

PCA Case No. 2015-28

IN THE MATTER OF AN ARBITRATION

- before -

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

THE ITALIAN REPUBLIC

- v. -

THE REPUBLIC OF INDIA

- concerning -

THE "ENRICA LEXIE" INCIDENT

PROCEDURAL ORDER NO. 5
(Witnesses to be Examined at the Hearing)

ARBITRAL TRIBUNAL:

H.E. Judge Vladimir Golitsyn (President)
H.E. Judge Jin-Hyun Paik
H.E. Judge Patrick Robinson
Professor Francesco Francioni
H.E. Judge Patibandla Chandrasekhara Rao

REGISTRY:

Permanent Court of Arbitration

WHEREAS both Parties have submitted documentary evidence containing statements made by various individuals with respect to the events of 15 February 2012, the day of the “Enrica Lexie” incident, and thereafter;

WHEREAS these statements were prepared in the course of 2012-2013, mostly by persons on board the “Enrica Lexie” and the “St. Antony” or by officials of Indian authorities;

WHEREAS on 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”;

WHEREAS on 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”;¹ whereas 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”;² 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”;³ 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;⁴

WHEREAS on 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”;⁵

WHEREAS on 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”;⁶ whereas India argued that “the Arbitral Tribunal is fully entitled to request the oral testimony of the individuals

¹ Italy’s Letter to the Arbitral Tribunal dated 22 June 2018, para. 16.

² Italy’s Letter to the Arbitral Tribunal dated 22 June 2018, para. 17.

³ Italy’s Letter to the Arbitral Tribunal dated 22 June 2018, paras 18-19.

⁴ Italy’s Letter to the Arbitral Tribunal dated 22 June 2018, para. 20.

⁵ India’s Letter to the Arbitral Tribunal dated 22 June 2018, para. 3.

⁶ India’s Letter to the Arbitral Tribunal dated 6 July 2018, para. 4.

who have been identified in the Secretariat's letter of 8 June",⁷ 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";⁸ and whereas India also took the view that "there was no risk" that the calling of witnesses would taint criminal proceedings against the marines;⁹

WHEREAS on 18 July 2018, Italy reacted to India's comments, arguing, first, that "Statements 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;"¹⁰ and

WHEREAS on 26 July 2018, India in its response pointed 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"¹¹ and 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"¹² and 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".¹³

TAKING THE PARTIES' VIEWS INTO ACCOUNT, THE ARBITRAL TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:

I. POWERS OF THE ARBITRAL TRIBUNAL TO CALL WITNESSES

1. At the outset, the Arbitral Tribunal recalls Annex VII, Article 6, sub-paragraph (b), to the United Nations Convention on the Law of the Sea ("UNCLOS"), which provides:

⁷ India's Letter to the Arbitral Tribunal dated 6 July 2018, paras 4 and 8.

⁸ India's Letter to the Arbitral Tribunal dated 6 July 2018, para. 6.

⁹ India's Letter to the Arbitral Tribunal dated 6 July 2018, para. 7.

¹⁰ Italy's Letter to the Arbitral Tribunal dated 18 July 2018, para. 6.

¹¹ India's Letter to the Arbitral Tribunal dated 26 July 2018, para. 3.

¹² India's Letter to the Arbitral Tribunal dated 26 July 2018, para. 3.

¹³ India's Letter to the Arbitral Tribunal dated 26 July 2018, para. 4.

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall:

[...]

- (b) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

2. The Arbitral Tribunal is thus empowered to call witnesses, and hear their evidence at the hearing, should the Arbitral Tribunal deem so appropriate. The Arbitral Tribunal notes that both Parties have acknowledged the Arbitral Tribunal's authority to that effect.¹⁴

II. INDIVIDUALS CALLED AS WITNESSES BY THE ARBITRAL TRIBUNAL

3. The Arbitral Tribunal notes that the Parties have submitted with their written pleadings forty-five exhibits containing statements, which were prepared in the course of 2012-2013 for purposes of various domestic proceedings. The Arbitral Tribunal is mindful of the fact that the statements on the record were originally made before different national authorities, in proceedings that did not relate to the interpretation or application of UNCLOS, and a considerable time before the present arbitration was instituted. On the basis of this evidence, the Arbitral Tribunal has identified several persons whose oral testimony at the hearing could, in the Arbitral Tribunal's view, assist it in further clarifying the events that have given rise to the present arbitration conducted pursuant to Annex VII to UNCLOS.
4. The Arbitral Tribunal notes that, having communicated an initial list of names to the Parties, both sides agreed that the individuals whose names had been communicated were likely to provide relevant information. In addition, the Parties suggested further names. Having considered the Parties' views, the Arbitral Tribunal determines, having regard to Annex VII, Article 6, to UNCLOS, that the following persons shall be called as witnesses of the Arbitral Tribunal to give evidence at the forthcoming hearing:
 - Captain Umberto Vitelli, Master of the "Enrica Lexie";
 - Captain Carlo Noviello, Master Supernumerary of the "Enrica Lexie";
 - Mr. Fredy J., captain and owner of the "St. Antony";
 - Commandant [REDACTED], staff observer of the Coast Guard Dornier aircraft; and
 - Assistant Commandant [REDACTED], keeping officer of the "Lakshmi Bai" Coast Guard ship.
5. For the avoidance of doubt, the determination by the Arbitral Tribunal in paragraph 4 above is without prejudice to the Parties' rights pursuant to Article 13, paragraphs 3 and 4, of the Rules of

¹⁴ Italy's Letter to the Arbitral Tribunal dated 22 June 2018, para. 30; India's Letter to the Arbitral Tribunal dated 6 July 2018, para. 4; Italy's Letter to the Arbitral Tribunal dated 18 July 2018, para. 14.

