Dispute Settlement in the Law of the Sea

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Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016

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Abstract

This is the latest in a series of annual surveys reviewing dispute settlement in the law of the sea, both under the UN Convention on the Law of the Sea and outside the framework of the Convention. It covers developments concerning the International Tribunal for the Law of the Sea in 2016 and concerning all other law of the sea dispute settlement bodies for both 2015 and 2016. The developments covered include the awards in *Chagos Marine Protected Area (Mauritius v. United Kingdom), South China Sea (Philippines v. China), Arctic Sunrise (Netherlands v. Russia)* and *Duzgit Integrity* cases, the judgments in the jurisdictional phases of the *Norstar* and *Nicaragua/Colombia* cases; the prescription of provisional measures by the arbitral tribunal in the *Enrica Lexie* case; and the first ever use of the compulsory conciliation procedures of the UN Convention on the Law of the Sea.

Keywords

arbitration; conciliation; dispute settlement; exclusive economic zone; historic rights and titles; islands; hot pursuit; International Court of Justice (ICJ); International

Tribunal for the Law of the Sea (ITLOS); islands; law enforcement; protection of the marine environment; safety zones; seizure and detention of ships; South China Sea.

Introduction

The previous instalment in this *Journal*'s annual surveys of dispute settlement in the law of the sea covered developments at the ITLOS in 2015. This instalment deals with developments at the ITLOS in 2016 and at all other international courts and tribunals for both 2015 and 2016. It thus covers the arbitral awards in *Chagos Marine Protected Area*, *South China Sea*, *Arctic Sunrise* and *Duzgit Integrity* cases; the judgments, by the ITLOS and the ICJ respectively, in the separate jurisdictional phases of the *Norstar* and *Nicaragua/Colombia* cases; the prescription of provisional measures by the arbitral tribunal in the *Enrica Lexie* case; the first ever use of the compulsory conciliation procedures of the UN Convention on the Law of the Sea (LOSC)[1] (between Timor-Leste and Australia); the initiation of Annex VII arbitration by Ukraine against Russia; and the decision of the arbitral tribunal in the *Croatia/Slovenia* case to continue its work after the major upheaval in its proceedings in 2015.

These developments have shed new light on both jurisdictional aspects of dispute settlement under the LOSC and on its substantive provisions. The former include Articles 281 (on agreements that exclude the dispute settlement procedures of the LOSC), 283 (on the requirement for an exchange of views regarding the means for

[1] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 3.

settling a dispute prior to its unilateral referral to a court or tribunal), 295 (on exhaustion of local remedies), 297 (exceptions to compulsory dispute settlement) and 298 (on the conditions for compulsory conciliation). The most noteworthy judicial pronouncements on the substantive provisions of the LOSC relate to historic rights, the regime of islands, the law enforcement powers of coastal States in their maritime zones, hot pursuit, the relationship between the rights of coastal and other States in the exclusive economic zone (EEZ) and protection of the marine environment.

International Tribunal for the Law of the Sea during 2016

At the beginning of 2016 two cases were ongoing before the ITLOS – *Case No. 23*, a maritime boundary dispute brought by Ghana against Côte d'Ivoire, and *Case No 25*, *M/V Norstar*, concerning the seizure and detention of a Panamanian vessel by Italy. In the former case written proceedings were completed during 2016. In the *Norstar* case the ITLOS gave a judgment in the separate jurisdictional phase of the case in November 2016, and this is discussed in more detail below.

Case No. 25: M/V "Norstar" (Panama v. Italy)

On 17 December 2015 Panama instituted proceedings against Italy. It argued that Italy had breached Articles 33, 73, 87, 111, 226 and 300 of the LOSC in seizing and detaining a Panamanian oil tanker, the *M/V Norstar*, and claimed as a consequence US$10 million in compensation for damage to the vessel and losses suffered by its owner. In 1998 the Public Prosecutor at the Court of Savona (in Italy) issued a decree of seizure against the *Norstar* in connection with the prosecution of eight persons for

alleged smuggling of mineral oils, the *Norstar* being viewed as the *corpus delicti* of the alleged offences. Following a request from the Public Prosecutor at Savona, the Spanish authorities seized the *Norstar* while at anchor in Spanish internal waters. In 2003 the court at Savona acquitted the accused of all charges and ordered the release of the *Norstar*. That ruling was confirmed on appeal in 2005. Following its ruling in 2003, the court at Savona requested the Spanish authorities to release the *Norstar*. They had not done so by 2006; and it is unclear from the available materials when, or even whether, they subsequently did so.

On 11 March 2016 Italy raised preliminary objections to the jurisdiction of the ITLOS and the admissibility of Panama's application. Proceedings on the merits were therefore suspended. Following the submission of written pleadings on the question of jurisdiction and admissibility and a hearing, the ITLOS delivered its judgment on 4 November 2016.[2]

Italy contested the jurisdiction of the ITLOS on three grounds: (1) there was no dispute between Panama and Italy; (2) Italy was the wrong respondent and, in any case, adjudication of Panama's claim would require the ITLOS to ascertain rights and obligations pertaining to Spain in the latter's absence; and (3) Panama had failed to pursue settlement of the dispute by negotiation or other peaceful means under Article 283 of the LOSC.

Before dealing with those points, the ITLOS considered Panama's declaration under Article 287 choosing the ITLOS as the means "for the settlement of the dispute between [Panama and Italy] concerning the interpretation or application of UNCLOS that arose from the detention of the Motor Tanker NORSTAR." The ITLOS observed

[2] *M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Judgment/C25_Judgment_04.11.16_orig.pdf; accessed 31 July 2017.

that the LOSC "does not preclude a declaration limited to a particular dispute" (para. 58), but it also noted that where two declarations did not coincide (as in the present case), its jurisdiction was confined to the terms of the narrower declaration. One might conclude, therefore, that in this case the jurisdiction of the ITLOS would be limited to the dispute concerning the "detention" of the *Norstar*. However, the ITLOS noted that in its application, Panama had referred to the "arrest and detention by Italy" of the *Norstar*, and that it had used the same terminology in its communications with Italy. "Therefore, in the view of the Tribunal, the Application is consistent with the terms of the declaration of Panama" (para. 59). The purport of that statement is unclear, but it appears to suggest that the ITLOS has jurisdiction in respect of both the "arrest" and the "detention" of the *Norstar*. This is borne out later in the judgment, as will be seen.

The ITLOS then turned to Italy's first jurisdictional objection. Panama, mainly through a lawyer in private practice whom it had authorised to act on its behalf, had sent a number of communications to Italy between 2004 and 2010 complaining of the illegal detention of the *Norstar*. Italy acknowledged receipt of one of those communications, but otherwise failed to respond. Assessing whether in those circumstances there could be a dispute between the parties, the ITLOS recalled the jurisprudence of the ICJ according to which the existence of a dispute could be inferred from the failure of a State to respond to a claim in circumstances where a response was called for, and that a disagreement on a point of law or fact or a conflict of legal views need not necessarily be stated *expressis verbis* but could be established by inference. The ITLOS thus concluded that "Italy cannot rely on its silence to cast doubt on the existence of a dispute between the Parties. In the view of the Tribunal,

the existence of such a dispute can be inferred from Italy's failure to respond to the questions raised by Panama regarding the detention of the *M/V "Norstar"* (para. 101).

The next question was whether that dispute related to the interpretation or application of the LOSC. Referring to its judgment in the *Louisa* case,[3] the ITLOS noted that in order to determine whether a dispute concerned the interpretation or application of the LOSC, it had to establish a link between the facts advanced by Panama (the Decree of Seizure against the *Norstar*) and the provisions of the LOSC referred to, and show that such provisions could sustain the claims made. Of the various articles of the LOSC invoked by Panama, most were easily disposed of. Panama itself in the oral proceedings conceded that Articles 73 and 226 were not applicable. Nor, in the view of the ITLOS, were Articles 33 (on the contiguous zone) or 111 (on hot pursuit) applicable as Italy had not claimed to be acting under either of those provisions. That left Articles 87 and 300. On Article 87 the ITLOS concluded that "[t]he Decree of Seizure by the Public Prosecutor at the Court of Savona against the *M/V 'Norstar'* with regard to activities conducted by that vessel on the high seas and the request for its execution by the Prosecutor at the Court of Savona *may be viewed* as an infringement of the rights of Panama under Article 87 as the flag State of the vessel. Consequently, the Tribunal concludes that Article 87 *is relevant* to the present case" (para. 122, emphasis added). That is a surprisingly tentative statement, given that the ITLOS was making a definitive ruling about jurisdiction. If the ITLOS was not sure, it might have been better advised to decide that Italy's objection raised matters that did not possess an exclusively preliminary character and therefore defer the issue of jurisdiction to the merits. Be that as it may, it is difficult to see how a

[3] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 32, para. 99.

request to the Spanish authorities to detain the *Norstar* could, in itself, interfere with Panama's freedom of navigation on the high seas. The approach of the ITLOS opens the way to any detention of a vessel by a State other than the flag State being challenged as a breach of Article 87. Furthermore, it is difficult to reconcile the ruling of the ITLOS with its finding in the *Louisa* case that "[a]rticle 87 cannot be interpreted in such a way as to grant [a ship detained in port] a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it".[4] Regrettably, the ITLOS made no attempt to distinguish the *Louisa* case, nor does it even refer to it in the one brief paragraph that discusses Article 87. On Article 300 (which requires States parties to fulfil their LOSC obligations in good faith), the ITLOS repeats its established case law that the Article cannot be invoked on its own, but only in conjunction with a substantive obligation. That leads the ITLOS to "consider that the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case" (para. 132).

Turning to Italy's second objection to jurisdiction, there were two questions to be considered: was Italy the proper respondent in this case, and was any third party indispensable to the proceedings. On the first question, the ITLOS considered that it was clear from the facts of the case that, while the arrest of the *Norstar* took place as the result of judicial cooperation between Italy and Spain, the decree of seizure issued by the court at Savona and the request for its enforcement by the Italian Public Prosecutor were central to the eventual arrest of the *Norstar*. Without that decree,

[4] Ibid., para. 109. For a cogent and more detailed criticism of the approach of the ITLOS to Article 87 in the present case, see the Joint Separate Opinion of Judges Wolfrum and Attard, paras. 33-42.

there would have been no arrest. Italy was therefore the proper respondent. Nor was Spain an indispensable third party. The dispute before the ITLOS concerned the rights and obligations of Italy. The involvement of Spain in the dispute was limited to the execution of Italy's request for the seizure of the *Norstar*. Accordingly, it was the legal interests of Italy, not those of Spain, that formed the subject matter of the decision to be rendered on the merits. This conclusion appears to be dependent on the jurisdiction of the ITLOS covering the arrest of the *Norstar* as well as its detention. As observed earlier, this is questionable. In the absence of any information in the judgment as to whether the Spanish authorities eventually released the *Norstar* from detention, the finding that Spain was not an indispensable third party may have been premature. The ITLOS might, therefore, have been better advised to have deferred this jurisdictional issue to the merits stage.

As regards Italy's third objection to jurisdiction, non-compliance with Article 283 of the LOSC, the ITLOS found that Panama had made a number of attempts to engage with Italy as to the means by which the dispute might be settled, but there had been no response from Italy. Panama was therefore justified in assuming that to continue attempts to exchange views could not have yielded a positive result and that it had fulfilled its obligation under Article 283.

Having rejected all of Italy's objections to jurisdiction (by 21 votes to 1 (Judge *ad hoc* Treves)), the ITLOS turned to consider various objections raised by Italy to the admissibility of Panama's application. Italy's first objection was that the case was predominantly one of diplomatic protection: Panama could not exercise diplomatic protection on behalf of non-nationals (as it was seeking to do), and in any case those persons had failed to exhaust domestic remedies as required by Article 295 of the LOSC. The ITLOS, following its judgments in the *Saiga (No. 2)* and *Virginia G*

cases, held that the *Norstar* was to be considered a unit as regards the right of Panama, as the flag State, to seek reparation for loss or damage caused to the *Norstar* by the acts of Italy. Thus, the *Norstar*, everything on it and every person involved or interested in its operations were to be treated as an entity linked to Panama and the nationalities of those persons was irrelevant. On the question of the requirement to exhaust local remedies, the ITLOS recalled its earlier finding that the case concerned the alleged violation of Panama's right under Article 87 of the LOSC. "[A] violation of that right would amount to a direct injury to Panama" (para. 270). "[T]he claim for damage to the persons and entities with an interest in the ship or its cargo arises from the alleged injury to Panama. Accordingly, the Tribunal concludes that the claims in respect of such damage are not subject to the rule of exhaustion of local remedies" (para.271). This formulation seems to blur the distinction between a claim for a direct injury to a State and a claim for an indirect injury. An injury to "persons and entities with an interest in the ship" is an indirect injury. If Panama had suffered only a direct injury, the "ship as a unit" doctrine would be irrelevant. If, on the other hand, Panama had suffered both direct and indirect injury, the exhaustion of local remedies would be required if the indirect injury was the preponderant claim.[5] Whether the injury to Panama is direct or indirect will (or at least should) be relevant again when the ITLOS has to decide whether Panama should be awarded the compensation that it has sought.

