Dispute Settlement in the Law of the Sea: Survey for 2021

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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 United Nations Convention on the Law of the Sea and outside the framework of the Convention. The most significant developments during 2021 were a judgment of a Special Chamber of the International Tribunal for the Law of the Sea finding that it had jurisdiction to delimit a maritime boundary between Mauritius and the Maldives and a judgment of the International Court of Justice delimiting the maritime boundary between Somalia and Kenya.

Keywords

advisory opinions – arbitration – International Court of Justice (ICJ) – International Tribunal for the Law of the Sea (ITLOS) – maritime boundary delimitation

Introduction

This is the latest in a series of annual surveys in this Journal reviewing dispute settlement in the law of the sea. It covers developments during 2021 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 (LOSC).\(^1\) It examines in turn the activities of those forums for the compulsory settlement of disputes under Part XV of the LOSC that were active during 2021, namely the

The most notable developments relating to dispute settlement in the law of the sea during 2021 were two judgments relating to maritime boundary delimitation. In the first, a Special Chamber of the ITLOS held that it had jurisdiction to delimit a maritime boundary between Mauritius and the Maldives. Its most notable finding was not directly related to the law of the sea: it was that there was no longer a dispute between Mauritius and the United Kingdom over sovereignty of the Chagos Archipelago and that Mauritius was the coastal State for the purposes of delimiting a maritime boundary between the Archipelago and the Maldives. The Special Chamber's judgment is also of interest for what it says about the relationship between negotiation and adjudication in maritime boundary delimitation. In the other notable judgment of 2021, the ICJ delimited the maritime boundary between Somalia and Kenya. Its delimitation of the boundary up to 200 nautical miles (M) from the baseline was a fairly straightforward application of its by now well-established methodology. However, for the first time the ICJ delimited a continental shelf boundary beyond 200 M and made significant observations about the obligations of States pending delimitation of their overlapping maritime zones.

Other developments in 2021 included the discontinuance of proceedings before the ITLOS in the San Padre Pio (No. 2) case (concerning the alleged illegal seizure and detention of a Swiss vessel by Nigeria) without a judgment on the merits; the conclusion of an agreement potentially enlarging the jurisdiction of the ITLOS to give advisory opinions; and the institution of proceedings before the ICJ by Equatorial Guinea and Gabon requesting the Court, inter alia, to delimit their maritime boundary.

International Tribunal for the Law of the Sea

At the beginning of 2021, two cases were pending before the ITLOS, a maritime boundary delimitation case between Mauritius and the Maldives and the San Padre Pio (No. 2) case, between Switzerland and Nigeria, concerning the alleged seizure and detention of a Swiss vessel by Nigeria. There were major developments in each case during 2021. In January, a Special Chamber of the ITLOS delivered a judgment in the first case in which it rejected all of the Maldives’ objections to its jurisdiction and to the admissibility of the claims of Mauritius.
In December, the ITLOS formally recorded the discontinuation of proceedings in the *San Padre Pio* case. Each of these developments is analysed in greater detail below.

A further significant development during 2021 was a potential enlargement of the jurisdiction of the ITLOS to give advisory opinions. The only provision of the LOSC dealing with advisory opinions is Article 191, which provides for the Seabed Disputes Chamber of the ITLOS to give advisory opinions at the request of the Assembly or Council of the International Seabed Authority on legal questions arising within the scope of their activities. However, in its advisory opinion in *Request for an Advisory Opinion by the Sub-Regional Fisheries Commission*, delivered in 2015, the ITLOS held that Article 21 of its Statute (contained in Annex VI of the LOSC) gave it the jurisdiction to give ‘advisory opinions, if specifically provided for in “any other agreement which confers jurisdiction on the Tribunal”’. In order for the ITLOS to exercise such jurisdiction, the ‘other agreement’ must relate to the purposes of the LOSC; the request must be transmitted to the ITLOS by a body authorized by or in accordance with the agreement; and the request must relate to a legal question. The ‘other agreement’ at issue in that case was the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (MCA Convention) (2012), Article 33 of which provides that ‘[t]he Conference of Ministers of the SRFC may authorize the Permanent Secretary of the SRFC to bring a given legal matter before the ITLOS for advisory opinion’.

Until 2021, the MCA Convention was, to the writer’s knowledge, the only treaty in existence (apart from the LOSC) that provided for requests to be made to the ITLOS for an advisory opinion. However, in October 2021 a further such treaty was adopted. This is the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law,

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2 *Request for an Advisory Opinion by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, *ITLOS Reports 2015*, p. 4, at para 56. See also para 58, where the ITLOS clarifies that ‘[i]t is the “other agreement” which confers such jurisdiction on the Tribunal. When the “other agreement” confers advisory jurisdiction on the Tribunal, the Tribunal is then rendered competent to exercise such jurisdiction with regard to “all matters” specifically provided for in the “other agreement”’.


Article 2(2) of the Agreement authorises the Commission of Small Island States on Climate Change and International Law established by the Agreement to request advisory opinions from the ITLOS ‘on any legal question within the scope’ of the LOSC, ‘having regard to the fundamental importance of the oceans as sinks and reservoirs of greenhouse gases and the direct relevance of the marine environment to the adverse effects of climate change on small island States’.

\textit{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 an arbitral tribunal to delimit the maritime boundary between the EEZs and continental shelves (including the continental shelves beyond 200 M) of Mauritius (in respect of the Chagos Archipelago) and the Maldives. On 24 September 2019, the two States concluded an agreement to transfer the case to a Special Chamber of the ITLOS.\footnote{Special Agreement and Notification. This and all the other materials relating to this case referred to below are available at https://itlos.org/en/main/cases/list-of-cases/dispute-concerning-delimitation-of-the-maritime-boundary-between-mauritius-and-maldives-in-the-indian-ocean-mauritius/maldives/.} 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 \textit{ad hoc} Schrijver (chosen by Mauritius) and Oxman (chosen by the Maldives). 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. Written proceedings relating to the Maldives’ preliminary objections were completed by April 2020 and hearings, in hybrid format (i.e., partly in person, partly virtually), were held in October 2020. On 28 January 2021, the Special Chamber delivered its judgment on the Maldives’ preliminary objections.\footnote{Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections, Judgment, ITLOS Case No. 28.}
The Maldives raised five objections to the jurisdiction of the Special Chamber and the admissibility of the claims of Mauritius. They were: (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.

Before examining the first two objections of the Maldives, it may be useful to set out some of the historical and legal background on which the Special Chamber draws. By the Treaty of Paris of 1814, France, which had first colonised Mauritius in 1715, ceded Mauritius and all its dependencies (which included the Chagos Archipelago) to the United Kingdom (UK). Between 1814 and 1965, the UK administered the Chagos Archipelago, which is situated some 2,200 km northeast of the island of Mauritius, as a dependency of its colony of Mauritius. In 1965, the UK established a new colony, known as British Indian Ocean Territory (BIOT). The latter consisted of the Chagos Archipelago, which was detached from Mauritius, and three other islands detached from the UK’s then colony of the Seychelles. In 1966, the UK signed an agreement with the United States permitting the latter to establish a military base on Diego Garcia, the largest island of the Chagos Archipelago. Pursuant to that agreement, the UK forcibly removed the inhabitants of the Archipelago between 1967 and 1971. In 1968, Mauritius became independent. As part of the independence arrangements, the UK undertook to return the Archipelago to Mauritius when it was no longer wanted for military purposes.

