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Dispute Settlement in the Law of the Sea: Survey for 2017

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Abstract

This is the latest in a series of annual surveys in this *Journal* reviewing dispute settlement in the law of the sea, both under the UN Convention on the Law of the Sea and outside the framework of the Convention. It covers developments in 2017. The most significant developments during the year were the judgment of the Special Chamber of the International Tribunal for the Law of the Sea in the Ghana/Côte d'Ivoire maritime boundary case and the final award of the tribunal in the Croatia/Slovenia arbitration. There were also a number of less significant developments.

Keywords

arbitration – bays – continental shelf – dispute settlement – International Court of Justice – International Tribunal for the Law of the Sea – maritime boundary delimitation

Introduction

This is the latest in a series of annual surveys in this *Journal* reviewing dispute settlement in the law of the sea. It covers developments in 2017 and follows the structure of previous surveys. It therefore begins by looking at dispute settlement under the UN Convention on the Law of the Sea (LOSC).¹ It examines in turn the activities of the various forums for the compulsory settlement of disputes under Part XV of the LOSC, namely the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), arbitration in accordance with Annex VII, arbitration under Annex VIII and conciliation. It then continues by looking at judicial settlement of law of the sea disputes outside the framework of Part XV, considering in turn the work of the ICJ and arbitral tribunals.

The most significant developments during 2017 were the judgment of the Special Chamber of the ITLOS in the Ghana/Côte d'Ivoire maritime boundary case and the award of the tribunal in the Croatia/Slovenia arbitration. The former is notable for being the third occasion on which an international court or tribunal has delimited a continental shelf boundary beyond 200 nautical miles (nm) from the baselines and for what the Special Chamber said about the obligations of States in undelimited areas of overlapping maritime zones. The chief interest of the latter case is the arbitral tribunal's pronouncements on the status and delimitation of bays bounded by more than one State, and the prescription of a special regime in an area of Croatia's territorial sea for ships and aircraft travelling to and from Slovenia that somewhat resembles a judgment *ex aequo et bono*.

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

Other developments during 2017 include an award of compensation by the Annex VII arbitral tribunal in the *Arctic Sunrise* case and the judgment of the ICJ on jurisdiction and admissibility in the Somalia/Kenya maritime boundary case. 2017 was also notable for being the first year since 2006 when no new judicial proceedings for the settlement of a law of the sea dispute were instituted.

International Tribunal for the Law of the Sea

Administrative and Organizational Matters

The most important organizational matter during 2017 was the seventh triennial election of judges to the ITLOS, held on 14 June at the 27th Meeting of States Parties. Articles 4 and 5 of Annex VI of the LOSC provide that one third of the 21 judges of the ITLOS are to retire every three years and that elections are to be held at a meeting of States parties to fill the seven vacancies thus created. Retiring judges are eligible for re-election. For the seventh triennial elections, 13 candidates were nominated;² that is about the average of the number of candidates at previous triennial elections. The candidates in 2017 included four of the seven retiring judges (Judges Akl, Bouguetaia, Jesus and Wolfrum).³ The Meeting of States Parties agreed that the elections would be based on the confirmed regional allocation of seats⁴ and would be

² UN doc. SPLOS/308 (15 March 2017). For the curricula vitae of the candidates, see SPLOS/309 (21 March 2017). One candidate withdrew before the elections took place. SPLOS documents are available at http://www.un.org/depts/los/meeting_states_parties/SPLOS_documents.htm#Reports%20of%20the%20Meetings; accessed 31 May 2018.

³ The judges not seeking re-election were Judges Chandrasekhara Rao (India) and Golitsyn (Russia). The seventh judge, Judge Cachapuz de Madeiros (Brazil), died not long before the expiry of his term of office.

⁴ That is: two each from the Group of African States and the Group of Asia-Pacific States and one each from the Eastern European, Latin American and Caribbean, and West European and Others Groups.

conducted in one step.⁵ The ballot resulted in the re-election of Judges Bouguetaia (Algeria) and Jesus (Cape Verde), and the election of five new judges, Mr Óscar Cabello Sarubhi (Paraguay), Ms Neeru Chadha (India), Professor Kriangsak Kittichaisaree (Thailand), Mr Roman Kolodkin (Russia) and Ms Liesbeth Lijnzaad (Netherlands).⁶ Thus, Judges Akl (Lebanon) and Wolfrum (Germany) were not re-elected: both had been members of the ITLOS since its inception in 1996.

The five new judges represent the largest injection of “new blood” into the ITLOS since the 2005 elections. It is welcome that two of them are women. The ITLOS now has three female members, the same number as the International Court of Justice, although a smaller proportion – one seventh as against one fifth. As regards the backgrounds of the new judges, all have had their primary careers in their respective Ministries of Foreign Affairs, most as legal advisers. Some have also held part-time academic appointments. Professor Kittichaisaree and Mr Kolodkin are also past members of the International Law Commission.⁷ Mr Kolodkin is the son of one of the original judges of the ITLOS, Judge Anatoly Kolodkin.

The beginning of the eighth triennium of the ITLOS on 1 October 2017 meant not only the beginning of the period of office of the newly elected judges, but also the election of a new president and vice-president of the ITLOS. Judges Paik and Attard were elected President and Vice-President, respectively, for a three-year period expiring on 30 September 2020.⁸ At the same time the five standing Chambers of the ITLOS were reconstituted.⁹

⁵ *Report of the twenty-seventh Meeting of States Parties*, SPLOS/316 (10 July 2017), para. 75.

⁶ *Ibid.*, para. 76 and Annex II.

⁷ This biographical information on the new judges has been taken from SPLOS/309 (n 2).

⁸ ITLOS Press Release 266 (2 October 2017), available at <https://www.itlos.org/press-media/press-releases/press-releases-2017/>; accessed 22 May 2018.

⁹ For details, see ITLOS Press Release 267 (6 October 2017), available at *ibid.*

During 2017 the ITLOS held its usual two sessions (in March and September/October) devoted to administrative and legal matters not directly related to cases. At those sessions the ITLOS discussed, *inter alia*, issues relating to its jurisdiction, its Rules (including questions relating to the publication of initial reports by parties in provisional measures cases) and its judicial procedures.¹⁰ The ITLOS also continued its capacity-building activities. The training programme on the LOSC dispute settlement system, established with the financial backing of the Nippon Foundation in 2007, supported seven fellows for the period July 2017 to March 2018.¹¹ The internship programme (which began in 1997) continued, with 16 people from 15 different States benefitting from the programme in 2017. Since 1997 a total of 337 persons from 95 different States have participated in the programme.¹² Over the years the ITLOS has held regional workshops on dispute settlement in the law of the sea. In 2017 (in June) it held a workshop in Costa Rica. The subject of the workshop was the role of the ITLOS in the settlement of disputes relating to the law of the sea in the Central American and Caribbean region.¹³

Judicial Activities

At the beginning of 2017 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 latter case the whole of 2017 was taken up with the written proceedings phase of

¹⁰ *Annual Report of the International Tribunal for the Law of the Sea for 2017*, SPLOS/317 (26 March 2018), paras. 41 and 68-70, available at http://www.un.org/depts/los/meeting_states_parties/twentyeighthmeetingstatesparties.htm; accessed 31 May 2018.

¹¹ *Ibid.*, at para. 125.

¹² *Ibid.*, at paras. 121-2.

¹³ *Ibid.*, at para. 127.

the case, which had not been completed at the year's end. However, in the *Ghana/Côte d'Ivoire* case the Special Chamber delivered its judgment on 23 September 2017, and this is analysed below.

Case No. 23: Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean

In September 2014 Ghana instituted arbitral proceedings against Côte d'Ivoire under Annex VII in respect of their maritime boundary dispute. In December 2014 the parties agreed to transfer the dispute from an Annex VII arbitral tribunal to a special chamber in accordance with Article 15(2) of Annex VI of the LOSC, the special chamber comprising Judges Bouguetaia (president), Wolfrum and Paik and Judges ad hoc Mensah and Abraham. In February 2015 Côte d'Ivoire made a request to the Special Chamber for the prescription of a number of provisional measures. In response the Special Chamber made an order requiring Ghana to ensure that no new drilling took place in the disputed area; to prevent information obtained from exploration activities in the disputed area that was not already in the public domain from being used in any way whatsoever to the detriment of Côte d'Ivoire; and to carry out strict and continuous monitoring of all existing activities in the disputed area in order to prevent serious harm to the marine environment. In addition, the Special Chamber ordered both parties to take all necessary steps to prevent serious harm to the marine environment in the disputed area, to cooperate to that end, and to refrain from any unilateral action that might aggravate the dispute.¹⁴

¹⁴ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Order of 25 April 2015, [2015] ITLOS Rep. 146. The Order was discussed in a previous *Survey*: see R. Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2015, Part I' (2016) 31 *IJMCL* 555-82 at 570-6.

