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Dispute Settlement in the Law of the Sea: Survey for 2022

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Abstract

This is the latest in a series of annual surveys in this *Journal* reviewing dispute settlement in the law of the sea, both under Part XV of the UN Convention on the Law of the Sea and outside the framework of the Convention. The most significant developments during 2022 were the award of an Annex VII arbitral tribunal relating to the preliminary objections of Russia in the *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* case and the judgment of the International Court of Justice on the merits in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* case.

Keywords

advisory opinions – arbitration – contiguous zone – International Court of Justice (ICJ) – International Tribunal for the Law of the Sea (ITLOS) – military activities exception – rights in the exclusive economic zone – straight baselines

Introduction

This is the latest in a series of annual surveys in this *Journal* reviewing dispute settlement in the law of the sea. It covers developments during 2022 and follows the structure of previous surveys. Thus, it begins by looking at dispute

settlement under the United Nations Convention on the Law of the Sea (LOSC).[1] It examines in turn the activities of those forums for the compulsory settlement of disputes under Part XV of the LOSC that were active during 2022, namely, the International Tribunal for the Law of the Sea (ITLOS) and arbitration in accordance with Annex VII of the LOSC. The survey then continues and concludes by looking at third-party settlement of law of the sea disputes outside the framework of Part XV, which in 2022 concerned only the International Court of Justice (ICJ).

The most notable developments relating to dispute settlement in the law of the sea during 2022 were the award of the Annex VII arbitral tribunal relating to the preliminary objections of Russia in the *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* (*Ukraine* v. *Russian Federation*) case and the judgment of the International Court of Justice on the merits in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*) case. In the former, the tribunal made significant contributions to the case law on the 'military activities' exception in Article 298 of the LOSC and the obligation to exchange views in Article 283. The ICJ's judgment is notable for its pronouncements on the relationship between various provisions of the LOSC and customary international law; the nature of the rights of the coastal State and other States in the exclusive economic zone (EEZ); the contiguous zone; and straight baselines.

Proceedings in two new cases were instituted during the course of 2022, both before the ITLOS. The first was a prompt release of vessel application by the Marshall Islands relating to the detention of one its vessels by Equatorial Guinea. However, the application was withdrawn shortly after it had been made. The second new case was a request by the Commission of Small Island States on Climate Change and International Law for an advisory opinion on States' obligations under the LOSC relating to climate change.

International Tribunal for the Law of the Sea

At the beginning of 2022, one case was pending before the ITLOS, Case No. 28, in which Mauritius has requested a Special Chamber of the ITLOS to delimit the maritime boundary between the EEZs and continental shelves (including the continental shelves beyond 200 M) of itself (in respect of the Chagos Archipelago) and the Maldives. On 28 January 2021 the Special

1 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396.

Chamber delivered a judgment in which it dismissed (by 8 votes to one) all of the Maldives' preliminary objections to the Chamber's jurisdiction and the admissibility of Mauritius's claims.[2] Written proceedings on the merits were completed in August 2022, and hearings were held 17–24 October 2022. The Special Chamber's judgment on the merits may therefore be expected during the course of 2023.

In the final weeks of 2022, the ITLOS was seised of two new cases, as detailed below.

Case No. 30: The M/T 'Heroic Idun' *Case* (Marshall Islands *v.* Equatorial Guinea), Prompt Release

On 10 November 2022, the Marshall Islands made an application to the ITLOS under Article 292 of the LOSC to obtain the release of a vessel flying its flag, the *Heroic Idun*, which at that time was being detained by Equatorial Guinea.[3] Article 292 provides for a flag State to apply to the ITLOS for the release of a vessel that has been arrested and detained by another State Party where the latter has allegedly not complied with the provisions of the LOSC providing for the prompt release on the posting of a bond or other surety: those provisions are Article 73(2), concerning illegal fishing in the EEZ, and Articles 220 and 226, concerning alleged pollution offences. The present application is the tenth made under Article 292 overall, but the first since 2007.

According to the Marshall Islands' application, the *Heroic Idun* is a very large crude carrier which, in mid-August 2022, was *en route* to load a cargo of oil at a Nigerian offshore terminal. However, because the necessary paperwork had not been completed, the vessel was requested to wait for several days. Following a failed attempt by a Nigerian naval vessel to board it at night, the *Heroic Idun* was drifting in the EEZ of São Tomé and Príncipe when it was approached by a naval vessel from Equatorial Guinea and ordered to follow it to the port of Malabo in Equatorial Guinea, where the vessel and its crew were detained. At the end of September 2022, the authorities of Equatorial Guinea

2 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*), Preliminary Objections, Judgment, ITLOS Case No. 28, 28 January 2021, available at https://itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf. All websites cited in this article were accessed on 31 March 2023. The Judgment was analysed in the Survey for 2021: see R Churchill, 'Dispute settlement in the law of the sea: Survey for 2021' (2022) 37(4) *International Journal of Marine and Coastal Law* (*IJMCL*) 575–609, at pp. 578–589.

3 The application, together with other materials relating to the case, is available at https://itlos.org/en/main/cases/list-of-cases/the-m/t-heroic-idun-case-marshall-islands-v-equatorial-guinea-prompt-release/.

stated that they would release the vessel and its crew on payment of a sum of two million euros. That sum was duly paid, but the vessel and its crew were not released. At the beginning of November, the authorities of Equatorial Guinea informed the Marshall Islands that the *Heroic Idun* and its crew were to be handed over to the Nigerian authorities.

Four days after making its application, the Marshall Islands wrote to the ITLOS informing it that the *Heroic Idun* had indeed been transferred to the jurisdiction, control and custody of the Nigerian authorities. Accordingly, its application against Equatorial Guinea was moot and it was therefore discontinuing proceedings. That was formally placed on record by the president of the ITLOS in an order of 15 November 2022.[4]

Had Equatorial Guinea not transferred the *Heroic Idun* to the Nigerian authorities, it is by no means certain that the Marshall Islands' application under Article 292 would have been successful. The *Heroic Idun* had obviously not engaged in fishing, and there is nothing in the application to suggest that it had committed a pollution offence. Nevertheless, the Marshall Islands argued in its application that a prompt release application under Article 292 was not limited to vessels detained in the circumstances referred to in Articles 73, 220 and 226.[5] Furthermore, it indicated in its application that it also intended immediately to institute arbitration proceedings against Equatorial Guinea in accordance with Annex VII and seek an order of provisional measures from the ITLOS under Article 290(5). The latter would seem to have been a more secure legal basis for obtaining the release of the *Heroic Idun* than an Article 292 application, had the ship still been detained by the authorities of Equatorial Guinea. At the time of writing (April 2023), there was no sign of the Marshall Islands instituting any kind of proceedings against Nigeria, although as of 20 February 2023 the ship and its crew were still being detained in Nigeria.[6]

4 *The M/T 'Heroic Idun'* Case (*Marshall Islands* v. *Equatorial Guinea*), Prompt Release, Order No. 2022/3, 15 November 2022.

5 Application of the Marshall Islands (n 3) paras 59–69. See also paras 81–83, where the Marshall Islands argued that Article 292(4) was a separate basis for seeking the release of a detained vessel.

6 See P Peachey, 'Tanker crew clock up six months in detention as Nigeria case rumbles on' (*Tradewinds*, 20 February 2023) available at https://www.tradewindsnews.com/tankers/tanker-crew-clock-up-six-months-in-detention-as-nigeria-case-rumbles-on/2-1-1406819.

Case No. 31: Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law

In the *Survey* for 2021,[7] it was reported that in October 2021 a number of members of the Alliance of Small Island States had concluded the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (the Agreement), and that Article 2(2) of the Agreement authorised the Commission to request advisory opinions from the ITLOS 'on any legal question within the scope' of the LOSC, 'having regard to the fundamental importance of the oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on small island States'. At a meeting in August 2022, the Commission decided to put Article 2(2) into effect and request the ITLOS for an advisory opinion on the following question:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:
>
> (a) To prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic emissions of greenhouse gases into the atmosphere?
>
> (b) To protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?

That request was submitted to the ITLOS on 12 December 2022.[8] On 16 December, the President of the ITLOS made an order setting a time limit of

7 See Churchill (n 2), at pp. 577–578.

8 The text of the request is available, with other materials relating to the case, at https://itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/. For comment on the request, see B McGarry and F Chávez Aco, 'The competence of the International Tribunal for the Law of the Sea in its new advisory proceedings on climate change' (*EJIL : Talk!* Blog, 16 December 2022). Even before the request was submitted, a number of authors had speculated about the possibility of a request being made, given the provisions of Article 2(2) of the Agreement. See, for example, R Barnes, 'An advisory opinion on climate change obligations under international law: A realistic prospect?' (2022) 53(2-3) *Ocean Development and International Law* (*ODIL*)

16 May 2023 (later extended to 16 June 2023) for the submission of statements by States Parties to the Convention, the Commission and certain named international organisations in relation to the questions in the Commission's request.[9]

Once such statements have been received and any oral proceedings completed, the ITLOS will have to decide whether it has jurisdiction to give an opinion. In its advisory opinion in *Request for an Advisory Opinion by the Sub-Regional Fisheries Commission*, delivered in 2015, the ITLOS held that, in accordance with Article 21 of its Statute (contained in Annex VI of the LOSC), where an agreement other than the LOSC conferred jurisdiction on it to give advisory opinions, the ITLOS was competent to exercise such jurisdiction with regard to 'all matters' specifically provided for in that other agreement provided that (1) the agreement was related to the purposes of the LOSC; (2) the request was transmitted to the ITLOS by a body authorised by or in accordance with that agreement; and (3) the request related to a legal question.[10] If, in the present case, the ITLOS adopts the same approach as in its 2015 opinion and applies the same three conditions, there would seem to be no doubt that the second and third conditions had been fulfilled. There should also not be any great difficulty in showing that the first condition had also been fulfilled since Article 1(3) of the Agreement defines the mandate of the Commission as being to 'promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, including … the obligations of States relating to the protection and preservation of the marine environment'.[11]

In its 2015 Advisory Opinion, the ITLOS also noted that the questions on which it had been asked to give an opinion 'need not necessarily be limited to the interpretation and application' of the agreement conferring jurisdiction

180–213; RJ Roland Holst, 'Taking the current when it serves: Prospects and challenges for an ITLOS advisory opinion' *Review of European, Comparative and International Environmental Law* (*RECIEL*), published online on 22 November 2022, available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12481; Y Tanaka, 'The role of an advisory opinion of the ITLOS in addressing climate change: Some preliminary considerations on jurisdiction and admissibility' *RECIEL*, published online on 23 August 2022, available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12459.

