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Spain and the Monetary Gold Doctrine in the M/V "*Norstar*" Case

Rosario OJINAGA RUIZ*

Abstract: The dispute between Panama and Italy regarding the seizure and detention of the M/V "*Norstar*" has led to the first preliminary objections proceeding brought before the ITLOS as well as to the invocation of the *Monetary Gold* doctrine, namely in relation to Spain. Besides the emphasis on the application of this doctrine with regard to Spain before international courts and tribunals, the study will touch on several other issues raised by the M/V "*Norstar*" case that are in close relation with the subject-matter of the dispute over the detention of the M/V *Louisa* and more prominent ITLOS's statements in the M/V "*Louisa*" (*San Vincent and the Granadines v, Kingdom of Spain*) case.

Keywords: International Tribunal for the Law of the Sea - Detention of vessels – Preliminary Objections- Indispensable party

(A) INTRODUCTION

Spain has been part in contentious and advisory proceedings before the International Tribunal for the Law of the Sea (ITLOS). It was a party to the contentious case concerning the detention of the M/V "*Louisa*", where the Tribunal concluded that no dispute concerning the interpretation or application of the United Nations Convention on the Law of the Sea (LOSC) existed between the parties and that, therefore, it has no jurisdiction *ratione materiae* to entertain the case before it[1]. Thereafter, Spain presented written and oral statements in the course of the proceedings that resulted in the Advisory Opinion on flag State responsibility for illegal fishing in the Exclusive Economic Zone rendered by ITLOS in response to the request submitted by the Sub-Regional Fisheries Commission (SRFC)[2].

* Associate Professor of Public International Law, Jean Monnet Chair Holder, University of Cantabria, Spain, ojinagar@unican.es

[1] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment,* ITLOS Reports (2013) 4. All the documents relating to the case are available at the ITLOS Web site. See R. Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2013", 30 *IJMCL* (2015) 1-35; C. Escobar, "España y el Tribunal Internacional de Derecho del Mar: especial referencia al caso M/V "Louisa", in J. Martín y Pérez de Nanclares (Dir.), *España y la práctica del Derecho Internacional, LXXV Aniversario de la Asesoria Jurídica Internacional del MEC* (Colección Escuela Diplomática 20, Madrid 2013) 179; P. Gautier, "The International Tribunal for the Law of the Sea: Activities in 2010", 10 *Chinese JIL* (2011) 865-881; R. Ojinaga, "The M/V "Louisa" Case: Spain and the International Tribunal for the Law of the Sea", 18 *SYbIL* (2013-2014) 199 -222; N. Peiris, "M/V Louisa: in search of a Jurisdictional basis in the Law of the Sea Convention", 29 *IJMCL* (2014) 149-157: E. Sessa, "Giurisprudenza Internazionale, International Tribunal for the Law of the Sea", 113 (3) *Il Diritto Marittimo,* (2011) 814-827; Y. Tanaka, "The M/V Louisa case (Saint Vincent and the Grenadines v. the Kingdom of Spain, 23 December 2010), Request for Provisional Measures", 26 *IJMCL* (2011) 481-490; Y. Tanaka, "A Note on the M/V "Louisa" Case", 45 *Ocean Development & International Law* (2014) 205-220.

[2] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC),* Advisory Opinion of 2 April 2015. See R. Ojinaga, "Spain and the Advisory Jurisdiction of the International Tribunal for

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More recently, Spain has been involved in the first preliminary objections proceeding brought before ITLOS since its creation in 1996. It was in relation to the dispute between Panama and Italy concerning the arrest and detention of the M/V "*Norstar*" as the result of judicial cooperation between Italy and Spain on the basis of the European Convention on Muttual Assistance in Criminal Matters on 20 April 1959. Having filed Panama its application with the ITLOS against Italy, this State contested the jurisdiction *ratione personae* of the Tribunal by considering it was not the proper respondent and that, in any event, Panama's claim would inevitably involve the ascertainment of the rights and obligations of a third State (Spain) in its absence from the proceedings and without its consent[3]. Both these arguments were rejected by ITLOS in its preliminary objections Judgment on 4 November 2016[4]. Between 10 and 13 September, 2018, the ITLOS held public-hearings on the merits of the case and heard the concluding arguments of the parties. The Tribunal plans to deliver the Judgment in spring 2019.

Besides the emphasis on the invocation of the *Monetary Gold* doctrine[5] with regard to Spain

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the Law of the Sea", 20 *SYbIL* (2016), 279-304.

[3] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Written Preliminary Objections under Article 294, paragraph 3, of the United Nations Convention on the Law of the Sea, 10 March 2016, at. 1.

[4] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 41. All the documents relating to the case are available at the ITLOS Web site, www.itlos.org/.

[5] C. Jiménez, "Fundamento, concepto y naturaleza jurídica de la doctrina del oro amonedado (tercero indispensable) en la jurisprudencia internacional", in M. Vargas and A. Salinas (cords), *Soberanía del Estado y Derecho Internacional*, homenaje al profesor Juan Antonio Carrillo Salcedo (Universidad de Córdoba, Servicio de Publicaciones: Universidad de Sevilla, Secretariado de Publicaciones: Universidad de Málaga (UMA), 2005) 733-755. On this matter, C. Chinkin, *Third Parties in International Law*, (Clarendon Press, Oxford 1993); "The East Timor Case before the International Court of Justice", 4 *EJIL* (1993) 206-222; B. Delcourt, "Un seul État vous marque ... La application de la jurisprudence de l'Or monétaire à l'affaire du Timor oriental", XXIX *RBDI* (1996), 191-215;; "Efectos explícitos e implícitos de la doctrina del oro amonedado: la retricción de la competencia de la CIJ en litigios de límites con presencia de trifinios", in *Pacis Artes*, Obra Homenaje al profesor Julio González Campos (Edifer, Madrid 2005) 291-325; F. Jouanner, "Le príncipe de l'or monétaire à propos de l'arrêt de la Cour du 39 juin 1885 dans l'affáire du Timor Oriental (Portugal c. Australie)", 100 *RGDIP* (1996), 673-713; N.S. Klein, "Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case", 21 *Yale Journal of International Law* (1996) 305-347; S. Torres, "The New Theory of "Indispensable Parties" under the Statute of the Internacional Court of Justice", in Wellens (ed.), *International Law: Theory and Practice* (Kluwer Law International, Dordrecht 1998) 737-750; "L'intervention dans la proèdure de la Cour internationale de Justice", *R. des C.*, t. 256 (Martinus Nijhoff, The Hague 1995) 197-457; A. Orakhelashvili, "The Competence of the International Court of Justice and the Doctine of the Indispensable Party: from Monetary Gold to East Timor and Beyond", 2 (2) *Journal of International Dispute Settlement* (2011) 373-392; S. Rosenne, "Article 59 of the Statute of the International Court of Justice Revisited", in *El Derecho Internacional en un mundo en transofrmación*, Liber Amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga, Vol. II (Fundación de Cultura Universitaria, Montevideo 1994) 1129-1158; M.A. Ruiz, "El "tercero indispensable" en el Asunto de Timor Oriental: una noción a medida de la Corte Internacional de Justicia para la determinación de su propia competencia", XLVIII *REDI* (1996) 99-124; T. Thiennel, "Third States and Jurisdiction of the Internacional Court of Justice: The *Monetary*

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in contentious proceedings before international courts and tribunals, it is also worth noting that main issues raised by the M/V "*Norstar*" case are in close relation with the subject-matter of the dispute over the detention of the M/V *Louisa* and more prominent ITLOS's statements in the M/V "*Louisa*" case. Accordingly, this note is structured into five sections. Firstly, a summary is given on the factual and procedural background of *the* M/V "*Norstar*" case. This is followed by an examination of the basis and scope of the jurisdiction of ITLOS to entertain the dispute by virtue of the unilateral declarations made by Panama and Italy under Article 287 LOSC. The following section is about jurisdiction and admissibility issues under discussion at the stage of the proceedings on preliminary objections; in particular, we will look at the arguments posed by Italy with regard to the interpretation of rules on international responsibility of States and the doctrine of indispensable parties which are of particular relevance to Spain. Last section provides conclusions on issues that may acquire a more relevant role in the development of the ITLOS's case law.