On 23 September 2017 the Special Chamber delivered its judgment on the merits.¹⁵ The judgment deals with six main issues: (1) the possible existence of a tacit boundary agreement; (2) delimitation of the maritime boundary within 200 nm of the baselines; (3) delimitation of the continental shelf beyond 200 nm; (4) Ghana's alleged violation of Côte d'Ivoire's sovereign rights; (5) Ghana's alleged violation of Article 83 of the LOSC; and (6) Ghana's alleged violation of the Special Chamber's provisional measures order.

The possible existence a tacit boundary agreement

Ghana argued that the parties had had an informal understanding since the 1960s that the boundary was an equidistance line and this was reflected in their practice in licensing hydrocarbon activities on their respective continental shelves. Furthermore, when each party made a submission to the Commission on the Limits of the Continental Shelf (CLCS) in 2009 relating to the establishment of the outer limit of their continental shelves beyond 200 nm, neither party showed the limit of its

¹⁵ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment of 23 September 2017, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf; accessed 30 May 2017. For early comment on the judgment, see N. Bankes, 'ITLOS Judgment in the Maritime Boundary Dispute between Ghana and Côte d'Ivoire', *Jebsen Centre for the Law of the Sea, Tromsø (JCLOS) Blog*, posted 27 October 2017, available at <http://site.uit.no/jclos/2017/10/27/itlos-judgment-in-the-maritime-boundary-dispute-between-ghana-and-cote-divoire/>; accessed 1 June 2018; S. V. Busch, 'Opposite or Adjacent – Does it make a difference? Delimiting the Continental Shelf beyond 200 nm', *JCLOS Blog*, posted 1 December 2017, available at <http://site.uit.no/jclos/2017/12/01/opposite-or-adjacent-does-it-make-a-difference-delimiting-the-continental-shelf-beyond-200-nm/>; accessed 1 June 2018; N. Ermolina and C. Yiallorides, 'State Responsibility for Unilateral Hydrocarbon Activities in Disputed Maritime Areas: The Case of Ghana and Côte d'Ivoire and its Implications', *JCLOS Blog*, posted 23 November 2017, available at <http://site.uit.no/jclos/2017/11/23/state-responsibility-for-unilateral-hydrocarbon-activities-in-disputed-maritime-areas-the-case-of-ghana-and-cote-divoire-and-its-implications/>; accessed 1 June 2018; A. Oude Elferink, 'Maritime Delimitation in Ghana/Côte d'Ivoire: Predictability . . . with an Occasional Glitch', *JCLOS Blog*, posted 6 February 2018, available at <http://site.uit.no/jclos/2018/02/06/maritime-delimitation-in-ghana-cote-divoire-predictability-with-an-occasional-glitch/>; accessed 1 June 2018; and C. Yiallorides, 'Analysis of Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean', Parts I and II, *EJIL: Talk!* Blog, posted 19 and 20 October 2017, available at <https://www.ejiltalk.org/part-i-analysis-of-dispute-concerning-delimitation-of-the-maritime-boundary-between-ghana-and-cote-divoire-in-the-atlantic-ocean/>; accessed 1 June 2018.

continental shelf as extending beyond the equidistance line. It was only from 2009 onwards, according to Ghana, that Côte d'Ivoire began to argue that the boundary should be a different line. That line was to the east (i.e. on Ghana's side) of the equidistance line. The area between the two lines within 200 nm of the baselines (the disputed area) is approximately 9,000 nm².¹⁶ Ghana has authorised exploration and exploitation of oil and gas in the disputed area for many years.

After reviewing the arguments and evidence relating to a possible tacit maritime boundary presented by the parties, the Special Chamber recalled the dictum of the ICJ in the *Nicaragua/Honduras* case that “[e]vidence of a tacit agreement on a maritime boundary must be compelling.”¹⁷ In the present case the Special Chamber did not find the evidence presented by Ghana “compelling”. The practice of the parties in awarding oil concessions that did not extend beyond the equidistance line “cannot in itself establish the existence of a tacit agreement on a maritime boundary” (para. 215). It might reflect the existence of a maritime boundary, or it might be explained by other reasons, such as the desire to avoid conflict with the other party. Furthermore, such practice related at most to a continental shelf boundary, not to boundaries for other maritime zones. Nor did various pieces of legislation quoted by Ghana provide compelling evidence of a maritime boundary. By contrast, the fact that the parties had at times engaged in negotiations on a maritime boundary contradicted the idea of a tacit agreement, as did their submissions to the CLCS.

¹⁶ *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*, Request for the prescription of provisional measures by Côte d'Ivoire, 27 February 2015, para. 7, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_prov_meas/C23_Request_prov_measures_translation_Reg.pdf; accessed 4 June 2018.

¹⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I. C. J. Reports 2007, p. 659, 735.

The Special Chamber also rejected an argument by Ghana that Côte d'Ivoire was estopped from denying that the maritime boundary was an equidistance line as it was essentially based on the same facts as Ghana's argument for the existence of a tacit agreement on a maritime boundary. The fact that there was no such agreement meant that the Special Chamber's task was now to delimit a boundary for all the parties' maritime zones (territorial sea, EEZ and continental shelf (both within and beyond 200 nm from the baselines)) *de novo*.

Delimitation of the maritime boundary within 200 nm of the baselines

For the territorial sea boundary, rather than apply Article 15 of the LOSC (which deals with the delimitation of territorial sea boundaries), the Special Chamber interpreted the submissions of the parties to the effect that it should use the same delimitation methodology for the territorial sea as for the EEZ and continental shelf, especially as neither party had raised "sovereignty-related considerations in respect of delimitation of the territorial sea" (paras. 259 and 262). Thus, the Special Chamber delimited the boundary between all the overlapping zones of the parties within 200 nm as a single exercise. Nevertheless, it emphasised that under the LOSC different rules apply to the delimitation of the territorial sea than to delimitation of the EEZ and continental shelf.

As for the methodology for delimiting a single maritime boundary, Côte d'Ivoire had argued that the Special Chamber should use the angle-bisector method in view of both the macro-geography and the coastal micro-geography and the small number of basepoints, which were located on a short stretch of coastline, part of which was unstable. The Special Chamber rejected those arguments. The macro-geography (i.e. the interests of neighbouring States) was irrelevant. The coastline of

the delimitation area was generally straight, with no offshore features such as islands, nor was it unstable: accordingly, even though the number of basepoints might be limited, the geography of the area did not call for the angle-bisector method. Furthermore, the judicial precedents relied on by Côte d'Ivoire were not relevant to the situation in this case. As to the method of delimitation that it would use, the Special Chamber observed that “[i]nternational jurisprudence confirms, that in the absence of any compelling reasons that make it impossible or inappropriate to draw a provisional equidistance line, the equidistance-relevant circumstances methodology should be chosen for maritime delimitation . . . a delimitation methodology which has been practised overwhelmingly by international courts and tribunals in recent decades” (para. 289). As there were no such compelling reasons, this was the methodology that it would use.

Accordingly, the Special Chamber began by drawing an equidistance line. As the agreed terminus of the parties’ land boundary was not on the low-water line, the Special Chamber extended the general direction of that boundary until it intersected with the low-water line. That point then became the starting point of the equidistance line, which was constructed using basepoints selected by the Special Chamber, rather than the basepoints proposed by the parties or the baselines set out in the parties’ national legislation. The Special Chamber’s method of constructing an equidistance line produced a large number of basepoints, which to simplify matters it reduced in number. The resulting line was described by the Special Chamber as a “simplified provisional equidistance line” (para. 400).

