

The M/V “*Louisa*” Case: Spain and the International Tribunal for the Law of the Sea

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Abstract: On 28 May 2013, the International Tribunal for the Law of the Sea delivered its judgment on *The M/V “Louisa”* Case between Saint Vincent and the Grenadines and the Kingdom of Spain. The Tribunal found that no dispute concerning the interpretation or application of the United Nations Convention on the Law of the Sea (UNCLOS) existed between the Parties at the time of the filing of the Application and that, therefore, it had no jurisdiction *ratione materiae* to entertain the case. Among other questions, the debates in the M/V “*Louisa*” Case have contributed to highlighting the disagreement among the members of the Tribunal regarding both the low threshold on *prima facie* jurisdiction and on exhaustion of prior exchange of views, as applied hitherto by the Tribunal. This is a matter of interest, because they are both prominent rules governing the jurisdiction of the ITLOS. More important, the jurisprudence in the M/V “*Louisa*” Case is now relied by the ITLOS as evidenced in the M/V “*Virginia G*” Case, while completed with more explicit pronunciations about the burden and standard of proof on the existence of and abuse of rights under Article 300, necessarily in connection with the exercise of the rights, jurisdiction and freedoms recognized by the UNCLOS.

Keywords: International Tribunal of the Law of the Sea – Detention of vessels – Coastal State’s rights

INTRODUCTION

The M/V “*Louisa*” Case was the first contentious procedure instituted against Spain before the International Tribunal for the Law of the Sea (ITLOS or the Tribunal) in a dispute concerning the detention of a vessel, registered in Saint Vincent and the Grenadines, at the port of Santa María (Cádiz)¹. More recently, Spain presented its Statement in the procedure on the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), which has raised a strong debate on the scope of the ITLOS’s advisory jurisdiction and is pending the final decision by the Tribunal².

Though the activity of the ITLOS is limited in practice, it is increasing with the considerable expansion of international judicial function and institutions in contemporary International Law. Recent reports on judicial settlement of international maritime disputes refer to 2013 as “the most eventful year so far in the history of dispute settlement in the law of the sea”³. Three cases terminated

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¹ Case N° 18: *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*. All the documents relating to the case are available at the ITLOS Web site, www.itlos.org/.

Spain was represented by C. Escobar as Agent, Counsel and Advocate. In the stage of the procedure on provisional measures, M.J. Aznar, as Counsel and Advocate; E. Molina as Adviser and J. Lorenzo, as Technical Adviser. In the stage of the procedures on the merits, J. Martín y Pérez de Nanclares, M. J. Aznar and C. Jiménez Piernas, as Counsel and Advocates; R. Ojinaga and J. Lorenzo as Counsel; D. Vázquez as Adviser. At public sittings, the following experts were called by Spain: C. Martínez de Azagra; D. Stow; J. Preston Delgado; J.A. Martín Pallín.

² Case N° 21: *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (SRFC), Written Statement by the Kingdom of Spain, 29 November 2013.

³ However, the position adopted by China in the dispute related to the West Philippine Sea, and by Russia in the *Artic Sunrise* case, both rejecting the recourse to arbitration under Annex VII of UNCLOS, was seen as a potential threat

and ten new cases were brought before different forum involving a wide range of subject matters. Then, the potential recourse to compulsory procedures entailing binding decisions under Section 2, Part XV, of United Nations Convention on the Law of the Sea (UNCLOS or the Convention) is progressively increasing its importance for Spain, as well as for the rest of the States parties⁴. Partly, the interest of the *M/V “Louisa”* Case could be linked to these current tendencies in the adjudication of international maritime disputes.

This note is about the main features of the *M/V “Louisa”* Case and its contribution to the development of the ITLOS’s jurisprudence on the Law of the Sea and, in particular, regarding those dispositions of UNCLOS, both substantive and procedural in character, which could appear decisive in holding the dispute⁵. Firstly, a summary is given on the factual and procedural background of the case. This is followed by an examination of the basis and scope of the jurisdiction of the Tribunal to entertain the dispute by virtue of the unilateral declarations made by Saint Vincent and Spain under Article 287 of UNCLOS. The following two sections are about jurisdiction and admissibility matters under discussion both at the stage of the proceedings on provisional measures and at the stage of the proceedings on the merits, respectively. Final conclusions will be posed.