Italy's second objection to the admissibility of Italy's claim was that it was time-barred, being brought 18 years after the events giving rise to the dispute. Relying on the commentary of the International Law Commission on its draft Articles on State Responsibility and the case law of the ICJ, the ITLOS noted that neither the LOSC nor general international law provided a time-limit regarding the institution of judicial

[5] See further the discussion below at notes 21-4.

proceedings. In any case Panama had not failed to pursue its claim since the time when it was first made. The ITLOS therefore dismissed, by 20 votes to 2 (Judge Cot and Judge *ad hoc* Treves), both of Italy's objections that Panama's application was inadmissible.

Overall, the judgment of the ITLOS is not very satisfactory. It appears to have given Panama the benefit of the doubt on a number of significant jurisdictional points. While the vagueness of some of the ITLOS's conclusions may be explained by the need to craft a judgment to attract the greatest possible support in what, on this occasion, was a 22-member court, it hardly justifies them. As revealed in the declarations and separate opinions given by six of the judges, there were considerably more nuanced views among a number of the individual judges.

Arbitration in accordance with Annex VII during 2015 and 2016

At the beginning of 2015 four arbitrations conducted under Annex VII of the LOSC were ongoing – the *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, *South China Sea (Philippines v. China)*, *Arctic Sunrise (Netherlands v. Russia)* and *Duzgit Integrity (Malta v. São Tomé and Príncipe)* cases. During 2015, the arbitral tribunals delivered their awards in the *Chagos Marine Protected Area* and *Arctic Sunrise* cases, and the tribunal in the *South China Sea* case delivered an award on jurisdiction and admissibility. Its award on the merits was delivered in 2016, as was the award in the *Duzgit Integrity* case. During 2015 and 2016 two new Annex VII arbitrations were begun: the *Enrica Lexie Incident* case between Italy and India (in 2015) and the *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov*

and Kerch Strait case between Ukraine and Russia (in 2016). The tribunal in the *Enrica Lexie Incident* case made an order of provisional measures in 2016. Developments in all six cases are discussed below.

Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)

In this case, begun in December 2010, Mauritius challenged the legality of the establishment by the United Kingdom in April 2010 of a marine protected area (MPA) in the whole of the 200 nm zone around the Chagos Archipelago, which is administered by the United Kingdom. The tribunal to hear the case comprised Professor Ivan Shearer (president), Judge Wolfrum (nominated by Mauritius), Judge Greenwood (nominated by the United Kingdom), Judge Hoffmann and Judge Kateka. The tribunal delivered its award on 18 March 2015.[6]

Mauritius made four submissions in the proceedings, requesting the Tribunal to find that:

1. The United Kingdom was not entitled to declare an MPA or other maritime zones because it was not the "coastal State" for the purposes of the LOSC;
2. Given the commitments that it had made to Mauritius, the United Kingdom was not entitled unilaterally to declare an MPA or other maritime zones because Mauritius had rights as a "coastal State" for the purposes of the LOSC;

[6] *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, available at https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf; accessed 31 July 2017. For comment, see, *inter alia*, LN Nguyen, 'The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction been Clarified?' (2016) 31 *IJMCL* 120-143; W Qu, 'The Issue of Jurisdiction over Mixed Disputes: "The Chagos Maritime Protection Area Arbitration and Beyond' (2016) 47 *Ocean Development and International Law* (*ODIL*) 40-51; and S Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals' (2016) 65 *International and Comparative Law Quarterly* 727-51.

3. The United Kingdom could not prevent the Commission on the Limits of the Continental Shelf from acting on any submission that Mauritius might make regarding the Chagos Archipelago; and
4. The MPA was incompatible with the United Kingdom's substantive and procedural obligations under Articles 2, 55, 56, 63, 64, 194 and 300 of the LOSC and Article 7 of the UN Fish Stocks Agreement.

The United Kingdom argued that the tribunal lacked jurisdiction in relation to all four of Mauritius's four submissions.

Having in 2013 rejected a request from the United Kingdom to deal with jurisdictional issues as a preliminary matter, the tribunal dealt at length with jurisdictional issues in the earlier part of its award. As regards Mauritius's first submission, the United Kingdom argued that it was in reality a claim to sovereignty over the Chagos Archipelago and therefore did not concern the interpretation and application of the LOSC. By a majority of three votes to two (Judges Kateka and Wolfrum), the tribunal agreed. Mauritius's first submission was "properly characterised" as a dispute relating to land sovereignty over the Chagos Archipelago. "The Parties' differing views on the 'coastal State' for the purposes of the Convention are simply one aspect of this larger dispute" (para. 212). It was clear from the negotiating history of the LOSC that its dispute settlement system was not intended to be used to resolve sovereignty disputes. While it was possible that minor questions of sovereignty could be considered if they were ancillary to a main dispute concerning the LOSC, that was not the case here. There was, therefore, no dispute concerning the interpretation or application of the LOSC, and so the tribunal lacked the jurisdiction.

The tribunal reached a similar conclusion in relation to Mauritius's second submission.[7]

As for Mauritius's third submission, the tribunal unanimously held that there was no dispute between the parties concerning submissions to the Commission on the Limits of the Continental Shelf and it was therefore not required to rule on whether it had jurisdiction.

In relation to Mauritius's fourth submission, the United Kingdom argued that the tribunal lacked jurisdiction because of Article 297(3) of the LOSC, which excludes disputes concerning a coastal State's sovereign rights to the living resources of the EEZ from compulsory dispute settlement. The tribunal unanimously rejected the argument that Article 297(3) could operate as a blanket ban on its jurisdiction. The MPA was not a measure solely relating to fisheries. Although commercial fishing was prohibited in the MPA, it was evident from the United Kingdom's statements when establishing the MPA that its primary purpose was to protect the marine environment. Furthermore, coral, which was a particular focus of that protection, was a sedentary species within the meaning of Article 77(4) of the LOSC: such species were excluded from the regime of the EEZ by Article 68, and thus beyond any possible application of Article 297(3). However, insofar as Mauritius claimed rights relating to fishing in the EEZ of the Chagos Archipelago, the tribunal's jurisdiction was excluded by Article 297(3). So, too, were Mauritius's claims of breaches of Articles 63 and 64 of the LOSC and Article 7 of the Fish Stocks Agreement, the tribunal thereby rejecting the argument of some commentators that Article 297(3) does not apply to straddling stocks. The tribunal then made some interesting observations about Article 297(1),

[7] Lack of space precludes further discussion of the tribunal's consideration of the first two submissions and the views of the two dissenting arbitrators. For such discussion, see the literature referred to in the previous note.

which deals with the situations where compulsory dispute settlement does apply in relation to the EEZ. It concluded that this provision expands the jurisdiction of LOSC courts and tribunals to certain instruments other than the LOSC.[8] Overall, the tribunal concluded that it had jurisdiction to consider Mauritius' fourth submission in relation to Articles 2(3) and 56(2) of the LOSC, insofar as they related to Mauritius's claimed rights, as well as in relation to Articles 194 and 300.

The tribunal then turned to consider whether there had been the exchange of views required by Article 283 of the LOSC. According to the tribunal, the purpose of Article 283 was "to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings. It [Article 283] should be applied as such, but without an undue formalism as to the manner and precision with which views were exchanged and understood" (para. 382). Here that test was satisfied, each party having made it clear to the other that their preferred means of settling the dispute was negotiation, albeit in each case subject to conditions that were incompatible. The tribunal also discussed whether it was necessary to engage in negotiations relating to the substance of a dispute (as opposed to the means of resolving it) before resorting unilaterally to compulsory dispute settlement. Noting that the LOSC did not expressly contain such a requirement, the tribunal observed that "to the extent that such a requirement could be considered to be implied from the structure of sections 1 and 2 of Part XV" (para. 379), Mauritius had met that requirement. It is curious that the tribunal makes no mention of Article 286 of the LOSC, which provides that a matter may be referred for compulsory dispute settlement only "where no settlement has been reached by recourse to section 1" of Part XV, which requires the parties to a

[8] See paras. 306-22. For further discussion of this part of the award, see, apart from the literature in note 6, S Allen, 'Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction' (2017) 48(3) *ODIL* (in press) (available online).

dispute to seek to settle it by negotiations or the other means listed in Article 33 of the UN Charter.

Having disposed of all the jurisdictional and other preliminary issues, the tribunal was able finally, three-quarters of the way through its 215-page award, to address the merits. It did so by considering, first, the content of Mauritius's rights in the territorial sea, EEZ and continental shelf in the area covered by the MPA, and, secondly, whether the United Kingdom's declaration of the MPA was in breach of those provisions of the LOSC in respect of which the tribunal had jurisdiction. As regards the first point, in 1965, at a conference held at Lancaster House in London in preparation for Mauritius's eventual independence, the United Kingdom had given various undertakings to Mauritius, including fishing rights in the waters of the Chagos Archipelago, mineral rights in the seabed and subsoil around the Archipelago, and a right to the eventual return of the Archipelago when no longer needed for defence purposes (the United Kingdom has leased the largest island of the Archipelago to the USA as a military base since 1966). In the view of the tribunal those undertakings were part of the *quid pro quo* for procuring the agreement of Mauritius to the detachment of the Chagos Archipelago from Mauritius to be administered separately as British Indian Ocean Territory (previously the two had been administered by the United Kingdom as a single unit). Once Mauritius became independent in 1968, the package deal comprising the Lancaster House undertakings and Mauritius's agreement to the detachment became an international agreement. Although that agreement did not expressly deal with its legal status, the tribunal's objective determination was that it was legally binding. That conclusion was supported by the fact that after Mauritius became independent, the United Kingdom had repeated and reaffirmed the Lancaster House undertakings on numerous occasions. Furthermore, as

Mauritius had relied on those undertakings and was entitled to so, the United Kingdom was estopped from denying their legally binding effect.[9]

The parties disagreed on the scope of the fishing rights referred to in the Lancaster House undertakings. The tribunal ruled that those rights including fishing in the territorial sea of the Chagos Archipelago (the only aspect of fisheries for which the tribunal had jurisdiction), subject to possessing a licence issued free by the United Kingdom and "dependent on the overarching defence needs of the United States and the United Kingdom's discretion in the routine management of the fishery" (para. 455).

Having identified the rights of Mauritius in the area covered by the MPA, the tribunal then turned to consider whether, when establishing the MPA, the United Kingdom had breached the provisions of the LOSC in respect of which it had jurisdiction. That involved interpreting Articles 2(3), 56(2) and 194, none of which have previously been interpreted by an international court. Article 2(3) provides that a coastal State's sovereignty over its territorial sea "is exercised subject to this Convention and to other rules of international law." Although the English-language version of Article 3(2) could be read as being purely descriptive ("is exercised"), the tribunal considered that the other authentic language texts, the context, the object and purpose of the LOSC and the negotiating history "lead to the interpretation that Article 2(3) contains an obligation on States to exercise their sovereignty subject to 'other rules of international law'" (para. 514). As regards what those "other rules" were, in the tribunal's view they were limited "general rules of international law" (para. 516) and did not include the Lancaster House undertakings. Nevertheless,

[9] Paras. 435-9 contain a useful summary of the doctrine of estoppel in international law.

"general international law requires the United Kingdom to act in good faith in its relations with Mauritius, including with respect to undertakings" (para. 517).

As for Article 56(2), which requires a coastal State when exercising its rights and performing its duties in the EEZ to have "due regard" to the rights and duties of other States, the tribunal declined to find in that obligation "any universal rules of conduct" (para. 519). The obligation did not mean that any impairment of Mauritius's rights must be avoided, but nor did it permit the United Kingdom to proceed as it wished. "Rather, the extent of the regard required by the [LOS] Convention will depend on the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State" (para. 519).

The tribunal considered the obligations in Articles 2(3) and 56(2) to be equivalent. Mauritius's rights had been significantly affected by the establishment of the MPA since its fishing rights had been extinguished and the condition of the Archipelago would be affected when returned to Mauritius. That meant that the United Kingdom should have consulted Mauritius properly and balanced its rights and interests with those of Mauritius. It had done neither of those things, and thus in establishing the MPA, the United Kingdom had breached Articles 2(3) and 56 of the LOSC.