(B)THE DISPUTE CONCERNING THE ARREST AND DETENTION OF THE M/V "NORSTAR"

On 17 December 2015, Panama filed an application with ITLOS instituting proceedings against Italy in a dispute concerning the arrest and detention of the M/V "*Norstar*", an oil tanker registered under the flag of Panama. From 1994 until 1998, the ship was allegedly engaged in supplying gasoil to mega yachts in an area described by Panama as "international waters beyond the Territorial Sea of Italy, France and Spain" and by Italy as "off the coasts of France, Italy and Spain"[6]. On 11 August 1998, the Public Prosecutor at the Court of Savona issued a Decree of Seizure against the M/V "*Norstar*", as *corpus delicti*, in the context of criminal proceedings against four Italian nationals and four foreign citizens for the alleged offences of criminal association aimed at smuggling mineral oils and tax fraud. As a result, the M/V "*Norstar*" was seized by Spanish authorities at the request of Italy when anchored at the bay of Palma de Mallorca on 24 September 1998[7].

With the Judgment of 13 March 2003, the Court of Savona acquitted all accused of all charges

Gold Principle", 57 *German Yearbook of International Law* (2014) 321-352; N. Zamir, "The applicability of the Monetary Gold principle in international arbitration", 33 *Arbitration International* (2017) 523-538.

6 *Ibid*., para. 41.

7 A request for judicial assistance was submitted by the Prosecutor at the Court of Savona pursuant to article 15 of the European Convention on Mutual Assistance in Criminal Matters, 72 UNTS 185 (adopted 20 April 1959, entered into force 12 June 1962) —amended by I y II Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters— and article 53 of the Schengen Agreement (Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Schengen, OJ L 239, 22.9.2000, p 13; adopted 14 June 1985, entered in force provisionally on 15 June 1985 and definitively on 2 March 1986).

and ordered that the seizure of motor vessel *Norstar* be revoked and the vessel returned to the owner. The Public Prosecutor appealed the Judgment of 13 March 2003 but the appeal was limited to the sentencing of the individuals and was not made in relation to the vessel. On 25 October 2005, the Court of Appeal of Genoa upheld the judgment delivered by the Court of Savona. According to Italy, on 18 March 2003 the Court of Savona transmitted a copy of its judgment of 13 March 2003 to the Court of Palma de Mallorca, requesting the latter to execute the order for release of the M/V "*Norstar*". By letter dated 17 April 2003, the Spanish judicial authorities instructed the Provincial Maritime Service to lift the detention of the M/V "*Norstar*". On 21 July 2003, the detention was consequently lifted by the Provincial Maritime Service, with Order No. 84/03. The following day, the Captain of the Provincial Maritime Service informed the competent Spanish judicial authorities that the detention of the M/V "*Norstar*" had been lifted, and attached the relevant documentation as evidence[8]. On 6 September 2006, the Port Authority of the Balearic Islands, requested through the Court of Savona authorization to demolish the M/V "*Norstar*". On 31 October 2006, the Court of Appeal of Genoa issued an order stating that the judgment of the Court of Savona of 13 March 2003 has to be enforced and that there was no decision to be taken given that the destiny of the vessel, after having been given back to the party entitled, does not fall within the competence of that Court. On 13 November 2006, the Court of Appeal of Genoa transmitted a copy of its order of 31 October 2006 to the Port Authority of the Balearic Islands.

The dispute was submitted to the ITLOS pursuant to the declarations made by Panama and Italy under article 287 of the United Nations Convention on the Law of the Sea (LOSC)[9]. In its application, Panama claims compensation from Italy for damage caused by the illegal arrest of the M/V "*Norstar*". In support of its request, Panama contends that Italy violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 LOSC; in particular, it rests upon the right of freedom of navigation provided in article 87.

In its Application, Panama requested that the dispute be referred to the Chamber of Summary Procedure pursuant to article 15, paragraph 3, of the Statute of the ITLOS, but Italy expressed its preference for the case to be heard before the Tribunal *in plenum*. Since the Tribunal did not include upon the bench a member of the nationality of either of the Parties to the dispute, both parties have availed themselves of the possibility to choose a judge *ad hoc*, pursuant to article 17 (3) of the Statute. Mr Tullio Treves was chosen by Italy and Mr Gudmundur Eiriksson was chosen by Panama.

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8 Italy included these documents as Annexes to its Counter-Memorial but as confidential documents.

9 United Nations Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994).

On 11 March 2016, Italy filed preliminary objections to the jurisdiction of ITLOS and the admissibility of Panama's claim under article 294 (3) LOSC and the proceedings on the merits were suspended[10]. On 4 November 2016, ITLOS delivered its Judgment on the preliminary objections. The Tribunal finds that it has jurisdiction to adjudicate the dispute and decides that Panama's application is admissible.

Notwithstanding the differences between the two cases, the *M/V "Norstar"* is a matter of interest in connection with the *M/V "Louisa"* case. Both cases deal with the exercise of the sovereign right of States to adjudicated suspected crimes, including measures relative to the detention of ships as *corpus delicti*. Notwithstanding, in the dispute on the *M/V "Louisa"*, the exercise of that right —regarding crimes committed in the Spanish territorial sea— was in conformity with LOSC and was considered by the ITLOS when criminal proceedings in Spain was still on-going. By the contrary, the dispute between Panama and Italy arises the question of the exercise of criminal jurisdiction by Italy regarding activities that could be were undermined, at least in part, in high seas and could be considered by the Tribunal as a wrongful act in the light of article 87 LOSC, and also extends to the question of the reparation of damages incurred by the *M/V "Norstar"*. Even if domestic legislation provides means for obtaining such reparation, the question arises about the conditions permitting that the reclamation may be claimed under international law, both as the consequence of the commission of an internationally wrongful act or even, more controversially, in absence of it[11].

(C)ARTICLE 287 LOSC AS THE LEGAL BASIS FOR JURISDICTION OF ITLOS IN THE SPECIFIC DISPUTE

In its application, Panama invoked as the basis for the jurisdiction of the ITLOS, the declarations made by the Parties in accordance with article 287 LOSC. The "choice of procedure" clause referred in article 287 (1) establishes that, upon ratification of LOSC or at any time thereafter, States parties may file a declaration selecting one or more of the following jurisdictions: International Tribunal for the Law of the Sea, International Court of Justice, arbitration under Annex VII or special arbitration under Annex VII. If the parties to a dispute have chosen the same forum, the dispute will be submitted only to that forum, unless the parties

[10] *The M/V "Norstar" (Panama v. Italy)*, Order 2016/12, 15 March 2016.

[11] In the opinion of Judge *ad hoc* Treves, there is one clear example of a provision, article 110 (3) LOSC, prescribing the compensation of damage caused by acts that are not wrongful, but not in situations as that of the *M/V "Norstar" (The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Dissenting Opinion of Judge *ad hoc* Treves, para. 15. A close examination on issues regarding the action for damages as exhaustion of local remedies, estoppel, acquiescence and extensive prescription (time bar) is addressed in the Separate Opinion of Judge Lucky.

agree otherwise (Article 288 (4)). If the parties have not selected the same forum, the dispute will be submitted to arbitration under Annex VII, unless the parties agree otherwise (Article 288 (5)).

Italy ratified LOSC on 13 January 1995 and made a declaration under the article 287 on 26 February 1997. Then, Italy chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other. In accordance with article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the ITLOS or the ICJ. The declaration states:

> "In implementation of article 287 of the United Nations Convention on the Law of the Sea, the Government of Italy has the honour to declare that, for the settlement of disputes concerning the application or interpretation of the Convention and of the Agreement adopted on 28 July 1994 relating to the Implementation of Part XI, it chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other.
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> In making this declaration under article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice".

Panama ratified the Convention on 1 July 1996 and made a more limited declaration under article 287 of the Convention on 29 April 2015, restricted to the specific case. The declaration states:

> "In accordance with paragraph 1 of article 287 of the United Nations Convention on the Law of the Sea of December 10th, 1982, the Government of the Republic of Panama declares that it accepts the competence and jurisdiction of the International Tribunal of the Law of the Sea for the settlement of the dispute between the Government of the Republic of Panama and the Government of the Italian Republic concerning the interpretation or application of LOSC that arose from the detention of the Motor Tanker NORSTAR, flying the Panamanian flag".

