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Dispute Settlement in the Law of the Sea: Survey for 2020

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Abstract

This is the latest in a series of annual surveys in this *Journal* reviewing dispute settlement in the law of the sea, both under Part xv of the UN Convention on the Law of the Sea and outside the framework of the Convention. It covers developments during 2020. The most significant developments were awards by the arbitral tribunals in the *Enrica Lexie* and *Coastal State Rights* cases.

Keywords

arbitration – International Court of Justice (ICJ) – International Tribunal for the Law of the Sea (ITLOS) – jurisdiction over vessels – peaceful purposes – piracy – sovereignty disputes – State immunity

Introduction

This is the latest in a series of annual surveys in this *Journal* reviewing dispute settlement in the law of the sea. It covers developments during 2020 and follows the structure of previous surveys. Thus, it begins by looking at dispute settlement under the UN Convention on the Law of the Sea (LOS).¹ It examines in turn the activities of those forums for the compulsory settlement of disputes under Part xv of the LOSC that were active during 2020, namely the International Tribunal for the Law of the Sea (ITLOS) and arbitration in

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

accordance with Annex VII. It then continues and concludes by looking at third-party settlement of law of the sea disputes outside the framework of Part xv, which in 2020 mainly concerned the International Court of Justice (ICJ).

The most notable developments relating to dispute settlement in the law of the sea during 2020 were two awards by arbitral tribunals constituted under Annex VII of the LOSC. In the first, in the *Enrica Lexie* case, the tribunal adopted a controversially broad view of the ambit of an 'incidental' issue over which a LOSC dispute settlement body may have jurisdiction, even though that issue does not concern the interpretation or application of the LOSC. The issue in question was whether members of a State's armed forces, placed on board a privately-owned vessel to provide protection against a possible attack by pirates, enjoyed immunity from the criminal jurisdiction of States other than their State of nationality. The *Enrica Lexie* award also addresses the application of the objective territorial basis of jurisdiction to ships in the exclusive economic zone (EEZ); provides the first interpretation by a LOSC dispute settlement body of the terms 'peaceful purposes' in Article 88 (and also found in several other provisions of the LOSC) and of 'incident of navigation' in Article 97; and includes the first consideration of the obligation to cooperate in the repression of piracy under Article 100 and the nationality and registration of small ships. In addition, the award adds to (and generally confirms) existing jurisprudence on the meaning of 'freedom of navigation' and 'due regard' and the exclusive nature of flag State jurisdiction on the high seas.

The other Annex VII arbitral award dealt with Russia's preliminary objections to the tribunal's jurisdiction in the *Coastal State Rights* case. The award adds to the existing jurisprudence on the question of whether LOSC dispute settlement bodies have jurisdiction to address issues of territorial sovereignty and on the 'military activities' exception to compulsory dispute settlement under Part xv of the LOSC. The award also provides the first consideration by a LOSC dispute settlement body of the relationship between arbitration under Annex VII and arbitration under Annex VIII.

Other developments in 2020 worthy of note were the election of five new judges to the ITLOS; the conclusion of an agreement enabling the ITLOS to sit in Singapore; the raising of preliminary objections by Russia to the jurisdiction of the arbitral tribunal in the *Detention of Ukrainian Naval Vessels and Servicemen* case; and an unsuccessful attempt by Slovenia to enforce the 2017 award of the arbitral tribunal in the *Croatia/Slovenia* case through the European Court of Justice.

No new law of the sea cases were begun in 2020; but at the year's end, no less than eight cases were ongoing before a variety of international courts and

tribunals: two before the ITLOS, two before Annex VII arbitral tribunals and four before the ICJ.

The year 2020 will, of course, be remembered as the (first) year of the COVID-19 pandemic. As in other walks of life, the pandemic affected the work and working methods of international courts and tribunals. Both the ICJ and the ITLOS amended their Rules to permit them to decide, for public health, security or other compelling reasons, to hold hearings and meetings entirely or in part by video link.² This option was used in a number of subsequent cases. The pandemic also caused postponement of the time limits for some written proceedings and the dates of some hearings.

International Tribunal for the Law of the Sea

Election of Judges

Every three years the terms of office of one third of the 21 judges of the ITLOS expires and the Meeting of States Parties to the LOSC elects judges to fill the seven vacancies thus created.³ 2020 was such a year. Five of the retiring judges did not seek re-election. They were Judges Cot (from France, first elected in 2002), Gao (China, 2008), Kelley (Argentina, 2011), Lucky (Trinidad and Tobago, 2003) and Ndiaye (Senegal, 1996). The other two retiring judges, Judges Attard (Malta) and Kulyk (Ukraine), stood for re-election and were elected, along with five new judges: Kathy-Ann Brown (Jamaica), Maria Teresa Infante Caffi (Chile), Ida Caracciolo (Italy), Jielong Duan (China) and Maurice Kamga (Cameroon). There was a total of nine candidates in all, four less than for the previous election in 2017.⁴ As a result of the 2020 elections, five of the 21 judges are women, the highest proportion of female judges in the history of the ITLOS, which was an exclusively male bastion until 2011. As regards the backgrounds of the new judges, three have had their primary careers in their respective foreign ministries and the other two in academia. The new triennium also meant a change in the praesidium, with Judge Hoffman succeeding

2 ICJ Press Release No. 2020/16 (25 June 2020); ITLOS Press Release 306 (25 September 2020). See further AN Honniball, 'Pandemics, procedure and participation: Hybrid hearings in the Mauritius/Maldives maritime boundary dispute', posted on the *EJIL*: Talk blog on 15 March 2021.

3 LOSC (n 1), Annex VI, Articles 4, 5. Elections are based on an agreed regional allocation of seats.

4 Report of the Thirtieth Meeting of States Parties, UN Doc SPLOS/30/14 (2020), 4–6.

Judge Paik as president and Judge Heidar becoming vice-president, as well as the reconstitution of the various chambers of the ITLOS.⁵

Model Agreement with Singapore

On 11 June 2020 the ITLOS signed an agreement with the government of Singapore that enables it to sit or otherwise exercise its functions in Singapore. The agreement is the first permitting the ITLOS to sit elsewhere than at its seat in Hamburg.⁶ The possibility of such agreements is provided for by Article 1(3) of the Statute of the ITLOS (Annex VI of the LOSC), which stipulates that the ITLOS may sit and exercise its functions outside Hamburg 'whenever it considers this desirable'.

Case No. 28: Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)

On 18 June 2019 Mauritius instituted arbitral proceedings against the Maldives under Annex VII of the LOSC requesting a tribunal to delimit the maritime boundary between the EEZs and continental shelves (including the continental shelves beyond 200 nautical miles (M)) of Mauritius (in respect of the Chagos Archipelago) and the Maldives. However, on 24 September 2019 the two States concluded an agreement to transfer the case to a Special Chamber of the ITLOS.⁷ The Chamber was duly constituted and comprises Judges Paik (President), Jesus, Pawlak (replacing Judge Cot following the expiry of his term of office), Yanai, Bouguetaia, Heidar and Chadha, and Judges *ad hoc* Schrijver (chosen by Mauritius) and Oxman (chosen by the Maldives).⁸ On 18 December 2019 the Maldives raised preliminary objections to the jurisdiction of the Special Chamber. As a result, proceedings on the merits were suspended. On the following day the President of the Special Chamber made an order, setting a time limit of 17 February 2020 for Mauritius to submit its observations on the Maldives' preliminary objections and a time limit of 17 April 2020

5 For details, see ITLOS Press Release 309 (7 October 2020). This and all other ITLOS documents referred to below are available on its website.

6 ITLOS Press Release 303 (11 June 2020). See further AN Honniball and VJ Schatz, 'Singapore. Model Agreement for the Provision of Facilities for the International Tribunal for the Law of the Sea' (2020) 5(2) *Asia-Pacific Journal of Ocean Law and Policy* 387–397.

7 Special Agreement and Notification, available on the ITLOS website.

8 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Order No. 2019/4 of 27 September 2019.

for the Maldives to reply.⁹ Hearings, in hybrid format (i.e., partly in person, partly remotely), were held 13–19 October 2020. On 28 January 2021 the Special Chamber delivered its judgment on the Maldives' preliminary objections.¹⁰ It is intended to provide a detailed analysis of the judgment for the *Survey* for 2021, but it may be useful to provide a summary of the judgment here.

The Maldives raised five objections to the jurisdiction of the Special Chamber and the admissibility of the claims of Mauritius: (1) the absence from the proceedings of an indispensable third party, namely the United Kingdom; (2) the existence of a dispute between Mauritius and the United Kingdom over sovereignty of the Chagos Archipelago; (3) the lack of negotiations between the parties over a maritime boundary; (4) the absence of a dispute between the parties over a maritime boundary; and (5) an abuse of process by Mauritius.

The Special Chamber dealt with the Maldives' first two objections together. It agreed with the Maldives that were it required to determine a dispute concerning sovereignty over the Chagos Archipelago, it would not have jurisdiction. However, it found (Judge *ad hoc* Oxman dissenting) that there was no such dispute, even though the United Kingdom continued to maintain its claim to sovereignty over the Chagos Archipelago. The Special Chamber considered that claim as 'contrary to the determinations' made by the ICJ in an advisory opinion of 2019 that the process of the decolonisation of Mauritius was not legally completed when it became independent in 1968 because of the United Kingdom's prior unlawful detachment of the Chagos Archipelago from the colony of Mauritius and its incorporation into a new colony, British Indian Ocean Territory, and that the United Kingdom's continued administration of the Chagos Archipelago constituted an unlawful act of a continuing character.¹¹ Furthermore, the Special Chamber considered that

[t]he ICJ's determinations may also entail considerable implications for the sovereignty claim of Mauritius, whose territory, as the ICJ found, included the Chagos Archipelago at the time of its unlawful detachment by the United Kingdom. In particular, the ICJ determined that "the obligations arising under international law and reflected in the resolutions

9 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Order No. 2019/6 of 19 December 2019.

