

The ‘Enrica Lexie’ Incident (Italy v. India) ITLOS Case No 24, ICGJ 499 (ITLOS 2015)

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Background

On June 26, 2015, the United Nations Convention on the Law of the Sea ("UNCLOS") was invoked to start the arbitral process. A "Notification under Article 287 and Annex VII, Article 1 of UNCLOS and Statement of Claim and Grounds on Which it is Based" was sent by Italy to India to start the procedure.

Introduction

Despite the longstanding amicable ties between India and Italy, the Enrica Lexie case posed a challenge to these relations. Originating in 2012, the dispute has recently been resolved through an innovative decision by the Permanent Court of Arbitration (PCA) in the form of an Arbitral Award. Subsequent to the establishment of the Tribunal for interstate arbitration proceedings between the two countries, the PCA issued a conclusive, enforceable, and legally binding order.¹

Facts

In 2012, the privately owned Italian ship Enrica Lexie embarked on a journey from Singapore to Djibouti. The International Maritime Organisation had warned the Italian government of an

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¹ The ‘Enrica Lexie’ incident (Italy v India) : Available at: https://sherloc.unodc.org/cld/case-law-doc/piracycrimetype/2015/the_enrica_lexie_incident_italy_v_india.html

elevated risk of pirate activity in the high seas off Kerala. In response, the tanker sought to ensure its safety by transporting a contingent from the "Italian Vessel Protection Department." Precisely 20.5 nautical miles off the coast of Kerala, on February 15, 2012, an Indian fishing vessel named "The St. Antony", carrying eleven crew members, was engaged in fishing within the Exclusive Economic Zone of India. Interestingly, the Enrica Lexie had representation from Sri Lanka and Egypt on board.

The vessel was accompanied by a Vessel Protection Detachment (VPD), an Italian force assigned to safeguard the ship from maritime piracy, given the prevalent threat in the area. The fishing vessel received a notification to alter its course when the VPD, mistakenly identifying it as a pirate ship, activated its warning alarm. Subsequently, the VPD began firing at the ship, asserting that the shots were intended as warnings. Unfortunately, this gunfire resulted in the immediate fatalities of two fishermen, Valentine Jelastine and Ajeesh Pink. The incident not only claimed lives but also inflicted damage upon the fishing boat, posing a threat to the safety of the nine surviving fishermen.²

Post Shooting

Upon receiving information from the Local Guard, the Indian Coast Guard and Indian Navy initiated an investigation, which revealed that the Enrica Lexie was the vessel involved in the gunfire incident. Following questioning, the Indian Coast Guard mandated the ship's return to the Indian Coast for a thorough investigation. Adhering to protocol, the ship's captain granted permission, and the vessel was navigated to Kochi Port.

Italy contended that Indian forces, employing tactics such as air power and Coast Guard vessels, restricted the Enrica Lexie's course and compelled it to approach the coast through deceptive means. In contrast, India refuted these claims, asserting that its actions were solely aimed at

² *The departure of Enrica Lexie: Complete justice or diplomatic success? The Wire*. Available at: <https://thewire.in/law/enrica-lexie-italian-marines-case-kerala-fishermen-supreme-court>

safeguarding the nation's maritime security. The resolution of these conflicting claims required a comprehensive examination of the merits to arrive at a final determination.

Following the arrival of the ship off the coast, a comprehensive investigation into the incident unfolded, encompassing detailed questioning of the crew members and a meticulous examination of the evidence. The Kerala Police determined that two members of the Vessel Protection Detachment (VPD), namely Sergeant Salvatore Girone and Sergeant Massimiliano Latorre, the VPD chief, were implicated in the gunfire. Subsequently, orders were issued for them to disembark from the ship.³ Serving in the Italian armed forces and executing official duties as marines, they faced charges of murder and attempted murder under multiple provisions of the Indian Penal Code, 1860. On February 19, they were formally placed under arrest, putting both marines at risk of facing execution.

Upon learning of these developments, the Italian government initiated a thorough investigation. Besides launching a criminal inquiry in Rome, they dispatched an admiral from the Italian Navy to India to conduct a comprehensive investigation and inquiry into the incident. These actions resulted in the initiation of numerous legal proceedings in various forums.⁴

Issues

1. Does the criminal case fall under the purview of Indian courts?
2. Did India violate any UN Convention provisions?
3. Does India qualify for any financial assistance?
4. What immunity do the Italian marines have?