9 See Orders 2022/4, 16 December 2022; and 2023/1, 15 February 2023.

10 *Request for an Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, p. 4, at paras 58, 60.

11 See also Article 3(1) of the Agreement, which sets out the activities of the Commission using similar language to Article 1(3). The text of the Agreement is available with the materials for the case. On the concept of a 'related agreement', see Barnes (n 8), at pp. 192–193.

on the ITLOS: it was 'enough' if those questions had a 'sufficient connection with the purposes and principles' of the agreement.[12] Whether that requirement would be satisfied in the case of the present request is not altogether straightforward since the questions are couched only in terms of the LOSC and do not make any reference to the Agreement. Nevertheless, it is arguable that the questions have a 'sufficient connection with the purposes and principles' of the Agreement in the light of the mandate of the Commission quoted above.

Even if it finds that it has jurisdiction, the ITLOS still has discretion on whether or not to give an advisory opinion. In its 2015 Opinion, the ITLOS stated that it should decline a request to give an advisory opinion only if there were 'compelling reasons' to do so.[13] In the present case, there appear to be few compelling reasons for the ITLOS to decline the request if it finds that it does have jurisdiction. One possible reason might be if the ITLOS considered it inappropriate to answer questions posed by a body that at the time of submitting the request had only six member States, when any answers given by the ITLOS have implications for all 168 States Parties to the LOSC.[14]

There is little point in speculating at this stage how the ITLOS might answer the questions put to it if it finds that it does have the jurisdiction to do so. However, it is worth recalling that any findings by the ITLOS about the scope of States' climate change obligations under the LOSC will not be legally binding, although they will obviously have a certain persuasive force.

The present request to the ITLOS is not the only request to an international court for an advisory opinion on States' obligations in relation to the climate emergency. On 9 January 2023, Chile and Colombia made a request to the Inter-American Court of Human Rights, [15] while on 29 March 2023 the United Nations General Assembly adopted a resolution requesting an advisory opinion from the ICJ.[16] While the request to the Inter-American Court relates only to States' obligations in relation to the American Convention on Human Rights, the UN General Assembly resolution refers to States' obligations in respect of a number of different instruments, including the LOSC. There is thus

12 *Request for an Advisory Opinion by the Sub-Regional Fisheries Commission* (n 10) para 68.

13 *Ibid*., para 72.

14 Further on this point, see Barnes (n 8), at pp. 189–190. See also pp. 196–204 for a more general survey of compelling reasons.

15 For the text of the request (in Spanish), see https://www.minrel.gob.cl/minrel/site/docs/20230118/20230118172718/solicitud_corte_idh.pdf. For discussion of the request, see J Auz and T Viveros-Uehara, 'Another advisory opinion on the climate emergency? The added value of the Inter-American Court of Human Rights' (*EJIL : Talk!* Blog, 2 March 2023).

16 United Nations General Assembly Res. 77/276 (29 March 2023), available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/094/52/PDF/N2309452.pdf?OpenElement.

the potential for the ICJ's eventual advisory opinion to duplicate or conflict with that of the ITLOS.

Arbitration in Accordance with Annex VII of the LOSC

At the beginning of 2022, two cases were pending before arbitral tribunals constituted in accordance with Annex VII of the LOSC, both instituted by Ukraine against Russia. They were the *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* case and the *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* case. There were significant developments in both cases during 2022, as reported below.

Ukraine instituted proceedings in the first case in September 2016, alleging some 20 breaches of the LOSC by Russia. In May 2018, Russia raised objections to the jurisdiction of the tribunal. Its main ground of objection was that the dispute was in reality about Ukraine's 'claim to sovereignty over Crimea', which, in Ukraine's view, Russia had illegally annexed in 2014, and therefore was not a dispute relating to the interpretation or application of the LOSC. Russia also raised a number of other objections. In February 2020, the tribunal hearing the case delivered an award in which it upheld Russia's principal objection to its jurisdiction. Russia's other objections were either dismissed or joined to the merits as not being of an exclusively preliminary character.[17] The consequence of the tribunal's ruling on Russia's principal objection was that the tribunal lacked jurisdiction over the dispute as submitted by Ukraine 'to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea'.[18] Thus, the tribunal could not rule on any of Ukraine's claims 'which are dependent on the premise of Ukraine being sovereign over Crimea'.[19] That included many, but not all, of Ukraine's claims. The tribunal did not identify which they were, but left it to Ukraine to do so in a revised memorial. Ukraine was set a time limit of 20 November 2020 to submit such a memorial and Russia a time limit of 20 August 2021 to submit a counter-memorial: those time limits were subsequently extended to

17 See *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* (*Ukraine* v. *Russia*), PCA Case No. 2017-06, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, available at https://pcacases.com/web/sendAttach/9272. The Award is analysed in the *Survey* for 2020: see R Churchill, 'Dispute settlement in the law of the sea: Survey for 2020' (2021) 36(4) *IJMCL* 539–73, at pp. 564–569.

18 Award (n 17), para 197.

19 *Ibid.*

20 May 2021 and 21 February 2022, respectively.[20] On 13 December 2021 the tribunal set a revised timetable for the remainder of the written proceedings phase of the case, including further extending the time limit for Russia's submission of a counter-memorial to 22 August 2022.[21] That timetable was again revised by an order of 20 July 2022, according to which Russia was to submit a counter-memorial by 24 October 2022, Ukraine a Reply by 24 March 2023 and Russia a Rejoinder by 24 August 2023.[22]

How Russia's invasion of Ukraine on 24 February 2022 may affect the proceedings in this case is unclear. It is not possible to ascertain from the website of the Permanent Court of Arbitration, which is acting as the registry for the case, whether Russia in fact submitted a counter-memorial within its deadline of 24 October 2022. Nevertheless, it is clear from the tribunal's order of 20 July 2022, issued five months after the invasion, that it envisages the proceedings as continuing. Whether Russia's purported annexation of the Ukrainian regions of Donetsk (which borders the Sea of Azov), Kherson (which borders both the Black Sea and the Sea of Azov), Luhansk (land-locked) and Zaporizhzhia (bordering the Sea of Azov) on 29 September 2022[23] will affect the exercise of the tribunal's jurisdiction, especially given the tribunal's approach to Russia's purported annexation of Crimea in its award on Russia's preliminary objections, remains to be seen. The coastlines of the three regions mentioned comprised the entirety of Ukraine's coastline on the Sea of Azov before the purported annexation. The legal status of that Sea is one of the issues in the arbitration. One almost immediate consequence of Russia's invasion was that the non-Russian members of Russia's legal team resigned with effect from 17 March 2022, as they also did in the case discussed below.[24]

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20 *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* case, Procedural Orders No. 6, 21 February 2020 and No. 7, 17 November 2020, available at https://pcacases.com/web/sendAttach/9271 and https://pcacases.com/web/sendAttach/22557.

21 *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* case, Procedural Order No. 8, 13 December 2021, available at https://pcacases.com/web/sendAttach/34126.

22 *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* case, Procedural Order No. 9, 20 July 2022, available at https://pcacases.com/web/sendAttach/38811.

23 See United Nations General Assembly Res ES-11/4 (12 October 2022), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/630/66/PDF/N2263066.pdf?OpenElement.

24 See the entry for the cases on the PCA's website. For the explanation given by one resigning member, see A Pellet, 'Open letter to my Russian friends: Ukraine is not Crimea' (*EJIL : Talk!* Blog, 3 March 2022).

Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine *v.* Russian Federation)

The second case brought by Ukraine against Russia concerns an incident that occurred in November 2018. Three Ukrainian naval vessels were *en route* from the Black Sea port of Odesa to the Ukrainian port of Berdyansk on the Sea of Azov. Near the entrance to the Kerch Strait, which links the Black Sea to the Sea of Azov (and whose legal status is at issue in the first *Ukraine* v. *Russia* case), they were confronted by Russian vessels and informed that Russia's territorial sea on the Black Sea side of the Kerch Strait was closed and that by continuing to the Kerch Strait, they would be illegally crossing the Russian State border. The Ukrainian vessels initially ignored that information and continued towards the Kerch Strait. Eventually, having at one point been surrounded by Russian naval vessels and naval helicopters, the Ukrainian vessels began to sail away from the area when they were asked to stop by Russian vessels. When they failed to do so, two Russian border patrol ships arrested the three Ukrainian vessels and their crews. The latter were charged with illegally crossing the Russian State border and the three vessels were detained.[25]

On 1 April 2019, Ukraine instituted arbitral proceedings against Russia, arguing in its Statement of Claim that Russia's actions breached its (Russia's) obligations under Articles 32, 58, 95 and 96 of the LOSC to accord foreign naval vessels and their crews complete immunity. On 16 April 2019, Ukraine applied to the ITLOS for an order of provisional measures under Article 290(5) of the LOSC, pending constitution of the Annex VII arbitral tribunal. The ITLOS made such an order on 25 May 2019,[26] finding that *prima facie* the Annex VII tribunal would have jurisdiction, that Ukraine had interests that required protection, and that the urgency of the situation required their protection by the ITLOS. Accordingly, it ordered Russia to release the three Ukrainian naval vessels and their crews and return them to Ukraine, and ordered both parties to refrain from any action that might aggravate the dispute before the Annex VII tribunal.

