

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2024

27 July 2024

List of Cases:

No. 33

THE “ZHENG HE” CASE

(LUXEMBOURG v. MEXICO)

Request for the prescription of provisional measures

ORDER

Present: President HEIDAR; Vice-President CHADHA; Judges JESUS, BOUGUETAIA, ATTARD, KULYK, CABELLO SARUBBI, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILOLO, KAMGA, ARMAS PFIRTER, HORINOUCI, JOYINI, RHEE, KEH KAMARA, MARCINIAK; Judges ad hoc SZÉKELY Y SÁNCHEZ, KOHEN; Registrar HINRICHS OYARCE.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to articles 287, paragraph 4, and 290, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) and articles 21 and 25 of the Statute of the Tribunal (hereinafter “the Statute”),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter “the Rules”),

Having regard to the application submitted to the Tribunal by the Grand Duchy of Luxembourg (hereinafter “Luxembourg”) on 4 June 2024 instituting proceedings against the United Mexican States (hereinafter “Mexico”) in a dispute regarding the vessel “*Zheng He*”,

Having regard to the request submitted by Luxembourg to the Tribunal on 7 June 2024 for the prescription of provisional measures by the Tribunal pursuant to article 290, paragraph 1, of the Convention,

Makes the following Order:

1. By an application dated 3 June 2024 and filed with the Registry of the Tribunal on 4 June 2024, Luxembourg instituted proceedings against Mexico in a dispute regarding the vessel “*Zheng He*” (hereinafter “the Application”). The case was entered in the List of cases as Case No. 33 and named *The “Zheng He” Case*. The original of the Application was received on 7 June 2024.
2. In the Application, the Minister for Foreign Affairs and Trade of Luxembourg appointed Ms Annabel Rossi, Head of Legal Services, Legalization and Approvals at the Luxembourg Maritime Administration, as Agent for Luxembourg.
3. By note verbale dated 4 June 2024, the Registrar of the Tribunal transmitted a certified copy of the Application to the Minister of Foreign Affairs of Mexico and also in care of the Ambassador of Mexico to the Federal Republic of Germany.
4. By letter dated 6 June 2024, received on 7 June 2024, the Ambassador of Mexico to the Federal Republic of Germany informed the Tribunal of the appointment of Mr Alejandro Celorio Alcántara, Legal Adviser to the Ministry of Foreign Affairs of Mexico, and Mr Francisco José Quiroga Fernández, Ambassador of Mexico to the Federal Republic of Germany, as Agents for Mexico.

5. On 7 June 2024, Luxembourg submitted to the Tribunal a request for the prescription of provisional measures (hereinafter “the Request”) under article 290, paragraph 1, of the Convention, the original of which was received on 10 June 2024.

6. On 7 June 2024, the Registrar transmitted a certified copy of the Request to the Agents of Mexico.

7. Since the bench of the Tribunal does not include a member of Luxembourgish nationality, Luxembourg, in its Request, pursuant to article 17, paragraph 3, of the Statute, chose Mr Marcelo Gustavo Kohen to sit as judge *ad hoc* in the case.

8. In accordance with article 24, paragraph 3, of the Statute, the Registrar notified the States Parties to the Convention of the Application and the Request by notes verbales dated 5 June 2024 and 11 June 2024, respectively.

9. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Application and the Request by letters dated 5 June 2024 and 11 June 2024, respectively.

10. By letter dated 12 June 2024, the Ambassador of Mexico to the Federal Republic of Germany informed the Tribunal that he would be acting as Co-Agent in the case and that Mr Miguel Angel Reyes Moncayo, Deputy Legal Adviser to the Ministry of Foreign Affairs of Mexico, was also appointed as a Co-Agent for Mexico.

11. Since the bench of the Tribunal does not include a member of Mexican nationality, Mexico, by letter dated 12 June 2024, pursuant to article 17, paragraph 3, of the Statute, chose Mr Alberto Székely y Sánchez to sit as judge *ad hoc* in the case.

12. By letter dated 11 June 2024, the Registrar requested the Agent of Luxembourg to submit a translation of an annex to the Request into one of the

official languages of the Tribunal, pursuant to article 64, paragraph 3, of the Rules. The requested document was submitted by Luxembourg on 14 June 2024.

13. On 12 June 2024, pursuant to articles 45 and 73 of the Rules, the President of the Tribunal held consultations by videoconference with the Agent of Luxembourg and the Co-Agents of Mexico, to ascertain the views of Luxembourg and Mexico with regard to questions of procedure.

14. By Order dated 13 June 2024, the President, pursuant to articles 25 and 27 of the Statute and articles 45 and 90, paragraph 2, of the Rules, fixed 11 and 12 July 2024 as the dates for the hearing. The Order was communicated to the Parties on the same date.

15. By letter of 14 June 2024, the Agent of Luxembourg requested to replace one of the annexes of the Application with a corrected version. A copy of the letter was transmitted to the Agent of Mexico on the same day. By letter of 19 June 2024, the Registrar informed the Agent of Luxembourg that no comments were received from Mexico with regard to the correction requested by Luxembourg and that the correction had been accepted by leave of the President, pursuant to article 65, paragraph 4, of the Rules.

16. On 3 July 2024, Mexico filed with the Registry its Statement in Response, a copy of which was transmitted electronically to the Agent of Luxembourg on the same date.

17. On the same date, the Registrar sent a letter to the Co-Agent of Mexico requesting the submission of corrected versions of four of the annexes attached to the Statement in Response. The requested documents were submitted by Mexico on 4 July 2024.

18. On 3 July 2024, Luxembourg submitted seven additional documents to the Tribunal. Copies of these documents were transmitted to the Agent of Mexico on the same day. Mexico did not object to the admission of the additional documents.

19. By letter dated 4 July 2024, the Co-Agent of Mexico requested the Tribunal, pursuant to article 74, paragraph 2, of the Rules, that the delegation of Mexico be allowed to participate in the hearing entirely by video link, referring, *inter alia*, to “financial and budgetary restrictions” and to the “administrative and operational capacities” of the Government of Mexico.

20. On 5 July 2024, the Registrar notified the Co-Agent of Mexico that pursuant to article 74, paragraph 2, of the Rules and in light of the practice of the Tribunal, the President had decided that the request of Mexico could not be granted. Copies of the correspondence between the Registrar and the Co-Agent of Mexico were transmitted to the Agent of Luxembourg on the same date.

21. By letter dated 7 July 2024, the Agent of Mexico notified the Registrar that the Government of Mexico had appointed Mr Alfonso Ascencio Herrera, Minister and Deputy Chief of Mission at the Embassy of Mexico to the Kingdom of the Netherlands, as Co-Agent of Mexico.

22. By letter of 7 July 2024, the Agent of Mexico requested to replace the cover page of the Statement in Response and one of the annexes attached to it with corrected versions. A copy of the letter was transmitted to the Agent of Luxembourg on 8 July 2024. By letter of 9 July 2024, the Registrar informed the Agent of Mexico that no objections were communicated by Luxembourg with regard to the correction requested by Mexico and that the correction had been accepted by leave of the President, pursuant to article 65, paragraph 4, of the Rules.

23. On 8 July 2024, Luxembourg submitted an additional document to the Tribunal. A copy of the document was transmitted to the Agent of Mexico on the same day. Mexico did not object to the admission of the additional document.

24. Pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, Mexico and Luxembourg submitted the required information to the Tribunal on 9 July 2024 and 10 July 2024, respectively.

25. On 10 July 2024, Luxembourg submitted an additional document to the Tribunal. A copy of the document was transmitted to the Agent of Mexico on the same day. Mexico did not object to the admission of the additional document.

26. Since no objections to the Parties' choice of judges *ad hoc* were raised by the respective other Party and no objections appeared to the Tribunal itself, Mr Kohen and Mr Székely y Sánchez were admitted to participate in the proceedings as judges *ad hoc* after having made the solemn declaration required under article 9 of the Rules at a public sitting of the Tribunal held on 10 July 2024.

27. In accordance with article 68 of the Rules, the Tribunal held initial deliberations on 10 July 2024 concerning the written pleadings and the conduct of the case.