Turning to Article 194 of the LOSC, a preliminary question was whether that article was limited to pollution and so was not applicable to wider environmental matters, such as MPAs. Article 194 is headed "Measures to prevent, reduce and control pollution of the marine environment" and its first four paragraphs refer only to

pollution, not to wider environmental protection. The tribunal makes no mention of those features of Article 194. Instead, it refers only to the fifth and final paragraph of Article 194 which provides that "[t]he measures taken in accordance with this Part [i.e. Part XII of the LOSC] shall include those necessary to protect" certain kinds of ecosystems and habitats. From this the tribunal concludes that Article 194 is "not limited to measures aimed strictly at controlling pollution and extends to measures focussed primarily on conservation and the preservation of ecosystems", such as the MPA. While the tribunal's finding about the scope of Article 194 may be desirable on policy grounds, it seems difficult to reconcile it with the text of Article 194. Be that as it may, the tribunal then considered whether the United Kingdom complied with the first and fourth paragraphs of Article 194. Article 194(1) requires States to "endeavour to harmonize their policies in this connection [i.e. to prevent marine pollution]." The tribunal rejected the United Kingdom's view that Article 194(1) imposes no obligations and held that it requires States to use their "best efforts" to harmonize their policies (para. 539). However, there was no particular deadline for the United Kingdom to harmonize its policies with Mauritius. In the limited life to date of the MPA, the United Kingdom had not violated that obligation. Article 194(4) requires States in taking measures to prevent marine pollution to "refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights." The tribunal considered this obligation to be "functionally equivalent" to the obligations in Article 2(3) and 56(2) discussed above and to require "a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue" (para. 540). The United Kingdom had failed to carry out such a

balancing act with respect to Mauritian fishing activities in the territorial sea of the Chagos Archipelago and therefore had violated Article 194(4) of the LOSC.

Finally, on Mauritius's claim that the United Kingdom had breached Article 300, the tribunal found no evidence of bad faith or abuse of rights. Overall, therefore the tribunal found that the United Kingdom had breached Articles 2(3), 56(2) and 194(4) of the LOSC in establishing an MPA around the Chagos Archipelago. As to how that breach might be remedied and the MPA lawfully established, the tribunal concluded its award by observing that "it is now open to the Parties to enter into the negotiations that the Tribunal would have expected prior to the proclamation of the MPA, with a view to achieving a mutually satisfactory arrangement for protecting the marine environment, to the extent necessary under a 'sovereignty umbrella'" (para. 544). Whether such negotiations have taken place the writer does not know.

The tribunal's reasoning on the merits is by no means always easy to follow or convincing. The tribunal assumes, without really explaining why, that one State can have rights in another State's EEZ additional to those listed in Article 58(1) of the LOSC. As will be seen below, the tribunal in the *South China Sea* case took the opposite view. The latter position seems more in keeping with the regime of the EEZ under the LOSC. Even if the tribunal in the present case is right about this matter, it is difficult to see why the two Lancaster House undertakings identified by the tribunal as Mauritius's rights in the EEZ of the Chagos Archipelago are EEZ rights. One of those undertakings is to mineral rights in the seabed and subsoil around the Archipelago. Article 56(3) of the LOSC provides that a coastal State's rights to the resources of the seabed and subsoil are to be exercised in accordance with Part VI (on the continental shelf). One might have thought that Mauritius's mineral rights would also be exercisable under Part VI, and that the United Kingdom's due regard obligation under

Article 56(2) would therefore not be applicable. Furthermore, given that under the LOSC a coastal State has exclusive rights to its continental shelf resources, there must be doubt as to whether another State's right to those resources that originated many years before the adoption of the LOSC would survive the latter's entry into force in the light of Article 311(2). Mauritius's other right is to the eventual return of the Chagos Archipelago when no longer needed for defence purposes. It is difficult to see how this can be a right exercisable in the EEZ in the way that, say, navigation and overflight are.

While the *Chagos MPA* case is all about a marine protected area, because of the way that the dispute was framed, the award actually tells us rather little about international law relating to MPAs, for example the legal basis for establishing an MPA in the EEZ. It provides some insights into the procedural conditions that must be observed in establishing an MPA in the territorial sea and EEZ, albeit in the context of the highly unusual relations prevailing between Mauritius and the United Kingdom. As the tribunal itself acknowledged, "it had taken no view on the substantive quality or nature of the MPA or on the importance of environmental protection. The Tribunal's concern has been with the manner in which the MPA was established, not its substance" (par. 544).

South China Sea (Philippines v. China)

In this arbitration, initiated in 2013, the Philippines sought a ruling on its and China's respective maritime entitlements in the South China Sea, including China's claim to rights within its so-called "nine-dash line", and on the lawfulness of certain Chinese activities. The tribunal hearing the case comprised Judge Mensah (president), Judge Cot, Judge Pawlak, Professor Soons and Judge Wolfrum. Although China declined to

take part in the proceedings, it sent the tribunal a position paper in December 2014 in which it raised various objections to the jurisdiction of the tribunal. The tribunal decided that it would treat that paper as a plea concerning its jurisdiction, which meant that under its Rules of Procedure it should rule on it as a preliminary question.[10] That ruling was given on 29 October 2015.[11]

Award on Jurisdiction and Admissibility

In its award the tribunal dealt not only with the objections to its jurisdiction raised in China's position paper, but also with a number of other possible reasons why it might not have jurisdiction or the case might not be admissible.

The tribunal began with issues of admissibility. It found that it was properly constituted; that in accordance with Article 9 of Annex VII of the LOSC, China's non-participation in the proceedings did not deprive it of jurisdction; and that the institution of proceedings by the Philippines was not an abuse of legal process.

The tribunal then turned to the first issue of jurisdiction, namely whether there was a dispute between the parties and, if so, whether that dispute concerned the interpretation and application of the LOSC. The tribunal noted that there was clearly a dispute between the parties concerning sovereignty over certain maritime features in the South China Sea, but rejected China's claim that this deprived the tribunal of jurisdiction. There were also disputes about matters other than sovereignty and the resolution of those disputes did not require the tribunal to reach a preliminary decision

[10] Procedural Order No. 4 of 21 April 2015, available at https://pcacases.com/web/sendAttach/1807; accessed 25 July 2017.
[11] *Philippines v. China*, Award on Jurisdiction and Admissibility, 29 October 2015, available at http://www.pcacases.com/web/sendAttach/1506; accessed 3 October 2016. For comment, see, *inter alia*, Special Issue in (2016) 15(2) *Chinese Journal of International Law* 217-487; and J Gao, 'The Obligation to Negotiate in the *Philippines v. China* Case: A Critique of the Award on Jurisdiction' (2016) 47(3) *ODIL* 272-88.

as to which State had sovereignty over the maritime features concerned. China had also argued in its position paper that the tribunal lacked jurisdiction because the case was about maritime boundary delimitation, which China had excluded from compulsory dispute settlement by a declaration under Article 298. The tribunal observed, however, that a dispute over the entitlement of a maritime feature to maritime zones was distinct from a dispute concerning the delimitation of those zones.

The tribunal then turned to examine whether there was a dispute concerning the issues that formed the subject matter of the Philippines' application. A preliminary problem was that China had not elaborated on some of its claimed rights and entitlements in the South China Sea. That made it difficult to determine whether there was the opposition of views necessary for the existence of a dispute. However, the tribunal held that it was entitled to draw appropriate inferences from China's conduct and to evaluate the position objectively, without "allowing ambiguity in a party's expression of its position to frustrate the resolution of a genuine dispute through arbitration" (para. 163). The tribunal then examined the 15 submissions made by the Philippines and found that there was a dispute in relation to all of them, and that those disputes concerned the interpretation and application of the LOSC. Even though China's claimed historic rights might be understood to exist independently of the LOSC, a dispute concerning the interaction of the LOSC "with another instrument or body of law, including the question of whether rights arising under another body of law were or were not preserved by the Convention, is unequivocally a dispute concerning the interpretation and application of the Convention" (para. 168).

Having found that there were no third parties indispensable to the proceedings, whose non-participation would deprive it of jurisdiction, the tribunal turned to the

preconditions for the exercise of its jurisdiction in Articles 281, 282, 283 and 286 of the LOSC. Article 281 provides that where the parties to a dispute concerning the LOSC "have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in [Part XV of the LOSC] apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure." The tribunal commented on the various elements of this provision. It assumed, without further explanation, that Article 281 referred to legally binding agreements. The requirement that no settlement has been reached by recourse to such an agreement "does not require the parties to pursue any agreed means of settlement indefinitely" (para. 220). As for the stipulation that an agreement exclude any further procedure for settling a dispute, the tribunal held that an agreement must "expressly" exclude any further such procedure. That contradicts the finding of the tribunal in the *Southern Bluefin Tuna* case, which found that an implied exclusion was sufficient. The tribunal in the present case characterised that view as "not in line with the intended meaning of Article 281" (para. 223).[12] The tribunal examined a number of instruments to determine whether they were agreements falling within Article 281. It found that the Declaration on the Conduct of Parties in the South China Sea (2002) "was not intended to be a legally binding agreement with respect to dispute resolution" (para. 217); that various bilateral statements of the parties were not legally binding; and that the provisions on dispute settlement in the Treaty of Amity and Co-operation in Southeast Asia (1976) were not legally binding, as they applied only where the parties to a particular dispute specifically agreed to use them for that dispute.

[12] Further on the question of express or implied exclusion, see N Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) 32 *IJMCL* 332-63, at pp. 335-40

Having made that finding, the tribunal then considered whether Article 282 might be applicable. This article provides that if the parties to a dispute concerning the LOSC "have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in [Part XV of the LOSC], unless the parties to the dispute otherwise agree." The tribunal considered whether any of the instruments that it had examined in relation to Article 281 were agreements within the meaning of Article 282. Not surprisingly, in the light of its discussion of Article 281, the tribunal found that none of them were, not least because none of them provided for submission to a procedure entailing a binding decision.

Next for consideration was Article 283, which requires the parties to a dispute, when it arises, to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means." China had argued in its position paper that there had been no exchange of views. The tribunal disagreed. It followed the *Chagos MPA* and *Arctic Sunrise* cases in holding that where a dispute arose with sufficient clarity that the parties were aware of the issues in respect of which they disagreed, Article 283 required them to engage in some exchange of views with regard to the means of settling the dispute, although not in relation to its substance. The tribunal examined the dealings between the parties and was "convinced that the Parties have unequivocally exchanged views regarding the possible means of settling the disputes between them . . . [but have] failed to reach agreement on the approach to resolving the disputes" (paras. 342-3). The tribunal therefore considered Article 283 to have been satisfied.

China's position paper also raised a question separate from Article 283, namely whether there was an obligation to engage in negotiations on the *substance* of a dispute before resorting to compulsory dispute settlement. The tribunal referred to Article 279, which provides that the parties to a dispute shall seek its resolution by the means indicated in Article 33 of the UN Charter (which include negotiations), and Article 286, which provides that any dispute relating to the LOSC may, "where no settlement has been reached by recourse to section 1" of Part XV (which includes Article 279), be referred to compulsory dispute settlement. The tribunal decided that it was "unnecessary to determine precisely the full scope of the obligation to seek a solution through recourse to section 1 of Part XV . . . This is because the Tribunal is satisfied that the Philippines did seek to negotiate with China concerning the disputes presented in these proceedings and that its obligations under the [LOSC] . . . have accordingly been satisfied" (para. 347). It did not matter that those negotiations did not address all of the matters in dispute with the same level of specificity as the Philippines' submissions to the tribunal.

Lastly, the tribunal turned to consider the exceptions to compulsory dispute settlement under Part XV of the LOSC set out in Articles 297 and 298. It decided that in respect of eight of the Philippines' 15 submissions, the possible application of those articles was interwoven with the merits and therefore did not possess an exclusively preliminary character. Accordingly, it would be deferred to the merits phase of the case.

Award on the merits

The tribunal delivered its award on the merits on 12 July 2016.[13] The online version of the award runs to nearly 500 pages. For reasons of space, only the baldest summary of its findings can be given here. The award includes extensive treatment of several important issues in the law of the sea never previously considered, or considered in depth, by international courts: the overview of the award that follows focuses on those aspects. The award groups the substantive issues discussed into four main categories: (1) China's nine-dash line and claim to historic rights in the South China Sea; (2) the status of various maritime features; (3) the legality of certain Chinese activities in the South China Sea; and (4) aggravation and extension of the disputes after the commencement of arbitration proceedings. In the course of addressing those issues, the tribunal also dealt with the outstanding questions of jurisdiction from its first award.