That tribunal was constituted on 8 July 2019. Its members were Professor Donald McRae (president), Judge Gudmundur Eiriksson, Judge Rüdiger Wolfrum, Sir Christopher Greenwood (appointed by Ukraine) and Judge

25 For a more detailed account of the facts, including matters on which the parties disagreed, see paras 43–74 of the tribunal's award on jurisdiction (n 30).

26 *Case concerning the Detention of Three Ukrainian Naval Vessels* (*Ukraine* v. *Russian Federation*), Provisional Measures, Order of 25 May 2019, *ITLOS Reports 2018–2019*, p. 283. The Order is discussed in the *Survey* for 2019: see R Churchill, 'Dispute settlement in the law of the sea: Survey for 2019' (2020) 35(4) *IJMCL* 621–659, at pp. 632–637.

Vladimir Golitsyn (appointed by Russia).[27] In its memorial, submitted in May 2020, Ukraine claimed that Russia had violated (1) Articles 58, 94 and 95 of the LOSC by arresting the three Ukrainian vessels and the servicemen on board and detaining the vessels until 18 November 2019 and the servicemen until 7 September 2019; (2) Articles 30 and 32 by ordering the vessels to stop and by attempting to prevent them from leaving the territorial sea; (3) Articles 290 and 296 by failing to comply with the provisional measures order of the ITLOS; and (4) Article 279 by continuing to aggravate the dispute.

In August 2020, Russia raised preliminary objections to the jurisdiction of the tribunal. It argued that the tribunal lacked jurisdiction because (1) both parties had made declarations under Article 298 of the LOSC excluding disputes 'concerning military activities' from the jurisdiction of LOSC dispute settlement bodies; (2) Article 32 of the LOSC did not provide for an applicable immunity; (3) the tribunal had no jurisdiction in respect of alleged breaches of the provisional measures order of the ITLOS and Article 279 (on continued aggravation of the dispute); and (4) there had been no exchange of views as required by Article 283. The tribunal decided, on 27 October 2020, that Russia's objections appeared to have a character that justified their being examined in a preliminary phase, and accordingly it suspended proceedings on the merits.[28] Written proceedings relating to Russia's preliminary objections were completed in January 2021 and hearings held in October 2021.[29] The tribunal delivered its award on 27 June 2022.[30]

At the outset, the tribunal observed that the 'present dispute arises in the context of competing claims to sovereignty over the land and maritime areas in the vicinity of the Kerch Strait [i.e., including the Crimean peninsula], matters that are outside the jurisdiction' of the tribunal. References to 'territorial sea' in the award 'simply reflect the pleadings of the parties and are without

27 Judge Golitsyn sadly died some months after the tribunal's award on jurisdiction, on 26 March 2023: see ITLOS Press Release No. 331, 31 March 2023, available at https://itlos.org/fileadmin/itlos/documents/press_releases_english/PR_331_EN.pdf.

28 *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* (*Ukraine* v. *Russian Federation*), Procedural Order No. 2, 27 October 2020, available at https://pcacases.com/web/sendAttach/21051.

29 PCA Press Release, 18 October 2021, available at https://pcacases.com/web/sendAttach/32601.

30 *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* (*Ukraine* v. *Russian Federation*), Award on Preliminary Objections, 27 June 2022, available at https://pcacases.com/web/sendAttach/38096. For early comment on the award, see A Lott, 'Reflections on the Kerch Strait Incident Award from the military activities exception perspective' (*Brill Blog*, 9 August 2022).

prejudice to their competing claims'.[31] The tribunal's response to each of Russia's objections was as follows.

The 'Military Activities' Exception

Both Russia and Ukraine have made declarations under Article 298(1)(b) of the LOSC excluding them from compulsory adjudication under Part XV of the LOSC 'disputes concerning military activities'. Russia argued that the entire dispute between itself and Ukraine fell within that exclusion and that therefore the arbitral tribunal had no jurisdiction. Ukraine argued that the exception did not apply as Russia's actions were simply those of law enforcement. In its provisional measures order, the ITLOS rejected Russia's argument and found that *prima facie* the exclusion did not apply. It considered that 'the distinction between military and law enforcement activities must be based primarily on an objective evaluation of the activities in question, taking into account the relevant circumstances in each case'.[32] In the present case, three circumstances were particularly relevant. First, the underlying dispute between the parties leading to the arrest and detention of the three vessels concerned the passage of Ukrainian vessels though the Kerch Strait. However, such passage did not *per se* in general amount to a military activity. Second, the specific cause of the arrest and detention was Russia's denial of passage through the Kerch Strait to the three vessels, of which the underlying cause was a dispute about the regime of passage through the Kerch Strait. Such a dispute was not military in nature. Third, although force was used in effecting the arrest of the three Ukrainian vessels, that arrest was a law enforcement, rather than a military, operation.

The arbitral tribunal started from much the same point as the ITLOS but thereafter took a very different route to arrive at its conclusion. It endorsed the view of the ITLOS, as quoted above, as to how the distinction between military and law enforcement activities was to be determined. The tribunal then examined events leading to the arrest and detention of the Ukrainian vessels and the prosecution of their crews. It found that the vessels 'were engaged in a military mission'.[33] The raising and lowering of guns on one of the Ukrainian vessels after having being ordered to stop was 'indicative of the fact that the Ukrainian vessels perceived themselves as being in confrontation with the naval vessels' of Russia.[34] 'Furthermore, Ukraine's action immediately follow-

31 Award (n 30), para 42. See also para 110.

32 Order (n 26), para 66.

33 Award (n 30), para 115.

34 *Ibid.*, para 116.

ing the arrest of the vessels was to see the issue as having been one of military activity',[35] as evidenced, for example, by it having referred to Russia's actions in the UN Security Council as an act of aggression. It could also be inferred that Russia saw the incident as a military confrontation.

The arbitral tribunal did not accept Ukraine's rigid dichotomy between military activities and law enforcement. Rather, 'activities that initially have a law enforcement character may become activities with a military character, and vice versa'.[36] Events in the present case fell into three phases. The first covered events up to the point when Ukrainian ships began to sail away from the area where they had been surrounded by Russian naval vessels; the second from that point to when the vessels were boarded and arrested; while the third phase covered the continuing detention of the vessels and the prosecution of their crews. The tribunal held that the first phase comprised activities of a military character and therefore fell outside its jurisdiction. The third phase had a law enforcement character and therefore fell within its jurisdiction. As for the second phase, the tribunal required more information in order to determine when military activities came to an end. That matter was therefore postponed to the merits stage.

Should the tribunal eventually find that the second phase was of a military character, it would produce the rather odd result that the tribunal would have jurisdiction in respect of the legality of the detention of the three Ukrainian naval vessels, but not in respect of the legality of their arrest. If, on the other hand, the tribunal were to conclude that the second phase had a law enforcement character, it is unclear what practical significance the finding that the first phase fell within the military activities exception would then have, as all of Ukraine's claims appear to relate to events subsequent to that phase.

Immunity of Warships

Ukraine's principal claim is that by arresting and detaining three of its naval vessels, Russia breached its obligations under the LOSC, including Article 32, to accord foreign naval vessels and their crews complete immunity. Article 32 provides that 'nothing in the [LOSC] affects the immunities of warships'. Russia argued that this provision did not confer immunity on warships. Thus, any dispute over immunity was not a dispute concerning the LOSC and accordingly the tribunal could have no jurisdiction in respect of it. Furthermore, insofar as customary international law conferred immunity on warships, that law was merely one of the 'other rules of international law not incompatible

35 *Ibid.*, para 117.
36 *Ibid.*, para 121.

with' the LOSC that LOSC tribunals were required to apply under Article 293(1) and did not give rise to a dispute concerning the LOSC itself. Ukraine, on the other hand, argued that such customary law immunity, in combination with Article 293, gave rise to a further basis for the tribunal's jurisdiction.

Those arguments arose only in a rather limited way before the ITLOS. In its provisional measures order, the ITLOS concluded that *prima facie* the parties' differences over this matter concerned a dispute over the interpretation and application of the LOSC.

The arbitral tribunal again took a different approach from the ITLOS. It noted that the parties differed as to whether the arrest of the Ukrainian vessels took place in the territorial sea, in which case Article 32 would be relevant, or in the EEZ, in which case the matter would be governed by Articles 58, 94 and 95 of the LOSC. The tribunal was therefore 'faced with the situation where it is unable to determine at this stage if the question whether the [LOS] Convention provides for an immunity of warships in the territorial sea is a live issue or an abstract question'.[37] If the arrest took place in the territorial sea, the interpretation of Article 32 was relevant. If the arrest took place outside the territorial sea, it was not relevant. Thus, Russia's objection was not of an exclusively preliminary character and therefore should be left to the merits, when the question of where the arrest took place would be determined.

The tribunal arguably makes somewhat heavy weather of addressing Russia's argument. A more straightforward approach would have been to do, as the ITLOS did, and conclude that there was a dispute between Russia and Ukraine over the meaning of Article 32 of the LOSC and its application to the facts of the present case. That would be a matter concerning the interpretation and application of the LOSC, over which the tribunal obviously has jurisdiction since that is how its jurisdiction is defined in Articles 286 and 288 of the LOSC.