In 2010, the UK established a marine protected area in the 200 M zone around the Chagos Archipelago. Some months later, Mauritius initiated arbitral proceedings against the UK under Annex VII of the LOSC. It claimed, inter alia, that the UK was not entitled to establish an MPA because it was not the ‘coastal State’ for the purposes of the LOSC; and in purporting to do so, the UK had breached various obligations of the LOSC. In 2015, the arbitral tribunal held (by three votes to two) that it had no jurisdiction to address the former claim because ‘properly characterised’, it was a dispute relating to land sovereignty over the Chagos Archipelago and therefore was not a dispute concerning the

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8 The account of the historical background that follows is based on paras 28–48 of the ICJ’s Advisory Opinion, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 25 February 2019, ICJ Reports 2019, p. 95.
interpretation or application of the LOSC. However, the tribunal unanimously upheld the latter claim, finding that in establishing the marine protected area, the UK had breached Articles 2(3), 56(2) and 194(4) of the LOSC.9

In 2017, the UN General Assembly requested an advisory opinion from the ICJ on the questions of whether the process of decolonisation of Mauritius was legally complete when it (Mauritius) became independent in 1968, following the separation of the Chagos Archipelago; and what the international law consequences were of the UK’s continued administration of the Archipelago. The ICJ delivered its opinion in February 2019.10 It found that the process of the decolonisation of Mauritius was not legally completed when it became independent because of the UK’s prior unlawful detachment of the Chagos Archipelago from the colony of Mauritius and its incorporation into a new colony, BIOT. Accordingly, the UK was ‘under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonisation of its territory in a manner consistent with the right of peoples to self-determination’.11 The modalities as to how that should be done were a matter for the UN General Assembly, with whom all Member States should cooperate.12 Following delivery of the advisory opinion, the UN General Assembly adopted a resolution in which it ‘affirms, in accordance with advisory opinion of the Court, that ... the Chagos Archipelago forms an integral part of the territory of Mauritius’ and that the United Kingdom ‘is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible’. The resolution goes on to call on the UN, all its specialised agencies and all other international and regional organisations ‘to recognise that the Chagos Archipelago forms an integral part of the territory of Mauritius’.13 The Maldives was one of only six States to vote against that resolution.

Returning to the judgment of the Special Chamber, the Maldives’ first two objections were dealt with together. That was because the UK would only be an indispensable party to the proceedings if there was a dispute over sovereignty of the Chagos Archipelago. Accordingly, the core issue was whether there was such a dispute. The Chamber agreed with the Maldives that if the dispute was

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10 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (n 8).  
11 Ibid., para 174.  
12 Ibid., paras 174–180.  
13 United Nations General Assembly Res 73/295 (22 May 2019). The resolution was adopted by 116 votes to 6, with 56 abstentions.
one that ‘requires the determination of a question of territorial sovereignty’, it would not be a dispute concerning the interpretation or application of the LOSC under Article 288(1), and the Special Chamber would therefore not have jurisdiction.\footnote{Judgment (n 7), para 110.} As to whether there was a dispute over the territorial sovereignty of the Chagos Archipelago, the Maldives put forward four arguments to support its view that there was such a dispute: (1) the Chagos Marine Protected Area (MPA) arbitral award did not resolve the sovereignty dispute and remained res judicata between Mauritius and the United Kingdom; (2) the ICJ’s Chagos advisory opinion did not resolve the sovereignty dispute; (3) UN General Assembly Resolution 73/295 had no effect on the sovereignty dispute; (4) the sovereignty dispute between Mauritius and the United Kingdom continued to exist as a matter of fact. Mauritius, on the other hand, submitted that, in the light of the ICJ’s advisory opinion, there was no issue of sovereignty over the Chagos Archipelago.

The Special Chamber addressed each of the Maldives’ four arguments in turn. As to the first, the Special Chamber noted that the arbitral tribunal in the Chagos MPA case had found that there was a dispute concerning sovereignty over the Chagos Archipelago which it lacked the jurisdiction to address. However, the Chamber did not accept that because the tribunal had held that the UK had breached various obligations under the LOSC in establishing the MPA, that meant that the tribunal had recognised the UK as the coastal State with respect to the Chagos Archipelago, as the Maldives argued. Rather, the main concern of the tribunal was, without prejudice to the question of sovereignty over the Chagos Archipelago, to consider whether the UK’s establishment of the MPA was compatible with its obligations under the LOSC.

Turning to the Maldives’ second argument, concerning the effect of the ICJ’s advisory opinion, the Special Chamber noted that while the advisory opinion could not resolve a bilateral sovereignty dispute without the consent of the parties to the dispute, that did not ‘mean that the advisory opinion could not entail implications for the disputed issue of sovereignty’.\footnote{Ibid., para 168.} Referring to the passages of the opinion quoted above, the Special Chamber considered that the UK’s claim to sovereignty over the Chagos Archipelago was ‘contrary to the determinations made by the ICJ’ in its opinion.\footnote{Ibid., para 173.} Furthermore, those determinations, in the Chamber’s view,
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 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”. 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”\(^\text{17}\) (emphasis added by the Special Chamber).

The Special Chamber went to observe that while an advisory opinion of the ICJ was not binding, judicial determinations made in an opinion carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny [and] ... have legal effect. The Special Chamber, accordingly, recognizes those determinations, and takes them into consideration in assessing the legal status of the Chagos Archipelago.\(^\text{18}\)

The Maldives’ third argument was that UN General Assembly Resolution 73/295 had no effect on the sovereignty dispute. While acknowledging that UN General Assembly resolutions were not legally binding, the Special Chamber noted that in the present case the General Assembly had been entrusted to take necessary steps towards completing the decolonisation of Mauritius.

In light of the general functions of the General Assembly on decolonization and the specific task of the decolonization of Mauritius with which

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\(^{17}\) ibid., para 174. The quotations in this passage are from paras 173 and 178 of the ICJ’s Advisory Opinion (n 8). Later in its judgment, at para 246, the Special Chamber stated that the sovereignty of Mauritius over the Chagos Archipelago ‘can be inferred from’ the ICJ’s advisory opinion.

\(^{18}\) ibid., paras 203, 205–206.
it was entrusted, the Special Chamber considers that resolution 73/295 is relevant to assessing the legal status of the Chagos Archipelago.\footnote{Ibid., para 227.}

The Chamber noted that the resolution affirmed that the Chagos Archipelago formed an integral part of the territory of Mauritius and called on the UK to withdraw its colonial administration from the Chagos Archipelago within six months. The failure of the UK to comply with that demand ‘further strengthens the Special Chamber’s finding as to the United Kingdom’s claim to sovereignty over the Chagos Archipelago noted’ earlier in its judgment.\footnote{Ibid., para 229. The finding concerned is at (n 16) above.}

As to the Maldives’ fourth and final argument that a dispute between Mauritius and the UK over sovereignty of the Chagos Archipelago continued to exist as a matter of fact, the Special Chamber did not find this ‘convincing’ in light of the ICJ’s advisory opinion determining that the UK’s ‘continued administration of the Chagos Archipelago to be an unlawful act of a continuing character’.\footnote{Ibid., para 245.}

Having considered all of the Maldives’ arguments, the Special Chamber was in a position to reach a conclusion on the Maldives’ first two objections to its jurisdiction. By eight votes to one (Judge \textit{ad hoc} Oxman), the Special Chamber rejected both objections. On the first, the Special Chamber concluded that whatever interests the UK might still have with respect to the Chagos Archipelago, they would not render it a State with sufficient legal interests, let alone an indispensable third party, that would be affected by the delimitation of the maritime boundary around the Chagos Archipelago. Indeed, ‘it is inconceivable that the United Kingdom, whose administration over the Chagos Archipelago constitutes a wrongful act of a continuing character and thus must be brought to an end as rapidly as possible, and yet who has failed to do so, can have any legal interests in permanently disposing of maritime zones around the Chagos Archipelago by delimitation’.\footnote{Ibid., para 247.} With respect to the Maldives’ second objection, the Special Chamber considered that its findings referred to above ‘provide it with sufficient basis to conclude that Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonization of Mauritius is completed’.\footnote{Ibid., para 250.}
The Special Chamber’s findings on the first two objections of the Maldives appear quite bold in jurisdictional terms. Had the question of territorial sovereignty over the Chagos Archipelago been authoritatively and definitively determined beforehand by a third party competent to do so, such as the ICJ, the Special Chamber would have been able simply to take note of such a determination and no issue as to its jurisdiction would have arisen. But that was not the case here. Instead, the Special Chamber had to rely on ‘implications’, ‘inferences’ and ‘suggestions’ (its words) in the ICJ’s advisory opinion and UN General Assembly resolution to find that Mauritius was the coastal State of the Chagos Archipelago for the purposes of delimiting a maritime boundary with the Maldives. That finding would seem to be, at best, at the outer limit of its jurisdiction.