10 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, Judgment of 28 January 2021.

11 The Special Chamber was referring to *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, *ICJ Reports 2019*, p. 95, at paras 174 and 177.

adopted by the General Assembly during the process of decolonization of Mauritius *require* the United Kingdom, as the administering Power, to respect the *territorial integrity of that country, including the Chagos Archipelago*" (emphasis added by the Special Chamber). In the Special Chamber's view, this can be interpreted as suggesting Mauritius' sovereignty over the Chagos Archipelago. The same may be said of the determination that "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the *decolonization of its territory* in a manner consistent with the right of peoples to self-determination" (emphasis added by the Special Chamber).¹²

Thus, the United Kingdom had no claim to sovereignty of the Chagos Archipelago and consequently was not an indispensable third party. Nor was there any doubt as to which State had sovereignty over the Archipelago as Mauritius' sovereignty 'can be inferred from' the ICJ's Advisory Opinion.¹³ That inference was supported by Resolution 73/295, adopted by the UN General Assembly following the Advisory Opinion, which affirmed that 'in accordance with the advisory opinion of the Court ... [t]he Chagos Archipelago forms an integral part of the territory of Mauritius' and demanded that the United Kingdom 'withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution'.¹⁴ Accordingly, the Special Chamber rejected the Maldives' first two preliminary objections to its jurisdiction.

The Maldives' third objection was that Articles 74 and 83 required States whose EEZs and continental shelves overlapped to try to negotiate an agreed boundary before resorting to the dispute settlement procedures of Part xv of the LOSC, and that in the present case there had been no such negotiations between Mauritius and the Maldives. The Special Chamber rejected that objection. It found that Mauritius had on several occasions attempted to engage the Maldives in negotiations: however, while the Maldives had at times shown interest in meeting, and even had met with Mauritius once, it had for most of the time refused to negotiate with Mauritius because in its view Mauritius did not have sovereignty over the Chagos Archipelago. Because of the Maldives'

12 Judgment (n 10), para 174. The quotations in this passage are from paras 173 and 178 of the ICJ's Advisory Opinion.

13 *Ibid.*, para 246.

14 UN General Assembly Res. 73/295, 22 May 2019, paras 2(b) and 3, available at <https://undocs.org/en/A/RES/73/295>; accessed 23 February 2021.

persistence with that position, it was clear that no agreement on a maritime boundary could be reached, and thus resort to the dispute settlement procedures of Part XV of the LOSC was not only justified but also obligatory.

The Maldives' fourth objection had two parts. First, the Maldives argued that there could be no dispute with Mauritius over maritime delimitation until such time as Mauritius undisputedly had sovereignty over the Chagos Archipelago. Given the Special Chamber's earlier decision on the issue of sovereignty, it found that this argument was without basis. Second, the Maldives argued that there was no dispute, consisting of positively opposed claims as to their respective maritime zones, between it and Mauritius. The Special Chamber also found this argument to be without merit. It was clear from the legislation of the parties and communications between them in 2010–2011 that there was an overlap between the Maldives' claim to a continental shelf beyond 200 M and Mauritius' claim to an EEZ delineated from the Chagos Archipelago. In the light of the formal protest by Mauritius in 2011 to the submission by the Maldives to the Commission on the Limits of the Continental Shelf (CLCS), it was evident that the claim of the Maldives was positively opposed by Mauritius, thus constituting a dispute.

The Special Chamber swiftly disposed of the Maldives' objection that Mauritius was abusing the judicial process by seeking a ruling on sovereignty over the Chagos Archipelago. That was not the case. Mauritius was seeking a ruling on delimitation of the maritime boundary between itself and the Maldives.

Thus, the Special Chamber rejected all of the Maldives' preliminary objections and held that it had jurisdiction to adjudicate on the dispute concerning the delimitation of the maritime boundary between the parties. However, the Special Chamber deferred to the proceedings on the merits 'questions concerning the extent' of that jurisdiction, 'including questions arising under article 76 of the Convention'.¹⁵ By this, the Special Chamber would appear to mean the question of whether it could delimit a boundary involving the continental shelf beyond 200 M. As regards Mauritius' claim relating to the obligations of paragraph 3 of Articles 74 and 83 of the LOSC (to make every effort to enter into provisional arrangements of a practical nature and not to jeopardise or hamper the reaching of a boundary agreement), the Special Chamber decided to reserve that question for consideration at the merits stage, as it had not been fully argued by the parties.

Following the judgment, the president of the Special Chamber made an order setting revised time limits of 25 May 2021 and 25 November 2021 for

15 Judgment (n 10), para 352.

the submission of a memorial by Mauritius and a counter-memorial by the Maldives, respectively.¹⁶

**Case No. 29: M/T “San Padre Pio” (No. 2) Case
(Switzerland/Nigeria)**

This case concerns the arrest by the Nigerian authorities of a Swiss-registered tanker, the *San Padre Pio*, in January 2018 for allegedly engaging in the unauthorised bunkering of another vessel in Nigeria’s EEZ. Following its arrest, the vessel was detained in a Nigerian port, and the master and three officers charged with criminal offences relating to the unauthorised distribution of petroleum and required to remain in Nigeria. On 6 May 2019 Switzerland instituted arbitral proceedings against Nigeria under Annex VII of the LOSC in relation to the arrest and continuing detention of the vessel and some of its crew. In its Statement of Claim, Switzerland argued that Nigeria’s actions violated Article 58 of the LOSC, read with Articles 87 and 92, which grant foreign vessels freedom of navigation through a coastal State’s EEZ and exclusive jurisdiction to the flag State. Switzerland also claimed that Nigeria’s actions violated the International Covenant on Civil and Political Rights and the Maritime Labour Convention. In December 2019 the parties agreed to transfer proceedings from the Annex VII arbitral tribunal to the ITLOS.¹⁷ On 7 January 2020 the President of the ITLOS made an order setting time limits of 6 July 2020 and 6 January 2021 for the submission of a memorial by Switzerland and a counter-memorial by Nigeria, respectively.¹⁸

Between the institution of proceedings under Annex VII and the transfer of the case to the ITLOS, Switzerland applied to the ITLOS for an order of provisional measures, requesting it to order Nigeria to allow the *San Padre Pio* and its crew to leave Nigeria and to suspend criminal proceedings against the master and three officers. In response, the ITLOS made an order on 6 July 2019.¹⁹ It prescribed provisional measures requiring Nigeria to release the *San Padre Pio*, its cargo and the master and three other detained officers on the posting

16 Order No. 2021/2 of 3 February 2021.

17 Special Agreement and Notification of 17 December 2019, available with the materials for the case on the ITLOS website.

18 *The M/T “San Padre Pio” (No. 2) Case (Switzerland/Nigeria)*, Order No. 2020/1. The deadline for Nigeria was subsequently extended to 6 April 2021: see Order No. 2021/1 of 5 January 2021.

19 *M/T “San Padre Pio” Case (Switzerland v. Nigeria)*, Preliminary Measures, Order of 6 July 2019. Available with the materials for Case No. 27 on the ITLOS website. The Order is discussed in the *Survey* for 2019: see R Churchill, ‘Dispute settlement in the law of the sea: Survey for 2019’ (2020) 35(4) *International Journal of Marine and Coastal Law (IJMCL)* 621–659, at pp. 637–644.

of a bond or other financial surety by Switzerland of US\$14 million and allow them to leave Nigeria. In addition, Switzerland should undertake to return the master and three officers to Nigeria if the Annex VII tribunal were to find that Nigeria had not violated the LOSC. The tribunal declined Switzerland's request that Nigeria should suspend criminal proceedings, but did order both parties to refrain from any action that could aggravate or extend the dispute. Both parties should report on implementation of the order by 22 July 2019.

Both parties reported by the deadline specified by the order and several times thereafter during 2019. In November 2020 Switzerland submitted a further report in which it informed the ITLOS that the *San Pedro Pio* and the four members of its crew had been acquitted of all the charges against them by the Nigerian Federal High Court on 28 November 2019.²⁰ The crew members had been allowed to leave Nigeria two days later. However, the vessel and its cargo continued to be detained 'in a dangerous location' in Nigeria, even though there was no legal basis under Nigerian law for the continued detention as both the Federal High Court and the Court of Appeal had refused a stay of execution. Although an appeal was pending before the Supreme Court, there was no automatic stay of execution under Nigerian law. Furthermore, Switzerland had been unable to post the bond of US\$14 million prescribed by the ITLOS as Nigeria had been unwilling to negotiate a contract of guarantee.

Arbitration in Accordance with Annex VII

At the beginning of 2020 three cases were pending before arbitral tribunals constituted in accordance with Annex VII of the LOSC: *Enrica Lexie Incident (Italy v. India)*, *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. Russian Federation)*; and *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation)*. During 2020 there were major developments in all three cases: the tribunal delivered its award in the *Enrica Lexie* case; in the first *Ukraine v. Russia* case the tribunal delivered its award on preliminary objections to its jurisdiction; while in the second *Ukraine v. Russia* case Russia raised objections to the tribunal's jurisdiction. Each of these developments is discussed in more detail below.

²⁰ The reports are available with the materials relating to Case No. 27 on the ITLOS website.

Enrica Lexie Incident (Italy v. India), PCA Case No. 2015–28

The *Enrica Lexie* case concerns an incident that occurred in February 2012 some 20 M off the southwest coast of India, and therefore within India's EEZ. Two ships were involved in the incident, the *Enrica Lexie*, an Italian-flagged oil tanker, and the *St. Antony*, a 13.7 metre long Indian fishing vessel. The *Enrica Lexie* was en route from Galle in Sri Lanka to Port Said in Egypt. That meant traversing an area where Somali pirates were active. In accordance with Italian practice at that time, six marines from the Italian Navy were put on board the *Enrica Lexie* at Galle to provide protection in the event of an attack by pirates.

