 293

Applicable law

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

258. The Arbitral Tribunal notes that the Parties have a disagreement as to the application of Article 293 to the question of the immunity of the Marines, and as to whether such question falls within the jurisdiction of the present Arbitral Tribunal pursuant to Article 288, paragraph 1, of the Convention.³⁴² This matter will be addressed in Part V, Section C.1 below.

V. CLAIMS OF ITALY REGARDING ALLEGED BREACHES BY INDIA OF UNCLOS AND VIOLATIONS OF RIGHTS OF ITALY UNDER UNCLOS

259. Italy's claims in the present proceedings concern (i) the compatibility with the Convention of India's 1976 Maritime Zones Act and 1981 Notification; (ii) alleged breaches by India of provisions of Part VII (High Seas) of the Convention; and (iii) the alleged violation by India of

³⁴² Italy's Memorial, paras 8.17, 11.1.

the immunity of the Italian Marines. The Arbitral Tribunal shall address Italy's claims in this order.

A. COMPATIBILITY WITH UNCLOS OF INDIA'S 1976 MARITIME ZONES ACT AND 1981 NOTIFICATION

260. Italy claims that certain sections of India's 1976 Maritime Zones Act and 1981 Notification are incompatible with the Convention.³⁴³ The 1976 Maritime Zones Act is India's main legislation governing India's jurisdiction over maritime zones. The Parties' disagreement centres, in particular, on the following sections of these two domestic legal instruments.

261. Section 5 of the 1976 Maritime Zones Act provides, in relevant part:

- (1) The contiguous zone of India (hereinafter referred to as the contiguous zone) is an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of section 3.
- (2) Notwithstanding anything contained in sub-section (1), the Central Government may whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the contiguous zone.
[...]
- (4) The Central Government may exercise such powers and take such measures in or in relation to the contiguous zone as it may consider necessary with respect to,—
 - (a) the security of India, and
 - (b) immigration, sanitation, customs and other fiscal matters.³⁴⁴

262. Section 7 of the 1976 Maritime Zones Act provides, in relevant part:

- (1) The exclusive economic zone of India (hereinafter referred to as the exclusive economic zone) is an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in subsection (2) of section 3.
- (2) Notwithstanding anything contained in sub-section (1), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the exclusive economic zone.
[...]
- (4) In the exclusive economic zone, the Union has,—
[...]
(e) such other rights as are recognised by International Law.

³⁴³ The Arbitral Tribunal recalls Italy's formal submission that "[b]y the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and 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 UNCLOS with regard to Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89". Italy's Memorial, p. 188.

³⁴⁴ 1976 Maritime Zones Act, Sections 5(1)-(2) and 5(4) (**Annex IT-65**).

[...]

- (7) The Central Government may, by notification in the official Gazette,—
- (a) extend, with such restrictions and modifications as it thinks fit, any enactment for the time being in force in India or any part thereof in the exclusive economic zone or any part thereof; and
 - (b) make such provisions as it may consider necessary for facilitating the enforcement of such enactment, and any enactment so extended shall have effect as if the exclusive economic zone or the part thereof to which it has been extended is a part of the territory of India.³⁴⁵

263. The 1981 Notification, which refers to the 1976 Maritime Zones Act, provides, in relevant part:

In exercise of the powers conferred by sub section (7) of section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976), the Central Government hereby extends to the exclusive economic zone, referred to therein, the Acts specified in the Schedule hereto annexed subject to the modifications (if any) and the provisions for facilitating the enforcement of such Acts specified in the said schedule.³⁴⁶

264. Part I of the Schedule to the 1981 Notification, in turn, lists the Indian Penal Code and the Indian Code of Criminal Procedure, as modified to include new Section 188A, which provides:

188A. Offence committed in the exclusive economic Zone:

When an offence is committed by any person in the exclusive economic zone described in sub-section (1) of section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in any place in which he may be found or in such other place as the Central Government may direct under section 13 of the said Act.³⁴⁷

1. Jurisdiction and Admissibility

(a) Existence of a Dispute at the Relevant Time in Respect of the 1976 Maritime Zones Act and 1981 Notification

265. The Arbitral Tribunal shall first consider whether it has jurisdiction over Italy's claim regarding the compatibility with UNCLOS of the 1976 Maritime Zones Act and 1981 Notification.

i. Position of India

266. India objects to the jurisdiction of the Arbitral Tribunal over Italy's claim that the 1976 Maritime Zones Act and 1981 Notification are incompatible with the Convention on the ground that "[t]here

³⁴⁵ 1976 Maritime Zones Act, Sections 7(1)-(2), 7(4)(e), and 7(7) (**Annex IT-65**).

³⁴⁶ 1981 Notification (**Annex IT-45**).

³⁴⁷ 1981 Notification, Schedule, Part I (**Annex IT-45**).

was no dispute between the Parties over the above mentioned Italian claim at the date of the filing of Italy's Notification and Statement of Claim of 26 June 2015".³⁴⁸

267. Consistent with ICJ jurisprudence, India submits that the dispute invoked must have existed, and be crystallised, on the date of the application.³⁴⁹ The existence of a dispute, in turn, "must be assessed on the basis of diplomatic exchanges between the Parties previous to its submission to the Court or tribunal", and "the evidence must show that the Parties 'hold clearly opposite views' with respect to the claimed issue".³⁵⁰
268. Similarly, India argues, while the conduct of the Parties subsequent to the Notification and Statement of Claim, such as statements made during judicial proceedings, may be relevant, they can only serve to confirm the existence of a dispute, clarify its subject matter, or determine whether the dispute has disappeared as of the time when the Arbitral Tribunal is to make its decision.³⁵¹ Subsequent conduct alone, India claims, is not sufficient for establishing the existence of the dispute, and cannot crystallise the dispute when, as in this case, it had not crystallised before the Notification and Statement of Claim.³⁵²
269. Applying the law to the facts of this case, India asserts that, not unlike Belgium in "the *Hissene Habré* case" before the ICJ, Italy "fails to establish that a clear opposition of views between the Parties exists in the present case", and "seeks to manufacture such an opposition of views where there is none".³⁵³ In particular, India asserts, Italy "neither in its notification of claims nor at any time before, during its diplomatic exchanges which led to this notification, drew India's attention to the fact that it considered the 1976 act and the 1981 notification unlawful or contrary to the UNCLOS and was requesting the cessation of their application".³⁵⁴

³⁴⁸ India's Counter-Memorial, para. 4.2.

³⁴⁹ India's Counter-Memorial, para. 4.7, citing *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 271, para. 39; India's Rejoinder, para. 2.13; Hearing Transcript, 13 July 2019, 20:9-21:7.

³⁵⁰ India's Counter-Memorial, para. 4.3, citing *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422 at pp 444-45, para. 54; India's Rejoinder, para. 2.6, citing *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 271, para. 39; Hearing Transcript, 13 July 2019, 26:14-18.

³⁵¹ India's Counter-Memorial, paras 4.8-4.10.

³⁵² India's Counter-Memorial, para. 4.10; India's Rejoinder, para. 2.14.

³⁵³ India's Rejoinder, para. 2.6. See also India's Counter-Memorial, para. 4.2; Hearing Transcript, 13 July 2019, 24:4-26:7, citing *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422 at pp 444-45, para. 54.

³⁵⁴ Hearing Transcript, 13 July 2019, 26:1-8. See also India's Counter-Memorial, para. 4.11.

270. Even though India “by no means denies that both Italy’s Statement of Claim and Memorial take another position and *now* question the compatibility of the 1976 Act and the 1981 Notification with UNCLOS”, it asserts that “this is precisely what [Italy] was not entitled to do failing a conflict of views on this matter before the Statement of Claim was made”.³⁵⁵ India submits that it was only in its Memorial that Italy “clearly articulated the more far-reaching position that the 1976 Act and the 1981 Notification are in themselves in breach of UNCLOS and that they must be repealed”.³⁵⁶
271. Moreover, India claims, the evidence proffered by Italy to establish the existence of the dispute “shows that *both Parties agree* that the 1976 Maritime Zones Act and the 1981 Notification are to be, and can be, read in harmony with UNCLOS”, and consequently, that “neither the Act nor the Notification can constitute a claim of sovereignty over the EEZ”.³⁵⁷
272. In any event, India maintains, while the Marines and Italy challenged the interpretation of the two domestic laws before Indian courts, “at no time [...] were there any questions of annulling the act or notification now in dispute, or terminating or ceasing their application”.³⁵⁸ In India’s view, there “could indeed be a difference of opinion concerning the interpretation of these instruments; but interpretation on the one hand and contestation of the validity of certain texts on the other hand cannot be equated”.³⁵⁹ In this respect, India also considers questions of domestic law to be irrelevant in this matter because “unless expressly referred to, [...] international arbitrators[] are not called upon to apply the rules of domestic law any more than [they] have the power to annul or amend them”.³⁶⁰ It is for this reason that India considers Justice Verma’s expert reports to be irrelevant, and did not deem it necessary to either produce an expert report in response or to cross-examine Justice Verma.³⁶¹
273. India concludes that it is also irrelevant whether Italy’s claim “arises ‘directly out of the question which is the subject-matter’ of” its Notification and Statement of Claim, because there was no genuine dispute between Italy and India concerning the legality of the 1976 Maritime Zones Act and the 1981 Notification at the time Italy filed its Notification and Statement of Claim.³⁶²

³⁵⁵ India’s Rejoinder, para. 2.13 [emphasis added by India].

³⁵⁶ India’s Rejoinder, para. 2.12. *See also* India’s Counter-Memorial, para. 4.5.

³⁵⁷ India’s Rejoinder, paras 2.6-2.11, *citing Aban Loyd Chiles Offshore Ltd. v. Union of India*, (2008) 11 SCC 439, para. 74 [emphases added by India].

³⁵⁸ Hearing Transcript, 13 July 2019, 27:3-29:13.

³⁵⁹ Hearing Transcript, 13 July 2019, 29:5-9.

³⁶⁰ Hearing Transcript, 13 July 2019, 30:1-5.

³⁶¹ Hearing Transcript, 13 July 2019, 30:6-23.

³⁶² India’s Rejoinder, paras 2.12, 2.15.

274. Accordingly, India submits, the Arbitral Tribunal lacks jurisdiction over this claim because the Parties did not hold “clearly opposite views” regarding the compatibility of the 1976 Maritime Zones Act and the 1981 Notification at the time of the Statement of Claim.³⁶³

ii. Position of Italy

275. Italy maintains that India’s objection to the Arbitral Tribunal’s jurisdiction over its claim regarding the compatibility of the 1976 Maritime Zones Act and 1981 Notification with the Convention fails.³⁶⁴ Italy claims that “[t]here is no doubt whatsoever that a dispute existed between Italy and India on the extension of India’s penal jurisdiction beyond the territorial sea *prior to* the filing of Italy’s Statement of Claim”.³⁶⁵ Accordingly, Italy submits that “there was a dispute between the Parties regarding the compatibility of the 1976 Act and the 1981 Notification with UNCLOS”³⁶⁶ prior to 26 June 2015, when the Notification and Statement of Claim was filed.

276. As an initial matter, Italy does not disagree that in order for there to be a legal dispute, the Parties must hold clearly opposite views with respect to the issue brought before the relevant court or tribunal pursuant to Part XV of the Convention, and that the date for determining the existence of such a dispute is the date on which the application is submitted.³⁶⁷ Italy also submits that, as confirmed by ITLOS and ICJ jurisprudence, “the existence of such a disagreement can be inferred from conduct”³⁶⁸ and “‘any statement or documents exchanged between the parties’, paying special attention to ‘the author of the statement or document, their intended or actual addressee, and their content’.”³⁶⁹

277. Applying the above to this case, and contrary to India’s claim, Italy contends that this requirement has been met because the Parties “have held ‘clearly opposite views’ on the consistency of the Maritime Zones Act 1976 and the 1981 Notification with UNCLOS since 2012”.³⁷⁰ In particular, Italy asserts that “the conformity with UNCLOS of the Maritime Zones Act 1976 and the 1981

³⁶³ India’s Rejoinder, paras 2.4, 2.6-2.15; India’s Counter-Memorial, paras 4.2-4.12.

³⁶⁴ Italy’s Reply, para. 2.32.

³⁶⁵ Italy’s Reply, para. 2.32 [emphasis added by Italy]. *See also* Italy’s Rejoinder, paras 3.2, 3.12.

³⁶⁶ Italy’s Rejoinder, para. 3.2; Hearing Transcript, 9 July 2019, 130:18-21.

³⁶⁷ Italy’s Reply, para. 2.37, *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at p. 271, paras 38-39.

³⁶⁸ Hearing Transcript, 9 July 2019, 130:21-131:2, *referring to M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 [forthcoming], para. 57.

³⁶⁹ Hearing Transcript, 18 July 2019, 64:9-21, *citing Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255 at pp 271-72, paras 39-40.

³⁷⁰ Italy’s Reply, para. 2.38.

Notification was raised by Italy *at every stage of those proceedings*”, and that the “juxtaposition of views and interpretations between [the Parties] on this issue emerged early on and remained prominent throughout the domestic proceedings”.³⁷¹

278. In this regard, Italy points to various oral and written submissions made by Italy and India in the relevant domestic court proceedings, in which, Italy alleges, India and Italy (on behalf of the Marines) take opposing views with respect to the question whether, if the correct Indian law interpretation of the 1976 Maritime Zones Act and the 1981 Notification was that they effected a wholesale extension of the Indian Penal Code beyond India’s territorial sea, the 1976 Maritime Zones Act and the 1981 Notification would be incompatible with the Convention.³⁷² In these domestic proceedings in which each State was involved at the highest levels,³⁷³ Italy argues, the Parties also took opposing views with respect to the question whether Indian law would prevail in the event that the 1976 Maritime Zones Act and the 1981 Notification were found to be incompatible with the Convention.³⁷⁴
279. Moreover, while it is true that Italy, in the domestic proceedings, “tried to argue for a read-down of those instruments precisely to avoid a breach of India’s obligations under UNCLOS”, Italy points out that these “arguments were strongly resisted by the Indian government in the proceedings before its courts” and ultimately rejected by the Supreme Court of India.³⁷⁵ Indeed, according to Italy, in a finding which constitutes binding law in India, the Supreme Court of India rejected the interpretation of the 1976 Maritime Zones Act and the 1981 Notification that would

³⁷¹ Italy’s Reply, para. 2.33 [emphasis added by Italy]. *See also* Italy’s Rejoinder, para. 3.6; Hearing Transcript, 9 July 2019, 132:1-5; Hearing Transcript, 18 July 2019, 60:12-15, 61:5-9.

³⁷² Italy’s Reply, para. 2.33, *citing* Notes of Argument submitted by the Advocate-General of Kerala, 27 March 2012, para. 6.i (**Annex IT-271**); Written Submissions filed on behalf of Massimiliano Latorre and Salvatore Girone and Italy, 2 April 2012, paras 26, 18-30 (**Annex IT-272**); Counter Affidavit filed on behalf of the Ministry of External Affairs, 7 May 2012, para. R (**Annex IT-273**); Special Leave Petition 20370 of 2012, 11 July 2012, pp 91-92 (**Annex IT-18**); Written Submissions submitted on behalf of the Union of India by the Additional Solicitor General, 12 September 2012, pp 4, 9, 11, 14 (**Annex IT-275**). *See also* Italy’s Rejoinder, para. 3.7, *citing* Notes of Argument submitted by the Advocate-General of Kerala, 27 March 2012, p. 5 (**Annex IT-271**); Written Submissions filed on behalf of Massimiliano Latorre and Salvatore Girone and Italy, 2 April 2012, para. 26 (**Annex IT-272**); Judgment of the High Court of Kerala, 29 May 2012, pp 23-24 (**Annex IT-17**); Special Leave Petition 20370 of 2012, 11 July 2012, pp 90-91, 133 (**Annex IT-18**); Written Submissions submitted on behalf of the Union of India by the Additional Solicitor General, 12 September 2012, pp 3-4, 8, 9 (**Annex IT-275**); Hearing Transcript, 18 July 2019, 61:11-62:22, *citing* Written Submissions filed on behalf of Massimiliano Latorre and Salvatore Girone and Italy, 2 April 2012, para. 26 (**Annex IT-272**); Writ Petition No. 236 of 2014 under Article 32 of the Constitution of India, 6 March 2014, para. 4(I) (**Annex IT-56**); Special Leave Petition 20370 of 2012, 11 July 2012, para. 5 (**Annex IT-18**).

³⁷³ Hearing Transcript, 18 July 2019, 60:15-21.

³⁷⁴ Italy’s Rejoinder, para. 3.7.

³⁷⁵ Hearing Transcript, 9 July 2019, 132:5-133:5. *See also* Hearing Transcript, 18 July 2019, 63:11-18.

allow them to be read harmoniously with the Convention, and instead adopted an interpretation inconsistent with the Convention.³⁷⁶

280. On the basis of the above, Italy alleges that there is “evidence [which is] copious and explicit, [and which] flatly contradicts India’s contention that ‘it cannot be said that India was aware, or could not have been unaware, that Italy was making ... an allegation that India was in breach of its obligations’ under UNCLOS by effect of the Maritime Zones Act 1976 and the 1981 Notification”.³⁷⁷ To the contrary, Italy claims, India was fully aware of Italy’s position and “resisted it expressly by pushing for an interpretation of its laws that India knew Italy regarded as inconsistent with UNCLOS”.³⁷⁸
281. Italy further asserts that this evidence shows that the legal dispute had crystallised well before Italy’s submission of the dispute to this Arbitral Tribunal, and was and remains a central element in the legal dispute between the Parties.³⁷⁹ This demonstrates, contrary to India’s claim, that Italy has maintained a “consistent position [...] that, if the correct Indian law interpretation of the 1976 Act and the 1981 Notification is that they effected a wholesale extension of Indian criminal law beyond India’s territorial sea, those two instruments would be incompatible with UNCLOS”.³⁸⁰
282. In response to India’s claim that Italy quoted selectively from the Parties’ submissions in the domestic court proceedings, specifically omitting passages from the *Aban Loyd Chiles Offshore Ltd. v. Union of India* case, Italy argues that those passages are not relevant to this Arbitration.³⁸¹ This is because both the High Court of Kerala and the Supreme Court of India have, since 2008, held that the 1976 Maritime Zones Act and the 1981 Notification do effect a wholesale extension of Indian penal law beyond India’s territorial sea, and that therefore the interpretation of the two legal instruments as a matter of Indian law, is incompatible with the Convention.³⁸²

(b) **Admissibility of Claim of Italy**

283. The Arbitral Tribunal must examine, furthermore, whether this particular claim of Italy constitutes a new, additional claim and is admissible.

³⁷⁶ Italy’s Reply, para. 2.34; Italy’s Rejoinder, para. 3.8; Hearing Transcript, 9 July 2019, 133:15-20.

³⁷⁷ Italy’s Reply, para. 2.35, *citing* India’s Counter-Memorial, para. 4.12.

³⁷⁸ Italy’s Reply, para. 2.35.

³⁷⁹ Italy’s Reply, para. 2.36.

³⁸⁰ Italy’s Rejoinder, para. 3.10.

³⁸¹ Italy’s Rejoinder, para. 3.11.

³⁸² Italy’s Rejoinder, para. 3.11.

i. Position of India

284. India argues that, even if there were a pre-existing dispute between the Parties regarding the compatibility of the 1976 Maritime Zones Act and the 1981 Notification, Italy's claim is inadmissible because it was "not raised, directly or indirectly, in the Statement of Claim".³⁸³ India argues that Italy's challenge to the compatibility of the 1976 Maritime Zones Act and the 1981 Notification with the Convention constitutes a new, additional claim that "transforms the dispute brought before this Tribunal".³⁸⁴
285. India argues that, in line with the *jurisprudence constante* of international courts and tribunals, the Notification and Statement of Claim must set out the subject of the dispute.³⁸⁵ Thus, while the claims made in the Notification and Statement of Claim can be clarified or specified later in the proceedings, any "additional claim must have been implicit [therein], or must arise directly out of the question which is the subject matter of that application".³⁸⁶ This requirement, India alleges, "is all the more compelling in the present case" given that Italy is asking the Arbitral Tribunal "no less than to nullify *de facto* an Act of Parliament", and is "all the more extraordinary [since] prior to the filing of its Memorial, Italy had never protested against the 1976 Act notwithstanding the fact that the Act was duly published by the Division of the Law of the Sea".³⁸⁷
286. In this respect, India emphasises that it is necessary to "distinguish between the dispute itself and arguments used by the Parties to sustain their respective submissions to the dispute".³⁸⁸ In India's view, while Italy "might have in principle the right to argue that the act and the [notification]

³⁸³ India's Rejoinder, para. 2.16.

³⁸⁴ India's Counter-Memorial, para. 4.13.

³⁸⁵ India's Counter-Memorial, para. 4.4; Hearing Transcript, 13 July 2019, 17:12-18:10, citing *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 447-48, para. 29; *Case Concerning the Administration of the Prince von Pless*, Order of 4 February 1933, P.C.I.J. Series A/B, No. 52, p. 11 at p. 14. See also India's Counter-Memorial, para. 4.13, citing *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275 at pp 318-19, para. 99; India's Rejoinder, para. 2.18, citing *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 143; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161 at p. 213, para. 117.

³⁸⁶ India's Counter-Memorial, para. 4.4; Hearing Transcript, 13 July 2019, 18:14-19:17, citing *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at p. 266, para. 67; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 142.

³⁸⁷ India's Counter-Memorial, para. 4.5; Hearing Transcript, 13 July 2019, 21:8-17.

³⁸⁸ Hearing Transcript, 13 July 2019, 16:23-17:4, citing *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 449, para. 32.

cannot justify India's case [...] it cannot indeed make it the subject matter of a claim, of a submission before the Tribunal".³⁸⁹

287. In addition, while Italy reserved its right to supplement and/or amend its claim and the relief sought as necessary, India maintains that such "reservation is of no effect at all" because it "cannot circumvent the well-established rule that any posterior request or submission must remain within the framework of the initial application or notification".³⁹⁰
288. In this case, India argues, Italy "indisputably introduces a new dispute of a nature different from the one it initially brought before this Tribunal" because Italy requests the Arbitral Tribunal "to order India to cease applying instruments which were not even mentioned in its Statement of Claim".³⁹¹ According to India, by now "advancing these claims and making them part of its submissions, Italy has extended the dispute beyond the limits of the reliefs sought and described in its application" and "tries to transform and expand unduly the subject matter of the dispute".³⁹²

ii. Position of Italy

289. Italy maintains that its Notification and Statement of Claim includes its claim regarding the incompatibility of the 1976 Maritime Zones Act and the 1981 Notification with the Convention.³⁹³ Referring to its description of the dispute and the first form of relief sought in its Notification and Statement of Claim, Italy notes that it clearly alleged that, by exercising criminal jurisdiction over the Marines, India was in breach of various obligations under the Convention.³⁹⁴ In addition, Italy points to one of the grounds of its claims described in its Notification and Statement of Claim which provides:

By extending the application of its domestic criminal laws and, consequently, providing for the apparent jurisdiction of the Indian investigating and prosecuting authorities, and the Indian courts, over incidents occurring in international waters in excess of the limits prescribed in UNCLOS regarding the jurisdiction of coastal States in the contiguous zone and the exclusive economic zone, India has acted and continues to act in a manner incompatible *inter alia* with Article 56(2) and Article 89 of UNCLOS.³⁹⁵

³⁸⁹ Hearing Transcript, 13 July 2019, 16:7-12.

³⁹⁰ Hearing Transcript, 13 July 2019, 22:3-25.

³⁹¹ India's Rejoinder, para. 2.19.

³⁹² Hearing Transcript, 13 July 2019, 32:3-11.

³⁹³ Italy's Reply, paras 2.39-2.43.

³⁹⁴ Italy's Reply, paras 2.39-2.41, *citing* Notification and Statement of Claim, paras 1, 29-30, 33(a); Italy's Rejoinder, para. 3.13, *citing* Notification and Statement of Claim, para. 29(h). *See also* Hearing Transcript, 9 July 2019, 134:12-15.

³⁹⁵ Notification and Statement of Claim, para. 29(h).

290. These paragraphs, as well as the relief section,³⁹⁶ Italy claims, “explicitly put in issue India’s application of its domestic criminal laws to the contiguous zone and the exclusive economic zone”,³⁹⁷ and India’s exercise of jurisdiction as a consequence of such application.³⁹⁸
291. In addition, Italy points out, Italy’s language in the Notification and Statement of Claim mirrored the language used by India in domestic proceedings, thereby rendering it “inconceivable that when India received Italy’s notification, it did not immediately understand what the almost identical language used by Italy was referring to”.³⁹⁹ Moreover, Italy submits, India cites no authority, and there is none, that would support India’s claim that Italy is required to mention the 1976 Maritime Zones Act and 1981 Notification by name in its Notification and Statement of Claim.⁴⁰⁰
292. In addition, relying on the judgment of the ICJ in *Oil Platforms (Islamic Republic of Iran v. United States of America)* (hereinafter “*Oil Platforms*”), Italy maintains that its Memorial merely provides additional evidence relating to its original claim made in paragraph 29, subparagraph (h), of its Notification and Statement of Claim;⁴⁰¹ this evidence, namely, being the “specifics relating to how Indian criminal law has been extended to the Indian contiguous zone and exclusive economic zone through the 1976 Act and the 1981 Notification”.⁴⁰²
293. Italy also dismisses India’s argument that Italy’s claim, like that of Saint Vincent and the Grenadines in *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, did not “arise [...] directly out of the Application”.⁴⁰³ Unlike Saint Vincent and the Grenadines which “had not identified any violation of Article 300 in the notification and in the memorial”, and instead only alleged such violations by Spain “after the closure of the written proceedings”, Italy “did expressly identify the extension of criminal laws as discrete Indian conduct in respect of which Italy was notifying a claim for breach of certain provisions of UNCLOS”.⁴⁰⁴

³⁹⁶ Hearing Transcript, 18 July 2019, 55:16-56:4, *referring to* Notification and Statement of Claim, para. 33(a).

³⁹⁷ Italy’s Reply, para. 2.42. *See also* Hearing Transcript, 9 July 2019, 134:16-135:4; Hearing Transcript, 18 July 2019, 55:2-9.

³⁹⁸ Hearing Transcript, 18 July 2019, 55:10-16.

³⁹⁹ Hearing Transcript, 18 July 2019, 56:5-18, *citing* Counter Affidavit filed on behalf of the Ministry of External Affairs, 7 May 2012, para. R (**Annex IT-273**).

⁴⁰⁰ Italy’s Rejoinder, para. 3.14.

⁴⁰¹ Italy’s Rejoinder, paras 3.15-3.16.

⁴⁰² Italy’s Rejoinder, para. 3.15.

⁴⁰³ Hearing Transcript, 18 July 2019, 56-58:8, *referring to* Hearing Transcript, 13 July 2019, 19:2-12.

⁴⁰⁴ Hearing Transcript, 18 July 2019, 58:1-13.

294. The fact that Italy’s claim regarding the compatibility of the two pieces of Indian legislation with the Convention is included in the terms of the Notification and Statement of Claim, Italy alleges, is “so incontrovertible that it is not necessary for Italy to reply to India’s argument” that Italy’s claim is an additional claim over which the Arbitral Tribunal lacks jurisdiction.⁴⁰⁵ Nevertheless, Italy maintains that even if Italy’s claim were regarded as an additional claim, it would still be admissible.⁴⁰⁶
295. According to Italy, ICJ and ITLOS jurisprudence allows additional claims to be submitted in two situations: where the additional claim is implicit in the Notification and Statement of Claim, or where the additional claim arises directly out of the question which is the subject-matter of the Notification and Statement of Claim.⁴⁰⁷ In this case, Italy argues, “there can be no doubt that this claim was either/both implicit in the original claim or/and arises ‘*directly out of the question which is the subject-matter*’ of it”.⁴⁰⁸ This is because, Italy claims, the 1976 Maritime Zones Act and 1981 Notification are central to the dispute between the Parties over who has jurisdiction over the Marines, in particular because they are necessary conditions for India’s assertion and exercise of jurisdiction over them.⁴⁰⁹
296. In addition, Italy dismisses India’s reliance on the ICJ’s judgment in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*,⁴¹⁰ arguing that unlike this case, Australia’s “claim on the allocation of the overseas assets of the British Phosphate Commissioners advanced in the memorial [was] inadmissible because [...] it only had a link ‘of a general nature’ with the original claim” and raised questions “that appear [...] to be extraneous to the original claim”.⁴¹¹

2. Alleged Breaches by India of Provisions of UNCLOS

297. Italy submits that Section 5, paragraph 4, of the 1976 Maritime Zones Act, and Section 7, paragraph 7, of the 1976 Maritime Zones Act, read in conjunction with the 1981 Notification, are incompatible with Article 33, paragraph 1; Article 56, paragraphs 1 and 2; Article 58,

⁴⁰⁵ Italy’s Reply, para. 2.43.

⁴⁰⁶ Italy’s Reply, paras 2.44-2.46; Hearing Transcript, 9 July 2019, 135:5-9; Hearing Transcript, 18 July 2019, 58:14-19.

⁴⁰⁷ Italy’s Reply, paras 2.44-2.45, citing *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 at p. 657, para. 41; *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 44, para. 142; Hearing Transcript, 9 July 2019, 135:9-136:4.

⁴⁰⁸ Italy’s Reply, para. 2.46 [emphasis added by Italy]. See also Hearing Transcript, 9 July 2019, 136:7-13.

⁴⁰⁹ Italy’s Reply, para. 2.46.

⁴¹⁰ See Hearing Transcript, 13 July 2019, 19:13-17.

⁴¹¹ Hearing Transcript, 18 July 2019, 58:20-59:14, citing *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at p. 266, paras 67-68.

paragraph 2; Article 87, paragraph 1, subparagraph (a); and/or Article 89 of the Convention.⁴¹² India, in response, denies that it applied the 1976 Maritime Zones Act and the 1981 Notification in any way that was contrary to UNCLOS”.⁴¹³

(a) **Position of Italy**

298. Italy claims that, by enacting the 1976 Maritime Zones Act and the 1981 Notification – which purport to extend India’s criminal jurisdiction over its contiguous zone and exclusive economic zone – India “has acted and is acting in a manner that is incompatible with UNCLOS with regard to Articles 33(1), 56(1), 56(2), 58(2), 87(1)(a) and/or 89”.⁴¹⁴
299. As a preliminary matter, Italy submits that there is “ample support for the proposition that the mere passage or existence of national legislation may breach international legal obligations”.⁴¹⁵ Italy acknowledges that whether a breach is caused by the mere enactment of legislation, or whether the legislation has to be implemented in a given case before a breach can be said to have occurred, depends on the nature of the primary obligation. However, since provisions of UNCLOS “set[] limits to, *inter alia*, prescriptive jurisdiction – that is, to the right of States to legislate on certain matters”, Italy maintains that it is “in the nature of such provisions that they may be violated by the mere enactment of legislation”.⁴¹⁶
300. Elaborating on this point, Italy asserts that the Convention was “intended to be a comprehensive legal regime governing the law of the sea”, particularly in relation to rules that govern the rights and duties of States in the maritime zones regulated under the regime.⁴¹⁷ Therefore, Italy argues, any assertion and exercise of rights, control, or jurisdiction by coastal States beyond their territorial sea requires an affirmative legal basis under the Convention.⁴¹⁸ In the absence of such a legal basis, the extension of jurisdiction and the exercise of adjudicative jurisdiction based on an extension of prescriptive jurisdiction beyond the territorial sea would be unlawful under international law and incompatible with the Convention.⁴¹⁹

⁴¹² Italy’s Memorial, p. 188.

⁴¹³ India’s Rejoinder, para. 5.10.

⁴¹⁴ Italy’s Memorial, p. 188.

⁴¹⁵ Italy’s Memorial, para. 9.14.

⁴¹⁶ Italy’s Memorial, para. 9.18.

⁴¹⁷ Italy’s Memorial, para. 9.19. *See also* Hearing Transcript, 9 July 2019, 140:24-141:1.

⁴¹⁸ Italy’s Memorial, para. 9.23.

⁴¹⁹ Italy’s Memorial, para. 9.23.

301. Turning to the 1976 Maritime Zones Act and the 1981 Notification, Italy submits that they give India “the right, under its domestic law, to apply and enforce penal laws over any person, Indian or foreign citizen, in its EEZ who is found to have committed an offence punishable under the penal laws extended and made applicable to the EEZ of India”.⁴²⁰ This understanding is, according to Italy, consistent with the views of India’s own legal advisors,⁴²¹ the interpretation and application of that law by the Indian courts, including the Supreme Court in the proceedings against the Marines,⁴²² the Indian Ministry of Home Affairs,⁴²³ and the expert opinion of a former justice of the Supreme Court of India.⁴²⁴

i. Alleged Aspects of Incompatibility between the 1976 Maritime Zones Act and 1981 Notification, and the Convention

302. On the above premises, Italy submits that the 1976 Maritime Zones Act and the 1981 Notification are incompatible with the Convention in three respects.

303. First, Italy submits that by purporting to subject the exclusive economic zone to its sovereignty, India is in breach of Article 89 of the Convention. In support of this claim, which Italy notes that India has essentially ignored,⁴²⁵ Italy contends that Article 89 must be read in conjunction with Article 87, regarding the freedom of the high seas, from which the prohibition of exercising sovereignty over the high seas flows.⁴²⁶ In this context, Italy submits that Article 89 does not only apply to prohibit *de jure* annexation, but also to “all state conduct amounting in effect to an assertion of sovereignty”.⁴²⁷ In Italy’s view, criminal law and criminal jurisdiction “are typical expressions of the ‘juridical order’ of a state” and “quintessential manifestations of

⁴²⁰ Hearing Transcript, 9 July 2019, 119:10-120:3, *citing* Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, para. 38.

⁴²¹ Hearing Transcript, 9 July 2019, 112:17-117:19, *referring to* Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 25 March 1983, para. 3(c) (**Annex IT-67**); Letter from the Ministry of Home Affairs of India to the Ministry of External Affairs of India (Legal & Treaties Division), 14 April 1983, para. 3 (**Annex IT-68**); Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 3 May 1983 (**Annex IT-69**).

⁴²² Hearing Transcript, 9 July 2019, 117:20-118:7, 120:14-22, *referring to* *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 99 (**Annex IT-19**); Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, para. 36.

⁴²³ Hearing Transcript, 9 July 2019, 118:8-119:9, *referring to* Notification of the Ministry of Home Affairs of India of 14 June 2016 (**Annex IT-215**).

⁴²⁴ Hearing Transcript, 9 July 2019, 121:4-11, *referring to* Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, para. 38.

⁴²⁵ Hearing Transcript, 9 July 2019, 138:9-15.

⁴²⁶ Hearing Transcript, 9 July 2019, 136:24-138:3. *See also* Italy’s Memorial, para. 9.39.

⁴²⁷ Hearing Transcript, 9 July 2019, 138:21-25. *See also* Italy’s Memorial, para. 9.39.

sovereignty”.⁴²⁸ As such, the fact that India “is extending the full body of its criminal laws to the EEZ *tout court*” is a “deep and comprehensive assertion of typically sovereign authority [that] must be properly characterised as an attempt to subject the EEZ to Indian sovereignty”.⁴²⁹

304. Second, Italy claims that the 1976 Maritime Zones Act and 1981 Notification are contrary to the rules on the rights of coastal States in the exclusive economic zone and the contiguous zone in the Convention, and more specifically Articles 33(1), 56, and 58.
305. In support of this claim, Italy reiterates its position that the Convention “was intended to be a comprehensive regime and to provide a complete basis for the rights and duties of states in the maritime zones”.⁴³⁰ This is confirmed, according to Italy, by Article 55 of the Convention, which provides that the zone is “subject to” a specific legal regime and “governed by” the relevant provisions of the Convention.⁴³¹ Similarly, Italy notes, ITLOS upheld this position in *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)* (hereinafter “*M/V ‘SAIGA’ (No. 2)’*”), when it rejected Guinea’s argument that its application of its customs laws in the exclusive economic zone was not contrary to the Convention because “rights or jurisdiction in the exclusive economic zone, which the Convention does not expressly attribute to the coastal States, do not fall automatically under the freedom of the high seas”.⁴³² Instead, ITLOS found that “the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned [in Article 55]”.⁴³³ Accordingly, Italy submits, when “there is no legal basis in the Convention for a particular coastal State’s right in the EEZ, it must follow that that right would breach UNCLOS”, otherwise, “the identification of rights and duties in the different maritime zones in the Convention would be hollowed out of any legal significance”.⁴³⁴
306. In Italy’s view, the customs laws applied by Guinea to the exclusive economic zone in the *M/V “SAIGA” (No. 2)* case are no different from the criminal laws applied by India in this case because there is no legal basis in the Convention for their application by the coastal State in the

⁴²⁸ Hearing Transcript, 9 July 2019, 139:6-9.

⁴²⁹ Hearing Transcript, 9 July 2019, 139:14-19. *See also* Italy’s Reply, para. 6.15.

⁴³⁰ Hearing Transcript, 9 July 2019, 140:25-141:1. *See also* Italy’s Reply, para. 6.14.

⁴³¹ Hearing Transcript, 9 July 2019, 141:1-12.

⁴³² Hearing Transcript, 9 July 2019, 141:14-142:14, *citing M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 54, para. 125.

⁴³³ Hearing Transcript, 9 July 2019, 142:9-19, *citing M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 54, 56, paras 127, 136.

⁴³⁴ Hearing Transcript, 9 July 2019, 142:24-143:6. *See also* Italy’s Memorial, paras 9.30-9.35; Italy’s Reply, para. 6.11.

exclusive economic zone.⁴³⁵ Indeed, Italy claims, “there is no plausible reading of the provisions in UNCLOS that deal with the EEZ that could sustain the broad and all-encompassing extension of penal jurisdiction that India has provided for” in its domestic laws.⁴³⁶ Therefore, Italy submits that Section 7, paragraph 7, of the 1976 Maritime Zones Act, in conjunction with the 1981 Notification, violates the Convention by extending India’s jurisdiction in the exclusive economic zone beyond the authorised limits in the Convention in breach of Article 56, paragraph 1, and Article 58, paragraph 2.⁴³⁷

307. In addition, Italy submits that the same analysis applies *mutatis mutandis* to the contiguous zone.⁴³⁸ Under Article 33, paragraph 1, of the Convention, coastal States may exercise the control necessary to “prevent the infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; [and] punish infringement of the above laws and regulations committed within its territory or territorial sea”. Section 5, paragraph 4, of the 1976 Maritime Zones Act authorises India to exercise the control necessary “with respect to [...] the security of India”.⁴³⁹ Because the exercise of control necessary with respect to “the security of India” has no basis in Article 33, paragraph 1, or anywhere else in the Convention, Italy submits that it is incompatible with the Convention,⁴⁴⁰ and that India itself was aware of this inconsistency but chose not to amend its legislation.⁴⁴¹
308. Third, Italy submits that the 1976 Maritime Zones Act and the 1981 Notification interfere with other States’ freedom of navigation in breach of Article 87, paragraph 1, subparagraph (a), which is extended to the exclusive economic zone by effect of Article 58, paragraph 1.⁴⁴²
309. In support of this claim, Italy quotes ITLOS’ judgment in *M/V “Norstar” (Panama v. Italy)* (hereinafter “*M/V ‘Norstar’*”),⁴⁴³ in which ITLOS found that “if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it

⁴³⁵ Hearing Transcript, 9 July 2019, 142:20-23.

⁴³⁶ Hearing Transcript, 9 July 2019, 143:9-15. *See also* Italy’s Reply, para. 6.14. *See also* Italy’s Memorial, paras 9.30-9.41.

⁴³⁷ Italy’s Memorial, paras 9.24, 9.36, 9.41; Italy’s Reply, paras 6.14-6.15.

⁴³⁸ Hearing Transcript, 9 July 2019, 144:5-7.

⁴³⁹ 1976 Maritime Zones Act, Sections 5(1)-(2) and 5(4) (**Annex IT-65**).

⁴⁴⁰ Italy’s Memorial, para. 9.27. *See also* Italy’s Reply, para. 6.13; Hearing Transcript, 9 July 2019, 144:18-145:22.

⁴⁴¹ Hearing Transcript, 9 July 2019, 145:23-146:20, *citing* O.P. Sharma, ‘Indian and the United Nations Convention on the Law of the Sea’ (1995) 26 *Ocean Development and International Law* 391, at 404.

⁴⁴² Italy’s Memorial, para. 9.44; Italy’s Reply, para. 6.15.

⁴⁴³ Hearing Transcript, 18 July 2019, 76:22-77:3; Hearing Transcript, 9 July 2019, 148:13-149:22, *citing* *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 222-23.

would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties”,⁴⁴⁴ and that “even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation”.⁴⁴⁵ Italy adds that “acts short of physical interference or enforcement include, on the *Norstar* analysis, the exercise of prescriptive jurisdiction”.⁴⁴⁶ Further, Italy submits that ITLOS found that it was not necessary to demonstrate that the legislation at issue had a “chilling effect” on navigation in order to establish a breach of Article 87.⁴⁴⁷ While Italy maintains that the 1976 Maritime Zones Act and the 1981 Notification, “by its nature, by its scope, has a chilling effect” on navigation, in Italy’s view, even if they did not, the threshold for establishing a breach of Article 87 of the Convention, as articulated by ITLOS in *M/V “Norstar”*, is clearly met in this case where India has not only exercised prescriptive jurisdiction but also adopted specific enforcement measures to ensure the effectiveness of such jurisdiction.⁴⁴⁸

310. Moreover, contrary to India’s contention, Italy maintains that it is irrelevant whether India only exercised jurisdiction over the Marines in India’s internal waters.⁴⁴⁹ This is because, in *M/V “Norstar”*, ITLOS rejected a similar argument made by Italy and instead held that “even when enforcement is carried out in internal waters, Article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them”.⁴⁵⁰ Accordingly, in Italy’s view, “even if the enforcement happened in a place where it would have been in theory permissible, the fact that it had been preceded and enabled by the unlawful prescriptive jurisdiction results in a breach of Article 87 and in the freedom of the high seas”.⁴⁵¹
311. Italy similarly dismisses India’s attempts to distinguish the *M/V “Norstar”* case on the basis that, unlike the Italian decree at issue in that case, the 1981 Notification only criminalises conduct by foreign persons and not foreign vessels. According to Italy, “[i]t is an established principle of the

⁴⁴⁴ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225. See Hearing Transcript, 18 July 2019, 76:22-77:3.

⁴⁴⁵ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 223. See Hearing Transcript, 9 July 2019, 148:13-23.

⁴⁴⁶ Hearing Transcript, 9 July 2019, 149:3-22, referring to *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225.

⁴⁴⁷ Hearing Transcript, 9 July 2019, 150:7-11, citing *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 224.

⁴⁴⁸ Hearing Transcript, 9 July 2019, 150:4-6; 150:12-16.

⁴⁴⁹ Hearing Transcript, 9 July 2019, 151:8-24.

⁴⁵⁰ Hearing Transcript, 9 July 2019, 150:17-151:24.

⁴⁵¹ Hearing Transcript, 9 July 2019, 151:19-24.

law of the sea that a vessel and those on board the vessel are an inseparable legal unit”.⁴⁵² In addition, while it is true that ITLOS did not address Panama’s claim concerning the legality of criminal charges over those involved in the operation of M/V “Norstar”, it was not, as India contends, because it concerned the exercise of jurisdiction over persons, as opposed to vessels, but because Panama failed to pursue the claim in this regard.⁴⁵³

312. Similarly, in response to India’s argument that unlike the bunkering activities in M/V “Norstar” the Marines’ conduct in this case was unlawful, Italy maintains that “it is not possible to say *a priori*, without the determination of a court, whether conduct is illegal or legal”.⁴⁵⁴ In addition, not only did ITLOS find that the criminalisation of activities carried out by foreign ships on the high seas would constitute a breach of the Convention, but also the extension of criminal laws to the high seas.⁴⁵⁵ The fact that the extension of criminal laws, which by definition concern activities which the State regards as unlawful, is prohibited, demonstrates, in Italy’s view, that even laws that prohibit unlawful activities may not be extended or applied to the high seas.⁴⁵⁶

ii. India’s Alleged Bases for Exercising Jurisdiction over the Marines

313. Italy responds to India’s argument that the 1976 Maritime Zones Act and the 1981 Notification are compatible with the Convention because India was entitled to exercise jurisdiction over the “Enrica Lexie” and the Marines on the basis of the principles of territoriality and passive personality under international law, as well as compatible and complementary rules under Indian law, as provided in Section 4, paragraph 2, of the Indian Penal Code and Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act.
314. With respect to the principles of territoriality and passive personality, Italy rejects India’s reliance thereon to justify its exercise of jurisdiction for several reasons.⁴⁵⁷
315. First, with respect to the territoriality principle, according to Italy, India asserts that this basis of jurisdiction is consistent with international law because Article 92, paragraph 1, of the Convention, which applies to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention, provides that “Indian flagged vessels ‘shall be subject to its exclusive

⁴⁵² Hearing Transcript, 18 July 2019, 77:4-78:2, citing M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, p. 4 at p. 48, para. 127.

⁴⁵³ Hearing Transcript, 18 July 2019, 78:11-79:19.

⁴⁵⁴ Hearing Transcript, 18 July 2019, 80:9-14.

⁴⁵⁵ Hearing Transcript, 18 July 2019, 80:15-81:15.

⁴⁵⁶ Hearing Transcript, 18 July 2019, 81:6-15.

⁴⁵⁷ Italy’s Reply, paras 6.25-6.38.

jurisdiction’.”⁴⁵⁸ Italy, however, argues that India “misinterprets the meaning and scope” of Article 92, paragraph 1, of the Convention.⁴⁵⁹

316. India, Italy notes, fails to recognise that exclusive flag-State jurisdiction under Article 92, paragraph 1, of the Convention applies to ships on the high seas.⁴⁶⁰ In addition, according to Italy, such jurisdiction “does not mean that such ships are assimilated into Indian territory for all purposes, given that ‘[t]he view that a ship is a floating part of state territory has long fallen into disrepute’.”⁴⁶¹
317. Accordingly, Italy submits that Indian exclusive jurisdiction over the “St. Antony” could not justify the exercise of jurisdiction over the Marines on the “Enrica Lexie”.⁴⁶² It is for this reason, Italy claims, that the evidence of State practice proffered by India is not only distinguishable from the present case because it involves examples of offences wholly committed by persons on board their flagged ships, but also irrelevant.⁴⁶³
318. Second, with respect to the passive personality principle, Italy points out that it “can in no way be said to have been the basis for India’s position in the case of the marines, nor can it be described as part of the ratio of the judgment of the Supreme Court”.⁴⁶⁴ While India claims that the passive personality principle is incorporated in Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act, which provides that, in the exclusive economic zone, India has, in addition to those provided in the Convention, “such ‘rights as are recognised by international law’,”⁴⁶⁵ Italy notes that this provision did not play “any meaningful role in the [domestic proceedings]”.⁴⁶⁶
319. In this regard, Italy rejects India’s position that the Arbitral Tribunal should look not to the legal basis India relied upon during the domestic proceedings, but the bases India may invoke in the context of these inter-State proceedings.⁴⁶⁷ In Italy’s view, this position “is untenable” because “India cannot assert and exercise its jurisdiction on one basis and then, when challenged about

⁴⁵⁸ India’s Counter-Memorial, para. 3.13.

⁴⁵⁹ Italy’s Reply, para. 6.26.

⁴⁶⁰ Italy’s Reply, para. 6.27.

⁴⁶¹ Italy’s Reply, para. 6.28, citing James Crawford, *Brownlie’s Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 464.

⁴⁶² Italy’s Reply, paras 6.29-6.30.

⁴⁶³ Italy’s Reply, para. 6.31.

⁴⁶⁴ Hearing Transcript, 9 July 2019, 126:2-17, citing Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, paras 23, 44.

⁴⁶⁵ India’s Counter-Memorial, para. 3.16.

⁴⁶⁶ Italy’s Reply, para. 6.33.

⁴⁶⁷ Hearing Transcript, 18 July 2019, 67:4-8.

the legality of that basis, seek some *a posteriori* justification” especially because “the basis that is identified at the moment when the jurisdiction is asserted and exercised [...] is the basis that matters”.⁴⁶⁸ In this case, Italy notes, “there can be no doubt that India’s justification was the unqualified extension of Indian criminal laws and justification to the EEZ by the [1976 Maritime Zones Act and the 1981 Notification]”.⁴⁶⁹

320. Third, even if India were entitled to rely on legal bases other than those invoked in the domestic proceedings, those cited by India, in Italy’s view, also do not sustain its arguments with respect to the passive personality principle.
321. For one, Italy does not consider India’s attempt to read passive personality into Article 56 of the Convention to be of any merit.⁴⁷⁰ According to Italy, “there is simply no basis for this loose interpretation of a coastal state’s rights in the EEZ”.⁴⁷¹ In fact, India’s argument would appear, in Italy’s view, to fail the test as articulated by ITLOS in *M/V “Virginia G” (Panama/Guinea-Bissau)* with respect to the scope of a coastal State’s rights with respect to fishing, namely that, as “apparent from the list in article 62 [...] for all activities that may be regulated by a coastal State there must be a direct connection to fishing”.⁴⁷² In Italy’s view, “[i]t is hopeless to suggest, as India does, that a blanket extension of its criminal laws jurisdiction in the EEZ could be justified on the basis of a direct connection to fishing”.⁴⁷³
322. In addition, Italy rejects India’s claim that because the Convention’s regime on maritime zones is not comprehensive, it is entitled to rely on rights that are neither formally expressed nor excluded from the Convention, including those provided under the passive personality principle.⁴⁷⁴ India’s position, Italy points out, “goes against the settled jurisprudence [...] [that] the UNCLOS regime of maritime zones has been regarded as comprehensive”⁴⁷⁵ and as providing “a complete basis for the rights and duties of States in the maritime zones”.⁴⁷⁶ Specifically, Italy submits that the Convention “expressly overrides *Lotus*-type passive personality in the event of collisions or other

⁴⁶⁸ Hearing Transcript, 18 July 2019, 67:15-23.

⁴⁶⁹ Hearing Transcript, 18 July 2019, 67:24-68:3.

⁴⁷⁰ Hearing Transcript, 9 July 2019, 127:6-8.

⁴⁷¹ Hearing Transcript, 9 July 2019, 127:19-20.

⁴⁷² Hearing Transcript, 9 July 2019, 127:21-128:5, citing *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4 at p. 68, para. 215.

⁴⁷³ Hearing Transcript, 9 July 2019, 128:6-9.

⁴⁷⁴ Hearing Transcript, 18 July 2019, 74:20-75:2.

⁴⁷⁵ Hearing Transcript, 18 July 2019, 75:2-4. See also Italy’s Reply, para. 6.36; Hearing Transcript, 9 July 2019, 137:9-138:6.

⁴⁷⁶ Italy’s Reply, para. 6.36.

incidents of navigation on the high seas because it was considered to ‘constitute an intolerable interference with international navigation’.”⁴⁷⁷

323. Moreover, Italy contends that the passive personality principle itself is considered controversial, dubious, and problematic as a matter of general international law.⁴⁷⁸ While India appears to claim that the ICJ has ruled decisively on the passive personality principle, Italy points out that India was relying on the only separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (hereinafter “*Arrest Warrant*”) that expressed this view, namely that of Judge Guillaume.⁴⁷⁹ In reality, Italy notes, the majority judgment in that case was silent on the issue of passive personality, and Judges Higgins, Kooijmans and Buergenthal actually conclude in their separate opinion that passive personality jurisdiction has been “long regarded as controversial” and “has only more recently been met with less opposition, and only for crimes of international terrorism”.⁴⁸⁰
324. Indeed, a general rule of passive personality does not exist as wide in scope as India claims, especially because, in Italy’s view, State practice on which India relies is lacking in uniformity and consistency.⁴⁸¹ In particular, Italy points out that “37 of the 49 states that India claims to have supposedly adopted the passive personality principle in their legislation in fact generally subject it to a combination of two preconditions: that the crime must have been committed abroad; and that the State of nationality of the offender must have first failed or refused to exercise its jurisdiction over the crime”.⁴⁸² Indeed, Italy notes that India’s own Law Commission stated that the “[p]assive personality principle [...] has found no place in Anglo-American jurisprudence”,⁴⁸³ and India itself has not actually expressly stated that the principle has indeed

⁴⁷⁷ Italy’s Reply, para. 6.36, citing Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn., Cambridge University Press, 2015), p. 160.

⁴⁷⁸ Italy’s Reply, paras 6.37-6.38, citing Malcolm N. Shaw, *International Law* (7th edn., Cambridge University Press, 2014), p. 483; James Crawford, *Brownlie’s Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 461.

⁴⁷⁹ Hearing Transcript, 18 July 2019, 68:20-69:10.

⁴⁸⁰ Hearing Transcript, 18 July 2019, 69:11-20, referring to *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 76-77, para. 47. See also Hearing Transcript, 9 July 2019, 128:22-129:5.

⁴⁸¹ Italy’s Reply, para. 6.38.

⁴⁸² Hearing Transcript, 18 July 2019, 71:17-72:2, referring to India’s Counter-Memorial, pp 55-63 (Afghanistan, Albania, Angola, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Capo Verde, Cambodia, China, Colombia, Czech Republic, Estonia, Ethiopia, France, FYROM, Germany, Greece, Iceland, India, Ireland, Kyrgyzstan, Latvia, Mexico, Moldova, Montenegro, Niger, Poland, Republic of Korea, Russian Federation, Serbia, Slovakia, Slovenia, Sweden, Timor-Leste, Tunisia, Ukraine, and the United States).

⁴⁸³ Hearing Transcript, 18 July 2019, 70:3-15, citing, Law Commission of India, Forty-Second Report, Indian Penal Code, June 1971, found at Second Expert Report of Justice Verma, Tab 3.

crystallised into a rule of customary international law.⁴⁸⁴ In any event, none of the legislation cited by India “extends criminal jurisdiction to the exclusive economic zone in the same way and to the same extent as the contested provisions of Indian law”⁴⁸⁵ nor constitutes evidence of *opinio juris*.⁴⁸⁶

325. Finally, Italy contends that India’s arguments regarding territorial and passive personality jurisdiction are not dispositive of Italy’s claim that the provisions of the 1976 Maritime Zones Act and the 1981 Notification extend India’s jurisdiction in the exclusive economic zone beyond the limits allowed under the Convention.⁴⁸⁷ Italy asserts that the provisions of the 1976 Maritime Zones Act and the 1981 Notification “have nothing whatever to do with the issue of Indian jurisdiction over Indian flagged vessels”.⁴⁸⁸ According to Italy, India’s assertion of jurisdiction over the contiguous zone pursuant to the provisions at issue “is different from and goes beyond jurisdictional claims based on the passive personality principle” such that the “unlawfulness of India’s extension of its jurisdiction could not be cured by passive personality *even if* such a ‘principle’ were available in this case”.⁴⁸⁹ Italy submits that this is true particularly because neither pieces of Indian legislation challenged by Italy could import passive personality.⁴⁹⁰
326. With regard to the domestic law bases on which India relies for its jurisdiction, namely Section 4, paragraph 2, of the Indian Penal Code, and Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act, Italy similarly considers them to be untenable.
327. First, Italy asserts that India’s account of the basis upon which it exercised jurisdiction is “fundamentally misleading” because “it is contrary to the position expressly taken by both the Indian Government and the Indian courts during the domestic criminal proceedings”.⁴⁹¹ Not only did “both the Indian Government and the Indian courts base India’s jurisdiction on the 1981 Notification”,⁴⁹² they also took the affirmative position that Section 4, paragraph 2, of the Indian Penal Code was not applicable to the facts of the case.⁴⁹³ In addition, even though the Indian

⁴⁸⁴ Hearing Transcript, 18 July 2019, 71:8-13.

⁴⁸⁵ Hearing Transcript, 18 July 2019, 72:13-16.

⁴⁸⁶ Hearing Transcript, 18 July 2019, 73:6-12.

⁴⁸⁷ Italy’s Reply, paras 6.31-6.32.

⁴⁸⁸ Italy’s Reply, para. 6.31.

⁴⁸⁹ Italy’s Reply, para. 6.32 [emphasis added by Italy].

⁴⁹⁰ Italy’s Reply, para. 6.34.

⁴⁹¹ Italy’s Reply, paras 5.2, 5.7. *See also* Italy’s Reply, para. 6.33; Hearing Transcript, 9 July 2019, 122:21-123:10.

⁴⁹² Italy’s Reply, paras 5.7-5.8. *See also* Hearing Transcript, 9 July 2019, 123:11-17.

⁴⁹³ Hearing Transcript, 9 July 2019, 122:21-123:7, *citing Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 61, 99 (**Annex IT-19**); Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, para. 22.

Government mentioned Section 7, paragraph 4, subparagraph (e), and the passive-personality principle in the course of its argument before the Supreme Court, it did not advance the particular argument that India now makes in its Counter-Memorial.⁴⁹⁴

328. Second, even if India’s position before its own courts were irrelevant, the bases of jurisdiction now advanced by India are, in Italy’s view, “flawed as a matter of Indian legal analysis”.⁴⁹⁵ Relying on the expert report of Justice Verma submitted with its Reply, Italy maintains that Section 4, paragraph 2, of the Indian Penal Code does not apply in this case because the Marines did not commit the alleged offence while they were on board the Indian-flagged “St. Antony”.⁴⁹⁶ As a result, according to Italy, the “fundamental precondition” for the application of Sections 179 and 188, paragraph b, of the Indian Code of Criminal Procedure – that the persons be accused of an offence punishable under the Indian Penal Code – would not be met either, and therefore, those provisions would also not apply.⁴⁹⁷ In addition, Italy submits that, contrary to India’s claim, Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act does not have the effect of incorporating the passive personality principle into Indian law.⁴⁹⁸ This is because under Indian law, Italy claims, “penal jurisdiction can only be created by specific legislation enacted by the legislature ‘with’ [...] ‘definiteness and preciseness’,” and Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act does not meet that standard.⁴⁹⁹

(b) **Position of India**

329. The Arbitral Tribunal recalls that, in objecting to the Arbitral Tribunal’s jurisdiction over this claim, India maintains that there was no dispute between the Parties on this issue at the relevant time. Accordingly, because India is of the view that this dispute is not properly before the Arbitral Tribunal, India engages with Italy’s arguments only in the alternative.⁵⁰⁰
330. India maintains that, even if a dispute existed at the relevant time, the 1976 Maritime Zones Act and the 1981 Notification are compatible with the Convention because India has “never exercised any criminal jurisdiction over the Marines, or any jurisdiction over the *Enrica Lexie*, in its

⁴⁹⁴ Italy’s Reply, para. 5.10. *See also* Hearing Transcript, 9 July 2019, 126:2-6.

⁴⁹⁵ Italy’s Reply, para. 5.11.

⁴⁹⁶ Italy’s Reply, para. 5.11(1), *citing* Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, para. 15; Hearing Transcript, 9 July 2019, 123:18-124:22.

⁴⁹⁷ Italy’s Reply, para. 5.11(1), *citing* Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, paras 5, 30-32.

⁴⁹⁸ Italy’s Reply, para. 5.11(2), *referring to* Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, paras 38-43.

⁴⁹⁹ Hearing Transcript, 9 July 2019, 125:10-20.

⁵⁰⁰ Hearing Transcript, 13 July 2019, 32:19-33:5; Hearing Transcript, 20 July 2019, 137:10-14.

contiguous zone or EEZ”,⁵⁰¹ and therefore “did not act, or apply the [1976 Maritime Zones Act] and the [1981] Notification in its exclusive economic zone or contiguous zone, in any way that was contrary to UNCLOS”.⁵⁰²

331. India submits, rather, that it “had jurisdiction to investigate upon the shootings against the St Antony and, as a necessary consequence of this right, it must have jurisdiction to sue and try the authors of these shootings”.⁵⁰³ Similarly, India contends that the 1976 Maritime Zones Act and the 1981 Notification, “insofar as they are relevant in respect to the present case”, are in conformity with the Convention, because they are “in the keeping with” the legal bases India has invoked to justify its exercise of jurisdiction.⁵⁰⁴
332. India disagrees with Italy’s claim that the Convention “created a comprehensive and complete normative system including the whole law of the sea”.⁵⁰⁵ To the contrary, India contends that the Convention “leaves open quite a large range of issues” including concerning the regime of internal waters and the issue of biodiversity in areas beyond national jurisdiction”.⁵⁰⁶ This understanding is, in India’s view, further confirmed by Article 59, which addresses “cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone”, and the fact that dispute settlement bodies are called to apply, besides the Convention itself, “other rules of international law not incompatible with [the] Convention”.⁵⁰⁷ Accordingly, India submits, while a coastal State does not have sovereignty over its exclusive economic zone, “this does not mean that it has no rights beyond the ‘sovereign rights’ and the ‘jurisdiction’ expressly recognized” in the Convention.⁵⁰⁸

⁵⁰¹ India’s Rejoinder, para. 5.7.

⁵⁰² India’s Rejoinder, para. 5.10.

⁵⁰³ Hearing Transcript, 20 July 2019, 137:14-18.

⁵⁰⁴ India’s Counter-Memorial, paras 4.23-4.24.

⁵⁰⁵ Hearing Transcript, 13 July 2019, 33:6-34:12.

⁵⁰⁶ Hearing Transcript, 13 July 2019, 33:15-19, citing “*Ara Libertad*” (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012, p. 332 at p. 370, para. 25; K. Trümpler, ‘Article 8, Internal Waters’, in Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 90, para. 15; Donald. R. Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edn., Hart Publishing, 2016), p. 55; UNGA, Res. 69/292, 6 July 2015, “Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.

⁵⁰⁷ Hearing Transcript, 13 July 2019, 34:1-12.

⁵⁰⁸ Hearing Transcript, 13 July 2019, 34:13-18.

i. Alleged Aspects of Incompatibility between the 1976 Maritime Zones Act and 1981 Notification, and the Convention

333. In view of the above considerations, India rejects Italy's claim that it has unlawfully subjected a portion of the high seas to Indian sovereignty, via a blanket extension of its criminal laws, in breach of Article 33, paragraph 1, Article 56, paragraphs 1 and 2, Article 58, paragraph 2, Article 87, paragraph 1, subparagraph (a), and Article 89 of the Convention.⁵⁰⁹
334. With respect to Italy's claim regarding Article 89, India maintains that it does not prevent flag States from dealing with crimes committed on ships flying its flag, and the 1976 Maritime Zones Act "only establishes specific and well-determined rights which are neither formally dealt with nor excluded by the Convention".⁵¹⁰
335. With respect to Italy's claim regarding Article 87, India disagrees with Italy's presumption that "coming within the purview of the application of Indian criminal law" would constitute "a factor that may discourage transit through the Indian exclusive economic zone".⁵¹¹ Moreover, India maintains that "[f]reedom of navigation does not imply impunity or immunity from the application of the coastal state's criminal legislation and procedure in matters over which it has jurisdiction".⁵¹²
336. India also dismisses Italy's reliance on the *M/V "Norstar"* judgment, in which ITLOS found that if a State "applies its criminal and customs laws to the high seas and criminalises activities carried out by foreign ships thereon, it would constitute a breach of Article 87 of the Convention, unless justified by the Convention or international treaties".⁵¹³ Notwithstanding the fact that this finding has been highly controversial as evident from the dissents of seven ITLOS judges, India claims that it does not apply in this case because its circumstances are distinguishable.⁵¹⁴ In particular, India notes, the *M/V "Norstar"* case involved the "criminalisation by a state of 'activities carried out by foreign ships'" and not foreign persons.⁵¹⁵ The challenged Italian decree in *M/V "Norstar"*, India points out, specifically targeted the activities of the *vessel* itself, alleging it to be a tax

⁵⁰⁹ Hearing Transcript, 13 July 2019, 34:20-35:10, *citing* Hearing Transcript, 9 July 2019, 104:21-23; Italy's Memorial, para. 9.41.

⁵¹⁰ Hearing Transcript, 13 July 2019, 35:2-5.

⁵¹¹ Hearing Transcript, 13 July 2019, 35:15-36:1, *citing* Italy's Memorial, para. 9.40.

⁵¹² Hearing Transcript, 13 July 2019, 36:2-6.

⁵¹³ Hearing Transcript, 13 July 2019, 36:7-14, *citing* *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225.

⁵¹⁴ Hearing Transcript, 13 July 2019, 36:15-19, *citing* *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge *ad hoc* Treves, ITLOS Reports 2018-2019 [forthcoming].

⁵¹⁵ Hearing Transcript, 13 July 2019, 37:19-22. *See also* Hearing Transcript, 20 July 2019, 140:24-141:6.

avoidance scheme, whereas the 1976 Maritime Zones Act “regulates the activities of *persons* in the EEZ, to the exclusion of those of vessels, which are mentioned in no provision of the act”⁵¹⁶ and the 1982 Notification only concerns offenses “committed *by any person* in the exclusive economic zone”.⁵¹⁷ In the same vein, India observes, ITLOS did not even address, much less uphold, Panama’s other claim that Italy had breached the Convention by filing criminal charges against persons having an interest in the M/V “Norstar”’s operations.⁵¹⁸

337. Another significant difference, in India’s view, is that the bunkering activities targeted by Italy in M/V “Norstar” were not unlawful *per se*, while the “actions [that] the marines are accused of are, nearly by way of definition, illegal”.⁵¹⁹ This is relevant, according to India, because ITLOS made clear in its M/V “Norstar” judgment that “the principle of exclusive flag-state jurisdiction prohibits the extension of states’ ‘prescriptive jurisdiction to *lawful activities* conducted by foreign ships on the high seas’.”⁵²⁰

ii. India’s Alleged Bases for Exercising Jurisdiction over the Marines

338. In India’s view, since “UNCLOS does not envisage the particular circumstances of the present case [...] it is open for the Tribunal to turn to other rules of international law ‘not incompatible with the Convention’,”⁵²¹ and this includes the following two legal bases on which India relies for its exercise of jurisdiction over the “Enrica Lexie” and the Marines.

339. First, India submits that it may rely on the “principle of law which assimilates ships with national territory for the purpose of exercising jurisdiction in relation to crimes committed on board ships bearing the national flag”, or the “territoriality” principle.⁵²²

340. According to India, this is reflected in Article 92, paragraph 1, of the Convention, which states that “[s]hips shall sail under the flag of one State only and [...] shall be subject to its exclusive jurisdiction on the high seas”, and applies to the exclusive economic zone by virtue of Article 58,

⁵¹⁶ Hearing Transcript, 13 July 2019, 36:20-37:15 [emphases added].

⁵¹⁷ Hearing Transcript, 13 July 2019, 37:15-19, *citing M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 222, 225-26 [emphasis added by India].

⁵¹⁸ Hearing Transcript, 13 July 2019, 37:23-38:8.

⁵¹⁹ Hearing Transcript, 13 July 2019, 38:9-15, *citing M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge *ad hoc* Treves, ITLOS Reports 2018-2019 [forthcoming], para. 20. *See also* Hearing Transcript, 20 July 2019, 141:7-15.

⁵²⁰ Hearing Transcript, 13 July 2019, 38:16-21, *citing M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225 [emphasis added by India].

⁵²¹ India’s Counter-Memorial, para. 4.22, *citing* Article 293 of the Convention.

⁵²² India’s Counter-Memorial, para. 4.23(b).

paragraph 2.⁵²³ Indeed, India points out, Italy itself has admitted that it “does not in these proceedings contend anywhere that India lacked exclusive jurisdiction over the St Antony”.⁵²⁴ India also posits that the right of coastal States to protect fisheries, as provided in Article 56 of UNCLOS, must extend to the protection of fishing boats and fishermen, “who are key actors in the exploitation and conservation of fish resources”.⁵²⁵ Therefore, in a situation where a murder is committed on board a fishing boat flying the national flag of a given State, as in this case, the flag State, namely India, “had jurisdiction over the St Antony by virtue of [Article 92, paragraph 1]”⁵²⁶ and “was entitled to investigate the deaths of the occupants of the St Antony and to prosecute the perpetrators of these killings independently of the provisions of the 1976 act and the 1981 notification”.⁵²⁷

341. Second, India asserts that it has jurisdiction *ratione personae* over the Marines based on the passive personality principle.⁵²⁸
342. According to India, Section 7, paragraph 4, subparagraph (e), of the 1976 Maritime Zones Act provides that, in its exclusive economic zone, India has “such rights as are recognised by International Law”.⁵²⁹ Such rights include the passive personality principle, which, according to India, is a “widely recognized principle of international law” and provides that “foreigners can be punished for acts abroad which injure nationals of the forum”.⁵³⁰ In India’s view, the passive personality principle is justified by the permissive principle of jurisdiction, as developed under the French doctrine of *théorie de la compétence*, according to which “a state may act at the international level if it can rely on a title, which can be, in particular, its territory or the nationality of the recipient or beneficiary of the rule or of the action of the state”.⁵³¹ In fact, India contends that the passive personality principle applies particularly in this case when “an accusation of crime of such gravity as a murder is at stake” and the argument that is sometimes invoked against the passive personality principle – that “the perpetrators may not have been aware of the illegality of

⁵²³ Hearing Transcript, 13 July 2019, 39:7-16.

⁵²⁴ Hearing Transcript, 20 July 2019, 137:21-23, *citing* Hearing Transcript, 10 July 2019, 58:10-13.

⁵²⁵ India’s Counter-Memorial, para 4.19. *See also* Hearing Transcript, 13 July 2019, 46:23-47:2.

⁵²⁶ Hearing Transcript, 13 July 2019, 39:17-21. *See also* India’s Counter-Memorial, paras 3.13-3.15 and 4.20-4.21.

⁵²⁷ Hearing Transcript, 13 July 2019, 40:5-9.

⁵²⁸ India’s Counter-Memorial, paras 3.16-3.18.

⁵²⁹ India’s Counter-Memorial, para. 3.16, *citing* 1976 Maritime Zones Act, Section 7(4)(e) (**Annex IT-65**).

⁵³⁰ India’s Counter-Memorial, paras 3.16, 4.17.

⁵³¹ Hearing Transcript, 13 July 2019, 41:5-42:10, *referring to* Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008), p. 31; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 76-77, para. 47.

their acts under the law of a foreign state” – is clearly irrelevant.⁵³² India further points out that Italy itself has admitted that “India is fully entitled to exercise its jurisdictions over its nationals” and that in Indian territorial waters, the “Enrica Lexie” “could be boarded for purpose of investigation and the arrest of persons on board”.⁵³³ This, in India’s view, “unavoidably implies that India can investigate on murders of its nationals, determine who are the persons suspected to be the authors, arrest them and sue them”.⁵³⁴

343. Similarly, India argues that the passive personality principle is consistent with Article 56 of the Convention, which provides that, in the exclusive economic zone, States have “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources” which must also extend to the protection of fishermen who are key actors in the exploitation and conservation of fisheries.⁵³⁵
344. Addressing Italy’s arguments, India considers it irrelevant that the passive personality principle was not the basis for India’s exercise of jurisdiction in its own courts because the relevant question is whether the principle of passive personality is compatible with the Convention, and “in the relations between parties to UNCLOS, Articles 56(1) and 89 justify recourse to this principle”.⁵³⁶ For the same reason, India does not deem it relevant whether the 1976 Maritime Zones Act and the 1981 Notification are grounded in the passive personality principle.⁵³⁷
345. India also dismisses Italy’s claim that the passive personality principle has not crystallised as a customary rule of international law, and that “the limited state practice that exists in its support is by reference to international crimes”.⁵³⁸ Italy’s position, in India’s view, is contradicted by the fact that “at least 49 states have included the principle of passive personality in their legislation” and that the ICJ itself has found that “[u]nder the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if [...] the offender, or at the very least the victim, has nationality of that State”.⁵³⁹ Moreover, regardless of whether the passive personality principle has crystallised as a customary rule, the State practice cited by India shows

⁵³² Hearing Transcript, 13 July 2019, 42:11-19.

⁵³³ Hearing Transcript, 20 July 2019, 138:1-8, *citing* Hearing Transcript, 10 July 2019, 58:16-18; Hearing Transcript, 11 July 2019, 32:13-24.

⁵³⁴ Hearing Transcript, 20 July 2019, 138:9-12.

⁵³⁵ India’s Counter-Memorial, paras 4.19-4.20.

⁵³⁶ Hearing Transcript, 13 July 2019, 43:4-16. *See also* Hearing Transcript, 20 July 2019, 139:6-15.

⁵³⁷ Hearing Transcript, 20 July 2019, 139:16-20.

⁵³⁸ Hearing Transcript, 13 July 2019, 44:7-17.

⁵³⁹ Hearing Transcript, 13 July 2019, 45:22-46:5, *citing Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Separate Opinion of President Guillaume, I.C.J. Reports 2002, p. 3 at p. 37, para. 4.

“that a large number of states interpret UNCLOS as authorising them to regulate matters concerning the EEZ and/or the high seas when they are not dealt with in UNCLOS”.⁵⁴⁰

346. India states that it “has full sovereignty over its territorial sea and can exercise jurisdiction therein”. Since “the Marines were only taken into custody after the *Enrica Lexie* was in port”, India argues that it “was entitled to exercise criminal jurisdiction over them.” Thus, according to India, “India had jurisdiction to arrest the Marines, and the right to exercise criminal jurisdiction by instituting proceedings against them afterwards”.⁵⁴¹
347. Finally, while maintaining, contrary to Italy’s contention, that the “question before this Tribunal is not on what legal basis India relied during the domestic proceedings, but which bases it may invoke in the context of the ongoing inter-state proceedings”, India nevertheless submits that it was also entitled to act on the basis of domestic law.⁵⁴²
348. In particular, India contends that it is “entitled to investigate and bring charges for alleged crimes that took place on the *St Antony*” based on Section 4, paragraph 2, of the Indian Penal Code, read with Sections 179 and 188, paragraph b, of the Indian Criminal Code of Procedure.⁵⁴³ Section 4, paragraph 2, of the Indian Penal Code, which reflects the territoriality principle, provides that “[t]he provisions of this Code apply also to any offence committed by [...] any person on any ship or aircraft registered in India wherever it may be”.⁵⁴⁴ According to India, Sections 179 and 188, paragraph (b), of the Indian Criminal Code of Procedure, in turn, provide that when such offences are committed, “the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence ensued”, and that the person committing the offence “may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found”.⁵⁴⁵
349. India claims that, by virtue of these provisions, the Indian Penal Code “applies to acts that caused the death of persons on the Indian registered *St Antony*” and that under its domestic law, India may exercise jurisdiction over both the “*Enrica Lexie*” incident and the Marines because they were located in Indian territory after the “*Enrica Lexie*” entered India’s territorial sea.⁵⁴⁶

⁵⁴⁰ Hearing Transcript, 20 July 2019, 140:8-17.

⁵⁴¹ India’s Counter-Memorial, para. 3.18. *See also* India’s Counter-Memorial, paras 3.12, 3.44.

⁵⁴² Hearing Transcript, 13 July 2019, 40:18-41:4. *See also* Hearing Transcript, 20 July 2019, 139:6-15.

⁵⁴³ India’s Counter-Memorial, paras 3.7-3.12.

⁵⁴⁴ Indian Penal Code (Act No. 45 of 1860), Section 4(2) (**Annex IN-19**).

⁵⁴⁵ Indian Code of Criminal Procedure, 1973 (Act No. 2 of 1974), Sections 179 and 188(b) (**Annex IN-20**).

⁵⁴⁶ India’s Counter-Memorial, para. 3.12.

350. India disagrees with Italy's contention that Section 4, paragraph 2, of the Indian Penal Code does not apply in this case because the persons accused of the offence did not commit the offence while they were on board the "St. Antony".⁵⁴⁷ India submits that Italy's interpretation is inconsistent with the object and purpose of the provision, which focuses on crimes that occur on an Indian registered ship.⁵⁴⁸ India claims that, because "the killing of the two fishermen and the damage to the boat, which form the basis of an alleged crime, clearly occurred *on* an Indian ship", Section 4, paragraph 2, does apply.⁵⁴⁹ India submits moreover that the language of Section 4, paragraph 2, makes clear that it applies to any offence committed on an Indian registered ship "wherever it may be".⁵⁵⁰
351. Accordingly, in India's view, "it could act on the basis of both its domestic law, the act of 1976 and the notification of 1981, and the international law principle[s], which "do not exclude or contradict each other, but rather combine to establish Indian jurisdiction".⁵⁵¹

3. Analysis of the Arbitral Tribunal

352. Italy claims that, by enacting the 1976 Maritime Zones Act and issuing the 1981 Notification, India has acted and is acting in a manner that is incompatible with UNCLOS with regard to Article 33, paragraph 1; Article 56, paragraphs 1 and 2; Article 58, paragraph 2; Article 87, paragraph 1, subparagraph (a); and/or Article 89.⁵⁵² Italy further claims that the aforementioned Act and Notification were the basis for the exercise by India of criminal jurisdiction over the Marines⁵⁵³ and requests the Arbitral Tribunal to "order, in addition or in the alternative, that" India shall "cease to apply the provisions of the 1976 Maritime Zones Act and the 1981 Notification insofar as they are incompatible with UNCLOS".⁵⁵⁴
353. India maintains that the 1976 Maritime Zones Act and the 1981 Notification are compatible with the Convention,⁵⁵⁵ and that India has "never exercised any criminal jurisdiction over the Marines,

⁵⁴⁷ India's Rejoinder, paras 5.14-5.18.

⁵⁴⁸ India's Rejoinder, paras 5.16-5.17.

⁵⁴⁹ India's Rejoinder, paras 5.16-5.17 [emphasis added by India].

⁵⁵⁰ India's Rejoinder, para. 5.15.

⁵⁵¹ Hearing Transcript, 13 July 2019, 40:15-41:4.

⁵⁵² Italy's Memorial, p. 188, 1 (a).

⁵⁵³ Italy's Memorial, para. 6.19.

⁵⁵⁴ Italy's Memorial, p. 189, 2 (a).

⁵⁵⁵ India's Counter-Memorial, para. 4.24.

or any jurisdiction over the *Enrica Lexie*, in its contiguous zone or EEZ” on the basis of this legislation.⁵⁵⁶

354. As noted by the Arbitral Tribunal in Part IV, Section A.2(b) related to the identification of a dispute, the Parties’ dispute that has given rise to the present Arbitration is appropriately characterised as a disagreement as to which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the “*Enrica Lexie*” and the “*St. Antony*”, which raises questions under several provisions of the Convention, including Articles 56, 58, 59, 87, 92, 97, 100, and 300 on the interpretation or application of which the Parties have different views. The Arbitral Tribunal will accordingly need to consider whether Italy’s argument that the 1976 Maritime Zones Act and 1981 Notification are incompatible with the Convention is relevant to the dispute before it.
355. It is common ground between the Parties that Italy did not raise the alleged incompatibility of the 1976 Maritime Zones Act and 1981 Notification in the abstract, as a separate dispute independent of the events of 15 February 2012. Rather, Italy regards the 1976 Maritime Zones Act and 1981 Notification as relevant because it considers that the measures allegedly undertaken by India in the exclusive economic zone *vis-à-vis* the “*Enrica Lexie*” were based on that legislation.
356. The Arbitral Tribunal notes that Indian authorities commenced investigation and asserted their jurisdiction in relation to the incident of 15 February 2012 on 16 February 2012, when the “*Enrica Lexie*” was anchored in Indian territorial waters, 4.5 miles off the shore of Kochi (*see* above paragraphs 157 to 158). On that date, the Coast Guard informed those on board the “*Enrica Lexie*” that they were under investigation “for the murder of the two fishermen” (*see* above paragraph 158). Thus, it is established that no enforcement actions were taken by the Indian authorities against the “*Enrica Lexie*” or the Marines in the Indian exclusive economic or contiguous zones.
357. The Arbitral Tribunal observes that the Indian Coast Guard, at the time of its action in the Indian exclusive economic zone on 15 February 2012, did not provide any indication as to the legal basis for its action. Any such discussion post-dates the incident.

⁵⁵⁶ India’s Rejoinder. para. 5.7.

358. Italy notably draws the attention of the Arbitral Tribunal to internal communications exchanged between different Indian ministries,⁵⁵⁷ and pleadings of the Union of India before Indian courts,⁵⁵⁸ in which India sought during the initial stage of its internal proceedings to justify the conduct of the Coast Guard in part by reference to the 1976 Maritime Zones Act and 1981 Notification.
359. In the present Arbitration, in contrast, India has not reiterated the argument that its conduct was based on the 1976 Maritime Zones Act and 1981 Notification. Rather, India relies on the territoriality and passive personality principles under international law, which are addressed in Part V, Section A.2, as well as provisions of its criminal code, as bases for the actions of its Coast Guard.
360. The Arbitral Tribunal observes that from among the Articles of UNCLOS with which Italy claims the Indian legislation is incompatible, only Article 87, paragraph 1, subparagraph (a), concerning freedom of navigation on the high seas is specifically referred to in the Italian submissions as being breached by India. However, this claim by Italy, which is examined in Part V, Section B.1(b) is not based on the alleged extension of the Indian legislation to the exclusive economic zone.
361. In these circumstances, the Arbitral Tribunal does not consider that Italy has established that the conduct of India of which Italy complains in the present Arbitration was in fact based on the 1976 Maritime Zones Act and 1981 Notification. Accordingly, even if questions may arise as to the compatibility of that legislation with the Convention, the Arbitral Tribunal sees no need to address that issue in the context of the present dispute.
362. The Arbitral Tribunal will now examine whether the two legal bases on which India relies in the present proceedings in support of the exercise of its jurisdiction over the “Enrica Lexie” incident and the Marines are compatible with the Convention. India invokes the “territoriality principle”⁵⁵⁹ and the “passive personality principle”⁵⁶⁰ as such legal bases.

⁵⁵⁷ Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 25 March 1983, para. 3(c) (**Annex IT-67**); Letter from the Ministry of Home Affairs of India to the Ministry of External Affairs of India (Legal & Treaties Division), 14 April 1983, para. 3 (**Annex IT-68**); Letter from the Ministry of External Affairs of India (Legal & Treaties Division) to the Ministry of Home Affairs of India, 3 May 1983 (**Annex IT-69**).

⁵⁵⁸ Hearing Transcript, 9 July 2019, 117:20-118:7, 120:14-22, *referring to Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 99 (**Annex IT-19**); Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017, para. 36.

⁵⁵⁹ India’s Counter-Memorial, paras 3.14-3.15, 4.23(b).

⁵⁶⁰ India’s Counter-Memorial, paras 3.16-3.18, 4.23(a), Hearing Transcript, 13 July 2019, 41:23-42:10.

363. The Arbitral Tribunal considers that, to justify India's exercise of jurisdiction in the present case, it would be sufficient for either of the two bases to be compatible with the Convention.
364. The territoriality principle invoked by India denotes the principle that a State may exercise jurisdiction over any offence committed in its territory. According to India, this principle may be extended to a vessel, so that a State may exercise jurisdiction over any offence committed on board its vessel wherever it may be, as if the offence were committed in its territory.⁵⁶¹
365. The Arbitral Tribunal notes that such an extended territoriality principle is well established, and the domestic criminal legislation of a large number of States confers jurisdiction over offences committed on board national ships or aircraft.⁵⁶² In this regard, the Arbitral Tribunal does not consider that this principle amounts to assimilating a vessel with national territory "for all purposes" as if "a ship is a floating part of state territory", as Italy argues.⁵⁶³
366. In the view of the Arbitral Tribunal, it is also well established that, where the commission of an offence involves the territories of more than one State (for example, an offence was commenced in the territory of one State and completed in the territory of another State), both the State in whose territory an offence was commenced (subjective territoriality principle) and the State in whose territory it was completed (objective territoriality principle) may exercise jurisdiction over the offence.⁵⁶⁴ Likewise, where an offence was commenced on board one vessel and completed on board another vessel, the flag States of both vessels may have concurrent jurisdiction over the offence.⁵⁶⁵
367. In the present case, the Marines on board the "Enrica Lexie" fired at the "St. Antony", resulting in the death of two Indian fishermen on board the "St. Antony" and damage to the vessel.⁵⁶⁶ The incident thus involves two vessels: the alleged offence was commenced on board the Italian vessel, "Enrica Lexie", and completed on board the Indian vessel, "St. Antony". According to the territoriality principle, both Italy and India are entitled to exercise jurisdiction over the incident.

⁵⁶¹ India's Counter-Memorial, paras 3.13-3.15, 4.20-4.21; India's Rejoinder, para. 7.13; Hearing Transcript, 13 July 2019, 39:17-21.

⁵⁶² This principle is comprised within the domestic laws of at least 81 States. *See* India's Counter-Memorial, para. 4.21 and pp 64-76 ("Domestic Criminal Legislation conferring Jurisdiction over Crimes committed on board National Ships").

⁵⁶³ Italy's Reply, para. 6.28.

⁵⁶⁴ *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, pp 19, 23.

⁵⁶⁵ *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25; Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), pp 722-23.

⁵⁶⁶ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**).

However, this is without prejudice to the question whether India is precluded from exercising jurisdiction over the Marines because of their status as State officials entitled to immunity in relation to acts performed in the exercise of their official functions. This question will be addressed in Part V, Section C, of the Award.

368. Furthermore, in the Arbitral Tribunal's view, India's exercise of jurisdiction over the "Enrica Lexie" incident is not only compatible with the Convention, but justified by Article 92, paragraph 1, of the Convention, which provides for the principle of exclusive flag State jurisdiction. Pursuant to this principle, India, as the flag State, has exclusive jurisdiction over the "St. Antony" and may assert its jurisdiction in respect of the offence that was allegedly completed on board its vessel in the exclusive economic zone, in the same way as Italy, as the flag State, has exclusive jurisdiction over the "Enrica Lexie" and may assert its jurisdiction in respect of the offence that was allegedly commenced on board its vessel.
369. Having found that the territoriality principle can provide a valid legal basis for India's exercise of jurisdiction over the "Enrica Lexie" incident, the Arbitral Tribunal does not find it necessary to address the validity of the second base invoked by India, the passive personality principle.
370. The Arbitral Tribunal recalls that the Parties engaged in extensive discussion as to whether India is entitled to exercise jurisdiction over the "Enrica Lexie" incident under its domestic criminal laws.⁵⁶⁷ However, the Arbitral Tribunal is not called upon to rule on any question of Indian law or proceedings instituted before Indian courts. Accordingly, there is no need for the Arbitral Tribunal to address such question in the present proceedings.

B. ALLEGED BREACHES AND VIOLATIONS BY INDIA OF PROVISIONS OF PART VII (HIGH SEAS) OF UNCLOS

371. Italy claims that India, through its conduct on, and subsequent to, 15 February 2012, has breached several provisions of Part VII of the Convention, namely, Article 87, paragraph 1, subparagraph (a) (freedom of navigation); Article 92 (status of ships); Article 97 (penal jurisdiction in matters of collision or any other incident of navigation); and Article 100 (duty to cooperate in the repression of piracy), read together with Article 300 (good faith and abuse of rights).

⁵⁶⁷ See e.g., India's Counter-Memorial, paras 3.7-3.12; India's Rejoinder, paras 5.13-5.18; Hearing Transcript, 13 July 2019, 40:15-41:4; Hearing Transcript, 20 July 2019, 139:6-15; Italy's Reply, paras 5.2, 5.7-5.12, 6.33, 6.35, 6.39; Hearing Transcript, 9 July 2019, 122:21-127:5.

372. These provisions are found in Part VII of the Convention and apply to the high seas. Article 58 of the Convention, however, extends the application of these provisions to the exclusive economic zone. Article 58 provides:

Article 58

Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

373. The Parties agree that, although the “Enrica Lexie” incident occurred in India’s exclusive economic zone, the provisions of Part VII indicated above apply by virtue of Article 58.⁵⁶⁸

374. Italy relies on these provisions of Part VII in the following requests for relief, as set out in its Memorial:

- (b) By directing the *Enrica Lexie* to change course and proceed into India’s territorial sea, India violated Italy’s freedom of navigation, in breach of UNCLOS Article 87(1)(a).
- (c) By interdicting the *Enrica Lexie* and escorting her to Kochi, India violated Italy’s exclusive jurisdiction over the *Enrica Lexie*, in breach of UNCLOS Article 92.
- (d) India violated, and continues to violate, Italy’s exclusive right to institute penal or disciplinary proceedings against the Marines, in breach of UNCLOS Article 97(1).
- (e) By ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India violated the prohibition contained in UNCLOS Article 97(3).

[...]

- (g) By failing to cooperate in the repression of piracy, India violated UNCLOS Article 100, read with UNCLOS Article 300.⁵⁶⁹

375. India has not raised any objections to the jurisdiction of the Arbitral Tribunal in its Counter-Memorial or Rejoinder in respect of these requests for relief.

⁵⁶⁸ Italy’s Memorial, paras 10.7, 10.31, 10.39, 10.65; Italy’s Reply, paras 7.4, 7.15; India’s Counter-Memorial, paras 3.13, 6.21, n. 388, 8.1, 8.19.

⁵⁶⁹ Italy’s Memorial, p. 188.

376. In the following subsections, the Arbitral Tribunal will summarise the positions of the Parties with respect to Italy's claims under these provisions of the Convention in the order that Italy raises them in its Memorial.

1. Alleged Breaches by India of Articles 87, paragraph 1, subparagraph (a), and 92 of UNCLOS

377. The Parties disagree over the interpretation of Article 87, paragraph 1, subparagraph (a), and Article 92 of the Convention. These Articles address the freedom of navigation and the status of ships on the high seas which, by virtue of Article 58, also apply to the exclusive economic zone.

378. Article 87, paragraph 1, subparagraph (a), provides:

Article 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;

379. Article 92 provides:

Article 92

Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

380. Since the Parties' claims turn on findings with regard to a common set of contested facts,⁵⁷⁰ the Arbitral Tribunal will first summarise the Parties' positions in respect of these facts, before proceeding to summarise the Parties' arguments under Article 87, paragraph 1, subparagraph (a), and Article 92, respectively.

⁵⁷⁰ Italy's Reply, para. 7.22; India's Rejoinder, para. 6.20.

(a) **Circumstances of the Alteration of the Course of the “Enrica Lexie” to Proceed to Kochi**

381. The Parties disagree on the circumstances that led the “Enrica Lexie” to alter course and proceed to Kochi, thereby entering into India’s territorial sea.

i. Position of Italy

382. Italy asserts that once the Indian authorities became aware of the “Enrica Lexie” incident, they “developed a pretext designed to cause the Enrica Lexie to sail into India’s territorial sea”,⁵⁷¹ directed the “Enrica Lexie” to “interrupt its voyage to proceed to Kochi”, “interdicted” it beyond India’s territorial sea, and “escorted” it into India’s territorial sea.⁵⁷² In support of this claim, Italy refers to the following evidence.

383. Neither Party disputes that the firing incident was declared closed at 17:00 SMT/17:30 IST⁵⁷³ and that at 17:50 SMT/18:10 IST, the “Enrica Lexie” had resumed its planned voyage.⁵⁷⁴ Captain Vitelli’s report in an SSAS message had been sent to MRCC Rome, given that Italy was the flag State of the vessel. The MRCC Rome “would then have informed MRCC Mumbai”.⁵⁷⁵

384. Italy asserts that India’s contention that the incident was not reported to MRCC Mumbai is incorrect for three reasons. First, according to Italy, it was not the responsibility of a ship’s captain navigating beyond India’s territorial waters to report the incident to the Indian authorities. Besides, the Italian and international authorities that he did inform, in turn, informed the Indian authorities. Otherwise, there would be no explanation as to why the MRCC Mumbai’s Duty Controller during the call to “Enrica Lexie” at 18:30 SMT/19:00 IST informed the “Enrica Lexie” that the Indian Coast Guard had captured two pirate boats “suspected to be related to the firing of shots from the Enrica Lexie”.⁵⁷⁶ Second, when the Indian authorities requested that Captain Vitelli share with them a copy of the message he had sent to others, he did so.⁵⁷⁷ Third, based on

⁵⁷¹ Hearing Transcript, 18 July 2019, 162:7-9.

⁵⁷² Italy’s Memorial, para. 4.106. *See also* Italy’s Reply, para. 4.27.

⁵⁷³ Italy’s Memorial, para. 4.30.

⁵⁷⁴ Italy’s Memorial, para. 4.31, *referring to* Additional Statement of Umberto Vitelli, 2 March 2012, p. 93 (**Annex IT-157**). *See also* Hearing Transcript, 9 July 2019, 1:15-17; Hearing Transcript, 18 July 2019, 157:22-25.

⁵⁷⁵ Hearing Transcript, 18 July 2019, 157:25-158:4, *referring to* Hearing Transcript, 15 July 2019, 42:3-19.

⁵⁷⁶ Hearing Transcript, 18 July 2019, 158:9-20, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012”, 12 March 2012, p. 7 (**Annex IT-161**).

⁵⁷⁷ Hearing Transcript, 18 July 2019, 158:21-153:2, *referring to* Email from the Master of the “Enrica Lexie” to MRC C Mumbai, 19:30 (IST), 15 February 2012 (**Annex IT-119**).

the evidence of Captain Fredy, the Indian authorities also received a report from the “St. Antony” concerning the “death of two fishermen aboard it following fire from a merchant tanker”, before the “St. Antony” reached shore.⁵⁷⁸

385. Italy submits that the matter then became a “police case”, and “a joint operation involving India’s police, Coast Guard and Navy was then launched” with the objective to “‘investigate’ the vessel involved in the firing incident, to apprehend it, and to arrest the individuals who India believed were responsible for the firing”.⁵⁷⁹
386. At 17:10 SMT/17:40 IST, according to Italy, Indian Coast Guard District HQ 4 informed DIG Negi of the CGAE that “a fishing boat was fired by a merchant vessel at sea” and “directed [Negi] to conduct search for *suspected vessel* between Kollam and Kadungalloor”.⁵⁸⁰ Italy further submits that the Coast Guard also ordered a search of the ship, directing ICGS “Samar” “to divert from area patrol and proceed with max speed to reach area and render assistance *for apprehension of suspect vessel*”.⁵⁸¹
387. Italy submits that, at approximately 18:30 SMT/19:00 IST, the MRCC Mumbai, “not the Indian police and not India’s Coast Guard in Kochi”,⁵⁸² called the “Enrica Lexie” and spoke by telephone with Captain Noviello and Mr. Gupta. Mr. Gupta explained in a declaration that the Commander of MRCC Mumbai

advised ENRICA LEXIE that they came to know that our vessel had a suspected pirate attack and in lieu of this they have caught 2 boats with suspected pirates and they asked [a]bout own vessel’s present speed, course and position. After that they *instructed the vessel* to approach to Cochin Port as they wanted the Master to give his statement and witness. Also they requested the vessel to forward the Incident Report to MRCC Mumbai.⁵⁸³

⁵⁷⁸ Hearing Transcript, 18 July 2019, 159:3-9.

⁵⁷⁹ Hearing Transcript, 18 July 2019, 159:10-19. *See also* Hearing Transcript, 9 July 2019, 1:18-2:1.

⁵⁸⁰ Italy’s Memorial, para. 4.59, *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**) [emphasis added by Italy]. *See also* “Coast Guard, fishermen made a smart move”, The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**); Italy’s Reply, para. 4.44; Hearing Transcript, 9 July 2019, 5:6-8.

⁵⁸¹ Italy’s Memorial, para. 4.59, *citing* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 2 (**Annex IT-9**) [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 5:11-13, 13:16-14:21.

⁵⁸² Hearing Transcript, 18 July 2019, 160:2-3.

⁵⁸³ Italy’s Memorial, para. 4.60, *citing* Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**) [emphasis added by Italy]. *See also* Log Book of the Master of the “Enrica Lexie” (**Annex IT-14**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012”, 12 March 2012, p. 7 (**Annex IT-161**); Italy’s Reply, para. 4.30; Hearing Transcript, 9 July 2019, 16:3-19:13; Hearing Transcript, 18 July 2019, 159:21-160:12.

388. Italy alleges that “[a]s we now know, no pirate vessels had in fact been captured by the Indian authorities” and that “[t]his was a false pretext deployed by the Indian authorities to cause Captain Vitelli to change the *Enrica Lexie*’s course”.⁵⁸⁴
389. Relying on a statement from Captain Vitelli and on the Log Book, Italy submits that, in the course of the 18:30 SMT/19:00 IST telephone call from MRCC Mumbai, Captain Vitelli requested a written message from MRCC Mumbai through Mr. Gupta.⁵⁸⁵ In the same statement, Captain Vitelli explained that, after the incident, the “*Enrica Lexie*” “did not change our route. ... We altered after getting the telephone call from MRCC Mumbai”.⁵⁸⁶
390. Italy submits that Captain Vitelli maintained his course for a while longer after receiving the telephone call from MRCC Mumbai. According to Italy, Captain Vitelli had anticipated receiving the written message by the time he reached the point at which he would be across from Kochi, but when the message did not arrive by the time he reached that point, Captain Vitelli turned for Kochi, “believing himself to be under a duty to do so; at least a seaman’s duty, if not a legal duty” as he considered the MRCC Mumbai to be the “highest authority” in that area.⁵⁸⁷ According to Italy, ultimately, the “pretext worked”,⁵⁸⁸ as Captain Vitelli headed towards Kochi, “for the purposes of assisting the MRCC and Coast Guard authorities to identify two suspected pirate boats that he had been informed had been arrested”.⁵⁸⁹
391. While Italy concedes that Captain Vitelli did not turn the “*Enrica Lexie*” towards Kochi “because he felt under threat” or “because he was coerced by the Indian Coast Guard”,⁵⁹⁰ Italy submits that it is clear that “there was trickery, that there was ruse, that there was misdirection, focused on bringing the *Enrica Lexie* into Indian territorial waters”.⁵⁹¹

⁵⁸⁴ Hearing Transcript, 18 July 2019, 160:13-16.

⁵⁸⁵ Italy’s Memorial, para. 4.61, *referring to* Log Book of the Master of the “*Enrica Lexie*” (**Annex IT-14**); Statement of Umberto Vitelli (**Annex IT-216**). *See also* Hearing Transcript, 9 July 2019, 19:14-19.

⁵⁸⁶ Italy’s Reply, para. 4.36, *citing* Additional Statement of Umberto Vitelli, 2 March 2012, p. 91 (**Annex IT-157**). *See also* Italy’s Reply, para. 4.37.

⁵⁸⁷ Hearing Transcript, 18 July 2019, 162:11-163:10, *referring to* “Coast Guard, fishermen made a smart move”, *The Times of India* (Electronic Edition), 18 February 2012 (**Annex IT-39**); “Smart move brings ship to Kochi”, *Express Buzz* (Electronic edition), 18 February 2012 (**Annex IT-268**); Hearing Transcript, 15 July 2019, 50:25-51:11; International Convention on maritime search and rescue, 1979 (Hamburg, 27 April 1979), UNTS, Vol. 1405, p. 119, Annex, Chapter 2; (Confidential Annex), p. 3 (**Annex IT-262**).

⁵⁸⁸ Hearing Transcript, 18 July 2019, 162:17.

⁵⁸⁹ Hearing Transcript, 18 July 2019, 45:21-46:7.

⁵⁹⁰ Hearing Transcript, 18 July 2019, 14:1-5.

⁵⁹¹ Hearing Transcript, 18 July 2019, 2:14-20. *See also* Hearing Transcript, 18 July 2019, 2:21-3:4, 162:4-9, 170:19-171:5.

392. Italy submits that the ruse only became apparent to those on board the “Enrica Lexie” when they arrived at Kochi anchorage, at which point, “surrounded by Coast Guard patrol boats, they were effectively detained, unable to move, unable to resume their intended course”.⁵⁹² According to Italy, the ruse became “a *de facto* detention”,⁵⁹³ which was formalised on 16 February 2012 when Commandant Kumar and 36 Police and Coast Guard officers boarded the vessel, formally detained it, and commenced investigation.⁵⁹⁴
393. Italy further avers that “behind the ruse [...] there was a big stick: it was prepared, it was raised, it was ready for use, if the misdirection did not work”.⁵⁹⁵ In contending this, Italy relies on the testimony of Commandant Kumar that the Boarding Party practised its “boarding drill”, the evidence of DIG Negi on “encircling”, “directing”, and “monitoring” the “Enrica Lexie” to ensure that it did not leave, evidence of Commandant Kumar that at the Kochi anchorage, “continuous pressure” was applied on the Marines and the Captain to comply with the Coast Guard’s directions, and that he had detained the “Enrica Lexie” inside the territorial sea, “over the protests of the captain and of the marines, and in the face of a written note of protest from Sergeant Latorre asserting exclusive Italian jurisdiction and the immunity of the marines”.⁵⁹⁶
394. Italy adds that according to Captain Vitelli’s testimony, while on his way to Kochi, he knew that he was being monitored.⁵⁹⁷ Captain Vitelli stated that he saw blurs on the radar screen and knew that there was movement not far away, but did not know what it was.⁵⁹⁸
395. Italy submits that the Coast Guard western regional commander, SPS Basra, was later quoted in a *Times of India* article as saying that “[w]hen Enrica Lexie officials confirmed they had an encounter with pirates, we asked them to sail to Kochi *to identify the pirates*”.⁵⁹⁹ According to Italy, SPS Basra explained that “[t]he Coast Guard had actually tricked the Italian ship” and “informed them that they were under investigation for the murder of two fishermen only after they reached the outer anchorage”.⁶⁰⁰ Referring to this account, Admiral Piroli’s stated:

⁵⁹² Hearing Transcript, 18 July 2019, 46:18-21.

