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1
2 **Monday, 8th July 2019**

3 **(9.05 am)**

4 **THE PRESIDENT:** Good morning, ladies and gentlemen. I am
5 pleased to open the hearing in PCA Case No. 2015-28,
6 the case concerning the "Enrica Lexie" Incident
7 instituted by the Italian Republic against the
8 Republic of India under Annex VII to the 1982
9 United Nations Convention on the Law of the Sea, to
10 which I will refer in the following as "the
11 Convention" Or "UNCLOS".

12 I am joined today by my colleagues and fellow
13 members of the Arbitral Tribunal in these proceedings:
14 Judge Jin-Hyun Paik, Judge Patrick Robinson, Professor
15 Francesco Francioni and Dr Pemmaraju Sreenivasa Rao.
16 I would like to apologise for my pronunciation. The
17 Tribunal is assisted by the Registrar and his
18 colleagues at the International Bureau of the
19 Permanent Court of Arbitration.

20 Pursuant to Article 13 of the Rules of Procedure
21 of this arbitration and Procedural Order No. 8, the
22 Arbitral Tribunal shall meet from today,
23 8th July 2019, to the following Saturday,
24 20th July 2019, to hear the parties' arguments
25 regarding the jurisdiction of the Arbitral Tribunal as
26 well as the merits of Italy's claim and India's

1 counterclaim.

2 On behalf of the Arbitral Tribunal, I welcome the
3 agents, co-agents, counsel and advocates of Italy and
4 India to this hearing.

5 Pursuant to Article 23, paragraph 3 of the Rules
6 of Procedure, as amended by the Arbitral Tribunal
7 after consultations with the Parties by Procedural
8 Order No. 7, the hearing shall in principle be
9 confidential. I note, however, that at the beginning
10 of the proceedings today, the agent of Italy and the
11 agent of India will each make a brief opening
12 statement which will be webcast live on the internet.
13 No other parts of the hearing will be broadcast.

14 Before turning it over to the parties, I would ask
15 the Registrar briefly to summarise the procedure and
16 to read out the submissions of the parties in respect
17 of jurisdiction of the Arbitral Tribunal, as well as
18 the merits of Italy's claims and India's
19 counterclaims, as formulated in their written
20 pleadings.

21 The Registrar.

22 **(9.08 am)**

23 **Summary of Procedure and Submissions of the Parties**
24 **by the Registrar**

25 **DR PULKOWSKI:** Thank you, Mr President.

1 On 26th June 2015, Italy instituted arbitral
2 proceedings against India by serving on India
3 a "Notification under Article 287 and Annex VII,
4 Article 1 of UNCLOS, and Statement of Claim and
5 Grounds on Which it is Based".

6 On 11th December 2015, Italy filed a "Request for
7 the Prescription of Provisional Measures under
8 Article 290, Paragraph 1 of UNCLOS".

9 On 18th January 2016, the Arbitral Tribunal held
10 a first procedural meeting with the parties at the
11 Peace Palace in The Hague.

12 On 19th January 2016, having regard to the
13 consultations with the parties at the first procedural
14 meeting, the Arbitral Tribunal adopted its Rules of
15 Procedure, fixing time limits for the parties' written
16 pleadings on jurisdiction and merits.

17 On the same date, the Arbitral Tribunal adopted
18 Procedural Order No. 1, concerning the procedural
19 timetable for the consideration of Italy's request for
20 the indication of provisional measures. Pursuant to
21 Procedural Order No. 1, India submitted, on
22 26th February 2016, the "Written Observations of the
23 Republic of India on the Request of the Italian
24 Republic for the Prescription of Provisional Measures
25 under Article 290, paragraph 1, of UNCLOS" and,
26 following a public hearing held at the Peace Palace on

1 29th April 2016, the Tribunal adopted an order in
2 respect of Italy's request, unanimously prescribing
3 provisional measures listed in paragraph 132 of that
4 order.

5 In Procedural Orders Nos. 2, 3 and 4, dated
6 9th September 2016, 1st June 2017 and
7 12th February 2018 respectively, the Tribunal, after
8 consultations with the parties, made certain
9 modifications to the procedural calendar for the
10 submission of written pleadings set out in Article 9
11 of the Rules of Procedure.

12 On 30th September 2016, Italy submitted its
13 Memorial dated 30th September 2016.

14 On 14th April 2017, India submitted its
15 Counter-Memorial. In its Counter-Memorial,
16 in addition to responding to Italy's Memorial, India
17 also presented counterclaims.

18 On 11th August 2017, Italy submitted its "Reply on
19 the Merits -- Counter-Memorial on Jurisdiction --
20 Counter-Memorial on India's Counter-Claims".

21 On 15th December 2017, India submitted its
22 "Rejoinder on the Merits -- Reply on Jurisdiction --
23 Reply to Italy's Counter on India's Counter-Claims".

24 On 30th July 2018, the Arbitral Tribunal issued
25 Procedural Order No. 5, in which it determined that
26 the hearing in the present arbitration would be held

1 from 22nd October to 3rd November 2018 and fixed the
2 schedule for that hearing.