28. On the same day, in accordance with article 45 of the Rules, the President held consultations with the Agent and Counsel of Luxembourg and the Co-Agent and Counsel of Mexico with regard to questions of procedure. During the consultations, the Parties received a question which the Tribunal wished them to address orally or in writing during the hearing, preferably during the first round of oral arguments.

29. By letter dated 10 July 2024, received by the Registry on 11 July 2024, Mexico submitted seven additional documents to the Tribunal. Copies of the documents were transmitted to the Agent of Luxembourg on the latter date. Luxembourg did not object to the admission of the additional documents.

30. Pursuant to article 67, paragraph 2, of the Rules, copies of the Statement in Response and the annexes thereto were made accessible to the public upon the opening of the oral proceedings.

31. Oral statements were presented at public sittings held on 11 and 12 July 2024 by the following:

On behalf of Luxembourg: Ms Annabel Rossi, Head of Legal Services, Legalization and Approvals, Maritime Administration, Ministry of the Economy,

as Agent,

Ms Mathilde Frappier, Professor of Law, Professor of Public International Law, University of Lorraine,

Mr Olivier Cachard, Professor of Law, Professor of Private International Law, University of Lorraine,

as Counsel and Advocates;

On behalf of Mexico: Mr Alfonso Ascencio Herrera, Minister and Deputy Chief of Mission at the Embassy of Mexico to the Kingdom of the Netherlands, The Hague,

as Co-Agent,

Mr Carlos Antonio Cruz Carrillo, PhD Researcher, University of Basel,

as Counsel and Advocate.

32. During the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by the Parties on video monitors.

33. By letter of 11 July 2024, received by the Registry on 12 July 2024, Mexico submitted seven additional documents to the Tribunal. Copies of the documents were transmitted to the Agent of Luxembourg on the latter date. Luxembourg did not object to the admission of the additional documents.

34. By the same letter, Mexico submitted a written response to the question put by the Tribunal on 10 July 2024. Luxembourg submitted a written response to the question by letter dated 12 July 2024. Both responses were duly transmitted to the respective other Party. Both Parties also responded orally to the question during the hearing.

35. On 12 July 2024, Luxembourg submitted four additional documents to the Tribunal. Copies of the documents were transmitted to the Agent of Mexico on the same date. Mexico did not object to the admission of the additional documents.

36. By letter dated 15 July 2024, the Registrar sent a letter to the Agent of Luxembourg requesting the submission of a corrected version of one of the additional documents submitted by Luxembourg on 12 July 2024. Corrected documents were submitted by Luxembourg on 19 and 22 July 2024.

37. By letter dated 17 July 2024, at the request of the Tribunal, the Registrar sent a letter to the Agent of Mexico requesting the submission of a translation of an additional page of one of the annexes to the Statement in Response, pursuant to article 64, paragraph 3, of the Rules. The requested document was submitted by Mexico on 18 July 2024.

38. By communication dated 25 July 2024, the Minister for Foreign Affairs and Trade of Luxembourg appointed Ms Elisabeth Relave-Svendsen, Deputy Head of Legal Services, Legalization and Approvals of the Luxembourg Maritime Administration, as Co-Agent for Luxembourg.

* *

39. In paragraph 16 of the Application, Luxembourg requests the Tribunal to adjudge and declare that

- (a) Mexico has breached the provisions of articles 2, 17, 18, 19, 21, 58, 87, 90, 92, 131 and 300 of the Convention. As a result, Mexico's international responsibility is engaged.
- (b) Mexico must immediately cease all ongoing violations.
- (c) Mexico must provide Luxembourg with appropriate assurances and guarantees of non-repetition.
- (d) Luxembourg is entitled to reparation for all losses suffered in the form of compensation, the amount of which will be determined when the case is examined on its merits.
- (e) Luxembourg is entitled to reimbursement of all legal fees, costs and other expenses incurred.

40. In paragraph 80 of the Request, Luxembourg requests the Tribunal to order the following provisional measures:

1. **In order to preserve the fundamental rights and freedoms of the crew:**
 - Order Mexico to continue to ensure the freedom of movement of the crew members off the vessel and their access to health-care facilities, places of worship and recreational facilities;
 - Order Mexico to continue to ensure that there will be no impediments to the renewal of the crew and the necessary rotations;
 - Order Mexico to continue to ensure that the crew will not be compelled by law enforcement agencies to disembark from the vessel nor be prevented from re-embarking the vessel;
2. **In order to safeguard the rights of Luxembourg as the flag State:**
 - Order Mexico to allow Luxembourg to effectively exercise its jurisdiction and control in administrative, technical and social matters over the vessel, and to enable any measures necessary for the preventive and corrective maintenance of the *Zheng He* in order to ensure its compliance with the national, European and international standards applicable to vessels flying the flag of Luxembourg;
 - Prohibit Mexico from directly or indirectly operating the vessel *Zheng He*;
 - Prohibit Mexico from taking any measures to create or transfer real rights to the vessel and from changing the flag of the vessel *Zheng He*;
3. **In order to avoid aggravating or extending the dispute:**
 - Prohibit Mexico from collecting the customs fine of 1,616,462,343.52 Mexican pesos imposed on *European Dredging Company SA*;
 - Prohibit Mexico from detaining, confiscating and expropriating, under any proceeding whatsoever, vessels related to the vessel *Zheng He* flying the flag of Luxembourg, whether they be the property of *European Dredging Company SA*, its parent company SOFIDRA or any other subsidiary of SOFIDRA;
 - Prohibit Mexico from instituting new national proceedings or new actions against the *Zheng He*, *European Dredging Company SA*, its parent company SOFIDRA or any other subsidiary of SOFIDRA;
4. **In order to ensure equality of the parties in the proceedings before the Tribunal:**
 - Authorize the agents of Luxembourg to conduct on the territory of Mexico, without restriction, any investigations in connection with the present proceedings, in particular to ascertain the

condition of the vessel *Zheng He* and to collect any relevant evidence;

- Transmit to Luxembourg, at its request and after examination by the Tribunal, the information and documents to which Luxembourg was unable to gain access relating to the non-contentious and contentious proceedings under Mexican law concerning the *Zheng He*, including forthwith:
 - The identification of the berths in the Port of Tampico, with their official and/or customary names, and the GPS coordinates of the endpoints of each berth;
 - The regulatory texts of Mexico in force on 21 October 2023 that were officially published relating to the tax and customs regime of each berth in the port of Tampico.

41. At the public sitting held on 12 July 2024, the Agent of Luxembourg made the following final submissions:

For the reasons set out above, Luxembourg respectfully requests the Tribunal to prescribe the following provisional measures:

1. *In order to preserve the fundamental rights and freedoms of the crew:*

- Order Mexico to continue to ensure the freedom of movement of the crew members off the vessel and their access to health-care facilities, places of worship and recreational facilities;
- Order Mexico to continue to ensure that there will be no impediments to the renewal of the crew and the necessary rotations;
- Order Mexico to continue to ensure that the crew will not be compelled by law enforcement agencies to disembark from the vessel nor be prevented from re-embarking the vessel.

2. *In order to preserve the rights of Luxembourg as the flag State:*

- Order Mexico to allow Luxembourg to effectively exercise its jurisdiction and control in administrative, technical and social matters over the vessel, and to enable any measures necessary for the preventive and corrective maintenance of the *Zheng He* in order to ensure its compliance with the national, European and international standards applicable to vessels flying the flag of Luxembourg;
- Prohibit Mexico from directly or indirectly operating the vessel *Zheng He*;
- Prohibit Mexico from taking any measures to create or transfer real rights to the vessel and from changing the flag of the vessel *Zheng He*.

3. In order to avoid aggravating or extending the dispute:

- Prohibit Mexico from collecting the customs fine of 1,616,462,343.52 Mexican pesos imposed on *European Dredging Company SA*;
- Prohibit Mexico from detaining, confiscating and expropriating, under any proceeding whatsoever, vessels related to the vessel *Zheng He* flying the flag of Luxembourg, whether they be the property of *European Dredging Company SA*, its parent company SOFIDRA or any other subsidiary of SOFIDRA;
- Prohibit Mexico from instituting new national proceedings or new actions against the *Zheng He*, *European Dredging Company SA*, its parent company SOFIDRA or any other subsidiary of SOFIDRA, and suspend ongoing national proceedings pending a decision on the merits.