In his Separate and Dissenting Opinion, Judge ad hoc Oxman considered that the Special Chamber’s finding was beyond that limit. In his view, even if Mauritius was correct in believing that the ICJ’s advisory opinion and the General Assembly resolution were determinative of the sovereignty dispute over the Chagos Archipelago, that view was not shared by the UK. The question before the Special Chamber was not whether that difference would constitute a dispute for the purposes of satisfying the requirements of adjudication. ‘The question is whether the issue posed is outside its jurisdiction’. Judge ad hoc Oxman considered that to be the case. It was not apparent to him ‘how, or why, the established jurisprudence, which eschews the exercise of compulsory jurisdiction under the [LOS] Convention with respect to issues regarding rights to land territory, can be or should be avoided where there is a disagreement regarding the legal effect of a treaty, or judgment, award, or advisory opinion, or resolution of an international organization that addresses such rights’. Furthermore, to accept the position of Mauritius would risk ‘complicating the exercise by the General Assembly’ of its task of completing the decolonisation of Mauritius and ‘the exercise by the ICJ of its discretion with respect to requests for advisory opinions’. The ICJ’s statement in its Chagos advisory

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24 Ibid., paras 168, 173, 174, 189, 246. In its Advisory Opinion (n 8), the ICJ made it clear that it had not been asked to resolve ‘a territorial dispute between two States’ (para 86; see also para 136).

25 For further academic comment on this issue, see, inter alia, S Thin, ‘The curious case of the “legal effect” of ICJ advisory opinions in the Mauritius/Maldives maritime boundary dispute’, posted on the EJIL:Talk blog on 5 February 2021; V Röben and S Jankovic, ‘Unpacking sovereignty and self-determination in the ITLOS and the IIC: A bundle of rights’, posted on the EJIL:Talk blog on 4 March 2021.

26 Separate and Dissenting Opinion of Judge ad hoc Oxman, para 28.

27 Ibid., para 29.

28 Ibid., para 33.
opinion that all UN member States were under an obligation to cooperate with the UN to complete the decolonisation of Mauritius did not necessarily preclude the Maldives from declining to negotiate a maritime boundary with Mauritius for the time being. More broadly, it was questionable whether the interpretation or application of the ICJ’s statement was within the jurisdiction of the Special Chamber, given the existing case law eschewing jurisdiction under the LOSC with respect to issues relating to rights to land territory.

It is also of interest to note the UK’s response to the Special Chamber’s judgment. In reply to a parliamentary question, some three weeks after the judgment was given, the UK government stated that it was ‘aware’ of the judgment which can have no effect for the UK or for maritime delimitation between the UK (in respect of the British Indian Ocean Territory) and the Republic of the Maldives. We have no doubt about our sovereignty over the territory of the British Indian Ocean Territory, which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the [Chagos] Archipelago, and we do not recognise its claim. We have made a long-standing commitment to cede sovereignty of the territory to Mauritius when it is no longer required for defence purposes. We stand by that commitment.29

In the meantime, the United States continues to occupy and operate its military base on Diego Garcia.

Returning to the judgment, the Special Chamber, having dealt with the first two objections of the Maldives to its jurisdiction at some length, turned to the remaining objections. The Maldives’ third objection was that Articles 74 and 83 of the LOSC 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. The Special Chamber did not accept the first limb of the Maldives’ argument as such. It observed that the main purpose of Articles 74 and 83 was to ensure that where States had overlapping EEZ and continental shelf claims, no State should settle its maritime limits unilaterally. Instead, such limits should be effected by agreement between the States concerned or by resorting to the compulsory dispute settlement procedures in Part XV of the

29 Answer by the Ministry of Defence to a parliamentary question, 8 February 2021, available at https://questions-statements.parliament.uk/written-questions/detail/2021-02-03/148829.
LOSCL if no agreement could be reached within a reasonable period of time. As to the former, Articles 74 and 83 entail an obligation to negotiate in good faith with a view to reaching an agreement on delimitation. However, this obligation does not require the States concerned to reach such agreement ... There can be a number of reasons for which the States concerned cannot reach an agreement. They may not be able to do so after exhaustive negotiations or because one State refuses to negotiate or withdraws from negotiations after initially engaging in them.30

As for the second limb of the Maldives’ argument, that there had been no negotiations between the parties over a maritime boundary, the Special Chamber 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 had even 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’ persistence with that position, it was clear that no agreement on a maritime boundary could be reached within a reasonable period of time, and thus resort to the dispute settlement procedures of Part XV was not only justified but obligatory. It might be wondered whether there is not a certain element of retrospective in that conclusion. The Maldives’ view that Mauritius did not have sovereignty over the Chagos Archipelago was arguably a tenable position until the ICJ delivered its advisory opinion in February 2019. All but one of the abortive attempts at negotiations between the parties occurred before that date, and one might therefore question whether they were relevant to assessment of the ‘reasonable period’. Be that as it may, the Special Chamber dismissed the Maldives’ third objection to its jurisdiction, again by eight votes to one, with Judge ad hoc Oxman dissenting.

In the view of Judge ad hoc Oxman, the fact that the maritime zones of two States overlapped did not in itself mean that a dispute had arisen that was ready to be addressed for judicial settlement under Part XV of the LOSC. Such disputes typically arose after one party claimed or proposed a maritime boundary or a method of delimitation that the other party rejected. That was not the position in the present case. The matter was before the Special Chamber because one of the parties had declined to proceed with negotiations on a maritime boundary. However, there was little in the record of this case to suggest that there was a

30 Judgment (n 7), paras 273–274.
pressing need for a permanent maritime boundary at the time of the proceedings. In Judge Oxman’s view, paragraph 1 of Articles 74 and 83 should not be interpreted to require a State to negotiate a permanent maritime boundary where it declined to do so because that would require it to become entangled in a disagreement between other States with respect to the territory of which the opposite or adjacent coast formed part. In that situation, it should follow that the ‘reasonable period of time’ referred to in paragraph 2 of Articles 74 and 83, after which reference should be made to dispute settlement under Part XV of the LOSC, would not have elapsed. That was the position here. The Maldives had made it clear that its reluctance to negotiate a maritime boundary was because of its desire not to be drawn into a dispute between Mauritius and the UK, two States with which it had good relations, over sovereignty of the Chagos Archipelago: once that dispute had been resolved, it would be willing to negotiate a boundary. That position should be respected ‘for important reasons of public order’. Thus, in Judge Oxman’s view, the request by Mauritius for judicial determination of a maritime boundary was not yet admissible. Nevertheless, both the Maldives and Mauritius would continue to have obligations under paragraph 3 of Articles 74 and 83, as explained below.

Turning now to the Maldives’ fourth objection, this 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 the extent of 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 and 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 rejected the Maldives’ argument that for a dispute to exist there had to be disagreement as to where the actual maritime boundary should lie. In the Special Chamber’s view, ‘maritime delimitation disputes are not limited to

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31 Separate and Dissenting Opinion of Judge ad hoc Oxman, para 38.
disagreement concerning the location of the actual maritime boundary and may arise in various other forms and situations.  

As regards the Maldives’ contention that a dispute would need to have crystallised during the ‘brief window’ after the ICJ had rendered its Chagos advisory opinion (in February 2019) and before Mauritius issued its notification instituting arbitral proceedings (in June 2019), the Special Chamber considered that it was clear that a disagreement existed between the parties regarding maritime delimitation long before the ICJ rendered its advisory opinion. While the Maldives might have been justified in having reservations with respect to the existence of a dispute between it and Mauritius before the delivery of the advisory opinion, that was no longer the case once the advisory opinion had been given. The Special Chamber noted that Mauritius had invited the Maldives to discussions on maritime delimitation in March 2019, and that the Maldives had not responded to that invitation. The Special Chamber referred to the case law of the ICJ according to which the existence of a dispute could be inferred from the failure of a State to respond to a claim in circumstances where a response was called for. The Special Chamber, therefore, concluded that in the present case a dispute existed between the parties concerning the delimitation of their maritime boundary at the time of the filing of Mauritius’ notification.