⁵⁹³ Hearing Transcript, 18 July 2019, 46:22.

⁵⁹⁴ Hearing Transcript, 18 July 2019, 46:15-47:4.

⁵⁹⁵ Hearing Transcript, 18 July 2019, 3:2-4.

⁵⁹⁶ Hearing Transcript, 18 July 2019, 3:13-25, 14:6-11.

⁵⁹⁷ Hearing Transcript, 18 July 2019, 15:12-17:12, *referring to* Hearing Transcript, 15 July 2019, 52:3-25.

⁵⁹⁸ Hearing Transcript, 18 July 2019, 168:18-169:1, *referring to* Hearing Transcript, 15 July 2019, 52:3-24.

⁵⁹⁹ Italy’s Memorial, para. 4.61; Italy’s Reply, para. 4.39, both *citing* “Coast Guard, fishermen made a smart move”, *The Times of India* (Electronic Edition), 18 February 2012 (**Annex IT-39**) [emphasis added].

⁶⁰⁰ Italy’s Reply, para. 4.39, *citing* “Coast Guard, fishermen made a smart move”, *The Times of India* (Electronic Edition), 18 February 2012 (**Annex IT-39**); “Smart move brings ship to Kochi”, *Express Buzz* (Electronic edition), 18 February 2012 (**Annex IT-268**); “Italian vessel erred in judgment”, *The Hindu*

The invitation to sail towards Cochin is possibly a deception by the Indian part ... The posture of the Indian authorities that followed was in fact very different from what they made MV LEXIE's Shipmaster believe with their request to change course. ... [T]he Indian Coast Guard asked MV LEXIE to head towards Cochin to collaborate in the identification of captured pirates. *This was a mystification of facts: MV LEXIE was already under investigation for the murder of two people*, as the events following its anchoring off the port of Cochin would reveal later.⁶⁰¹

396. Italy counters India's argument that based on the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, the press report on SPS Basra's statements should not be given any weight. Italy asserts that it relies not on press reports containing general descriptions or the appreciation of the journalists but "direct quotations from the regional commander of the Coast Guard published contemporaneously in India's newspaper of record", which neither he nor India has ever corrected or denied.⁶⁰² Italy adds that even if the reports quoting SPS Basra are treated only as a form of corroboration, they corroborate other contemporaneous evidence that India instructed the "Enrica Lexie" on a pretext. Such evidence includes the Piroli Report and the Flash Report to the Presidency of the Republic of Italy.⁶⁰³
397. According to Italy, by 18:40 SMT/19:10 IST, when MRCC Mumbai identified and indicated that the "Enrica Lexie" was the "vessel [that] fired on a suspected pirate boat", the "Enrica Lexie" was "in position 243 Kochi Lt 37 n miles, about 34 n miles from the incident position".⁶⁰⁴ Italy argues that this evidence further puts to an end any suggestion that, by this point, India was "in the dark" concerning the incident.⁶⁰⁵
398. Italy submits that, according to a statement by DIG Negi, the pilot of the Dornier aircraft, at 18:50 SMT/19:20 IST, the CGAE received from Coast Guard District HQ 4 "the name and type of

(Electronic edition), 18 February 2012 (**Annex IT-269**). *See also* Hearing Transcript, 9 July 2019, 31:24-32:7; Hearing Transcript, 18 July 2019, 161:2-16.

⁶⁰¹ Italy's Reply, para. 4.40, *citing* Piroli Report (Confidential Annex), pp 3-34-3-35 (**Annex IT-233**) [emphasis added by Italy].

⁶⁰² Hearing Transcript, 9 July 2019, 32:8-17, *referring to* India's Rejoinder, para. 6.81.

⁶⁰³ Hearing Transcript, 9 July 2019, 32:22-34:11 *referring to* Interforce Operations High Command Flash Report no. 016/SO to the Presidency of the Republic of Italy and various Ministries, 15:30 (CET), 15 February 2012 (**Annex IT-115**); Piroli Report (Confidential Annex), pp 3-34-3-35 (**Annex IT-233**).

⁶⁰⁴ Italy's Memorial, para. 4.38, *citing* Boarding Officer's Report MV "Enrica Lexie", 16-17 February 2012, para. 3 (**Annex IT-9**); *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Italy's Reply, para. 4.34; Hearing Transcript, 9 July 2019, 20:4-8.

⁶⁰⁵ Hearing Transcript, 18 July 2019, 162:2-4; Hearing Transcript, 9 July 2019, 20:16-21.

vessel involved in the firing”,⁶⁰⁶ and a *Times of India* article reported that, at 19:00 SMT/19:30 IST, the Southern Naval Command sent INS “Kabra” “to augment force level”.⁶⁰⁷

399. DIG Negi further recounts that, at 19:05 SMT/19:35 IST, the Indian Coast Guard Dornier aircraft CG760 took off from INS “Garuda” for a “sea-air coordinated search”.⁶⁰⁸ At the same time, Coast Guard District HQ 4 instructed Commandant Kumar, officer of the watch at ICGS “Lakshmbai”, “to sail with dispatch for interrogation positively and to *interrogate/identify all the merchant vessels in the area for confirming of a firing incident*”.⁶⁰⁹ The ICGS “Lakshmbai” “was sailed from Kochi ... (with 04 police personnel embarked) to the most probable area for search and *interdiction of the suspected merchant vessel*”.⁶¹⁰
400. While the “Enrica Lexie” was turning, but before it had begun navigating towards Kochi,⁶¹¹ the Indian Coast Guard Dornier aircraft CG760 located the “Enrica Lexie” at 19:20 SMT/19:50 IST at position 09° 51.6’ N 075° 37.5’ E, beyond India’s territorial sea.⁶¹² According to DIG Negi:

*At 19.20 hrs. [IST] we got the name and type of vessel involved in the firing. At 19.35 hrs. [IST] I along with Assistant Commandant Mayank Varma and Rajyasree Rathore as crew took off from INS Garuda in CG 760. The Dornier Air Craft at 19.50 hrs. [IST] We located the vessel ENRICA LEXIE in the Position 09°51.6”N and 075°37.5”E.*⁶¹³

401. DIG Negi further explained that, upon locating the “Enrica Lexie”, the Dornier aircraft “encircled” it and contacted it over VHF channels 16 and 10. The “Enrica Lexie” “confirmed the

⁶⁰⁶ Italy’s Memorial, para. 4.62, *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**).

⁶⁰⁷ Italy’s Memorial, para. 4. 62, *citing* “Coast Guard, fishermen made a smart move”, The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**). *See also* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Italy’s Reply, paras 4.42-4.43, 7.38.

⁶⁰⁸ Italy’s Memorial, para. 4.63, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**); *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Hearing Transcript, 9 July 2019, 21:5-9.

⁶⁰⁹ Italy’s Memorial, para. 4.64, *citing* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 1 (**Annex IT-134**) [emphasis added by Italy].

⁶¹⁰ Italy’s Memorial, para. 4.64, *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**) [emphasis added by Italy].

⁶¹¹ Hearing Transcript, 18 July 2019, 163:11-12, *referring to* Hearing Transcript, 15 July 2019, 46:12-13, 78:8.

⁶¹² Italy’s Memorial, para. 4.65, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 4 (**Annex IT-9**).

⁶¹³ Italy’s Reply, para. 4.44, *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (“[IST]” added) (**Annex IT-7**) [emphasis added by Italy]. *See also* Statement of Witness in connection with the NIA investigation, Statement of Commandant Alok Negi, Coast Guard, 750 Squadron, Coast Guard Air Station, Daman, 19 September 2013, p. 37 (**Annex IT-279**).

firing at the boat by the security guards on the vessel who belong to [the] Italian Navy”.⁶¹⁴ Dornier aircraft’s crew “directed them to amend the course and proceed to Kochi harbour” and “informed” them to remain on the VHF channels, through which the Dornier aircraft continuously contacted them.⁶¹⁵ Italy asserts that “this direction came in the context of the instruction already received from MRCC Mumbai”.⁶¹⁶ The Dornier aircraft “vectored ICG ships for interception” of the “Enrica Lexie”.⁶¹⁷

402. According to Italy, the “Enrica Lexie” “altered the course towards Kochi” at 19:15 SMT/19.45 IST, and after it had turned, the Dornier aircraft “shadowed it to Kochi anchorage” from the height of 3,000 to 5,000 feet.⁶¹⁸
403. Italy states that at 19:30 SMT/20:00 IST, ICGS “Lakshmibai” sailed with four police officers from the Coastal Police Station at Fort Kochi on board “with the admitted goal of investigating, intercepting and then apprehending the Enrica Lexie”.⁶¹⁹ Italy further states that according to the testimony of Commandant Kumar, he was conducting boarding drills with the four policemen as the “Lakshmibai” left Kochi, heading for a location beyond India’s territorial sea.⁶²⁰ ICGS “Lakshmibai” called the “Enrica Lexie” on VHF channel 16. INS “Kabra” also began searching for the “Enrica Lexie”.⁶²¹
404. According to Italy, the “Enrica Lexie” responded to ICGS “Lakshmibai”’s VHF call at 19:45 SMT/20:15 IST and confirmed that, at about 16:00 SMT/16:30 IST, the “Enrica Lexie” had resorted to firing while in transit. Italy alleges that the ICGS “Lakshmibai” “directed the vessel

⁶¹⁴ Italy’s Memorial, para. 4.66, *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

⁶¹⁵ Italy’s Memorial, para. 4.66, *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**). *See also* Italy’s Reply, para. 4.45; Hearing Transcript, 18 July 2019, 163:15-164:1.

⁶¹⁶ Hearing Transcript, 18 July 2019, 164:12-14.

⁶¹⁷ Italy’s Memorial, para. 4.66, *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

⁶¹⁸ Italy’s Memorial, para. 4.66, *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**); Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**). *See also* Italy’s Reply, para. 4.45; Hearing Transcript, 18 July 2019, 167:12-16.

⁶¹⁹ Hearing Transcript, 18 July 2019, 164:15-19, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Hearing Transcript, 16 July 2019, 129:17-20, 130:13-15, 138:20-25, 140:24-145:1.

⁶²⁰ Hearing Transcript, 18 July 2019, 164:19-165:3, *referring to* Hearing Transcript, 16 July 2019, 86:23-26.

⁶²¹ Italy’s Memorial, para. 4.67, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 4 (**Annex IT-9**); Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-134**); Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**).

to proceed towards Kochi”.⁶²² Italy further alleges that Commandant Kumar’s instructions were “[y]ou have to come to the Kochi”.⁶²³

405. As noted above, at 20:06 SMT/20:36 IST, the “Enrica Lexie” received an e-mail from MRCC Mumbai referring to the telephone call at 18:30 SMT/19:00 IST and indicating MRCC Mumbai’s understanding that there had been “a piracy incident/firing incident by your vessel on a suspicious skiffs”. The e-mail, Italy submits, included a “request” for the “Enrica Lexie” to “head for Kochi and establish communication with Indian Coast Guard [...] for further deposition/clarification”, and further inquired as to the “Enrica Lexie”’s estimated time of arrival at Kochi.⁶²⁴ Italy submits that if Captain Vitelli turned before 19:30 SMT/20:00 IST, it was not that e-mail that prompted the turn.⁶²⁵
406. Italy contends that India and Admiral Piroli erred in their perception of the time that the e-mail from MRCC Mumbai was received by the “Enrica Lexie” and in the suggestion that the version of the e-mail that India has submitted into evidence in this Arbitration was drawn from a computer that was on Italian time. Italy notes that the timestamp of such an e-mail is determined “by the computer on which the email is found, not the computer from which it is sent”.⁶²⁶ Italy then notes that the timestamp of the original e-mail is 16:06, while that of the forwarding e-mail is 15:16, and asserts that the e-mail cannot have been forwarded before it was received.⁶²⁷ Noting that the time in the “Enrica Lexie” was set to Italian time, Italy concludes that the computer from which the e-mail was taken was not set to Central European Time (hereinafter “CET”), but on Coordinated Universal Time (hereinafter “UTC”), which is an hour behind CET.⁶²⁸ Further, according to Italy, the e-mail produced by India is not supported by witness evidence and does not prove that the e-mail from the MRCC Mumbai to the “Enrica Lexie” was received before the “Enrica Lexie” turned for Kochi.⁶²⁹ Italy states that this is in contrast to Captain Vitelli’s “clear”

⁶²² Italy’s Memorial, para. 4.68, *citing* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**). *See also* “Coast Guard, fishermen made a smart move”, The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

⁶²³ Hearing Transcript, 18 July 2019, 168:1-2, *referring to* Hearing Transcript, 16 July 2019, 110:15-16.

⁶²⁴ Italy’s Memorial, para. 4.69, *citing* E-mail from MRCC Mumbai to Master of the “Enrica Lexie”, 15 February 2012 (**Annex IT-8**). *See also* E-mail from MRCC Mumbai to the Master of the “Enrica Lexie”, 16:10 (CET), 15 February 2012 (**Annex IT-123**); Italy’s Reply, para. 4.38; Hearing Transcript, 18 July 2019, 165:4-11.

⁶²⁵ Hearing Transcript, 9 July 2019, 7:6-8.

⁶²⁶ Hearing Transcript, 18 July 2019, 166:7-8.

⁶²⁷ Hearing Transcript, 18 July 2019, 165:15-166:11, *referring to* E-mail from the Shipmaster of the “Enrica Lexie” to the Shipowner of the “Enrica Lexie” dated 15 February 2012 at 19:46 IST (**Annex IN-35**).

⁶²⁸ Hearing Transcript, 18 July 2019, 165:15-166:11.

⁶²⁹ Hearing Transcript, 18 July 2019, 166:12-167:5.

written and oral statements that he received the e-mail at 20:06 SMT/20:36 IST, after he had begun navigating towards Kochi.⁶³⁰

407. At 20:17 SMT/20:47 IST, according to Italy, Captain Vitelli sent an e-mail to MSCHOA and UKMTO, with a copy to Fratelli D’Amato SpA, stating, with reference to the e-mail from MRCC Mumbai, that the “Enrica Lexie” had altered its course and was proceeding to Kochi.⁶³¹
408. Italy contends that, after contacting the “Enrica Lexie” over VHF again, at approximately 21:00 SMT/21:30 IST, ICGS “Lakshmibai” “intercepted” the “Enrica Lexie”. The location at which this interception occurred is imprecise, but it is uncontested that the interception occurred “after Captain Vitelli had amended his course and beyond India’s territorial sea”.⁶³² Italy alleges that the ICGS “Lakshmibai”, like the Dornier aircraft, stayed in “continuous communication with the [...] Enrica Lexie”.⁶³³ Together with the Dornier, ICGS “Lakshmibai” “escorted” the “Enrica Lexie” to Kochi.⁶³⁴
409. Italy asserts that the suggestion that the escort of the “Enrica Lexie” by air and sea was to ensure safe passage “through sea lanes unknown to the Enrica Lexie might or might not be true”, but even if true, it was not the only purpose.⁶³⁵ This is demonstrated not only by contemporaneous evidence, but from the fact that once the “Enrica Lexie” anchored at Kochi anchorage, it continued to be monitored to ensure that it did not leave the anchorage. According to Italy, this was in implementation of the instructions under which the Coast Guard had been operating, that is, to “apprehend” the “Enrica Lexie”.⁶³⁶

⁶³⁰ Hearing Transcript, 18 July 2019, 167:6-11, *referring to* Additional Statement of Umberto Vitelli, 2 March 2012, p. 57 (**Annex IT-157**); (Confidential Annex), p. 3 (**Annex IT-262**); Hearing Transcript, 15 July 2019, 49:3-50:9.

⁶³¹ Italy’s Memorial, para. 4.70, *referring to* E-mail from the Master of the “Enrica Lexie” to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**).

⁶³² Hearing Transcript, 18 July 2019, 168:3-10. *See also* Italy’s Memorial, para. 4.71, *referring to* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**).

⁶³³ Italy’s Reply, para. 4.52, *citing* Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant Rohithesh Kumar, Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

⁶³⁴ Italy’s Reply, para. 4.52, *citing* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**); Statement of Witness in connection with the NIA investigation, Statement of Deputy Commandant Rohithesh Kumar, Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Hearing Transcript, 9 July 2019, 28:21-30:5; Hearing Transcript, 18 July 2019, 168:11-15.

⁶³⁵ Hearing Transcript, 18 July 2019, 169:2-6.

⁶³⁶ Hearing Transcript, 18 July 2019, 169:2-24 *referring to* Hearing Transcript, 16 July 2019, 125:14-18; Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012,

410. At 21:18 SMT/21:48 IST, the “Enrica Lexie” arrived at Kochi anchorage and “began to drop anchor, at position 09° 56.0’ N 076° 04.1’ E, within India’s territorial sea”.⁶³⁷ Italy points out that ICGS “Lakshmbai” continued “patrolling in the *Enrica Lexie*’s vicinity after the *Enrica Lexie* anchored”. ICGS “Samar” also reached the area that night.⁶³⁸
411. Italy states that the Indian Coast Guard later stated that, “[t]hrough no warning shots were fired by Coast Guard at MT *Enrica Lexie*”, ICGS “Lakshmbai” “escorted it till our outer anchorage of Kochi”.⁶³⁹ Italy asserts that, referring to this statement, Admiral Piroli “inferred that the local Coast Guard was ready to use force to enforce compliance by MV LEXIE, if necessary”.⁶⁴⁰ Further, Italy alleges, if the “*Enrica Lexie*” had not complied, it “would have been apprehended anyway”, given that in addition to the Dornier and the “Lakshmbai”, the INS “Kabra” had sailed at 19:00 SMT/19:30 IST and the 100-metre-long “Samar” similarly had been diverted.⁶⁴¹
412. According to Italy, the Indian Coast Guard informed the “*Enrica Lexie*” that its officers would board the “*Enrica Lexie*” the following morning, on 16 February 2012. The Dornier aircraft “remained above the *Enrica Lexie* until 22:45 [SMT/23:15 IST], where it had been for more than three hours”.⁶⁴²
413. Finally, Italy contends that the “contemporaneous evidence” of India’s own authorities, such as the Coast Guard “Diary of Events”, and the National Maritime Search and Rescue Board’s Report of 4 June 2012, permit the conclusion that the “*Enrica Lexie*” initially had no intention of

p. 175 (**Annex IT-131**); Boarding Officer’s Report MV “*Enrica Lexie*”, 16-17 February 2012, para. 4 (**Annex IT-9**).

⁶³⁷ Italy’s Memorial, para. 4.72, referring to Log Book of the Master of the “*Enrica Lexie*”, p. 2 (**Annex IT-14**); Extract from the “*Enrica Lexie*” Log Book for 15 February 2012 (**Annex IT-121**).

⁶³⁸ Italy’s Memorial, para. 4.72, referring to Boarding Officer’s Report MV “*Enrica Lexie*”, 16-17 February 2012, para. 5 (**Annex IT-9**).

⁶³⁹ Italy’s Memorial, para. 4.71, citing Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**); Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**). See also National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**); Italy’s Reply, para. 4.55; Hearing Transcript, 9 July 2019, 8:22-9:4.

⁶⁴⁰ Italy’s Reply, para. 4.56, citing Piroli Report (Confidential Annex), p. 3-36 (**Annex IT-233**). See also Hearing Transcript, 9 July 2019, 29:21-30:1.⁶⁴¹ Hearing Transcript, 18 July 2019, 171:6-10, referring to Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

⁶⁴¹ Hearing Transcript, 18 July 2019, 171:6-10, referring to Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

⁶⁴² Italy’s Memorial, para. 4.74, referring to Log Book of the Master of the “*Enrica Lexie*”, p. 3 (**Annex IT-14**); Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

proceeding to the Indian coast and that there was a “causal effect” of India’s intervention on the “Enrica Lexie”’s turn for Kochi.⁶⁴³

ii. Position of India

414. India asserts that the decision of the Captain of the “Enrica Lexie” to proceed to the port of Kochi “was entirely voluntary” and was not based on any threatening or coercive measures on the part of India.⁶⁴⁴ It states that India simply “requested” the “Enrica Lexie” to head to Kochi port to give its version of the events that took place.⁶⁴⁵ India also opposes Italy’s “erroneous” claim that India’s “interdiction” of the “Enrica Lexie” violated its freedom of navigation.⁶⁴⁶

415. According to India, the events leading to the alteration of course by the “Enrica Lexie” are as follows:

[T]he Shipmaster received a request from MRCC Mumbai. That request was passed on to Italian military officials and the ship owner. Neither raised any objection. The Shipmaster then made the decision to alter course. This was an entirely voluntary decision with no hint of any threat or coercion, or exercise of jurisdiction, by India.⁶⁴⁷

416. India alleges that after the incident, the “Enrica Lexie” simply continued on its way and that Captain Vitelli failed to report the incident to MRCC Mumbai, leaving India “in the dark”.⁶⁴⁸ It adds that the Captain of the “Enrica Lexie” failed to preserve the VDR data concerning the incident.⁶⁴⁹ India avers that Italy’s assertion that the SSAS message, having been sent to MRCC Rome, would have been passed on to MRCC Mumbai is not based on any evidence.⁶⁵⁰ It argues that if this were the case, there would have been no reason for India “to have recourse to its Bangalore satellite station for determining what vessels were out in the area, then trying to

⁶⁴³ Italy’s Reply, para. 4.11. *See also* Italy’s Reply, paras 4.53, 4.67; Hearing Transcript, 9 July 2019, 10:12-15, *referring to* Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 7 (**Annex IT-152**); Hearing Transcript, 9 July 2019, 11:16-23, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

⁶⁴⁴ India’s Counter-Memorial, para. 2.32.

⁶⁴⁵ India’s Counter-Memorial, para. 2.44.

⁶⁴⁶ India’s Counter-Memorial, para. 2.32. *See also* India’s Counter-Memorial, para. 2.44; India’s Rejoinder, para. 4.4.

⁶⁴⁷ India’s Counter-Memorial, para. 2.40.

⁶⁴⁸ Hearing Transcript, 12 July 2019, 7:12; Hearing Transcript, 20 July 2019, 25:4. *See also* Hearing Transcript, 12 July 2019, 7:1-16; Hearing Transcript, 20 July 2019, 24:21-25:6.

⁶⁴⁹ India’s Counter-Memorial, para. 2.22, *referring to* Investigation Report of the National Investigation Agency in RC No 04/2013/NIA/DLI, dated 4 April 2013 (hereinafter the “NIA Report”) (Confidential Annex), para. 11.13 (**Annex IN-27**). *See also* Hearing Transcript, 12 July 2019, 2:11-18.

⁶⁵⁰ Hearing Transcript, 20 July 2019, 25:7-15, *referring to* Hearing Transcript, 18 July 2019, 158:9-20

winnow that data down to four potential vessels, and then telephoning or calling each of these four vessels”.⁶⁵¹

417. Referring to the Piroli Report, India asserts that at “either 18:40 or 19:00”, the Indian Coast Guard at MRCC Mumbai contacted the “Enrica Lexie” by telephone and had a conversation with Second Officer, Sahil Gupta, after Captain Noviello had difficulty understanding the transmission.⁶⁵² India submits that there is no written record of that conversation, and in his statement to the NIA, the Second Officer “merely” stated that he answered a call from MRCC Mumbai and handed the phone over to Captain Noviello.⁶⁵³ India asserts that MRCC Mumbai advised the “Enrica Lexie” that it had come to know that the vessel had been involved in a suspected pirate attack and that two boats had been caught with suspected pirates.⁶⁵⁴ MRCC Mumbai sought to know the location of the “Enrica Lexie” and “supposedly, according to Mr. Gupta’s account, ‘instructed’ the vessel to approach Kochi port so that the captain of the vessel could give a statement. MRCC Mumbai also requested the vessel to forward an incident report to it”.⁶⁵⁵ India submits that it was not until this call that India received confirmation that the “Enrica Lexie” was the vessel involved in the firing incident.⁶⁵⁶
418. India refutes Italy’s argument that the call from MRCC Mumbai to the “Enrica Lexie” was a ruse because the MRCC referred to two pirate crafts having been taken and asked the vessel to come to port. India notes that this “so-called ‘ruse’” was never mentioned again in any subsequent communication that the Coast Guard had with the vessel or in the written message that the MRCC Mumbai sent.⁶⁵⁷ Further, India adds, there is no evidence, in any of the numerous communications that Captain Vitelli and the Marines had afterwards with either the shipowner or the Italian naval authorities, that this initial phone call “was ever questioned or thought to be a ruse”.⁶⁵⁸ India also

⁶⁵¹ Hearing Transcript, 20 July 2019, 25:16-23. *See also* Hearing Transcript, 12 July 2019, 8:14-9:6.

⁶⁵² India’s Counter-Memorial, para. 2.36, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**).

⁶⁵³ India’s Counter-Memorial, para. 2.37, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**); Statement of Witness in connection with the NIA investigation, Statement of Shri Sahil Gupta, p. 61 (**Annex IN-30**). *See also* India’s Rejoinder, para. 4.45.

⁶⁵⁴ Hearing Transcript, 12 July 2019, 10:3-13.

⁶⁵⁵ Hearing Transcript, 12 July 2019, 10:9-13, *citing* Declaration of Sahil Gupta, 15 February 2012 (emphasis added) (**Annex IT-118**). *See also*, Italy’s Memorial, para. 4.60.

⁶⁵⁶ Hearing Transcript, 12 July 2019, 9:7-14; Hearing Transcript, 20 July 2019, 26:2-5.

⁶⁵⁷ Hearing Transcript, 20 July 2019, 26:17. *See also* Hearing Transcript, 20 July 2019, 26:5-22; Hearing Transcript, 12 July 2019, 10:14-18.

⁶⁵⁸ Hearing Transcript, 20 July 2019, 27:2-7.

asserts that there is no evidence that Sergeant Latorre and Captain Vitelli “conveyed any impression” that they were “under any obligation or threats to divert to Kochi”.⁶⁵⁹

419. India submits that, at 19:05 SMT/19:35 IST, Captain Vitelli and Sergeant Latorre informed CINCNAV about the “request for collaboration” from MRCC Mumbai to alter course for Kochi.⁶⁶⁰ CINCNAV, India alleges, “raised no objection”.⁶⁶¹ India contends that CINCNAV “considered that the decision rested with the Shipmaster since only he could take decisions about the navigation and course”.⁶⁶²
420. India emphasises that the e-mail from MRCC Mumbai to the “Enrica Lexie” was received at 19:06 SMT/19:36 IST, before the “Enrica Lexie” changed its course, as indicated in the document produced by India, which was the actual e-mail in which the MRCC sent the message. India recalls, however, that Captain Vitelli in his testimony expressed with certainty that he received the e-mail after he had decided to change course.⁶⁶³ India alleges that in light of these different versions with respect to the timing of the e-mail, a third source, the Piroli Report, should be consulted.⁶⁶⁴
421. India submits that, contrary to Italy’s assertion that Admiral Piroli made an error, the Piroli Report is clear that at 19:16 SMT/19:46 IST, Captain Vitelli forwarded the e-mail message to the shipowner, and one minute later to MSCHOA and UKMTO, in which he added a comment that he had altered course and was proceeding to Kochi.⁶⁶⁵ India notes that the message forwarded to the shipowner has as one of the recipients “Mattessi Mario”, who accompanied Admiral Piroli to carry out investigations in Kochi, and who would have paid attention to the timing of the messages.⁶⁶⁶ Further, in opposition to Italy’s suggestion that the e-mail “must have in fact been on UTC”, India asserts that there is no evidence to back that suggestion, as the e-mail was clearly sent at 15:16 Italian time.⁶⁶⁷

⁶⁵⁹ India’s Rejoinder, para. 4.51.

⁶⁶⁰ India’s Rejoinder, para. 6.15; Hearing Transcript, 12 July 2019, 11:23-24, *citing* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

⁶⁶¹ India’s Counter-Memorial, para. 2.39.

⁶⁶² India’s Counter-Memorial, para. 2.39, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**). *See also* India’s Rejoinder, paras 4.71-4.73; Hearing Transcript, 12 July 2019, 11:22-12:19.

⁶⁶³ Hearing Transcript, 20 July 2019, 28:20-29:12, *referring to* Hearing Transcript, 15 July 2019, 85:20-22. *See also* Hearing Transcript, 12 July 2019, 12:20-16:7.

⁶⁶⁴ Hearing Transcript, 20 July 2019, 29:14-30:1.

⁶⁶⁵ Hearing Transcript, 20 July 2019, 30:1-16, *referring to* Hearing Transcript, 18 July 2019, 165:15-23; Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**).

⁶⁶⁶ Hearing Transcript, 20 July 2019, 31:6-20.

⁶⁶⁷ Hearing Transcript, 20 July 2019, 31:21-32:7. *See also* Hearing Transcript, 20 July 2019, 32:14-24.

422. Furthermore, with regard to the e-mail message from the MRCC Mumbai to the “Enrica Lexie” “requesting it” to proceed to Kochi for “clarification/disposition”, India asserts that “[t]here was absolutely no ‘ruse’ or pretext with respect to this e-mail, and no threats issued if the captain did not comply, and Italy has never suggested that there was”.⁶⁶⁸ According to India, the e-mail

simply referred to the firing incident and a request – not an order, a request – to, for clarification/deposition, come to Kochi, that email did not lead to any change of mind, either on the part of Captain Vitelli or the shipowner or the Italian naval officials. No one questioned the request thereafter, and no one ever suggested that in the light of that written email that Captain Vitelli had asked for and received, the earlier phone call had somehow been a “ruse”.⁶⁶⁹

423. This e-mail, India adds, did not cause Captain Vitelli or anyone else to question the original phone call that referred to the capture of two pirate skiffs or to change his mind about proceeding to Kochi.⁶⁷⁰

424. India alleges that, after the call, Captain Vitelli did not change the course of the “Enrica Lexie” for the next 45 minutes.⁶⁷¹ According to India, at 19:15 SMT/19:45 IST, after having “received the authorization of the ship owner and no objection by CINCNAV, the *Enrica Lexie* altered its course and headed towards Kochi”.⁶⁷² India quotes from the Piroli Report that “[t]he Shipmaster agreed to collaborate as requested by the Indian authorities after he spoke with the ship owner and informed CINCNAV”.⁶⁷³ India also quotes the testimony of Captain Vitelli that “all parties were of the same opinion, that is to say, to head towards Kochi and to provide our support, both the military authorities and the owners. We all agreed”.⁶⁷⁴ India asserts that this was before “any Indian aircraft or Coast Guard vessels had arrived at the scene or made contact with the vessel”.⁶⁷⁵ According to India, this evidence demonstrates that “Captain Vitelli made a voluntary decision to accede to the request contained in the email from MRCC Mumbai [...] without any coercion being applied by India”.⁶⁷⁶

⁶⁶⁸ Hearing Transcript, 20 July 2019, 28:9-19. *See also* Hearing Transcript, 12 July 2019, 16:13-20.

⁶⁶⁹ Hearing Transcript, 20 July 2019, 33:4-13.

⁶⁷⁰ Hearing Transcript, 20 July 2019, 31:1-5.

⁶⁷¹ India’s Counter-Memorial, paras 4.54, 4.57, 4.66, 6.15. *See also* Hearing Transcript, 20 July 2019, 27:8-9.

⁶⁷² India’s Counter-Memorial, para. 2.40, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**). *See also* Hearing Transcript, 20 July 2019, 27:11-28:8, *referring to* Hearing Transcript, 15 July 2019, 91:6-12.

⁶⁷³ India’s Counter-Memorial, para. 2.40, *citing* Piroli Report (Confidential Annex), p. 3-36 (**Annex IT-233**). *See also* Hearing Transcript, 12 July 2019, 16:24-17:4.

⁶⁷⁴ Hearing Transcript, 20 July 2019, 28:5-8, *citing* Hearing Transcript, 15 July 2019, 91:6-10.

⁶⁷⁵ India’s Counter-Memorial, para. 2.40. *See also* Hearing Transcript, 12 July 2019, 18:6-19.

⁶⁷⁶ Hearing Transcript, 12 July 2019, 19:2-6.

425. India states that the Dornier aircraft spotted the “Enrica Lexie” at 19:20 SMT/19:50 IST, “although the Piroli Report indicates that there is no evidence of this”.⁶⁷⁷ According to India, by this time, Captain Vitelli had already “decided and implemented his decision to proceed to Kochi”, which India claims demonstrates that the presence of the Coast Guard had no impact on the Shipmaster’s decision to change course.⁶⁷⁸
426. India also contests Italy’s interpretation of communications between the aircraft and the “Enrica Lexie”, according to which “the aircraft directed the *Enrica Lexie* to proceed to Kochi harbor”.⁶⁷⁹ India alleges that “by the time the Dornier made radio contact with the *Enrica Lexie*, the Shipmaster of the vessel had already made his decision to alter course and proceed to Kochi”.⁶⁸⁰
427. India asserts that when Captain Vitelli was questioned by the Dornier as to whether he had changed course, he answered that he had, which is consistent with the evidence of the log and that of DIG Negi. India notes:

Commandant Negi noted that the normal course of the *Enrica Lexie* – as if it was going to continue its voyage to the Red Sea, which it started to do after the shooting incident – the normal course of the *Enrica Lexie* would have been in a north-northwesterly direction of about 345°; but when he, Commandant Negi, reached the vessel, it was heading in a northeasterly direction of 30° to 40°. So that obviously meant that when Commandant Negi reached the *Enrica Lexie* in the Dornier, it had already started to turn towards Kochi; which makes perfect sense, since Captain Vitelli said he had started turning five minutes earlier, at 19.45. And then 40 minutes after that, the log shows that it had completed the turn and was already heading back on an almost due easterly course, a course of 79°, towards Kochi.⁶⁸¹

428. With regard to the alleged “escort” of the “Enrica Lexie”, India asserts that the ICGS “Lakshmbai” “only arrived at the *Enrica Lexie*’s location at 21:30 [IST]” and that this was “well after the Shipmaster of the *Enrica Lexie* had made his decision” to alter course and head for Kochi.⁶⁸² India submits that this development “did not seem to cause concern” to Captain Vitelli, and there is no evidence that either he or the Marines contacted naval authorities in Italy to suggest that they were being “forced into port”.⁶⁸³

⁶⁷⁷ India’s Counter-Memorial, para. 2.41, referring to Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**).

⁶⁷⁸ India’s Rejoinder, para. 4.57.

⁶⁷⁹ India’s Counter-Memorial, para. 2.41, referring to Italy’s Memorial, para. 4.66.

⁶⁸⁰ India’s Counter-Memorial, para. 2.41. See also Hearing Transcript, 12 July 2019, 20:3-21.

⁶⁸¹ Hearing Transcript, 20 July 2019, 34:6-21.

⁶⁸² India’s Counter-Memorial, para. 2.42. See also India’s Rejoinder, para. 4.63.

⁶⁸³ India’s Counter-Memorial, para. 2.42. See also India’s Rejoinder, para. 4.62; Hearing Transcript, 12 July 2019, 23:21-26:5, 28:12-29:15.

429. India also notes that Captain Vitelli did not suggest in his testimony that the arrival of the Dornier or the “Lakshmibai” “influenced or somehow constrained his choices”.⁶⁸⁴ In his testimony, Captain Vitelli stated, “yes, I didn’t have the impression that force was being used. I was free to alter the course”.⁶⁸⁵ Further, India asserts that neither DIG Negi nor Commandant Kumar were under any instruction to force the vessel to head to port if it refused to comply with the request to proceed there.⁶⁸⁶
430. Concerning Italy’s allegation that India wielded a “big stick that India was carrying behind its back, readying for use”,⁶⁸⁷ India argues that there is no evidence of this as demonstrated by the testimonies of DIG Negi and Commandant Kumar. In particular, Commandant Kumar testified that he did not have the name of the “target vessel”⁶⁸⁸ before setting sail, that boarding drills were routine on all his missions, that there was no boarding at any time when the “Enrica Lexie” was navigating to the port, and that the reason why there were police officers on board the “Lakshmibai” was because the report was that there had been a firing incident.⁶⁸⁹
431. India also opposes Italy’s contention that Captain Vitelli testified that “he ‘communicated with the ship owner and the navy’, but then ‘continued on my route’.”⁶⁹⁰ India submits that this is a misrepresentation, based on the full testimony which stated:
- At 18:00-18:30 hours I had a satellite call from the MRCC who asked me if I had suffered a pirate attack because two pirate boats had been identified. I answered yes and requested a written message. It did not arrive fast. Meanwhile I communicated with the ship owner and the navy. I continued on my route until I was across from Cochin, as I had been asked to go there.⁶⁹¹
432. India concludes that until the “Enrica Lexie” laid anchor at 21:18 SMT/21:48 IST, “two miles inside of Indian territorial waters about 10 nautical miles from the coast”, it “had not exercised any jurisdiction over the vessel or any individuals on board”.⁶⁹²
433. With regard to Italy’s argument that the “Lakshmibai” “intercepted” the “Enrica Lexie”, India asserts that as Commandant Kumar testified, this is “just a normal term that’s used. The Coast

⁶⁸⁴ Hearing Transcript, 20 July 2019, 35:5-6.

⁶⁸⁵ Hearing Transcript, 20 July 2019, 35:8-10, *citing* Hearing Transcript, 15 July 2019, 94:14-16.

⁶⁸⁶ Hearing Transcript, 20 July 2019, 35:13-36:4.

⁶⁸⁷ Hearing Transcript, 20 July 2019, 38:17-18, *citing* Hearing Transcript, 18 July 2019, 14:24-25.

⁶⁸⁸ Hearing Transcript, 20 July 2019, 39:13.

⁶⁸⁹ Hearing Transcript, 20 July 2019, 38:16-41:24, *referring to* Hearing Transcript, 16 July 2019, 98:2-102:3.

⁶⁹⁰ India’s Rejoinder, para. 4.64, *citing* Italy’s Reply, para. 4.48 [emphasis added by Italy].

⁶⁹¹ India’s Rejoinder, para. 4.65, *citing* (Confidential Annex), p. 3 (**Annex IT-262**).

⁶⁹² India’s Counter-Memorial, para. 2.43, *citing* Piroli Report (Confidential Annex), p. 2-13 (**Annex IT-233**); Italy’s Memorial, para. 4.72. *See also* India’s Rejoinder paras 4.74-4.78.

Guard had remained 3 to 5 miles away, there wasn't any physical interception, and Captain Vitelli didn't even know they were there".⁶⁹³

434. In connection with the allegation of "escorting", India asserts that the photographic evidence produced by Italy to show that the "Enrica Lexie" was surrounded by other vessels was not taken at night when the "Enrica Lexie" was proceeding to Kochi, but in "broad daylight", when the "Enrica Lexie" was already anchored.⁶⁹⁴ India adds that in any event, Captain Vitelli, according to his oral testimony, did not consider changing his mind about going to Kochi, and "he had no clue that there were any patrol boats around him"⁶⁹⁵ while proceeding to Kochi.⁶⁹⁶

**(b) Interpretation and Application of Article 87, paragraph 1, subparagraph (a)
(Freedom of Navigation)**

435. Italy submits that India violated Italy's right to freedom of navigation under Articles 87, paragraph 1, subparagraph (a), of the Convention by directing, interdicting, and escorting the Italian-flagged "Enrica Lexie" beyond its territorial waters. India rejects Italy's claim.

i. Position of Italy

436. According to Italy, "[f]reedom of navigation involves a positive and a negative aspect: positively, vessels of every State may freely navigate on the high seas; negatively, no State may exercise any authority against any vessel sailing under the flag of another State".⁶⁹⁷ This negative aspect, Italy contends, precludes a State that might have jurisdiction from exercising it over any vessel sailing under the flag of another State on the high seas.⁶⁹⁸ Specifically, Italy submits, ITLOS in its *M/V "Norstar"* judgment makes "clear that there may be no interference or exercise of jurisdiction of any kind, whether physical or otherwise, save in exceptional cases, as provided for in the Convention or other international treaties".⁶⁹⁹

⁶⁹³ Hearing Transcript, 20 July 2019, 44:11, 44:13-16.

⁶⁹⁴ Hearing Transcript, 20 July 2019, 44:17, 45:3-4. *See generally* Hearing Transcript, 20 July 2019, 44:16-45:12.

⁶⁹⁵ Hearing Transcript, 20 July 2019, 45:17-18, *referring to* Hearing Transcript, 15 July 2019, 52:3-16.

⁶⁹⁶ Hearing Transcript, 20 July 2019, 45:13-18.

⁶⁹⁷ Italy's Memorial, para. 10.18, *referring to Oscar Chinn (The United Kingdom v. Belgium)*, Judgment of 12 December 1934, P.C.I.J. Series A/B, No. 63, p. 65 at p. 83; Gilbert Gidel, *Le droit international public de la mer: Le temps de paix*, Vol. 1 (Sirey, 1932), p. 236.

⁶⁹⁸ Italy's Memorial, para. 10.19, *citing S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25.

⁶⁹⁹ Hearing Transcript, 10 July 2019, 7:18-22, *referring to M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 222-23. *See also* Hearing Transcript, 10 July 2019, 5:12-7:22.

437. Italy further argues that the exceptions to the freedom of navigation provided for in Article 110 (piracy, slave trade, unauthorised broadcasting, no nationality, and refusal to reveal nationality) and Article 111 (hot pursuit) are relatively limited and therefore reaffirm the extent of the freedom.⁷⁰⁰
438. Italy also rejects both of the tests which India proposes for assessing interference with the freedom of navigation under Article 87. According to Italy, the test is neither whether India used force against the “*Enrica Lexie*”, nor whether it boarded or attempted to board the “*Enrica Lexie*”.⁷⁰¹ Italy submits that the cases on which India relies – *Guyana v. Suriname* and the *South China Sea Arbitration* – are inapposite because, in Italy’s view, they do not turn on the issue of freedom of navigation.⁷⁰² Further, ITLOS’ judgment in *M/V “Norstar”*, which explicitly considered the question of what conduct constitutes a breach of Article 87, Italy argues, demonstrates that India’s position that only physical interventions can constitute such a breach “is impossible”.⁷⁰³
439. Italy submits instead that the test is “simply whether India interfered with the freedom of navigation of the *Enrica Lexie*, and it could do so by exercises of authority falling far short of boarding it or using or threatening to use force against it”.⁷⁰⁴ According to Italy, this test “is confirmed by the exceptions to which freedom of navigation under Article 87 is subject”.⁷⁰⁵ Italy gives the example of Article 111 which, in its view, provides that escorting a vessel is sufficient to constitute an interference,⁷⁰⁶ even though, again according to Italy, none of the exercises of authority under Article 111 necessarily involve boarding the vessel or the use or threat of force.⁷⁰⁷
440. Based on this interpretation, Italy submits that “this coordinated Indian Government operation to bring the *Enrica Lexie* to Kochi one way or another was plainly an exercise of jurisdiction over

⁷⁰⁰ Italy’s Memorial, para. 10.21.

⁷⁰¹ Italy’s Reply, paras 7.6, 7.8, referring to India’s Counter-Memorial, paras 6.9, 6.13. See also Hearing Transcript, 10 July 2019, 8:21-9:9.

⁷⁰² Italy’s Reply, para. 7.7, referring to PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1; PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, paras 1083, 1109.

⁷⁰³ Hearing Transcript, 10 July 2019, 9:10-11, referring to *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming].

⁷⁰⁴ Italy’s Reply, para. 7.13. See also Hearing Transcript, 10 July 2019, 9:19-10:1.

⁷⁰⁵ Italy’s Reply, para. 7.9.

⁷⁰⁶ Italy’s Reply, paras 7.9-7.11. To support its interpretation, Italy also cites the International Law Commission’s view in respect of the analogous provision in its 1956 draft Articles: International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 285. See also Hearing Transcript, 10 July 2019, 17:5-25.

⁷⁰⁷ Italy’s Reply, para. 7.12.

the *Enrica Lexie* beyond India's territorial sea".⁷⁰⁸ Specifically, it asserts that India "exercised its authority beyond its territorial sea to direct, interdict and escort the *Enrica Lexie* into Indian territorial waters for the purpose of conducting a criminal investigation into an incident that occurred outside India's territorial sea".⁷⁰⁹ According to Italy, any one of direction, interdiction, or escort "would alone be sufficient" to constitute a breach of Article 87, paragraph 1, subparagraph (a), of the Convention.⁷¹⁰

441. First, Italy contends that India violated Article 87, paragraph 1, subparagraph (a), by directing the "Enrica Lexie" to change course for Kochi. According to Italy, the "issuing of directions to a ship by the naval, coast guard and other executive organs and agencies of a State that is not the flag State of the ship in question is an exercise of authority over the ship by that State".⁷¹¹ Italy submits that there is a "convergence of evidence" that is "both clear and compelling that the Indian authorities directed the *Enrica Lexie* to change course".⁷¹² In support of this submission, Italy cites the following evidence:

- Second Officer Gupta's declaration, indicating that "they instructed the vessel to approach to Cochin Port".⁷¹³
- Captain Vitelli's Log Book, recording that MRCC Mumbai "ask[ed]" him "to change course and head toward Cochin", followed by an email, "request[ing]" that the "Enrica Lexie" "head for Kochi".⁷¹⁴
- The Dornier pilot's statement that the aircraft "encircled the vessel and contacted it" and "directed them to amend the course and proceed to Kochi harbour".⁷¹⁵
- India's National Maritime Search and Rescue Board's Report, stipulating that the Dornier "directed the vessel to proceed to Kochi".⁷¹⁶

⁷⁰⁸ Hearing Transcript, 18 July 2019, 172:6-10, referring to *Guillermo Colunje (Panama) v. United States*, Decision of 27 June 1933, RIAA Vol. VI, p. 342 at pp 343-44.

⁷⁰⁹ Italy's Reply, para. 7.57.

⁷¹⁰ Italy's Reply, para. 7.53.

⁷¹¹ Italy's Reply, para. 7.34. See also Hearing Transcript, 10 July 2019, 2:9-18, 20:16-22.

⁷¹² Italy's Reply, para. 7.34.

⁷¹³ Italy's Reply, para. 7.28, citing Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**) [emphasis added by Italy].

⁷¹⁴ Italy's Reply, para. 7.29, citing Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**); E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**). See also Italy's Memorial, para. 10.24(1).

⁷¹⁵ Italy's Reply, para. 7.30, citing Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**). See also Italy's Memorial, para. 10.35(3).

⁷¹⁶ Italy's Reply, para. 731, citing National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

- Captain Vitelli’s statement to Indian Police, in which he avers that he was “directed to head for Kochi”, and his additional statement, asserting that “[t]hey informed [him] to alter the course”.⁷¹⁷
 - Statement of Rohithesh Kumar and the NIA statements, indicating that the Indian authority “directed” the “Enrica Lexie” to proceed to Kochi.⁷¹⁸
442. Second, Italy argues that the fact that Captain Vitelli decided to go to Kochi, coupled with the fact that he did not believe that he was acting under any coercion, does not assist India’s case.⁷¹⁹ This is because, in Italy’s view, the Arbitral Tribunal in examining whether a State was exercising jurisdiction should assess “an objective question” determined by the evidence of the acts of the Indian State, not by “the subjective appreciation” of the target of that exercise of jurisdiction.⁷²⁰ More precisely, according to Italy, “whether a state was exercising jurisdiction is to be determined and assessed by reference to the acts of that state, not by reference to the extent to which the master of the vessel over which jurisdiction was being exercised felt himself to be constrained”.⁷²¹ Thus, the fact that Captain Vitelli decided to comply with the request to go to Kochi to identify pirate vessels “does not diminish the exercise of jurisdiction by Indian authorities”.⁷²²
443. Third, Italy submits that a State’s maritime rescue coordination centre issuing an instruction on a “false pretext” constitutes an interference with freedom of navigation, as any responsible mariner “would need a very good reason indeed not to comply” with an instruction from the closest maritime rescue coordination centre, even while exercising freedoms of the high seas.⁷²³ Italy alleges that if the perpetration of a “falsehood”⁷²⁴ by the entity tasked under international law with maritime rescue is not an interference with the freedom of navigation,

⁷¹⁷ Italy’s Reply, para. 7.32, *citing* Statement of Umberto Vitelli, 19 February 2012, p. 84 (**Annex IT-270**); Additional Statement of Umberto Vitelli, 2 March 2012, p. 89 (**Annex IT-157**).

⁷¹⁸ Italy’s Reply, para. 7.33, *citing* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**); Statement of Witness in connection with the NIA Investigation, Statement of Deputy Commandant Rohitesh Kumar, Coast Guard, 745 Squadron, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 19 September 2013, p. 32 (**Annex IT-278**). *See also* Statement of Witness in connection with the NIA Investigation, Statement of K. Suresh, Uttam Adhikari, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 20 September 2013, p. 35 (**Annex IT-280**); Statement of Witness in connection with the NIA Investigation, Statement of Commandant Neeraj Sharma, Commandant, Coast Guard Headquarters, Delhi, 12 July 2013, p. 39 (**Annex IT-276**); Italy’s Memorial, para. 10.35(4).

⁷¹⁹ Hearing Transcript, 18 July 2019, 173:12-21.

⁷²⁰ Hearing Transcript, 18 July 2019, 174:11-16.

⁷²¹ Hearing Transcript, 18 July 2019, 173:16-21.

⁷²² Hearing Transcript, 18 July 2019, 173:25-174:1.

⁷²³ Hearing Transcript, 18 July 2019, 174:17-24.

⁷²⁴ Hearing Transcript, 18 July 2019, 175:9.

then the spectre is raised of maritime rescue coordination centres being freely enlisted in the service of law enforcement agencies and operations, with all of the guile that sometimes forms part of those operations. That would be a frightening prospect indeed for the question of whether responsible, seamanlike mariners would continue to be willing to comply with requests from MRCCs around the world, in circumstances where such compliance requires mariners to deviate from their commercial and other operations in the interests of the safety of all those who use the high seas. Mariners do so absent legal obligation, at least in some countries, because of the special status of MRCCs.⁷²⁵

444. Fourth, Italy counters India's argument that Italy acquiesced to Captain Vitelli's turn to Kochi in response to the request from MRCC Mumbai, arguing that "[a]ny consent constituted by such acquiescence would be entirely vitiated by the falsehood involved in the request with which the Italian authorities were presented via Captain Vitelli".⁷²⁶ Italy states that if Italy acquiesced to anything, it was to a request for the "Enrica Lexie", with Italian naval marines aboard, to identify two pirate vessels.⁷²⁷
445. Fifth, Italy contends that India violated Article 87, paragraph 1, subparagraph (a), by interdicting the "Enrica Lexie". According to Italy, the "[i]nterdiction of a vessel is the most manifest and self-evident breach of Articles 87 and 92 of UNCLOS of which it is possible to conceive".⁷²⁸ Italy submits that a "convergence of evidence showing an interdiction of the *Enrica Lexie* is both clear and compelling".⁷²⁹ In support of this submission, Italy cites the following evidence:
- The Coast Guard's "Diary of Events", recording that India's Coast Guard launched Dornier "for identification/interdiction of suspect vessel".⁷³⁰
 - India's National Maritime Search and Rescue Board's Report, recording that the Dornier "vectored ICG ships for interception" of the "Enrica Lexie".⁷³¹
 - A contemporaneous news report stating that the Southern Naval Command sent the INS "Kabra" "to augment [the] force level".⁷³²

⁷²⁵ Hearing Transcript, 18 July 2019, 175:12-26.

⁷²⁶ Hearing Transcript, 18 July 2019, 176:11-15.

⁷²⁷ Hearing Transcript, 18 July 2019, 176:8-11.

⁷²⁸ Italy's Reply, para. 7.43; Hearing Transcript, 10 July 2019, 14:4-10.

⁷²⁹ Italy's Reply, para. 7.43.

⁷³⁰ Italy's Reply, para. 7.36, *citing* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**). *See also* Hearing Transcript, 10 July 2019, 12:15-20.

⁷³¹ Italy's Reply, para. 7.37, *citing* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

⁷³² Italy's Reply, para. 7.38, *citing* "Coast Guard, fishermen made a smart move", The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

- The Boarding Officer of ICGS “Lakshmbai” reporting that the Indian Coast Guard instructed the ICGS “Samar” to “proceed with max speed to reach area and render assistance for apprehension of suspect vessel”.⁷³³
- The Inventory prepared by Assistant Commissioner of Police and India’s National Maritime Search and Rescue Board’s Report, confirming that “ICGS Lakshmbai was sailed” for “interdiction” of the suspected vessel.⁷³⁴
- The Dornier pilot’s statement to the Indian police, indicating that they “directed them to amend the course and proceed to Kochi harbor [...] and [they] shadowed it [there]”.⁷³⁵
- Rohitesh Kumar’s statement to the Indian police, saying that “ICGS L[a]kshmbai intercepted the vessel [...] and escorted it till our outer anchorage of Kochi”.⁷³⁶

446. Sixth, Italy argues that India violated Article 87, paragraph 1, subparagraph (a), by escorting the “Enrica Lexie” beyond its territorial sea with an aircraft and armed vessels of the Indian Coast Guard.⁷³⁷ Italy adds that “[i]n the absence of the consent of the flag state, [escort] constitutes an interference with freedom of navigation and an unlawful exercise of jurisdiction”.⁷³⁸ In support of this submission, Italy cites the following evidence:

- The report of the Boarding Officer of ICGS “Lakshmbai” that after directing the “Enrica Lexie” to proceed towards Kochi, it then “escorted” the vessel until arrival at Kochi anchorage.⁷³⁹
- A letter by the Indian Ministry of Shipping, Road Transport and Highways to the operators of the “Enrica Lexie”, confirming that the “Indian Coast Guard intercepted the vessel and escorted her to Kochi for investigation”.⁷⁴⁰

⁷³³ Italy’s Reply, para. 7.39, *citing* Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 2 (**Annex IT-9**). *See also*, Italy’s Memorial, para. 10.35(1); Hearing Transcript, 10 July 2019, 13:1-6.

⁷³⁴ Italy’s Reply, para. 7.40, *citing* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 178 (**Annex IT-131**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**). *See also* Italy’s Memorial, para. 10.35(2).

⁷³⁵ Italy’s Reply, para. 7.41, *citing* Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**).

⁷³⁶ Italy’s Reply, para. 7.42, *citing* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**).

⁷³⁷ Italy’s Reply, para. 7.52; Hearing Transcript, 10 July 2019, 16:4-10.

⁷³⁸ Hearing Transcript, 10 July 2019, 16:7-10.

⁷³⁹ Italy’s Reply, para. 7.46, *citing* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**). *See also* Italy’s Memorial, para. 10.35(5).

⁷⁴⁰ Italy’s Reply, para. 7.47, *citing* Letter from the Indian “Dy Director General of Shipping” to the Owners of the *Enrica Lexie*, 16 February 2012 (**Annex IT-5**). *See also* Italy’s Memorial, para. 10.35(5).

- The Indian Coast Guard's statement filed with the High Court of Kerala, stating that the "[Coast Guard] escorted the vessel to Kochi under escort of aerial support from [the] Dornier Aircraft".⁷⁴¹
- A photograph taken from the air of the "Enrica Lexie" under escort.⁷⁴²
- The Piroli Report, where Admiral Piroli "inferred that the local Coast Guard was ready to use force to enforce compliance by MV LEXIE, if necessary".⁷⁴³

447. Italy argues that Article 111 on the right of hot pursuit, although not applicable to this case, confirms Italy's position that the escort of the "Enrica Lexie" by Indian authorities through the Indian exclusive economic zone both unlawfully impeded its free navigation and constituted an unlawful exercise of jurisdiction. Italy avers that Article 111, paragraph 7, authorises the escort of a vessel that is arrested within the jurisdiction of a State, where circumstances require that the vessel be escorted across some part of the high seas or exclusive economic zone in order to reach a port of the arresting State.⁷⁴⁴ Italy asserts that India's claim that Article 111, paragraph 7, only applies where a vessel is already arrested "misses the point".⁷⁴⁵

448. Finally, Italy contends that "no exceptional circumstances [...] could have justified any exercise of authority by India over the *Enrica Lexie*".⁷⁴⁶ In support of this contention, Italy cites the following alleged facts:

- (1) India did not seek and obtain the consent of Italy as the flag State.
- (2) None of the exceptions provided for under UNCLOS were applicable: the *Enrica Lexie* was not suspected of piracy, the slave trade or unauthorised broadcasting.
- (3) India exercised jurisdiction beyond its contiguous zone, and did not do so in connection with the limited jurisdiction afforded to a coastal State in that zone: India was not purporting to prevent the violation of its customs, fiscal, immigration or sanitary laws and regulations in its territorial sea. The *Enrica Lexie* had not entered India's territorial sea and had no intention of doing so.
- (4) India was not exercising a right of hot pursuit.
- (5) Nor was India exercising any form of authority related to its jurisdiction in its exclusive economic zone over environmental matters.⁷⁴⁷

⁷⁴¹ Italy's Reply, para. 7.48, *citing* Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 6 (**Annex IT-152**).

⁷⁴² Italy's Memorial, para. 4.73, Figure 9; Italy's Reply, paras 4.59, Figure 2, 7.49, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

⁷⁴³ Italy's Reply, para. 7.51, *citing* Piroli Report (Confidential Annex), p. 3-36 (**Annex IT-233**).

⁷⁴⁴ Italy's Reply, para. 7.9; Hearing Transcript, 10 July 2019, 17:18-18:1.

⁷⁴⁵ Hearing Transcript, 10 July 2019, 17:1-5, *referring to* India's Rejoinder para. 6.13.

⁷⁴⁶ Italy's Memorial, para. 10.26. *See also* Italy's Memorial, para. 10.36.

⁷⁴⁷ Italy's Memorial, para. 10.26. *See also* Italy's Memorial, para. 10.36; Hearing Transcript, 10 July 2019, 18:7-12.

ii. Position of India

449. India disagrees with Italy's interpretation of Article 87, paragraph 1, subparagraph (a). While it "has no issue" with ITLOS' finding in *M/V "Norstar"* that "any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of freedom of navigation", India maintains that it has no bearing on this case because the facts in *M/V "Norstar"* "were very different".⁷⁴⁸ For example, India points out, the Italian measures found to be in breach of Article 87 in *M/V "Norstar"* targeted a foreign ship – the *M/V "Norstar"*. In this case, by contrast, India notes that "neither [its] investigation into the shooting incident that resulted in the death of two fishermen, nor the Indian court proceedings, targeted the *Enrica Lexie*".⁷⁴⁹ In addition, India observes that the "use of armed force by state agents against a defenceless fishing boat [...] bears no resemblance to legitimate bunkering activities that were at issue in *Norstar*".⁷⁵⁰
450. In addition, India argues that Italy's references to Article 111 are inapposite.⁷⁵¹ According to India, in the context of hot pursuit, "escort outside the territorial sea is necessary to give practical effect to the coastal State's rights with respect to hot pursuit and the enforcement of its laws".⁷⁵² Hence "it is a complete *non sequitur* to argue that, just because escort is permitted in a case of hot pursuit, it is a violation of the freedom of navigation in all other circumstances".⁷⁵³ Moreover, India observes, Article 111, which deals with the situation of hot pursuit in which a ship has already been arrested, and must be escorted to prevent escape, "has nothing to do with the present case".⁷⁵⁴ This is because the "*Enrica Lexie*" had not been arrested in India's exclusive economic zone, was already on a course that it intended to take anyway, and for that reason, was not constrained in any manner.⁷⁵⁵
451. India's principal assertion in response to Italy's claim is that "at no time did India exercise any authority over the *Enrica Lexie* while it was navigating in India's exclusive economic zone".⁷⁵⁶

⁷⁴⁸ Hearing Transcript, 12 July 2019, 124:11-20, citing *M/V "Norstar"* (*Panama v. Italy*), Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

⁷⁴⁹ Hearing Transcript, 12 July 2019, 126:5-8, referring to *M/V "Norstar"* (*Panama v. Italy*), Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 224.

⁷⁵⁰ Hearing Transcript, 12 July 2019, 126:17-23. See also Hearing Transcript, 12 July 2019, 124:21-125:8, referring to *M/V "Norstar"* (*Panama v. Italy*), Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 219.

⁷⁵¹ India's Rejoinder, para. 6.9, citing Italy's Reply, para. 7.9.

⁷⁵² India's Rejoinder, para. 6.13. See also Hearing Transcript, 12 July 2019, 139:21-140:8.

⁷⁵³ India's Rejoinder, para. 6.14.

⁷⁵⁴ Hearing Transcript, 12 July 2019, 139:8. See also Hearing Transcript, 12 July 2019, 140:9-18.

⁷⁵⁵ Hearing Transcript, 12 July 2019, 139:2-6, 140:19-141:1.

⁷⁵⁶ India's Counter-Memorial, para. 6.7. See also Hearing Transcript, 20 July 2019, 46:9-12.

India therefore maintains that it did not violate Italy's freedom of navigation.⁷⁵⁷ In particular, India claims that there was no "interdiction", and the Master of the "Enrica Lexie" "made his own decision to alter course and head for port",⁷⁵⁸ "before the arrival of any Indian vessels on the scene".⁷⁵⁹ India offers several arguments in support of its claim.

452. First, India submits that the Master's decision was voluntary and notes Italy's concession that the Captain of the "Enrica Lexie" was not compelled to alter course and was not under any threats or coercion while doing so.⁷⁶⁰ According to India, before the Master made his decision to alter course, India "simply requested the *Enrica Lexie* to proceed to port" for information, following which the Master checked the request with senior naval officials in Italy and the shipowner, none of whom raised an objection to the decision to head to port.⁷⁶¹ Subsequently, India claims, the Log Book confirms that he willingly headed to Kochi.⁷⁶² In support of this argument, India refers to the following chronology of events:

- At 19:00 IST, MRCC Mumbai first called the "Enrica Lexie" seeking information.⁷⁶³
- At 19:35 IST, the Master of the "Enrica Lexie" informed CINCNAV by telephone about MRCC Mumbai's request for the "Enrica Lexie" to proceed to Kochi, and CINCNAV expressed no objection.⁷⁶⁴
- Immediately thereafter, CINCNAV "informed the Operations Room of the Navy General Staff and the JOHQ [Joint Operations Headquarters]" of the request.⁷⁶⁵
- At 19:36 IST, MRCC Mumbai sent the written request.⁷⁶⁶
- At 19:45 IST, the "Enrica Lexie" altered its course towards Kochi upon authorisation of the ship owner.⁷⁶⁷

⁷⁵⁷ Hearing Transcript, 20 July 2019, 49:10-11.

⁷⁵⁸ India's Counter-Memorial, para. 6.7.

⁷⁵⁹ India's Counter-Memorial, para. 6.15. *See also* India's Rejoinder, paras 6.3, 6.20.

⁷⁶⁰ Hearing Transcript, 20 July 2019, 49:12-15, *referring to* Hearing Transcript, 18 July 2019, 13:24-14:5.

⁷⁶¹ India's Counter-Memorial, para. 6.7. *See also* India's Rejoinder, para. 6.3; Hearing Transcript, 20 July 2019, 50:1-7.

⁷⁶² India's Counter-Memorial, para. 6.25, *referring to* Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

⁷⁶³ India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), p. 2-10 (**Annex IT-233**).

⁷⁶⁴ India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**). *See also* India's Counter-Memorial, para. 6.25.

⁷⁶⁵ India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**).

⁷⁶⁶ India's Rejoinder, para. 6.15, *referring to* E-mail from MRCC Mumbai to the Shipmaster of the "Enrica Lexie", 15 February 2012, 19:36 IST (**Annex IN-34**).

⁷⁶⁷ India's Rejoinder, para. 6.15, *referring to* Piroli Report (Confidential Annex), pp 2-11-2-12 (**Annex IT-233**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

- After altering course to head to Kochi, Captain Vitelli “did not consider that the vessel’s freedom of navigation was being interfered with. He was free to alter course”.⁷⁶⁸
453. India submits that “[a]ll of this occurred *before* the Dornier aircraft reached the *Enrica Lexie* and made radio contact with it” at 19:20 SMT/19:50 IST⁷⁶⁹ and before the Indian Coast Guard vessel, ICGS “Lakshmbai”, encountered the “Enrica Lexie” at 21:00 SMT/21:30 IST.⁷⁷⁰ Therefore, India concludes, neither action by India could have caused the Master to alter course for the port.⁷⁷¹
454. India refutes Italy’s argument that Captain Vitelli’s view “was irrelevant”, arguing that, on the contrary, Captain Vitelli’s views are highly relevant in assessing whether any measures of constraint were actually placed on him with respect to the navigation of the vessel.⁷⁷²
455. Second, India asserts that Captain Vitelli did not act on the phone call; he did not fall for any “ruse” or “pretext”, as alleged by Italy. He requested and received a written message, after which he changed course at 19:15 SMT/19:45 IST, heading towards Kochi.⁷⁷³ During that 45-minute interval between 19:00 IST and 19:45 IST, there was no interference with the vessel’s freedom of navigation. To the contrary, Captain Vitelli and Sergeant Latorre both communicated with Italian naval authorities at CINCNAV, informing them about the “*request* for collaboration” by MRCC Mumbai.⁷⁷⁴ There was no mention of any threat by India, and there was no objection from CINCNAV or from the shipowner.⁷⁷⁵
456. India opposes Italy’s argument that a pretext or ruse issued by a State’s maritime rescue coordination centre is an interference with freedom of navigation.⁷⁷⁶ India argues that “regardless of whether there was a ruse or not in the original phone call, when the situation on the Indian side regarding the incident was anything but clear, it makes no difference”, as the phone call was

⁷⁶⁸ Hearing Transcript, 20 July 2019, 49:16-19.

⁷⁶⁹ India’s Rejoinder, para. 6.16 [emphasis in original], referring to Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**); Statement of K. Suresh, Adhikari, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-132**); Statement by Commandant Alok Negi (**Annex IT-7**). See also Counter-Memorial, para. 6.25, citing Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012 (**Annex IT-131**).

⁷⁷⁰ India’s Rejoinder, para. 6.17; India’s Counter-Memorial, para. 6.14.

⁷⁷¹ India’s Rejoinder, para. 6.14. See also Hearing Transcript, 12 July 2019, 147:14-26.

⁷⁷² Hearing Transcript, 20 July 2019, 48:7-14, referring to Hearing Transcript, 18 July 2019, 174:10-16.

⁷⁷³ Hearing Transcript, 12 July 2019, 131:1-9, referring to Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

⁷⁷⁴ Hearing Transcript, 12 July 2019, 131:17, citing Piroli Report (Confidential Annex), p. 2-11 (**Annex IT-233**) [emphasis added by India].

⁷⁷⁵ Hearing Transcript, 12 July 2019, 131:10-21.

⁷⁷⁶ Hearing Transcript, 20 July 2019, 50:11-16, referring to Hearing Transcript, 18 July 2019, 174:17-20.

overtaken by subsequent events and was never mentioned again.⁷⁷⁷ When Captain Vitelli received the written message, it contained no ruse; it was a request, not an order.⁷⁷⁸ Further, India questions the credibility of Italy's argument that Italy could only have acquiesced in the original phone call referring to the request for assistance in identifying two pirate vessels, arguing that the phone call was "quickly forgotten"; when the written message arrived, no one from the Italian side suggested that there had been a ruse, or that Captain Vitelli should consider changing his mind.⁷⁷⁹

457. India emphasises that the written message from MRCC Mumbai was simply a request to head for Kochi for further "deposition/clarification". That message, thus, "cannot possibly be construed as an interference with the *Enrica Lexie*'s freedom of navigation or exercise of jurisdiction, any more than the 19.00 phone call".⁷⁸⁰
458. Third, India asserts that since the decision to change course was made at 19:15 SMT/19:45 IST, prior to the arrival of the Dornier at 19:20 SMT/19:50 IST, "the arrival of the Dornier aircraft had nothing to do with the captain's decision to change course and cannot be said to have caused any interference in the *Enrica Lexie*'s navigation".⁷⁸¹
459. Fourth, India asserts that Italy's contention that India breached its freedom of navigation by "interdicting", "directing", and "escorting" the "*Enrica Lexie*" is also misguided. In response, India argues that the Captain had already made his decision to change course to Kochi before the arrival of any of the Indian Coast Guard vessels.⁷⁸² India adds that, subsequently, India did not interfere with the Captain's decision. According to India, "[i]nterference in a ship's freedom of navigation would, 'at the very minimum', require that the ship is ordered or forced by another state to deviate from its intended course".⁷⁸³ India argues that nothing done by the Indian authorities caused the "*Enrica Lexie*" to deviate from its intended course towards Kochi or interfered with Captain Vitelli's decision to do so, which was known by Italian authorities and the shipowner.⁷⁸⁴

⁷⁷⁷ Hearing Transcript, 20 July 2019, 50:21-25.

⁷⁷⁸ Hearing Transcript, 20 July 2019, 50:25-51:3.

⁷⁷⁹ Hearing Transcript, 20 July 2019, 51:11-52:2.

⁷⁸⁰ Hearing Transcript, 12 July 2019, 133:19-23.

⁷⁸¹ Hearing Transcript, 12 July 2019, 137:1-5.

⁷⁸² Hearing Transcript, 12 July 2019, 137:14-25, *referring to* Hearing Transcript, 9 July 2019, 51:19-20:1. *See also* Hearing Transcript, 18 July 2019, 240:11-18.

⁷⁸³ Hearing Transcript, 12 July 2019, 137:20-23.

⁷⁸⁴ Hearing Transcript, 12 July 2019, 138:2-4.

460. Fifth, India submits that “the chronology of events confirms that the escorting of the *Enrica Lexie* was not a use of force which obliged the ship to change her route to Kochi”.⁷⁸⁵ India argues that the mission of ICGS “Lakshmibai” was to clarify where the firing had occurred but not to exert any pressure on the vessel.⁷⁸⁶ According to India, “Italy itself does not claim that the *Lakshmibai* was threatening, let alone using force”.⁷⁸⁷ Further, with respect to Italy’s argument that the “*Enrica Lexie*” did not consent to the escort, India argues that the shipmaster, and Italy once informed, did not complain or protest about it.⁷⁸⁸
461. India disagrees with Italy’s contention that “escorting a vessel is sufficient to constitute an interference with freedom of navigation”.⁷⁸⁹ India submits that, while the Dornier aircraft and ICGS “Lakshmibai” indeed escorted the “*Enrica Lexie*” on its already chosen route to Kochi, they did not interfere with the vessel’s freedom of navigation since no action had been taken to cause the vessel to alter course.⁷⁹⁰ For this reason also, India alleges that Italy’s reliance on Article 111, paragraph 7, as an aid to the proper interpretation of Articles 87 and 92 and to demonstrate as impermissible any escort outside of the circumstances envisaged under Article 111, is “a non-starter”.⁷⁹¹ India asserts that Article 111 deals with the situation of hot pursuit, which is not relevant to the present case. India also notes that paragraph 7 deals with a situation where a ship has already been arrested in the jurisdiction of the arresting State, which was not the case with the “*Enrica Lexie*”.⁷⁹² According to India, Article 111, paragraph 7, does not also stand for the proposition that “all forms of escort except those listed in paragraph 7 are *ipso facto* illegal”.⁷⁹³
462. Finally, India argues that neither the Master nor the Italian Navy complained that India was in breach of the “*Enrica Lexie*”’s freedom of navigation between the time that the “*Enrica Lexie*” turned towards Kochi and when it arrived in port.⁷⁹⁴

⁷⁸⁵ India’s Counter-Memorial, para. 6.26.

⁷⁸⁶ India’s Counter-Memorial, para. 6.27, *citing* Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-134**).

⁷⁸⁷ India’s Counter-Memorial, para. 6.27, *referring to* Italy’s Memorial, para. 4.71.

⁷⁸⁸ Hearing Transcript, 12 July 2019, 148:2-22.

⁷⁸⁹ Hearing Transcript, 12 July 2019, 138:5-7, *citing* Italy’s Reply, para. 7.9; Hearing Transcript, 10 July 2019, 16:4-10.

⁷⁹⁰ India’s Rejoinder, paras 6.14, 6.18; Hearing Transcript, 12 July 2019, 26:6-10.

⁷⁹¹ Hearing Transcript, 12 July 2019, 138:14-139:1.

⁷⁹² Hearing Transcript, 12 July 2019, 138:14-140:21.

⁷⁹³ Hearing Transcript, 12 July 2019, 141:2-5.

⁷⁹⁴ India’s Rejoinder, paras 6.5, 6.19-6.20, 6.25-6.26, 6.30; Hearing Transcript, 12 July 2019, 143:5-145:23.

iii. Analysis of the Arbitral Tribunal

463. Italy claims that India, through its conduct, has breached the freedom of navigation stipulated in Article 87, paragraph 1, subparagraph (a), of the Convention, which provides:

*Article 87**Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation;

464. By virtue of Article 58, paragraph 1, of the Convention, the freedoms referred in Article 87, including the freedom of navigation, are extended to exclusive economic zones where all States, whether coastal or land-locked, enjoy such freedoms.

(a) The concept of freedom of navigation

465. The freedom of navigation, as underlined by Italy, imposes an obligation on States other than the flag State not to interfere with its exercise and “involves a positive and a negative aspect: positively, vessels of every State may freely navigate on the high seas”⁷⁹⁵ and “negatively, no State may exercise any authority against any vessel sailing under the flag of another State”.⁷⁹⁶ On that basis, Italy asserts that the legal test for a breach of Italy’s freedom of navigation is “simply whether India interfered with the freedom of navigation of the *Enrica Lexie*”, arguing that “it could do so by exercises of authority falling far short of boarding it or using or threatening to use force against it”.⁷⁹⁷

466. For its part, India believes that there is a higher threshold for a finding of interference, requiring the threat or use of force as a necessary condition.⁷⁹⁸ India asserts that “at no time did India exercise any authority over the *Enrica Lexie* while it was navigating in India’s exclusive economic zone”,⁷⁹⁹ or “board or attempt to board the *Enrica Lexie* while it was in India’s EEZ”.⁸⁰⁰

⁷⁹⁵ Italy’s Memorial, para. 10.18, referring to Oscar Chinn (*The United Kingdom v. Belgium*), Judgment of 12 December 1934, P.C.I.J. Series A/B, No. 63, p. 65 at p. 83.

⁷⁹⁶ Italy’s Memorial, para. 10.18, referring to Gilbert Gidel, *Le droit international public de la mer: Le temps de paix*, Vol. 1 (Sirey, 1932), p. 236.

⁷⁹⁷ Italy’s Reply, para. 7.13. See also Italy’s Reply para. 7.6; Hearing Transcript, 10 July 2019, 9:22-10:1.

⁷⁹⁸ India’s Counter-Memorial, paras 6.9-6.13.

⁷⁹⁹ India’s Counter-Memorial, para. 6.7. See also Hearing Transcript, 12 July 2019, 122:24-123:5.

⁸⁰⁰ India’s Counter-Memorial, para. 6.9.

467. The Arbitral Tribunal recalls the statement made by the PCIJ in *S.S. “Lotus” (France v. Turkey)* (hereinafter “*S.S. ‘Lotus’*”)

that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.⁸⁰¹

This longstanding rule of customary international law is codified in Article 92 of the Convention, which provides that “[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas”.

468. Turning now to the question of which acts can constitute a breach of freedom of navigation under Article 87, paragraph 1, of the Convention, the Arbitral Tribunal notes that the right to freedom of navigation “provides ships of any States with the right to traverse the high seas with no or minimal interference from any other State”.⁸⁰² Accordingly, as stated by ITLOS in *M/V “Norstar”*, “any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties”.⁸⁰³ Further, in *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, the arbitral tribunal made it clear that “except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal”.⁸⁰⁴ In that case, such interference was found to constitute “a violation of the sovereignty of the country whose flag the vessel flies”.⁸⁰⁵

469. The Arbitral Tribunal observes that interference may take physical or non-physical forms.

470. As observed by ITLOS in *M/V “Norstar”*, “[i]t goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of

⁸⁰¹ *S.S. “Lotus” (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25.

⁸⁰² Albert J. Hoffmann, ‘Freedom of Navigation’ (2011) Max Planck Encyclopedia of International Law, para. 22.

⁸⁰³ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

⁸⁰⁴ *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 58.

⁸⁰⁵ *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 58.

navigation”.⁸⁰⁶ Interference of a physical nature may include, as stated in the *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, “boarding, arrest, detention, [or] diversion” of a vessel.⁸⁰⁷

471. However, “even acts which do not involve physical interference or enforcement on the high seas may constitute a breach of the freedom of navigation”.⁸⁰⁸ The arbitral tribunal in *Guyana v. Suriname* thus considered that a demand by a navy vessel to “leave the area in 12 hours” or “the consequences will be yours”,⁸⁰⁹ constituted “a threat of the use of force in contravention of the Convention, the UN Charter and general international law”.⁸¹⁰ Moreover, as stated by Judge Laing in his separate opinion in *M/V “SAIGA” (No. 2)*, the enjoyment of “freedom of the seas” is dependent on freedom from fear, that is, “security and non-interference, in today’s language”.⁸¹¹
472. Accordingly, in the Arbitral Tribunal’s view, a breach of freedom of navigation may result from acts including physical or material interference with navigation of a foreign vessel, the threat or use of force against a foreign vessel, or non-physical forms of interference whose effect is that of instilling fear in, or causing hindrance to, the exercise of the freedom of navigation.
473. Additionally, as stated in *M/V “Norstar”*, the exercise of jurisdiction over a foreign ship on the high seas, unless justified by the Convention or other international treaties, is generally agreed to constitute a breach of freedom of navigation.⁸¹² The Arbitral Tribunal will consider Italy’s argument that India exercised jurisdiction over the “*Enrica Lexie*” primarily in its analysis of Italy’s claim pursuant to Article 92, paragraph 1, of the Convention.

(b) *Examination of India’s conduct vis-à-vis the “Enrica Lexie”*

474. Italy’s claims that “[b]y directing the *Enrica Lexie* to proceed to Kochi while it was navigating beyond India’s territorial sea, by interdicting it, and by escorting it to Kochi, India breached

⁸⁰⁶ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

⁸⁰⁷ PCA Case No. 2012-04: *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, Final Award of 29 June 2017, para. 1129.

⁸⁰⁸ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 223.

⁸⁰⁹ PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1 at p. 126, para. 433.

⁸¹⁰ PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1 at p. 126, para. 445.

⁸¹¹ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, Separate Opinion of Judge Laing, ITLOS Reports 1999, p. 10 at p. 173, para. 29.

⁸¹² *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

Italy's freedom of navigation under Article 87(1)(a) of UNCLOS".⁸¹³ The Arbitral Tribunal will also consider Italy's allegation that India perpetrated a "ruse" in order to bring the "Enrica Lexie" into India's territorial waters,⁸¹⁴ and that by doing so, India interfered with Italy's freedom of navigation.⁸¹⁵ These four aspects referred to by Italy will be examined *seriatim*.

(i) *Alleged direction*

475. Italy claims that India "directed" the "Enrica Lexie" to alter course and proceed to Kochi, both through a communication from MRCC Mumbai and subsequently through the Dornier aircraft and the ICGS "Lakshmbai", and that this direction breached Italy's freedom of navigation.⁸¹⁶
476. The Arbitral Tribunal observes that, in the Log Book, concerning the 18:30 SMT/19:00 IST telephone call, Captain Vitelli records (with reference to MRCC Mumbai): "they asked me to change course and head toward Cochin (India) to take stock of events and bear witness. I asked for, and received, a written message. At 1915 hrs we changed course, heading toward Cochin".⁸¹⁷ Mr. Gupta stated, referring to the same call, that MRCC Mumbai "instructed the vessel to approach to Cochin Port as they wanted the Master to give his statement and witness".⁸¹⁸ The subsequent e-mail from the MRCC read: "You are requested to head for Kochi and establish communication with Indian Coast Guard [...] for further deposition/clarification".⁸¹⁹
477. At 19:00 SMT/19:30 IST, Sergeant Latorre called CINCNAV regarding the "request for collaboration" that MRCC Mumbai had submitted via telephone to the Master of the "Enrica Lexie".⁸²⁰ At 19:05 SMT/19:35 IST, Captain Vitelli also communicated by telephone with CINCNAV.⁸²¹ Captain Vitelli forwarded the e-mail from MRCC Mumbai to MSCHOA and UKMTO with a copy to Fratelli D'Amato SpA (the owner of the "Enrica Lexie"). In the covering e-mail, Captain Vitelli noted: "Please be advised that with reference to the below message from

⁸¹³ Italy's Reply, para. 7.1 [emphases added]. *See also* Hearing Transcript, 10 July 2019, 2:9-18.

⁸¹⁴ Hearing Transcript, 18 July 2019, 2:17-20 [emphasis added].

⁸¹⁵ Hearing Transcript, 18 July 2019, 174:17-24.

⁸¹⁶ Hearing Transcript, 18 July 2019, 164:10-14. *See also* Italy's Memorial, para. 10.15.

⁸¹⁷ Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

⁸¹⁸ Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**).

⁸¹⁹ E-mail from MRCC Mumbai to Master of the "Enrica Lexie", 15 February 2012 (**Annex IT-8**); E-mail from MRCC Mumbai to the Shipmaster of the "Enrica Lexie", 15 February 2012, 19:36 IST (**Annex IN-34**).

⁸²⁰ Piroli Report (Confidential Annex) p. 2-11 (**IT-233**).

⁸²¹ Piroli Report (Confidential Annex) p. 2-11 (**IT-233**).

MRCC Mumbai, we have altered course and are now proceeding towards Cochin. We will revert when we resume the voyage”.⁸²²

478. Following the telephone call, Captain Vitelli continued on his course, waiting for the written message from MRCC Mumbai. When the vessel was “at 90° angle towards the port of Kochi”, at 19:15 SMT/19:45 IST, he changed course towards Kochi. At 19:20 SMT/19:50 IST, the Indian Coast Guard Dornier aircraft located and arrived above the “Enrica Lexie” at 09° 51.6’ N 075° 37.5’ E, “beyond India’s territorial sea”.⁸²³ The Dornier aircraft “encircled” and “contacted” the “Enrica Lexie” over VHF in channels 16 and 10.⁸²⁴ According to the pilot of the Dornier aircraft, DIG Negi, “[w]e encircled the vessel and contacted it” and “directed them to amend the course and proceed to Kochi harbour”.⁸²⁵ Subsequently, at 19:45 SMT/20:15 IST, the “Enrica Lexie” responded to the ICGS “Lakshmbai”’s VHF call and confirmed that, at about 16:00 SMT/16:30 IST, the vessel had resorted to firing while in transit. The ICGS “Lakshmbai” “also directed the vessel to proceed towards Kochi”.⁸²⁶
479. As it became clear during the Hearing, Captain Vitelli was not under any compulsion to head to Kochi, nor does Italy (now) allege that he was. According to Captain Vitelli’s testimony, the MRCC is “the highest authority in that sea area”. He adds, “[h]ow could I ignore such a call? I had to consider that, I had to attach the necessary importance to that”.⁸²⁷ He, however, did not consider his freedom “to change the course again and resume the original course towards Egypt” to be hindered.⁸²⁸ He testified, “[f]rankly, I didn’t give this a thought. The plans had already changed. My task was to provide support to the authorities and to resume our journey as soon as

⁸²² E-mail from the Shipmaster of the “Enrica Lexie” to MSCHOA and UKMTO dated 15 February 2012 at 19:47 IST (**Annex IN-36**). See also E-mail from the Master of the “Enrica Lexie” to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**IT-120**).

⁸²³ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012 (**Annex IT-7**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 4 (**Annex IT-9**); Statement of Witness in connection with the NIA investigation, Statement of Shri N.V. Rama Rao, Commandant, Coast Guard, Officer In-Charge, MRCC Mumbai, 16 July 2013, p. 129 (**Annex IT-277**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

⁸²⁴ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

⁸²⁵ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**).

⁸²⁶ Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**).

⁸²⁷ Hearing Transcript, 15 July 2019, 48:2-4.

⁸²⁸ Hearing Transcript, 15 July 2019, 94:5-6.

possible [...] I didn't have the impression that force was being used. I was free to alter the course".⁸²⁹

480. Captain Vitelli testified that "[i]n the end, everybody was in agreement: the best thing to do was to head to Kochi".⁸³⁰ The Arbitral Tribunal has found the testimony of Captain Vitelli in respect of the motivation for the change of course to Kochi credible and has no reason to doubt its veracity.
481. In these circumstances, the MRCC's request for the "Enrica Lexie" to proceed to Kochi cannot be regarded as constituting interference with navigation of the "Enrica Lexie", which could amount to a breach of Italy's freedom of navigation.
482. The same applies to the communication from the Dornier and the ICGS "Lakshmibai", which the Arbitral Tribunal notes took place subsequent to the "Enrica Lexie"'s change of course towards to Kochi. Having considered that the communications from the MRCC Mumbai did not amount to a breach of Italy's freedom of navigation, the Arbitral Tribunal likewise finds that the communication from the Dornier and the ICGS "Lakshmibai" did not, any more than the MRCC's telephone and e-mail communications, violate Italy's freedom of navigation.

(ii) *Alleged "ruse"*

483. In connection with MRCC Mumbai's communications, Italy also alleges that India perpetrated a "ruse", a "misdirection", and "trickery" in order to bring the "Enrica Lexie" into India's territorial waters,⁸³¹ and that this constitutes interference with freedom of navigation.⁸³² According to Italy, had the ruse not achieved its purpose, the Indian Coast Guard was prepared to compel the "Enrica Lexie" into India's territorial sea as evidenced by the boarding preparations and presence of a police contingent in the ICGS "Lakshmibai".⁸³³ India refutes these allegations.⁸³⁴
484. In this regard, the Parties have accorded considerable importance to the precise time of receipt of the e-mail from MRCC Mumbai. India submits that the e-mail was received at 19:06 SMT/19:36

⁸²⁹ Hearing Transcript, 15 July 2019, 94:7-16.

⁸³⁰ Hearing Transcript, 15 July 2019, 80:23-24.

⁸³¹ Hearing Transcript, 18 July 2019, 2:17-20.

⁸³² Hearing Transcript, 18 July 2019, 174:17-24.

⁸³³ Hearing Transcript, 18 July 2019, 46:8-14.

⁸³⁴ Hearing Transcript, 20 July 2019, 26:6-22; Hearing Transcript, 12 July 2019, 10:14-22. *See also* Hearing Transcript, 20 July 2019, 38:23-41:24, *referring to* Hearing Transcript, 18 July 2019, 14:6-11; Hearing Transcript, 16 July 2019, 98:25-102:3.

IST,⁸³⁵ before the “Enrica Lexie” changed its course at 19:15 SMT/19:45 IST, while Italy submits that the e-mail was received at 20:06 SMT/20:36 IST,⁸³⁶ after the “Enrica Lexie” had changed its course. Italy accordingly argues that, if Captain Vitelli turned before 19:30 SMT/20:00 IST, it was not the e-mail that prompted the turn, but the earlier telephone call, during which mention was made of a need to identify two suspected pirate skiffs.⁸³⁷ India, on its part, argues that Captain Vitelli did not act on the telephone call but rather on the e-mail.⁸³⁸ India further argues that regardless of whether the information provided in the earlier telephone call was accurate, the call was overtaken by subsequent events and was never mentioned again. India adds that the written message that Captain Vitelli received contained no ruse; it was a request, not an order.⁸³⁹

485. Italy, as “the litigant seeking to establish a fact”,⁸⁴⁰ carries the burden of proof with regard to its allegation that the Indian authorities perpetrated a ruse in order to bring the “Enrica Lexie” into India’s territorial waters. The Arbitral Tribunal recalls that there is no transcript of the telephone call. The record of the discussion undertaken during the telephone call in the Log Book indicates that MRCC Mumbai “told us that they had been informed about the suspect pirate attack and, as a result, had seized two crafts”.⁸⁴¹ Captain Noviello, in his statement before the Deputy Public Prosecutor, stated that “the MRCC of Bombay called and I was first to talk with them. I was told that they had caught two boats suspected to be pirate boats and invited us to return to Cochin to make an identification and provide evidence”.⁸⁴² This is consistent with the statement of Mr. Gupta, who spoke with the MRCC and who reported that the MRCC had advised that “they came to know that our vessel had a suspected pirate attack and in lieu of this they have caught 2 boats with suspected pirates”.⁸⁴³ It is thus established, in the view of the Arbitral Tribunal, that reference to the capture of two suspected pirate boats was made during the telephone call. The e-

⁸³⁵ E-mail from MRCC Mumbai to the Shipmaster of the “Enrica Lexie”, 15 February 2012, 19:36 IST (**Annex IN-34**).

⁸³⁶ E-mail from MRCC Mumbai to Master of the “Enrica Lexie”, 15 February 2012 (**Annex IT-8**).

⁸³⁷ Hearing Transcript, 9 July 2019, 7:6-12.

⁸³⁸ Hearing Transcript, 12 July 2019, 131:1-9, citing Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

⁸³⁹ Hearing Transcript, 20 July 2019, 50:20-51:3.

⁸⁴⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392 at p. 437, para. 101. See also Chester Brown, *A Common Law of International Adjudication*, (Oxford University Press, 2007), p. 93, referring to Durward Sandifer, *Evidence before International Tribunals*, (2nd ed., University Press of Virginia 1975) pp 127, 468.

⁸⁴¹ Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

⁸⁴² (Confidential Annex), p. 2 (**Annex IT-261**). See also Hearing Transcript, 15 July 2019, 114:17-20.

⁸⁴³ Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**).

mail message following the telephone call, on the other hand, made no reference to the capture of such boats.

486. The Arbitral Tribunal has reviewed the different documentary exhibits containing the e-mail from MRCC Mumbai filed in this Arbitration by the Parties. Italy relies on the time stamp on its exhibit to argue that the e-mail was received by the “Enrica Lexie” at 20:06 SMT/20:36 IST,⁸⁴⁴ while India relies on the time stamps on its exhibits, and on the Piroli Report, which in turn had been based on the same exhibits, to argue that the e-mail was received by the “Enrica Lexie” at 19:06 SMT/19:36 IST.⁸⁴⁵ In the view of the Arbitral Tribunal, neither piece of evidence is preferable. E-mails may receive time stamps depending on the time zone in which the computer used for sending, receiving, or printing a message is located. The Arbitral Tribunal considers that, in these circumstances, it is not in a position to come to a definitive conclusion on the question of the precise timing of the e-mail on the basis of the documentary evidence.

487. In his oral testimony, Captain Vitelli stated:

I am adamant about this [...] The MRCC’s email was received after I changed the course to head towards Kochi. As long as I kept the course, and when I changed the course, I had not received this message. That is why I’m sure about that.⁸⁴⁶

There is, thus, support for Italy’s position that the e-mail was received only after the course had been altered for Kochi. If the Arbitral Tribunal had to make a determination in this regard, it would find on a balance of probabilities that the e-mail was received at 20:06 SMT/20:36 IST.

488. In the view of the Arbitral Tribunal, however, the question of the precise timing of the e-mail can remain open since, even if Italy is right that the e-mail played no role in prompting the change of course, Italy has not established that India perpetrated a ruse. The Arbitral Tribunal recalls that Captain Vitelli and the Italian authorities were aware that a shooting incident had occurred, and that it involved the Marines stationed on the “Enrica Lexie” as VPDs. Captain Vitelli and those on board the “Enrica Lexie”, conscious that they had received only limited information and that the Indian authorities themselves, at the time of the call, only had limited information, chose not to seek or wait for further clarification but proceeded voluntarily to Kochi. Captain Vitelli testified

⁸⁴⁴ E-mail from MRCC Mumbai to Master of the “Enrica Lexie”, 15 February 2012 (**Annex IT-8**); Hearing Transcript, 15 July 2019, 85:13-26.

⁸⁴⁵ Hearing Transcript, 20 July 2019, 30:1-17, *referring to* Hearing Transcript, 18 July 2019, 165:15-23; Piroli Report (Confidential Annex), p. 2-12 (**Annex IT-233**). *See also* E-mail from MRCC Mumbai to the Shipmaster of the “Enrica Lexie”, 15 February 2012, 19:36 IST (**Annex IN-34**); E-mail from the Shipmaster of the “Enrica Lexie” to the Shipowner of the “Enrica Lexie” dated 15 February 2012 at 19:46 IST (**Annex IN-35**); E-mail from the Shipmaster of the “Enrica Lexie” to MSCHOA and UKMTO dated 15 February 2012 at 19:47 IST (**Annex IN-36**).

⁸⁴⁶ Hearing Transcript, 15 July 2019, 85:20-86:4.

that he felt free to alter course so as to return to his original course⁸⁴⁷ even after he had received the e-mail, but he “wasn’t even considering this”.⁸⁴⁸ There is no evidence in the conduct of Captain Vitelli following the receipt of the telephone call, and no indication in his oral testimony before the Arbitral Tribunal, that he gave specific thought to the form and scope of the investigation that India intended to conduct. Rather, Captain Vitelli appears to have been focused on what he saw as a seaman’s duty to cooperate with the Indian authorities.

489. Finally, the Arbitral Tribunal observes that, while it seems likely that MRCC Mumbai received further information regarding the role of the “Enrica Lexie” and the Marines in the incident after the telephone call, it did not pass such information on to the “Enrica Lexie”, by e-mail or otherwise. However, the fact that the “Enrica Lexie” was somewhat left in the dark as to the evolution of the Indian investigations cannot be equated with ruse or trickery. The Arbitral Tribunal, thus, concludes that Italy has not discharged its burden of proof in this respect. Having so concluded, the Arbitral Tribunal finds that India did not interfere with Italy’s freedom of navigation by perpetrating a ruse.

(iii) *Alleged interdiction*

490. Italy further alleges that India interdicted the “Enrica Lexie” in its exclusive economic zone and thus violated Italy’s freedom of navigation.
491. In the context of the law of the sea, “interdiction” is generally understood as a State’s action of stopping, searching, and arresting foreign flag vessels and crew on the high seas. Interdiction has been taken to denote a “two-step process: first, the boarding, inspection and search of a ship at sea suspected of prohibited conduct; second, where such suspicions prove justified, taking measures including any combination of arresting the vessel, arresting persons aboard or seizing cargo”.⁸⁴⁹ While a flag State has jurisdiction to interdict vessels flying its flag on the high seas, all other States “may only conduct an interdiction under a permissive rule of international law or with permission from the flag state or the coastal state in whose regulatory zone the vessel is present”.⁸⁵⁰

⁸⁴⁷ Hearing Transcript, 15 July 2019, 94:7-16.

⁸⁴⁸ Hearing Transcript, 15 July 2019, 94:12.

⁸⁴⁹ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press, 2009), p. 4.

⁸⁵⁰ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press, 2009), p. 5.

492. In the present case, the evidence on the record indicates that the Indian Coast Guard dispatched its vessels “for identification/interdiction of suspect vessel”,⁸⁵¹ “for interception” of the “Enrica Lexie”,⁸⁵² “to augment force level”,⁸⁵³ and to “render assistance for apprehension of suspect vessel”.⁸⁵⁴ At approximately 21:00 SMT/21:30 IST, ICGS “Lakshmbai” “intercepted the vessel at the same location and escorted it till our outer anchorage of Kochi”.⁸⁵⁵ By this time, the “Enrica Lexie” was already sailing east towards Kochi.⁸⁵⁶
493. In his oral testimony, Captain Noviello stated that when they “saw a helicopter hovering over” the “Enrica Lexie”,⁸⁵⁷ there was some fear that it could act “forcefully on the vessel”,⁸⁵⁸ but he was not sure whether that occurred when the “Enrica Lexie” was outside or inside the Indian territorial sea.⁸⁵⁹ However, when asked whether Indian authorities had issued any threats, his answer was negative.⁸⁶⁰
494. No boarding or arrest of the “Enrica Lexie” took place when the vessel was in India’s exclusive economic zone. The Arbitral Tribunal is not prepared to speculate as to whether the Indian Coast Guard might have used force to compel the “Enrica Lexie” to head to Kochi, or boarded the vessel, had this become necessary. According to the evidence before the Arbitral Tribunal, no such instructions had been given,⁸⁶¹ boarding drills were routine on all missions,⁸⁶² and the reason for the presence of police officers in the ICGS “Lakshmbai” was that firing had been reported, thus making the incident a police case.⁸⁶³

⁸⁵¹ Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

⁸⁵² National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**); Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**).

⁸⁵³ “Coast Guard, fishermen made a smart move”, The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**).

⁸⁵⁴ Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 2 (**Annex IT-9**).

⁸⁵⁵ Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**).

⁸⁵⁶ Hearing Transcript, 16 July 2019, 77:18-25.

⁸⁵⁷ Hearing Transcript, 15 July 2019, 118:20.

⁸⁵⁸ Hearing Transcript, 15 July 2019, 133:9-10.

⁸⁵⁹ Hearing Transcript, 15 July 2019, 119:9-21.

⁸⁶⁰ Hearing Transcript, 15 July 2019, 133:12-15.

⁸⁶¹ Hearing Transcript, 16 July 2019, 177:21-178:13.

⁸⁶² Hearing Transcript, 16 July 2019, 139:5-21.

⁸⁶³ Hearing Transcript, 16 July 2019, 96:16-26.

495. The Arbitral Tribunal thus finds that there was no interdiction of the “Enrica Lexie” in India’s exclusive economic zone, which could be said to have violated Italy’s freedom of navigation.

(iv) *Alleged escort*

496. The Arbitral Tribunal finally turns to Italy’s contention that, by escorting the “Enrica Lexie” to Kochi, India breached Italy’s freedom of navigation.⁸⁶⁴

497. The Arbitral Tribunal observes that whether the “escort” of the “Enrica Lexie” (a term employed both by the Indian Coast Guard at the time of the incident and by the Parties during the Arbitration) was inconsistent with the freedom of navigation enjoyed by Italy depends on a variety of circumstances, including the form of the escort, its purpose, and the perception of those on board the vessel which is being escorted.

498. With respect to the form of escort, the Arbitral Tribunal notes that, after locating the “Enrica Lexie”, the Dornier “contacted [it] continuously over VHF” and “shadowed it to Kochi anchorage till 22.30 hrs”.⁸⁶⁵ DIG Negi testified that “we maintained from 3,000 to 5,000 feet”.⁸⁶⁶ According to him, “[i]t does not mean that we are very close, encircling the vessel, but we were maintaining around the vessel”.⁸⁶⁷ At approximately 21:00 SMT/21:30 IST, ICGS “Lakshmbai” located the “Enrica Lexie” and “escorted it till our outer anchorage of Kochi”.⁸⁶⁸ Commandant Kumar testified that “we maintained patrolling [...] around that ship only [...] within 5 nautical miles”.⁸⁶⁹ According to him, from “3 to 5 nautical miles, we can easily see the vessel, we can easily see what course they are doing, we can easily see the aspect of the vessels”,⁸⁷⁰ while simultaneously maintaining a distance that minimizes chances of a collision with the vessel being escorted.⁸⁷¹ There is no indication that the Dornier and the ICGS “Lakshmbai” sought to influence the movement of the “Enrica Lexie”, whether through their own navigation or the displaying of visual or acoustic signals. In the view of the Arbitral Tribunal, the evidence demonstrates, instead, that

⁸⁶⁴ Italy’s Reply, para. 7.52; Hearing Transcript, 10 July 2019, 16:4-10.

⁸⁶⁵ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 2 (**Annex IT-7**).

⁸⁶⁶ Hearing Transcript, 16 July 2019, 20:2.

⁸⁶⁷ Hearing Transcript, 16 July 2019, 20:12-14.

⁸⁶⁸ Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, pp 1-2 (**Annex IT-134**).

⁸⁶⁹ Hearing Transcript, 16 July 2019, 80:14-15. *See also* Hearing Transcript, 16 July 2019, 120:22-25.

⁸⁷⁰ Hearing Transcript, 16 July 2019, 122:26-123:2.

⁸⁷¹ Hearing Transcript, 16 July 2019, 123:6-13.

the Dornier and the ICGS “Lakshmbai” were travelling alongside the “Enrica Lexie” at safe distances.

499. Responding to a question at the Hearing regarding his perception of the escort, Captain Vitelli noted that he knew that he was being monitored, both from his experience as a seaman and from the fact that he could see false echoes on the radar. But he did not “have the impression that force was being used”.⁸⁷² He testified, “I was free to alter the course”.⁸⁷³
500. The Arbitral Tribunal also considers that the purpose of the escort may be taken into account as a relevant element. The Arbitral Tribunal notes Italy’s argument that, “[i]n the absence of the consent of the flag state, [escort] constitutes an interference with freedom of navigation and an unlawful exercise of jurisdiction”.⁸⁷⁴ According to Italy, “outside the very particular circumstances envisaged and authorised by paragraph 7 of Article 111, escort beyond the territorial sea would be an unlawful interference with freedom of navigation and an unlawful exercise of jurisdiction”.⁸⁷⁵ In the Arbitral Tribunal’s view, that statement must be qualified, as there may be instances where the escort of a foreign vessel by a vessel of the coastal State without the express consent of the flag State is not contrary to the Convention, such as to ensure safety of passage through unknown sea lanes or to prevent environmental harm.
501. More specifically, Italy alleges that the escort of the “Enrica Lexie” occurred in implementation of instructions to “apprehend” the “Enrica Lexie”.⁸⁷⁶ However, according to the testimony of Commandant Kumar, the reason for escorting the “Enrica Lexie” was “just to facilitate them, just to help them to come to the Kochi”.⁸⁷⁷ When questioned whether there was any other reason for the escort, Commandant Kumar stated that “[s]ince this accident had happened, so this was an order from district headquarters, that’s why we escorted them”.⁸⁷⁸ DIG Negi testified that the purpose of staying in the vicinity of the “Enrica Lexie” was in order to communicate with it and obtain data about its movement.⁸⁷⁹

⁸⁷² Hearing Transcript, 15 July 2019, 94:14-15.