On the afternoon of 15 February 2012, those on board the *Enrica Lexie* noticed a small vessel (the *St. Antony*) coming straight towards them. They suspected that it was a pirate vessel about to attack. When the *St. Antony* was about 800 metres from the *Enrica Lexie*, they shone warning lights and waved their weapons in the air. When the *St. Antony* did not then alter course, two of the marines fired three successive rounds of a mix of tracer and ordinary bullets when the *St. Antony* was approximately 500, 300 and 80–100 metres distant. When the *St. Antony* was no more than about 30 metres away, it abruptly changed course away from the *Enrica Lexie*. According to the skipper of the *St. Antony*, its crew had been fishing the whole of the previous night and were all asleep at the time apart from the helmsman and another man at the bow, who were supposed be awake. The skipper had been woken by the sound of gunfire to find that the helmsman and the other man had been shot and were dying. He seized the helm and turned the *St. Antony* sharply away from the *Enrica Lexie*.

The captain of the *Enrica Lexie* reported to various authorities that a suspected pirate attack had taken place. Subsequently, he was requested by the Indian authorities to proceed to the Indian port of Kochi. Once the *Enrica Lexie* was docked there, the Indian authorities arrested the two marines involved in the shooting and charged them with the murder of the two fishermen on board the *St. Antony*.

Italy instituted proceedings against India under Annex VII of the LOSC in June 2015. In its statement of claim, it argued that India had violated international law by asserting and exercising criminal jurisdiction over the *Enrica Lexie* and the two marines and by failing to cooperate in the repression of piracy. An arbitral tribunal was duly constituted, comprising Judge Golitsyn (president), Judge Paik, Judge Robinson, Professor Francioni (appointed by Italy) and Judge Chandrasekhara Rao (appointed by India), replaced by Dr PS Rao following Judge Rao's death in October 2018.

During the course of the proceedings, Italy requested an order of provisional measures from the ITLOS in 2015 under Article 290(5) of the LOSC, pending the constitution of the arbitral tribunal, and a further order from the tribunal

itself in 2016. Both prescribed provisional measures.²¹ The main effect of those measures was that India was required to suspend criminal proceedings against the two marines and consider a relaxation of their bail conditions.

Italy spelt out the broad claims that it had originally put forward in its notification of claim in its subsequently submitted memorial. It argued that (1) India's maritime zones legislation of 1976 was incompatible with Articles 33, 56, 58, 87 and/or 89 of the LOSC; (2) by directing the *Enrica Lexie* to change course and enter India's territorial sea, India had violated Italy's freedom of navigation under Article 87(1)(a); (3) by interdicting the *Enrica Lexie* and escorting her to the port of Kochi, India had violated Italy's exclusive jurisdiction over the *Enrica Lexie* under Article 92; (4) India had violated, and was continuing to violate, Italy's exclusive right under Article 97(1) to institute penal or disciplinary proceedings against the marines; (5) by ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India had violated Article 97(3); (6) the assertion and continued exercise of criminal jurisdiction by India over the two marines was in violation of India's obligation to respect their immunity under Articles 2(3), 56(2) and 58(2) of the LOSC as Italian State officials exercising official functions; and (7) India had violated Articles 100 and 300 of the LOSC by failing to cooperate in the repression of piracy. In its counter-memorial India raised objections to the jurisdiction of the tribunal and the admissibility of Italy's claims, and presented a counter-claim that by killing two Indian fishermen on board the *St. Antony*, Italy had violated India's sovereign rights under Article 56 of the LOSC; breached its obligation under Article 58(3) to have due regard to India's rights in its EEZ; violated India's freedom and right of navigation under Articles 87 and 90; and infringed India's right to have its EEZ reserved for peaceful purposes under Article 88. The written proceedings phase of the case was completed in March 2018 and hearings held in July 2019. The tribunal delivered its award on 21 May 2020.²² The award addresses both jurisdiction and the numer-

21 *The "Enrica Lexie" Incident (Italy v. India), Request for the Prescription of Provisional Measures*, Order, *ITLOS Reports 2015*, p. 179; *The "Enrica Lexie" Incident (Italy v. India), Request for Provisional Measures*, Order of 29 April 2016, available with all the other materials for the case on the website of the Permanent Court of Arbitration (PCA) at <https://pca-cpa.org/en/cases/117/>; accessed 1 March 2021. The two orders have been discussed in previous *Surveys*: see R Churchill, 'Dispute settlement in the law of the sea: Survey for 2015 – Part I' (2016) 31(4) *IJMC* 553–582, at pp. 576–580; R Churchill, 'Dispute settlement in the law of the sea: Survey for 2015, Part II and 2016' (2017) 32(3) *IJMC* 379–426, at pp. 413–416.

22 *The "Enrica Lexie" Incident (Italy v. India)*, Award, 21 May 2020, PCA Case No. 2015–28, available at <https://pcacases.com/web/sendAttach/16500>; accessed 1 March 2021.

ous substantive issues raised by the parties in their pleadings: in its electronic form, it runs to over 300 pages.

Jurisdiction and Admissibility

In its order of provisional measures, the tribunal had found that *prima facie* it had jurisdiction in the case. It had little difficulty in confirming that finding in its award. There was clearly a dispute between the parties. As to whether that dispute concerned the interpretation or application of the LOSC, it was necessary to identify and characterise the object of Italy's claims. In the tribunal's view, the parties' dispute was appropriately characterised as a disagreement as to which State was entitled to exercise jurisdiction over the incident of 15 February 2012. That raised questions under several provisions of the LOSC, including Articles 56, 58, 59, 87, 92, 97, 100 and 300, on the interpretation or application of which the parties had different views. Thus, there was clearly a dispute concerning the interpretation or application of the LOSC. Whether the tribunal also had jurisdiction with respect to the question of immunity would be addressed when the tribunal came to consider the specific claim of Italy concerning the matter. In addition, the tribunal found that the parties had complied with the obligation under Article 283 of the LOSC to exchange views regarding settlement of the dispute by negotiations or other peaceful means. The parties' exchanges at various diplomatic and political levels had not led to any agreement regarding settlement of the dispute.

The tribunal also had to consider whether India's counter-claims were admissible. While its Rules of Procedure did not expressly provide for the right to present counter-claims, the tribunal had no doubt that arbitral tribunals established pursuant to Annex VII of the LOSC had the inherent power to hear counter-claims. That position was supported by Article 5 of Annex VII, which requires that each party must be assured 'a full opportunity to be heard', and the fact that the rules of procedure of both alternative fora for the settlement of disputes under the LOSC, the ICJ and ITLOS, expressly provided for the filing of counter-claims by respondent States. The tribunal noted that it was a general principle of procedural law that a counter-claim could be admitted only if it came within the jurisdiction of the court or tribunal concerned and was directly connected with the subject matter of the claim of the other party. Those conditions were satisfied in the present case. Thus, India's counter-claims were admissible.

Italy's Claims Relating to Matters Other than the Immunity of the Marines

Italy's first claim was that India's Maritime Zones Act of 1976, particularly sections 5 and 7, under which India claimed jurisdiction in respect of security in

its contiguous zone and had extended its Penal Code and Code of Criminal Procedure to its EEZ, was incompatible with Articles 33, 56, 58, 87 and/or 89 of the LOSC. In response, the tribunal noted that the Indian authorities did not commence investigation or assert their jurisdiction in relation to the incident until the *Enrica Lexie* was anchored in Indian territorial waters. Thus, as no enforcement action was taken by India against the *Enrica Lexie* or the marines in its EEZ or contiguous zone, the 1976 Act was not relevant, and accordingly it was not necessary for the tribunal to determine its compatibility with the LOSC.

However, it was necessary for the tribunal to examine whether the two legal bases on which India relied in support of its exercise of jurisdiction over the *Enrica Lexie* and the marines, namely the territoriality principle and the passive personality principle, were compatible with the LOSC. As regards the territoriality principle, the tribunal considered it well established that the principle could be extended to allow a State to exercise jurisdiction over any offence committed on board one of its vessels, wherever it might be. It was also well established that where the commission of an offence was commenced on board the vessel of one State and completed on board the vessel of another State, both flag States could exercise jurisdiction over the offence.

In the present case, the alleged offence (the murder of two fishermen) was commenced on board the *Enrica Lexie* and completed on board the *St. Antony*. Accordingly, both Italy (under the subjective territoriality principle) and India (under the objective territoriality principle) were entitled to exercise jurisdiction over the incident. That conclusion was without prejudice to the question of whether India was precluded from exercising jurisdiction over the marines because of their status as State officials entitled to immunity, a matter which the tribunal considered later in its award. Furthermore, India's exercise of jurisdiction over the *Enrica Lexie* incident was not only compatible with the LOSC, but justified by Article 92(1), which provides for the principle of exclusive flag State jurisdiction. Pursuant to that principle, India, as the flag State, had exclusive jurisdiction over the *St. Antony* and could assert its jurisdiction in respect of the offence that was allegedly completed on board that vessel in its EEZ, in the same way as Italy, as the flag State, had exclusive jurisdiction over the *Enrica Lexie* and could exercise its jurisdiction in respect of the offence that was allegedly commenced on board its vessel. Having found that the objective territoriality principle provided a valid legal basis for India's exercise of jurisdiction over the incident, the tribunal did not consider it necessary to address the validity of the second basis for jurisdiction invoked by India, namely the passive personality principle.

To support its position on the applicability to vessels on the high seas of the objective territoriality principle of jurisdiction, the tribunal referred to the judgment of the Permanent Court of International Justice (PCIJ) in the *Lotus*

case,²³ which factually has some obvious similarities with the present case. Although it did not acknowledge the fact, the tribunal's position on this point also accords with that of the seven dissenting ITLOS judges in the *Norstar* case,²⁴ even though the tribunal later in its award quoted with approval the passage in the judgment of the *Norstar* case from which the minority were dissenting.²⁵

Italy's second claim was that by directing the *Enrica Lexie* to change course and enter India's territorial sea, India had violated Italy's freedom of navigation under Article 87(1)(a) of the LOSC, which by virtue of Article 58(1) of the LOSC also applies in the EEZ. The tribunal began by noting that such freedom of navigation was the right of every ship to traverse the high seas (and EEZ) free from interference, or the exercise of jurisdiction, by any other State, unless justified by the LOSC or some other treaty. Interference in this context included 'physical or material interference with navigation of a foreign vessel, the threat or use of force against a foreign vessel, or non-physical forms of interference whose effect is that of instilling fear in, or causing hindrance to, the exercise of the freedom of navigation'.²⁶ However, the tribunal found that on the facts there had been no interference of this kind by India with the *Enrica Lexie's* freedom of navigation, and therefore no breach of Article 87(1)(a) of the LOSC.