3 On 27th September 2018, the Arbitral Tribunal
4 informed the parties that the hearing had been
5 postponed, and on 26th October 2018, the Arbitral
6 Tribunal requested the parties to keep in reserve the
7 period from 8th July 2019 to 20th July 2019 as
8 tentative dates for the hearing.

9 On 16th May 2019, the Arbitral Tribunal issued
10 Procedural Order No. 8, in which it confirmed that the
11 hearing in the present arbitration would be held from
12 8th July 2019 to 20th July 2019.

13 In its Memorial, Italy requests the Arbitral
14 Tribunal to adjudge and declare that:

15 "(a) By the Territorial Waters, Continental Shelf,
16 Exclusive Economic Zone and other Maritime Zones Act,
17 1976, and Ministry of Home Affairs Notification
18 No. S.O. 671(E), dated 27th August 1981, India has
19 acted and is acting in a manner that is incompatible
20 with UNCLOS with regard to Articles 33(1), 56(1),
21 56(2), 58(2), 87(1)(a) and/or 89.

22 "(b) By directing the Enrica Lexie to change
23 course and proceed into India's territorial sea, India
24 violated Italy's freedom of navigation, in breach of
25 UNCLOS Article 87(1)(a).

26 "(c) By interdicting the Enrica Lexie and

1 escorting her to Kochi, India violated Italy's
2 exclusive jurisdiction over the Enrica Lexie, in
3 breach of UNCLOS Article 92.

4 "(d) India violated, and continues to violate,
5 Italy's exclusive right to institute penal and
6 disciplinary proceedings against the Marines, in
7 breach of UNCLOS Article 97(1).

8 "(e) By ordering the detention of the Enrica Lexie
9 between February and May 2012, and investigating those
10 on board, India violated the prohibition contained in
11 UNCLOS Article 97(3).

12 "(f) The assertion and continued exercise of
13 criminal jurisdiction by India over Chief Master
14 Sergeant Massimiliano Latorre and Sergeant Salvatore
15 Girone is in violation of India's obligation to
16 respect the immunity of the Marines under UNCLOS
17 Articles 2(3), 56(2), 58(2) and 100, as Italian State
18 officials exercising official functions.

19 "(g) By failing to cooperate in the repression of
20 piracy, India violated UNCLOS Article 100, read with
21 UNCLOS Article 300.

22 "(h) India's assertion of jurisdiction in the
23 present case was and is contrary to UNCLOS."

24 Italy also requests the Arbitral Tribunal to
25 order, in addition or in the alternative, that:

26 "(a) India must cease all wrongful acts that have

1 caused and continue to cause any of the continuing
2 breaches of UNCLOS in paragraphs 1(a), (d), (f), (g)
3 and (h), above. It shall, in particular, cease to
4 apply the provisions of the 1976 Maritime Zones Act
5 and the 1981 Notification insofar as they are
6 incompatible with UNCLOS. It shall also cease to
7 exercise any form of criminal jurisdiction over the
8 Marines, including measures of restraint and legal
9 proceedings in India.

10 "(b) India must make full reparation for the
11 breaches of UNCLOS set out in paragraphs 1(a) to (h),
12 above, and re-establish the situation that existed
13 before its wrongful acts. India must, in particular,
14 terminate all criminal proceedings (including measures
15 of restraint) in respect of Chief Master Sergeant
16 Massimiliano Latorre and Sergeant Salvatore Girone in
17 connection with the 'Enrica Lexie' Incident.

18 "(c) India must pay compensation for the
19 non-material damage suffered by Chief Master Sergeant
20 Massimiliano Latorre and Sergeant Salvatore Girone as
21 a result of India's unlawful exercise of jurisdiction
22 over them, and the material damage suffered in
23 consequence of the detention of the Enrica Lexie."

24 In its Reply and Rejoinder to Counterclaim, Italy
25 also requests the Arbitral Tribunal:

26 "(1) To dismiss India's objections to the

1 jurisdiction of the Tribunal with respect to Italy's
2 Claims 1(a), 1(f), and 1(h); and

3 "(2) To dismiss India's counter-claims in their
4 entirety and all requests consequential on them."

5 In its Rejoinder, whose content reflects the
6 submissions set out in its Counter-Memorial, India
7 requests the Arbitral Tribunal to:

8 "(1) adjudge and declare that it has no
9 jurisdiction with respect to Italy's Claims 1(a), 1(f)
10 and 1(h), and to dismiss and reject those Claims; and

11 "(2) dismiss and reject all other requests and
12 submissions of Italy."¹

13 Regarding its counterclaims, India also requests
14 the Arbitral Tribunal to adjudge and declare that:

15 "(3) India's counterclaims are admissible; and
16 that,

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

19 "(4) violated India's sovereign rights under
20 Article 56 of UNCLOS;

21 "(5) breached its obligation to have due regard to
22 India's rights in its EEZ under Article 58(3) of
23 UNCLOS;

¹ India's Rejoinder, p. 131. In India's Counter-Memorial, p. 125, India's first request is slightly different -- "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" [emphasis added].