4. In order to ensure equality of the parties in the proceedings before the Tribunal:

Prescribe that Mexico and Luxembourg must cooperate and, to that end, hold consultations without delay in order to:

(a) exchange additional information on the non-contentious and contentious proceedings under Mexican law instituted by Mexico against the *Zheng He*, including forthwith:

- the identification of the berths in the Port of Tampico, with their official and/or customary names, and the GPS coordinates of the endpoints of each berth;
- the regulatory texts of Mexico in force on 21 October 2023 that were officially published relating to the tax and customs regime of each berth in the Port of Tampico;
- the initiatives taken in particular by the Mexican customs and port authorities relating to the dispute concerning the *Zheng He*;

(b) prevent risks and effects resulting from maintenance work and repairs that are not carried out, inadequately carried out or belatedly carried out which could affect the vessel's classification.

42. In paragraph 151 of its Statement in Response, Mexico makes the following submission:

For the reasons given in this *Response*, the United Mexican States respectfully requests the International Tribunal for the Law of the Sea to reject Luxembourg's application for provisional measures.

43. At the public sitting held on 12 July 2024, the Co-Agent of Mexico made the following final submission:

For the reasons explained by Mexico in its Statement in Response and during the hearings, and pursuant to article 75(2) of the Rules of the International Tribunal of the Law of the Sea, the United Mexican States respectfully requests the Tribunal to reject Luxembourg's request for provisional measures.

* *

44. The factual background, as presented by the Parties, can be summarized as follows. The “*Zheng He*” is a dredger owned and operated by a Luxembourgish company named *European Dredging Company SA* (hereinafter “the shipowner”) and flies the flag of Luxembourg. On 5 October 2023, the vessel left the port of Freeport in The Bahamas. According to a certificate issued by the Government of The Bahamas on that day, the vessel was “cleared” for Tampico in Mexico. While the vessel was en route, on 9 October 2023, the shipowner's local agent sent to the Tampico Maritime Customs Office a “notice of arrival of an open-seas vessel”. It stated:

We hereby inform you of the arrival at this port of the Luxembourg-flagged dredger vessel “ZHENG HE” ... coming from Freeport Bahamas. Its declared ETA is 11 October 2023 at 6.00 a.m., in the anchorage area of Tampico for a crew change and refuelling. It will then dock in the fiscal area to carry out temporary import procedures with the Tampico Maritime Customs Office, and will remain available to you should you require inspections of any kind.

45. On 10 October 2023, the Tampico harbour master's office authorized the arrival of the vessel, and on 11 October 2023, the “*Zheng He*” arrived at what Luxembourg refers to as the “Tampico roadstead” and Mexico as “the Tampico anchorage area”, located in the Mexican territorial sea. At the time of the vessel's arrival, 36 seafarers including the captain were aboard and formed the crew. While the vessel was waiting in the anchorage area, the shipowner's agent transmitted to the port authorities in Tampico on 17 October 2023 a request for authorization “to dock the dredger in berth 3 of ASIPONA [National Port System Administration] for a period of approximately 3 to 4 weeks” in order “to await instructions and, in the meantime, for provisioning, crew change, garbage and sludge removal”. The Tampico harbour master's office authorized the vessel on 21 October 2023 to dock at berth 3. Luxembourg confirms that the vessel reached the port and berthed there that same day. On 23 October 2023, the shipowner's agent notified the National

Customs Agency of Mexico (hereinafter “ANAM”) of the docking of the vessel at that berth “for the sole purpose of bunkering, changing the crew and carrying out preventive maintenance, while it, in addition, awaited instructions.”

46. On 24 October 2023, ANAM imposed a “tax debt” (Luxembourg) or a “tax credit” (Mexico) on the shipowner’s agent in the amount of 9,570 Mexican pesos, stating that “it is evident that the vessel “ZHENG HE”, arriving from deep-sea traffic and scheduled for temporary import procedures, docked in unauthorized areas for such activities”.

47. The Northeast Regional Office of the Foreign Trade Audit Administration of Mexico (hereinafter “ADACEN”), in accordance with its decision of 31 October 2023, conducted an on-board inspection of the “*Zheng He*” on 1 November 2023. Thereafter, on the same day, ADACEN carried out a “precautionary seizure” of the vessel. According to Luxembourg, ADACEN decided to detain the vessel “on the grounds that [it] should be considered as a commodity whose entry into Mexican territory was treated as an import”. Mexico contends that, during the onboard inspection, neither the shipowner nor its agent “presented customs documentation demonstrating the legal importation, stay, and possession of the *Zheng He* in national territory, in contravention of the Mexican Customs Law.”

48. On 10 November 2023, the shipowner instituted legal proceedings (“*amparo indirecto 1240/2023*”) before the Tampico District Court, challenging the actions of ADACEN, namely the “domiciliary visit order”, the “[o]rder for initiation and precautionary seizure” and the “[i]nitiation of the administrative proceeding in customs matters”.

49. By an order issued on 15 February 2024, ADACEN fixed the total amount of the “tax debt” (Luxembourg) or “tax credit” (Mexico) of the shipowner at 1,616,462,343.62 Mexican pesos. According to Luxembourg, this amount corresponds to approximately USD 96,230,000. The order also provided for the confiscation of the vessel. With regard to this order, Luxembourg states that it “resulted, in addition and cumulatively, in the definitive confiscation (subject only to appeal) of the *Zheng He*, whose ownership is now claimed by the Mexican State”.

Mexico contends that ADACEN “definitively confiscated the *Zheng He*.” It also contends that ADACEN, in its order, determined that the shipowner did not prove the legal stay or possession of the vessel in Mexican territory.

50. On 22 March 2024, the Tampico District Court issued a judgment on the proceedings instituted by the shipowner on 10 November 2023. Luxembourg submits that the court “ruled that the customs proceedings against the *Zheng He* were null and void ..., thereby depriving of legal effect the onboard visit, the fine reports and the expropriation of the vessel.” Mexico contends that “[t]he effects of the decision were to nullify: (i) the inspection visit order of 31 October; (ii) the initiation of the administrative customs procedure; and (iii) the precautionary seizure of the vessel *Zheng He*.” Furthermore, with regard to the aforementioned judgment, in a certification issued on 17 April 2024, the Tampico District Court noted that “the parties did not file a request for review of the judgment rendered in this proceeding within the legally established period”, declared the judgment to be “enforceable” and ordered ADACEN to comply with the judgment within three days. Luxembourg submits in this regard that it was “thus established that the decision annulling the customs proceedings had become final”. It adds, however, that, “the Mexican authorities refused to release the vessel and its crew.”

51. Mexico contends that “the legal status of the [*“Zheng He”*] is currently the subject of litigation before higher instances of the Federal Judiciary.” It states, in this regard, that ADACEN “timely filed” a legal remedy (*“recurso de revisión”*) against the decision of the Tampico District Court of 22 March 2024 which “is currently pending resolution”. It also states that ADACEN filed another legal remedy (*“recurso de queja”*) “against the 17 April 2024 decision, in which the District Court declared that the *amparo* judgment in favour of the [shipowner] could be executed.” In addition, Mexico refers to a number of other pending legal proceedings, including a motion by ADACEN of 19 June 2024 before the Supreme Court of Justice of the Nation requesting the Supreme Court to exercise its “attraction power”. Thus, according to Mexico, the court’s decision “is not final” and, “[c]onsequently, it will be necessary to wait for these proceedings to be resolved before the prevailing party can execute the ... judgment.” Mexico argues that, “[u]ntil these judicial proceedings are resolved, the vessel continues to fly the Luxembourg flag” and “Mexican authorities are currently

unable to take any action aimed at transferring the ownership of the “Zheng He” vessel.”

I. *Prima facie* jurisdiction

52. Article 290, paragraph 1, of the Convention reads:

If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

53. Article 287, paragraph 4, of the Convention provides that “[i]f the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.”