The next stage of the equidistance/relevant circumstances method was to consider whether there were any relevant circumstances that would require adjustment of the equidistance line. Côte d'Ivoire argued that there were three sets of

circumstances that were relevant. First, it argued that the configuration of the parties' coasts, in particular the concavity of its own coast and the convexity of Ghana's coast, cut off its maritime zones in front of its coast. The Special Chamber rejected that argument. The configuration of the coasts was not such as to have a significant cut-off effect warranting adjustment of the equidistance line. Second, Côte d'Ivoire argued that the Jomoro peninsula, located at the western end of Ghana's coast, blocked off the Ivorian land mass. That argument was also dismissed. The "geographical particularity of Jamoro does not justify treating it as an island on the wrong side of an equidistance line [as Côte d'Ivoire had contended], or as a peninsula protruding into the sea" (para. 434). Last, Côte d'Ivoire claimed the exceptional presence of hydrocarbons in the disputed area was a relevant circumstance. That argument was again rejected. According to established jurisprudence, the location of economic resources was a not relevant circumstance in maritime delimitation. For its part, Ghana argued that the conduct of the parties relating to the granting of oil concessions was a relevant circumstance. The Special Chamber regarded that as essentially an attempt to revive Ghana's argument about a tacitly agreed boundary. Having rejected the latter, it would undermine that finding if the Special Chamber were now to regard the conduct of the parties as a relevant circumstance. In any case that conduct was relevant only to the seabed, not water column, of an all-purpose boundary.

Overall, therefore, the Special Chamber found that there were no relevant circumstances requiring the adjustment of its simplified provisional equidistance line. The third stage of the equidistance/relevant circumstance method calls for the application of a disproportionality test. The Special Chamber deferred applying that test until after it had delimited the continental shelf boundary beyond 200 nm, a matter that it considered next.

Delimitation of the continental shelf beyond 200 nm

This was the third occasion on which an international court or tribunal had engaged in delimiting a continental shelf boundary beyond 200 nm from the baselines, following the two Bay of Bengal cases. In the present case, the Special Chamber followed the approach of the ITLOS in the *Bangladesh/Myanmar* case¹⁸ in deciding that it had jurisdiction in principle to delimit a continental shelf boundary between the parties beyond 200 nm from the baselines, but that it should only do so in practice if it was satisfied that the continental shelves of the parties extended beyond 200 nm. It was so satisfied. Ghana had already received recommendations from the CLCS that established that its continental shelf extended beyond 200 nm and it was evident that the continental shelf of Côte d'Ivoire, in respect of which recommendations from the CLCS in response to Côte d'Ivoire's submission were awaited, must also extend beyond 200 nm "since its geological situation is identical to that of Ghana" (para 491).

When it came to the method of delimitation, the Special Chamber adopted, with virtually no discussion, the same methodology as the *Bangladesh/Myanmar* case for delimiting the continental shelf boundary beyond 200 nm, based on the same reasoning. Accordingly, it decided that the boundary between the two parties' overlapping continental shelves beyond 200 nm would be a continuation of its simplified provisional equidistance line from the 200 nm limit until it met the outer limits of the continental shelf.

¹⁸ *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4.

The Special Chamber then turned to apply the disproportionality test. This test requires a comparison of the ratio of the lengths of the parties' relevant coasts (those coasts generating overlapping projections of each party's maritime zones) with the ratio of those parts of the relevant area, both within and beyond 200 nm, resulting to each party from the delimitation process up to this point. The Special Chamber found that the first ratio was 1: 2.53 in Côte d'Ivoire's favour, and the second 1: 2.02, also in Côte d'Ivoire's favour. The Special Chamber held that the relationship between those ratios "does not entail such disproportionality as to constitute an inequitable result" (para. 538). Accordingly, the simplified provisional equidistance line would constitute the boundary between all the overlapping maritime zones of the parties, both within and beyond 200 nm. That boundary is much the same as the equidistance line that Ghana claimed was already the boundary, except that the starting points of the two lines are some 40 metres apart and the lines were constructed using different basepoints. However, the differences in the areas resulting to the parties from each line are probably very small.

Ghana's alleged violation of Côte d'Ivoire's sovereign rights

Having delimited the maritime boundary, the Special Chamber turned to address Côte d'Ivoire's claim invoking Ghana's international responsibility. Côte d'Ivoire alleged violations by that Ghana of three different matters: Côte d'Ivoire's sovereign rights; Article 83 of the LOSC; and the Special Chamber's provisional measures order. The first question was whether the Special Chamber had jurisdiction to consider those matters. It found that it had an inherent jurisdiction to consider the third matter. It also had jurisdiction to consider the first two matters. Such jurisdiction was conferred, not from the parties' agreement referring the case to the Special Chamber (which was

limited to the maritime boundary issue), but from the conduct of the parties during the proceedings which made it evident that they agreed to consideration of Ghana's international responsibility by the Special Chamber. The latter labels this basis of jurisdiction as "*forum prorogatum*" (para. 552). That appears to be a somewhat debatable basis for jurisdiction. Côte d'Ivoire's allegations were essentially a counter-claim, although admittedly not labelled as such, and might therefore have been better dealt with under Rule 98 of the ITLOS Rules, which covers counter-claims and their admissibility.¹⁹ To address the merits of Côte d'Ivoire's claim, Article 293 permitted the Special Chamber to apply not only the LOSC but also other rules of international law not incompatible with it. The Special Chamber would therefore apply the general rules on State responsibility, which were found in customary international law as reflected in the International Law Commission's Draft Articles on State Responsibility.

Côte d'Ivoire's first claim was that Ghana had violated its sovereign rights by engaging in exploration and exploitation of hydrocarbons in the disputed area before the boundary had been delimited. It argued that because States' sovereign rights over their continental shelves were inherent and exclusive, international law required a State to refrain from any unilateral economic activity in a disputed area of continental shelf, pending its definitive delimitation, since it might violate the sovereign rights of the other State should the disputed area eventually be attributed to the latter. The Special Chamber rejected that argument, holding that "maritime activities undertaken by a State in an area of continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign

¹⁹ Rule 98 of the ITLOS Rules is very similar to Article 80 of the ICJ's Rules, which is discussed below: see text following (n 38).

rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States” (para. 592). It therefore dismissed Côte d’Ivoire’s claim that Ghana’s activities in the disputed area prior to its judgment was a breach of Côte d’Ivoire’s rights.

That ruling is not very satisfactory. The Special Chamber gave no authority to support its ruling other than a brief quotation from the *Nicaragua/Colombia* case on a similar, though not identical, point,²⁰ which was itself unsupported. It seems difficult to reconcile the ruling with the obligation in Article 83(3) of the LOSC not to jeopardize or hamper the reaching of a boundary agreement, at least as interpreted and applied by the tribunal in the *Guyana/Suriname* case (discussed below), and the Special Chamber’s own order of provisional measures in the present case (summarized above). The reference to “claims made in good faith” might suggest that the principle contained in the ruling applied only to those areas of overlap that could plausibly be claimed by both States. However, the Special Chamber’s observation that “in a case of overlap both States concerned have an entitlement to the relevant continental shelf on the basis of their relevant coasts” (para. 591) suggests that the principle applies to the whole of the overlapping area. Furthermore, from a policy perspective the principle is undesirable as it may encourage unilateral hydrocarbon activity in disputed areas. The principle as enunciated was probably wider than was necessary to decide the case, since Ghana appears not to have undertaken any activities on what turned to be Côte d’Ivoire’s side of the boundary line (although the Special Chamber did not make any finding on that point). Read literally, the Special

²⁰ See *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, Judgment, I. C. J. Reports 2012, p. 624, 718 (para. 250).

Chamber's principle is confined to the situation where a boundary has been determined by a court and not to the position before a boundary has been subject to possible adjudication. Because of the policy implications referred to, the narrowest possible reading of the Special Chamber's principle should be preferred.