Even if the Parties did not raise the issue of the scope of their declarations, the Tribunal considered it appropriate to restate its jurisprudence by stating that LOSC does not preclude a declaration limited to a particular dispute[12]. Therefore,

> "[...] in cases where States Parties have made declarations of differing scope under article 287 of the Convention, its jurisdiction exists only to the extent to which the substance of the declarations of the two parties to a dispute coincides"[13].

[12] Judgment, para. 58. See M/V "Louisa" (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Judgment, ITLOS Reports (2013) 4, at 30, para. 79.

[13] *Ibid.* See M/V "Louisa" (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Judgment, ITLOS Reports

On this point the Tribunal is relaying in its previous decision in the *M/V Louisa* case and the *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* case, considered as the initiation of a new practice regarding the implementation of Article 287 and consisting in the selection of a forum for a particular category of disputes or a specific dispute. The view that a declaration under article 287 confined to the particular case is compatible with that disposition is debatable, as posed by judge *ad hoc* Treves who decided not entry into this discussion with the Tribunal[14].

Certainly, the tendency to the inclusion of limitations *ratione materiae* to the jurisdiction of ITLOS in the framework of unilateral declarations made by States under Article 287 must be examined on the basis of a systematic interpretation of Part XV of LOSC. The differences between the ICJ's facultative jurisdiction for States making declarations under Article 36 of the Statute and the compulsory jurisdiction system established in Section 2, Part XV, of LOSC are remarkable. The only exceptions and limitations to applicability of compulsory procedures are those provided in articles 297 and 298, and article 309 prohibits reservations to LOSC [15]. In addition, the limitation of the declaration of acceptance of the ITLOS's jurisdiction to one particular case "is hardly reconcilable with the principle of equality of arms"[16]. In any event, the Judgment on preliminary objections in the *M/V "Norstar"* "touches upon the scope of the Tribunal's jurisdiction in paragraph 58 but not as to whether such a practice of limited declarations is legitimate under the Convention"[17].

(2013) 4, at p. 30, paras. 81. In this regard, the ITLOS made recourse to the ICJ's jurisprudence on Article 36(2) of its Statute (*Certain Norwegian Loans*, Judgment, I.C.J. Reports (1957) 9, at 23; see also *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports (2006) 6, at 39, para. 88).

[14] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Dissenting Opinon of Judge *ad hoc* Treves, para 4.

[15] Moreover, as posed in previous commentary on the *M/V Louisa* case, a reasonable interpretation of the admissibility of limitations to the competence of the Tribunal, or other particular forum chosen by States under Article 287 of LOSC, leads to the conclusion that matters excluded by virtue of that unilateral declarations fall, at last, into the residual jurisdiction of the arbitral tribunal. In any case, the inclusion of "reservations" in unilateral declarations under Article 287 increase the risk of fragmentation of the object of the controversies and could raise new problems of coordination among international tribunals acting both inside and outside the framework of the LOSC's settlement of disputes regime. In the past, consideration by the Tribunal of the concurrence of jurisdictions issues, both in the *Southern Bluefin Tuna* case and the *MOX Plant* case, were drew to great criticism (Ojinaga *supra* n. 1, at 204-205).

[16] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Separate Opinion of Judges Wolfrumg and Attard, para 10.

[17] *Ibid.*, para. 10.

(D) OBJECTIONS TO JURISDICTION OF THE ITLOS AND THE ADMISSIBILITY OF THE APPLICATION

On 11 March 2016, Italy filed preliminary objections to the jurisdiction of ITLOS and the admissibility of Panama's application under article 294 (3) LOSC. It was the first preliminary objections case in the twenty-year history of the Tribunal. So, some judges considered that "the Judgment could have dealt with the new matter of procedural objections and established a legal regime in that regard before dealing with jurisdiction and admissibility of the application. Furthermore, the operative part of the Judgment should have been more conventional"[18]. In this regard, there has been a deal of criticism which focuses on the fact that operative provisions should have contained a formal disposition of each of the preliminary objections, so that each objection would have been voted on separately in order to ensure great advantage and transparency[19].

Italy contested the jurisdiction of the ITLOS on the grounds that (i) there was not dispute between Panama and Italy; (ii) Italy was not the proper respondent and, in any event, Panama's claim would inevitably involve the ascertainment of the rights and obligations of a third State in its absence from the proceedings and without its consent; (iii) Panama has failed to appropriately pursue the settlement of the dispute by negotiation of other peaceful means under article 283 LOSC.[20] All of these objections to jurisdiction were rejected by the Tribunal, but its decision has not been without criticism because a more rigorous test could be applied to the determination of the jurisdiction *ratione materiae* and, even, it would probably have been good reasons for declaring that some points regarding objections were not of an exclusive preliminary character on the basis of article 97 (1) of the Rules of the Tribunal[21]. Certainly, some statements need further explanation and deemed controversial.

Italy also raised various objections to the admissibility of the Panama's application that relates to the nature of the Panama claim as an exercise of diplomatic protection, the nationality of the reclamation and the application of the rule of exhaustion of local remedies as required by article 295 LOSC. Consistent with its previous jurisprudence[22], even if open to criticism, the ITLOS rejected these objections by restating that "the exercise of diplomatic protection by a

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[18] Separate Opinion of Judge Ndiaye, at 1.

[19] Declaration of Judge Heidar, para. 10 and 15-16; Dissenting Opinion of Judge ad hoc Treves, para. 2.

[20] M. Aznar, "The obligation to exchange views before the International Tribunal for the Law of the Sea: a critical appraisal", 17/1 *RBDI* (2014) 237-254.

[21] Separate Opinion of Judges Wolfrumg adn Attard, para. 3. Similarly, Dissenting Opinion of Judge *ad hoc* Treves, para. 18.

[22] *The M/V 'Saiga' (No 2), (Saint Vincent and the Grenadines v Guinea)*, Merits, Judgment, ITLOS Reports (1988) 2, at 62-63; *M/V "Virginia G" Case (Panama / Guinea.Bissau)*, Judgment, ITLOS, Reports (2014), at 48.

State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of the ship who are not nationals of that State"[23].

(1) Jurisdiction *Ratione Materiae*: The Existence of a Dispute Concerning Articles 87 and 300 LOSC

The existence of a dispute is the primary condition for a court or tribunal to exercise its judicial functions. In its Order of 27 August 1999, in *the Southern Bluefin Tuna* cases[24] the Tribunal stated that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests"[25] and '[i]t must be shown that the claim of one party is positively opposed by the other"[26]. This jurisprudence of the ICJ has been reaffirmed further in the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. [27]

In its advisory Opinion of 30 March 1950 on the Interpretation of *Peace Treaties Case*, the ICJ stated: "[w]hether there exists an international dispute is a matter for objective determination"[28]. Notwithstanding, it is also necessary that the Applicant established that the scope of the dispute is covered by the jurisdiction of the Tribunal in general and -regarding the ITLOS- by declarations made under article 287 LOSC by the parties. In line with its Judgment in the *M/V "Louisa"* case[29] —where the Tribunal made recourse to the *Oil Platforms* case[30]—, the ITLOS stated again in the preliminary objections Judgment on *M/V "Norstar"*

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[23] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 229.

[24] *The Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS Reports (1999), at 293, para 44.

[25] Citing *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, 11.

[26] Citing *South West Africa*, Preliminary Objections, Judgment, I.C.J. Reports (1962) 238.

[27] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, 5 October 2016, paras 27 et seq.

[28] *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania, First Phase*, (1950) ICJ Report 65, at 70: Second Phase, ICJ Report (1950) 221. The dictum was applied again in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)*, (1996) ICJ Report 595, at. 614

[29] "[...] To enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines."*M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Judgment, ITLOS Reports (2013) 4, at p. 32, para. 99.

[30] "[T]he Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has

that:

> "[...] in order for the Tribunal to determine whether a dispute between the two Parties in the present case concerns the interpretation or application of the Convention, the Tribunal must establish a link between the facts advanced by Panama and the provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by Panama"[31]

As previously note, in support of its request Panama contends that Italy violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 LOSC. However, in the course of oral proceedings, Panama conceded that articles 58, 73 and 226 were not applicable[32]. Additionally, the ITLOS stated that Italy had not claimed to be acting under Article 33 and Article 111 and it therefore considered that those provisions had not relevance to the case[33]. That left Articles 87 and 300 LOSC as the rules applicable to the circumstances to the case. On Article 87 the ITLOS concluded that:

> "The Decree of Seizure by the Public Prosecutor at the Court of Savona against the M/V "*Norstar*" with regard to activities conducted by that vessel on the high seas and the request for its execution by the Prosecutor at the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel. Consequently, the Tribunal concludes that article 87 is relevant to the present case"[34].