The tribunal began by considering China's claimed historic rights. Article 298 allows a State party to make a declaration excluding the application to it of the LOSC's compulsory dispute settlement procedures in relation to disputes concerning, *inter alia*, "historic bays or titles." China has made such a declaration. A crucial question, therefore, was whether China's claims in the South China Sea, in particular its nine-dash line, amounted to a claim to "historic title". The tribunal considered that term to refer to "claims of sovereignty over maritime areas derived from historical circumstances" (para. 226), which were "typically exercised either as a claim to internal waters or as a claim to the territorial sea" (para. 225). "Historic title" was to be contrasted with "historic rights", which "describe any rights that a State may

[13] *South China Sea case (Philippines v. China)*, Award, 12 July 2016, available at https://pcacases.com/web/sendAttach/2086; accessed 26 July 2017. For comment see, *inter alia*, S Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' (2017) 48(2) *ODIL* 181-207; S Talmon, 'The South China Sea Arbitration and the Finality of "Final" Awards' (2017) 8(2) *Journal of International Dispute Settlement* 388-401; and several posts on the EJIL*Talk!* and KG Jebsen Centre for the Law of the Sea (JCLOS) blogs.

possess that would not normally arise under the general rules of international law, absent particular historical circumstances" (para. 225). The tribunal then applied those conclusions to China's claims in the South China Sea. It noted that the nine-dash line, which is a U-shaped line extending from China's coast southwards so as to enclose a large part of the South China Sea and passes with 200 nm of the Philippines and other States bordering the Sea, first appeared on official Chinese maps in 1948. The tribunal noted various statements by China that speak (in English translation) of China's sovereignty over the islands in the South China Sea and "adjacent waters" and "sovereign rights and jurisdiction over the relevant waters" being "supported by abundant historical and legal evidence", and of China's "sovereignty and relevant rights" being "formed through the long course of history."[14] Those and similar statements, as well as China's conduct, did not appear to treat the area within the nine-dash line as part of China's internal waters or territorial sea. The tribunal therefore concluded that China's claim in the South China Sea was one of historic rights rather than historic title. Thus, Article 298 did not apply and, accordingly, the tribunal had jurisdiction to consider the validity of China's claimed historic rights. The tribunal reached that conclusion notwithstanding the fact that in 2011 China sent the UN a *note verbale* that referred to "waters of which China has *historic titles* including sovereign rights and jurisdiction" (emphasis added). In the tribunal's view that statement was "at odds with the vast majority of China's statements, however, and the Tribunal considers that it more likely represents an error in translation or an instance of imprecise drafting, rather than a claim by China to sovereignty over the entirety of the South China Sea" (para. 227). It is perhaps unfortunate that this aspect of the tribunal's jurisdiction hangs on English translations of the original Chinese that

[14] See the materials quoted in paras. 185 and 200 of the Award.

may or may not accurately reflect China's position. Had China participated in the proceedings, there might have been a different outcome.

As for the nature of China's claimed historic rights, the tribunal considered that they related to the exploitation of the living and non-living resources in the waters of the South China Sea within the nine-dash line. Insofar as those rights were claimed within the EEZs of other States, they were incompatible with the LOSC. From the text and negotiating history of the LOSC, it was clear that the LOSC did not intend to allow the preservation of historic rights of other States in the EEZ. In any case Chinese activities in the South China Sea before the entry into force of the LOSC were simply exercises of its high seas freedoms and therefore could not create historic rights.

Following its examination of historic rights and titles, the tribunal turned to consider the legal status of various maritime features in the South China Sea, most of which lie in the Spratly Islands group. In particular, the tribunal considered whether they were low-tide elevations within the meaning of Article 13 of the LOSC, in which case they generated no territorial sea or other maritime zones; whether they were "rocks which cannot sustain human habitation or economic life of their own" within the meaning of Article 121(3) of the LOSC, in which case they had a territorial sea but no EEZ or continental shelf; or whether they were islands other than Article 121(3)-type rocks, in which case they generated a full suite of maritime zones.

The tribunal found that Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef and Second Thomas Shoal were all low-tide elevations within the meaning of Article 13. That was not so, notwithstanding the fact that as a result of land reclamation activities by China, some of those features were now above water at high tide. According to the tribunal, it was the situation of the feature in its natural

state that was determinative of its status: "[human] modification cannot change . . . a low-tide elevation into an island" (para. 305). In addition, the tribunal followed the ICJ by holding that a low-tide elevation could not be appropriated, although a coastal State had sovereignty over low-tide elevations situated in its territorial sea.

Next the tribunal turned to consider whether any of the maritime features concerned were Article 121(3)-type rocks. In the past when international courts and tribunals have been faced with the question of whether a particular maritime feature was such a rock, they have avoided the issue and refrained from attempting to interpret the imprecise wording of Article 121(3). In the present case the tribunal confronts the issue head on and engages in a very lengthy and detailed interpretation of Article 121(3), running to nearly 30 pages, with its findings summarised as nine conclusions (paras. 540-8). For reasons of space, it is impossible to say more here about the tribunal's interpretation other than that it is the most authoritative interpretation of Article 121(3) that exists, although not uncontroversial.[15] Applying its interpretation to the maritime features at issue, the tribunal ruled that Scarborough Shoal, Gavan Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, Fiery Cross Reef and all other features in the Spratly Islands above water at high tide were all Article 121(3)-type rocks. While a number of those features had persons living on them, such habitation was dependent on outside resources and support. A number of the features had been modified to improve their habitability, including through land reclamation and the construction of infrastructure such as desalination plants. Those facts did not establish the capacity of those features in their natural condition to support a stable community of people, nor was there any historical evidence that those

[15] For a particularly critical view, see AG Oude Elferink, 'The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First', JCLOS blog, available at http://site.uit.no/jclos/category/islands/; accessed 15 August 2015.

features had supported such communities in the past. Thus, they did not fall outside Article 121(3).

China's position paper (referred to earlier) appeared to suggest that the Spratly Islands could be enclosed by a system of archipelagic or straight baselines. The tribunal rejected that possibility. Archipelagic baselines could only be drawn by an archipelagic State, and China was not an archipelagic State. Nor, if the Philippines had sovereignty over the Spratly Islands, would it be able to draw archipelagic baselines as they could not meet the requirement that the ratio of water to land within those baselines must not exceed 9 to 1. Nor could straight baselines under Article 7 of the LOSC be utilised because the circumstances in which they may be drawn, namely where coasts are deeply indented or fringed with islands, "do not include the situation of an offshore archipelago" (para. 575). While there was some contrary State practice, that was not sufficient to give rise to a new rule of customary international law. The tribunal thus emphatically rejected the assertion of some commentators that there is an emerging rule of customary international law that permits straight baselines to be drawn around the archipelagos of non-archipelagic States.

As noted above, the tribunal found that Mischief Reef and Second Thomas Shoal were low-tide elevations. As they did not lie within any of the maritime zones of the islands claimed by China but were situated within 200 nm of the Philippines' archipelagic baselines, they fell within the Philippines' EEZ. The tribunal accepted that China considered in good faith that it had rights in this area. Diplomatic communications asserting those rights did not breach the LOSC. The position was different, however, in relation to actions going beyond such communications: they breached the continental shelf and EEZ rights of the Philippines. Specifically, the tribunal found that China had breached the Philippines' rights under Article 77 of the

LOSC by its marine surveillance vessels ordering a ship carrying out seismic surveying for the Philippines to halt operations; breached Article 56 by adopting a moratorium on fishing in an area that included the Philippines' EEZ and applied not only to Chinese vessels; breached Article 58(3) to have due regard to the fisheries rights of the Philippines in its (the Philippines') EEZ by not exercising due diligence to prevent its fishermen from fishing there;[16] and breached Articles 60 and 80 by constructing installations and artificial islands at Mischief Reef without the authorization of the Philippines.

The tribunal also assessed the legality of a number of other acts by China. It found that China had "unlawfully prevented Filipino fishermen from engaging in traditional fishing" in the territorial sea around Scarborough Shoal (para. 814), a finding that did not depend on which State had sovereignty over the Shoal. Fishermen from the Philippines, as well as China and Vietnam, had acquired traditional fishing rights in that area. The legal basis for protecting those rights "stems from the notion of vested rights and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears" (para. 798). Such rights were not the historic rights of States, but private rights. The tribunal does not specify what provision of international law China had breached in not protecting those rights. The tribunal noted, but did not specifically endorse, the Philippines' argument that if it (the Philippines) had sovereignty over Scarborough Shoal, China would have violated the Philippines' territorial sea rights under the LOSC; and if China had sovereignty, it would have violated its obligation under

[16] On the obligation of due regard, the tribunal follows the *Chagos MPA* case (discussed above); on that of due diligence it follows the ITLOS 2015 advisory opinion on fisheries.

Article 2(3) of the LOSC to exercise its sovereignty subject to other rules of international law. The tribunal did, however, agree with the *Chagos MPA* case on the nature of the obligation under Article 2(3), and observed that "other rules of international law" included traditional fishing rights.

The tribunal turned next to consider the compatibility of various Chinese activities with the environmental provisions of the LOSC. It found that China had violated Articles 192 and 194(5) by failing to exercise due diligence to prevent its vessels from harvesting endangered species (including coral, turtles, sharks and giant clams) on a significant scale and from harvesting giant clams by using their propellers to break up coral, which was seriously destructive of the coral reef ecosystem. The present case is the first in which an international judicial body has considered the scope of Article 192, which provides simply that "States have the obligation to protect and preserve the marine environment." The tribunal rejected the view of some commentators that the article is purely hortatory. On the contrary, "Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. This 'general obligation' extends both to 'protection' of the marine environment from future damage and 'preservation' in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment . . . The content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements" (paras. 941-2). In relation to non-State actors, there is an obligation on States to exercise due diligence to prevent their nationals from

violating Article 192 and 194(5) (see paras. 944, 956 and 959). In addition to the violations already described, the tribunal found that China had also violated Articles 192 and 194(5), as well as Articles 123 (on cooperation in semi-enclosed seas), 194(1) (on harmonisation of pollution policies), 197 (on cooperation on environmental protection) and 206 (on the communication of environmental impact assessments), by causing "devastating and long-lasting damage to the marine environment" of seven coral reefs in the Spratly Islands by its land reclamation and construction activities (para. 983). In making that assessment, the tribunal was aided by the reports of three experts on coral reefs whom it had appointed

The final Chinese activity whose legality was assessed by the tribunal was alleged dangerous manoeuvring by Chinese law enforcement vessels on two occasions in 2012 near Scarborough Shoal, which had created a serious risk of collision with Philippine vessels. With the assistance of an expert on navigational safety whom it had appointed, the tribunal found that the Chinese vessels had contravened several of the provisions of the Convention on the International Regulations for Preventing Collisions at Sea, 1972. The Convention was one of the "generally accepted international regulations" referred to in Article 94(5) of the LOSC, to which States parties are required to "conform". Accordingly, China had breached Article 94.

That left one remaining issue: whether China's activities during the time that the arbitration was in progress had aggravated or extended the dispute. The tribunal found there was an obligation on the parties to a dispute not to take any steps that would aggravate or extend the dispute while dispute settlement proceedings were ongoing, an obligation that existed independently of any order made by a court (such as a provisional measure). That obligation "stems from the purpose of dispute

settlement" (para. 1169) and is "inherent in the central role of good faith in the international legal relations between States" (para. 1171). Moreover, the obligation found expression in the LOSC, in Articles 279 (which requires States to settle disputes by peaceful means), 300 (which requires States to fulfil their LOSC obligations in good faith) and 296 (which provides that decisions of LOSC dispute settlement bodies are final and binding). The tribunal found that during the period that the arbitration had been ongoing, China had violated those three provisions by constructing a large artificial island on Mischief Reef, by causing permanent and irreparable harm to the coral reef ecosystem of that and other reefs, and by permanently destroying evidence of the natural conditions of those reefs through its land reclamation and construction activities, thus having made it harder for the tribunal to determine their legal status and maritime entitlements. This is the first occasion on which a LOSC dispute settlement body has found a breach of Article 300. On the other hand, the tribunal found that it lacked the jurisdiction to rule on whether interactions between Chinese and Philippine military personnel at Second Thomas Shoal had aggravated the dispute because of China's declaration under Article 298 excluding military activities from compulsory dispute settlement.

Overall, the tribunal upheld, in whole or in part, all but one of the Philippines' 15 submissions. The exception was a request for the tribunal to rule that China should comply with its LOSC obligations in future. Since there was no dispute between the parties over this, the tribunal found it unnecessary to make a ruling. Not surprisingly, China announced that it would not accept the tribunal's award.[17]

[17] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, 12 July 2016, available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml; accessed 8 January 2017.