Having dismissed all four of Maldives’ objections to its jurisdiction, the Special Chamber dealt with the final issue, which was one of admissibility. The Maldives argued that Mauritius’ claim was inadmissible because Mauritius was abusing the judicial process by seeking a ruling on sovereignty over the Chagos Archipelago. The Special Chamber swiftly disposed of that argument. It was clear from its notification that Mauritius was seeking a ruling only 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 and that the case was admissible. However, the Special Chamber deferred to the proceedings on the merits ‘questions concerning the extent’ of its jurisdiction, ‘including questions arising under article 76 of the Convention’. 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

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32 Judgment (n 7), para 333.
33 Ibid., para 352.
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. The two ad hoc judges issued a joint declaration in which they stated their view that the Special Chamber’s decision on this point ‘does not call into question the duty of the parties to comply’ with the obligations in paragraph 3 of Articles 74 and 83, and they trusted that the parties would do so ‘in a spirit of understanding and co-operation’.34

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 the submission of a memorial by Mauritius and a counter-memorial by the Maldives, respectively.35 Following the filing of the memorial and counter-memorial within those time limits, the president of the Special Chamber made a further order setting time limits of 14 April 2022 and 15 August 2022 for the submission of a reply by Mauritius and a rejoinder by the Maldives, respectively.36

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

34 Joint Declaration of Judges ad hoc Oxman and Schrijver. This point was also stressed by Judge ad hoc Oxman in paras 44–49 of his Separate and Dissenting Opinion. There he explains why the obligations of paragraph 3 apply to the Maldives, notwithstanding its unwillingness to negotiate a maritime boundary with Mauritius for the time being.
35 Order No. 2021/2, 3 February 2021.
Convention. In December 2019 the parties agreed to transfer proceedings from the Annex VII arbitral tribunal to the ITLOS.\(^{37}\)

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 of provisional measures on 6 July 2019,\(^{38}\) requiring Nigeria to release the San Padre Pio, its cargo and the master and three other detained officers on the posting of a bond or other financial surety by Switzerland of US $14 million and to 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 ITLOS 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 Padre 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.\(^{39}\) 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.

\(^{37}\) Special Agreement and Notification, 17 December 2019, available with all the other materials for the case at https://www.itlos.org/en/main/cases/list-of-cases/the-m/t-san-padre-pio-no-2-case-switzerland/nigeria/.


\(^{39}\) The reports are available with the materials for Case No. 27 at https://www.itlos.org/en/main/cases/list-of-cases/the-m/t-san-padre-pio-case-switzerland-v-nigeria-provisional-measures/.
On 7 January 2020 the President of the ITLOS made an order setting time limits of 6 July 2020 and 6 January 2021 (subsequently extended to 6 April 2021), respectively, for the submission of a memorial by Switzerland and a counter-memorial by Nigeria.\footnote{The M/T “San Padre Pio” (No. 2) Case (Switzerland/Nigeria), Orders No. 2020/1, 7 January 2020 and No. 2021/1, 5 January 2021. These orders, and those referred to below, are available at https://www.itlos.org/en/main/cases/list-of-cases/the-m/t-san-padre-pio-no-2-case-switzerland/nigeria/.} Although Nigeria failed to file a counter-memorial within its extended time limit, the President of the ITLOS made an order on 18 June 2021 determining that hearings should begin on 9 September 2021.\footnote{The M/T “San Padre Pio” (No. 2) case, Order No. 2021/3, 18 June 2021.}

However, on 30 July, Switzerland wrote to the ITLOS with a request that the hearings should be postponed to a later date in 2021 in view of the ‘ongoing implementation’ of a memorandum of understanding between Switzerland and Nigeria, concluded on 20 May 2021, which provided for the ‘immediate release’ of the San Padre Pio and the discontinuance of proceedings before the ITLOS ‘from the moment that the San Padre Pio enters’ the high seas, or the territorial sea or EEZ of another State. However, at the time of Switzerland’s request, the San Padre Pio was ‘not in a state allowing it to swiftly depart from Nigeria’ and it remained ‘uncertain when and under what conditions the vessel might be able to depart’. The President of the ITLOS decided to accede to Switzerland’s request for a postponement of the hearings.\footnote{The M/T “San Padre Pio” (No. 2) case, Order No. 2021/4, 10 August 2021.}

On 10 December 2021, Switzerland informed the ITLOS that on that day the San Padre Pio had exited the EEZ of Nigeria and entered the EEZ of Benin. Accordingly, Switzerland requested the discontinuance of the proceedings. Nigeria notified the ITLOS that it had no objection to that. The President of the ITLOS therefore made an order placing on record the discontinuance, by agreement of the parties, of proceedings in the M/T “San Padre Pio” (No. 2) case and ordering the removal of the case from its list of cases.\footnote{The M/T “San Padre Pio” (No. 2) case, Order No. 2021/6, 29 December 2021.} The memorandum of understanding between Switzerland and Nigeria provided that upon discontinuance of the proceedings, the provisional measures order of the ITLOS (referred to above) would cease to have effect. The memorandum also provided that it constituted ‘a full and final settlement’ of the case.

The outcome of the M/T “San Padre Pio” (No. 2) case would appear to be broadly satisfactory for both parties. Switzerland secured the release of its vessel, albeit after a lengthy delay. Nigeria avoided having to pay possible compensation to Switzerland for what its own courts had judged to be an unlawful seizure and detention of the vessel, although the owner of the San Padre Pio...
could presumably sue the Nigerian authorities for compensation before the Nigerian courts.

**Arbitration in Accordance with Annex VII of the LOSC**

At the beginning of 2021, two cases were pending before arbitral tribunals constituted in accordance with Annex VII of the LOSC, both instituted by Ukraine against Russia. They were the *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* case and the *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen* case. There were minor developments in each case during the course of 2021, as reported below.

Ukraine instituted proceedings in the first case in September 2016, alleging some 20 breaches of the LOSC by Russia. Many concerned areas of the Black Sea and Sea of Azov where Russia had not challenged Ukraine’s jurisdiction before what, in Ukraine’s view, was Russia’s annexation of the Ukrainian territory of Crimea in 2014. In May 2018, Russia raised objections to the jurisdiction of the tribunal. Its main ground of objection was that the dispute was in reality about Ukraine’s ‘claim to sovereignty over Crimea’, and therefore was not a dispute relating to the interpretation or application of the LOSC. It also raised a number of other objections. In February 2020, the tribunal hearing the case delivered an award in which it upheld Russia’s principal objection to its jurisdiction. Russia’s other objections were either dismissed or joined to the merits as not being of an exclusively preliminary character. The consequence of the tribunal’s ruling on Russia’s principal objection was that it lacked jurisdiction over the dispute as submitted by Ukraine ‘to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine’s claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea’. Thus, the tribunal could not rule on any of Ukraine’s claims ‘which are dependent on the premise of Ukraine being sovereign over Crimea’. That included many, but not all, of Ukraine’s claims. The tribunal did not identify which they were, but left it to Ukraine to do so in a revised memorial. Ukraine was set a time limit to submit such a memorial of 20 November 2020,

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45 Ibid., para 197.

46 Ibid.
The second case brought by Ukraine against Russia concerns an incident that occurred in November 2018. According to Ukraine, three of its naval vessels and their personnel were seized by Russia when attempting to transit the Kerch Strait en route from the Black Sea port of Odessa to the port of Berdyansk in the Sea of Azov. According to Russia, the crews of the vessels were arrested on suspicion of illegally crossing the Russian State border. On 1 April 2019, Ukraine instituted arbitral proceedings, 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. 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, inter alia, (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; and (3) 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. Written proceedings relating to Russia's preliminary objections were completed in January 2021. Hearings were held in October 2021.

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49 See the entry for each case on the PCA website. For the explanation given by one resigning member, see A Pellet, 'Open letter to my Russian friends: Ukraine is not Crimea', posted on the EJIL: Talk blog on 3 March 2022.