THE M/V LOUISA CASE

The *Louisa* was a vessel flying the flag of Saint Vincent, which was owned and operated by Sage Maritime Partners Ltd., an affiliate of Sage Maritime Scientific Research Inc., both registered in Texas (USA). The vessel arrived in the port of Cádiz on 20 August 2004 and conducted operations in the territorial sea and the internal waters of Spain. According to Saint Vincent, the *Louisa* conducted sonar and cesium magnetic surveys of the sea floor with the aim of locating oil and gas deposits on the basis of a permit issued on 5 April 2004 by the Spanish Ministry of the Environment to the company Tupet Sociedad de Pesquía Marítima S.A., a partner of Sage⁶.

to UNCLOS dispute settlement system. (R. Churchill, “Dispute Settlement in the Law of the Sea: Survey for 2013”, 30 *IJMCL* (2015), 1–35).

⁴ United Nations Convention on the Law of the Sea, Dec. 10, 1982, UN Doc A/CONF 62/122 (1982), http://www.un.org/depts/los/convention_agreements/textsunclos/unclos_e.pdf.

⁵ R. Churchill, “Dispute Settlement under the UN Convention on the Law of the Sea: Survey for 2010”, 6 *IJMCL*, (2011), 495–523; Churchill, *supra* note 2; 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 Asesoría 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; 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. A more specific study of certain aspects of the case, in Cortés Martín, M., “Prior Consultations and Jurisdiction at ITLOS”, 13 *The Law and Practice of International Courts and Tribunals* (2014), 1–26.

⁶ The agreement between Sage and Tupet is partially reproduced in the Judgment of 28 May 2013 and makes express references to eventual discovery of historical artefacts, sunken vessels or other lost items of value during the course of routine marine exploration and study. Additionally, it considers the division and payment for recovery. Only after the conclusion of the oral proceedings the applicant delivered a copy of the document to the ITLOS.

On 1 February 2006 the *Louisa* was boarded, searched and detained at the port of Santa María in connection with preliminary proceedings initiated by Order dated 30 November 2005 of the Juzgado de Instrucción Nº 4 de Cádiz. A second vessel, the *Gemini III*, was detained at Puerto Sherry. Two Hungarian crew members and the daughter of the representative of Sage on the *Louisa*, national of the USA, were arrested and subsequently released. Later, the representative of Sage and a beneficial owner of the *Louisa*, both nationals of USA, were charged with unlawful criminal acts under Spanish Law. During the search of the vessel, diverse pieces of undersea archaeological origin were found, as well as five assault rifles, considered weapons of war, and a handgun. According to the indictment issued by that Court on 27 October 2010, the *Louisa* was seized due to its direct relationship to an instrument for carrying out the crime of possession and depositing of weapons of war together with the continued crime of damaging Spanish historical patrimony⁷.

By letter dated 23 November 2010, Saint Vincent filed an application instituting proceedings against Spain before the ITLOS. By the same letter, the Applicant submitted a request for the prescription of provisional measures under Article 290 (1) of UNCLOS. In its Application, Saint Vincent claimed that the continued detention of the *Louisa* and *Gemini III* was in breach of Articles 73 (notification of arrest), 87 (freedom of the high seas), 226 (investigation), 245 (scientific research) and 303 (archeological objects) of UNCLOS. In its Reply it invoked, additionally, Article 227 (non—discrimination with respect to foreign vessels) and changed the erroneous invocation of Article 303 by 304 (responsibility and liability by damages). After the finalization of the written proceedings, the Applicant sent a note to the ITLOS Register announcing it would raise new arguments related to the applicability of the doctrine of abuse of rights provided in Article 300. The Applicant requested the release of the *Louisa* and the *Gemini III* and the return of the property seized, and sought reparations in the amount of more than US\$40.000.000.

The Spanish position was steady from the beginning of the proceedings. The conditions set out by UNCLOS governing the exercise of the jurisdiction of ITLOS had not been met, and the provisions of UNCLOS cited by the Applicant to support its arguments were not applicable to the facts under discussion in the M/V “*Louisa*” Case. Consequently, Spain asked the Tribunal to declare it lacked jurisdiction and, subsidiary, to declare that the Applicant's contention that Spain had breached its obligations under the Convention was manifestly unfounded. Therefore, Spain requested the Tribunal to reject each and every of the petitions made by Saint Vincent.

Saint Vincent requested that the Application and the Request be referred to the Chamber of Summary Procedure, pursuant to Article 15(3) of the Statute. However, Spain did not agree with that request and invited the Tribunal, acting as a full court, to hear the case pursuant to Article 13(3) of the Statute.