Ghana's alleged violation of Article 83 of the LOSC

Côte d'Ivoire's second claim was that Ghana had violated paragraphs 1 and 3 of Article 83 of the LOSC. Paragraph 1 provides that "[t]he delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution." Côte d'Ivoire argued that Ghana's unilateral activities in the disputed area and inflexibility in the negotiations, together with the fact that Ghana had foreclosed the possibility of settling the boundary dispute by judicial means by making a declaration under Article 298 of the LOSC that was not withdrawn until it instituted proceedings in the present case, violated the obligation to negotiate in good faith required by Article 83(1). The Special Chamber rejected that argument. While it was true that Article 83(1) "necessarily entails negotiations" to reach a delimitation agreement, it was an obligation of conduct, not of result (para. 604). However, Ghana had not violated that obligation because it had participated in 10 rounds of boundary negotiations over a period of six years and there was no evidence that those negotiations were not meaningful. Foreclosing the possibility of judicial settlement was not a breach of the obligation to negotiate as Article 298 specifically permitted such foreclosure.

Paragraph 3 of Article 83 provides that "[p]ending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation,

shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.” Côte d’Ivoire argued that Ghana’s activities in the disputed area both made it impossible to conclude a provisional arrangement and jeopardized and hampered the conclusion of a definitive delimitation agreement. The Special Chamber began its response by observing that Article 83(3) “contains two interlinked obligations” (para. 626). The first, relating to provisional arrangements, was an obligation of conduct and so did not amount to an obligation to reach an agreement on a provisional arrangement, although there was a duty to act in good faith. In the present case, it was for Côte d’Ivoire to propose provisional arrangements but it had not done so. That failure “bars Côte d’Ivoire from claiming that Ghana has violated its obligation to negotiate on such arrangements” (para. 628).

As for the second obligation in Article 83(3), the Special Chamber noted that the phrase “shall make every effort” in Article 83(3) applied to both provisional arrangements and the obligation not to jeopardize or hamper, thereby qualifying the latter as also being an obligation of conduct. The “transitional period” referred to Article 83(3) meant “the period after the maritime delimitation dispute has been established until after a final delimitation by agreement or adjudication has been achieved” (para. 630). The Special Chamber disagreed with Côte d’Ivoire that Ghana’s activities in the disputed area during the period after it realised that that area was also claimed by Côte d’Ivoire (which appeared to have occurred in 2009), had jeopardized or hampered the reaching of a final agreement. This was so for two reasons. First, Ghana had suspended drilling operations in the disputed area following the order of provisional measures by the Special Chamber. “It would, however, have

been preferable if Ghana had adhered to the request of Côte d'Ivoire earlier to suspend its hydrocarbon activities in [the undelimited] area" (para. 632). This reasoning is unconvincing. The transitional period to which the obligation applies clearly began well before the order of provisional measures. To say that it "would have been preferable" if Ghana had ceased its activities before the provisional measures order is to confuse a legal obligation with an apparently moral one. It is also difficult to reconcile the Special Chamber's decision with the arbitral tribunal's award in the *Guyana/Suriname* case, the only other case to date in which the obligation not to jeopardize or hamper has been considered. In that case the tribunal held that drilling for hydrocarbons in an area claimed by both parties to a delimitation dispute was a breach of the obligation not to jeopardize or hamper, and found that Guyana had breached that obligation by authorising oil companies to conduct exploratory drilling in the disputed area.²¹

Returning to the present case, the second reason given by the Special Chamber as to why Ghana had not breached the obligation not to jeopardize or hamper was because Ghana had only undertaken activities in the area attributed to it by the Special Chamber's line of delimitation, whereas Côte d'Ivoire had claimed a breach of Article 83(3) by Ghana in respect of its activities in the "Ivorian maritime area" (para. 633). Again, this is not convincing as it gives Ghana the benefit of what is arguably simply a drafting technicality. Had Côte d'Ivoire been claiming compensation in respect of Ghana's alleged breach of Article 83(3), the Special Chamber's approach to the question might perhaps have been perhaps more understandable, but in fact Côte d'Ivoire was seeking no more than a declaration of Ghana's breach. Unfortunately,

²¹ *Arbitration between Guyana and Suriname* (2007), (2012) XXX RIAA 1 at paras. 467-82.

the Special Chamber's approach to the obligation in this case may send the wrong signal to other States with unresolved maritime boundaries.²²

In a separate opinion, Judge Paik expressed disagreement with the judgment's approach to Article 83(3). He voted for the operative part of the judgment only because Côte d'Ivoire had limited its claim to the "Ivorian maritime area". "Leaving that formalistic reason aside," Judge Paik had "serious reservations about the correctness of Ghana's activities in the disputed area in terms" of Article 83(3) (para. 1 of Judge Paik's separate opinion). The reasons given by the judgment in support of its conclusion were "insufficient and unconvincing" (*ibid.*). As to what actions would jeopardize or hamper the reaching of a final boundary agreement, Judge Paik considered that there was no purpose in attempting to identify in general and in abstract what actions were permissible and what were not. However, "a key criterion is whether the actions in question would have the effect of endangering the process of reaching a final agreement or impeding the progress of negotiations to that end" (para. 6). The answer to that question depended much on the individual circumstances in each case, such as the type, nature, location and time of the actions in question, as well as the manner in which they were carried out. In the present case Ghana had carried out extensive drilling activities in the disputed area in spite of Côte d'Ivoire's repeated requests that it should abstain from unilateral action. That was clearly a breach of Article 83(3) and it was irrelevant that the disputed area was eventually allocated to Ghana by the Special Chamber's boundary line. Judge Paik's approach to Article 83(3) is far more convincing and satisfactory than of the

²² The criticisms made here about the Special Chamber's approach to the obligation not to jeopardize or hamper are broadly shared by Bankes and Ermolina and Yiallourides (n 15).

judgment, and it is to be regretted that the other judges did not apparently share his view.

Ghana's alleged violation of the Special Chamber's provisional measures order

Côte d'Ivoire argued that Ghana had breached the Special Chamber's provisional measures order by engaging in new drilling and by failing to provide Côte d'Ivoire with information on its activities so that Côte d'Ivoire could verify whether Ghana was complying with the order. The Special Chamber disagreed. The drilling carried out by Ghana was not new but related to ongoing activities aimed at ensuring proper production and maintenance of oil deposits, which was permitted under the order. On the question of providing information, Ghana had done so, although some information was not provided until after the President of the Special Chamber had requested Ghana to do so in September 2016. Nevertheless, the Special Chamber concluded that Ghana's conduct "cannot reasonably be considered to constitute a violation" of the order (para. 656).

Conclusion

Overall, Ghana must have felt very satisfied with the outcome of this case, since it ended up with its preferred equidistance boundary (even if the Special Chamber rejected its argument that such a boundary had already been tacitly agreed) and it was found not to have committed the violations of various obligations alleged by Côte d'Ivoire. The Special Chamber's judgment was unanimous on all points. Judge Paik and Judge ad hoc Mensah also issued separate opinions. Judge Paik's separate opinion is concerned solely with Article 83(3) of the LOSC and was discussed above. Judge

ad hoc Mensah's opinion essentially does no more than record his agreement with all the main findings of the judgment.

The International Court of Justice

As at the beginning of 2017 no cases had been brought before the Court under section 2 of Part XV of the LOSC and that remained the position at the end of the year. Cases relating to the law of the sea brought before the Court in other ways are considered below, in the section on Judicial Settlement of Law of the Sea Disputes outside the Framework of Section 2 of Part XV of the LOSC.

Arbitration in accordance with Annex VII

At the beginning of 2017 four arbitrations conducted under Annex VII of the LOSC were ongoing – the compensation phases of the *Arctic Sunrise (Netherlands v. Russia)* and *Duzgit Integrity (Malta v. São Tomé and Príncipe)* cases, as well as the *Enrica Lexie Incident (Italy v. India)* and *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. Russia)* cases. During 2017 the tribunal in the *Arctic Sunrise* case made an award of compensation, while there were some developments of note in the *Enrica Lexie* and *Ukraine v. Russia* cases. These developments are discussed below.

Arctic Sunrise Arbitration (Netherlands v. Russia)

The tribunal hearing this case delivered an award in August 2015 in which it held that Russia had breached various obligations under the LOSC that it owed to the Netherlands by seizing in its EEZ and subsequently detaining a Dutch-registered vessel, the *Arctic Sunrise*, and arresting those on board, following a protest against Russian oil activities in the Arctic by member of Greenpeace on board the vessel, which had included attempting to get onto a Russian oil platform on Russia's continental shelf in the Pechora Sea.²³ The tribunal also decided that the Netherlands was entitled to compensation for damage to the *Arctic Sunrise*, the wrongful arrest and detention of the Greenpeace protesters (known as the Arctic 30), the expenses of the Arctic 30 during their detention, the Netherlands' payment of Russia's share of the deposits for the costs of the arbitration, and the Netherlands' costs in issuing a bank guarantee further to the provisional measures ordered by the ITLOS. The tribunal reserved the amount of such compensation for further decision.