It might seem difficult to reconcile this ruling of the ITLOS with is finding in the M/V "*Louisa*" case, when the Tribunal found that article 87 cannot be interpreted in such a way as to grant a ship detained in port a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it. From this standpoint, it is difficult to see how a request for the Spanish authorities to detain the M/V "*Norstar*" could, in itself, interfere with Panama's freedom of navigation on the high seas[35]. Nevertheless, it seems to be assumed by the ITLOS that Panama had invoked a possible violation of article 87 LOSC arguing on the basis of the fact that the Decree Seizure of the Public Prosecutor of Savona concerned crimes derived from bunkering activities conducted on the high seas[36]. As a consequence, the violation of Article 87 could result from enforcement action for the sole reason that it was decided in relation to activities carried out by the vessel when it was on the high

jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2." (*Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment*, I.C.J. Reports 1996, 803, at 810, para. 16).

[31] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 110.

[32] *Ibid.*, para. 116, 118 y 127.

[33] *Ibid.*, para. 125. However, Judge Lucky is of the opinion that the Italian authorities incorrectly applied the provisions of article 33, paragrapah 1 (a) LOSC (para. 48).

[34] *Ibid.*, para. 122.

[35] R. Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016", 32 *The International Journal of Marine and Coastal Law* (2017) pp 379-426, at 383.

[36] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Dissenting Opinion of Judge *ad hoc* Treves, para. 12.

seas. This broad interpretation of article 87 has been rejected by Judges Wolfrum and Attard which emphasized that the *M/V "Norstar"* case differs sharply from the *Arctic Sunrise* case[37] because, in the latter case, enforcement measures were taken against the vessel when it was on the high seas and the Arbitral Tribunal considered this a violation of article 87 LOSC[38].

Nonetheless, further to the Judgment on preliminary objections, Italy noted that during the incidental proceedings parties did not discuss in detail the scope of the application of the Decree of Seizure and asserted that, contrary to the assumption of the Tribunal, it didn't target the activities conducted by *M/V "Norstar"* on the high seas but contemplates the detention and arrest of the vessel because it was allegedly part of a unitary criminal plan concerning the commission of the crimes of tax evasion and smuggling in the Italian territory[39]. In addition, Italy argued that at the time when the Decree of Seizure was enforced, the vessel was in Spanish internal waters and, therefore, it did not enjoy the right to freedom of navigation under Article 87 (1)[40], then relying on the ITLOS's statement regarding the interpretation of Article 87 in the *M/V Louisa Case* and remaining then fully opposed to a broader interpretation of Article 87.

In view of the above, the judgment on preliminary objections would have indeed required to submit the claim of the existence of jurisdiction *ratione materiae* to a more rigorous test[41];

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[37] PCA Case No. 2014-02, In the Matter of the Arctic Sunrise Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Kingdom of the Netherlands and The Russian Federation, Award of 14 August 2015, paras 226 et seq.

[38] Separate Opinion of Judges Wolfrum and Attard, at 12-13, paras 35-39 and 42.

[39] *The M/V "Norstar" (Panama v. Italy)*, Counter-Memorial of Italy, Vol. I, Counter-Memorial, 11 October 2017, para. 129 and 151. This view of the facts has been already adopted by Judges Wolfrum and Attard in its Joint Separate Opinion to the Judgment on preliminary objections (at 13, para. 40). More specifically, Judge Lucky exposed that "[t]he essence of the conduct under scrutiny by the Italian prosecuting authority consisted in the purchase of oil products as ship's stores in non-European Union countries, in Italy and in other European Union ports under a customs-free regime. These oil products were then to be used to refuel yachts and mega yachts, including many registered in Italy. These yachts and mega yachts subsequently introduced the fuel into the Italian territorial sea without making a declaration for customs purposes. The *M/V "Norstar"* loaded marine gas oil on four occasions in the ports of Gibraltar, Livorno, Barcelona and Livorno again" (Separate Opinion of Judge Lucky, at 5, para. 19).

[40] *Ibid.*, para. 75.

[41] As posed by Judges Wolfrum and Attard, "[t]he decision on preliminary objections is rendered in the form of a judgment which decides on the objections raised with binding effect on the parties concerned (res judicata). This means, in principle, that there is no possibility to reintroduce an objection against jurisdiction and admissibility decided upon by a judgment on preliminary objections or to reopen an issue which was dealt with in this context in the merits phase. In this respect, the procedure of preliminary objections differs significantly from a decision on jurisdiction in the course of proceedings on provisional measures. In the latter case, the decision on jurisdiction and admissibility is taken prima facie without prejudice to the merits; in a procedure on preliminary objections such a decision is, as already indicated, final. This necessarily has consequences concerning the assessment of facts, the interpretation and application of the provisions on jurisdictional limitations, and on limitations concerning admissibility. The standards to be applied by the Tribunal have to reflect that the decision

in particular, it has been evidenced the necessary difference with the test which could be utilized in provisional measures proceedings in order to support the view that jurisdiction exists *prima facie*[42]. The mere acceptation that article 87 is relevant for the case "is a surprisingly tentative statement, given that the ITLOS was making a definitive ruling about jurisdiction"[43]. In the same vein, Judge *ad hoc* Treves expressed the view that the Tribunal "while finding that a dispute exists between Panama and Italy, studiosly avoids specifying what its object is"[44].

Regarding Article 300 LOSC, the principle of good faith and the prohibition of the abuse of rights in the area of the Law of the Sea, the ITLOS repeated its case law as established in the M/V *Louisa* case[45], noting that "it is apparent from the language of article 300 of the Convention cannot be invoked on its own"[46]. Then, "a claim pursuant to Article 300 is

is a final one; consequently, we feel the prima facie standard establishing jurisdiction concerning provisional measures is not sufficient in proceedings on preliminary objections" (Separate Opinion, para. 4). The same argument has been made by Judge *ad hoc* Treves, (Dissenting Opinion, para. 13).

[42] *Ibid*., para. 13. The distinction between jurisdiction *prima facie* in proceedings on provisional measures and jurisdiction on the merits was established by the ITLOS in the M/V "*Saiga*" (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), Provisional Measures, Order of 11 March 1998, ITLOS Reports (1998) 24, at 37, para. 29. *The* M/V "*Louisa*" (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Provisional Measures, Order, 23 December 2010. para. 69. The case law of the ITLOS confirms it has adopted a low threshold on *prima facie* jurisdiction as that assumed by the ICJ (Case *Anglo-Iranian Oil Co. (United Kingdom v. Iran) (Interim Measures)*, Order, I.C.J., Reports (1951) 89, at 93. Criticism had been expressed regarding ITLOS's approach to *prima facie* jurisdiction, especially when the Tribunal is called upon to decide *prima facie* on its own jurisdiction under Article 290 (1), as in the *Southern Bluefin Tuna Case and MOX Plant Case* (Y. Kerbrat, "Le différend relative à l'usine Mox de Sellafield (Irlande/Royaume—Uni): connexité des procedures et droit d'accès à l'informationen matière environnementale", *AFDI* (2004) 607-623; R. Rayfuse, "The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention", 36 *VUWRL* (2005), 683; B. Kwiatkowska, "The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) Cases"15 *Int'l J Marine and Coastal*, (2000) 1. Criticism has also been expressed in other situations as in the M/V *Louisa* (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Provisional Measures, Order, 23 December 2010, Dissenting Opinion of Judge Wolfrum, para.7).

[43] Churchill, *supra* n. 35, at 383. In this regard, judges Wolfrum and Attard expressed criticism with the statement in paragraph 122 of the Judgment that the Decree of the Seizure against the M/V "*Norstar*" "may be viewed" as an infringement of the rights of Panama under article 87 as the flag State of the vessel which they consider as a repetitiion of the statement made by Panama but lacking any legal reasoning. In this respect, they considers that "the standart of appreciation applied by the Judgment does not even meet the *prima facie* standart of appreciation in provisional measures proceedings" (Separate Opinion, para. 5).