Arctic Sunrise Arbitration (Netherlands v. Russia)

This case concerns the seizure and detention by Russia of a Netherlands-registered ship, the *Arctic Sunrise*, and all those on board in September 2013, following a protest by members of Greenpeace against Russian oil activities in the Arctic that had included attempts to board a Russian oil platform in Russia's EEZ in the Pechora Sea. On 4 October 2013 the Netherlands instituted arbitral proceedings against Russia under Annex VII of the LOSC, claiming that Russia's seizure and detention of the *Arctic Sunrise* and those on board (whom the tribunal consistently refers to as the "Arctic 30") breached Articles 56, 58, 60 and 87 of the LOSC, as well as Articles 9 and 12 of the International Covenant on Civil and Political Rights (ICCPR). At the same time it applied to the ITLOS for an order of provisional measures, requesting the release the *Arctic Sunrise* and the Arctic 30. The ITLOS made an order to that effect on 22 October 2013. In December 2013 Russia released those members of the Arctic 30 who were not Russian nationals as part of a general amnesty. The *Arctic Sunrise* itself was allowed to leave the port of Murmansk on 1 August 2014.

In the meantime the arbitration proceedings continued. Like China in the *South China Sea* case, Russia declined to take part in the proceedings, including the nomination of an arbitrator. As a result, the arbitral tribunal was, with the exception of the Netherlands-nominated arbitrator, appointed by the President of the ITLOS and comprised Judge Thomas Mensah (president), Professor Alfred Soons (nominated by the Netherlands), Dr Alberto Székely, Mr Henry Burmester and Professor Janusz Symonides. Although not participating in the tribunal, Russia wrote to the tribunal asserting that it lacked jurisdiction because of Russia's declaration under Article 298

of the LOSC. On 26 November 2014 the tribunal delivered an award on that matter, rejecting Russia's assertion.[18]

On 14 August 2015 the tribunal delivered its award on the remaining issues of jurisdiction and on the merits.[19] On jurisdiction, the tribunal considered two principal matters – whether there had been the exchange of views between the parties regarding the means of settling their dispute required by Article 283, and the Netherlands' standing to bring the case. On the exchange of views, the tribunal found that the only communication between the parties concerning the means of settling the dispute was a *note verbale* sent by the Netherlands to Russia on 3 October 2013 in which it stated that "there seems to be merit in submitting this dispute to arbitration" under the LOSC and that it "is considering initiating such arbitration as soon as feasible." The tribunal considered that this sufficed as an exchange of views for the purpose of Article 283, even though, as it acknowledged, this was "brief, one-sided (in the sense that Russia did not make any counter-proposal or accept the proposal to arbitrate) and took place only a day before the commencement of arbitration. Such an exchange of views may not suffice in every case" (para. 153). It sufficed in the present case because of "the urgency, from the perspective of the Netherlands, of securing the release of the *Arctic Sunrise* and its crew" (para. 154). That appears almost to presuppose that Russia's seizure and detention of the ship were illegal.

[18] *In the Matter of the Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Jurisdiction, 26 November 2014, available at http://www.pcacases.com/web/sendAttach/1325; accessed 3 October 2016.

[19] *In the Matter of the Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits, 14 August 2015, available at http://www.pcacases.com/web/sendAttach/1438; accessed 3 October 2016. For comment see, *inter alia*, AG Oude Elferink, 'The Russian Federation and the *Arctic Sunrise* Case: Hot Pursuit and Other Issues under the LOSC' (2016) 92 *International Law Studies* 381-406; J Harrison, '*Arctic Sunrise* Arbitration (Netherlands v. Russia). Background to the Arbitral Proceedings' (2016) 31 *IJMCL* 145-57; and J Mossop, 'Protests against Oil Exploration at Sea: Lessons from the *Arctic Sunrise* Arbitration (2016) 31 *IJMCL* 60-87.

Regrettably, and unlike the tribunal in the *South China Sea* case, the tribunal made no reference to Article 286, which provides that unilateral resort to the binding means of settlement under section 2 of Part XV may only be made "where no settlement has been reached by recourse to section 1" of Part XV. It is difficult to see in the present case that any attempt had been made to settle the dispute under section 1 of Part XV, especially given the limited time between the dispute arising and its submission to arbitration. The tribunal did not, in fact, consider at what point in time the dispute arose. The earliest that the dispute could have arisen was 29 September 2013, when the Netherlands first protested the seizure of the *Arctic Sunrise*. More likely, it was on 3 October, when the Netherlands informed Russia that it disagreed with the latter's interpretation of the LOSC.[20] Thus, there was either one day, or at most five days, between the dispute arising and the initiation of arbitral proceedings. It is difficult to see how in either time frame there could have been a meaningful attempt to settle the dispute in accordance with section 1 of Part XV.

As regards the question of standing, the tribunal held that the Netherlands had standing, as the flag State of the *Arctic Sunrise*, to bring claims as regards alleged breaches of obligations of international law owed to it by Russia. Applying the "ship as a unit doctrine" referred to when discussing the *Norstar* case above, the tribunal held that the Netherlands also had standing to bring "claims in respect of alleged violations of its rights under the Convention which resulted in injury or damage to the ship, all persons and objects and persons on board, as well as the owner" (para. 172). "As [those] claims are direct claims brought by the Netherlands against Russia . . . the

[20] In his dissenting opinion in the provisional measures phase of the case, Judge Golitsyn considered that the dispute arose on 3 October: see *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation)* (Provisional Measures), Order of 22 November 2013, dissenting opinion of Judge Golitsyn para. 12, ITLOS Reports 2013, 230. The ITLOS itself did not offer a view as to when the dispute arose.

requirement for the exhaustion of local remedies is inapposite" (para. 173). It is questionable whether that analysis is correct. In Article 18 of its Draft Articles on Diplomatic Protection the International Law Commission recognises the right of a flag State to seek redress under the ship as a unit doctrine.[21] In its commentary on Article 18, it states that there is "a close resemblance between this type of protection and diplomatic protection", even if the two are not the same.[22] Elsewhere in its Draft Articles, the Commission makes a distinction between "direct injuries" to a State and "indirect injuries" to a State. The latter situation is where the State is injured "through its national."[23] Given the "close resemblance" between the right of diplomatic protection and the right to exercise protection in respect of a ship and those on board, it would seem that an injury to a privately-owned ship and those on board is an indirect injury to the flag State, although admittedly the Commission does not actually say so. If that is correct, then, in accordance with Article 14(3), exhaustion of local remedies is required unless a State is claiming for both direct and indirect injuries and the former is the preponderant claim. This approach was largely adopted by the decision of the ITLOS in the *Virginia G* case.[24] If this analysis is correct, the tribunal should have characterised the injury to the *Arctic Sunrise* and the Arctic 30 as an indirect injury to the Netherlands, and then considered which of its claims was preponderant.

The tribunal dealt with the alleged breaches by Russia of the ICCPR under the heading of "Applicable Law." It noted that the ICCPR "has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime" (para. 197).

[21] Draft Articles on Diplomatic Protection, *Yearbook of the International Law Commission 2006*, Vol. II, Part 2, p. 23.
[22] Commentary on Draft Article 18, para. 1.
[23] Commentary on Draft Article 14, para. 9.
[24] Para. 157.

Instead, the tribunal could, if necessary, "have regard to general international law in relation to human rights in order to determine whether law enforcement action such as [that at issue in the case] was reasonable and proportionate.

Turning to the merits, the tribunal identified four issues: (1) Russia's establishment of a safety zone around the oil platform that members of the Arctic 30 had attempted to board; (2) the lawfulness of the measures taken by Russia against the *Arctic Sunrise* and the Arctic 30; (3) Russia's compliance with the ITLOS order of provisional measures; and (4) Russia's failure to pay deposits towards the cost of the arbitration. As regards the first issue, the Netherlands had alleged that Russia had established a three nm safety zone around that platform and that this breached Article 60 of the LOSC. The tribunal disagreed. Although ships were recommended not to enter the three-mile zone without the permission of the platform operator, that did not make the zone a safety zones within the meaning of Article 60. In accordance with Russian Law (and the LOSC), Russia had in fact established a safety zone of only 500 metres in breadth. There was therefore no breach of Article 60.

The next issue was that of the lawfulness of the seizure of the *Arctic Sunrise* and the Arctic 30. The tribunal began by observing that "[p]rotest at sea is an internationally lawful use of the sea related to the freedom of navigation," as it is "necessarily exercised in conjunction with freedom of navigation" (para. 227). The right to protest derived from the freedoms of expression and assembly, both of which were recognised in several human rights treaties to which the Netherlands and Russia were parties. The right to protest at sea was, however, subject to certain limitations, in particular Article 88 of the LOSC, which provides that the high seas shall be reserved for peaceful purposes, and Article 58(2), which requires States exercising their right

of navigation in another State's EEZ to have due regard to the coastal State's rights and duties and to comply with its laws adopted in conformity with the LOSC.

The tribunal then noted that under Article 92(1) of the LOSC, which applied to the EEZ by virtue of Article 58(2), a flag State had exclusive jurisdiction over its ships navigating in the EEZ of another State, subject to certain exceptions. With Russia absent from the proceedings, the tribunal had to examine the possible exceptions that might have been relied on by Russia, had it participated in the case, to justify its interference with the Netherlands's exclusive flag State jurisdiction by boarding, seizing and detaining the *Arctic Sunrise*.

A first possible justification for Russia's actions was the right of visit on suspicion of piracy, provided by Article 110 of the LOSC. However, this was not applicable because the LOSC required a suspected pirate ship to have taken action in respect of another ship. Here the *Arctic Sunrise* had directed its acts against an oil platform, not another ship.

A second possible justification was the right of hot pursuit, following violation of Russian laws applicable to the oil platform and its safety zone. Absent hot pursuit, the LOSC did not justify seizure for such violations outside the safety zone. The tribunal examined the requirements of hot pursuit set out in Article 111 of the LOSC. It found that the requirement that there be a violation of the coastal State's laws was satisfied as small boats from the *Arctic Sunrise* had entered the safety zone around the platform without permission, contrary to Russian law. The tribunal also found that the necessary auditory signal to stop had been given. Even if that signal was given by VHF radio, it was an "auditory signal" for the purposes of Article 111: that provision had to be interpreted in the light of its object and purpose, "having regard to the modern use of technology" (para. 259). As regards the requirement that hot pursuit

must be commenced "when the foreign ship or, in the application of the doctrine of constructive presence incorporated in Article 111(4), its boats or other craft working as a team and using the pursued ship as a mother ship, are within the relevant area" (para. 253), that requirement should be determined not "with the benefit of hindsight, but rather looked at from the perspective of the pursuing ship" (para. 267). On that basis, the requirement was satisfied. However, the requirement that pursuit be continuous, i.e. not interrupted between the first signal to stop being given and a ship being boarded, was not satisfied in this case. Thus, Russia could not justify its seizure of the *Arctic Sunrise* on the basis of hot pursuit.

A possible alternative justification was as a response to the commission of a terrorist offence in the safety zone. While a coastal State was entitled to seize a ship within the safety zone for such an offence, there was no right to do so in the EEZ "where such action would not otherwise be authorised by the [Law of the Sea] Convention" (para. 278). The only example that the tribunal gives of such possible authorisation is hot pursuit. Later in its award, the tribunal considered the preventive powers of the coastal State in relation to terrorist offences in its EEZ. It observed that the coastal State would be able to take preventive action against a terrorist attack on an installation because that would involve a direct interference with the exercise of a coastal State's sovereign rights to exploit the non-living resources of its seabed. However, it was not necessary for the tribunal to "determine the extent of any power to take such preventive action" as "there was no reasonable basis for Russia to suspect that the *Arctic Sunrise* was engaged or likely to engage in terrorist acts" (para. 314).