In September 2016 the tribunal appointed two experts to help it in this matter. As in the previous phases of the case, Russia declined to participate in the compensation proceedings. The tribunal delivered its award on compensation on 10 July 2017, determining that Russia should pay the Netherlands compensation totalling some €4.4 million, plus interest.²⁴ That compares with some €3.2 million claimed by the Netherlands. The tribunal's total was broken down as follows: damage to the *Arctic Sunrise*, €1.7 million; non-material damage to the Arctic 30, €0.6 million; damage resulting from the measures taken by Russia against the Arctic 30, €2.5

²³ *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. The award is discussed in the previous *Survey*: see R. Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016' (2017) 32 *IJMCL* 379-426 at 403-10.

²⁴ *In the Matter of the Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Compensation, 10 July 2017, available at <https://pcacases.com/web/sendAttach/2214>; accessed 23 May 2018.

million; costs incurred for the issue of a bank guarantee, €13,500; and deposits for the costs of the arbitration, €25,000. In calculating those sums, the tribunal made considerable reference to the case law of other international courts and tribunals and the work of the International Law Commission.

Given that Russia did not accept the tribunal's award on the merits, it seems unlikely that it will pay the compensation awarded to the Netherlands by the tribunal.

The “Enrica Lexie” Incident Arbitration (Italy v. India)

In 2015 Italy initiated arbitration proceedings under Annex VII against India in relation to an incident that occurred in February 2012.²⁵ According to Italy, the parties' dispute arises from an incident approximately 20.5 nm off the coast of southern India (i.e. in India's EEZ) involving the *MV Enrica Lexie*, an oil tanker flying the Italian flag and en route from Sri Lanka to Djibouti, and India's subsequent exercise of criminal jurisdiction over two Italian marines from the Italian Navy who were on board the ship. On the other hand, according to India, the incident concerns the killing of two Indian fishermen on board an Indian vessel by the two Italian marines and the subsequent exercise of its criminal jurisdiction over the two marines. In its statement of claim, Italy argues that India has violated numerous provisions of the LOSC by exercising jurisdiction over the *Enrica Lexie* and the two marines and by failing to cooperate in the repression of piracy. The tribunal hearing the case comprises Judge Golitsyn (president), Judge Paik, Judge Robinson, Professor Francioni and Judge Rao. In 2015 the ITLOS made an order of provisional measures

²⁵ Italy's notification and statement of claim are available at [http://www.pcacases.com/pcadocs/Notification/Italys%20Notification%20\(Redacted\).pdf](http://www.pcacases.com/pcadocs/Notification/Italys%20Notification%20(Redacted).pdf); accessed 10 June 2016.

under Article 290(5) of the LOSC pending the constitution of the tribunal.²⁶ The tribunal itself made a further order of provisional measures in 2016.²⁷

The main development of note in the case during 2017 was that India, when submitting its counter-memorial in April 2017, included a counter-claim. The website of the Permanent Court of Arbitration, which is acting as the registry for the arbitration, does not give any details of India's counter-claim. The tribunal has left open for the time being the question of whether it will deal with the admissibility of the counter-claim as part of an award on jurisdiction and merits or whether it will address it separately at an earlier stage.²⁸

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

In September 2016 Ukraine began arbitration proceeding against Russia in accordance with Annex VII of the LOSC by serving it with a notification and statement of claim, alleging that Russia had violated its (Ukraine's) rights as the coastal State in the waters off Crimea. The tribunal hearing the case comprises Judge Paik (president), Judge Bouguetaia, Judge Gómez-Robledo, Professor Vaughan Lowe (appointed by Ukraine) and Judge Golitsyn (appointed by Russia). The most significant publicly recorded development in the case during 2017 was the adoption by the tribunal of its Rules of Procedure on 18 May.²⁹ Article 13 of the Rules envisages the completion of

²⁶ *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 a previous *Survey*: see Churchill (n 14), at pp. 576-580.

²⁷ *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. The Order is discussed in the previous *Survey*: see Churchill (n 23), at pp. 413-416.

²⁸ Procedural Order No. 3 of 1 June 2017, available at <http://www.pcacases.com/web/sendAttach/2145>; accessed 19 May 2018.

²⁹ Available at <https://pcacases.com/web/sendAttach/2136>; accessed 23 May 2018.

the written proceedings by September 2019 if there are no preliminary objections to jurisdiction or admissibility.

It is encouraging that unlike in the *Arctic Sunrise* case, where it declined to participate in any of the proceedings, Russia has so far participated fully in this case, by nominating an arbitrator, appointing an agent and a legal team (which includes a number of non-Russian lawyers), and taking part in the meeting between the parties and the tribunal to discuss the Rules of Procedure.³⁰

Arbitration in accordance with Annex VIII

As at the beginning of 2017 no disputes had been referred to arbitration in accordance with Annex VIII and that remained the position at the end of the year. Given that only eleven parties to the LOSC (three of which are landlocked) have so far selected Annex VIII arbitration as one of their preferred means of settlement, the chances of a dispute being referred to such arbitration are currently rather small.

Compulsory Conciliation

In April 2016 Timor-Leste initiated compulsory conciliation proceedings against Australia in relation to a dispute over their maritime boundary under Article 298(1)(a) and section 2 of Annex V of the LOSC. In September 2016 the Conciliation

³⁰ See PCA Press Release of 22 May 2017, available at <https://pcacases.com/web/sendAttach/2135>; accessed 23 May 2018.

Commission, comprising Ambassador Peter Taksøe-Jensen (chairman), Dr. Rosalie Balkin, Judge Abdul Koroma, Professor Donald McRae and Judge Rüdiger Wolfrum, rejected a challenge by Australia to its competence.³¹ According to Annex V of the LOSC, the Commission then had 12 months in which to complete its work. It did not meet that deadline, nor had it completed its work by the end of 2017. Nevertheless, it is clear from a series of press releases issued by the Commission during the year that it made good progress during 2017.³²

The Commission met with the parties at roughly two month intervals. In January 2017, as part of confidence-building measures promoted by the Commission, Timor-Leste withdrew its claims in two arbitrations that it had commenced against Australia concerning disputes relating to the Treaty on Certain Maritime Arrangements in the Timor Sea (2006). At the same time it notified Australia of its termination of the Treaty.³³ What was described as a ‘breakthrough’ in the conciliation process occurred on 30 August 2017 when the parties reached a “Comprehensive Package Agreement” on the central elements of a maritime boundary delimitation between them in the Timor Sea; the legal status of, and establishment of a special regime for, the Greater Sunrise gas field; a pathway to development of the field; and the sharing of its resources.³⁴ In October, the parties reached agreement on a draft treaty embodying the Comprehensive Package Agreement.³⁵ It was expected that the treaty would be signed in early 2018.

³¹ *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. The Decision is discussed in the previous *Survey*: see Churchill (n 23), at pp. 417-421.

³² The press releases are available at <http://www.pcacases.com/web/view/132>; accessed 24 May 2018.

³³ Joint Statements of the Governments of Timor/Leste and Australia and the Conciliation Commission of 9 and 24 January 2017, available at *ibid.*

³⁴ Press Release No. 9 of 1 September 2017, available at *ibid.*

³⁵ Press Release No. 10 of 5 October 2017, available at *ibid.*

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

International Court of Justice

At the beginning of 2017 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. The first two cases were all referred to the Court in 2013; the last two in 2014. In the first *Nicaragua/Colombia* case and the *Costa Rica/Nicaragua* case the year 2017 saw, respectively, the continuation of the written proceedings phase and the oral proceedings phase. However, there were more significant developments in the other two cases, where the Court made an order and gave a judgment concerning matters of admissibility and jurisdiction. Those decisions are discussed below.