[44] Dissenting Opinion of Judge *ad hoc* Treves, para. 6.

[45] M/V "*Louisa*" (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), Judgment, ITLOS Reports (2013) 4, at p. 41, para. 137. Similarly, M/V "*Virginia G*" (*Panama/Guinea-Bissau*), Judgment, ITLOS Reports (2014) 4, para. 398-399.

[46] *The* M/V "*Norstar*" (*Panama v. Italy*), Preliminary Objections, Judgment of 4 November 2016, para. 131. Regarding the applicability of article 300, Spain contended that a systematic interpretation of the LOSC in line with the Vienna Convention on the Law of Treaties leads to the conclusion that the principle of good faith and the prohibition of the abuse of rights embodied in Article 300 LOSC is applicable *in connection to the exercise of the rights, jurisdiction and freedoms recognized in the Convention* (Presentation by Professor Escobar Hernández, Agent, Counsel and Advocate of Spain, Verbatin Record, 10 October 2012, ITLOS/PV.12/C18/11, 10; Ojinaga,

necessarily linked to the alleged violation of another provision of the Convention"[47]. Accordingly:

> "The Tribunal concluded in paragraph 122 that article 87 of the Convention concerning the freedom of the high seas is relevant to the present case. The Tribunal considers that the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case"[48].

In the light of the foregoing, the ITLOS rejected the objection raised by Italy based on non-existence of a dispute concerning the interpretation or application of LOSC[49].

Further the preliminary objections Judgment, Panama had asserted that by ordering the arrest of the M/V "*Norstar*" in the exercise of its criminal and tax jurisdiction for bunkering activities performed by Panama on the high seas, Italy also breached articles 92, 97(1) and 97(3)[50]. Italy has opposed by considering that Panama is precluded from enlarging the dispute before the Tribunal. So, in its Judgment of the merits, the ITLOS will have to state if Panama is bringing a new claim or an additional claim. In its previous statement in the M/V *Louisa* case, the ITLOS explained that "the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character"[51]. This would be contrary to Articles 24 (1) and 54 of the Rules, which are considered as essential from the point of view of legal security and the good administration of justice[52]. In order for a new claim to be admitted "it [...] must arise directly out of the application or be implicit in it"[53].

Even more controversial could be Panama new or additional claims concerning human rights[54]. While LOSC is not a human rights instrument, it must be admitted that human rights

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supra n. 1, at 216).

[47] *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), PCA Case No. 2011-03, Award, 18 March 2015, para. 303.

[48] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 132.

[49] *Ibid.*, para. 133.

[50] *The M/V "Norstar" (Panama v. Italy)*, Memorial of the Republic of Panama, 11 April 2017, para. 92.

[51] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports (2013) 4, para. 143.

[52] *Ibid.*, para. 148. Citing *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), Preliminary Objections, Judgment I.C.J., Reports (1992) 240, para. 67-69. Quoting its own case law, the ICJ held that it is not sufficient that there should be links between the original claim and the additional one of a general nature. Additional claims, must have been implicit in the application (*Temple of Preah Vihear*, Merits, I.C.J. Reports (1962) 36) or must arise 'directly out of the question which is the subject-matter of that Application' (Fisheries Jurisdiction (*Federal Republic of Germany v. Iceland*), *Merits*, I.C.J. Reports (1974) 203, para. 72).

[53] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports (2013) 4, para. 142.

[54] It claims that: "[b]y applying its customs laws and ordering and requesting the arrest of the M/V "*Norstar*", Italy breached its international obligations concerning the human rights, fundamental freedoms, and the

should be taken into consideration in the process of applying the Convention. However, the ITLOS has never ruled *in abstracto* on violations of due process and human rights. This is merely a consequence of its specific jurisdiction as the International Tribunal for the Law of the Sea[55]. More explicitly, the Arbitral Tribunal constituted under Annex VII in the *Artic Sunrise* case stated that:

> "The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime. In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions."[56]

(2)Jurisdiction Ratione Personae: Italy is the Proper Respondent and Spain is not an Indispensable Party

Italy submitted that ITLOS lacks jurisdiction *ratione personae* in the case on the basis of three arguments, considering that each of these three grounds alone was sufficient to establish the lack of jurisdiction of the Tribunal. All of them have serious implications for Spain:

> "First, Italy argues that it is not the proper respondent in this case because the Decree of Seizure of the M/V "*Norstar*" issued by the Italian judicial authorities does not amount per se to an internationally wrongful conduct. Second, Italy argues that it is not the proper respondent

performance of the obligations of the persons involved or interested in the operations of the M/V "*Norstar*" and so did not conform to the due process of law" (*The M/V "Norstar" (Panama v. Italy)*, Memorial of the Republic of Panama, 11 April 2017, para. 133. Panama invoques a number of human rights provisions that Italy would have violated. These include Article 17 of the Universal Declaration of Human Rights; Articles 17 and 54 of the Charter of Fundamental Rights of the European Union; Articles 1 and 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 4 of Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms (*Ibid.*, paras 139-148).

[55] Ojinaga, *supra* n. 1, at. 216-217.

[56] *Arctic Sunrise*" (*Kingdom of the Netherlands v. Russian Federation*), PCA Case No. 2014-12, Award on the Merits, 14 August 2015, paras. 197–198.

> because the conduct of the authorities of Spain could not be attributable to Italy. Third, Italy argues that, in any event, the Tribunal may not exercise jurisdiction because such exercise over the merits of the case would imply adjudicating on rights and duties of a State absent from the present proceedings, without its consent"[57].

Regarding the first argument, Italy invoked the jurisprudence of the ICJ in the case concerning *the Gabčíkovo-Nagymaros Project*[58] in order to conclude that, asuming that the arrest of the M/V "*Norstar*" was to be considered as internationally unlawful, the Order for Seizure of the Italian judiciary could only be deemed as conduct 'preparatory' to an internationally wrongful act; namely, the material arrest and detention of the M/V "*Norstar*" executed not by Italian enforcement officials but by the Spanish authorities. By the contrary, Panama emphasized that the order of arrest was an internationally wrongful act because it was issued in contravention of several provisions of LOSC and Spain merely provided judicial assistance. Finally, the ITLOS considered that the facts and circumstances of the case indicate that, although the arrest took place as the result of judicial cooperation between Italy and Spain, "the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel. It is clear that without the Decree of Seizure, there would have been no arrest"[59]. Consequently, the Tribunal finds that the dispute before it concerns the rights and obligations of Italy and that its decision would affect the legal interests of Italy, so it is the proper respondent to the claim made by Panama in these proceedings[60]. Then,

> "The Tribunal does not consider relevant to the present case the reference made by Italy to the distinction between a State's conduct that completes a wrongful act and the State's conduct that precedes such conduct and does not qualify as a wrongful act, stated in the Gabčíkovo-Nagymaros Project case and the preparatory work of the ILC. The present case, which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State"[61].

The response of the ITLOS to the second ground of objection is in connection with the terms indicated above, so that

> "Having made the above findings, the Tribunal considers it unnecessary to determine the validity of Italy's second ground of objection, namely, that the conduct of Spain could not be attributable to Italy. The Tribunal recalls that Italy made this argument as "complementary submissions" to its first argument that the Decree of Seizure of the M/V

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57 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 135.
58 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports (1997) 7, at p. 54, para. 79.
59 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 165.
60 *Ibid.*, para 167-168.
61 *Ibid.*, para. 166

> "*Norstar*" does not per se amount to a breach of an international obligation. As the Tribunal has rejected the first argument of Italy and found that Italy is the proper respondent, the question whether the conduct of Spain is attributable to Italy is irrelevant for the purpose of determining the proper respondent"[62].

Although Italy posed the second ground of objection as subsidiary to the first one, the ITLOS has considered unnecessary to answer it just because the first ground had been rejected. In any case, ITLOS considers the case fits in abstract within the framework of article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (ILC) and excludes the application of article 6 -conduct of organs placed at the disposal of a State by another State- as argued by Italy and contested by Panama.[63] The position of ITLOS regarding the nonapplication of this rule seems to be in conformity with the ILC's commentary when it states that "article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise"[64]. On the other hand, article 16 is characterised by the stringent conditions of complicity[65] that could provide legal basis for international responsibility of the State.[66] In

[62] *Ibid.*, para. 169.