Next the tribunal turned to the right of a coastal State to enforce its laws regarding non-living resources in the EEZ as a possible justification for Russia's actions. The tribunal noted that the LOSC gave the coastal State no explicit powers in

that regard. However, the provisions in the LOSC on a coastal State's sovereign rights over non-living resources largely derived from the 1958 Convention on the Continental Shelf. In its commentary on the draft articles that formed the basis of that Convention, the International Law Commission had observed that a coastal State's sovereign rights included jurisdiction in connection with the prevention and punishment of violations of its laws. That led the tribunal to observe that while it "does not find it necessary to reach a view on the extent of the coastal State's right to enforce its laws in relation to the non-living resources in the EEZ, it is clear that such a right exists" (para. 284). However, in the present case there was no evidence that the *Arctic Sunrise* had breached Russia's laws other than in the safety zone. Elsewhere in its award the tribunal concludes that a coastal State also has the right to take "appropriate" measures to prevent interference with its sovereign rights, provided such measures "fulfil the tests of reasonableness, necessity and proportionality" (para. 326). Such measures could include those necessary to prevent violations of the coastal State's laws, dangerous situations, "negative environmental consequences", and delay or interruption to essential operations (para. 327). "At the same time the coastal State should tolerate some level of nuisance through civilian protest as long as it does not amount to an 'interference with the exercise of its sovereign rights'. Due regard must be given to rights of other States, including the right to allow vessels flying their flag to protest" (para. 328). In the present case the *Arctic Sunrise* was, at the time of its seizure, no longer engaged in actions that could potentially interfere with the exercise by Russia of its sovereign rights, nor did the Russian authorities give that as their reason for the seizure. Had they done so, their actions would not have been justified, as they would have infringed the Netherlands' freedom of navigation contrary to Article 78(2) of the LOSC. The award is not overly clear on how the preventive

powers of a coastal State in relation to its rights over the non-living resources of the seabed are to be balanced against the right of other States to protest, in particular as regards the dividing line between acts of "nuisance" by a ship (which are lawful) and acts amounting to "interference" (which are not).

A further possible justification for Russia's seizure and detention of the *Arctic Sunrise* could have been the exercise of enforcement jurisdiction in relation to the marine environment. The tribunal examines various provisions of the LOSC in this regard. Article 220 was not relevant as there was no evidence that the *Arctic Sunrise* had violated applicable international rules and standards relating to vessel-source pollution. Nor were the conditions for a coastal State to take preventive action against maritime casualties under Article 221 casualties satisfied. While Russia had adopted laws relating to pollution in ice-covered areas under Article 234 of the LOSC, those laws did not apply in the area where the *Arctic Sunrise* was seized.

The final possible justification for Russia's seizure of the *Arctic Sunrise* might have been because of its alleged dangerous manoeuvring. However, seizure for that reason would not have been justified because under Article 97 of the LOSC, which the tribunal assumes (reasonably, it would seem) applies in the EEZ by virtue of Article 58(2), arrest or detention of a ship following an "incident of navigation" is reserved to the flag State.

Thus, the tribunal concluded that none of the possible grounds discussed above could justify Russia's boarding, seizure and detention of the *Arctic Sunrise*. Russia had therefore breached its obligations under Article 56, 58, 87 and 92 of the LOSC that it owed to the Netherlands "as a flag State exercising exclusive jurisdiction over the *Arctic Sunrise* in Russia's EEZ" (para. 333).

The tribunal then turned to deal with the Netherlands' claim that Russia had not complied with the provisional measures order made by the ITLOS. It found that Russia had failed to comply by not allowing the Arctic 30 to leave Russia sufficiently promptly following their release from custody and by not releasing the *Arctic Sunrise* until six months after the ITLOS order. Russia also failed to submit the report required by that order.

The final issue was Russia's failure to pay deposits requested by the tribunal to cover its costs. While there was no express obligation in the LOSC, "[a] requirement to make such deposits must be regarded as inherent in the obligations under Part XV and Annex VII" of the LOSC (para. 367). The tribunal therefore ordered Russia to reimburse the Netherlands for having paid Russia's share of the deposits when that had not been forthcoming.

Having found various breaches of the LOSC, the tribunal was left with the question of reparation. It decided that it was unnecessary to accede to the Netherlands' request that it order Russia to issue a formal apology for its actions or provide assurances of non-repetition: a declaration finding various breaches of the LOSC by Russia was sufficient. The tribunal did, however, order Russia to return various objects belonging to the *Arctic Sunrise* and some personal belongings of the Arctic 30 that Russia had retained. The tribunal also decided that the Netherlands was entitled to compensation for damage to the *Arctic Sunrise*, the wrongful arrest and detention of the Arctic 30, its payment of Russia's share of the deposits, and its costs in issuing a bank guarantee further to the provisional measures of the ITLOS. The tribunal reserved the amount of such compensation for further decision. No such decision had been given as at the end of 2016.

The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)

This case concerns the seizure, detention, and penalisation of the *Duzgit Integrity*, a Maltese-registered tanker, and its master by São Tomé and Príncipe (STP), following the tanker's involvement in an allegedly unauthorised ship-to-ship (STS) transfer of oil that took place in STP's archipelagic waters in March 2013. Following unsuccessful attempts to resolve a dispute over the legality of STP's actions, Malta instituted arbitral proceedings against STP on 22 October 2013, alleging that in seizing, detaining and penalising the *Duzgit Integrity* STP had violated Articles 2(3), 25(1), 49(3) and 300 of the LOSC, and that in ordering a subsequent transfer of oil from the ship, it had violated Articles 192, 194, 225 and 300. The tribunal appointed to hear the case comprised three arbitrators rather than the five stipulated by Annex VII, presumably for reasons of cost. The three were Professor Alfred Soons (president), Professor Tullio Treves and Judge James Kateka. The tribunal delivered its award on 5 September 2016.[25]

STP raised objections of jurisdiction and admissibility to the proceedings. Its jurisdictional objection was that there was no dispute concerning the interpretation and application of the LOSC. The tribunal readily disposed of that objection, noting that the dispute was about the confines of STP's enforcement jurisdiction under the LOSC.

STP's objections of admissibility were more substantial. Its first was that there had been no exhaustion of local remedies, as required by Article 295 of the LOSC. As already seen, this issue also arose in the *Norstar* and *Arctic Sunrise* cases. In the

[25] *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Award, 5 September 2016, available at http://www.pcacases.com/web/sendAttach/1915; accessed 3 October 2016.

present case the tribunal's approach is much more satisfactory. While Malta had characterised its claim as one of diplomatic protection, it had also invoked its rights as a flag State under the LOSC. For Malta to have standing in the latter situation, the tribunal needed only to be satisfied that obligations were owed by STP to Malta under the LOSC. That was the case here. Pursuant to Articles 49(3) and 300, STP had to ensure that any law enforcement measures taken by it against a vessel under Malta's flag in STP's archipelagic waters complied with the LOSC. As for Malta's right to bring a claim for possible indirect injury, the tribunal accepted the ship as a unit doctrine. The question then was which of Malta's claims was preponderant, that regarding its direct rights or that of its indirect rights. If the latter, the exhaustion of local remedies would be required. While it was often difficult to decide which claim was preponderant in mixed claims, the position in this case was straightforward as the owner of the *Duzgit Integrity* had concluded a settlement agreement with STP waiving any claims against it. Thus, Malta's claim for direct injuries was preponderant. STP's other objections of admissibility were dismissed more rapidly by the tribunal. It rejected arguments that Malta had not specified the legal bases of its claims sufficiently, that the settlement agreement between STP and DS Tankers precluded Malta from bringing the case, and that the requirements of Article 283 had not been satisfied.

Before addressing the merits, the tribunal noted that Malta had argued that STP's conduct relating to the seizure and detention of the *Duzgit Integrity* had not complied with basic human rights norms. The tribunal followed the award in the *Arctic Sunrise* case closely in its view of the relevance of such norms. It also observed that "the exercise of [law] enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the [LOS] Convention is also

governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the principles of necessity and proportionality" (para. 209).

The tribunal then turned to address the merits. There were two distinct claims by Malta to be considered. The first was that in seizing and detaining the *Duzgit Integrity* and penalising the vessel and its master, STP had violated various provisions of the LOSC. The tribunal began with Article 49(3), which provides that an archipelagic State's sovereignty over its archipelagic waters "is exercised subject to this Part", i.e. Part IV, headed "Archipelagic States". The tribunal found that Malta had failed to establish that the *Duzgit Integrity* had the authorization required under STP's law for a STS transfer of oil and which STP was entitled to require by virtue of its sovereignty over archipelagic waters. The tribunal therefore ruled that STP was justified in seizing the *Duzgit Integrity* in order to ensure compliance with its laws. STP was likewise entitled to detain the *Duzgit Integrity* and fine its master: that fine was reasonable and proportionate. However, the other penalties imposed by STP (which included prolonged detention of the vessel and its master, further fines and confiscation of the cargo), when taken together, were unreasonable and disproportionate in relation to the offence committed by the *Duzgit Integrity*. The tribunal therefore held, Judge Kateka dissenting, that STP had violated Article 49(3) of the LOSC. Judge Kateka disagreed. In his view the tribunal had been wrong to treat the various penalties imposed cumulatively, rather than assessing the reasonableness of each penalty individually. Furthermore, the tribunal had paid insufficient attention to the particular circumstances of the case, which included the prevalence of illegal STS transfers and bunkering in West African waters, which fuelled IUU fishing, as well as STP's lack of at-sea enforcement capability.

The tribunal dealt swiftly with the other provisions of the LOSC invoked by Malta in its first claim. It ruled that it was unnecessary to determine whether there had been a violation of Article 300. Article 2(3), which applies to the territorial sea, was not relevant because at the time when the *Duzgit Integrity* was seized, it was in STP's archipelagic waters. Although Article 25(1) is located in Part II on the territorial sea, it also applies to archipelagic waters by virtue of Article 52(1). Nevertheless, it was not relevant because it dealt with ships in innocent passage, whereas at the time of its seizure the *Duzgit Integrity*, being engaged in a STS transfer of oil, was not in passage.

The tribunal also summarily dismissed Malta's second claim, that in ordering a transfer of oil from the *Duzgit Integrity* to another ship, STP had violated Articles 192, 194, 225 and 300 of the LOSC. Based on the evidence before it, the tribunal was not persuaded that STP had exposed the marine environment to an unreasonable risk in breach of Article 225 (and presumably also of Articles 192 and 194, although the tribunal does not mention them explicitly).

Overall, therefore, the tribunal found that the only provision of the LOSC that STP had violated was Article 49(3). As regards reparation for this breach, the tribunal decided (Judge Kateka dissenting) that "Malta is entitled to proceed in a further phase of these proceedings to claim damages in respect of [various] heads of claim to the extent that it can establish causation between the loss and São Tomé's unlawful conduct" (para. 333). As at the end of 2016, this further phase of proceedings had not taken place.

The "Enrica Lexie" Incident Arbitration (Italy v. India)

On 26 June 2015 Italy initiated arbitration proceedings under Annex VII against India in relation to an incident that occurred in February 2012.[26] The parties differ sharply in their accounts of that incident. According to Italy, the *Enrica Lexie*, an oil tanker flying its flag, was 20.5 nm off the coast of southern India (i.e. in India's EEZ) en route from Sri Lanka to Djibouti when an unidentified craft was observed heading rapidly towards it. Two Italian marines on board thought that it was a pirate attack and fired warning shots. Eventually the craft turned away and headed towards the open sea. According to India, two fishermen had been shot and killed on an Indian fishing boat and the *Enrica Lexie* was considered responsible. Indian authorities instructed the *Enrica Lexie* to sail to the Indian port of Kochi where it was boarded and the two marines arrested. In its statement of claim, Italy argued that India had violated Articles 2(3), 27, 33, 56, 58, 87, 89, 92, 94, 97, 100 and 300 of the LOSC by exercising jurisdiction over the *Enrica Lexie* and the two marines and by failing to cooperate in the repression of piracy.

Italy appointed Professor Francesco Francioni as an arbitrator and India appointed Judge Chandrasekhara Rao (a member of the ITLOS). The parties were unable to agree on the appointment of the remaining three arbitrators. In accordance with Article 3(e) of Annex VII of the LOSC, the President of the ITLOS appointed as arbitrators Judge Paik (a member of the ITLOS), Judge Robinson (a member of the ICJ) and Judge Golitsyn (the incoming president of the ITLOS), with Judge Golitsyn to serve as president of the arbitral tribunal.[27]

[26] Italy's notification and statement of claim are available at http://www.pcacases.com/pcadocs/Notification/Italys%20Notification%20(Redacted).pdf; accessed 10 June 2016.
[27] PCA Press Release of 6 November 2015, available at http://www.pcacases.com/web/sendAttach/1515; accessed 10 June 2016.

On 21 July 2015 Italy requested the ITLOS to make an order of provisional measures under Article 290(5) of the LOSC requiring India to refrain from taking any judicial or administrative measures against the two marines and to lift all restrictions on their liberty so as to allow one of the marines (Sergeant Girone), who was detained in India, to return to Italy and the other marine, who had returned to Italy on grounds of ill health, to remain there during the arbitral proceedings. The ITLOS made an order of provisional on 24 August 2015.[28] It decided not to prescribe the measures requested by Italy, but instead prescribed a measure of its own, ordering Italy and India to suspend all court proceedings and refrain from initiating any new ones that might aggravate the dispute or that might jeopardize the carrying out of any decision that the arbitral tribunal might render.