1 "(6) violated India's freedom and right of
2 navigation under Articles 87 and 90 of UNCLOS; and

3 "(7) infringed India's right to have its EEZ
4 reserved for peaceful purposes under Article 88 of
5 UNCLOS."

6 Consequently, India requests the Tribunal to order
7 that:

8 "(8) Italy make full reparation for its breaches
9 of Article 56, 58(3), 87, 88 and 90 of UNCLOS."²

10 Mr President.

11 **THE PRESIDENT:** Thank you, Mr Registrar.

12 I now invite the parties to introduce their
13 delegations. First let me turn the floor over to the
14 agent of Italy, Mr Francesco Azzarello, to introduce
15 the delegation of Italy.

16 **(9.18 am)**

17 **Introduction of the Delegations**

18 **AMBASSADOR AZZARELLO:** Mr President, members of the
19 Tribunal, agent and members of delegation of the
20 India, Registrar of the Permanent Court of
21 Arbitration, it is an honour to represent Italy in
22 these proceedings.

² India's Rejoinder, p. 131; India's Counter-Memorial, p. 125. India in its Counter-Memorial "reserves the right to request that the Tribunal order" the full reparation, while India in its Rejoinder "requests the Tribunal to order" the full reparation [emphases added].

1 Before starting, I would like to pay my own -- and
2 Italy's -- respects to Judge Patibandla Chandrasekhara
3 Rao, who sadly passed away last year, and to convey
4 the assurances of our highest consideration to
5 Dr PS Rao. This is how I will set the scene.

6 I have already provided you with a list of all the
7 members in Italy's delegation. The following counsel
8 will present submissions on behalf of Italy during
9 these two weeks of hearing: Sir Daniel Bethlehem QC,
10 Dr Paolo Busco, Professor Ida Caracciolo, Dr Ben
11 Juratowich QC, Mr Sudhanshu Swaroop QC, Professor
12 Guglielmo Verdirame QC, Dr Philippa Webb, Sir Michael
13 Wood.

14 Mr President, following the presentation of the
15 Indian delegation by the agent of India at your
16 invitation, I will return to make an opening statement
17 on behalf of Italy.

18 **THE PRESIDENT:** Thank you, Mr Azzarello.

19 I turn now to the agent of [India], Mr Gangadharan
20 Balasubramanian -- I would apologise for
21 mispronouncing it; I tried, with the help of my
22 colleague, but I probably am not that talented! -- to
23 introduce the delegation of India.

24 **MR BALASUBRAMANIAN:** Thank you, Mr President, members of
25 the Tribunal and esteemed colleagues from Italy and
26 India.

1 Like my co-agent from Italy, I would also like to
2 place on record our sincere condolences for the
3 passing away of Mr PC Rao, and we welcome Mr PS Rao
4 over here. And I would also like to apologise for the
5 long and very difficult pronunciation of my name,
6 Mr President.

7 In short, I will take this opportunity -- and
8 thank you for giving us this opportunity -- to
9 introduce the Indian team.

10 I am Balasubramanian, Joint Secretary in Europe
11 West of the Indian Ministry of External Affairs.

12 His Excellency Mr Venu Rajamony, Ambassador of
13 India to the Netherlands, is the co-agent;
14 Mrs Uma Sekhar, Joint Secretary, L&T, is another
15 co-agent; and Dr Luther M Rangreji is the deputy
16 agent.

17 The counsel and advocates include: Professor Alain
18 Pellet, emeritus professor, University Paris Nanterre;
19 Mr Rodman Bundy, member of the New York Bar; Dr Vishnu
20 Dutt Sharma, senior counsel and former additional
21 secretary, L&T; Mr Benjamin Samson, International Law
22 Centre of Nanterre; Mr Alvin Yap, advocate and
23 solicitor of the Supreme Court of Singapore; Ms Joyce
24 Ng, advocate and solicitor of the Supreme Court of
25 Singapore; Mr Ludovic Legrand from the Law Centre of
26 Nanterre; and Ms Héloïse Bajer-Pellet, member of the

1 Paris Bar.

2 We also have advisors and members for the team,
3 and they are: Mr Donny Michael, deputy inspector
4 general from the Indian Coast Guard; Dr Sanjay Kumar,
5 under secretary from the Ministry of External Affairs;
6 Mr S Senthil, legal officer from the Ministry of
7 External Affairs; and Mr P Vikraman, deputy
8 superintendent of police for the National
9 Investigation Agency.

10 Thank you for this opportunity. I look forward to
11 coming back to give our presentation of the case
12 subsequently. Thank you.

13 **THE PRESIDENT:** Thank you, Mr Balasubramanian.

14 According to the schedule for the hearing, adopted
15 by the Tribunal in consultation with the parties, the
16 agent of Italy and the agent of India are each to make
17 a brief opening statement.

