DISSENTING OPINION OF JUDGE P. CHANDRASEKHARA RAO

1. I disagree with the decision of the International Tribunal for the Law of the Sea (hereinafter "the Tribunal") mainly on the question of the need in this case for prescription of provisional measures in terms of article 290, paragraph 5, of the Convention.

2. This case was brought to the Tribunal by Italy under article 290, paragraph 5, of the Convention. This paragraph lays down two conditions to be satisfied before the Tribunal may prescribe provisional measures: the Tribunal must consider first that *prima facie* the Annex VII arbitral tribunal would have jurisdiction and second, the "urgency" of the situation requires the prescription of provisional measures.

3. Explaining the essential elements of "urgency", the Special Chamber of the Tribunal (hereinafter "the Special Chamber") in *Ghana/Côte d'Ivoire* summarized the legal position as follows:

> Considering, in this regard, that urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered *(see Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 13 December 2013, I.C.J. Reports 2013, p. 398, at p. 405, para. 25).*[1]

4. Accordingly, the Tribunal is required to examine whether there is a risk of "irreparable prejudice" to rights at issue in this case, whether such a risk is "real and imminent", and whether the "urgency" is such that the provisional measures are required "pending the constitution" of the Annex VII arbitral tribunal.

5. The Special Chamber referred to above also held that the requirements of article 290, paragraph 5, must be evaluated "on a case by case basis in light of all relevant factors".

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[1] See *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015,* to be published, para. 42.

6. In this connection, two essential factors need to be underlined. Provisional measures cannot be prescribed merely on a finding that there is a *possibility* of prejudice to the rights in issue. In order for such measures to be prescribed, it is necessary to find that there is "a real and imminent risk" of irreparable prejudice being caused to rights at issue and that, more importantly, such prejudice could occur before the Annex VII arbitral tribunal would be able to deal with rights at issue. Though it is difficult to indicate precisely when the Annex VII arbitral tribunal could be constituted, it is reasonable to presume that it would be constituted in the next couple of months. The urgency of the situation has to be assessed not on a long-term basis but with reference to the short period involved before the Annex VII arbitral tribunal is constituted.

7. The question here is: has Italy established that the "urgency" of the situation in this case warrants the prescription of provisional measures?

8. Italy submitted its Request for the prescription of provisional measures under article 290, paragraph 5, on 21 July 2015. It needs to prove that the "urgency" of the situation called for provisional measures as on that date.

9. This case has been pending in Indian courts for nearly three-and-a-half years. Both Italy and the two marines have filed a number of petitions in these courts to slow down the legal process and thereby delay the criminal trial. More recently, the accused marines filed Writ Petition 236 of 2014 in the Supreme Court of India on the issues of jurisdiction and immunities. This led the Supreme Court to stay the trial proceedings before the Special Court which was constituted to try the case expeditiously.

10. On 26 June 2015, Italy notified a Statement of Claim instituting proceedings against India before an arbitral tribunal to be constituted under Annex VII to the Convention. On 8 July 2015, Italy filed an application in the Supreme Court of India for deferment of the writ petition mentioned above pending the award of the Annex VII arbitral tribunal in the present case and for an extension of the stay of the accused Mr Latorre in Italy until the final settlement of claims in the arbitration

proceedings. The Supreme Court has scheduled the next hearing for 26 August 2015.

11. Even before the Supreme Court of India could consider the deferment application, Italy approached the Tribunal with a Request for provisional measures.

12. On the date the Request for provisional measures was filed with the Tribunal, was there a "real and imminent risk" that India or its courts would cause irreparable prejudice to rights claimed by Italy before the Annex VII arbitral tribunal could deal with this case? In short, was the Italian Request justified by the "urgency of the situation" on the date it was filed? What was the "real and imminent risk" that Italy was seeking to avert on that date?

13. If the case was being litigated in the Indian courts for nearly three-and-a-half years and Italy had not deemed there to be any "urgency" in terms of article 290, paragraph 5, of the Convention, what happened suddenly to justify its Request on grounds of "urgency"?

14. Italy gave two reasons for finding "urgency". First, it drew attention to a statement made on 31 May 2015 by India's Minister of External Affairs, which reads as follows:

> So far as the marines is concerned, we have repeatedly conveyed to Italy, you please join us in judicial process. The matter is *sub judice*. So far, they have not even joined the judicial process. If they join our judicial process, things can move forward.[2]

15. Italy argues that this statement made them realize that:

> there was no scope for the Indian Government to engage in further discussions about a political settlement. *This is the reason* why Italy instituted Annex VII proceedings on 26 June.[3]
> (emphasis added)

[2] ITLOS/PV.15/C24/3, p. 7.
[3] ITLOS/PV.15/C24/3, p. 8.