[63] Panama considered applicable article 6 because the Spanish authorities were indeed put at the disposal of Italy and "did not act independently but rather under the exclusive direction and control of Italy as the receiving or beneficiary party" (*Ibid.*, para. 153). and contended that the *Xhavara* case is not comparable to the M/V "*Norstar*" (*Xhavara and Others v. Italy and Albania*, Decision of 11 January 2001, Appl. No. 39473/98, ECHJ). It posed that in the *Xhavara* case Italy action was not a mere execution of mutual assistance but in execution of its own decision on the basis of a bilateral agreement authorizing the Italian Navy to board and search Albanian boats. Thus, in the *Xhavara* case the sinking of the Albanian ship was directly caused by the Italian warship so it observed that if "Spain had used excessive force and had damaged the Norstar when putting its organ at the disposal of Italy, Panama would have considered Spain as the respondent for the wrongful act of the sending State" (*Ibid.*, para. 154).

[64] UN International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN Doc. A/56/10, 2001, 44. In this regard, ILO cites the above mentioned *Xhavara Case* –where the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania- and that of the conduct of Turkey taken in the context of the Turkey-European Communities customs union where the conduct was still attributable to Turkey (WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44).

[65] H.P. Aust, *Complicity and the Law of State Responsibility*, (Cambridge University Press, 2013), 225 et seq; V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Oxford and Portland, Oregon 2016); G. Nolte & H. P. Aust, "Equivocal Helpers – Complicity States, Mixed Messages and International Law", 58 *ICLQ* (2009) 1-30.

[66] State practice has been mainly related to the use of force, but a State also may incur responsibility if it assists another State to circumvent sanctions imposed by the UN Security Council or provides material aid to a State that uses the aid to commit human rights violations (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, cit., at 66). The ICJ made reference to article 16 and endorsed it as reflecting customary international law in the *Application of the Convention on the Prevention and Punishment*

particular, the double condition of both (actual) knowledge of the circumstances in which aid or assistance is intended to be used by the acting state[67] and the intention to facilitate the commission of the wrongful conduct[68], which must actually occur, is rather unlike to be met in judicial assistance cases as well as in extradition[69]. So, in this later field of law, "[t]he difficulty in relying on Article 16 of the ARSIWA to deal with most complicity scenarios in the context of extradition and related transfers has been remedied by resort to primary rules that can take precedence as *lex specialis* (as per Article 55 of the ARSIWA)"[70].

Another option has been the reliance on the concept of attribution, instead of the rules on derived responsibility under ARSIWA. In particular, the European Court of Human Rights (ECHR) has adopted this line of reasoning in the *Stephens v. Malta* case[71], latter reaffirmed in *Toniolo v. San Marino and Italy* case[72] and the admissibility decisions in *Wedler v. Poland*[73] and *Benioashvili v. Russia and Georgia*[74]. The main case is *Stephens v. Malta* in relation to the extradition of a UK national who was arrested and detained in Spain as the result of an extradition request by the Maltese authorities. Following an appeal by the applicant, the Maltese Civil Court ruled that the warrant was defective under Maltese law as the issuing court

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of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007.

67 Attemps to also include constructive knowledge —that the complicit state should have known that it was asisting in the commission of an internationally wrongful act— in article 16 ARSIWA were rejected (J. Crawford, *State Responsibility, The General Part* (Cambridege University Press, 2013, at 406.

68 H. Moynean, "Aiding and Assiting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility", 67 *ICLQ* (2018), 455-471.

69 A. Constatinides, "The Practice of Shared Responsibility in relation to Extradition", SHARES Research Paper 77 (2016), at 18; B. Malkani, "The Obligation from Assisting the Use of the Death Penalty", 62 ICLQ (2013) 523-556; M. den Heijer, 'Shared Responsibility before the European Court of Human Rights' 60 *NILR* (2013).

70 The practice and case law of extradition provides a fertile ground for the development of rules of shared responsibility of the cooperating states. But when courts and treaty bodies have grounded the responsibility sending states for contributing to the harm inflicted on the individual by the receiving states none seem to have resorted to the rules of complicity under article 16 of the International Law Commission (ILC) on Responsibility of States for Internationally Wrongful Acts, "because the primary obligation of sending states have been broadened in the case law of the ECtHR and treaty bodies so as to substitute for any derived responsibility they could have incurred as a result of the transfer" (A. Constatinides, *supra* note 69, at 18).

Similarly, while empathizing the relevance of these rules in connection with many forms of cooperation in controlling migration, it has been questioned how these categories of derived responsibility embodied in articles 16, 17 and 18 of the ARSIWA "correspond to the doctrine of positive obligations under human rights law, which may also entail a duty to undertake preventive or protective action in respect of human rights violations committed by another state" (M. Heijer, *Europe and Extraterritorial Asylum* (Studies in International Law, Hart Publishing 2011), at 101).

71 *Stephens v. Malta* (No. 1), App. No. 11956/07 (ECHR, 21 April 2009).

72 *Toniolo v. San Marino and Italy*, App. No. 44853/10 (ECHR, 26 June 2012).

73 *Wedler v. Poland* (*Decision*), App. No. 44115/98 (ECHR, 27 May 2003).

74 *Benihasvili v. Russia and Georgia* (*Decision*), App. No. 39549/02 (ECHR, 13 March 2012).

had acted *ultra vires* and lacked jurisdiction over non-Maltese national accused of committing a crime outside Malta. The application before the ECHR was filed against both Spain and Malta but the Court decided to strike the applicant's complaints lodged against Spain out of its list of cases. The ECHR referred to its case law on extraterritorial jurisdiction, thus implying that through the arrest warrant Malta had exercised control over the applicant when he was arrested in Spain. It noted that 'the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition"[75]. By setting in motion a request for the applicant's detention pending extradition, the responsibility had lain with Malta to ensure that the arrest warrant and extradition request were valid as a matter of both its substantive and procedural law. In addition, the ECHR stated that,

> "In the context of an extradition procedure, a requested State should be able to presume the validity of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty is requested. It is to be noted that in the instant case the arrest warrant had been issued by a court which did not have the authority to do so, a technical irregularity which the Spanish court could not have been expected to notice when examining the request for the applicant's arrest and detention. Accordingly, the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain"[76].

Giving the underdeveloped character of the rules of shared responsibility in international law[77], main issues raised in the *M/V "Norstar"* case are about the determination of the regime of international responsibility inherent in the system of judicial cooperation. The more prominent ITLOS's statement on this regard is found in paragraph 167 in connection with paragraph 164 of the Judgment that led the Tribunal to the conclusion that Italy was the proper respondent to the claim made by Panama in these proceedings:

> "The Tribunal notes that the detention carried out by Spain was part of the criminal investigation and proceedings conducted by Italy against the *M/V "Norstar"*. It is Italy that adopted legal positions and pursued legal interests with respect to the detention of the *M/V "Norstar"* through the investigation and proceedings. Spain merely provided assistance in accordance with its

[75] *Stephens v. Malta* (No. 1), App. No. 11956/07 (ECHR, 21 April 2009), para 51.

[76] *Ibid.*, para. 52.

[77] A, Nolkaemper and D. Jacbos, "Shared Responsibility in International Law: A Conceptual Framework", 34 (2) *Michigan Journal of International Law* (2013) 359-438. Because of its very nature, cases of shared responsibility are in close relation to the indispensable parties principle. A. Nolkaemper, "Issues of Shared Responsibility before the International Court of Justice", SHARES Research Paper 01 (2011), ACIL 2011-01; M. Paparinskis, "Procedural Aspects of Shared Responsibility in the International Court of Justice", 4 *European Journal of International Law* (2013) 295-318.

> obligations under the 1959 Strasbourg Convention. It is also Italy that has held legal control over the *M/V "Norstar"* during its detention. This is clearly evidenced by the communication that took place between Italy and Spain subsequent to the seizure of the *M/V "Norstar"*, including Italy's letter of request dated 18 March 2003 for the release of the vessel and its return to the owner following the judgment of the Court of Savona and Spain's letter dated 6 September 2006 asking for Italy's authorization to demolish the vessel. Accordingly, the Tribunal finds that the dispute before it concerns the rights and obligations of Italy and that its decision would affect the legal interests of Italy"[78].