Alleged Breach of the Provisional Measures Order of the ITLOS

Russia argued that the tribunal had no jurisdiction over Ukraine's claim that it had failed to comply with the provisional measures order of the ITLOS because the tribunal had no jurisdiction over the main dispute. Ukraine, on the other hand, emphasised the obligation in Article 290(6) of the LOSC to comply 'promptly' with a provisional measures order. The tribunal noted that Russia, by contrast, had denied that Article 290(6) was relevant. There was therefore a difference between the parties over the scope, application and relevance of Article 290(6). That difference was a dispute concerning the interpretation and application of the LOSC and therefore a matter in respect of which the tribunal

37 *Ibid.*, para 154.

had jurisdiction. Moreover, Russia's argument that because the tribunal had no jurisdiction over the main dispute, it therefore had no jurisdiction over the issue of non-compliance with the ITLOS order, should be rejected because the tribunal had already found that it did have jurisdiction over part of the main dispute.

Article 279 (Continued Aggravation of the Dispute)

In its notification and statement of claim made when instituting proceedings, Ukraine asserted that Russia had violated Article 279 of the LOSC by aggravating the dispute. Article 279 provides that the parties shall settle any dispute concerning the LOSC by peaceful means and seek a solution by the means indicated in Article 33 of the UN Charter. In its preliminary objections, Russia argued that Article 279 made no reference to the aggravation of a dispute and therefore the tribunal lacked jurisdiction. In any case, Ukraine's claim in respect of Article 279 was no different from the ITLOS provisional measures order that the parties refrain from taking any action that might aggravate or extend the dispute. In response, Ukraine argued that there was a duty of non-aggravation arising under Article 279 and that the ITLOS order imposed an additional obligation of non-aggravation.

The tribunal agreed that the ITLOS order imposed an obligation of non-aggravation and noted that it had already determined that it had jurisdiction to determine whether the order had been complied with. Nevertheless, the order took effect only on 25 May 2019 and therefore did not apply to the period between that date and the institution of proceedings by Ukraine on 1 April 2019. Accordingly, any alleged breach of the duty of non-aggravation during that period would have to be based on other grounds, including potentially Article 279, whose meaning was disputed by the parties. That 'gives rise to a dispute over the interpretation and application of the [LOS] Convention over which the Arbitral Tribunal has jurisdiction pursuant to Article 288(1)'.[38] Somewhat confusingly, the tribunal then adds: 'Accordingly, the tribunal makes no determination on the interpretation and application of Article 279 which is a matter not of an exclusively preliminary character and joins the issue to the merits'.[39] This is confusing because determining the meaning of a LOSC provision is a substantive matter, which can never be the subject of a preliminary objection. The latter is always confined to issues of jurisdiction and admissibility, and the tribunal had seemingly already determined that it did have jurisdiction as far as the meaning of Article 279 was concerned.

38 *Ibid.*, para 184.

39 *Ibid.*, para 185.

The Exchange of Views Requirement

Article 283 of the LOSC provides that when a dispute arises, the parties 'shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means' before its referral to a dispute settlement body under section 2 of Part XV. In its order of provisional measures, the ITLOS decided that this requirement had been fulfilled. It noted that although the dispute arose in late November 2018, the first attempt to engage in the exchange of views referred to in Article 283 did not occur until 15 March 2019, when Ukraine sent Russia a note requesting it to proceed to an exchange of views, and to do so within ten days. On 25 March Russia replied, acknowledging Ukraine's note and stated that 'possible comments' on the note 'are expected to be sent separately'. Those 'comments', according to which Russia agreed to hold consultations with Ukraine, were sent on 12 April. The parties met for consultations on 23 April. In the meantime, however, Ukraine had already instituted arbitral proceedings. Nevertheless, the ITLOS held that Ukraine was entitled to conclude from Russia's response of 25 March that, under the circumstances, 'the possibility of reaching agreement was exhausted' and that Article 283 was therefore satisfied.[40]

Before the arbitral tribunal, Russia argued that, notwithstanding the finding of the ITLOS, the requirements of Article 283 had not been satisfied. The arbitral tribunal disagreed. However, its reasoning as to why Article 283 had been complied with was very different from that of the ITLOS. Contrary to the ITLOS, the tribunal held that Ukraine's note of 15 March 2019 and Russia's reply ten days later did not constitute an exchange of views, given that Ukraine's note did not contain any views on dispute settlement. On those facts, Article 283 had therefore not been complied with. The question then was 'whether there are any other circumstances in the case that would justify the institution of arbitral proceedings notwithstanding the lack of an exchange of views in accordance with Article 283'.[41] The tribunal found that there were. The circumstances in which Ukraine's servicemen were being detained by Russia were about to change because there was a growing likelihood that the criminal case against them would proceed to trial. In the light of those circumstances, coupled with the lack of a substantive response from Russia in its reply to Ukraine's request of 15 March 2019 for consultations under Article 283,

> there was urgency in initiating proceedings given the imminent risk to Ukraine's rights in respect of its vessels and servicemen. Accordingly, in

40 Provisional Measures Order (n 26), para 86.

41 Award (n 30), para 204.

> the particular circumstances of this case, the Arbitral Tribunal does not see Article 283 as a barrier to its exercise of jurisdiction.[42]

It is not altogether clear what the tribunal means by this formulation. Is it that in situations of urgency the requirements of Article 283 are waived? Or is it rather that in situations of urgency, Article 283 requires no more than that the claimant State contact the respondent State requesting consultations over the means of settling the dispute, even if there has not been an exchange of views as such? The relevant paragraph of the *dispositif*, which states that the tribunal 'rejects the objection that Ukraine has not complied with Article 283',[43] suggests the latter. In either case, the tribunal's ruling adds a new element to the existing case law on Article 283.[44]

At the end of its *dispositif*, the tribunal set a time limit of six months from the date of its award (i.e., 27 December 2022) for Russia to submit a counter-memorial. That deadline was subsequently extended, first, to 24 March 2023[45] and then to 14 April 2023.[46]

Judicial Settlement of Law of the Sea Disputes outside the Framework of Section 2 of Part XV of the LOSC

International Court of Justice

At the beginning of 2022 four law of the sea cases were pending before the Court: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua* v. *Colombia*); *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*); *Guatemala's Territorial, Insular and Maritime Claim* (*Guatemala/Belize*); and *Land and Maritime Delimitation and Sovereignty over Islands* (*Gabon/Equatorial Guinea*). There were no significant

42 *Ibid.*, para 206. It should be noted that Ukraine could not seek a provisional measures order from the ITLOS under Article 290(5) until it had initiated arbitral proceedings.

43 *Ibid.*, para 208(i).

44 On that case law, see N Bankes, 'Precluding the applicability of Section 2 of Part XV of the Law of the Sea Convention' (2017) 48(3–4) *ODIL* 239–264, at pp. 253–259; N Klein and K Parlett, *Judging the Law of the Sea* (Oxford University Press, 2022) 63–67.

45 *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* (*Ukraine* v. *Russian Federation*), Procedural Order No. 4, 20 December 2022, available at https://pcacases.com/web/sendAttach/44422.

46 *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* (*Ukraine* v. *Russian Federation*), Procedural Order No. 5, 2 March 2023, available at https://pcacases.com/web/sendAttach/44773.

developments in relation to the two last cases during 2022. However, there were developments of particular note in the two *Nicaragua* v. *Colombia* cases, including the judgment on the merits in the second case. These developments are chronicled below.

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua *v.* Colombia)

Proceedings in this case have been lengthy and tortuous. They have their origins in the Court's judgment in the *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*) case.[47] In that case, Nicaragua requested the Court, *inter alia*, to delimit a boundary between its continental shelf beyond 200 M (outer continental shelf) and Colombia's continental shelf. In response, the Court observed that as a party to UNCLOS, Nicaragua was obliged to make a submission to the Commission on the Limits of the Continental Shelf (CLCS) if it wished to establish the outer limit of its continental shelf beyond 200 M. It noted, however, that Nicaragua had not made such a submission, but had done no more than submit preliminary information about its outer continental shelf.[48] Such information would not be considered by the CLCS. The Court therefore concluded that since 'Nicaragua has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast, the Court is not in a position to delimit the continental shelf boundary between Nicaragua and Colombia, as requested by Nicaragua.'[49] The Court therefore did not need to consider Nicaragua's argument that where one State's continental shelf extends beyond 200 M and overlaps with the 200 M continental shelf of another State, the boundary between them can be delimited within 200 M of the latter State.

47 *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), Judgment, 19 November 2012, *ICJ Reports 2012*, p. 624.

48 In 2008 the Meeting of States Parties to the LOSC decided that where States were not in a position to make a proper submission to the CLCS within the 10-year deadline, they could instead submit preliminary information indicative of the outer limits of the continental shelf beyond 200 M and a description of the status of preparations and intended date of making a proper submission. See the Decision of the Eighteenth Meeting of States Parties, Doc SPLOS/183 (20 June 2008), available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/398/76/PDF/N0839876.pdf?OpenElement.