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

In 2013, Nicaragua instituted proceedings against Colombia claiming that Colombia had not complied with the ICJ's judgment in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, given in 2012, and had violated Nicaragua's rights resulting from that judgment. Nicaragua sought to found the Court's jurisdiction on

Article XXXI of the Pact of Bogotá or, in the alternative, on the Court's "inherent power to pronounce on the actions required by its Judgments."³⁶ Following preliminary objections to its jurisdiction by Colombia, the Court delivered a judgment on the matter in March 2016, rejecting all but one of Colombia's preliminary objections.³⁷

In November 2016 Colombia filed its counter-memorial, which contained four counter-claims, namely: (1) and (2) alleged breaches by Nicaragua of its duties of due diligence to protect and preserve the marine environment of the south-west Caribbean Sea and to protect the right of the inhabitants of the San Andrés Archipelago to benefit from a healthy, sound and sustainable environment; (3) an alleged infringement by Nicaragua of the customary artisanal rights of those inhabitants to access and exploit their traditional fishing grounds; and (4) an alleged denial by Nicaragua of Colombia's rights as a result of the straight baselines established by Nicaragua in 2013 that had the effect of extending Nicaragua's internal waters and maritime zones beyond what international law permitted. In early 2017, Nicaragua informed the Court that it considered those counter-claims to be inadmissible. Following the submission of written observations by each party, the Court made an order on the question on 15 November 2017.³⁸

Under Article 80 of the Court's Rules, a counter-claim is admissible only if it comes within the jurisdiction of the Court and is "directly connected" with the subject matter of the claim of the other party. The Court found that the first two counter-

³⁶ Application of Nicaragua, para. 18, available at <http://www.icj-cij.org/docket/files/155/17978.pdf>; accessed 25 May 2016.

³⁷ *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/docket/files/155/18948.pdf>; accessed 25 May 2016. The Judgment was discussed in the previous *Survey*: see Churchill (n 23), at pp. 423-424.

³⁸ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Claims, Order of 15 November 2017, available at <http://www.icj-cij.org/files/case-related/155/155-20171115-ORD-01-00-EN.pdf>; accessed 25 May 2018.

claims were not so connected because the alleged facts underlying Colombia's counter-claim and Nicaragua's claim were different and did not relate to the same factual complex. Furthermore, there was no direct legal connection between the counter-claim and the claim as the legal principles relied on by each party were different as they did not have the same legal aim. On the other hand, Colombia's third counter-claim did have a direct connection with Nicaragua's claim as the facts underpinning them were of the same nature and they were both concerned with the scope of a coastal State's rights and obligations in the EEZ. Likewise, there was a direct connection between Colombia's fourth counter-claim and Nicaragua's claim as both concerned provisions of domestic law adopted around the same time, alleged violation of each party's respective sovereign rights, and had the same legal aim of establishing that the other party's legislation was contrary to international law.

That left the question of whether the third and fourth counter-claims fell within the jurisdiction of the Court. In its 2016 judgment, referred to above, the Court had found that the only jurisdictional basis for Nicaragua's claim was Article XXXI of the Pact of Bogotá. Nicaragua argued that the Court had no jurisdiction over Colombia's counter-claims as the critical date for determining such jurisdiction was the date on which the counter-claims were made, by which time Colombia had denounced the Pact of Bogotá and was no longer a party. Moreover, two of the conditions for the application of Article XXXI were not satisfied: first, there was no dispute between the parties concerning the third counter-claim; second, the parties had not determined that their disputes concerning the third and fourth counter-claim could not be settled by negotiation.

The Court disagreed with those arguments. It observed that once it had jurisdiction to hear a case, that jurisdiction covered all phases of the cases, including

counter-claims, regardless of whether (as here) the basis of that jurisdiction had lapsed after the applicant State had instituted proceedings. Were that not so, an applicant might be able to deprive the respondent of the possibility of making a counter-claim by withdrawing its consent to the Court's jurisdiction after the commencement of proceedings.

Turning to the conditions that had to be satisfied if Article XXXI was to serve as the basis of its jurisdiction, the Court found that there was a dispute concerning Colombia's third counter-claim because the parties had opposing views on the scope of their respective rights and duties in Nicaragua's EEZ and Nicaragua was aware that its claims were positively opposed by Colombia. As to the condition that the issues involved in Colombia's third and fourth counter claims could not, in the opinion of the parties, be settled by direct negotiations, the Court observed in relation to the third counter-claim that the parties had never initiated direct negotiations to try to resolve the issues involved. That showed that they did not consider that there was a possibility of resolving their dispute over traditional fishing rights by direct negotiations. The condition was also fulfilled in respect of Colombia's fourth counter-claim because Colombia's protest against Nicaragua's straight baselines decree showed that it would not have been useful for the parties to have engaged in direct negotiations. The Court's conclusions here are perhaps less than wholly convincing. It does not necessarily follow that if negotiations have not been attempted or there has been a protest, a dispute cannot be settled by negotiation. In practice, protests are often followed by negotiations.

Overall, therefore, the Court held that it had jurisdiction in respect of Colombia's third and fourth counter-claims and that the latter were accordingly admissible. The Court further decided that as a consequence, it was necessary for

Nicaragua to file a Reply and Colombia a Rejoinder, the latter to be done by 15 November 2018.

Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)

In 2014 Somalia instituted proceedings against Kenya in respect of their disputed maritime boundary: it sought to found the Court's jurisdiction on the declarations made by itself and Kenya under Article 36(2) of the Court's Statute. In October 2015, Kenya raised certain preliminary objections to the jurisdiction of the Court and the admissibility of the application. On 2 February 2017 the Court delivered its judgment on those matters.³⁹

Kenya argued that the Court did not have jurisdiction because of a reservation contained in its declaration under Article 36(2), which excluded from the Court's jurisdiction "disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement." According to Kenya, there were two such agreed methods of settlement that were relevant, a memorandum of understanding (MOU) between the two States concluded in 2009⁴⁰ and Part XV of the LOSC.

Under the MOU each party agreed not to object to the other's submission to the Commission on the Limits of the Continental Shelf relating to the establishment of

³⁹ *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment of 2 February 2017, available at <http://www.icj-cij.org/files/case-related/161/161-20170202-JUD-01-00-EN.pdf>; accessed 26 May 2018. For early comment, see N. Bankes, 'The Relationship between Declarations under the Optional Clause of the Statute of the International Court of Justice and Part XV of the Law of the Sea Convention', JCLoS Blog, posted 10 February 2017, available at <http://site.uit.no/jclos/2017/02/10/the-relationship-between-declarations-under-the-optional-clause-of-the-statute-of-the-international-court-of-justice-and-part-xv-of-the-law-of-the-sea-convention/#more-397>; accessed 4 June 2018; and M. Benatar and E. Franckx, 'The ICJ's Preliminary Objections Judgment in Somalia v. Kenya: Causing Ripples in Law of the Sea Dispute Settlement?', EJIL: *Talk!* Blog, posted 22 February 2017, available at <https://www.ejiltalk.org/the-icjs-preliminary-objections-judgment-in-somalia-v-kenya-causing-ripples-in-law-of-the-sea-dispute-settlement/#more-15010>; accessed 4 June 2018.

⁴⁰ The MOU is reproduced in para. 37 of the Judgment.

the outer limits of the continental shelf beyond 200 nm. Paragraph 6 of the MOU stated that “delimitation of maritime boundaries in the area under dispute . . . shall be agreed between” the two States after the Commission had given its recommendations in response to each party’s submission. While the Court found the MOU to be a valid treaty and therefore binding on the parties (a matter that Somalia had initially contested), it concluded that paragraph 6 of the MOU, read in its context and in the light of its object and purpose, ‘sets out the expectation of the Parties that an agreement would be reached on delimitation of the continental shelf after receipt of the [Commission’s] recommendations. It does not, however, provide a method of dispute settlement’ and therefore fell outside the scope of Kenya’s reservation to its declaration under Article 36(2) of the Court’s Statute (para. 106). In reaching that conclusion, the Court was strongly influenced by the similarity of wording between paragraph 6 of the MOU and Article 83(1) of the LOSC, which was to be considered as a relevant rule of international law in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties. In the view of the Court, Article 83(1) “does not prescribe the method for the settlement of any dispute concerning the delimitation of the continental shelf” (para. 90). Furthermore, paragraph 6 of the MOU related only to a continental shelf boundary, not to delimitation of the parties’ territorial sea and EEZ boundaries, which were also in dispute. That part of the Court’s judgment dealing with the MOU is notable for its extensive references to the Vienna Convention.