⁸⁷³ Hearing Transcript, 15 July 2019, 94:15-16.

⁸⁷⁴ Hearing Transcript, 10 July 2019, 16:7-10.

⁸⁷⁵ Hearing Transcript, 10 July 2019, 17:13-17.

⁸⁷⁶ Hearing Transcript, 18 July 2019, 169:2-24 *referring to* Hearing Transcript, 16 July 2019, 125:14-18; Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 175 (**Annex IT-131**); Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 4 (**Annex IT-9**).

⁸⁷⁷ Hearing Transcript, 16 July 2019, 123:20-21.

⁸⁷⁸ Hearing Transcript, 16 July 2019, 123:24-26. *See also* Hearing Transcript, 16 July 2019, 176:9-12.

⁸⁷⁹ Hearing Transcript, 16 July 2019, 19:25-20:5.

502. Commandant Kumar’s and DIG Negi’s testimonies are consistent with the evidence of Captain Vitelli, reviewed above, that the “Enrica Lexie” was already turning to Kochi when the Dornier encountered it, and was voluntarily proceeding to Kochi when the “Lakshmibai” began to travel alongside it. As noted above, the question whether force or threat of force would have been used during the escort, had the “Enrica Lexie” failed to proceed to Kochi, cannot be answered conclusively.
503. The Arbitral Tribunal observes that the ICGS “Lakshmibai” had a police contingent on board.⁸⁸⁰ Commandant Kumar testified, however, that “[a]ll the weapons” in the ICGS “Lakshmibai” “were locked in [the] armoury”.⁸⁸¹ There is also no indication that the crew of the ICGS “Lakshmibai” made any preparations to threaten or use armed force against the “Enrica Lexie”, aside from the boarding drills that were undertaken while setting sail, which, as noted previously, were routine on all missions.⁸⁸² Without sufficient evidence to support Italy’s allegation that the purpose of the escort was the apprehension of the “Enrica Lexie”, there is no basis for the Arbitral Tribunal to so conclude. The Arbitral Tribunal thus finds that the escort of the “Enrica Lexie” by the Dornier aircraft and Indian naval vessels did not amount to a breach of Italy’s freedom of navigation.
504. Finally, the Arbitral Tribunal notes Italy’s argument that the evidence on the record permits the conclusion that, since the “Enrica Lexie” initially had no intention of proceeding to the Indian coast, there was a “causal effect” of India’s intervention on the “Enrica Lexie”’s turn for Kochi.⁸⁸³ While such a causal effect is undeniable, in the sense that, had the MRCC not requested the “Enrica Lexie” to proceed to Kochi, the “Enrica Lexie” would not have changed course, such effect is too remote to amount to “interference” with Italy’s freedom of navigation.
505. For the reasons set out above, the Arbitral Tribunal concludes that India has not interfered with Italy’s freedom of navigation, and thus it has not acted in breach of Article 87, paragraph 1, subparagraph (a), of the Convention.

⁸⁸⁰ Hearing Transcript, 16 July 2019, 96:3-26.

⁸⁸¹ Hearing Transcript, 16 July 2019, 88:3-4. *See also* Hearing Transcript, 16 July 2019, 88:24-25.

⁸⁸² Hearing Transcript, 16 July 2019, 139:5-21.

⁸⁸³ Italy’s Reply, paras 4.11, 4.53, 4.67; Hearing Transcript, 9 July 2019, 10:13-15, *referring to* Statement filed on behalf of the Coast Guard, Kochi, 28 February 2012, para. 7 (**Annex IT-152**); Hearing Transcript, 9 July 2019, 11:16-23, *referring to* National Maritime Search and Rescue Board, Report, 4 June 2012, p. 11 (**Annex IT-6**).

(c) Interpretation and Application of Article 92 (Flag-State Jurisdiction)

i. Position of Italy

506. Italy contends that “Article 92 of UNCLOS embodies the fundamental rule of the international law of the sea” – flag-State jurisdiction⁸⁸⁴ – and that the purpose of Article 92 is “not to limit or restrict the freedom of the high seas but to safeguard its exercise”.⁸⁸⁵
507. According to Italy, it follows from Article 92 that, in light of the absence of territorial sovereignty upon the high seas, no State can exercise any kind of jurisdiction over foreign vessels on the high seas.⁸⁸⁶ Italy understands that India has accepted this scope of Article 92.⁸⁸⁷ According to Italy, “the consequences of exclusive flag-State jurisdiction are broad”, as set out in Article 27, paragraph 5.⁸⁸⁸ Italy further argues that Article 92, paragraph 1, makes explicit that the only exceptions to the rule of exclusive flag-State jurisdiction are “exceptional cases expressly provided for in international treaties or in this Convention”, not in customary international law.⁸⁸⁹
508. Italy contends that the test for finding a violation of flag-State jurisdiction under Article 92 is not an actual or threatened use of force.⁸⁹⁰ Instead, according to Italy, the test is “whether the authority of the Indian State was asserted when the *Enrica Lexie* was beyond its territorial sea”.⁸⁹¹
509. Finally, Italy argues that, contrary to India’s assertion, Article 92 concerns not only the vessel but also its crew.⁸⁹² According to Italy, Article 27, paragraph 5, confirms this interpretation, “the effect of which is that, even once India had caused the *Enrica Lexie* to enter its territorial waters, it still could not take any steps on board the *Enrica Lexie*”.⁸⁹³

⁸⁸⁴ Italy’s Memorial, para. 10.30.

⁸⁸⁵ Italy’s Memorial, para. 10.32, citing International Law Commission, ‘Report of the International Law Commission Covering the Work of its Seventh Session’ (2 May – 8 July 1955) U.N. Doc. A/CN.4/94, p. 19, at p. 22 (commentary to draft Article 2).

⁸⁸⁶ Italy’s Memorial, paras 10.32-10.33, referring to S.S. “*Lotus*” (*France v. Turkey*), Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 25; Rüdiger Wolfrum, ‘Freedom of Navigation: New Challenges’, in Myron H Nordquist, Thong Bee Koh, John Norton Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff, 2009) 79, p. 92.

⁸⁸⁷ Italy’s Reply, para. 7.16, citing India’s Counter-Memorial, para. 6.21.

⁸⁸⁸ Italy’s Memorial, para. 10.34.

⁸⁸⁹ Italy’s Memorial, para. 10.36. See also Hearing Transcript, 10 July 2019, 7:18-8:5.

⁸⁹⁰ Italy’s Reply, para. 7.18, referring to India’s Counter-Memorial, para. 6.26.

⁸⁹¹ Italy’s Reply, para. 7.18.

⁸⁹² Italy’s Reply, para. 7.19, referring to India’s Counter-Memorial, para. 6.29. See also *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 48, para. 106.

⁸⁹³ Italy’s Reply, para. 7.20.

510. Applying this interpretation to the facts, Italy similarly submits that for the same reasons described with respect to India’s alleged breach of Article 87, paragraph 1, subparagraph (a), of the Convention,⁸⁹⁴ India breached Article 92 of the Convention by directing, interdicting, and escorting the “Enrica Lexie” while it was in India’s exclusive economic zone.⁸⁹⁵

ii. Position of India

511. India acknowledges that Article 92 must be interpreted to mean that “in the high seas, no measures of constraint can be exercised against ships navigating under another State’s flag”.⁸⁹⁶ India submits, however, that Article 92 “does not exclude any kind of contact between the coastal authorities of the neighbouring States and the ships – if only for security matters”.⁸⁹⁷ According to India, this is common ground between the Parties.⁸⁹⁸ India submits that Article 33 of the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships includes the “[a]ction by coastal/port States” in such cases.⁸⁹⁹

512. Furthermore, India submits that “it is clear from the text of Article 92 that it concerns only the vessel and not its crew”, and India “did not exercise any jurisdiction over the vessel in the EEZ”.⁹⁰⁰

513. Finally, India responds to Italy’s argument that India’s interpretation of Article 92 “would go far enough to justify the extension of India’s criminal jurisdiction to events occurring beyond India’s territorial sea”.⁹⁰¹ First, India argues that it did not exercise jurisdiction over the “Enrica Lexie” outside its territorial sea and internal waters. Second, India argues that the application of the Indian Penal Code has nothing to do with Article 92 of the Convention, given that such application does not involve any exercise of jurisdiction over the “Enrica Lexie” but rather over the “St. Antony”.⁹⁰²

⁸⁹⁴ See paras 440-448 above.

⁸⁹⁵ Italy’s Reply, para. 7.53.

⁸⁹⁶ India’s Counter-Memorial, para. 6.21.

⁸⁹⁷ India’s Counter-Memorial, para. 6.21.

⁸⁹⁸ India’s Rejoinder, para. 6.21, *citing* Italy’s Reply, para. 7.17.

⁸⁹⁹ India’s Counter-Memorial, para. 6.21, *referring to* IMO Resolution A.1025(26), “Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ship”, 2 December 2009, Article 3(3).

⁹⁰⁰ India’s Counter-Memorial, para. 6.29.

⁹⁰¹ India’s Rejoinder, para. 6.27, *citing* Italy’s Reply, para. 7.21.

⁹⁰² India’s Rejoinder, paras 6.28-6.29.

514. Applying this interpretation to the facts, India disagrees with Italy's claim that its alleged "direction, interdiction and escort" of the "Enrica Lexie" amounted to a breach of Article 92.⁹⁰³ According to India, Italy "substitutes assertion for actual proof that fits the contemporary evidence and is relevant for the real issue of causality".⁹⁰⁴ India submits that, "other than the original phone call and written message from the MRCC Mumbai, which did no more than request the *Enrica Lexie* to come to port to assist in shedding light on what had happened, none of the communications made by Indian Coast Guard officials to the tanker occurred before the Shipmaster took his decision to alter course for Kochi". Therefore, India concludes, "none of these later communications *caused* the *Enrica Lexie* to proceed to port".⁹⁰⁵ Rather, India submits that "[t]he *cause* of that action was Captain Vitelli's decision to change his route with the consent of Italian naval officials and his shipowner",⁹⁰⁶ and that any later messages had no influence on the vessel's navigation towards Kochi.⁹⁰⁷
515. In addition, India submits that it did not exercise any jurisdiction over the vessel in its exclusive economic zone either through "physical interference" or "indirect means" and that it therefore could not have violated Article 92.⁹⁰⁸ Refuting Italy's argument that India exercised its jurisdiction over the "Enrica Lexie" through the mobilisation of Indian assets for "search", "contact", and "escort", India argues that merely doing so "without applying any measures of constraint or any threats on the vessel, is not and cannot be an exercise of jurisdiction".⁹⁰⁹ Moreover, India was entitled to investigate what happened with respect to the "St. Antony" and its crew in India's EEZ, and mobilizing Indian Coast Guard assets for this purpose did not, contrary to Italy's argument, amount to an exercise of jurisdiction over the "Enrica Lexie".⁹¹⁰ India recalls that contrary to Italy's argument, no criminal investigation was underway at the time.⁹¹¹
516. India asserts that the "Enrica Lexie" incident bears no resemblance to the situations in *Guyana v. Suriname* or the *South China Sea Arbitration* since, according to India, it never threatened the Master nor harassed or coerced the vessel.⁹¹² India further submits that neither ICGS

⁹⁰³ India's Rejoinder, para. 6.21, referring to Italy's Reply, paras 7.17, 7.34.

⁹⁰⁴ India's Rejoinder, para. 6.22.

⁹⁰⁵ India's Rejoinder, para. 6.22 [emphasis added by India].

⁹⁰⁶ India's Rejoinder, para. 6.22 [emphasis added by India].

⁹⁰⁷ India's Rejoinder, para. 6.23.

⁹⁰⁸ Hearing Transcript, 20 July 2019, 46:19-47:6. See also India's Counter-Memorial, para. 6.29.

⁹⁰⁹ Hearing Transcript, 20 July 2019, 48:2-4.

⁹¹⁰ Hearing Transcript, 20 July 2019, 47:15-48:4. See also Hearing Transcript, 12 July 2019, 132:22-133:4.

⁹¹¹ Hearing Transcript, 12 July 2019, 133:5-7.

⁹¹² India's Counter-Memorial, para. 6.13.

“Lakshmibai” nor the Dornier purported to exercise any authority over the vessel,⁹¹³ and that there is no evidence to back Italy’s assertion that if the “Enrica Lexie” did not comply, it would have been apprehended anyway.⁹¹⁴

517. According to India, Indian authorities did not board the “Enrica Lexie” until it was anchored in India’s territorial sea and they were invited on board.⁹¹⁵ India submits that the *S.S. “Lotus”* case is irrelevant because “[a]t no point did India board or attempt to board the *Enrica Lexie* while it was in India’s EEZ”.⁹¹⁶ India further submits that, once the ship had anchored, “the investigation on board was led with the authorization and even at the request of the master of the ship”.⁹¹⁷

518. After distinguishing the present case from *M/V “Norstar”*, India adds that, unlike in *M/V “Norstar”*,

there was no allegation at all that the vessel itself had engaged in any wrongful conduct. It was the actions of the marines that were under scrutiny, marines who were organs of the Italian State, and marines who had no responsibility or role to play with respect to the *Enrica Lexie*’s navigation; that was solely within the domain of the shipmaster.⁹¹⁸

519. Further, recalling its interpretation that Article 92 concerns only the vessel but not its crew, India argues that it did not exercise any jurisdiction over the vessel in the exclusive economic zone.⁹¹⁹ India argues that, *a fortiori*, Italy’s point about the lack of exceptional circumstances to justify an exercise of authority is irrelevant.⁹²⁰

520. Finally, India argues that neither the Master nor the Italian Navy complained that India was illegally exercising jurisdiction over the “Enrica Lexie” between the time it turned towards Kochi and the time it arrived in port.⁹²¹

⁹¹³ India’s Counter-Memorial, para. 6.14.

⁹¹⁴ Hearing Transcript, 20 July 2019, 48:15-49:2, *referring to* Hearing Transcript, 18 July 2019, 171: 6-7. *See also* Hearing Transcript, 20 July 2019, 49:20-24.

⁹¹⁵ India’s Counter-Memorial, para. 6.9.

⁹¹⁶ India’s Counter-Memorial, para. 6.9.

⁹¹⁷ India’s Counter-Memorial, para. 6.28.

⁹¹⁸ Hearing Transcript, 12 July 2019, 126:8-15.

⁹¹⁹ India’s Counter-Memorial, para. 6.29.

⁹²⁰ India’s Counter-Memorial, para. 6.16.

⁹²¹ India’s Rejoinder, paras 6.5, 6.19-6.20, 6.25-6.26, 6.30; Hearing Transcript, 12 July 2019, 143:5-145:23.

iii. Analysis of the Arbitral Tribunal

521. Italy claims that India breached Article 92, paragraph 1, of the Convention by exercising jurisdiction over the “Enrica Lexie” while it was in India’s exclusive economic zone.⁹²²

522. Article 92, paragraph 1, concerning status of ships reads as follows:

Article 92

Status of ships

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

523. Article 92 applies to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention, which extends Articles 88 to 115 to the exclusive economic zone.

(a) The concept of exclusive jurisdiction of the flag State

524. The principle of exclusive flag State jurisdiction has been recognised as an “essential adjunct[] to the principle of the freedom of the seas”⁹²³ or a “corollary of the open and free status of the high seas”.⁹²⁴

525. The concept of “jurisdiction”, derived from the Latin *juris dicere* (literally: “to speak the law”), while broadly used in international law, remains largely undefined in the case law of international courts and tribunals.

526. One may distinguish between prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction.⁹²⁵ Prescriptive jurisdiction is the authority of a State to make laws in relation to persons, property, or conduct; adjudicative jurisdiction is the authority of a State to apply law to persons or things; and enforcement jurisdiction is the authority of a State to exercise its power to

⁹²² Italy’s Reply, para. 7.53.

⁹²³ International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 279 (commentary to Article 30, para. 1) (1956).

⁹²⁴ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 216. See also Bernard H. Oxman, ‘Jurisdiction of States’ (2007) Max Planck Encyclopedia of International Law, para. 30.

⁹²⁵ Some scholars favour the three-prong jurisdiction approach. The terminology varies slightly, as some authors refer to legislative, judicial, and executive jurisdiction. See Rain Liivoja, ‘The Criminal Jurisdiction of States: a Theoretical Primer’ (2010) 7 NoFo 25, at p. 29; Philip C. Jessup, ‘Jurisdiction’ (1980) 61 Int’l L Stud Ser US Naval War Col 303, at 303; Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed., Oxford Monographs in International Law 2015), p. 9; Bernard H. Oxman, ‘Jurisdiction of States’ (2007) Max Planck Encyclopedia of International Law, para. 3.

compel compliance with law. Under international law, the exercise of jurisdiction by a State entails an element of prescribing laws, rules, or regulations over conduct, or applying or enforcing such laws, rules, or regulations over persons or property.

527. It follows from the above analysis that the principle of exclusive flag State jurisdiction under the Convention is violated when a State other than the flag State seeks to prescribe laws, rules, or regulations over a ship of the flag State, or applies or enforces such laws, rules, or regulations in respect of such a ship. The Arbitral Tribunal also recalls in this respect the observation of ITLOS in *M/V “Norstar”* that the principle of exclusive flag State jurisdiction “prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas”.⁹²⁶

(b) *Examination of India’s conduct vis-à-vis the “Enrica Lexie”*

528. The Arbitral Tribunal now turns to Italy’s claim that “[b]y directing the *Enrica Lexie* to proceed to Kochi while it was navigating beyond India’s territorial sea, by interdicting it, and by escorting it to Kochi, India [...] breached Italy’s right to exclusive jurisdiction over the *Enrica Lexie* under Article 92(1) of UNCLOS”.⁹²⁷
529. The Arbitral Tribunal recalls its factual findings made in the context of its analysis of Article 87, paragraph 1, subparagraph (a). In particular, the Arbitral Tribunal recalls that at 18:30 SMT/19:00 IST, MRCC Mumbai requested the “*Enrica Lexie*” to proceed to Kochi “to take stock of events and bear witness”.⁹²⁸ According to Mr. Gupta, the “*Enrica Lexie*” was requested to “approach to Cochin Port as they wanted the Master to give his statement and witness”.⁹²⁹ This request was followed by a written message stating: “You are requested to head for Kochi and establish communication with Indian Coast Guard [...] for further deposition/clarification”.⁹³⁰ In the view of the Arbitral Tribunal, it is possible to interpret the communications from MRCC Mumbai, as their wording indeed suggests, as mere requests.

⁹²⁶ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 225.

⁹²⁷ Italy’s Reply, para. 7.1 [emphases added]. See also Hearing Transcript, 10 July 2019, 2:9-18.

⁹²⁸ Log Book of the Master of the “*Enrica Lexie*”, p. 2 (**Annex IT-14**).

⁹²⁹ Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**).

⁹³⁰ E-mail from MRCC Mumbai to Master of the “*Enrica Lexie*”, 15 February 2012 (**Annex IT-8**); E-mail from MRCC Mumbai to the Master of the “*Enrica Lexie*”, 16:10 (CET), 15 February 2012 (**Annex IT-123**).

530. This interpretation was ostensibly shared by Captain Vitelli, the primary addressee on the “Enrica Lexie” of the requests from the MRCC. As noted above, he testified that he was not under any compulsion to head to Kochi: he did not “have the impression that force was being used”.⁹³¹ He changed course towards Kochi at 19:15 SMT/19:45 IST,⁹³² but he did not consider his freedom “to change the course again and resume the original course towards Egypt” to be hindered.⁹³³ He added that, having informed CINCNAV, MSCHOA, UKMTO, and Fratelli D’Amato SpA, “[i]n the end, everybody was in agreement: the best thing to do was to head to Kochi”.⁹³⁴
531. In the view of the Arbitral Tribunal, Italy has not discharged its burden of proving that the requests from the MRCC were in fact directions or orders, having an element of enforcement jurisdiction.
532. Additionally, while the Indian Coast Guard deployed an aircraft and naval vessels to “conduct search for suspected vessel between Kollam and Kadungalloor”,⁹³⁵ to “render assistance for apprehension of suspect vessel”,⁹³⁶ and to “interrogate/identify all the merchant vessels in the area” in search of the vessel involved in the firing,⁹³⁷ the aircraft and vessels did not, in fact, carry out any enforcement measures, such as boarding or detention, while the “Enrica Lexie” was in India’s exclusive economic zone. Rather, at 19:20 SMT/19:50 IST, the Dornier aircraft located and arrived above the “Enrica Lexie” and “directed them to amend the course and proceed to Kochi harbour”.⁹³⁸ Subsequently, at 19:45 SMT/20:15 IST, the “Enrica Lexie” responded to the ICGS “Lakshmbibai”’s VHF call and the ICGS “Lakshmbibai” “also directed the vessel to proceed towards Kochi”.⁹³⁹
533. The Arbitral Tribunal further recalls its finding that, after the Dornier aircraft and ICGS “Lakshmbibai” located the “Enrica Lexie”, they travelled alongside the “Enrica Lexie” at safe

⁹³¹ Hearing Transcript, 15 July 2019, 94:14-15.

⁹³² Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

⁹³³ Hearing Transcript, 15 July 2019, 94:5-6.

⁹³⁴ Hearing Transcript, 15 July 2019, 80:23-24.

⁹³⁵ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, p. 1 (**Annex IT-7**). *See also* Italy’s Reply, para. 4.44; Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 2 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 16:10-14, 16:17-21.

⁹³⁶ Boarding Officer’s Report MV “Enrica Lexie”, 16-17 February 2012, para. 1 (**Annex IT-9**). *See also* Hearing Transcript, 16 July 2019, 137:6-20.

⁹³⁷ Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 46 (**Annex IT-134**). *See also* Italy’s Reply, para. 7.56; Hearing Transcript, 16 July 2019, 89:16-90:1, 90:14-24.

⁹³⁸ Statement by Commandant Alok Negi, Coast Guard Air Enclave Kochi, 19 February 2012, pp 1-2 (**Annex IT-7**). *See also* Italy’s Memorial, para. 4.66; Statement of Witness in connection with the NIA investigation, Statement of Commandant Alok Negi, Coast Guard, 750 Squadron, Coast Guard Air Station, Daman, 19 September 2013, p. 37 (**Annex IT-279**).

⁹³⁹ Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012, p. 2 (**Annex IT-134**).

distances: the Dornier aircraft “maintained from 3,000 to 5,000 feet”,⁹⁴⁰ while the ICGS “Lakshmbai” “maintained patrolling [...] within 5 nautical miles”.⁹⁴¹ According to the testimony of Commandant Kumar, the reason for escorting the “Enrica Lexie” was “just to facilitate them, just to help them to come to the Kochi”.⁹⁴² DIG Negi testified that the purpose of staying in the vicinity of the “Enrica Lexie” was to communicate with it and obtain data about its movement.⁹⁴³

534. The Arbitral Tribunal finally recalls that it cannot answer conclusively, on the evidentiary record before it, whether the Indian Coast Guard might have had recourse to force or the threat of force to compel the “Enrica Lexie” to head to Kochi, had it not pursued that course voluntarily.
535. In the view of the Arbitral Tribunal, Italy has not discharged its burden of proving that the Indian Coast Guard, by “interdicting” and “escorting” the “Enrica Lexie”, exercised enforcement jurisdiction.
536. In conclusion, the conduct of the Indian authorities while the “Enrica Lexie” was in India’s exclusive economic zone did not amount to an exercise of jurisdiction. The Arbitral Tribunal accordingly finds that India did not violate Article 92, paragraph 1, of the Convention.

2. Alleged Breaches by India of Article 97 of UNCLOS

537. The Parties also differ over the interpretation and application of Article 97 of the Convention, which, by virtue of Article 58, applies in the exclusive economic zone. Article 97 provides:

Article 97

Penal jurisdiction in matters of collision or any other incident of navigation

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.
2. In disciplinary matters, the State which has issued a master’s certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

⁹⁴⁰ Hearing Transcript, 16 July 2019, 20:2.

⁹⁴¹ Hearing Transcript, 16 July 2019, 80:14-15.

⁹⁴² Hearing Transcript, 16 July 2019, 123:20-21.

⁹⁴³ Hearing Transcript, 16 July 2019, 19:25-20:5.

538. In particular, the Parties disagree as to whether Article 97, paragraphs 1 and 3, applies to the facts of this dispute, and further whether India has breached these provisions by exercising jurisdiction over the *Marines* and the “*Enrica Lexie*”.
539. Instead of Article 97 of the Convention, India contends that the residual clause in Article 59 of the Convention applies. Italy disputes this claim. Article 59 of the Convention provides:

Article 59

Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

540. Since the Parties’ claims turn on findings with regard to a common set of contested facts, namely those surrounding the risk of a collision between the “*Enrica Lexie*” and the “*St. Antony*”, the Arbitral Tribunal will first summarise the Parties’ positions in respect of these facts. Thereafter, the Arbitral Tribunal will proceed to summarise the Parties’ arguments under Article 97, paragraphs 1 and 3, and Article 59 of the Convention.

(a) **Risk of Collision between the “*Enrica Lexie*” and the “*St. Antony*”**

541. The Parties disagree as to whether there was a risk of collision between the “*Enrica Lexie*” and the “*St. Antony*” and, if so, whether the “*Enrica Lexie*” changed course to avoid possible collision.

i. Navigation of the “*Enrica Lexie*” and the “*St. Antony*”

(a) *Position of Italy*

542. Italy asserts that the Master of the “*Enrica Lexie*” identified a risk of collision between the “*Enrica Lexie*” and the “*St. Antony*”, leading to a range of “escalating steps” by the Captain, the VPD, and the crew.⁹⁴⁴ Italy asserts that the crew’s apprehension of the risk of collision and the steps taken thereafter in response are supported by the following evidence.

⁹⁴⁴ Italy’s Memorial, para. 4.105. *See also* Hearing Transcript, 8 July 2019, 155:3-4; Hearing Transcript, 18 July 2019, 44:20-26, 45:9-12, 126:3-4.

543. According to a statement by Captain Noviello, upon spotting the craft, he informed the Second Officer, Sahil Gupta, that there was “a vessel on a collision course with the *Enrica Lexie*”.⁹⁴⁵ Captain Noviello states that, in order to avert this “perceived collision and threat to the safe navigation of the vessel”,⁹⁴⁶ the Second Officer put the “*Enrica Lexie*” on manual steering from automatic steering and “altered course [...] to port to avoid a collision”,⁹⁴⁷ while the VPD took a range of dissuasive measures. The crew took refuge in the citadel.⁹⁴⁸ Italy contends therefore that “[f]or 75 minutes”, the “*Enrica Lexie*” was under “exceptional navigational constraint”.⁹⁴⁹
544. Captain Vitelli testified that “anything I do, I risk having a collision with the skiff”,⁹⁵⁰ while Captain Noviello stated that “I am 99% convinced that we would have had a collision if they hadn’t altered their course, once the riflemen fired shots into the water”.⁹⁵¹
545. Captain Noviello also testified that Second Officer Gupta “changed the course in effect by only 2° to port because [...] the second officer thought that ‘in this way a collision could be avoided’.”⁹⁵² Italy recognises that “Captain Noviello thought that the turn implemented by Second Officer Gupta was in the wrong direction and was not significant enough”.⁹⁵³ In view of this, Italy contends that the key point is that “Captain Noviello confirmed that Second Officer Gupta did change the course of the *Enrica Lexie*, and that he did so to avoid a collision”.⁹⁵⁴
546. Italy alleges that, in addition to the first turn undertaken by Second Officer Gupta, once Captain Vitelli became involved, he changed course again, seeking to avoid a collision. As evidence, Italy refers to Captain Vitelli’s testimony that “I had to avert the collision. ... So first of all, I pulled to the starboard side”.⁹⁵⁵

⁹⁴⁵ Italy’s Memorial, para. 4.14, referring to (Confidential Annex) (**Annex IT-261**); Statement of Narandra Fulbaria, 19 February 2012 (**Annex IT-139**). See also Italy’s Reply, para. 4.18.

⁹⁴⁶ Italy’s Memorial, para. 4.105.

⁹⁴⁷ Italy’s Memorial, para. 4.14, referring to (Confidential Annex) (**Annex IT-261**); Statement of Sahil Gupta, 19 February 2012 (**Annex IT-140**). See also Italy’s Reply, para 4.22.

⁹⁴⁸ Italy’s Memorial, para. 4.105.

⁹⁴⁹ Italy’s Memorial, para. 4.105.

⁹⁵⁰ Hearing Transcript, 18 July 2019, 134:4-5, citing Hearing Transcript, 15 July 2019, 35:14-15. See also Hearing Transcript, 18 July 2019, 134:7-8, referring to Hearing Transcript, 15 July 2019, 89:4-5.

⁹⁵¹ Hearing Transcript, 18 July 2019, 134:14-16, citing Hearing Transcript, 15 July 2019, 137:24-138:1.

⁹⁵² Hearing Transcript, 18 July 2019, 135:20-136:2, citing Hearing Transcript, 15 July 2019, 123:22-23.

⁹⁵³ Hearing Transcript, 18 July 2019, 135:14-16, referring to Hearing Transcript, 15 July 2019, 123:9-11, 124:14-18.

⁹⁵⁴ Hearing Transcript, 18 July 2019, 135:16-19. See also Hearing Transcript, 15 July 2019, 137:24-26.

⁹⁵⁵ Hearing Transcript, 18 July 2019, 136:13-14, citing Transcript Day 7, 36:23-26.

547. Italy submits that, as the craft approached the “Enrica Lexie” from approximately 800 metres, the Marines implemented various visual signals to warn the craft, including flashing a search light⁹⁵⁶ and showing their weapons above their heads, in order to “signal the presence of military personnel onboard”.⁹⁵⁷ Nevertheless, Italy contends, the small craft continued to approach the “Enrica Lexie”.⁹⁵⁸
548. Italy submits that India has accepted that the two vessels came within 100 metres of each other. Accordingly, Italy argues that, in such circumstances, “it is not tenable for India to maintain that there was no genuine risk of collision”.⁹⁵⁹ Italy also submits that the craft approached until it was approximately 30 metres away from the “Enrica Lexie”, where, after the third burst of shots was fired by the Marines, it “changed course” away from the “Enrica Lexie”.⁹⁶⁰ Italy concludes that these facts demonstrate that this was “by any measure a close quarters situation involving imminent risk of a collision”.⁹⁶¹
549. Italy further refers to Captain Fredy’s testimony that he woke up from sleep after “hearing noise of firing” and saw that his boat was “running at a high speed and was dangerously approaching another vessel”.⁹⁶² According to Captain Fredy, the boat had “reached dangerously close” to the vessel, while a “person unqualified to be at the helm [of the boat] ‘went off to sleep while driving’”.⁹⁶³ Captain Fredy stated that he immediately took charge of the boat and navigated to

⁹⁵⁶ Italy’s Memorial, para. 4.18, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**).

⁹⁵⁷ Italy’s Memorial, para. 4.19, *citing* (Confidential Annex), p. 1 (**Annex IT-236**). *See also* (Confidential Annex) (**Annex IT-237**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

⁹⁵⁸ Italy’s Memorial, para. 4.19, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); (Confidential Annex) (**Annex IT-237**).

⁹⁵⁹ Hearing Transcript, 8 July 2019, 160:1-10, *referring to* India’s Counter-Memorial, para. 2.27; India’s Counter-Memorial, Annex to Chapter 2, p. 33; India’s Rejoinder, “Timeline of Key Events on 15 February 2012”, p. 60.

⁹⁶⁰ Italy’s Memorial, para. 4.25, *referring to* (Confidential Annex) (**Annex IT-261**); (Confidential Annex) (**Annex IT-236**); Commander in Chief of the Naval Squadron (CINCNV) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012, p. 2 (**Annex IT-109**); Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**). *See also* Hearing Transcript, 8 July 2019, 160:3-4, *referring to* (Confidential Annex) (**Annex IT-261**).

⁹⁶¹ Italy’s Memorial, para. 4.25.

⁹⁶² Italy’s Memorial, para. 4.27, *citing* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**). *See also* Italy’s Reply, para. 4.25.

⁹⁶³ Italy’s Memorial, para. 4.27, *citing* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

the high seas, adding that, “had [he] not intervened, there was a risk of collision between the said Boat and the other vessel”.⁹⁶⁴

550. Italy questions the statement of Second Officer Gupta to the NIA that “I checked the position of the boat on the Radar and I was sure that the boat will clearly [be] passing without any collision”.⁹⁶⁵ First, Italy argues that Officer Gupta “does not say, however, that there was no risk of collision”.⁹⁶⁶ Second, Italy adds, when read “in context, it is clear that Mr Gupta was describing the situation as he perceived it when the small craft was first spotted”. Third, Italy contends that it appears that Officer Gupta’s opinion changed as the two vessels came closer together, and hence in the same statement, Officer Gupta explains that he changed the course of the “Enrica Lexie”.⁹⁶⁷ Fourth, Italy alleges that the credibility of Second Officer Gupta’s statement is compromised by a contemporaneous statement he had given to the Kerala police on 19 February 2012, which records that at the time of the incident he was “busy with the changing of the course of the ship to the Port side”.⁹⁶⁸
551. Italy also clarifies Captain Noviello’s statement that the small craft “was just clearing the stern of the vessel”.⁹⁶⁹ Italy argues that first, this statement suggests that “there was a genuine risk of collision”.⁹⁷⁰ Second, Italy argues that this sentence ought to be read in the context of the full statement, in which Captain Noviello states that he “saw one target on the radar screen at about 2,8 miles on nearly collision course”.⁹⁷¹ Third, Italy submits that the statement ought to be read in the context of earlier and later statements made by Captain Noviello, in which he is clear about the risk of collision.⁹⁷²

⁹⁶⁴ Italy’s Memorial, para. 4.27, *citing* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**). *See also* Italy’s Reply, para. 4.26.

⁹⁶⁵ Hearing Transcript, 8 July 2019, 161:12-14, *referring to* India’s Rejoinder, para. 4.16, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**).

⁹⁶⁶ Italy’s Reply, para. 4.18.

⁹⁶⁷ Hearing Transcript, 8 July 2019, 161:15-162:23, *referring to* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**).

⁹⁶⁸ Italy’s Reply, para. 4.18, *citing* Statement of Sahil Gupta, 19 February 2012, p. 2 (**Annex IT-140**). *See also* Hearing Transcript, 8 July 2019, 163:1-164:14.

⁹⁶⁹ Hearing Transcript, 8 July 2019, 164:22-23, *referring to* India’s Rejoinder, para 4.16, *citing* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**).

⁹⁷⁰ Hearing Transcript, 8 July 2019, 165:3-4.

⁹⁷¹ Hearing Transcript, 8 July 2019, 166:4-6, *referring to* India’s Rejoinder, para 4.16, *citing* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**).

⁹⁷² Hearing Transcript, 8 July 2019, 167:8-169:5, *referring to* Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); (Confidential Annex) (**Annex IT-261**).

552. Italy also points to Captain Vitelli's statement that "[i]f I turned the ship to starboard side it will be very near to boat or collide. If I moved the ship to the portside [it will] definitely collide".⁹⁷³ Italy submits that this confirms the apprehension of a serious threat of collision.
553. Italy notes that India contends that it was "only *afterwards* that Captain Vitelli instituted a change of course", that "a change [in course] at the last minute [...] would have been far too late", and that after the firing "the ship had turned very slightly to the *starboard* side". Italy submits that these statements amount to acknowledgements that the "Enrica Lexie" did change its course in response to the situation. Italy argues that the time the change was made is "not [...] material".⁹⁷⁴

(b) *Position of India*

554. For its part, India asserts that there was no actual risk of collision between the "St. Antony" and the "Enrica Lexie" and that the "Enrica Lexie" was not under any "exceptional navigational constraint".⁹⁷⁵ In support of this claim, India relies on the following statement by Second Officer Gupta:

At about 1545 hrs my watch duty Naren Fulbaria reported that he noticed a fishing boat. I asked him to monitor it. I checked the position of the boat on the Radar and I was sure that the boat will clearly [be] passing without any collision.⁹⁷⁶

555. Moreover, Captain Noviello's declaration stated that he saw the "target" on the radar screen, and the vector of the craft "was just clearing the stern".⁹⁷⁷
556. India asserts that the "Enrica Lexie" had a top speed of 14 knots, while the small craft was "loitering at slow speed" of not more than 10 knots while approaching the "Enrica Lexie".⁹⁷⁸ Further, according to the Piroli Report, the craft was "sailing at 5-7 knots (definitely not more than 10 knots)".⁹⁷⁹ Approximately 25-35 minutes passed between when it was first spotted and when it reached the vicinity of the "Enrica Lexie".⁹⁸⁰ Accordingly, India argues that had there

⁹⁷³ Hearing Transcript, 15 July 2019, 36:8-11, *citing* Additional Statement of Umberto Vitelli, 27 February 2012, p. 86 (**Annex IT-150**).

⁹⁷⁴ Italy's Rejoinder, paras 2.16-2.18, *citing* India's Rejoinder, paras 4.29, 4.36, 4.38 [emphases added by Italy and India].

⁹⁷⁵ India's Counter-Memorial, para. 2.44, *citing* Italy's Memorial, para. 4.105.

⁹⁷⁶ India's Counter-Memorial, para. 2.14, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**). *See also* Hearing Transcript, 11 July 2019, 71:11-17.

⁹⁷⁷ India's Rejoinder, para. 4.16, *citing* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**).

⁹⁷⁸ India's Counter-Memorial, para. 2.4, *citing* Piroli Report (Confidential Annex), pp 2-14, 3-14 (**Annex IT-233**).

⁹⁷⁹ India's Counter-Memorial, para. 2.16, *citing* Piroli Report (Confidential Annex), p. 2-14 (**Annex IT-233**).

⁹⁸⁰ India's Counter-Memorial, para. 2.16. *See also* Hearing Transcript, 11 July 2019, 66:23-67:19.

been a risk of collision, the “Enrica Lexie” could “easily have turned and outrun the small boat and avoided the incident altogether”.⁹⁸¹

557. India asserts that, had there been a risk of collision when the small craft did not alter its course (which, according to India, “it was under no obligation to do since it had the right of way”), the shipmaster of the “Enrica Lexie” could have changed course to avoid the boat. According to India, in the end, he “took no such action”.⁹⁸²

558. India submits that Captain Vitelli has previously provided witness statements indicating that the “Enrica Lexie” did not change course during the “incident”.⁹⁸³ India further submits that, in his testimony before the Rome Prosecutor on 15 May 2012, Captain Vitelli stated:

All I could do and did was to increase the speed, since, being a large ship, I would have overthrown the fishing boat or I could have gone too near if altered the route.⁹⁸⁴

559. India notes that this testimony is supported by the finding in the Piroli Report that:

during the entire incident, the kinematic parameters of MV LEXIE *did not change* (course: 335 degrees, speed: 13 knots), apart from a one-knot increase in speed in the final phases of the incident.⁹⁸⁵

560. While the Piroli Report noted that “changing course was assessed to be unfeasible [...] due to the high traffic”, India asserts that the Report adds that “it would have sufficed to turn a few degrees”.⁹⁸⁶

561. India disputes the statement of Second Officer Gupta that:

I heard firing shots and I took the vessel on hand steering and altered the course of the ship to western side [...] As and when I heard firing I took the vessel on hand steering from automatic steering. Fulbariya came and he took over the wheel from me and meantime master came in and pressed the emergency alarm and addressed in the PA system that this is not a

⁹⁸¹ India’s Counter-Memorial, para. 2.4.

⁹⁸² India’s Counter-Memorial, para. 2.4. *See also* Hearing Transcript, 11 July 2019, 72:5-10; Hearing Transcript, 20 July 2019, 7:2-13.

⁹⁸³ India’s Rejoinder, para. 4.28. *See also* Hearing Transcript, 11 July 2019, 74:1-14 *referring to* Additional Statement of Umberto Vitelli, 27 February 2012 (**Annex IT-150**); Statement of Umberto Vitelli (**Annex IT-216**); (Confidential Annex), p. 1 (**Annex IT-262**).

⁹⁸⁴ India’s Rejoinder, para. 4.28, *citing* (Confidential Annex), p. 1 (**Annex IT-262**).

⁹⁸⁵ India’s Counter-Memorial, para. 2.14, *citing* Piroli Report (Confidential Annex), p. 2-14 (**Annex IT-233**) [emphasis added by India]; Hearing Transcript, 11 July 2019, 66:23-1, *referring to* Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**).

⁹⁸⁶ India’s Rejoinder, para. 4.30, *citing* Piroli Report (Confidential Annex), p. 3-14 (**Annex IT-233**). *See also*, Hearing Transcript, 11 July 2019, 75:17-23; 76:16-78:3.

drill, everybody to go to the Engine Control Room, we are under a pirate attack. [...] When I heard the firing, the boat was about 200 mtrs away from the ship.⁹⁸⁷

562. First, India submits that Second Officer Gupta testified to have changed course when he heard the firing shots, that is, during the final stages of the incident, at approximately 16:15 SMT/16:45 IST, when the boat was within 200 metres from the “Enrica Lexie”. At this time, India submits, it would have been “far too late and essentially meaningless to alter course”. Second, according to India, the testimony that Second Officer Gupta altered course by 10 degrees to portside when the fishing boat was 200 metres away is “inconsistent” with Captain Vitelli’s statement that he “only increased speed by one knot, but did not change course”.⁹⁸⁸ Third, India submits that, at 16:23 SMT/16:53 IST, just after the fishing boat had veered off, Captain Vitelli activated the SSAS, which noted the course of the “Enrica Lexie” to be 331 degrees. India asserts that this account is “impossible to reconcile” with the statement of Second Officer Gupta that he “turned the ship 10 degrees *to port*”.⁹⁸⁹
563. Additionally, India disputes the allegation that the “Enrica Lexie” failed to alter its course “due to the intense traffic of small boats in the area”.⁹⁹⁰ India asserts that there is no evidence of any other small craft on the radar of the “Enrica Lexie” or in its way throughout the incident that might have prevented the vessel from altering course to avoid the boat.⁹⁹¹ India asserts that this position is further supported by the testimony of Captain Noviello at the Hearing that the “Enrica Lexie” did in fact change course by eight degrees to portside shortly before the “St. Antony” was spotted.⁹⁹²
564. Finally, India argues that Italy’s “theory” that the “Enrica Lexie” could have first turned to port then to starboard during these very few minutes is “not only speculation”, but also implausible in light of Italy’s statement that “the speed and direction of an oil tanker the size of Enrica Lexie are not easily and quickly adjusted”.⁹⁹³

⁹⁸⁷ India’s Rejoinder, para. 4.35, *citing* Statement of Witness in connection with the NIA investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**); Statement of Sahil Gupta, 19 February 2012, p. 166 (**Annex IT-140**).

⁹⁸⁸ India’s Rejoinder, paras 4.36-4.37; Hearing Transcript, 11 July 2019, 79:17-80:5.

⁹⁸⁹ India’s Rejoinder, para. 4.38; Hearing Transcript, 11 July 2019, 80:8-14.

⁹⁹⁰ India’s Counter-Memorial, para. 2.15, *citing* Statement of Witness in connection with the NIA investigation, Statement of Shri Sahil Gupta, p. 60 (**Annex IN-30**).

⁹⁹¹ India’s Counter-Memorial, para. 2.15.

⁹⁹² Hearing Transcript, 20 July 2019, 6:16-7:1, *referring to* Hearing Transcript, 15 July 2019, 124:14-25.

⁹⁹³ Hearing Transcript, 11 July 2019, 80:15-81:2, *citing* Hearing Transcript, 8 July 2019, 68:1-2.

ii. Compliance with International Regulations

565. Italy and India are both parties to the Convention on the International Regulations for Preventing Collisions at Sea, 20 October 1972 (hereinafter “COLREGS”), which set out “globally accepted” regulations and rules regarding navigation.⁹⁹⁴

566. India submits that the arbitral tribunal in the *South China Sea Arbitration* observed that “the COLREGS comprise one of the most widely adopted multilateral conventions in force”⁹⁹⁵ and that Article 94 of UNCLOS incorporates the COLREGS into UNCLOS, such that a violation of the COLREGS constitutes a violation of UNCLOS.⁹⁹⁶

567. Rule 2 of COLREGS provides:

(a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.⁹⁹⁷

568. Rule 14 of COLREGS, which deals with a “head-on situation”, provides:

When two power-driven vessels are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision each shall alter her course to starboard so that each shall pass on the port side of the other... When a vessel is in any doubt as to whether such a situation exists she shall assume that it does exist and act accordingly.⁹⁹⁸

569. Rule 15 of COLREGS, which governs “crossing situation[s]”,⁹⁹⁹ provides:

When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own *starboard side* shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.¹⁰⁰⁰

⁹⁹⁴ India’s Counter-Memorial, para. 2.18.

⁹⁹⁵ Hearing Transcript, 11 July 2019, 68:17-18, *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 1081.

⁹⁹⁶ Hearing Transcript, 11 July 2019, 68:19-69:1, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 1083.

⁹⁹⁷ International Regulations for Preventing Collisions at Sea, 1972, Rule 2 (**Annex IN-17**).

⁹⁹⁸ Rule 14, International Regulations for Preventing Collisions at Sea, 1972, Rule 14 (**Annex IN-17**). *See also* Hearing Transcript, 18 July 2019, 148:1-11.

⁹⁹⁹ Hearing Transcript, 20 July 2019, 7:19-8:14, *referring to* Hearing Transcript, 18 July 2019, 145:12-149:2.

¹⁰⁰⁰ India’s Counter-Memorial, para. 2.18, n. 67, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 15 (**Annex IN-17**) [emphasis added by India]. *See also* Hearing Transcript, 20 July 2019, 8:10-23.

570. Further, Rule 17, paragraph a, subparagraph (i), of COLREGS provides that “[w]here one of two vessels is to keep out of the way the other shall keep her course and speed”,¹⁰⁰¹ unless, “it comes so close that action is required to avoid collision”.¹⁰⁰²
571. According to Italy, Rule 2 of COLREGS contains a “general prudential principle” that “always applies”.¹⁰⁰³ Italy submits that the “Enrica Lexie” was required to exercise prudence in its assessment of the immediacy of the collision and respond accordingly. Italy also submits that, under the same standard, the “St. Antony” should have been “under the control of a licensed, alert driver, operating in a manner that would be characterised as ‘seamanlike’.”¹⁰⁰⁴ Italy further asserts that, had it followed this rule, the “St. Antony” would have “slowed down: it would have gone astern, in the face of the continuing closing on a 244-metre oil tanker”.¹⁰⁰⁵
572. Italy alleges that, under Rule 14, both the “Enrica Lexie” and the “St. Antony” would have been required to turn to starboard to avoid collision if there was such risk.¹⁰⁰⁶ According to the testimony of Captain Vitelli and Captain Noviello, their understanding of international regulations would have required, as is required under Rule 14, *both* the “Enrica Lexie” *and* the “St. Antony” to turn to the starboard side.¹⁰⁰⁷ Italy submits that, whether or not it was a “head-on situation” when the “St. Antony” first appeared on the radar, as the two vessels moved closer together, the incident “may have developed into effectively a head-on” situation, which is governed by Rule 14 of the COLREGS and requires both vessels to turn to starboard “in ample time”.¹⁰⁰⁸ According to Italy, neither of the vessels appears to have done what was required by the COLREGS.¹⁰⁰⁹
573. According to India, under Rule 15, the “Enrica Lexie” would have had the obligation to take measures to avoid a collision with the “St. Antony” if there was such risk.¹⁰¹⁰ India submits that

¹⁰⁰¹ Rule 17, International Regulations for Preventing Collisions at Sea, 1972.

¹⁰⁰² India’s Counter-Memorial, para. 2.20, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 17, paragraph a, subparagraph (i) (**Annex IN-17**). *See also* Hearing Transcript, 11 July 2019, 69:16-23; Hearing Transcript, 20 July 2019, 109:20-110:17.

¹⁰⁰³ Hearing Transcript, 18 July 2019, 149:3-4.

¹⁰⁰⁴ Hearing Transcript, 18 July 2019, 149:6-8.

¹⁰⁰⁵ Hearing Transcript, 18 July 2019, 149:9-10.

¹⁰⁰⁶ Hearing Transcript, 18 July 2019, 148:12-18.

¹⁰⁰⁷ Hearing Transcript, 18 July 2019, 146:11-147:23, *referring to* Hearing Transcript, 15 July 2019, 73:1-3, 73:9-11, 109:14-17.

¹⁰⁰⁸ Hearing Transcript, 18 July 2019, 147:7-8. *See also* Hearing Transcript, 18 July 2019, 147:24-149:2, *referring to* International Regulations for Preventing Collisions at Sea, 1972, Rule 14, paragraph a, Rule 8, paragraph c (**Annex IN-17**).

¹⁰⁰⁹ Hearing Transcript, 18 July 2019, 148:20-22.

¹⁰¹⁰ India’s Counter-Memorial, para. 2.18, *referring to* International Regulations for Preventing Collisions at Sea, 1972, Rule 7, paragraph a (**Annex IN-17**), which provides: “Every vessel shall use all available

the small craft had the right of way, given that it was on the starboard side and that the “Enrica Lexie”, as the “give-way” vessel, had ample time to alter course, avoid a collision (“if there had genuinely been such a risk”), and “outrun the craft if it considered the craft to be threatening (which it never was)”. India states that none of these “elementary measures were taken by the Shipmaster of the vessel or suggested by the Marines”.¹⁰¹¹ It quotes from the Piroli Report:

Considering that the craft was loitering at slow speed while approaching the ship from the forward starboard side (approx. 20 to 30 deg. Starboard), it would have sufficed to turn a few degrees (to starboard or portside) in order to get away from a near collision course and to give way to the craft which, under the circumstances, had the right of way in compliance with universally accepted rules to prevent collisions at sea.¹⁰¹²

574. India submits that during the “Enrica Lexie” incident, the “St. Antony”, being the “stand-on” vessel, maintained its course and speed until the last moment when it took evasive action. India contends that Rule 17 of COLREGS “does not relieve the give-way of her obligation to keep out of the way”.¹⁰¹³ India submits that a “small adjustment to the wrong side, or an increase of speed of just 1 or 2 knots, scarcely satisfied this requirement”, adding that, under Rule 8, paragraph b, of COLREGS, “a series of small alterations of course and/or speed should be avoided”.¹⁰¹⁴ India concludes that the conduct of the Shipmaster of the “Enrica Lexie” was in breach of the COLREGS, which the Piroli Report emphasises are “universally accepted rules to prevent collisions at sea”.¹⁰¹⁵ Further, as the actions of Second Officer Gupta were characterised by Captain Noviello as a “big mistake”, any responsibility for any risk of collision, if there was such a risk, “lies entirely in the hands of those navigating on the Enrica Lexie”.¹⁰¹⁶
575. Italy asserts that the breach of the COLREGS alleged by India, presupposes a risk of collision.¹⁰¹⁷ According to Italy, whether there was any breach of the COLREGS is not in issue in these proceedings; it is only significant that India’s argument concerning the COLREGS can only proceed on the basis that there was a risk of collision. Italy submits that, in accordance with

means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist”.

¹⁰¹¹ India’s Counter-Memorial, paras 2.17-2.19, in fn. 69, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 16 (**Annex IN-17**): “Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear”. *See also* Hearing Transcript, 11 July 2019, 69:2-15; Hearing Transcript, 20 July 2019, 8:24-9:5.

¹⁰¹² India’s Counter-Memorial, para. 2.17, *citing* Piroli Report (Confidential Annex), p. 3-14 (**Annex IT-233**).

¹⁰¹³ India’s Counter-Memorial, para. 2.20, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 17, paragraph d (**Annex IN-17**). *See also* Hearing Transcript, 11 July 2019, 69:24-70-2; Hearing Transcript, 20 July 2019, 110:22-26.

¹⁰¹⁴ Hearing Transcript, 20 July 2019, 9:12-17.

¹⁰¹⁵ India’s Counter-Memorial, para. 2.21, *citing* Piroli Report (Confidential Annex), p. 3-14 (**Annex IT-233**).

¹⁰¹⁶ Hearing Transcript, 20 July 2019, 9:18-24.

¹⁰¹⁷ Italy’s Reply, para. 4.18.

Rule 7, paragraph a, of COLREGS, “[i]f there is any doubt such risk [of collision] shall be deemed to exist”.¹⁰¹⁸ Italy adds that in this case there was “no need for any deeming, because the contemporaneous evidence demonstrates that there was a risk of collision”.¹⁰¹⁹

(b) **Interpretation and Application of Article 97, paragraph 1 (Penal Jurisdiction)**

i. Position of Italy

576. Italy submits that India breached Article 97, paragraph 1, by instituting penal proceedings against the Marines who, according to Italy, were persons “in the service of the ship” during a “collision or any other incident of navigation”.¹⁰²⁰ According to Italy, only Italy had the authority to institute penal or disciplinary proceedings pursuant to Article 97, paragraph 1, as either the flag State of the ship or the Marines’ State of nationality.¹⁰²¹ In Italy’s view, India thus breached Article 97, paragraph 1, by violating Italy’s exclusive jurisdiction to prosecute the Marines.¹⁰²²

(a) *Interpretation and application of “incident of navigation” under Article 97*

577. According to Italy, Article 97 applies to the “Enrica Lexie” incident as an “incident of navigation” within the meaning of that Article. In support of its claim, Italy submits that the two vessels were on or near a collision course and, at one point, were only 30 metres from each other; that the Marines fired warning shots out of a fear of a pirate attack; that both vessels altered their course; that at least one of the vessels changed its speed to avoid collision; and that the near collision and warning shots endangered the safe navigation of both vessels.¹⁰²³

578. Italy submits that regardless of its own interpretation of Article 97 of the Convention, even on India’s and the High Court of Kerala’s proposed definition of the phrase “incident of navigation”, the above facts, which include the actions of the Marines, fall within that definition.¹⁰²⁴

579. According to Italy, India initially defined an “incident of navigation” as “an event that is either unpleasant or unusual”, “which occurs in relation with the movement of the ship”,¹⁰²⁵ and

¹⁰¹⁸ Italy’s Rejoinder, para. 2.24, *citing* International Regulations for Preventing Collisions at Sea, 1972, Rule 7, paragraph a (**Annex IN-17**). *See also* Hearing Transcript, 8 July 2019, 169:16-170:1.

¹⁰¹⁹ Hearing Transcript, 8 July 2019, 170:2-5.

¹⁰²⁰ Italy’s Memorial, paras 10.55-10.58, *citing* Article 97(1) of UNCLOS.

¹⁰²¹ Italy’s Memorial, para. 10.57.

¹⁰²² Italy’s Memorial, para. 10.58.

¹⁰²³ Italy’s Reply, para. 7.80; Hearing Transcript, 9 July 2019, 159:25-160:19.

¹⁰²⁴ Italy’s Reply, paras 7.63, 7.78-7.80; Hearing Transcript, 9 July 2019, 174:13-17.

¹⁰²⁵ Hearing Transcript, 9 July 2019, 162:1-4, *citing* India’s Counter-Memorial, para. 6.37. *See also* Italy’s Reply, paras 7.65-7.66.

similarly, the High Court of Kerala defined it as “an event that has a bearing on the navigation”.¹⁰²⁶ Based on this definition, since the “Enrica Lexie” incident was “plainly unpleasant and unusual”, Italy submits that the only question is whether the incident occurred in relation with the movement of the ship and with a bearing on navigation.¹⁰²⁷ Italy contends that this question must be answered in the affirmative because “the incident concerned the movement of the Enrica Lexie and of the St Antony in respect of each other”.¹⁰²⁸

580. In support of this claim, Italy argues that, instead of “mak[ing] findings about each individual fact comprising that overall incident”, “[t]he incident must be viewed as a composite whole”.¹⁰²⁹ Specifically, Italy cites what it asserts to be “the sequence of events that occurred from 15:45 on 15 February 2012, when the Master [...] saw an unidentified craft on the ship’s radar heading towards [it] on a collision course, to 17:00, when Captain Vitelli ended the piracy attack alert, and Sergeant Latorre ‘declared the incident closed’.”¹⁰³⁰ Italy states that this was an incident of navigation and the salient elements to be taken into account for this purpose include the following:

- Two vessels were on a collision course.¹⁰³¹
- The small craft had fenders out some 21 nautical miles out to sea with intention of a hostile boarding.¹⁰³²
- Those on the “Enrica Lexie” apprehended that they were the subject of a pirate attack.¹⁰³³
- The “Enrica Lexie” switched from automatic to manual steering, changed its direction, and increased to its maximum speed to avoid a collision or being boarded.¹⁰³⁴
- The Marines delivered visual warnings and fired warning shots to cause the small craft to desist from its collision course and the apprehended attempt to board.¹⁰³⁵

¹⁰²⁶ Italy’s Reply, paras 7.72, *citing* Judgment of the High Court of Kerala, 29 May 2012, para. 26 (**Annex IT-17**) [emphasis by Italy omitted].

¹⁰²⁷ Hearing Transcript, 9 July 2019, 162:5-8.

¹⁰²⁸ Hearing Transcript, 9 July 2019, 162:12-14.

¹⁰²⁹ Italy’s Memorial, para. 10.51.

¹⁰³⁰ Italy’s Memorial, para. 10.50 [emphases omitted], *referring to* E-mail from the Master of the “Enrica Lexie” to Fratelli D’Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); and *citing* (Confidential Annex), p. 3 (**Annex IT-236**).

¹⁰³¹ Italy’s Memorial, para. 10.51(1); Italy’s Reply, para. 7.77.

¹⁰³² Italy’s Memorial, para. 10.51(2).

¹⁰³³ Italy’s Memorial, para. 10.51(3).

¹⁰³⁴ Italy’s Memorial, para. 10.51(4).

¹⁰³⁵ Italy’s Memorial, para. 10.51(5).

- The Master sent most crew to the “citadel”, leaving the “Enrica Lexie” manned by few;¹⁰³⁶ the small craft continued to make attempts to approach the “Enrica Lexie”.¹⁰³⁷
- The captain of the “St. Antony” described the negative effect on the navigation of his vessel.¹⁰³⁸

581. In summary, Italy submits that contemporaneous documentary evidence demonstrates that (i) “the St Antony and the Enrica Lexie were navigating so as to bring them closer together on the open seas”;¹⁰³⁹ (ii) “having attempted other measures intended to dissuade the St Antony from continuing its approach towards the Enrica Lexie, the marines fired shots in a further attempt to dissuade the St Antony from continuing its approach”;¹⁰⁴⁰ and (iii) “following these shots, the St Antony ultimately did change its course to move away from the Enrica Lexie”.¹⁰⁴¹
582. Regarding these facts, Italy emphasises that the shots fired by the Marines form part of the incident of navigation.¹⁰⁴² Unlike a situation where two ships passed at sea at a safe distance and, for reasons unrelated to navigation, an assassin on one ship shot a passenger on another ship, the facts of this case, as corroborated by witness testimony during the Hearing, clearly show that the shots fired by the Marines are closely related to the safe navigation of both ships and therefore form part of the incident.¹⁰⁴³
583. In addition, Italy contends, India’s own written pleadings and the Investigation Report of the NIA in RC No 04/2013/NIA/DLI, dated 4 April 2013 (hereinafter the “NIA Report”) belie their claim that the incident was “totally unrelated to navigation”.¹⁰⁴⁴ For example, India stated in its Written Observations on Italy’s Request for the Prescription of Provisional Measures that the “incident caused serious damage to the boat endangering the safe navigation of the fishing vessel”,¹⁰⁴⁵ and

¹⁰³⁶ Italy’s Memorial, para. 10.51(6).

¹⁰³⁷ Italy’s Memorial, para. 10.51(7).

¹⁰³⁸ Italy’s Memorial, para. 10.51(8).

¹⁰³⁹ Hearing Transcript, 9 July 2019, 163:22-164:1. *See also* Hearing Transcript, 9 July 2019, 164:16-165:17, 166:20-22, 167:24.

¹⁰⁴⁰ Hearing Transcript, 9 July 2019, 164:1-5. *See also* Hearing Transcript, 9 July 2019, 165:22-166:7, 166:23-167:13, 167:25-168:1.

¹⁰⁴¹ Hearing Transcript, 9 July 2019, 164: 6-8. *See also* Hearing Transcript, 9 July 2019, 166:8-20, 168:1-20, *referring to* Commander in Chief of the Naval Squadron (CINCNAV) Flash Report no. 07/2012, 13:00 (CET), 15 February 2012 (**Annex IT-109**); Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

¹⁰⁴² Hearing Transcript, 18 July 2019, 124:12-17, 125:8-12.

¹⁰⁴³ Hearing Transcript, 18 July 2019, 124:18-126:8.

¹⁰⁴⁴ Hearing Transcript, 9 July 2019, 168:21-169:4, *citing* India’s Rejoinder, para. 6.45.

¹⁰⁴⁵ Hearing Transcript, 9 July 2019, 169:9-11, *citing* India’s Written Observations on Italy’s Request for the Prescription of Provisional Measures, para. 2.10 [emphasis omitted].

acknowledged in its Counter-Memorial and Rejoinder that the firing of shots led the “St. Antony” to change course.¹⁰⁴⁶ Similarly, the NIA Report states that the Marines’ firing of shots “endanger[ed] the safe navigation of the ship” and that, thereafter, the “St. Antony” “immediately turned away and started sailing towards the coast”.¹⁰⁴⁷ Furthermore, according to Italy, India alleges that the whole incident was due to the “Enrica Lexie” Master’s breach of the COLREGS;¹⁰⁴⁸ Italy submits without prejudice that the obligation under Rule 15 of the COLREGS applies only where there is a risk of collision.¹⁰⁴⁹

584. This evidence, Italy submits, demonstrates that the incident was clearly related to navigation, and therefore fell within India’s initial definition of “incident of navigation” because “the foundation of the entire incident was the trajectory of the two vessels, starting from when Captain Noviello first saw the small craft on a radar screen”, followed by the “Enrica Lexie” increasing speed to avoid the approaching craft, the firing of the shots by the Marines as a result of the approaching crafts, and ultimately to the change in the “St. Antony”’s course.¹⁰⁵⁰
585. Italy claims that, at the Hearing, India submitted for the first time a new proposed definition of “incident of navigation” – namely that it must be an incident “caused either by the execution or non-execution of a manoeuvre or by the non-observance of regulations, even if no collision has taken place”.¹⁰⁵¹ Notwithstanding Italy’s disagreement with India’s new proposed definition, which it considers overly narrow, Italy maintains that the facts of the present case would still fall within its scope.¹⁰⁵²
586. Italy submits that the incident was caused by the non-execution of manoeuvres and the non-observance of regulations by at least one, if not both, vessels during the incident when they were on a collision course.¹⁰⁵³ According to Italy, India contends that the “Enrica Lexie” breached the COLREGS by failing to take early and substantial action to steer clear of the “St. Antony”.¹⁰⁵⁴ However, Captains Vitelli and Noviello consider that both vessels should have turned to starboard

¹⁰⁴⁶ Hearing Transcript, 9 July 2019, 169:19-170:15, *referring to* India’s Counter-Memorial, para. 8.20; India’s Rejoinder, para. 1.12.

¹⁰⁴⁷ Hearing Transcript, 9 July 2019, 170:16-172:23, *citing* NIA Report (Confidential Annex), paras 9.1, 11.3, 11.25, 12.2(iv) (**Annex IN-27**).

¹⁰⁴⁸ Italy’s Reply, para. 7.78, *referring to* India’s Counter-Memorial, paras 1.7, 2.18-2.21.

¹⁰⁴⁹ Italy’s Reply, para. 7.79, *referring to* International Regulations for Preventing Collisions at Sea, 1972, Article 15 (**Annex IN-17**).

¹⁰⁵⁰ Hearing Transcript, 9 July 2019, 173:24-174:12.

¹⁰⁵¹ Hearing Transcript, 18 July 2019, 144:23-145:4, *citing* Hearing Transcript, 12 July 2019, 16:1-4.

¹⁰⁵² Hearing Transcript, 18 July 2019, 145:5-11.

¹⁰⁵³ Hearing Transcript, 18 July 2019, 145:9-11.

¹⁰⁵⁴ Hearing Transcript, 18 July 2019, 145:12-18, *referring to* Hearing Transcript, 11 July 2019, 69:2-70:6, 79:24-80:7.

because the “St. Antony” was approaching the “Enrice Lexie” from its starboard side.¹⁰⁵⁵ Even if the two vessels were approaching each other in a head-on situation, they would both also have had to turn to starboard under the COLREGS.¹⁰⁵⁶ Regardless of which situation actually applied, Italy observes that it is clear that neither vessel appears to have turned to starboard in ample time, nor done what was required by the COLREGs, therefore resulting in the warning shots fired, the near collision, and the final veering away of the “St. Antony” to its port side to avert the collision.¹⁰⁵⁷ Therefore, in Italy’s view, the incident “only occurred because the two vessels did not execute the manoeuvres required of them under the COLREGs”.¹⁰⁵⁸

587. For these reasons, Italy submits that even on India’s own proposed definitions, as they evolved over the course of the proceeding, this was an incident of navigation, and that the actions of the Marines formed part of that incident.¹⁰⁵⁹

588. While Italy considers that its argument stands even under India’s increasingly narrow definitions of “incident of navigation”, it cautions that, if accepted, such narrow definitions would have manifest implications, including significantly reducing the range of incidents over which the Convention allocates exclusive jurisdiction to the flag State, and going against the broad approach to the protection of freedom of navigation under the Convention.¹⁰⁶⁰

589. Notwithstanding the above, Italy notes its disagreement with India’s proposed definition, which it considers too narrow, and maintains that the phrase “incident of navigation” is broader, when interpreted in accordance with the normal canons of treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter “VCLT”).¹⁰⁶¹

590. Beginning with the ordinary meaning of the phrase, Italy submits that “incident of navigation” has a broad meaning which includes events other than collisions, such as incidents at sea in response to a perceived pirate attack; otherwise, Italy argues, the words “[i]n the event of a collision or any other incident of navigation” would have no meaning.¹⁰⁶² In particular, Italy contends that when those aboard a ship perceive that they are under pirate attack from another ship, and take measures to deter the attack, as was the case with the Marines on the “Enrica Lexie”,

¹⁰⁵⁵ Hearing Transcript, 18 July 2019, 145:19-147:2, *citing* Hearing Transcript, 15 July 2019, 72:16-75:23.

¹⁰⁵⁶ Hearing Transcript, 18 July 2019, 147:3-148:22.

¹⁰⁵⁷ Hearing Transcript, 18 July 2019, 148:20-149:21.

¹⁰⁵⁸ Hearing Transcript, 18 July 2019, 149:22-24.

¹⁰⁵⁹ Hearing Transcript, 9 July 2019, 174:13-17.

¹⁰⁶⁰ Hearing Transcript, 18 July 2019, 150:4-152:1.

¹⁰⁶¹ Italy’s Memorial, para. 10.41.

¹⁰⁶² Italy’s Memorial, para. 10.42, *citing* UNCLOS, Article 97(1) [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 175:3-24.

such an incident “is sufficiently connected to ‘navigation’, and in particular to the safety of navigation, to constitute an ‘incident of navigation’” under Article 97.¹⁰⁶³

591. In this regard, Italy maintains that whether or not the Marines were correct in their perception of a pirate attack is irrelevant because “Article 97 must be capable of application promptly after an incident occurs” and “with all of the uncertainty that will often come before the disciplinary or penal proceedings that Article 97 envisages have occurred”.¹⁰⁶⁴ The key and relevant matter in this case, Italy submits, is that the evidence clearly establishes that the Marines thought that they were experiencing a pirate attack and fired shots precisely for that reason. This is because a small craft which appeared not to be a regular fishing boat was approaching the vessel; the small craft was not reacting to any of the measures taken on the “Enrica Lexie”; India’s own Ministry of Shipping took the position that the “Enrica Lexie” had been approached by pirates; and the boats were on a collision course.¹⁰⁶⁵
592. Moreover, Italy submits, the relevant context of the phrase, which, other than in Article 97, also appears in Article 94, paragraph 7, and Article 221, paragraph 2, of the Convention, supports its broad interpretation.¹⁰⁶⁶ Specifically, Italy argues that the fact that Article 94, paragraph 7, deals with “incidents of navigation” “causing the loss of life or serious injury to nationals of another State”, shows that the Convention envisages that such incidents may cause serious consequences.¹⁰⁶⁷ It is for this reason that Italy also rejects India’s claim that the “Enrica Lexie” incident cannot constitute an “incident of navigation” because it involves an alleged murder.¹⁰⁶⁸
593. Article 221, paragraph 2, defines a “maritime casualty” as “a collision of vessels, stranding or other incident of navigation”. According to Italy, the use of the word “other” in this definition demonstrates that collisions and strandings are but two examples of events that can fall within the broader definition of an “incident of navigation” and, conversely, that an “incident of navigation” does not have to involve either a collision or a stranding.¹⁰⁶⁹ Italy further contends that the *travaux*

¹⁰⁶³ Hearing Transcript, 9 July 2019, 175:18-21.

¹⁰⁶⁴ Hearing Transcript, 9 July 2019, 177:3-11.

¹⁰⁶⁵ Hearing Transcript, 18 July 2019, 126:18-136:15, *referring to* E-mail from the Master of the “Enrica Lexie” to Fratelli D’Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**); Hearing Transcript, 15 July 2019, 67:2-13, 110:8-114:8, 125:1-26; Hearing Transcript, 11 July 2019, 82:23-83:18; Government of India, Ministry of Shipping Notice No. 7, 7 March 2012 (**Annex IN-9**); (Confidential Annex) (**Annex IT-261**).

¹⁰⁶⁶ Italy’s Memorial, para. 10.43. *See also* Hearing Transcript, 9 July 2019, 178:26-181:8.

¹⁰⁶⁷ Hearing Transcript, 9 July 2019, 179:4-180:9, *citing* UNCLOS, Article 94(7).

¹⁰⁶⁸ Italy’s Memorial, para. 10.52; Italy’s Reply, paras 7.81-7.82.

¹⁰⁶⁹ Italy’s Memorial, para. 10.43; Italy’s Reply, paras 7.84-7.87. In response to India’s assertion that Italy’s reading of Article 221 is not genuine, Italy argues that “‘incidents of navigation’ are one type of occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo”, and that India already acknowledged that the facts giving rise to this case

préparatoires of Article II, paragraph 1, of the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, which is almost identical to Article 221, paragraph 2, of the Convention, demonstrates that the phrase “‘incident of navigation’ is not a specific term of art, capable of precise definition”, but rather a “general expression, intended by the drafters of UNCLOS to cover a broad range of occurrences”.¹⁰⁷⁰

594. Italy further contends that a broad interpretation is consistent with the function as well as the *travaux préparatoires* of Article 97, as reflected in the records and commentary of the International Law Commission (hereinafter the “ILC”), confirm that “‘incident of navigation’ has a broad meaning, covering incidents of loss of life occurring without a collision”.¹⁰⁷¹
595. Italy also submits that the purpose of Article 97 is to “reverse the finding in the *Lotus* case”¹⁰⁷² and “prevent foreign prosecutions relating to collisions and any other incidents of navigation” on the basis that they constitute an “intolerable interference with international navigation”.¹⁰⁷³ Since the foreign penal proceedings against the Marines in India caused an intolerable interference with the international navigation of the Italian-flagged “*Enrica Lexie*” by causing it to divert from its course and be detained for ten weeks, Italy submits that the events in this case are exactly of the type that Article 97 was designed to prohibit.¹⁰⁷⁴
596. Finally, Italy rejects India’s position that Article 97 only applies to accidental conduct, and maintains that it also applies to deliberate conduct. Referring to the case of collisions, which clearly fall within the scope of Article 97, as an example, Italy notes that it clearly includes both deliberate and accidental collisions.¹⁰⁷⁵ Moreover, Article 97 must be capable of functioning

constituted an “incident”, hence the only question is whether it was one “of navigation”, the answer to which is positive. Italy’s Reply, para. 7.86.

¹⁰⁷⁰ Hearing Transcript, 9 July 2019, 188:18-22. *See also* Hearing Transcript, 9 July 2019, 186:17-188:22, referring to Francesco Berlingieri, *International Maritime Conventions (Volume III): Protection of the Marine Environment* (Informa Law from Routledge, 2015), p. 5.

¹⁰⁷¹ Italy’s Memorial, paras 10.46, referring to International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956); *Yearbook of the International Law Commission*, Vol. I, 286th meeting, 6 May 1955, p. 22, paras 37-38 (1955); *Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, paras 148, 150-151 (1951). *See also* Italy’s Reply, paras 7.74-7.76.

¹⁰⁷² Hearing Transcript, 9 July 2019, 183:3-4.

¹⁰⁷³ Hearing Transcript, 9 July 2019, 182:16-22, citing International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956). *See also* Italy’s Memorial, para. 10.48.

¹⁰⁷⁴ Hearing Transcript, 9 July 2019, 184:7-186:16.

¹⁰⁷⁵ Hearing Transcript, 9 July 2019, 189:16-24.

promptly once an incident occurs, at a time when it would be difficult to ascertain what actions were deliberate or accidental.¹⁰⁷⁶

(b) Interpretation and application of “person in the service of the ship” under Article 97, paragraph 1

597. Italy submits that Article 97, paragraph 1, applies not only to the Master and crew of the ship, but also to “any other person in the service of the ship” and that the Marines fall within the latter category.¹⁰⁷⁷ Since India does not deny that Article 97, paragraph 1, applies to both the crew and “other person[s] in the service of the ship”, Italy contends that the only point dividing the Parties is “whether ‘in the service of’ a ship means forming part of the crew of a ship”.¹⁰⁷⁸
598. According to Italy, persons “in the service of the ship” mean anyone other than its “passengers” and therefore constitute a category inclusive of, but broader than, the crew.¹⁰⁷⁹ Italy submits that this interpretation accords with the *travaux préparatoires* of Article 97, the context of the Convention, and relevant provisions in other conventions.
599. The dictionary meaning of “crew”, Italy observes, refers to persons who “work on and operate a ship”, while the definition of “service” involves, “more broadly, ‘helping or doing work for someone’.”¹⁰⁸⁰ Similarly, Italy submits that since the term “crew” is used in many other instances in the Convention where they intended to refer only to the crew, the use of a different phrase here implies a broader category.¹⁰⁸¹ Furthermore, Italy submits that Article 6 of the 1910 International Convention for Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea also uses “persons *in the service* of each salving vessel” instead of “crew”.¹⁰⁸² According to Italy,

¹⁰⁷⁶ Hearing Transcript, 9 July 2019, 190:2-26.

¹⁰⁷⁷ Italy’s Reply, paras 7.89, 7.98. *See also* Italy’s Memorial, paras 10.55-10.58.

¹⁰⁷⁸ Hearing Transcript, 9 July 2019, 191:21-192:10. *See also* Italy’s Reply, para. 7.90.

¹⁰⁷⁹ Hearing Transcript, 9 July 2019, 192:11-13. *See also* Italy’s Reply, paras. 7.93-7.94.

¹⁰⁸⁰ Hearing Transcript, 9 July 2019, 192:24-193:3, *citing* Lexico.com, “Crew”, Lexico English Dictionary, Thesaurus, & Grammar Help, available at <<https://www.lexico.com/definition/crew>>; Lexico.com, “Service”, Lexico English Dictionary, Thesaurus, & Grammar Help, available at <<https://www.lexico.com/definition/service>>.

¹⁰⁸¹ Italy’s Reply, para. 7.95, *referring to* Articles 27(3), 29, 73(2), 94(2)-(4), 98(1), 101(a), 102, 292(1), 292(3), 292(4) of UNCLOS. *See also* Hearing Transcript, 9 July 2019, 192:13-20, 194:7-23.

¹⁰⁸² Italy’s Reply, para. 7.96, *citing* Article 6 of International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea (1910) [emphasis added by Italy].

this demonstrates the drafters' intent "to extend the scope of application of the national law to the apportionment amongst *persons 'in the service of the ship' who are not members of the crew*".¹⁰⁸³

600. Italy submits that the Marines were "in the service of" the "Enrica Lexie" under Article 97, paragraph 1, because, according to Italy, the Marines were "tasked as they were with protecting the *Enrica Lexie*, including by identifying emergency routes in case of attack and countering any attack for the benefit of the ship, its crew and its cargo".¹⁰⁸⁴ Italy submits that Italian documents quoted by India – including the Template Agreement between the Ministry of Defence of Italy and the Ship Owner (hereinafter the "Template Agreement") and the Manual for Vessel Protection Detachments on Board Italian Merchant Vessels, 2011 (hereinafter the "VPD Manual") – list these tasks.¹⁰⁸⁵
601. Even if "persons in service of a ship" refers only to crew and the only categories of persons on a ship are masters, crew, and passengers, as India contends, Italy maintains that its claim still stands. This is because the Marines are neither passengers nor masters, so they must be crew, as demonstrated by the fact that they were listed on the crew list of the "Enrica Lexie".¹⁰⁸⁶

ii. Position of India

602. India denies that it breached Article 97, paragraph 1, of the Convention, and instead maintains that the provision does not apply to this dispute because it did not involve an "incident of navigation" and the Marines were not "persons in the service of the ship".

(a) *Interpretation and application of "incident of navigation" under Article 97*

603. India rejects Italy's interpretation of "incident of navigation" under Article 97. According to India, the phrase must not be interpreted narrowly or broadly, as Italy urges, but "in accordance with its terms".¹⁰⁸⁷ This is particularly important in this case, India contends, because the "system of

¹⁰⁸³ Italy's Reply, para. 7.96, citing Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), pp 66-67 [emphasis added by Italy]. See also Hearing Transcript, 9 July 2019, 195:5-196:6.

¹⁰⁸⁴ Italy's Reply, para. 7.98 [emphases omitted]. See also Hearing Transcript, 9 July 2019, 193:7-11.

¹⁰⁸⁵ Italy's Reply, para. 7.97, citing Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4.1 (**Annex IT-95(b)**); VPD Manual (Confidential Annex), pp 18-19 (**Annex IT-234**). See also Hearing Transcript, 9 July 2019, 193:12-194:2.

¹⁰⁸⁶ Hearing Transcript, 18 July 2019, 152:13-153:9.

¹⁰⁸⁷ Hearing Transcript, 12 July 2019, 152:22-153:5. See also India's Counter-Memorial, para. 6.35.

UNCLOS’ is a delicately crafted one” and “the outcome of multiple compromises”, which should be duly considered in the interpretative process.¹⁰⁸⁸

604. India submits that the ordinary meaning of “incident” is that of a “particular occurrence, especially one of minor importance”.¹⁰⁸⁹ While India maintains that the “shooting at another boat and the killing of two people clearly does not fit this definition”; even if it did, it would not trigger the application of Article 97 because it applies not just to incidents, but incidents of navigation.¹⁰⁹⁰ The term “navigation”, India submits, refers to “the act or process of navigating”, and “the process and business of directing the course of a vessel”, while the verb “to navigate” means “to move on water, over, or through ... in a ship or aircraft” and “to direct or manage [a ship] on its course”.¹⁰⁹¹ Thus to be “of navigation”, an incident must “occur[] in relation with the movement of the ship”, excluding “events not linked with the movement of the ship”.¹⁰⁹² Accordingly, India submits that for Article 97 to apply, “the ‘penal or disciplinary responsibility’ involved in an incident of navigation should arise from the operation of the ship” and a “navigational manoeuvre should be the cause of the damage suffered” such that “navigation [is] at the core of the incident”.¹⁰⁹³
605. In addition, India considers that the phrase “incident of navigation” refers only to “an *unintended and accidental* eventuality”¹⁰⁹⁴ and “does not include a deliberate act or omission, with the intention to cause harm to the safety of a ship, an individual or the environment”.¹⁰⁹⁵ India submits that, in any event, Article 97 “does not apply to the deliberate and reckless disproportionate use of force”.¹⁰⁹⁶
606. India also submits that Article 94, paragraph 7, and Article 221, paragraph 2, of the Convention, both of which refer to “incidents of navigation”, confirm the limited scope of Article 97.¹⁰⁹⁷ India

¹⁰⁸⁸ Hearing Transcript, 12 July 2019, 153:9-13.

¹⁰⁸⁹ Hearing Transcript, 12 July 2019, 156:6-8, *citing* Collins English Dictionary, Harper Collins Publishers, 12th ed., 2014.

¹⁰⁹⁰ Hearing Transcript, 12 July 2019, 156:9-14.

¹⁰⁹¹ Hearing Transcript, 12 July 2019, 156:16-157:5, *referring to* India’s Counter-Memorial, para. 6.36.

¹⁰⁹² India’s Counter-Memorial, paras 6.37, 6.39; India’s Rejoinder, para. 6.36. *See also* Hearing Transcript, 12 July 2019, 157:6-8.

¹⁰⁹³ Hearing Transcript, 12 July 2019, 157:8-14.

¹⁰⁹⁴ India’s Counter-Memorial, para. 6.38, *citing* C.R. Symmons, ‘Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea’ (2012) 51 *Military Law and Law of War Review* 21, at 54 [emphasis added by India].

¹⁰⁹⁵ India’s Rejoinder, para. 6.44, *citing* IMO Resolution MSC.255(84), “Adoption of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident”, 16 May 2008, para. 2.10.

¹⁰⁹⁶ India’s Counter-Memorial, para. 6.46.

¹⁰⁹⁷ Hearing Transcript, 12 July 2019, 157:15-20.

considers that Article 94, paragraph 7, is broader in scope than Article 97 because it applies not only to incidents of navigation, but also to marine casualties, which are different from, and constitute a larger category than, incidents of navigation.¹⁰⁹⁸ In addition, India agrees with Italy that this provision shows that the Convention envisages that an incident of navigation may “cause ‘loss of life or serious injury to nationals of another State’.”¹⁰⁹⁹ However, India maintains that since other types of incidents occurring at sea may have such consequences as well, it does not assist the Arbitral Tribunal in determining whether an incident of navigation has occurred in this case.¹¹⁰⁰ To India, Italy has “conflate[d] the incident itself and its consequences”.¹¹⁰¹

607. Similarly, India submits that Article 221, paragraph 2, does not, as Italy claims, show that “incidents of navigation” include “occurrence[s] on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo”.¹¹⁰² Rather, India submits that this provision is broader in scope than Article 97 because “collisions of vessels, stranding or other incident of navigation” and “occurrences on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo” are separated with a comma and “or” and are therefore distinguished from one another.¹¹⁰³ In India’s view, Article 221 thus refers to two different scenarios, of which Article 97 only applies to the former, and in any event, there was “no imminent threat to the *Enrica Lexie* or its cargo”.¹¹⁰⁴
608. India further disagrees with Italy’s submission that Article 97 should be interpreted broadly because, in accordance with its object and purpose, it must be capable of functioning the moment an incident occurs, before anything is known about its specific details, so as to determine which State is competent to investigate the incident.¹¹⁰⁵ To the contrary, India argues, Article 94, paragraph 7, demonstrates that any State having a ship flying its flag involved in an incident of navigation has the obligation to conduct an inquiry.¹¹⁰⁶ Therefore, India submits that the purpose of Article 97 is not “to determine which State is competent to *investigate the incident*”, but rather

¹⁰⁹⁸ Hearing Transcript, 12 July 2019, 159:3-14. *See also* India’s Counter-Memorial, para. 6.44.

¹⁰⁹⁹ Hearing Transcript, 12 July 2019, 158:17-20. *See also* Hearing Transcript, 12 July 2019, 158:11-15.

¹¹⁰⁰ Hearing Transcript, 12 July 2019, 158:20-24.

¹¹⁰¹ Hearing Transcript, 12 July 2019, 158:15-16.

¹¹⁰² Hearing Transcript, 12 July 2019, 159:22-25.

¹¹⁰³ India’s Counter-Memorial, paras 6.40, 6.43, 6.45.

¹¹⁰⁴ India’s Rejoinder, para. 6.54.

¹¹⁰⁵ Hearing Transcript, 12 July 2019, 161:2-162:7.

¹¹⁰⁶ Hearing Transcript, 12 July 2019, 162:7-10.

“which state may *institute criminal or disciplinary proceedings* in case of incidents of navigation”.¹¹⁰⁷

609. Rejecting Italy’s proposed broad definition of “incident of navigation”, India further points out that Italy’s own hypothesis – that if two ships passed at sea at a safe distance and for reasons unrelated to navigation, an assassin on one ship shot a passenger on the other ship as it were passing, it would not be an incident of navigation – reveals the artificial nature of its position.¹¹⁰⁸ Italy’s proposed hypothetical situation, in India’s view, would never occur because had one of the two ships changed course even slightly, it would become an incident of navigation, and in “no circumstance[s] would a ship maintain its course imperturbably after having been shot at”.¹¹⁰⁹
610. Turning to the *travaux préparatoires*, India disagrees with Italy’s view that it supports a broad interpretation of the phrase “incidents of navigation” and that, at the very least, it includes “incidents of loss of life” and “near and averted collisions”.¹¹¹⁰ To the contrary, India points out that during the ILC debate on the Draft Articles Concerning the Law of the Sea, with Commentaries, adopted by the ILC at its eighth session, in 1956 (hereinafter “ILC Draft Articles Concerning the Law of the Sea”),¹¹¹¹ no ILC member proposed to include the risk of collision or “a near and averted collision” within the meaning of the term, and all the incidents referred to concerned the manoeuvring of the ship and damage caused by the operation of the vessel.¹¹¹²
611. India also dismisses Italy’s reliance on Article II, paragraph 1, of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, done at Brussels on 29 November 1969, because that provision inspired Article 221, paragraph 2, not Article 97 of the Convention, and concerns pollution, not criminal jurisdiction.¹¹¹³ Instead, India considers more relevant the 1952 Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collisions and Other Incidents of Navigation, which the ILC considered when it developed Article 35 of the ILC Draft Articles Concerning the Law of the Sea, the predecessor to Article 97.¹¹¹⁴ In Berlingieri’s commentary to this convention, Article 1 of which is almost identical to Article 35 of the ILC Draft Articles Concerning the Law of the Sea and

¹¹⁰⁷ Hearing Transcript, 12 July 2019, 162:5-15 [emphases added].

¹¹⁰⁸ Hearing Transcript, 20 July 2019, 65:3-15.

¹¹⁰⁹ Hearing Transcript, 20 July 2019, 65:15-19.

¹¹¹⁰ Hearing Transcript, 12 July 2019, 163:5-22. India’s Rejoinder, para. 6.46, *citing* Italy’s Reply, para. 7.75.

¹¹¹¹ International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (1956).

¹¹¹² Hearing Transcript, 12 July 2019, 164:7-165:3, *citing* *Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, paras 149-151 (1951).

¹¹¹³ Hearing Transcript, 12 July 2019, 166:11-17.

¹¹¹⁴ Hearing Transcript, 12 July 2019, 166:18-167:5.

Article 97 of the Convention, he considered that “other incidents of navigation” to be “incidents caused either by the execution or non-execution of a manoeuvre or by the non-observance of regulations, even if no collision has taken place”.¹¹¹⁵ In this respect, India rejects as false Italy’s claim that India only raised this definition in its oral submissions, pointing out that it was already mentioned in paragraph 6.37 of its Rejoinder.¹¹¹⁶ According to India, a series of other conventions “from which the substance of Article 97 was borrowed” and the commentary of these conventions similarly confirm its interpretation.¹¹¹⁷ India cites, *inter alia*, the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels; and the Convention on Maritime Liens and Mortgages.¹¹¹⁸

612. Applying this definition, India argues that the “Enrica Lexie” incident is not an “incident of navigation” because the Marines’ firing of shots at the “St. Antony” and its crew was not linked to the movement of the vessels, not caused by manoeuvres of either of the vessels,¹¹¹⁹ and did not interrupt the movement of the “Enrica Lexie”.¹¹²⁰ Instead, India contends that the incident “was caused by two armed persons on board the *Enrica Lexie*, which were not part of the crew and were not responsible for the navigation”.¹¹²¹ According to India, this incident related to “firing from weapons, [which] was totally unrelated to navigation”.¹¹²²
613. India rejects Italy’s attempt to link the conduct of the “Enrica Lexie” – particularly its alleged violation of the COLREGS – to firing of shots that caused damage to the “St. Antony” and the death of the fishermen. In India’s view, the damage was caused by the Marines, not the Master; by the rifles used by the Marines, not by a movement of the ship; and before, not after the ship changed direction.¹¹²³ Accordingly, India submits that it was “not the manoeuvre, or failure to

¹¹¹⁵ Hearing Transcript, 12 July 2019, 167:6-168:3, *citing* Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), pp 7-8, 40, 42, 143, 506.

¹¹¹⁶ Hearing Transcript, 20 July 2019, 63:2-18.

¹¹¹⁷ India’s Rejoinder, para. 6.36. *See also* India’s Rejoinder, paras 6.36-6.44, *referring to* Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), pp 7-8, 40, 42, 143, 506.

¹¹¹⁸ India’s Rejoinder, paras 6.36-6.44.

¹¹¹⁹ India’s Rejoinder, para. 6.45.

¹¹²⁰ India’s Counter-Memorial, para. 6.37, *referring to* Piroli Report (Confidential Annex), pp 2-6, 2-17, 3-13 (**Annex IT-233**); (Confidential Annex) (**Annex IT-238**); Declaration of Carlo Noviello, 24 February 2012 (**Annex IT-148**). *See also* Hearing Transcript, 12 July 2019, 168:23-169:6.

¹¹²¹ India’s Rejoinder, para. 6.45.

¹¹²² India’s Rejoinder, para. 6.45. *See also* India’s Counter-Memorial, para. 6.37, *citing* Judgment of the High Court of Kerala, 29 May 2012, para. 26 (**Annex IT-17**); India’s Rejoinder, para. 6.40; Hearing Transcript, 12 July 2019, 168:15-16.

¹¹²³ India’s Rejoinder, para. 6.49, *referring to* Italy’s Reply, para. 7.78. *See also* Hearing Transcript, 12 July 2019, 170:2-11.

execute one, which caused the firing incident; it is the imagination of the marines, their recklessness".¹¹²⁴ India contends that these alleged facts further exclude the ILC Special Rapporteur's hypothesis (relied on by Italy) that "cases of loss of life arising out of an accident attributable to the master of a ship, without any collision" fall within the definition of "incident of navigation", because the contested incident is attributable to the Marines instead of the Master.¹¹²⁵

614. Moreover, in India's view, the Marines were not concerned with the risk of collision as Italy submits, but were instead "doing their own thing out there".¹¹²⁶ Indeed, India points out, not only has it established that there was no risk of collision,¹¹²⁷ but none of the evidence and witness testimony to which Italy cites to prove the risk of collision mentions either of the Marines.¹¹²⁸
615. Even if a "near and averted collision" did occur, and even if the "Enrica Lexie" had increased speed and changed course earlier, India maintains that it was not the cause of death of the fishermen or of the damage to the "St. Antony", and hence, does not constitute an "accident of navigation due to failure to observe international rules compelling another ship to carry out some manoeuvre and damage its engines thereby".¹¹²⁹ This, in India's view, is the significant difference between this case and the *S.S. "Lotus"* case, where the damage and loss of life was directly attributable to the collision of the two vessels that was caused by an incident of navigation.¹¹³⁰

(b) *Interpretation and application of "person in the service of the ship" under Article 97, paragraph 1*

616. India submits that Article 97, paragraph 1, does not apply because it only covers "the Master of the ship and its crew" but not the Marines.¹¹³¹ In the alternative, India submits that "the Marines were not in the service of the *Enrica Lexie*".¹¹³²

¹¹²⁴ Hearing Transcript, 20 July 2019, 71:5-8.

¹¹²⁵ India's Rejoinder, para. 6.50, citing *Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, para. 151 (1951).

¹¹²⁶ Hearing Transcript, 20 July 2019, 67:14-17.

¹¹²⁷ See Part V, Section B.2(a) above summarising India's position on the likelihood of a collision.

¹¹²⁸ Hearing Transcript, 20 July 2019, 67:17-22.

¹¹²⁹ India's Rejoinder, para. 6.48, citing *Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 336, para. 150 (1951). See also Hearing Transcript, 12 July 2019, 170:12-24.

¹¹³⁰ Hearing Transcript, 12 July 2019, 170:25-26.

¹¹³¹ India's Counter-Memorial, para. 6.47.

¹¹³² India's Rejoinder, para. 6.32.

617. India argues that Article 97, paragraph 1, “only applies to the Master of the ship and its crew”¹¹³³ and refers to the explanation given by the Special Rapporteur when addressing the relevant draft article presented to the ILC for discussion, in which he clarified that the article applied to “the master or crew”.¹¹³⁴ In this regard, India rejects as baseless Italy’s arguments that the Special Rapporteur was not addressing the expression “person in service of a ship”, nor was he being exhaustive.¹¹³⁵
618. In addition, India points out that, other than in Article 97, the only three categories of persons mentioned elsewhere in the Convention are the master of the ship, its crew, and its passengers.¹¹³⁶ Article 98, paragraph 1, of the Convention, India submits, further confirms that these are the only three categories of persons present on board a private ship which the Convention contemplates.¹¹³⁷ Since Article 98 only refers to the three categories, an interpretation of the phrase, “other persons in service of the ship”, to include persons other than the crew and its passengers would lead to the absurd result that, in the event of a collision, the duty to render assistance under Article 98 would not extend to such “persons in service of a ship”.¹¹³⁸
619. India further submits that the *travaux préparatoires* confirm its interpretation by showing that the provision was included to avoid “intolerable interference[s] with international navigation”, and VPDs “are not concerned with navigation”.¹¹³⁹
620. According to India, the purpose of Article 97, paragraph 1, which stems from Article 35 of the ILC Draft Articles Concerning the Law of the Sea, is to protect international navigation.¹¹⁴⁰ India submits that the master and crew are not only material but indispensable to navigation.¹¹⁴¹ Further, India submits that the Special Rapporteur explained that “the persons concerned” refers to the

¹¹³³ India’s Counter-Memorial, para. 6.47.

¹¹³⁴ India’s Counter-Memorial, para. 6.47, citing *Yearbook of the International Law Commission*, Vol. I, 286th Meeting, 6 May 1955, p. 22, para. 43 (1955).

¹¹³⁵ Hearing Transcript, 12 July 2019, 175:20-176:15.

¹¹³⁶ Hearing Transcript, 12 July 2019, 174:9-16.

¹¹³⁷ Hearing Transcript, 12 July 2019, 174:17-20.

¹¹³⁸ Hearing Transcript, 12 July 2019, 174:21-175:6.

¹¹³⁹ India’s Counter-Memorial, para. 6.48, citing International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956); referring to J.P.A. François, ‘Second Report on the Regime of the High Seas’, *Yearbook of the International Law Commission*, Vol. II, p. 78, para. 21 (1951).

¹¹⁴⁰ India’s Rejoinder, para. 6.56, citing *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nordquist et al., eds. 1995) Vol. III, p. 169, para. 97 (hereinafter “Virginia Commentary”); International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956).

¹¹⁴¹ India’s Rejoinder, para. 6.56.

“master and crew” only in response to Spiropoulos’s complaint that it was not clear to whom the former phrase referred.¹¹⁴² India contends that comments referring to the exclusion of passengers were made only *ex abundanti cautela* and were outside the object of the discussion.¹¹⁴³

621. Thus, based on this interpretation, India concludes that Article 97, paragraph 1, does not apply to the Marines because they cannot be considered crew.¹¹⁴⁴ India contends that this point is confirmed by Italian law,¹¹⁴⁵ the Template Agreement,¹¹⁴⁶ the VPD Manual,¹¹⁴⁷ Italy’s own explanation,¹¹⁴⁸ and the communication between the “Enrica Lexie” and the Indian authorities.¹¹⁴⁹

622. Even if the Arbitral Tribunal accepts Italy’s interpretation that the Marines are “other persons in service of the ship”, India submits that this case still does not fall within the scope of Article 97 because the Marines act in service of Italy, not the ship.¹¹⁵⁰

(c) **Interpretation and Application of Article 97, paragraph 3**

i. Position of Italy

623. Italy claims that India breached Italy’s exclusive flag-State jurisdiction under Article 97, paragraph 3, by ordering the detention of the “Enrica Lexie”.¹¹⁵¹

624. According to Italy, the Parties only disagree on one issue with respect to the interpretation of this provision, namely “whether it prevents arrest and detention only outside the territorial sea, or also within the territorial sea”.¹¹⁵² Italy submits that Article 97, paragraph 3, “does prohibit in the

¹¹⁴² India’s Rejoinder, para. 6.57, referring to *Yearbook of the International Law Commission*, Vol. I, 286th Meeting, 6 May 1955, p. 22, para. 43 (1955).

¹¹⁴³ India’s Rejoinder, para. 6.57.

¹¹⁴⁴ India’s Counter-Memorial, para. 6.50.

¹¹⁴⁵ India’s Counter-Memorial, para. 6.50, referring to Law Decree no. 963 of the Ministry of Transport of Italy, 7 October 2011, 7 October 2011, Article 3(1) (**Annex IT-94**).

¹¹⁴⁶ India’s Counter-Memorial, para. 6.50, referring to Article 4 of the Template Agreement between the Ministry of Defence of Italy and the Ship Owner (**Annex IT-95(b)**).

¹¹⁴⁷ India’s Counter-Memorial, para. 6.51, referring to VPD Manual (Confidential Annex), pp 18-19 (**Annex IT-234**).

¹¹⁴⁸ India’s Counter-Memorial, para. 6.52, referring to Italy’s Memorial, para. 3.28; (Confidential Annex) (**Annex IT-235(c)**).

¹¹⁴⁹ India’s Counter-Memorial, para. 6.54, referring to Statement of Rohithesh Kumar, Assistant Commandant, Coast Guard District HQ 4, Kochi, 18 February 2012 (**Annex IT-134**).

¹¹⁵⁰ India’s Counter-Memorial, para. 6.53, referring to Decree no. 266 of the Ministry of Interior of Italy, 28 December 2012, Article 9(1) (**Annex IT-180**). See also Hearing Transcript, 12 July 2019, 176:16-177:9.

¹¹⁵¹ Italy’s Memorial, para. 10.61; Italy’s Reply, para. 7.100.

¹¹⁵² Hearing Transcript, 9 July 2019, 197:19-23.

territorial sea arrest and detention in respect of incidents of navigation occurring on the high seas or in the EEZ”.¹¹⁵³

625. While India maintains that this provision only prohibits States from arresting and detaining ships while they remain in the high seas or the exclusive economic zone, Italy contends that this interpretation is untenable because it would “very significantly reduce the protection provided in Article 97 against intolerable interference with international navigation”.¹¹⁵⁴ Moreover, the plain terms of the provision provide for a blanket prohibition of arrests and detentions, and Italy’s interpretation is consistent with the purpose of Article 97, namely to reverse the finding in the *S.S. “Lotus”* decision where the ship was similarly not arrested or detained on the high seas but at Constantinople, in Turkish territory.¹¹⁵⁵ Italy also dismisses the two commentaries on which India relies for its claim as irrelevant and unhelpful to its case.¹¹⁵⁶
626. Furthermore, Italy argues that, according to Article 94, paragraph 7, of the Convention, India’s competence *vis-à-vis* the “*Enrica Lexie*” incident is limited to holding an “inquiry”, which Italy submits does not include inquiries into penal responsibility for the incident,¹¹⁵⁷ and that inquiry has already been concluded.¹¹⁵⁸ According to Italy, Article 97, paragraph 3, makes clear that “India had no right to arrest or detain the *Enrica Lexie* even as a measure of investigation”.¹¹⁵⁹
627. Applying this to the facts, Italy claims that India violated its obligations under Article 97, paragraph 3, of the Convention in light of the facts that the Assistant Solicitor General of India admitted the arrest and detention of the “*Enrica Lexie*” before the High Court of Kerala;¹¹⁶⁰ that the Ministry of External Affairs of India directed the police to detain the “*Enrica Lexie*”,¹¹⁶¹ that a Circle Inspector of Police issued a letter dated 26 February 2012 to the Master of the “*Enrica*

¹¹⁵³ Hearing Transcript, 9 July 2019, 197:24-198:1.

¹¹⁵⁴ Hearing Transcript, 9 July 2019, 198:19-21.

¹¹⁵⁵ Hearing Transcript, 9 July 2019, 199:5-20.

¹¹⁵⁶ Hearing Transcript, 9 July 2019, 198:22-100:10, *referring to* India’s Rejoinder, para 6.61, *citing* Virginia Commentary, Vol. III, p. 169, para. 97; India’s Rejoinder, para. 6.62, *citing* Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 724.

¹¹⁵⁷ Hearing Transcript, 18 July 2019, 154:1-155:10, *referring to* Code of the International Standards and Recommended Practices for a Safety Investigation into a Maritime Casualty or Marine Incident, annexed to Resolution MSC.255(84), adopted 16 May 2008, p. 4, para. 4.

¹¹⁵⁸ Italy’s Memorial, para. 10.63, *referring to* Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012”, 12 March 2012 (**Annex IT-161**).

¹¹⁵⁹ Italy’s Memorial, para. 10.63.

¹¹⁶⁰ Italy’s Memorial, para. 10.61; Italy’s Reply, para. 7.100, both *referring to* Statement filed by the Assistant Solicitor General of India before the High Court of Kerala, 15 March 2012, para. 7 (**Annex IT-162**).