³ Devaney, J.G. and Tams, C.J. (2021) *In re arbitration between the Italian Republic and the Republic of India concerning the 'enrica lexie' incident: American Journal of International law, Cambridge Core*. Available at: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/in-re-arbitration-between-the-italian-republic-and-the-republic-of-india-concerning-the-enrica-lexie-incident/3687735D2E8E5675D0B4C85DDAF95CE0>

⁴ *CIL.NUS.EDU.SG*. Available at: <https://cil.nus.edu.sg/blogs/the-enrica-lexie-incident-award-and-exclusive-flag-state-jurisdiction-by-arron-n-honniball/>

Contentions by the Petitioners

The individuals submitting the petition asserted that their dedication to security responsibilities hindered any association with the purported acts of killing or attempted killing, thus substantiating their innocence. They stated that they perceived the fishing boat as a clever pirate maneuver and a potential threat. Despite numerous warnings through flashlights, flags, and horns, the vessel persisted in its course. The petitioners underscored the unsuccessful endeavor to seek assistance from the Indian Navy. They highlighted that the incident transpired not within Indian waters but within the Exclusive Economic Zone (Contiguous Zone), which extends significantly beyond the territorial boundaries.

They contested India's assertion of jurisdiction, referencing Section 4 of the Indian Penal Code, which asserts India's jurisdiction over criminal matters predominantly taking place within its territory and involving Indian residents. Given that the seafarers were Italian nationals, the petitioners contended that Indian courts did not possess exclusive jurisdiction. They argued that, according to Article 87(1)(a) of The United Nations Convention on the Law of the Sea (UNCLOS) 1982, they had the right to navigate freely, unaffected by external influences. The assertion of sovereign immunity for the seafarers, based on their official duty, stood out as a key point of disagreement.

They argued for the bestowal of functional immunity in accordance with UNCLOS regulations. The petitioners also emphasized that, as per Articles 97 and 217 of the UNCLOS, the flag state of a ship holds exclusive jurisdiction for bringing criminal charges related to ships in international waters. They claimed that Indian authorities utilized force and coercion to intercept the vessel in international waters, compelling a change in its course. Additionally, they asserted that the Maritime Zones Act of 1976 allows foreign ships, excluding warships, to navigate territorial seas.

Ultimately, they maintained that legal proceedings in India were unnecessary as an ongoing investigation had already been initiated in Italy.⁵

Contentions by the Respondents

The respondents strongly opposed the Italian seamen's assertion of sovereign immunity, contending that their actions were driven by private corporate interests rather than the typical sovereign duties carried out by public servants. The primary source of disagreement centered on the location of the alleged crime. The respondents argued that, as it occurred in the Contiguous Zone, India retained the right to assert sovereignty over the area.

Challenging the relevance of UNCLOS Article 97, the respondents highlighted that the incident transpired in the high seas, precisely 20.5 nautical miles from India's baseline. This counterargument aimed to undermine the petitioner's position grounded in that particular article.

The respondents underscored the importance of UNCLOS Articles 32 and 56, asserting that India had the right to conduct the trial within its Exclusive Economic Zone (EEZ) to maintain law and order. They highlighted the absence of pirate incidents in the waters off the coast of Kerala before this event, attributing the tragic deaths of the fishermen to the actions of the Italian seafarers.

The respondents argued that the fishing vessel maintained a safe distance from the tanker and did not pose an immediate threat. Their critique of the Vessel Protection Detachment's (VPD) use of force rested on the argument that the firing was unnecessary and lacked appropriate caution.

In contradiction to the petitioners' claims, the respondents contended that there was no indication for the fishermen to alter their course, rendering the use of torches ineffective during daylight. The

⁵ Devaney, J.G. and Tams, C.J. (2021) *In re arbitration between the Italian Republic and the Republic of India concerning the 'enrica lexie' incident: American Journal of International law, Cambridge Core*. Available at: <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/in-re-arbitration-between-the-italian-republic-and-the-republic-of-india-concerning-the-enrica-lexie-incident/3687735D2E8E5675D0B4C85DDAF95CE0>

respondents heavily relied on the precedent set by the S.S. Lotus case (France v. Turkey)⁶ in their efforts to establish jurisdiction.⁷

Judgement of the Kerala High Court

The High Court deemed the two Italian seamen accountable and subject to Indian jurisdiction, and that they may be made liable under the Indian Penal Code. Additionally, the court asserted its authority to uphold law and order and take necessary actions to safeguard the rights of India and its citizens, given that the crime occurred in an Indian coastal region. The court dismissed Italy's entire argument, describing the killing of the fishermen as horrific.