49 Judgment (n 47), para 129.

Seven months after the Court's judgment was delivered, on 24 June 2013, Nicaragua made a submission to the CLCS, setting out its views as to where the outer limits of its continental shelf beyond 200 M lay.[50] After referring to the Court's judgment, the submission went to state that it was made 'without prejudice to the question of delimitation of the continental shelf between Nicaragua and neighbouring States' and that 'there are no unresolved land or maritime disputes related to this submission'.[51] The latter statement is somewhat disingenuous. The area of seabed beyond 200 M from its coast that Nicaragua believes to be part of its outer continental shelf, depicted on a map attached to its submission, appears to overlap with maritime areas that might plausibly be claimed by Colombia, Costa Rica, Jamaica and Panama. In communications to the UN Secretary-General, all four States stated that Nicaragua's claimed outer continental shelf did indeed overlap with their maritime zones, and three of them – Colombia, Costa Rica and Panama – objected to the CLCS considering Nicaragua's submission.[52] That has the consequence that the CLCS, according to its Rules of Procedure, will not be able to consider Nicaragua's submission unless and until those objections are withdrawn.[53]

Three months after making its submission to the CLCS, on 16 September 2013, Nicaragua instituted proceedings against Colombia before the Court, requesting it to 'determine the precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries' established by the Court's 2012 judgment.[54] In August 2014, Colombia raised objections to the jurisdiction of the Court and the admissibility of Nicaragua's application. It contended, *inter alia*, that the Court lacked jurisdiction because the issue raised in Nicaragua's application had already been decided in the Court's 2012 judgment and that Nicaragua's application was inadmissible because the CLCS had not yet considered Nicaragua's submission and issued recommendations relating to it. The Court decided to treat Colombia's objections as a preliminary matter on which

50 The submission is available at https://www.un.org/depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf.

51 Submission (n 50), paras 7, 8.

52 Their communications, along with Nicaragua's responses, are available at https://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm.

53 See the Rules of Procedure of the CLCS, Annex I, para 5(a), available at https://www.un.org/depts/los/clcs_new/commission_documents.htm#Rules%20of%20Procedure.

54 Application of Nicaragua, p. 8, available at https://www.icj-cij.org/sites/default/files/case-related/154/154-20120916-APP-01-00-EN.pdf.

it delivered a judgment in March 2016.[55] It dismissed the first of Colombia's contentions mentioned above by eight votes to eight, with the President's casting vote, and the second by 11 votes to five. All of Colombia's other objections were rejected unanimously.

Following that judgment, written proceedings on the merits of the case continued and were completed in February 2019. However, it was not until nearly four years after that, on 5–9 December 2022, that hearings took place. It is not apparent from the Court's website why there was such an unusually lengthy interval between the written and oral proceedings.

Two months before those hearings took place, on 4 October 2022, the full Court issued an order in which it decided that the hearings should be confined exclusively to the following two questions: (1) under customary international law may one State's outer continental shelf extend within 200 M of another State?; and (2) what are the criteria under customary international law for determining the continental shelf beyond 200 M and do paragraphs 2–6 of Article 76 of the LOSC (which set out the criteria for determining the limit of the continental shelf beyond 200 M under the LOSC) reflect customary international law?[56] Five judges (Judges Tomka, Xue, Robinson and Nolte and Judge *ad hoc* Skotnikov) issued a joint declaration in which they expressed considerable reservations about the order. After noting that this was the first time in its history that the Court had divided the oral proceedings on the merits of a case into two separate parts, the judges questioned whether the order served the need for judicial economy, as not all the matters on which Nicaragua had asked the Court to rule were dependent on the answers to the Court's two questions; nor did the order respect the procedural rights of the parties, as their views on the procedure that the Court was proposing to adopt had not been sought beforehand.[57]

At the end of the subsequent hearings, Nicaragua, not surprisingly, submitted that the Court's two questions should be answered in the affirmative; while Colombia, equally unsurprisingly, submitted that a negative answer

55 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua* v. *Colombia*), Preliminary Objections, Judgment, 17 March 2016, *ICJ Reports 2016*, p. 100.

56 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua* v. *Colombia*), Order, 4 October 2022, available at https://www.icj-cij.org/sites/default/files/case-related/154/154-20221004-ORD-01-00-EN.pdf.

57 The judges' joint declaration is available at https://www.icj-cij.org/sites/default/files/case-related/154/154-20221004-ORD-01-01-EN.pdf.

should be given to the questions.[58] It is not entirely clear what will happen next. Presumably the Court will give a judgment in which it answers its own two questions. If it gives a negative answer to the first question that might be the end of the matter as there would be no boundary to delimit. That was suggested by Judge Abraham in a declaration,[59] which was supportive of the order but considered that its reasoning was overly concise. Alternatively, the Court might answer the questions submitted by Nicaragua which are identified in the joint declaration as not being dependent on an answer to the Court's two questions either in its judgment on the two questions or in a separate, subsequent judgment. If the latter, there may possibly be another round of hearings. If, on the other hand, the Court answers its first question in the affirmative, it would seem necessary then to hold a second round of hearings that would focus on the way in which the boundary should be delimited.

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua *v.* Colombia)

This case also has its origins in the Court's 2012 judgment in the *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*) case.[60] Just over a year after that judgment was delivered, on 26 November 2013, Nicaragua instituted proceedings against Colombia, claiming that Colombia had not complied with that judgment. In particular, Nicaragua argued that Colombia had violated its (Nicaragua's) sovereign rights and jurisdiction in its EEZ, as delimited by the 2012 judgment, by interfering with Nicaraguan flagged or licensed fishing and marine scientific research vessels within Nicaragua's EEZ; by granting permits for fishing and authorisations for marine scientific research to nationals of Colombia and third States to take place in Nicaragua's EEZ; and by offering and awarding licences to explore and exploit for hydrocarbons there. Nicaragua also claimed that Colombia's 'integral contiguous zone', established by a decree of 2013, overlapped with Nicaragua's EEZ and violated customary international law. Nicaragua sought to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. In December 2014, Colombia filed preliminary objections, arguing, *inter alia*, that because it had denounced the Pact of

58 See ICJ Press Release No. 2022/73, 9 December 2022, available at https://www.icj-cij.org/sites/default/files/case-related/154/154-20221209-PRE-01-00-EN.pdf.

59 Declaration of Judge Abraham, para 7, available at https://www.icj-cij.org/sites/default/files/case-related/154/154-20221004-ORD-01-02-EN.pdf.

60 See (n 47).

Bogotá on 27 November 2012, almost a year before Nicaragua instituted proceedings, the Court lacked jurisdiction. In a judgment given in March 2016, the Court rejected that objection, finding that, in accordance with Article LVI of the Pact, Colombia's denunciation did not take effect until one year after it had been made, namely on 27 November 2013, the day after Nicaragua instituted proceedings.[61]

In its subsequent counter-memorial, Colombia put forward a number of counter-claims. In an order made in November 2017, the Court held that two of those counter-claims were admissible, those concerning claims that Nicaragua had breached the traditional fishing rights of the inhabitants of the San Andrés Archipelago (which belongs to Colombia) and that the straight baselines established by Nicaragua in 2013 were contrary to international law.[62] The remainder of the written proceedings were completed in March 2019 and hearings were held between 20 September and 1 October 2021. Finally, the Court gave its judgment on the merits on 21 April 2022.[63]

The Court's Jurisdiction *Ratione Temporis*

As a preliminary matter, the Court had to consider an issue concerning the temporal scope of its jurisdiction before it could address Nicaragua's allegations that Colombia had violated its (Nicaragua's) EEZ rights. As noted above, Colombia's denunciation of the Pact of Bogotá took effect on 27 November 2013. While the Court had found in its judgment in 2016 that Colombia's denunciation did not affect its jurisdiction to consider Nicaragua's application, the

61 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*), Preliminary Objections, Judgment, 17 March 2016, *ICJ Reports 2016*, p. 3.

62 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*), Order, 15 November 2017, *ICJ Reports 2017*, p. 289.

63 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*), Judgment, 21 April 2022, available at https://www.icj-cij.org/public/files/case-related/155/155-20220421-JUD-01-00-EN.pdf. For early comment on the case, see R Abello-Galvis and W Arevalo-Ramirez, '*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua* v. *Colombia*, 2022): Commentary on the case and the judgment on the merits by the International Court of Justice' (2022) 10(1) *Journal of Territorial and Maritime Studies* 5–20; Y Ishii, 'Violations of sovereign rights at a foreign EEZ: Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)' (*EJIL : Talk!* Blog, 7 July 2022); Jingyao Wang and Qi Xu, 'Reflections on the *Nicaragua v. Colombia* case (2022): From the perspective of traditional fishing rights' *Frontiers in Marine Science*, published online on 2 March 2023, available at https://www.frontiersin.org/articles/10.3389/fmars.2023.1126708/full. There is also an analysis of the judgment by members of the American Society of International Law Interest Group on the Law of the Sea on You Tube at https://www.youtube.com/watch?v=JrEd8StJTdw.

question that arose in the present phase of the case was whether Nicaragua could rely on events occurring after 27 November 2013 to support its allegations. Colombia argued that Nicaragua could not. The Court disagreed. It held that the incidents that occurred after 27 November 2013 on which Nicaragua wished to rely were 'of the same nature as those that allegedly occurred before' that date; concerned 'precisely the dispute over which the Court found that it had jurisdiction in 2016'; and did not 'transform the nature of the dispute between the parties'.[64] Accordingly, the Court had jurisdiction to consider incidents that occurred after 27 November 2013.

Five of the 15 judges (Judges Abraham, Bennouna, Yusuf and Nolte and Judge *ad hoc* McRae) disagreed with that conclusion. The dissenting judges all emphasised that the case law on which the Court had sought to rely to support its position involved situations where, unlike the present case, the Court's jurisdictional title had not lapsed subsequent to the institution of proceedings. That case law was therefore irrelevant to the present case and the Court's reasoning was consequently unconvincing. For Judges Bennouna, Nolte and Yusuf, the wording of Article XXXI of the Pact of Bogotá itself determined that the Court did not have jurisdiction.[65] For Judge Abraham and Judge *ad hoc* McRae, there was no convincing reason why the Court should have jurisdiction over events occurring after 27 November 2013 when the Court's jurisdictional title had lapsed, particularly as those events did not constitute an indivisible group with events occurring before that date.[66]

Colombia's Contested Activities in Nicaragua's Maritime Zones

Before addressing Colombia's alleged violations of Nicaragua's sovereign rights and jurisdiction in its EEZ, the Court had to consider the content of coastal States' rights and duties in the EEZ, as well as the rights and duties of other States in that zone, under customary international law, a matter on which the parties disagreed. Nicaragua argued that those rights and duties were identical to the relevant provisions of the LOSC, Colombia that the rights of other States were wider and included a right and a duty to protect the marine environment. The Court agreed with Nicaragua. After noting that in the *Libya/Malta* case it had declared that the institution of the EEZ had become part of customary international law,[67] the Court went on to state that '[c]ustomary rules on the

64 Judgment (n 63), paras 46, 47.

65 Declaration of Judge Bennouna, paras 2–6; Dissenting Opinion of Judge Nolte, paras 9–12; Separate Opinion of Judge Yusuf, paras 2–9.