¹¹⁶¹ Italy’s Memorial, para. 10.62; Italy’s Reply, para. 7.101, *referring to* Inventory, prepared by Jacob J., Assistant Commissioner of Police, DCRB Kollam, 18 February 2012, p. 176 (**Annex IT-131**).

Lexie” directing the ship not continue her voyage;¹¹⁶² and that the Supreme Court of India on 2 May 2012 ordered the “Enrica Lexie” to commence her voyage.¹¹⁶³

628. Italy rejects India’s argument that India did not violate this provision because the Indian authorities were invited to board the “Enrica Lexie”.¹¹⁶⁴ Not only did Italy not consent to the boarding of the “Enrica Lexie”, but even if they did, this would be irrelevant because Italy did not consent to the detention of the “Enrica Lexie”.¹¹⁶⁵

629. Therefore, since India has not contested any of these facts, Italy submits that India was in breach of Article 97, paragraph 3, for “every day of the two and a half months prior to 2 May 2012”.¹¹⁶⁶

ii. Position of India

630. India rejects Italy’s arguments that it breached Article 97, paragraph 3. India offers several reasons in support of its view.

631. First, India reiterates that Article 97 is not applicable to the present case because, as India argued before,¹¹⁶⁷ the “Enrica Lexie” incident does not constitute a collision or an incident of navigation.¹¹⁶⁸

632. Second, India submits that the detention of the “Enrica Lexie” occurred in an Indian port and not on the high seas. According to India, “[t]his is crucial since Article 97 is only applicable to the high seas” and not India’s territorial sea.¹¹⁶⁹ In support of this claim, India cites the *United Nations Convention on the Law of the Sea 1982: A Commentary* (hereinafter “Virginia Commentary”) which states that “[i]n areas other than the high seas, the Convention explicitly refers to the arrest or detention of a ship by a State other than the flag State for the purpose of instituting civil or judicial proceedings for specific purposes”.¹¹⁷⁰

¹¹⁶² Italy’s Memorial, para. 10.62, citing *M.T. Enrica Lexie and Another v. Doramma and Others* (2012) 6 SCC 760, p. 762, para. 5 (**Annex IT-181**); Italy’s Reply, para. 7.101.

¹¹⁶³ Italy’s Memorial, para. 10.62; Italy’s Reply, para. 7.101, both referring to *M.T. Enrica Lexie and Another v. Doramma and Others* (2012) 6 SCC 760, p. 769, para. 29 (**Annex IT-181**).

¹¹⁶⁴ Italy’s Reply, para. 7.104, referring to India’s Counter-Memorial, paras 6.60-6.62. See also Hearing Transcript, 9 July 2019, 201:23-202:4.

¹¹⁶⁵ Italy’s Reply, para. 7.104. See also Hearing Transcript, 9 July 2019, 202:4-10.

¹¹⁶⁶ Italy’s Reply, para. 7.102. See also Hearing Transcript, 9 July 2019, 201:20-23.

¹¹⁶⁷ See paras 603-615 above.

¹¹⁶⁸ India’s Rejoinder, para. 6.60.

¹¹⁶⁹ India’s Rejoinder, para. 6.61; Hearing Transcript, 12 July 2019, 179:20-180:5.

¹¹⁷⁰ India’s Rejoinder, para. 6.61, citing Virginia Commentary, Vol. III, p. 169, para. 97.8(d). See also Hearing Transcript, 12 July 2019, 180:23-181:17.

633. India further submits that the Convention is silent on the military use of the exclusive economic zone as well as other unlawful acts committed therein.¹¹⁷¹ Hence, according to India, relevant customary rules are reflected in the *S.S. “Lotus”* case.¹¹⁷² India contends that Article 97 overturned only those parts of the *S.S. “Lotus”* judgment which concern collision and incidents of navigation but not “other cases of criminal jurisdiction”.¹¹⁷³
634. Finally, India submits that it did not breach Article 97, paragraph 3, because the Indian authorities “have not used force or measures of constraint to investigate on board the *Enrica Lexie* [...] [but] were invited to board the vessel”.¹¹⁷⁴ India cites the following alleged documents in support of its argument:¹¹⁷⁵
- The e-mail exchange between the Master of the “*Enrica Lexie*” and the MRCC Mumbai dated 15 February 2012 discussing the invitation to board the vessel.¹¹⁷⁶
 - The letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police dated 23 March 2012 reflecting the invitation.¹¹⁷⁷
 - The updated spontaneous statement of the Master of the “*Enrica Lexie*”.¹¹⁷⁸

(d) **Analysis of the Arbitral Tribunal**

635. The Parties differ over the interpretation and application of Article 97 of the Convention, which, by virtue of Article 58, applies to the exclusive economic zone.
636. Italy submits that Article 97 applies to the incident of 15 February 2012 because the Marines were persons “in the service of the ship” during a “collision or any other incident of navigation”,¹¹⁷⁹ and Italy is the flag State of the “*Enrica Lexie*”. Italy contends that only it had the authority to

¹¹⁷¹ India’s Rejoinder, para. 6.63, citing *The “Enrica Lexie” Incident (Italy v. India)*, Provisional Measures, Order of 24 August 2015, Dissenting Opinion of Judge Ndiaye, ITLOS Reports 2015, pp 10-11.

¹¹⁷² India’s Rejoinder, para. 6.63.

¹¹⁷³ India’s Rejoinder, para. 6.64, citing Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), pp 703, 723.

¹¹⁷⁴ India’s Counter-Memorial, para. 6.60.

¹¹⁷⁵ India’s Counter-Memorial, para. 6.61.

¹¹⁷⁶ E-mail from the Master of the “*Enrica Lexie*” to MRCC Mumbai, 23:39 (IST), 15 February 2012, and E-mail from MRCC Mumbai to the Master of the “*Enrica Lexie*”, 21:14 (CET), 15 February 2012 (**Annex IT-122**).

¹¹⁷⁷ Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012”, 12 March 2012 (**Annex IT-161**).

¹¹⁷⁸ Statement of Umberto Vitelli (**Annex IT-216**).

¹¹⁷⁹ Italy’s Memorial, para. 10.58; Italy’s Reply, para. 7.61.

institute penal or disciplinary proceedings against the Marines and detain the “Enrica Lexie”, as either the flag State of the ship or the Marines’ State of nationality.¹¹⁸⁰ In Italy’s view, India breached Article 97, paragraphs 1 and 3, of the Convention by violating Italy’s exclusive jurisdiction to prosecute the Marines and by detaining the “Enrica Lexie”.¹¹⁸¹

637. India denies that it breached any provision in Article 97 of the Convention and instead maintains that the Article does not apply to this dispute because it did not involve an “incident of navigation”, and the Marines were not persons “in the service of the ship”.¹¹⁸²

i. The Definition of “Incident of Navigation” under Article 97 of the Convention

638. The phrase “incident of navigation” is not defined in the Convention. In accordance with Article 31, paragraph 1, of the VCLT, therefore, it must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.¹¹⁸³

639. The dictionary meaning of the term “incident” is a “distinct occurrence or event, esp[ecially] one that attracts general attention or is noteworthy in some way”.¹¹⁸⁴ The term “navigation” refers to the “action or practice of travelling on water; sailing”; the “art or science of directing a ship, boat”,¹¹⁸⁵ and the verb “to navigate” means to “sail, direct, manage, a ship”.¹¹⁸⁶ Thus, based on the ordinary meaning of the phrase, an “incident of navigation” should involve, at least, a distinct or noteworthy event that occurs in relation to the movement and directing or manoeuvring of a ship.

640. The term “incident of navigation” appears in two other instances in the Convention.

641. First, Article 221, paragraph 2, provides:

For the purposes of this article, “maritime casualty” means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

¹¹⁸⁰ Italy’s Memorial, para. 10.57.

¹¹⁸¹ Italy’s Memorial, paras 10.58, 10.62.

¹¹⁸² India’s Counter-Memorial, paras 6.32-6.33; India’s Rejoinder, paras 6.32-6.33.

¹¹⁸³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 340, Article 31(1).

¹¹⁸⁴ See *Shorter Oxford English Dictionary*, Vol. I (6th ed. 2007) at 1351.

¹¹⁸⁵ See *Shorter Oxford English Dictionary*, Vol. I (6th ed. 2007) at 1897.

¹¹⁸⁶ See *Shorter Oxford English Dictionary*, Vol. II (6th ed. 2007) at 1897.

642. This provision distinguishes between (i) “a collision of vessels”; (ii) “stranding or other incident of navigation”; and (iii) “other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo”. The first two categories, namely, a collision and a “stranding or other incident of navigation”, are but examples of occurrences “on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo”. Accordingly, “incident of navigation”, within the context of the Convention, must be taken to refer to an occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.
643. This is corroborated by the further context provided by Article 94, paragraph 7, of the Convention, which addresses “incidents of navigation” “causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment”.
644. The object and purpose of Article 97 of the Convention sheds further light on the meaning of “incident of navigation”. In its commentary to Article 35 of the ILC Draft Articles Concerning the Law of the Sea, the precursor to Article 97 of the Convention, the ILC explained that the provision was intended to reverse the judgment rendered by the PCIJ in the *S.S. “Lotus”* case.¹¹⁸⁷ That case turned on the question whether Turkey could exercise penal jurisdiction over the French officer-in-charge for the purposes of holding him to account for a high seas collision between his ship (the “Lotus”) and a Turkish ship (the “Boz-Kourt”) that resulted in the loss of eight lives aboard, and severe damage to, the latter, “which was cut in two [and] sank”.¹¹⁸⁸
645. The PCIJ’s judgment, which decided that both France and Turkey were entitled to exercise penal jurisdiction over the French officer, was reversed with “the object of protecting ships and their crews from the risk of penal proceedings before foreign courts in the event of collision on the high seas, since such proceedings may constitute an intolerable interference with international navigation”.¹¹⁸⁹ Article 35 of the ILC Draft Articles Concerning the Law of the Sea accordingly reserved exclusive penal jurisdiction to either the flag State of the ship on which the accused person serves, or the State of which the accused person is a national, with the latter addition made

¹¹⁸⁷ International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 1) (1956).

¹¹⁸⁸ *S.S. “Lotus” (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, para. 14.

¹¹⁸⁹ International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265, at p. 281 (commentary to draft Article 35, para. 1) (1956).

“in order to enable States to take penal or disciplinary measures against their nationals serving on board foreign vessels who are accused of causing collisions”.¹¹⁹⁰

646. It is thus apparent that an exception to the otherwise prevailing rules on allocating jurisdiction was created specifically for a situation where the master or any other person in the service of a ship are at risk of facing penal proceedings before foreign courts in respect of navigational conduct on the high seas; such risk would typically arise only where some form of damage or harm has occurred as a result of navigation.
647. Additionally, pursuant to Article 32 of the VCLT, “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31”.¹¹⁹¹
648. In this regard, the *travaux préparatoires* of Article 97 of the Convention similarly support the view that “incident of navigation” refers to an event that occurs in relation to the movement and manoeuvring of the ship and which is alleged to have caused some form of serious damage or harm to the ships involved, their cargo, or the individuals on board.
649. During the discussion in the ILC of Article 35 of the ILC Draft Articles Concerning the Law of the Sea, all examples of “incidents of navigation” that were raised concerned the manoeuvring of the ship and damage caused by the operation of the vessel.¹¹⁹² In its commentary to Article 35 of the ILC Draft Articles Concerning the Law of the Sea, the ILC also described “incident of navigation” as including “damage to a submarine telegraph, telephone or high-voltage power cable or to a pipeline”.¹¹⁹³ It is on this basis that a scholarly commentary to the Convention, to which the Parties referred during the Hearing,¹¹⁹⁴ considered that “other incidents of navigation”

¹¹⁹⁰ International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265, at p. 281 (commentary to draft Article 35, para. 1) (1956).

¹¹⁹¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 340, Article 32.

¹¹⁹² Hearing Transcript, 12 July 2019, 164:7-165:3, citing *Yearbook of the International Law Commission*, Vol. I, 121st meeting, 10 July 1951, p. 327, paras 149-151 (1951).

¹¹⁹³ International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 281 (commentary to Article 35, para. 2) (1956). See also Virginia Commentary, Vol. III, pp 168-169, para. 97.8(b); Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 723, para. 6.

¹¹⁹⁴ Hearing Transcript, 9 July 2019, 187:18-188:22; Hearing Transcript, 12 July 2019, 167:6-168:4.

were “incidents caused either by the execution or non-execution of a manoeuvre or by the non-observance of regulations, even if no collision has taken place”.¹¹⁹⁵

650. On the basis of the above analysis, in the view of the Arbitral Tribunal, the phrase “incident of navigation” within the meaning of Article 97, paragraph 1, of the Convention, refers to an event that (i) occurs in relation to the movement and manoeuvring of a ship; and (ii) which allegedly causes some form of serious damage or harm, including to the ships involved, their cargo, or the individuals on board.

ii. Application of Article 97, paragraph 1, of the Convention to the Incident of 15 February 2012

651. In order to answer the allegation that India has breached Article 97, paragraph 1, of the Convention, the Arbitral Tribunal must determine whether an “incident of navigation” occurred on 15 February 2012 and, therefore, whether Article 97, paragraph 1, is applicable in the present case. In order to constitute an “incident of navigation”, in turn, there must have occurred manoeuvring or movement of a ship that resulted in serious damage or harm, including to the ships involved, their cargo, or the individuals on board.

652. The Arbitral Tribunal observes that it is undisputed between the Parties that no collision occurred between the “Enrica Lexie” and the “St. Antony” on 15 February 2012. In the view of the Arbitral Tribunal, there was a risk of collision. However, no damage resulted from the manoeuvring or movement of a ship. While the “St. Antony” was indeed damaged and two Indian fishermen on board lost their lives during the incident, this damage and mortal harm were not caused by the movement or manoeuvring of either ship.

653. The Arbitral Tribunal is unconvinced by the argument that the damage to the “St. Antony” and the death of the Indian fishermen related to navigation because the origin of the entire incident was the course steered by each of the two approaching vessels, that then led the Marines to apprehend a threat of piracy and fire a series of warning shots in the direction of the approaching fishing vessel, thereby causing damage to the “St. Antony” and harm to its crew. The link between any navigational aspect of the incident, on the one hand, and the damage and harm caused, on the other hand, is too tenuous to sustain the claim that the firing of shots by the Marines related to navigation.

¹¹⁹⁵ Francesco Berlingieri, *International Maritime Conventions (Volume II): Navigation, Securities, Limitation of Liability and Jurisdiction* (Informa Law from Routledge, 2015), p. 40.

654. Unlike the *S.S. "Lotus"* case, where the death of the eight Turkish nationals on board the "Boz-Kourt" was directly caused by the collision of the two vessels, thus raising questions of criminal responsibility of the lieutenant on watch duty with responsibility for the navigation of the "Lotus",¹¹⁹⁶ the direct cause of the death of the two Indian fishermen on board the "St. Antony" would have been the firing of shots by the Marines, who themselves were not involved with the navigation of the "Enrica Lexie". This is consistent with the division of responsibilities set out in Article 4.2 of the Template Agreement and the VPD Manual, both of which make clear that "[d]ecisions regarding navigation and manoeuvring the Vessel shall be included within the competence of the Ship master" and not the VPD.¹¹⁹⁷
655. While the acts for which the Marines are being prosecuted, and the harm caused by those acts, took place while two ships were sailing in the exclusive economic zone of India, they are not caused by the movement or manoeuvring of those ships and cannot be said to have been part of an "incident of navigation".
656. For the foregoing reasons, no "incident of navigation" has occurred that would trigger the application of Article 97, paragraph 1, of the Convention. While there also is some doubt as to whether the Marines qualify as "other person[s] in service of the ship", given that they are not involved with its navigation or manoeuvring, there is no need for the Arbitral Tribunal to further address this question, since it has already established that Article 97 does not apply in this dispute.
657. Accordingly, Italy's claim that India has violated Article 97, paragraph 1, of the Convention is rejected.

iii. Application of Article 97, paragraph 3, of the Convention in the Case of the Incident of 15 February 2012

658. The Parties disagree as to whether Article 97, paragraph 3, prohibits arrest and detention of foreign vessels in the territorial sea in respect of incidents of navigation occurring on the high seas. While Italy submits that such arrest and detention are prohibited, India maintains that such prohibition is only applicable to the high seas.
659. The Arbitral Tribunal observes that it follows from the title of Article 97 that it governs the exercise of penal jurisdiction only in matters of collision or any other incident of navigation. As

¹¹⁹⁶ *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, paras 14-15.

¹¹⁹⁷ Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4.2 (**Annex IT-95(b)**); VPD Manual (Confidential Annex), pp 18-19 (**Annex IT-234**). *See also* Hearing Transcript, 9 July 2019, 193:12-194:2.

has been determined by the Arbitral Tribunal in the preceding analysis on a possible applicability of paragraph 1 of Article 97, in the case of the incident that took place on 15 February 2012, there was no collision or any other incident of navigation during that incident. Consequently, Article 97, paragraph 3, is not applicable in the present case as well.

3. Alleged Violations by India of Articles 100 and 300 of UNCLOS

660. The Parties differ over their interpretation and application of Articles 100 and 300 of the Convention, which address, respectively, the duty to cooperate in the repression of piracy, and good faith and abuse of rights. Article 100 provides:

Article 100

Duty to cooperate in the repression of piracy

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

661. Article 300 of the Convention provides:

Article 300

Good faith and abuse of rights

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

662. Italy submits that India breached its obligations under Article 100 by failing to recognise and uphold the immunity of the Marines and by asserting jurisdiction over the “Enrica Lexie” and the Marines in respect of the incident. Further, Italy claims that India committed this breach in bad faith and abused its right to cooperation in the repression of piracy by using it as a pretext to obtain custody over the “Enrica Lexie” and the Marines, thereby further breaching its obligations under Article 100, read in conjunction with Article 300. India denies Italy’s claims as baseless.

663. Since the Parties’ claims turn on findings with regard to a common set of contested facts, namely those surrounding the apprehension of a threat of piracy on the day of the incident, the Arbitral Tribunal will first summarise the Parties’ positions in respect of these facts. Thereafter, the Arbitral Tribunal will proceed to summarise the Parties’ arguments regarding Article 100, read in conjunction with Article 300.

(a) Reasonable Apprehension of a Threat of Piracy

664. The Parties disagree as to whether there was a general threat of piracy on the day of the shooting incident, and whether there was an apprehension of a threat of piracy from the small craft – the “St. Antony”, which appears to have led the Marines to have recourse to fire arms.

i. Piracy Situation off the Coast of Kerala

665. India submits that there was no serious threat of piracy off the southwest coast of India.¹¹⁹⁸ It states that the southwest coast of India is a “popular fishing zone, with a large number of fishing grounds off the coast”.¹¹⁹⁹ India adds:

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia [hereinafter “ReCAAP”] has recommended that ship masters navigate with extreme caution when approaching up to 50 nautical miles from the Indian coast because of the presence of intense fishing activity in the area. [...] ReCAAP points to IMO circular MSC 1/1334 of 23 June 2009, and highlights the need to appreciate sufficient grounds before suspecting that a fishing vessel is in fact a pirate skiff, stating that fishing boats should not be presumed to be pirate skiffs without verification.¹²⁰⁰

666. According to Italy, there was a “very real and serious piracy risk posed to the *Enrica Lexie* as she crossed the waters off the Kerala coast in February 2012”.¹²⁰¹ Italy asserts that between 1 January 2010 and 15 February 2012, “about 35 incidents of piracy and armed robbery were reported” in the “waters off the western coast of India”.¹²⁰² Twelve incidents “(including the ‘Enrica Lexie’ Incident) occurred near the coast of Kerala”.¹²⁰³

667. India contends that these twelve “incidents of piracy” were either “cases of mistaken identity (where investigations verified that the suspected pirate skiff was in fact a fishing vessel), incidents

¹¹⁹⁸ India’s Rejoinder, para. 4.9.

¹¹⁹⁹ India’s Counter-Memorial, para. 1.25.

¹²⁰⁰ India’s Counter-Memorial, para. 1.26, referring to “Special Report on Fishing Activities off Southwest Coast of India”, SR 01/2012, ReCAAP Information Sharing Centre, 29 May 2012, p. 7 (**Annex IN-7**). See also Hearing Transcript, 11 July 2019, 64:21-65:8.

¹²⁰¹ Italy’s Memorial, para. 2.9. See also Hearing Transcript, 8 July 2019, 155:4-6.

¹²⁰² Italy’s Memorial, para. 2.7.

¹²⁰³ Italy’s Memorial, para. 2.7. Italy states:

This figure has been derived using the IMO, Global Integrated Shipping Information System website (<https://gisis.imo.org/Public/Default.aspx>). The query entered into the database had the parameters: “Coastal State is India”, “Incident date is between 2010-01-01 and 2012-02-15” and “Geographical area of incident is Indian Ocean”. This query generated 45 results. For five of those results, geographic coordinates were not given. Another five occurred off the eastern coast of India”.

Italy’s Memorial, para. 2.7, n. 13. See also Hearing Transcript, 8 July 2019, 60:2-22, 149:2-11.

of robbery (but not piracy), or plainly false or unsubstantiated”.¹²⁰⁴ According to India, no case of piracy has occurred in the relevant part of India’s exclusive economic zone since June 2011,¹²⁰⁵ and, as a result of the efforts of the Indian Navy and Coast Guard, piracy was virtually eradicated in India’s maritime zones by 2012.¹²⁰⁶

668. According to India, “there was no serious threat of piracy off the Indian coast on the day of the ‘incident’.”¹²⁰⁷ In response, Italy notes that at the time of the incident, the International Maritime Organisation (hereinafter the “IMO”) had “recently” declared, and the Indian Ministry of Shipping advised on, the area as a High Risk Area. Italy thus avers that focus should not be placed only on “the day”, but also on this broader context.¹²⁰⁸
669. Italy submits that it had adopted measures to combat the piracy threat, such as the deployment of military VPD, under a legal framework established in 2011.¹²⁰⁹ Under the Best Management Practices for Protection against Somalia Based Piracy, August 2011 (hereinafter the “BMP4”),¹²¹⁰ the deployment of VPD was the “recommended option when considering armed guards”.¹²¹¹ The BMP4 were issued to “assist ships to avoid, deter or delay piracy attacks in the High Risk Area” and were endorsed by the IMO.¹²¹² The High Risk Area, in turn, is described in the BMP4 as a place “where pirate activity and/or attacks have taken place” and in which a “high state of readiness and vigilance should be maintained”.¹²¹³ The BMP4 also specifically delimits the High

¹²⁰⁴ India’s Counter-Memorial, para. 1.31. *See also* India’s Counter-Memorial, paras 1.32; Hearing Transcript, 11 July 2019, 17:13-18:24.

¹²⁰⁵ India’s Counter-Memorial, para. 1.27, *referring to* Government of India, Ministry of Shipping Notice No. 7, 7 March 2012 (**Annex IN-9**). *See also* Hearing Transcript, 11 July 2019, 17:3-12.

¹²⁰⁶ Hearing Transcript, 11 July 2019, 16:20-17:2.

¹²⁰⁷ India’s Rejoinder, para. 4.12.

¹²⁰⁸ Italy’s Reply, para. 3.8.

¹²⁰⁹ Italy’s Memorial, paras 3.5-3.8. *See also* Hearing Transcript, 8 July 2019, 14:1-4; 130:8-20; Hearing Transcript, 18 July 2019, 36:7-16.

¹²¹⁰ Best Management Practices for Protection against Somalia Based Piracy, August 2011, produced and supported by, *inter alia*, International Chamber of Shipping, International Association of Independent Tanker Owners, the Society of International Gas Tanker and Terminal Operators, Operation Ocean Shield, and the UKMTO.

¹²¹¹ Italy’s Memorial, para. 2.23, *citing* BMP4: Best Management Practices for Protection against Somalia Based Piracy, v. 4, August 2011, para. 8.15 (**Annex IT-90**).

¹²¹² Italy’s Memorial, para. 2.4, *citing* BMP4: Best Management Practices for Protection against Somalia Based Piracy, v. 4, August 2011, para. 1.1 (**Annex IT-90**).

¹²¹³ Italy’s Memorial, para. 2.4, *citing* BMP4: Best Management Practices for Protection against Somalia Based Piracy, v. 4, August 2011, para. 2.4 (**Annex IT-90**). *See also* Hearing Transcript, 8 July 2019, 59:16-60:1.

Risk Area and on that basis, “the ‘Enrica Lexie’ Incident occurred within the [High Risk Area]”.¹²¹⁴

ii. Navigation of the “Enrica Lexie” with Respect to Perceived Risk of Piracy

670. According to Italy, in the days leading up to the “Enrica Lexie” incident, the “Enrica Lexie” was acting under instruction to follow a “counter-piracy course”.¹²¹⁵ Italy describes the precautions taken by the “Enrica Lexie” in accordance with these instructions:

There was an armed VPD on board. The deck was wound with barbed wire. The crew undertook counter-piracy drills. The voyage route was chosen to minimise piracy risks. The ship was headed to the north Indian Ocean to join a naval convoy to cross the Gulf, and then to Port Said. Portholes were shut and darkened.¹²¹⁶

671. After departing from the port of Galle on 14 February 2012, the VPD and crew aboard the “Enrica Lexie” jointly conducted, more than once, a “*Pirate Attack* exercise” in order to “make sure that the crew and the [VPD] team could familiarise themselves” with procedures for responding to a threat of pirate attack.¹²¹⁷

672. According to India, on 15 February 2012, the weather was good with clear visibility in the area off the Indian coast where the “Enrica Lexie” was navigating. Captain Vitelli testified that he received piracy-related information on a daily basis and that, on the day in question, “[t]here was no specific piracy threat at the Arabian Sea”.¹²¹⁸ Moreover, India points out that according to Captain Fredy’s testimony, fishermen in the area in which he was fishing had not experienced any incident of collision or piracy before 15 February 2012.¹²¹⁹

673. However, Italy indicates that Captain Vitelli was “acutely aware of the risks”.¹²²⁰ Captain Vitelli testified that, at the time of the incident, he recalled the pirate attack on the “Enrica Lexie”’s sister

¹²¹⁴ Italy’s Memorial, para. 2.5.

¹²¹⁵ Italy’s Rejoinder, para. 2.11.

¹²¹⁶ Hearing Transcript, 18 July 2019, 36:9-15.

¹²¹⁷ Log Book of the Master of the “Enrica Lexie”, p. 1 (**Annex IT-14**); Hearing Transcript, 15 July 2019, 21:6-23:1.

¹²¹⁸ India’s Counter-Memorial, para. 1.28, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of “Enrica Lexie”, 9 August 2013, p. 45 (**Annex IN-28**). *See also* Hearing Transcript, 11 July 2019, 63:3-6; India’s Rejoinder, paras 4.9-4.12, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, “Enrica Lexie”, 9 August 2013, p. 59 (**Annex IN-29**).

¹²¹⁹ Hearing Transcript, 20 July 2019, 4:2-7.

¹²²⁰ Hearing Transcript, 18 July 2019, 36:5-6.

ship, the “Savina Caylyn, with the use of RPGs, of rocket-propelled grenades, that had resulted in the crew being held hostage for almost eleven months”.¹²²¹

674. India submits, in response, that the incident involving the “Savina Caylyn” took place “a year earlier, in February 2011, at a location that was more than 800 kilometres from India’s northern coast” which was “nowhere near where the events of 15th February 2012 occurred”.¹²²²

iii. Appearance and Movement of the “St. Antony”

675. Italy submits that the appearance and conduct of the “St. Antony” inspired a “very real apprehension of piracy threat” in those on board the “Enrica Lexie”. India challenges this assertion, contending that multiple members of the “Enrica Lexie”’s crew testified to the contrary, that the “St. Antony” appeared to be a regular fishing vessel and that there could be no real apprehension of the threat of a pirate attack.

(a) *Position of Italy*

676. Italy submits that the appearance of the “St. Antony” provided a legitimate basis for apprehension that the “St. Antony” posed a threat of piracy. In support of this claim, Italy relies on the following evidence.
677. Captain Noviello testified that he observed that the “St. Antony” had tyres as fenders. Fenders prevent damage to a vessel when approaching a wharf or another vessel and are typically pulled in while navigating in open seas. He testified that the “boat had a dozen fenders on the outside”, which led him to contemplate as to why “they have the fenders on when sailing so far out”,¹²²³ as though “preparing to come alongside another vessel”.¹²²⁴ Captain Noviello also observed on the boat persons with black belts across their shoulders.¹²²⁵ In addition, he testified that the “Enrica Lexie” attempted to contact the “St. Antony” multiple times on the emergency VHF channel without a response.¹²²⁶

¹²²¹ Hearing Transcript, 18 July 2019, 35:20-36:6, *referring to* Hearing Transcript, 15 July 2019, 34:10-22.

¹²²² Hearing Transcript, 20 July 2019, 3:17-4:1.

¹²²³ Italy’s Memorial, para. 4.16, *citing* (Confidential Annex), p. 1 (**Annex IT-261**). *See also* (Confidential Annex), p. 2 (**Annex IT-236**); Hearing Transcript, 18 July 2019, 131:17-19, *referring to* Hearing Transcript, 15 July 2019, 125:17-20.

¹²²⁴ Italy’s Memorial, para. 4.16.

¹²²⁵ Hearing Transcript, 18 July 2019, 131:15-17, *referring to* Hearing Transcript, 15 July 2019, 125:9-14.

¹²²⁶ Hearing Transcript, 18 July 2019, 130:1-9, *referring to* Hearing Transcript, 15 July 2019, 111:14-24.

678. Italy also cites Sergeant Girone’s account of what he saw through binoculars when the craft was at a distance of 300 metres:

at least two members of the crew were equipped with long-barrel rifles slung over their shoulders, with a posture clearly aimed at boarding our vessel. Bulk equipment was also visible on the starboard of the fishing boat’s deck, which could be assessed as boarding instruments and tools.¹²²⁷

679. Italy opposes India’s argument that Sergeant Girone’s account is “self-serving since he undoubtedly would have wanted to justify his actions when questioned by Admiral Piroli”.¹²²⁸ In response, Italy claims that contemporaneous evidence “confirms that Sergeant Girone had been saying since the beginning that he thought he saw armed persons on board the small craft”.¹²²⁹ In this regard, Italy relies on an e-mail sent by Captain Vitelli shortly after the incident stating that, “Security team sighted 6 armed people on board the boat”.¹²³⁰

680. Italy disagrees with India’s position that, should Sergeant Girone’s testimony be disregarded, the Marines cannot have perceived the risk of piracy.¹²³¹ Italy alleges in this regard that the apprehension of a piracy threat during the “*Enrica Lexie*” incident was warranted because small crafts, including fishing boats are “routinely used by pirates”, and the “kinematics, or motion, of the approaching vessel” led the Marines to perceive that the craft was on an “interception course” and to don their equipment.¹²³² Italy also submits that a number of other factors contributed to this perception, such as:

the navigational trajectory of the *St Antony*, i.e., that it was on a collision course or near collision course with the *Enrica Lexie*; its failure to respond to signals from the *Enrica Lexie*; the short and rapidly diminishing distance between the two vessels; the *St Antony*’s failure to respond to warning shots; and physical characteristics including that the craft was navigating far out to sea with its fenders out, which could have been in anticipation of coming alongside a vessel such as the *Enrica Lexie*.¹²³³

¹²²⁷ Italy’s Memorial, para. 4.23, *citing* (Confidential Annex), p. 2 (**Annex IT-237**) [emphases omitted].

¹²²⁸ Hearing Transcript, 8 July 2019, 192:12-17, *citing* India’s Rejoinder, para. 4.20.

¹²²⁹ Hearing Transcript, 8 July 2019, 193:15-18.

¹²³⁰ Hearing Transcript, 8 July 2019, 193:22-23, *citing* E-mail from the Master of the “*Enrica Lexie*” to Fratelli D’Amato SpA, 13:47 (CET), 15 February 2012 (**Annex IT-111**). *See also* Hearing Transcript, 8 July 2019, 194:1-5; Hearing Transcript, 18 July 2019, 127:2-18.

¹²³¹ Hearing Transcript, 8 July 2019, 194:17-20, *referring to* India’s Rejoinder, paras 4.21-4.23.

¹²³² Hearing Transcript, 8 July 2019, 195:5-197:11, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNAV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**). *See also* Italy’s Rejoinder, para. 2.13.

¹²³³ Italy’s Rejoinder, para. 2.10. *See also* Hearing Transcript, 8 July 2019, 197:12-18, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); (Confidential Annex) (**Annex IT-261**); Hearing Transcript, 18 July 2019, 36:17-25, 129:15-21, 131:1-5.

681. Italy questions the probative weight of evidence presented in the NIA Report, upon which India relies. First, Italy notes that none of the crew members' statements is contemporaneous, as they were made between 16 and 18 months after the incident.¹²³⁴ Second, Captain Vitelli had sent most of the crew members in question to the citadel, and according to Captain Vitelli's testimony at the Hearing, he had ordered the crew members on the bridge not to get close to the glass, and hence did not "think that they got close to the glass to see if any armed people were present on the boat or not".¹²³⁵ Third, Italy alleges that "when one examines the full statements carefully [...] there is an interesting coincidence of language on key issues that inevitably raises questions about the reliability of these statements".¹²³⁶
682. Furthermore, Italy submits that Captain Freddy's statement that he "abruptly helmed the boat away" so as to avoid a collision further demonstrates the circumstances to which those on the "Enrica Lexie" responded.¹²³⁷
683. Finally, Italy avers that India's own official notice one month after the incident that "[t]he ship's security guards had assumed the innocent fishermen to be pirates" contemporaneously acknowledges that the Marines did perceive that the "Enrica Lexie" was being approached by pirates.¹²³⁸

(b) Position of India

684. India points out that in the NIA Report, based on an interrogation of the crew members of the "Enrica Lexie", the incident was described as follows:

On 15.02.2012 at 1630 hrs. IST, Enrica Lexie was sailing at a position of Latitude 9 degree 17.2 Minutes North and Longitude 076 Degree 01.8 minutes E in Arabian Sea and 20.5 nautical miles away from the nearest base, Thrikkunnappuzha, Alappuzha District of Kerala and the fishing vessel St Antony was about 100 metres away from the ship. The Italian Marines [...] opened unprovoked firing which continued even after the death of the two fishermen thereby endangering the safe navigation of the ship [...] [Captain Freddy] was also present on the boat, immediately turned away and started sailing towards the coast [...] The authorities were successful in identifying the ship involved in the incident and caused to sail it back and anchor at Kochi port for the purpose of joining in the enquiry.¹²³⁹

¹²³⁴ Hearing Transcript, 18 July 2019, 39:11-20.

¹²³⁵ Hearing Transcript, 18 July 2019, 128:16-18. *See also* Hearing Transcript, 18 July 2019, 39:21-40:1, 127:22-128:23, *referring to* Hearing Transcript, 11 July 2019, 84:3-87:19.

¹²³⁶ Hearing Transcript, 18 July 2019, 40:2-7.

¹²³⁷ Italy's Rejoinder, para. 2.14, *citing* First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, p. 2 (**Annex IT-110**).

¹²³⁸ Hearing Transcript, 8 July 2019, 198:8-19, *citing* Government of India, Ministry of Shipping Notice No. 7, 7 March 2012 (**Annex IN-9**) para. 4. *See also* Hearing Transcript, 18 July 2019, 132:11-133:11.

¹²³⁹ NIA Report (Confidential Annex), para. 9.1 (**Annex IN-27**).

685. India submits that the NIA investigation involved the examination of 64 witnesses and over 180 documents and material objects.¹²⁴⁰ As part of the investigation, the NIA interviewed all members of the crew of the “Enrica Lexie”. The testimony of the members of the crew indicated that there was no threat emanating from the “St. Antony”. Specifically, statements by the crew members “ruled out any sighting of armed persons, and also the shape and make of the boat was far from a typical pirate skiff which usually carries ladders and hooks”.¹²⁴¹ In light of their testimony, the investigation report concluded as follows:

The accused [Massimiliano Latorre and Salvatore Girone][...] while they were deployed as the mariners in the Italian Ship MT Enrica Lexie, had fired from the ship with automatic weapons, without any reasonable apprehension of threat, on the fishing boat owned by the complainant [...] which resulted in the death of two fishermen, caused damage to the fishing boat and affected the safe navigation of the fishing boat dangerously. The accused therefore, had committed the offences of murder, attempt to commit murder, mischief and act endangering the safe navigation of the fishing boat.¹²⁴²

686. India considers that these statements are tenable. First, contrary to Italy’s argument, the fact that they were given 18 months after the incident does not render them unreliable.¹²⁴³ Second, Captain Vitelli and Captain Noviello made statements to the NIA during the same period, in which they noted that they did not see any armed men or boarding equipment on the craft.¹²⁴⁴ Third, in response to Captain Vitelli’s testimony that he had sent the non-essential crew members to the citadel (and hence they could not have been observing the small craft or the people on it), India submits that the crew “had been observing the St Antony with binoculars for some time – a good 20 minutes – before the shooting started, and none of them saw anything suspicious”.¹²⁴⁵ Fourth, even though, according to Captain Vitelli’s testimony, the crew members on the bridge had been asked to stay away from the glass, Captain Vitelli testified that using binoculars “you can still see if there is a fishing boat approaching, if there is another vessel approaching”.¹²⁴⁶

¹²⁴⁰ NIA Report (Confidential Annex), para. 11.2 (**Annex IN-27**).

¹²⁴¹ NIA Report (Confidential Annex), para. 11.25 (**Annex IN-27**).

¹²⁴² NIA Report (Confidential Annex), para. 10 (**Annex IN-27**).

¹²⁴³ Hearing Transcript, 20 July 2019, 13:10-14.

¹²⁴⁴ Hearing Transcript, 20 July 2019, 13:14-22, *referring to* Statement of Witness in connection with the NIA investigation, Statement of Mr. Vitelli Umberto, Master of “Enrica Lexie”, 9 August 2013, p.46 (**Annex IN-28**); Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, “Enrica Lexie”, 9 August 2013, p. 56 (**Annex IN-29**).

¹²⁴⁵ Hearing Transcript, 20 July 2019, 14:16-19.

¹²⁴⁶ Hearing Transcript, 20 July 2019, 15:16-17, *citing* Hearing Transcript, 15 July 2019, 38:18-26.

687. India submits that, apart from Sergeant Girone,¹²⁴⁷ none of the crew members of the “Enrica Lexie” claimed to have seen any armed men or boarding equipment on the fishing boat.¹²⁴⁸ In support of this claim, India cites the following statements.

688. First, the Chief Officer of the “Enrica Lexie”, James Mandley Samson, stated:

I heard a bunch of gunshots from the bridge wing. I took the binocular and went to the AFT window (behind window) and sighted a boat drawing away. Then the Commander of the armed guard shouted at me to go away from the glass window. The sighted boat looked like a fishing boat and there was no armed personnel in that fishing boat. There were no hooks and ladders in the boat.¹²⁴⁹

689. Second, Able Sea Man Narendra Kumar Naran Fulbariya in his statement recorded that he “noticed it as a fishing boat and two men on board, they were unarmed”. He added that “[t]here was no ladder and hooks on the boat”.¹²⁵⁰

690. Third, the duty officer, Second Officer Gupta stated that “[w]hen I heard the firing, the boat was about 200 mtrs away from the ship. It was a normal fishing boat and I didn’t see anything unusual with it. I have not seen any person armed in the boat”.¹²⁵¹ He added that “I didn’t press the VDR since to me it was not a suspicious boat, it was a normal fishing boat”.¹²⁵²

691. Fourth, Captain Vitelli stated:

When I saw the boat from the bridge I have not seen any armed person on the board of the boat. I did not see any ladders or hooks in the boat. I have not cross checked with Fulbaria

¹²⁴⁷ India contends that Sergeant Girone’s account of the incident is “self-serving since he undoubtedly would have wanted to justify his actions when questioned by Admiral Piroli”. Hearing Transcript, 8 July 2019, 192:10-17, citing India’s Rejoinder, para. 4.20, *referring to* (Confidential Annex) (**Annex IT-237**). See also India’s Counter-Memorial, para. 2.44; Hearing Transcript, 11 July 2019, 89:7-90:1.

¹²⁴⁸ India’s Counter-Memorial, para. 2.24, *referring to* NIA Report (Confidential Annex), paras 11.15, 11.18 (**Annex IN-27**).

¹²⁴⁹ India’s Counter-Memorial, para. 2.25, citing Statement of Witness in connection with the NIA Investigation, Statement of Shri Victor James Mandley Samson, p. 48 (**Annex IN-31**). See also India’s Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 87:6-13.

¹²⁵⁰ India’s Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Fulbariya Narendra Kumar Naran, p. 52 (**Annex IN-32**). [emphasis added by India omitted] See also India’s Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 84:12-85:4.

¹²⁵¹ India’s Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 61 (**Annex IN-30**); Hearing Transcript, 11 July 2019, 85:5-10.

¹²⁵² India’s Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Shri Sahil Gupta, p. 61 (**Annex IN-30**); Hearing Transcript, 11 July 2019, 85:12-15. See also India’s Rejoinder, para. 4.17.

about the presence of the armed men and other crew members. Only the Italian Naval Guards conveyed the message to me in Italian language.¹²⁵³

692. Fifth, Captain Noviello stated:

On 1545 hrs, I was in the Wheel House and I noticed in the Radar a target and I took the Binocular and looked into it, it appears to be a fishing boat. I didn't notice any hooks, ladder or any drum like material in the boat.¹²⁵⁴

693. Captain Noviello added that when the boat was about 100 metres away, he still "couldn't find any hooks, ladders or any armed men in the boat".¹²⁵⁵

694. Sixth, Ordinary Seaman Shri Kandamochu Thirumala Rao stated:

I was also asked to do watch duty. At that time ship time was 30 minutes behind Indian Standard time (IST). There was a Binocular in the bridge for the watchman on duty. It was a new one. I could see far away objects. I was on the bridge two minutes prior to 1600 hrs ship time. I have seen Fulbariya watching a fishing boat approaching the vessel. I also took the Binocular and watched it. It was a fishing boat. Nobody was seen in the boat armed. I did not see any ladders or hooks in the fishing boat.¹²⁵⁶

695. India concludes that, in light of these multiple contrasting accounts, Sergeant Girone's statement that he spotted two armed men on the fishing boat is "self-serving" and "unsustainable".¹²⁵⁷

696. With regard to Italy's argument that the "kinematics" of the "St. Antony" contributed to an apprehension of the risk of piracy, India submits that the "St. Antony" was entitled to maintain its course and speed, as it had the right of way under Rule 15 of the COLREGS, while the "Enrica Lexie", under Rule 16, was obliged to "take early and substantial action to keep well clear". Thus, India argues that the "St. Antony"'s navigation, which was "not only permitted but expressly

¹²⁵³ India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA Investigation, Statement of Mr. Vitelli Umberto, Master of "Enrica Lexie", 15 June 2013, p. 46 (**Annex IN-28**). *See also* India's Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 84:3-11.

¹²⁵⁴ India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, "Enrica Lexie", 9 August 2013, p. 56 (**Annex IN-29**). *See also* India's Rejoinder, para. 4.17; Hearing Transcript, 11 July 2019, 85:24-86:6.

¹²⁵⁵ India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA investigation, Statement of Mr. Carlo Noviello, Master Super NM, "Enrica Lexie", 9 August 2013, p. 57 (**Annex IN-29**). *See also* Hearing Transcript, 11 July 2019, 86:8-11.

¹²⁵⁶ India's Counter-Memorial, para. 2.25, *citing* Statement of Witness in connection with the NIA investigation, Statement of Shri Kandamochu Thirumala Rao, 2 July 2013, p. 63 (**Annex IN-33**). *See also* Hearing Transcript, 11 July 2019, 86:15-87:1.

¹²⁵⁷ India's Counter-Memorial, para. 2.44; India's Rejoinder, paras 4.19-4.20, *citing* (Confidential Annex) (**Annex IT-237**). *See also* Hearing Transcript, 11 July 2019, 89:7-90:1.

called for under the COLREGS scarcely justified the marines assuming that it was a pirate attack, let alone opening fire on the boat”.¹²⁵⁸

697. Concerning the testimony of Captain Noviello that he saw men with black belts on the fishing boat, India asserts that this was not mentioned in any of Captain Noviello’s past statements.¹²⁵⁹
698. Finally, India points to the testimony of Captain Fredy that his boat was not continuing to move towards the other vessel, that he did not think there was a risk of collision, and that he abruptly helmed away “to prevent more casualties and damage to the boat, not to avoid a collision”.¹²⁶⁰

iv. The Reaction on Board the “Enrica Lexie”

699. Italy submits that the “Enrica Lexie” incident is comparable to the incident involving the “San Padre Pio”, and there was a “very real apprehension of vulnerability to pirate attack by those on board the Enrica Lexie”.¹²⁶¹ Italy underscores the significance of the “Enrica Lexie”’s Log Book entries¹²⁶² and contemporaneous reports of the incident in the immediate days following 15 February 2012 and contends that they are “very compelling” in supporting the apprehension of a threat of piracy by those on board the “Enrica Lexie”.¹²⁶³
700. India, on the other hand, submits that there was “no reasonable apprehension of a security threat” or “piracy attack” on the “Enrica Lexie”.¹²⁶⁴
701. Italy contends, relying on the testimony of Captain Noviello, that the “Enrica Lexie” continuously attempted to communicate with the “St. Antony” by calling on channel 16 of the VHF radio, but received no response.¹²⁶⁵ In addition, Italy submits that, as the craft approached the “Enrica Lexie” from approximately 800 metres, the Marines implemented various visual signals to warn

¹²⁵⁸ Hearing Transcript, 11 July 2019, 70:22-71:2, *referring to* Rules 15 and 16 of International Regulations for Preventing Collisions at Sea, 1972.

¹²⁵⁹ Hearing Transcript, 20 July 2019, 13:23-14:9.

¹²⁶⁰ Hearing Transcript, 20 July 2019, 17:20-21:4, *referring to* Hearing Transcript, 15 July 2019, 153:24-25; 162:1-11.

¹²⁶¹ Hearing Transcript, 8 July 2019, 61:21-62:8, *referring to* *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 [forthcoming], para.129.

¹²⁶² Hearing Transcript, 8 July 2019, 151:16-152:26, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 1 (**Annex IT-14**).

¹²⁶³ Hearing Transcript, 8 July 2019, 63:2-9. *See also* Italy’s Reply, paras 4.17, 4.19; Italy’s Rejoinder, paras 2.4-2.7, 2.12; Hearing Transcript, 8 July 2019, 152:11-26; Hearing Transcript, 18 July 2019, 35:20-36:6.

¹²⁶⁴ India’s Rejoinder, paras 4.9-4.24, 9.5.

¹²⁶⁵ Hearing Transcript, 18 July 2019, 36:17-20; 130:1-16, *referring to* Hearing Transcript, 15 July 2019, 111:10-24.

the craft, including flashing a search light¹²⁶⁶ and showing their weapons above their heads, in order to “signal the presence of military personnel onboard”.¹²⁶⁷ Nevertheless, Italy contends, the small craft continued to approach the “Enrica Lexie”.¹²⁶⁸

702. Responding to the above, India argues that Captain Noviello’s testimony that the “Enrica Lexie” sought to establish radio communication with the “St. Antony” through VHF is untenable. In this regard, India points to Captain Fredy’s testimony that he had the VHF on high volume while he lay down, and that after the incident, he made contact with other boats and with his brother-in-law through VHF communication.¹²⁶⁹ India additionally notes that according to the Piroli Report, “no attempt to use VHF emergency channel in order to get radio contact with the fishing boat was made”¹²⁷⁰ despite that “an attempt to hail the craft should have been made using the VHF emergency channel, at least to clarify the parameters of its navigation”.¹²⁷¹
703. Italy asserts that upon monitoring the trajectory of the “St. Antony”, the VPD marines donned their equipment, including “bulletproof vests and helmets [...] all before any warning shots were fired and before anything needed to be justified to anyone”.¹²⁷²
704. India, in response, alleges that the Marines, contrary to the VPD Manual and the operational directives of CINCPAC, ¹²⁷³ opened fire before there was any evidence either of “armed men or pirate boarding equipment”, as it was only when the fishing boat was about 300 metres from the “Enrica Lexie” that Sergeant Girone said that he spotted “at least two members of the crew” with

¹²⁶⁶ Italy’s Memorial, para. 4.18, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**).

¹²⁶⁷ Italy’s Memorial, para. 4.19, *citing* (Confidential Annex), p. 1 (**Annex IT-236**). *See also* (Confidential Annex) (**Annex IT-237**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

¹²⁶⁸ Italy’s Memorial, para. 4.19, *referring to* Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); (Confidential Annex) (**Annex IT-237**).

¹²⁶⁹ Hearing Transcript, 20 July 2019, 10:18-11:22, *referring to* Hearing Transcript, 15 July 2019, 149:21-22, 151:5-24.

¹²⁷⁰ Hearing Transcript, 20 July 2019, 12:11-16, *citing* Piroli Report (Confidential Annex), p. 3-16 (**Annex IT-233**).

¹²⁷¹ Hearing Transcript, 20 July 2019, 12:20-13:1, *citing* Piroli Report (Confidential Annex), p. 4-5 (**Annex IT-233**).

¹²⁷² Hearing Transcript, 8 July 2019, 195:21-196:2.

¹²⁷³ Hearing Transcript, 20 July 2019, 16:13-19, *referring to* VPD Manual (Confidential Annex) (**Annex IT-234**); Piroli Report (Confidential Annex), p. 1-20 (**Annex IT-233**).

long-barrel rifles slung over their shoulders.¹²⁷⁴ With regard to the warning shots fired by the Marines, India states:

It strains belief that, under the circumstances, the Marines could keep track of where each of their rounds landed, particularly given that only nine of the total of 20 rounds fired, and just two of the eight rounds fired from the closest distance (100 meters), were tracer bullets that could be visually followed.¹²⁷⁵

705. Italy points to Captain Vitelli’s announcement three times on the vessel’s public address system that “[w]e are under pirate attack. This is not a drill”,¹²⁷⁶ together with the fact that he sent all non-essential crew to the citadel.¹²⁷⁷ According to Italy, these actions during the incident coupled with an SSAS message sent by Captain Vitelli immediately after the “Enrica Lexie” incident, when the “St. Antony” navigated away from the “Enrica Lexie”, demonstrate that he perceived the “nature of distress” as a “piracy/armed attack”.¹²⁷⁸
706. Italy concludes that the Marines may have been wrong about whether the “Enrica Lexie” was being approached by a pirate skiff, “but there is no credible basis to doubt that the marines considered that the Enrica Lexie was at risk of a pirate attack” both by reference to these statements and the general context in that part of the Indian Ocean during the time of the incident.¹²⁷⁹

(b) **Interpretation and Application of Article 100 (Duty to Cooperate), in Conjunction with Article 300 (Good Faith and Abuse of Rights)**

i. Position of Italy

707. Italy submits that India breached Article 100 of the Convention, which imposes a strong, and not merely hortatory, duty on all States to cooperate to the fullest extent in the repression of piracy. In particular, Italy claims that India breached this Article by failing to recognise and uphold the

¹²⁷⁴ India’s Rejoinder, paras 4.22-4.23. *See also* Hearing Transcript, 11 July 2019, 90:21-91:7; Hearing Transcript, 20 July 2019, 16:6-10.

¹²⁷⁵ India’s Counter-Memorial, para. 2.27, *referring to* Piroli Report (Confidential Annex), pp 2-7-2-8 (**Annex IT-233**).

¹²⁷⁶ Italy’s Reply, para. 4.19, *citing* Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**). *See also* Hearing Transcript, 8 July 2019, 191:21-23.

¹²⁷⁷ Italy’s Reply, para. 4.19, *referring to* (Confidential Annex), p. 1 (**Annex IT-236**).

¹²⁷⁸ Italy’s Memorial, para. 4.28, *citing* Ship Security Alarm System Message sent out by the “Enrica Lexie” on 15 February 2012 (**Annex IT-3**). *See also* Hearing Transcript, 8 July 2019, 191: 23-192:1.

¹²⁷⁹ Hearing Transcript, 8 July 2019, 197:19-198:3.

immunity of the Marines and by asserting jurisdiction over the “*Enrica Lexie*” and the Marines in respect of the incident.¹²⁸⁰

708. In this regard, Italy submits:

If the Tribunal finds that India breached any of Articles 87, 92 or 97 of UNCLOS, and as a result orders that India cannot exercise criminal jurisdiction over the Marines, it will not be necessary for the Tribunal to determine Italy’s claim under Article 100. If, however, the Tribunal were to find [...] that India was not in breach of any of these Articles, and finds [...] that the *Enrica Lexie* decided to change course for Kochi voluntarily, then India would nonetheless have breached Article 100 of UNCLOS, read with Article 300 of UNCLOS. This Section proceeds on those alternative bases.¹²⁸¹

709. In addition, Italy submits that India violated Article 100, read in conjunction with Article 300. According to Italy, it is well established that Article 300 cannot be breached on its own, but only in conjunction with other obligations under the Convention.¹²⁸² Conversely, a mere breach of a provision of the Convention itself is not sufficient to constitute a breach of Article 300 – it must be established that the provision was violated in breach of good faith.¹²⁸³

710. Applying this to the facts, Italy submits that India violated Article 100 in bad faith, and is therefore in violation of Article 300 as well, by “directing the *Enrica Lexie* to assist with an investigation of an incident of piracy as a pretext for obtaining custody of the *Enrica Lexie* and the Marines”.¹²⁸⁴ Italy submits that such instruction constitutes an abuse of right because, in its view, although India purported to require cooperation to repress piracy, India’s real motive was to obtain custody of those who allegedly fired the shots. In support of this claim, Italy submits that India informed the Marines that they were under investigation for murder only after they arrived in Kochi.¹²⁸⁵

¹²⁸⁰ Italy’s Memorial, paras 10.66-10.68. *See also* Hearing Transcript, 10 July 2019, 22:19-23, 24:23-25:8, 30:15-31:6; Hearing Transcript, 18 July 2019, 98:7-24, 99:9-22.

¹²⁸¹ Italy’s Reply, para. 7.117 [emphases omitted].

¹²⁸² Hearing Transcript, 10 July 2019, 31:7-33:11, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 303; *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], paras 232-308.

¹²⁸³ Hearing Transcript, 10 July 2019, 32:20-33:3, *citing* *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 243.

¹²⁸⁴ Italy’s Memorial, para. 10.68. *See also* Italy’s Memorial, para. 10.69, *referring to* Declaration of Sahil Gupta, 15 February 2012 (**Annex IT-118**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. *Enrica Lexie*, Flag Italy, on 15.02.2012”, 12 March 2012, p. 7 (**Annex IT-161**); “Coast Guard, fishermen made a smart move”, *The Times of India* (Electronic Edition), 18 February 2012 (**Annex IT-39**). *See also* Italy’s Reply, para. 7.120; Hearing Transcript, 10 July 2019, 22:24-23:1, 25:9-14.

¹²⁸⁵ Italy’s Memorial, para. 10.70, *referring to* “Coast Guard, fishermen made a smart move”, *The Times of India* (Electronic Edition), 18 February 2012 (**Annex IT-39**); “Smart move brings ship to Kochi”, *The New Indian Express*, 18 February 2012 (**Annex IT-137**). *See also* Italy’s Reply, para. 7.125.

711. Furthermore, Italy claims that the e-mail from MRCC Mumbai, in which the “Enrica Lexie” was requested to proceed to Kochi for “further deposition/clarification” regarding a “piracy incident/firing incident”, confirms that the Indian authorities wanted to create the impression that the assistance was for a piracy incident because by that time they already knew that no pirates or pirate vessels were involved.¹²⁸⁶ Italy cites communications between Indian authorities to support its view that their real motivation was to investigate the alleged shooting of the fishermen instead of any incident of piracy.¹²⁸⁷ Italy further submits that the “misleading of the *Enrica Lexie* by Indian authorities” was characterised as a “trick” by the Indian Coast Guard and as a “mystification of facts” by Admiral Piroli.¹²⁸⁸
712. Italy also disagrees with India’s claim that Articles 100 and 300 do not apply in this case because no piracy act was involved in the “Enrica Lexie” incident. In Italy’s view, Article 100 cannot be read as conditional on an act of piracy having occurred because it would render the obligation thereunder “meaningless and inoperable”.¹²⁸⁹ Rather, Italy posits that Article 100 is “engaged in respect of precautionary planning, in respect of the taking of dissuasive action, in respect of engagement with vulnerable vessels, and much more”.¹²⁹⁰ In fact, Italy points out, the Supreme Court of India itself considered Article 100 to play an important role in addressing the question of India’s jurisdiction over the Marines and their immunity with respect to the “Enrica Lexie” incident.¹²⁹¹

¹²⁸⁶ Italy’s Reply, para. 7.121, referring to E-mail from the Master of the “Enrica Lexie” to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**); Hearing Transcript, 10 July 2019, 33:12-34:12.

¹²⁸⁷ Italy’s Reply, paras 7.122-7.124, referring to General Diary Extract of Coastal Police Station, Neendakara, Kollam, 15 February 2012 (**Annex IT-113**); Statement of Witness in connection with the NIA investigation, Statement of Commandant Neeraj Sharma, Commandant, Coast Guard Headquarters, Delhi, 12 July 2013, p. 39 (**Annex IT-276**); Statement of Witness in connection with the NIA investigation, Statement of K. Suresh, Uttam Adhikari, Coast Guard Regional Headquarters, Andaman and Nicobar Islands, 20 September 2013, p. 35 (**Annex IT-280**); Statement of Witness in connection with the NIA investigation, Statement of Shri N.V. Rama Rao, Commandant, Coast Guard, Officer In-Charge, MRCC Mumbai, 16 July 2013, pp 128-129 (**Annex IT-277**).

¹²⁸⁸ Italy’s Reply, para. 7.126 [emphases omitted], citing “Coast Guard, fishermen made a smart move”, The Times of India (Electronic Edition), 18 February 2012 (**Annex IT-39**); Piroli Report (Confidential Annex), pp 3-35, 4-8 (**Annex IT-233**).

¹²⁸⁹ Hearing Transcript, 10 July 2019, 24:1-5.

¹²⁹⁰ Hearing Transcript, 10 July 2019, 24:7-12.

¹²⁹¹ Hearing Transcript, 10 July 2019, 24:21-28:10, referring to *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 101 (**Annex IT-19**). See also Hearing Transcript, 18 July 2019, 100:4-101:19.

ii. Position of India

713. India submits that it has already addressed the first two of Italy’s arguments for the alleged breach of Article 100 as baseless. According to India, these arguments have nothing to do with the repression of piracy because the “Enrica Lexie” incident did not involve an act of piracy, and India “had virtually eradicated piracy off its coast”.¹²⁹² In addition, contrary to Italy’s claim, India does not agree and has not admitted in its submissions that Article 100 is relevant to the question of immunities, nor that it incorporates the international law rules on immunity of State officials from criminal jurisdiction.¹²⁹³ In any event, even if Article 100 were somehow relevant to the question of the Marines’ immunities, Italy’s claims of breach would fail because the Arbitral Tribunal has no jurisdiction to address that question on the merits.¹²⁹⁴ India also maintains that the obligation to cooperate under Article 100 is not absolute and cannot extend to upholding the Marines’ immunities in this case, otherwise it would give States a *carte blanche* to take any counter-piracy measures they wish “without regard to their legality, legitimacy or the burden imposed on other states by those [measures]”.¹²⁹⁵
714. India similarly dismisses Italy’s claim that India breached Article 100 in conjunction with Article 300 because it abused its right to cooperation in the repression of piracy and maintains that it acted well within its right under Article 100 to request assistance from Italy in investigating the incident.¹²⁹⁶
715. A finding of bad faith, India first notes, must be established by clear and convincing evidence.¹²⁹⁷ Yet, India alleges, Italy has not presented any evidence to this effect.¹²⁹⁸ In fact, India claims that it did not even invoke Article 100 in seeking cooperation from the “Enrica Lexie”, but rather sought Captain Vitelli’s cooperation, which he freely gave without having been misled.¹²⁹⁹
716. In this regard, India rejects Italy’s claim that India engaged in trickery to lure the “Enrica Lexie” to its territorial waters. In particular, India’s request for the “Enrica Lexie” to head to Kochi did not cause it to change course.¹³⁰⁰ Moreover, according to India, the e-mail from MRCC Mumbai

¹²⁹² India’s Counter-Memorial, para. 6.73. *See also* India’s Counter-Memorial, paras 6.63, 6.66, 6.74, 6.77.

¹²⁹³ Hearing Transcript, 13 July 2019, 3:6-4:1; Hearing Transcript, 20 July 2019, 78:9-79:21.

¹²⁹⁴ Hearing Transcript, 20 July 2019, 79:22-80:7.

¹²⁹⁵ Hearing Transcript, 20 July 2019, 81:10-17.

¹²⁹⁶ India’s Rejoinder, para. 6.75.

¹²⁹⁷ Hearing Transcript, 13 July 2019, 4:13-4:4, *referring to Tcana-Arica Question (Chile/Peru)*, Award of 4 March 1925, RIAA Vol. 2, p. 921 at p. 930. *See also* Hearing Transcript, 20 July 2019, 82:11-83:2.

¹²⁹⁸ Hearing Transcript, 13 July 2019, 5:5-8.

¹²⁹⁹ India’s Rejoinder, para. 6.75.

¹³⁰⁰ Hearing Transcript, 20 July 2019, 86:6-16.

to the “Enrica Lexie”, which describes a “piracy incident/firing incident”, simply shows that Indian authorities did not have “any preconceived mindset”¹³⁰¹ and were then “in the dark”, which is why they requested cooperation to clarify the situation.¹³⁰² In India’s view, the e-mail “merely reflects the difficult situation in which the MRCC was, handling two different – and yet unverified – [pieces of] information: one about a firing incident, and the other – which had started circulating from international agencies and the Enrica Lexie itself – about a pirate attack”.¹³⁰³ This is further corroborated, according to India, by an e-mail sent later that day to the Master in which MRCC Mumbai explained that “the firing incident needs to be investigated” and formally requested the Master “to be in the anchored position till completion of the said investigation”.¹³⁰⁴ India argues that the General Diary Extract of the Coastal Police Station again proves that the Indian authorities were uncertain on the situation and wanted to ascertain the facts instead of prejudging them.¹³⁰⁵

717. Noting that “the only annex Italy refers to that mentions a trick, is a press report”,¹³⁰⁶ India emphasises that the ICJ has explained in several cases that press information must not be regarded as evidence capable of proving facts.¹³⁰⁷ Moreover, India submits that the newspaper article does not give factual information but rather an impression. India argues that the e-mail from MRCC Mumbai contained nothing that could reasonably mislead the Master, who, according to India, decided on his own to proceed to Kochi.¹³⁰⁸
718. Conversely, India argues that “the *Enrica Lexie*’s attitude violated both Article 100 and 300”.¹³⁰⁹ According to India, the “Enrica Lexie” did not contact the MRCC as they were supposed to, did not inform India of the passage of the “Enrica Lexie” off India’s coast when armed military personnel were on board, and did not notify India as to the presence of the Marines on board.

¹³⁰¹ India’s Counter-Memorial, para. 6.70. *See also* India’s Rejoinder, paras 6.77-6.80, *citing* E-mail from the Master of the “Enrica Lexie” to MSCHOA and UKMTO, 16:18 (CET), 15 February 2012 (**Annex IT-120**).

¹³⁰² India’s Rejoinder, para. 6.79. *See also* Hearing Transcript, 13 July 2019, 5:9-8:21.

¹³⁰³ Hearing Transcript, 13 July 2019, 9:6-13.

¹³⁰⁴ India’s Counter-Memorial, para. 6.71, *citing* E-mail from the Master of the “Enrica Lexie” to MRCC Mumbai, 23:39 (IST), 15 February 2012, and E-mail from MRCC Mumbai to the Master of the “Enrica Lexie”, 21:14 (CET), 15 February 2012 (**Annex IT-122**).

¹³⁰⁵ India’s Counter-Memorial, paras 6.68-6.69; India’s Rejoinder, para. 6.79, both *referring to* General Diary Extract of Coastal Police Station, Neendakara, Kollam, 15 February 2012 (**Annex IT-113**).

¹³⁰⁶ India’s Rejoinder, para. 6.81, *referring to* Italy’s Reply, ns 565, 567.

¹³⁰⁷ India’s Rejoinder, para. 6.81, *referring to* *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 at p. 40, para. 62.

¹³⁰⁸ India’s Rejoinder, para. 6.81.

¹³⁰⁹ India’s Counter-Memorial, para. 6.75.

India concludes that “[t]hese omissions are hardly compatible with a cooperation on Italy’s part *bona fide* to suppress piracy”.¹³¹⁰

(c) **Analysis of the Arbitral Tribunal**

719. Italy submits that if the Arbitral Tribunal were to find that India was not in breach of Articles 87, 92, and 97 of the Convention, then India would nonetheless have breached Article 100 read with Article 300 of UNCLOS.¹³¹¹
720. Italy claims that India violated Article 100 of UNCLOS because the real motive of India in directing the “Enrica Lexie” to proceed to port was not to seek assistance with an investigation of piracy but to obtain custody of those who allegedly fired shots at the “St. Antony”.¹³¹² Italy further claims that India violated Article 100 in bad faith, thus violating Article 300 of UNCLOS as well.¹³¹³
721. India denies these allegations by pointing out that the available information proves that, by directing the “Enrica Lexie” to proceed to Kochi, the competent Indian authorities “wanted to ascertain the facts, without prejudging them”.¹³¹⁴ India stresses that “[t]he fight against piracy cannot serve as an excuse for criminal acts or to legitimize unfounded claims”.¹³¹⁵
722. The Arbitral Tribunal notes that Article 100 does not stipulate the forms or modalities of cooperation States shall undertake in order fulfil their duty to cooperate in the repression of piracy. In its commentary to Article 38 of the ILC Draft Articles Concerning the Law of the Sea, the forerunner of Article 100 of the Convention, the ILC made the following observation:

Any state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case.¹³¹⁶

¹³¹⁰ India’s Counter-Memorial, para. 6.76.

¹³¹¹ Italy’s Reply, para. 7.117.

¹³¹² Italy’s Memorial, paras 10.68-10.70.

¹³¹³ Italy’s Memorial, para. 10.68; Italy’s Reply, paras 7.120, 7.126.

¹³¹⁴ India’s Counter-Memorial, para. 6.69.

¹³¹⁵ India’s Counter-Memorial, para. 6.77.

¹³¹⁶ International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265 at p. 282 (commentary to Article 38, para. 2) (1956).

723. The duty to cooperate under Article 100 of the Convention “does not necessarily imply a duty to capture and prosecute pirates”.¹³¹⁷ Rather, States’ obligations under Article 100 can be implemented, for example, by including “in their national legislation provisions on mutual assistance in criminal matters, extradition and transfer of suspected, detained and convicted pirates” or conclusion of “bilateral and multilateral agreements or arrangements in order to facilitate such cooperation”.¹³¹⁸ This is consistent with other provisions of the Convention prescribing a duty to cooperate as “a duty of a continuing nature – an obligation of conduct rather than a one-time commitment or result”.¹³¹⁹
724. In this regard, the Arbitral Tribunal notes that India has provided sufficient information confirming that it has taken and is taking active steps to prevent piracy attempts at sea and plays an active role in this regard within the framework of the ReCAAP, launched in November 2006.¹³²⁰
725. Moreover, the Arbitral Tribunal notes that when MRCC Mumbai first contacted the “Enrica Lexie” by telephone and instructed it to change course and head towards Kochi, the MRCC explained that this was necessary in order to “take stock of events” in connection with the information it had received about the suspected pirate attack,¹³²¹ which is evidence of India’s willingness to cooperate in the repression of piracy. Therefore, given that “the State must be allowed a certain latitude as to the measures it should take”,¹³²² the Arbitral Tribunal does not

¹³¹⁷ Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 734, para. 1.

¹³¹⁸ International Maritime Organization, ‘Circular letter No. 3180 concerning information and guidance on elements of international law relating to piracy’, 17 May 2011, LEG 98/8/3 of 18 February 2011, para. 17. See also James Kraska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Praeger Security International, 2011), p. 128. (“Adoption, of a national legislation relating to piracy is a manifest pre-condition for state to fulfil the duty to co-operate”), cf. Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 737, para. 1. (“This duty does not expressly require that States have an adequate national criminal law addressing piracy; many States have lacked such laws historically and many continue to do so”).

¹³¹⁹ Seokwoo Lee, Jeong Woo Kim, ‘UNCLOS and the Obligation to Cooperate: International Legal Framework for Semi-Enclosed Seas Cooperation’, in Keyuan Zou (ed.), *Maritime Cooperation in Semi-Enclosed Seas* (Nijhoff, 2019), p. 12.

¹³²⁰ India’s Counter-Memorial, paras 1.25-1.27.

¹³²¹ Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**).

¹³²² International Law Commission, “Articles Concerning the Law of the Sea with Commentaries” in *Yearbook of the International Law Commission*, Vol. II, p. 265, at p. 282 (commentary to Article 38, para. 2) (1956).

find that India breached its obligation to cooperate in the repression of piracy, even from the viewpoint that “States may not lightly decline to intervene against acts of piracy”.¹³²³

726. In respect of Italy’s allegation that India’s real motive in directing the “Enrica Lexie” to proceed to Kochi was not to seek assistance with an investigation of piracy, the Arbitral Tribunal recalls that it has already determined that Italy has not discharged its burden of proof in regard to its allegation that India perpetrated a ruse in order to bring the “Enrica Lexie” into India’s territorial waters (*see* paragraph 489). The Arbitral Tribunal recalls in this regard that, in analyzing the alleged violation by India of Article 87, paragraph 1, subparagraph (a), it has found that this communication from the MRCC Mumbai did not amount to a breach of Italy’s freedom of navigation.
727. Further, the Arbitral Tribunal observes that as reflected in the ILC’s commentary cited above, the threshold for accusing a State of violating Article 100 of UNCLOS is relatively high, and Italy has not provided sufficient evidence to discharge its burden of proof in this regard.
728. Accordingly, the Arbitral Tribunal concludes that India has not violated its duty to cooperate in the repression of piracy under Article 100 of the Convention.
729. With reference to Italy’s allegation of the violation by India of Article 300 of the Convention, the Arbitral Tribunal notes that in the *M/V “Norstar”* case, ITLOS stated:

article 300 of the Convention cannot be invoked on its own. Therefore, a State Party claiming a breach of article 300 must first identify “the obligations assumed under this Convention” that are not fulfilled in good faith or “the rights, jurisdiction and freedoms recognized in this Convention” that are exercised in an abusive manner. The State Party then has to establish a link between its claim under article 300 and “the obligations assumed under this Convention” or “the rights, jurisdiction and freedoms recognized in this Convention”.¹³²⁴

730. Consequently, the Arbitral Tribunal finds that, in light of its conclusion that India has not violated Article 100 of the Convention, Article 300 cannot be invoked in the present case.

4. Remedies

731. The Parties have each presented their positions on the question of remedies. However, considering that the Arbitral Tribunal has concluded that India has not violated Articles 87, 92, 97, or 100 in

¹³²³ Rüdiger Wolfrum, ‘Fighting Terrorism at Sea: Options and Limitations under International Law’ in Myron H. Nordquist, Rüdiger Wolfrum, Ronán Long (eds.), *Legal Challenges in Maritime Security* (Brill, Nijhoff 2008), at p. 3.

¹³²⁴ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 241.

conjunction with 300, there is no need for the Arbitral Tribunal to consider the question of remedies in this respect.

C. ALLEGED VIOLATION BY INDIA OF THE IMMUNITY OF THE MARINES

732. The Arbitral Tribunal will next address Italy’s claim that India has acted inconsistently with UNCLOS by exercising jurisdiction over the Marines even though the Marines, as Italian State officials exercising official functions, enjoy immunity.

1. Jurisdiction

733. Before proceeding to the consideration of the merits of Italy’s claim, the Arbitral Tribunal must determine whether it has jurisdiction over such claim.

(a) **Jurisdiction pursuant to Article 288, paragraph 1, in Conjunction with Article 2, paragraph 3, Article 56, paragraph 2, and Article 58, paragraph 2, of UNCLOS**

734. Italy submits that the question whether the Marines enjoy immunity from Indian criminal jurisdiction concerns the interpretation and application of the Convention in view of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of UNCLOS, which “import immunity by *renvoi*”.¹³²⁵

735. Article 288, paragraph 1, of the Convention provides:

Article 288

Jurisdiction

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

736. Article 2, paragraph 3, of the Convention provides:

Article 2

Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil

3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

¹³²⁵ Italy’s Memorial, paras 8.17, 11.1.

737. Article 56, paragraph 2, of the Convention provides:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

738. Article 58, paragraph 2, of the Convention provides:

Article 58

Rights and duties of other States in the exclusive economic zone

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

739. India denies that Italy's claim concerns the interpretation and application of any provision of the Convention.¹³²⁶

i. Position of India

740. India submits that "Italy's claim fails, first and foremost, because none of the provisions of UNCLOS it invokes deals with, nor refers to, the issue of the immunity of the marines from criminal jurisdiction of foreign courts and tribunals".¹³²⁷ India refers to the finding in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (hereinafter "*Chagos Marine Protected Area Arbitration*") that if "the 'real issue in the case' and the 'object of the claim' [...] do not relate to the interpretation or application of the Convention, [...] an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)".¹³²⁸ India asserts that, contrary to Italy's claim, when determining the "real issue in the case" and the "object of the claim", tribunals have adopted an objective, rather than purposive or pragmatic, approach.¹³²⁹

741. Applying this to the facts of this case, India argues that Italy's claim "is essentially based on a set of rules extraneous to UNCLOS, belonging to general (customary) international law on

¹³²⁶ India's Counter-Memorial, para. 5.10.

¹³²⁷ Hearing Transcript, 12 July 2019, 73:9-13.

¹³²⁸ India's Counter-Memorial, para. 5.9, citing PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220. See also India's Rejoinder, para. 3.12.

¹³²⁹ India's Rejoinder, paras 3.11, 3.13-3.14, citing PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

immunities of States officials”.¹³³⁰ Indeed, India observes, “nothing in UNCLOS concerns or refers to the immunities of military personnel on board commercial ships”.¹³³¹ In particular, the Convention contains no provision concerning the immunities of State officials, and the only provisions that address immunity – Articles 95 and 96 – pertain to the immunity of warships and ships used only on government non-commercial service.¹³³² While ITLOS did recently hold, in the case *Concerning the Detention of Three Ukrainian Naval Vessels*, that the rights claimed by Ukraine in relation to the immunity of its naval vessels on the basis of, *inter alia*, Articles 95 and 96 of the Convention “are plausible under the circumstances,”¹³³³ the circumstances in this case are different because the “*Enrica Lexie*” is neither a warship within the meaning of Article 29 of the Convention nor “a ship owned or operated by a State and used only on government non-commercial services”.¹³³⁴

742. Further, India finds it telling that Article 97, which was invoked by Italy and immediately follows the only two articles in the Convention that deal with immunities, does not expressly mention immunities. In India’s view, this was intentional on the part of the drafters, and therefore any consideration by this Arbitral Tribunal of immunities issues not envisaged in the Convention, as Italy urges, would exceed its jurisdiction.¹³³⁵
743. Accordingly, India contends, because the “‘real issue in the case’ and the ‘object of the claim’ [...] do not relate to the interpretation or application of the Convention”, the Arbitral Tribunal does not have jurisdiction over Italy’s claim.¹³³⁶
744. In addition, India submits that Italy’s *renvoi* argument would “abusively stretch the meaning” of “other rules of international law” in Article 2, paragraph 3, of the Convention; “the rights and duties of other States” in Article 56, paragraph 2, of the Convention; and “other pertinent rules of international law” in Article 58, paragraph 2, of the Convention.¹³³⁷ Although these provisions refer to international law, India argues that they “clearly do not intend to constitute a *renvoi* to

¹³³⁰ India’s Rejoinder, para. 3.14.

¹³³¹ Hearing Transcript, 12 July 2019, 74:22-24. *See also* Hearing Transcript, 12 July 2019, 74:1-23.

¹³³² India’s Counter-Memorial, para. 5.10.

¹³³³ Hearing Transcript, 12 July 2019, 79:5-80:20, *citing* *Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019 [forthcoming], paras 93, 96-97.

¹³³⁴ Hearing Transcript, 12 July 2019, 80:1-4. *See also* Hearing Transcript, 12 July 2019, 80:5-81:5.

¹³³⁵ Hearing Transcript, 12 July 2019, 78:17-79:4.

¹³³⁶ India’s Counter-Memorial, para. 5.9, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220.

¹³³⁷ India’s Rejoinder, para. 3.8. *See also* Hearing Transcript, 12 July 2019, 98:11-99:15.

international law in general”, including any law of immunity.¹³³⁸ Rather, the rights and duties envisaged by these provisions can only be those protected by the Convention, as they may be interpreted in light of the general rules of international law, and do not include unrelated issues of international law not provided for or relevant under the Convention.¹³³⁹

745. Specifically in relation to Article 2, paragraph 3, of the Convention, India submits that the relevant international jurisprudence confirms that “[t]he sole mention of the sovereignty of the state does not attract, under the Convention, all the rules of international law deriving from the principle of sovereignty, including state immunities”.¹³⁴⁰
746. According to India, in the recent *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (hereinafter “*Immunities and Criminal Proceedings*”) case, the ICJ found that Article 4, paragraph 1, of the Palermo Convention,¹³⁴¹ which requires parties to “carry out their obligations [...] in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States”, “does not appear to create new rules concerning the immunities of holders of high-ranking office in the state or incorporate rules of customary international law concerning those immunities”.¹³⁴² Similarly, the ICJ in the *Oil Platforms* case found that Article I of the 1955 Treaty of Amity,¹³⁴³ which provided that there shall be firm and enduring peace and sincere friendship between the parties, was relevant for the interpretation of other provisions in the Treaty, but could not form the basis for the jurisdiction of the court in relation to the regulation of peace and friendly relations between the States in a general sense.¹³⁴⁴ Likewise in this case, India argues, while Article 2, paragraph 3, of the Convention “can be used in view of throwing light on the interpretation of the other provisions”, “it cannot be a basis for the jurisdiction of the court in the matter of the immunity of the marines, which is simply alien to the provision”.¹³⁴⁵
747. India submits that the above reasoning applies *mutatis mutandis* to Italy’s *renvoi* argument in connection with Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention, which

¹³³⁸ India’s Counter-Memorial, para. 5.12.

¹³³⁹ India’s Counter-Memorial, para. 5.12. *See also* Hearing Transcript, 12 July 2019, 86:8-87:4.

¹³⁴⁰ Hearing Transcript, 12 July 2019, 92:8-11.

¹³⁴¹ United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000.

¹³⁴² Hearing Transcript, 12 July 2019, 89:4-25.

¹³⁴³ Treaty of Amity, Economic Relations, and Consular Rights. Signed at Tehran, on 15 August 1955.

¹³⁴⁴ Hearing Transcript, 12 July 2019, 87:5-88:17, *referring to Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161 at p. 213, para. 117.

¹³⁴⁵ Hearing Transcript, 12 July 2019, 88:18-89:2.

are “irrelevant and unconnected with the facts [of this] case”.¹³⁴⁶ This is because, India reasons, those articles apply to the exclusive economic zone, and the exercise of adjudicative jurisdiction by a court on the territory of a State concerning events that occurred within the exclusive economic zone is not an exercise of jurisdiction within that zone, and accordingly, they do not apply in this case.¹³⁴⁷

748. In pursuing such an interpretation of the provisions, India additionally asserts, Italy is “attempt[ing] to blur the fundamental distinction between jurisdiction and applicable law” and improperly trying to extend the jurisdiction of the Arbitral Tribunal beyond the limits prescribed under UNCLOS.¹³⁴⁸
749. Referring to scholarly commentary and decisions of international courts and tribunals, India emphasises that the reference to “other rules of international law” in Article 293, paragraph 1, of the Convention, which determines the applicable law to this dispute, cannot be used to extend the jurisdiction of a tribunal.¹³⁴⁹ In particular, India argues, Article 293 cannot be used as a means to obtain a determination that certain rules of customary international law, such as those relating to the immunity of State officials from foreign criminal jurisdiction, have been violated, unless those rules themselves are a source of jurisdiction for the Arbitral Tribunal, or unless they otherwise directly apply pursuant to the Convention.¹³⁵⁰ In this case, according to India, the alleged rule on immunities that Italy invokes “is not referred to either expressly or implicitly in the Convention; nor is it, by any stretch of the imagination, a source of jurisdiction for this Tribunal”.¹³⁵¹
750. Consequently, according to India, interpreting Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention in the way Italy proposes “would call for the same criticisms as those rightly addressed to an excessively broad interpretation of Article 293”.¹³⁵²

¹³⁴⁶ Hearing Transcript, 12 July 2019, 95:8-16, 96:13-16.

¹³⁴⁷ India’s Rejoinder, para. 3.19, referring to *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4 at p. 36, para. 109. See also Hearing Transcript, 12 July 2019, 95:17-96:16.

¹³⁴⁸ India’s Counter-Memorial, paras 5.2-5.7, 5.12.

¹³⁴⁹ India’s Counter-Memorial, paras 5.6-5.7, citing PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 188.

¹³⁵⁰ India’s Counter-Memorial, para. 5.7, citing PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 188.

¹³⁵¹ India’s Counter-Memorial, para. 5.7.

¹³⁵² India’s Counter-Memorial, para. 5.12.

751. India further disagrees that Italy's interpretation of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention is in any way assisted by the fact that questions of immunity and jurisdiction are inextricably linked.¹³⁵³
752. According to India, "the existence of a link between two aspects of a dispute does not necessarily mean that *both* aspects come within the jurisdiction of the court or tribunal seized of the case".¹³⁵⁴ India argues that, in fact, decisions of international courts or tribunals demonstrate that tribunals regularly decide only the specific legal questions over which they have jurisdiction, despite there being other legal questions that are related and implicated in a single dispute.¹³⁵⁵ India concludes from this that it is insufficient merely to invoke a link between different aspects of a dispute to establish a basis of jurisdiction. Rather, case law demonstrates that the Arbitral Tribunal's jurisdiction must be established with respect to each element of the allegedly linked aspects.¹³⁵⁶
753. Neither, in India's view, is Italy assisted by its argument that the Arbitral Tribunal must reach a decision on immunity or risk not settling the overall dispute between the Parties in regards to jurisdiction over the Marines.¹³⁵⁷ As an initial matter, India maintains that the Arbitral Tribunal does not have jurisdiction to decide the question of which Party may exercise criminal jurisdiction over the Marines.¹³⁵⁸ In addition, one of the reasons India considers the entire case to fall outside the Arbitral Tribunal's jurisdiction is precisely because the core issue of jurisdiction cannot be settled without deciding on the Marines' immunity, and the latter does not concern the application and interpretation of the Convention.¹³⁵⁹ Moreover, India notes, even if the Arbitral Tribunal found that it had jurisdiction over this matter globally, it does not mean that it has jurisdiction over the limited question of immunities, as mentioned above, in particular since "[i]n the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception".¹³⁶⁰
754. India further maintains that its use of the "necessary for and connected with" test, to support its counter-claim that its rights under Article 56, paragraph 1, include the right to protect its

¹³⁵³ India's Rejoinder, para. 3.4.

¹³⁵⁴ India's Rejoinder, para. 3.4 [emphasis added by India]. See also Hearing Transcript, 12 July 2019, 103:21-104:10, citing PCA Case No. 2013-19, *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 152.

¹³⁵⁵ India's Rejoinder, paras 3.6-3.9.

¹³⁵⁶ India's Rejoinder, para. 3.10.

¹³⁵⁷ Hearing Transcript, 12 July 2019, 99:22-101:19.

¹³⁵⁸ Hearing Transcript, 12 July 2019, 101:12-20.

¹³⁵⁹ Hearing Transcript, 12 July 2019, 101:21-102:5.

¹³⁶⁰ Hearing Transcript, 12 July 2019, 102:7-24, citing *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, *Second Phase*, Judgment, I.C.J. Reports 1966, p. 6, at p. 46, para. 86.

fishermen in all circumstances, does not contradict its arguments against Italy's *renvoi* claim with respect to Article 56, paragraph 2. In India's view, this difference is explained by the fact that "the exclusive fishing right claimed by India is the direct and express consequence of the 'sovereign rights'" enumerated in Article 56, paragraph 1, while "[t]here is nothing like this with regard to Italy's alleged right to enforce the immunity of its military personnel in the exclusive [economic] zone".¹³⁶¹

755. In the alternative, even if Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention do incorporate the rules of customary international law on immunity, India maintains that the Arbitral Tribunal still lacks jurisdiction because Italy has failed to establish that the alleged breaches of the Marines' immunity were committed in India's exclusive economic zone or territorial sea.¹³⁶²
756. India notes that the topic of immunity of State officials from foreign criminal jurisdiction remains "extremely controversial", as evidenced by the debates both in the ILC and at the Sixth Committee of the United Nations General Assembly, and the fact that there is no multilateral treaty providing for compulsory jurisdiction for disputes concerning the interpretation or application of such rules.¹³⁶³ Italy, India points out, does not appear to dispute this.¹³⁶⁴ In light of "the reluctance to codify the law of state officials' immunity and, *a fortiori*, to institute compulsory jurisdiction in this area", India therefore considers it "rather paradoxical if UNCLOS overcame this reluctance and filled this gap in international law by, in addition, complementing it with a mandatory mechanism for the settlement of [such] disputes".¹³⁶⁵
757. In any event, India does not agree that Italy has properly established any breach of the Marines' immunities in India's exclusive economic zone or territorial sea. While Italy cites an extract from the Second Report of Mr. Roman Kolodkin, the then-ILC Special Rapporteur on this issue, which states that an official enjoying immunity *ratione materiae* is protected from criminal procedures and restrictive measures in respect of acts performed by him in an official capacity, India maintains that this does not "advance Italy's case or [assist in] the determination of the acts

¹³⁶¹ Hearing Transcript, 12 July 2019, 97:7-98:9. *See also* Hearing Transcript, 20 July 2019, 136:1-10.

¹³⁶² Hearing Transcript, 12 July 2019, 105:15-106:3.

¹³⁶³ Hearing Transcript, 12 July 2019, 107:1-19.

¹³⁶⁴ Hearing Transcript, 20 July 2019, 136:11-20.

¹³⁶⁵ Hearing Transcript, 12 July 2019, 107:20-26. *See also* Hearing Transcript, 12 July 2019, 107:23-108:1.

precluded by the immunity”.¹³⁶⁶ Rather, India points to the more “telling”¹³⁶⁷ part of the Report which states that “a State which has grounds to believe that a foreign official has performed an act which is criminally punishable under its legislation, is able to carry out at least the initial collection of evidence for this case [...] using measures which are not binding or constraining on the foreign official”.¹³⁶⁸ This was, according to India, confirmed by Ms. Concepción Escobar Hernández, the current ILC Special Rapporteur on the issue, who identified three categories of precluded acts, all of which involve “some kind of coercive effect or aiming at having one”.¹³⁶⁹ Similarly, the ICJ in its decision in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (hereinafter “*Certain Questions of Mutual Assistance in Criminal Matters*”) held that “the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority”.¹³⁷⁰ For this reason, the ICJ found that the summons addressed to the President of the Republic of Djibouti in that case by the French investigating judge was not a breach of the immunity from criminal jurisdiction that he enjoyed because it was simply an invitation to testify which he could freely accept or decline.¹³⁷¹ In their joint separate opinion in the ICJ’s *Arrest Warrant* case, India observes, Judges Higgins, Kooijmans, and Buergenthal also confirmed that “commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate [the] principles” of inviolability and immunity.¹³⁷²

758. According to India, the Marines raised no complaint that any jurisdiction or unlawful pressure was being exercised over them or the vessel while the “Enrica Lexie” was on her way to Kochi in India’s exclusive economic zone.¹³⁷³ Similarly, while in India’s territorial sea, India maintains

¹³⁶⁶ Hearing Transcript, 12 July 2019, 108:2-109:1, citing R. Kolodkin, Special Rapporteur, ‘Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction’, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 409, para. 45.

¹³⁶⁷ Hearing Transcript, 20 July 2019, 109:2.

¹³⁶⁸ Hearing Transcript, 12 July 2019, 111:4-11, citing R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 409, para. 43.

¹³⁶⁹ Hearing Transcript, 12 July 2019, 111:18-112:2, referring to C. Escobar Hernández, Special Rapporteur, Sixth Report to the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/722, 12 June 2018, pp 26-27, para. 67.

¹³⁷⁰ Hearing Transcript, 12 July 2019, 109:3-9, citing *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 237, para. 170.

¹³⁷¹ Hearing Transcript, 12 July 2019, 109:11-22, citing *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 237, para. 171.

¹³⁷² Hearing Transcript, 12 July 2019, 110:14-22, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at pp 80-81, para. 59.

¹³⁷³ Hearing Transcript, 12 July 2019, 115:2-5.

that its authorities “merely checked the identities of the persons on board and held a meeting with Italian officials, the shipmaster and the marines”.¹³⁷⁴ India maintains that “the investigation of the events only started when the marines were in India’s internal waters; and the marines were detained only on India’s land territory”.¹³⁷⁵

759. Unlike with respect to the exclusive economic zone and territorial sea, India submits that the Convention does not similarly regulate the conduct of the coastal State on its land territory and “sets out only very few rules with regard to internal waters whose regime is outside the scope of UNCLOS”.¹³⁷⁶ The latter is confirmed, according to India, by both academic commentators and the joint separate opinion of Judges Cot and Wolfrum in “*Ara Libertad*” (*Argentina v. Ghana*), in which they found that, *inter alia*, “the fact that ‘internal waters in principle are not covered by the Convention but by customary international law’ is largely confirmed by the *travaux préparatoires* of the Convention”.¹³⁷⁷
760. As such, India submits that since no coercive act has been committed in India’s exclusive economic zone or territorial sea, and the regime governing coastal States’ internal waters and land territory fall outside the scope of the Convention, Italy has failed to establish that the facts in violation of the Marines’ immunity are covered by at least one provision of the Convention.¹³⁷⁸
761. For all these reasons, according to India, Italy’s claim is not, and cannot be brought, within the Arbitral Tribunal’s jurisdiction by operation of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention.

ii. Position of Italy

762. Italy submits that the Arbitral Tribunal has jurisdiction over its claim because the question of immunity arises in the interpretation or application of three provisions of the Convention, which by their plain terms effect a *renvoi* to general international law, including the law of immunity. The three provisions of the Convention that Italy invokes are Article 2, paragraph 3, which provides that sovereignty over the territorial sea is exercised subject to the Convention as well as

¹³⁷⁴ Hearing Transcript, 12 July 2019, 114:7-11.

¹³⁷⁵ Hearing Transcript, 12 July 2019, 114:11-14.

¹³⁷⁶ Hearing Transcript, 12 July 2019, 116:5-9.

¹³⁷⁷ Hearing Transcript, 12 July 2019, 117:3-6, citing “*Ara Libertad*” (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ITLOS Reports 2012, p. 332 at pp 369-70, paras 23-24; referring to R.R. Churchill and V. Lowe, *The Law of the Sea* (3rd edn., Manchester University Press, 1999), p. 61; D.R. Rothwell and T. Stephens, *The International Law of the Sea* (2nd edn., Hart Publishing, 2016), p. 55.

¹³⁷⁸ Hearing Transcript, 12 July 2019, 114:1-2, 115:23-116:3; Hearing Transcript, 20 July 2019, 133:23-134:7.

“other rules of international law”; Article 56, paragraph 2, which obliges coastal States to give “due regard to the rights and duties of other States”, where those rights and duties, Italy argues, are those that arise under international law generally, not only under the Convention; and Article 58, paragraph 2, which refers to “other pertinent rules of international law” applying to the exclusive economic zone.¹³⁷⁹

763. In any event, Italy maintains that India’s jurisdictional objection has no merit, for various reasons.
764. Italy points out that India’s objection pertains not to the Arbitral Tribunal’s jurisdiction but to the merits of Italy’s claim because they pertain to the questions whether certain provisions of the Convention provide for immunity, and whether they are applicable to the facts of the case.¹³⁸⁰ According to Italy, these questions plainly concern the interpretation and application of those provisions, thereby placing this claim squarely within the Arbitral Tribunal’s jurisdiction under Article 288, paragraph 1, of the Convention.¹³⁸¹
765. Italy does not disagree with India¹³⁸² that, as the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* stated, “the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it”¹³⁸³ and “[w]here the ‘real issue in the case’ and the ‘object of the claim’ do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)”.¹³⁸⁴
766. Unlike India, however, Italy submits that the “real issue in the case” and “object of the claim” is “the determination of which state is entitled, under UNCLOS, to exercise jurisdiction over the two marines in relation to the incident” and that “self-evidently concerns both the interpretation and the application of the Convention”.¹³⁸⁵ The question whether the Marines are entitled to immunity in respect of criminal proceedings before Indian courts is, in Italy’s view, not the central issue as India asserts, but an “ancillary determination of law” necessary to decide which State

¹³⁷⁹ Italy’s Reply, para. 2.54. *See also* Italy’s Memorial, para. 8.17; Italy’s Rejoinder, paras 4.6, 4.24; Hearing Transcript, 9 July 2019, 66:16-69:2.

¹³⁸⁰ Italy’s Reply, paras 2.53, 2.57; Italy’s Rejoinder, para. 4.23.

¹³⁸¹ Italy’s Reply, para. 2.49.

¹³⁸² Hearing Transcript, 18 July 2019, 90:19-22.

¹³⁸³ Hearing Transcript, 9 July 2019, 58:2-8.

¹³⁸⁴ Hearing Transcript, 9 July 2019, 58:2-16, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220. *See also* Italy’s Rejoinder, para. 4.10.

¹³⁸⁵ Hearing Transcript, 9 July 2019, 58:19-24.

may lawfully exercise jurisdiction to resolve the dispute.¹³⁸⁶ India’s position in this regard, Italy points out, is inconsistent both “with the logical view that it is only when a domestic court is found to have jurisdiction that the question of immunity arises” and “with India’s repeated assertion in respect of its domestic proceedings that considerations of jurisdiction will necessarily include the determination of immunity”.¹³⁸⁷

767. Consistent with the approach articulated, Italy submits that the question of the Marines’ immunity is sufficiently connected to the real issue in the case to come within the scope of Article 288(1). That the issues of jurisdiction and immunity are so intertwined, Italy argues, is demonstrated by the fact that the Arbitral Tribunal will necessarily have to consider the immunity of the Marines under the Convention in order to determine which Party may lawfully exercise jurisdiction over the Marines.¹³⁸⁸ Italy claims that India itself admitted this when they noted that the Special Court set up pursuant to the direction of the Supreme Court of India would be able to decide the claim of immunity when it would be seised again with the question of jurisdiction.¹³⁸⁹
768. Moreover, Italy notes, any conclusion that India had criminal jurisdiction over the Marines under or consistent with the Convention, but which did not simultaneously address the immunity of the Marines would, in Italy’s view, not resolve the disagreement between the Parties with which the Arbitral Tribunal is seised and lead to a “profoundly unsatisfactory outcome”.¹³⁹⁰ This is especially the case given that the Indian courts have failed to determine the question of immunity *in limine litis* in the criminal proceedings against the Marines, in contravention of a cardinal principle of the international law on immunities.¹³⁹¹ Moreover, according to Italy, “[t]here is nothing unusual in an international court or tribunal with jurisdiction over a dispute concerning the interpretation or application of a treaty deciding questions of international law that necessarily arise in the resolution of the dispute”.¹³⁹² Italy further cautions that “[a]ny other approach would gravely weaken the dispute settlement provisions in the very large number of treaties [...] that contain compromissory clauses referring to their interpretation or application”.¹³⁹³

¹³⁸⁶ Hearing Transcript, 9 July 2019, 59: 3-4. *See also* Hearing Transcript, 9 July 2019, 58:24-59:13.

¹³⁸⁷ Hearing Transcript, 18 July 2019, 92:25-93:8.

¹³⁸⁸ Hearing Transcript, 18 July 2019, 93:13-19. *See also* Hearing Transcript, 18 July 2019, 107:9-18.

¹³⁸⁹ Hearing Transcript, 18 July 2019, 93:20-94:7, *citing* Hearing Transcript, 12 July 2019, 58:21-59:19, 103:1-20.

¹³⁹⁰ Italy’s Rejoinder, para. 4.17. *See also* Hearing Transcript, 9 July 2019, 59:5-26.

¹³⁹¹ Hearing Transcript, 9 July 2019, 60:1-14.

¹³⁹² Italy’s Rejoinder, para. 4.20.

¹³⁹³ Italy’s Rejoinder, paras 4.20. *See also* Hearing Transcript, 9 July 2019, 61:4-63:19.

769. Italy also disagrees with India's claim that the link between the Marines' immunity from India's criminal jurisdiction and India's exercise of jurisdiction under the Convention is irrelevant.¹³⁹⁴ This link, the existence of which Italy states India does not dispute, is in Italy's view highly relevant because it reinforces Italy's argument that the three provisions of the Convention incorporate rules on immunity.¹³⁹⁵ According to Italy, the link also explains why the effect of the three provisions of the Convention is not to incorporate all the rules of international law into the Convention, but only those relevant for the interpretation and application of the Convention in the case at issue.¹³⁹⁶ Italy also dismisses as irrelevant the decisions of international courts or tribunals that India cited on the basis that they "show only that other issues, having nothing to do with immunity, were held not to concern the interpretation or application of UNCLOS in the cases in question".¹³⁹⁷
770. With respect to its claim that the references to general international law in certain provisions in the Convention effect a *renvoi*, Italy disagrees with India's position that it would be an abusive interpretation because the references only "serve at most an interpretative function".¹³⁹⁸ India's position, Italy claims, "is inconsistent with a plain reading of the text of those provisions, and with arbitral jurisprudence and scholarly commentary".¹³⁹⁹ For example, Italy points out, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* found that the reference to "other rules of international law" in Article 2, paragraph 3, of the Convention does include "general rules of international law".¹⁴⁰⁰
771. In the same vein, Italy maintains that the *Immunities and Criminal Proceedings* and *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (hereinafter "*Certain Iranian Assets*") decisions by the ICJ "do not stand for any general proposition that rules on immunity cannot be read into a treaty that does not expressly provide for them".¹⁴⁰¹ Rather, in Italy's view, the ICJ "clearly envisaged that this could be the case"¹⁴⁰² but declined to do so based on the particular terms of the treaty provisions concerned and on the facts, both of which are

¹³⁹⁴ Italy's Rejoinder, paras 4.13-4.22.

¹³⁹⁵ Italy's Rejoinder, para. 4.14.

¹³⁹⁶ Italy's Rejoinder, para. 4.14. *See also* Hearing Transcript, 18 July 2019, 107:9-18.

¹³⁹⁷ Italy's Rejoinder, paras 4.15.

¹³⁹⁸ Italy's Reply, para. 2.55; Italy's Rejoinder, para. 4.7.

¹³⁹⁹ Italy's Reply, para. 2.55.

¹⁴⁰⁰ Italy's Reply, para. 2.57, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 516; Italy's Rejoinder, paras 4.9-4.10.

¹⁴⁰¹ Hearing Transcript, 9 July 2019, 70:4-6.

¹⁴⁰² Hearing Transcript, 9 July 2019, 69:11-15.

distinguishable from the present case.¹⁴⁰³ For example, Italy notes that while the provisions on which Italy relies in this case directly refer to rules of international law, there were no similar references in the Palermo Convention and the 1955 Treaty of Amity, which were at issue in the *Immunities and Criminal Proceedings* and *Certain Iranian Assets* cases, respectively.¹⁴⁰⁴ Moreover, Italy observes, the ICJ in the *Certain Iranian Assets* case recognised that the mere fact that the relevant article in the 1955 Treaty of Amity did not mention sovereign immunities or contain a *renvoi* to the rules of general international law “does not suffice to exclude the question of immunities from the scope *ratione materiae* of the provision at issue”.¹⁴⁰⁵ But the ICJ went on to find that “for that question to be relevant, the breach of international law on immunities would have to be capable of having some impact on compliance with the right guaranteed” by the relevant article.¹⁴⁰⁶

772. Applying the same approach to this case, Italy submits that the Arbitral Tribunal should find jurisdiction because “the mere fact that the UNCLOS provisions at issue in our case makes no express mention of immunities does not suffice to exclude the question of immunities from the provisions”,¹⁴⁰⁷ and unlike the *Certain Iranian Assets* case, “there is an express *renvoi* to rules of international law” and a “breach of international law on immunities would most certainly be capable of having an impact on compliance with the provisions of UNCLOS”.¹⁴⁰⁸
773. Italy also dismisses as groundless India’s contention that a negative inference – that these provisions cannot be interpreted to address immunity – must be drawn on the basis that there are provisions elsewhere in the Convention that expressly address immunity issues, and that those provisions, which pertain to the immunity of warships and ships in non-commercial service, are irrelevant to the case at hand.¹⁴⁰⁹ To the contrary, Italy asserts, the inclusion of express provisions on immunity in the Convention “show[s] that the law of immunity does not exist in a separate

¹⁴⁰³ Hearing Transcript, 9 July 2019, 69:12-70:7.

¹⁴⁰⁴ Hearing Transcript, 9 July 2019, 69:16-70:3, referring to *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 7. See also Hearing Transcript, 18 July 2019, 109:11-15.