Italy's third claim was that by directing the *Enrica Lexie* to proceed to the port of Kochi, interdicting her and escorting her to the port, India had violated Italy's exclusive jurisdiction over the vessel under Article 92 of the LOSC, which by virtue of Article 58(2) of the LOSC also applies in the EEZ. In adjudging this claim, the tribunal began by noting that Article 92, which provides for exclusive flag State jurisdiction over ships on the high seas, was an essential adjunct to the principle of the freedom of the seas. It held that 'the principle of exclusive flag State jurisdiction under the [LOS] Convention is violated when a State other than the flag State seeks to prescribe laws, rules, or regulations over a ship of the flag State, or applies or enforces such laws, rules, or regulations

23 *SS "Lotus" (France v. Turkey)*, PCIJ, Series A, No. 10 (1927): see particularly pp. 23–25.

24 *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, *ITLOS Reports 2018–2019* [forthcoming], Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad and Judge *ad hoc* Treves, para 31.

25 *Enrica Lexie* Award (n 22), para 527. See further Churchill 2020 (n 19), at pp. 627–630.

26 *Enrica Lexie* Award (n 22), para 472. The tribunal quotes in support of its proposition the *Norstar* case (n 24), paras 222–223; *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Great Britain) v. United States*, Award (1921), *RIAA* VI (2006) 57, at p. 58; *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, Final Award (2017), para 1129, PCA Case No. 2012–04; *Guyana v. Suriname*, Award (2007), *RIAA* XXX (2012) 1, paras 433, 445.

in respect of such a ship.²⁷ However, on the facts the tribunal found that the *Enrica Lexie* was requested, rather than coerced, to proceed to Kochi while in India's EEZ, and that no element of enforcement jurisdiction had been exercised there by India. Accordingly, there was no breach of Article 92.

Italy's fourth claim was that India had violated, and was continuing to violate, Italy's exclusive right under Article 97(1) of the LOSC to institute penal or disciplinary proceedings against the marines. Article 97(1), which applies in the EEZ by virtue of Article 58(2), provides that 'in the event of a collision or any other incident of navigation concerning a ship on the high seas', involving the criminal responsibility of any 'person in the service of the ship', no criminal proceedings may be instituted against that person except by the flag State or the State of nationality.²⁸ The tribunal had first to decide what was meant by the term 'incident of navigation' in Article 97(1). The term is not defined in the LOSC. Based on its use elsewhere in the LOSC (Articles 221(2) and 94(7)), the object and purpose of Article 97 and its drafting history, the tribunal determined that an 'incident of navigation', refers to an event that (i) occurs in relation to the movement and manoeuvring of a ship; and (ii) which [*sic*] allegedly causes some form of serious damage or harm, including to the ships involved, their cargo, or the individuals on board.²⁹ On the facts, the tribunal held that there had been no 'incident of navigation' in this case. While there had been damage to the *St Antony*, that was not caused by the movement or manoeuvring of either ship but by the actions of the two marines, who were not involved in the navigation of the *Enrica Lexie*. Accordingly, Article 97(1) was not applicable in this case.

Italy's fifth claim was that by ordering the detention of the *Enrica Lexie* between February and May 2012, and investigating those on board, India had violated Article 97(3) of the LOSC, which provides that 'no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State'. The tribunal dealt with this issue very briefly. It observed that it followed from the title of Article 97 that it governed

27 *Enrica Lexie* Award (n 22), para 527. The tribunal again quotes the *Norstar* case (n 24), para 225, in support of its position.

28 Article 97 of the LOSC (n 1) repeats Article 11 of the 1958 Convention on the High Seas, which in turn is very similar to Articles 1 and 2 of the 1952 International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation (439 *UNTS* 233). This last convention was adopted to reverse the ruling of the PCIJ in the *Lotus* case that the flag State of a vessel involved in a collision with a vessel of a different nationality was entitled to exercise criminal jurisdiction over those on board the latter vessel that were alleged to be responsible for the collision.

29 *Enrica Lexie* Award (n 22), para 650.

the exercise of penal jurisdiction only in matters of collision or any other incident of navigation. As there had been no such incident, Article 97(3) was also not applicable.

Italy's final claim in relation to matters other than the immunity of the marines was that India had violated Article 100 of the LOSC by failing to cooperate in the repression of piracy and had done so in bad faith, thereby violating Article 300. The tribunal noted that Article 100 did not stipulate the forms or modalities of cooperation that States should undertake in order to fulfil their duty to cooperate, and that States must be allowed a certain latitude as to the measures to be taken in any particular case. The obligation to cooperate did not necessarily imply a duty to capture and prosecute pirates. It could be implemented, for example, by including in national legislation provisions on mutual assistance in criminal matters, such as the extradition and transfer of suspected, detained and convicted pirates, or the conclusion of treaties to facilitate cooperation. Thus, the duty to cooperate was a continuing obligation of conduct rather than a one-time obligation of result. The tribunal found that India had provided sufficient information confirming that it had taken, and was continuing to take, active steps to prevent piracy, and that when the *Enrica Lexie* was requested to proceed to Kochi, the purpose was to 'take stock of events' in connection with the information that it had received about the suspected pirate attack and was not a pretext in order to arrest the marines. Accordingly, the tribunal found that India had not breached Article 100. As for Article 300, the tribunal followed the *Norstar* case in holding that there could be no breach of Article 300 unless there had first been a breach of a substantive provision of the LOSC.

The tribunal thus rejected all of Italy's non-immunity claims. It did so unanimously. That was in marked contrast to most of the other issues in the case, which were decided by majority.

Italy's Claim Relating to the Immunity of the Marines

Italy argued that the assertion and continued exercise of criminal jurisdiction by India over the two marines was in violation of India's obligation to respect their immunity under Articles 2(3), 56(2) and 58(2) of the LOSC as Italian State officials exercising official functions. Each of those articles, Italy argued, included a *renvoi* to general rules of international law, including therefore the law relating to State immunity.

It will be recalled that the tribunal had deferred the question of whether it had jurisdiction in respect of this claim from its general consideration of jurisdiction earlier in its award. Accordingly, it now had to decide whether it did have such jurisdiction. The tribunal found that Articles 2(3), 56(2) and 58(2) of

the LOSC, which Italy had relied on to found the tribunal's jurisdiction, were not pertinent as they applied to the exercise of coastal State rights and duties in the territorial sea and the EEZ, whereas India had exercised enforcement jurisdiction over the marines only in its internal waters and on land. Articles 95 and 96, which were also invoked by Italy, were not relevant as they did not address the immunity of State officials, but only of warships and ships owned or operated by a State and used on government non-commercial service. Italy had further argued that Article 297(1) was a subsidiary basis for the tribunal's jurisdiction over the question of immunity. The tribunal rejected that line of argument. While it was true that the tribunal in the *Chagos Marine Protected Area* case had found that Article 297(1)(a) 'includes a *renvoi* to sources of law beyond the Convention itself', that finding was in the context of considering 'other internationally lawful uses of the sea specified in article 58'.³⁰ However, as Article 58 did not apply to the present dispute, Article 297(1)(a) was not applicable. Nor was Article 297(1)(b) relevant, as the subject matter of the present dispute did not relate to the exercise of freedoms, rights and uses of the sea 'in contravention of ... the laws and regulations adopted by the coastal State in conformity with' the LOSC and other rules of international law not incompatible it.

That raised the question of whether there was any other possible basis for the tribunal to exercise jurisdiction in respect of the immunity of the marines. In the view of the tribunal, the dispute between the parties in the case before it concerned the question of which party was entitled to exercise jurisdiction over the incident of February 2012. That question could not be satisfactorily answered without addressing the question of immunity, which operated as an exception to the exercise of jurisdiction. Whether that exception applied in the present case was 'a question that forms an integral part' of the tribunal's task of determining which party could exercise jurisdiction over the marines, a determination that the tribunal could not make completely 'without incidentally examining whether' the marines enjoyed immunity.³¹ The tribunal thus concluded, by three votes to two, that as the issue of the immunity of the marines was 'an incidental question that necessarily presents itself in the application' of the LOSC to the dispute before it,³² namely, which party was entitled to exercise jurisdiction over the incident of February 2012, it was a matter that the tribunal had the jurisdiction to address. The tribunal relied on the decision of

30 *In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award (2015), *RIAA XXXI* (2018) 365, para 316.

31 *Enrica Lexie Award* (n 22), para 808.