66 Dissenting Opinion of Judge Abraham, paras 2–12; Dissenting Opinion of Judge *ad hoc* McRae, paras 4–17.

67 *Continental Shelf* (*Libya/Malta*), Judgment, 3 June 1985, *ICJ Reports 1985*, p. 13, at p. 33.

rights and duties in the [EEZ] of coastal States and other States are reflected in several articles of [the LOSC], including Articles 56, 58, 61, 62 and 73'.[68] Furthermore, 'the customary rules as reflected in Articles 88–115 of [the LOSC] and other pertinent rules of international law are applicable in the [EEZ] in so far as they are not incompatible with the regime of that zone'.[69] The Court gave no evidence to support those assertions.

Turning then to the substance of Nicaragua's allegations of unlawful conduct by Colombia in its EEZ, the Court dismissed many of those allegations for lack of proof. It discussed ten incidents between 2013 and 2018, only one of which had occurred before 27 November 2013. The Court found that in six of those incidents, Colombian naval vessels had purported to exercise enforcement jurisdiction in Nicaragua's EEZ.

Colombia put forward two legal grounds to justify its conduct: first, its actions were permitted as an exercise of the freedoms of navigation and overflight in the EEZ; and second, it had an international obligation to protect and preserve the marine environment of the southwest Caribbean Sea. The Court rejected both those arguments. As to the first, the freedoms of navigation and overflight did not give other States jurisdiction to enforce conservation measures in the EEZ of a coastal State. As for Colombia's second argument, while 'all States have the obligation under customary international law to protect and preserve the marine environment',[70] within the EEZ it was the coastal State that had jurisdiction to discharge that obligation. To that end, the coastal State had the responsibility to take

> legislative, administrative and enforcement measures in accordance with customary international law, as reflected in the relevant provisions of [the LOSC], for the purpose of conserving the living resources and protecting and preserving the marine environment … [A] third State has no jurisdiction to enforce conservation standards on fishing vessels of other States in the [EEZ].[71]

Nor was the position any different under the Cartagena Convention and its SPAW Protocol,[72] on which Colombia had sought to rely. Thus, Colombia had

68 Judgment (n 63), para 57. See also paras 62, 216, 233.

69 *Ibid.*, para 62.

70 *Ibid.*, para 95. The Court's language here echoes exactly the wording of Article 192 of the LOSC although the Court makes no reference to that provision.

71 *Ibid.*

72 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, 24 March 1983, in force 30 March 1986) 1506 *UNTS*

> violated its international obligations to respect Nicaragua's sovereign rights and jurisdiction in the latter's [EEZ] by interfering with fishing activities and marine scientific research by Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels, and by purporting to enforce conservation measures in that zone.[73]

The Court also found that Colombia had violated Nicaragua's EEZ rights by authorising Colombian vessels to fish in Nicaragua's EEZ. However, it rejected for lack of evidence Nicaragua's claims that Colombia had also authorised marine scientific research and oil exploration in Nicaragua's EEZ.

The violations of Nicaragua's EEZ rights by Colombia engaged the latter's responsibility under international law. Therefore, Colombia had to cease its unlawful conduct immediately. The Court rejected Nicaragua's claim for compensation because of a lack of evidence that Nicaraguan fishing vessels had suffered material damage as a result of Colombia's activities. It also rejected Nicaragua's request that the Court remain seized of the case until Colombia recognised and respected Nicaragua's rights as attributed by the Court's 2012 judgment as there was 'no legal basis for the Court to accept such a request'.[74] Reading between the lines, it would seem that much of Colombia's conduct that the Court found to have violated international law may be explained by the fact that Colombia did not accept the Court's delimitation of maritime boundaries between itself and Nicaragua in the 2012 judgment, at least during the years immediately following that judgment.[75]

As all of Colombia's violations definitively established by the Court occurred after 27 November 2013, the same five judges that had dissented on the issue of the Court's temporal jurisdiction consequently dissented in respect of the Court's decision that Colombia had violated Nicaragua's EEZ rights. Judge *ad hoc* McRae added that even if the Court had had jurisdiction, the evidence that Colombia had violated Nicaragua's EEZ rights was contested or lacking. At most, Colombia had not fulfilled its obligation to have due regard to those rights.[76] The dissenting judges were joined by Vice-President Gevorgian on the

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157; Protocol concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region (Kingston, 18 January 1990, in force 18 June 2000) 2180 *UNTS* 101.

73 Judgment (n 63), para 101. The Court made no attempt to define the concept of enforcement: cf. Judge *ad hoc* McRae's dissenting opinion, para 26.

74 Judgment (n 63), para 199.

75 See, for example, Judgment (n 63), paras 73, 75, 87 and 92 and Dissenting Opinion of Judge Nolte, para 17.

76 Dissenting Opinion of Judge *ad hoc* McRae, paras 18–35.

issue of Colombia's alleged authorisation of fishing in Nicaragua's EEZ as he considered that Nicaragua had failed to substantiate its claim.[77]

Colombia's 'Integral Contiguous Zone'

Nicaragua's final claim against Colombia was that latter's Presidential Decree 1946 establishing an 'integral contiguous zone', adopted in September 2013, violated international law because it extended into Nicaragua's EEZ, as delimited by the 2012 judgment, and included powers going beyond those permitted under customary international law. The parties disagreed as to whether customary international law on the contiguous zone was reflected in Article 33 of the LOSC, Nicaragua arguing that it was, Colombia that it was not. The Court agreed with Nicaragua, holding that 'Article 33 reflects contemporary customary international law'.[78] It rejected Colombia's argument that customary international law had evolved since the adoption of the LOSC to permit a contiguous zone in excess of 24 miles in breadth and for purposes beyond those listed in Article 33. In particular, it held, referring to the drafting history of Article 33 of the LOSC and Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone (on which Article 33 is based),[79] that security was not one of the purposes for which the powers in Article 33 could be exercised. The Court also noted that while a few States claimed security as a contiguous zone purpose, those claims had been opposed by other States.

Turning to Nicaragua's claim concerning the extension of Colombia's contiguous zone into Nicaragua's EEZ, the Court began by noting that its 2012 judgment had not established a contiguous zone boundary. Observing that the contiguous zone and EEZ were governed by two distinct regimes, the Court considered that 'the establishment by one State of a contiguous zone in a specific area is not, as a general rule, incompatible with the existence of an [EEZ] of another State in the same area'.[80] That was because the powers that a State could exercise in a contiguous zone were different from the rights and duties of a State in its EEZ. 'The two zones may overlap, but the powers that may be exercised therein and the geographical extent are not the same'.[81] In exercising their powers under either regime, each State had to have due regard to the rights and duties of the other State. The Court therefore concluded that Colombia had a right to establish a contiguous zone around the San Andrés

77 Declaration of Vice-President Gevorgian.

78 Judgment (n 63), para 155.

79 Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958, in force 10 September 1964) 515 *UNTS* 205.

80 Judgment (n 63), para 160.

81 *Ibid.*, para 161.

Archipelago. Where that zone extended into Nicaragua's EEZ, Colombia was 'under an obligation to have due regard to the sovereign rights and jurisdiction of Nicaragua in its [EEZ] under customary law as reflected in Articles 56 and 73 of' the LOSC.[82]

The Court then proceeded to consider the compatibility of Colombia's integral contiguous zone with customary international law. It found the zone incompatible in a number of respects. First, it extended beyond the maximum limit of 24 miles from the baselines in a number of places. Second, the purposes for which Colombia claimed to be able to exercise powers of control in the contiguous zone included matters beyond those listed in Article 33. Those purposes included the 'integral security of the State, including piracy, trafficking in drugs and psychotropic substances, as well as conduct contrary to the security in the sea and the national maritime interests'.[83] The Court treated this list as equivalent to security. As noted above, the Court had already found that security was not a permitted power of control. Colombia also claimed control powers in respect of the 'preservation of the maritime environment'.[84] That was also not permitted, the Court rejecting Colombia's argument that this purpose fell within the concept of 'sanitary laws and regulations' listed in Article 33. Last, Colombia claimed powers in respect of 'the cultural heritage',[85] justifying its claim on the basis on Article 303(2) of the LOSC. Nicaragua argued that this provision was not part of customary international law. The Court disagreed. It held that 'taking into account State practice and other legal developments in this field [which included 'multilateral treaties … to protect the underwater cultural heritage'] … Article 303(2) of [the LOSC] reflects customary international law'.[86] Colombia's legislation did not, therefore, violate customary international law insofar as it included powers of control in respect of 'objects of an archaeological and historical nature', the phrase used in Article 303(2) of the LOSC.

Having found that Presidential Decree 1946 breached customary international law in a number of respects, the Court had to decide whether that engaged the international responsibility of Colombia. The Court agreed with the International Law Commission that 'there is no general rule applicable to the question whether a State engages its international responsibility by the enactment of national legislation. The question depends on the specific terms

82 *Ibid*., para 162.