Turning to Kenya’s argument that Part XV of the LOSC was an agreed method of dispute settlement and therefore excluded the Court’s jurisdiction in accordance with Kenya’s declaration under Article 36(2), the Court observed that where States had agreed a procedure to settle a dispute that fell within the terms of

Article 282 of the LOSC, that procedure applied instead of the compulsory dispute settlement procedures of section 2 of Part XV. Article 282 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].” The Court held that the phrase “or otherwise” in Article 282 included declarations made under Article 36(2) of its Statute, a finding confirmed by the *travaux préparatoires*. That was so even if such a declaration had a reservation (as Kenya’s did) that excluded from the Court’s jurisdiction disputes in respect of which the States concerned had agreed on another method of settlement. In reaching that conclusion, the Court was influenced by the fact that a majority of declarations under Article 36(2), both at the time that the LOSC was negotiated and at the present time, contain reservations similar to that of Kenya. The Court also noted that if it had reached the contrary conclusion, it would have achieved precisely the opposite result from that intended by Article 282, which was to give priority to declarations under Article 36(2). The Court did, however, note that if such a declaration “excluded disputes concerning a particular subject (for example, a reservation excluding disputes relating to maritime delimitation)”, section 2 of Part XV would apply (para. 128).

The Court dealt briefly with Kenya’s two arguments that Somalia’s application was inadmissible. The first was essentially a repetition of its argument concerning Article 6 of the MOU. The second argument was that the application was inadmissible because Somalia had breached the MOU by objecting to the consideration of Kenya’s submission by the Commission on the Limits of the Continental Shelf and thus had not come to the Court with “clean hands”. The Court

rejected that argument. It observed that the fact that a party might have breached a treaty at issue in a case did not *per se* affect the admissibility of an application. Furthermore, Somalia was not relying on the MOU as an instrument conferring jurisdiction on the Court or as a source of substantive law governing the merits.

Overall, therefore, the Court found both that it had jurisdiction to consider Somalia's application and that the application was admissible.⁴¹ Following delivery of the judgment, written proceedings in the main action continue. On the same day as the judgment, the Court made an order fixing 10 December 2017 as the time-limit for Kenya to file its counter-memorial on the merits.⁴²

Questions may be raised about the implications of the Court's judgment in the present case. Whether the Court will have jurisdiction in law of the sea disputes in future where an applicant seeks to found that jurisdiction on declarations made under Article 36(2) of the Court's Statute would seem to depend on the nature of the reservations (if any) that the parties to the dispute have made to their declarations. The distinction between specific reservations and reservations such as Kenya's in the present case is not wholly convincing and may be a fine one. While the Court discounted Kenya's reservation on the basis of Article 282, Kenya's intention with its reservation, and presumably the intention of other States making similar reservations, was clearly to express a preference for resolving disputes concerning the interpretation or application of the LOSC, of whatever nature, through the dispute settlement machinery of section 2 of Part XV of the LOSC. On the other hand, if the applicant in the above scenario were to initiate proceedings under section 2 of Part XV of the LOSC instead of before the ICJ, it is possible that the LOSC dispute

⁴¹ There were a number of declarations, separate opinions and dissenting opinions. For an overview of their content, see Bankes (n 39).

⁴² *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Order of 2 February 2017, available at <http://www.icj-cij.org/files/case-related/161/19346.pdf>; accessed 26 May 2017.

settlement body concerned might decline jurisdiction on the basis of Article 282 of the LOSC, especially in the light of the ICJ's judgment in the present case.

Arbitration

At the beginning of 2017 three law of the sea arbitrations outside the framework of the LOSC dispute settlement procedures were pending – one between Croatia and Slovenia, and two between Timor-Leste and Australia. During the year, proceedings in the latter two cases were terminated, as noted above, but in the *Croatia/Slovenia* case the tribunal delivered its final award, discussed below.

Croatia-Slovenia

Under an agreement between Croatia and Slovenia concluded in 2009, brokered by the European Union in order that Slovenia should lift its veto on Croatia's accession to the EU, an arbitral tribunal was requested to determine the following matters: the course of the land and maritime boundaries between Croatia and Slovenia; Slovenia's "junction to the High Sea;" and "the regime for the use of the relevant maritime areas."⁴³ A tribunal was constituted in 2012 and began its work. Following the rather extraordinary disruption to the course of the proceedings in 2015,⁴⁴ the arbitral tribunal, by that stage comprising Judge Gilbert Guillaume (president), Ambassador

⁴³ 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 <http://www.pcacases.com/web/sendAttach/2165>; accessed 25 May 2018.

⁴⁴ See the previous *Survey*; Churchill (n 23), at pp. 424-426.

Rolf Einar Fife, Professor Vaughan Lowe, Professor Nicolas Michel and Judge Bruno Simma, delivered its final award, dealing with the merits, on 29 June 2017.⁴⁵

Nearly half of the 370-page award is concerned with the course of the land boundary between Croatia and Slovenia and therefore falls outside the scope of this article. The first maritime issue with which the tribunal had to deal was the status of a bay known in Croatia as the Bay of Savudrija/Piran and in Slovenia as the Bay of Piran, which the tribunal, to preserve neutrality, refers to simply as “the Bay” (para. 771 of the award). The land boundary between Croatia and Slovenia terminates in the south-east corner of the Bay. Thus, the southern entrance point of the Bay (Cape Savudrija) and its southern shoreline are located in Croatia, while the northern entrance point (Cape Madona) and the remaining shoreline are located in Slovenia. The distance between the two entrance points is 2.7 nm.

The tribunal found that before the dissolution of Yugoslavia in 1991, the Bay was a juridical bay within the meaning of Article 7 of the 1958 Territorial Sea Convention and Article 10 of the LOSC and thus had the status of internal waters. After 1991, the Bay became bordered by Croatia and Slovenia as the successors of Yugoslavia. However, the tribunal held that such State succession did not change the previous status of the Bay as internal waters (para. 883). It found support for that

⁴⁵ *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, Final Award, 29 June 2017, available at <http://www.pcacases.com/web/sendAttach/2172>; accessed 25 May 2018. For early comment, see N. Bankes, ‘The Maritime Aspects of the Award in the Arbitration between Croatia and Slovenia’, JCLOSE Blog, posted 19 July 2017, available at <http://site.uit.no/jclos/2017/07/19/the-maritime-aspects-of-the-award-in-the-arbitration-between-croatia-and-slovenia/#more-450>; accessed 4 June 2018; A. Oude Elferink, ‘Slovenia/Croatia arbitration – Is the territorial sea delimitation consistent with the case law on maritime delimitation?’, JCLOSE Blog, posted 16 August 2017, available at <http://site.uit.no/jclos/2017/08/16/sloveniacroatia-arbitration-is-the-territorial-sea-delimitation-inconsistent-with-the-case-law-on-maritime-delimitation/#more-454>; accessed 4 June 2018; and A. Solomou, ‘A Commentary on the Maritime Delimitation Issues in the *Croatia v. Slovenia* Final Award’, EJIL: *Talk!* Blog, posted 15 September 2017, available at <https://www.ejiltalk.org/a-commentary-on-the-maritime-delimitation-issues-in-the-croatia-v-slovenia-final-award/>; accessed 4 June 2018.

position in the judgment of the ICJ in the *Land, Island and Maritime Frontier* case regarding the Gulf of Fonseca.⁴⁶ However, it may be questioned how much support that case offers as the ICJ found that the Gulf was an historic bay and that determined the status of its waters prior to the succession of El Salvador, Honduras and Nicaragua as riparian States to Spain in 1821. Returning to the present case, the tribunal noted that the fact that Article 7 of the 1958 Convention and Article 10 of the LOSC apply only to bays bordered by a single State did not imply that those articles “exclude the existence of bays with the character of internal waters, the coasts of which belong to more than one State” (para. 884). That conclusion is not entirely convincing. The fact that the Convention articles do not exclude the possibility that the waters of bays bordered by more than one State are internal, does not necessarily mean that such waters do have that status, as the tribunal implies.⁴⁷

The tribunal went on to consider the boundary between the parties in the Bay. It decided that as there were no provisions in the 1958 Conventions or the LOSC dealing with the delimitation of overlapping internal waters, the boundary between Croatia and Slovenia within the Bay should be delimited “on the basis of the same principles as are applicable” to the delimitation of land territories (para. 886). In the present case the delimitation had to be made on the basis of *uti possidetis*. As there had been no dividing line in the Bay before the dissolution of Yugoslavia in 1991, “[d]elimitation must thus be made on the basis of the *effectivités* at the date of independence” (para. 888). In this connection the tribunal noted that the Slovenian

⁴⁶ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) Case*, Judgment, I. C. J. Reports 1992, p. 351, paras 385 and 401.