32 *Ibid.*, para 811.

the PCIJ in the *Case Concerning Certain German Interests* for its finding that international tribunals may consider questions that would otherwise fall outside the scope of their jurisdiction if they are 'incidental' to the main issue.³³

The two dissenting arbitrators were Judge Robinson and Dr Rao. Judge Robinson argued that the majority had wrongly characterised the dispute as the question of which State had jurisdiction over the incident. Properly characterised, the dispute concerned the question of the exercise by India of its criminal jurisdiction over the marines in the face of their claim to immunity from that jurisdiction. As the issue of immunity did not concern the interpretation or application of the LOSC, and as it was a core element of the dispute, and not an incidental question, the tribunal should have declined jurisdiction, not only over the issue of immunity but over the dispute as a whole.³⁴ Judge Robinson considered that the tribunal had 'misdirected itself as to the law on incidental questions'.³⁵ The *Case Concerning Certain German Interests* was not pertinent. Rather, the tribunal should have considered three LOSC Annex VII arbitration cases, namely, the *Chagos Marine Protected Area*, *South China Sea* and *Ukraine v. Russia* cases.³⁶ Dr Rao also considered that the issue of immunity was not an incidental question. Nor did the issue have any bearing on the interpretation and application of the LOSC. Thus, the tribunal had no jurisdiction over the question of immunity. However, Dr Rao accepted that the tribunal did have jurisdiction over the other issues in the case.³⁷ Academic commentary has also questioned whether the issue of immunity was an incidental question over which the tribunal had jurisdiction.³⁸

It is possible to appreciate aspects of the position of the majority, as well as that of the dissenting minority. There was a case for the tribunal deferring the question of its jurisdiction relating to the possible immunity of the marines from its initial consideration of jurisdiction. Had the tribunal found that India did not have jurisdiction to try the marines, the question of immunity would have been irrelevant. One can also understand the dilemma of the tribunal in

33 *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ, Series A, No. 6 (1925), at p. 18.

34 Dissenting Opinion of Judge Robinson, paras 3–54, 81.

35 *Ibid.*, para 51.

36 See further *ibid.*, paras 43–54.

37 Concurring and Dissenting Opinion of Dr Rao, paras 24–59.

38 See, for example, E Methymaki and C Tams, 'Immunities and compromissory clauses: Making sense of *Enrica Lexie*' (Parts I and II), posted on the *EJIL: Talk* blog on 27 August 2020; D Raju, 'The *Enrica Lexie* Award – Some thoughts on "incidental" jurisdiction' (Parts I and II), posted on the *Opinio Juris* blog on 22 July 2020; VJ Schatz, 'Incidental jurisdiction in the Award in *The 'Enrica Lexie' Incident (Italy v. India)*' (Parts I and II), posted on the *Völkerrechtsblog*, 23 and 24 July 2020.

that having decided that India did have jurisdiction, it would have left hanging in the air the question of whether in practice India could exercise that jurisdiction if it did not also determine whether the marines enjoyed immunity. One response to that dilemma would have been for the tribunal to declare that it did not have jurisdiction to rule on whether the marines had immunity and make it clear that it was leaving it to the Indian courts to decide the matter. After all, it is not uncommon for national courts to decide whether States and their officials enjoy immunity in the circumstances of the case before them. However, the tribunal did not take that course of action. Instead, it ruled that the question of immunity was 'an integral part' of its task and one 'necessarily arising' in applying the LOSC, while at the same time describing it as being no more than an 'incidental' issue.³⁹ That sounds almost like a contradiction in terms.

Having found, albeit by a narrow majority, that it did have jurisdiction to address the question of immunity, the tribunal had next to consider whether the two Italian marines actually enjoyed immunity from prosecution before the courts of India. The tribunal noted that under customary international law, State officials enjoyed immunity from foreign criminal jurisdiction in respect of acts performed in an official capacity. Thus, in the present case the tribunal had to determine whether the marines on board the *Enrica Lexie* at the time of the incident were State officials; whether their actions during the incident were performed in an official capacity; and whether any exceptions, to the extent they existed under customary international law, applied to preclude them from enjoying immunity.

As regards the first question, the tribunal held that even though shipowners made a fairly substantial financial contribution to the Italian government towards the costs of placing marines on Italian ships to provide protection against possible pirate attacks, the marines on board the *Enrica Lexie* were Italian State officials because they were and remained members of the Italian Navy. Furthermore, while they were on board, they were officers and agents of the judicial police, authorised to arrest and detain suspected pirates and to conduct investigations into crimes of piracy in support of the Italian public prosecutor.

As to whether the marines' actions during the incident were performed in an official capacity, the tribunal followed the International Law Commission's work on the immunity of State officials from foreign criminal jurisdiction in holding that the test was one of imputability. According to Articles 4 and 7 of

39 The quotations come from paras 808 and 809 of the *Enrica Lexie* Award (n 22). See also para 811.

the Commission's Draft Articles on State Responsibility, the conduct of any State organ is imputable to the State, even if it exceeds its authority. In the present case, regardless of whether the marines' acts were *ultra vires* or unlawful, the evidence demonstrated that during the incident the marines 'were under an apprehension of a piracy threat and engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a VPD [vessel protection detachment]'.⁴⁰

That left the question of whether there was any exception to such immunity. India had argued that the so-called 'territorial tort' exception applied. The tribunal considered that there was doubt as to whether such an exception existed in international law; but if it did, there was 'a general understanding that [the exception] would only apply in cases where (i) the acts at issue were committed in the territory of the forum State; [and] (ii) by a foreign official who had been present in the territory of that State at the time of the acts at issue without the State's express consent for the discharge of his or her official functions'.⁴¹ The second condition was not fulfilled in the present case as the two marines were not present on Indian territory at the time of the incident, and thus there could be no question of the exception applying to the marines' immunity.

The tribunal therefore concluded that the two marines on board the *Enrica Lexie* enjoyed immunity from India's criminal jurisdiction in relation to the events that occurred on 15 February 2012. Accordingly, India should take the necessary steps to cease exercising its criminal jurisdiction over the marines. The tribunal took note of Italy's commitment to resume its criminal investigation into the events of February 2012 following the tribunal's award. Both parties should cooperate with each other 'in pursuit of that investigation that would follow the evidence wherever it may lead'.⁴²

Both Judge Robinson and Dr Rao disagreed with the tribunal on the question of whether the marines enjoyed immunity. For Judge Robinson, international law on the immunity of State officials from foreign criminal jurisdiction was much less settled than the tribunal had suggested. In his view, Italy had engaged in an essentially commercial transaction in placing the marines on board the *Enrica Lexie* to protect it from pirates. That was an *act jure gestionis* and thus did not attract immunity under customary international law. The shooting could not be separated from the essential commercial nature of the transaction. Because Italy, as a State, did not enjoy immunity, so neither did its

⁴⁰ *Enrica Lexie* Award (n 22), para 862.

⁴¹ *Ibid.*, para 868.

⁴² *Ibid.*, para 889.

officials, including the marines.⁴³ Judge Robinson also considered an alternative approach to the issue of immunity, which was to regard the marines as assimilated to the status of visiting forces. The immunity of visiting forces usually depended on agreements concluded between sending and receiving States. Since there was no agreement between Italy and India to grant immunity to the marines, the latter's acts that were completed on board the *St. Antony*, over which India had jurisdiction, did not attract immunity.⁴⁴ Dr Rao took a broadly similar approach to Judge Robinson's first line of argument, emphasizing that the services of the marines were rendered under a commercial contract.⁴⁵

Before turning to deal with India's counter-claims, the tribunal examined a subsidiary argument that India had put forward as to why it had jurisdiction over the incident of February 2012. This was based on Article 59 of the LOSC, which deals with the position where the LOSC 'does not attribute rights or jurisdiction to the coastal State or to other States within the [EEZ], and a conflict arises between the interests of the coastal State and any other State'. In response, the tribunal noted that it had already considered several provisions of the LOSC that did attribute rights or jurisdiction within the EEZ that were relevant to the dispute between the parties. Thus, the dispute was not one where the LOSC did not attribute rights and jurisdiction to the parties, and so Article 59 was not applicable.

India's Counter-claims

It will be recalled that India had put forward four counter-claims. The first was that the killing by the Italian marines of two Indian fishermen on board the *St. Antony* was a violation by Italy of India's sovereign rights under Article 56 of the LOSC. The tribunal, by three votes to two (Dr Rao and Judge Robinson),⁴⁶ disagreed. The actions by the marines were 'not directed at undermining or interfering with India's sovereign rights under Article 56' but rather 'occurred in the context of a singular and isolated incident, which had a merely incidental effect' on the ability of the *St. Antony* to continue pursuing its fishing activities.⁴⁷ Such circumstances did not rise to the level of interference with India's sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources of its EEZ. In any case, those rights were not unlimited, but under Article 56(2) had to be exercised with 'due

43 Dissenting Opinion of Judge Robinson, paras 55–71.

44 *Ibid.*, paras 72–79.

45 Concurring and Dissenting Opinion of Dr Rao, paras 69–80.

46 See their Joint Dissenting Opinion, paras 2–14.

47 *Enrica Lexie Award* (n 22), para 953.

regard' to the rights and duties of other States. The latter included the right and duty of all States to protect their vessels against piracy at sea, including in the EEZ. In the present case, the marines had targeted the *St. Antony*, not as a fishing vessel, but on the suspicion that it was a pirate vessel intending to board the *Enrica Lexie*.

India's second counter-claim was that Italy had breached its obligation under Article 58(3) of the LOSC to have 'due regard' to India's rights in its EEZ. The tribunal noted that the term 'due regard' was not defined in the LOSC. Its ordinary meaning, 'with the proper care or concern for', did 'not contemplate priority for one activity over another'.⁴⁸ It followed from the complementarity of the 'due regard' obligation, according to which a coastal State is required under Article 56(2) of the LOSC to have 'due regard' to the rights and duties of other States in its EEZ while other States are required under Article 58(3) to have 'due regard' to the rights and duties of the coastal State in its EEZ, that the object and purpose of the obligation was to 'ensure balance between concurrent rights belonging to coastal and other States'.⁴⁹ The tribunal cited with approval a passage from the *Chagos Marine Protected Area* case which stated that the extent of the regard required of a coastal State under Article 56(2) in any particular case depended on the nature of the rights held by the other State, their importance, the extent of the anticipated impairment, and the nature and importance of the activities contemplated by the coastal State.⁵⁰ That, the *Enrica Lexie* tribunal said, applied equally to the due regard obligation under Article 58(3). What was therefore required was a balancing of each State's rights and duties, and refraining from activities that unreasonably interfered with the exercise of each State's rights. Turning to its application in the present case, the tribunal held that because Article 100 of the LOSC (on cooperation to repress piracy) applied in the EEZ by virtue of Article 58(2), protection from and repression of piracy in India's EEZ comprised a right and a duty of India and Italy alike. The conduct of the marines on board the *Enrica Lexie* 'in responding to a perceived piracy threat cannot have "unreasonably interfere[d]" with, and thus have failed to show "due regard" to, India's rights as the coastal State'.⁵¹ Accordingly, there had been no breach by Italy of its obligation of 'due regard' under Article 58(3). That finding was again adopted by three votes to two (Dr Rao and Judge Robinson dissenting).⁵²

48 *Ibid.*, para 973.