83 Presidential Decree 1946, Article 5(3)(a), as quoted in para 176 of the Court's judgment (n 63).

84 *Ibid*.

85 *Ibid*.

86 Judgment (n 63), para 186.

of the obligation concerned and the circumstances of the case.'[87] In this case, the Court decided that in areas where Colombia's contiguous zone overlapped with Nicaragua's EEZ, it 'infringes upon Nicaragua's sovereign rights and jurisdiction in the [EEZ]. Colombia's responsibility is thereby engaged'.[88] Colombia was therefore obliged to bring Presidential Decree 1946 into conformity with customary international law in those areas.

The Court's decision on the contiguous zone was by 13 votes to two (Judge Abraham and Judge *ad hoc* McRae).[89] Judge Abraham disagreed with the Court's approach, which he considered too abstract. Rather than considering whether Decree 1946 was in conformity with customary international law, what the Court ought to have done was to determine whether and to what extent Colombia's contiguous zone infringed Nicaragua's rights, as Nicaragua had requested it to do. There was no evidence that the security aspects of Decree 1946 infringed Nicaragua's sovereign rights as reflected in Article 56(1)(a) of the LOSC. On the other hand, the powers of control in relation to the marine environment in Decree 1946 could potentially affect Nicaragua's jurisdiction in respect of the protection of the marine environment as reflected in Article 56(1)(b)(iii). However, there was no evidence that they had yet done so, and thus Colombia's international responsibility was not engaged. Judge *ad hoc* McRae had a different perspective. On the basis of the International Law Commission's commentary on its 1956 draft articles on the law of the sea, he argued that the purpose of the contiguous zone was to safeguard the security concerns of the coastal State. While in the 1950s those concerns were covered by the four matters listed in Article 24 of the 1958 Territorial Sea Convention, today they also included those matters listed in Decree 1946.[90] Furthermore, Colombia's contiguous zone did not infringe Nicaragua's EEZ rights since in that zone Colombia claimed to exercise powers of control in relation to offences committed in its territory or territorial sea, not offences committed in Nicaragua's EEZ.[91]

87 *Ibid.*, para 191. The view of the International Law Commission to which the Court referred comes from the Commission's commentary on Article 12 of its Draft Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 57, para 12.

88 *Ibid.*, para 194. Judge Iwasawa considered that Colombia's contiguous zone violated not only Nicaragua's sovereign rights and jurisdiction in its EEZ, but also its freedom of navigation there. See Declaration of Judge Iwasawa, paras 9–15.

89 While Judge Yusuf agreed with the Court that aspects of Colombia's contiguous zone were incompatible with international law, he disagreed with the Court's formulation of Colombia's consequential obligation. See Separate Opinion of Judge Yusuf, paras 12–14.

90 Dissenting Judgment of Judge *ad hoc* McRae, paras 37–43.

91 *Ibid.*, paras 44–48.

The present case is the first in which the Court has considered legal issues relating to the contiguous zone. The judgment is notable both for the Court's affirmation of the traditional view of the purposes for which the powers of control in the contiguous zone may be exercised, and for its finding that one State's contiguous zone may overlap with the EEZ of another State, a possibility that hitherto has seldom been considered in the literature.

Nicaragua's Alleged Infringement of Artisanal Fishing Rights

The Court then turned to Colombia's counter-claims. In the first of those, Colombia argued that the inhabitants of the San Andrés Archipelago, which lies parallel to the coast of Nicaragua and some 100 M distant, had for centuries practised traditional or artisanal fishing in what since the Court's 2012 judgment had become Nicaragua's EEZ, and that this had given rise to a local customary norm. Furthermore, such fishing rights had been recognised by the President of Nicaragua.

The Court rejected those arguments. It found that Colombia had failed to establish that the inhabitants of the San Andrés Archipelago enjoyed the traditional fishing rights claimed. Moreover, that claim was contradicted by statements that Colombia had made before the International Labour Organization. As regards the statements of the President of Nicaragua, the President had made it clear that the access of Colombia's artisanal fishing vessels to Nicaragua's EEZ should be regulated by bilateral agreement between Nicaragua and Colombia, and the Court took note of Nicaragua's willingness to negotiate such an agreement. The Court also emphasised that under customary international law, 'as reflected in Article 58 of the LOSC', third States possessed freedom of navigation in the EEZ. Thus, Colombia's artisanal fishing vessels 'may freely navigate within' Nicaragua's EEZ when sailing to and between fishing grounds on Colombia's side of the maritime boundary.[92] In view of those conclusions, the Court did not find it necessary to consider Nicaragua's argument that traditional fishing rights had not survived the introduction of the EEZ.

The Court's judgment on this aspect of the case was given by 14 votes to one (Judge *ad hoc* McRae). In his dissenting opinion, Judge *ad hoc* McRae argued that the Court had failed to recognise that the Raizales people were a distinct ethnic group among the inhabitants of the San Andrés Archipelago who had rights akin to indigenous rights. The latter included the right to fish in waters where they had traditionally fished. Those waters comprised, *inter alia*, parts of Nicaragua's EEZ, and thus they had rights to fish there. That had been recognised by the President of Nicaragua in the statements quoted by the Court. The

92 Judgment (n 63), para 233.

purpose of a bilateral agreement between Colombia and Nicaragua would not be to grant a right to the Raizales to fish in Nicaragua's EEZ, but to provide the modalities for the continued exercise of a pre-existing right.[93]

In a declaration, Judge Xue, while agreeing with the Court that Colombia had failed to substantiate its counter-claim, argued that traditional fishing rights were protected under customary international law and had not been extinguished by the EEZ regime. There were two requirements for such traditional rights: first, the fishery concerned must be artisanal in nature; and, second, it must have been practised for a lengthy period of time.[94] In referring to the case law to support her view that traditional fishing rights had not been extinguished by the EEZ, Judge Xue did not mention the *South China Sea* case, where the arbitral tribunal held that the LOSC had extinguished any historic rights that a State might once have had in areas that were now part of the EEZ of another State.[95]

Nicaragua's Straight Baselines

Colombia's other counter-claim concerned Nicaragua's straight baseline system. That system, established by a Decree of 19 August 2013,[96] comprised eight lines joining nine points, two of which were located on the low-water line of Nicaragua's mainland Caribbean coast, with the remainder being located on the low-water line of various islands off that coast. Colombia argued that those baselines were contrary to international law because there was no fringe of islands along Nicaragua's coast, nor was the coast deeply indented and cut into. Furthermore, the baselines did not follow the general direction of Nicaragua's coast and the waters that they enclosed were not sufficiently linked to the land domain to be subject to the regime of internal waters.[97]

In response to those arguments, the Court began by observing that the provisions on straight baselines in Article 7 of the LOSC (on which Colombia had

93 Dissenting Opinion of Judge *ad hoc* McRae, paras 50–70.

94 Declaration of Judge Xue, paras 2, 9, 16.

95 *South China Sea Arbitration* (*Philippines* v. *China*), Award, 12 July 2016, PCA Case No. 2013-19, (2020) 33 *Reports of International Arbitral Awards* 153, paras 235–247.

96 Decree No. 33-2013, English translation and illustrative map in United Nations, *Law of the Sea Bulletin* No. 83 (2014), pp. 35–36.

97 One might note parenthetically that Colombia's own straight baselines appear not to meet those criteria. See Decree No. 1436 of 1984, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/COL_1984_Decree.pdf. For an analysis of, and map illustrating, the baselines prescribed by the Decree, see The Geographer, US Department of State, *Limits in the Seas* No. 103, *Baselines: Colombia* (Washington DC, 1985), available at https://www.state.gov/wp-content/uploads/2019/12/LIS-103.pdf.

based its arguments) 'reflect customary international law'.[98] The Court rejected Nicaragua's argument that the southern part of its straight baseline system had been drawn along a coast that was 'deeply indented and cut into' (the phrase used in Article 7(1) of the LOSC). In the view of the Court, Nicaragua's coastline in this area did no more than 'curve inwards' and have a 'smooth configuration'.[99] The Court also rejected Nicaragua's argument that the northern (and longer) part of its baseline system had been drawn where there was a fringe of islands in the immediate vicinity of its coast. First, Nicaragua had not demonstrated that at least one of its claimed islands on which a basepoint was located, Edinburgh Cay, met the legal test for an island by being above water at high tide. Second, Nicaragua's islands did not constitute a 'fringe', which, according to the Court, 'must enclose a set, or a cluster of islands which present an interconnected system with some consistency or continuity'.[100] The requirement in Article 7(1) of the LOSC/customary international law, that a fringe of islands be located 'along the coast in its immediate vicinity', read with the requirement in Article 7(3) that straight baselines must not depart from the general direction of the coast and must enclose waters sufficiently closely linked to the land domain to be subject to the regime of internal waters, meant that a fringe of islands

> must be sufficiently close to the mainland coast so as to warrant its consideration as the outer edge or extremity of that coast … It is not sufficient that the concerned maritime features be part, in general terms, of the overall geographical configuration of the State. They need to be an integral part of its coastal configuration.[101]

Nicaragua's offshore islands did not meet those criteria. Finally, the Court noted that the effect of those baselines was to convert some areas of Nicaragua's territorial sea and EEZ into areas having the status of internal waters, thereby depriving Colombia of its rights in those areas.