During 2021, there were also developments arising out of the Annex VII arbitral tribunal’s award in the *Enrica Lexie Incident (Italy v. India)* case in May 2020. In that award, the tribunal found that Italy had violated India’s right to navigation under Articles 87 and 90 of the LOSC through the killing of two crew members on board an Indian fishing vessel by shots fired at the vessel by two Italian marines on board an Italian-registered tanker, the *Enrica Lexie*, in the mistaken belief that the *Enrica Lexie* was under attack from pirates. As part of the remedy for that breach, the tribunal held that Italy should pay compensation to India. 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. The tribunal also held that the two Italian marines were immune from India’s criminal jurisdiction in respect of the incident and therefore India should take the necessary steps to cease exercising such jurisdiction. The tribunal took note of Italy’s commitment to resume its criminal investigation into the incident following the tribunal’s award, in relation to which the parties should cooperate.

In the event, it was not necessary for the tribunal to exercise its retained jurisdiction. On 15 June 2021, the Supreme Court of India made an order closing all judicial proceedings in India against the two marines. In doing so, it noted that Italy had agreed to pay INR 100 million (approximately US$ 1.34 million) in compensation, which the Court considered a reasonable amount, in addition to INR 21.7 million compensation that Italy had already paid ex gratia to the families of the two victims shortly after the incident. The Supreme Court also noted that Italy would resume its criminal investigation into the incident, with which India should cooperate. In the light of those developments, the arbitral tribunal made an order on 12 October 2021 formally closing proceedings in the case.


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 2021 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).

The first case, which was referred to the ICJ in 2013, concerns the boundary between the continental shelf of Nicaragua beyond 200 miles and the continental shelf of Colombia. Written proceedings in this case were completed in February 2019, but no date had been fixed for hearings by the end of 2021. It is not clear from the ICJ’s website why there will apparently be an unusually lengthy interval between the written and oral proceedings. One explanation could be a combination of the COVID-19 pandemic and the size of the ICJ’s current docket.

In the second case, in which proceedings were also instituted in 2013, Nicaragua claims that Colombia has not complied with the Court’s 2012 judgment in the Territorial and Maritime Dispute (Nicaragua v. Colombia) case.\textsuperscript{55} In particular, Nicaragua argues that Colombia has violated its sovereign rights and jurisdiction in its EEZ, as delimited by the 2012 judgment, by interfering with Nicaraguan flagged or licensed fishing and marine scientific research vessels; by granting permits for fishing and authorisations for marine scientific research to nationals of Colombia and third States; and by offering and awarding licences to explore and exploit for hydrocarbons. Nicaragua also claims that Colombia’s ‘integral contiguous zone’, established by a decree of 2013, overlaps with Nicaragua’s EEZ and violates customary international law. The case also involves counter-claims by Colombia that Nicaragua has breached the traditional fishing rights of the inhabitants of the San Andrés Archipelago (which belongs to Colombia); and that the straight baselines established by Nicaragua in 2013 are contrary to international law. Written proceedings in respect of both Nicaragua’s claims and Colombia’s counter-claims were completed by March 2019. Unlike in the first case, hearings have been held, taking

\textsuperscript{55} Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, 19 November 2012, ICJ Reports 2012, p. 624.
place in September 2021. That suggested that the judgment of the Court in this case was therefore likely to be delivered some time in 2022. That indeed has proved to be the case, the judgment being delivered on 21 April 2022.

It is intended to provide a detailed analysis of the judgment in the Survey for 2022. In the meantime, a brief summary of the Court’s findings will be given here. The Court upheld some of Nicaragua’s complaints concerning interference by Colombia with its EEZ rights, namely those concerning interference with the fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels; the enforcement of conservation measures; and the authorisation of fishing activities. As for Colombia’s ‘integral contiguous zone’, the Court held that this zone violated customary international law on the contiguous zone (which the Court found to be the same as Articles 33 and 303(2) of the LOSC) in two respects. First, the outer limit of the zone in places exceeded the maximum limit of 24 M from the baseline. Second, the purposes for which Colombia claimed to be able to exercise jurisdiction included matters that were not listed in Article 33 of the LOSC, in particular security and preservation of the environment, which the Court considered did not fall within the concept of ‘sanitary’ regulations listed in Article 33. The Court did not, however, accept Nicaragua’s argument that the overlap of Colombia’s contiguous zone with Nicaragua’s EEZ was in itself a breach of international law. One State’s contiguous zone could in principle overlap with the EEZ of another State, as the rights of each State in their respective zones were different, but the first State should exercise its contiguous zone rights with due regard to the EEZ rights of the other State.

Turning to Colombia’s counter-claims, the Court found that Colombia had failed to establish that the inhabitants of the San Andrés Archipelago enjoyed artisanal fishing rights in Nicaragua’s EEZ or that Nicaragua had, through unilateral statements of its Head of State, accepted or recognised their traditional fishing rights or legally undertaken to respect them. On the other hand, the Court found that Nicaragua’s straight baselines were contrary to the customary rules on the matter (which were the same as Article 7(1) of the LOSC) because they had been drawn along a coast that was neither deeply indented nor fringed by islands.

In the third of the cases listed above, Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), proceedings were completed during 2021, when the
Court delivered its judgment on the merits on 12 October 2021. The judgment is analysed in detail below.

In the fourth case, which was referred to the Court in 2019, Guatemala and Belize have requested the Court to determine ‘any and all legal claims of Guatemala against Belize to land and insular territories and to any maritime areas pertaining to these territories, to declare the rights therein of both Parties, and to determine the boundaries between their respective territories and areas’. At the end of 2021, written proceedings in the case were still ongoing, with Belize due to submit a counter-memorial by 8 June 2022, Guatemala having submitted its memorial at the end of 2020.58

In addition to the above cases, one new case with a law of the sea dimension was referred to the Court during 2021. On 5 March, the Court was seized of a dispute between Gabon and Equatorial Guinea by means of a special agreement. In that agreement, which was signed in 2016 and came into force in March 2020, the parties request the Court to ‘determine whether the legal titles, treaties and international conventions invoked by the Parties have the force of law in the relations between [Gabon and Equatorial Guinea] in so far as they concern the delimitation of their common maritime and land boundaries and sovereignty over the islands of Mbanié/Mbáne, Cocotiers/Cocoteros and Conga’. The special agreement goes on to state that both parties recognise as applicable to the dispute the special Convention on the delimitation of French and Spanish possessions in West Africa, on the coasts of the Sahara and the Gulf of Guinea, signed in 1900. Gabon also recognises as applicable the Convention demarcating the land and maritime frontiers of Equatorial Guinea and Gabon, signed in 1974. According to the special agreement, the parties also reserve the right to invoke other legal titles.59 The agreement is the result of mediation by the United Nations after the parties had failed to settle the dispute through negotiations.60 On 7 April 2021, the Court made an order fixing the time limit for the submission of a memorial by Equatorial Guinea as 5 October 2021, and the time limit for Gabon’s counter-memorial as 5 May 2022. The subsequent procedure was reserved for further decision.61

60 See the materials with the special agreement at ibid.
Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)

Proceedings in this case were instituted by Somalia in August 2014, when it submitted an application requesting the Court ‘to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including the continental shelf beyond 200 M’. Somalia sought to found the Court’s jurisdiction on the declarations made by itself and Kenya under Article 36(2) of the Court’s Statute (the optional clause). Kenya challenged the Court’s jurisdiction, seeking to rely on a reservation in its declaration excluding ‘disputes which the parties have agreed or shall agree to have recourse to some other method or methods of settlement’. However, in a judgment given in 2017, the Court rejected Kenya’s challenge.