49 *Ibid.*, paras 975.

50 *Chagos MPA* case (n 30), para 519.

51 *Enrica Lexie* Award (n 22), para 980.

52 See further the Joint Dissenting Opinion of Dr Rao and Judge Robinson, paras 15–21.

India's third counter-claim was that the firing by the marines on board the *Enrica Lexie* at the *St. Antony* was a violation by Italy of India's freedom and right of navigation under Articles 87 and 90 of the LOSC, which applied in India's EEZ by virtue of Article 58(2). Italy argued that India did not enjoy freedom of navigation in respect of the *St. Antony* because the vessel was not entitled to fly the flag of India. The tribunal rejected that argument. According to Article 91 of the LOSC, the granting of nationality to a vessel was a matter to be determined by individual States. The tribunal was satisfied, after examining Indian law on the nationality of vessels, that the *St. Antony* had Indian nationality. Italy also argued that India had breached Article 94(2) of the LOSC by not registering the *St. Antony*. The tribunal rejected that argument also. The test for establishing a jurisdictional link between a vessel and a State was whether the vessel possessed the nationality of that State, not whether it was included in that State's register of shipping or flew its flag. Although Article 94(2) exempted 'small' vessels from the requirements of registration, it could not be inferred from that exemption that the State of nationality would, in relation to such small vessels, be deprived of the right to freedom of navigation set out in Article 87 of the LOSC. That right derived from nationality, not registration. Accordingly, India enjoyed the right to freedom of navigation in respect of the *St. Antony*.

As to whether Italy had violated that right, the tribunal considered that the act of shooting at the *St. Antony* by the marines on the *Enrica Lexie* caused the *St. Antony* 'to change direction and ultimately head back to shore. The "St. Antony" was, both during and after the incident, prevented from navigating its intended course'.⁵³ Applying the same test for identifying the freedom of navigation that it had applied in respect of Italy's second claim (see above), the shooting 'amounted to physical interference with the navigation' of the *St. Antony*.⁵⁴ It thus constituted a breach by Italy of Articles 87 and 90. The tribunal's decision on this point was unanimous.

It is clear from the tribunal's analysis that a coastal State's right to navigation in its EEZ derives from Article 58 of the LOSC.⁵⁵ That is a point that is not often spelt out in the literature, which tends to focus on other States' right of navigation. While the tribunal does not spell out the reasons for its view, the justification for its position is presumably that Article 58(1) refers to the right of navigation for 'all States', while Article 56, which details a coastal State's rights in its EEZ, makes no mention of navigation. India's right to navigation in its

53 *Enrica Lexie* Award (n 22), para 1041.

54 *Ibid.*, para 1042.

55 See, in particular, paras 983 and 1036 of the Award, *ibid.*

EEZ would seem to be a right to which Italy should have had due regard under Article 58(3) of the LOSC. It seems odd, therefore, that the tribunal could find that Italy had violated India's right to navigation, but not its (Italy's) obligation under Article 58(3) to have due regard to that right. One explanation may be that India had argued that it was only its rights under Article 56(1)(a) to which Italy had failed to have due regard.

India's final counter-claim was that Italy had infringed the right of India to have its EEZ reserved for 'peaceful purposes' in accordance with Article 88 of the LOSC. Article 88 provides that the high seas 'shall be reserved for peaceful purposes', but also applies to the EEZ by virtue of Article 58(2). The tribunal noted that the principle in Article 88 was 'confirmed' in Article 301 of the LOSC, which could 'be used as an interpretive guide' to Article 88.⁵⁶ Article 301 requires States, when exercising their rights and performing their duties under the LOSC, to 'refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations'. The tribunal observed that Article 301 repeated the obligation in Article 2(4) of the UN Charter. As the latter did not prohibit the use of force if consistent with the Charter and with other rules of international law, 'the use of force is not completely excluded on the high seas'.⁵⁷ The tribunal then went on to find that it followed from the LOSC provisions on piracy that all States 'can take the necessary measures, including enforcement measures consistent with the Convention and the Charter of the United Nations, to protect their vessels against pirate attacks. Such measures cannot be viewed as a violation of Article 88 of the Convention or as an infringement on the rights of the coastal State' in its EEZ.⁵⁸ That was confirmed by UN Security Council Resolution 2077, which commended flag States for providing their vessels navigating through areas at high risk of piracy with armed security personnel. The tribunal therefore concluded, unanimously, that as the Italian marines on board the *Enrica Lexie* took action to protect the vessel against a perceived pirate attack, Italy had not breached Article 88.

Finally, the tribunal had to consider the question of remedies for Italy's breach of India's right of navigation under Articles 87 and 90. The tribunal noted that that breach had two aspects. First, India's freedom of navigation had been infringed. For that, satisfaction, in the form of a finding by the tribunal that Italy had breached Articles 87 and 90 of the LOSC, was appropriate

56 *Ibid.*, paras 1069, 1070.

57 *Ibid.*, para 1073.

58 *Ibid.*, para 1074.

reparation. The second aspect was the shooting by the marines at the *St. Antony*, which had caused loss of life, physical harm to the crew, material damage to their property (including to the vessel itself), and moral harm. For that, compensation was the appropriate remedy. The parties should consult with a view to reaching agreement on the amount of compensation. Nevertheless, the tribunal would retain jurisdiction, should one or both of the parties wish to apply to it for a ruling on the amount of compensation due to India. If no such application had been received within one year of the date of the tribunal's award, the proceedings would be closed.

Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. Russia), PCA Case No. 2017-06

This case has its origins in events that occurred in 2014 in Crimea, a peninsula surrounded by the Black Sea to the west and south and the Sea of Azov to the northeast. Between Ukraine's proclamation of independence in 1991 and 2014, Crimea was generally accepted as being part of Ukraine. The events of 2014 are characterised by Ukraine as an annexation of Crimea by Russia; and by Russia as a reunification of Crimea with Russia, following a referendum in Crimea.⁵⁹ On 16 September 2016 Ukraine instituted proceedings against Russia under Annex VII of the LOSC claiming in broad terms various breaches of the LOSC by Russia in areas of the Black Sea and Sea of Azov where Russia had not challenged Ukraine's jurisdiction before 2014. 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).

On 19 February 2018, Ukraine submitted its memorial, setting out its claims much more precisely than in its notification instituting proceedings. It alleged that Russia had committed no less than 20 violations of the LOSC, including of Articles 2, 56, 77 and 92 by interfering with Ukraine's rights to regulate and exploit the seabed and fishery resources of 'its' (Ukraine's) territorial sea, EEZ and continental shelf; of Articles 2, 35, 43 and 44 by laying power cables and a gas pipeline across, and constructing a bridge over, the Kerch Strait;⁶⁰ of various provisions in Part XII by failing to cooperate over an oil spill in 2016;

59 See *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. Russia)*, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, paras 2–6, available with all the other materials concerning the case at <https://pca-cpa.org/en/cases/149/>; accessed 31 March 2021.

60 The Kerch Strait is a narrow waterway that connects the Black Sea with the Sea of Azov. It is 19 M in length and at its narrowest point is about one M in width.

and of Articles 2 and 303 by interfering with Ukraine's attempts to protect the underwater cultural heritage and failing to cooperate over such protection.

On 21 May 2018, Russia raised objections to the jurisdiction of the tribunal. Its main ground of objection was that the dispute was in reality about Ukraine's 'claim to sovereignty over Crimea', and therefore was not a dispute relating to the interpretation or application of the LOSC. Without prejudice to that objection, Russia raised a number of other objections. First, it argued that insofar as the dispute related to the Sea of Azov and the Kerch Strait, the tribunal had no jurisdiction because those areas comprised internal waters and the LOSC did not deal with such waters. Furthermore, the Kerch Strait was not a strait regulated by the LOSC. Second, Russia argued that Ukraine's claims fell within the matters listed in Article 298(1)(a) and (b) of the LOSC, in respect of which both parties had made declarations excluding them from compulsory dispute settlement. Third, insofar as Ukraine's claims concerned fisheries in the EEZ, they were excluded from compulsory dispute settlement under Article 297(3). Fourth, both parties had selected Annex VIII as their preferred means for settling disputes relating to fisheries, protection and preservation of the marine environment, marine scientific research and navigation. Insofar as Ukraine's claims related to those matters, they had to be heard by an Annex VIII tribunal, not an Annex VII tribunal. Last, in accordance with Article 281 of the LOSC, the tribunal's jurisdiction in relation to matters concerning the Sea of Azov and the Kerch Strait was excluded because the parties had agreed to settle disputes concerning those matters under the dispute settlement machinery of their State Border Treaty and the Azov/Kerch Cooperation Treaty.⁶¹

On 21 August 2018 the tribunal decided to bifurcate the dispute and deal with Russia's objections to its jurisdiction separately as a preliminary matter.⁶² Written proceedings on that phase of the case were completed in March 2019, and hearings were held in June 2019. The tribunal delivered its award, which was unanimous on all points, on 21 February 2020.⁶³

As regards Russia's main ground of objection, the arbitral tribunal noted that although Ukraine formulated its dispute with Russia in terms of the

61 *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait case*, Preliminary Objections of the Russian Federation, 19 May 2018.

62 *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait case*, Procedural Order No. 3 of 20 August 2018 regarding Bifurcation of the Proceedings.