Notwithstanding that order, Italy made an application to the arbitral tribunal for a further provisional measure on 11 December 2015, requesting it to order India to relax the bail conditions of Girone in order to enable him to return to Italy pending the decision of the tribunal on the merits of the case. The tribunal made an order in response to this request on 29 April 2016.[29] Article 290(1) requires two conditions to be satisfied before the court or tribunal hearing a case may make an order of provisional measures: first, it must be satisfied that *prima facie* it has jurisdiction, and, second, that provisional measures are appropriate to preserve the respective rights of

[28] *The "Enrica Lexie" Incident (Italy v. India), Request for the Prescription of Provisional Measures*, Order of 24 August 2015, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf; accessed 14 October 2016. The Order is discussed in the previous Survey: see R Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2015 – Part I' (2016) 31 *IJMCL* 555-82, at pp. 576-80.

[29] *The "Enrica Lexie" Incident (Italy v. India)*, Request for Provisional Measures, Order of 29 April 2016, available at http://www.pcacases.com/web/sendAttach/1707; accessed 3 October 2016. For early comment, see N Bankes, 'The Annex VII tribunal in the "Enrica Lexie" incident makes a new order of provisional measures', JCLOS blog, available at http://site.uit.no/jclos/2016/05/12/the-annex-vii-tribunal-in-the-enrica-lexie-incident-makes-new-provisional-measures-order/; accessed 3 October 2016.

the parties. The tribunal dealt with the first condition very briefly. It considered that there was a dispute relating to the LOSC as Italy had alleged breaches of a variety of its provisions and India had contested that. That was sufficient for the tribunal to conclude that *prima facie* it had jurisdiction. This brief treatment of *prima facie* jurisdiction may be because in its order the ITLOS (of which three of the arbitrators are members) had already concluded that *prima facie* the tribunal had jurisdiction and because India had not contested that finding in the present case.

Before addressing the second condition necessary for the prescription of provisional measures, the tribunal dealt with issues of admissibility. It found that there had been an exchange of views between the parties, as required by Article 283 of the LOSC. The next issue was whether Italy's request was sufficiently similar to the order that it had sought from, but not been granted by, the ITLOS so as to render it inadmissible. In the tribunal's view, Italy's present request was different. Its request to the ITLOS had sought to remove Girone "entirely from the reach of India's legal system", whereas the present request recognised that should Girone be allowed to return to Italy, "he will remain under the jurisdiction of the courts of India" (para. 35). Furthermore, Italy was not seeking a revision of the provisional measure made by the ITLOS; thus the conditions governing such revision, set out in Article 290(2) of the LOSC, did not apply. Italy's request for provisional measures was therefore admissible.

A further matter dealt with by the tribunal before addressing the question of whether there was a need to preserve the respective rights of the parties was the question of urgency. Although Article 290(1) makes no reference to this question, the tribunal, relying on the recent jurisprudence of the ITLOS (in particular the *Ghana/Côte d'Ivoire* case) and the ICJ, considered that "a showing or urgency in

some form is inherent in provisional measures proceedings. Generally, urgency is linked to the criterion of the preservation of the respective rights of the parties to the dispute in order to avert a real and imminent risk that irreparable prejudice may be caused to the rights at issue" (para. 89). In the present case, such a link "is particularly pronounced" (ibid.).

That then led on to consideration of the respective rights of the parties. The tribunal noted that although Girone was living at the residence of the Italian ambassador in India and thus able to receive visits from members of his family, the sporadic contact meant that his children were suffering. That raised "considerations of humanity" that the tribunal should seek to "give effect to", while preserving the respective rights of the parties (para. 106). The tribunal therefore "considers that the rights of both Parties could be appropriately preserved by alleviating Sergeant Girone's bail conditions so as to allow him to spend the time of his bail in Italy pending a final decision in this case" (para. 107). One might conclude from that observation that the tribunal would order India to allow Girone to return to Italy. In fact, the tribunal did not do so. Instead, it put the ball back in the parties' court, unanimously ordering them to cooperate "to achieve a relaxation of the bail conditions of Sergeant Girone so as to give effect to the concept of considerations of humanity", in order that Girone might return to Italy during the arbitration proceedings (para. 132(a)). If that happened, Italy would be under an obligation to return Girone should the tribunal find that India had jurisdiction over him. This rather unsatisfactory outcome is compounded by the fact that the tribunal never clearly identified the respective rights of the parties that it was supposed to be preserving, nor, seemingly, did it take much account to the gravity of the offence (murder) with which Girone had been charged.

Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait case (Ukraine v. the Russian Federation)

On 14 September 2016 Ukraine initiated arbitration proceeding against Russia in accordance with Annex VII of the LOSC by serving it with a notification and statement of claim. Ukraine alleges that Russia has violated its rights as the coastal State in the waters off Crimea.[30] Ukraine nominated Professor Vaughan Lowe as its arbitrator, Russia Judge Golitsyn, President of the ITLOS. The parties were unable to agree on the remaining three arbitrators. Thus, in accordance with Article 3(e) of Annex VII, their appointment was to be made by the President of the ITLOS. However, President Golitsyn was a national of one of the parties and so it fell to the Vice-President, Judge Bouguetaia, to appoint the remaining arbitrators. He nominated himself and his fellow ITLOS judges, Judges Paik and Gómez-Robledo, with Judge Paik being appointed president of the arbitral tribunal.

From the limited information that appears to be available in the public domain, at least in English, it is not possible to tell how far this case is in reality a dispute about sovereignty (Russia's annexation of Crimea) presented as a dispute relating to the interpretation and application of the LOSC, and thus how far it raises issues similar to those in the *Chagos MPA* case.

[30] Statement of the Ministry of Affairs of Ukraine of 15 September 2016, available at http://mfa.gov.ua/en/press-center/comments/6313-statement-of-the-ministry-of-foreign-affairs-of-ukraine-on-the-initiation-of-arbitration-against-the-russian-federation-under-the-united-nations-convention-on-the-law-of-the-sea; accessed 28 June 2017. Ukraine's notification and statement of claim do not appear to be publicly available.

Conciliation in accordance with Annex V during 2015 and 2016

In Annex V the LOSC sets out a conciliation procedure available to its parties. Generally, in accordance with Article 284 and section 1 of Annex V, this procedure may be utilised only where both/all the parties to a dispute agree. However, the LOSC provides for three situations where one of the parties to a dispute may unilaterally refer a dispute for "compulsory conciliation", although any recommendations made by a conciliation commission are not legally binding. The first two situations relate to disputes concerning a coastal State's rights relating to marine scientific research and fisheries in the EEZ, where under Article 297(2) and (3) of the LOSC a coastal State is not obliged to accept submission of such disputes to binding judicial settlement. The third situation relates to disputes relating to maritime boundaries and historic bays or titles which one of the parties has excepted from compulsory judicial settlement by making a declaration under Article 298(1)(a). Before 2016 the conciliation procedure of Annex V had never been invoked, in either its consensual or compulsory form. In April 2016 it was invoked for the first time when Timor-Leste unilaterally referred a dispute with Australia over their maritime boundary to conciliation in accordance with Article 298(1)(a) and section 2 of Annex V, Australia having made a declaration under Article 298(1)(a) in 2002. To appreciate the significance of Timor-Leste's action, it is necessary to have some knowledge of the extensive background to the dispute.

In 2002, on the same day that it became independent, Timor-Leste concluded the Timor Sea Treaty with Australia, establishing a joint petroleum development area

pending delimitation of the maritime boundary between the two States.[31] In 2006 Australia and Timor-Leste signed a further treaty, the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty),[32] which, *inter alia*, precluded the parties from seeking delimitation of their maritime boundary by a court or tribunal for the lifetime of the Treaty, envisaged as 50 years. The validity of the CMATS Treaty was subsequently challenged by Timor-Leste in arbitral proceedings instituted against Australia in 2013.[33]

In its Notification Instituting Conciliation, Timor-Leste appointed Judge Koroma (formerly of the ICJ) and Judge Wolfrum (of the ITLOS) as conciliators. In its Response Australia appointed Dr. Rosalie Balkin and Professor Donald McRae as conciliators. In turn the four conciliators appointed Ambassador Peter Taksøe-Jensen to serve as Chairman of the Conciliation Commission.

At the outset of the conciliation proceedings, Australia raised six objections to the competence of the Conciliation Commission: (1) Article 4 of the CMATS Treaty precluded either Party from initiating compulsory conciliation under Article 298; (2) the CMATS Treaty was a provisional arrangement within the meaning of Articles 74(3) and 83(3) of the LOSC, with the consequence that the moratorium on determining a maritime boundary in the Treaty was not displaced by the LOSC; (3) in 2003, the Parties had agreed by an exchange of letters that the mechanism for resolving their maritime boundary dispute was negotiation and that was confirmed by the CMATS Treaty, which stipulated that such negotiations were not to begin until some future date. The CMATS Treaty was thus an agreement within the meaning of

[31] Timor Sea Treaty between the Government of East Timor and the Government of Australia (Dili, 20 May 2002, in force 2 April 2003), 2258 UNTS 3.
[32] Treaty on Certain Maritime Arrangements in the Timor Sea (Sydney, 12 January 2006, in force 27 June 2006) 2438 UNTS 358.
[33] For details of the arbitration, see https://pca-cpa.org/en/cases/37/; accessed 29 July 2017.

Article 281 of the LOSC; (4) the parties' dispute over maritime boundaries arose in 2002, prior to the entry into force of the LOSC as between the parties (Timor-Leste did not become a party to the LOSC until 2013) and thus the first condition of Article 298 – that the dispute arise "subsequent to the entry into force of this Convention" – was not met; (5) there had been no negotiations on the maritime boundary, which Article 298 contemplated would be necessary before a State could resort to conciliation; and (6) the dispute was inadmissible because Timor-Leste was seeking to seize the Conciliation Commission in breach of its treaty commitments to Australia. Timor-Leste contested all of those objections. Australia requested the Commission to deal with its objections as a preliminary matter. Following written submissions by each party and a hearing, the Commission issued a unanimous decision on its competence on 19 September 2016.[34]

Unlike Australia, the Commission's point of departure in determining its competence was the LOSC, not the CMATS Treaty. The latter was relevant to the question of the Commission's competence, but only within the framework and from the perspective of the LOSC. Within that framework and perspective, an initial (and important) point was that a State must first meet the requirements of Section 1 of Part XV to enable access not only to the binding procedures of Section 2 but also to the compulsory conciliation procedures provided in Section 3. That meant that Article 281 (the provisions of which were outlined when discussing the *South China Sea* case above) was potentially applicable. The Commission noted furthermore that Article

[34] *In the Matter of a Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Decision on Australia's Objection to Competence, 19 September 2016, available at https://pcacases.com/web/sendAttach/1921; accessed 29 July 2017. For early comment see N Bankes, 'Compulsory Conciliation under the Law of the Sea Convention: Rich Pickings in the Decision on Objections to Competence of the Timor-Leste/Australia Conciliation Commission', JCLOS blog, posted on 25 October 2016, available at http://site.uit.no/jclos/2016/10/25/compulsory-conciliation-under-the-law-of-the-sea-convention-rich-pickings-in-the-decision-on-objections-to-competence-of-the-timor-lesteaustralia-conciliation-commission/#comment-1274; accessed 9 August 2017.

281 provides that "the procedures of this Part" (i.e. Part XV, and including therefore compulsory conciliation) apply only where there is no agreement of the kind referred to in that Article. The Commission followed the *South China Sea* case, but with more supporting legal argument, in holding that Article 281 applied only to legally binding agreements. That meant that the 2003 Exchange of Letters was not relevant. The CMATS Treaty, on the other hand, was undoubtedly a legally binding agreement. However, it was not an agreement within the meaning of Article 281 because it was not an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice." Nowhere in the CMATS Treaty was there any procedure intended to provide for the settlement of maritime boundaries. On the contrary, CMATS foreclosed all possible avenues for the resolution of disputes relating to maritime boundaries for the period of the Treaty.

The Commission then turned to Article 298 and the two conditions set out in paragraph (1)(a)(i) that must be fulfilled before a conciliation commission may operate. The first condition is that a dispute concerning the interpretation or application of Articles 15, 74 or 83 has arisen "subsequent to the entry into force of the Convention." On the basis of the use of the quoted phrase elsewhere in the LOSC and the negotiating history of Article 298, the Commission held that the phrase referred to the general entry into force of the LOSC in 1994, not the entry into force as between Australia and Timor-Leste in 2013 (as argued by Australia). The earliest that the dispute between the parties could possibly have arisen was when Timor-Leste became independent in 2002. Thus, the first condition was satisfied. The second condition is that no agreement within a reasonable period of time has been reached in negotiations between the parties. The Commission found that that condition had also been fulfilled. Article 298 did not expressly require prior negotiations between the

parties to the dispute actually to have taken place. Such a requirement would effectively grant a party the right to veto any recourse to compulsory conciliation by refusing to negotiate. In any case negotiations had taken place at various times. While the CMATS Treaty was an agreement resulting from those negotiations, it was not an agreement within the meaning of Article 298(1)(a)(i) as it did not purport to resolve the dispute concerning the interpretation or application of Articles 74 and 83 of the LOSC relating to maritime boundary delimitation. It was at most a provisional arrangement of the kind contemplated under Articles 74(3) and 83(3) of the LOSC.