Written proceedings on the merits of the case were completed in December 2018. While that phase of the case proceeded in a straightforward way, the same was not true of the oral stage. Hearings were originally scheduled to be held in September 2019, but were postponed to November 2019, and then to June 2020, on both occasions at Kenya’s request. However, because of the COVID-19 pandemic, hearings were again postponed, this time to March 2021. In February 2021, the Court rejected a request from Kenya that the hearings be postponed ‘until such a time as the [COVID-19] pandemic conditions would have subsided’. On 11 March 2021 (four days before the hearings were due to begin), Kenya informed the Court that it would not be participating in the hearings, but requested the opportunity to address the Court orally before the commencement of the hearings and to submit a ‘position paper’. The Court rejected both requests. On 15 March, Kenya informed the Court that while it would not participate in the hearings, it intended to utilise 30 minutes out of the time allocated to it on 18 March to address the Court. The Court informed the parties that it was prepared to give Kenya that opportunity, but then on 17 March, Kenya indicated that it would not utilise that opportunity. The following day it submitted four new documents ‘for the Court’s information and consideration’. Although Somalia argued that those documents were neither new nor critical, and of no probative value in support of Kenya’s case,
the Court decided to include them in the case file.\textsuperscript{65} Seven months after the closure of the hearings, on 12 October 2021, the Court delivered its judgment.\textsuperscript{66}

### Delimitation by Acquiescence?

The first issue that the Court had to consider was an argument by Kenya that Somalia had acquiesced in its (Kenya’s) claim that the maritime boundary was the line of latitude passing through the terminus of the parties’ land boundary, and that there was thus an agreed boundary between them. The Court noted that there was a high threshold for proof that a maritime boundary had been established by acquiescence, which in this context was equivalent to tacit recognition manifested by unilateral conduct that the other party might interpret as consent. Basing itself on its earlier case law, the Court examined whether there was ‘compelling evidence’ that Kenya’s claim that the maritime boundary was the line of latitude passing through the terminus of the parties’ land boundary was ‘maintained consistently and, consequently, called for a response from Somalia’ and whether there was compelling evidence that Somalia ‘clearly and consistently accepted the boundary claimed by Kenya’.\textsuperscript{67}

After examining a variety of materials relating to Kenyan legislation and practice, the Court concluded that there was ‘no compelling evidence that Kenya’s claim and related conduct were consistently maintained and, consequently, called for a response from Somalia’.\textsuperscript{68} Likewise, the Court rejected Kenya’s claim of acquiescence based on Somalia’s alleged acceptance of the line of latitude as the maritime boundary because the conduct of Somalia did not establish its clear and consistent acceptance of such a boundary.

\textsuperscript{65} For discussion of this lengthy saga, see A Zimmermann, “To appear or not to appear this was the question” – the saga of Kenya’s non-appearance in the Kenya-Somalia maritime delimitation in the Indian Ocean case, posted on the \textit{EJIL: Talk!} blog on 29 March 2021.


\textsuperscript{67} Judgment (n 66), para 52.

\textsuperscript{68} \textit{Ibid.}, para 7.
Territorial Sea Boundary

Having found that there was no existing maritime boundary between the parties, the Court turned to delimit the boundary itself, beginning with the territorial sea boundary. For that, the applicable law was Article 15 of the LOSC, which provides that in the absence of agreement, a territorial sea boundary is a line equidistant from the nearest points on the parties’ baselines unless historic title or special circumstances make it necessary to vary that line. Kenya and Somalia had proposed differing sets of basepoints from which such an equidistance line should be constructed. However, the Court affirmed its established jurisprudence that it was not bound to accept the basepoints proposed by the parties if they were not ‘appropriate’ to the geography of their coasts. That was the case here. Two of the basepoints proposed by Somalia on its coast were located on the Diua Damasciaca islets and another was off the southern tip of Ras Kaambooni, a minor protuberance in Somalia’s otherwise relatively straight coastline in the vicinity of the land boundary terminus. Those basepoints had ‘an effect on the course of the median line that is disproportionate to their size and significance to the overall coastal geography’, pushing that line to the south.69 The Court therefore selected its own basepoints. That resulted in the construction of an equidistance line whose seaward terminus was some 600 metres northeast of that proposed by Somalia. The Court did not discuss whether there were any special circumstances that might require modification of its line.70 Thus, the unmodified equidistance line constituted the territorial sea boundary.

The starting point of that boundary was a point on the low-water line connected by a straight line running in a southeasterly direction perpendicular to the coast in that area from the terminus of the parties’ land boundary, which had been established by agreements of 1927 and 1933 between the previous colonial powers, Italy and the United Kingdom.

69  Ibid., para 113.
70  Arguably, the Court’s decision to ignore the Diua Damasciaca islets and the southern tip of Ras Kaambooni in constructing its equidistance line was effectively to treat them as special circumstances, since if a strict equidistance line had been drawn, they would have been used as basepoints. In paras 3 and 8–21 of his separate opinion, Judge Yusuf criticised the Court for not using them as basepoints. For further critique of the Court’s basepoints, including those used for the single maritime boundary, see Bekker et al. (n 66) and Schofield et al. (n 66). The authors point out that some of the basepoints used by the Court are actually landward of the low-water line.
The Single Maritime Boundary

Next the Court turned to the boundary between the parties’ overlapping EEZs and continental shelves within 200 miles of the baselines. Here Somalia had requested the Court to construct a single maritime boundary. To do so, the Court found it appropriate to utilise the equidistance/relevant circumstances, three-stage methodology that it has employed in every delimitation of a single maritime boundary that it has undertaken since its judgment in the Black Sea case in 2009,\(^7^1\) where the methodology was first elaborated. According to this methodology, the Court first constructs an equidistance line as the provisional boundary and then considers whether there are any relevant circumstances (which are primarily geographical in nature) that might call for an adjustment of the equidistance line in order to achieve an equitable solution. At the third stage, the Court assesses whether the ratio of the parties’ respective shares of the relevant area resulting from the first two stages of the delimitation exercise is markedly disproportionate to the ratio of the lengths of their relevant coasts. If so, a further adjustment may be made. If not, the equidistance line, as modified in the light of any relevant circumstances, will be the maritime boundary.\(^7^2\) In opting for its usual methodology, the Court rejected Kenya’s proposal to use the line of latitude passing through the terminus of the parties’ land boundary as the method of delimitation as this would produce a severe cut-off effect on the maritime projections of the southernmost coast of Somalia and therefore not achieve an equitable solution.

In applying its methodology, the Court began, as it usually does, by identifying the relevant coasts of each party, namely those parts of each party’s coastline that generate 200 M radial projections that overlap with the 200 M radial projections generated by the other party’s coastline. In previous cases, the Court has explained that identifying the parties’ relevant coasts serves three functions. First, relevant coasts indicate the areas where the maritime zones of the parties overlap and where, therefore, a boundary is required. Second, the basepoints for constructing the equidistance line must be located on a relevant coast. Third, relevant coasts come into play when applying the disproportionality test at the third stage of delimiting a single maritime boundary, as explained above. In the present case, the Court identified Somalia’s relevant coast as the coastline from the terminus of the parties’ land boundary to a point some way north of Mogadishu, a distance of 733 km. Kenya’s relevant coast was virtually the entire length of its coastline, a distance of 511 km.


\(^{7^2}\) Ibid., paras 115–122. See also paras 122–125 of the present judgment (n 66).
Next the Court identified the ‘relevant area’, defined as ‘that part of the maritime space in which the potential entitlements of the parties overlap’.\textsuperscript{73} Identification of the relevant area is necessary for applying the disproportionality test, as explained above. In this case, the Court considered that the relevant area comprised the overlap of the 200 M radial projections from the land boundary terminus, excluding any overlap south of the existing maritime boundary between Kenya and Tanzania. That area measured approximately 212,844 km\textsuperscript{2}.

Having identified the relevant coasts and areas, the Court turned to the first stage proper of the delimitation process, construction of an equidistance line. To construct that line, the Court needed to identify appropriate basepoints. It selected three such points on each party’s coastline. As has usually been the position in previous cases, those points were not the same as the basepoints proposed by the parties. Utilising its chosen basepoints, the Court constructed an equidistance line, beginning at the terminus of the territorial sea boundary and ending at a point 200 M from the starting point of the territorial sea boundary.