Since the ITLOS has not made use of a more explicit line of reasoning regarding the application of the rules of international responsibility in the specific circumstances of judicial cooperation, doubts has been expressed by some judges regarding the consideration of Spain as an indispensable party[79]. Nonetheless, these issues were more directly addressed by Judge Nyiage in its Separate Opinion:

> "The clauses in the Strasbourg Convention of 1959 which attribute prerogatives are clear. They present a requesting State and a requested State, which acts in the name and on behalf of the former, in conformity with the Convention. In truth, Spain itself had no interest in seizing the "Norstar". Its action simply follows the "international letter rogatory sent by the Court of Savona to the Spanish authorities, on 11 August 1998" and Italy's order constituted a request for international judicial cooperation sent by it to Spain. It is thus Italy which initiated the letter rogatory and, consequently, it is Italy which is responsible for the actions of the Spanish authorities, carried out in its name, since, with Spain being the requested State, they were hardly responsible for conducting an investigation into the validity of the seizure of the vessel, or the lack thereof, in the context of a request for cooperation. Spain was accountable only for the manner in which the seizure was carried out; that is for the protection of the integrity of the vessel and crew when seized. This definition of mutual responsibility is inherent in the system of judicial cooperation. The effect of this distinction between the responsibilities of the requesting State and of the requested State in the area of judicial cooperation is also that, if a criminal accusation is invalid, it is the requesting State which is liable for compensation, not the requested State; any other conclusion would result in the States' refusal to accept a request for judicial cooperation"[80]

Then, taken into consideration the respective functions performed by both States in the framework of the European Convention on Mutual Assistance in Criminal Matters on 20 April 1959, we could arrive to the conclusion that Italy is the proper respondent and Spain is not an indispensable party to the proceedings. While according to Italy, this instrument gives to the Spanish authorities "ample margin to refuse the Italian letter rogatory"[81], Panama was in the view that "Spain, as the State providing judicial assistance, was neither obligated nor expected

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78 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 167.

79 Separate Opinion of Judges Wolfrumg and Attard, para. 44.

80 Separate Opinion of Judge Ndiaye, paras. 25-26.

81 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 141

to investigate whether an offence existed or whether the seizure was justified". This latter assertion seems to be reinforced with the arguments raised by Italy itself when it further emphasized that the Order of Seizure indicated that the crimes were committed on the Italian territory and the Letter Rogatory of the Tribunal of Savona to the Spanish Authorities of 11 August 1998 explained that the main ground justifying the investigations by the Italian was that "many bunkering operations were specifically aimed at concomitantly and illegally re-introducing the product into the territory of the Community"[82]. Then, Spain was obliged to comply because the request was not contrary to the provisions of articles 2 and 5 of European Convention on Mutual Assistance in Criminal Matters on 20 April 1959 and should be considered as a "delegate operative", so that "the indispensable party principle" would not be applicable in this case[83]. Therefore, Panama assumed that if a criminal charge for which judicial assistance had been granted were not ratified "the State seeking judicial assistance would be liable for paying damages, not the State providing judicial assistance"[84], adding in the abstract that "Spain was merely responsible for the manner and methods of the seizure". At the public-hearings again:

> "Panama contends that Spain does not have any interest of a legal nature which would be affected by the decision of the Tribunal. The arrest of the *Norstar* was based on an order given by Italy, not by Spain, and thus this case involves only the actions of Italy and not those of a third State"[85]

A more specific concern has been expressed on the basis that ITLOS does not consider sufficiently the Order of the Court of Savona of 18 March 2003 to release the vessel. How Spanish authorities reacted vis-à-vis the owner has not been reported to the Tribunal, so the finding that Spain was not an indispensable third party has been referred as premature[86]. According to Italy, the M/V "*Norstar*" had been in a state of abandonment since 14 April 1998, even before the date of the seizure. From 2005 the ship's agent (Transcoma) cessed formally to act as such and brought legal actions against the owner (Inter Marine & Co) claiming the payment of pending invoices. As the result, the M/V "*Norstar*" was sold at public auction on August 2015[87].

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[82] *The M/V "Norstar" (Panama v. Italy)*, Counter-Memorial of Italy, Vol. I, Counter-Memorial, 11 October 2017, para. 130.

[83] Separate Opinion of Judge Lucky, para. 34.

[84] *The M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment of 4 November 2016*, para. 150.

[85] ITLOS/PV.16/C25/3/Rev.1. Public sitting held on Wednesday, 21 September 2016, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, at. 4, Lin. 9-13

[86] Separate Opinion of Judges Wolfrum and Attard, para. 45; Separate Opinon of Judge Lucky, para. 94; Churchill, *supra* note, at 384.

[87] Italy cites and article attached to the Panama's Memorial (Annex 16), published in Diario de Mallorca on 8 August 2015 (disponible at *Memoria Sostenibilidad*, Ports de Balears, Autoritat Portuària de Balears, 2015, at 25).

Having adopted the above-mentioned line of reasoning, the ITLOS didn't accept the third argument of Italy that Spain was an indispensable party to the proceedings. On the contrary,

> "The Tribunal does not consider that Spain is an indispensable party in the present case. As noted in paragraph 167, the dispute before the Tribunal concerns the rights and obligations of Italy. The involvement of Spain in this dispute is limited to the execution of Italy's request for the seizure of the M/V "*Norstar*" in accordance with the 1959 Strasbourg Convention. Accordingly, it is the legal interests of Italy, not those of Spain, that form the subject matter of the decision to be rendered by the Tribunal on the merits of Panama's Application. The decision of the Tribunal on jurisdiction and admissibility does not require the prior determination of Spain's rights and obligations. Thus, it is not necessary, let alone indispensable, for Spain to be a party to the present proceedings for the Tribunal to determine whether Italy violated the provisions of the Convention"[88].

The ITLOS made recourse to the principle of the indispensable party but none explicit reference was made to the existing international case law in the matter. The principle of indispensable parties is also referred as the *Monetary Gold* doctrine[89] since it was formulated by the International Court of Justice in its judgment in the case of *the Monetary Gold removed from Rome in 1943*, when the ICJ declined to exert jurisdiction by considering that Albania's "legal interest would not only be affected by a decision, but would from the very subject-matter of the decision"[90]. It is a well-established principle of international law that an international court or tribunal can exercise jurisdiction over a State only with its consent. The doctrine of the third indispensable or the indispensable party precludes a court or tribunal from adjudicating the merits of a case involving the rights, duties and claims of states that not participate in the relevant proceedings, in order to strength the integrity of the judicial function and to ensure the proper administration of justice[91]. The *Monetary Gold* doctrine was

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[88] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 173.

[89] In fact, this would be a more appropriate terminology as explained by C. Jiménez, supra note 6, at. 732-735.

[90] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question). (Italy v. France, UK and USA)* I.C.J. Reports (1954) 32. The background of this doctrine is in the *Corfu Channel* case (I.C.J. Report (1949) 4) and the *Rights of U.S. Nationals in Morocco case* (I.C.J. Report (1952) 215). See S. Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judiciary Body?*, (Springer, Heidelberg 2014), at 44-46. On the application of the "very-subject matter" test and the "prerequisite determination" test used by the Court in further decisions, P. Tzeng, "Investments on Disputed Territory: Indispensable Parties and Indispensable Issues", 14 (2) *Revista de Direito Internacional, Brazilian Journal of International Law* (2017), at 124-125.