The Court therefore held, by 12 votes to three (Judges Bennouna and Xue, and Judge *ad hoc* McRae), that Nicaragua's straight baselines did not conform to customary international law and that a declaratory judgment to that effect was an appropriate remedy. Unlike the case with Colombia's contiguous zone, the Court did not discuss whether Nicaragua's legislation on straight baselines

98 Judgment (n 63), para 242.
99 *Ibid.*, para 245.
100 *Ibid.*, para 254.
101 *Ibid.*, para 255.

engaged its international responsibility. Given the Court's approach in relation to Colombia's contiguous zone and its observation about Nicaragua's straight baselines system depriving Colombia of its rights, one might have thought that Nicaragua's international responsibility was engaged and that it was under an obligation to bring its baselines into conformity with customary international law. In his separate opinion, Judge Tomka stated that Nicaragua was indeed obliged to do so.[102]

Of the three dissenting judges, Judge Xue did not explain the reasons for her dissent. Judge Bennouna dissented because he considered that the effect of Nicaragua's straight baseline system on Colombia's navigational rights was no different from its effects on the rights of all other States. Colombia was not, therefore, an injured State.[103] Judge *ad hoc* McRae disagreed with the whole approach of the Court. Given the imprecision of the language in Article 7 of the LOSC, which was based on the Court's judgment in the *Fisheries* case,[104] the Court should have interpreted Article 7 in the light of State practice on the drawing of straight baselines. Furthermore, the present case was not a suitable one for the Court to provide a definitive interpretation of Article 7, as the matter had come before it as a counter-claim and there was no technical expert to assist the Court.[105]

The present case is the first time since the *Fisheries* case that any international court has assessed the conformity of a State's straight baseline system with international law, even though in the intervening 70 years a considerable number of States have drawn straight baselines that, even on a generous interpretation of Article 7 of the LOSC, are difficult to reconcile with its provisions.[106]

Comment

The Court's judgment is, in the first instance, of importance to the parties. Colombia must in future refrain from acts that violate Nicaragua's EEZ rights and bring its contiguous zone legislation into conformity with customary international law. While the Court did not expressly state that Nicaragua must bring its straight baseline system into conformity with international

102 Separate Opinion of Judge Tomka, para 32.

103 Declaration of Judge Bennouna, para 16. Judge Abraham, however, considered that Nicaragua was especially affected: see para 17 of his Dissenting Opinion.

104 *Fisheries* (*United Kingdom* v. *Norway*), Judgment, 18 December 1951, *ICJ Reports 1951*, p. 116.

105 Dissenting Opinion of Judge *ad hoc* McRae, paras 71–80.

106 For examples, see R Churchill, V Lowe and A Sander, *The Law of the Sea*, 4th edition (Manchester University Press, 2022) 69–71; JA Roach, *Excessive Maritime Claims*, 4th edition (Brill, 2021) 96–119.

law (which would seem to require using the low-water line as the baseline instead of straight baselines), that would seem to be the implication of the Court's judgment.

However, the judgment is also of significance for the wider international community for the Court's findings in respect of both the substantive provisions of the LOSC that the Court analysed (particularly Articles 7 and 33) and, more broadly, the relationship between the LOSC and customary international law. As regards the latter, the Court has in a number of earlier cases found various provisions of the LOSC reflective of customary international law, including Article 10 (on bays),[107] Article 13 (low-tide elevations),[108] 15 (delimitation of territorial sea boundaries),[109] 74 (delimitation of EEZ boundaries),[110] 76(1) (the definition of the continental shelf),[111] 83 (delimitation of continental shelf boundaries)[112] and 121 (islands).[113] In the present case, the Court found that a further eight provisions also reflected customary international law – Articles 7 (on straight baselines), 33 (contiguous zone), 56 (coastal States' rights in the EEZ), 58 (other States' rights in the EEZ), 61 and 62 (coastal States' fisheries conservation and management duties in the EEZ), 73 (coastal States' fisheries enforcement jurisdiction in the EEZ) and 303(2) (coastal State powers of control in respect of archaeological and cultural and objects in the contiguous zone). Although it did not say so explicitly, the Court appears to imply that Article 192 (on the obligation to preserve and protect the marine environment) is reflective of customary international law.[114]

As in the earlier cases, the Court tended in the present case simply to declare that a particular provision of the LOSC is reflective of customary international law, without making any attempt to assess whether the two traditional requirements for a rule of customary international law, namely, State

107 See *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras, Nicaragua intervening*), Judgment, 11 September 1992, *ICJ Reports 1992*, p. 351, para 383.

108 See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar* v. *Bahrain*), Judgment, 16 March 2001, *ICJ Reports 2001*, p. 40, para 201.

109 *Ibid*., para 176.

110 *Ibid*., para 167; *Nicaragua* v. *Colombia* (n 47), para 139.

111 *Nicaragua* v. *Colombia* (n 47), para 118.

112 As (n 110).

113 *Qatar* v. *Bahrain* (n 108), paras 167, 185; *Nicaragua* v. *Colombia* (n 47), paras 139, 176.

114 See (n 70).

practice and *opinio iuris*,[115] were satisfied.[116] Only in respect of Articles 33 and 303(2) of the LOSC did the Court make some, albeit very limited, reference to State practice.[117] As regards Article 33, the Court noted that '[a]s demonstrated by the general practice of States …, the concept of the contiguous zone is well established in international law … To date, about 100 States, including States that are not parties to [the LOSC], have established contiguous zones'.[118] Arguably, the Court did not need to assess whether Article 7 was reflective of customary international law because much of that article is based, in places *verbatim*, on the *Fisheries* case.[119] Of the other provisions of the LOSC that the Court found to be reflective of customary international law, most commentators would agree, based on the amount of State practice, that Articles 56, 58 and Article 73(1) reflect custom. However, whether Articles 61 and 62 also do so seems less certain. In the past it has been suggested those provisions, which concern a coastal State's duties in relation to fisheries conservation and management, do not reflect custom because of the limited State practice acknowledging those duties, some of which diverges from the LOSC, and because of doubts as to whether the provisions of Articles 61 and 62 have the 'fundamentally norm-creating character' necessary for a rule of customary international law.[120] In fact, one might wonder why the Court referred to Articles 61 and 62 at all, given that it made no more than a fleeting reference to the coastal State's duties to conserve the living resources of its EEZ.[121] Likewise, the Court was too

115 See International Law Commission, Draft Conclusions on Identification of Customary International Law (2018), Conclusions 2 and 3, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf.

116 For an explanation and justification of the Court's approach, see N Petersen, 'The ICJ and the judicial politics of identifying customary international law' (2017) 28(2) *European Journal of International Law* (*EJIL*) 357–385. For more critical views of the Court's practice, see S Talmon, 'Determining customary international law: The ICJ's methodology between induction, deduction and assertion' (2015) 26(2) *EJIL* 417–443; Xuexia Liao, 'The LOSC as a package deal and its implications for determination of customary international law' (2020) 35(4) *IJMCL* 704–739.

117 In the case of Article 303(2), see text at (n 86).

118 Judgment (n 63), para 149. See also para 154, where the Court observed that '[a]lthough there are a few States that maintain in their national laws the powers to exercise control with respect to security in the contiguous zone, that practice has been opposed by other States'.

119 See (n 104).

120 See Churchill, Lowe and Sander (n 106), at p. 256. The quotation is from the *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), Judgment, 20 February 1969, *ICJ Reports 1969*, p. 3, para 72.

121 See text at (n 68).

sweeping in suggesting that Article 73 as such was reflective of custom, when the Court considered only the first paragraph of that article.[122]

The Court's approach to the relationship between customary international law and the LOSC contrasts with the Court's examination as to whether Article 6 of the 1958 Convention on the Continental Shelf was reflective of customary international law in the *North Sea Continental Shelf* cases, where the Court was far more probing and rigorous.[123] The Court there was concerned with a treaty provision that it found did not codify or crystallise pre-existing customary international law. Numerous provisions of the LOSC are also of this character. Nevertheless, reading the Court's jurisprudence relating to the LOSC, one has the impression that in any future case where the question arose, the Court would declare almost any provision to be reflective of customary international law. The likely exceptions would be provisions that are closely linked to procedural requirements involving institutions created by the LOSC, in particular the delineation of the outer limit of the continental shelf beyond 200 M (paras 2 *et seq*. of Article 76) and the regime of the Area (Part XI as modified by the 1994 Implementation Agreement). We will probably get an answer to the first of these provisions in the Court's forthcoming judgment in the other *Nicaragua* v. *Colombia* case (see above).

Of course, one can well understand why the Court tends simply to declare that particular provisions of the LOSC reflect customary international law, especially where several provisions of the LOSC may be involved in a single case, as in the present judgment. It saves the Court from having to engage in a lengthy examination of State practice (including the question of the extent to which practice of Parties to the LOSC is relevant) and the thorny issue of *opinio juris*, as well as from having to consider the implications of the package deal nature of the LOSC.[124] Such examination and consideration would lead to very lengthy, unwieldy and possibly inconclusive judgments.

It might be thought at first sight that the extent to which the LOSC reflects customary international law might be of interest only to those 14 coastal States that are not parties to the LOSC.[125] However, it must not be forgotten that custom is also applicable to relations between a State Party to the LOSC and a non-State Party, as was indeed the situation in the present case. The majority

122 Judgment (n 63), paras 59, 94, 100. There must be some doubt as to whether the remainder of Article 73 is reflective of custom, given the limited, and not always consistent, practice relating to those provisions.

123 *North Sea Continental Shelf* cases (n 120), paras 60–81.

124 On which see Liao (n 116).

125 Those States are Cambodia, Colombia, El Salvador, Eritrea, Iran, Israel, Libya, North Korea, Peru, Syria, Turkey, the United Arab Emirates, the United States and Venezuela.

of coastal non-Party States border enclosed or semi-enclosed seas, such as the Caribbean Sea, bordered by Colombia, the United States (in respect of some of its island territories) and Venezuela; the Mediterranean Sea, bordered by Israel, Libya, Syria and Turkey; the Red Sea, bordered by Eritrea; and the Arabian/Persian Gulf, bordered by Iran and the United Arab Emirates. In such seas questions of customary international law are likely to arise frequently in relations between the States that border them.