18 I give the floor first to the agent of Italy,
19 Mr Azzarello, to present Italy's opening statement.

20 **(9.22 am)**

21 **Opening statement on behalf of the Italian Republic**
22 **by Ambassador Azzarello**

23 **AMBASSADOR AZZARELLO:** Mr President, members of the
24 Tribunal, the dispute between Italy and India that
25 this eminent Tribunal is convened to resolve concerns

1 a maritime incident that took place seven and a half
2 years ago in international waters off the Indian
3 coast. The handling of that incident by India, and
4 the dispute that followed, led to a rupture in
5 relations between the two states, with two Italian
6 marines being detained in India for a number of years
7 without lawful charge, a frustrated investigation by
8 the Rome Public Prosecutor, and an impasse between the
9 two states over the exercise of rights of
10 jurisdiction, including immunities from jurisdiction,
11 in relation to the Italian marines.

12 The commencement of these proceedings by Italy on
13 26th June 2015 was followed by provisional measures
14 ordered, first, by the International Tribunal for the
15 Law of the Sea, and subsequently by this Tribunal,
16 which saw the marines returned to Italy pending the
17 award of the Tribunal. With those decisions, and with
18 the calm created by moving the dispute on to the
19 arbitration track, relations between the two states
20 returned to a customary path. The task of the
21 Tribunal, guided by and applying the law, will be
22 delicate and important.

23 Let me begin by briefly recalling the factual
24 background to the dispute.

25 On 15th February 2012, the *Enrica Lexie*, an oil
26 tanker flying the flag of Italy, was en route from

1 Sri Lanka to Egypt. A vessel protection detachment,
2 or "VPD", comprising six Italian marines was stationed
3 on board the ship, with an official anti-piracy
4 mandate entrusted to them under Italian law. Chief
5 Master Sergeant Massimiliano Latorre was the head of
6 the vessel protection detachment. Sergeant Salvatore
7 Girone was one of its members.

8 While the Enrica Lexie was navigating about
9 20.5 nautical miles off the costs of Alappuzha, India,
10 a small, unidentified craft was spotted on radar,
11 proceeding on a collision course with the tanker. As
12 the boat drew nearer, the marines on board the
13 Enrica Lexie took a series of visual and auditory
14 measures to urge those on the approaching boat to
15 change its course. It is to be recalled that these
16 events took place in waters in which pirate attacks
17 were known to have occurred, and a common
18 *modus operandi* for pirate attacks involved the use of
19 small crafts, including fishing vessels.

20 Despite the systematic steps taken to encourage
21 the boat to change its course, it continued undeterred
22 on its collision course with the Enrica Lexie. Faced
23 with this situation, and apprehending that his vessel
24 was under pirate attack, the master of the Enrica
25 Lexie sounded the emergency alarm. He instructed
26 those members of the crew not indispensable to the

1 safe navigation of the ship to take refuge in the
2 citadel, secure quarters within the ship. The
3 Enrica Lexie manoeuvred to try and avoid the impending
4 collision. Observation through binoculars reinforced
5 the fear that the Enrica Lexie was the target of
6 a piracy attack. The marines fired three volleys of
7 warning shots into the water as the skiff continued to
8 approach. When the skiff finally turned away, it was
9 very close to the tanker, seconds from a collision.

10 The master of the Enrica Lexie and the marines
11 immediately reported the incident to all concerned
12 authorities, Italian and international. Hours after
13 the incident, when the Enrica Lexie had resumed its
14 navigation and was some 36 nautical miles off the
15 Indian coast, India dispatched armed Coast Guard
16 vessels and aerial units to interdict the Enrica Lexie
17 and escort her to Kochi.

18 On 19th February 2012, Chief Master Sergeant
19 Latorre and Sergeant Girone were compelled to
20 disembark the vessel by the Kerala police. They were
21 arrested on the spot, with an accusation of murder for
22 having allegedly killed two Indian fishermen,
23 Ajeesh Pink and Valentine Jelastine, on board the
24 fishing boat the St Antony, in the context of the
25 incident that had occurred four days before. The
26 marines' ordeal in India, detained and at one point at

1 risk of the death penalty, began.

2 At its core, this dispute is about which state,
3 Italy or India, is mandated to exercise jurisdiction
4 over Massimiliano Latorre and Salvatore Girone,
5 members of the Italian armed forces on official
6 duties, with regard to what has become known as "the
7 Enrica Lexie Incident". As members of the Italian
8 armed forces, then, as today, the marines were state
9 officials. They were performing official duties at
10 the time of the incident, exercising official
11 functions under Italian law. They were stationed on
12 an Italian-flagged vessel. The incident occurred in
13 international waters, beyond India's territorial sea.

14 As soon as the nature of the incident became
15 known, Italy took immediate steps to investigate the
16 incident. A criminal investigation was opened by the
17 Rome Public Prosecutor. In parallel, an admiral of
18 the Italian Navy was immediately dispatched to India
19 to enquire into the incident. Both sought the
20 cooperation and assistance of the Indian authorities.
21 No cooperation was forthcoming. Instead, the Indian
22 authorities pressed ahead with their own proceedings.
23 Charges were brought against the marines before the
24 Kerala courts, later thrown out by the Indian Supreme
25 Court, which went on to invent a novel procedure to
26 try the marines, although on charges that were never

1 defined. The Italian courts failed to determine the
2 marines' claim to immunity as required under
3 international law.