63 *Coastal State Rights Award* (n 59). For early comment on the Award, see N Oral, 'Ukraine v. The Russian Federation: Navigating conflict over sovereignty under UNCLOS' (2021) 97 *International Law Studies* 478–308, at pp. 492–503; V Schatz, 'The Award concerning Preliminary Objections in *Ukraine v. Russia*: Observations regarding the implicated status of Crimea and the Sea of Azov', posted on the *EJIL: Talk* blog on 3 March 2020.

alleged violation of its rights under the LOSC, and thus as a dispute concerning the interpretation or application of the LOSC, many of its claims were based on the premise that it was sovereign over Crimea, and thus the 'coastal State' within the meaning of the various provisions of the LOSC that it had invoked. However, unless that premise was to be taken at face value (which in practice the tribunal did not do), Ukraine's claims could not be addressed by the tribunal without first examining the question of sovereignty over Crimea. The question as to which State was sovereign over Crimea, and thus the 'coastal State' within the meaning of several of the provisions of the LOSC invoked by Ukraine, was a prerequisite to the decision of the tribunal on a significant part of Ukraine's claims.

For the purposes of determining the tribunal's jurisdiction, that characterisation of the dispute raised two questions: first, the scope of the tribunal's jurisdiction under Article 288(1) of the LOSC, which provides that the jurisdiction of a LOSC dispute settlement body is limited to 'any dispute concerning the interpretation or application of' the LOSC; and second, whether there was a dispute relating to sovereignty over Crimea. As regards the first question, the tribunal held that 'a sovereignty dispute ... may not be regarded [as] a dispute concerning the interpretation or application of the Convention'.⁶⁴ It found support for that conclusion from the fact that the exclusions from the jurisdiction of LOSC dispute settlement bodies in Articles 297 and 298 of the LOSC did not include sovereignty disputes, thus indicating that the drafters of the LOSC did not consider such disputes to be ones concerning the interpretation or application of the LOSC. As regards the second question, it was clear that there was a dispute between Ukraine and Russia in relation to sovereignty over Crimea. The tribunal rejected Ukraine's arguments that Russia's claim to sovereignty over Crimea was inadmissible (because the tribunal was bound not to recognise claims to territory acquired unlawfully) and implausible. On the question of admissibility, the tribunal held that it was not required by UN General Assembly resolutions (whose status it considered at some length) not to recognise Russia's claim to Crimea or precluded from finding that there was a dispute concerning sovereignty over Crimea.

The tribunal also rejected Ukraine's argument that the dispute over sovereignty was a minor issue ancillary to the dispute concerning the interpretation or application of the LOSC.

On the contrary, the question of sovereignty is a prerequisite to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine

64 *Coastal State Rights Award* (n 59), para 156.

under the Convention. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the “coastal State” within the meaning of provisions of the Convention invoked by Ukraine.⁶⁵

The tribunal therefore concluded that it lacked jurisdiction under Article 288(1) of the LOSC over the dispute as submitted by Ukraine ‘to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine’s claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea.’⁶⁶ Consequently, the tribunal could not rule on any of Ukraine’s claims ‘which are dependent on the premise of Ukraine being sovereign over Crimea.’⁶⁷ That included many, but not all, of Ukraine’s claims. The tribunal did not identify which they were, but left it to Ukraine to do so in a revised memorial.

Having dealt at some length with Russia’s main objection to its jurisdiction, the tribunal turned to Russia’s other objections. The first of these was that the Sea of Azov and the Kerch Strait comprised internal waters: as the LOSC did not deal with such waters, there was no issue involving the interpretation or application of the LOSC. The tribunal considered that to determine the status of the Sea of Azov and Kerch Strait, in particular whether they were internal waters, would require it to examine the practice of the parties since Ukraine became independent in 1991. That was not an exclusively preliminary matter, but rather one for the merits stage of proceedings. Furthermore, the tribunal was ‘not entirely convinced’ by Russia’s ‘rather sweeping premise’ that the LOSC ‘does not regulate a regime of internal waters.’⁶⁸

As regards Russia’s argument that Ukraine’s claims fell within matters excluded from the tribunal’s jurisdiction as a result of the parties’ declarations under Article 298, the tribunal dealt in turn with each of the four matters listed there that had been raised by Russia. As regards the exception relating to ‘disputes concerning military activities’, the tribunal noted that the term ‘concerning’ circumscribed the military activities exception by limiting it to those disputes whose subject matter was military activities. A mere causal or historical link between certain alleged military activities and the activities in dispute did not bring the matter within the exception in Article 298. The latter was ‘not triggered simply because the conduct of Russia complained of by Ukraine has

65 *Ibid.*, para 195.

66 *Ibid.*, para. 197.

67 *Ibid.*

68 *Ibid.*, para 294.

its origins in, or occurred against the background of, a broader alleged armed conflict. Rather ... the relevant question is whether “certain specific acts subject of Ukraine’s complaints” constitute military activities.⁶⁹ The tribunal also noted that that the ‘mere involvement or presence of military vessels is in and by itself’ insufficient to trigger the military activities exception.⁷⁰ Nor was the alleged use of physical force sufficient to conclude that an activity was military in nature: the tribunal noted that, for example, law enforcement forces were generally authorised to use physical force without their activities being considered military. In the present case, Russia’s alleged use of physical force did not turn the dispute into one concerning military activities. Rather, such alleged force appeared to have been directed towards maintaining civilian activities such as the exploitation of hydrocarbons and fisheries. As regards ‘specific acts’, which included the detention of the captain of a Ukrainian fishing vessel by Russian military personnel, the deployment of armed men to oversee the work carried out on an oil platform, and the alleged harassment of Ukrainian vessels by Russian military vessels and aircraft, those acts ‘cannot be objectively classified as military in nature’.⁷¹ Thus, the ‘military activities’ exception was not applicable in the present case.

The next exception raised by Russia was that relating to ‘law enforcement activities’ concerning the exercise of certain sovereign rights in the EEZ. In the tribunal’s view, the conditions for that exception to apply were not met if there was a dispute as to which State had the right to claim the area of EEZ concerned. That was the case here. The exception in Article 298 relating to ‘sea boundary delimitations’ could only be relevant if the parties had overlapping maritime entitlements. However, the tribunal could not determine if that was the case because it would have to decide, expressly or implicitly, which party had sovereignty over Crimea. That left the exception relating to ‘historic bays or titles’. Russia had supported its claim that the Sea of Azov was internal waters in part by arguments based on historic title. Thus, the exception was interwoven with the merits of the dispute and so did not possess an exclusively preliminary character. Accordingly, consideration of the exception would be reserved for the proceedings on the merits.

Russia’s next objection was that insofar as Ukraine’s claims concerned interference by Russia with fisheries in its EEZ, they were excluded from compulsory dispute settlement under Article 297(3) of the LOSC. In response, the tribunal observed that the area of EEZ concerned was in dispute between the

69 *Ibid.*, para 331.

70 *Ibid.*, para 334.

71 *Ibid.*, para 338.

parties. Thus, as in relation to the law enforcement exception discussed above, the conditions for the application of the exception in Article 297(3) had not been met.

Russia had also objected to the tribunal's jurisdiction on the ground that insofar as Ukraine's claims related to fisheries, protection and preservation of the marine environment, marine scientific research and navigation, they had to be heard by an Annex VIII special arbitral tribunal as both parties had made declarations under Article 287 of the LOSC selecting Annex VIII as their preferred means for settling disputes relating to those matters. In response, the tribunal began by observing that Russia's objection had been brought 'in a timely fashion'.⁷² A respondent State could not be expected to raise an objection prior to the institution of proceedings against it, as it is only then that 'the subject matter of the proceedings is circumscribed and a procedure for the settlement of the dispute selected'.⁷³ In the present case, there was no disagreement between the parties that the dispute encompassed wide-ranging issues and was not limited to the matters referred to in Annex VIII. The key question was whether the tribunal could exercise jurisdiction over the dispute as a whole or whether it should decline to deal with those aspects of the dispute that fell within Annex VIII and leave them to be pursued separately before one or more Annex VIII tribunals. The tribunal answered that question by noting that each of Ukraine's claims did not constitute a distinct and separate dispute, but rather were part of a single, unified dispute. Accordingly, it was not possible to isolate from the broader dispute those elements that fell exclusively within the jurisdiction of one or more Annex VIII tribunals. Nor would it be in the interests of justice for the present tribunal to decline jurisdiction over certain aspects of the dispute before it. The fragmentation of the dispute would risk there being inconsistent outcomes from the various arbitral tribunals that might be seised of different aspects of the dispute and would increase the costs and time spent on litigation by the parties. The tribunal therefore rejected Russia's objection on this point.

Russia's final objection concerned Article 281 of the LOSC, which provides that where the parties to a dispute concerning the interpretation or application of the LOSC have agreed to seek settlement of the dispute by a peaceful means of their own choice, the dispute settlement procedures of 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. Russia argued that Article 281 applied to those aspects of

⁷² *Ibid.*, para 435.

⁷³ *Ibid.*

Ukraine's claims relating to the Sea of Azov and the Kerch Strait as the parties had agreed to settle disputes concerning such matters under Article 5 of their State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty. Thus, the jurisdiction of the Annex VII tribunal was excluded in relation to those aspects of the dispute. The tribunal rejected that argument. It noted that the provisions of the treaties referred to by Russia concerned the settlement of 'questions/issues' relating to the areas concerned by 'agreement' between the parties. The terms 'questions' and 'issues' were not synonymous with 'disputes', nor was agreement a means of dispute settlement. Accordingly, Article 5 of the State Border Treaty and Article 1 of the Azov/Kerch Cooperation Treaty were not dispute settlement clauses, and Article 281 was therefore not applicable. That conclusion was supported by the negotiating history of the two treaties; and in the case of the Azov/Kerch Cooperation Treaty by its context, namely the inclusion of a genuine dispute settlement clause in Article 4, albeit one limited to the settlement of disputes concerning that Treaty.