¹⁴⁰⁵ Hearing Transcript, 9 July 2019, 71:18-72:3, citing *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 7 at p. 32, para. 70. See also Hearing Transcript, 18 July 2019, 108:21-109:10.

¹⁴⁰⁶ Hearing Transcript, 9 July 2019, 72:5-8, citing *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 7 at p. 32, para. 70.

¹⁴⁰⁷ Hearing Transcript, 9 July 2019, 72:9-13.

¹⁴⁰⁸ Hearing Transcript, 9 July 2019, 72:14-18.

¹⁴⁰⁹ Italy’s Reply, paras 2.63-2.64.

universe from the law of the sea, and that there would be no reason to excise ‘general rules of international law’ of immunity from the scope of Articles 2(3), 56(2) or 58(2)”.¹⁴¹⁰

774. In response to India’s claim that Article 2, paragraph 3, of the Convention is not applicable because India did not take any enforcement measure concerning, or exercise jurisdiction over, the Marines outside India’s internal waters or land territory, Italy claims that “India takes an impermissibly narrow approach to acts that engage the immunity of the Marines”.¹⁴¹¹ According to Italy, other than arrest and detention, the immunity enjoyed by the Marines also protects them from acts that interfere with their freedom to perform their official functions.¹⁴¹² Italy submits that this includes India’s exercise of criminal jurisdiction over the Marines while they were on board the “*Enrica Lexie*” when it was anchored in India’s territorial sea, a fact which Italy claims India has conceded.¹⁴¹³
775. Italy maintains that, contrary to India’s claim, Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention are also implicated because of the “prior coercive action taken by the Indian authorities against the *Enrica Lexie* precisely because of the actions of the Marines in the exclusive economic zone”.¹⁴¹⁴ Italy states that India itself took the position in the domestic proceedings that it exercised jurisdiction over the Marines in the exclusive economic zone.¹⁴¹⁵ Italy further claims that India’s interdiction, direction, and escort of the “*Enrica Lexie*” while the Marines were on board constitutes an interference by the Indian authorities in the Marines’ freedom of movement and exercise of their official functions in India’s exclusive economic zone and territorial sea.¹⁴¹⁶
776. Italy denies India’s allegation that it has blurred the distinction between jurisdiction and applicable law. Italy contends that, to the contrary, Article 293, paragraph 1, of the Convention actually requires the Arbitral Tribunal to apply both the Convention and other rules of international law not incompatible with the Convention.¹⁴¹⁷

¹⁴¹⁰ Italy’s Reply, para. 2.64, *referring to* India’s Counter-Memorial, para. 5.12.

¹⁴¹¹ Italy’s Rejoinder, para. 4.25.

¹⁴¹² Italy’s Rejoinder, para. 4.25.

¹⁴¹³ Italy’s Rejoinder, paras 4.26, *referring to* India’s Rejoinder, para. 5.6.

¹⁴¹⁴ Italy’s Rejoinder, para. 4.28.

¹⁴¹⁵ Italy’s Rejoinder, para. 4.28.

¹⁴¹⁶ Italy’s Rejoinder, para. 4.30.

¹⁴¹⁷ Italy’s Reply, paras 2.16-2.19, *citing* *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 61-62, para. 155; PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 176.

777. Italy submits that India’s jurisdictional objections to this claim are in many respects at odds with the arguments India raises in support of its counter-claims.¹⁴¹⁸ Italy argues in particular that India’s narrow reading of the rights and duties envisaged by the three provisions is at odds with its own expansive reading of, *inter alia*, Articles 56, paragraph 1, and 58, paragraph 3, of the Convention.¹⁴¹⁹ For example, India argues that the Marines’ firing on the “St. Antony” was a breach of Italy’s obligation to have “due regard” to India’s rights under Article 58, paragraph 3 of the Convention. In doing so, India is claiming that the Arbitral Tribunal’s jurisdiction must cover both “Italy’s obligations not to engage in conduct violative of India’s rights in the EEZ” and “Italy’s rights *vis-à-vis* India arising directly from the very same conduct and having [...] a connection to the EEZ”.¹⁴²⁰ These rights and obligations to which India claims the Arbitral Tribunal’s jurisdiction extends are, in Italy’s view, not unlike those pertaining to the Marines’ immunity with respect to the same conduct.¹⁴²¹ Similarly, India’s use of the “necessary for and connected with” test to support its counter-claim that its rights under Article 56, paragraph 1, include the right to protect its fishermen in all circumstances, is not dissimilar to Italy’s claim that the three provisions include rights and rules not expressly mentioned.¹⁴²² Italy also notes that India cannot rely on the relationship of attribution between Italy and the Marines in support of its counter-claim while at the same time asserting that immunity is outside the scope of the Convention.¹⁴²³
778. For all these reasons, Italy claims that India has “failed to advance any argument capable of challenging the jurisdiction of the Tribunal over immunity in this case”.¹⁴²⁴

(b) **Jurisdiction pursuant to Article 297, paragraph 1, of UNCLOS**

779. As a “subsidiary argument”, Italy asserts that the Arbitral Tribunal may also rely on Article 297, paragraph 1, of the Convention which, according to Italy, “extends the jurisdiction of a court or tribunal established in accordance with Part XV of UNCLOS beyond Article 288(1)” and effects a *renvoi* to other sources of law.¹⁴²⁵

¹⁴¹⁸ Italy’s Reply, para. 2.60.

¹⁴¹⁹ Italy’s Reply, paras 2.60-2.62.

¹⁴²⁰ Hearing Transcript, 18 July 2019, 105:14-19. *See also* Hearing Transcript, 18 July 2019, 105:1-13.

¹⁴²¹ Hearing Transcript, 18 July 2019, 105:20-24.

¹⁴²² Hearing Transcript, 18 July 2019, 106:1-15, *referring to* India’s Counter-Memorial, para. 4.19.

¹⁴²³ Hearing Transcript, 18 July 2019, 106:16-21.

¹⁴²⁴ Italy’s Reply, para. 2.68.

¹⁴²⁵ Italy’s Memorial, para. 8.19, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220; Italy’s Reply, para. 2.50.

780. Article 297, paragraph 1, of the Convention provides, in relevant part:

Article 297

Limitations on applicability of section 2

1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:

(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;

(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention;

781. India disagrees with Italy's interpretation of Article 297, paragraph 1, of the Convention, and maintains that it does not provide a ground for the Arbitral Tribunal to have jurisdiction over Italy's claim regarding the alleged violation of the Marines' immunities.

i. Position of India

782. India disputes Italy's claim that Article 297, paragraph 1, of the Convention provides an additional ground upon which the Arbitral Tribunal may exercise jurisdiction over the issue of the Marines' immunity from foreign criminal jurisdiction. India disagrees in particular with Italy's interpretation of the provision, claiming that Article 297, paragraph 1, subparagraph (b), of the Convention is irrelevant, and that Article 297, paragraph 1, subparagraph (a), does not expand the jurisdiction of the Arbitral Tribunal over Italy's claim.¹⁴²⁶

783. India disagrees with Italy's assertion that its claim regarding the Marines' immunities is covered by Article 297, paragraph 1, subparagraph (b), of the Convention because it involves an allegation that India, in exercise of the "aforementioned freedoms, rights or uses' [has acted] in contravention of the Convention [and] 'of other rules of international law not incompatible with' the Convention".¹⁴²⁷

784. According to India, Italy's interpretation is "plainly wrong" because the provision only covers disputes arising in connection with acts of States other than the coastal State, and in this case, Italy's claim targets the acts of a coastal State, India.¹⁴²⁸ India argues that "the expression 'other

¹⁴²⁶ India's Counter-Memorial, para. 5.15, *citing* Italy's Memorial, para. 8.16.

¹⁴²⁷ India's Counter-Memorial, para. 5.16.

¹⁴²⁸ India's Counter-Memorial, para. 5.16.

rules of international law’ does not relate to acts under arbitral scrutiny, but to the ‘laws or regulations adopted by the coastal State’.”¹⁴²⁹ India submits that Article 297, paragraph 1, subparagraph (b), of the Convention should be read to provide that a claim by a coastal State that a third State has breached its laws or regulations is admissible only if these laws or regulations are in conformity with the Convention and other rules of international law.¹⁴³⁰

785. India argues that, in any event, Article 297, paragraph 1, subparagraph (b), of the Convention is irrelevant because the subject matter of this claim does not pertain to “the exercise of freedoms, rights and uses of the sea ‘*in contravention of ... the laws and regulations adopted by the coastal State* in conformity with this Convention and other rules of international law not incompatible with this Convention’.”¹⁴³¹
786. India maintains that Article 297, paragraph 1, subparagraph (a), cannot expand the Arbitral Tribunal’s jurisdiction over Italy’s claim concerning the Marines’ immunities for the same reasons which it claims that Article 2, paragraph 3, Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention cannot. Indeed, India notes, Italy’s interpretation of this provision is untenable because it “is so far-reaching that it would transform the ITLOS and Annex VII Arbitral Tribunals in[to] bodies possessing ‘all-competent’ international law jurisdiction”.¹⁴³²
787. India concedes that the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* found that Article 297, paragraph 1, of the Convention establishes the jurisdiction of the relevant tribunals in positive terms, but it disagrees that this implies that such jurisdiction extends to questions of immunities, a subject matter not regulated by the Convention.¹⁴³³
788. India submits that the arbitral tribunal in the recent *Arctic Sunrise Arbitration (Netherlands v. Russia)* (hereinafter “*Arctic Sunrise Arbitration*”) declined to exercise jurisdiction over a subject matter not linked with the Convention.¹⁴³⁴ There, India asserts, the *Arctic Sunrise Arbitration* arbitral tribunal referred to human-rights standards in order to interpret the relevant provisions of the Convention, but the arbitral tribunal found that it did not have jurisdiction to apply directly

¹⁴²⁹ India’s Counter-Memorial, para. 5.16.

¹⁴³⁰ India’s Counter-Memorial, para. 5.16.

¹⁴³¹ India’s Counter-Memorial, para. 5.16 *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316(b) [emphasis added by India].

¹⁴³² India’s Counter-Memorial, para. 5.20. *See also* Hearing Transcript, 12 July 2019, 104:11-105:14.

¹⁴³³ India’s Counter-Memorial, para. 5.21, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 307.

¹⁴³⁴ India’s Counter-Memorial, para. 5.23, *referring to* PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, paras 140, 198.

specific provisions of the 1966 International Covenant on Civil and Political Rights or to determine breach of such provisions.¹⁴³⁵

789. India argues that the Arbitral Tribunal in this case similarly does not have jurisdiction over Italy's claim on the basis of Article 297, paragraph 1, subparagraph (a), of the Convention because the law of immunities in general is a different body of law, and, India submits that Italy's claim does not concern the application or interpretation of the Convention.¹⁴³⁶
790. Finally, India claims that Article 297, paragraph 1, subparagraph (a), of the Convention is irrelevant to the Arbitral Tribunal's jurisdiction over this claim because India's alleged actions concerning events in the exclusive economic zone do not relate to immunity.¹⁴³⁷

ii. Position of Italy

791. Italy contends that, while the Arbitral Tribunal's jurisdiction over Italy's claim regarding the immunity of the Marines is already well established under Article 288, paragraph 1, of the Convention, Article 297, paragraph 1, provides an additional and confirmatory ground for jurisdiction.¹⁴³⁸
792. According to Italy, Article 297, paragraph 1, of the Convention expands the jurisdiction given by Article 288 of the Convention by including a *renvoi* to sources of law beyond UNCLOS.¹⁴³⁹ Citing the *Chagos Marine Protected Area Arbitration* award, to which India also refers, Italy contends that Article 297, paragraph 1, of the Convention "expands the Tribunal's jurisdiction to certain disputes involving the contravention of legal instruments beyond the four corners of the Convention itself".¹⁴⁴⁰ Indeed, the fact that India quoted the very same language from the *Chagos Marine Protected Area Arbitration* award, Italy submits, shows that India has effectively conceded Italy's point about the effect of Article 297.¹⁴⁴¹
793. Accordingly, Italy argues that, insofar as the claim is deemed to involve any of the other sources of law to which Article 297, paragraph 1, effects a *renvoi*, the Arbitral Tribunal would also have

¹⁴³⁵ India's Counter-Memorial, para. 5.23, referring to PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 198.

¹⁴³⁶ India's Counter-Memorial, para. 5.24.

¹⁴³⁷ India's Rejoinder, para. 3.21.

¹⁴³⁸ Italy's Reply, paras 2.50, 2.66.

¹⁴³⁹ Italy's Memorial, paras 8.14-8.15; India's Reply, para. 2.67.

¹⁴⁴⁰ Italy's Reply, para. 2.67, citing PCA Case No. 2011-03: *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316. See also India's Counter-Memorial, para. 5.22.

¹⁴⁴¹ Italy's Reply, para. 2.67.

jurisdiction to determine it under that provision.¹⁴⁴² According to Italy, this is because “(a) the dispute arises in connection with India’s actions in contravention of UNCLOS ‘in regard to the freedoms and rights of navigation’ or ‘in regard to other internationally lawful uses of the sea specified in article 58’; and/or (b) India’s exercise of ‘the aforementioned freedoms, rights or uses’ is in contravention of the Convention or of ‘other rules of international law not incompatible with’ the Convention”.¹⁴⁴³

794. Italy dismisses India’s attempt to distinguish the present case from the *Chagos Marine Protected Area Arbitration* on the basis that, according to India, the claim regarding the alleged violation of the Marines’ immunities has no link whatsoever with the Convention.¹⁴⁴⁴ To the contrary, Italy argues, “immunity is incorporated by reference into certain provisions of UNCLOS and is inextricably linked to the question of jurisdiction”.¹⁴⁴⁵

(c) **Analysis of the Arbitral Tribunal**

795. As pointed out in paragraph 733 of this Award, before proceeding to the consideration of Italy’s claim concerning the immunity *ratione materiae* of the Marines from Indian criminal jurisdiction, or in other words, the merits of Italy’s claim, the Arbitral Tribunal must first determine whether it has jurisdiction over Italy’s claim.

796. The Arbitral Tribunal will first address the issue whether any of the Articles of the Convention invoked by Italy may constitute a basis for the Arbitral Tribunal ascertaining its jurisdiction regarding the issue of the immunity of the Marines. The Arbitral Tribunal will then turn to the question whether there is any other justification for the Arbitral Tribunal to ascertain such jurisdiction.

797. Italy invokes Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention which make reference to “other rules of international law”, “the rights and duties of other States”, and “other pertinent rules of international law”.¹⁴⁴⁶

798. However, in the view of the Arbitral Tribunal, these Articles are not pertinent and applicable in the present case. Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of

¹⁴⁴² Italy’s Memorial, paras 8.14-8.16, 8.19.

¹⁴⁴³ Italy’s Memorial, para. 8.16, *citing* Article 297, paragraph 1, subparagraphs (a) and (b), of the Convention.

¹⁴⁴⁴ Italy’s Reply, para. 2.67.

¹⁴⁴⁵ Italy’s Reply, para. 2.67.

¹⁴⁴⁶ Italy’s Reply, paras 2.49, 2.54. *See also* Italy’s Memorial, para. 8.17; Italy’s Rejoinder, paras 4.6, 4.24; Hearing Transcript, 9 July 2019, 66:16-69:2.

the Convention apply to the exercise of rights and duties in the territorial sea and the exclusive economic zone by coastal States, while the evidence in the present case demonstrates that India enforced its jurisdiction over the Marines only in its internal waters and on land, when the Marines were arrested and detained.¹⁴⁴⁷ Although the Indian authorities boarded the “Enrica Lexie” and conducted preliminary investigations when it was anchored in India’s territorial sea, it was only when the “Enrica Lexie” was docked at Kochi harbour that the Indian authorities disembarked the Marines for questioning and arrested them.¹⁴⁴⁸

799. Articles 95 and 96, also invoked by Italy, do not address the immunity of persons, namely individuals who may be described as State officials. They address, first in Article 95, the immunity of warships, and second in Article 96, the immunity of ships “owned or operated by a State and used only on government non-commercial service”. The word “only” in Article 96 is of specific significance, and indicates that even if the vessel is not a warship, it must still be owned or operated by a State and exclusively dedicated to government non-commercial service. The Arbitral Tribunal is therefore of the view that these two articles are not applicable to Italy’s claim.
800. Article 297, paragraph 1, is invoked by Italy as a “subsidiary argument”.¹⁴⁴⁹
801. The Arbitral Tribunal observes that in the *Chagos Marine Protected Area Arbitration*, the arbitral tribunal found that Article 297, paragraph 1, subparagraph (a), “includes a *renvoi* to sources of law beyond the Convention itself”. The arbitral tribunal made this finding in the context of considering “other internationally lawful uses of the sea specified in article 58”.¹⁴⁵⁰ However, Article 58 does not apply to the present dispute, nor does Article 297, paragraph 1, subparagraph (a).
802. As to Article 297, paragraph 1, subparagraph (b), of the Convention, the Arbitral Tribunal notes that the subject matter of the Parties’ dispute does not pertain to the exercise of freedoms, rights and uses of the sea “in contravention of ... the laws and regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this

¹⁴⁴⁷ See Hearing Transcript, 12 July 2019, 114:2-14.

¹⁴⁴⁸ Italy’s Memorial, paras 4.101, 6.22, referring to Remand Report in Crime 02/2012 U/S 302 IPC, Coastal Police Station, Neendakara, Kollam, 20 February 2012, p. 28 (**Annex IT-144**); Log Book of the Master of the “Enrica Lexie” (**Annex IT-14**); Affidavit of R. Jayaraj, Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, 1 March 2012, para. 16 (**Annex IT-153**); Kerala Charge Sheet, 18 May 2012, p. 9 (**Annex IT-171**).

¹⁴⁴⁹ Italy’s Reply, para. 2.50; Italy’s Memorial, para. 8.19, referring to PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316.

¹⁴⁵⁰ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316(a).

Convention”.¹⁴⁵¹ Consequently, the Arbitral Tribunal is of the view that Article 297, paragraph 1, subparagraph (b), is not relevant to the present case.

803. The Arbitral Tribunal now turns to the question whether there is any other justification for it to exercise jurisdiction over the issue of the immunity of the Marines.
804. As determined by the Arbitral Tribunal, the dispute between the Parties in the present case concerns which Party is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the “Enrica Lexie” and the “St. Antony” which raises, but is not limited to, the question of the immunity of the Marines.¹⁴⁵²
805. The question therefore arises as to whether the issue of the entitlement to exercise jurisdiction over the incident of 15 February 2012 could be satisfactorily answered without addressing the question of the immunity of the Marines.
806. The issue of entitlement to exercise jurisdiction encompasses, but is not conclusively answered by, the question as to whether the Marines enjoy immunity from jurisdiction in respect of acts that they undertook during the incident. In fact, both Italy and India have presented various other arguments, unrelated to the question of immunity, as to why each of them should or should not be entitled to exercise jurisdiction under different provisions of the Convention. Thus the question of the immunity of the Marines is one aspect out of several, albeit an important one, that requires examination in resolving the Parties’ dispute.
807. The Arbitral Tribunal takes note in this regard that as stated by the counsel for Italy, Sir Michael Wood KCMG, during the Hearing:

in the circumstances of this case, it would make no sense whatsoever for the Tribunal to determine that a state has jurisdiction under the Convention without, at the same time, deciding whether the exercise of such jurisdiction would be lawful under international law. This necessarily requires a decision on immunity.¹⁴⁵³

808. Immunity from jurisdiction, by definition, operates as an exception to an otherwise-existing right to exercise jurisdiction. Whether that exception applies in the present case is a question that forms an integral part of the Arbitral Tribunal’s task to determine which Party may exercise jurisdiction over the Marines. The Arbitral Tribunal could not provide a complete answer to the question as to which Party may exercise jurisdiction without incidentally examining whether the Marines

¹⁴⁵¹ India’s Counter-Memorial, para. 5.16 *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 316(b).

¹⁴⁵² *See* Part IV, Section A.

¹⁴⁵³ Hearing Transcript, 9 July 2019, 57:17-23.

enjoy immunity. The issue of immunity of the Marines, in the words of the PCIJ in the *Case Concerning Certain German Interests* belongs to those “questions preliminary or incidental to the application”¹⁴⁵⁴ of the Convention.

809. The Arbitral Tribunal considers that, while the Convention may not provide a basis for entertaining an independent immunity claim under general international law, the Arbitral Tribunal’s competence extends to the determination of the issue of immunity of the Marines that necessarily arises as an incidental question in the application of the Convention.
810. The Arbitral Tribunal recalls in this regard Italy’s argument that “[t]here is nothing unusual in an international court or tribunal with jurisdiction over a dispute concerning the interpretation or application of a treaty deciding questions of international law that necessarily arise in the resolution of the dispute”.¹⁴⁵⁵ India, for its part, has acknowledged that “the very fact that the ITLOS, as well as Annex VII tribunals, are called to apply, besides the UNCLOS itself, ‘other rules of international law not incompatible with [the] Convention’ confirms the accepted incompleteness of the Convention”.¹⁴⁵⁶
811. The Arbitral Tribunal finds that examining the issue of the immunity of the Marines is an incidental question that necessarily presents itself in the application of the Convention in respect of the dispute before it, namely which Party is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the “Enrica Lexie” and the “St. Antony”. The Arbitral Tribunal accordingly concludes that it has jurisdiction to deal with the question of immunity of the Marines in the present dispute.

¹⁴⁵⁴ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18 (“It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the Geneva Convention. Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction”). See also Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (first published 1953, Grotius Publications Ltd., Cambridge, 1987), p. 266 (“Where a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary”); Charles Kotuby Jr and Luke Sabota, *General Principles Of Law And International Due Process*, (Oxford University Press, 2017), pp 159-160 (“once jurisdiction is properly obtained, the tribunal’s power typically extends to all relevant and auxiliary questions necessary to decide the primary dispute – even when those questions technically fall beyond the scope of the tribunal’s authority”).

¹⁴⁵⁵ Italy’s Rejoinder, para. 4.20.

¹⁴⁵⁶ Hearing Transcript, 13 July 2019, 34:1-5.

2. Immunity *Ratione Materiae* of the Italian Marines as Applicable in the Context of UNCLOS

812. In the following, the Arbitral Tribunal will summarise the positions of the Parties as to whether the Marines are entitled to immunity *ratione materiae* from India's exercise of criminal jurisdiction. Italy's claim in this regard is set out in its request for relief (f) as follows:

The assertion and continued exercise of criminal jurisdiction by India over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone is in violation of India's obligation to respect the immunity of the Marines under UNCLOS Articles 2(3), 56(2), 58(2) and 100 as Italian State officials exercising official functions.¹⁴⁵⁷

(a) Position of Italy

813. Italy claims that the Marines enjoy immunity *ratione materiae* from criminal jurisdiction because they were and are State officials who were acting in an official capacity during the "Enrica Lexie" incident which took place in the exclusive economic zone and territorial sea. Accordingly, because the law of immunity which applies to the Marines is a necessary part of the Convention by operation of Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, India is in breach of these provisions by continuing to assert and exercise criminal jurisdiction over the Marines for actions that they undertook during the "Enrica Lexie" incident.
814. Italy contends that immunity *ratione materiae* "attaches to a person who acts on behalf of a State in relation to acts performed in an official capacity", and that this rule "applies to all State officials, regardless of their position in the internal hierarchy".¹⁴⁵⁸ Italy asserts that this general principle finds extensive support in State practice and has been endorsed by India itself.¹⁴⁵⁹ Italy claims that one of the clearest examples of an individual having immunity *ratione materiae* is a

¹⁴⁵⁷ Italy's Memorial, p. 188.

¹⁴⁵⁸ Italy's Memorial, para. 11.10; Hearing Transcript, 9 July 2019, 76:16-23, *citing* International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, p. 353 (Draft Article 6).

¹⁴⁵⁹ Italy's Memorial, paras 11.13-11.14, *referring to* A. Sari, 'The Status of Armed Forces in Public International Law: Jurisdiction and Immunity', in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing Limited, 2015), p. 360; *citing* General Assembly, Official Records, Sixty-sixth session, Sixth Committee, Summary Record of the 27th meeting, 2 November 2011, A/C.6/66/SR.27, para. 79; Statement by Ambassador Asoke Kumar Mkerji, Permanent Representative of India to the United Nations at the United Nations Security Council Open Debate on Peacekeeping Operations, 11 June 2014, U.N. Doc. S/PV.7196, p. 27.

member of a State's armed forces on official duties¹⁴⁶⁰ and that allegations of excessive use of force do not lift such immunity.¹⁴⁶¹

815. Applying this general principle, Italy claims that the Marines are entitled to immunity on the basis of two elements, neither of which, Italy notes, India disputes.
816. First, Italy asserts that the Marines are “State officials of the Italian Republic”.¹⁴⁶² Referring to the ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, provisionally adopted by the ILC (hereinafter “ILC Draft Articles on Immunity of State Officials”), Italy submits that a “State official” is defined as “any individual who represents the State or who exercises State functions”.¹⁴⁶³ The Marines, Italy claims, fall within this definition because they were and remain members of the Italian Navy and officers and agents of the judicial police entrusted with guaranteeing the maritime defence of the State. Italy argues that this status is supported by the relevant Articles of the Italian Military Code, as well as other Italian legal instruments, which define and affirm the status of the Marines as State officials exercising State functions, both generally and as part of the VPD on board the “Enrica Lexie”.¹⁴⁶⁴ In addition, Italy notes, the Marines are subject to a military chain of command, receive their salary from the Ministry of Defence according to their rank and deployment, and were listed as Government military personnel on board the “Enrica Lexie”, as required by Italian law.¹⁴⁶⁵
817. Second, Italy submits that the Marines were acting in an official capacity. Italy proffers several bases in support of this submission. Italy contends that under international law, there is a presumption that a State is correct about its official acting in an official capacity, and that this

¹⁴⁶⁰ Italy's Memorial, para. 11.11, referring to *Germany v. Margellos and 18 other natural and legal persons (intervening)*, Petition for Cassation, Case No. 6/2002, (2003) 1 AED 11, ILDC 87 (GR2002), 17 September 2002, para. 14; and citing J. Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (Asser Press, 2015), p. 162. See also Hearing Transcript, 9 July 2019, 78:2-7.

¹⁴⁶¹ Italy's Memorial, para. 11.15, referring to R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), para. 29.

¹⁴⁶² Italy's Memorial, para. 11.18; Hearing Transcript, 9 July 2019, 79:2-3.

¹⁴⁶³ Italy's Memorial, para. 11.18, citing International Law Commission, “Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction”, provisionally adopted by the International Law Commission, in ‘Report of the International Law Commission on the Work of its 66th Session’ (5 May – 6 June and 7 July – 8 August 2014) U.N. Doc. A/69/10, p. 231 (Draft Article 2, paragraph (e)).

¹⁴⁶⁴ Italy's Memorial, paras 11.19-11.23; Hearing Transcript, 9 July 2019, 79:4-13, citing Italian Military Code, Articles 110 and 111(1)(a) (**Annex IT-228**); Italian Code of Navigation, Article 1235 in conjunction with Articles 1135 and 1136 (**Annex IT-225**); Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4(4) (**Annex IT-95(b)**).

¹⁴⁶⁵ Italy's Memorial, paras 11.24-11.26, 11.28-11.29. See also Hearing Transcript, 9 July 2019, 80:14-19, 81:1-82:12, citing (Confidential Annex) (**Annex IT-235(c)**); Law Decree no. 963 of the Ministry of Transport of Italy, 7 October 2011, Article 3 (**Annex IT-94**).

presumption is only displaced if the circumstances of the case clearly indicate otherwise.¹⁴⁶⁶ Italy claims that, in this case, it asserted immunity at the first opportunity, namely in the written notification that Sergeant Latorre handed to the Indian boarding team on 16 February 2012, and repeatedly again thereafter.¹⁴⁶⁷

818. In addition, Italy claims that, as members of the VPD assigned to the vessel, the Marines were on board the “Enrica Lexie” in an official capacity with a specific anti-piracy mandate under Italian law.¹⁴⁶⁸ Italy contends that the Marines “acted in their official capacity before, during and in the aftermath of the incident of 15 February 2012”.¹⁴⁶⁹ Specifically, Italy submits that the Marines “were defending an Italian-flagged oil tanker *pursuant to a mandate from the Italian State* to ensure maritime security in a high-risk piracy area”.¹⁴⁷⁰ Italy further submits that the Marines acted in accordance with the applicable rules of engagement, which, according to Italy, authorise the use of warning shots in the proximity of a suspected pirate vessel or craft and the use of proportional and necessary force to force suspected pirate vessels or crafts to implement specific kinematic manoeuvres.¹⁴⁷¹
819. Moreover, even if the Marines’ acts were found to be *ultra vires*, unlawful, or as having involved an excessive use of force, Italy asserts that the Marines would still have immunity *ratione materiae* because the conduct at issue was nevertheless engaged “under colour of or in ostensible exercise of [their] public authority”.¹⁴⁷² This is demonstrated, Italy submits, by the facts that Chief Master Sergeant Latorre “engaged his chain of command while the incident was still ongoing”, “was the source of the first flash report by CINCPAC regarding an attempted attack on the Enrica

¹⁴⁶⁶ Italy’s Memorial, paras 11.33-11.36, *citing* R. Kolodkin, Special Rapporteur, Third Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/646, *Yearbook of the International Law Commission 2011*, Vol. II (Part 2), paras 30, 61(i); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 62 at p. 87, paras 60-61. *See also* Hearing Transcript, 9 July 2019, 82:18-83:1, 83:7-84:15.

¹⁴⁶⁷ Italy’s Memorial, para. 11.38, *citing* Statement of Massimiliano Latorre addressed to the Indian authorities, 16 February 2012 (**Annex IT-124**); *referring to Note Verbale* 69/456, 17 February 2012 (**Annex IT-12**); Log Book of the Master of the “Enrica Lexie”, p. 4 (**Annex IT-14**). *See also* Hearing Transcript, 9 July 2019, 84:16-17.

¹⁴⁶⁸ Italy’s Memorial, paras 11.41-11.45. *See also* Hearing Transcript, 9 July 2019, 84:18-86:4.

¹⁴⁶⁹ Italy’s Memorial, para. 11.46.

¹⁴⁷⁰ Italy’s Memorial, para. 11.47 [emphasis added by Italy]. *See also* Hearing Transcript, 9 July 2019, 86:5-18.

¹⁴⁷¹ Italy’s Memorial, para. 11.48, *citing* (Confidential Annex) (**Annex IT-235(d)**). *See also* Hearing Transcript, 9 July 2019, 86:19-87:5.

¹⁴⁷² Italy’s Memorial, para. 11.49, *citing* J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014), pp 142-143; R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), para. 29. *See also* Hearing Transcript, 9 July 2019, 87:6-88:10.

Lexie”, and “a couple of hours after the attack, he sent his action report to CINCPAC, the Italian Ministry of Defence and the Office of the Chief of Staff of the Italian Navy regarding the incident”.¹⁴⁷³

820. Italy disputes the contention that the Marines do not enjoy immunity because they were on a merchant vessel, not a warship.¹⁴⁷⁴ Italy notes that it is not claiming immunity for the “Enrica Lexie” under Articles 32 and 95 of the Convention.¹⁴⁷⁵ In any event, Italy submits that whether the “Enrica Lexie” is a merchant vessel or a warship is irrelevant to the determination of the immunity *ratione materiae* of the Marines.¹⁴⁷⁶ This is because the Marines were protecting the “Enrica Lexie” in exercise of State authority in pursuit of State interests with respect to maritime security.¹⁴⁷⁷ Moreover, even if the interests at issue were commercial, Italy submits that the “distinction between acts *jure imperii* and acts *jure gestionis* is irrelevant to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction” as long as the acts at issue were performed in an official capacity.¹⁴⁷⁸ For these reasons, Italy maintains that the Marines were acting in an official capacity for purposes of determining their immunity *ratione materiae*.
821. In response to India’s claim that the Marines do not enjoy immunity *ratione materiae* from India’s criminal jurisdiction because they fall within the “territorial tort” exception, Italy argues that the exception is not customary international law.¹⁴⁷⁹ Italy submits that this is most notably demonstrated by the fact that the ILC deleted the “territorial tort” exception from Article 7 of the ILC Draft Articles on Immunity of State Officials (regarding the exceptions to the immunity *ratione materiae* of State officials), which the ILC plenary adopted provisionally on 20 July 2017.¹⁴⁸⁰
822. Italy further argues that State practice on the claimed exception is sparse and diverse and that the case law cited by India is largely distinguishable from the case at hand because they either related

¹⁴⁷³ Hearing Transcript, 9 July 2019, 88:14-89:16.

¹⁴⁷⁴ Italy’s Memorial, para. 11.50.

¹⁴⁷⁵ Italy’s Memorial, para. 11.50. *See also* Hearing Transcript, 9 July 2019, 89:16-18.

¹⁴⁷⁶ Italy’s Memorial, paras 11.50. *See also* Hearing Transcript, 9 July 2019, 89:19-21.

¹⁴⁷⁷ Italy’s Memorial, paras 11.51-11.53. *See also* Hearing Transcript, 9 July 2019, 90:1-5.

¹⁴⁷⁸ Italy’s Memorial, para. 11.54; Hearing Transcript, 9 July 2019, 90:5-91:6, *citing John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L, LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003), p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

¹⁴⁷⁹ Italy’s Reply, paras 8.5-8.7, 8.14-8.19. *See also* Hearing Transcript, 9 July 2019, 91:9-14.

¹⁴⁸⁰ Italy’s Reply, paras 8.6-8.7, 8.14, *referring to* International Law Commission, “Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction”, provisionally adopted by the International Law Commission, in ‘Report of the International Law Commission on the Work of its 69th Session’ (1 May – 2 June and 3 July – 4 August 2017) U.N. Doc. A/72/10, p. 231 (Draft Article 7 and Annex). *See also* Hearing Transcript, 9 July 2019, 91:15-93:6.

to immunity from civil proceedings or cases in which the State never invoked immunity for its official.¹⁴⁸¹ In Italy's view, the only case cited by India that might be relevant is the English first-instance decision in *Khurts Bat v. Investigating Judge of the General Federal Court*, which is "wholly exceptional" and does not provide any support for India's claim.¹⁴⁸² This is because the alleged crime in that case was committed not in the United Kingdom but in Germany, and since Germany had requested a European arrest warrant, the English court assumed that Germany took the view that the accused did not enjoy immunity.¹⁴⁸³ Further, the court itself recognised that "the evidence of state practice [on the territorial tort exception] is not all one way"¹⁴⁸⁴ and ultimately relied on one academic source to find that in the special case of covert action, such an exception was allowed.¹⁴⁸⁵ Thus, Italy submits, even if such an exception did exist, it has at most been applied only to covert operations not acknowledged by the State concerned as an official act, wholly unlike the circumstances in this case where Italy has from the beginning asserted the immunity of the Marines.¹⁴⁸⁶

823. Italy dismisses the academic commentary which India cites as insufficient to support the "territorial tort" exception because, according to Italy, the authors either concede that State practice is sparse and inconsistent or provide examples of cases that concern covert action where immunity was not considered and the State of nationality of the accused did not admit that the covert act was undertaken on its behalf.¹⁴⁸⁷
824. Italy submits that, even if the "territorial tort" exception were a rule of customary international law, it would not apply because two key elements have not been satisfied in this case.¹⁴⁸⁸ Specifically, Italy submits that the alleged crime did not occur on Indian territory and the Marines were not present in Indian territory at the time of the alleged crime.¹⁴⁸⁹ With respect to the first element, Italy notes that the Parties do not dispute that the alleged crime occurred 20.5 nautical miles off India's coast, beyond India's territorial sea. Italy submits that India's assertion that the crime occurred on an Indian flagged boat which is assimilated to India's territory for the application of criminal law is not supported by any authority. To the contrary, Italy argues under

¹⁴⁸¹ Italy's Reply, para. 8.16. *See also* Hearing Transcript, 9 July 2019, 93:7-13.

¹⁴⁸² Italy's Reply, para. 8.17; Hearing Transcript, 9 July 2019, 93:14-20, *referring to Khurts Bat and Mongolia (intervening) v. Investigating Judge of the German Federal Court and Secretary of State for Foreign and Commonwealth Affairs (intervening)*, Appeal Decision, [2011] EWHC 2029 (Admin).

¹⁴⁸³ Hearing Transcript, 9 July 2019, 93:20-94:2.

¹⁴⁸⁴ Hearing Transcript, 9 July 2019, 94:5-6.

¹⁴⁸⁵ Hearing Transcript, 9 July 2019, 94:7-13.

¹⁴⁸⁶ Hearing Transcript, 9 July 2019, 94:17-95:5.

¹⁴⁸⁷ Italy's Reply, para. 8.18.

¹⁴⁸⁸ Italy's Reply, paras 8.9, 8.23. *See also* Hearing Transcript, 9 July 2019, 96:13-20.

¹⁴⁸⁹ Italy's Reply, para. 8.23. *See also* Hearing Transcript, 9 July 2019, 96:20-23.

international law, a vessel is not a “floating territory” of a State, and the “fiction of the territoriality of the ship [...] has now been abandoned by all States”.¹⁴⁹⁰ Italy further submits that the Supreme Court of India expressly recorded that the “St. Antony” is not registered under the Indian Merchant Shipping Act, 1958, and found that it “was not flying an Indian Flag at the time when the incident took place”.¹⁴⁹¹

825. Italy submits that the second element is also not met because, as Italy notes the Parties do not dispute, the Marines never boarded the “St. Antony”.¹⁴⁹² According to Italy, the fact that the Marines were arrested in India’s territorial sea is irrelevant for the purposes of the claimed exception.¹⁴⁹³ This is because, Italy contends, “[f]or the purposes of the claimed exception, the relevant place is where the person concerned was present when the alleged crime was committed”, not where any arrest was made.¹⁴⁹⁴ As such, Italy submits, even on India’s own description of the claimed exception, the facts of the case do not satisfy the relevant requirements.¹⁴⁹⁵
826. Italy also rejects India’s argument that the Marines’ immunity was only engaged when they were arrested and detained on India’s land territory. In Italy’s view, “[i]mmunity is engaged by subjecting an official to a ‘constraining act of authority’, coercive measures, any measure directed at that official which imposes obligations on him or her which, in the event of non-compliance, may lead to coercive measures and which may impede the proper performance of his or her state function”.¹⁴⁹⁶ While Italy acknowledges that Judges Higgins, Kooijmans, and Buergenthal did observe in the *Arrest Warrant* case that the commencement of an investigation does not by itself violate the immunities of the person concerned, Italy points out that they also took into account the important factor that the investigating State “must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned”.¹⁴⁹⁷

¹⁴⁹⁰ Italy’s Reply, paras 8.26-8.27 citing R.J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Vol. 1 (Martinus Nijhoff Publishers, 1991), p. 407; and referring to James Crawford, *Brownlie’s Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 464. See also Hearing Transcript, 9 July 2019, 96:24-98:1.

¹⁴⁹¹ Italy’s Reply, para. 8.28, citing *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, paras 29, 93 (**Annex IT-19**).

¹⁴⁹² Italy’s Reply, para. 8.30(1). See also Hearing Transcript, 9 July 2019, 98:6.

¹⁴⁹³ Italy’s Reply, para. 8.30(2). See also Hearing Transcript, 9 July 2019, 98:6-8.

¹⁴⁹⁴ Hearing Transcript, 9 July 2019, 98:9-11. See also Hearing Transcript, 9 July 2019, 98:12-13.

¹⁴⁹⁵ Hearing Transcript, 9 July 2019, 98:19-21.

¹⁴⁹⁶ Hearing Transcript, 18 July 2019, 112:7-13, referring to *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 237, para. 170; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 79, paras 54-55.

¹⁴⁹⁷ Hearing Transcript, 18 July 2019, 113: 1-3, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and

Moreover, Italy notes, the ICJ in that case found that the mere issuance of an arrest warrant was an act that violated the immunity of the person concerned because it constituted “a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium’s choosing”.¹⁴⁹⁸ This is, in Italy’s view, not different from the case at hand, in which “the Indian authorities searched for and locked on to the *Enrica Lexie*” and ““prepared the ground’ for their arrest and detention” while the ship was in the exclusive economic zone and the territorial sea.¹⁴⁹⁹ Italy similarly rejects India’s reliance on the ICJ’s decision in *Certain Questions of Mutual Assistance in Criminal Matters*, noting that unlike the invitation to testify issued by the French judge to the President of Djibouti, which he could freely accept or decline, the Marines were not free to accept or decline to enter into India’s territorial sea or to be brought into its internal waters and land territory.¹⁵⁰⁰

827. Finally, Italy dismisses as irrelevant the declaration that India signed upon its ratification of the Convention, in which India contends that the Convention does not authorise other States to carry out in the contiguous zone and exclusive economic zone military exercise or manoeuvres, in particular those involving the use of weapons or explosives without the consent of the coastal State.¹⁵⁰¹ According to Italy, this is because the declaration is not a reservation that modifies legal relations between the Parties, and in any event, the “*Enrica Lexie*” incident does not concern military exercises or manoeuvres.¹⁵⁰²
828. Therefore, since the Marines enjoy immunity *ratione materiae* and no exceptions apply under international law, Italy submits that India has breached provisions of UNCLOS by violating the immunity of the Marines.¹⁵⁰³ First, Italy submits, India breached Article 56, paragraph 2, and Article 58, paragraph 2, of the Convention, which require the coastal State to have “due regard to the rights and duties of other States” and the “pertinent rules of international law” that apply in the exclusive economic zone.¹⁵⁰⁴ They did so, Italy alleges, by exercising jurisdiction over the Marines as persons implicated in the “*Enrica Lexie*” incident by directing, interdicting and escorting the “*Enrica Lexie*”, on which India knew the Marines were boarded, beginning some

Buergenthal, I.C.J. Reports 2002, p. 3 at pp 80-81, para. 59. *See also* Hearing Transcript, 18 July 2019, 112:14-21.

¹⁴⁹⁸ Hearing Transcript, 18 July 2019, 114:4-6, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 3 at p. 84, para. 69. *See also* Hearing Transcript, 18 July 2019, 113:4-19.

¹⁴⁹⁹ Hearing Transcript, 18 July 2019, 114:8-10, 114:9-20.

¹⁵⁰⁰ Hearing Transcript, 18 July 2019, 118:3-13.

¹⁵⁰¹ Italy’s Reply, para. 8.33. *See also* Hearing Transcript, 9 July 2019, 98:22-99:7.

¹⁵⁰² Italy’s Reply, para. 8.33(1)-8.33(2).

¹⁵⁰³ Hearing Transcript, 9 July 2019, 99:18-22.

¹⁵⁰⁴ Hearing Transcript, 9 July 2019, 100:4-8.

36 nautical miles from its coast in the exclusive economic zone.¹⁵⁰⁵ Similarly, Italy claims that India exercised criminal jurisdiction over the Marines while they were on board the “Enrica Lexie” when it was anchored in India’s territorial sea, in breach of Article 2, paragraph 3, of the Convention which requires States Parties to respect the rules on immunity in the territorial sea, and refraining from restrictive measures in respect of acts performed by a person in an official capacity.¹⁵⁰⁶

829. Separately, Italy also submits that India failed to decide the Marines’ immunity *in limine litis*, in breach of their obligations to do so under international law.¹⁵⁰⁷ Despite Chief Master Sergeant Latorre’s written notification to the Indian boarding team less than 24 hours after the incident that the Marines were “exclusively answerable to Italian Judicial Authorities”, Italy’s 18 February 2012 *note verbale* to India’s Ministry of External Affairs asserting the Marines’ immunity, and Italy’s repeated invocation of the Marines’ immunity to challenge the jurisdiction of Indian courts, the Indian authorities and judicial bodies have failed to decide the question of immunity to date.¹⁵⁰⁸

(b) **Position of India**

830. India disputes that the Marines are entitled to immunity *ratione materiae* from the Indian courts’ exercise of criminal jurisdiction. Specifically, India contends that the “territorial tort” exception to the immunity that the Marines would otherwise enjoy applies in this case because the alleged crime was “committed against Indian nationals, on an Indian flagged boat, which is assimilated to India’s territory for the application of criminal law, and the Marines have been found on India’s territory”.¹⁵⁰⁹
831. While acknowledging that “there seems to be no exact precedent in case-law”, India submits that the facts of this case “can be compared, by analogy, to [those] prevailing when a crime is committed (or alleged to have been committed) by a State official on the territory of a foreign State”.¹⁵¹⁰ India asserts that, in such cases, there is a substantive body of case law and academic

¹⁵⁰⁵ Hearing Transcript, 9 July 2019, 100:9-18.

¹⁵⁰⁶ Hearing Transcript, 9 July 2019, 101:2-13.

¹⁵⁰⁷ Hearing Transcript, 9 July 2019, 74:23-75:6.

¹⁵⁰⁸ Hearing Transcript, 9 July 2019, 75:9-76:14, *referring to* Statement of Massimiliano Latorre, 16 February 2012, p. 1 (**Annex IT-124**); *Note Verbale* 71 from Italy to India, 18 February 2012 (**Annex IT-133**). *See also* Hearing Transcript, 18 July 2019, 119:4-120:16.

¹⁵⁰⁹ India’s Counter-Memorial, para. 5.25, *referring to* Article 188 of the Indian Code of Criminal Procedure, 1973 (**Annex IN-20**). *See also* India’s Counter-Memorial, paras 5.26-5.35; India’s Rejoinder, paras 7.1-7.16.

¹⁵¹⁰ India’s Counter-Memorial, para. 5.26.

commentary that recognises the application of a “territorial tort” exception to the immunity of State officials from foreign criminal jurisdiction.¹⁵¹¹

832. India submits that this exception is enshrined in draft Article 7, paragraph 1, subparagraph (iii) as proposed by Special Rapporteur Escobar Hernández in her fifth report on immunity of State officials from foreign criminal jurisdiction. India further contends that its reliance on this draft is not undermined by the fact that the ILC subsequently decided not to include that provision in Article 7 of the ILC Draft Articles on Immunity of State Officials as provisionally adopted by the ILC plenary. India claims that, to the contrary, the ILC plenary debate and ILC commentary to this Draft Article served to confirm India’s position.¹⁵¹²
833. Specifically, according to India, the Special Rapporteur’s summary of the ILC plenary debate notes that “most [ILC] members had indicated that they were in favour, in a more or less qualified way, of incorporating the ‘territorial tort exception’.”¹⁵¹³ Similarly, India submits that the commentary to Article 7 of the ILC Draft Articles on Immunity of State Officials that was provisionally adopted states as follows:

*Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft Article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes, such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply.¹⁵¹⁴*

834. India further claims that, despite the fact that the “territorial tort” exception finds its origins in the context of immunities from civil proceedings, India is entitled to reason by analogy.¹⁵¹⁵ India claims that this is because the ILC has done the same on the basis of the review of the jurisprudence by the Special Rapporteur, and because such reasoning is also consistent with the

¹⁵¹¹ India’s Counter-Memorial, para. 5.28-5.32.

¹⁵¹² India’s Rejoinder, para. 7.4, *referring to* C. Escobar Hernández, Special Rapporteur, Fifth Report to the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/701, 14 June 2016.

¹⁵¹³ India’s Rejoinder, para. 7.5 *citing* International Law Commission, ‘Provisional Summary Record of the 3365th Meeting’, U.N. Doc. A/CN.4/SR.3365, p. 15.

¹⁵¹⁴ India’s Rejoinder, para. 7.6, *citing* International Law Commission, ‘Report of the International Law Commission on the Work of its 69th Session’ (1 May-2 June and 3 July-4 August 2017), U.N. Doc. A/72/10, p. 188, para. 141 [emphasis added by India].

¹⁵¹⁵ India’s Rejoinder, para. 7.7.

ILC's work on the identification of customary international law.¹⁵¹⁶ India submits, in particular, that the ILC's commentary to Conclusion 8, in its Report on the work of its 68th session provides:

[I]t is of course important to consider instances of conduct that are in fact comparable, that is, where the same or similar issues have arisen so that such instances could indeed constitute reliable guides. The Permanent Court of International Justice referred in the *Lotus* case to: 'precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle [of customary international law] applicable to the particular case may appear'.¹⁵¹⁷

835. India also disputes Italy's claim that the "territorial tort" exception is not customary international law because State practice is deemed not to be fully consistent.¹⁵¹⁸ India claims that, to the contrary, both the ICJ and the ILC have noted that complete consistency in State practice is not required for a rule to be established as customary, and that some inconsistencies and contradictions are not necessarily fatal to a finding of "a general practice".¹⁵¹⁹
836. Finally, India disputes Italy's claim that the "territorial tort" exception would not apply to the facts of this case even if it were customary international law.¹⁵²⁰ With regard to Italy's first argument in this respect, India maintains that the alleged crimes were committed on Indian territory.¹⁵²¹ According to India, the "legal fiction [of] assimilating ship and territory" for the specific purpose of criminal law is well accepted and logical, especially since criminal jurisdiction can only be either territorial or personal, and for crimes committed on board a ship, India contends, territorial jurisdiction is the only possibility.¹⁵²²
837. With regard to Italy's second argument, India maintains that the fact that the Marines were not on board the "St. Antony" when they committed the alleged crime is not dispositive of its claim. Relying on a scholarly article which analyses various national legislation on immunity, India

¹⁵¹⁶ India's Rejoinder, paras 7.7-7.8.

¹⁵¹⁷ India's Rejoinder, para. 7.8, *citing* International Law Commission, 'Report of the International Law Commission on the Work of its 68th Session' (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, Paragraph 6 of the Commentary to Conclusion 8, p. 195, para. 63.

¹⁵¹⁸ India's Rejoinder, para. 7.9.

¹⁵¹⁹ India's Rejoinder, paras 7.9-7.10, *citing* *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 at p. 98, para. 186; International Law Commission, 'Report of the International Law Commission on the Work of its 68th Session', (2 May-10 June and 4 July-12 August 2016), U.N. Doc. A/71/10, p. 96, para. 63 (commentary to Conclusion 8, para. 7).

¹⁵²⁰ India's Rejoinder, paras 7.12-7.16.

¹⁵²¹ India's Rejoinder, para. 7.13.

¹⁵²² India's Rejoinder, para. 7.13.

argues that Italy's argument fails because "general State practice shows that the overriding consideration is whether the injury has been suffered on the territory of the forum State".¹⁵²³

(c) **Analysis of the Arbitral Tribunal**

838. As observed by the Arbitral Tribunal, the disagreement between the Parties on points of law or fact and conflicts of legal views or interests are confined to the question of which one of them is entitled to exercise jurisdiction over the incident involving the "Enrica Lexie" and the "St. Antony" which led, as claimed by the Parties, to the alleged violations of various provisions of the Convention referred to in their respective submissions.
839. Pursuant to Article 58, paragraph 2, and Article 92, each Party has exclusive jurisdiction over their respective ship involved in the incident, namely, Italy over the "Enrica Lexie" and India over the "St. Antony". The Parties therefore have concurrent jurisdiction over the incident.
840. At the same time, pursuant to the principle of objective territoriality, well established in international law, a State may assert its jurisdiction in respect of offences committed outside its territory but consummated within its territory or, as stated in 1926 by the PCIJ in the *S.S. "Lotus"* judgment, "if one of the constituent elements of the offence, and more especially its effects, have taken place [in its territory]".¹⁵²⁴
841. A question therefore arises whether India, as the flag State of the "St. Antony", on which the effects of the Marines' alleged offences – the death of Mr. Ajeesh Pinku and Mr. Jelastine Valentine – occurred, has in principle the right to exercise jurisdiction over the Marines or whether such exercise of jurisdiction is precluded because the Marines enjoy immunity under international law.
842. To answer this question the Arbitral Tribunal must consider whether the Marines are entitled to immunity *ratione materiae* for the acts that they committed in relation to the incident of 15 February 2012. Since there is no provision in the Convention that expressly addresses the immunity *ratione materiae* of State officials, the Arbitral Tribunal will examine how this matter is governed by customary international law.

¹⁵²³ India's Rejoinder, paras 7.14-7.15, citing Xiaodong Yang, *State Immunity in International Law*, (Cambridge University Press, 2015), pp 216-228.

¹⁵²⁴ *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 23. See also James Crawford, *Brownlie's Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 458.

i. Immunity *Ratione Materiae* under Customary International Law

843. Under customary international law, immunity *ratione materiae* from foreign criminal jurisdiction is accorded to State officials in respect of their “official acts” or “acts performed in an official capacity”.
844. The International Criminal Tribunal for the Former Yugoslavia in the *Prosecutor v. Tihomir Blaškić* case recognised the immunity of State officials as “a well-established rule of customary international law going back to the eighteenth and nineteenth centuries”.¹⁵²⁵ The ICJ also considered the issue in *Certain Questions of Mutual Assistance in Criminal Matters* and, while not stating directly that the *procureur de la République* and the Head of the National Security Service of Djibouti held functional immunity, refers to functional immunity in the following terms:

The Court observes that it has not been “concretely verified” before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State.¹⁵²⁶

845. While acknowledging that various aspects of its discussion on the immunity of State officials from foreign criminal jurisdiction were still in flux, the ILC’s discussion of the topic started from what the Commission regarded as the uncontroversial premise that the acts of State officials performed in an official capacity are subject to immunity.¹⁵²⁷ This was then further reflected in Articles 5, and 6, paragraph 1, of the ILC Draft Articles on Immunity of State Officials.¹⁵²⁸

¹⁵²⁵ *Prosecutor v. Tihomir Blaškić*, ICTY, Appeal Chamber, IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 38.

¹⁵²⁶ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 243, para. 191.

¹⁵²⁷ See R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 402, para. 21; International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat, U.N. Doc. A/CN.4/596, 31 March 2008, paras 88 (“[f]ollowing a construction that seems to be widely accepted by States, judicial organs and scholars, issues concerning beneficiaries, covered acts and possible exceptions are often examined with reference to two distinct categories of immunity of State officials, namely immunity *ratione personae* and immunity *ratione materiae*”), and 154 (“[c]ontrary to immunity *ratione personae* [...], immunity *ratione materiae* covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions. This limitation to the scope of immunity *ratione materiae* appears to be undisputed in the legal literature and has been confirmed by domestic courts”).

¹⁵²⁸ See International Law Commission, “Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction”, provisionally adopted by the International Law Commission, in ‘Report of the International Law Commission on the Work of its 68th Session’ (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, p. 353 (Draft Articles 5 (“State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction”) and 6, paragraph 1, (“State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity”)).

846. The Parties, in the present proceedings, similarly appear to accept the existence of the customary international law rule of functional immunity for State officials in respect of acts performed in an official capacity. Italy submits that immunity *ratione materiae* is “an integral part of the body of international legal rules on State immunity”.¹⁵²⁹ On its part, India has not questioned the notion that such a rule exists under customary international law. Instead, it focussed on establishing the existence of a “territorial tort” exception to that rule, pursuant to which immunity does not apply in respect of certain crimes committed by a foreign official on the territory of the forum State, thereby implying an acceptance of the general rule itself.¹⁵³⁰

ii. Immunity *Ratione Materiae* of the Marines as Applicable in the Context of the Present Case

847. In the following subsections, the Arbitral Tribunal will proceed to assess whether the Marines enjoy immunity *ratione materiae* in this case by determining whether they are “State officials”, whether the acts that they undertook in relation to the incident of 15 February 2012 were “official acts” or “acts performed in an official capacity”, and finally whether any exceptions, to the extent they exist under customary international law, apply to preclude them from enjoying such immunity.

(a) *Qualification of the Marines as State officials*

848. Immunity *ratione materiae* is enjoyed by State officials in general, irrespective of their position in the hierarchy of the State,¹⁵³¹ and includes members of a State’s armed forces on official duties.¹⁵³²

¹⁵²⁹ Italy’s Memorial, para. 11.10, citing to J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press, 2014), p. 7. See also Hearing Transcript, 9 July 2019, 76:16-23.

¹⁵³⁰ See India’s Counter-Memorial, paras 5.25-5.28; India’s Rejoinder, paras 7.4-7.5.

¹⁵³¹ See International Law Commission, “Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction”, provisionally adopted by the International Law Commission, in ‘Report of the International Law Commission on the Work of its 68th Session’ (2 May – 10 June and 4 July – 12 August 2016) U.N. Doc. A/71/10, p. 353 (Draft Articles 5 and 6); A. Sari, “The Status of Armed Forces in Public International Law: Jurisdiction and Immunity”, in A. Orakelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar Publishing, Limited, 2015), p. 360; General Assembly, Official Records, Sixty-sixth session, Sixth Committee, Summary Record of the 27th meeting, 2 November 2011, U.N. Doc. A/C.6/66/SR.27, para. 79. See also *Germany v. Margellos and 18 other natural and legal persons (intervening)*, Petition for Cassation, Case No. 6/2002, 17 September 2002, (2003) 1 AED 11, ILDC 87 (GR2002), para. 14.

¹⁵³² See J. Voetelink, *Status of Forces: Criminal Jurisdiction over Military Personnel Abroad* (Asser Press, 2015), pp 162-163; *Bundesverwaltungsgericht* (Federal Administrative Court), Judgment of 30 September 1988, *Deutsches Verwaltungsblatt* 1989, p. 261 et seq., summarised in Council of Europe, Committee of Legal Advisers on Public International Law (CADHI), Database on the Immunities of

849. In his second report on the immunity of State officials from foreign criminal jurisdiction, the ILC's then-Special Rapporteur Kolodkin noted an "agreement in the doctrine on the question of the category of persons enjoying immunity *ratione materiae*: all State officials are meant, irrespective of their position within the structure of the organs of State power".¹⁵³³ In its commentary to the provisionally adopted definition of "State official", the ILC recognised in this regard that "what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State".¹⁵³⁴
850. According to Articles 110 and 111, paragraph 1, subparagraph (a), of the Italian Military Code, the "Navy is the operative component of the Military entrusted with the maritime defence of the State" and has special competences with respect to the "safeguarding and protection of national interests [...] beyond the outer limit of the territorial sea, including as regards the fight against piracy, with the modalities set forth under article 5, paragraph 1, of the Decree-Law dated 12 July 2011, no. 107".¹⁵³⁵ The Italian Law on VPDs, in turn, is the specific legislation on the basis of which the two Marines were on board the "Enrica Lexie" as part of a VPD.¹⁵³⁶
851. As provided in Article 5, paragraph 2, of the Italian Law on VPDs and Article 55, paragraph 1, of the Italian Code of Criminal Procedure, the Marines had the additional status of officers and agents of the judicial police (*ufficiali ed agenti di polizia giudiziaria*) which authorised them, among other things, to arrest pirates and maintain them under their custody, and conduct investigations into crimes of piracy and suspicion of piracy in support of the public prosecutor.¹⁵³⁷
852. Article 4, paragraph 4, of the Template Agreement further corroborates this role:

Pursuant to art. 5, Law Decree n.107, 12 July 2011, the Chief of the VPD shall be assigned, for the time the VPD remains onboard to protect the Vessel, judicial police functions, limited

States and International Organisations, available at <http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/State_Immunities/>.

- ¹⁵³³ R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 402, para. 21.
- ¹⁵³⁴ International Law Commission, "Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction", provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 66th Session' (5 May – 6 June and 7 July – 8 August 2014) U.N. Doc. A/69/10, p. 235 (commentary to Draft Article 2, paragraph (e), para. 13).
- ¹⁵³⁵ Italian Military Code, Articles 110 and 111, paragraph 1, subparagraph (a) (**Annex IT-228**).
- ¹⁵³⁶ Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**).
- ¹⁵³⁷ See Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 2 (**Annex IT-91**) (designating the head of the VPD as an "officer" of the judicial police and the other members of the VPD as "agents" of the judicial police). See also Italian Code of Criminal Procedure, Article 55, paragraph 1 (**Annex IT-224**).

to activities conducted to suppress pirate attacks, without prejudice, for the remainder, for the assignments of the Ship master.¹⁵³⁸

853. In their role as members of the Italian Navy, the Marines were subject to a military chain of command,¹⁵³⁹ and in their role as officers and agents of the judicial police, the Marines were under the direct control of the judiciary.¹⁵⁴⁰
854. Although shipowners contributed to the expense of stationing a VPD on board their ship, such contribution was, as described in the Template Agreement, for the purposes of “repay[ing] [to the Italian Ministry of Defence] costs incurred for the employment of the VPD, including ancillary costs for personnel, operation and in-area logistic support”.¹⁵⁴¹ This reimbursement to the Italian government, as opposed to a direct payment of salaries by the shipowners, is a standard and common practice designed to simply compensate the Ministry of Defence for the costs incurred by the VPD when stationed on board a vessel. As such, it does not detract from the extensive evidence demonstrating that, as part of a VPD, established “[i]n the context of the international activities aimed at combating piracy for the purposes of ensuring freedom of navigation of national merchant vessels”,¹⁵⁴² the Marines were members of the Italian Navy, and officers and agents of the judicial police.
855. The Marines are therefore “State officials of the Italian Republic” for the purpose of determining their entitlement to immunity *ratione materiae* because they were and remain members of the Italian Navy and officers and agents of the judicial police entrusted with guaranteeing the maritime defence of the State.

(b) *Exercise by the Marines of official functions*

856. In order to determine whether immunity *ratione materiae* applies, the Arbitral Tribunal must next verify that the acts of the Marines were indeed acts within the scope of their duties as officials of the State.¹⁵⁴³

¹⁵³⁸ Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 4, paragraph 4 (**Annex IT-95(b)**).

¹⁵³⁹ (Confidential Annex) (**Annex IT-235(c)**).

¹⁵⁴⁰ Constitution of Italy, Article 109 (**Annex IT-222**).

¹⁵⁴¹ Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 6, paragraph 1 (**Annex IT-95(b)**).

¹⁵⁴² Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

¹⁵⁴³ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177 at p. 243, para. 191. *See also* R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction,

857. In his second report, then-Special Rapporteur Kolodkin noted that, in making this determination, “the correct test to be applied [...] is one of imputability. If the conduct in question is imputable or attributable to the sending State – even if it did not expressly order or sanction it – then continuing immunity *ratione materiae* should apply”.¹⁵⁴⁴
858. According to Article 4, paragraph 1, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the ILC at its fifty-third session, in 2001 (hereinafter “ILC Draft Articles on State Responsibility”), the “conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”.¹⁵⁴⁵ Paragraph 2 of the same Article states that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State”.¹⁵⁴⁶ In this regard, there exists a presumption under international law that a State is right about the characterisation of the conduct of its official as being official in nature.¹⁵⁴⁷
859. In the present case, the Marines were, as members of Italy’s armed forces, fulfilling a State function. The Marines were deployed on board the “Enrica Lexie” as part of a VPD pursuant to a mandate from the Italian State, as provided in the Italian Law on VPDs, to ensure “the protection of ships flying the Italian flag in transit in international maritime spaces at risk of piracy”.¹⁵⁴⁸ In this role, the Marines were not only acting as officers of the Italian Navy but also as officers and

U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 404, para. 25.

¹⁵⁴⁴ R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 404, para. 25 citing Eileen Denza et al., ‘Ex parte Pinochet: lacuna or leap?’ (1999) 48(4) *International and Comparative Law Quarterly* 949, p. 951; and referring to Eileen Denza, *A Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press, 2016).

¹⁵⁴⁵ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 40 Article 4, paragraph 1 (2001).

¹⁵⁴⁶ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 40 Article 4, paragraph 2 (2001).

¹⁵⁴⁷ R. Kolodkin, Special Rapporteur, Third Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/646, *Yearbook of the International Law Commission 2011*, Vol. II (Part 2), p. 233, paras 30, 61(i); *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 62 at p. 87, paras 60-61. See also Hearing Transcript, 9 July 2019, 82:18-83:1, 83:7-84:15.

¹⁵⁴⁸ Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

agents of the judicial police in respect of crimes related to piracy.¹⁵⁴⁹ The fact that the Marines were stationed on a merchant vessel, and not a warship, in the view of the Arbitral Tribunal, does not alter their status and the character of their mission as part of the VPD, undertaking acts in an official capacity attributable to the Italian State.¹⁵⁵⁰

860. Similarly, even if the Marines' acts might be found to be *ultra vires* or contrary to their instructions or orders (a question that this Arbitral Tribunal does not prejudge in the present proceedings), this would not preclude them from enjoying immunity *ratione materiae* as long as they continued to act in the name of the State and in their "official capacity".¹⁵⁵¹ This is corroborated by Article 7 of the ILC Draft Articles on State Responsibility, which provides that conduct by a State organ acting in its official capacity shall be attributable to the State "even if it exceeds its authority or contravenes instructions".¹⁵⁵²
861. During the incident, Sergeant Latorre engaged his chain of command by activating radio communication with other members of the VPD, donned his personal protection equipment, and positioned himself on the starboard wing of the bridge.¹⁵⁵³ As the craft approached the "Enrica Lexie", the Marines appeared to have followed the applicable rules of engagement by implementing visual signals to alert the presence of military personnel on board,¹⁵⁵⁴ monitoring the approaching craft, and firing warning shots in the proximity of a suspected pirate vessel or craft to force them to implement specific kinematic manoeuvres.¹⁵⁵⁵

¹⁵⁴⁹ Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 2 (**Annex IT-91**); Italian Code of Navigation, Articles 1135 and 1136 (**Annex IT-225**); Italian Code of Criminal Procedure, Article 55, paragraph 1 (**Annex IT-224**).

¹⁵⁵⁰ International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 41 (2001) ("It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as *acta iure gestionis*"); R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 404, para. 28. See also *John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L, LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003), p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

¹⁵⁵¹ R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 405, paras 29-31.

¹⁵⁵² International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 45 (2001).

¹⁵⁵³ (Confidential Annex) (**Annex IT-240**); (Confidential Annex) (**Annex IT-236**).

¹⁵⁵⁴ (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the "Enrica Lexie", p. 2 (**Annex IT-14**).

¹⁵⁵⁵ (Confidential Annex) (**Annex IT-235(d)**).

862. Thus, regardless of whether the Marines' acts were *ultra vires* or unlawful, in the view of the Arbitral Tribunal, the evidence demonstrates that during the incident the Marines were under an apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a VPD.

(c) *Applicability of the territorial tort exception*

863. Having found that the Marines were State officials acting in their official capacity during the incident of 15 February 2012, the Arbitral Tribunal must finally consider whether they might still be precluded from enjoying immunity *ratione materiae* as a result of the application of the "territorial tort" exception.

864. The Parties disagree as to the status of the territorial tort exception under customary international law. India asserts that, with respect to cases where a crime is alleged to have been committed by a State official on the territory of a foreign State, there is a substantive body of case law and academic commentary that recognises the application of a "territorial tort" exception to the immunity of State officials from foreign criminal jurisdiction.¹⁵⁵⁶ Italy, on the other hand, maintains that this exception has not crystallised into a rule of customary international law, as demonstrated by the fact that State practice is sparse and diverse and the case law that India cites is largely distinguishable from the case at hand because it relates either to immunity from civil proceedings or instances in which the State did not invoke immunity for its official.¹⁵⁵⁷

865. The Arbitral Tribunal observes that the concept of a "territorial tort" exception was incorporated in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.¹⁵⁵⁸ This convention was concluded for the purpose of enhancing the rule of law and legal certainty, particularly in the dealings of States with natural or juridical persons, and of contributing to the codification and development of international law and the harmonisation of practice. This convention has not yet entered into force. It has been signed but not ratified by India, and was acceded to by Italy on 6 May 2013.

866. While it is indisputable that national courts in a relatively significant number of States look to this convention as a reflection of customary international law, the fact remains that States that consider

¹⁵⁵⁶ India's Counter-Memorial, para. 5.28.

¹⁵⁵⁷ Italy's Reply, para. 8.16. *See also* Hearing Transcript, 9 July 2019, 93:7-13.

¹⁵⁵⁸ United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on 2 December 2004 (not yet in force).

that there is immunity for foreign States before other States' national courts do not accept the provisions of this convention, including Article 12.

867. Article 12 of the aforementioned convention establishes two criteria that must be met to apply a concept of the "territorial tort" exception. This Article states the following:

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

868. Thus, in any case, regardless of whether the "territorial tort" exception is recognised under customary international law, the Arbitral Tribunal observes that, to the extent the rule is thought to exist, there is a general understanding that it would only apply in cases where (i) the acts at issue were committed in the territory of the forum State; (ii) by a foreign official who had been present in the territory of that State at the time of the acts at issue without the State's express consent for the discharge of his or her official functions.¹⁵⁵⁹

869. With regard to the first criterion established by Article 12, the Arbitral Tribunal would note that, especially prior to the nineteenth century, in reference to the jurisdictional relationship between a ship and its flag State, the ship was occasionally viewed as an "ambulatory province" or "floating island" of the State under whose flag it sailed.¹⁵⁶⁰ However, the legal fiction that ships may be assimilated for jurisdictional purposes with land territory of the flag State has since been universally rejected.¹⁵⁶¹

870. There is no support for the proposition that the second condition – the presence of a foreign official in the territory of the forum State without the State's consent – is dispensable. To the contrary, commentary on this subject underscores the importance of the presence of the foreign

¹⁵⁵⁹ C. Escobar Hernández, Special Rapporteur, Fifth Report to the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/701, 14 June 2016, pp 88-89, para. 226; R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 422, paras 81-86.

¹⁵⁶⁰ D.P. O'Connell, 'The Theory of Maritime Jurisdiction' in I.A. Shearer (ed.), *The International Law of the Sea: Volume II* (1st edn., Oxford University Press, 1988), p. 735.

¹⁵⁶¹ D.P. O'Connell, 'The Theory of Maritime Jurisdiction' in I.A. Shearer (ed.), *The International Law of the Sea: Volume II* (1st edn., Oxford University Press, 1988), pp 735-37; René Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea: Book 1*, (Martinus Nijhoff Publishers, 1991), p. 407, para. 1; Sompong Sucharitkul, 'Liability and Responsibility of the State of Registration or the Flag State in Respect of Sea-Going Vessels, Aircraft and Spacecraft Registered by National Registration Authorities' (2006) 54 Am. J. Comp. L. 409, at 413.

official in the territory of that State at the time of the acts at issue, and whether such presence was with or without the State's express consent for the discharge of his or her official functions, for the exception to apply.¹⁵⁶²

871. In the present case, it is undisputed that the Marines were on board the "Enrica Lexie", and not on Indian territory, when they committed the acts at issue.¹⁵⁶³ As such, there was no situation in which the Indian government's consent for the discharge of the Marine's official functions could have been required or sought, and no intentional breach of India's sovereignty can be imputed to the Marines or the Italian State.
872. The Arbitral Tribunal is of the view that for the reasons referred to above, even if a "territorial tort" exception were recognised under customary international law, the exception would not apply in this case.

(d) Conclusion

873. In light of the foregoing, the Arbitral Tribunal concludes that the Marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012 because (i) immunity of State officials is a well established rule of customary international law; (ii) the Marines are State officials who were acting in their official capacity during the incident; and (iii) to the extent that the "territorial tort" exception is a customary rule of international law, it would in any event not apply in this case because the Marines were not on Indian territory when they committed the acts at issue.
874. The Arbitral Tribunal accordingly finds that the Marines enjoy immunity in relation to the acts that occurred during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines.

¹⁵⁶² R. Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 422, paras 81-82; International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat, U.N. Doc. A/CN.4/596, 31 March 2008, para. 163.

¹⁵⁶³ India's Rejoinder, paras 7.14-7.15.

3. Remedies

(a) Position of Italy

875. Italy seeks both declaratory and non-declaratory reliefs in respect of this claim. In terms of declaratory relief, Italy requests that the Arbitral Tribunal declare that India's assertion and continued exercise of criminal jurisdiction over Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone violates India's obligation to respect the immunity of the Marines under Article 2, paragraph 3; Article 56, paragraph 2; Article 58, paragraph 2; and Article 100, of the Convention as Italian State officials exercising official functions.¹⁵⁶⁴
876. In terms of non-declaratory relief, Italy requests an order of cessation, and reparation in the form of both restitution and compensation.
877. Citing Article 30, paragraph (a), of the ILC Draft Articles on State Responsibility, Italy submits that the State responsible for an internationally wrongful act is under an obligation to cease that act if it is continuing.¹⁵⁶⁵ Since India continues to exercise criminal jurisdiction over the Marines in breach of the immunity to which they are entitled as State officials, Italy contends that India must cease to exercise any form of criminal jurisdiction over the Marines by lifting any measure of restraint in place against them and terminating all legal proceedings concerning them.¹⁵⁶⁶ Italy rejects India's characterisation of this remedy as moot because the Marines have been permitted to return to Italy, pointing out that the Marines still have restrictions on their liberty, and are still under the authority of the Supreme Court of India.¹⁵⁶⁷
878. Separately, while Italy recognises that "[t]he result of cessation may be indistinguishable from that of restitution", it nevertheless asserts that whether "in addition or in the alternative, India must cease [from exercising penal jurisdiction over the Marines] pursuant to its obligation [to] make restitution and re-establish the *status quo ante*".¹⁵⁶⁸ In Italy's view, the reestablishment of the *status quo ante* would mean India's termination of the exercise of criminal jurisdiction in respect of the Marines.¹⁵⁶⁹

¹⁵⁶⁴ Italy's Memorial, p. 188; Italy's Reply, para. 9.3(a).

¹⁵⁶⁵ Italy's Memorial, para. 12.4.

¹⁵⁶⁶ Italy's Memorial, paras 12.6-12.7(3).

¹⁵⁶⁷ Hearing Transcript, 18 July 2019, 188:6-14.

¹⁵⁶⁸ Italy's Memorial, para. 12.15, citing James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 465.

¹⁵⁶⁹ Hearing Transcript, 10 July 2019, 40:5-8.

879. Citing Article 35 of the ILC Draft Articles on State Responsibility, Italy notes that there are two qualifications to the obligation to make restitution, namely that restitution is not “materially impossible”, and that it “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.¹⁵⁷⁰
880. Applying this to the facts, Italy submits that, as in the *Jurisdictional Immunities* and *Arrest Warrant* cases before the ICJ, India’s breaches of immunities are of a continuing nature and the obligation to cease them is a consequence that flows directly from a finding in Italy’s favour under any of the provisions of the Convention that Italy claims India has breached.¹⁵⁷¹ In any event, Italy notes that the consequences “would practically be the same” even if the claimed breaches were not characterised as continuous, but rather as occurring only at a specific moment in the past.¹⁵⁷² In addition, Italy points out that in the *Jurisdictional Immunities* case, the ICJ “had no hesitation to find that restitution would not involve a disproportionate burden for the country that had violated the immunities”.¹⁵⁷³
881. Finally, citing, *inter alia*, Article 36, paragraph 1, of the ILC Draft Articles on State Responsibility, Italy claims that India is obliged to pay compensation, which covers any financially assessable damages including loss of profits to the extent that it is established, insofar as the damage, which can include both material and moral damage, caused is not made good by restitution.¹⁵⁷⁴

(b) **Position of India**

882. In respect of Italy’s claim for declaratory relief, India maintains that the Arbitral Tribunal lacks jurisdiction over this claim and that therefore, the Arbitral Tribunal “cannot make any declaration concerning [the] claims”.¹⁵⁷⁵
883. India submits that, as both Parties claim exclusive jurisdiction and the Arbitral Tribunal is not bound by the Parties’ submissions, it is possible that the Arbitral Tribunal takes the position that both Parties can lawfully claim jurisdiction, in which case the Arbitral Tribunal “would have to

¹⁵⁷⁰ Hearing Transcript, 10 July 2019, 37:11-17.

¹⁵⁷¹ Hearing Transcript, 10 July 2019, 38:13-16, referring to *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, I.C.J. Reports 2012, p. 99; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3.

¹⁵⁷² Hearing Transcript, 10 July 2019, 39:11-22.

¹⁵⁷³ Hearing Transcript, 10 July 2019, 40:18-22, citing *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, I.C.J. Reports 2012, p. 99 at pp 153-54, para. 137.

¹⁵⁷⁴ Italy’s Memorial, para. 12.17.

¹⁵⁷⁵ India’s Counter-Memorial, para. 7.6.

draw the consequences of these competing jurisdictions”.¹⁵⁷⁶ For this scenario, India requests that the tribunal take into consideration that the matter took place in India’s EEZ and involved the killing of two Indian nationals and damage to an Indian-registered boat in addition to the fact that judicial proceedings in India are well advanced.¹⁵⁷⁷

884. In addition, India submits that Italy’s claim that India should wipe out all consequences of its illegal acts “is a moot claim since both Marines have been permitted to return in Italy where they are, and will be, staying until the final decision of the Arbitral Tribunal”.¹⁵⁷⁸ Thus, according to India, even if the Arbitral Tribunal accepted Italy’s claim “concerning the termination of criminal procedures against them, no supplementary step would have to be taken concretely in their favour”.¹⁵⁷⁹
885. Furthermore, relying on the judgment of the ICJ in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, India alleges that once the Arbitral Tribunal finds that a certain conduct is contrary to the Convention, there is no need to expressly make a decision on the obligation to cease the unlawful conduct.¹⁵⁸⁰
886. India further argues that it is the Provisional Measures Order that ruled that “Sergeant Girone remains [...] under the authority of the Supreme Court of India”,¹⁵⁸¹ therefore, even if eventually the Arbitral Tribunal would rule in favour of Italy, there would be no “continuing breach” on the part of India.¹⁵⁸²
887. Finally, with respect to the compensation to be paid for the non-material damage suffered by the Marines, India notes that it “ha[s] some difficulty in not seeing this request as particularly cynical”.¹⁵⁸³ India further submits that the Parties are in agreement that, if the Arbitral Tribunal were to consider that any compensation is due by India, that would have to be decided at a later stage of the procedure.¹⁵⁸⁴

¹⁵⁷⁶ Hearing Transcript, 13 July 2019, 123:6-8. *See also* Hearing Transcript, 20 July 2019, 149:6-11.

¹⁵⁷⁷ Hearing Transcript, 13 July 2019, 131:6-11.

¹⁵⁷⁸ India’s Counter-Memorial, para. 7.14.

¹⁵⁷⁹ India’s Counter-Memorial, para. 7.15.

¹⁵⁸⁰ Hearing Transcript, 13 July 2019, 127:19-128:3, *referring to Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213.

¹⁵⁸¹ Hearing Transcript, 13 July 2019, 128:6-7.

¹⁵⁸² Hearing Transcript, 13 July 2019, 128:7-14.

¹⁵⁸³ Hearing Transcript, 13 July 2019, 132:1-2.

¹⁵⁸⁴ Hearing Transcript, 13 July 2019, 133:4-8.

(c) **Analysis of the Arbitral Tribunal**

888. The Arbitral Tribunal notes that, in accordance with Article 30, paragraph (a), of the ILC Draft Articles on State Responsibility, the State responsible for an internationally wrongful act is under an obligation “to cease that act, if it is continuing”.¹⁵⁸⁵ Accordingly, the Arbitral Tribunal decides that India must take the necessary steps in order to cease to exercise its criminal jurisdiction over the Marines.

889. In reaching this decision, the Arbitral Tribunal has taken note of the commitment expressed by Italy on several occasions during these proceedings, and in particular at the Hearing, that Italy, following the issuance of this Award, will resume its criminal investigation into the events of 15 February 2012 and that both Parties will cooperate with each other in pursuit of that investigation that would follow the evidence wherever it may lead.¹⁵⁸⁶ The Arbitral Tribunal considers that no other remedies are required at this stage.

D. APPLICABILITY OF ARTICLE 59 OF UNCLOS

890. The Arbitral Tribunal will finally address the applicability of Article 59 of the Convention, to which both Parties referred on a subsidiary basis, for the resolution of the present dispute.

1. Position of Italy

891. Italy contends that the residual provision found in Article 59 does not apply and that, even if it does, the balance of equity under all the relevant circumstances favours Italy.¹⁵⁸⁷

892. Italy contests India’s argument that Article 59 granted India jurisdiction over the incident. Italy submits that India seeks to use Article 59 as a vehicle for embedding the S.S. “*Lotus*” decision into the Convention, even though, according to Italy, successive law of sea conventions and the Supreme Court of India have disavowed such an approach.¹⁵⁸⁸

893. Italy provides several reasons why it considers that Article 59 does not apply.

¹⁵⁸⁵ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 91, Article 30 (2001).

¹⁵⁸⁶ Hearing Transcript, 18 July 2019, 50:6-11, 234:5-19.

¹⁵⁸⁷ Italy’s Reply, paras 7.105-7.116.

¹⁵⁸⁸ Italy’s Reply, paras 7.105-7.106, referring to S.S. “*Lotus*” (*France v. Turkey*), Judgment of 7 September 1927, P.C.I.J. Series A, No. 10, p. 5; *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 99 (**Annex IT-19**).

894. First, according to Italy, Article 59 applies only where the “Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone”. In the present case, however, the Convention does attribute exclusive jurisdiction to Italy under Articles 97 and 92.¹⁵⁸⁹
895. Second, Italy submits, even if the Arbitral Tribunal were to find that Articles 87, 92, and 97 do not confer on Italy the freedom of navigation and right of exclusive jurisdiction in this case, “the question of which State is entitled to exercise penal jurisdiction [...] still could *not* be resolved [...] by resort to Article 59”.¹⁵⁹⁰ Italy submits that this is because Article 59 is not a mandatory provision but instead “a framework that States ‘should’ follow when faced with a conflict of ‘interests’ where the Convention has not attributed ‘rights or jurisdiction’ to one of them”.¹⁵⁹¹ Relying on academic commentary, Italy argues that the word “should” in Article 59 indicates that the Article creates no binding legal obligation.¹⁵⁹²
896. Third, Italy argues that Article 59 is inapplicable because an exercise of adjudicative jurisdiction by a court on the territory of a State concerning events that occurred within the exclusive economic zone, as has happened in the present case, is not an exercise of jurisdiction “within the exclusive economic zone”.¹⁵⁹³
897. Fourth, Italy submits that the application of Article 59 would have far-reaching consequences, and potentially allow a State “to obtain an award or judgment under Part XV protecting ‘interests’ nowhere recognized in UNCLOS as rights”.¹⁵⁹⁴
898. Even if Article 59 did apply, Italy contends that the balance of “equity” and “all the relevant circumstances” would favour Italy. In Italy’s view, because India has prejudged the Marines as being guilty of “murder” and as having no immunity under customary international law, it is “now inconceivable that they could receive a fair trial in India”.¹⁵⁹⁵

¹⁵⁸⁹ Italy’s Reply, para. 7.108.

¹⁵⁹⁰ Italy’s Reply, para. 7.109 [emphasis added by Italy].

¹⁵⁹¹ Italy’s Reply, para. 7.110.

¹⁵⁹² Italy’s Reply, paras 7.111-7.112, citing Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), pp 461-62; I.A. Shearer, ‘Problems of Jurisdiction and Law Enforcement against Delinquent Vessels’ (1986) 35(2) *International & Comparative Law Quarterly* 320, p. 334.

¹⁵⁹³ Italy’s Reply, para. 7.113.

¹⁵⁹⁴ Italy’s Reply, paras 7.114-7.115.

¹⁵⁹⁵ Italy’s Reply, para. 7.116.

2. Position of India

899. India submits that the residual clause in Article 59 applies and that India has jurisdiction over the incident. According to India, “all the relevant circumstances confirm that the most important interests in the present case are those of India”.¹⁵⁹⁶
900. According to India, Article 59 shows that the Convention does not provide rules for the attribution of rights or jurisdiction in all circumstances in the exclusive economic zone, and that the Convention recommends that States invoking conflicting interests settle their differences on the basis of equity.¹⁵⁹⁷
901. India claims that Article 59 applies in the present case because, absent a collision or an incident of navigation under Article 97, the Convention provides no rules on the fight against piracy in the exclusive economic zone nor guidance for murders committed from a ship under the flag of a State against individuals on another boat with the flag of the coastal State.¹⁵⁹⁸
902. India dismisses as irrelevant Italy’s argument that Article 59 is not applicable because “[a]n exercise of adjudicative jurisdiction by a court on the territory of a State concerning events that occurred within the exclusive economic zone is not an exercise of jurisdiction ‘within’ the exclusive economic zone”.¹⁵⁹⁹ According to India, Italy “confuses the attribution of jurisdiction and its exercise. Jurisdiction over a situation which occurred in a particular maritime zone can be exercised *outside* this zone”.¹⁶⁰⁰
903. India considers that its interests are more important than those of Italy since the deaths of Indian nationals occurred in the Indian contiguous zone on an Indian fishing vessel.¹⁶⁰¹ While acknowledging the importance of the fight against piracy, India argues that the threat of piracy had disappeared from the area.¹⁶⁰² India also argues that the Arbitral Tribunal should keep the following elements in mind:

the interests involved are respectively a “risk” for two Italian Marines being charged with murders, to be judged by a court whose independence cannot be, and is not challenged on the

¹⁵⁹⁶ India’s Counter-Memorial, para. 6.57; India’s Rejoinder, para. 6.34; Hearing Transcript, 12 July 2019, 178:24-179:5.

¹⁵⁹⁷ India’s Rejoinder, para. 6.67.

¹⁵⁹⁸ India’s Counter-Memorial, para. 6.56.

¹⁵⁹⁹ India’s Rejoinder, para. 6.66, *citing* Italy’s Reply, para. 7.113.

¹⁶⁰⁰ India’s Rejoinder, para. 6.66 [emphasis added by India].

¹⁶⁰¹ India’s Counter-Memorial, para. 6.57; India’s Rejoinder, para. 6.72.

¹⁶⁰² India’s Counter-Memorial, para. 6.58.

one hand; and, on the other hand, the risk for the families and relatives of the murdered fishermen that justice will not be done[.]¹⁶⁰³

3. Analysis of the Arbitral Tribunal

904. The rights, jurisdiction, and duties of coastal States and other States in the exclusive economic zone are spelt out by Part V of the Convention. Pursuant to Article 59, where the Convention “does not attribute rights or jurisdiction” to the coastal State or to other States within the exclusive economic zone, and “a conflict arises between the interests of the coastal State and any other State or States”, such a conflict should be resolved “on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole”.¹⁶⁰⁴ As such, the Arbitral Tribunal notes that Article 59 has been described as addressing the basis for the resolution of conflicts over “residual rights” in the exclusive economic zone.¹⁶⁰⁵

905. Article 59 conditions its application in a twofold manner. First, there must be a situation where the Convention does not attribute rights and jurisdiction to either the coastal State or other States within the exclusive economic zone. Second, a conflict must arise between the interests of the coastal State and any other State or States.

906. In regard to the first element, India argues that Article 59 is engaged in the present case since the circumstances of the dispute are not contemplated by the Convention.¹⁶⁰⁶ India submits that:

absent a collision or an incident of navigation within the meaning of Article 97, UNCLOS does not provide for rules on the fight against piracy in the EEZ, and, in any case, it provides no guidance concerning murders committed from a ship under the flag of a given State against individuals located on another boat, under the flag of the coastal State.¹⁶⁰⁷

907. Italy, on its part, argues that Article 59 does not apply because the Convention “does attribute exclusive jurisdiction to Italy pursuant to Article 97 concerning any potential penal or disciplinary responsibility of the Italian Marines on board an Italian-flagged ship involved in an incident of navigation in India’s exclusive economic zone”; it also attributes “exclusive jurisdiction to Italy under Article 92 over the Italian-flagged *Enrica Lexie* while it was navigating in India’s exclusive economic zone”; and entitles Italy to freedom of navigation in

¹⁶⁰³ India’s Counter-Memorial, para. 6.58.

¹⁶⁰⁴ Article 59 of the Convention.

¹⁶⁰⁵ Virginia Commentary, Vol. II, p. 567, para. 59.1; Alexander Proelß (ed.), *The United Nations Convention of the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 459.

¹⁶⁰⁶ India’s Counter-Memorial, para. 6.56.

¹⁶⁰⁷ India’s Counter-Memorial, para. 6.56.

India's exclusive economic zone pursuant to Article 87 of the Convention read together with Article 58, paragraph 2.¹⁶⁰⁸

908. In considering the claims presented by Italy and counter-claims presented by India, the Arbitral Tribunal has considered several provisions of the Convention attributing rights or jurisdiction within the exclusive economic zone, which are relevant to the dispute between the Parties. In particular, pursuant to Article 87, paragraph 1, subparagraph (a), read together with Article 58, paragraph 2, Italy is entitled to freedom of navigation in India's exclusive economic zone; pursuant to Article 92, Italy is entitled to exercise exclusive jurisdiction over the "Enrica Lexie", and India is entitled to exercise exclusive jurisdiction over the "St. Antony"; Article 56 attributes to India rights and jurisdiction in the exclusive economic zone; and pursuant to Article 87, paragraph 1, subparagraph (a), and Article 90, read together with Article 58, paragraphs 1 and 2, India is entitled to enjoy the right and freedom of navigation in the exclusive economic zone.
909. The Arbitral Tribunal thus finds that the present dispute is not a case in which the Convention does not attribute rights and jurisdiction to Italy or India within the exclusive economic zone. In the Arbitral Tribunal's view, therefore, the first condition for the applicability of Article 59 is not met. Given this, there is no need for the Arbitral Tribunal to consider whether the second condition is met.
910. The Arbitral Tribunal concludes that Article 59 of the Convention is not applicable to this dispute.

VI. COUNTER-CLAIMS OF INDIA REGARDING ALLEGED BREACHES BY ITALY OF UNCLOS AND VIOLATIONS OF RIGHTS OF INDIA UNDER UNCLOS

911. India has presented counter-claims, contending that Italy has violated its rights under Articles 56, 87, and 90 of the Convention; has breached its obligations under Article 58, paragraph 3, of the Convention; and has infringed India's rights under Article 88 of the Convention. Italy rejects these counter-claims.

A. ALLEGED BREACHES BY ITALY OF PROVISIONS OF PARTS V (EXCLUSIVE ECONOMIC ZONE) AND VII (HIGH SEAS) OF UNCLOS

912. Before turning to the Parties' specific arguments with respect to each counter-claim, the Arbitral Tribunal notes several preliminary points raised by Italy in relation to India's counter-claims.

¹⁶⁰⁸ Italy's Reply, paras 7.108-7.109. *See also* Italy's Reply, para. 7.1.

913. First, Italy argues that India's counter-claims are premised on the factual allegation that the Marines shot at the "St. Antony" and killed two fishermen on board and objects to what it considers to be an attempt to prejudge the guilt of the Marines in advance of any criminal trial.¹⁶⁰⁹ India disagrees with Italy's suggestion that its counter-claims are premised on the assumption that the Marines are guilty. To the contrary, India maintains that its counter-claims do not concern the liability of the Marines, but rather whether Italy, by virtue of the Marines' actions, breached specific provisions of the Convention.¹⁶¹⁰
914. Second, Italy contends that, since India relies on the firing on the "St. Antony" by the Marines for the purposes of its counter-claims, it cannot at the same time argue that the same conduct is outside the scope of the Convention with respect to Italy's immunity claim.¹⁶¹¹ India, on its part, considers that it is "not the conduct that controls whether a matter falls within or without the Convention; it is whether the legal point, the substantive right, is covered by a specific provision of UNCLOS".¹⁶¹² According to India, while the obligations invoked in India's counter-claims are covered by specific provisions in the Convention, Italy's immunities claim is based on a customary rule of international law that has no express basis in, and would have to be incorporated into, the Convention.¹⁶¹³
915. Third, Italy claims that the conduct of the Marines concerned a specific, isolated incident, and as such, cannot give rise to liability on the part of Italy.¹⁶¹⁴ India, in response, maintains that any individual violation of an international obligation by a State may give rise to international responsibility.¹⁶¹⁵ While Italy concedes that "a single act is, in principle, sufficient to give rise to international responsibility",¹⁶¹⁶ it maintains that the act of incidental interference with the navigation of a private Indian vessel cannot amount to a breach of sovereign rights of India.¹⁶¹⁷

¹⁶⁰⁹ Hearing Transcript, 18 July 2019, 193:21-23.

¹⁶¹⁰ Hearing Transcript, 13 July 2019, 64:16-23.

¹⁶¹¹ Hearing Transcript, 18 July 2019, 103:15-17, 105:20-24; Hearing Transcript, 20 July 2019, 93:4-11, 94:3-5.

¹⁶¹² Hearing Transcript, 20 July 2019, 92:16-93:19.

¹⁶¹³ Hearing Transcript, 20 July 2019, 93:12-23.

¹⁶¹⁴ Hearing Transcript, 20 July 2019, 197: 21-25.

¹⁶¹⁵ Hearing Transcript, 13 July 2019, 69:17, 70:5-9, citing *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, RIAA Vol. XX., p. 215 at p. 251, para 75.

¹⁶¹⁶ Hearing Transcript, 18 July 2019, 197:17-18.

¹⁶¹⁷ Hearing Transcript, 18 July 2019, 197:18-25.

1. Alleged Violation by Italy of India's Rights under Article 56 (Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone) of UNCLOS

916. The Parties disagree as to whether Italy violated India's sovereign rights in the exclusive economic zone under Article 56 of the Convention.

917. Article 56 provides, in relevant part:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(a) **Position of India**

918. India submits that, on its account of the "Enrica Lexie" incident, Italy violated India's sovereign rights in the exclusive economic zone provided in Article 56 of the Convention.

919. According to India, the exclusive economic zone was "designed primarily to give coastal States sovereign rights over the resources of the zone", including "all rights 'necessary for and connected with' the exploitation" of such resources.¹⁶¹⁸ India submits that "the term 'sovereign rights' was taken from the language of Article 2 of the 1958 Convention on the Continental Shelf", which the ILC interpreted to mean that "the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf".¹⁶¹⁹

920. Consequently, India submits that "a coastal State's sovereign rights over the living resources must include the right for its fishermen, who are key actors in the exploitation and conservation of fish resources, not to be impeded in their fishing activities" as "[s]uch a right is 'necessary for and connected with' the exploitation of fisheries".¹⁶²⁰ This means that "any interference by one state

¹⁶¹⁸ India's Counter-Memorial, para. 8.7, *citing* Dolliver Nelson, 'Exclusive Economic Zone' (2008) Max Planck Encyclopedia of Public International Law, para. 42. *See also* Hearing Transcript, 13 July 2019, 77:4-15.

¹⁶¹⁹ India's Counter-Memorial, para. 8.8, *referring to* Virginia Commentary, Vol. VII, p. 541, para. 56.11(a); *citing* International Law Commission, "Articles Concerning the Law of the Sea with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (1956), p. 297 [emphasis omitted].

¹⁶²⁰ India's Counter-Memorial, para. 8.9.

with the ability of fishing vessels of another state to exploit the fishing resources of that state's EEZ violates sovereign rights and the fundamental object and purposes of Article 56(1)(a)".¹⁶²¹

921. This interpretation, India contends, was confirmed by the arbitral tribunal in the *South China Sea Arbitration*, which found that China had breached Article 56, paragraph 1, subparagraph (a), of the Convention by promulgating a fishing moratorium in 2012 which deterred Filipino fishermen from fishing in the Philippines' exclusive economic zone.¹⁶²² The arbitral tribunal in that case reached its decision on the basis of its conclusion that "[t]he rights of other States do not include restricting a coastal State from exploiting the living resources of its own exclusive economic zone".¹⁶²³
922. Applying this interpretation to the facts of the present case, India submits that Italy violated India's sovereign rights to exploit the fishing resources in its exclusive economic zone under Article 56, paragraph 1, of the Convention when the Marines' actions caused the "St. Antony" to cease its fishing activities on the day of the incident.¹⁶²⁴
923. According to India, the "St. Antony" was a fishing boat registered in India, with a fishing licence issued by the Indian authorities, and carrying eleven Indian fishermen who were legitimately engaged in fishing activities in India's exclusive economic zone on the day of the incident.¹⁶²⁵ By 15 February 2012, the day of the incident, India contends that the "St. Antony" had been engaged for eight days in fishing activities in India's exclusive economic zone,¹⁶²⁶ "[w]hen the Marines shot at the St Antony with the resulting death of the two crew members, [and] had to cease its fishing activities and [...] return to shore".¹⁶²⁷
924. Regardless of whether the crew members of the "St. Antony" were fishing at the time of the incident, India maintains that they were engaged in an extended fishing expedition, which was due to continue when the Marines' actions caused them to cease those activities.¹⁶²⁸ Therefore, India submits, the Marines' actions "fundamentally violated India's sovereign rights over fishing

¹⁶²¹ Hearing Transcript, 13 July 2019, 77:15-20.

¹⁶²² Hearing Transcript, 13 July 2019, 77:20-78:13, referring to PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 711.

¹⁶²³ India's Counter-Memorial, para. 8.10, citing PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 700.

¹⁶²⁴ Hearing Transcript, 13 July 2019, 81:3-26.

¹⁶²⁵ Hearing Transcript, 13 July 2019, 81:3-8.

¹⁶²⁶ India's Counter-Memorial, para. 8.6(2), referring to Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**). See also Hearing Transcript, 13 July 2019, 81:6-8.

¹⁶²⁷ Hearing Transcript, 13 July 2019, 81:8-13. See also India's Counter-Memorial, para. 8.10.

¹⁶²⁸ Hearing Transcript, 13 July 2019, 81:14-22.

in its EEZ, which necessarily includes the right to have its nationals and registered boats operate in the EEZ without being impeded, let alone being fired upon with lethal force”.¹⁶²⁹

925. India claims that “[t]his was particularly the case when the use of lethal force was resorted to without provocation and in the absence of any reasonable apprehension of threat to the safety of their ship, against unarmed fishermen”.¹⁶³⁰ India further submits that under the VPD Manual, the Marines were required to use force only as a last resort, and if they were subject to an actual attack.¹⁶³¹ In spite of this, India claims, little was done by the Marines to consider other approaches, before firing on the fishing boat.¹⁶³²
926. India challenges the Piroli Report’s finding that the two Marines “observed the rounds of all bursts ended into the water and away from the suspicious craft”.¹⁶³³ India points out that the bursts were fired from automatic weapons and that it is questionable whether the Marines “could keep track of where each of their rounds landed, particularly given that only nine of the total of 20 rounds fired, and just two of the eight rounds fired from the closest distance (100 meters), were tracer bullets that could be visually followed”.¹⁶³⁴
927. India rejects Italy’s defence that the Marines “did not act to impede” any sovereign rights because they “acted on the basis of an apprehension that the *Enrica Lexie* was facing a threat to the safety of its navigation, in the form of a risk of collision and pirate boarding”.¹⁶³⁵ India refers to its earlier argument that there was no reasonable basis for such an apprehension particularly since the crew members of the “*Enrica Lexie*” have attested that they did not see any armed men or boarding equipment, and there was no risk of collision between the two vessels.¹⁶³⁶ India argues that, even if the Master apprehended a risk of collision, he failed to give way in the first instance, as India submits he was obliged to under established maritime rules,¹⁶³⁷ and which he evidently

¹⁶²⁹ India’s Counter-Memorial, para. 8.6. *See also* Hearing Transcript, 13 July 2019, 82:1-12.

¹⁶³⁰ India’s Counter-Memorial, para. 8.10.

¹⁶³¹ Hearing Transcript, 13 July 2019, 90:2-4, *referring to* VPD Manual (Confidential Annex) (**Annex IT-234**).

¹⁶³² Hearing Transcript, 13 July 2019, 89:25-90:1.

¹⁶³³ India’s Counter-Memorial, para. 2.27 *citing* Piroli Report (Confidential Annex), p. 2-3 (**Annex IT-233**).

¹⁶³⁴ India’s Counter-Memorial, para. 2.27 *referring to* Piroli Report (Confidential Annex), pp 2-7, 2-8 (**Annex IT-233**).

¹⁶³⁵ India’s Rejoinder, para. 9.4, *citing* Italy’s Reply, para. 10.8. *See also* Hearing Transcript, 13 July 2019, 82:19-25.

¹⁶³⁶ *See* Section V.B.3(a). *See also* Hearing Transcript, 13 July 2019, 83:10-11.

¹⁶³⁷ India’s Rejoinder, para. 9.6. *See also* Hearing Transcript, 13 July 2019, 83:1-9.

could have done given that the “Enrica Lexie” did eventually change course during the very last stages of the incident.¹⁶³⁸

928. In any event, India maintains, Italy “has not provided any legal basis for why and how India’s sovereign rights could be ignored, even if there had been the apprehension of a security threat in the form of a possible collision or pirate boarding”.¹⁶³⁹ India contends that “nothing in Article 56(1)(a) of UNCLOS suggests that a coastal State’s sovereign rights can be interfered with in certain circumstances, and Italy provides no authority for its assertion”.¹⁶⁴⁰ In fact, India argues that this argument would “set[] a dangerous precedent whereby a coastal state’s sovereign rights can be violated merely if there are perceived threats that are not shared by any of the actual crew members and not backed up by any reasonably objective appreciation of the facts”.¹⁶⁴¹
929. In addition, Italy’s claim that the Marines did not intend to interfere with the fishing activities of the “St. Antony” is, in India’s view, “legally irrelevant” to whether Italy breached Article 56, paragraph 1, subparagraph (a), of the Convention.¹⁶⁴² According to India, nothing in Article 56, paragraph 1, subparagraph (a), nor in general international law, “suggests that a lack of intention to infringe sovereign rights is a defence to a breach of that provision”.¹⁶⁴³ This principle, India contends, “was articulated in the case of *The Jessie* between Great Britain and the United States”,¹⁶⁴⁴ and confirmed in the commentary to the ILC Draft Articles on State Responsibility,

¹⁶³⁸ Hearing Transcript, 13 July 2019, 84:1-17.