4 The prompt assertions by the marines and Italy
5 that India lacked jurisdiction over the *Enrica Lexie*
6 and the marines under the UN Convention on the Law of
7 the Sea were swept aside by reference to India's
8 domestic law, which purported to give the Indian
9 authorities penal jurisdiction beyond its territorial
10 sea.

11 This dispute is rooted in the provisions of
12 UNCLOS: in Articles 87 and 58, which address Italy's
13 freedom of navigation, and the rights attendant
14 thereon; in Article 89, which provides that no state
15 may subject any part of the high seas to its
16 sovereignty; in Article 92, which provides that ships
17 on the high seas shall be subject to the exclusive
18 jurisdiction of their flag state; in Article 97, which
19 provides that, in the event of an incident of
20 navigation, it is the flag state that has exclusive
21 jurisdiction to investigate the incident;
22 Articles 2(3), 56(2) and 58(2), which require respect
23 for rules of international law and the rights of other
24 states, including concerning the immunity of state
25 officials; Article 100 on the duty to cooperate in the
26 repression of piracy; and Article 300 on the

1 obligation not to abuse rights granted by the
2 convention.

3 Mr President, members of the Tribunal, I will
4 leave the development of these and other legal
5 arguments to Italy's counsel. In my role as agent of
6 the Italian Republic, I would like to stress five
7 important points in this opening submission.

8 First, Italy has from the outset taken every
9 available step to exercise its jurisdiction over the
10 Enrica Lexie and over the marines. I have addressed
11 this already, and you will hear more about this from
12 Italy's counsel during the course of the coming day.

13 For the avoidance of doubt, it is no part of
14 Italy's case that the incident of 15th February 2012
15 should not be fully investigated. It should be so
16 investigated, and Italy from the start has been
17 committed to doing so. The question in issue in these
18 proceedings is which of Italy or India can lawfully
19 exercise jurisdiction over the marines to undertake
20 such an investigation.

21 Second, the prejudice in this case, Mr President,
22 members of the Tribunal, is the prejudice that India
23 has at every single step caused to Italy and the
24 marines. The immunity of the marines was not
25 determined in an expeditious and preliminary manner,
26 as required under international law. There have been

1 inexcusable delays of process. Special procedures
2 have been invented, in breach of India's own
3 Constitution. The conduct of India's investigatory,
4 prosecutorial and judicial authorities combined to
5 deny to the marines, and to Italy, due and proper
6 consideration of law.

7 India's prejudice against the marines extends to
8 these arbitral proceedings, in which India, in both
9 its written pleadings and in the earlier oral phases
10 of this case, asserted the guilt of the marines for
11 the murder of Ajeesh Pink and Valentine Jelastine. In
12 India's eyes, in its submissions, there is no
13 presumption of innocence. The marines were guilty of
14 murder before charges had even been laid.

15 Third, India has suggested over and over again
16 that the natural centre of gravity of the Enrica Lexie
17 incident is India because the incident occurred off
18 the Indian coast and because, as it is alleged, two
19 Indian fishermen were killed by the actions of the
20 marines. The truth, however, is that the law
21 prescribes that the centre of gravity of the incident
22 is Italy. The Enrica Lexie was an Italian-flagged
23 vessel. It was in international waters at the time of
24 the incident. The actions of which the marines have
25 been accused took place on the Enrica Lexie, even if
26 they are alleged to have had consequences elsewhere.

1 The marines are Italian state officials and immune
2 before foreign domestic courts. The territorial link
3 with India, such as it is, was a consequence of the
4 Indian authorities unlawfully interfering with the
5 freedom of navigation of the Enrica Lexie following
6 the incident, and of trickery by the Indian
7 authorities that brought the Enrica Lexie into Indian
8 waters.

9 Fourth, the rights that Italy seeks to vindicate
10 in this arbitration are rights that belong to Italy as
11 a matter of international law. Away from the legal
12 technicalities of this arbitration, however, Italy
13 also wants to stress that those who serve in the armed
14 forces of a country render a noble service to their
15 nation and, in circumstances in which wider objectives
16 are pursued, to the international community as
17 a whole.

18 The immunity of members of the armed forces of
19 a state from foreign criminal jurisdiction is
20 recognized worldwide. India has not hesitated to
21 assert the immunity of its state officials, including
22 members of its armed forces, who are deployed in large
23 numbers around the world as members of international
24 peacekeeping contingents. Italy is confident that
25 India, away from the political spotlight of this case,
26 would be the first to defend the principle that

1 members of its armed forces are immune from the
2 criminal jurisdiction of a foreign state.

3 Finally, Mr President, members of the Tribunal,
4 while the marines are now in Italy, their deprivation
5 of liberty continues. Italy was grateful when, in
6 2015, India allowed Chief Master Sergeant Latorre to
7 return to Italy after he suffered a stroke while
8 detained in India. The provisional measures order of
9 this Tribunal in 2016, in respect of Sergeant Girone,
10 recognised that considerations of humanity apply as
11 part of the law of the sea. Considerations of
12 humanity remain relevant. By the end of this
13 arbitration, Massimiliano Latorre and Salvatore Girone
14 will have been subject to various degrees of
15 deprivation of liberty without any lawful charge for
16 over eight years. The further investigation that is
17 required in this case, and any subsequent procedure,
18 should take place in Italy.