According to the court's ruling, the Italian vessel was engaged in a commercial activity rather than a sovereign duty. Consequently, the petitioners were obligated to compensate both respondents with Rs. 1,00,000.⁸

Judgement of the Supreme Court of India

In a pivotal ruling, the Supreme Court of India overturned the Kerala High Court's decision on jurisdictional matters and authorized the establishment of a special court for cases involving foreign entities. The court determined that the state of Kerala, being just a component of India, lacked the authority under the IPC or CrPC to adjudicate the offense; rather, the Union of India held jurisdiction. It stated that any dispute, in any form, involved the Republic of Italy due to the mariners being members of Italy's royal navy.⁹

The Judgement

⁶ *The case of the S.S. Lotus, France v. Turkey, judgment, 7 September 1927, Permanent Court of International Justice (PCIJ)*. Available at: https://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm

⁷ Odello, M. (2021) *The Enrica Lexie Incident and the status of Anti-Piracy Security personnel on board*, OUP Academic. Available at: <https://academic.oup.com/jcsl/article/26/3/551/6367959#322378799>

⁸ *Enrica Lexie: Did India lose case against Italy because of lapses by its own Supreme Court? The Wire*. Available at: <https://thewire.in/law/enrica-lexie-india-case-arbitral-tribunal-dissents-supreme-court>

⁹ Biju, R.M. (2022) *Enrica Lexie Case: Supreme Court directs payment of Rs 5 lakh each to 9 fishermen out of compensation given to boat owner*, Live Law. Available at: <https://www.livelaw.in/top-stories/supreme-court-enrica-lexie-italian-marines-case-kerala-coast-compensation-to-fishermen-215090>

After an extensive period of trial, the Italian government remained dissatisfied with the Supreme Court's judgment, alleging it to be biased. Subsequently, they escalated the case to the International Court of Justice where the case was settled through arbitration. On July 2, 2020, the eagerly awaited Arbitral Award was issued, addressing various concerns raised by both parties before the five-member Arbitral Tribunal, hereinafter referred to as the AT.

Firstly, the tribunal ruled that the AT possesses jurisdiction over the dispute in question, countering India's categorical denial of jurisdiction. Furthermore, it was established that the AT is empowered to deliberate on the matter of the Marines' immunity. Consequently, the AT dismissed all of India's arguments against Italy pertaining to a coastal state's jurisdiction and rights over its Exclusive Economic Zone (EEZ).

Second, by a majority of three votes, the AT ruled in favor of the Italian marines' immunity, stating that, "India is precluded from exercising its jurisdiction over the Marines, and that Marines are entitled to immunity in relation to the acts that they committed during the incident of February 15, 2012." Additionally, it mandated that India cease the criminal prosecution of the marines.

Thirdly, the AT unanimously determined that, in accordance with Articles 87(1)(a) and 90 of the UNCLOS, Italy had violated India's freedom of navigation through the actions of its marines. It also declared that India had not committed any acts contravening the convention's provisions related to ship status, freedom of navigation on the high seas, criminal jurisdiction over disputes, and collaboration in the fight against piracy.

Lastly, the AT ruled that India's case is eligible for compensation, as it encompasses death, physical harm, material damage to the St. Antony's property, and any moral harm suffered by the captain and other crew members of the ship—injuries irreparable through restitution. The amount of this compensation would be mutually determined by both parties.¹⁰

¹⁰ The 'Enrica Lexie' incident (*Italy v. India*) PCA. Available at: <https://pca-cpa.org/en/cases/117/>

The Aspect of Arbitration

The resolution of the Enrica Lexie dispute between Italy and India was largely dependent on the arbitration proceedings that were started under the United Nations Convention on the Law of the Sea (UNCLOS). The Permanent Court of Arbitration (PCA) was the arbitral tribunal's governing body when UNCLOS was invoked in June 2015. The Arbitral Tribunal, which was made up of eminent jurists and legal experts such as Professor Francesco Francioni, Judges Jin-Hyun Paik and Patrick L. Robinson, and H.E. Judge Vladimir Golitsyn as President, provided an impartial and fair resolution of the case. The Tribunal rendered important verdicts on jurisdictional issues, affirmed the Italian marines' immunity, concluded that Italy had violated India's freedom of navigation, and addressed compensation for India. An important milestone was reached on May 21, 2020, when the Arbitral Award was issued. It clarified jurisdictional issues, provided a thorough legal framework, and established precedents for UNCLOS regulations. The Enrica Lexie case helped to shape international maritime law and encourage peaceful methods of resolving maritime conflicts when the arbitration proceedings came to an end, transforming it from a drawn-out legal battle into a settled international disagreement.

Conclusion

The Enrica Lexie case unfolds as a complex and contentious legal drama, shedding light on the challenges associated with navigating international waters and determining jurisdictional boundaries. The incident gave rise to a diplomatic dispute between Italy and India, further prompting critical reflections on the application of maritime law and the rights and responsibilities of individuals implicated in such events.

While the legal proceedings have yielded some resolution, lingering questions persist regarding the broader implications of the case on diplomatic relations, maritime security, and the pursuit of justice at sea. This case underscores the imperative for well-defined international frameworks and collaborative efforts to effectively manage such incidents, preventing them from evolving into prolonged legal and diplomatic conflicts.

With its intricacies and far-reaching consequences, the Enrica Lexie case serves as a poignant reminder of the complexities inherent in addressing situations that transcend national boundaries.