16. It is surprising that Italy took more than three-and-a-half years to realize that in this case there was no prospect of "political settlement". It is highly improper to assume that Italy was not aware that the offence complained of is murder, that murder is not a compensable offence, and that the matter is also *sub judice*. As India's Minister of External Affairs stated, this position was "repeatedly conveyed to Italy". Accordingly, the Italian claim that it was only when India's Minister of External Affairs made the statement on 31 May 2015 that it became clear to them that there was no longer any prospect of a negotiated situation is totally untenable.

17. Let us turn to the second reason given by Italy. Explaining why it took more than three years to institute the arbitration proceedings, Italy stated: "[t]he well-foundedness of the application must be assessed without reference to the issue of delay in filing it"[4]. This is a strange argument. If the Request for provisional measures is not filed when the urgency of the situation so requires, and delay is allowed to occur, such delay would undermine the "urgency" requirement in article 290, paragraph 5, of the Convention. In any view of the matter, the "urgency" requirement has never been satisfied in the facts and circumstances of this case.

18. It must also be ascertained whether there is a real and imminent risk that irreparable prejudice may be caused to the rights of Italy if no provisional measures are prescribed in the next few months before the Annex VII arbitral tribunal is constituted. It will be relevant to examine the factual position on the eve of Italy's Notification instituting proceedings before the Annex VII arbitral tribunal.

19. The Special Court established by the Supreme Court on 18 January 2013 had been in abeyance since 28 March 2014. There was thus no prospect of imminent criminal proceedings against the two marines. The Supreme Court has yet to dispose of the deferment application filed by Italy on 8 July 2015. Even if the proceedings in the Supreme Court are permitted to continue, either the Supreme Court or the Special Court will first have to determine the questions of jurisdiction and immunity of the two marines before criminal proceedings could commence. Even if it were concluded for the sake of argument that the competent court decides

[4] ITLOS/PV.15/C24/3, p. 18.

that there is jurisdiction, it would be fanciful to imagine that the criminal proceedings would be completed before the Annex VII arbitral tribunal could deal with the case. As noted earlier, it is not enough that there is a possibility of prejudice; it is essential to establish that there is a "real and imminent risk" that irreparable prejudice may be caused to rights at issue before the Annex VII arbitral tribunal could deal with this case. The Tribunal has failed to establish that there is such real and imminent risk justifying the prescription of provisional measures.

20. Referring to the fact that the Supreme Court has actually stayed the Special Court proceedings, the Additional Solicitor General of India stated that "[i]t would not be going too far to say that until the [Annex VII] tribunal is constituted and hears the matter, there is no compelling assumption that the matter will be taken up and that there will be an adverse decision against them" i.e., the two marines.[5]

21. In any view of the matter, of the two accused marines, Sergeant Latorre is already in Italy on health grounds and he is authorized to stay there until 15 January 2016. The Additional Solicitor General of India assured the Tribunal: "It is not our case that he should come back if his health does not permit him to do that at all".[6]

22. The case of the other marine, Sergeant Girone, stands upon a different footing. There are no allegations of ill-treatment in respect of him. He lives in the comfort of the residence of the Italian Ambassador in New Delhi. He withdrew his application in the Supreme Court seeking to relax bail conditions thereby enabling him to travel to Italy. The Supreme Court disposed of his application as withdrawn. How can Italy argue that there is a situation of urgency regarding Sergeant Girone as of 21 July 2015 when he had unilaterally withdrawn a petition in the Supreme Court for the relaxation of his bail in December 2014?

23. What is more, even if Sergeant Girone is allowed to travel to Italy, it is highly improbable that Italy will oblige him to return to India to stand trial, if required, since on two occasions, as India has pointed out, Italy has betrayed solemn promises made to the Supreme Court of India. Further, the Indian courts have to bear in mind

[5] ITLOS/PV.15/C24/2, pp.12-13.
[6] Ibid.

the public interest in ensuring that justice is done for the two dead fishermen and that nothing is done which would make impossible the implementation of the final decision of the Annex VII arbitral tribunal.

24. The record in this case shows that there is absolutely no “real and imminent risk” that irreparable prejudice will be caused to Italy’s rights before the Annex VII arbitral tribunal would be able to deal with the case.

25. In view of the above, there is no “urgency” such as that required to justify the exercise of the power to prescribe provisional measures. Though it appears that the measure prescribed by the Tribunal is addressed to both parties, it is actually addressed only to India. The measure prescribed by the Tribunal in this case is entirely one-sided and is not well-founded in law.

(signed) P. Chandrasekhara Rao