Having found that the conditions of Article 298 were satisfied, the Commission turned to consider Australia's objection of "admissibility" that the Commission should decline to exercise its competence because Timor-Leste had commenced the conciliation proceedings in breach of the CMATS Treaty. The Commission rejected that argument. The alleged breach of the Treaty was not a matter that properly fell to the Commission to consider or decide. As mentioned above, Timor-Leste was contesting the validity of the Treaty before the tribunal in the *Timor Sea Treaty Arbitration* and the parties had agreed that the Conciliation Commission was not competent to deal with that matter. The Commission could not address one aspect of the CMATS Treaty (its alleged breach) without also addressing Timor-Leste's defence regarding the validity of the Treaty.

During the hearing on the Commission's competence, Timor-Leste had requested the Commission not only to assist the parties to reach an agreement on the delimitation of permanent maritime boundaries, but also to assist the parties to agree on appropriate transitional arrangements in the disputed maritime area and on how to dissolve the joint institutions and arrangements set up by the Timor Sea and CMATS Treaties. Australia contested the latter role for the Commission. That objection was,

however, dismissed by the Commission. Articles 74 and 83 dealt not only with the actual delimitation of maritime boundaries but also with the question of the transitional period pending a final delimitation and the provisional arrangements of a practical nature that States were called on to apply pending delimitation. Those matters therefore fell within the scope of a conciliation commission under Article 298 and the Commission was accordingly competent to accede to Timor-Leste's request that it consider transitional arrangements and the arrangements that might follow the termination of the CMATS Treaty.

Annex V provides that a conciliation commission must complete its work within 12 months. The tribunal held that in cases of compulsory conciliation where a conciliation commission's competence was contested, the 12-month period ran from the date on which a commission decided that it was competent to deal with a conciliation request. Accordingly, in this case the 12-month period would run from 19 September 2016.

The Commission's findings about its competence have a wider application than the present conciliation proceedings. It made a number of important pronouncements about compulsory conciliation under the LOSC, including the relevance of Article 281 (and by similar reasoning Article 282) and the meaning of the conditions set out in Article 298(1)(a)(i). While these pronouncements are not binding on any later LOSC conciliation commissions, they will certainly be persuasive. In robustly and unanimously rejecting some strong objections to its jurisdiction from Australia, the Commission not only struck a blow for the weaker party in an asymmetric maritime power relationship, but may also encourage the use of conciliation by other parties to the LOSC, particularly if it succeeds in helping the

parties to reach agreement to resolve what has been a long-running and festering dispute.

Judicial Settlement of Law of the Sea Disputes outside the Framework of Section 2 of Part XV of the LOSC during 2015 and 2016

International Court of Justice

At the beginning of 2015 four law of the sea cases were pending before the Court – the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* case; the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* case; the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* case; and the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* case. During 2016 the Court gave judgements on jurisdiction in the first two cases, which are discussed below. Written proceedings in the *Costa Rica v. Nicaragua* case were completed during 2015, but no hearing had been held by the end of 2016. In the *Somalia v. Kenya* case, Kenya certain preliminary objections to the jurisdiction of the Court and the admissibility of Somalia's application on 7 October 2015. Proceedings on the merits were accordingly suspended. The Court had not given a judgment on jurisdiction and admissibility by the end of 2016.

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v. Colombia)

In this case, begun in 2013, Nicaragua has requested the ICJ, first, to delimit the boundary between its continental shelf beyond 200 nm and the continental shelf of Colombia and, second, "to indicate the rights and duties of the two States in relation to the area of overlapping claims and the use of its resources pending the precise delimitation of the line of the boundary".[35] It seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá or, in the alternative, on the Court's continuing jurisdiction arising from its 2012 judgement in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case. In August 2014, Colombia raised preliminary objections to the jurisdiction of the Court and to the admissibility of Nicaragua's application.

On 17 March 2016 the Court delivered its judgment in response.[36] It rejected Colombia's objections that the case was brought after Colombia's denunciation of the Pact of Bogotá had taken effect and that the necessary preconditions for Article XXXI of the Pact had not been satisfied: thus, the Court had jurisdiction on the basis of Article XXXI and so it was unnecessary to consider Nicaragua's alternative basis for the Court's jurisdiction. It also rejected Colombia's objection that the Court had decided Nicaragua's first request in its 2012 judgment, so that the matter was *res*

[35] Application of Nicaragua, para.2, available at: http://www.icj-cij.org/docket/files/154/17532.pdf; accessed 25 May 2016.

[36] *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 of 17 March 2016, available at: http://www.icj-cij.org/docket/files/154/18956.pdf; accessed 25 May 2016. For early comment on the judgment, see M Lando, 'Delimiting the Continental Shelf beyond 200 Nautical Miles at the ICJ: The *Nicaragua v. Colombia* Cases' (2017) 16(2) *Chinese Journal of International Law* (in press) (available online); and CG Vega-Barbosa, 'The admissibility of a claim of continental shelf rights beyond 200 nm before an international tribunal absent a recommendation by the CLCS: A few words about the ICJ's 2016 Judgment in Nicaragua v. Colombia' *EJIL Talk!*, available at https://www.ejiltalk.org/author/gvegabarbosa/; accessed 16 August 2017.

judicata, and that Nicaragua was seeking to appeal or revise that judgment. On the other hand, the Court held that Nicaragua's second request was inadmissible as it did not reveal the existence of a dispute. Colombia had argued that Nicaragua's first request was also inadmissible as the Commission on the Limits of the Continental Shelf (CLCS) had not yet considered Nicaragua's submission relating to its continental shelf beyond 200 nm. By eight votes to eight, with the President's casting vote, the Court rejected that objection. The Court considered that "since delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the latter is not a prerequisite that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation" (para. 114). This appears to be inconsistent with the position that the Court had previously taken in the *Nicaragua v Honduras* and *Nicaragua v. Colombia* cases, but is in line with the approach of the ITLOS in the *Bangladesh/Myanmar* case and the tribunal in the *Bangladesh/India* case.

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

In this case, begun in 2013, Nicaragua claims that Colombia is in breach of its obligation not to violate Nicaragua's maritime zones as delimited by the ICJ's judgment in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case, and its obligation not to use or threaten force contrary to Article 2(4) of the UN Charter. Nicaragua seeks to found the Court's jurisdiction on Article XXXI of the Pact of

Bogotá or, in the alternative, the Court's "inherent power to pronounce on the actions required by its Judgments."[37]

In December 2014, Colombia filed preliminary objections to the jurisdiction of the Court. The Court delivered its judgment on those objections on 17 March 2016.[38] The Court upheld Colombia's objection that it had no jurisdiction to rule on Nicaragua's second claim (breach of Article 2(4) of the UN Charter) as there was no dispute between the parties over this question. However, it rejected all of Colombia's other objections, finding that it had jurisdiction under the Pact of Bogotá to consider Nicaragua's first claim for the same reasons as in the previous case.

Arbitration

At the beginning of 2015 two law of the sea arbitrations outside the framework of the LOSC dispute settlement procedures were pending – one between Croatia and Slovenia, the other between Timor-Leste and Australia (referred to above in the section on Conciliation). Developments in the Croatia/Slovenia case during 2015 and 2016 are discussed briefly below.

Croatia/Slovenia

This case, begun in 2009, concerns the course of the land and maritime boundary between Croatia and Slovenia; Slovenia's "junction to the High Sea;" and "the regime

[37] Application of Nicaragua, para. 18, available at: http://www.icj-cij.org/docket/files/155/17978.pdf; accessed 25 May 2016.
[38] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objection, Judgment of 17 March 2016, available at: http://www.icj-cij.org/files/case-related/155/155-20160317-JUD-01-00-EN.pdf; accessed 9 August 2017.

for the use of the relevant maritime areas."[39] The tribunal established to hear the case comprises Judge Gilbert Guillaume (president), Professor Vaughan Lowe, Judge Bruno Simma, Dr Jernej Sekolec (appointed by Slovenia) and Professor Budislav Vukas (appointed by Croatia).

In July 2015 the tribunal announced that it would deliver its award in mid-December 2015.[40] However, within days of that announcement, its proceedings were thrown into complete turmoil. On 22 July a Croatian newspaper published transcripts of alleged telephone conversations between Dr Sekolec, and the agent of Slovenia, in which they discussed how best to influence the tribunal to rule in Slovenia's favour.[41] Dr Sekolec resigned the following day.[42] On 24 July Croatia informed the tribunal that "the entire arbitral process has been tainted" by the above events, and requested it to suspend proceedings. Slovenia, however, while deeply regretting what had happened, urged the tribunal to "fulfil its mandate" and appointed Judge Abraham (President of the ICJ) as a replacement arbitrator.[43] On 30 July Professor Vukas, the Croatian-appointed arbitrator, resigned.[44] The following day Croatia informed the tribunal that it could not continue the arbitration "in good faith" and that it had given Slovenia notice of its termination of the Arbitration Agreement. On 3 August Judge Abraham resigned as arbitrator, explaining that he had agreed to be appointed in the

[39] Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, 4 November 2009, Art. 3(1), available at https://pcacases.com/web/sendAttach/2165; accessed 10 August 2017.
[40] PCA Press Release of 10 July 2015, available at https://pcacases.com/web/sendAttach/1308; accessed 10 August 2017.
[41] A Sarvarian and R Baker, 'Arbitration between Croatia and Slovenia: Leaks, wiretaps, scandal' *EJIL Talk!*, available at: https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/; accessed 14 August 2017. See also P. Sands, 'Reflections on International Judicialization' (2016) 27 *European Journal of International Law* 885-900 at pp. 895-8.
[42] PCA Press Release of 23 July 2015, available at http://www.pcacases.com/web/sendAttach/1310; accessed 25 May 2016.
[43] PCA Press Release of 28 July 2015, available at http://www.pcacases.com/web/sendAttach/1313; accessed 25 May 2016.
[44] PCA Press Release of 30 July 2015, available at http://www.pcacases.com/web/sendAttach/1330; accessed 25 May 2016.

hope that that would help to restore confidence between the parties and allow the arbitration to proceed normally, but clearly that had not happened.[45]

On 13 August Slovenia informed the tribunal that it "objected to Croatia's purported unilateral termination of the Arbitration Agreement" and argued that the tribunal had "a power and a duty to continue the proceedings." "To preserve the integrity, independence and impartiality" of the tribunal, it would refrain from appointing an arbitrator to replace Judge Abraham. Instead, it requested the president of the tribunal to make appointments to fill the two vacancies on the tribunal in accordance with Article 2(2) of the Arbitration Agreement.[46] The president acceded to that request, and on 25 September 2015 appointed Ambassador Rolf Einar Fife and Professor Nicolas Michel as members of the tribunal.[47]

On 1 December 2015 the reconstituted tribunal invited the parties to make submissions "concerning the legal implications of the matters set out in Croatia's letters of 24 July 2015 and 31 July 2015." Having received the views of the parties and held a hearing (which Croatia did not attend), the tribunal delivered a partial award on 30 June 2016.[48] It held that Slovenia, by engaging in *ex parte* contacts with the arbitrator originally appointed by it, had violated the Arbitration Agreement. However, that violation did not constitute a material breach within the meaning of Article 60 of the Vienna Convention on the Law of Treaties, and thus did not entitle Croatia unilaterally to terminate the Agreement. Furthermore, the violation did not affect the tribunal's ability, in its current composition, to complete its mandate and

[45] PCA Press Release of 5 August 2015, available at http://www.pcacases.com/web/sendAttach/1389; accessed 25 May 2016.
[46] PCA Press Release of 5 August 2015, available at http://www.pcacases.com/web/sendAttach/1403; accessed 25 May 2016.
[47] PCA Press Release of 25 September 2015, available at http://www.pcacases.com/web/sendAttach/1468; accessed 25 May 2016.
[48] *Arbitration between Croatia and Slovenia*, Partial Award of 30 June 2016, available at http://www.pcacases.com/web/sendAttach/1787; accessed 3 October 2016.

render a final award independently and impartially. The arbitration would therefore continue.