19 Let me emphasise that Italy recognises India's
20 interest in the incident, as well as the high personal
21 interest of the families of Ajeesh Pink and Valentine
22 Jelastine. Considerations of humanity are relevant
23 here as well. And Italy would of course take all
24 appropriate steps to ensure that their interests are
25 addressed and respected in the Italian investigation
26 that would follow a finding in favour of Italy in

1 these proceedings and any proceedings that may follow,
2 including by facilitating their participation and
3 representation in such proceedings.

4 Mr President, members of the Tribunal, in
5 April 2016 this Tribunal ordered Italy and India to
6 cooperate to allow the return of Sergeant Girone to
7 Italy, under the authority of the Supreme Court of
8 India. The Supreme Court of India has, on the same
9 basis, allowed the extension of Chief Master Sergeant
10 Latorre's stay in Italy for the duration of this
11 arbitration. Those were wise orders, that brought
12 Italy and India to the path of normalising their
13 relations after years of tension caused by this
14 incident. The cooperation that the Tribunal has
15 required of Italy and India with respect to Sergeant
16 Girone's return has extended to other areas as well.
17 The proceedings to date in this arbitration are
18 an example of the positive role that an Annex VII
19 tribunal can play in bringing accord back to
20 once-riven relations between states.

21 Italy is grateful for the new course on which the
22 Tribunal has set Italy and India. We trust that India
23 shares Italy's wish that the Tribunal delivers an
24 award that fully and finally resolves the dispute
25 between them on the issue of the lawful exercise of
26 jurisdiction over the marines.

1 Mr President, members of the Tribunal, this
2 concludes my opening statement. Thank you,
3 Mr President and members of the Tribunal.

4 **THE PRESIDENT:** Thank you, Mr Azzarello.

5 I now give the floor to agent of India,
6 Mr Balasubramanian, to present India's opening
7 statement.

8 **(9.38 am)**

9 **Opening statement on behalf of the Republic of India**

10 **by Mr Balasubramanian**

11 **MR BALASUBRAMANIAN:** Mr President, distinguished members of
12 the Tribunal, it is indeed an honour for me to present
13 before you an overview of the facts, circumstances and
14 the legal position in the present case in my capacity
15 as the agent of the Republic of India.

16 The gist of the subject matter brought by Italy
17 against India essentially concerns the tragic killing
18 of two innocent Indian fishermen onboard an Indian
19 fishing boat in India's exclusive economic zone.
20 I would like to touch briefly on the facts of this
21 so-called "incident".

22 On 15th February 2012, at about 4.30 pm Indian
23 Standard Time, the Indian boat named St Antony, while
24 at a distance of about 20.5 nautical miles from the
25 Indian coast, faced a volley of shots originating from

1 two uniformed persons on board an oil tanker, which
2 was a few hundred metres away from the fishing boat.
3 The firing incident killed Mr Valentine Jelastine and
4 Mr Ajeesh Pink onboard the fishing boat. It is
5 difficult to believe that these volleys were simply
6 meant as "warning shots", as alleged by Italy. They
7 hit two crew members, caused damage to the boat,
8 endangering its safe navigation and also endangering
9 the lives of the other nine crew members on the boat.

10 As a natural consequence, upon receiving the
11 report of the killings, the Indian authorities, as
12 they were supposed to act upon it, started enquiring
13 into the killings in accordance with the applicable
14 law. It was ascertained from the vessel movements in
15 the area that the Enrica Lexie could be a vessel
16 involved in the firing incident. Once that was
17 confirmed by a crew member on the tanker, the vessel
18 was requested to turn back and join the investigation.
19 There was no ruse and no coercion, as alleged by
20 Italy, in persuading the Enrica Lexie to collaborate;
21 only a request that was confirmed in writing. The
22 shipmaster decided to accede to that request and to
23 come to Kochi port.

24 After it was *prima facie* established that two of
25 the six marines on board the Enrica Lexie had fired
26 the shots killing the two innocent fishermen, they

1 were arrested when they were on Indian territory.
2 Legal proceedings were then commenced in the Indian
3 court of Kollam in the state of Kerala. Mr President,
4 the commencement of an investigation and court
5 proceedings in light of the facts of this case, and in
6 circumstances where the alleged accused were available
7 on the territory of the country of nationality of the
8 deceased victims, is, legally speaking, entirely
9 natural.

10 Mr President, members of the Tribunal, it is my
11 firm view that no legal or administrative authority
12 would deny on both legal and humanitarian grounds to
13 recognise the immediate requirement for carrying out
14 a prompt inquiry and investigation of the two
15 killings. Therefore, without prejudice to the outcome
16 that may result from the judgement of the trial court,
17 the quick action and efforts of the Indian authorities
18 deserve not criticism of the type levelled by Italy,
19 but rather support. Italy's attempt to find fault
20 with the actions taken by the Indian investigation
21 authorities and the courts is not only unjustified, it
22 would have the perverse effect of discouraging law
23 enforcement agencies worldwide.