⁴⁷ State practice on the status of waters in bays bordered by more than one State is ambiguous, although admittedly most such practice does not concern situations of State succession. Further on this question, see C. R. Symmons, “The Maritime Border Area of Ireland, North and South: An Assessment of Present Jurisdictional Ambiguities and International Precedents relating to Delimitation of “Border Bays”” (2009) 24 *IJMCL* 457-500, especially at 464-475; and F. Talaie, “The Issue of the Delimitation of Multi-State Bays in the International Law of the Sea” (1999) 18 *University of Tasmania Law Review* 22-64.

coastline in the Bay was relatively densely populated, whereas the Croatian coastline had been deserted for centuries; that fishing in the Bay had primarily been regulated by Slovenia; and that most policing in the Bay had been carried from Slovenia. In 2001 the parties had initialled a draft border agreement which divided the Bay by a line running from the mouth of the Dragonja River (the terminus of the land border) to a point on the closing line of the Bay (referred to as Point A) that was three times as far from Cape Madona as from Cape Savudrija. The tribunal considered that the line in the 2001 draft agreement “corresponds to the effectivités it has been able to determine and will adopt it” (para. 912). As a result, the overwhelming proportion of the Bay belongs to Slovenia, the exception being a narrow strip of water close to the Croatian coastline.

The next issue for the tribunal was delimitation of the territorial sea boundary between Croatia and Slovenia. The tribunal noted that the applicable law was Article 15 of the LOSC, and also the similarity of the methods of delimitation for all maritime zones, which was to begin with the construction of an equidistance line and then consider whether that line required adjustment in the light of any special circumstances. Accordingly, the tribunal began by constructing what it describes as an equidistance line “using all available base points on the coasts of Croatia and Slovenia, extending from Point A out to the intersection of the equidistance line with the maritime boundary between Italy and Yugoslavia established by the Treaty of Osimo, 1975” (para. 1003). There is something rather curious about this so-called equidistance line. It appears to ignore the fact that the closing line drawn across the mouth of the Bay is part of the baseline. That would mean that the first part of an equidistance line would be perpendicular to the closing line of the Bay. That does not appear to be the case, although admittedly the small-scale of the map in the award

means that one cannot be absolutely sure. What is certain, however, is that where the controlling basepoints are Capes Madona and Savudrija, a significant part of the so-called equidistance line is nowhere near being equidistant because the starting point of the line, Point A, is located so much closer to Croatia than Slovenia.

Be that as it may, the tribunal then went on to consider whether there were any special circumstances that would render its equidistance line “inapposite for the definitive maritime boundary” (para. 1005). It decided that there was one such circumstance. That was the fact that Croatia’s controlling basepoints were located on only a small stretch of its coast since beyond Cape Savudrija the direction of the coast turns to face south-west. Croatia’s basepoints had the effect of deflecting the equidistance line significantly northwards and exaggerated Slovenia’s boxed-in effect. Accordingly, the tribunal decided to adjust its equidistance line southwards to form the territorial sea boundary between Croatia and Slovenia. That line was approximately parallel to Slovenia’s territorial sea boundary with Italy and attenuated the boxed-in nature of Slovenia’s maritime space.⁴⁸

The next issue for the tribunal was “Slovenia’s junction to the High Sea”. It began by defining the terms used in that phrase. It considered “High Sea” to mean the area in which high seas freedoms of navigation, overflight and the laying of cables and pipelines could be exercised, in other words areas beyond the territorial sea. It decided that “junction” had its ordinary dictionary meaning as the physical location of a connection between two or more areas, and could refer either to “a geographical point or line, without spatial extension, or an area” (para. 1077). The tribunal therefore concluded that the phrase “Slovenia’s junction to the High Sea” meant “the connection between the territorial sea of Slovenia and an area beyond the territorial

⁴⁸ For strong criticism of this part of the award, see Oude Elferink (n 45).

seas of Croatia and Italy” (para. 1076). The tribunal noted that in determining the area of the junction, it was mandated by Article 4(b) of the Arbitration Agreement to apply “international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances.”

According to the tribunal, those circumstances were primarily the access of ships and aircraft to and from Slovenia and the exercise of jurisdiction over such ships and aircraft. The tribunal decided that the junction area would be an elongated area of Croatia’s territorial sea about 2.5 nm in width and roughly seven or eight nm in length. To the north-east this area was bounded by the Croatia-Slovenia territorial sea boundary, to the west by the Croatia-Italy territorial sea boundary, in the south-east by the outer limit of Croatia’s 12 nm territorial sea, with the eastern side, lying within Croatia’s territorial sea, being a line roughly parallel to the western side of the area.

The final issue for the tribunal was to determine “the regime for the use of the relevant maritime areas”, for which again it was to apply the provisions of Article 4(b) of the Arbitration Agreement. The tribunal considered that no special regime was required for any “maritime area” other than the junction area. For that area the tribunal determined that the regime for ships and aircraft, of whatever nationality, travelling to or from Slovenia should be the same as the freedoms set out in Article 58(1) of the LOSC (on the rights of other States in a coastal State’s EEZ). The tribunal stressed that that regime differed both from innocent passage in the territorial sea and transit passage through international straits. There should also be freedom to lay cables and pipelines, subject to the coastal State’s powers under Article 79 of the LOSC. Croatia would be entitled to prescribe laws and regulations for foreign ships and aircraft in the junction area that gave effect to generally accepted international standards in accordance with Article 39(2) and (3) of the LOSC (which deal with

transit passage through international straits), but it could not enforce such laws and regulations in the junction area, although it could do so elsewhere in accordance with international law. The tribunal emphasised that the rights and obligations of the parties under the regime must be exercised in good faith and with due regard for the rights and obligations of other States. Furthermore, the parties should cooperate with each other and with other States, and in this connection the tribunal recalled Article 123 of the LOSC (on cooperation between States bordering enclosed and semi-enclosed seas). The tribunal was satisfied that the regime that it had prescribed for the junction area was “consistent with [the] basic principles” of the LOSC and therefore did not violate the prohibition in Article 311(3) of the LOSC on the conclusion of agreements that affect the application of those principles (para. 1140).

To some eyes the special regime for the junction area devised by the tribunal may seem overly ambitious, given the unclear and ambiguous provision of the Arbitration Agreement on which it is based. However, it is worth noting that in its pleadings Croatia had accepted that the purpose of the provisions in the Arbitration Agreement concerning the junction was to ensure secure access for ships navigating between the high seas and Slovenian waters.⁴⁹ Nevertheless, it is difficult to see how the rights intended for third States by the special regime could be enforced by such States, given that the award applies between the two parties only.

The tribunal’s decision was unanimous on all points. On the day that the award was delivered, the Prime Minister of Croatia made a statement that the award did not in any way bind Croatia and Croatia would not implement it.⁵⁰ In December 2017 Croatia invited Slovenia not to take any action unilaterally to implement the

⁴⁹ See paras. 1027, 1042, 1053, 1112 and 1113 of the award.

⁵⁰ Press Release of the Croatian Ministry of Foreign Affairs of 29 June 2017, available at <http://www.mvep.hr/en/info-servis/press-releases/,28223.html>; accessed 4 June 2018.

award and emphasised that it was willing to try to resolve outstanding boundary issues through negotiation.⁵¹

⁵¹ Press Release of the Croatian Ministry of Foreign Affairs of 28 December 2017, available at <http://www.mvep.hr/en/info-servis/press-releases/,29394.html>; accessed 4 June 2018.