Next the Court considered whether there were any relevant circumstances that might call for an adjustment of the equidistance line in order to achieve an equitable solution. Somalia argued that there were no such circumstances. Kenya, on the other hand, argued that there were five circumstances that were relevant, which cumulatively ought to result in the equidistance line being adjusted so as to accord with the line of latitude passing through the parties’ land frontier. Those five circumstances were as follows: (1) the severe reduction in Kenya’s coastal projection, constituting a significant and unreasonable cut-off effect with respect to its maritime areas, that would result from an unadjusted equidistance line; (2) the regional practice of using parallels of latitude to define the maritime boundaries of States on the eastern African coast; (3) the vital security interests of the parties and the international community at large, in particular those relating to terrorism and piracy; (4) the parties’ long-standing and consistent conduct in relation to oil concessions, naval patrols, fishing and other activities which reflected the existence of a \textit{de facto} maritime boundary along the parallel of latitude; and (5) the devastating repercussions for the livelihoods and economic well-being of Kenya’s fisherfolk that an unadjusted equidistance line would have.

In response to those arguments, the Court began by observing that having failed to show that the line of latitude was already the maritime boundary, Kenya was now seeking to obtain the same boundary through an adjustment of...

\textsuperscript{73} Judgment (n 66), para 140, quoting from earlier case law of the Court.
the equidistance line. However, that would be a radical adjustment that would not achieve an equitable solution as it would severely curtail Somalia’s entitlements to the continental shelf and EEZ generated by its coast adjacent to that of Kenya and not allow the coasts of the parties ‘to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way’.74

The Court then considered the non-geographical circumstances invoked by Kenya. As regards security considerations, the Court did not underestimate the serious threats to security in the region. It noted the efforts of the international community to assist Somalia in re-establishing peace and security after many years of internal conflict. It therefore viewed the current security situation in Somalia and in the maritime spaces adjacent to its coast as not being of a permanent nature and thus as not justifying an adjustment of the provisional equidistance line. Moreover, in its earlier case law, the Court had held that legitimate security considerations could be a relevant circumstance if a maritime delimitation was effected particularly close to the coast of a State, but that was not the case here, as the equidistance line did not pass close to the coast of Kenya. Furthermore, control over the EEZ and continental shelf was ‘not normally associated with security considerations’.75

A second non-geographical circumstances invoked by Kenya was the consequences of an unadjusted equidistance line for its fisherfolk. Such a circumstance was relevant only in exceptional cases, in particular if an unadjusted equidistance line was likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the States concerned. That was not the case here. The Court also rejected Kenya’s fourth argument, concerning the past conduct of the parties, having already found that no boundary had been established through such conduct.

That left Kenya’s first two arguments. The Court noted that in the case law of international courts and tribunals, it was accepted that an equidistance line could produce a cut-off effect, particularly where the coastline was markedly concave or convex. In the Cameroon v. Nigeria case, the Court had stated that ‘the concavity of the coastline could be a relevant circumstance for the purposes of delimitation “when such concavity lies within the area to be delimited”’.76

In the present case, the Court sought to distinguish that position, observing

74 Ibid., para 156.
75 Ibid., para 158. The Court was quoting from Nicaragua v. Colombia (n 55), para 222.
76 Ibid., para 164. The Court was quoting from Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Equatorial Guinea intervening), Judgment, 10 October 2002, ICJ Reports 2002, p. 303, para 297. Although the Court does not mention it in the present case, in the Costa Rica v. Nicaragua case, the Court considered a peninsula as a possible relevant circumstance, noting that it lay ‘in the area to be delimited’: see

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that ‘examining only the coastlines of the two States concerned to assess the extent of any cut-off effect resulting from the geographical configuration of the coastline may be an overly narrow approach’. Examining the concavity of the coastline in a broader geographical configuration was consistent with the approach taken in the North Sea, Bay of Bengal and Guinea/Guinea Bissau cases. When the coasts of Somalia, Kenya and Tanzania were observed as a whole, the coastline was undoubtedly concave. Kenya faced a cut-off of its maritime entitlements as the middle State located between Somalia and Tanzania because the equidistance line drawn by the Court between Somalia and Kenya progressively narrowed the coastal projection of Kenya, substantially reducing its maritime entitlements within 200 M. In earlier cases, international courts and tribunals had recognised an adjustment of the equidistance line was warranted if the cut-off effect was significant. Although the cut-off effect in the present case was less pronounced than in some earlier cases, it was still serious enough to warrant some adjustment to the equidistance line. That adjustment should be made by shifting the equidistance line to the north so that from the end point of the territorial sea, the boundary would be a geodetic line with an initial azimuth of 114º, terminating at its intersection with the 200 M limit from Kenya. Such a line ‘would attenuate in a reasonable and mutually balanced way the cut-off effect produced by the unadjusted equidistance line’. The Court gave no further explanation for its choice of azimuth beyond noting that it was the ‘result of an overall appreciation of the relevant circumstances by the Court in seeking to achieve an equitable solution’.

As the final stage of the delimitation of the single maritime boundary, the Court turned to the disproportionality test to check whether the maritime
boundary resulting from the first two stages of its delimitation ‘leads to a significant disproportionality between the ratio of the lengths of the Parties’ respective relevant coasts and the ratio of the size of the relevant areas appor-
tioned by that line’. As already noted, the Court had earlier found that the
relevant coast of Somalia was 733 km long and that of Kenya 511 km long. That
gave a ratio of the relevant coasts of 1:1.43 in favour of Somalia. According to
the Court, 120,455 km² of the relevant area would appertain to Kenya, and
92,389 km² would appertain to Somalia. Thus, ‘[t]he ratio between the mar-
time zones that would appertain respectively to Kenya and Somalia is 1:1.30 in
favour of Kenya. A comparison of these two ratios does not reveal any signifi-
cant or marked disproportionality’.

Put like that, the Court’s conclusion seems quite plausible. However, it is a
rather unfortunate way of expressing the position as it is potentially mislead-
ing. That is because the Court is not comparing like with like. In the case of the
ratio of coasts, Kenya is used as the comparator (i.e., the State representing 1 in
the comparison); in the case of the ratio of areas, Somalia is the comparator.
However, to get a true comparison, the same State must be used as the com-
parator for both ratios. If Kenya is used as the comparator, the ratio of coastal
lengths is, as before, 1:1.43, but the ratio of the relevant area is 1:0.77. There is
thus a disparity by a factor of 1.86. That is much greater than the disparity in
ratios in nearly all the other cases decided by international courts and tribu-
nals since the ICJ introduced the disproportionality test in its current form
in the *Black Sea* case in 2009. It approaches the disparity in the *Nicaragua v.
Colombia* case, where the disparity was by a factor of 2.38, the greatest dis-
parity in any case since the *Black Sea* case. The Court went to considerable
lengths in the *Nicaragua v. Colombia* case to justify its view that the disparity in
that case did not constitute a significant disproportionality. It is a little sur-
prising that in the present case the Court did not comment further on the dis-
parity in ratios.

Since the Court’s application of the disproportionality test did not lead to
any further adjustment being required, the Court’s adjusted equidistance line
was the single maritime boundary between the EEZs and continental shelves
within 200 M of the baselines of Kenya and Somalia. While the Court’s deci-
sions on the acquiescence issue and the territorial sea boundary were unani-
mous, its decision on the single maritime boundary was by a majority of 10
votes to four. Two of the dissenting judges (Judges Bhandari and Salam) gave

83 *Ibid*, para. 175.
84 *Ibid*, para. 176.
85 See the *Nicaragua v. Colombia* case (n 55), paras 239–247.
Continental Shelf Boundary beyond 200 M

Having delimited the continental shelf within 200 M of the baselines by means of a single maritime boundary, the Court turned to delimitation of the shelf beyond 200 M. In its 2017 judgment, the Court had held that it had in principle jurisdiction to delimit a continental shelf beyond 200 M. The question here was whether it should exercise that jurisdiction, given that the Commission on the Limits of the Continental Shelf (CLCS) had not yet considered the submissions of Kenya and Somalia to a continental shelf beyond 200 M (outer continental shelf). It noted that the situation here was different from that in the previous cases in which an outer continental shelf boundary had been delimited, namely the two Bay of Bengal cases, where it had already been firmly established that the whole of the bed of the Bay of Bengal met the criteria of Article 76 of the LOSC to be continental shelf, and the Ghana/Côte d’Ivoire case, where the CLCS had already addressed recommendations in response to Ghana’s submission. Nevertheless, the Court decided that it would exercise its jurisdiction in this case and delimit an outer continental shelf boundary in light of the fact that both parties claimed an outer continental shelf on the basis of scientific evidence and that neither party questioned the other’s entitlement to such a shelf or the extent of its claim. The Court went on to determine that the outer continental shelf boundary should be a continuation of the geodetic line used for the single maritime boundary until that line reached the outer limits of the parties’ continental shelves as delineated in due course on the basis of the recommendations of the CLCS or until that line reached the area where the rights of third States might be affected.