54. Both Luxembourg and Mexico are States Parties to the Convention, having ratified the Convention on 5 October 2000 and 18 March 1983, respectively. Upon ratification of the Convention, Mexico made the following declaration:

In accordance with the terms of article 287 of the United Nations Convention on the Law of the Sea, the Government of Mexico declares that it chooses, in no order of preference, one of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

1. The International Tribunal for the Law of the Sea established in accordance with annex VI;
2. The International Court of Justice;
3. A special arbitral tribunal constituted in accordance with annex VIII for one or more of the categories of disputes specified therein.

55. On 29 April 2024, Luxembourg made the following declaration:

In accordance with article 287, paragraph 1, of the United Nations Convention on the Law of the Sea, the Grand Duchy of Luxembourg declares that it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of disputes concerning the interpretation or application of the Convention.

56. The Tribunal notes that Luxembourg submitted an application on 4 June 2024 instituting proceedings against Mexico in the dispute regarding the vessel “*Zheng He*” and that it submitted a request for the prescription of provisional measures on 7 June 2024. The proceedings were thus instituted after the deposit of the declarations under article 287 of the Convention.

57. Before prescribing provisional measures under article 290, paragraph 1, of the Convention, the Tribunal must satisfy itself that *prima facie* it has jurisdiction over the dispute regarding the vessel “*Zheng He*”, submitted by the Applicant on 4 June 2024. As the Tribunal has previously stated, it need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe provisional measures unless the provisions invoked by the applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded (*M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 37, para. 29; see also *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at pp. 65 and 69, paras. 39 and 69; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at p. 155, para. 34).

Existence of a dispute concerning the interpretation or application of the Convention

58. Article 288, paragraph 1, of the Convention provides that “[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.” Accordingly, the Tribunal must determine whether, on the date of the institution of the proceedings on the merits, a dispute appears to have existed between the Parties and, if so, whether such dispute concerns the interpretation or application of the Convention.

59. Luxembourg contends that “the international dispute between Luxembourg and Mexico concerns the lawfulness of the detention, taxation and confiscation of the

Zheng He” It states that “[t]here is ... absolutely no doubt that the dispute between the two States has ... crystallized. They are in disagreement over the facts and the law as to whether the enforcement by Mexico of [the] disputed customs procedure against the “*Zheng He*” has indeed breached Mexico’s international obligations vis-à-vis Luxembourg.” Luxembourg argues that disputes may exist without their being formally expressed but on account of the attitude or conduct of one of the parties.

60. According to Luxembourg, Mexico claims that the dispute is “strictly domestic and customs-related”, whereas Luxembourg claims that “the foreign-flag status of the *Zheng He* has been, and continues to be, denied, in violation of international law.” It adds that there is therefore “a disagreement on a point of law or fact, a conflict of legal views or of interests” between the two States. Luxembourg states that “[t]he assertion by Mexico [that] the dispute is of a purely domestic nature and referring solely to its national judicial bodies, confirms the opposition between the States.”

61. Luxembourg submits that “the dispute with Mexico concerning the vessel *Zheng He* concerns the interpretation and application of the Convention, in particular articles 2, 17, 18, 19, 21, 58, 87, 90, 92, 131 and 300 thereof.” Luxembourg contends that the dispute concerns the rights and obligations of the flag State relating to its ships and the rights and obligations of coastal States relating to foreign ships, including in its internal waters, maritime ports and territorial sea. It argues that Mexico has breached a number of specific provisions of the Convention, including those relating to the jurisdiction of a State over its internal waters, the right of innocent passage and those that prohibit discrimination of landlocked countries and abuse of rights.

62. With respect to articles 2 and 300 of the Convention, Luxembourg asserts that, while article 300 cannot be applied on its own, article 2 recognizes the sovereignty of the coastal State over its internal waters, and articles 218 and 220 enshrine certain limited powers for the benefit of the port State and the coastal State. As a result, it argues, the State’s jurisdiction and powers over foreign ships, including in its internal waters and maritime ports, “cannot be exercised abusively without violating the Convention.”

63. Luxembourg states that article 17 of the Convention establishes the right of innocent passage through the territorial sea for ships of all States and that, in accordance with article 18, such passage includes navigation through the territorial sea for the purpose of proceeding to or from internal waters or a call at a roadstead or port facility. It adds that such passage includes stopping and anchoring insofar as they are incidental to ordinary navigation.

64. Luxembourg contends that the “*Zheng He*” “intended to exercise only this right of innocent passage on which all other navigational freedoms in the Convention hinge; yet, the ship has effectively been deprived of that possibility since 1 November 2023.” According to Luxembourg, “the *de facto* continuation of the detention [is] in violation of the right to leave port as enshrined in article 18(1)(b) UNCLOS”.

65. Luxembourg asserts that Mexico has violated specific provisions of the Convention concerning rights and freedoms of navigation recognized for the benefit of foreign vessels and their flag States, which form the cornerstone of the law of the sea, namely, freedom of navigation in the exclusive economic zone, as set out in article 58 of the Convention, and freedom of navigation on the high seas, as set out in articles 87 and 90.

66. Luxembourg submits that

Mexico’s continuation of domestic proceedings in order to obtain confirmation of the definitive expropriation of the vessel would ... result in a twofold violation of Luxembourg’s rights. On the one hand, article 92(1) *in principio* clearly states: “*Ships shall sail under the flag of one State only*”. On the other hand, article 92(1) *in fine* also provides: “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 a change of registry*”, which prohibits a change of flag during the open-sea voyage of the *Zheng He* and while it remains registered in the Luxembourg registry.

67. Luxembourg states that because of its geographical location, with no direct access to the sea, it is a landlocked State within the meaning of article 124 of the Convention. It therefore takes great heed to ensure that its vessels enjoy, in the

maritime ports of other States Parties, treatment equal to that enjoyed by other vessels within the meaning of article 131 of the Convention. Luxembourg contends that Mexico has violated its obligation under article 131 to grant ships flying the flag of landlocked States treatment equal to that accorded to other foreign ships in maritime ports.

68. In this regard, Luxembourg argues that

[t]he treatment of the “Zheng He” has no known precedent in Mexican practice. Never before has a foreign-flagged vessel been confiscated and, cumulatively, received an exorbitant fine on the pretext of an unlawful import. What is a violation of equal treatment if it isn’t the application of different treatment in similar situations?

Luxembourg states that it is therefore reasonable to contend that the right to equal treatment in maritime ports for Luxembourg, as a landlocked State, is at issue in this case.

69. At the hearing, in the context of plausible rights, Luxembourg also referred to article 94 of the Convention, which it contends is “the very source of the flag rights.” It asserts that, “[a]s the flag state, Luxembourg ... [has] the duty to exercise ‘a permanent control ... over the vessel’, wherever the vessel is to be found, including in the territorial sea or in the internal waters of another State.” According to Luxembourg, “Mexico must respect the jurisdiction of Luxembourg as a flag State and allow it to exercise its control in administrative, technical and social matters over the “Zheng He” in accordance with article 94 of the Convention.”

70. In regard to the existence of a dispute, Mexico contends that the case submitted by Luxembourg does not relate to the interpretation or application of the Convention but rather to a subject matter outside the scope of the Convention. It states that, therefore, the Tribunal must find that “the application lodged by Luxembourg manifestly lacks jurisdiction, even *prima facie*.” Mexico asserts that “[t]here must be ‘a link between the facts advanced’, and ‘the provisions of the Convention referred to’” by the Applicant. In its view, for there to be “a dispute on this matter, both States to the present case should hold opposite views regarding the interpretation or application of the Convention.” Mexico contends that it is not

sufficient that one side argues that a State has breached the Convention and that the latter denies it.

71. Mexico contends that this case “is about internal waters and the situation of a ship, the ‘Zheng He’, which has entered voluntarily the Port of Tampico inside the Pánuco River, and which has infringed Mexican customs and tax laws.” It adds that none of the provisions of the Convention regulate how a State may exercise its “exclusive sovereignty in this space.”

72. Mexico states that Luxembourg claims that it has breached the following articles of the Convention: 2, 17, 18, 19, 21, 58, 87, 90, 92, 131 and 300. Nevertheless, in Mexico’s view, this is not supported by the factual background, which is “linkless to these Articles.”