[91] The notion has been summarized in the following terms: "El fin de la doctrina del oro amonedado, también mal llamada del tercero indispensable, consiste en proteger los derechos, obligaciones o pretensiones de terceros Estados que puedan verse implicados en una controversia al formar parte del objeto o el núcleo de la misma, y sobre los que la Corte deba pronunciarse previamente o al mismo tiempo por imperativos de lógica jurídica para resolver el fondo del litigio al que, en principio, esos terceros son ajenos. La Corte atiende así a las exigencias de su Estatuto, que le impide ejercer su jurisdicción sin el consentimiento de las partes, en honor a la integridad de su función jurisdiccional y de una buena administración de la justicia internacional. Esta doctrina debe

subsequently applied by ICJ in the *East Timor* case —where it refused to adjudicate a case involving the validity of the 1989 East Timor Gap Treaty between Indonesia and Australia in the absence of Indonesia—[92] whereas, in other cases, it had exercised jurisdiction but limited its decision to those areas in which the claims of the principal parties were the only competing claims[93], even it had merely rejected the application of such doctrine in most instances[94]. The same principle was further invoked before other international courts and tribunals[95], as has recently been the case of the ITLOS in M/V "*Norstar*" and the arbitral tribunals deciding under Section 2, Part XV of LOSC in the *South China Sea Arbitration*[96]. In both these cases

distinguirse de las formas de intervención de los artículos 62 y 63 del Estatuto, que son procedimientos de autoprotección voluntarios de carácter incidental puestos a disposición de los terceros Estados para que éstos los activen si entienden que en un caso ante la Corte puede verse afectado algún interés jurídico real y propio" (C. Jiménez, *supra* note 6, at 754, 739-744). On the relation between the *Monetary Gold* doctrine and third-party intervention, see also C. Chinkin, *supra* note 6. Similarly, to articles 62 and 63 of the Statute of the ICJ, article 31 and 32 of the Statute of the ITLOS envisaged two types of intervention in the proceedings envisaged before it. According to Wolfrum the most remarkable difference between the two bodies concerning intervention is to be found in paragraph 3 of article 31 of the Statute of the ITLOS, as there is no corresponding provision in the Statute of the ICJ., This provision provides that the decision of the Tribunal shall be binding upon the intervening State as regards the matter for which it had intervened (R. Wolfrum, "Intervention in the Proceedings before the ICJ and ITLOS", in P. C. Rao, & R. Khan, *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, The Hague/London, 2001) 161-172, at. 171; T. Treves, "The Rule of the International Tribunal for the Law of the Sea". in P. C. Rao, & R. Khan, *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, The Hague/London, 2001) 135-159);

92 *East Timor (Portugal v Australia)*, Jurisdiction, Judgment, ICJ Report (1995) 90.

93 *Continental Shelf (Libya v Malta)*, Merits, Judgment, I.C.J. Report (1995) 13; As exemplified in this case, the ICJ make this limited use of its competence in relation to disputes over maritime areas when the rights and claims of third States might be affected (C., Jiménez, *supra* n. 6, at. 737). See C. Tomuschat, "Article 36", in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, C. J. Tams, *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2012), at 650 et se.

94 These three options have been identified in the practice of the ICJ, depending on the level of impact granted by the Court to these doctrine in the exercise of its jurisdiction, by Jiménez, *supra* n. 6, at 736-737.

In most cases the ICJ rejected the application of the principle as in *Frontier Dispute, Burkina Faso v Mali*, Merits, Judgment, I.C.J. Report (1986) 554; *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, Merits, Judgment, I.C.J. Report (1986) 14; *Certain Phosphate Lands in Nauru, Nauru v Australia*, Preliminary Objections, Judgment, I.C.J. Report (1992) 240; *Certain Property, Liechtenstein v Germany*, Judgment, Preliminary Objections, I.C.J. Report (2005) 6; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports (2015) 118.

95 The *Monetary Gold* doctrine has been even invoked in relation to the *Al-Bashir* case before the International Criminal Court (ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Order inviting submissions, No. ICC-02/05-01/09 OA2, 25 May 2018. See, M. Vagías, "The problem: Discussing Sudan's immunities in the absence of Sudan", Opinio Iuris, 29 August 2018. On main legal issues raised in Al-Bassir case regarding the inmunity of Heads of State from criminal jurisdiction, J. Abrisketa, "Al-Bashir: ¿Excepción a la inmunidad del Jefe de Estado de Sudán y Cooperación con la Corte Penal Internacional", 68/1 *REDI* (2016) 19-47.

96 *The South China Sea Arbitration: Republic of Philippines v People's Republic of China*, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Law of the Sea Convention, Case No. 2013-19, Award

the tribunal concluded that there was no indispensable third party precluding the tribunal exercise of jurisdiction.

In the light of the foregoing, the ITLOS rejected the objection raised by Italy based on lack of jurisdiction *ratione personae*[97]. Although the objection was submitted under this denomination, commentators generally consider the *Monetary Gold* doctrine as an objection to admissibility rather than jurisdiction[98], and the ICJ jurisprudence suggest the same[99] even though the Court often has not characterised it[100].

(E) CONCLUSIONS

The dispute between Panama and Italy regarding the seizure and detention of the M/V "*Norstar*" has led to the first preliminary objections proceeding brought before the ITLOS as well as to the invocation of the *Monetary Gold* doctrine, namely in relation to Spain. The treatment of the third indispensable or the indispensable party principle by the ITLOS is overly concise and without references to the ICJ jurisprudence on the matter. In brief, the application of the doctrine to the circumstances of the M/V "*Norstar*" case seems to be correct if perfunctorily reasoned[101]. Some explanation can be found in the range of views among the judges and the voting method, that excluded the possibility that each objection would have been voted on separately. In addition, the specific constraints envisaged by the Tribunal on this matter should be considered.

In fact, the ITLOS merely rejected this third ground of the preliminary objections raised by Italy on the basis of its previous determination that Italy was the proper respondent to the claim made by Panama in these proceedings. In doing so, the Tribunal held that the case, which involves the action of more than one State, fits into a situation of aid or assistance of a State

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of 12 July 2016. See S. Rao Pemmaraju, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility", 15 *Chinese Journal of International Law* (2016), 265-307; S. Talmon, "The South China Sea Arbitration: Observations on the Award of Jurisdiction and Admissibility", 15 *Chinese Journal of International Law* (2016) 309-391.

[97] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 175.

[98] C. Jiménez, *supra* n. 6, at. 749-754; Y. Shany, "Jurisdiction and Admissibility", in C. Romano and others (eds.), *The Oxford Handbook of International Adjudication* (OUP Oxford 2013, at 797-798; H. Thirdway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. 1, (OUP Oxford 2013), at 971.

[99] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question). (Italy v. France, UK and* USA) I.C.J. Reports (1954), at 32; *Certain Phosphate Lands in Nauru, Nauru v Australia*, Preliminary Objections, Judgment, I.C.J. Report (1992) 240, para. 55; *East Timor (Portugal v Australia)*, Jurisdiction, Judgment, ICJ Report (1995) 90, para. 35;

[100] C. Jiménez, *supra* n. 6, at. 750.

[101] F. Fontanelli, "Reflections on the Indispensable Party Principle in the Wake of the Judgment on Preliminary Objections in the Norstar Case", 1 *Rivista di Diritto Internazionale* (2017) 112-132, at 131.

in the alleged commission of an internationally wrongful act by another State, placing then the case within the framework of article 16 of ARSIWA. However, as the international rules on shared responsibility are poorly developed, such assertion does not shed much light on the matter. Instead, as mentioned above, the ECHR case law provides with a more sophisticated line of reasoning in the field of international cooperation among States in extradition, which is built around the concept of attribution, instead on the rules on derived responsibility provided in the ARSIWA. Even if the ITLOS seems to implicitly adopt a similar line of reasoning in its preliminary objections Judgment, the scheme of international responsibility inherent to judicial assistance system needs major clarification. This is a matter of practical significance in an era characterized by coordinated and joint action, rather than independent action, of the States.

In addition, the *M/V "Norstar"* case has disclosed the extensive use of the jurisprudence in the *M/V Louisa* case in further practice before the Tribunal, mainly in relation to the interpretation and application of article 300 LOSC, that is often invoked by the parties in proceedings brought before the Tribunal. Other trends in the further development of the jurisprudence in the *M/V Louisa* are more open to criticism. Declarations under Article 287 LOSC consisting in the selection of a forum for a particular category of disputes or a specific dispute are unqualified accepted by the ITLOS as the legal basis for jurisdiction. One more, in the *M/V "Norstar"*, "the Judgment touches upon the scope of the Tribunal's jurisdiction in paragraph 58 but not as to whether such practice of limited declarations is legitimate under the Convention"[102]. Finally, the trend in the *M/V "Norstar"* case to embrace a new broader interpretation of article 87 LOSC —as far as the freedom of navigation is concerned— in connection with the exercise of the sovereign right of States to adjudicated crimes under its competence, deserves to be stressed while waiting for the Judgment on the merits that is still pending before the ITLOS.

[102] Separate Opinion of Judges Wolfrum and Attard, paa. 10.