The Court did not explain its methodology for drawing the outer continental shelf boundary, noting only that it was ‘appropriate’ to extend the single

87 Individual Opinion, Partly Concurring and Partly Dissenting, of Judge Robinson, paras 29–33.
88 Dispute concerning Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/ Côte d’Ivoire), Judgment, 23 September 2017, ITLOS Reports 2017, p. 4.
It is regrettable that the Court did not say more about the methodology for the delimitation of outer continental shelf boundaries, at least as between adjacent States, as the methodology used for such delimitation in the earlier cases has come in for criticism. President Donoghue, although voting with the majority, expressed reservations about the Court’s methodology. She observed that in delimiting the outer continental shelf boundary between adjacent States, ‘it is simple (and therefore inviting) to continue’ the single maritime boundary using a directional arrow. However, because of the different legal bases for entitlement to the area within 200 M and the outer continental shelf, ‘it cannot be presumed that a line that achieves an equitable delimitation of the 200-nautical-mile zones will also result in equitable delimitation of overlapping areas of two States’ outer continental shelf.

The Court noted that one consequence of its outer continental shelf boundary, depending on the extent of Kenya’s entitlement to an outer continental shelf as might result from the recommendations of the CLCS, might be the existence of a small area beyond 200 M from the coast of Kenya and within 200 M from the coast of Somalia but on the Kenyan side of the boundary, a so-called ‘grey area’. However, since the existence of this grey area was only a possibility, the Court did not consider it necessary ‘to pronounce itself on the legal regime that would be applicable in that area’.

The Court’s decision on the outer continental shelf boundary was given by nine votes to five, the four judges dissenting on the single maritime boundary being joined by Judge Robinson. Judges Abraham and Yusuf dissented for essentially the same reasons that they dissented on the single maritime boundary. Judge Robinson’s objection was more fundamental. He considered that the Court was not in a position to carry out a delimitation of the outer continental shelf boundary because it had no convincing evidence that the parties were entitled to a continental shelf beyond 200 M and it failed to explain why

89 Judgment (n 66), para 195.
91 Separate Opinion of Judge Donoghue, para 13.
92 Separate Opinion of Judge Yusuf, paras 6, 49–52. Judge Abraham did not explicitly address the outer continental shelf in his separate opinion.
93 Judgment (n 66), para 197. In contrast, in the two Bay of Bengal cases, both the ITLOS and the arbitral tribunal did pronounce on the legal regime to apply in the grey area: see Bangladesh/Myanmar case (n 79), paras 472–476 and Bangladesh v. India (n 79), paras 503–508.
it found the parties’ submissions to the CLCS persuasive.\textsuperscript{94} Although voting with the majority, President Donoghue expressed similar reservations.\textsuperscript{95}

Other Issues
The final issue that the Court had to consider was a claim by Somalia that Kenya, by its activities in the disputed area prior to the Court’s delimitation, had violated Somalia’s sovereignty over its territorial sea and its sovereign rights in the EEZ and on the continental shelf, as well as the obligation in Articles 74(3) and 83(3) ‘not to jeopardize or hamper the reaching of the final agreement’. As to the former, the Court, echoing the view of the ITLOS in the \textit{Ghana/Côte d’Ivoire} case, considered that ‘when maritime claims of States overlap, maritime activities undertaken by a State in an area which is subsequently attributed to another State by a judgment “cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States”’.\textsuperscript{96} Applying that principle to the facts, the Court noted that Kenya’s surveying and drilling activities complained of by Somalia were located north of the equidistance line claimed by Somalia as the maritime boundary. However, ‘there was no evidence that Kenya’s claims over the area concerned were not made in good faith’.\textsuperscript{97} The Court thus concluded that Kenya’s activities in parts of the disputed area that it had attributed to Somalia by its delimitation were not in violation of Somalia’s sovereignty or sovereign rights. One may question the desirability of the principle enunciated by the Court in this case, and by the ITLOS in the earlier \textit{Ghana/Côte d’Ivoire} case. The principle seems difficult to reconcile with the obligation not to jeopardise and hamper in Articles 74(3) and 83(3) of UNCLOS, discussed below. Furthermore, from a policy perspective, the principle is undesirable as it may encourage unilateral hydrocarbon activity in disputed areas and thus engender conflict.\textsuperscript{98}

As regards Kenya’s alleged violation of Articles 74(3) and 83(3), the Court agreed with the view of the ITLOS in the \textit{Ghana/Côte d’Ivoire} case that the

\begin{itemize}
\item \textsuperscript{94} Individual Opinion, Partly Concurring and Partly Dissenting, of Judge Robinson, paras 3–21.
\item \textsuperscript{95} Separate Opinion of Judge Donoghue, para 4.
\item \textsuperscript{96} Judgment (n 66), para 203. The quotation is from the judgment of the ITLOS in the \textit{Ghana/Côte d’Ivoire} case (n 88), para 592.
\item \textsuperscript{97} \textit{Ibid.}, para 204.
\item \textsuperscript{98} In paras 18 and 19 of his separate opinion in the \textit{Ghana/Côte d’Ivoire} case, Judge Paik also expressed reservations about the principle. For a further critique, see NA Ioannides, ‘A commentary on the \textit{Dispute Concerning Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)}’ (2016–2017) 3 Maritime Safety and Security Law Journal 48–61, at pp. 55–58.
\end{itemize}
'transitional period' during which the obligation not to jeopardise or hamper applies referred to the period after a maritime delimitation dispute had been established until a final delimitation by agreement or adjudication had been effected. In the present case, the maritime delimitation dispute was established in 2009. Thus, it was only Kenya's activities after that date that were relevant. Some of those activities complained of by Somalia concerned the award of oil concession blocks to private operators and the performance of seismic and other surveys in those blocks. However, those activities were not of the kind that could lead to permanent physical change in the marine environment, nor had it been established that they had the effect of jeopardising or hampering the reaching of a maritime boundary agreement. Somalia had also complained of drilling activities that could lead ‘to permanent physical change in the marine environment. Such activities may alter the status quo between the parties to a maritime dispute and could jeopardize or hamper the reaching of a final agreement’.99 However, there was no conclusive evidence that such activities had taken place in the disputed area after 2009. Thus, there had been no breach of Articles 74(3) and 83(3) by Kenya. The Court's decision on this point, and on the alleged breach of Somalia’s sovereignty and sovereign rights, was unanimous.

When the Court gave notice on 24 September 2021 that it would deliver its judgment in this case on 12 October, Kenya immediately terminated its declaration under the optional clause. At the same time, the Kenyan Ministry of Foreign Affairs stated that ‘the delivery of the judgement will be the culmination of a flawed judicial process that Kenya has had reservations with, and withdrawn from’.100 However, it follows from the Nottebohm principle that Kenya's withdrawal from the optional clause does not affect the validity of the Court's judgment. The president of Kenya is reported to have rejected the judgment.101

99 Judgment (n 66), para 208. The distinction that the Court makes between activities that cause ‘permanent physical change in the marine environment’ and those that do not echoes the award in the Arbitration between Guyana and Suriname, PCA Case No. 2004-04, Award, 17 September 2007, (2012) 30 Reports of International Arbitral Awards, p. 1, paras 466–467, 470, 480.