73. As regards article 2 of the Convention, Mexico asserts that it does not limit the coastal State’s exercise of sovereignty over its internal waters but that its purpose is to establish the “legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil”. Mexico argues that it does not regulate internal waters and that “the Convention does not mention anything related to tax and custom issues in internal waters.” With respect to article 300 of the Convention, Mexico states that, first, Luxembourg does not advance any fact linked to a possible abuse of right which could sustain its claims and, second, that the detention of the “*Zheng He*” does not relate to any provision of the Convention.

74. Mexico contends that “[t]he provisions concerning the right of innocent passage (Articles 17, 18, 19, and 21) make fairly clear that this right does not apply to the present circumstances, as plain from Article 18.” According to Mexico,

article 18, paragraph 1 ... must be read in conjunction with article 18, paragraph 2, which states that the passage shall be continuous and expeditious. It only contemplates stopping and anchoring when it is incidental to ordinary navigation or is rendered necessary.

75. Mexico argues that the arrival of the “*Zheng He*” was fixed in Mexico’s internal waters – it was not just traversing nor stopping incidentally – and that this cannot be

connected to the exercise of the right of innocent passage regulated under articles 17, 18, 19 and 21 of the Convention.

76. In the view of Mexico, “[t]he inapplicability of Articles 58, 87, and 90 of UNCLOS is crystal-clear.” It states that these provisions relate, respectively, to the rights and duties of other States in the exclusive economic zone, the freedom of the high seas, and the right of navigation. Mexico argues that, however, the detention of the “*Zheng He*” occurred in the Port of Tampico, not in any of the previously mentioned zones, and, therefore, none of the provisions invoked applies to the present case. According to Mexico, “[i]t cannot be interpreted that a vessel has the right to leave a port and gain access to the high seas disregarding its detention in the context of legal proceedings against it”.

77. As regards article 92 of the Convention, Mexico contends that “the portion of that article invoked by Luxembourg presupposes that the ship is in a voyage or in a port of call. As has been explained and demonstrated, the “*Zheng He*” was not in any of the aforesaid hypotheses. Rather, it was in the port of destiny.”

78. With respect to article 131 of the Convention, Mexico maintains that “[t]his case ... is not about discriminatory treatment against a landlocked State.” According to Mexico, for article 131 to be applicable, it is not enough that some events have taken place in a port, but it is required to prove the existence of a link between the facts advanced and that article in order to demonstrate that the Tribunal has *prima facie* jurisdiction.

79. Mexico argues that article 131 of the Convention

needs the following cumulative circumstances to come into play. First, the set of facts that encompass the treatment given to a foreign ship flying the flag of a landlocked State – Luxembourg in this case. Second, at least one example of the treatment given to a foreign ship flying the flag of a coastal State. Third, that the treatment given to both ships was different, in prejudice of the ship flying the flag of a landlocked State. And fourth, that the treatment afforded to the latter was specifically due to the fact that the ship flies the flag of a landlocked State.

In Mexico's view, none of the previously mentioned circumstances can be extracted from Luxembourg's application and request for the prescription of provisional measures besides the facts related to the "*Zheng He*" alone.

* *

80. The Tribunal notes that, following the detention of the "*Zheng He*" by the Mexican authorities in November 2023, Luxembourg submitted a number of notes verbales to Mexico where it requested, *inter alia*, a solution of the situation within the framework of international law.

81. The Tribunal observes in relation to a meeting of 23 February 2024 between a delegation of Luxembourg and the Ambassador of Mexico to Luxembourg that, while the Parties differ in their assessment of the content of this meeting, references to the right of innocent passage of the "*Zheng He*" were made during that meeting. Furthermore, the intention of Luxembourg to settle the dispute by recourse to the Tribunal was expressed. The single note verbale submitted by Mexico to Luxembourg with regard to the "*Zheng He*", dated 20 March 2024, referred to that very meeting and stated, in particular, that there were various administrative and judicial remedies available "under Mexican law". The Tribunal further observes that the subsequent note verbale of Luxembourg, dated 29 March 2024, specified that regardless of national proceedings under Mexican law, Luxembourg was to examine "all possible remedies before international tribunals for the law of the sea with the aim of obtaining the prompt release of the vessel." The final note verbale of Luxembourg, dated 29 April 2024, informed Mexico of Luxembourg's intention to initiate proceedings before the Tribunal. Both of these notes verbales remained unanswered by Mexico.

82. In this context, the Tribunal recalls that, in line with established jurisprudence,

"it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument," but ... "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter" (*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, p. 70 at p. 85, para. 30; see also *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 pp. 428-429, para. 83).
(*Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, p. 148, para. 379)

83. Although Mexico did not respond directly to Luxembourg's assertion of rights under the Convention in relation to the detention of the "Zheng He" before proceedings were instituted, Mexico's view on this question may be inferred from its conduct. As the International Court of Justice (hereinafter the "ICJ") stated in *Land and Maritime Boundary between Cameroon and Nigeria*:

[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.

(*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, at p. 315, para. 89; see also *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, at p. 69, para 100; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019, p. 283, at p. 295, para. 43; and *M/T "San Padre Pio (Switzerland v. Nigeria)*, Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019, p. 375, at pp. 389-390, para. 57)

84. The Tribunal is therefore of the view that a dispute concerning the interpretation or application of the Convention appears *prima facie* to have existed between the Parties on the date of the institution of the proceedings on the merits.

85. The Tribunal notes that the Applicant has invoked a number of provisions of the Convention as affording a basis on which *prima facie* the Tribunal's jurisdiction over the dispute submitted to it might be founded. The Tribunal recalls that, at this stage of the proceedings, it need only satisfy itself that at least one of those provisions appears *prima facie* to afford such a basis. In this regard, the Tribunal considers that article 131 of the Convention appears *prima facie* to afford a basis on which its jurisdiction might be founded.

Article 283 of the Convention

86. The Tribunal will now proceed to determine whether the requirements under article 283 of the Convention relating to an exchange of views have been met.

87. Article 283, paragraph 1, of the Convention reads:

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.

88. Luxembourg states that steps to exchange views “were deployed as soon as the vessel was detained.” It underlines that it had already in its first note verbale, dated 7 November 2023, six days after the detention of its vessel, drawn the attention of Mexico to “this prejudicial situation and called for a solution within the framework of international law”.

89. Luxembourg points out that the abovementioned note verbale as well as all but one of its subsequent notes verbales remained unanswered. It argues that “Mexico has denied the international scope of the dispute and the existence of Luxembourg’s own rights as the flag State” and that Mexico has presented recourse to proceedings under its domestic law as the “appropriate means” to protect all of the rights in question. Luxembourg draws the attention of the Tribunal to its last two notes verbales in which it underscored that domestic remedies had not resolved the situation and that it was “considering using international legal remedies” and, ultimately, that “it was finalizing an application to institute proceedings before [the Tribunal]”.

90. Luxembourg also refers to a number of unofficial and official meetings between the Parties concerning the vessel “*Zheng He*”. Luxembourg points out in particular the meeting that took place on 23 February 2024 between a delegation of Luxembourg and the Ambassador of Mexico to Luxembourg during which, according to the minutes of the meeting prepared by Luxembourg, references were made to

the right of innocent passage of the “*Zheng He*” as well as to a possibility of initiating proceedings before the Tribunal.

91. Luxembourg contends that “[it] had no other choice than to conclude that the possibilities of reaching a friendly settlement of the dispute had been exhausted and to submit its request to [the] Tribunal.”

92. Mexico is of the view that the requirements set out in article 283 of the Convention are not met. In this respect, Mexico underscores that “the exchanges between Luxembourg and Mexico only referred to the seizure of the vessel “*Zheng He*” and its crew” and that “[i]t never involved freedom of navigation, unequal treatment, nor any mistreatment of the ship’s crew.” While Mexico admits that “even if no specific mention of UNCLOS provisions was necessary,” it maintains that “at least it would be required that the subject matter arose in the diplomatic exchange, which did not.” Mexico also argues in this respect that, “as inferred from the content of the verbal notes, the Applicant did not mention any possible violation of any provision of the UNCLOS, much less any specific right provided for in this Treaty.”

93. Mexico further maintains that

it was not until 4 June 2024, when Mexico was notified of Luxembourg’s submission of a request to initiate proceedings before the Tribunal, that Mexico became aware of the allegations of a supposed violation of Articles 17, 18, 19, 21, 58, 87, 90, 92, 131, and 300 of UNCLOS.