Procedure to call witnesses of their own, to be examined on the same days as the witnesses called by the Tribunal.

III. STATEMENTS FORMING THE BASIS OF ORAL TESTIMONY

6. The Arbitral Tribunal has noted Italy's concern that "none of the Statements [placed on the record by the Parties] were produced or provided for purposes of the Annex VII proceedings".¹⁵ India, on the other hand, considers that the examination of witnesses should "be focused on their statements on the record, which can be treated as evidence-in-chief".¹⁶
7. In the Arbitral Tribunal's view, the fact that statements were not "provided" specifically to the Arbitral Tribunal pursuant to Article 13, paragraph 4, of the Rules of Procedure does not exclude that they might form the basis of the examination of witnesses called by the Arbitral Tribunal. The nature, purpose, legal context, and circumstances of the preparation of the statements will need to be taken into account by the Arbitral Tribunal when assessing the relevance and probative value of such evidence.
8. In addition, the Tribunal would welcome receiving from the individuals listed in paragraph 4, **by 24 September 2018**, a short supplemental statement setting out their recollection of the events of 15 February 2012 for purposes of the present proceedings relating to the interpretation and application of UNCLOS. Should an individual not submit a supplemental statement, he may be examined on the basis of his original statement.

IV. EXAMINATION OF WITNESSES AT THE HEARING

9. Given that both Parties have relied on aspects of the statements of the same individuals, the Tribunal considers that neither Party should be regarded as the direct-examining or cross-examining party at the hearing. Rather, the examination of the witnesses called by the Tribunal shall proceed as follows:
 - At the hearing, the Tribunal will give each witness the opportunity to make a brief statement concerning his recollection of the events of 15 February 2012 and thereafter;
 - Subsequently, the Parties may examine the witness in an order to be agreed between them, or to be determined by the Arbitral Tribunal, using the original statement or

¹⁵ Italy's Letter to the Arbitral Tribunal dated 22 June 2018, para. 17.

¹⁶ India's Letter to the Arbitral Tribunal dated 6 July 2018, para. 7.

declaration made in 2012-2013 as well as the witness's supplemental statement, if any, as a basis for questions;

- Finally, the Arbitral Tribunal may put further questions to the witness, if it so wishes.

V. HEARING SCHEDULE

10. To accommodate the examination of witnesses, and taking account of the time concerns expressed by the Parties in their recent correspondence, the schedule for the forthcoming hearing is amended as follows:

- Monday, 22 October to lunch break on Wednesday, 24 October – Italy's first round submissions (2 ½ days)
- Wednesday afternoon, 24 October and Thursday morning, 25 October – break (1 day)
- Thursday afternoon, 25 October to Saturday, 27 October – India's first round submissions (2 ½ days)
- Sunday, 28 October – break (1 day)
- Monday, 29 October – examination of Captain Vitelli, Captain Noviello, and Mr. Fredy J. (1 day)
- Tuesday, 30 October – examination of Commandant [REDACTED] and Assistant Commandant [REDACTED] (1 day)
- Wednesday, 31 October – break (1 day)
- Thursday, 1 November – Italy's second round submissions (1 day)
- Friday, 2 November – break (1 day)
- Saturday, 3 November – India's second round submissions (1 day)

VI. CONSULTATIONS BETWEEN THE PARTIES AND PRACTICAL ARRANGEMENTS

11. The Parties are requested to consult with each other in respect of the implementation of the present Procedural Order.

12. In particular, the Parties are directed to agree as to which Party shall make contact with each of the individuals identified by the Tribunal in paragraph 4, with a view to transmitting to him the Tribunal's request to testify at the hearing as a Tribunal witness and inviting him to provide an optional supplemental statement for the purposes of the present arbitration in accordance with paragraph 8. The Party transmitting the request shall inform the individual that, in appearing as a Tribunal witness, his duty is to assist the Tribunal in gathering evidence as to the events giving rise to this arbitration. While the Party transmitting the request may provide explanation to the witness as to the purpose and procedural context of his testimony, the Party shall refrain from discussing the content of any testimony that he may be invited to give before the Arbitral Tribunal, from rehearsing such testimony, and from other forms of witness preparation.

13. The Parties shall also seek to reach agreement on the sequence of examination of each witness, failing which the Tribunal shall determine which Party shall examine a witness first.
14. Finally, the Parties are invited to consult with each other in respect of confidentiality arrangements that may be necessary at the hearing in respect of oral witness testimony.
15. The Parties are directed to report to the Tribunal, jointly or separately, on progress made in respect of the issues set out in paragraphs 12, 13 and 14 **by 31 August 2018**.
16. The PCA registry shall take charge of travel and accommodation arrangements for the witnesses called. To that end, the Parties are requested to provide the PCA with direct contact details, including telephone number(s) and e-mail address(es) for each witness. The expenses incurred in connection with the attendance by witnesses of the hearing shall be covered from the case deposit.

For the Arbitral Tribunal:



H.E. Judge Vladimir Golitsyn
President

30 July 2018