24 Concerning Italy's often-repeated allegation of
25 delay in the Indian court proceedings, Mr President,
26 the reality of facts forces me to say that had Italy

1 cooperated with the prosecution of the killing
2 incident, this case would have been finally concluded
3 long ago. Italy initially joined the proceedings
4 before the Indian courts, but surprisingly, in
5 a negative way, hampered them by filing multiple
6 interlocutory applications challenging the actions of
7 the Indian authorities.

8 Mr President, members of the Tribunal, the case
9 proceeded in the Indian courts, first before the
10 Kerala court and then before the Supreme Court,
11 followed by an establishment of a special court for
12 that purpose. Adopting a negative posture, however,
13 Italy chose the course of delaying it further by
14 filing continuous applications which are nothing but
15 designed to thwart the special court, and then by
16 instituting the present proceedings under Annex VII of
17 UNCLOS years after the "incident" had occurred.

18 At that point in time, Sergeant Latorre was in
19 Italy on leave granted by the Supreme Court of India
20 on health grounds; and Sergeant Girone was on bail in
21 India, allowed to reside at the residence of the
22 Italian ambassador in New Delhi. This clearly
23 articulates how reasonable and cooperative India has
24 been treating the marines and Italy during the
25 proceedings before the Indian courts.

26 Italy, soon after instituting the arbitration

1 proceedings, as we all know, sought provisional
2 measures from the International Tribunal for the Law
3 of the Sea (ITLOS) in July 2015, pending the
4 constitution of the Arbitral Tribunal. Italy had
5 requested ITLOS to preclude India from taking or
6 enforcing any judicial or administrative measures
7 against the two marines in connection with the case
8 and from exercising any other form of jurisdiction
9 over the case; and that India shall take all measures
10 necessary to ensure that the restrictions on the
11 liberty, security and movement of the marines are
12 lifted, to enable Sergeant Girone to travel to and
13 remain in Italy, and Sergeant Latorre to remain in
14 Italy, throughout the duration of the proceedings
15 before the Annex VII Tribunal.

16 It is pertinent to mention that ITLOS did not find
17 merit in prescribing the provisional measures as
18 requested. Instead, in its order dated 24th August
19 2015, with respect to Italy's first measure, ITLOS
20 prescribed a different provisional measure to the
21 effect that both Italy and India shall suspend all
22 court proceedings and refrain from initiating new ones
23 which might aggravate or extend the dispute submitted
24 to the Annex VII Tribunal or might jeopardise or
25 prejudice the carrying out of any decision which the
26 Arbitral Tribunal may render. Accordingly, the

1 parties complied with the provisional measure, as
2 prescribed by ITLOS.

3 Concerning Italy's second provisional measure
4 sought from ITLOS -- that is, seeking a relaxation of
5 the marines' bail such that, insofar as relating to
6 Sergeant Salvatore Girone, he be allowed to travel to
7 and remain in Italy until the end of the Annex VII
8 proceedings -- ITLOS did not accept Italy's request.
9 Rather, the Tribunal observed that the provisional
10 measures order must protect the rights of both parties
11 and must not prejudice any decision of the arbitral
12 tribunal to be constituted under Annex VII.

13 Mr President, members of the Tribunal,
14 interestingly, Italy did not stop there. On the
15 constitution of your Tribunal, Italy once again in
16 December 2015 requested for the additional provisional
17 measures: that India shall take such measures as are
18 necessary to relax the bail conditions of Sergeant
19 Girone in order to enable him to return to Italy,
20 under the responsibility of the Italian authorities,
21 pending the final determination of the Annex VII
22 Tribunal. At that time Italy included no request with
23 respect to Sergeant Latorre.

24 This Tribunal, after hearing the parties on 30th
25 and 31st March 2016, vide its order dated
26 29th April 2016, prescribed provisional measures

1 regarding cooperation between Italy and India for
2 relaxation in the bail conditions of Sergeant Girone
3 on considerations of humanity; that Sergeant Girone,
4 while remaining under the authority of the Supreme
5 Court of India, may return to Italy during the present
6 Annex VII arbitration, as was accepted during the
7 hearings by the then agent of India. Accordingly, the
8 Arbitral Tribunal confirmed Italy's obligation to
9 return Sergeant Girone to India in case the Arbitral
10 Tribunal found that India has jurisdiction over him in
11 respect of the Enrica Lexie incident; and the Arbitral
12 Tribunal asked Italy and India to report on compliance
13 with these provisional measures.

14 Thus, the Tribunal, having regard to humanitarian
15 considerations -- which has been accepted by India --
16 allowed the temporary transfer of Sergeant Girone to
17 Italy only during arbitration proceedings.

18 Recognising the legal and judicial requirements, the
19 Tribunal also ruled that the accused remain under the
20 authority of the Indian Supreme Court, and that both
21 the marines would be returned back for trial in India
22 in case the Tribunal finds that India has
23 jurisdiction.

24 India fully cooperated with Italy in giving effect
25 to the Tribunal's order. The ambassador of Italy
26 filed an undertaking on affidavit before the Supreme

1 Court of India that Sergeant Girone shall be returned
2 to India within one month of the decision or direction
3 of the Arbitral Tribunal requiring him to do so, or as
4 directed by the orders of the Supreme Court.
5 Accordingly, Sergeant Girone left India on
6 27th May 2016 and reached Italy on 28th May 2016.