94. As regards the meeting of 23 February 2024 with the Ambassador of Mexico, Mexico contends that the arguments put forward by Luxembourg are based on an “internal document” which is a “one-sided alleged record of a meeting” and, hence, the Luxembourgish argumentation contains “various factual inaccuracies”. In particular, Mexico states that its Ambassador “did not dwell on the vessel’s right to innocent passage, but simply asserted that a request for clarification had been made to the corresponding authority.”

95. The Tribunal wishes to recall that when a dispute arises, article 283 of the Convention requires the parties to “proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”. This obligation refers to the means of settling the dispute and “‘cannot be understood as an obligation to negotiate the substance of the dispute’ (*Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, para. 378)” (*M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 38, at pp. 90-91, para. 208).

96. The Tribunal observes that Luxembourg has made a number of attempts to exchange views with Mexico regarding the vessel “*Zheng He*”. The initial attempts by Luxembourg were formulated in a general manner.

97. With regard to subsequent attempts, in paragraph 81 above, the Tribunal took note of, *inter alia*, references to the right of innocent passage, Luxembourg’s intention to settle the dispute by recourse to the Tribunal and Mexico’s response referring the matter to the legal remedies available under its domestic law. Furthermore, the Tribunal observes that Luxembourg, in its note verbale dated 29 March 2024, expressed its readiness to settle the issue “in the spirit of mutual respect that characterizes the relations of friendship and cooperation between [Luxembourg] and [Mexico]”. As the Tribunal observed above, Luxembourg, in its last note verbale, dated 29 April 2024, informed Mexico of its intention to initiate proceedings before the Tribunal. Both of these notes verbales remained unanswered and it was not until 4 June 2024 that Luxembourg filed the Application.

98. The Tribunal emphasizes in this context that “the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute” (*M/V “Norstar” (Panama v. Italy)*, Preliminary Objections, Judgment, ITLOS Reports 2016, p. 44, at p. 91, para. 213; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019, p. 283, at p. 304, para. 88; *M/T “San Padre Pio” (Switzerland v.*

Nigeria), *Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-1029*, p. 375, at p. 393, para. 74).

99. The Tribunal also wishes to recall that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted” (*MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60; “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 345, para. 71; “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 247, para. 76; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019*, p. 283, at p. 304, para. 87; *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019*, p. 375, at pp. 392-393, para. 73).

100. In this respect, the Tribunal considers that the referral by Mexico solely to the legal means available to Luxembourg under the national law of Mexico could reasonably lead Luxembourg to conclude that all possibilities of reaching agreement were exhausted.

101. The Tribunal is of the view that these considerations are sufficient at this stage to find that the requirements of article 283 of the Convention are satisfied.

Article 295 of the Convention

102. The Parties disagree as to the applicability and fulfilment of the requirements concerning the exhaustion of local remedies under article 295 of the Convention in the present case.

103. Mexico maintains that

if Applicant pretends to claim the protection of any individual, it would need to exhaust local remedies available in Mexico before resorting to an international tribunal. This is not only recognized in Article 295 of UNCLOS, but also under general international law.

104. Luxembourg states that “Mexico ... is attempting to introduce a condition of the exhaustion of domestic remedies, which is not applicable to the present proceedings.” It further specifies that

Article 295 of the Convention requires exhaustion of domestic remedies only when this is required under international law. Such is not the case when the remedy concerns direct violation of rights which the flag state holds under the Convention. Luxembourg's application predominantly invokes its own rights.

* *

105. In the view of the Tribunal, in the circumstances of this case, the issue of exhaustion of local remedies should be examined at a future stage of the proceedings.

* * *

106. In light of the foregoing, the Tribunal concludes that *prima facie* it has jurisdiction over the dispute submitted to it.

II. Plausibility of rights

107. The power of the Tribunal to prescribe provisional measures under article 290, paragraph 1, of the Convention has as its object the preservation of the respective rights of the parties to the dispute, pending the final decision. Before prescribing provisional measures, the Tribunal is not called upon to settle the competing claims of the parties. In the present case, the Tribunal need only satisfy itself that the rights which Luxembourg seeks to protect are at least plausible (see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*,

Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146, at p. 158, para. 58; *“Enrica Lexie” (Italy v. India)*, *Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018-2019*, p. 283, at p. 305, para. 91; *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018-2019*, p. 375, at p. 393, para. 77).

108. Luxembourg maintains that the rights it seeks to protect are a central element of the law of the sea and are intended to guarantee freedom of navigation and other internationally lawful uses of the sea. It states that

[b]ecause of its geographical location, with no direct access to the sea, Luxembourg is a “*landlocked State*” within the meaning of article 124 of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”). It therefore takes great heed to ensure that its vessels enjoy, in the maritime ports of other States Parties, treatment equal to that enjoyed by other vessels within the meaning of article 131 of UNCLOS.

109. Luxembourg asserts that at this point in the proceedings, it “does not need to introduce comprehensive, detailed evidence of the discrimination that it was subjected to in breach of article 131 of the Convention.”

110. According to Luxembourg, the violations of the rights it has invoked are “more than ‘plausible’”. In this respect, it claims that the vessel “*Zheng He*” has been detained for over seven months by the Mexican authorities, despite the fact that it was engaged in open-sea navigation and was calling into port to carry out bunkering, refuelling, preventive maintenance and personnel rotation. It argues that the “*Zheng He*” was detained, seized and confiscated in circumstances in which the owner was “deprived of any reasonable way of regularizing the situation and has been subjected to an exorbitant fine which may affect the lawful activities of other Luxembourg-flagged ships in waters under Mexico’s jurisdiction.”

111. Luxembourg states that

it is not the application of Mexican customs legislation, in principle, that is at issue for Luxembourg. Rather, it is the abusive and discriminatory manner, in infringement of certain rights guaranteed by the Convention, in

which this legislation has been applied to the specific situation of “Zheng He” since 2023.

112. In this regard, Luxembourg contends that the confiscation of the vessel, the value of which exceeds the customs duties claimed for the temporary importation of the vessel by a factor of several thousand, is completely out of proportion to the amount of duties that Mexico could claim. It points to the fine of USD 96,230,000 which was imposed, asserting that this exceeds by a factor of 12,000 the amount of customs duties claimed for a temporary import, supposing they were due. According to Luxembourg, the penalties imposed on the “*Zheng He*” are “clearly disproportionate”.

113. Luxembourg asserts, on the basis of a legal opinion of an international law firm with a practice in Mexico, that the penalty against the “*Zheng He*” pursuant to the resolution of 15 February 2024 is unprecedented in the Mexican legal system. It argues that “[i]t is precisely in the unprecedented, unique, extraordinary nature of this procedure and penalty against the “*Zheng He*” that a plausible discrimination lies.” It contends that “[t]he fact that there are no similar cases against ships flying foreign flags is indeed an initial plausible element of the discriminatory treatment against the “*Zheng He*” and not least its flag State.” It submits that present circumstances are such that it makes no difference that the “*Zheng He*” was able to use the temporary import procedure in the past.

114. Luxembourg alleges that the shipowner has access to only some of the administrative, customs and tax documents that concern it directly, “with delays that reflect a clear desire on the part of the Mexican authorities to withhold information.” Luxembourg seeks access to additional documentation, asserting that it must be put in a position to compare the treatment reserved for its vessel with the treatment reserved in the same period for other foreign-flagged vessels by the Mexican authorities. It argues that this is a matter of equality of the Parties before the Tribunal, a judicial body, which is part of the requirements for the proper administration of justice.

115. Mexico contends that the assessment of plausibility requires the examination of legal and factual issues, meaning that the alleged right must have a legal basis and be applicable to the facts of the case. In this regard, it asserts that Luxembourg has failed to establish the existence of a plausible right which can be related to the requested measures.

116. Addressing Luxembourg's allegation that Mexico has breached article 131 of the Convention, Mexico argues that

[f]or this to be applied, it would be necessary to have a set of facts that could, at least *prima facie*, lead to consider that the *Zheng He* was subjected to a different treatment to that given to other foreign ships in Mexico, based on the flag of the vessels. Nonetheless, there is no such factual background to sustain a claim based on Article 131.