¹⁶³⁹ Hearing Transcript, 13 July 2019, 85:4-8.

¹⁶⁴⁰ India’s Rejoinder, para. 9.12.

¹⁶⁴¹ Hearing Transcript, 13 July 2019, 85:18-22. *See also* India’s Rejoinder, para. 9.11.

¹⁶⁴² India’s Rejoinder, paras 9.7, 9.10. Hearing Transcript, 13 July 2019, 71:11-15.

¹⁶⁴³ India’s Rejoinder, paras 9.7-9.8, *citing* International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 36, para. 10 (2001); and *referring to* James Crawford, *Brownlie’s Principles of Public International Law* (8th edn., Oxford University Press, 2012), p. 559.

¹⁶⁴⁴ India’s Rejoinder, para. 9.9, *citing* *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 59:

It is unquestionable that the United States naval authorities acted bona fide, but though their bona fides might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any Government is responsible to other Governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.

See also *Owners, Officers and Men of the Wanderer (Gr.Br.) v. United States*, Award of 9 December 1921, RIAA Vol. VI, p. 68 at p. 74; *Laughlin McLean (Great Britain) v. United States (Favourite case)*, Award of 9 December 1921, RIAA Vol. VI, p. 82 at p. 84

which notes that “[i]n the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention”.¹⁶⁴⁵

930. India further rejects Italy’s argument that Article 56, paragraph 1, subparagraph (a), only confers sovereign rights on India that do not extend to Indian boats, or Indian fishermen. India clarifies that it is “not espousing claims [on] behalf of the St Antony or its crew”, and that rather, its “counterclaims are firmly grounded on a violation by Italy of India’s sovereign rights”.¹⁶⁴⁶ In this respect, India justifies its claim on the basis that it is “self-evident that a coastal state’s sovereign rights over the fishing resources in its exclusive economic zone are frequently, if not primarily, exercised by its own nationals and privately-owned fishing boats licensed by that state”.¹⁶⁴⁷ Referring to the *South China Sea Arbitration*, India notes that the arbitral tribunal in that case also looked at the effect of China’s fishing moratorium on Filipino fishermen and private citizens, and not on the State or State-owned vessels.¹⁶⁴⁸ The arbitral tribunal then went on to hold that China had violated Article 56 because China’s “fishing moratorium established a realistic prospect that Filipino fishermen, seeking to exploit the resources of the Philippines’ exclusive economic zone, could be exposed to the punitive measures spelled out in the moratorium” and “such developments may have a deterring effect on Filipino fishermen and their activities”.¹⁶⁴⁹ India submits that Italy’s actions had a similar,¹⁶⁵⁰ if not even more severe,¹⁶⁵¹ deterring effect.
931. India also rejects Italy’s argument that this case is distinguishable because Italy did not systematically interfere with, or claim jurisdiction, in conflict with India’s sovereign rights in its exclusive economic zone in the same way that China’s fishing moratorium did.¹⁶⁵² In India’s view, it was not China’s conflicting claims to the exclusive economic zone that violated the Philippines’ sovereign rights, but the effect that the moratorium had on the Filipino fishermen.¹⁶⁵³

¹⁶⁴⁵ Hearing Transcript, 13 July 2019, 71:15-72:6, *citing* International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 36 (2001).

¹⁶⁴⁶ Hearing Transcript, 13 July 2019, 86:12-15.

¹⁶⁴⁷ Hearing Transcript, 13 July 2019, 87:3-7.

¹⁶⁴⁸ Hearing Transcript, 13 July 2019, 87:15-22, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 712.

¹⁶⁴⁹ India’s Rejoinder, para. 9.15, *citing* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 712.

¹⁶⁵⁰ India’s Rejoinder, para. 9.15.

¹⁶⁵¹ Hearing Transcript, 13 July 2019, 78:3-13.

¹⁶⁵² India’s Rejoinder, para. 9.17, *referring to* Italy’s Reply, para. 10.11. *See also* Hearing Transcript, 13 July 2019, 97:4-9.

¹⁶⁵³ Hearing Transcript, 13 July 2019, 87:15-19.

932. India further rejects Italy's argument that Article 56, paragraph 1, subparagraph (a), does not confer a right on "Indian fishermen to fish outside the maritime zone in which they are entitled to operate".¹⁶⁵⁴ According to India, the "St. Antony" was permitted and indeed licenced to fish off India's coast.¹⁶⁵⁵ India further submits that "the issue before this Tribunal is not whether the *St Antony* had a right to fish in India's EEZ under Indian law or [Article 56]". Rather, India submits that it "is claiming that Italy violated *India's* sovereign rights under Article 56(1)(a)".¹⁶⁵⁶
933. India contends that the area in which the "Enrica Lexie" was navigating was known to be an area of intensive Indian fishing and, therefore, the presumption should have been that "any boat that appeared to be a fishing boat was either an Indian boat or one that was licensed to fish in the EEZ".¹⁶⁵⁷

(b) **Position of Italy**

934. Italy denies that it ever interfered with India's rights to explore, exploit, conserve, or manage the natural resources in its exclusive economic zone, in breach of Article 56, paragraph 1, subparagraph (a), of the Convention.
935. While India claims that the Marines violated India's sovereign rights when they shot at the "St. Antony", Italy contends, by contrast, that the Marines "did not act to impede India's rights to explore, exploit, conserve or manage its natural resources. Rather, they acted on the basis of an apprehension that the *Enrica Lexie* was facing a threat to the safety of its navigation, in the form of a risk of collision and pirate boarding".¹⁶⁵⁸
936. Italy notes that the assertion by the Marines in the Piroli Report that they fired into the water to deter the oncoming vessel is supported by the testimony of Captain Vitelli at the Hearing, who averred:

¹⁶⁵⁴ India's Rejoinder, para. 9.19, *citing* Italy's Reply, para. 10.10.

¹⁶⁵⁵ India's Rejoinder, para. 9.19, *referring to* The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**); Certificate of Registration for the "St. Antony" issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**); and The "St. Antony"'s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**). According to India, the "*St Antony* is a mechanized boat so it had to fish beyond 12nm from Kerala's coast because the territorial waters are reserved for fishermen without mechanized boats". India's Rejoinder, para. 919, n. 399, *referring to* Additional Statement of Shri Freddy s/o John Bosco (**Annex IN-39**).

¹⁶⁵⁶ India's Rejoinder, para. 9.19.

¹⁶⁵⁷ Hearing Transcript, 13 July 2019, 89:23-25.

¹⁶⁵⁸ Italy's Reply, para. 10.8.

Right after I realised the danger coming from the left side, so the collision risk – because that was my worry – I saw some water splashes. As a matter of fact, since I was not used to seeing that, my first thought was very quick: I asked myself, "Who's throwing rocks in the water?" As this was the impression that I got. But then I connected the water with the shots, and I understood that it was not rocks that were being thrown in the water.¹⁶⁵⁹

937. Captain Noviello similarly affirmed at the Hearing: “I saw that they were firing the shots into the water, since I saw a lot of water splashes coming from the water to the surface”.¹⁶⁶⁰
938. Italy further contends that, “[e]ven if it were true that the Marines’ apprehension of a threat to the safety of their ship were not reasonable, that in no way serves to make India’s case about interference with its right to exploit the natural resources of its exclusive economic zone”. According to Italy, Article 56 “does not confer on coastal States a right to the protection of individual fishermen irrespective of the context for the acts complained of, and irrespective of whether that treatment was motivated by their status as fishermen”.¹⁶⁶¹
939. Italy denies India’s claim that sovereign rights with respect to fishing vessels, or a right to the protection of fishermen, are necessary for and connected with its sovereign rights relating to the exploration, exploitation, conservation, and management of natural resources, including fisheries.¹⁶⁶² Pointing to India’s reference to fishery management under UNCLOS and *dicta* in the *South China Sea Arbitration*, Italy contends that Article 56 mainly concerns fisheries, not fishermen.¹⁶⁶³ According to Italy, even if the Arbitral Tribunal accepts India’s interpretation of its sovereign rights under Article 56, “India’s sovereign rights do not include rights to protection from interference with fishermen in all circumstances, including, as in this case, an apprehension of a security threat and possible collision and pirate boarding”.¹⁶⁶⁴
940. Similarly, Italy argues that, even if India’s sovereign rights under Article 56 extend to the protection of fishermen, “Article 56(1)(a) does not confer a right on Indian fishermen to fish outside the maritime zone in which they are entitled to operate”.¹⁶⁶⁵ In this regard, Italy rejects India’s claim that the fishermen on the “St. Antony” were legitimately engaged in fishing activities in India’s exclusive economic zone on the day of the incident. According to Italy, the

¹⁶⁵⁹ Hearing Transcript, 15 July 2019, 30:13-21.

¹⁶⁶⁰ Hearing Transcript, 15 July 2019, 111:7-9.

¹⁶⁶¹ Italy’s Reply, para. 10.8. *See also* Hearing Transcript, 18 July 2019, 196:2-5.

¹⁶⁶² Italy’s Reply, para. 10.9, *referring to* India’s Counter-Memorial, paras 4.19, 8.18.

¹⁶⁶³ Italy’s Reply, para. 10.9, *referring to* India’s Counter-Memorial, para. 4.19; PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 700 (“the concept of sovereign rights and the exclusive jurisdiction over fisheries that was the central objective motivating the introduction of the exclusive economic zone concept”).

¹⁶⁶⁴ Italy’s Reply, para. 10.9. *See also* Hearing Transcript, 18 July 2019, 196:6-20.

¹⁶⁶⁵ Italy’s Reply, para. 10.10.

Tamil Nadu Marine Fishing Regulation Act, 1983, under which the “St. Antony” was registered, requires registered fishing vessels to apply “to the authorised officer for the grant of a licence for using such fishing vessel for fishing”.¹⁶⁶⁶ It is not clear to Italy whether the “St. Antony” had such a licence, but even if it did, Italy contends that it was not permitted to fish beyond Indian territorial waters.¹⁶⁶⁷

941. In addition, Italy argues that the Marines’ conduct in this case was “completely different from the conduct at issue” in the *South China Sea Arbitration*, in which the “effect and intent was systematically to prevent fishing in certain areas by vessels flying a certain flag”.¹⁶⁶⁸ According to Italy, it had neither the intent nor the effect of “systematically interfering with the exercise of any right of India in connection with its natural resources”. Rather, Italy argues that this case “concerns a very specific single incident involving two vessels and those on board them while they were navigating in India’s exclusive economic zone” that is “unrelated to any fishing activities of the *St Antony*”.¹⁶⁶⁹
942. With reference to the *South China Sea Arbitration*, Italy also argues that Italy’s conduct in no way resembles that of China *vis-à-vis* the Philippines. According to Italy, the arbitral tribunal in that case took the view that at “the core of the dispute relating to living and non-living resources was the fact that China and the Philippines each considered itself to have exclusive rights to those resources”.¹⁶⁷⁰ In the present case, Italy submits, the Parties do not present conflicting claims to the fisheries in India’s exclusive economic zone, and Italy has committed no act equivalent to China’s 2012 moratorium on fishing activities. Italy contends that it never sought to interfere with the “St. Antony” as a fishing boat, to impede the fishing activities of the vessel or the fishermen on board it, or to interfere with the rights of India to the natural resources of its exclusive economic zone.¹⁶⁷¹ According to Italy, the differences between the two cases are so striking that drawing an analogy between this case and the situation in the *South China Sea Arbitration* is “absurd”.¹⁶⁷²

¹⁶⁶⁶ Italy’s Reply, para. 10.10, *referring to* Certificate of Registration for the “St. Antony” issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**); and *citing* Indian Tamil Nadu Marine Fishing Regulation Act, 1983, Section 7(1) (**Annex IT-266**).

¹⁶⁶⁷ Italy’s Reply, para. 10.10, *referring to* Indian Tamil Nadu Marine Fishing Regulation Act, 1983, Sections 7(1) and 3(k) (defining “specified area”) (**Annex IT-266**).

¹⁶⁶⁸ Italy’s Reply, para. 10.11, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016.

¹⁶⁶⁹ Italy’s Reply, para. 10.11.

¹⁶⁷⁰ Italy’s Rejoinder, para. 5.13, *referring to* PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 696.

¹⁶⁷¹ Italy’s Rejoinder, para. 5.13.

¹⁶⁷² Hearing Transcript, 18 July 2019, 199:4.

943. Italy rejects India’s argument that Article 56 would lose its meaning if other States could prejudice the rights of a coastal State by shooting at the coastal State’s vessels in the exclusive economic zone. According to Italy, Article 56 “confers rights on States with respect to the natural resources of their exclusive economic zone, but it does not confer any particular right with respect to any particular vessel or those aboard it”.¹⁶⁷³
944. In reply to India’s arguments regarding the alleged violations of the COLREGS by the “Enrica Lexie”, Italy submits that even if this was the case, “the failure of Captain Vitelli to turn in the appropriate manner at the appropriate time would not be attributable to Italy”.¹⁶⁷⁴
945. Italy does not take issue with India’s proposition that a State’s acts matter “independently of any intention”.¹⁶⁷⁵ According to Italy, this point “has no bearing on the fact that there was no connection between the Marines’ actions and the *St Antony*’s status as a fishing boat, nor its fishing activities”.¹⁶⁷⁶
946. Finally, Italy points out that while India uses the “necessary for and connected with” test to include rights and rules not expressly mentioned in Article 56, paragraph 1, of the Convention, it rejects Italy’s arguments under Article 2, paragraph 3; Article 56, paragraph 2; and Article 58, paragraph 2, of the Convention which take the same approach.¹⁶⁷⁷

(c) **Analysis of the Arbitral Tribunal**

947. As noted above, Article 56 relates to rights, jurisdiction and duties of the coastal State in the exclusive economic zone. It states in paragraph 1, subparagraph (a), that the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, in the exclusive economic zone. Article 56, paragraph 2, further states that in exercising its rights and performing its duties under the Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention.
948. India argues that interference by one State with the ability of fishing vessels of a coastal State to legitimately exploit the fishing resources of its exclusive economic zone violates the fundamental object and purpose of Article 56, paragraph 1, subparagraph (a), of the Convention and the coastal

¹⁶⁷³ Italy’s Rejoinder, para. 5.9.

¹⁶⁷⁴ Hearing Transcript, 18 July 2019, 197:9-11.

¹⁶⁷⁵ Italy’s Rejoinder, para. 5.12, *citing* India’s Rejoinder, para. 9.8.

¹⁶⁷⁶ Italy’s Rejoinder, para. 5.12.

¹⁶⁷⁷ Hearing Transcript, 18 July 2019, 106:10-15.

State's sovereign rights protected thereunder.¹⁶⁷⁸ India claims in this regard that the actions of the Marines caused the "St. Antony" to cease its fishing activities within India's exclusive economic zone and thus constituted a violation by Italy of Article 56, paragraph 1, subparagraph (a), of the Convention.¹⁶⁷⁹ India stresses that in this incident, force was used by the Marines against unarmed Indian fishermen, without provocation and in the absence of any reasonable apprehension of a threat to the safety of the "Enrica Lexie".¹⁶⁸⁰

949. Italy challenges these allegations by arguing that the Marines did not act to impede India's rights to explore, exploit, conserve or manage its natural resources within its exclusive economic zone because the Marines acted on the basis of an apprehension that the "Enrica Lexie" was facing a threat of a risk of collision with the "St. Antony" and of pirate boarding.¹⁶⁸¹
950. The Arbitral Tribunal notes that on the date of the incident the "Enrica Lexie" was crossing India's exclusive economic zone, in accordance with its right to exercise freedom of navigation, and was destined for Port Said, Egypt. The "Enrica Lexie" had on board a VPD consisting of six members of the Italian Marines, whose task was to ensure the safe navigation of the "Enrica Lexie" and protect it against potential pirate attacks. The Italian Law on VPDs regulated the presence of the Marines on board the "Enrica Lexie" and their duties.¹⁶⁸² The Arbitral Tribunal notes that in accordance with this Law Decree, responsibility for determining whether a vessel is at risk of a pirate attack rests with the Chief of the VPD.¹⁶⁸³
951. On the date of the incident, Second Officer Gupta and Captain Noviello spotted a small craft, later identified as the "St. Antony", rapidly approaching the "Enrica Lexie".¹⁶⁸⁴ According to the evidence on the record, it appears that the crew of the "Enrica Lexie" implemented a range of measures to communicate with the ship including through, according to Captain Noviello, an attempt to contact the small craft through channel 16 of the VHF communication system, when the small craft was between 1 and 1.5 nautical miles away.¹⁶⁸⁵ As the craft came closer to the

¹⁶⁷⁸ Hearing Transcript, 13 July 2019, 77:15-20.

¹⁶⁷⁹ Hearing Transcript, 13 July 2019, 81:3-26.

¹⁶⁸⁰ India's Rejoinder, para. 9.4, *referring to* Italy's Reply, para. 10.8. *See also* Hearing Transcript, 13 July 2019, 82:23-83:9.

¹⁶⁸¹ Italy's Reply, para. 10.8.

¹⁶⁸² Law Decree No. 107 of 12 July 2011, of the Italian Republic (**Annex IT-91**). *See also* Hearing Transcript, 8 July 2019, 131:12-132:2.

¹⁶⁸³ Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 2 (**Annex IT-91**) ("The Head of the VPD of each team, [...] has exclusively the responsibility for the military activity of combating piracy").

¹⁶⁸⁴ (Confidential Annex) (**Annex IT-261**).

¹⁶⁸⁵ Hearing Transcript, 15 July 2019, 111:10-24; 149:21-22.

“Enrica Lexie”, the Marines used various methods in an attempt to alert the approaching craft, including visual signals¹⁶⁸⁶ and firing a mix of tracer and ordinary bullets, when the craft was at approximately 800 metres,¹⁶⁸⁷ 500 metres,¹⁶⁸⁸ and 300 metres.¹⁶⁸⁹ Despite such signals, the craft maintained its course and speed, approaching the “Enrica Lexie”.¹⁶⁹⁰ According to the available records of the incident, a conclusion was reached on board the “Enrica Lexie” that it was under pirate attack. This is confirmed by Captain Vitelli who “sounded the general emergency alarm by bell, by foghorn and announced” three times on the public address system that the “Enrica Lexie” was under pirate attack and instructed the “Enrica Lexie” crew to go into the engine room, known as the citadel, for shelter.¹⁶⁹¹

952. It follows from the available factual information that under the circumstances the Marines and the “Enrica Lexie” crew believed that the vessel was under a pirate attack and took actions, the appropriateness of which will be determined by a competent criminal court, to protect the “Enrica Lexie” against a perceived pirate attack.
953. In the view of the Arbitral Tribunal, it is established that the actions by the Marines were not directed at undermining or interfering with India’s sovereign rights under Article 56 of the Convention. The Arbitral Tribunal notes, in particular, that the conduct of the Marines in the present case occurred in the context of a singular and isolated incident, which had a merely incidental effect on the ability of a fishing vessel, the “St. Antony”, to continue pursuing its fishing activities. Such circumstances do not rise to the level of interference with “sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources” of the exclusive economic zone.
954. In any case, the sovereign rights enjoyed by India in its exclusive economic zone are not unlimited but must be balanced against the rights and duties of other States. This is confirmed by the

¹⁶⁸⁶ (Confidential Annex), p. 1 (**Annex IT-236**); Statement of Carlo Noviello, 19 February 2012 (**Annex IT-142**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Log Book of the Master of the “Enrica Lexie”, p. 2 (**Annex IT-14**); Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**).

¹⁶⁸⁷ (Confidential Annex), p. 1 (**Annex IT-236**); Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**).

¹⁶⁸⁸ (Confidential Annex), p. 1 (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Piroli Report (Confidential Annex), p. 2-6 (**Annex IT-233**).

¹⁶⁸⁹ (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**), Piroli Report (Confidential Annex), p. 2-7 (**Annex IT-233**).

¹⁶⁹⁰ (Confidential Annex) (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Piroli Report (Confidential Annex), pp 2-6, 2-7, 2-8 (**Annex IT-233**).

¹⁶⁹¹ Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Hearing Transcript, 15 July 2019, 22:7-16, 29:13-18.

obligation on the coastal State in Article 56, paragraph 2, of the Convention to have due regard to the rights and duties of other States and the applicability of Article 110 of the Convention.

955. With respect to the obligation to have due regard to the rights of other States, the Arbitral Tribunal observes that piracy at sea constitutes an international crime. All States have the right¹⁶⁹² and duty¹⁶⁹³ to protect their vessels against piracy at sea including in the exclusive economic zone of a coastal State.¹⁶⁹⁴ In the present case, the Marines did not target the “St. Antony” as a fishing vessel, but on the suspicion that it was a pirate vessel intending to board the “Enrica Lexie”. The Arbitral Tribunal consequently concludes that the actions taken by the Marines, as Italian State officials, for the discrete purpose of protecting the “Enrica Lexie” against a perceived pirate attack, the domestic law aspects of which will be subject to determination by a competent criminal court, did not result in a violation by Italy of Article 56 of the Convention.

2. Alleged Breach by Italy of its Obligations under Article 58 (Rights and Duties of Other States in the Exclusive Economic Zone) of UNCLOS

956. The Parties further disagree as to whether Italy breached its obligation of due regard under Article 58, paragraph 3, of the Convention.

957. Article 58 of the Convention sets out the rights and duties of other States in an exclusive economic zone. Article 58, paragraph 3, provides:

Article 58

Rights and duties of other States in the exclusive economic zone

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

(a) **Position of India**

958. India submits that, on its version of the “Enrica Lexie” incident, Italy violated its obligation under Article 58, paragraph 3, of the Convention to give “due regard” to India’s sovereign rights in the exclusive economic zone, as provided in Article 56, paragraph 1, subparagraph (a).

¹⁶⁹² See Articles 105, 109, and 110 of the Convention.

¹⁶⁹³ See Article 100 of the Convention.

¹⁶⁹⁴ See Articles 58, paragraph 2, and 110 of the Convention.

959. According to India, under Article 58, paragraph 3, “[t]he balance between the sovereign rights of the coastal State with respect to its economic utilization of its exclusive economic zone, and the rights of other States, is in favour of the coastal State”.¹⁶⁹⁵ India contends that this interpretation is consistent with the object and purpose of the exclusive economic zone, and the *travaux préparatoires* of the Convention.¹⁶⁹⁶ In India’s view, “[i]t follows that, if another State’s activity clashes with the coastal State’s competence in respect of economic utilization of the zone, the determination must be in favour of the coastal State”.¹⁶⁹⁷
960. In addition, India contends that the “due regard” clause is “generally understood as non-infringement of the coastal State’s rights”,¹⁶⁹⁸ and that the “criteria to be applied in assessing each circumstance is whether the activity interferes with the rights and interests of the coastal State”.¹⁶⁹⁹ India relies on the arbitral tribunal’s finding in the *Chagos Marine Protected Area Arbitration* with respect to Article 56, paragraph 2, of the Convention, which also contains a “due regard” obligation.¹⁷⁰⁰ As Italy itself has recognised, India notes, the arbitral tribunal in that case considered the obligation to give “due regard” as functionally equivalent to the obligation under Article 194, paragraph 4, of the Convention to “refrain from unjustifiable interference”.¹⁷⁰¹
961. India submits that the actions of the Marines “interfered in a most dramatic way with India’s sovereign rights” and “constituted a flagrant breach of Italy’s obligation to have ‘due regard’ to India’s rights”.¹⁷⁰² India refers to the *Chagos Marine Protected Area Arbitration*, in which the

¹⁶⁹⁵ India’s Counter-Memorial, para. 8.13.

¹⁶⁹⁶ India’s Counter-Memorial, paras 8.13-8.14, *citing* Virginia Commentary, Vol. VII, p. 525, para. 56.2; Alexander Proelß, ‘The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited’ (2012) 26 *Ocean Yearbook* 87, p. 93.

¹⁶⁹⁷ India’s Counter-Memorial, para. 8.15, *referring to* Virginia Commentary, Vol. VII, p. 502, para. V.15, *citing* Official Records of the Third United Nations Conference on the Law of the Sea, Vol. V, 10 December 1982, U.N. Doc. A/CONF.62/WP.8/Rev.1/Part II, para. 18 (“In simple terms, the rights as to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication”).

¹⁶⁹⁸ India’s Counter-Memorial, para. 8.15, *referring to* Moritaka Hayashi, ‘Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms’ (2005) 29 *Marine Policy* 123, at 133.

¹⁶⁹⁹ India’s Counter-Memorial, para. 8.15, *referring to* Moritaka Hayashi, ‘Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms’ (2005) 29 *Marine Policy* 123, at 133; Bateman, S., ‘Prospective Guidelines for Navigation and Overflight in the Exclusive Economic Zone’ (2005) 144 *Maritime Studies* 17, at 22.

¹⁷⁰⁰ India’s Counter-Memorial, para. 8.15, *referring to* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519 (“[T]he ordinary meaning of ‘due regard’ calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights”).

¹⁷⁰¹ Hearing Transcript, 13 July 2019, 80:8-9, *citing* PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 540; and *referring to* Italy’s Rejoinder, para 5.16.

¹⁷⁰² India’s Counter-Memorial, para. 8.16.

arbitral tribunal stated that the “extent of impairment” is an important factor in considering the “due regard” requirement.¹⁷⁰³ India further relies on the *South China Sea Arbitration*, in which, according to India, the arbitral tribunal found a violation of the “due regard” clause “even without any resort to the use of force”.¹⁷⁰⁴ India argues that “[t]he facts of this case are far more egregious”, including, on India’s account, the use of “lethal force without provocation and in the absence of any reasonable apprehension of threat to the safety of their ship, against unarmed fishermen”.¹⁷⁰⁵

962. India contends that Italy’s alleged breach of Article 56, paragraph 1, subparagraph (a), of the Convention also constituted a breach of Italy’s obligation to give “due regard” to India’s sovereign rights under Article 58.¹⁷⁰⁶ India adds, however, that if the Arbitral Tribunal declines to hold that Italy breached Article 56, India maintains its separate counter-claim under Article 58.¹⁷⁰⁷

(b) **Position of Italy**

963. Italy contends that it did not breach Article 58 of the Convention.
964. Italy rejects India’s arguments with respect to “due regard” obligation of Article 58, paragraph 3, of the Convention. According to Italy, this Article would impose a relevant obligation on Italy only if India’s rights under Article 56, paragraph 1, subparagraph (a), were engaged in this case, which Italy contends they are not. As with respect to Article 56,¹⁷⁰⁸ Italy finds that there is “no basis on which to claim that the Marines’ actions were in any way connected to India’s right to exploit fisheries within its economic zone, or any attempt to prevent the exercise of that right”. Italy further contends that “[e]ven if India’s sovereign rights [under Articles 56 or 58] include rights with respect to fishing vessels, or fishermen, such rights cannot include the right to the protection of fishermen from interference in circumstances where a threat to the security and safe navigation of a vessel is apprehended”.¹⁷⁰⁹

¹⁷⁰³ Hearing Transcript, 13 July 2019, 90:6-9, referring to PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

¹⁷⁰⁴ India’s Counter-Memorial, para. 8.17, referring to PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 753.

¹⁷⁰⁵ India’s Counter-Memorial, para. 8.18; referring to NIA Report (Confidential Annex), para. 11.25 (**Annex IN-27**).

¹⁷⁰⁶ India’s Rejoinder, para. 9.20.

¹⁷⁰⁷ India’s Rejoinder, para. 9.21.

¹⁷⁰⁸ See Part VI.A.1(b) above.

¹⁷⁰⁹ Italy’s Reply, para. 10.14.

965. Italy contends that India makes “no real attempt to engage with Article 58(3) as a provision that stands alone from Article 56(1)(a), or with the meaning of the obligation to give ‘due regard’ to the sovereign right of the coastal State to exploit its natural resources”.¹⁷¹⁰
966. Italy disputes India’s reliance on the *South China Sea Arbitration* in which the arbitral tribunal found that China breached its obligation to have due regard to the rights of the Philippines in its exclusive economic zone.¹⁷¹¹ According to Italy, this case presents no conduct equivalent to the acts of vessels under Chinese Government control “to escort and protect Chinese fishing vessels engaged in fishing unlawfully in the Philippines’ exclusive economic zone”.¹⁷¹²
967. Italy further disputes India’s understanding of the *Chagos Marine Protected Area Arbitration*. According to Italy, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* considered the obligation to “refrain from unjustifiable interference” under Article 194, paragraph 4, of the Convention “to be functionally equivalent to the obligation to give ‘due regard’, set out in Article 56(2)”.¹⁷¹³
968. Italy submits that, even if, as India asserts, the Marines’ conduct was unjustified on the basis that none of the crew members considered the “St. Antony” to be anything other than a small fishing craft, this would not prove that Italy failed to have due regard to India’s rights to explore and exploit natural resources, including fisheries, in its exclusive economic zone.¹⁷¹⁴ Italy supports this point by arguing that, as India has observed,¹⁷¹⁵ the content of the “due regard” obligation depends on the extent of the regard “called for by the circumstances and by the nature of those rights”.¹⁷¹⁶
969. According to Italy, India contends that the rights at issue in this case were India’s sovereign rights under Article 56 to exploit its fisheries.¹⁷¹⁷ Italy maintains, however, that “India’s sovereign rights

¹⁷¹⁰ Italy’s Rejoinder, para. 5.15.

¹⁷¹¹ Italy’s Rejoinder, para. 5.15, n. 195, referring to India’s Counter-Memorial, para. 8.17.

¹⁷¹² Italy’s Rejoinder, para. 5.15, n. 195, citing PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award of 12 July 2016, para. 756.

¹⁷¹³ Italy’s Rejoinder para. 5.16, citing PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 540.

¹⁷¹⁴ Italy’s Rejoinder, para. 5.16.

¹⁷¹⁵ Italy’s Rejoinder, para. 5.17, referring to India’s Counter-Memorial, para. 8.15.

¹⁷¹⁶ Italy’s Rejoinder, para. 5.17, referring to PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519. According to Italy, “[t]he *Chagos* tribunal was interpreting Article 56(2), but ITLOS appears to consider that the ‘due regard’ obligations in Articles 56(2) and 58(3) are equivalent”. See also Italy’s Rejoinder, para. 5.17, n. 199, referring to *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, p. 4 at p. 61, para. 216.

¹⁷¹⁷ Italy’s Rejoinder, para. 5.17, citing India’s Rejoinder, para. 9.21.

to exploit its fisheries were simply not engaged in this case”. Italy submits that the “contemporaneous evidence [...] indicates that those on board the *Enrica Lexie* apprehended a risk of collision and pirate attack and, therefore, a threat to the *Enrica Lexie*’s safe navigation”.¹⁷¹⁸ Italy concludes that the “apprehension of that risk and the Marines’ reaction to it was unrelated to India’s rights under Article 56(1)(a), and the Marines’ conduct did not constitute a breach by Italy of its obligation to have due regard to India’s right under that provision”.¹⁷¹⁹

970. Italy rejects India’s contention that, even if the Arbitral Tribunal were to find that Italy did not violate India’s rights under Article 56, Italy could be found to have failed to have due regard to India’s rights under that provision. According to Italy, the Parties agree that the “*St. Antony*” was not flying an Indian flag when the incident occurred.¹⁷²⁰ Italy submits that, “[w]ithout a flag flying on the *St Antony*, particularly beyond India’s territorial sea, Italy could not be said to have failed to have had due regard to any alleged sovereign rights of India”.¹⁷²¹ According to Italy, India’s assertions that the “*St. Antony*” was an Indian-registered fishing boat operated by Indian nationals in the Indian exclusive economic zone do not prove that those on board the “*Enrica Lexie*” knew or could have known the status of the “*St. Antony*” at the time. Italy concludes that there was “no basis on which, in reacting to the oncoming, unflagged, vessel, [...] the Marines could be said to have failed to have due regard to any rights of India to the fisheries in its exclusive economic zone”.¹⁷²²

(c) Analysis of the Arbitral Tribunal

971. India argues that the term “due regard” in Article 58, paragraph 3, of the Convention implies that “if another State’s activity clashes with the coastal State’s competence in respect of economic utilization of the zone, the determination must be in favour of the coastal State”.¹⁷²³ India therefore concludes that by not giving “due regard” to India’s sovereign rights in the exclusive economic zone, as provided for in Article 56, paragraph 1, subparagraph (a), Italy violated its obligation under Article 58, paragraph 3, of the Convention.

¹⁷¹⁸ Italy’s Rejoinder, para. 5.17. *See also* Italy’s Reply, paras 4.17-4.21.

¹⁷¹⁹ Italy’s Rejoinder, para. 5.17.

¹⁷²⁰ Italy’s Rejoinder, para. 5.18, *referring to* India’s Rejoinder, para. 9.34.

¹⁷²¹ Italy’s Rejoinder, para. 5.18.

¹⁷²² Italy’s Rejoinder, para. 5.18.

¹⁷²³ India’s Counter-Memorial, para. 8.15.

972. Italy rejects these arguments and points out that the content of the “due regard” obligation depends on the extent of the regard “called for by the circumstances and by nature of those rights”.¹⁷²⁴ Italy submits in this regard that the “contemporaneous evidence [...] indicates that those on board the *Enrica Lexie* apprehended a risk of collision and pirate attack and, therefore, a threat to the *Enrica Lexie*’s safe navigation”.¹⁷²⁵ Consequently, the “apprehension of that risk and the Marines’ reaction to it was unrelated to India’s rights under Article 56(1)(a), and the Marines’ conduct did not constitute a breach by Italy of its obligation to have due regard to India’s right under that provision”.¹⁷²⁶
973. The notion of “due regard” is not defined by UNCLOS. The ordinary meaning of the phrase “with due regard to” is “with the proper care or concern for”.¹⁷²⁷ The term “regard” also signifies “[a]ttention, care, or consideration given to a thing or person; concern for, heed of”, or “[a] thing or circumstance taken into account in determining action; a consideration, a motive”.¹⁷²⁸ As a general rule, the ordinary meaning of “due regard” does not contemplate priority for one activity over another.
974. This absence of hierarchy is reflected in the complementarity of Article 56, paragraph 2, and Article 58, paragraph 3, of the Convention. As discussed in the Virginia Commentary, “[t]here is a mutuality in the relationship of the coastal State and other States, and articles 56 and 58 taken together constitute the essence of the regime of the exclusive economic zone”.¹⁷²⁹
975. The sovereign rights of the coastal State over the natural resources in the exclusive economic zone coexist with the high seas freedoms enjoyed by other States in that zone. In accordance with Article 56, paragraph 2, the coastal State is required to have “due regard” to the rights and duties of other States in the exclusive economic zone, and correspondingly, under Article 58, paragraph 3, of the Convention, other States shall have “due regard” to the rights and duties of the coastal State in its exclusive economic zone. Thus, the object and purpose of the obligation of “due regard” is to ensure balance between concurrent rights belonging to coastal and other States.

¹⁷²⁴ Italy’s Rejoinder, para. 5.17, citing PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

¹⁷²⁵ Italy’s Rejoinder, para. 5.17.

¹⁷²⁶ Italy’s Rejoinder, para. 5.17.

¹⁷²⁷ Merriam-Webster.com Dictionary, Merriam-Webster, available at <www.merriam-webster.com/dictionary/with%20due%20regard%20to>.

¹⁷²⁸ See *Shorter Oxford English Dictionary*, Vol. II (6th ed. 2007) at 2511.

¹⁷²⁹ Virginia Commentary, Vol. II, p. 556, para. 58.1.

976. In *Chagos Marine Protected Area Arbitration*, the arbitral tribunal defined the notion of “due regard”, in the context of Article 56, paragraph 2, of the Convention, as follows:

In the Tribunal’s view, the ordinary meaning of “due regard” calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius’ rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches.¹⁷³⁰

977. In the view of the Arbitral Tribunal, the above notion of “due regard” as defined by the arbitral tribunal also applies in the context of Article 58, paragraph 3.

978. It follows from the *Chagos Marine Protected Area Arbitration* award that the extent of the “regard” required by the Convention depends, among others, upon the nature of the rights enjoyed by a State.¹⁷³¹ In other words, Article 56, paragraph 2, and Article 58, paragraph 3, are structured so as to guarantee observance of the concurrent respective rights and duties of coastal and other States. The Virginia Commentary to Article 58, paragraph 3, of the Convention indicates that the Article’s significance is “that it balances the rights, jurisdiction and duties of the coastal State with the rights and duties of other States in the exclusive economic zone”.¹⁷³² Some commentators share this understanding. For instance, it has been observed that “[the] reciprocal ‘due regard’ rule does not grant priority to the rights of the coastal State or to the freedoms of other States. It is an obligation for both States to exercise their rights respecting those of the other States and to endeavour in good faith to find accommodations permitting the exercise of the rights of both”.¹⁷³³ The obligation requires, as has been noted by another commentator, that other States “refrain from activities that *unreasonably interfere* with the exercise of the rights of the coastal State”.¹⁷³⁴

979. The Arbitral Tribunal observes that Article 58, paragraph 2, of the Convention provides that Articles 88 to 115 “apply to the exclusive economic zone”. That reference extends specific rights and duties of States as regards the repression of piracy to the exclusive economic zone. The

¹⁷³⁰ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

¹⁷³¹ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

¹⁷³² Virginia Commentary, Vol. II, p. 543, para. 56.11(f).

¹⁷³³ Tullio Treves, ‘Coastal States’ rights in the maritime areas under UNCLOS’ (2015) 12:1 *Revista de Direito Internacional*, Brasilia 39, at 42.

¹⁷³⁴ Albert J. Hoffmann, ‘Freedom of Navigation’ (2011) *Max Planck Encyclopedia of Public International Law*, para. 15 [emphasis added].

repression of piracy by States in the exclusive economic zone is thus not only sanctioned by the Convention but also, pursuant to Article 100 of the Convention as incorporated into Article 58, paragraph 2, a duty incumbent on all States.

980. It follows that, if protection from and repression of piracy comprise a right and a duty of India and Italy alike, including within India's exclusive economic zone, the conduct of the Marines on board the "Enrica Lexie" in responding to a perceived piracy threat cannot have "unreasonably interfere[d]" with, and thus have failed to show "due regard" to, India's rights as the coastal State. The domestic law aspects of the Marines' response to the putative piracy threat will be subject to determination by a competent criminal court, and it is not for the Arbitral Tribunal to decide on this matter in the present context.
981. In light of the foregoing, the Arbitral Tribunal determines that the actions taken by the Marines, as Italian State officials, to protect the "Enrica Lexie" against an alleged pirate attack did not result in a breach of Italy's obligation of "due regard" for the sovereign rights of India over natural resources in its exclusive economic zone. Consequently, the Arbitral Tribunal concludes that Italy has not violated Article 58, paragraph 3, of the Convention.

3. Alleged Violation by Italy of India's Right and Freedom under Article 87 (Freedom of the High Seas) and Article 90 (Right of Navigation) of UNCLOS

982. The Parties also disagree as to whether Italy violated India's right and freedom of navigation in the exclusive economic zone under Articles 87 and 90 of the Convention.
983. Articles 87 and 90 of the Convention relate to the right and freedom of navigation on the high seas. Both apply equally to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention.
984. Article 87, paragraph 1, subparagraph (a), provides:

Article 87

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;

985. Article 90 provides:

Article 90

Right of navigation

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

986. As described below, Italy argues in defence that India failed to comply with Article 94 of the Convention, thereby limiting its right to freedom of navigation. Article 94 provides, in relevant part:

Article 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
 - (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
[...]
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
 - [...]
 - (c) the use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure:
 - [...]
 - (b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
[...]
6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

(a) **Position of India**

987. India submits that, on its version of the “Enrica Lexie” incident, Italy violated India’s freedom and right of navigation in India’s exclusive economic zone under Articles 87 and 90 of the Convention when the Marines fired shots at the “St. Antony” and caused it to change course and veer away in order to avoid further gunfire.¹⁷³⁵ Contrary to Italy’s assertion that, “[b]oth before

¹⁷³⁵ India’s Counter-Memorial, para. 8.20; India’s Rejoinder, para. 9.23. *See also* Hearing Transcript, 13 July 2019, 93:11-15, 94:12-23, *referring to* Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-**

and after the incident, the *St Antony* navigated within India's exclusive economic zone without any constraint being applied by the Marines",¹⁷³⁶ India submits that the Marines' alleged shooting was a "blatant constraint" on a vessel's freedom of navigation, and that the "St. Antony" was further "constrained to proceed immediately to port"¹⁷³⁷ because of the "resulting deaths on board".¹⁷³⁸

988. India rejects Italy's argument that the facts of the "Enrica Lexie" incident do not engage Article 90 because, in Italy's view, it did not attempt to prevent India from sailing any ship flying the Indian flag since the "St. Antony" was not flying that flag.¹⁷³⁹ India argues that the present case does engage Article 90. India asserts that Article 90 grants India the right of navigation in its exclusive economic zone and the "St. Antony", a small-size fishing craft, was under no obligation to fly the Indian flag.¹⁷⁴⁰ India contends that Italy interfered with its freedom of navigation when, on its version of the facts, the "St. Antony" had to veer away sharply when fired upon and then return to port in light of the deaths on board.¹⁷⁴¹
989. India also rejects Italy's argument that India's freedom of navigation cannot extend to a situation where, on Italy's account, those at the wheel of the "St. Antony" were asleep and "placed it inadvertently on a collision course".¹⁷⁴² According to India, the "St. Antony" clearly had the right of way and, unlike the "Enrica Lexie", was under no obligation to alter course. India further contends that the "Enrica Lexie" and the "St. Antony" were at no "genuine" risk of collision, which India submits was attested to by the Second Officer of the "Enrica Lexie".¹⁷⁴³ According to India, the "St. Antony" changed course because the Marines fired shots at it, not to avoid collision.¹⁷⁴⁴ India points out that Italy seems to have conceded to this assertion at the Hearing.¹⁷⁴⁵ In any event, India maintains that "[n]othing in UNCLOS suggests that a state's freedom of navigation [...] can be interfered with in circumstances where a vessel having its nationality is

141); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

¹⁷³⁶ India's Rejoinder, para. 9.25, *citing* Italy's Reply, para. 10.20.

¹⁷³⁷ India's Rejoinder, para. 9.25.

¹⁷³⁸ India's Rejoinder, para. 9.23.

¹⁷³⁹ India's Rejoinder, paras 9.22-9.23, *referring to* Italy's Reply, para. 10.19.

¹⁷⁴⁰ India's Rejoinder, para. 9.23.

¹⁷⁴¹ India's Rejoinder, para. 9.23.

¹⁷⁴² India's Rejoinder, para. 9.24, *citing* Italy's Reply, para. 10.20.

¹⁷⁴³ India's Rejoinder, para. 9.24. *See also* Hearing Transcript, 13 July 2019, 83:5-9, 95:2-4. *See also* Part V, Section B.3(a).

¹⁷⁴⁴ India's Rejoinder, para. 9.24.

¹⁷⁴⁵ Hearing Transcript, 13 July 2019, 94:4-9, *referring to* Hearing Transcript, 9 July 2019, 174:9-12.

operating legitimately in that state’s EEZ, has the right of way and has not attacked or threatened any other vessel”.¹⁷⁴⁶

990. India further rejects Italy’s argument that India does not enjoy freedom of navigation in this instance because India violated its obligation as a flag State under Article 94 of the Convention.¹⁷⁴⁷ According to India, Article 94, paragraph 2, subparagraph (a), did not require the “St. Antony” to be registered given the vessel’s small size. India further contends that it complied with the requirement under Article 94, paragraph 3, to “take such measures for ships flying its flag as are necessary to ensure safety at sea”. In this regard, India points to the fact that the “St. Antony” “was registered in the State of Tamil Nadu in India [...] by the Assistant Director of Fisheries at Colachel, Kanya Kumari District, State of Tamil Nadu”. Further, while at its size (“a small boat less than 20 metres in length”) “it did not need any further registration”, it nevertheless “was additionally registered at the Office of Assistant Director, MPEDA (Marine Products Export Development Authority), Tuticorin, Tamil Nadu [...] and therefore is an Indian vessel under Section 2(e) of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels Act), 1981”.¹⁷⁴⁸ Additionally, India points out that the “insurance for the boat is also listed”.¹⁷⁴⁹
991. India submits that, even if India had failed to comply with Article 94, “[t]here is nothing in UNCLOS to suggest that a state’s alleged breach of Article 94 disentitles it from enjoying the freedom of navigation”.¹⁷⁵⁰ Moreover, India notes, the remedy which Article 94 provides for its violation is for the State discovering the defect to report it to the flag State – something which Italy failed to do in the more than seven years since the incident.¹⁷⁵¹ India adds that the fact that “Italy’s claims in this case do not include a claim for breach of Article 94 confirms the point”.¹⁷⁵²
992. India finally rejects Italy’s argument that the “St. Antony” was not exercising India’s right to freedom of navigation as it was not displaying the Indian flag.¹⁷⁵³ India submits that, under Article 91, paragraph 1, “there were clearly genuine links between the *St Antony* and India more than

¹⁷⁴⁶ Hearing Transcript, 13 July 2019, 95:8-13.

¹⁷⁴⁷ India’s Rejoinder, para. 9.26.

¹⁷⁴⁸ India’s Rejoinder, para. 5.30, *referring to* Certificate of Registration for the “St. Antony” issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**); The “St. Antony”’s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**).

¹⁷⁴⁹ India’s Rejoinder, para. 9.26.

¹⁷⁵⁰ Hearing Transcript, 13 July 2019, 96:7-9. *See also* India’s Rejoinder, para. 9.28.

¹⁷⁵¹ India’s Rejoinder, para. 9.28.

¹⁷⁵² India’s Rejoinder, para 9.28; Hearing Transcript, 13 July 2019, 96:24-25.

¹⁷⁵³ Hearing Transcript, 13 July 2019, 97:6-14, *referring to* Italy’s Reply, para. 10.25; Italy’s Rejoinder, paras 5.24, 5.27, 5.30.

sufficient to classify the boat as an Indian vessel as a matter of fact”.¹⁷⁵⁴ India further contends that it is for “each State, in its discretion, to fix the conditions for the grant of its nationality to ships”.¹⁷⁵⁵ In support of its position, India cites the *M/V “SAIGA” (No. 2)* case in which ITLOS held that Article 91 “leaves to each State exclusive jurisdiction over the granting of its nationality to ships”¹⁷⁵⁶ and that the “determination of a ship’s nationality is a question of fact”.¹⁷⁵⁷

993. In this regard, India submits that “a state enjoys the freedom of navigation through all vessels which have its nationality, regardless of whether or not they are displaying the flag of that state”.¹⁷⁵⁸ In support of this argument, India refers to the *M/V “SAIGA” (No. 2)*¹⁷⁵⁹ and the “*Grand Prince*” cases,¹⁷⁶⁰ in which ITLOS considered the nationality of the vessels in order to determine the flag State, and not the flag that was actually being displayed by the vessel. Specifically, in the “*Grand Prince*” case, “ITLOS found that Belize was not the flag State of the *Grand Prince* even though it was flying the flag of Belize at the time of its arrest”.¹⁷⁶¹ The case is even stronger, India argues, for small-size boats that, according to India, do not have to be registered by the coastal State under the Convention.¹⁷⁶²
994. Relying on scholarly commentary which states that “[t]he term ‘flag State’ denotes the state whose nationality a ship bears, and whose flag it flies as a symbol of its nationality”,¹⁷⁶³ India argues that “the flag of a vessel is like a wedding ring: it symbolises a legal status”, but the

¹⁷⁵⁴ India’s Rejoinder, para. 9.30.

¹⁷⁵⁵ India’s Rejoinder, para. 9.30, *citing* Virginia Commentary, Vol. III, p. 106, para. 91.9(b) (“[Article 91] requires every State to fix conditions for the grant of its nationality to ships, but imposes no further specific requirements in that respect, this being left to the discretion of the individual State”).

¹⁷⁵⁶ India’s Rejoinder, para. 9.31, *citing* *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 63.

¹⁷⁵⁷ India’s Rejoinder, para. 9.31.

¹⁷⁵⁸ Hearing Transcript, 13 July 2019, 49:21-24. *See also* India’s Rejoinder, para. 9.34.

¹⁷⁵⁹ Hearing Transcript, 13 July 2019, 52:11-19, *citing* *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 62 (“The question for consideration is whether the *SAIGA* had the nationality of Saint Vincent and the Grenadines at the time of its arrest”).

¹⁷⁶⁰ Hearing Transcript, 13 July 2019, 53:1-6, *referring to* “*Grand Prince*” (*Belize v. France*), Prompt Release, Judgment, ITLOS Reports 2001, p. 17 at p. 41, paras 80-81.

¹⁷⁶¹ India’s Rejoinder, para. 9.34, *referring to* “*Grand Prince*” (*Belize v. France*), Prompt Release, Judgment, ITLOS Reports 2001, p. 17 at p. 29, para. 32.

¹⁷⁶² India’s Rejoinder, para. 9.34.

¹⁷⁶³ Hearing Transcript, 13 July 2019, 54:4-6, *citing* Doris König, ‘Flag of Ships’ (2009) Max Planck Encyclopedia of Public International Law, para. 1. *See also* Hearing Transcript, 13 July 2019, 53:13-18, *citing* Herman Meyers, *The Nationality of Ships* (Martinus Nijhoff, 1967), p. 162; Hearing Transcript, 13 July 2019, 60:2-16, *citing* Douglas Guilfoyle, ‘Article 91’ in Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694; Hearing Transcript, 20 July 2019, 103:2-16, *citing* Douglas Guilfoyle, ‘Article 91’ in Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694.

existence of the status itself does not depend on the display of this symbol.¹⁷⁶⁴ Moreover, as India notes, commentators have pointed out that “[r]egistration is the most widely used modality to grant nationality in the shipping legislation of many States”.¹⁷⁶⁵

995. This interpretation is, in India’s view, logical because if the Convention premised the freedom of navigation on the display of a flag, it would lead to the untenable proposition that if a ship loses its flag at sea, another State could interfere with its voyage without sanction.¹⁷⁶⁶
996. Applying this to the facts, India argues that under Indian law, specifically Section 2, paragraph (e), of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, the “St. Antony” was at all material times an Indian vessel under Indian law, and that it was registered under both the Tamil Nadu Marine Fishing Regulation Act, 1983, and the Marine Products Export Development Authority Act, 1972.¹⁷⁶⁷
997. India submits that it is of no consequence that the “St. Antony” was not registered under the Indian Merchant Shipping Act, 1958, because, according to India, the Act clearly states that a fishing vessel like the “St. Antony” does not need to be registered under that legislation.¹⁷⁶⁸ Furthermore, India argues that since the “St. Antony” had already acquired its Indian nationality through registering under the two other Indian legislations, there was no need for it to be registered also under the Merchant Shipping Act, 1958.¹⁷⁶⁹
998. India further notes that, while Italy asserts that it is the flag State of the “Enrica Lexie” – in fact, Italy’s counsel has referred to the “Enrica Lexie” as an “Italian-flagged vessel” on numerous occasions – it has not produced any evidence that the “Enrica Lexie” was displaying the Italian flag at the time of the incident.¹⁷⁷⁰ This, according to India, shows that “even Italy does not

¹⁷⁶⁴ Hearing Transcript, 13 July 2019, 54:9-10. *See also* Hearing Transcript, 13 July 2019, 54:11-16.

¹⁷⁶⁵ Hearing Transcript, 13 July 2019, 57:14-16, *citing* Doris König, ‘Flag of Ships’ (2009) Max Planck Encyclopedia of Public International Law, para. 19; Hearing Transcript, 13 July 2019, 57:11-16, *citing* *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, Declaration of Judge Paik, ITLOS Reports 2013, p. 4 at p. 50, para. 6.

¹⁷⁶⁶ Hearing Transcript, 13 July 2019, 97:21-98:8.

¹⁷⁶⁷ India’s Rejoinder, para. 9.32, *referring to* The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**); The “St. Antony”’s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**). *See also* Hearing Transcript, 13 July 2019, 61:13-15.

¹⁷⁶⁸ India’s Rejoinder, para. 9.33.

¹⁷⁶⁹ Hearing Transcript, 20 July 2019, 106:17-107:4.

¹⁷⁷⁰ Hearing Transcript, 13 July 2019, 54:17-55:6.

seriously consider that the flag state of a vessel is determined by the flag displayed by the vessel”.¹⁷⁷¹

999. Regarding the merits of its counter-claim under Article 87 of the Convention, India adds that the evidence shows that the conduct of the “St. Antony” was in harmony with the applicable rules of the COLREGS,¹⁷⁷² while the actions of the person steering the “Enrica Lexie” were characterised by Captain Noviello as a “big mistake”.¹⁷⁷³
1000. Finally, in reply to Italy’s arguments that Mr. Jelastine was driving the “St. Antony” without a licence, India contends that while this might very well be “an infraction under Indian law”,¹⁷⁷⁴ it is not a reason in itself to pass responsibility on to the “St. Antony” “when it was those in charge of the navigation of the tanker, the Enrica Lexie, who made the big mistake”.¹⁷⁷⁵

(b) **Position of Italy**

1001. Italy rejects India’s counter-claims under Articles 87 and 90 of the Convention. Italy submits that they fail on three grounds.
1002. First, Italy submits that “India did not and does not enjoy the right or the freedom of navigation in respect of the *St Antony* because the vessel did not and was not entitled to fly its flag”.¹⁷⁷⁶
1003. Italy submits that the counter-claim must fail because both Articles 87 and 90 depend on the “*St Antony* having been an Indian-flagged vessel, which it was not”.¹⁷⁷⁷ Italy contends that because “the freedom and right of navigation belongs to the State, rather than the vessel, it is through the flying of the flag of a State, and the entitlement to do so under the law of that State, that the freedoms and rights of the flag State are exercised by a private vessel”.¹⁷⁷⁸ According to Italy, “the *St Antony* was neither entitled to fly the Indian flag nor actually flying the Indian flag”.¹⁷⁷⁹

¹⁷⁷¹ Hearing Transcript, 13 July 2019, 55:7-9.

¹⁷⁷² Hearing Transcript, 20 July 2019, 109:7-111:3.

¹⁷⁷³ Hearing Transcript, 20 July 2019, 111:6-7, *citing* Hearing Transcript, 15 July 2019, 138:12.

¹⁷⁷⁴ Hearing Transcript, 20 July 2019, 111: 19-20.

¹⁷⁷⁵ Hearing Transcript, 20 July 2019, 111:16-17.

¹⁷⁷⁶ Italy’s Rejoinder, para. 5.22(1). *See also* Hearing Transcript, 18 July 2019, 212:22-25.

¹⁷⁷⁷ Italy’s Reply, para. 10.24.

¹⁷⁷⁸ Italy’s Reply, para. 10.25.

¹⁷⁷⁹ Italy’s Reply, para. 10.26.

1004. According to Italy, “[a]ll that Article 90 [...] does is confer a right on every State ‘to sail ships flying its flag’ in the exclusive economic zone”.¹⁷⁸⁰ Italy submits that it has “plainly not breached India’s right to do so, either generally or with respect to the *St Antony*” because the “incident in no way involved any attempt by Italy to prevent India from sailing any ship flying the Indian flag, not least because the *St Antony* was neither flying, nor entitled to fly, the Indian flag”. Italy concludes, therefore, that “[t]he terms of Article 90 are simply not engaged by the facts of this case”.¹⁷⁸¹
1005. In Italy’s view, “[t]here is an important difference between a vessel having the nationality of a State, and a vessel being entitled to fly the flag of a State”.¹⁷⁸² Italy submits that Article 91 of the Convention¹⁷⁸³ clearly “distinguishes between the conditions for the grant of nationality to a vessel, for the registration of a ship, *and* for the right to fly its flag”. In Italy’s view, “[f]or the purposes of Article 87(1)(a) and Article 90 of UNCLOS, only the entitlement to and the display of the flag are relevant”.¹⁷⁸⁴
1006. Italy further contends that “physical display of the flag [...] is an indispensable requirement for a State to enjoy through a vessel flying its flag the right and the freedom of navigation”¹⁷⁸⁵ and that “any interference with the navigation of a vessel that is not displaying a flag is not prohibited by UNCLOS”.¹⁷⁸⁶ Italy refers to Article 110, which, according to Italy, permits interference in the navigation of ships “without nationality”, at least in order to verify the ship’s right to fly a flag by

¹⁷⁸⁰ Italy’s Reply, para. 10.19.

¹⁷⁸¹ Italy’s Reply, para. 10.19. *See also* Hearing Transcript, 18 July 2019, 204:8-22.

¹⁷⁸² Italy’s Rejoinder, para. 5.25.

¹⁷⁸³ Article 91 of the Convention reads in full:

Article 91

Nationality of ships

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

¹⁷⁸⁴ Italy’s Rejoinder, para. 5.25 [emphasis added by Italy].

¹⁷⁸⁵ Italy’s Rejoinder, para. 5.26, *referring to State v. V. Jayachandra* (1997) 10 SCC 70, para. 9 (**Annex IT-282**) (“Under Articles 91 and 92 of the Convention it is mandatory for a vessel to fly its nationality flag”); *P. Nedumaran v. Union of India* (1993) MANU/AP/0367/1993, para. 18 and *see paras 39-40 (Annex IT-281)* (“Under international law, there is no unrestricted freedom of navigation on high seas; every ship must fly the flag of the country of her registration and the flag must, at all times, be exhibited”). *See also* Italy’s Rejoinder, paras 5.39-5.40.

¹⁷⁸⁶ Italy’s Rejoinder, para. 5.25.

examining the documents attesting to such a right that each State must issue to ships to which it has “granted the right to fly its flag”.¹⁷⁸⁷

1007. According to Italy, the Supreme Court of India has found that “the St. Antony was not flying an Indian flag at the time when the incident took place”.¹⁷⁸⁸ Italy therefore concludes that since the “St. Antony” was not flying the Indian flag, “India cannot enjoy the right or the freedom of navigation in respect of that vessel”.¹⁷⁸⁹
1008. Moreover, since India is claiming a direct breach of its own rights, and not that of its citizens under an espousal claim, Italy further contends that India is required, but has failed, to provide evidence proving that the “St. Antony” was entitled to fly the Indian flag.¹⁷⁹⁰ This is consistent, according to Italy, with Article 91, paragraph 2, of the Convention, which provides that “[e]very state shall issue to ships to which it has granted the right to fly its flag documents to that effect”.¹⁷⁹¹ In this regard, Italy maintains that the factors that India relies on might be sufficient to show that a genuine link existed between India and the “St. Antony”, but they are not sufficient to establish the right to fly the Indian flag under the Convention.¹⁷⁹² In Italy’s view, under India’s wedding ring analogy, the present situation resembles “more a person who claims to be married, but who lacks a marriage certificate as well as a wedding ring”.¹⁷⁹³
1009. For example, Italy claims that neither of the two pieces of Indian legislation under which the “St. Antony” was registered are fit for that purpose.¹⁷⁹⁴ The first one, the Tamil Nadu Marine Fishing Regulation Act, 1983, Italy argues, only allows for licences “for fishing in any specified area”, and these specified areas “may not be beyond territorial waters”.¹⁷⁹⁵ Italy submits that there can be no rights conferred to exercise India’s freedom of navigation under Part VII of the Convention, and that it “has nothing to do with any entitlement to fly the Indian flag”.¹⁷⁹⁶ The second piece of legislation, the Marine Products Export Development Authority Act, 1972 “concerns the

¹⁷⁸⁷ Italy’s Rejoinder, para. 5.26.

¹⁷⁸⁸ Italy’s Rejoinder, para. 5.27, citing *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 29 (**Annex IT-19**).

¹⁷⁸⁹ Italy’s Rejoinder, para. 5.27.

¹⁷⁹⁰ Hearing Transcript, 18 July 2019, 206:8-17.

¹⁷⁹¹ Hearing Transcript, 18 July 2019, 206:4-6, citing Article 91, paragraph 2, of the Convention.

¹⁷⁹² Hearing Transcript, 18 July 2019, 206:22-207:5.

¹⁷⁹³ Hearing Transcript, 18 July 2019, 212:18-19.

¹⁷⁹⁴ Hearing Transcript, 18 July 2019, 207:13-209:13.

¹⁷⁹⁵ Hearing Transcript, 18 July 2019, 208:1-7, citing Tamil Nadu Marine Fishing Regulations Act, 1983, Section 7, paragraph 1, Section 3 paragraph k (**Annex IT-266**).

¹⁷⁹⁶ Hearing Transcript, 18 July 2019, 208:3-11.

establishment of an authority concerned principally with the export of seafood”.¹⁷⁹⁷ Consequently, Italy submits that it can bear no relevance to the case at hand.¹⁷⁹⁸

1010. Similarly, with respect to the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, Italy submits that while the “St. Antony” might well come within the definition of “Indian vessel” under the legislation, that “just means that it did not need to be licensed under this act regulating foreign vessels”.¹⁷⁹⁹ According to Italy, it “conferred no entitlement on the St. Antony to fly the Indian flag or otherwise exercise India’s high seas freedoms of navigation”.¹⁸⁰⁰
1011. In Italy’s view, the registration of ships, “in the sense of creation of an entitlement to fly the Indian flag”, is governed not by any of these regulations but by the Merchant Shipping Act, 1958.¹⁸⁰¹ Italy submits that “[t]he registration provisions of this act, as India accepts, did not apply to fishing vessels; and, more importantly, at the time of the events relevant to this case, no notification extending the application of those provisions to fishing vessels had been issued”.¹⁸⁰² Italy notes that “India accepted that the St Antony was not registered under the Merchant Shipping Act”.¹⁸⁰³
1012. Italy also rejects India’s reliance on the “*Grand Prince*” judgment which, in Italy’s view, not only fails to support India’s claim but also in fact demonstrates that the entitlement to fly the flag must be proven, even if the flag is physically displayed.¹⁸⁰⁴ Italy similarly submits that India’s reference to the *M/V “SAIGA” (No. 2)* case is inapposite because the vessel in that case “was entitled to fly the Vincentian flag and flew that flag”.¹⁸⁰⁵ According to Italy, “[n]either Article 90, nor Article 87(1)(a), of UNCLOS grants States the right or freedom of navigation with respect to vessels of their nationality, but only vessels flying their flag”.¹⁸⁰⁶

¹⁷⁹⁷ Hearing Transcript, 18 July 2019, 209:4-6.

¹⁷⁹⁸ Hearing Transcript, 18 July 2019, 209:8-13.

¹⁷⁹⁹ Hearing Transcript, 18 July 2019, 209:14-22.

¹⁸⁰⁰ Hearing Transcript, 18 July 2019, 209:22-210:1.

¹⁸⁰¹ Hearing Transcript, 18 July 2019, 210:3-4.

¹⁸⁰² Hearing Transcript, 18 July 2019, 210:8-11.

¹⁸⁰³ Hearing Transcript, 18 July 2019, 210:12-13. *See also* Italy’s Rejoinder, para. 5.29, referring to The Merchant Shipping Act, 1958, Sections 22, 63, 64, 68, 435B, 435V (**Annex IT-265**); Letter from the Mercantile Marine Department of the Ministry of Shipping of India to the Commissioner of Police, Kochi, 23 March 2012, attaching “Interim Report into the Marine Casualty of Death of Two Fishermen off Kochi due to Firing by M.T. Enrica Lexie, Flag Italy, on 15.02.2012”, 12 March 2012, p. 4 (**Annex IT-161**).

¹⁸⁰⁴ Hearing Transcript, 18 July 2019, 211:11-17, referring to “*Grand Prince*” (*Belize v. France*), Prompt Release, Judgment, ITLOS Reports 2001, p. 17 at p. 42, para 83.

¹⁸⁰⁵ Italy’s Rejoinder, para. 5.25, n. 208, referring to *M/V “SAIGA” (No. 2)* (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, p. 10 at pp 33-39, paras 55-74.

¹⁸⁰⁶ Italy’s Rejoinder, para. 5.24.

1013. Second, Italy submits that even if the Arbitral Tribunal finds that the “St. Antony” was entitled to fly the Indian flag, it was not entitled to the protection of the Convention because it was not navigating in accordance with applicable rules of international law.¹⁸⁰⁷
1014. In this regard, Italy points out that “[o]n the evidence of its captain, the St Antony had an unlicensed person at the wheel and was motoring uncontrolled with [...] either everyone, or at least most of the people on board, asleep”.¹⁸⁰⁸ Based on these facts, even if India has shown that the “St. Antony” had been entitled to fly its flag, Italy submits that India would have been in breach of its obligation under Article 94, paragraph 4, subparagraph (b), of the Convention effectively to “exercise its jurisdiction over the St Antony in respect of the qualifications in seamanship, navigation and communications of those controlling it”.¹⁸⁰⁹ Italy also submits that “[f]reedom of navigation does not include a freedom to navigate in breach of these standards”.¹⁸¹⁰ In Italy’s view, “[t]he flag State of a vessel motoring in the open seas with everyone on board asleep and thus having no regard for the safe navigation of the vessel, or other vessels it may encounter, does not enjoy a right or freedom of navigation in respect of that vessel”.¹⁸¹¹
1015. Third, Italy submits that “even if India did enjoy the rights guaranteed under Articles 87(1)(a) and 90 of UNCLOS in respect of the *St Antony*, Italy did not breach them”.¹⁸¹² This is because, Italy submits, “taking dissuasive measures to avoid a collision or perceived risk of hostile boarding in a close-quarters situation does not constitute an interference with the freedom of navigation of either vessel involved in the incident”.¹⁸¹³ In particular, Italy contends that its “Marines responded to the close quarters situation of the two vessels” and maintains that any criminal liability which may attach to those actions does not relate to India’s freedom of navigation because “[n]one of Italy, the *Enrica Lexie* nor the Marines had any interest in nor exerted any influence over the navigation of the *St Antony* at any time other than when those on the *Enrica Lexie* considered that there was a threat of an imminent collision or hostile boarding”.¹⁸¹⁴
1016. Similarly, Italy disagrees with India’s claim that the Marines interfered with the freedom of navigation of the “St. Antony” because it had to return to port following the incident. Italy submits

¹⁸⁰⁷ Hearing Transcript, 18 July 2019, 216:25-217:5. *See also* Italy’s Rejoinder, para. 5.31.

¹⁸⁰⁸ Hearing Transcript, 18 July 2019, 214:7-11, *referring to* Hearing Transcript, 15 July 2019, 149:6-13, 166:26-167:12. *See also* Italy’s Reply, para. 10.20, *referring to* Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

¹⁸⁰⁹ Hearing Transcript, 18 July 2019, 214:15-17. *See also* Italy’s Reply, paras 10.21-10.22.

¹⁸¹⁰ Italy’s Reply, para. 10.22.

¹⁸¹¹ Italy’s Rejoinder, para. 5.32.

¹⁸¹² Italy’s Rejoinder, para. 5.22(3). *See also* Hearing Transcript, 18 July 2019, 217:6-15.

¹⁸¹³ Hearing Transcript, 18 July 2019, 217:16-20.

¹⁸¹⁴ Italy’s Reply, para. 10.23. *See also* Italy’s Rejoinder, paras 5.33-5.34.

that this was merely a consequence of the incident and not a continued interference with the freedom of navigation.¹⁸¹⁵

(c) **Analysis of the Arbitral Tribunal**

1017. India claims that Italy, through its conduct, has breached India's freedom and right of navigation in the exclusive economic zone, pursuant to Article 87, paragraph 1, subparagraph (a) and Article 90, of the Convention, respectively. India argues that this breach occurred when the Marines fired shots at the "St. Antony" and caused it to change course and veer away in order to avoid further gunfire.¹⁸¹⁶ Italy submits that it has not breached India's freedom and right of navigation "either generally or with respect to the *St. Antony*" as the incident in no way involved any attempt by Italy to interfere with India's freedom of navigation or to prevent India from sailing any ship flying the Indian flag.¹⁸¹⁷

1018. According to Italy, "India did not and does not enjoy the right or the freedom of navigation in respect of the *St Antony* because the vessel did not and was not entitled to fly its flag".¹⁸¹⁸ Italy argues that Articles 87 and 90 "confer[] rights on States which are 'enjoyed through them by ships to which the right to fly their flag has been accorded'".¹⁸¹⁹ On the contrary, according to India,

there was no obligation for a small-size fishing craft to fly the Indian flag. It was still an Indian vessel. When the *St Antony* was fired at, it had to veer away sharply to avoid further gunfire, and then return to port because of the resulting deaths on board. In those circumstances, it is evident that India's right of navigation under Article 90 was both engaged and violated.¹⁸²⁰

1019. Italy also argues that, while India has not substantiated its claim that the "St. Antony" was an Indian-flagged vessel, in any case, India has not fulfilled its obligations as a flag State under Article 94, paragraph 1; paragraph 3, subparagraphs (b) and (c); and paragraph 4, subparagraph (b), of the Convention. According to Italy, freedom of navigation does not include freedom to navigate in breach of these standards.¹⁸²¹ India argues that there is no evidence that India violated

¹⁸¹⁵ Hearing Transcript, 18 July 2019, 219:17- 220:2.

¹⁸¹⁶ India's Counter-Memorial, para. 8.20. *See also* Hearing Transcript, 13 July 2019, 93:11-15, 94:12-23, referring to Declaration of Umberto Vitelli, 19 February 2012 (**Annex IT-141**); Declaration of Carlo Noviello, 19 February 2012 (**Annex IT-138**); Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**).

¹⁸¹⁷ Italy's Reply, paras 10.19-10.20.

¹⁸¹⁸ Italy's Rejoinder, para. 5.22(1). *See also* Italy's Reply, paras 10.19, 10.24; Hearing Transcript, 18 July 2019, 212:22-25.

¹⁸¹⁹ Italy's Reply, para. 10.24, *citing* N.M. Hosanee, 'A critical analysis of flag State duties as laid down under Article 94 of the 1982 United Nations Convention on the Law of the Sea' (2009) United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, p. 12.

¹⁸²⁰ India's Rejoinder, para. 9.23.

¹⁸²¹ Italy's Reply, paras 10.21-10.22.

Article 94 and that even if it did, this would not entitle Italy to interfere with India’s freedom of navigation.¹⁸²²

1020. Before addressing India’s claim, the Arbitral Tribunal will first consider the status of the “St. Antony” and its implications on India’s rights under the Convention, which is central to the Parties’ arguments concerning this claim.

i. The Status of the “St. Antony”

1021. Article 91 of the Convention provides as follows:

Article 91

Nationality of ships

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

1022. Every State is sovereign in its decision to grant its nationality to ships. As pointed out by India,¹⁸²³ Article 91 “requires every State to fix conditions for the grant of its nationality to ships, but imposes no further specific requirements in that respect, this being left to the discretion of the individual State”.¹⁸²⁴ This principle has been confirmed by the case law of international tribunals and national courts. In the *Muscat Dhows* case, the tribunal stated that “generally speaking it belongs to every Sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants”.¹⁸²⁵ Similarly, in *M/V “SAIGA” (No. 2)*, ITLOS observed that Article 91 “leaves to each State exclusive jurisdiction over the granting of its nationality to ships”.¹⁸²⁶ These conditions are regulated by a State in its domestic law. While there are several modalities for the grant of nationality to different types of ships, most States confer their nationality upon ships by registration.¹⁸²⁷ Registration of a vessel is the “means of entering

¹⁸²² India’s Rejoinder, paras 9.27-9.29.

¹⁸²³ India’s Rejoinder, para. 9.30.

¹⁸²⁴ Virginia Commentary, Vol. III, p. 106, para. 91.9(b).

¹⁸²⁵ PCA Case No. 1904-01: *Muscat Dhows Case, France v. Great Britain*, Award of 8 August 1905, RIAA Vol. XI RIAA, p. 83 at p. 84. *See also Lauritzen v. Larsen* (United States Supreme Court [25 May 1953] 345 US 571).

¹⁸²⁶ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 63.

¹⁸²⁷ Doris König, ‘Flag of Ships’ (2009) Max Planck Encyclopedia of Public International Law, para. 3; *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 37, para. 64.

[the vessel] in the public records [and] is generally – but not always – not only a precondition for, but also the test of, a vessel’s nationality”.¹⁸²⁸

1023. As stated by ITLOS in this respect, “the nationality of a ship is a question of fact to be determined [...] on the basis of evidence adduced by the parties”.¹⁸²⁹

1024. In the present case, India has submitted to the Arbitral Tribunal its national law containing the relevant conditions for grant of its nationality to ships.¹⁸³⁰ According to India, this law supports its assertion that the “St. Antony” was an Indian vessel. Specifically, India points to Section 2, paragraph (e), of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, and asserts that according to this provision, the “St. Antony” was at all material times an Indian vessel.¹⁸³¹ According to Section 2, paragraph (e):

In this Act, unless the context otherwise requires, [...]

(e) “Indian vessel” means:-

[...]

(II) a vessel:-

(i) which is owned wholly by persons to each of whom any of the following descriptions applies:

(1) a citizen of India;

[...]; and

(ii) which is registered under the Merchant Shipping Act, 1958, or under any other Central Act or any Provincial or State Act.¹⁸³²

1025. The “St. Antony” was a fishing vessel owned by an Indian national¹⁸³³ and registered under the Tamil Nadu Marine Fishing Regulation Act, 1983,¹⁸³⁴ and the Marine Products Export

¹⁸²⁸ Nigel Ready, ‘Nationality, Registration, and Ownership of Ships’ in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea*, (Oxford University Press, 2016), p. 25.

¹⁸²⁹ *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 36, para. 66. *See also* Hearing Transcript, 13 July 2019, 61:13-15.

¹⁸³⁰ The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**).

¹⁸³¹ India’s Rejoinder, para. 9.32, *referring to* The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**).

¹⁸³² The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981 (**Annex IN-38**).

¹⁸³³ Additional Statement of Shri Freddy s/o John Bosco, owner of the “St. Antony” (**Annex IN-39**).

¹⁸³⁴ India’s Rejoinder, para. 9.32; Italy’s Reply, para. 10.10; Certificate of Registration for the “St. Antony” issued by the Office of the Assistant Director of Fisheries, Extension & Training, Colachel, Kanyakumari (West) under the Tamil Nadu Marine Fishing Regulation Act, 1983 (**Annex IT-267**).

Development Authority Act, 1972.¹⁸³⁵ In view of this, the Arbitral Tribunal is satisfied that the “St. Antony” was an Indian vessel.

ii. Consequences of Exemption from Registration under the Indian Merchant Shipping Act, 1958

1026. India submits that the “St. Antony”, as a small fishing vessel, was exempt from registration under the Indian Merchant Shipping Act, 1958,¹⁸³⁶ and that pursuant to Article 94, paragraph 2, subparagraph (a), of the Convention, “it was not [...] obligatory for the *St Antony* to be registered given its small size”.¹⁸³⁷

1027. Article 94, paragraph 2, subparagraph (a), of the Convention provides as follows:

Article 94

Duties of the flag State

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size;

1028. It has been suggested in academic commentary that the exemption from registration under Article 94 was intended to shield small vessels from onerous requirements of registration:¹⁸³⁸

Indeed, it has been said the intention was all ocean-going vessels should be registered; and that any possibility small vessels might not have to be registered “was created [only] to avoid imposing onerous requirements on small local vessels” which due to their size “would not normally be used outside coastal waters”. While perhaps a desirable outcome, this is not consistent with the Convention’s language nor with State practice. The Convention, simply, does not require all ocean-going vessels to be registered. Its reference to vessels “excluded from generally accepted international regulations” due to their “small size”, appears only to attempt to place some limits on the well-known State practice of allowing small craft a right of nationality based on ownership alone without requiring registration (even where such vessels may be capable of voyages beyond coastal waters).¹⁸³⁹

1029. In the view of the Arbitral Tribunal, the test under the Convention for establishing a jurisdictional link between a vessel and a State is whether a vessel possesses the nationality of that State, as

¹⁸³⁵ India’s Rejoinder, para. 9.32; The “St. Antony”’s Certificate of Registration for Fishing Vessels under the Marine Products Export Development Authority Act (**Annex IN-37**).

¹⁸³⁶ India’s Rejoinder, paras 5.31, 9.33. (Section 22 of The Merchant Shipping Act, 1958, on ‘Obligation to register’ contains a note stipulating that “For the purposes of this section, ‘ship’ does not include a fishing vessel”, see The Merchant Shipping Act, 1958 (**Annex IT-265**)).

¹⁸³⁷ India’s Rejoinder, para. 9.27. See also India’s Rejoinder, paras 5.29-5.32.

¹⁸³⁸ Alexander Proelß (ed.), *The United Nations Convention of the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 711.

¹⁸³⁹ Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694, para. 3.

opposed to whether or not it is found in a public register or flies a flag. A flag may thus be regarded as “visual evidence” or “a symbol” of nationality, but is not determinative for that vessel’s nationality.¹⁸⁴⁰

iii. Exercise of Freedom of the High Seas by Small Vessels not Registered under the Indian Merchant Shipping Act, 1958

1030. In India, vessels registered under the Indian Merchant Shipping Act, 1958, acquire the right to fly the Indian flag *ipso iure*.¹⁸⁴¹ No comparable express grant of the right to fly the Indian flag is made under the Acts pursuant to which the “St. Antony” was registered.¹⁸⁴² The Arbitral Tribunal must therefore consider whether the lack of an express grant to a vessel to fly a State’s flag affects the right of the State of nationality to enjoy its rights under the Convention, including freedom of navigation, through that vessel.
1031. The fundamental freedoms enjoyed by States on the high seas are set out in Article 87 of the Convention. These include rights exercised through vessels of that State’s nationality, including freedom of navigation. These freedoms, according to Article 87, must be “exercised under the conditions laid down by this Convention”.
1032. Article 94, paragraph 2, of the Convention requires States, in principle, to “maintain a register of ships containing the names and particulars of ships flying its flag”. That requirement in turn is conditioned by the phrase “except those which are excluded from generally accepted international regulations on account of their small size”. Article 94, paragraph 2, thus implies that vessels that “are excluded from generally accepted international regulations on account of their small size” by a State may nonetheless qualify as “ships flying its flag”.
1033. It cannot be inferred from the exemption in Article 94, paragraph 2, of small vessels from the generally-prevailing registration requirement that the State of nationality would, in relation to such small vessels, be deprived of the fundamental rights to freedom of navigation set out in

¹⁸⁴⁰ Nigel Ready, ‘Nationality, Registration, and Ownership of Ships’ in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea*, (Oxford University Press, 2016), p. 24.

¹⁸⁴¹ The Merchant Shipping Act, 1958, Sections 22, 63 (**Annex IT-265**).

¹⁸⁴² India could have adopted legislation clarifying that ships that are exempt from registration under the Merchant Shipping Act, 1958, may nonetheless fly the Indian flag. The Arbitral Tribunal observes that Section 63 of the Indian Merchant Shipping Act, 1958, entitled ‘National colours for Indian ships’ provides that “[t]he Central Government may, by notification in the Official Gazette, declare what shall be the proper national colours for all ships registered under this Act and for all ships which are not so registered but which are owned by [...] any body corporate established by or under any law for the time being in force in India or by a citizen of India”. However, no evidence has been adduced to the Arbitral Tribunal that such a notification has been made. See The Merchant Shipping Act, 1958, (**Annex IT-265**).

Article 87. Rather, the entitlement to enjoy freedom of navigation is “intimately linked to the question of the granting of nationality to ships”, not to the act of registration.¹⁸⁴³ As already noted above, “[t]he Convention, simply, does not require all ocean-going vessels to be registered [...] (even where such vessels may be capable of voyages beyond coastal waters)”.¹⁸⁴⁴

1034. Accordingly, it follows that States may, exceptionally, exercise their freedoms under Article 87 of the Convention also through small non-registered vessels, although the Convention tends to discourage non-registration. India, as the flag State of the “St. Antony”, was entitled to the freedoms and rights attendant to this status under the Convention.

1035. With regard to Italy’s allegation that India has failed in its flag State duties under Article 94,¹⁸⁴⁵ the Arbitral Tribunal considers that an alleged failure by India to fulfil its duties under Article 94 would not negate India’s right and freedom of navigation under Articles 87 and 90. The Arbitral Tribunal thus need not consider Italy’s allegation any further.

iv. Examination of Italy’s Conduct *vis-à-vis* the “St. Antony”

1036. The Arbitral Tribunal will now examine whether Italy’s conduct in relation to the “St. Antony” was in violation of Articles 87 and 90 of the Convention. Articles 87 and 90 of the Convention provide for the freedom and right of navigation on the high seas, respectively. Both Articles apply equally to the exclusive economic zone by virtue of Article 58, paragraph 2, of the Convention.

1037. The Arbitral Tribunal recalls that it has extensively discussed the concept of breach of freedom of navigation in the context of Italy’s claim under Article 87, paragraph 1, subparagraph (a) (*see* Part V, Section B.1(b)). Article 90 is said to have been intended to “at least in part to reinforce the freedom of navigation provided for in Art. 87 with a specific right”;¹⁸⁴⁶ for present purposes, however, Article 90 does not alter the legal test to be applied. In considering whether Italy is in violation of India’s freedom and right of navigation under Articles 87 and 90, the Arbitral Tribunal will apply the same legal test it used to determine Italy’s allegation of breach of freedom of navigation by India.

¹⁸⁴³ David Attard and Patricia Mallia, ‘The High Seas’ in David Attard, Malgosia Fitzmaurice, and Norman A. Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law: Volume 1: The Law of the Sea* (Oxford University Press, 2014), p. 247.

¹⁸⁴⁴ Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 694, para. 3.

¹⁸⁴⁵ Hearing Transcript, 18 July 2019, 214:11-22. *See also* Italy’s Reply, paras 10.21-10.22; Italy’s Rejoinder, para. 5.22(2).

¹⁸⁴⁶ Alexander Proelß (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck, Hart, Nomos, 2017), p. 690. *See also* Virginia Commentary, Volume III, p. 99, para. 90.1.

1038. The Arbitral Tribunal recalls that a breach of freedom of navigation may result from acts ranging from physical or material interference with navigation of a foreign vessel, to the threat or use of force against a foreign vessel, to non-physical forms of interference whose effect is that of instilling fear against, or causing hindrance to, the enjoyment of the freedom of navigation.
1039. When the “St. Antony” was at a distance of approximately 500 metres from the “Enrica Lexie”, Sergeant Latorre and Sergeant Girone each fired four rounds of a mix of tracer and ordinary bullets.¹⁸⁴⁷ According to the testimony of Sergeant Latorre, the purpose of these shots was to “deter the craft from continuing to keep its course heading toward the Enrica LEXIE”.¹⁸⁴⁸ Sergeant Latorre noted in his Action Report that this “first burst of warning shots” did not succeed in “persuading the craft to drift away”.¹⁸⁴⁹ When the “St. Antony” was at a distance of 300 metres from the “Enrica Lexie”, Sergeant Latorre fired four rounds of a mix of tracer and ordinary bullets.¹⁸⁵⁰ Sergeant Latorre noted further in his testimony that “the second burst of warning shots did not achieve the desired effect, the craft ignored the warning shots and kept its course, heading toward the MV at constant speed”.¹⁸⁵¹ When it was at a distance of approximately 80-100 metres from the “Enrica Lexie”, Sergeant Latorre and Sergeant Girone, each fired four further rounds of a mix of tracer and ordinary bullets.¹⁸⁵² Following this third burst of shots, the “St. Antony”, after being approximately 30 metres away from the “Enrica Lexie”, changed its course away from the “Enrica Lexie”.¹⁸⁵³
1040. Captain Fredy testified that he took over the steering,¹⁸⁵⁴ and “abruptly helmed the boat away”.¹⁸⁵⁵ He steered the “St. Antony” at high speed, and only when he “realized [the bullets] were not hitting the boat” but rather “falling into water” did he slow the boat to “find out what had happened

¹⁸⁴⁷ (Confidential Annex), pp 1-2 (**Annex IT-236**); (Confidential Annex) (**Annex IT-237**); Piroli Report (Confidential Annex), p. 2-7 (**Annex IT-233**).

¹⁸⁴⁸ (Confidential Annex), p. 1 (**Annex IT-236**).

¹⁸⁴⁹ Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**).

¹⁸⁵⁰ (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex), p. 2 (**Annex IT-237**).

¹⁸⁵¹ (Confidential Annex), p. 2 (**Annex IT-236**).

¹⁸⁵² (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex), p. 2 (**Annex IT-237**).

¹⁸⁵³ Action Report from Massimiliano Latorre to the Commander in Chief of the Naval Squadron (CINCNV), 19:30 (IST - 0.5 hours), 15 February 2012 (**Annex IT-108**); (Confidential Annex), p. 2 (**Annex IT-236**); (Confidential Annex), p.2 (**Annex IT-261**); Hearing Transcript, 15 July 2019, 113:16-26.

¹⁸⁵⁴ Hearing Transcript, 15 July 2019, 150:9-10.

¹⁸⁵⁵ First Information Statement relating to First Information Report no. 2 of 2012, Kerala Police, 15 February 2012, para. 2 (**Annex IT-110**). *See also* Hearing Transcript, 15 July 2019, 150:16-17; 161:24-26.

to the two people who were shot”.¹⁸⁵⁶ After the incident, the “St. Antony” headed “towards the seashore”.¹⁸⁵⁷

1041. In the Arbitral Tribunal’s view, the evidence on the record is clear that it was the act of shooting at the “St. Antony” by the Marines stationed on the “Enrica Lexie” that caused the “St. Antony” to change direction and ultimately head back to shore. The “St. Antony” was, both during and after the incident, prevented from navigating its intended course.

1042. The shooting at the “St. Antony” amounted to physical interference with the navigation of the “St. Antony”. As observed by ITLOS in *M/V “Norstar”*, “[i]t goes without saying that physical or material interference with navigation of foreign ships on the high seas violates the freedom of navigation”.¹⁸⁵⁸

1043. Accordingly, the Arbitral Tribunal concludes that by interfering with the navigation of the “St. Antony”, Italy acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention.

4. Alleged Infringement by Italy of India’s Rights under Article 88 (Reservation of the High Seas for Peaceful Purposes) of UNCLOS

1044. Finally, the Parties disagree as to whether Italy breached Article 88 of the Convention, which applies to India’s exclusive economic zone by virtue of Article 58, paragraph 2.

1045. Article 88 of the Convention reads as follows:

Article 88

Reservation of the high seas for peaceful purposes

The high seas shall be reserved for peaceful purposes.

(a) **Position of India**

1046. India asserts that Italy infringed India’s right to have its exclusive economic zone reserved for peaceful purposes under Article 88.¹⁸⁵⁹

¹⁸⁵⁶ Hearing Transcript, 15 July 2019, 150:16-24.

¹⁸⁵⁷ Hearing Transcript, 15 July 2019, 153:1-2.

¹⁸⁵⁸ *M/V “Norstar” (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019 [forthcoming], para. 222.

¹⁸⁵⁹ India’s Counter-Memorial, paras 8.21-8.27.

1047. India submits that “the use of force by another State is inconsistent with India’s right to have its EEZ reserved for peaceful purposes”.¹⁸⁶⁰ India argues that Article 88 should be read together with Article 301 of the Convention, which prohibits the threat or use of force or any other action inconsistent with the Charter of the United Nations.¹⁸⁶¹ According to India, the *travaux préparatoires* of Article 301 show that it was originally part of Article 88 and hence was intended to clarify “peaceful purposes”.¹⁸⁶² Moreover, India submits that “[c]ommentators generally agree that the peaceful purposes or uses clauses (Articles 88 and 301) should be interpreted as prohibiting activities which are inconsistent with the UN Charter”.¹⁸⁶³ India notes that Italy does not seem to dispute this interpretation.¹⁸⁶⁴
1048. India submits that Italy breached Article 88 by recklessly “caus[ing] the deaths of two Indian fishermen, endanger[ing] the safe navigation of the fishing boat, and compromis[ing] the lives of the other persons on board the *St Antony*”.¹⁸⁶⁵ India argues that the “*St. Antony*” was a small fishing boat travelling at low speed no more than 10 knots, facing a large oil tanker riding high in the sea, “protected by barbed wire along its high-raised decks, and heavily guarded by six well-armed Marines”¹⁸⁶⁶ and having a top speed of 14 knots.¹⁸⁶⁷ India submits that the “*Enrica Lexie*” “could easily (and it had ample time to) [have] alter[ed] course and out-run the *St Antony*”, and that it “could have taken further initiatives to warn the *St Antony*”.¹⁸⁶⁸
1049. India concludes that “the Italian Marines’ use of force was unwarranted and excessive, and their actions not only endangered human life, they took two lives”.¹⁸⁶⁹ India submits that there was no reasonable apprehension of any threat to justify the Marines’ acts. According to India, “[e]xcept for one of the accused Marines, who stated that he saw two armed men on the craft, none of the crew of the *Enrica Lexie* reported that they had seen any armed persons on the small boat, no shots were fired from the craft, no attempt was made by individuals on the boat to board the *Enrica*

¹⁸⁶⁰ India’s Counter-Memorial, para. 8.23.

¹⁸⁶¹ India’s Counter-Memorial, para. 8.22.

¹⁸⁶² India’s Counter-Memorial, para. 8.22, referring to Alexander Proelß, ‘Peaceful Purposes’ (2010) Max Planck Encyclopedia of Public International Law, para. 15.

¹⁸⁶³ India’s Counter-Memorial, para. 8.23, referring to Hayashi, M., ‘Military and Intelligence Gathering Activities in the EEZ: Definition of Key Terms’ (2005) 29 Marine Policy 123, at 125.

¹⁸⁶⁴ Hearing Transcript, 13 July 2019, 99:11-12.

¹⁸⁶⁵ India’s Counter-Memorial, para. 8.27.

¹⁸⁶⁶ India’s Counter-Memorial, para. 8.26.

¹⁸⁶⁷ India’s Counter-Memorial, para. 8.26, referring to Piroli Report (Confidential Annex), pp 2-14, 3-14 (**Annex IT-233**).

¹⁸⁶⁸ India’s Counter-Memorial, para. 8.26, referring to Piroli Report (Confidential Annex), p. 3-15 (**Annex IT-233**).

¹⁸⁶⁹ India’s Counter-Memorial, para. 8.27.

Lexie, and the shape and makeup of the St Antony was far from a typical pirate skiff which usually carries ladders and hooks”.¹⁸⁷⁰

1050. India cites the *M/V “SAIGA” (No. 2)* case as an example, where, according to India, Guinea had allegedly used excessive and unreasonable force in stopping and arresting the vessel in question. According to India, ITLOS found that “the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances”.¹⁸⁷¹ In particular, India submits that ITLOS referred to the normal practice used to stop a ship at sea, and highlighted that it was only after appropriate actions failed that force could be used “as a last resort”, and even then, “appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered”.¹⁸⁷² While Italy, according to India, seeks to distinguish the present case from the *M/V “SAIGA” (No. 2)* case on the ground that it involved no risk of collision or hostile boarding, India argues that the Marines “were not under a reasonable apprehension of a security threat and possible collision and hostile pirate boarding”.¹⁸⁷³ India submits that the present case shares several similarities to the *M/V “SAIGA” (No. 2)* case: on India’s account, the Marines used “live ammunition”, no evidence shows use or threat of force by the crew of the “St. Antony”, and the Marines “attached little or no importance to the safety of the ship and the persons on board”.¹⁸⁷⁴
1051. India also relies on the *Guyana v. Suriname* arbitration where, according to India, the Annex VII arbitral tribunal found that “even a threat to a drilling vessel to leave the area or ‘the consequences will be yours’” amounted to “a breach of general international law and the 1982 Convention”.¹⁸⁷⁵ In India’s view, the Marines’ actions were not only incompatible with the VPD Manual but also “much more egregious than what happened in the *Guyana-Suriname* case”, and therefore must constitute a violation of the Italy’s obligations under the Convention.¹⁸⁷⁶
1052. India further claims that Italy is “miss[ing] the point” when it argues that the embarking and deployment of the VPDs was not inconsistent with the Charter of the United Nations because it

¹⁸⁷⁰ India’s Counter-Memorial, para. 8.27, referring to NIA Report (Confidential Annex), para. 11.25 (**Annex IN-27**).

¹⁸⁷¹ India’s Counter-Memorial, para. 8.24, citing *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 61-62, para. 155.

¹⁸⁷² India’s Counter-Memorial, para. 8.25, citing *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 62, para. 156.

¹⁸⁷³ India’s Rejoinder, para. 9.38.

¹⁸⁷⁴ India’s Rejoinder, para. 9.40.

¹⁸⁷⁵ Hearing Transcript, 13 July 2019, 100:7-16, citing PCA Case No. 2004-04: *Guyana v. Suriname*, Award of 17 September 2007, PCA Award Series at p. 2, RIAA Vol. XXX, p. 1 at p. 139, para. 488(2).

¹⁸⁷⁶ Hearing Transcript, 13 July 2019, 100:10-11. See also Hearing Transcript, 13 July 2019, 100:17-101:5.

was a measure implemented by the Italian government to protect its vessels from piracy at sea. According to India, the issue is not the legality of the deployment of the VPDs, but their unjustified use of armed force, and the consequences for the “St. Antony”’s navigation.¹⁸⁷⁷

1053. In the same vein, India disagrees with Italy’s claim that it did not breach Article 88 because the Marines’ actions were consistent with the Charter of the United Nations in the light of the United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012 (hereinafter “Resolution 2077”).¹⁸⁷⁸ To the contrary, India maintains that the Marines’ actions were not consistent with either Articles 88 and 301 of the Convention or Article 2, paragraph 4, of the Charter of the United Nations.¹⁸⁷⁹ In particular, India submits that Resolution 2077 was adopted after the present incident and did not authorise the use of force in India’s exclusive economic zone.¹⁸⁸⁰ India argues that a “Security Council resolution must be explicit and sufficiently clear in its mandate in order to constitute an authorization to use force”.¹⁸⁸¹ Further, Resolution 2077 does not include the phrases “all necessary means” or “all necessary measures”, which the Security Council uses where it authorises the use of force.¹⁸⁸² India asserts that the Marines’ use of force was unnecessary as, in India’s view, the “Enrica Lexie” was under no reasonable apprehension of a security threat or piracy attack.¹⁸⁸³ Lastly, India contends that Resolution 2077 applies only to “the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including [...] the Convention”.¹⁸⁸⁴
1054. Concerning Italy’s allegation that the actions of Marines should be adjudged by the State which has jurisdiction, India submits that it is “not asking this Tribunal to decide on whether the Marines are guilty under domestic criminal law of either State”.¹⁸⁸⁵ Instead, India submits that it “is

¹⁸⁷⁷ Hearing Transcript, 13 July 2019, 101:19. *See also* Hearing Transcript, 13 July 2019, 101:20-24.

¹⁸⁷⁸ India’s Rejoinder, para. 9.41, *referring to* United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077.

¹⁸⁷⁹ India’s Rejoinder, paras 9.42-9.43.

¹⁸⁸⁰ India’s Rejoinder, para. 9.44.

¹⁸⁸¹ India’s Rejoinder, para. 9.44, *citing* Oliver Dörr, “Use of Force, Prohibition of” in Frauke Lachenmann and Rüdiger Wolfrum (eds.), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law, Thematic Series Volume 2* (Oxford University Press, 2013), p. 1296.

¹⁸⁸² India’s Rejoinder, para. 9.45, *referring to* Christine Gray, *International Law and the Use of Force* (3rd edn., Oxford University Press, 2008), p. 328.

¹⁸⁸³ India’s Rejoinder, para. 9.45.

¹⁸⁸⁴ India’s Rejoinder, para. 9.48, *citing* United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, para. 13 [emphases omitted].

¹⁸⁸⁵ India’s Rejoinder, para. 9.37.

claiming that Italy bears international responsibility for its violation of UNCLOS under international law”.¹⁸⁸⁶

1055. Finally, India dismisses Italy’s complaint that India had failed to adduce any evidence that Italy intended to pursue a breach of the peace as required to show a breach of Article 88 of the Convention.¹⁸⁸⁷ In India’s view, under international law, a showing of purpose or intent is not necessary for establishing an internationally wrongful act as long as the act has occurred.¹⁸⁸⁸

(b) **Position of Italy**

1056. Italy argues that it did not violate Article 88 of the Convention.¹⁸⁸⁹

1057. Italy submits that India’s Article 88 counter-claim “is based on the allegation that the Marines ‘caused the deaths of two Indian fishermen’.”¹⁸⁹⁰ According to Italy, however, Article 88 is not engaged by the facts. Italy contends that India dismisses the threat to the safe navigation of the “Enrica Lexie” while asking the Arbitral Tribunal, under “a broad provision” of the Convention concerning State “purposes”, to make findings concerning the Marines’ actions in response to “their apprehension of a security threat and possible collision and pirate boarding”.¹⁸⁹¹ To further support its point that the apprehension of a security threat was reasonable, Italy relies on a notice from India’s Ministry of Shipping issued in March 2012, according to which India, shortly after the incident, also took the view that the Marines had perceived a genuine threat of piracy.¹⁸⁹²

1058. Italy argues that “Article 88 is not engaged [...] because Italy did not have any purpose that was not peaceful in India’s exclusive economic zone”.¹⁸⁹³ Italy identifies “an important distinction” between States’ purposes under Article 88 and the attribution to Italy of “a particular purpose based on the conduct of the Marines in a particular incident in which they responded to a perceived threat to [...] security and safe navigation”.¹⁸⁹⁴

1059. According to Italy, even in applying India’s interpretation of Article 88 as prohibiting activities inconsistent with the UN Charter, “India takes that argument much too far” by omitting the words

¹⁸⁸⁶ India’s Rejoinder, para. 9.37.

¹⁸⁸⁷ Hearing Transcript, 20 July 2019, 99:16-17. *See also* Hearing Transcript, 20 July 2019, 99:8-13.

¹⁸⁸⁸ Hearing Transcript, 20 July 2019, 99:14-18. *See also* Hearing Transcript, 13 July 2019, 71:11-72:14.

¹⁸⁸⁹ Italy’s Reply, paras 10.27-10.37; Italy’s Rejoinder, paras 5.35-5.44.

¹⁸⁹⁰ Italy’s Reply, para. 10.29, *citing* India’s Counter-Memorial, para. 8.27.

¹⁸⁹¹ Italy’s Reply, para. 10.29. *See also* Italy’s Rejoinder, para. 5.37.

¹⁸⁹² Hearing Transcript, 18 July 2019, 201:1-6.

¹⁸⁹³ Italy’s Rejoinder, para. 5.38. *See also* Italy’s Reply, para. 10.33.

¹⁸⁹⁴ Italy’s Rejoinder, para. 5.38. *See also* Italy’s Reply, para. 10.29.

“under the UN Charter” and interpreting Article 88 to prohibit any use of force.¹⁸⁹⁵ Italy argues that “the threshold for armed attack cannot be lowered to the point where this sort of situation is characterised as a *jus ad bellum* event. This dilution of the *jus ad bellum* would not be in anyone’s interest”.¹⁸⁹⁶ On the contrary, according to Italy, the Virginia Commentary indicates that military activities consistent with Article 2, paragraph 4, and Article 51, of the Charter of the United Nations are not prohibited by the Convention.¹⁸⁹⁷

1060. Italy argues that “[e]mbarking VPDs on Italian merchant vessels including the *Enrica Lexie* was a response by the Italian government to the threat of piracy and a measure of protection of such vessels from piracy attacks at sea”.¹⁸⁹⁸ Italy further argues that such deployment was not inconsistent with the prohibition on the use of force in Article 2, paragraph 4, of the Charter of the United Nations, as reflected in Resolution 2077. According to Italy, the UN Security Council “[c]ommend[ed] the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel”.¹⁸⁹⁹

1061. Italy submits that India misrepresents its reference to Resolution 2077.¹⁹⁰⁰ Italy argues that it invoked Resolution 2077 to support its contention that embarking VPDs on vessels was not inconsistent with the Charter of the United Nations but in fact commended by the Security Council.¹⁹⁰¹ According to Italy, by arguing that the use of force not authorised by Resolution 2077 would breach Article 2, paragraph 4, of the Charter of the United Nations, India appears to argue that any use of force by a State is inconsistent with Article 88.¹⁹⁰² Italy contends, however, that the Convention “does not prohibit the use of force in certain circumstances within the limits prescribed by international law”.¹⁹⁰³

1062. Regarding the *M/V “SAIGA” (No. 2)* case, Italy argues that “no comparison can reasonably be drawn between conduct of the Marines [...] and the conduct of the authorities of Guinea in the ‘*Saiga*’.”¹⁹⁰⁴ According to Italy, the discussion of the use of force in the *M/V “SAIGA” (No. 2)*

¹⁸⁹⁵ Italy’s Reply, para. 10.34, referring to India’s Counter-Memorial, para. 8.23.

¹⁸⁹⁶ Hearing Transcript, 18 July 2019, 203:1-5.

¹⁸⁹⁷ Italy’s Reply, para. 10.35, citing Virginia Commentary, Vol. III, p. 91, para. 88.7(c).

¹⁸⁹⁸ Italy’s Reply, para. 10.36.

¹⁸⁹⁹ Italy’s Reply, para. 10.36, citing United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, p. 2.

¹⁹⁰⁰ Italy’s Rejoinder, paras 5.41-5.42, referring to India’s Rejoinder, para. 9.49.

¹⁹⁰¹ Italy’s Rejoinder, para. 5.42.

¹⁹⁰² Italy’s Rejoinder, para. 5.43.