The foreign ministries of both parties responded positively towards the award.⁷⁴ As mentioned above, the tribunal requested Ukraine to revise its memorial in the light of the tribunal's decision on Russia's main objection. The tribunal set a time limit of 20 November 2020 for Ukraine to do so, and a time limit of 20 August 2021 for Russia to submit a counter-memorial. The time limits for Ukraine's Reply and Russia's Rejoinder were set as 20 January 2022 and 20 June 2022, respectively.⁷⁵ Thus, any award on the merits is unlikely before 2023.

Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation), PCA Case No. 2019–28

This case relates to an incident that occurred in November 2018. According to Ukraine, three of its naval vessels were *en route* from the Black Sea port of Odessa to the port of Berdyansk in the Sea of Azov, intending to transit the Kerch Strait. However, their entry to the Strait was blocked by Russian Coast Guard vessels. The Ukrainian vessels turned round, but were pursued by the Russian vessels, which eventually seized them and the 24 navy personnel on board. According to Russia, the crews of the vessels were arrested on suspicion of illegally crossing the Russian State border. The Ukrainian vessels and their

74 Their press releases are available at <https://demaribus.net/2020/03/16/arbitration-award-on-preliminary-objections-of-the-russian-federation-in-dispute-concerning-coastal-state-rights/>; accessed 31 March 2021.

75 *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait case*, Procedural Order No. 6 of 21 February 2020.

crews continued to be detained in the Russian port of Kerch. On 1 April 2019, Ukraine instituted arbitral proceedings against Russia under Annex VII of the LOSC, arguing in its statement of claim that Russia's actions breached its obligations under Articles 32, 58, 95 and 96 of the LOSC to accord foreign naval vessels and their crews complete immunity.

The tribunal hearing the case is comprised of Professor D McRae (president), former ITLOS Judges G Eiriksson and R Wolfrum, former ICJ Judge Sir Christopher Greenwood (nominated by Ukraine) and former ITLOS Judge V Golitsyn (nominated by Russia). Before the tribunal had been constituted, in April 2019, Ukraine applied to the ITLOS for an order of provisional measures, requesting it to order Russia to release the three Ukrainian vessels, suspend criminal proceedings against their crew members and allow them to return to Ukraine. In response, the ITLOS made an order of provisional measures on 25 May 2019.⁷⁶ It ordered Russia to release the three Ukrainian naval vessels and their crews and return them to Ukraine, and ordered both parties to refrain from any action that might aggravate the dispute before the Annex VII tribunal.

Although Russia declined to participate in the provisional measures proceedings before the ITLOS, it has, to date, fully participated in proceedings before the Annex VII tribunal. In August 2020, following Ukraine's submission of its memorial in May 2020, Russia raised preliminary objections to the jurisdiction of the tribunal. It argued that the tribunal did not have jurisdiction because (1) both parties had made declarations under Article 298 of the LOSC excluding disputes 'concerning military activities' from the jurisdiction of LOSC dispute settlement bodies; (2) Article 32 of the LOSC did not provide for the immunity of warships in the territorial sea; (3) the lack of jurisdiction in relation to the main dispute meant there was no jurisdiction in relation to Russia's alleged non-compliance with the provisional measures order of the ITLOS; (4) in relation to Russia's alleged aggravation of the dispute, Article 279 of the LOSC contained no reference to the aggravation of disputes; and (5) there had been no exchange of views as required by Article 283 of the LOSC. The tribunal decided, on 27 October 2020, that Russia's objections appeared to have a character that justified their being examined in a preliminary phase, and accordingly it suspended proceedings on the merits. Ukraine was given until 27 January 2021 to file any observations on Russia's preliminary objections.

76 *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, Provisional Measures, Order of 25 May 2019, available on the ITLOS website with the materials for Case No. 26. The Order is discussed in the *Survey* for 2019: see Churchill 2020 (n 19), at pp. 632–637.

Thereafter the tribunal would decide if any further written proceedings were necessary.⁷⁷

In its order of provisional measures, the ITLOS had had to decide whether *prima facie* the Annex VII tribunal would have jurisdiction. In the course of dealing with that issue, the ITLOS considered the first and last of the matters raised by Russia in its subsequent preliminary objections to the Annex VII tribunal's jurisdiction. The ITLOS found that the dispute did not concern 'military activities' and that the requirements of Article 283 had been satisfied. Those findings are in no way binding on the Annex VII tribunal, and it remains to be seen whether the tribunal will agree with them.

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 2020 four law of the sea cases were pending before the Court: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v. Colombia)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*; and *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize)*.⁷⁸ During 2020 there were no developments in the first two cases. There were minor developments in the other two cases. In *Somalia v. Kenya*, the hearings, which had originally been due to take place in September 2019 but were then twice postponed, were further postponed to March 2021 at Kenya's request because of the COVID-19 pandemic.⁷⁹ In the *Guatemala/Belize* case the Court made an order on 22 April 2020 extending the original dates for the submission of Guatemala's memorial and Belize's counter-memorial to 8 December 2020 and 8 June 2022, respectively.⁸⁰

77 *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation)*, Procedural Order No. 2.

78 For brief accounts of developments in all four cases up to the end of 2019, see Churchill 2020 (n 19), at pp. 656–659.

79 ICJ Press Release 2020/13 of 22 May 2020, available at <https://www.icj-cij.org/files/case-related/161/161-20200522-PRE-01-00-EN.pdf>; accessed 1 February 2021.

80 *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize)*, Order of 22 April 2020, available at <https://www.icj-cij.org/files/case-related/177/177-20200422-ORD-01-00-EN.pdf>; accessed 1 February 2021.

Arbitration

In 2017 the tribunal in the *Croatia/Slovenia Arbitration* delivered an award in which it delimited the land and maritime boundaries between Croatia and Slovenia and determined that in an area of Croatia's territorial sea adjacent to the territorial sea boundary between Croatia and Slovenia that it had delimited, ships and aircraft, of whatever nationality, travelling to or from Slovenia should enjoy freedom of navigation, subject to a degree of Croatian legislative jurisdiction.⁸¹ On the day that the award was delivered, the Prime Minister of Croatia declared that the award did not in any way bind Croatia and Croatia would not implement it.⁸²

Slovenia subsequently tried to enforce the award through the Court of Justice of the European Union (EU). In July 2018 it instituted proceedings before the Court under Article 259 of the Treaty on the Functioning of the European Union (TFEU) arguing that Croatia had failed to fulfil its obligations under EU law. It cited various provisions of EU law with which Croatia had allegedly failed to comply as a consequence of its non-compliance with the arbitral award, notably the principle of the rule of law in Article 2 of the Treaty on the European Union (TEU), which obliged Croatia to respect the territory of Slovenia as determined by the arbitral award.

The Court delivered its judgment on 31 January 2020.⁸³ It began by noting that 'in the context of an action for failure to fulfil obligations, ... it lacks jurisdiction to rule on the interpretation of an international agreement concluded by Member States whose subject matter falls outside the areas of EU competence and on the obligations arising under it for them', as well as on 'an action for failure to fulfil obligations ... where the infringement of provisions of EU law that is pleaded in support of the action is ancillary to the alleged failure to comply with obligations arising from such an agreement'.⁸⁴ That was the case

81 *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, PCA Case No. 2012-04. The award was discussed in the Survey for 2017: see R Churchill, 'Dispute settlement in the law of the sea: Survey for 2017' (2018) 33(4) *IJMCL* 653-682, at pp. 677-682.

82 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 31 March 2021.

83 Case C-457/18, *Croatia v. Slovenia*, Judgment of 31 January 2020, available at <http://curia.europa.eu/juris/document/document.jsf?jsessionid=79F309E67EC175994C5AE50B8A7B957B?text=&docid=223863&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1093020>; accessed 22 February 2021. For comment on the judgment, see T Bickl, 'CJEU judgment on Slovenia v Croatia: What role for international law in EU-accession dispute settlement?', posted on *The NCLOS Blog* on 18 February 2020.

84 *Ibid.*, paras 91-92.

here. The EU was not a party to the Arbitration Agreement, which required the parties to implement the award of the arbitral tribunal within six months of its delivery, even though it had helped to broker the Agreement and the arbitration was linked to Croatia's accession to the EU. In addition, the subject matter of the Agreement fell outside the area of EU competence, the extent and limits of its territory being a matter for each Member State. The alleged infringements of EU law by Croatia were ancillary to the failure by Croatia to comply with the obligations arising under the Arbitration Agreement and the arbitral award. Consequently, the Court lacked jurisdiction to rule on Croatia's non-compliance with the arbitral award.

The Court added, however, that

this conclusion is without prejudice to any obligation arising – for both of the Member States concerned, in their reciprocal relations but also vis-à-vis the European Union and the other Member States – from Article 4(3) TEU to strive sincerely to bring about a definitive legal solution consistent with international law, as suggested in the Act of Accession, that ensures the effective and unhindered application of EU law in the areas concerned, and to bring their dispute to an end by using one or other means of settling it, including, as the case may be, by submitting it to the Court under a special agreement pursuant to Article 273 TFEU.⁸⁵

This observation is not easy to understand. Given that the Court had found that Croatia's failure to implement the arbitral tribunal's award fell outside the field of EU law, it is not obvious how Article 4(3) TEU is relevant, especially as this was one of the provisions of EU law with which Slovenia alleged Croatia had not complied and in respect of which the Court held that it did not have jurisdiction. Furthermore, it is not clear what the 'dispute' is to which the Court refers. It cannot be the original territorial dispute between Croatia and Slovenia as that has been settled by the arbitral award. It may refer to Croatia's non-compliance with the award, but that non-compliance is not disputed by either Croatia or Slovenia. More likely, perhaps, it refers to the parties' difference of views over whether the arbitral award is valid. In any case, it is difficult to see how Croatia and Slovenia might agree to refer their 'dispute', whatever its exact nature, to the Court under Article 273 TFEU; or in the unlikely event that they did so agree, how the Court would have jurisdiction, given that a 'dispute' under Article 273 must 'relat[e] to the subject matter of the Treaties'.

85 *Ibid.*, para 109.