117. Mexico maintains that Luxembourg's allegations "are far from reality". In particular, it contends that the suggestion that the treatment accorded to the "*Zheng He*" is unprecedented in Mexican practice "is a misleading assertion in an attempt to demonstrate the plausibility of Luxembourg's rights." It submits that it "finds these statements perplexing" because, as demonstrated by the evidence provided, "the last time the "*Zheng He*" entered Mexico to perform dredging activities, it had no issues completing its temporary import process."

118. Mexico states that a document submitted to the Tribunal on the final day of the hearing demonstrates that "since 2012 to date, Mexican tax and customs authorities have conducted 77 administrative procedures in customs matters against vessels flagged in at least 10 different countries." Mexico notes that of these 77 procedures, 26 have culminated in the imposition of a tax credit and the confiscation of the vessels. It, however, clarifies that "among the confiscated vessels, no dredgers are to be found. Rather, they have been vessels such as ship suppliers, consoles, motorboats, tugboats, sailboats and yachts."

* *

119. At this stage of the proceedings, the Tribunal is not called upon to determine definitively whether the rights claimed by the applicant exist, but need only decide

whether such rights are plausible (*Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, *ITLOS Reports 2018-2019*, p. 283, at p. 306, para. 95; see “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 182, at p. 197, para. 84; *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019*, *ITLOS Reports 2018–2019*, p. 375, at p. 393, para. 105).

120. Taking into account the Tribunal’s finding in paragraph 85 above, it will now determine whether the alleged rights Luxembourg seeks to protect in relation to article 131 of the Convention are plausible.

121. Article 131 of the Convention reads:

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

122. The Tribunal notes that Luxembourg is a landlocked State as defined in article 124 of the Convention and that its flagged vessel “*Zheng He*” is detained in the Port of Tampico, Mexico.

123. The Tribunal notes the opposing claims of the Parties concerning the alleged unequal treatment of the “*Zheng He*” in the Port of Tampico and evidence provided by them.

124. The Tribunal is mindful that, at this stage of the proceedings, the Parties have not had sufficient opportunity to furnish all the evidence to establish their arguments in full.

125. In the Tribunal’s view, in light of the foregoing, the rights claimed by Luxembourg in the present case on the basis of article 131 of the Convention are plausible.

III. Real and imminent risk of irreparable prejudice

126. Under article 290, paragraph 1, of the Convention, the Tribunal may prescribe measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. The Tribunal may prescribe provisional measures if the urgency of the situation so requires. Urgency implies that there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties to the dispute, pending the final decision. Accordingly, the Tribunal is required to find whether there is a risk of irreparable prejudice to the rights of the parties to the dispute and whether such risk is real and imminent (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010*, *ITLOS Reports 2008-2010*, p. 58, at p. 69, para. 72; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, *Provisional Measures, Order of 25 April 2015*, *ITLOS Reports 2015*, p. 146, at pp. 156 and 161, paras. 42 and 74; *“Enrica Lexie” (Italy v. India)*, *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 182, at p. 197, para. 87; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, *ITLOS Reports 2018-2019*, p. 283, at p. 307, para. 100; *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019*, *ITLOS Reports 2018-2019*, p. 375, at p. 400, para. 111).

127. Luxembourg contends that “the detention and the exorbitant fine imposed on the *Zheng He* create a real and imminent risk of irreversible prejudice”. In particular, according to Luxembourg, the request for the prescription of provisional measures is motivated by “established urgency, which grows with each day of the detention, the race towards the domestic courts, the inevitable deterioration of the vessel, and the proven and imminent risk of losing the classification and certification, with all that this would entail for the real rights and the nationality of our vessel.”

128. According to Luxembourg, the requirement of urgency “requires the object of the risk, its reality and its temporality to be characterized”. In that regard, it further claims that the provisional measures requested “actually seek to safeguard the rights which Luxembourg indisputably derives from the Convention” and that these measures are necessitated not only by the circumstances surrounding the detention

of the vessel but also by the subsequent conduct of Mexico. Concerning the temporality of the risk, Luxembourg maintains that the imminence of the risk is well established and that “the test of imminence consisted in assessing the risk not in the light of the past or the present but in the light of the circumstances currently unfolding at the time when your Tribunal is called upon to order the prescription of measures.”

129. In this context, Luxembourg identifies a number of risks connected with the detention of the vessel:

Firstly, an asymmetry of information between Mexico and Luxembourg is identified (1). Luxembourg as the flag State is consequently prevented from fully exercising its obligations in terms of maritime safety (2) and maritime labour (3). Loss of the vessel is a risk due to its gradual deterioration at anchor in Tampico (4). The risk of vessel loss is incurred also, and above all, by the persistence of the Mexican authorities in seeking to confiscate the vessel, which would again harm the Luxembourg flag (5). The imposition of a fine separate from the expropriation of the *Zheng He* raises legitimate fears of further harm to the Luxembourg flag through the detention of related vessels operated under the same flag by the *Jan De Nul* group (6).

130. Luxembourg contends that it suffers a situation of “asymmetry of information” compared with Mexico. According to Luxembourg, this is due to the lack of access to information such as regulatory texts, decisions specifying the fiscal nature, or not, of the docks, and information about the policy of the Mexican authorities on port calls by other foreign vessels. It states that this situation not only is unfavourable to the shipowner but it also affects Luxembourg’s position even more severely since access to this information is necessary to support its claims on the merits and to respond appropriately to Mexico’s allegations before the Tribunal.

131. Luxembourg claims that it is prevented *de facto* and *de jure* by Mexico’s long-term detention of the vessel from fulfilling its obligations as a sovereign State, particularly with regard to the safety of the vessel. In particular, Luxembourg draws attention to its jurisdiction and control, as the flag State, in maritime safety pursuant to the International Convention for the Safety of Life at Sea (SOLAS). It argues that it must ensure that its competence *ratione personae* over vessels flying its flag is neither contested nor rendered ineffective in order to exercise such jurisdiction and

control. Luxembourg also draws attention to the risk of failure to carry out preventive maintenance and those visits and surveys relating to the vessel's safety which determine its classification and statutory certification. According to Luxembourg, the class certificate is valid until 21 October 2025, and after that date, "[t]he loss of classification will lead to the loss of statutory certification, which will make the vessel liable to be removed from its original register, the Luxembourg register."

132. Luxembourg argues that the prolonged detention of the "*Zheng He*", without any guarantees for the captain and those seafarers remaining on board, means that they are placed in a situation of real and imminent risk. Luxembourg acknowledges that, at present and up to now, the seafarers have not been subject to detention, custodial measures or criminal incarceration. However, it highlights that the fundamental rights of seafarers are nevertheless infringed in the absence of a custodial measure, also on account of the security conditions in Mexican ports. Luxembourg identifies other risks for the well-being of the crew, one consisting of the imminent deterioration of the conditions of habitability of the vessel because of its degraded maintenance, and another consisting of the impact on the mental health of the seafarers resulting from anxiety due to the detention of the ship and the uncertain outcome of the legal proceedings underway in Mexico. Luxembourg contends also that the detention of the "*Zheng He*" prevents it, as the flag State, from ensuring that the social rights of seafarers under the Maritime Labour Convention (MLC) are respected.

133. Luxembourg claims that there is a real and imminent risk that its rights as a flag State under the Convention, SOLAS and the MLC "will be irreversibly infringed" by the detention of the "*Zheng He*" by Mexico.

134. Luxembourg argues that the detention of the "*Zheng He*" "in itself produces harmful effects" since the prolonged detention will be inevitably and deliberately calling into question the seaworthiness of the vessel. Luxembourg maintains that the location and situation of the "*Zheng He*" do not allow for proper cleaning of the hull and other external parts and that the long-term inactivity of the motor and pump systems in an equatorial environment means that the vessel runs a real risk of major equipment failure, requiring "heavy investment" to restore them. Consequently,

according to Luxembourg, the value of the “*Zheng He*” will continue to depreciate, ultimately leading to *de facto* expropriation.