¹⁹⁰³ Italy’s Rejoinder, para. 5.43.

¹⁹⁰⁴ Italy’s Reply, para. 10.30.

case “is in the context of the arrest of ships [where] UNCLOS contains no express provisions”, unlike the present case.¹⁹⁰⁵ Italy adds that the “SAIGA” presented no threat or cause of alarm while the Guinean authorities “attacked” and “subsequently boarded the ship and arrested it”.¹⁹⁰⁶ Italy points out that “[e]ven in that case, however, there was no suggestion that Article 88 was engaged, let alone breached”.¹⁹⁰⁷

1063. Italy further contends that, unlike the *M/V “SAIGA” (No. 2)* case in which the Guinean officers “fired indiscriminately” despite the non-resistance and apparent lack of use or threat of force from the crew, here the Marines never boarded the “St. Antony”, nor did they fire indiscriminately.¹⁹⁰⁸ Italy argues that, on the evidence of the owner of the “St. Antony”, the vessel was “running at a high speed and was dangerously approaching another vessel”.¹⁹⁰⁹ Italy submits that “it was only after having issued visual and auditory signals to no avail that the Marines resorted to firing, and even then to warning shots”.¹⁹¹⁰ Italy contends that this case is different from the indiscriminate use of gunfire in the *M/V “SAIGA” (No. 2)* case. Italy further contends that India’s reliance on the *M/V “SAIGA” (No. 2)* case is premised on a wrong assumption that “the Marines were not under a reasonable apprehension of a security threat and possible collision and hostile pirate boarding”.¹⁹¹¹
1064. Italy concludes that it is not for the Arbitral Tribunal to decide by reference to what it calls the “very broad language” of Article 88 whether the Marines acted disproportionately.¹⁹¹² Rather, Italy contends that this is a question for a court in the State that is entitled to exercise penal jurisdiction over the Marines.¹⁹¹³ According to Italy, the question before the Arbitral Tribunal is “only whether Italy had a purpose that was not peaceful” with respect to India’s exclusive economic zone.¹⁹¹⁴

¹⁹⁰⁵ Italy’s Reply, para. 10.30, referring to *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at pp 61-62, para. 155.

¹⁹⁰⁶ Italy’s Reply, para. 10.30, citing *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 28, para. 33.

¹⁹⁰⁷ Italy’s Reply, para. 10.31.

¹⁹⁰⁸ Italy’s Rejoinder, para. 5.40, citing *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10 at p. 63, para. 158; referring to (Confidential Annex), p. 1 (**Annex IT-237**).

¹⁹⁰⁹ Italy’s Rejoinder, para. 5.40, citing Affidavit of Fredy J., 27 April 2012, p. 1 (**Annex IT-168**).

¹⁹¹⁰ Italy’s Rejoinder, para. 5.40.

¹⁹¹¹ Italy’s Rejoinder, para. 5.40, citing India’s Rejoinder, para. 9.38.

¹⁹¹² Italy’s Reply, para. 10.32.

¹⁹¹³ Italy’s Reply, paras 10.32, 10.37.

¹⁹¹⁴ Italy’s Rejoinder, para. 5.44.

(c) Analysis of the Arbitral Tribunal

1065. India asserts that Italy infringed its rights under Article 88 because “the use of force by another State is inconsistent with India’s right” under that Article “to have its EEZ reserved for peaceful purposes”.¹⁹¹⁵ India argues that Article 88 should be read together with Article 301 of the Convention, which prohibits the threat or use of force or any other action inconsistent with the Charter of the United Nations.¹⁹¹⁶
1066. India submits that the Marines were not under a reasonable apprehension of a security threat, possible collision, or hostile pirate boarding¹⁹¹⁷ and therefore the use of force by the Marines “was unwarranted and excessive”,¹⁹¹⁸ “caus[ing] the deaths of two Indian fishermen, endanger[ing] the safe navigation of the fishing boat, and compromis[ing] the lives of the other persons on board the *St Antony*”.¹⁹¹⁹
1067. Italy argues that Article 88 of the Convention is not engaged in this case “because Italy did not have any purpose that was not peaceful in India’s exclusive economic zone”.¹⁹²⁰ Italy contends that the Convention “does not prohibit the use of force in certain circumstances within the limits prescribed by international law”.¹⁹²¹
1068. According to Italy, deployment of VPDs on Italian merchant vessels, including the “*Enrica Lexie*”, was not inconsistent with the prohibition on the use of force in Article 2, paragraph 4, of the Charter of the United Nations. Italy makes reference in this regard to Resolution 2077 in which the United Nations Security Council “[c]ommend[ed] the efforts by flag States for taking appropriate measures to permit vessels under their flag transiting the High Risk Area to embark vessel protection detachment and privately contracted armed security personnel”.¹⁹²²
1069. The Arbitral Tribunal observes that, as pointed out in the Virginia Commentary, Article 88 sets out the general principle that the high seas are to be reserved for peaceful purposes and that this

¹⁹¹⁵ India’s Counter-Memorial, para. 8.23.

¹⁹¹⁶ India’s Counter-Memorial, para. 8.22.

¹⁹¹⁷ India’s Rejoinder, para. 9.38.

¹⁹¹⁸ India’s Counter-Memorial, para. 8.27.

¹⁹¹⁹ India’s Counter-Memorial, para. 8.27.

¹⁹²⁰ Italy’s Rejoinder, para. 5.38.

¹⁹²¹ Italy’s Rejoinder, para. 5.43.

¹⁹²² Italy’s Reply, para. 10.36, *citing* United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, p. 2.

principle is also confirmed in Article 301 concerning peaceful uses of the seas.¹⁹²³ The latter calls on all States to:

refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

1070. It is further noted in the Virginia Commentary that there is nothing on the record to connect Article 301 with Article 88. At the same time, Article 301 can be used as an interpretive guide to Article 88.¹⁹²⁴

1071. The Arbitral Tribunal observes that Article 301 of the Convention, which is drawn from Article 2, paragraph 4, of the Charter of the United Nations, is applicable to all activities dealt with by the Convention and would not seem to add anything to the obligations of States that existed prior to the conclusion of the Convention.

1072. Article 2, paragraph 4, of the Charter of the United Nations provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

1073. Thus, under the Charter of the United Nations, the use of force is not completely prohibited if it is consistent with the Charter and with other rules of international law. This means that pursuant to Article 301 of the Convention, the use of force is not completely excluded on the high seas.

1074. It clearly follows from the articles of the Convention related to the fight against piracy that all States can take the necessary measures, including enforcement measures consistent with the Convention and the Charter of the United Nations, to protect their vessels against pirate attacks. Such measures cannot be viewed as a violation of Article 88 of the Convention or as an infringement on the rights of the coastal State in its exclusive economic zone. This is confirmed by Resolution 2077, which is cited by both Parties.

1075. By that Resolution, the Security Council of the United Nations reaffirmed that international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery at sea as well as other ocean activities, and:

commend[ed] the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel and encouraging States to regulate such

¹⁹²³ Virginia Commentary, Vol. III, para.88.7 (a), p. 90.

¹⁹²⁴ Virginia Commentary, Vol. V, para. 301.6, p. 155.

activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures.¹⁹²⁵

1076. It is an established fact that the Italian Marines were on board the “Enrica Lexie” to protect it against potential pirate attacks. As has also been noted in the present Award, the Arbitral Tribunal is of the view, on the basis of information available, that during the incident of 15 February 2012, the Marines acted under the apprehension that the “Enrica Lexie” was under a pirate attack and therefore took actions, the domestic law aspects of which are to be determined by a competent criminal court, to protect the “Enrica Lexie” against a perceived pirate attack.

1077. In light of the foregoing analysis, the Arbitral Tribunal concludes that Italy did not breach Article 88 of the Convention.

B. REMEDIES

1. Position of India

1078. India requests the Arbitral Tribunal to adjudge and declare that its counter-claims are admissible and that, “[b]y 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.¹⁹²⁶

1079. India further requests that the Arbitral Tribunal order Italy to “make full reparation for its breaches of Article 56, 58(3), 87, 88 and 90 of UNCLOS”.¹⁹²⁷

2. Position of Italy

1080. Italy requests the Arbitral Tribunal to dismiss “India’s counter-claims in their entirety and all requests consequential on them”.¹⁹²⁸

¹⁹²⁵ United Nations Security Council Resolution 2077 (2012), adopted by the Security Council at its 6867th meeting, on 21 November 2012, U.N. Doc. S/RES/2077, p. 2.

¹⁹²⁶ India’s Rejoinder, p. 131; India’s Counter-Memorial, p. 125.

¹⁹²⁷ India’s Rejoinder, p. 131; India’s Counter-Memorial, p. 125.

¹⁹²⁸ Italy’s Reply, para. 11.3(2); Italy’s Rejoinder, para. 6.6(2).

3. Analysis of the Arbitral Tribunal

1081. Having found that, by interfering with the navigation of the “St. Antony”, Italy acted in breach of Article 87, paragraph 1, subparagraph (a), and Article 90, of the Convention, the Arbitral Tribunal will examine which consequences arise from Italy’s unlawful conduct.
1082. The Arbitral Tribunal recalls that, under customary international law as codified in the ILC Draft Articles on State Responsibility, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”, which may include “any damage, whether material or moral, caused by the internationally wrongful act”.¹⁹²⁹ Specifically, full reparation shall take the form of restitution, compensation and satisfaction, either singly or in combination.¹⁹³⁰
1083. The Parties, at the present stage, have not presented detailed submissions to the Arbitral Tribunal as to the injury suffered by India. While India has requested the Arbitral Tribunal to order Italy to make full reparation, the Parties concur that the contents of any obligation on either Party to make reparation should be determined, if necessary, in a subsequent phase of these proceedings. Specifically, Italy has expressed the view that “all matters of quantum of compensation should be held over to be addressed in a subsequent phase”.¹⁹³¹ India, on its part, has indicated that, if “the Tribunal were of the opinion that compensation [to Italy] is justified, it should in any case be held over in order to be addressed in a subsequent phase. India takes the same position with regard to its own counterclaims”.¹⁹³²
1084. Although the Arbitral Tribunal notes that the Parties have agreed that the question of reparations may be dealt with in a subsequent phase of the proceedings, the Arbitral Tribunal considers it appropriate to make the following observations.
1085. The injury suffered by India as a result of Italy’s breach, through the conduct of the Marines, of India’s freedom of navigation under the Convention is twofold.
1086. First, India was subject to an infringement of its freedom of navigation. Such injury is a consequence of the breach of the Convention by Italy. While no specific material damage is

¹⁹²⁹ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 91, Article 31 (2001).

¹⁹³⁰ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 95, Article 34 (2001).

¹⁹³¹ Italy’s Reply, para. 9.17.

¹⁹³² India’s Rejoinder, para. 8.9.

associated with that injury, the Arbitral Tribunal recalls the principle expressed in the award of the arbitral tribunal in the *“Rainbow Warrior” Affair* that “[u]nlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State”.¹⁹³³

1087. The injury in question being of such a nature that it cannot be made good by restitution or compensation, reparation can only take the form of satisfaction. The Arbitral Tribunal considers 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 India.¹⁹³⁴ The Arbitral Tribunal recalls in this regard that, in the *Corfu Channel case*, the ICJ regarded a declaration by the Court “that the action of the British Navy constituted a violation of Albanian sovereignty” to be “in itself appropriate satisfaction”.¹⁹³⁵
1088. Second, as noted in paragraph 1042 of the Award, the shooting at the “St. Antony” amounted to physical interference with the freedom of navigation of the “St. Antony” and constituted a breach of Article 87, paragraph 1, subparagraph (a), and Article 90. Based on the limited evidence available to the Arbitral Tribunal, as a consequence of such breach, crew members of the “St. Antony” suffered loss of life, physical harm, material damage to their property (including to the “St. Antony” itself), and moral harm. India is accordingly entitled to payment of compensation in respect of such damage, which by its nature cannot be made good through restitution.¹⁹³⁶
1089. Consistent with the Parties’ positions, the Parties are invited to consult with each other with a view to reaching agreement on the amount of compensation due to India.
1090. 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. Should

¹⁹³³ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, Decision of 30 April 1990, RIAA Vol. XX, p. 215 at p. 267, para. 109.

¹⁹³⁴ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 105, Article 37 (2001).

¹⁹³⁵ *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4 at p. 35.

¹⁹³⁶ International Law Commission, “Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries” in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 31 at p. 98, Article 36 (2001).

no such application be received within one year after the date of the present Award, the proceedings shall be closed.

VII. COSTS

1091. Based on Article 21 of the Rules of Procedure, Italy submits that it is appropriate for the Arbitral Tribunal to “make an award of costs to Italy that reflects India’s breaches of UNCLOS and other relevant rules of international law as pleaded in this Memorial”.¹⁹³⁷
1092. India contends that Italy’s costs claim, “which is not based on any justification or reproduced in Italy’s submissions, is not serious in the circumstances of the case and does not deserve any rebuttal”.¹⁹³⁸
1093. Annex VII, Article 7, to the Convention provides that, “[u]nless the arbitral tribunal decides otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares”. Article 21 of the Rules of Procedure applicable in this Arbitration states that “[u]nless decided otherwise by the Arbitral Tribunal, each Party shall bear its own costs”. In the view of the Arbitral Tribunal, there are no “particular circumstances” that would lead the Arbitral Tribunal to any other allocation of costs. Accordingly, no particular cost order from the Arbitral Tribunal is called for in this case.

¹⁹³⁷ Italy’s Memorial, para. 12.25.

¹⁹³⁸ India’s Counter-Memorial, para. 7.18.

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.

* * *

Done at The Hague, the Netherlands, this twenty-first day of May, two thousand and twenty:

For the Arbitral Tribunal:

Professor Francesco Francioni

Dr. Pemmaraju Sreenivasa Rao

H.E. Judge Jin-Hyun Paik

H.E. Judge Patrick Robinson

H.E. Judge Vladimir Golitsyn
President

For the Registry:

Dr. Dirk Pulkowski
Senior Legal Counsel
- Registrar -

Arbitrators Robinson and Pemmaraju Sreenivasa Rao append a joint dissenting opinion to the Award. *Arbitrator* Robinson appends a dissenting opinion to the Award. *Arbitrator* Pemmaraju Sreenivasa Rao appends a concurring and dissenting opinion to the Award.

Dr. Dirk Pulkowski
Senior Legal Counsel
- Registrar -

Concurring and Dissenting Opinion

Dr. Sreenivasa Rao Pemmaraju (Dr. P.S. Rao)

I.	FACTUAL BACKGROUND TO THE PROSECUTION OF THE ITALIAN MARINES IN INDIA.....	2
II.	ITALIAN OBJECTIONS TO PROSECUTION OF THE MARINES IN INDIA.....	4
III.	LACK OF CONCLUSIVE EVIDENCE CONCERNING THE CASE OF PIRACY	6
IV.	LEGAL PROCEEDINGS BEFORE THE KERALA HIGH COURT AND THE INDIAN SUPREME COURT	6
V.	THE PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL	7
	A. EXISTENCE OF A DISPUTE WITHIN THE MEANING OF ARTICLE 288, PARAGRAPH 1, OF UNCLOS CONCERNING ITALY’S CLAIM OF EXCLUSIVE JURISDICTION	8
	B. JURISDICTION WITH RESPECT TO IMMUNITY OF THE ITALIAN MARINES.....	10
	1. Lack of Jurisdiction of the Arbitral Tribunal over the Immunity of the Marines: A Dispute Not Within the Scope of Article 288, paragraph 1, of the Convention.	12
	2. Identification of an “Incidental Matter” to a Dispute within the Scope of Article 288, paragraph 1, of UNCLOS	17
	3. The Scheme of the Settlement of Disputes under Part XV of the Convention	19
	4. Essential Distinction between Competence to Deal with a Dispute and ‘Applicable Law’ to Settle the Dispute on Merits.....	25
	C. IMMUNITY <i>RATIONE MATERIAE</i> UNDER INTERNATIONAL LAW: IMMUNITY OF THE MARINES, IN PARTICULAR	26
	1. International Law Governing Immunity of Officials from Foreign State Criminal Jurisdiction	28
	2. Employment of the Marines by a Cargo Vessel: Not a “Government Non-commercial Service”	31
VI.	HUMANITARIAN CONSIDERATIONS	33
VII.	CONCLUSIONS	34

1. As the Dispositif indicates, I am in substantial agreement with nearly all aspects of the Award of the Arbitral Tribunal, with the notable exception of its findings concerning the immunity of the Marines, on which I must respectfully dissent. I shall elaborate on my reasons for dissent below. In order to put my views into perspective, I will briefly identify the salient facts of the case and recall in brief the principal arguments presented by the Parties before the Indian courts and the present Arbitral Tribunal.

I. FACTUAL BACKGROUND TO THE PROSECUTION OF THE ITALIAN MARINES IN INDIA

2. The present case concerns an incident of firing that occurred on 15 February 2012 between 16:00-16:30 IST in the maritime area off the coast of India (Kerala state) at a distance of 20.5 nautical miles. It is admitted that the firing was done by two marines of the Italian Navy, Chief Master Sergeant Massimiliano Latorre and Sergeant Salvatore Girone, positioned on the “Enrica Lexie”, an oil tanker flying the Italian flag, to protect the vessel from what they believed to be an impending piracy or armed robbery attack from a small Indian boat, the “St. Antony”, which they perceived to be on a steady collision course. At the time, the “Enrica Lexie” was transiting through a maritime area that was within the range of a “High Risk Area” for piracy designated by the International Maritime Organization. On the particular day of the incident, the seas were calm, and a lot of fishing activity was undertaken, with no reports or warnings about any piracy/armed attacks.
3. Witness statements were recorded in India, Italy, and at the hearing held by the Arbitral Tribunal in July 2019. According to the statements made by Captain Vitelli, who recorded the events in the log book of the “Enrica Lexie”, Captain Noviello, whose role was essentially to assist Captain Vitelli and Sergeant Girone, one of the Marines involved in the firing incident, first observed a small boat at a distance of 2.8 nautical miles coming towards the “Enrica Lexie”. The “St. Antony” did not change its course, despite physical warnings given to it when it was at distance of 800 metres. This resulted in the firing of “warnings shots”, first at a distance of 500 metres, later at 300 metres, and finally at 100 metres to avert collision and/or a pirate attack. The Indian boat, in the event, managed to move away after coming as close as 80 to 100 metres without incident, allowing the “Enrica Lexie” to resume its normal course.
4. While all necessary precautions were taken on board the “Enrica Lexie” as required in such cases, the button on the VDR was not pressed,¹ and, in the event, no data was preserved, even though it was a “reportable” incident.² The statements on the record do not provide a clear account of the

¹ The VDR was always on and hence in use, but it was necessary for the recording button to be pressed once in 12 hours only to save the data during the period to prevent it from over-writing. In reply to a question from Mr. Bundy, counsel for India, as to why the VDR was not pressed, Captain Vitelli explained that they “did not have any information regarding the fact that something happened [...] somebody had died or somebody had been injured”, and in such situations they “were not required, according to the regulation, to do that”. *See* Hearing Transcript, 15 July 2019, 62:15-19.

² In response to a question asked by the President of the Arbitral Tribunal on 15 July 2019 during examination of witnesses at the hearings held by it, Captain Noviello stated that “[t]he procedures to be adhered to in the event of a piracy attack are the procedures that Captain Vitelli complied with. And from my point of view, he has complied with all the procedures; with the exception of the voyage data recorder, which has a memory of about twelve hours. We didn't absolutely think about saving the communications back then, we didn't really think about saving the communications taking place on the bridge. It was a

number of persons whom those on board the “Enrica Lexie” saw on the “St. Antony”; whether they were armed; and whether the boat was engaged in manoeuvres typical of a pirate attack and had any equipment or implements commonly used in such an attack. It was also noted that the vessel could not communicate with the boat as the latter was not responding to attempts to engage in radio communication. Under the circumstances, the statements made by various members of the crew and the Captain of the “Enrica Lexie” concerning the perceived threat of piracy and action taken in response, including warnings given and their target, as well as the claim that the small fishing boat was on a collision course remain unverified and unverifiable, leaving much to conjecture and circumstantial evidence on this score.

5. On India’s case, the “St. Antony” was a small fishing boat with eleven men on board, which was passing by, after a night-long fishing session, from one area to another fishing area as part of an eight-day fishing expedition. According to Captain Fredy,³ the man in charge of the fishing boat, all those on board the “St. Antony” were asleep in the afternoon at the time of the incident, when he was suddenly awoken by the sound of firing of shots, only to see that Jelastine, who was at the helm of the boat, was bleeding and motionless. Soon thereafter he saw Pinku, at the bow, also succumbing to death due to a bullet wound. Captain Fredy said that he took control of the boat and managed to move it away when it was at a distance of 100 to 200 metres from the “Enrica Lexie” to avoid any further damage to his men and the boat. He also stated that bullets fell “like torrential rain” for nearly “two minutes”, without any “provocation”, sounding “no alarm”,

very hasty point in time, we didn't give it a thought; that was our mistake, and we unfortunately have to accept this”. See Hearing Transcript, 15 July 2019, 137:1-12.

³ See First Information Statement of Mr. Fredy, dated 15 February 2012 (**Annex IN-2**) (in this statement, Captain Fredy recorded, before the Kerala Police, that the firing came from the ship which passed them on their right side, heading north-west. The ship was 200 metres away and painted black atop and red at the bottom. He noted that “the bullets came in falling like torrential rain” for nearly “two minutes”, adding that “he abruptly helmed the boat away”. He later informed the owner of the boat, Mr. Prabhu, and appraised him of the situation adding that the firing came from the ship and killed two men without any “provocation”, sounding “no alarm”, making “no mike announcement” or “a warning shot fired”). See also India’s Written Observations, para. 2.10 (a summary account of the incident from the perspective of the Indian investigating authorities noted that “[o]n 15 February 2012 at about 4.30 p.m. Indian Standard Time, an Indian fishing boat, the St. Antony, engaged in fishing activity in India’s Exclusive Economic Zone at a distance of about 20.5 nautical miles off the Indian coast at Kollam, Kerala (at a position 09 degree 17.2 Minutes North Latitude and 76 Degree 01.8 minutes East Longitude), faced a volley of bullets fired from sophisticated automatic firearms from two uniformed persons on board an oil tanker ship, which was about 200 meters from the boat operating in clear weather. Two fishermen on St. Antony were fatally hit by the bullets fired from *the Enrica Lexie*, and the lives of nine other fishermen on the boat were endangered due to the firing. Valentine Jelastine, who was at the helm of the boat, received a bullet to his head; Ajeesh Pink, who was at the bow, received bullet hit on his chest. Both died on the spot. In addition to the casualties, the incident caused serious damage to the boat endangering the safe navigation of the fishing vessel”). For an account of the events as seen from St. Antony, see the summary as noted by the Arbitral Tribunal, see Award, paras 105-117. During the testimony given before the Arbitral Tribunal on 15 July 2019, Captain Fredy “distanced himself from the affidavit of 27 April 2012” he gave to the Italian authorities, Hearing Transcript, 15 July 2019, 165:20-166:2, referring to Affidavit of Fredy J., 27 April 2012 (**Annex IT-168**), See also Award, para. 116.

making “no mike announcement” or “a warning shot fired”. He reported the death of two of his men as a result of the incident, which was promptly conveyed to the local police authorities at Neendakara. According to Captain Fredy, the incident occurred at about 31 nautical miles north-west from Neendakara. He reached Neendakara at about 11 p.m. with the remaining men on the boat, including the two dead.

6. The Indian MRCC Mumbai, and two Indian Coast Guard vessels, the “Lakshmibai” and “Samar”, were duly alerted and swung into action to trace the vessel involved in the incident. Once they identified the “Enrica Lexie” as the vessel involved in the incident, they requested it change its course and directed it to enter Indian territorial waters. The Captain of the “Enrica Lexie” confirmed that he asked for written instructions to change the course of the vessel and received such instructions by e-mail from the MRCC Mumbai. India and Italy disagree as to whether the written message was received before or after the “Enrica Lexie” had already decided to change its course. Once it was in Indian territorial waters, investigations were conducted by the police authorities of Kerala. Following the same, the relevant authorities decided to arrest the two Marines, detain the “Enrica Lexie”, and proceed to take necessary action in accordance with Indian law against the two Marines.

II. ITALIAN OBJECTIONS TO PROSECUTION OF THE MARINES IN INDIA

7. Italy opposed India’s exercise of jurisdiction, first by filing a writ petition before the High Court of Kerala and later before the Supreme Court of India.
8. Italy opposed the exercise of jurisdiction by India before the Kerala High Court and the Supreme Court of India on several grounds. In brief they could be summarised as follows:
 - (i) The incident was the result of warning shots fired by the Marines at an approaching boat to prevent or avert an attempted pirate attack on the “Enrica Lexie”.
 - (ii) As this incident took place in a maritime area beyond the 12 nautical mile territorial waters of India (and not being an incident attracting the provisions and the authority of India with respect to the contiguous zone, which extends up to 24 nautical miles), Italy contended that it is, at best, an incident of navigation in terms of Article 97, paragraph 1, of the Convention. As such, Italy argued that (a) it has exclusive jurisdiction to institute penal or disciplinary proceedings against the master or any other person in the service of the ship before its judicial or administrative authorities; and (b) in pursuance of Article 97, paragraph 3, of the Convention, no State other than Italy could order arrest or detention of the Italian vessel “even as measure of investigation”.

- (iii) Accordingly, Italy submitted that any exercise of jurisdiction by India over the incident, on the basis of the 1976 Indian Maritime Zones Act (and the Gazette Notification of 27 August 1981 issued thereunder) and/or other domestic Indian laws (the 1860 Indian Penal Code, the 1973 Criminal Procedure Code and the SUA) is contrary to India's obligations as a State party to the Convention.
 - (v) The "Enrica Lexie" was called to Indian territorial waters under a false premise and the arrest of the Marines amounted to abduction.
 - (vi) Italy also submitted, "alternatively" and "without prejudice" to the submissions already made, that India cannot exercise its jurisdiction to prosecute the Marines as they are Italian officials, being part of the Naval judicial police, and were engaged in the discharge of their official functions at the time of the incident. Thus, Italy asserted that the Marines were entitled to immunity under general international law.⁴
9. Before the present Arbitral Tribunal, Italy elaborated on certain of the grounds, noted above, as follows:
- (i) Italy also contended that 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".⁵
 - (ii) In addition, 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".⁶

⁴ See Notification and Statement of Claim, paras 16-19, n. 22. See also Writ Petition No. 4542 of 2012, 22 February 2012 (**Annex IT-15**), para. 11, ("without prejudice") and, pp 14-15; Writ Petition No. 135 of 2012, 19 April 2012 paras 26-27, 45 (**Annex IT-16**); Judgment of the High Court of Kerala, 29 May 2012, paras 46-48 (**Annex IT-17**); Special Leave Petition 20370 of 2012, 11 July 2012, pp 126-127 (**Annex IT-18**) (noting that "the Learned Single Judge misdirected himself in giving factual conclusions relating to the alleged incident when the same was beyond the scope of the writ petition no. 4542 of 2012, which challenged *only* the jurisdiction of the Respondents to initiate the criminal proceedings and prosecution and *alternatively* raised the issue sovereign immunity and functional immunity of Petitioners 1 and 2 from prosecution in India for the alleged incident"), *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, pp 36-40 (**Annex IT-19**) [emphasis added].

⁵ Hearing Transcript, 18 July 2019, 240:11-18.

⁶ Hearing Transcript, 18 July 2019, 240:19-24.

III. LACK OF CONCLUSIVE EVIDENCE CONCERNING THE CASE OF PIRACY

10. The investigations conducted by India⁷ and Italy⁸ separately did not reveal any conclusive evidence concerning the circumstances under which firing by the Marines was called for. Having regard to the statements of those on board the “Enrica Lexie”, Italy was unable to produce credible evidence to substantiate its case that the Marines were responding to a possible threat of piracy/armed robbery.
11. On the other hand, statements made by Captain Fredy were neither consistent nor helpful in establishing facts of the incident from his side. As most of these facts, allegations, or claims made by the Parties deal with the cause of death of the two Indian fishermen, which is of concern only to the national court of proper jurisdiction, subject to applicable rules of evidence, it is not necessary for this Opinion to dwell upon them.⁹
12. Insofar as the reasons for the “Enrica Lexie”’s change of course, following the request from the MRCC, Mumbai, are concerned, however, the oral testimony given by the Tribunal Witnesses at the Hearing provided considerable clarification, as is set out in detail in Part III, Section C of the Award.

IV. LEGAL PROCEEDINGS BEFORE THE KERALA HIGH COURT AND THE INDIAN SUPREME COURT

13. It may be recalled that the Kerala Police filed a charge sheet on 18 May 2012 under Sections 302, 307, and 427, read with Section 34 of the Indian Penal Code and Section 3 of the SUA.¹⁰ While the Kerala High Court upheld India’s jurisdiction over the Marines and rejected the Italian plea of immunity, the Supreme Court in its order of 18 January 2013 did not deal with the matter of immunity, instead, it upheld India’s jurisdiction and directed the Union of India to establish a Special Court to dispose of the case as expeditiously as possible. It also directed the prospective Special Court to examine Italy’s objections to its jurisdiction, paying special attention to the provisions of the Convention concerning piracy. Immediately after this judgment, India took steps to establish the Special Court, which was constituted on 15 April 2013. The NIA was put in charge of conducting the necessary investigations. However, upon a petition filed by the Marines before

⁷ For the investigations conducted by India, see Award, paras 155-169.

⁸ For the investigations conducted by Italy, see Award, paras 194-203.

⁹ For factual background to the case, see Award, Part III.

¹⁰ For a mention of these charges and the two grounds on which the Kerala High Court rejected the objections raised by Italy against the exercise of jurisdiction by India, see *Republic of Italy & Ors v. Union of India & Ors*, Supreme Court of India, Judgment of 18 January 2013, Judgment of Kabir CJ, para. 9 (**Annex IT-19**).

the Supreme Court in January 2014, the NIA was blocked from filing charges before the Special Court. Italy also requested India to amend the charge sheet against the Marines by dropping any reference to the SUA, which India agreed to do.¹¹

14. Italy questioned the validity of the Gazette Notification of 1981 issued under the 1976 Indian Maritime Zones Act, which extended Indian laws, in particular its criminal laws, to the exclusive economic zone.¹² India, on the other hand, defended its right to issue the notification given its sovereign rights and exclusive jurisdiction over the living and non-living resources and the need to protect the oil platforms in its continental shelf, asserting that in enforcing Indian laws, due account would be taken of the facts of each case.¹³ The Supreme Court was in the event not persuaded to order the termination of the criminal proceedings against the Marines. Ultimately, India asserted its jurisdiction over the incident and the Marines on the basis of passive personality or objective territoriality principles of international law.¹⁴ Italy, on the other hand, opposed Indian jurisdiction on this score, claiming that it amounted to an exercise of extra-territorial jurisdiction in contravention of Indian law.¹⁵

V. THE PROCEEDINGS BEFORE THE ARBITRAL TRIBUNAL

15. Given the priority it attached to the immunity of the Marines from the jurisdiction of India, and after failing to obtain relief on this score from the Indian judicial process with which it was engaged for over three years, Italy decided in June 2015 to submit the dispute to arbitration under Annex VII of the Convention, invoking Article 286; Article 287, paragraphs 1 and 5; and Article 288, paragraph 1. According to Italy, the Arbitral Tribunal so constituted has jurisdiction, among other matters, to adjudge and declare (i) that “India violated and continues to violate Italy’s

¹¹ See India’s Written Observations on Italy’s Request for the Prescription of Provisional Measures, paras 3.41-3.42.

¹² Italy’s Reply, paras 6.3-6.17.

¹³ See India’s Counter-Memorial, paras 4.19 -4.24 see also India’s Counter-Memorial, paras 4.2-4.18, in its submissions, India defends the 1981 Notification under the 1976 Maritime Zones Act and questions the right of Italy to raise the matter before the Arbitral Tribunal as a new dispute, asserting that the Arbitral Tribunal lacks the jurisdiction). See also Written Submissions submitted on behalf of the Union of India by the Additional Solicitor General, 12 September 2012 (**Annex II-275**), in which it was noted that the Notification could and should be read harmoniously with India’s rights and obligations under the Convention in respect of the exclusive economic zone.

¹⁴ See India’s Counter-Memorial, paras 3.6-3.18, 4.15-4.24; Table I, ‘Principle of Passive Criminal Jurisdiction’, pp 55-63, Table II, ‘Domestic Criminal Legislation Conferring Jurisdiction over Crimes Committed on Board National Ships’, pp 64-76.

¹⁵ In this regard, it is noted that Italy relied on two expert opinions of Justice Deepak Verma to submit that India cannot exercise extra-territorial jurisdiction over foreigners when the act complained of took place outside Indian territorial jurisdiction. See Justice Deepak Verma, First Expert Report: The “Enrica Lexie” Incident, dated 24 August 2016; Justice Deepak Verma, Second Expert Report: The “Enrica Lexie” Incident, dated 25 July 2017. See also Italy’s Memorial, para. 6.4; Italy’s Reply, para. 5.11.

exclusive right to institute penal and disciplinary proceedings against the Marines, in breach of Article 97(1) of UNCLOS”;¹⁶ (ii) 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”;¹⁷ and (iii) by “asserting and continuing to exercise its criminal jurisdiction” over the Marines, “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”.¹⁸

16. India, on the other hand, requested the Arbitral Tribunal, in its final submissions, among others, “to adjudge and declare that it has no jurisdiction with respect to the case submitted to it by Italy”. It is India’s argument that it is exercising its jurisdiction in respect of the death of two of its fishermen who were “legitimately exercising their right to fish in India’s exclusive economic zone”.¹⁹ India also takes the view that the prosecution of the Italian Marines is based on the passive personality and objective territoriality principles, well recognized in State practice, rather than on any provisions of the Convention, and that it had started exercising such jurisdiction against the Marines only after they were found in the territory of India.

A. EXISTENCE OF A DISPUTE WITHIN THE MEANING OF ARTICLE 288, PARAGRAPH 1, OF UNCLOS CONCERNING ITALY’S CLAIM OF EXCLUSIVE JURISDICTION

17. The Award deals extensively with the arguments of the Parties on the basis of evidence placed on the record as well as gathered at the time of oral hearings in July 2019.²⁰ The Parties disagreed as to the relevance and interpretation or application of a number of Articles of the Convention. It has been the consistent view of India that the dispute between the Parties is one that is related to the exercise of jurisdiction by India based on its law and the same does not fall within the scope of the Convention. It is important to note, however, that India, in its Counter-Memorial, not only defended its authority to prosecute the Italian Marines under Indian law but also justified its actions in directing the “*Enrica Lexie*” to move towards the port of Kochi, noting that in so doing, it acted in conformity with the Convention and did not violate Articles 87.²¹ India went further

¹⁶ Italy’s Memorial, p. 188.

¹⁷ Hearing Transcript, 18 July 2019, 241:4-8.

¹⁸ Hearing Transcript, 18 July 2019, 241:9-15.

¹⁹ *See* Award, para. 230.

²⁰ For an overview of the facts and evidence, *see* Award, Part III.

²¹ *See* Counter-Memorial of India, Chapter 6.

and made counter-claims alleging that Italy breached its obligations and violated India's rights under the Convention.²²

18. On the existence of dispute within the meaning of Article 288, paragraph 1, of the Convention, the Arbitral Tribunal held that there is a dispute "which is appropriately characterized as a disagreement as to which State is entitled to exercise its jurisdiction over the incident of 15 February 2012 involving the 'Enrica Lexie' and the 'St. Antony' which raises questions under several provisions of the Convention, including Articles 56, 58, 59, 87, 92, 97, 100 and 300 on the interpretation or application of which the Parties have different views".²³ However, with respect to the claim of Italy on the immunity of the Marines, the Arbitral Tribunal noted that "the dispute may raise, but is not limited to, the question of immunity of the Marines".²⁴
19. The Arbitral Tribunal, after an extensive examination of the relevant articles of the Convention, decided that both India and Italy, in their capacity as flag States, and in accordance with Article 92 of the Convention, are entitled to exercise jurisdiction concurrently over the incident. It based this conclusion on the fact that the Marines on board the "Enrica Lexie" fired shots that killed two fishermen on the Indian boat "St. Antony". In the process, it rejected the Italian argument that India used "ruse and force" to direct the "Enrica Lexie" to change its onward course to enter its territorial sea, and that India is entitled to investigate the death of two of its fishermen and seek cooperation in that respect from the Italian captain and others on the "Enrica Lexie". The Arbitral Tribunal held that such actions do not amount to interference with Italy's right to exercise its freedom of navigation under Article 87, paragraph 1. The Arbitral Tribunal also rejected the Italian claim that it enjoyed exclusive jurisdiction over the firing incident under Article 97, paragraphs 1 and 3, as, on the facts of the case, it did not involve collision, and the incident could not be properly treated as an incident of navigation.
20. I agree with these findings of the Arbitral Tribunal.
21. With respect to Italy's claim that the 1976 Maritime Zones Act and the 1981 Notification issued thereunder are not compatible with the provisions of the Convention, the Arbitral Tribunal found²⁵ that: (1) it is established that no enforcement action was taken by the Indian authorities against the "Enrica Lexie" or the Marines in the Indian exclusive economic or contiguous zones; (2) India has not reiterated the argument before the Arbitral Tribunal that its conduct was based on the 1976

²² India's Counter-Memorial, Chapter 8.

²³ Award, para. 243.

²⁴ Award, para. 243.

²⁵ See Award, paras 356-60.

Maritime Zones Act and 1981 Notification, even if the pleadings of the Union of India before the Indian courts during the initial course of the internal proceedings relied on them to justify its conduct; and (3) India instead relied on the territoriality and passive personality principles under international law as justification for its conduct. For its claim that the Indian legislation is incompatible, Italy referred, from among the Articles of the Convention, to only Article 87, paragraph 1, subparagraph (a), concerning freedom of navigation on the high seas in support of its submission that India is thereby in breach of the Convention.

22. In addition, the Arbitral Tribunal noted that in its examination of the submission of Italy that India breached its right to freedom of navigation, in Part V, Section B.1(b), of the Award, it found that it is not based on the alleged extension of the Indian legislation to the exclusive economic zone. Accordingly, the Arbitral Tribunal concludes that, even if questions may arise as to the compatibility of that legislation with the Convention, it sees no need to address that issue in the context of the present dispute.²⁶
23. I voted in favour of the operative paragraph A.6 of the Dispositif, not only for the reasons thus noted by the Award, concluding that there is no need to deal with the issue in the present context of the dispute as defined under paragraph A.1 of the Dispositif, but also because the Arbitral Tribunal is not competent, in my opinion, to deal with the matter in the first instance. It is well-established that India did not invoke the same as a justification for its conduct in the exclusive economic or contiguous zones or for framing the charges under its national criminal law for the purpose of prosecution before its courts. It is thus not only a matter which is moot, but also one that does not arise under any of the provisions considered by the Arbitral Tribunal in deciding on the dispute, as material for its jurisdiction, that is, which State has jurisdiction over the incident in accordance with the provisions of the Convention.

B. JURISDICTION WITH RESPECT TO IMMUNITY OF THE ITALIAN MARINES

24. Turning then to the other issue, the immunity of the Marines, more important from the perspective of Italy, the Arbitral Tribunal examined the question whether the matter of immunity of State officials could be treated as a dispute within the meaning of Article 288, paragraph 1, of the Convention. On the basis of its examination of all the articles relied upon by Italy to argue that the Arbitral Tribunal has such jurisdiction, the Arbitral Tribunal came to the conclusion that the “Convention may not provide a basis for entertaining an independent immunity claim under general international law”.²⁷ This is a significant finding that should have put an end to the case

²⁶ Award, paras 360-61.

²⁷ Award, para. 809.

before the Arbitral Tribunal, leaving the dispute on the issue of immunity of the Marines to the Special Court of India.

25. The Arbitral Tribunal, however, rejecting the objections of India by a majority vote, found that (i) it “is one aspect out of several, albeit an important one, that requires examination in resolving the Parties’ dispute”;²⁸ and (ii) to resolve the dispute “satisfactorily” and “conclusively”, it is incumbent upon it to examine the “issue of immunity of the Marines” which “is an incidental question that necessarily presents itself in the application of the Convention in respect of the dispute before it”.²⁹ The Arbitral Tribunal thus founded its jurisdiction over Italy’s claim on the immunity of the Marines on the ground that it is an issue that is incidental to the more general dispute over which it has jurisdiction, that is, which State is entitled to exercise its jurisdiction over the incident.
26. On the merits of the Italian claim concerning the immunity of the Marines, the Arbitral Tribunal, by a majority vote, decided that “the Marines were, as members of Italy’s armed forces, fulfilling a State function”³⁰ when they were deployed on “Enrica Lexie” as part of a VPD pursuant to a mandate from the Italian State, as provided in the Italian law on VPDs to ensure “the protection of the ships flying the Italian flag in transit in international maritime spaces at risk of piracy”.³¹ In this connection, it took the view that the fact that “the Marines were stationed on a merchant vessel, and not a warship” did “not alter [...] the character of their mission as part of the VPD, undertaking acts in an official capacity attributable to the Italian State”.³²
27. I respectfully disagree with these conclusions of the Arbitral Tribunal both on the issue of jurisdiction over, and on the merits of, the Italian claim concerning the immunity of the Marines. I am of the view that the Arbitral Tribunal erred in treating the issue of immunity as an incidental matter to the dispute between Italy and India concerning the “jurisdiction over the incident”. I am also of the view that its conclusion that the Italian Marines are entitled to immunity from Indian jurisdiction does not have a basis in general (customary) international law. I entirely disagree with its finding that the Marines are entitled to immunity from Indian jurisdiction, even when they were on a commercial (cargo) vessel, under private ownership, whereas immunity under general

²⁸ Award, para. 806.

²⁹ Award, para. 811.

³⁰ Award, para. 859.

³¹ Award, para. 859, *citing* Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

³² Award, para. 859.

international law is reserved in respect of a ship “used only on government non-commercial service”.³³

28. I will first deal with my point that the issue/dispute concerning the immunity of the Marines is not and cannot be treated as an issue incidental to the dispute between Italy and India concerning the jurisdiction over the incident.

1. Lack of Jurisdiction of the Arbitral Tribunal over the Immunity of the Marines: A Dispute Not Within the Scope of Article 288, paragraph 1, of the Convention.

29. India submitted that the subject of immunity of State officials from foreign criminal jurisdiction is not a subject covered by any of the provisions of the Convention and hence not within the competence of the Arbitral Tribunal to deal with under Article 288, paragraph 1. Italy, on the other hand, submitted that Article 2, paragraph 3; Article 56, paragraph 2; Article 58, paragraph 2; Article 95; Article 96; and, as a subsidiary argument, Article 297, paragraph 1, subparagraphs (a) and (b), provide a basis for the Arbitral Tribunal to assume jurisdiction over the issue of immunity. The Arbitral Tribunal held in this regard that it could exercise its jurisdiction over the issue of immunity, not as an issue covered by the Convention, but as an incidental issue necessary to discharge its mandate fully and completely. In so deciding, for reasons noted below, I consider that the Arbitral Tribunal erred and exceeded its competence.
30. The Arbitral Tribunal’s decision to assume jurisdiction over the issue of immunity, although it found that it is not as an issue covered by the Convention, but on the ground that it is an issue incidental to the dispute and necessary to discharge its mandate fully and completely is fundamentally wrong and based on untenable propositions. It is not unusual for a tribunal to face more than “one aspect out of several, albeit an important one, that requires examination in resolving the Parties’ dispute”.³⁴ As was observed by the ICJ in the case between Bolivia and Chile, “in the past, applications that are submitted to the Court often present a particular dispute that arises in the context of a broader disagreement between parties”.³⁵ In that connection, the Court observed that “while it may be assumed that sovereign access to the Pacific Ocean is, in the

³³ UNCLOS, Article 96.

³⁴ Award, para. 806.

³⁵ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015, p. 592, para. 32, referring to *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), pp 85-86, para. 32; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, pp 91-92, para. 54; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, pp 19-20, paras 36-37.

end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the Application, namely, whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and, if such an obligation exists, whether Chile has breached it".³⁶ In any case, the problem whether it constituted as an incidental issue did not arise in that case because "[t]he Application", as the Court noted, "does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access".³⁷

31. Courts or tribunals faced with such a situation have undertaken first to isolate the real issue of the case and the object of the claim on the basis of an objective examination of the application or notification, the memorials and counter-memorials, and the arguments placed before it. The Arbitral Tribunal, following this well-established practice,³⁸ noted that the real issue of the case

³⁶ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015, p. 592, para. 32. We may also note in this connection that there are differing views on the issue whether a general reference to the obligation to respect the principle of 'sovereign equality' of States in a treaty obliges the Court to deal with a dispute concerning sovereign immunity of State officials, for example, as is the case in Article 4, paragraph 1, of the United Nations Convention against Transnational Organized Crime of 15 November 2000 (hereinafter the "Palermo Convention"). The International Court of Justice held that "[a]s the Court has previously observed, the rules of State immunity derive from the principle of sovereign equality of States (*Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, I.C.J. Reports 2012 (I), pp. 123-124, para. 57). However, Article 4 does not refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself. Article 4 refers only to general principles of international law. In its ordinary meaning, Article 4(1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules". See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292 at p. 321, para. 93.

Dissenting from the view of the majority, in a joint dissenting opinion Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka observed on the other hand that "[f]rom the time the principle of sovereign equality of States was included in the 1988 Drugs Convention to the time of its inclusion in the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism, the 2000 Palermo Convention and the 2003 Corruption Convention, that principle has functioned as a conventional troubleshooter to keep in check the conduct of States in the exercise of their jurisdiction, whether territorial or extraterritorial. It serves as a standard against which the conduct of States is to be measured in the discharge of their treaty obligations". See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment (Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka), I.C.J. Reports 2018, p. 340 at 355, para. 48. "Now we see clearly the function of the reference to the principle of sovereign equality of States: it is a compendious way of saying that acts, such as a breach of foreign State immunity, are a breach of the principle of sovereign equality of States as laid down in Article 4(1)". See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment (Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka), I.C.J. Reports 2018, p. 340 at 355, para. 49.

³⁷ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, I.C.J. Reports 2015, p. 592, para. 32.

³⁸ It may be recalled that the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* case, noted that: "[u]ltimately, it is for the Tribunal itself 'while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties'" (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court*, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para. 30), and in the process "to isolate the real

and the object of claim is a dispute between the Parties concerning the interpretation or application of the Convention and that it is about which State is entitled to exercise jurisdiction over the incident of 15 February 2012 involving the “Enrica Lexie” and the “St. Antony”. The Arbitral Tribunal, despite its finding that none of the articles relied upon by Italy to claim that India is in violation of its obligation to respect the immunity of the Marines are “pertinent and applicable in the present case”, found fit to exercise jurisdiction over the dispute concerning immunity of the Marines on the ground that it is an important matter arising out of several issues raised by the dispute, deserving a full and complete answer as “*an incidental question* that necessarily presents itself in the application of the Convention in respect of the dispute before it”.³⁹

32. In the process, the Arbitral Tribunal relied upon the oft-cited dictum from the *Certain German Interests in Upper Silesia* case to conclude that it is entitled to assume jurisdiction over the dispute between the Parties concerning the immunity of the Marines. In so doing, the Arbitral Tribunal failed to see that the facts and issues involved in that case were different and not comparable to the facts and claims of the present case to offer necessary guidance and justification to treat the issue of immunity of the Marines as an ‘incidental issue’ to the dispute concerning the jurisdiction over the incident.
33. It may be observed that, in the case concerning *Certain German Interests*, the Permanent Court of International Justice made a distinction between rights held by Germany in its own right as a sovereign as opposed to its interests as a holder of private property. Germany sought the jurisdiction of the Permanent Court in respect of a dispute with Poland, in accordance with Article 23 of the 1922 Geneva Convention concluded between Germany and Poland for the protection of private property interests over large industrial estates of German Upper Silesia. The issues involved in the case were related to differences of opinion between the German and Polish Governments respecting the construction and application of the provisions of Articles 6 to 22.
34. We may recall in this connection that, following the First World War, Poland acquired sovereignty over Upper Silesia as a successor to Germany. Poland opposed the jurisdiction of the Permanent Court on the ground that, under Article 256 of the Treaty of Versailles, as a State succeeding Germany, it was entitled to enact a measure of “liquidation” concerning property, rights, and interests which Germany had enjoyed prior to the creation of Poland. Poland claimed that any dispute between the two parties in this regard was subject to settlement by recourse to

issue in the case and to identify the object of the claim (*Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, p. 457 at p. 466, para. 30)”, PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 208.

³⁹ Award, para. 811 [emphasis added].

the German-Polish Mixed Arbitration Tribunal constituted in pursuance of the Treaty of Versailles.

35. The Permanent Court rejected Poland's objection to its jurisdiction on the ground that there was a dispute between the two States concerning "the sphere of application of Articles 6 to 22" of the Geneva Convention;⁴⁰ and that the "jurisdiction possessed by the Court under Article 23 in regard to differences of opinion between the German and Polish Governments with respect to the construction and application of the provisions of Articles 6 to 22 concerning the rights, property and interests of German nationals is not affected by the fact that the validity of these rights is disputed on the basis of texts other than the Geneva Convention".⁴¹ The Permanent Court noted that it may be indispensable to interpret the Treaty of Versailles in respect of the rights claimed by Poland under Article 256 of the same as part of its examination of the merits of the case but determined that such matters would "constitute merely questions preliminary or incidental to the application of the Geneva Convention".⁴² In this connection, the Permanent Court asserted that "the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction".⁴³
36. It is clear from the above that in the case of *Certain German Interests*, it was necessary for the Permanent Court to deal with the rights of Poland under Article 256 of the Treaty of Versailles in order to come to a conclusion on its obligations under the Geneva Convention. Under the circumstances, issues arising under Article 256 of the Treaty of Versailles were treated as "incidental" to the Permanent Court's jurisdiction under Article 23 of the Geneva Convention. There exists no such inseparable or integral link between the issue of immunity and the issue of exclusive jurisdiction claimed by Italy in the present case.
37. Further, while the immunity of the Marines is submitted as one issue out of several, as the Arbitral Tribunal rightly noted, that does not necessarily make it an incidental issue, as immunity of State officials is not linked to any of the subject matters dealt with by the Convention. In fact, it is

⁴⁰ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 16.

⁴¹ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18.

⁴² *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18.

⁴³ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18. For a summary of the case, see *Certain German Interests in Upper Silesia*, Judgment of 25 August 1925 (Series A, No. 6) (Jurisdiction), in *Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice*, ST/LEG/SER.F/1/Add.4 (United Nations, New York 2012), pp 52-59.

specifically *excluded* from the Convention by virtue of the strictly limited context in which “complete immunity” is recognized. It is notable that whereas Article 95 provides for the right of warships on the high seas “to have complete immunity from the jurisdiction of any State other than the flag State”, Article 96 qualifies the same, limiting it *only* in respect of “ships owned or operated by a State or used *only* on government non-commercial service” (emphasis added). An equally significant conclusion that emerges from Article 27 on the definition of warship, is that the immunity warships enjoy under the Convention comprises immunity only in respect of the officer in command, “duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline”.

38. Moreover, the issue of immunity of State officials, even if it is an important aspect of the Italian case is a subject that lies outside the scope of the Convention, like issues of “sovereignty or other rights over the continental or insular land territory”.⁴⁴ Inasmuch as issues of sovereignty are excluded from the scope of the Convention under Section 3 of Part V, immunity of State officials, as an attribute of the principle of sovereignty of States under international law, should, likewise, be deemed to have been excluded.
39. An examination on an “objective basis”⁴⁵ of the various submissions made by Italy before the Arbitral Tribunal makes it quite clear that the issue of immunity of the Marines is submitted to the Arbitral Tribunal, not as an incidental issue, but as a core issue deserving of treatment as an independent dispute. It is clear that the “object of [Italy’s] claim”⁴⁶ is to preclude India from exercising its jurisdiction over the Marines, and for this purpose, from the very outset of the dispute, Italy advanced the claim of immunity independently of its other claim that Italy, as the flag State, enjoyed exclusive jurisdiction over the incident.⁴⁷ In effect, it is evident that Italy brought before the Arbitral Tribunal two different disputes: one, as the Arbitral Tribunal noted,

⁴⁴ See Article 298(1)(a) where it is noted that where “any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over the continental or insular land territory” is excluded from the scope of the dispute settlement of the UNCLOS even in the case of those States which have not excluded disputes concerning “sea boundary delimitations, or those involving historic bays or titles” by an express declaration to be made at the time of signing, ratification, or accession to the Convention or at any as provided under Article 298.

⁴⁵ Award, para. 231, referring to PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

⁴⁶ Award, para. 231, citing *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30.

⁴⁷ See the Statement of Sir Daniel Bethlehem, the Italian Counsel at the hearings held by the Arbitral Tribunal on 8 July 2019, Hearing Transcript, 8 July 2019, 45:22-46:4, 46:20-23, cited in Award, para. 225.

as to “which State may exercise jurisdiction over the incident [of 15 February 2012]”⁴⁸ and the other concerning the issue of immunity of the Marines, opposable only to the jurisdiction being exercised by India.

40. The fact that the issue of immunity is an independent dispute is also further supported by the fact that the Arbitral Tribunal’s determination that both India and Italy enjoyed concurrent jurisdiction over the incident is based on Article 92 dealing with the exclusive jurisdiction of the flag State. In arriving at this conclusion it did not have to interpret or apply any of the articles cited by Italy in defence of its claim that India violated its obligations under the Convention by not respecting the immunity of its Marines. It is self-evident that the issue of immunity would not even have arisen if there was a collision between the “Enrica Lexie” and the “St. Antony” and the Tribunal concluded that Italy alone had exclusive jurisdiction over the incident under paragraphs (1) and (3) of Article 97.
41. The Arbitral Tribunal, on the other hand, to reach the conclusion it did on the dispute concerning immunity, as will be shown below, had to examine the matter under general international law and did not find any of the articles of the Convention, on which Italy relied for this purpose, as applicable.

2. Identification of an “Incidental Matter” to a Dispute within the Scope of Article 288, paragraph 1, of UNCLOS

42. It is generally agreed that the Convention does provide a basis for treating some issues as incidental to a dispute under Article 288, paragraph 1. But what can be treated as an incidental issue or not is strictly governed by two important features of the Convention. First, the Convention is framed as a constitution of the oceans; and in that sense it is not a comprehensive and “self-contained regime”.⁴⁹ Second, the Convention, as an outcome of the negotiations held from 1974

⁴⁸ Award, para. 235.

⁴⁹ Bruno Simma, ‘Self-contained Regimes’ (1985) 16 *Netherlands Yearbook of International Law*, 111. This is a concept that has become current in the context of the development of international law of State responsibility, and Article 55 (*Lex specialis*) of the ILC Draft Articles on State Responsibility, which provides “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or the implementation of international responsibility of a State are governed by special rules of international law”. See James Crawford, ‘Symposium: The ILC’s State Responsibility Articles: The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’ (2002) 96 *AJIL* 874, in which Professor (now Judge) Crawford, former ILC Special Rapporteur on State responsibility, noted that the Articles on State Responsibility “presume that international law is a unified body of law”. “But”, he added, “this ‘unification’ can be understood only in a limited sense”. Noting further that “the degree of unification or conflict in international system is both political and (in relation to existing regimes) a question of interpretation”, he took the view that “there cannot be, at the international level, any truly self-contained regime, hermetically sealed against bad weather”, without denying however that as a general matter, “if states wish to create such a regime

to 1982, not counting the discussions held in the United Nations Seabed Committee during 1968 to 1974 and later during 1990-1994 leading to the conclusion of the 1994 supplementary Agreement by way of implementation of Part XI of the Convention, is treated as a package deal. The provisions of Part XV on settlement of disputes are part of that package deal. After all, as observed by a commentator, with the exception of the ICJ, nearly all of the tribunals in the international arena, including ITLOS and arbitral tribunals envisaged under Annex VII of the Convention, are “treaty bodies” or “specialized bodies”, and, as such, it is a well-established principle in international law that, in order to ascertain their jurisdiction, international courts and tribunals are required to determine whether or not the subject-matter of the dispute falls within the provisions of the treaty under which they are established. This requirement must be assessed as an element of jurisdiction *ratione materiae* under the heading of what is usually called today the “platform test”.⁵⁰

43. The Convention, regarded as the “Constitution for the Oceans”,⁵¹ does allow for the interpretation and application of its provisions considering principles of international law that govern the subject matters covered by those provisions. Matters concerning the conservation of fisheries, marine environment and bio-diversity, pollution due to oil spills, efficient management of resources in

(still governed by international law), there seems to be nothing to stop them”. As an example of a self-contained regime, it is often argued that the European Union is one such regime. Crawford avers that it may be so in “good weather”, pp 879-880. But see for example, Trevor C. Hartley, ‘International Law and the Law of the European Union—A Reassessment’, (2001) 72 *British Yearbook of International Law* 1, cited by Crawford at n. 22, p. 880.

⁵⁰ Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, 191-192, referring to the observations of the ICJ in the case of *Oil Platforms (Islamic Republic of Iran v. the United States of America)*, Preliminary Objections, Judgment of 12 December 1996, I.C.J. Reports, 1996, p. 803, at pp 809-810, para. 16. The relevant passage in the judgment reads: “It is not contested that several of the conditions laid down by this text have been met in the present case: a dispute has arisen between Iran and the United States; it has not been possible to adjust that dispute by diplomacy and the two States have not agreed ‘to settlement by some other pacific means’ as contemplated by Article XXI. On the other hand, the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute ‘as to the interpretation or application’ of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2”.

⁵¹ Ambassador Tommy Koh of Singapore, in his capacity as President of the United Nations Conference on the Law of the Sea at the time of the signing ceremony of the Convention held at Montego Bay, Jamaica, noted that after a long and arduous journey for 14 years, the international community succeeded in adopting a comprehensive “Constitution for the Oceans”, covering some “25 subjects and issues”, thanks to many innovative techniques and methods of negotiations adopted. The Convention was adopted by consensus without putting it to vote, and it does not allow for reservations – thus deviating from the standard procedure usually applicable to multilateral treaty-making. See Remarks by President Tommy T.B. Koh, Third United Nations Conference on the Law of the Sea of 10 December 1982, available at <www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm>.

the exclusive economic zone, marine scientific research, and the balancing of the freedom of navigation and security interests of coastal States, on the one hand, and those of the major maritime powers including those in respect of military uses of the oceans and suppression of piracy, on the other, are examples of subjects in respect of which the international law of the sea is constantly evolving. Principles of international law, adopted by States by way of codification and progressive development, relating to the lawful use and optimum management of the sea where otherwise not incompatible with the provisions of the Convention, as noted in Article 293, are admissible as applicable law in deciding a dispute concerning the interpretation or application of the Convention. In that sense, “the UNCLOS is not a self-contained treaty”.⁵²

44. Nevertheless, there are clear limits on the exercise of jurisdiction by the courts or tribunals, including those constituted under Annex VII of the Convention, elected by States under Article 287, to settle disputes involving the interpretation or application of Convention. These limits are inherent in the scheme of the settlement of disputes under Part XV, which is a part and parcel of the package deal that characterises the nature of the Convention.

3. The Scheme of the Settlement of Disputes under Part XV of the Convention

45. The scheme for the settlement of disputes embodied in Part XV of the Convention is complex and carefully crafted. It is limited in scope to the interpretation or application of the Convention. It is essential for tribunals constituted in accordance with Part XV of the Convention to exercise judicial caution to avoid abuse to which it is open, and to limit their jurisdiction strictly in respect of disputes on subject matters relevant only to the exercise of their mandate, which is the “interpretation or application of the Convention”.⁵³ There are two good reasons for this. For one,

⁵² Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, 195.

⁵³ On the background and history of negotiations on Part XV dispute settlement provisions, see A. O. Adede, ‘Settlement of Disputes arising under the Law of the Sea Convention’ (1975) 69 *AJIL* 798, 798-818; A.O. Adede, ‘Law of the Sea—The Integration of the System of Settlement of Disputes under the Draft Convention as a Whole’ (1978) 72 *AJIL* 84, 84-95.

For an in-depth analysis of the relationship between Article 288 (1) and 297(1) (essentially “a jurisdiction-affirming provision in an article otherwise devoted to limitations on the exercise of compulsory dispute settlement”), see PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, paras 309-318, citing Virginia Commentary, Vol. V, pp 92-94; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume V (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fourth Session)*, Informal Single Negotiating Text, Part IV, Art. 18, UN Doc. A/CONF.62/WP.9/Rev.1, 6 May 1976; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VI (Summary Records, Plenary, General Committee, First, Second and Third Committees, as well as Documents of the Conference, Fifth Session)*, Revised Single Negotiating Text, Part IV, Art. 17, UN Doc. A/CONF.62/WP.9/Rev.2, 23 November 1976; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text,*

compulsory jurisdiction in international law is an exception to the basic principle that the consent of States parties to a dispute is the basis of the jurisdiction of international courts and tribunals. Secondly, it is well-accepted that UNCLOS is the result of a “package deal”⁵⁴ and adopted by States parties to it, by consensus, providing for multiple uses in a given maritime area. In the process, the package deal succeeded in designing a Convention that accommodates interests arising from the exercise of sovereign rights and exclusive jurisdiction by coastal States over the exclusive economic zone, without undermining or subordinating the rights of other States in respect of the freedoms of the high seas guaranteed by the Convention beyond the 12-mile limit of the territorial sea.⁵⁵ By way of balancing the competing and sometimes conflicting interests,

Sixth Session), Informal Composite Negotiating Text, Art. 296, UN Doc. A/CONF.62/WP.10, 15 July 1977; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text Revision 1, Art. 296, UN Doc. A/CONF.62/WP.10/Rev.1, 28 April 1979; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text Revision 2, Art. 296, UN Doc. A/CONF.62/WP.10/Rev.2, 11 April 1980; *Official Records of the Third United Nations Conference on the Law of the Sea, Volume VIII (Informal Composite Negotiating Text, Sixth Session)*, Informal Composite Negotiating Text Revision 3, Art. 297, UN Doc. A/CONF.62/WP.10/Rev.3, 22 September 1980.

On the basis of the analysis thus done, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* concluded that “[w]here a dispute concerns ‘the interpretation or application’ of the Convention, and provided that none of the express exceptions to jurisdiction set out in Article 297(2) and 297(3) are applicable, jurisdiction for the compulsory settlement of the dispute flows from Article 288(1). It is not necessary that the Parties’ dispute also fall within one of the cases specified in Article 297(1)”. PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 317.

On the possibility that decision-makers may differ on the interpretation or even abuse the dispute settlement provisions “to expand the compulsory jurisdiction of Part XV courts and tribunals” in “several ways”, given that the Convention’s dispute settlement scheme is organized under three different Sections in Part XV of the Convention, it is noted that “[f]irst, the procedural preconditions of compulsory jurisdiction in section 1 can be read down; second, the limited scope of compulsory subject-matter jurisdiction under section 2 can be expanded by broadening the meaning of ‘any dispute concerning the interpretation or application of this Convention’; and, third, the limitations and exceptions to compulsory jurisdiction in section 3 can be restricted”. See Stefan Talmon, ‘The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals’ (2016) 65 *International and Comparative Law Quarterly* 927, 929-30.

For an analysis of the scheme for the settlement of disputes under Part XV of the Convention in the context of the *South China Sea Dispute*, see Sreenivasa Rao Pemmaraju, ‘The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility’ (2016) 15 *Chinese Journal of International Law* 265, paras 10-22.

⁵⁴ For an authoritative account on the Convention as a product of a “package deal”, see Hugo Caminos and Michael R. Molitor, ‘Progressive Development of International Law and the Package Deal’ (1985) 79 *AJIL* 871, 873 (alluding approvingly to the view of Judge Jennings). The article highlights the view of the United States and other delegations which attach great importance to the provisions of the Convention because they were negotiated as a package offering *quid pro quo* (at p. 875), which was one of the reasons the Convention does not permit reservations except in respect of specific provisions in Part XV to promote settlement of disputes.

⁵⁵ For a first-hand account of the negotiation history concerning the rights and duties of the coastal State and the rights of third States within the exclusive economic zone, see Jorge Castaneda, ‘Negotiations on the Exclusive Economic Zone at the Third United Conference on the Law of the Sea’, in Makarczyk, J. (ed.), *Essays in International Law in Honor of Judge Manfred Lachs*, (Institute of the State and Law of

the Convention makes reference to “external rules” in about 100 of its provisions, which, as noted by a commentator, concern, depending upon the provisions, “other rules of international law”, “generally accepted international regulations” or “standards”, “generally recommended international minimum standards, whether subregional, regional or global”, other treaties, agreements or “applicable international instruments” and “resolutions and recommendations of other international organizations”.⁵⁶

46. Similarly, Article 300 also requires States parties to the Convention to “fulfil in good faith the obligations assumed under this Convention and [to] exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”. In spite of the references noted thus to “external rules” including the reference to “other rules of international law” in Article 293, it is understood that these references cannot in and of themselves provide a basis for enlarging the jurisdiction *ratione materiae* of the tribunals constituted under Annex VII or of ITLOS to cover disputes under general international law unless the law in question has a bearing on the utilization or management of the oceans.
47. The integrated structure of the “package deal” highlights the fact, as the third paragraph of the Preamble of the Convention stated, that “the problems of ocean space are closely interrelated and need to be considered as a whole”. There is good reason therefore to operate the scheme of compulsory settlement of disputes with every possible judicial caution, keeping in view the “need for uniform interpretation and application of the Convention” to prevent “the disintegration of the

the Polish Academy of Sciences, (Martinus Nijhoff Publishers, Kluwer Academic Publishers Group 1984), pp 605-623, reprinted by the Ministry of External Relations, Government of Mexico (New York, 2002), pp 42-43.

See also Dolliver Nelson, ‘Exclusive Economic Zone’ (2008) Max Planck Encyclopedia of Public International Law, para. 14. (noting, “[t]he UN Convention on the Law of the Sea in particular declares that the EEZ is subject to ‘a specific legal regime’ (Art. 55). In the light of Art. 55 it seems difficult to maintain the thesis that the EEZ is part of the high seas. It is *sui generis*, with the important consequence that it is neither the territorial sea nor the high seas but partakes of the characteristics of both regimes”). In that sense, it could be said that the rights and duties of the coastal States, on the one hand, and that of the other States in the exclusive economic zone, coexist. As Professor and a former Judge of the ITLOS, Tullio Treves noted: “[c]oexistence between activities on the high seas is disciplined by the reciprocal due regard rule of Art. 87 (2) UN Convention on the Law of the Sea. If these activities become activities in the exclusive economic zone their coexistence is disciplined by the due regard rules of Arts 56 (2) and 58 (3). This gives a role to “the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law”. Other States should be aware that this possibility may become a fact”. *See* Tullio Treves, ‘Law of the Sea’ (2011) Max Planck Encyclopedia of Public International Law, para. 38.

⁵⁶ For a mention of these and other examples as noted under various articles of the Convention, *see* Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 The Law and Practice of International Tribunals 190, 195, n. 12.

delicate compromises so carefully negotiated to offer balanced protection to competing rights and interests".⁵⁷

48. In a pertinent comment, the arbitral tribunal in the *Chagos Marine Protected Area Arbitration* noted thus:

The negotiation of the Convention involved extensive debate regarding the extent to which disputes concerning its provisions would be subject to compulsory settlement. The distrust with which some participants at the Conference viewed compulsory settlement is evidenced by the inclusion in the final texts of substantial carve outs, in Article 297, for disputes relating to the exercise of sovereign rights and jurisdiction in the exclusive economic zone. It is also apparent in the option, in Article 298(a)(i), for States to exclude the delimitation of maritime boundaries from dispute settlement, subject only to the requirement of compulsory conciliation. Given the inherent sensitivity of States to questions of territorial sovereignty, the question must be asked: if the drafters of the Convention were sufficiently concerned with the sensitivities involved in delimiting maritime boundaries that they included the option to exclude such disputes from compulsory settlement, is it reasonable to expect that the same States accepted that more fundamental issues of territorial sovereignty could be raised as separate claims under Article 288(1)?⁵⁸

49. Answering the question, the arbitral tribunal noted that "had the drafters intended that such claims could be presented as disputes 'concerning the interpretation or application of the Convention', the Convention would have included an opt-out facility for States not wishing their sovereignty claims to be adjudicated, just as one sees in Article 298(1)(a)(i) in relation to maritime delimitation disputes".⁵⁹
50. In the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* between Ukraine and the Russian Federation, the arbitral tribunal endorsed this view even more directly when it concluded that the fact that "a sovereignty dispute is not included either in the limitations on, or in the optional exceptions to, the applicability of compulsory dispute settlement

⁵⁷ A.O. Adede, 'Settlement of Disputes Arising under the Law of the Sea Convention' (1975) 69 AJIL 798, 817, referring to Louis B. Sohn, 'Settlement of Disputes Arising out of the Law of the Sea Convention' (1975) 12 San Diego L. Rev. 495, 516. See also A.O. Adede, 'Law of the Sea: The Scope of the Third-Party, Compulsory Procedures for Settlement of Disputes' (1977) 71 AJIL 305, p. 308, for the clarification on the scope of compulsory third party settlement of disputes under the Convention, keeping in view of the negotiating history of relative rights of coastal States in different maritime zones for different purposes and that of the other States. He observed "that the extent to which coastal state activities may be subject to compulsory third-party proceedings would correspond somewhat to the nature and the extent of the coastal state's competence [...]. There is, comparatively, more scope for third-party settlement proceedings with respect to issues over which the coastal state only exercises 'jurisdiction'; less scope for third-party settlement procedures on issues over which a coastal state exercises 'exclusive jurisdiction'; and even less scope for compulsory procedures as issues become those over which a coastal state exercises 'exclusive rights' or 'sovereign rights'."

⁵⁸ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 216.

⁵⁹ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 217.

procedures supports the view that the drafters of the Convention did not consider such a dispute to be ‘a dispute concerning the interpretation or application of the Convention’.”⁶⁰

51. Accordingly, where more than one issue is involved in a dispute strictly regulated by the Convention, it is, as pointed out by Mathias Forteau, “crucial for the purpose of assessing jurisdiction *ratione materiae* under Part XV of the UNCLOS” to determine whether the issues involved are related to each other as subject matters covered by the Convention “or to the contrary must be considered as an obstacle to jurisdiction”.⁶¹ For example, in the *Chagos Marine Protected Area Arbitration*, the arbitral tribunal held that “[w]here the ‘real issue in the case’ and the ‘object of the claim’ do not relate to the interpretation or application of the Convention [...] an incidental connection [...] is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)”.⁶² In the *South China Sea Arbitration* between the Philippines and China, the arbitral tribunal noted that only when a dispute can “fairly be said to concern the interpretation or application of the Convention”, it is deemed to come within the scope of Article 288(1).⁶³
52. In the *Dispute Concerning Coastal State Rights*, the arbitral tribunal first identified the real issue involved, which it determined to be whether there existed “a sovereignty dispute over Crimea, and if so, whether such dispute is ancillary to the determination of the maritime dispute brought before the Arbitral Tribunal by Ukraine”.⁶⁴ On this score, the arbitral tribunal came to the conclusion that the Parties’ dispute over Crimea

is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention. On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal’s decision on a number of claims submitted by Ukraine under this Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the “coastal State” within the meaning of provisions of the Convention invoked by Ukraine.⁶⁵

⁶⁰ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para.156.

⁶¹ Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, p. 200.

⁶² PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 220.

⁶³ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People’s Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 150.

⁶⁴ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para. 161.

⁶⁵ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para. 195.

53. Accordingly, it concluded that it cannot deal with that issue even if, as Ukraine argued, “the relative weight of the dispute lies with the interpretation or application of the Convention”.⁶⁶
54. Thus, a dispute concerning an “external rule”, like the one related to the immunity of State officials from foreign jurisdiction, cannot be treated as a dispute “concerning the interpretation or application” of the Convention. It is further clear, as the Arbitral Tribunal itself noted, that the question of immunity from jurisdiction, by definition, operates as “an exception to an *otherwise-existing* right to exercise jurisdiction” over the merits of the case.⁶⁷
55. In other words, the issue of immunity is fundamentally a procedural objection to be pleaded as an exception to jurisdiction which is otherwise found to exist in spite of it. Judges Higgins, Kooijmans, and Buergenthal, in their Separate Opinion in the *Arrest Warrant* case put it thus: “Immunity is the common shorthand phrase for immunity from jurisdiction”.⁶⁸ Accordingly, the distinguished judges stressed: “If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise”.⁶⁹ Moreover, as the ICJ emphasized in the case, “the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction”.⁷⁰
56. On the basis of the above analysis, the question concerning immunities of State officials, by any reckoning, cannot and, in fact, did not have any bearing on the interpretation or application of any of the provisions of the Convention; hence, is not an incidental issue.

⁶⁶ PCA Case No.2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Preliminary Objections, Judgment of 21 February 2020, para. 196.

⁶⁷ Award, para. 808 [emphasis added].

⁶⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 63 at p. 64, para. 3 [internal quotations omitted].

⁶⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002, p. 63 at p. 64, para. 3. The Court also noted that “it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction”. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at p. 19, para. 46.

⁷⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at pp 25-26, para. 59.

4. Essential Distinction between Competence to Deal with a Dispute and ‘Applicable Law’ to Settle the Dispute on Merits

57. At this stage, it may be opportune to deal with the submission of Italy to which the Arbitral Tribunal refers in support of assuming jurisdiction over the issue of immunity. Italy argued that “[t]here is nothing unusual in an international court or tribunal with jurisdiction over a dispute concerning the interpretation or application of a treaty deciding questions of international law that necessarily arise in the resolution of the dispute”.⁷¹ In the interest of balance, the Arbitral Tribunal also recalled the point made by India when it noted that “ITLOS, as well as Annex VII tribunals, are called to apply, besides the UNCLOS itself ‘other rules of international law not incompatible with [the] Convention’.”⁷² While it is undeniable, as noted above, that the Convention is not a self-contained treaty and is open to constant evolution, subject to the needs of the international community and in light of the developments in the field of science and technology, it can only rely upon such principles of international law that are “not incompatible with the Convention”. The important point to note in this regard is that the Arbitral Tribunal clearly confuses issues of “applicable law” under Article 293, which governs the merits of a matter that otherwise fall under its competence, with issues relating to its competence under Article 288, paragraph 1, which is a preliminary matter.⁷³
58. Equally irrelevant is Italy’s claim that the Arbitral Tribunal is competent to decide the issue of immunity because “it would make no sense whatsoever for the Tribunal to determine that a state has jurisdiction under the Convention without, at the same time, deciding whether the exercise of such jurisdiction would be lawful under international law”.⁷⁴ After all, if the Arbitral Tribunal found that India has a valid but concurrent jurisdiction over the incident under Article 92 of the Convention, it goes without saying that any such exercise would be *ipso facto* lawful and no separate determination would appear to be necessary.

⁷¹ See Award, para. 810, citing Italy’s Rejoinder, para. 4.20.

⁷² See Award, para. 810, citing Hearing Transcript, 13 July 2019, 34:1-5.

⁷³ On the important distinction between a court or tribunal’s jurisdiction to hear a case and the law to be applied by the tribunal in deciding a case, the Arbitral Tribunal in the *Arctic Sunrise Arbitration* noted, while disallowing a claim based on the provisions on the 1966 International Convention on Civil and Political Rights, that “Article 293 is not [...] a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention”. PCA Case No. 2014-02: *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, para. 192. See also Mathias Forteau, ‘Regulating the Competition between International Courts and Tribunals: The Role of *Ratione Materiae* Jurisdiction under Part XV of UNCLOS’ (2016) 15 *The Law and Practice of International Tribunals* 190, 204.

⁷⁴ Award, para. 807, citing Hearing Transcript, 9 July 2019, 57:17-23.

59. For the reasons noted above, the Italian submission on immunity of its marines is a separate dispute and not a matter incidental to the dispute over which the Arbitral Tribunal could exercise its jurisdiction.

C. IMMUNITY *RATIONE MATERIAE* UNDER INTERNATIONAL LAW: IMMUNITY OF THE MARINES, IN PARTICULAR

60. In light of the above conclusion that the Arbitral Tribunal lacks competence to deal with the issue of immunity of the Marines, it would not be strictly necessary for me to deal with issues of immunity *ratione materiae* under international law in general and the eligibility of the Marines to claim immunity from the jurisdiction of India. However, as the Arbitral Tribunal considered itself competent to deal with the matter on its merits, I consider that it is necessary for me to indicate my views in this regard.
61. It may be recalled, as a preface to the consideration of the matter of immunity *ratione materiae* on its merits, that the Arbitral Tribunal framed the question before it thus: “whether India, as the flag State of the ‘St. Antony’, on which the effects of the Marines’ alleged offences – the death of Mr. Ajeesh Pinku and Mr. Jelastine Valentine – occurred, has in principle the right to exercise jurisdiction over the Marines or whether such exercise of jurisdiction is precluded because the Marines enjoy immunity under international law”.⁷⁵
62. To answer this question, the Arbitral Tribunal felt obliged to examine immunity *ratione materiae* under customary international law, in the absence of any provision dealing with that issue in the Convention. Based on the decisions of the ICJ, the International Criminal Tribunal for the Former Yugoslavia, the work of the ILC concerning the immunity of State officials from foreign criminal jurisdiction, and Articles 5 and 6, paragraph 1, of the ILC Draft Articles on Immunity of State Officials, the Arbitral Tribunal came to the conclusion that State officials acting as such enjoy immunity *ratione materiae*.⁷⁶
63. On the applicability of that general proposition on immunity *ratione materiae* to the specific case of the Marines in the present case, the Arbitral Tribunal again fell back on the work of the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters* and the guidance provided by the work of the Special Rapporteur Kolodkin to come to the conclusion endorsed by the work of the

⁷⁵ Award, para. 841.

⁷⁶ Award, para. 846 (noting that this conclusion was endorsed by Italy and India did not object).

ILC on State responsibility, that officials, irrespective of their rank in the hierarchy of their government, enjoy immunity if the acts performed are attributable to the State they serve.⁷⁷

64. Finally, the Arbitral Tribunal, accepting all the submissions of Italy, concluded that in the present case, “the Marines were, as members of Italy’s armed forces, fulfilling a State function” when they were deployed on the “Enrica Lexie” as part of a VPD pursuant to the mandate of the Italian State, as provided in the Italian Law on VPDs, to ensure “protection of ships flying the Italian flag in transit in international maritime spaces at risk of piracy”.⁷⁸ Referring to the fact that “the Marines were stationed on a merchant vessel, and not a warship”, the Arbitral Tribunal noted that in its view, this “does not alter their status and the character of their mission as part of the VPD, undertaking acts in an official capacity attributable to the Italian State”.⁷⁹
65. Having concluded that the Marines enjoy immunity under customary international law, the Arbitral Tribunal examined whether the Marines could still be prosecuted by India “as a result of the application of the ‘territorial tort’ exception”.⁸⁰ It may be recalled that this principle was incorporated in Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property.⁸¹ According to this principle, unless otherwise agreed between the States concerned,

a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.⁸²

66. In this regard, the fact that the Marines were on board the “Enrica Lexie”, and not on Indian territory, when they committed the acts at issue, proved decisive for the Arbitral Tribunal to come to the conclusion that neither Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, nor the “territorial tort” exception, even if it “were

⁷⁷ Award, paras 856-58.

⁷⁸ Award, para. 859, *citing* Law Decree No. 107 of 12 July 2011, of the Italian Republic, Article 5, paragraph 1 (**Annex IT-91**).

⁷⁹ Award, para. 859.

⁸⁰ Award, para. 863.

⁸¹ The United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on 2 December 2004. The UNCSI was adopted by the United Nations General Assembly by Resolution A/59/38 of 2 December 2004. It was signed by 28 countries, including China, France, India, Iran, Japan, Mexico, the Russian Federation and the United Kingdom. The Convention is ratified by 22 States, including Italy, and requires 30 States to come into force.

⁸² The United Nations Convention on Jurisdictional Immunities of States and Their Property, done in New York on 2 December 2004, Article 12.

recognised under customary international law”, are applicable in the circumstances of the present case.⁸³

67. On the basis of the above analysis, the Arbitral Tribunal concluded that “the Marines enjoy immunity in relation to the acts that occurred during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines”.⁸⁴
68. Regretfully, I disagree with all the reasons enumerated by the Arbitral Tribunal for its findings, which in the final analysis led it to conclude that India is precluded from exercising its jurisdiction on the ground that the Marines were entitled to immunity. The finding of the Arbitral Tribunal on the immunity *ratione materiae* of State officials, under customary international law, as a general proposition, is not in issue, but its application in a specific case is a matter of substantial debate, particularly in the absence of a uniform State practice.

1. International Law Governing Immunity of Officials from Foreign State Criminal Jurisdiction

69. International law governing immunity of officials from foreign State criminal jurisdiction is constantly evolving.⁸⁵ The work of the ILC on immunity of State officials from foreign criminal jurisdiction is a work in progress.⁸⁶ It is well accepted that while immunity *ratione personae* is accepted only in the case of a limited and select category of high functionaries of State,⁸⁷ the

⁸³ Award, paras 871-72.

⁸⁴ Award, para. 874.

⁸⁵ See Tom Ruys, Nicolas Angelet, and Luca Ferro, ‘Introduction – International Immunities in a State of Flux?’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 1-20.

⁸⁶ See Lori F. Damrosch, ‘The Sources of Immunity Law – Between International and Domestic Law’ in *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 40-60. The author observed: “The ILC’s valuable work has not so far provided definitive answers to questions that recurrently arise with respect to categories of individuals who personify or act for States in capacities other than as diplomatic or consular agents in the classic sense – for example, a sitting or former head of State, head of government, foreign minister, or other high-level official”, p.52. On the current work of the ILC: “The topic of foreign official immunity in national criminal proceedings”, which is attracting much attention from governments and scholars, she felt, “is one area where finding common ground for new law- making may be elusive”, p. 60.

⁸⁷ For example, for the head of State or government, the minister in charge of foreign affairs, and the ambassadors and other senior category of diplomatic officials accredited to a State as diplomatic agents, immunity *ratione personae* is generally governed by the Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, which is now regarded as reflecting customary international law in respect of immunity of senior functionaries of State. In the *Arrest Warrant* case, the ICJ noted that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal”, see *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at pp 20-21, para. 51.

matter of functional immunity, that is, immunity *ratione materiae*, is limited by the nature and scope of the official function involved⁸⁸ and strictly governed by specific multilateral agreements.⁸⁹ In the case of placement of armed forces of one country within the territory of another country, immunity *ratione materiae* is governed by special agreements, frequently referred to as ‘status of forces agreements’.⁹⁰ Even in the case of the Marines, subject of the present Arbitration, Article 2.1 of the Template Agreement, which governs their deployment on Italian vessels, provides that, “[e]mbarkation and disembarkation of Vessel Protection Detachments takes place, based on existing agreements with coastal States in the High Risk Area, in ports listed in the Addendum”.⁹¹

70. Under the circumstances, while as a general proposition it may be possible to assert that under international law, government officials performing government functions enjoy immunity from foreign State jurisdiction, it is equally clear its application to specific cases involving commercial and non-government service is highly contested, with an ever growing number of countries favouring and adopting a restrictive theory of immunity.⁹²

⁸⁸ See Zachary Douglas, ‘State Immunity for the Acts of State Officials’ (2011) 82 BYIL 281, for a very thorough analysis of the concept of State immunity *vis-à-vis* state liability and for the proposition that “[u]nlike the rules of attribution, the law of state immunity is concerned with the function underlying the exercise of public powers because this is essential to the reconciliation of the competing interests of the forum state and the foreign state” [emphasis in original].

⁸⁹ For privileges and immunities of international organizations and their officials, see Niels Blokker, ‘Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 185-200. For an analysis of agreements covering different persons, both natural and legal, see Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), Part IV on Individual Immunities, pp 411-576.

⁹⁰ For an analysis of agreements in this regard, see Aurel Sari, ‘The Immunities of Visiting Forces’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 559-576. The author notes that “[d]espite the proliferation of status of forces agreements, the position of customary international law remains of more than just scholarly interest”. He adds that “[a]s we have seen, international practice has not given rise to a single immunity regime that applies to all visiting forces in a uniform manner. Instead, distinct regimes are applicable to different types of deployment”, p. 573.

⁹¹ Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 2.1 (**Annex IT-95(b)**). See also Addendum to the Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 3 (**Annex IT-95(c)**), for the list of ports specified for this purpose.

⁹² According to one account, “more recent international law-making and domestic practices reveal a general trend towards the restrictive doctrine on State immunity. The transition from absolute to restrictive immunity has taken many years and much effort. Among the measures adopted, the UN codification marks the most significant achievement. As noted by Judge James Crawford, ‘although not yet in force, the UN Convention has been understood by several courts to reflect an international consensus on State immunity’,” Wenhua Shan and Peng Wang, ‘Divergent Views on State Immunity in the International Community’, in Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019), pp 63-64.

71. Notable in this connection is the view taken by the ILC in the early stages of its consideration of the topic of ‘Jurisdictional immunities of States and their property’ (which it took up for codification and progressive development in 1978). As part of his initial or preliminary proposal, the then-ILC Special Rapporteur, Mr. Sompong Sucharitkul, provisionally identified certain categories of property which were exempt from attachment for the purpose of execution of a court decree. He referred to “State property used in connections with its sovereign functions, such as diplomatic or consular or governmental representation”, and noted that such property “remains immune from attachment and execution”.⁹³ The ILC, after considering the proposal, observed that “the question of the extent of, or limitations on, the application of the rules of State immunity required an extremely careful and balanced approach”.⁹⁴ Accordingly, the ILC felt that “the exceptions identified in the preliminary report” should be considered as merely “possible limitations, without any assessment or evaluation of their significance in State practice”.⁹⁵
72. It was also agreed that the question of immunity from execution of judgment should be left for later consideration, that is, towards the end of the finalization of the draft articles, as it required the “greatest care”, given “the widening functions of the State, which had enhanced the complexities of the problem of State immunities”.⁹⁶ The ILC took the view that as the State began to engage in activities such as trade and finance – areas which were formerly undertaken only by individuals or entities – controversies had existed in the past concerning the divisibility of the functions of the State, resulting in “[no] generally accepted criterion for identifying the circumstances or areas in which State immunity could be invoked or accorded”.⁹⁷
73. Accordingly, Italian national law, *ipso facto*, without more by way of applicable principles of international law, or an agreement between India and Italy could not be cited as an obstacle for India to exercise its jurisdiction over the Marines. In this context, it is notable that “Italy sought but failed to obtain an agreement with India on the status of VPDs”.⁹⁸

⁹³ Sompong Sucharitkul, Special Rapporteur, ‘Preliminary Report on Jurisdictional Immunities of States and their Property’, A/CN.4/323, *Yearbook of the International Law Commission 1979*, Vol. II (Part 1), p. 243, paras 84-85.

⁹⁴ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁵ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁶ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁷ See ‘Summaries of the Work of the International Law Commission: Jurisdictional immunities of States and their property’, available at <https://legal.un.org/ilc/summaries/4_1.shtml#a5>.

⁹⁸ India’s Counter-Memorial, para. 5.34, n. 371, referring to Exchange of e-mails between India and Italy on VPDs, 6 February 2012 (**Annex IN-26**) (“Ms. Laura Carpini of the Italian Embassy in India submitted a request for diplomatic clearance for a cargo vessel with a team of six Italian Navy military personnel

74. The crux of the matter in the present Arbitration is whether the Marines are entitled to immunity given the terms and conditions of their deployment on a cargo vessel. The findings of the Arbitral Tribunal on that matter are devoid of any basis in customary international law.

2. Employment of the Marines by a Cargo Vessel: Not a “Government Non-commercial Service”

75. It is clear that the Marines were members of VPD of the Italian naval judicial police. The Italian law cited for establishing this point is not in question. Equally clear is the fact that they fired shots (leaving aside for the moment questions of evidence) in pursuance of the function assigned to them, that is, to protect the merchant vessel from what they apprehended to be a possible piracy attack or armed robbery. However, it is equally clear that in the context of the present case, the terms and conditions of the placement of the Marines on the “Enrica Lexie”, as specified in the Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association,⁹⁹ are decisive to determine the eligibility of the Marines for immunity under international law.

76. An examination of the terms and conditions of that Memorandum and its annexes reveals that the deployment is:

- (i) based on a contract of services offered by the Government of Italy to the Italian merchant/cargo vessels, subject to payment of a specified daily allowance as consideration; and
- (ii) open to ship owners to accept at their free will, subject only to the condition that they should first seek such service from the Italian authority in charge of the VPDs before seeking the same from private sources.

77. In other words, the deployment of marines is a form of “supply of services” to the owner of the merchant vessel who “intends” to use them¹⁰⁰ upon payment of EUR 467 per day, covering “costs linked to the employment of VPDs, including ancillary costs for personnel, operation and in-area logistic support”.¹⁰¹ The deployment of marines is viewed as an “institutional contribution based

on board on 6 February 2012. The next day, Mr. Srinivas of the Indian Ministry of External Affairs responded to decline the request, and confirmed that the Government of India could not agree to Italy’s proposal for an Agreement on VPDs”).

⁹⁹ Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association (Confitarma), 11 October 2011 (**Annex IT-95(a)**).

¹⁰⁰ Addendum to the Template Agreement between the Ministry of Defence of Italy and the Ship Owner (**Annex IT-95(c)**).

¹⁰¹ Addendum to the Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 2 (**Annex IT-95(c)**).

on the principle of burden-sharing with individual signatory Ship owners”.¹⁰² It is also clear that the deployment of Italian marines on Italian merchant/cargo vessels is only intended to “complement”, but not as part and parcel of, “actions conducted at sea by military ships”.¹⁰³ In that sense, it is clear that the VPDs, despite their status as officials of the Italian naval police, are not authorized “to patrol the seas, board, inspect or arrest suspect pirate ships”.¹⁰⁴

78. In as much as the Marines were deployed on a commercial cargo vessel as part of an offer of services to the private Italian ship owners on payment of a fee, it is a quintessentially commercial contract or transaction between the Government of Italy and the Italian ship owners. A commercial transaction, according to Article 2, paragraph 1, subparagraph (c)(i), of the United Nations Convention on Jurisdictional Immunities of States and Their Property means “any contract or transaction for the sale of goods or *supply of services*”.¹⁰⁵ Further, Article 2, paragraph 2, of the same Convention provides that the “nature” of the contract or transaction “primarily” determines its commercial character. However, if the parties to a contract or transaction so agree or if, in the practice of the State of the forum, it is relevant, the “purpose” of the contract or transaction could also be taken into account.¹⁰⁶
79. In addition, it is undisputed that the Marines were operating on a merchant/cargo vessel and not on a ship which is exclusively operated for a “government non-commercial purpose”, an essential criterion to distinguish services offered as part of commercial services from services rendered as part of State’s sovereign functions. It is well accepted in international law that only “government non-commercial service” would qualify for immunity from foreign State jurisdiction. An example of this is warships, as noted above.¹⁰⁷

¹⁰² Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association (Confitarma), 11 October 2011, p. 2 (**Annex IT-95(a)**).

¹⁰³ Memorandum of Understanding between the Ministry of Defence of Italy and the Italian Ship Owners’ Association (Confitarma), 11 October 2011, p. 2 (**Annex IT-95(a)**).

¹⁰⁴ See Oceans Beyond Piracy, ‘Issue Paper: Vessel Protection Detachments’, available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/Vessel_Protection_Detachments_IssuePaper.pdf>, for an interesting background to the deployment of VPDs, in contrast to “Privately Contracted Armed Maritime Security”, which proved “to be a popular and effective model to mitigate piracy off the coast of Somalia”, and was prohibited later by States. The paper also notes that “VPDs are unique in the maritime security paradigm, as they introduce military personnel, equipment, and activities—including military-specific command and control hierarchies—directly into the commercial maritime sector, aboard private vessels. This infuses sovereign state military operations into commercial activities. The most prominent VPD activities are those conducted by Italian and Dutch governments, although other countries such as Estonia, Lithuania, Serbia, Croatia, Finland, and Ukraine also deployed VPDs either on their own flagged vessels or as part of coalition operations”.

¹⁰⁵ See above, note 81, Article 2, paragraph 1, subparagraph (c)(i) [emphasis added].

¹⁰⁶ *Ibid.*, Article 2, paragraph 2.

¹⁰⁷ See UNCLOS, Article 96 and *ibid.*, Article 16, paragraph 2.

80. In view of the above, the conclusion reached by the majority of the Arbitral Tribunal, that the Marines are entitled to immunity from the jurisdiction of India, is not supported by State practice, let alone one that is uniform and consistent. Thus, it is without foundation either in treaty or customary international law. Accordingly, the conclusion reached by the Arbitral Tribunal on the merits of the Italian claim concerning the immunity of the Marines does not fit well, like a square peg in a round hole, with the well-established principle under international law that government officials enjoy immunity from foreign jurisdiction for official acts performed. This is because the service rendered by the Marines was part of an agreement amounting to a commercial contract.

VI. HUMANITARIAN CONSIDERATIONS

81. With the decision of the Arbitral Tribunal, this Arbitration comes to a close, more than eight years after the incident. The case management, whether at the national level in India or later at the international level (before ITLOS and the present Annex VII Arbitral Tribunal), for much of the time, was concerned with writ petitions and provisional orders addressing serious health and humanitarian side effects of the case on the Marines. Ironically, the long delay and the extended legal battle only further aggravated the side effects on all those concerned, including the Marines, giving rise to grave humanitarian concerns. The result is that the families of the two dead Indian fishermen and Captain Fredy, as well as other fishermen, are given no relief from their loss or suffering in the absence of proper reparation.
82. It is a matter of some satisfaction that despite the legal complications, which are beyond diplomatic means, India and Italy kept their diplomatic channels open and engaged at all times. They even concluded an agreement, which India ratified soon after the shooting incident, regarding the transfer of sentenced persons. According to this pact, the execution of the sentence shall be governed by the administering State, which will be free, under its laws, to provide alternative measures. The agreement is inspired by the Convention on the Transfer of Sentenced Persons, done at Strasbourg on 21 March 1983.¹⁰⁸
83. As a result of the Arbitral Tribunal's decision, the Marines, who are now in Italy pending a final decision on this Arbitration, do not have to return to India to face its judicial process, subject only to such legal process as Italian authorities may consider necessary under their law. This answers one side of the humanitarian crisis that plagued this case. In addition, the Arbitral Tribunal

¹⁰⁸ For a mention of the agreement between India and Italy and a comment on this Arbitration, see Hari Sankar, 'Jurisdictional and Immunity Issues in the Story of Enrica Lexie: A Case of Shoot & Scoot turns around!', in EJIL:Talk!, 25 March 2013, available at <<https://www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/>>.

addressed some urgent humanitarian considerations on the Indian side also. It ordered Italy to pay the necessary compensation to India for the damage suffered by India, Captain Fredy, and the Indian fishermen, on account of the physical harm and material damage to their property (including to the “St. Antony”) and mortal harm suffered by the crew members of the “St. Antony”, attributing responsibility to Italy for the death of the two Indian fishermen. I welcome these conclusions, despite my reservations on the subject of immunity of the Marines.

84. In this regard, the Arbitral Tribunal invited the Parties “to consult with each other with a view to reaching agreement on the amount of compensation due to India”.¹⁰⁹ The Arbitral Tribunal noted that it “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”, if such an application is submitted within one year from the date of the Award.¹¹⁰

VII. CONCLUSIONS

- i) The Arbitral Tribunal can only have jurisdiction over a dispute concerning the interpretation or application of the Convention. A dispute may involve more than one aspect or issue, but it is for the Arbitral Tribunal to isolate the ‘real issue of the case’.
- ii) An objective examination of the ‘real issue of the case’ and the ‘object of the claim’ revealed two distinct and separate disputes: one, which of the two countries, India or Italy, is entitled to exercise its jurisdiction over the incident of 15 February 2012; the other, concerning the immunity of Marines from foreign criminal jurisdiction, to wit, the Indian jurisdiction.
- iii) Accordingly, the claim concerning immunity is not and cannot be treated as an incidental issue to the other dispute over which the Arbitral Tribunal found jurisdiction.
- iv) To the extent that the issue of immunity of State officials is not covered by any of the provisions of the Convention, the Arbitral Tribunal is not empowered to exercise its jurisdiction to determine its validity in accordance with Article 288, paragraph 1, of the Convention. In addition, the claim of immunity operates as an exception to an otherwise existing jurisdiction.
- v) It may be recalled that the Marines were employed by the owner of an oil tanker for rendering a service in return for a payment of a daily allowance and other incidental costs for such employment. Service rendered under those conditions is anything but a “government non-commercial service”. Under the circumstances, it fails to meet the

¹⁰⁹ Award, para. 1089.

¹¹⁰ Award, para. 1090.

essential condition under international law to qualify for immunity from foreign jurisdiction. In the case of military personnel of one country stationed or visiting another country, a claim of immunity is admissible only if there is an agreement between the sending and receiving State. Italy did not have such an agreement with India to cover the Marines in the present case.¹¹¹

- vi) The Convention does not deal with issues of general international law or other treaty regimes not related to subject matters that fall within its scope. The Convention is admittedly not a self-contained treaty and has several provisions which, by their very nature, are open to further evolution in related fields of international law. Provisions of the Convention that deal with the sovereign rights and duties of coastal States over the exclusive economic zone and the continental shelf, conservation of fisheries, marine pollution, bio-diversity and the environment, and security interests or military uses, may be noted as prime examples of such related fields.
- vii) However, as the Convention is the outcome of a ‘package deal’, “external rules” bearing upon the subject matters specified in the Convention could be raised as incidental issues, subject to such exceptions and limitations noted under Section 3, Part XV, and in particular, Articles 297 and 298, of the Convention.¹¹²
- viii) The regime of compulsory settlement of disputes under Part XV of the Convention is a regime that operates as an exception to the general principle of international law according to which the jurisdiction of an international court or tribunal is based on consent of State parties to the dispute. As an exception to the rule, what is not specified in the Convention’s scheme of compulsory settlement of disputes is deemed to have been excluded from it. Accordingly, the claim of immunity cannot be considered by the Arbitral Tribunal without express consent from India.
- ix) Italy and India have done their best to cooperate with each other in good faith to settle matters arising from the “Enrica Lexie” incident. It is even more important that they work together now to settle expeditiously all the pending humanitarian issues on both sides, including issues of compensation.

* * *

¹¹¹ Template Agreement between the Ministry of Defence of Italy and the Ship Owner, Article 2.1 (**Annex IT-95(b)**), states that “embarkation and disembarkation of Vessel Protection Detachments takes place, based on existing agreements with coastal States in the High Risk Area in ports listed in the Addendum”. *See also* para. 73, n. 98 above for information on the lack of an agreement between Italy and India in this respect.

¹¹² *See above* para. 45, n. 54 and n. 56.

Dissenting Opinion

Judge Patrick Robinson

I.	INTRODUCTION.....	1
II.	IDENTIFICATION AND CHARACTERIZATION OF THE DISPUTE.....	2
	A. EXAMINATION OF THE DIPLOMATIC COMMUNICATIONS BETWEEN THE PARTIES PRIOR TO THE NOTIFICATION AND STATEMENT OF CLAIM	4
	B. THE NOTIFICATION AND STATEMENT OF CLAIM	7
	C. THE WRITTEN AND ORAL SUBMISSIONS OF THE PARTIES	9
	D. INFERENCES DRAWN FROM THE CONDUCT OF A PARTY OF ITS OPPOSING VIEW IN A DISPUTE	10
	E. CONCLUSION.....	14
III.	THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE ISSUE OF THE IMMUNITY OF THE MARINES	14
	A. THE LAW RELATING TO INCIDENTAL QUESTIONS	18
	B. CONCLUSION.....	23
IV.	ASSUMING THAT THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE ISSUE OF IMMUNITY OF THE MARINES FROM THE EXERCISE OF INDIAN CRIMINAL JURISDICTION, DO THE MARINES ENJOY IMMUNITY <i>RATIONE MATERIAE</i>?	25
	A. THE STATE OF THE LAW ON IMMUNITY	25
	B. DISTINGUISHING THE PECULIAR CIRCUMSTANCES OF THIS CASE FROM OTHER SITUATIONS IN WHICH THE ISSUE OF THE IMMUNITY OF STATE OFFICIALS ARISES	32
	C. CONCLUSION.....	35
V.	WHETHER THE MARINES ARE ENTITLED TO IMMUNITY FROM THE CRIMINAL JURISDICTION OF INDIA IN THE ABSENCE OF AN AGREEMENT BETWEEN ITALY AND INDIA: THE ASSIMILATION OF THE MARINES TO THE STATUS OF VISITING FORCES.....	36
VI.	GENERAL CONCLUSIONS.....	39

I. INTRODUCTION

1. I disagree with the findings in paragraph 1094(A)(1), A(2), A(4), A(5), B(2), B(3), B(4)(a) and B(4)(b) of the Award. I am in agreement with the other findings in that paragraph. In this Opinion, I explain my disagreement with the first six findings.