7 Mr President, members of the Tribunal, India thus
8 fully complied -- and is still complying -- with the
9 provisional measures prescribed by this Tribunal in
10 its order of 29th April 2016.

11 Under the current phase of proceedings, this
12 Tribunal will hear the parties on the merits of
13 Italy's claims in its notification dated
14 26th June 2015, as well as India's counterclaims. The
15 principal claim of Italy, as contained in
16 paragraph 33(c) of the notification, is that Italy has
17 exclusive jurisdiction over the Enrica Lexie and over
18 the Italian marines in connection with the Enrica
19 Lexie incident, in accordance with the provisions of
20 UNCLOS. Mr President, according to Italy's assertion,
21 India does not have the jurisdiction at all, despite
22 the fact that two innocent Indian citizens were killed
23 on an Indian boat, and India has apprehended the
24 accused persons when they were in its territory.

25 To determine whether Italy's claim that it has
26 exclusive jurisdiction is valid, the question before

1 the Tribunal is entirely legal in nature. The
2 Tribunal is essentially to determine whether there is
3 any provision at all in UNCLOS applicable to the
4 incident, and in particular which supports Italy's
5 claims in the facts and circumstances of this very
6 particular killing incident. In other words, is there
7 any provision granting Italy exclusive jurisdiction in
8 circumstances where two human beings located on
9 an Indian boat were killed as a result of actions
10 coming from individuals on board a commercial vessel?

11 Mr President, as we have shown -- and will
12 continue to do so -- Italy's claims that India
13 breached certain specific provisions of UNCLOS do not
14 stand up to legal or factual scrutiny. It is rather
15 India whose legal rights under UNCLOS have been
16 violated by Italy. It has to be kept in mind that
17 India and its fishermen are the true victims in this
18 case. It is for this reason that India has introduced
19 counterclaims, which arise as a result of Italy's
20 breach of India's sovereign and other rights in its
21 exclusive economic zone by its marines firing
22 automatic weapons at an Indian fishing boat, the
23 St Antony, that was fully entitled to be operating in
24 the area without being harassed, let alone shot at,
25 and having two of its crew members killed and the boat
26 damaged, forcing it to return to port.

1 Mr President, members of the Tribunal, you might
2 have seen that Italy, throughout its written
3 pleadings, knowing perhaps that its claim would not
4 withstand legal scrutiny under provisions of UNCLOS
5 before this Tribunal, has tried to create a state of
6 confusion by raising issues concerning the
7 investigation, India's domestic legislation, and
8 certain other factual and practical aspects that this
9 Tribunal lacks jurisdiction to deal with. Such issues
10 form the subject matter of proceedings before the
11 domestic trial court, and not before the Arbitral
12 Tribunal, whose jurisdiction is limited to matters
13 concerning the interpretation and application of
14 UNCLOS. Italy's attempt to burden the Tribunal with
15 such issues is abusive and seeks to have this Tribunal
16 equated to that of a municipal court, which in my view
17 is unfortunate.

18 It was open to Italy as early as in 2012 to bring
19 its claims before an Annex VII tribunal under UNCLOS,
20 if Italy was so legally sure about its exclusive
21 jurisdiction in the facts and circumstances of this
22 particular case. Resorting to these proceedings after
23 three and a half years shows that any delaying tactics
24 lay squarely at Italy's door.

25 Italy has been alleging violation of the rights of
26 the marines and denial of fair trial, but even

1 a cursory review of the situation of the marines
2 reveals the opposite story. Despite the severity of
3 the crime that they are charged with, the marines have
4 been out on bail and, pursuant to the provisional
5 measures ordered by this Tribunal, are in Italy.

6 Given status of work of investigating agencies in
7 this process of criminal prosecution, the case has
8 been practically ready for trial for some time. It is
9 Italy which is not allowing the prosecution to
10 progress further.

11 Speaking from the technical legal standpoint, who
12 would know better than this Tribunal that Italy has
13 already submitted to the jurisdiction of the Indian
14 courts by using the Indian courts in responding to the
15 issues relating to prosecution, and in filing the
16 various petitions for different prosecution purposes.
17 The spirit of justice demands that Italy cease
18 employing such delaying tactics to further impede the
19 trial proceedings; extend its full cooperation with
20 the justice system; and raise any issue, including
21 relating to jurisdiction, before the trial court.
22 This behaviour of Italy could certainly result in the
23 early conclusion of the proceedings and a decision in
24 the case of the killing of Mr Ajeesh Pink and
25 Mr Valentine Jelastine.

26 Mr President, I will leave it to the other members

1 of India's legal team to develop the relevant facts
2 and legal principles in more detail. Having given you
3 a flavour of what this case is about, and equally what
4 it is not about, I have concluded my opening remarks.
5 Thank you.

6 **THE PRESIDENT:** Thank you, Mr Balasubramanian.

7 This concludes the parties' opening statements.
8 The remaining portion of the hearing will be
9 confidential. The live transmission will now
10 conclude.