135. Luxembourg emphasizes the “imminence of the risk of prejudice to the ownership and nationality of the “*Zheng He*”.” According to Luxembourg, the infringement of the shipowner’s property already constitutes a direct prejudice to Luxembourg and the definitive expropriation by Mexico would undermine the legal certainty of the connection of the “*Zheng He*” to the Luxembourg flag. Luxembourg alleges that since 15 February 2024, there has been a high risk that the Mexican authorities will seize one or more other Luxembourg-flagged vessels of the same shipowner group when they pass through the territorial sea or the internal waters of Mexico.

136. Mexico contends that the requirement of urgency has not been met, since there is no risk of an imminent and irreparable prejudice to the rights claimed by Luxembourg.

137. Mexico states that “the provisional measure to ensure the equality of the parties, as characterized by Luxembourg, lacks a risk of irreparable damage” and that Luxembourg has the procedural opportunity to request necessary information through the Tribunal. In this regard, Mexico expresses its willingness to hold consultations with Luxembourg “to establish the process for the taking of evidence at the location of the *Zheng He*, and for Luxembourg to specify what information it requires regarding Mexican law.”

138. Mexico contends that it has provided all the facilities for the owner to carry out the necessary actions to provide preventive and curative maintenance to the dredge. According to Mexico, “it is evident that Luxembourg has not accredited a situation of urgency or a real and imminent risk that would require an order of provisional measures to continue providing such maintenance.” Mexico argues that the vessel has been anchored in the Port of Tampico for around eight months and has not encountered any risk. It also argues that, upon request by the shipowner, the Mexican port authorities have taken all steps to facilitate the preventive and corrective maintenance of the vessel. In particular, Mexico highlights that several

maintenance services were granted in November and December 2023, as well as in January, April and May 2024. According to Mexico, these services have included maintenance works for mechanical and electrical systems, along with the supply of the necessary materials, as well as an underwater examination of the hull of the “*Zheng He*”.

139. Mexico contends that there is no risk of an irreparable prejudice to the rights claimed by Luxembourg with regard to the preservation of the fundamental rights and freedoms of the seafarers. In particular, Mexico argues that Luxembourg recognizes that Mexico “is already taking action and seeks that the Tribunal request Mexico to continue to ensure such measures. In this regard, there is no exceptional and urgent situation that justifies the adoption of provisional measures.”

140. Mexico emphasizes that the crew is not under any risk that would imply humanitarian considerations since the Mexican administrative and judicial authorities have allowed the free movement and circulation of the crew and have guaranteed them access to health services and food. In this regard, Mexico states that on 27 November 2023, the shipowner obtained a judgment from a competent domestic court that granted the precautionary measure for the responsible authority to facilitate unrestricted access to supplies for the crew. According to Mexico, this decision remains in effect to date, and it demonstrates that the provisional measures requested by Luxembourg “are already being addressed, thus negating any urgency in the present case.”

141. Mexico clarifies that the members of the crew are not subject to any detention measures and that they hold the status of visitors without permission to engage in remunerated activities, which allows them to transit and stay in Mexican territory, and embark and disembark from the vessel. According to Mexico, its authorities have also permitted the shipowner the renewal and rotation of the crew whenever the shipowner deems it necessary. With regard to the psychological health of the crew, Mexico contends that “there is no evidence of a causal link between the alleged actions of Mexican authorities and the alleged psychological damage of members of the crew” and emphasizes its commitment regarding the protection of the mental health of all seafarers.

142. As regards the risk connected to the transfer of the property of the vessel or its expropriation by Mexican authorities, Mexico argues that there is no urgency and, in particular, that “[t]here is currently no real and imminent risk, given that there are pending legal proceedings.” It states that “Mexican authorities in charge of registering seized property rejected an application to that effect in view that the judicial proceedings are still ongoing.” In this regard, Mexico maintains that, despite the vessel being in its custody, aspects related to the vessel’s legal status are currently under judicial review and the vessel continues to fly the Luxembourg flag. According to Mexico, given the pending national proceedings, its authorities are currently unable to collect the fine or to take any action aimed at transferring the ownership of the vessel. In particular, Mexico states that the collection of a fine does not constitute irreparable damage. Mexico further states that the detention of other vessels belonging to the shipowner, its parent company or any other subsidiary refers to situations that may or may not occur in the future and are not related to the present case.

* *

143. On the basis of the factual information and legal arguments presented by the Parties, the Tribunal considers that there is at present no urgency, in the sense that there is no real and imminent risk of irreparable prejudice to the rights claimed by Luxembourg.

144. In this context, the Tribunal takes note of the assurances given by Mexico during the hearing on 11 and 12 July 2024, as reproduced below.

* * *

145. The Tribunal places on record the following assurances given by the Co-Agent of Mexico during the hearing on 11 and 12 July 2024:

Mexico wishes to emphasize its commitment regarding the protection of the mental health of all seafarers that enter into Mexican ports.

I would like to take the opportunity to assure this Tribunal and to our learned colleagues of Luxembourg, that any request for information, strictly related to this case, will be duly assessed and answered – of course, having due regard to the rights of Luxembourg in the present proceedings.

Mexico considers that the rights of the crew are of the utmost importance and their well-being and integrity must be preserved even when internal procedures under Mexican law are pending. Equally, Mexico considers it important to safeguard the integrity of the vessel, thus allowing maintenance work on the Zheng He, as requested by the agency contracted by the owners of the vessel. In this regard, and considering that an order for provisional measures should safeguard the rights of both parties and acknowledging that the Tribunal must recognize Mexico's right to exercise jurisdiction over events occurring in internal waters, Mexico wishes to voluntarily offer periodic reports reflecting the treatment provided to both the crew and the vessel, as well as their current status. Of course, these demonstrations of good faith should not, in any way, be construed as an admission of the claims of Luxembourg before this Tribunal.

146. The Tribunal recalls that any action or abstention by either party in order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 39, para. 44; *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010*, p. 58, at p. 70, para. 79; *"Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation)*, *Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 251, para. 99; *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, *Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at p. 165, para. 103; *"Enrica Lexie" (Italy v. India)*, *Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at pp. 204-205, para. 136).

147. The Tribunal also recalls that, according to article 92 of the Rules, "[t]he rejection of a request for the prescription of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts."

148. The present Order in no way prejudices the question of the jurisdiction of the Tribunal to deal with the merits of the case or any questions relating to the

admissibility of the Application, or relating to the merits themselves, and leaves unaffected the rights of Luxembourg and Mexico to submit arguments in respect of those questions (*M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, *Provisional Measures, Order of 23 December 2010*, *ITLOS Reports 2008-2010*, p. 58, at p. 70, para. 80; *Delimitation of the maritime boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, *Provisional Measures, Order of 25 April 2015*, *ITLOS Reports 2015*, p. 146, at p. 165, para. 104; *Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 25 May 2019*, *ITLOS Reports 2018-2019*, p. 283, at p. 311, para. 122; *M/T “San Padre Pio” (Switzerland v. Nigeria)*, *Provisional Measures, Order of 6 July 2019*, *ITLOS Reports 2018-2019*, p. 375, at p. 408, para. 145).

IV. Operative provision

149. For these reasons,

THE TRIBUNAL,

By 22 votes to 1,

Finds that the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its powers to prescribe provisional measures under article 290, paragraph 1, of the Convention.

FOR: *President* HEIDAR; *Vice-President* CHADHA; *Judges* JESUS, BOUGUETAIA, ATTARD, KULYK, CABELLO SARUBBI, KITTICHAISAREE, KOLODKIN, LIJNZAAD, INFANTE CAFFI, DUAN, BROWN, CARACCILOLO, KAMGA, ARMAS PFIRTER, HORINOUCI, JOYINI, RHEE, KEH KAMARA, MARCINIAK; *Judge ad hoc* SZÉKELY Y SÁNCHEZ;

AGAINST: *Judge ad hoc* KOHEN.

Done in English and French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-seventh day of July, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Luxembourg and the Government of Mexico, respectively.

(signed)
Tomas HEIDAR,
President

(signed)
Ximena HINRICHS OYARCE,
Registrar

Judge Kittichaisaree appends a declaration to the Order of the Tribunal.

Judges Infante Caffi and Kamga append a joint declaration to the Order of the Tribunal.

Judge Kulyk appends a separate opinion to the Order of the Tribunal.

Judge *ad hoc* Kohen appends a dissenting opinion to the Order of the Tribunal.