2. The Opinion has the following parts: Part I: The identification and characterization of the dispute; Part II: The Arbitral Tribunal does not have jurisdiction over the issue of the immunity of the marines; Part III: Assuming that the Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines from the exercise of Indian criminal jurisdiction, the marines do not enjoy immunity *ratione materiae*; Part IV: Whether the marines are entitled to immunity from the criminal jurisdiction of India in the absence of an agreement between Italy and India: the assimilation of the marines to the status of visiting forces; Part V: General Conclusions.
3. It is argued that the Majority wrongly characterized the dispute as the question of which State has jurisdiction over the incident; that, properly characterized, the dispute concerns the question of the exercise by India of its criminal jurisdiction over the marines in the face of their claim to immunity from that jurisdiction; that the issue of the immunity of the marines does not concern the interpretation or application of the Convention, and that consequently, since that issue is a core element of the dispute, and not an incidental question, the Arbitral Tribunal was obliged to decline jurisdiction over the dispute; and that in any event, the marines do not enjoy immunity from the criminal jurisdiction of India.

II. IDENTIFICATION AND CHARACTERIZATION OF THE DISPUTE

4. In accordance with Article 288, paragraph 1, of the Convention, the Arbitral Tribunal has “jurisdiction over any dispute concerning the interpretation or application of the Convention”. Therefore, in order for the Arbitral Tribunal to be vested with jurisdiction, there must be a dispute and that dispute must concern the interpretation or application of the Convention. Case law on how the task of identifying and characterizing a dispute is to be carried out is well-established. It is therefore regrettable that the Majority has failed to carry out this function in accordance with established jurisprudence.
5. It is settled that a dispute is a disagreement on “a point of law or fact, a conflict of legal views or of interests between two persons”.¹
6. Case law of the ICJ establishes three features in the process of identifying and characterizing a dispute. First, a court or tribunal examines how the parties themselves have identified and characterized the dispute, but in doing so it has particular regard to the applicant’s formulation of the dispute.² However, and second, it is ultimately the responsibility of the court or tribunal to

¹ *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, P.C.I.J. Series A, No.2, p. 11.

² *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448.

determine on an objective basis the dispute between the parties.³ Third, it does that by “isolate[ing] the real issue in the case and ... identify[ing] the object of the claim”.⁴ The logic of the case law is that it is the parties who are involved in the dispute that has been brought to the court or tribunal, and it is therefore entirely appropriate for the court or tribunal to examine how they, in particular the applicant, have described the dispute. Nonetheless, the court or tribunal is not bound to accept the description of the dispute by the parties. It has an obligation to determine the nature of the dispute on an objective basis and it carries out this task by examining all the pertinent evidence at hand, including diplomatic communications between the parties and their written and oral submissions. Thus, a party’s characterization of the dispute is only a starting point, and a dispute, properly characterized, may have more than one element, and indeed, a case may have more than one dispute.

7. From the very inception of this case, Italy has, both expressly and indirectly, referred to the Indian exercise of criminal jurisdiction over the marines and their claim to immunity therefrom as the core elements of the dispute. In characterizing the dispute in this case as the question of which State has jurisdiction over the Incident,⁵ the Majority has failed to acknowledge the centrality of the issue of the immunity of the marines in the disagreement between the Parties. In terms of the substance of the dispute, the issues of the exercise of Indian criminal jurisdiction and the marines’ claim to immunity therefrom are inseparable and core elements of the dispute.
8. In seeking to support its position that the immunity of the marines is not a part of the dispute, the Majority points to the absence of any statement in the pleadings of either Party “characteri[z]ing the dispute between them as one primarily relating to immunity”.⁶ The precise meaning of that statement is not clear. However, what is beyond dispute is that Italy consistently claimed immunity from the exercise by India of its criminal jurisdiction over the marines and India consistently rejected that claim. An objective determination of the dispute shows that it concerns both the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom. In those circumstances, the question whether the dispute relates primarily to immunity does not arise.
9. The Majority maintains that when Italy refers to issues of immunity in defining the dispute, “it is with respect to its relevance as an exception to India’s exercise of criminal jurisdiction over the Marines and as one of several bases on which Italy alleges such exercise to be unlawful”.⁷ That statement warrants comment for three reasons. First, in paragraph 1.14 of its Memorial, Italy states

³ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448.

⁴ *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30.

⁵ Paragraph 243 of the Award.

⁶ Paragraph 242 of the Award.

⁷ Paragraph 238 of the Award (Emphasis in original).

that, “reduced to its core the dispute between the Parties is a dispute about jurisdiction and immunity from jurisdiction”. There is absolutely nothing in that statement to suggest that Italy refers to immunity as an exception to India’s exercise of criminal jurisdiction over the marines. Second, even if Italy relied on the issue of immunity “as an exception to India’s exercise of criminal jurisdiction over the Marines”, that issue could nonetheless constitute a central element of the dispute between the Parties. For an objective determination of the real issue dividing the Parties and the object of Italy’s claim could show that the exceptional feature of immunity is a core element of the dispute. Third, even if Italy relied on immunity “as one out of several bases on which Italy alleges such exercise to be unlawful”, such reliance would only have significance if one of those bases itself was a core element of the dispute. No submission to that effect has been made. For example, no one has suggested that an alleged breach of Article 97 of the Convention by India constitutes the dispute between the Parties. What generates the dispute between the Parties is the Italian claim to immunity from the exercise of Indian criminal jurisdiction over the marines.

10. The Opinion now proceeds to an examination of the evidence, which shows that the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom are the core elements of the dispute. Four areas will be examined. First, diplomatic communications between the Parties prior to Italy’s filing of its Notification and Statement of Claim. Second, the Notification and Statement of Claim. Third, the written and oral submissions of the Parties and fourth, the drawing of inferences of a Party’s opposing views to a dispute from the conduct of the Parties.

A. EXAMINATION OF THE DIPLOMATIC COMMUNICATIONS BETWEEN THE PARTIES PRIOR TO THE NOTIFICATION AND STATEMENT OF CLAIM

11. Although there were several diplomatic communications between the Parties prior to the filing by Italy of its Notification and Statement of Claim on 26 June 2015 which point to the treatment by them of the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom as the core elements of the dispute, the Majority has not cited any of these communications in its identification and characterization of the dispute. Diplomatic communications are a fertile ground for evidence of a dispute. The ICJ frequently examines such communications in its identification and characterization of a dispute; for example, in *Belgium v. Senegal*, the Court was only able to conclude that there was no dispute in respect of certain claims on the basis of its examination of diplomatic exchanges between the Parties prior to the filing of the application.⁸ The *notes verbales* that will be examined below were written and communicated in the period not long after the incident on 15 February 2012. They provide material relevant to the

⁸ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 445, para. 55.

characterization of the dispute that is as valuable as the written and oral submissions of the Parties; in fact, it is arguable that, by reason of their closeness in time to the incident, they are more valuable than the written and oral submissions of the Parties. Although in these *notes* Italy is not expressly setting out to define the dispute as it does in its written pleadings, they provide evidence of Italy's perception of the dispute.

- (i) On 16 February 2012, the day after the incident, the Indian Coast Guard boarded the "Enrica Lexie" and informed the marines that the incident fell under the jurisdiction of India's territorial waters. The marines responded that they were only answerable to the Italian authorities, who had already commenced an investigation. They gave the Coast Guard a written document stating that they were entitled to immunities as military forces in transit. The Coast Guard nonetheless carried out its investigation. On the same day, Italy sent a *note verbale* to India stating that the Italian marines were, "exclusively answerable to the Italian judicial Authorities, under Article 97".⁹ On the following day (17 February 2012), Italy sent a *note verbale* to India indicating that "based on international law, the Italian judicial Authorities are the sole competent judicial Authorities for the case in question".¹⁰ These communications constitute the first twinning by Italy of the Indian exercise of criminal jurisdiction over the marines and their claim to immunity therefrom as the core elements of the dispute. The subsequent *notes* examined also illustrate this twinning.
- (ii) In the second paragraph of the *note verbale* of 29 February 2012 from Italy to India, fourteen days after the incident, Italy states, "State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions. The Italian Navy Military Detachment that operated in international waters on board the ship Enrica Lexie must be considered as an organ of the Italian State".¹¹ The *note verbale* in its fifth paragraph reasserts Italian exclusive jurisdiction in respect of the said military personnel, and in its penultimate paragraph it states that the marines were carrying out official functions and that their conduct "should not be open to judgement scrutiny in front of any court other than the Italian ones". In the same *note verbale*, Italy also stated that "State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions". Italy also asserted that it had exclusive jurisdiction in respect of the marines.

⁹ Paragraph 14 of the Notification and Statement of Claim, *Note Verbale* 67/438 of 16 February 2012 (Annex 10).

¹⁰ *Note Verbale* 69/465 of 17 February 2012.

¹¹ *Note Verbale* 95/553 of 29 February 2012.

- (iii) In the first paragraph of another *note verbale* dated 11 March 2013, less than a month after the incident, from Italy to India, Italy refers to the “Supreme Court decision of 18 January 2013, in which it was denied the Italian jurisdiction on the incident”.¹² In the second paragraph, Italy stated that India was in “violation of International Law obligations including the principle of immunity of jurisdiction for agents of a Foreign State and the provisions of the [UNCLOS]”. This *note verbale*, just like the others, provides the basis for an objective determination that both the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom are the core elements of the dispute. In the third paragraph of this *note verbale*, Italy states that “in the light of said decision of the Indian Supreme Court and of the lack of answer to the Note Verbale dated 6 of march ... there is an existing controversy with India concerning the provisions of said Convention and the general principles of International Law applicable to this incident”. This statement reveals that Italy did not accept the “said decision of the Indian Supreme Court” which rejected its claims of immunity for the marines and that it had jurisdiction over the “Enrica Lexie” and the marines; this statement also reveals that Italy did not accept the Indian Court’s exercise of jurisdiction over the marines. It is beyond doubt that in this *note verbale*, Italy twins the elements of the Indian exercise of criminal jurisdiction over the marines and the Italian claim to immunity therefrom as the core elements of what that country describes as “the existing controversy [dispute] with India”.
- (iv) In the *note verbale* of 7 February 2014¹³ Italy stated that “the two Italian Marines enjoy immunity from jurisdiction of Indian courts under international customary law, and that Italy has jurisdiction over the matter”.
- (v) A *note verbale* of 15 February 2014 in similar terms to the one of 7 February 2014.¹⁴
- (vi) In the *note verbale* of 10 March 2014,¹⁵ Italy stated that it expected the Indian authorities to dispose of the case in conformity with international law and “with special regard to the international rules on immunity of State officials on duty and on the exclusive jurisdiction of the flag State on the high seas”.

12. On the whole, these diplomatic communications show that, although Italy at times referred to its jurisdiction over the marines on the basis of Articles 92 and 97 of the Convention, the real issue separating the Parties and the object of Italy’s claim was the termination of the exercise by India of

¹² *Note Verbale* 89/635 of 11 March 2013.

¹³ *Note Verbale* 56/259 of 7 February 2014.

¹⁴ *Note Verbale* 67/319 of 15 February 2014.

¹⁵ *Note Verbale* 93/6446 of 10 March 2014.

its criminal jurisdiction over the marines and their claim to immunity therefrom. In these *notes*, when Italy asserts that it has jurisdiction over the “*Enrica Lexie*” and the marines, it is in fact saying that India has no jurisdiction because the marines are entitled to immunity; therefore, that assertion also relates to the issue of the immunity of the marines. Italy’s main focus was to employ immunity as the most effective means to secure the release of the marines from Indian criminal jurisdiction. No doubt Italy had this concern because at that time the marines had been arrested and detained by the Indian authorities. The marines were granted bail subject to very severe conditions: they were required to surrender their passports; remain within “the territorial limits of the City Police Commissioner, Kochi”, except to attend Court in Kollam; “stay in a building within a distance of 10 kilometres from the office of the City Police Commissioner, Kochi”; and appear before the “City Police Commissioner, Kochi” every day between 10:00 and 11:00.

B. THE NOTIFICATION AND STATEMENT OF CLAIM

13. In characterizing the dispute, the tribunal is required to isolate the real issue dividing the parties and to determine the object of the claim. In seeking to identify the object of Italy’s claim, although all relevant material must be examined, one would be forgiven for paying particular attention to Italy’s Statement of Claim.

14. Italy’s twinning of the exercise by India of criminal jurisdiction over the marines and the claim to immunity therefrom is very evident in the relief sought in Section VI of its Notification and Statement of Claim. It is noteworthy that immediately after requesting in paragraph 33(a) a declaration that India “is acting in breach of international law by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines ...”, Italy requests in the very next paragraph, 33(b), a declaration that “[t]he assertion and exercise of criminal jurisdiction by India is in violation of India’s obligation to respect the immunity of the marines as State officials exercising official functions”. Therefore, paragraph 33(b) should be read as follows: that assertion of jurisdiction, meaning the assertion and exercise of jurisdiction referred to in paragraph 33(a), violates India’s obligation to respect the immunity of the marines. By this juxtaposition of the exercise of Indian criminal jurisdiction in paragraph 33(a) and the claim in paragraph 33(b) that that exercise of criminal jurisdiction violates the immunity of the marines, Italy has specifically targeted immunity as the most effective means of terminating India’s exercise of criminal jurisdiction over the marines. Significantly, Italy does not seek a specific declaration that India’s exercise of its criminal jurisdiction over the marines violates its rights under Articles 92 and 97 of the Convention as the flag State of the “*Enrica Lexie*” or, indeed, under any other Article. Rather, in paragraphs 33(a) and 33(b) of its Notification and Statement of Claim, Italy centres its attention on the claim to the immunity of the marines as the most effective means of securing their release from Indian

criminal jurisdiction. For that reason, it is inconsequential that, as argued by the Majority, immunity is “but one of several bases” on which Italy argues that India’s exercise of its criminal jurisdiction over the marines breaches the Convention.¹⁶ What is decisive is that of the “several bases”, it is immunity that Italy has selected in paragraphs 33(a) and 33(b) as the best means of securing the release of the marines from Indian criminal jurisdiction. It is the very specific relationship between the exercise of jurisdiction in paragraph 33(a) and the claim to immunity in paragraph 33(b) that is determinative in isolating the real issue dividing the Parties and determining the object of Italy’s claim. That very specific relationship is therefore critically important in the characterization of the dispute.

15. Of course, one must not overlook Italy’s request in paragraph 33(c) of its Notification and Statement of Claim for a declaration that it “has exclusive jurisdiction over the ... Italian Marines in connection with the *Enrica Lexie* Incident”. But when that request is set against the background of the very specific request in paragraph 33(b) for a declaration that India’s exercise of its criminal jurisdiction over the marines breaches their entitlement to immunity, it takes on the character of a claim that is incidental, reflecting Italy’s confidence in its immunity claim.
16. It is entirely reasonable to seek an explanation for Italy’s concentration on the entitlement of the marines to immunity in its Statement of Claim. As noted before, the explanation is that the stark reality facing Italy at the time of the filing of its Statement of Claim was that the marines had been arrested, detained, and granted bail subject to the very severe conditions set out in paragraph 12 of this Opinion. The object of Italy’s claim was to use the marines’ claim to immunity as the most effective tool to terminate Indian criminal jurisdiction over them. Immunity is therefore a core element of the dispute dividing the Parties.
17. Not to be ignored is Italy’s request in paragraph 33(d) for a declaration that “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”. Here, Italy has in mind the threshold link for a claim to immunity, which is achieved by the exercise of “any measure of restraint” by the forum State against officials of the foreign State. In other words, in seeking this declaration, Italy’s real purpose is to argue that by virtue of the entitlement of the marines to immunity, India must not exercise “any form of jurisdiction”, “including any measure of restraint” against them. It is also telling that in paragraph 34 Italy “request[ed] the Tribunal to order India not to prosecute the criminal case against the Italian Marines and to terminate all legal proceedings connected to the *Enrica Lexie* Incident before the Indian Courts”. The rationale for this request is

¹⁶ Paragraph 239 of the Award.

that since, on Italy's case, the marines are entitled to immunity from India's criminal jurisdiction, India is obliged to terminate the criminal case it has brought against them. Here again, Italy is emphasizing its argument that on the basis of the marines' claim to immunity, India has no right to initiate or continue criminal proceedings against them and accordingly India is obliged to terminate those proceedings.

18. Notably, Italy's Statement of Claim is virtually wholly devoted to the use of the claim to immunity as the measure that would be most effective in extricating the marines from Indian criminal jurisdiction.

C. THE WRITTEN AND ORAL SUBMISSIONS OF THE PARTIES

19. A curious feature of this case is that the Majority cites¹⁷ a passage from Italy's Memorial, which illustrates that the dispute is about the exercise by India of its criminal jurisdiction over the marines and their claim to immunity therefrom. As noted before, in paragraph 1.14 of its Memorial, Italy states that "reduced to its core, the dispute between the Parties is a dispute about jurisdiction and immunity from jurisdiction". Nothing could be plainer: in Italy's view, the dispute has two core elements *viz*, first, the exercise by India of its criminal jurisdiction over the marines and, second, their claim to immunity therefrom; in this statement, Italy twins questions of jurisdiction and immunity as central and inseparable elements of the dispute.
20. The Majority relies on passages from Italy's Notification and Statement of Claim as well as its Memorial in which Italy only refers to the question of which party is entitled to exercise jurisdiction over the marines as constituting the dispute between the Parties. For example, the Majority cites the statement in paragraph 1.1 of Italy's Memorial that the dispute was about which State had jurisdiction over the M/V "Enrica Lexie" and the Italian marines. The Majority also cites¹⁸ five other passages from Italy's pleadings to the same effect. For its own part, India did not describe the dispute in express terms in its Counter-Memorial. But in the oral proceedings, India submitted that "the core issue the real subject matter of the dispute is the question whether the marines are entitled to immunity from criminal proceedings arising out of the Enrica Lexie incident".¹⁹ The Arbitral Tribunal is therefore faced with a statement from Italy and one from India indicating their view that the dispute is about the exercise by India of its criminal jurisdiction over the marines and the marines' claim to immunity therefrom, as well as statements from Italy that the dispute only concerns which State has jurisdiction over the marines and the Incident. Italy's position is therefore

¹⁷ Footnote 326 of the Award.

¹⁸ Footnote 325 of the Award.

¹⁹ Hearing Transcript, 13 July 2019, 107:5-110:8.

not consistent, as is argued by the Majority.²⁰ However, the Arbitral Tribunal is bound to look beyond the subjective description of the dispute by the Parties and apply the law relating to the identification and characterization of a dispute. The most important requirement in that exercise is the duty to determine on an objective basis the dispute between the parties by “isolate[ing] the real issue [dividing the parties] and identify[ing] the object of [Italy’s] claim”.²¹ The Arbitral Tribunal must therefore examine all the pertinent material at hand if it is to correctly isolate the real issue that is in dispute. In this case, there is, regrettably, a basis for concluding that rather than making an objective determination as to what constitutes the dispute, the Majority has attached too much weight to the subjective characterization of the dispute by Italy and too little to India’s characterization of the dispute. For example, in the Section of the Award headed “Characterisation of the Dispute by the Arbitral Tribunal”, the Majority makes no mention of India’s submission that “the core issue the real subject matter of the dispute is the question whether the marines are entitled to immunity from criminal proceedings arising out of the Enrica Lexie Incident”.²²

D. INFERENCES DRAWN FROM THE CONDUCT OF A PARTY OF ITS OPPOSING VIEW IN A DISPUTE

21. The lament of the Majority that neither Party has characterized the dispute “as one primarily relating to immunity” is certainly puzzling; it overlooks many important aspects of the law relating to the identification of disputes; more specifically, it misses the point, well developed in case law, that the position of the parties may be inferred from their conduct.
22. In *Land and Maritime Boundary between Cameroon and Nigeria*,²³ it was argued by Cameroon that Nigeria had not made any explicit challenge to the whole of the boundary. However, the Court held that the position of the parties does not have to be stated “*expressis verbis*” and that a party’s opposing view in a dispute could be inferred from conduct, “whatever the professed view of that party may be”.²⁴ In the case between Switzerland and Nigeria²⁵ before the ITLOS, it was argued by Switzerland that Nigeria did not respond to its position relating to the interception, arrest and

²⁰ Paragraph 238 of the Award.

²¹ *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30.

²² Hearing Transcript, 13 July 2019, 107:5-110:8.

²³ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275; also referred in footnote 368 of this Award citing *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 (forthcoming).

²⁴ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89.

²⁵ See also *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 (forthcoming); *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections Judgment, ITLOS Reports 2016.

detention of the vessel, “San Padre Pio”. However, ITLOS, holding that Nigeria’s views could be inferred from conduct, stated that, “[t]he fact that the Nigerian authorities intercepted, arrested and detained the M/T “San Padre Pio” and commenced criminal proceedings against it and its crew members indicates that Nigeria holds a different position from Switzerland on the question whether the events that occurred on 22-23 January 2018 gave rise to the alleged breach of Nigeria’s obligations under the Convention”.²⁶

23. In the instant case, not only have the Parties addressed the question of the immunity of the marines in their pleadings and the oral hearing as a core issue in the dispute, but their conduct also provides evidence as to the existence of a dispute, of which the question of immunity is a core element. The marines consistently claimed that they were immune from Indian criminal jurisdiction and India consistently rejected that claim by exercising jurisdiction over them both through their law enforcement personnel and their Judiciary. This refrain of claim and rejection provides testimony as to the centrality of the question of the immunity of the marines in the dispute between the Parties.
24. On 15 February 2012, the very day of the incident, the Kerala Police started investigating the complaint about the killing of the two Indian fishermen – this was an investigation into the crime of murder. On 16 February 2012, an Indian party of thirty-six police officers boarded the “Enrica Lexie”. The Coast Guard told the marines that the Incident came “under the jurisdiction of their territorial waters”.²⁷ Following a discussion between the Indian officials and the marines, Sergeant Latorre maintained that the VPD is “exclusively answerable to Italian Judicial Authorities” and that Italian authorities were investigating the incident.²⁸ Sergeant Latorre then gave the boarding party a written document which included the statement that “[u]nder International Law the detachment is afforded with judicial immunities as internationally recognised in respect of military forces in transit”. Nonetheless the Indian boarding party “‘formally detained’ the ‘Enrica Lexie’”²⁹ and continued to put “pressure ... on the crew and master to furnish details of the weapons and surrender them”.³⁰ The Indian Ministry of External Affairs instructed Commandant Kumar “to bar the ‘Enrica Lexie’ from leaving the Kochi anchorage and to bring the ship into port”.³¹

²⁶ See also *M/T “San Padre Pio” (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019 (forthcoming), p. 16, paras 57-58; *M/V “Norstar” (Panama v. Italy)*, Preliminary Objections Judgment, ITLOS Reports 2016, p. 44, para. 69.

²⁷ Paragraph 158 of the Award.

²⁸ Paragraph 159 of the Award.

²⁹ Paragraph 162 of the Award.

³⁰ Paragraph 160 of the Award.

³¹ Paragraph 162 of the Award.

25. This claim of immunity by the marines and its rejection by the Indian exercise of jurisdiction over them unmistakably shows that from the day after the incident, the question of immunity from India's criminal jurisdiction had become engaged as a central issue in the dispute between the Parties. From that time, properly analysed, every exercise of jurisdiction over the marines, whether by India's law enforcement personnel or its Judiciary, proceeds on the basis that the claim of immunity was rejected by India; and, in light of the formal nature of the claim of immunity by the marines on 16 February 2012, evidenced by its presentation in a written form, this conclusion applies even if the exercise of jurisdiction was not preceded by an explicit claim for immunity. This is a classic illustration of a dispute inferred from the conduct of Parties in the form of a claim by one Party and the demonstration by the other Party of its opposition through its conduct.
26. Set out below are illustrations of this phenomenon of India's exercise of criminal jurisdiction over the marines in the face of their claim to immunity from that jurisdiction, showing that the legal requirement of positive disagreement for the existence of a dispute has been met.
- (i) On 16 February 2012, the Indian officials required the "Enrica Lexie" to enter the port of Kochi.³²
 - (ii) On 19 February 2012, the Indian police "disembarked Captain Vitelli for questioning" and the Indian mercantile marine department boarded the vessel to commence investigations.³³
 - (iii) On the same day, "the Kerala police escorted the Marines from the 'Enrica Lexie' and arrested them ... 'on an allegation of murder'."³⁴
 - (iv) On 20 February 2012, the "Enrica Lexie", obviously on the instruction of the Indian Coast Guard, moved from Kochi oil terminal to another position in Indian internal waters, with fifteen Indian policemen remaining on board.³⁵
 - (v) On 1 March 2012, the marines challenged their detention before the "Chief Judicial Magistrate in Kollam on grounds of safety concerns and their immunity ..." and on 5 March 2012 "the Chief Judicial Magistrate ordered that the marines be transferred to 'judicial custody' in the central prison ...".³⁶

³² Paragraph 164 of the Award.

³³ Paragraph 167 of the Award.

³⁴ Paragraph 168 of the Award.

³⁵ Paragraph 170 of the Award.

³⁶ Paragraph 173 of the Award.

- (vi) On 2 May 2012, the Supreme Court ordered that the Government of Kerala and its authorities shall allow the “Enrica Lexie” to commence her voyage.³⁷
- (vii) On 9 May 2012, the Supreme Court gave leave for the marines to apply for bail and the bail application was rejected by the Chief Judicial Magistrate in Kollam on 11 May 2012.³⁸
- (viii) On 18 May 2012, the Kerala Police concluded their investigation and filed a “Final Report” (or “Charge Sheet”) against the marines, referring to the crime of murder.³⁹
- (ix) On 19 May 2012, the Court of the Sessions Judge, Kollam, rejected another bail application by the marines.⁴⁰
- (x) The marines were detained in custody until 30 May 2012, when they were granted bail by the High Court of Kerala subject to certain conditions.⁴¹
- (xi) On 18 January 2013, the Supreme Court found that the Union of India had jurisdiction over the marines.⁴²
- (xii) On 22 February 2012, Italy and the marines filed Petition 4242 in the High Court of Kerala. They contended that India did not have jurisdiction, Italy had exclusive jurisdiction “and that in any event, under international law, the marines had immunity from Indian criminal jurisdiction”.⁴³ On 29 May 2012, the High Court of Kerala dismissed the Writ Petition, finding that India and the Kerala authorities had jurisdiction, and in what can only be described as a blunt rejection of immunity, the Court stated that the Incident “can be treated only as a case of brutal murder and can in no way be masqueraded as a discharge of the sovereign function”.⁴⁴

27. There are many other examples of the centrality of the issue of immunity from the exercise by India of its criminal jurisdiction in the disagreement between the Parties that is reflected in the rejection by India’s law enforcement authorities and Judiciary of the claim to immunity from that jurisdiction. It is difficult to understand how in light of that overwhelming evidence the Majority can maintain that the dispute between the Parties did not encompass the question of the marines’ claim to

³⁷ Paragraph 172 of the Award.

³⁸ Paragraph 174 of the Award.

³⁹ Paragraph 175 of the Award.

⁴⁰ Paragraph 175 of the Award.

⁴¹ Paragraph 176 of the Award.

⁴² Paragraph 178 of the Award.

⁴³ Paragraph 179 of the Award.

⁴⁴ Paragraph 180 of the Award.

immunity from Indian jurisdiction. The Indian rejection of the claim of immunity through the exercise by its law enforcement personnel and Judiciary of criminal jurisdiction over the marines is a concrete and graphic reflection of the core elements of the dispute between the Parties.

28. It is also difficult to understand why the Majority makes so much of the lack of a reference to the question of immunity in the section of India's Counter-Memorial entitled, "What the Case is really about: The Killing of Its Nationals on the St. Antony". Here, India as the aggrieved Party, whose nationals have been killed, understandably focuses on that horrific incident. There was no need for India to include in that section of its Counter-Memorial any reference to questions of immunity, because its conduct, as discussed in this Section of the Opinion, unambiguously showed that by its exercise of jurisdiction over the marines, it rejected their claims of immunity. Here again, the Arbitral Tribunal should be seeking to isolate on an objective basis the real issue dividing the Parties and to identify the object of Italy's claim. In that regard, it is of no consequence that India did not refer to the question of immunity in the section of its Counter-Memorial cited above. The Majority's reasoning is scarcely persuasive.

E. CONCLUSION

29. In light of the inconsistency in Italy's position on the identification of the dispute and the opposing views of India on that subject, there is a heightened obligation on the Arbitral Tribunal to examine all the pertinent evidence so as to isolate on an objective basis the real issue and identify the object of Italy's claim. An examination of this evidence shows that the issue of the immunity of the marines is a core element of the dispute, which is characterized as the question of the exercise by India of its criminal jurisdiction over the marines in the face of their claim to immunity therefrom.

III. THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE ISSUE OF THE IMMUNITY OF THE MARINES

30. The significance of a jurisdictional clause such as Article 288, paragraph 1, of the Convention is that it demarcates the boundaries of a court's or tribunal's jurisdiction over a dispute. By conferring on a court or a tribunal jurisdiction over a dispute concerning the interpretation or application of a treaty, a jurisdictional clause reflects the limits of a State's consent to a court or tribunal's jurisdiction over that dispute. Consequently, if the question of the immunity of the marines does not concern the interpretation or application of the Convention, it would be a breach of India's consent to the jurisdiction of the Arbitral Tribunal for it to pronounce on that question. In other words, the Arbitral Tribunal would have no jurisdiction to determine that question.

31. The Majority devoted five paragraphs⁴⁵ to consider whether it had jurisdiction over the issue of the immunity of the marines. Although there is no provision in the Convention that expressly refers to the kind of immunity claimed by the marines, Italy argued that the references to “other rules of international law” in Article 2, paragraph 3, of the Convention, “the rights and duties of other States” in Article 56, paragraph 2, of the Convention, and “other pertinent rules of international law” in Article 58, paragraph 2, of the Convention, “import immunity by *renvoi*”;⁴⁶ therefore, Italy maintains that the issue of the immunity of the marines concerns the interpretation and application of the Convention. The Majority concluded that these Articles were “not pertinent and applicable in the present case”⁴⁷ because, while they apply to the territorial sea and the exclusive economic zone, India only enforced its jurisdiction in its internal waters and on land. Italy also argued that the reference in Article 297, paragraph 1, subparagraph (a), of the Convention to “other rules of international law not incompatible with this Convention” was a *renvoi* to general international law. The Arbitral Tribunal found that this Article “does not pertain to the exercise of freedoms, rights and uses of the sea ‘in contravention of ... the laws and regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention’.”⁴⁸ Thus, the Majority did not conduct any enquiry, and therefore did not make any finding, as to whether customary international law was imported into the Convention on the basis of the Articles relied on by Italy. As a matter of law, those Articles do not constitute a *renvoi* to customary international law. The ICJ’s decision in *Immunities and Criminal Proceedings*, discussed in paragraph 36 of this Opinion, supports that conclusion. Moreover, India was right in its submission that while the Articles may be relied on for the purpose of interpreting the relevant provisions of the Convention, they cannot be used as a basis for ascertaining whether the Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines.⁴⁹ In other words, the Articles are relevant as part of the applicable law, but they have no relevance for jurisdictional purposes.
32. The Arbitral Tribunal correctly decided that Articles 95 and 96 of the Convention devoted to warships and ships used for government non-commercial service were “not applicable to Italy’s claim”.⁵⁰
33. Not having examined and determined whether the Convention “provide[s] a basis for entertaining an independent immunity claim under general international law”, the Majority is not in a position

⁴⁵ Paragraphs 797-802 of the Award.

⁴⁶ Italy’s Memorial, paras 8:17, 11.1.

⁴⁷ Paragraph 798 of the Award.

⁴⁸ Paragraph 802 of the Award.

⁴⁹ Hearing Transcript, 12 July 2019, 86: 8-14; 88: 18-23.

⁵⁰ Paragraph 799 of the Award.

to conclude that “the Convention may not provide [such] a basis”. The failure of the Majority to carry out such an examination and arrive at a conclusion based on it explains the hesitancy and uncertainty in its finding that “while the Convention may not provide a basis for entertaining an independent immunity claim under general international law, the Arbitral Tribunal’s competence extends to the determination of the issue of the immunity of the Marines that necessarily arises as an incidental question in the application of the Convention”.⁵¹ The speculation that is all too evident in that conclusion provides the basis for the Majority’s sortie into the murky waters of the law on incidental questions.

34. There is another troubling aspect of the Majority’s finding.⁵² The Majority speaks of “an independent immunity claim under general international law”. But independent of what? Not of jurisdiction, since immunity, as we are reminded in the Separate Opinion of Judges Higgins, Kooijmans, and Buergethal in the *Arrest Warrant* case, is but a “common short-hand phrase for immunity from jurisdiction”.⁵³ A claim to immunity is therefore, definitionally incapable of being independent. It will always relate to jurisdiction (and in some cases to enforcement). In this case, the immunity claimed is immunity from the exercise by India of its criminal jurisdiction over the marines.
35. It is important for the position taken in this Opinion to establish that the Arbitral Tribunal has no jurisdiction to address the issue of the immunity of the marines, because that issue does not concern the interpretation or application of the Convention. The uncertain and hesitant manner in which this matter has been addressed by the Majority is wholly inappropriate.
36. The ICJ’s recent decision on immunity in *Immunities and Criminal Proceedings*⁵⁴ is instructive. The Arbitral Tribunal is, of course, not bound by that decision, but the approach taken by the Court is persuasive. Essentially, the Court had to determine whether the issue of immunity arose under the United Nations Convention against Transnational Organized Crime. The Court found that, even though Article 4 of that Convention obliged States Parties to discharge their obligations under that Convention in a manner consistent with the principle of sovereign equality, the reference to that principle was not a *renvoi* to immunity under general international law. It made that finding even though it is generally accepted that the principle of sovereign equality of States provides the

⁵¹ Paragraph 809 of the Award (My Emphasis).

⁵² Paragraph 809 of the Award.

⁵³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergethal, I.C.J. Reports 2002, p. 3 at p. 64, para. 3.

⁵⁴ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 292.

jurisprudential foundation for the law of State immunity. Indeed the Court itself recalled that “... the rules of State immunity derive from the principle of sovereign equality of States”.⁵⁵ In *Al-Adsani* the European Court of Human Rights held that “sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State”.⁵⁶ The ILC’s Special Rapporteur on Immunity of State Officials from Foreign Criminal Jurisdiction also emphasized that the basis for the immunity of States, reflected in the Latin tag, *par in parem non habet imperium*, is the principle of sovereign equality of States. Despite this well-established connection between the law of immunity and the principle of the sovereign equality of States, the Court nonetheless held that Article 4 “[did] not refer to the customary international law rules, [on] State immunity that derive from the principle of the sovereign equality [of States]”.⁵⁷ Similarly, in this case the Articles relied on by Italy do not refer to the customary international law rules of immunity of State officials.

37. This approach to determining the Court’s jurisdiction is deferential to, and protective of, the limits of a State party’s consent to jurisdiction in a compromissory clause conferring on the Court jurisdiction over a dispute concerning the interpretation or application of a treaty. In this case, the Majority has not been deferential to and protective of the limits of India’s consent to the Arbitral Tribunal’s jurisdiction over the dispute.
38. Although the Majority correctly concludes that Articles 95 and 96 of the Convention “are not applicable to Italy’s claim”, these two articles have another significance that the Majority has failed to emphasize. There is a strong *a contrario* inference to be drawn from the fact that the only provisions in the Convention on immunity do not relate to the kind of immunity claimed by the marines: the inference is that the drafters of the Convention did not intend that the Convention should apply to types of immunity other than the complete immunity in respect of warships and ships used only on government non-commercial service. Those other types of immunity would include immunities for State officials like the marines. The inference is particularly strong because the provisions of Articles 95 and 96 of the Convention were included verbatim in Articles 8 and 9 of the 1958 Convention on the High Seas. The drafters of UNCLOS III therefore had ample time in the Convention’s negotiating history of eight years to modify those provisions, if they so wished, to include the immunities of State officials. The failure to do so strengthens the inference that the clear

⁵⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 321, para. 93.

⁵⁶ *Al-Adsani v. The United Kingdom*, Application No. 35763/97, [2001] ECHR 752, Judgment of 21 November 2001, p. 17, para. 54.

⁵⁷ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 321, para. 93.

intention of the drafters was to exclude those qualified and functional immunities from coverage by the Convention. Therefore, it is not merely that, as stated by the Majority “these two Articles are not applicable to Italy’s claim”;⁵⁸ rather, it is that the provisions of Articles 95 and 96 of the Convention give rise to an irresistible *a contrario* inference that the Convention does not cover the kind of immunities claimed by the marines.

39. As has been shown in Part I, the issue of immunity of the marines is a core element of the dispute dividing the Parties. A core element of a dispute cannot at the same time be an incidental question in relation to that dispute.
40. The Majority’s reasoning appears to be that the issue of the immunity of the marines is incidental because “the Arbitral Tribunal could not provide a complete answer to the question as to which Party may exercise jurisdiction without incidentally examining whether the Marines enjoy immunity”.⁵⁹ Although this appears to be the reasoning, it is noticeable that nowhere in the Award does the Majority attempt to identify the characteristics of an incidental question. Incidentally, it is not the examination of the issue of the immunity of the marines that is claimed to be incidental; rather, it is that issue itself that is claimed to be incidental.
41. There is no main issue in this case; there is no incidental issue in this case. Rather, there is one issue: the question of the Indian exercise of criminal jurisdiction over the marines in the face of their claim to immunity therefrom. Immunity is central, and not incidental, to the dispute between the Parties. If the Majority is right that the dispute, as characterized by it, cannot be resolved without examining the issue of the immunity of the marines, then that would suggest that that issue is anything but an incidental question;⁶⁰ it would also flatly contradict the Majority’s theory in paragraph 235 of the Award that on Italy’s claim, the dispute could be resolved without determining the issue of the immunity of the marines.

A. THE LAW RELATING TO INCIDENTAL QUESTIONS

42. Even if the immunity of the marines from the exercise of Indian jurisdiction is an incidental question, *quod non*, the Majority has misdirected itself as to the applicable law.
43. Generally, the four cases that will be examined below demonstrate that a determination as to whether a question is incidental calls for a proper characterization of the dispute dividing the Parties and a

⁵⁸ Paragraph 799 of the Award.

⁵⁹ Paragraph 808 of the Award.

⁶⁰ Paragraph 808 of the Award

careful separation of a question that is incidental from the real issue in the dispute. A subset of the analysis of the law on incidental questions in the cases relating to the Convention is that the need to ensure that the question is indeed incidental becomes more urgent because the Convention is the result of a package deal, and conferring jurisdiction on a court or tribunal over a question that does not fall within the provisions of the Convention may disturb the balance in the compromise solutions that were reached in the negotiations that led to its adoption. This is particularly the case in relation to the exceptional regime for the compulsory settlement of disputes under Part XV of the Convention.

44. The first case is the *Case Concerning Certain German Interests*.⁶¹ The Majority relies on this case. In that case, Germany brought a claim against Poland under Article 23 of the Geneva Convention, which conferred jurisdiction on the PCIJ over differences of opinion respecting the construction and application of Articles 6 to 23 of that Convention. Article 6 prohibited Poland from expropriating property of German nationals in Polish Upper Silesia. Germany argued that Poland had contravened Article 6 by expropriating the factory of a German national. Poland responded that the national did not own the nitrate factory because it had been transferred to him in violation of Article 256 of the Treaty of Versailles, which provided that: “Powers to which German territory is ceded shall acquire all property ... situated therein belonging to the German Empire ...”. The PCIJ had to determine whether it had the competence to interpret Article 256 of the Treaty of Versailles, over which it had no jurisdiction. The Court held that:

It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the Geneva Convention. Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction.

45. Three comments are in order. First, although this case has been cited by the Majority as setting out the law on incidental questions, it is noteworthy that the PCIJ confined its findings to the interpretation of Article 256 of the Treaty of Versailles, and even when the Court spoke more generally, it also confined its analysis to the interpretation of other treaties when “such interpretation must be regarded as incidental to a decision on a point in regard to which it had jurisdiction”.⁶² The PCIJ appeared to have focused more on the interpretation rather than the application of the Treaty of Versailles. It is not uncommon for courts and tribunals to interpret treaties other than the one over which they have jurisdiction in discharging their judicial function. Second, the analysis in the case

⁶¹ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, p. 18.

⁶² My Emphasis.

suggests that an incidental question is one over which a court or tribunal does not have jurisdiction, but the determination of which is necessary for the resolution of the dispute concerning the interpretation or application of the Convention. The Court held that the application of the Geneva Convention was “hardly possible” without interpreting Article 256 of the Treaty of Versailles. Thus, the word “incidental” does not bear its ordinary dictionary meaning of a minor accompaniment – an accompaniment, yes, but certainly not a minor one. Although in the first part of the quotation the Court speaks of “preliminary or incidental” questions, in its conclusion in the last sentence it only refers to an interpretation that is incidental. An incidental question is not necessarily a preliminary question nor is a preliminary question necessarily an incidental question. However, the PCIJ appears to have used the terms interchangeably, although settling on incidental in its conclusion. In terms of the facts of the case, the question raised by Article 256 of the Versailles Convention would seem to be better described as preliminary or ancillary. Third, there is noticeably absent from the PCIJ’s decision in this case any significant examination of the relationship between the incidental question over which the Court had no jurisdiction and the dispute over which it had jurisdiction; in particular, there is no discussion as to whether the incidental question was the real issue dividing the Parties; if it warranted that description, the Court would have had no jurisdiction over it since it did not relate to the interpretation or application of the Geneva Convention. The later cases show that since a court or tribunal would normally not have jurisdiction over the incidental question, it is of the greatest importance to ensure that the question is properly characterized as incidental.

46. The second case is *Chagos Marine Protected Area Arbitration*.⁶³ It has not been cited by the Majority in its characterization of the dispute. In that case, Mauritius submitted, *inter alia*, that the United Kingdom was not entitled to declare a marine protected area around the Chagos Archipelago because it was not the coastal State within the meaning of Articles 2, 55, 56, and 76 of the Convention. The tribunal made three important pronouncements. In the first, it held that “as a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a Court or Tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it”.⁶⁴ That finding is consistent with the reasoning in the PCIJ case of *Case Concerning Certain German Interests*. In the second pronouncement, it held that “[w]here the ‘real issue in the case’ and the ‘object of the claim’ ... do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated

⁶³ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015.

⁶⁴ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, p. 90, para. 220.

by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1)".⁶⁵ In the third, it held that "[t]he Tribunal does not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention".⁶⁶ Although these pronouncements provide a valuable insight into the characteristics of an incidental question, they are arguably *obiter dicta*, since the *ratio* of the case was that the real issue dividing the parties was a question of land sovereignty which did not fall within the provisions of the Convention, and over which therefore, the tribunal had no jurisdiction. Thus, the land sovereignty issue, far from being an incidental question, was the real issue dividing the parties. The tribunal declined jurisdiction for that reason. It also stressed the importance of the proper characterization of an issue as an incidental question. In relation to Mauritius' argument that Article 298, paragraph 1, subparagraph (a) (i), of the Convention could be read *a contrario*, the tribunal concluded that "... [a]t most, an *a contrario* reading of the provision supports the proposition that an issue of land sovereignty might be within the jurisdiction of a Part XV Court or Tribunal if it were genuinely ancillary to a dispute over a maritime boundary or a claim of historic title".⁶⁷ Here, the tribunal was emphasizing the importance of not confusing an incidental question with the real issue dividing the parties.

47. The *Chagos* tribunal made another finding that is pertinent to the instant case. It held that reading Article 298, paragraph 1, subparagraph (a)(i), of the Convention as conferring jurisdiction over issues of land sovereignty "would do violence to the intent of the drafters of the Convention to craft a balanced text and to respect the manifest sensitivity of States to compulsory settlement of disputes relating to sovereign rights and maritime territory".⁶⁸ In *Chagos Marine Protected Area Arbitration*, the Annex VII tribunal exhibited appropriate sensitivity to the negotiation of the Convention as a package deal on the basis of which a balanced text was achieved. It declined jurisdiction because territorial sovereignty did not fall within the provisions of the Convention. The Majority should have exhibited the same sensitivity to the question of the immunity of the marines which, like matters of land sovereignty, is the real issue in dispute and does not fall within the provisions of the Convention.

⁶⁵ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, p. 90, para. 220.

⁶⁶ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 221.

⁶⁷ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, p. 89, para. 218 (My Emphasis).

⁶⁸ PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 219.

48. The third case, the *South China Sea Arbitration*, is cited by the Majority. In this case, which involved issues of maritime entitlements and activities in the South China sea, one of the questions was whether the dispute concerned sovereignty over certain maritime features and was therefore not a matter concerning the interpretation or application of UNCLOS. The arbitral tribunal had to determine whether deciding the Philippines' claim would have required it first to give a decision explicitly or implicitly on the issue of sovereignty and whether the true objective of the claim by the Philippines was to advance its position in the dispute between the parties on sovereignty.⁶⁹ The arbitral tribunal determined both issues in the negative because it was of the view that the Philippines' claim did not expressly or impliedly require it to rule on issues of land sovereignty.⁷⁰ In another issue, the tribunal, considering a submission of the Philippines, held that it had jurisdiction, but made it clear that, had the tribunal found that a certain maritime feature claimed by China within 200 nautical miles of the relevant areas was an island and therefore able to generate an entitlement to an exclusive economic zone and continental shelf, the tribunal would have had to decline jurisdiction over the dispute.⁷¹

49. The fourth decision on incidental questions is the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)* (hereinafter "*Ukraine v. Russia*").⁷² This case was not cited by the Majority. Ukraine made certain claims against Russia, which argued that the tribunal had no jurisdiction over the claims because the dispute between the parties related to Ukraine's claim to sovereignty over Crimea and that such a dispute did not concern the interpretation or application of the Convention. In upholding the Russian submission, the tribunal reasoned that there was a dispute concerning territorial sovereignty over Crimea, which was not, as argued by Ukraine, ancillary to the dispute concerning the interpretation or application of the Convention. In particular, the tribunal held that the dispute concerning sovereignty over Crimea was not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention; rather, it was a prerequisite to the decision on a number of claims made by Ukraine. The tribunal therefore ruled that the question of land sovereignty over Crimea was the real issue in

⁶⁹ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 153.

⁷⁰ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 153.

⁷¹ PCA Case No. 2013-19: *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award of 12 July 2016, para. 711.

⁷² PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020.

dispute and that it had no jurisdiction because that issue did not concern the interpretation or application of the Convention.⁷³

B. CONCLUSION

50. The Majority's baseless conclusion – “while the Convention may not provide a basis for entertaining an independent immunity claim under general international law, the Arbitral Tribunal's competence extends to the determination of the issue of immunity of the marines that necessarily arises as an incidental question in the application of the Convention” – is an error of law that invalidates the subsequent decisions that are founded on it. These decisions are the conclusion that the Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines as an incidental question, the examination of the immunity *ratione materiae* of the marines under customary international law, and the conclusion that the marines are entitled to immunity in relation to the acts they committed during the incident of 15 February 2012. Had the Majority enquired and determined whether any Article in the Convention imported the customary rules on immunity by way of *renvoi*, it would have found that there was no *renvoi* to customary international law; consequently, the issue of the immunity of the marines did not concern the interpretation or application of the Convention. Since that issue is a core element of the dispute, the Arbitral Tribunal was obliged to decline jurisdiction over the dispute, in which event the examination of the issue of the immunity of the marines as an incidental question would not have arisen.
51. In any event, the Majority misdirected itself as to the law on incidental questions: the issue of the immunity of the marines is not an incidental question.
52. There is a major difference between the *Case Concerning Certain German Interests of 1925* and the three later cases, which all dealt with the issue of sovereignty as an incidental question under the Convention. In the 1925 case, the PCIJ decided that its competence extended to the issue raised in Article 256 of the Treaty of Versailles, over which it had no jurisdiction, on the ground that the determination of that issue was necessary for the resolution of the dispute under the Geneva Convention, over which it had jurisdiction. However, in the three later cases, all under Part XV of UNCLOS, the Annex VII tribunals went beyond the approach adopted by the PCIJ, for whom the only criterion for competence over an incidental question was that that question was necessary for the resolution of the dispute. The Annex VII tribunals did not simply decide that sovereignty was an incidental question, the determination of which was necessary for a resolution of the various disputes, and then conclude that their jurisdiction extended to that question. Rather, the approach

⁷³ PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020.

adopted by the tribunals was to objectively isolate the real issue dividing the parties, ascertain the relationship of the incidental question to that issue and exhibit appropriate sensitivity to the balance reflected in the compulsory dispute settlement regime in Part XV. Today, a tribunal deciding the 1925 *Case Concerning Certain German Interests* would at least have considered whether the issue raised by Article 256 of the Treaty of Versailles was the real issue dividing the parties; an affirmative answer to that question would oblige the tribunal – as it did the Annex VII tribunals in the *Chagos* case and the case between Ukraine and Russia – to decline jurisdiction over the case on the ground that the dispute, of which the issue in Article 256 of the Treaty of Versailles was a core element, did not relate to the interpretation or application of the Geneva Convention. The 1925 *Case Concerning Certain German Interests* therefore offers little help in determining whether this Arbitral Tribunal has jurisdiction over the issue of the immunity of the marines as an incidental question under the Convention. It can only offer guidance if it is read subject to the three later cases. The premise on which the doctrine of the incidental question, as reflected in the 1925 case operates, is not applicable to the instant case: the parties impliedly consent to the tribunal extending its jurisdiction over the incidental question (over which it has no jurisdiction) because it is necessary for the determination of the dispute (over which it has jurisdiction); the premise does not apply because in the instant case, the Parties cannot be said to have impliedly consented to the extension of the Arbitral Tribunal’s jurisdiction over the so-called incidental question, because it is in fact the real issue in dispute and therefore the Arbitral Tribunal has no jurisdiction since that issue, which is outside the Convention, does not concern its interpretation or application.

53. The various Annex VII tribunals’ treatment of the issue of sovereignty as an incidental question shows that it is vital to have a proper characterization of the dispute in order to determine whether a so-called “incidental question” is genuinely ancillary to the dispute over which the tribunal has jurisdiction. In this case, there is a dispute about the issue of the immunity of the marines. That dispute is not ancillary to the dispute between the Parties concerning the exercise by India of criminal jurisdiction over the marines. It is, to use the language in *Chagos Marine Protected Area Arbitration*, “the real issue” dividing the parties, or to use the language in *Ukraine v. Russia*, at the “heart of ...”⁷⁴ or, at the “front and centre”⁷⁵ of that dispute.

54. The issue of the immunity of the marines does not fall within the provisions of the Convention, as such, it does not concern the interpretation or application of the Convention; therefore, the Arbitral

⁷⁴ PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 161, citing the submission of the Russian Federation.

⁷⁵ PCA Case No. 2017-06: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 192.

Tribunal has no jurisdiction over that issue which, so far from being an incidental question, is a core element of the dispute between the Parties. Consequently, the Arbitral Tribunal was obliged to decline jurisdiction over the dispute.

IV. ASSUMING THAT THE ARBITRAL TRIBUNAL HAS JURISDICTION OVER THE ISSUE OF IMMUNITY OF THE MARINES FROM THE EXERCISE OF INDIAN CRIMINAL JURISDICTION, DO THE MARINES ENJOY IMMUNITY *RATIONE MATERIAE*?

55. The Opinion now proceeds to consider the immunity *ratione materiae* of the marines, but in light of the Opinion's conclusions in Parts I and II, it does so only in the interest of completeness.

A. THE STATE OF THE LAW ON IMMUNITY

56. While some aspects of the law on immunity, whether of States and their property or of State officials, are fairly well established as reflecting customary international law, there remain areas that do not have that status. In 2004, the United Nations adopted the United Nations Convention on Jurisdictional Immunities of States and their Property. Sixteen years afterwards, that Convention has only received twenty two of the thirty ratifications required for entry into force, although it must be acknowledged that some of its provisions, and, indeed, the Convention itself, are seen as reflecting customary international law.⁷⁶ While Italy has ratified the Convention, India has signed but not ratified it.

57. The ILC has been working for thirteen years on draft Articles on the Immunity of State officials from foreign criminal jurisdiction. The law on this topic is not as clear-cut as the Majority makes out in its reference to the Commission's "uncontroversial premise" that "the acts of State officials performed in an official capacity are subject to immunity".⁷⁷ Indeed, one State, Poland,⁷⁸ in commenting on the Report of the International Law Commission at its Sixty Seventh Session (2015), concluded that the question of the immunity of State officials was not regulated by general international law and that the entire matter was "... not so much the subject of codification, [but was one of] ... 'the progressive development of international law'".⁷⁹

⁷⁶ In *Jones v. Minister of Interior of Kingdom of Saudi Arabia* [2006] 2 WLR 70, p. 23, para. 47, Lord Hoffman described the Convention as a codification of the law of State immunity. See also *Oleynikov v. Russia* no 3670/04 Judgment on March 14 2013 in which the European Court of Human Rights expressed the view that the 2004 Convention applied as customary international law to a State that was not a party to that Convention.

⁷⁷ Paragraph 845 of the Award.

⁷⁸ Warsaw, 27 April 2015 Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on the immunities of State officials from foreign criminal jurisdiction.

⁷⁹ Warsaw, 27 April 2015 Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the

58. The aspect of the law on immunities that has the greatest level of certainty as a customary rule is that the troika – the Head of State, Head of Government, and Minister of Foreign Affairs – enjoys full personal immunity; for all else, there is either a lower degree of certainty or no certainty.
59. The approach that the Majority has taken in its analysis is traditional: the marines are State officials and therefore enjoy immunity under customary international law because they acted in an official capacity. In that regard, the Majority relies on the draft articles of the International Law Commission on Immunity of State Officials from Foreign Criminal Jurisdiction. However, the novel context in which the claim to immunity arises in this case calls for a different approach.
60. This is far from being the usual case where the acts of an official and a determination as to whether they were carried out in an official capacity are the only considerations. Rather, this is a case in which the acts of the State also influence the determination whether the marines enjoy immunity *ratione materiae*. The immunity of a State official is in large measure a reflection of the immunity of the State, and “the functional immunity of (former) foreign State official is often approached as a corollary of the rule of State immunity”.⁸⁰ There are many dicta to that effect. Thus in *Certain Questions of Mutual Assistance in Criminal Matters*, the ICJ, referring to a reformulated claim of Djibouti in respect of the Procureur of the Republic and Head of National Security, held that “such a claim is in essence a claim of immunity for the Djiboutian State, from which the Procureur de la République ... would be said to benefit”.⁸¹ In *Propend Finance Limited v. Sing*, the United Kingdom Court of Appeal held that “the protection afforded by the [State Immunity Act] to States would be undermined if employees, officers or ... ‘functionaries’ could be sued as individuals for matters of State conduct in respect of which the State they were serving had immunity. [The relevant provision of the SIA] must be read as affording individual employees or officials of a foreign State protection under the same cloak as protects the State itself”.⁸² The ‘cloak’ imagery is very apt. The foreign State official wears the same cloak of immunity as the cloak of immunity worn by his State; the foreign State official ‘benefits’ from the protection offered by the cloak of immunity of his State. Therefore, if for some reason the State has no immunity, then it has no cloak of immunity to provide protection to its official.

Republic of Poland on the immunities of State officials from foreign criminal jurisdiction, p. 8.

⁸⁰ UN Doc. A/CN.41/631, International Law Commission, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 2010, (hereafter the 2010 ILC Report on Immunity of State Officials) p. 13, footnote 51 citing R. van Alebeek, *The Immunity of States and their Officials in the light of International Criminal Law and International Human Rights Law*, 2006, p. 153.

⁸¹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, para. 188 (My Emphasis).

⁸² 1997, 111 ILR 611 at p. 669 (My Emphasis).

61. The underlined dicta of the ICJ and the United Kingdom Court of Appeal in the previous paragraph reflect the correspondence between the immunity of a State official and the immunity of the State itself for an act carried out by its official. Thus, the immunity of a State official in general proceeds on the basis that the State itself enjoys immunity in respect of the acts of its officials. If the State does not enjoy immunity in respect of that conduct, it is difficult to see how the official could, since the State is the fountainhead of the immunity of its official.
62. The law on State immunity changed about one hundred years ago from the doctrine of absolute immunity for all acts, enunciated by Marshall CJ in *Schooner Exchange v. McFadden*,⁸³ to a doctrine of restrictive or qualified immunity in respect of sovereign acts. There is no longer immunity for State acts of a commercial character. The majority of States follow the restrictive approach, which can be said to reflect customary international law.⁸⁴ The law calls for a determination as to whether an act is *jure imperii* or *jure gestionis*; the former act, being sovereign, attracts immunity while the latter, being commercial, does not. In distinguishing between the two acts, the law, as is evident from the practice of the majority of States, calls for an identification of the nature of the act or transaction, and not its purpose. The preponderance of authorities supports the use of the criterion of the nature of the act rather than its purpose or motive to distinguish between an act *jure imperii* and an act *jure gestionis*. Article 2, paragraph 2, of United Nations Convention on Jurisdictional Immunities of States and their Property provides that the nature of the contract or transaction primarily determines whether it has a commercial character. However, it provides that the purpose of the contract or transaction may be taken into account if the parties so agree or if in the practice of the State of the forum it is relevant. In 2001, Italy informed the ILC that “Italy considers the ‘nature test’ to be in principle the sole criterion for determining the commercial character of a contract or transaction”;⁸⁵ in its Counter-Memorial in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Italy stated that in Belgium and Italy, “the distinction between private and public acts has since the beginning been established on the basis of the nature of the act and not its purpose”.⁸⁶ The nature test is, therefore, opposable to Italy. The relevant law of the United States provides “[t]he commercial character of an activity shall be determined by

⁸³ 11 U.S. (7 Cranch) 116 (1812).

⁸⁴ In paragraph 4.17 of its Counter-Memorial in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Italy, referring to the pioneering role played by Belgium and itself in the evolution of the private-acts exception to immunity, stated “Belgium and Italian case-law did not long remain isolated. The distinction between *acta jure imperii* and *jure gestionis* was immediately appreciated by scholars, and well before the Second World War the principle of restrictive immunity was being applied, and still is applied, by the municipal courts of an increasing number of European countries.” Judgment, I.C.J. Reports 2012, p. 99. Italy then went on to give examples of the application of the restrictive approach in decisions in the Courts of Austria, Switzerland and Greece.

⁸⁵ UN doc. A/56/291/Add. 1, p. 3 para. 7.

⁸⁶ Counter-Memorial of Italy, p. 46-47, para. 4.16.

reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose”.⁸⁷ In a case cited by Italy and the Majority, *Airport Ilc v. United States*,⁸⁸ the Supreme Court of Austria held that “international practice no longer refers to the object or purpose of a State’s act (functional approach) but to the nature of the act itself (irrespective of the object or purpose)” (paragraph 3). The reason for the use of the criterion of the nature of the activity and not its motive or purpose is fairly obvious: the criterion of purpose serves to render almost pointless the distinction between commercial and sovereign acts, since once the government of a State is involved in a transaction, it is almost inevitable that one will be able to detect some kind of sovereign, governmental purpose in that transaction. Therefore, in determining whether the transaction carried out by the Government of Italy with the shipowners was commercial or sovereign, the fact that its purpose was the protection of Italian vessels on the High Seas is not decisive. What is decisive is the nature of the transaction, not its purpose.

63. The following factors demonstrate the essentially commercial nature of the transaction that led to the marines being placed on the vessel to provide their services; they show that the public purpose of the transaction was completely engulfed by its essentially commercial nature:

- (i) To begin with, it is to be noted that Article 5 of the Law Decree of 12 July 2011 enables the Ministry of Defence of Italy to enter into framework agreements with shipowners for the protection of ships flying the Italian flag. It is also significant that in order for a shipowner to benefit from the protection of its vessel through the emplacement of marines on the vessel, the shipowner was obliged to make a specific application for the services of the marines. Those services were only provided to the shipowners who applied and were prepared to accept the onerous obligations imposed by Italy for its provision of the services of the marines. There was therefore, a very peculiar, direct and specific contractual relationship between the Italian Government and the shipowners of the “Enrica Lexie”.
- (ii) On 11 October 2011, the Ministry of Defence of Italy and the shipowners concluded a Memorandum of Understanding. Its preambular paragraph indicates that the purpose of its adoption was the supply of services to shipowners. On the same day, 11 October 2011, there was also concluded an Agreement between the Ministry of Defence of Italy and the shipowners intending to avail themselves of the services of the marines. Article 2.1 provides that there is available to applicant shipowners the services of the marines for protection of vessels from piracy and armed robbery. The Article also refers to “service supply” in the form of VPDs “made up of armed military personnel equipped with

⁸⁷ Section 1603, Foreign Sovereign Immunities Act, 1976.

⁸⁸ *Airport LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003).

individual and team weapons”. It is therefore clear that the transaction between the Government of Italy through its Ministry of Defence and the shipowners was carried out on the basis of what in many jurisdictions would be an ordinary contract for services. This is a commercial transaction, that is, an act *jure gestionis*, not attracting immunity. The fact that the contract between the Government of Italy and the shipowners had an ostensibly public purpose of providing protection for vessels from piracy is irrelevant in determining whether it had the character of a commercial or sovereign transaction. What is decisive is the essentially commercial nature of the Agreement between the Government of Italy and the shipowners. For that reason, a contract between a government and a private entity to purchase equipment for its armed forces is a transaction *jure gestionis* that would not attract immunity.

- (iii) The essence of a commercial transaction is the exchange of goods and services between persons or entities. That element of exchange is very strong in the Agreement between the Ministry of Defence and the shipowners. Essentially, under the Agreement, the Ministry of Defence undertakes to supply the services of the VPDs in exchange for commitments on the part of the shipowner set out in Article 2.2. This subparagraph identifies seven commitments on the part of the shipowners. Any one would suffice to illustrate the commercial character of the transaction between the Ministry of Defence and the shipowners. All of them are characteristic of the give and take or *quid pro quo* that are at the heart of a commercial transaction. But two provisions are particularly striking in that they indicate the extent to which the Government of Italy went to protect itself. First, subparagraph (c) of Article 2.2 obliges the shipowner to maintain suitable insurance contracts for third party liability, more specifically in relation to damage incurred by the VPDs for fault-based liability of the shipowner or his subordinates. It would not have been unreasonable to expect the Government of Italy to take out insurance contracts for the marines who, after all, are on the vessels in the service of their country. Nonetheless, the Italian Government was able to secure an Agreement in which the shipowner bears the burden of entering into insurance contracts for third party liability in respect of damage from acts carried out by the VPDs. This is by no means an inconsequential commitment. The shipowner would incur the expense for insurance in respect of a VPD which consists of at least six persons. Second, subparagraph (d) of Article 2.2 obliges the shipowner to waive compensation claims for contractual liabilities incurred by the shipowner due to a deviation from the trade course to allow the embarkation and disembarkation of VPDs, as well as detention and disembarkation requirements as regards individuals possibly arrested or subject to provisional arrest. Both subparagraphs (c) and (d) are the kind of provisions

one finds in a commercial transaction between two private persons, one of whom is bent on protecting himself/herself, and who has the negotiating strength to do so. The risk of damage resulting from acts of the VPDs has been placed on the shipowners in a manner that almost suggests that the VPDs have become employees of the shipowner. In any event, the entire set of commitments in Article 2.2, in particular subparagraphs (c) and (d), highlight the extent to which the Government of Italy went to ensure that, if something went amiss in the performance by the VPDs of their functions, it would be protected. The shipowners undoubtedly paid a significant price for the services of the VPDs provided by the Government of Italy. There is, of course, nothing wrong with that, but it needs to be acknowledged that the transaction that led to the marines being placed on the “Enrica Lexie” was an essentially commercial one.

- (iv) However, the most striking feature of the transaction illustrating the element of the exchange of goods and services that characterizes a commercial transaction is Article 6 of the Agreement. Under that Article, the shipowner is obliged to “repay costs incurred for the employment of the VPD”. These costs are set out in Article 2 of the Addendum to the Agreement, which shows that for a total amount for daily service onboard, the shipowner must pay the sum of 467 euros to repay the costs linked to the employment of the VPDs. Three comments may be made. First, the sum of 467 euros per person per day amounts to 14,010 euros for 30 days of service, 170,455 euros for 365 days of service, a sum that appears to be much higher than the average salary of a member of a VPD. Regardless of whether the sum is considered high or low, it does illustrate the commercial character of the transaction. In assessing the commercial character of the transaction, it is irrelevant that the repayment is for costs incurred by the Italian Government in providing the services, because, given that the criterion is the nature and not the purpose of the transaction, it is immaterial whether the Italian Government was prompted by a profit motive. Second, the Majority states that “this reimbursement to the Italian Government, as opposed to a direct payment of salary by the shipowners is a standard and common practice designed to simply compensate the Ministry of Defence for the costs incurred by the VPDs when stationed onboard a vessel”.⁸⁹ It matters not whether the practice is standard or not; what is decisive is that, at any rate, in the case of Italy, it is a practice that is part of what is an essentially commercial transaction. Third, there is another problem in Article 6, which speaks of “repay[ing] costs linked to the employment of VPDs”. The word “employment” in English (the official language of the Arbitration) strongly suggests that the VPDs were in the

⁸⁹ Paragraph 854 of the Award.

employment of the shipowners. It would be entirely reasonable to read the phrase this way: “repay costs linked to the employment of VPDs by the shipowner”. It warrants comment that no explanation has been offered for the use of this word, which, if given its ordinary meaning in English, would mean that the VPDs as employees of the shipowners would certainly not be entitled to immunity for their acts.

- (v) A question that deserves consideration is whether the act of the marines firing the shots that killed the two Indian fishermen can be isolated and severed from the commercial transaction that led to their emplacement on the “Enrica Lexie”. In other words, can the shooting be isolated and severed as a sovereign, governmental act attracting immunity? Can it stand on its own? Those questions must be answered in the negative. The presence of the marines on the vessel is so intertwined with the essentially commercial transaction between the Italian Government and the shipowners that it is not possible to separate the one from the other. After all, absent that transaction, they would not have been on the vessel. Even though it is argued that the marines acted in accordance with the Ministry of Defence’s terms of engagement, it is not possible to separate their conduct from the context in which they were placed onboard the “Enrica Lexie”. When they fired the shots, they did so against the background and on the basis of a commercial transaction in which (a) the Government of Italy received from the shipowners the sum of 467 euros per person per day, amounting to 14,010 euros for 30 days of service and (b) the shipowners were obliged to accept onerous obligations in order to protect the Government of Italy from claims arising from the conduct of the marines. Although in accordance with the Agreement the sum paid by the shipowners was to “repay the costs incurred for the employment of the VPDs”, it is not unreasonable to see that sum as being in effect a payment by the shipowners for the services of the marines. While the provision of security by a government for its citizens is usually seen as a sovereign, governmental act, it need not necessarily have that character. In some countries today, the provision of security has a commercial component. In this case, the commercial component is such that it completely nullifies the public purpose that is usually associated with the provision of security by a government. The shooting that led to the death of the two Indian fishermen was by its nature a commercial act carried out in defence of the interests of the shipowners. It is as though the Agreement between the Italian Government and the shipowners was in effect a contract for the employment of the marines by the shipowners. The services provided by the marines to the shipowners cannot attract immunity in the circumstances of this case.

B. DISTINGUISHING THE PECULIAR CIRCUMSTANCES OF THIS CASE FROM OTHER SITUATIONS IN WHICH THE ISSUE OF THE IMMUNITY OF STATE OFFICIALS ARISES

64. The peculiar circumstances of this case are that the marines as State officials carrying out their duties under the Agreement, shot and killed two Indian fishermen; in respect of that act, as has been discussed earlier, the State has no immunity under customary international law by reason of the commercial character of the transaction authorizing it. This case therefore concerns both the immunity of a State official and the immunity of a State itself.
65. The circumstances described above (see paragraph 64) are different from the usual situation in which the issue of immunity of a State official arises in relation to the acts of officials carried out in an official capacity. It is different because in those situations, the official acts are usually performed against the background of the immunity of the State for the very same acts, whereas in the instant case, the State has no immunity in respect of those acts. In the usual situation the immunity of a State official will, more often than not, be coterminous with the immunity of the State for the same act. Thus, as noted before, the ICJ held in *Certain Questions of Mutual Assistance in Criminal Matters*: “such a claim is in essence a claim of immunity for the Djibouti State, from which the Procureur de la Republique would be said to benefit”. Here, the ICJ sees an organic relationship between the immunity of a State official for an act and the immunity of the State itself for the very same act, a relationship in which the immunity of the State for that act flows to the State official. Thus, the immunity of the State official is contingent on the immunity of the State for the same act. Absent the immunity of the State in respect of the acts of its official, there is no immunity from which the marines can benefit, that is, there is no immunity of the State to flow to its official.
66. The circumstances described above (paragraph 64 above) are different from the situation in which the issue of the immunity of a State official arises for acts that are *ultra vires* his mandate from the sending State.⁹⁰ Here, it is agreed that the official enjoys immunity. But here again, the immunity of the State official proceeds on the basis that the State will usually enjoy immunity in respect of the same act, whereas in the instant case the State does not have immunity in respect of the acts carried out by its officials. The immunity of a State official for acts that are *ultra vires* is merely an illustration of the truism that a State official’s immunity is for the most part a reflection of the immunity of the State. For the immunity of a State under customary international law cannot and does not depend on whether its acts are *intra* or *ultra vires* its laws or anything else. Its immunity

⁹⁰ See paragraphs 860-62 of the Award and Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, ILC, Sixty Second Session, 2010, para. 29.

simply depends on its sovereignty and so long as what is in issue is a sovereign and not a commercial act it will have immunity.

67. What must now be considered is whether the circumstances described above (paragraph 64) are different from those in which the issue of the immunity of a State official arises in respect of his acts that are *jure gestionis*.
68. To begin with, both the ILC Commentary⁹¹ and the Memorandum by the Secretariat⁹² (hereinafter the “Secretariat Paper”) make clear that there is a doctrinal controversy concerning the immunity of the State official in respect of acts *jure gestionis* – so much for the Majority’s reference to the ILC’s “uncontroversial premise that the acts of State officials performed in an official capacity are subject to immunity”.⁹³ The Secretariat Paper states that “the distinction between acts *jure imperii* and acts *jure gestionis*, which appears to be relevant in the context of State immunity, also applies in the context of immunity *ratione materiae* of State officials”.⁹⁴ The Paper concludes that “there would seem to be reasonable grounds for considering that a State organ performing an act *jure gestionis* which is attributable to the State is indeed acting in his or her official capacity and would therefore enjoy immunity in respect of that act”.⁹⁵ The ILC appears to follow this tentative conclusion of the Secretariat Paper but provides no authority for it. The idea that a State official will always enjoy immunity once he acts in an official capacity has at least one undesirable implication in that it contributes to the position adopted by some that a State official enjoys immunity even for acts constituting crimes that breach a peremptory norm of *jus cogens*, provided the State official was acting in an official capacity. Doctrine and practice should combine to prevent such an outcome.
69. In any event, the situation covered by that conclusion is wholly distinct from the circumstances of this case: in that situation the immunity of the official is principally driven by his own conduct,

⁹¹ Paragraph 28 of the ILC Commentary in the 2010 ILC Report on Immunity, International Law Commission, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 2010, paragraph 28.

⁹² UN Doc. A/CN.4/596 Memorandum by Secretariat Immunity of State Officials from Foreign Criminal Jurisdiction, paragraph 161. The Secretariat Paper was a study prepared at the request of the International Law Commission which was intended to provide a background to the ILC’s consideration of the topic “Immunity of State Officials from foreign criminal jurisdiction.” The study was intended to consider the main legal issues that arise with regard to the topic under consideration, taking into account traditional and contemporary developments in international criminal law which impact on the topic (UN Doc. A/CN.4/596, p. 1). See also paragraph 161: “though infrequently and only cursorily addressed, this question has given rise to conflicting opinions in the legal literature.”

⁹³ Paragraph 845 of the Award.

⁹⁴ UN Doc. A/CN.4/596 Memorandum by Secretariat Immunity of State Officials from Foreign Criminal Jurisdiction, paragraph 161.

⁹⁵ UN Doc. A/CN.4/596 Memorandum by Secretariat Immunity of State Officials from Foreign Criminal Jurisdiction, paragraph 161.

while in the circumstances of this case, the immunity of the official is principally driven by the conduct of the State. Thus, the statement in the ILC Commentary – that “it is irrelevant ... that the conduct of a State organ may be classified as commercial ...”⁹⁶ – is itself irrelevant to the instant case in which immunity is principally driven not by the conduct of a State organ, the marines, but rather by the conduct of the State. As has been shown, the acts of the Italian State on the basis of which the marines performed their function amounted to a commercial transaction, leaving Italy bereft of immunity for that conduct; therefore the marines chosen by that country to implement the commercial transaction cannot be protected by an immunity that the Italian State itself does not have. The fact that the marines acted in an official capacity is immaterial. Acting in an official capacity cannot by itself endow a State official with immunity if its State is not entitled to immunity in respect of his actions. State officials do not generate their own immunity by their acts; the source of their immunity is the State itself; if the State lacks immunity, as Italy does in this case, then it has no immunity to transmit to its officials or, in the language of the ICJ, it has no immunity from which the officials would benefit. Therefore the circumstances of the instant case (in paragraph 64) are wholly different from the situation dealt with in the cases set out by the Majority to illustrate the argument of Italy that “even if the interests at issue were commercial”, the distinction between acts *jure imperii* and acts *jure gestionis* is irrelevant to the immunity of State officials from foreign criminal jurisdiction “as long as the acts at issue were performed in an official capacity”.⁹⁷ These cases are again cited by the Majority.⁹⁸ However, none of them addresses the peculiar circumstances of this case: a situation in which Italy has no State immunity from which the marines as State officials could benefit because it carried out a commercial transaction in order to emplace the marines onboard the “Enrica Lexie”. The instant case concerns both the immunity of a State official and the immunity of the State. None of the cases cited addresses the issue of the immunity of a State official. They are confined to the issue of State immunity.

70. Both the Secretariat Paper and the 2010 Report on Immunity of State Officials proceed on the assumption that once an official acts in an official capacity he or she has immunity in respect of those acts. The Majority followed this approach.⁹⁹ This is a questionable premise. Just as questionable is the link that is made between the law of immunity and the law of State responsibility,

⁹⁶ See paragraph 28.

⁹⁷ See paragraph 820 and footnote 1478 of the Award citing *John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L*, p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

⁹⁸ See footnote 1550 of the Award citing *See also John Doe I and Ors v. UNOCAL Corporation and Ors*, 25 March 1997, 963 F. Supp. 880 (9th Cir. 2002), p. 14230; *Airport L, LLC GmbH v. United States*, 28 August 2003, 2 Ob 156/O3k, ILDC 3 (AT 2003), p. 4; *Littrell v. U.S.A. (No. 2)*, [1995] 1 WLR 82, p. 95.

⁹⁹ Paragraphs 843-62 of the Award.

whereby immunity necessarily follows from the attribution of an act of a State official to his State.¹⁰⁰ The facile manner in which the link is made leaves unanswered many questions concerning the relationship between the two regimes. The ILC Commentary on its 2010 Report on the Immunity of State Officials cites with approval¹⁰¹ the Commission's statement¹⁰² that, "it is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as acts *jure gestionis*". While the ILC stressed that its draft Articles on State Responsibility only served the purpose of determining the responsibility of a State and said nothing about the "legality or otherwise of that conduct",¹⁰³ one commentator observed that "the law of state immunity is concerned with the exercise of public powers in mediating the interest of the forum and foreign state".¹⁰⁴ There is a danger in eliding the law of the immunity of State officials with the principle of attribution in the law of State responsibility. It should not be taken for granted that once an act of an official is attributable to a State, that official will always enjoy immunity in respect of that act.

C. CONCLUSION

71. If the Arbitral Tribunal has jurisdiction over the question of the immunity of the marines from the exercise of Indian criminal jurisdiction, *quod non*, the marines do not enjoy immunity from that jurisdiction for the following reasons:

- (i) Italy bears the burden of establishing to the satisfaction of the Arbitral Tribunal that the marines are entitled to immunity from the exercise by India of its criminal jurisdiction over them.
- (ii) The act of Italy that resulted in the emplacement of the marines on the "Enrica Lexie" was by its nature commercial and not sovereign; therefore, notwithstanding that the emplacement of the marines on the vessel served the public purpose of protecting the ship from piratical attacks, Italy does not enjoy immunity under customary international law; the shooting by the marines is not severable from the commercial transaction that led to the embarkation of the marines on the "Enrica Lexie"; it was by nature a commercial, and not a sovereign, act.

¹⁰⁰ Paragraph 24 of the 2010 ILC Report on Immunity of State Officials.

¹⁰¹ Paragraph 28.

¹⁰² Paragraph 6 of its Commentary on Article 4 of its Draft Articles on State Responsibility.

¹⁰³ International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" in *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 39 at para. 4 Article 3 (2001).

¹⁰⁴ Zachary Douglas, State Immunity for the Acts of State Officials, *BYIL British Yearbook of International Law*, Volume 82, Issue 1, 2012, pages 281–348.

- (iii) Since the immunity of the marines is for the most part a reflection of the immunity of the State of Italy, the absence of Italian immunity for the acts leading to the shooting of the two Indian fishermen means that there is no immunity from which the marines can benefit as State officials; the marines cannot generate their own immunity and it is not decisive that they were acting in an official capacity.
- (iv) In order for the marines to enjoy immunity, Italy has the burden of establishing that in their service on the ship they remained in the employment of the Italian Government and did not become employees of the shipowners. The following factors raise serious questions as to whether the marines were not in the employment of the shipowners. First, the sum paid by the shipowners for “repay[ing] costs linked to the employment of VPDs” is of such an amount that it is not unreasonable to see it as a payment by the shipowners for the services of the VPDs. Second, the language in Article 6 – “repay[ing] costs linked to the employment of VPDs” suggests that the marines were in the employment of the shipowners; in English, it would be reasonable to read the sentence as meaning, “repaying costs linked to the employment of VPDs by shipowners”; if the marines were so employed their actions would not attract immunity because the possibility of immunity only arises if they were performing sovereign functions on behalf of the Italian Government. Third, the nature of the very onerous obligations imposed by the Agreement on the shipowners also raises doubt as to whether as a result of the Agreement the marines did not become employees of the shipowners.
- (v) In light of the foregoing, Italy has failed to discharge its burden of establishing that the marines are entitled to immunity *ratione materiae*.

V. WHETHER THE MARINES ARE ENTITLED TO IMMUNITY FROM THE CRIMINAL JURISDICTION OF INDIA IN THE ABSENCE OF AN AGREEMENT BETWEEN ITALY AND INDIA: THE ASSIMILATION OF THE MARINES TO THE STATUS OF VISITING FORCES

72. This Part offers an alternative foundation for the conclusion in the last Part that the marines are not entitled to immunity *ratione materiae*. It argues that the marines can be assimilated to the status of visiting forces, which generally, do not enjoy immunity under customary international law for their acts. The immunity of visiting forces usually depends on agreements concluded between the sending and receiving States.
73. The Agreement between the Ministry of Defence and the shipowners envisaged the embarkation and disembarkation of VPDs at ports in various countries. Thus, Article 2.1 provides that “embarkation and disembarkation of vessel protection detachments takes place based on existing

agreements with coastal States in the High-Risk Area, in ports listed in the Addendum”. That document identifies Djibouti as the main port for embarkation and disembarkation of VPDs. It also identifies nine ports in other countries for that purpose. Moreover, Article 2.1 provides that vessel protection will be available “even in cases where for the technical and operational reasons, VPDs may embark and disembark in traffic areas laying outside the areas identified by the Ministry of Defence by means of a specific decree”.

74. Thus, according to the Agreement, VPDs could embark, disembark, and enter ten States for the purposes of their services. In the instant case, the “Enrica Lexie” was sailing from Galle, Sri Lanka to Port Said, Egypt. The question arises whether VPDs are immune from the jurisdiction of those receiving States in respect of acts that fall under their jurisdiction.
75. When the two marines were arrested by the Indian Coast Guard, one of them, Sergeant Latorre, gave the Coast Guard a written Statement that included an assertion that they were entitled under international law to the immunity of “forces in transit”. Although VPDs are obviously on the move, embarking and disembarking at ports in various countries, it is not entirely clear what is meant by the immunity of “forces in transit”. To the extent that the phrase refers to the principle of the “law of the flag”, this harkens back to the doctrine of absolute immunity, derived from the decision in *Schooner Exchange v. McFadden*.¹⁰⁵ The law of the flag, which provided the basis for absolute immunity of visiting forces, is as outmoded as the doctrine of absolute immunity, which was replaced some one hundred year ago by the doctrine of restrictive immunity. In this Part, it is argued that when VPDs disembark and commit a crime in a receiving State or when they commit a crime that takes effect on a vessel that falls within the jurisdiction of the receiving State they are assimilated to the status of visiting forces under customary international law. The Arbitral Tribunal found that India had jurisdiction in respect of the crimes committed on the “St. Antony” on two bases: first, as the flag State, over the offence that commenced on the “Enrica Lexie” and was completed on its vessel, the “St. Antony”; second, on the basis of the principle of objective territoriality.¹⁰⁶ It found that India had the right to assert its jurisdiction over the offence that was allegedly completed onboard its vessel.¹⁰⁷
76. It is generally accepted that notwithstanding the number of Status of Forces Agreements (hereinafter “SOFA”) granting visiting forces certain immunities in a receiving State, there is no rule of customary international law that visiting forces enjoy immunities in a receiving State. Their

¹⁰⁵ 11 U.S. (7 Cranch) 116 (1812).

¹⁰⁶ Paragraphs 366-70 of the Award.

¹⁰⁷ It made a companion finding in respect of Italy relating to the Enrica Lexie.

immunities depend on agreement between the State of the visiting forces and the receiving State. These immunities are usually found in SOFAs. One commentator expressed the view that:

Even though NATO has generated substantial relevant practice and the NATO SOFA is often used as a precedent, there is no consensus about the existence of a corresponding rule of customary international law. Indeed the contents of modern SOFA tend to vary by the circumstances.¹⁰⁸

77. Regrettably, the agreements concluded by Italy (described as existing agreements) with the ten States identified in the Addendum to the Agreement were not available for examination. Nonetheless, it is safe to assume that they include provisions, similar to those in SOFAs, granting immunity to the VPDs in circumstances when the receiving State is entitled to exercise jurisdiction over them under international law. Interestingly, the material before the Arbitral Tribunal shows that on 6 February 2012, Italy requested India to grant diplomatic clearance of a cargo vessel which had six VPDs onboard. India declined the request for an agreement on VPDs.¹⁰⁹
78. The existence of these agreements in no way detracts from the generally accepted proposition that, despite the existence of SOFAs there is no rule of customary international law that visiting forces enjoy immunities from the jurisdiction of receiving States. In fact, agreements such as SOFAs and the existing agreements between Italy and the ten States mentioned in the Addendum to the Agreement are concluded because States are not confident that there exists a customary rule granting immunities to visiting forces.
79. When the two Indian fishermen were shot and killed, they were aboard the “St. Antony”, a vessel over which, as has been stated, the Arbitral Tribunal has found that India has jurisdiction as the flag State and on the basis of the principle of objective territoriality. The assimilation of the marines to the status of visiting forces means that, absent an agreement between Italy and India for their immunities as officials of a foreign State, they do not enjoy immunity from Indian criminal

¹⁰⁸ Zsuzsanna Deen-Racsmany, “Exclusive” Criminal Jurisdiction over UN Peacekeepers and the UN Project(s) on Criminal Accountability: A Self-Fulfilling Prophecy? *Military Law and the Law of War Review* 53/2 (2014), p. 273. See also generally (ed. Dieter Fleck), *The Handbook of the Law of Visiting Forces*, Second Edition, Oxford Scholarly Articles on International Law, “Jurisdiction” by Paul J. Conderman and Aurel Sari at p. 209, which states:

“Over the course of the last century, it has become commonplace to regulate the exercise of jurisdiction over visiting armed forces through status-of-forces agreements. While their use predates the twentieth century,¹⁰ States began to enter into the first modern status-of-forces agreements during World War I.¹¹ Since then, international agreements have emerged as the instrument of choice for defining the legal position of Visiting Forces. Their popularity is largely due to the fact that they offer Sending States and Receiving States greater levels of legal certainty compared to the unwritten rules of customary international law”.

¹⁰⁹ Counter-Memorial of India, Vol.1, 15 April 2017, para. 5.34.

jurisdiction in respect of the shooting from the “Enrica Lexie” that resulted in the death of the fishermen.

VI. GENERAL CONCLUSIONS

80. The original error in the Award is the Majority’s mischaracterization of the dispute; the cascade of errors thereafter is traceable to that original error.

81. The case brought by Italy against India should be dismissed because:

- (i) The dispute, properly characterized, concerns the question of the exercise by India of its criminal jurisdiction over the marines in the face of their claim to immunity therefrom; the Arbitral Tribunal has no jurisdiction over the issue of the immunity of the marines because it does not concern the interpretation or application of the Convention; since that issue is a core element of the dispute, the Arbitral Tribunal should have declined jurisdiction over the dispute.
- (ii) The issue of the immunity of the marines is not an incidental question; rather it is a core element of the dispute; it is the real issue in the dispute between the Parties.
- (iii) The Arbitral Tribunal derives no help from the doctrine of the incidental question in determining whether it has jurisdiction over the issue of the immunity of the marines. The case relied on by the Majority, *Case Concerning Certain German Interests*, is not pertinent to the facts of the instant case. It is the UNCLOS Annex VII cases of *Chagos Marine Protected Area Arbitration*, *South China Sea Arbitration*, and *Ukraine v. Russia* that are pertinent. Those cases stress the need to separate a so-called incidental question from the real issue that is in dispute. In this case, the issue of the immunity of the marines is the real issue separating the Parties; since it does not concern the interpretation or application of the Convention, the Arbitral Tribunal would, in any event, be obliged to decline jurisdiction over the dispute.
- (iv) Even if the Arbitral Tribunal had jurisdiction over the issue of the immunity of the marines, the marines do not enjoy immunity either because: (a) the State of Italy engaged in an essentially commercial transaction in order to emplace the marines onboard the “Enrica Lexie” to protect the vessel from pirates; that act, *jure gestionis*, does not attract immunity for the State of Italy under customary international law; therefore the State of Italy had no immunity from which the marines could benefit in their act of firing shots from the “Enrica Lexie” that resulted in the death of two Indian fishermen aboard the “St.

Antony”; or (b) the marines can be assimilated to the status of visiting forces which do not enjoy immunity under customary international law for acts carried out in the receiving State. Since there was no agreement between Italy and India to grant immunity to the marines, the act of the marines that was completed onboard the “St. Antony”, over which India had jurisdiction as the flag State or on the basis of the principle of objective territoriality, does not attract immunity.

82. In sum, in light of the foregoing, the immunity claim fails, and the Courts of India are competent to continue to exercise criminal jurisdiction over the marines.

* * *

Joint Dissenting Opinion

**Dr. Sreenivasa Rao Pemmaraju (Dr. P.S. Rao)
and Judge Patrick Robinson**

1. The present joint dissenting opinion addresses the findings in paragraph 1094(B)(4)(a) and (b) of the Award that Italy has not violated Articles 56 and 58, paragraph 3, of the Convention.

I. DISSENT TO THE FINDING IN PARAGRAPH 1094(B)(4)(A) OF THE AWARD THAT ITALY HAS NOT VIOLATED INDIA’S SOVEREIGN RIGHTS UNDER ARTICLE 56 OF THE CONVENTION

2. In paragraph 1094(B)(5) of the Award, the Majority finds 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”. An examination of why that finding is correct illustrates why the finding in paragraph 1094(B)(4)(a) is wrong. The finding in paragraph 1094(B)(5) is correct inasmuch as it is based on the firing by the Marines of shots that interfered, both during the course of and after the incident, with the right of Indian fishermen to engage in fishing within the Indian exclusive economic zone over which India enjoys sovereign rights under Article 56, paragraph 1, of the Convention. The intention of the Marines, insofar as it is claimed and admitted that they acted under an apprehension of a perceived threat of piracy, is immaterial for treating the conduct of the Marines as an internationally wrongful act attributable to Italy as the State of which they are officials. Given that the factual matrix is the same in respect of all three provisions, that is, Article 56, paragraph 1, Article 87, paragraph 1, and Article 90 of the Convention, it is odd that the Arbitral Tribunal failed in paragraph 1094(B)(4)(a) to draw the same conclusions with respect to Article 56, paragraph 1, and Article 58, paragraph 3, as it did in the case of Article 87, paragraph 1, and Article 90 of the Convention.

3. In relation to its claim that Italy breached Article 87, paragraph 1, subparagraph (a), of the Convention, India submitted that its freedom and right of navigation in its exclusive economic zone was violated by Italy “when the Marines fired shots at the ‘St. Antony’ and caused it to change course and veer away to avoid further gunfire”.¹ Italy submitted that the measures, adopted by the Marines to avoid a collision or perceived risk of hostile boarding, did not constitute an interference with the freedom of navigation of the “St. Antony”² and in no way involved any

¹ Paragraph 987 of the Award.

² Paragraph 1015 of the Award.

attempt by Italy to interfere with India's freedom of navigation.³ In effect, Italy argued that the Marines had no intention to interfere with India's freedom of navigation, and that the measures they adopted were a response to what they perceived as a potential collision and an attack by pirates.

4. The Arbitral Tribunal was not persuaded by Italy's submission. It simply identified the possible breaches of the right to freedom of navigation, including "physical or material interference with navigation of a foreign vessel",⁴ determined that the shooting by the Marines "caused the 'St. Antony' to change direction and ultimately head back to shore",⁵ and concluded that this was an interference with the navigation of the "St. Antony", in breach of Article 87, paragraph 1, subparagraph (a), and Article 90 of the Convention. Notably, in identifying the breaches of the primary obligation to respect India's right to freedom of navigation, the Arbitral Tribunal did not include "an intention to harm" as an element of the breach.
5. The Arbitral Tribunal was entirely correct to disregard Italy's submission that the Marines did not intend to interfere with the "St. Antony"'s navigation, because a State's international responsibility for wrongful conduct is engaged independently of whether it intended to cause harm. This is how the ILC addresses the question in paragraph 10 of the Commentary on Article 3 of its Draft Articles on State Responsibility:

A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.⁶

6. It is surprising that, in considering India's submission that Italy violated its sovereign rights under Article 56 of the Convention, the Majority did not follow the same impeccable reasoning that led to its finding that Italy had violated India's right to freedom of navigation under Article 87, paragraph 1, subparagraph (a), of the Convention. The factual matrix is the same in respect of India's claim of Italy's breach of Article 87, paragraph 1, subparagraph (a), and its claim of a breach of Article 56 of the Convention: the firing of shots by the Marines from the "Enrica Lexie" to the "St. Antony" and the death of the two Indian fishermen.

³ Paragraph 1017 of the Award.

⁴ Paragraph 1038 of the Award.

⁵ Paragraph 1041 of the Award.

⁶ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 36, para. 10.

7. Moreover, Italy's submissions are also the same, namely, that Italy acted on the basis of an apprehension that the "Enrica Lexie" was facing the threat to a safety of its navigation, in the form of a risk of collision and pirate boarding; Italy argues that it did not act to impede India's right to explore and exploit its natural resources in its exclusive economic zone. The Arbitral Tribunal found that "the Marines and the 'Enrica Lexie' crew believed that the vessel was under a pirate attack and took actions...to protect the 'Enrica Lexie' against a perceived pirate attack".⁷ However, Italy's international responsibility is engaged for the acts of the Marines that clearly infringed India's sovereign rights by firing at the "St. Antony" and the killing of two Indian fishermen. Its responsibility is engaged, as the ILC stated, "independently of any intention", that is, independently of whether the Marines had "an intention to harm" India's sovereign rights to exploit its living resources in the exclusive economic zone. There is nothing in the formulation in Article 56 of the coastal State's sovereign rights to exploit its living resources in its exclusive economic zone to absolve Italy of its responsibility in this regard. Hence, the Majority's reasoning that "the Marines did not target the 'St. Antony' as a fishing vessel, but on the suspicion that it was a pirate vessel intending to board the 'Enrica Lexie'"⁸ cannot serve as basis, under the law of State responsibility, to conclude that Italy did not violate India's sovereign rights under Article 56 of the Convention. What is relevant is that, whether the "St. Antony" was targeted or not, the Marines fired shots that resulted in the death of the two Indian fishermen, consequently contravening the enjoyment by India of its sovereign rights in the exclusive economic zone.
8. While the mental state (an intention to harm) of the Marines may be a factor affecting the quantum of damages for the breach, it does not affect the fundamental question of Italy's responsibility for its breach of Article 56 of the Convention.
9. Paragraph 10 of the ILC Commentary, cited above, does not state anything that is new in the law of State responsibility. In the case of the *Jessie*,⁹ the tribunal held that although the United States naval authorities acted *bona fide*, they made an error of judgment and that the United States Government, like any other government, was responsible for the errors in judgment of its officials. Similarly, in this case, Italy bears responsibility for acts of the Marines that led to the shooting at the "St. Antony" and the killing of the two fishermen, thereby interfering with India's enjoyment of its sovereign rights in respect of the living resources in its exclusive economic zone. Clearly, the position of the Majority in concluding that there was no breach of Article 56 because the Marines' conduct had "the discrete purpose of protecting the 'Enrica Lexie' against a perceived

⁷ Paragraph 952 of the Award.

⁸ Paragraph 955 of the Award.

⁹ *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award of 2 December 1921, RIAA Vol. VI, p. 57 at p. 59.

pirate attack”¹⁰ is at variance with this well-established principle governing State responsibility, and the reason for the same is not obvious

10. It may be that the conduct of the Marines, directed at what the Majority describes as “a perceived pirate attack”, would not be in breach of Article 100 that imposes a duty on all States to “cooperate to the fullest possible extent in the repression of piracy”. But conduct that does not breach Article 100 may yet breach Article 56, because the Articles impose different requirements on State Parties. Compliance with Article 100 may not necessarily constitute compliance with Article 56 of the Convention.

11. By way of further justification, the Majority found that the Marines’ conduct was a “singular and isolated incident, which had a merely incidental effect on the ability of a fishing vessel, the ‘St. Antony’, to continue pursuing its fishing activities”.¹¹ This is a very questionable finding. In the first place, in its reference to “a fishing vessel”, it would appear to be embracing the elitist view that Article 56 is more concerned with fisheries than fishermen.¹² Secondly, the effect of the conduct of the Marines on the ability of the “St. Antony” to carry out its fishing activities is anything but “incidental”; it is a very direct effect. Third, for the purposes of the engagement of the international responsibility of Italy, it is irrelevant that the Marines’ conduct was what the Majority describes as “a singular and isolated incident”. Neither the right under Article 56, nor its corresponding obligation has a numerical threshold. What is relevant is that that conduct interfered with India’s enjoyment through the fishermen of its sovereign rights in extracting the living resources in its exclusive economic zone. Moreover, it appears that the Majority concluded that the shooting by the Marines at the “St. Antony” and the killing of the two Indian fishermen plying their trade in India’s exclusive economic zone does not rise to the level of interference with “sovereign rights for the purposes of exploring and exploiting, conserving and managing” the natural resources of the exclusive economic zone. Yet, it is hard to envisage any act that could constitute a greater interference with a coastal State’s enjoyment of its sovereign rights in the exclusive economic zone than the killing of two of that State’s fishermen while they were pursuing their livelihood of fishing in that coastal State’s exclusive economic zone.

12. The Majority, in an attempt to justify its finding, invokes India’s duty under Article 56, paragraph 2, to have “due regard to the rights and duties of other States and the applicability of Article 110 of the Convention”.¹³ Article 110 is irrelevant. That Article addresses the

¹⁰ Paragraph 955 of the Award.

¹¹ Paragraph 953 of the Award.

¹² Paragraph 939 of the Award.

¹³ Paragraph 954 of the Award.

circumstances in which a warship may exercise the right of visit in relation to a foreign ship on the High Seas. One of the circumstances identified is when the foreign ship is engaged in piracy. However, the Article is inapplicable because the “Enrica Lexie” is neither a warship nor a “duly authorized ship” within the meaning of Article 110, paragraph 5, of the Convention.

13. Second, the Majority did not cite Article 56, paragraph 2, of the Convention in full. The duty to have due regard does not exist in a vacuum. It arises when the coastal State is “exercising its rights and performing its duties under the Convention in the exclusive economic zone”. The obligation of India to have due regard to the rights of Italy does not arise because India was not exercising any right or performing any obligation in respect of the incident that took place in its exclusive economic zone. By the time the Indian authorities came on the scene, the Marines had already fired the shots from the “Enrica Lexie” that resulted in the killing of the two Indian fishermen on the “St. Antony”. Therefore, the due regard obligation is inapplicable to India. Moreover, the Arbitral Tribunal unanimously determined that India did not breach the obligation under Article 100 of the Convention to “cooperate to the fullest possible extent in the repression of piracy on the High Seas”.
14. Therefore, we regret our inability to share the conclusion of the Majority, finding that Italy had not violated India’s sovereign rights under Article 56 of the Convention, which is wrong.

II. DISSENT TO THE FINDING IN PARAGRAPH 1094(B)(4)(B) OF THE AWARD THAT ITALY HAS NOT VIOLATED ARTICLE 58, PARAGRAPH 3, OF THE CONVENTION

15. India argues that Italy has breached the due regard obligation in Article 58, paragraph 3, of the Convention. Italy’s response is quite straightforward. It argues that the action taken by the Marines was in response to a perceived threat of a collision and pirate attack and hence a threat to the “Enrica Lexie”’s safe navigation. The Majority found that the duty under Article 100 of the Convention to repress piracy is a duty incumbent on all States. It also found that “if protection from and repression of piracy comprise a right and a duty of India and Italy alike, including within India’s [EEZ], the conduct of the Marines on board the ‘Enrica Lexie’ in responding to a perceived piracy threat cannot have ‘unreasonably interfere[d] with’, and thus have failed to show ‘due regard’ to, India’s rights as the coastal State”.¹⁴
16. The best definition of the due regard obligation is the one that is found in the award in the *Chagos Marine Protected Area Arbitration*, which is cited in paragraph 976 of the Award. That tribunal

¹⁴ Paragraph 980 of the Award.

found that the due regard obligation requires “such regard for the right of Mauritius as is called for by the circumstances and by the nature of those rights”. The tribunal then went on to find that “the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches”.¹⁵

17. In the instant case, the right for which Italy must have due regard is India’s sovereign rights to exploit the living resources (fisheries) in its exclusive economic zone. Italy has a corresponding obligation to respect that right. The conduct of the Marines in firing shots at the “St. Antony”, resulting in the death of the two Indian fishermen was a breach of that obligation. This obligation exists notwithstanding that the Marines did not intend to harm India’s enjoyment of its right to exploit the living resources in its exclusive economic zone. That is so because a State’s international responsibility for wrongful conduct, as noted above in paragraph 5, above, is engaged independently of whether it intended to cause harm.
18. *Dicta* from the *Chagos Marine Protected Area Arbitration* award indicate that the regard that is required is that which is called for by the circumstances and by the nature of the right. The nature of India’s right is such that Italy is not relieved of its obligation to respect and have due regard for that right on the ground that the Marines perceived that there was a threat of a collision and pirate attack. In this case therefore, Italy’s breach of its obligation to respect India’s rights under Article 56, paragraph 1, subparagraph (a), of the Convention is also a breach of its duty under Article 58, paragraph 3, of the Convention to have due regard for that right.
19. One of the factors identified in the *Chagos Marine Protected Area Arbitration* award for determining the extent of the regard required by the Convention is the “availability of alternative approaches”. It was certainly open to the Marines to take some action other than firing at a miniscule vessel, leading to the death of the two Indian fishermen. For example, the difference in the size and maximum speed of the “Enrica Lexie” (243.8 metres and 14 knots) and the “St. Antony” (13.7 metres and 10 knots) was such that the “Enrica Lexie” could easily have changed course and outrun the very small Indian fishing boat, thereby avoiding any risk of collision or pirate attack. This provides another basis for concluding that the obligation to have due regard to India’s rights was breached by Italy.

¹⁵ Paragraph 976 of the Award, citing PCA Case No. 2011-03: *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 519.

20. It remains now to address the observation of the Majority that Article 100 imposes a duty on all States to repress piracy in their exclusive economic zone. The Majority's finding in paragraph 980 of the Award has already been cited in paragraph 1 of this Joint Dissent. It is a finding that is based on reasoning that is wholly tortuous and wrong. If the phrase, "India and Italy alike" is intended to signify an equivalence in the position of the two countries in relation to the suppression of piracy, it is misleading. In the first place, India did not fail by any act or any omission in its duty to repress piracy in its exclusive economic zone. The Arbitral Tribunal unanimously found in paragraph 1094(B)(1)(d) of the Award that India did not violate its duty to repress piracy under Article 100. Second, the Majority's finding that the Marines' response was prompted by their perception of the risk of collision and a pirate attack is misplaced. As noted before, the obligation imposed by the right under Article 56, paragraph 1, subparagraph (a), of the Convention applies independently of any intention. Whether the Marines acted reasonably or not in the circumstances is irrelevant to the engagement of Italy's international responsibility on the basis of their conduct.
21. For all the reasons noted above, we disagree with the Majority and hold that Italy is in breach of its obligation of due regard under Article 58, paragraph 3, of the Convention. The *bona fide* conduct of the Italian officials may be taken into consideration, as a factor, to determine the quantum of damages for the breach, but it does not relieve Italy of its international responsibility for its failure to pay due regard under Article 58, paragraph 3.

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