In its Order of 23 December 2010, the Tribunal held that it had *prima facie* jurisdiction over the M/V “*Louisa*” Case and found, by 17 votes to 4, that the circumstances were not such as to require the

⁷ The M/V “*Louisa*” Case (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Provisional Measures, Written Response of the Kingdom of Spain, 8 December 2010, paras. 11–43; *The M/V Louisa case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Merits, Contra—Memorial of the Kingdom of Spain, 12 December 2011, paras. 10–41.

exercise of its powers to prescribe provisional measures⁸. Subsequently, in its Judgment on the merits, on 28 May 2013, the Tribunal found, by 19 votes to 2, that it had no jurisdiction to entertain the Application filed by Saint Vincent⁹.

JURISDICTION OF ITLOS

The UNCLOS establishes a comprehensive legal framework to regulate all ocean spaces, its uses and resources. Thereof, its comprehensive dispute settlement regime was considered as essential to preserve the balance of rights among States parties as embodied in the Convention. The Section 1 of Part XV reaffirms the general obligation of the States to settle their disputes by peacefully means (Article 279 (1)). Nonetheless, where no settlement of the dispute has been reached by these means and no other procedure has otherwise been agreed upon the States parties to it, they are obliged to submit the dispute to compulsory procedures entailing binding decisions as provided in Section 2 of Part XV¹⁰. Then, Article 287 (1) —the “choice of procedure” clause— establishes that, upon ratification of the Convention or at any time thereafter, States parties may file a declaration selecting one or more of the following jurisdictions: ITLOS, ICJ, 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 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)).

Thus, the ITLOS is a new specialized jurisdiction established in the framework of UNCLOS. Its jurisdiction *ratione materiae* comprises disputes concerning the interpretation or application of the UNCLOS —Article 288 (1)— and disputes concerning the interpretation or application of international agreements related to the purposes of UNCLOS conferring jurisdiction to the Tribunal —Article 288 (2)—¹¹.

The ITLOS has contentious jurisdiction on the grounds of unilateral declarations made by States under Article 287¹². In addition, mandatory contentious jurisdiction over all States Parties to the Convention is conferred to the ITLOS in the procedure on prompt release of detained vessels and crews —Article 292— and the requests for provisional measures pending the constitution of the

⁸ *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Order, 23 December 2010.

⁹ *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Merits, Judgment of 28 May 2013.

¹⁰ The compulsory mechanism for the settlement of disputes set out in Part XV of the Convention does not apply to all matters regulated by the Convention. There are exceptions and facultative limitations relating to specific categories of disputes under Article 297 and Article 298, respectively.

¹¹ Article 21 of the Statute. A non-exhaustive list can be found in the ITLOS Website.

¹² As of 10 April 2013, 165 States were parties in the UNCLOS, as well as the European Union. Moreover, 45 States had made a choice on the applicable dispute settlement means. They represent over one quarter of all States parties. Thirty-three States selected the ITLOS as the first option, either exclusively (12) or as an alternative to the ICJ. Twenty States selected the ICJ, either exclusively (6) or as an alternative or subsidiary to the ITLOS. Thirteen States, including Spain, choose both ITLOS and ICJ as the first option. Two States rejected the jurisdiction of the ICJ for any kind of dispute. Eight States selected arbitration under Annex VII as the first option, and two more as the second option. Eleven States choose special arbitration under Annex VIII as first or other option.

arbitral tribunal under Annex VII —Article 290(5)—. In practice, most of the activity of the Tribunal is related to both these procedures. The advisory jurisdiction of the ITLOS —Article 138 of the Rules in conjunction with Article 21 of the Statute— is currently under discussion. In addition, there is a more specific contentious, consultative and prejudicial competence conferred to the Sea-Bed Disputes Chamber under Part XI of UNCLOS with respect to activities in the Area.

THE SCOPE OF THE DECLARATIONS UNDER ARTICLE 287 OF UNCLOS

The M/V “*Louisa*” Case was one of the few cases submitted to the Tribunal by unilateral application under Article 54 of the Rules. Both Saint Vincent and Spain were States Parties to UNCLOS and had accepted the jurisdiction of ITLOS by virtue of unilateral declarations under Article 287.

Spain ratified the Convention on 15 January 1997 and made a declaration pursuant to Article 287 with effects from 19 July 2002. It states as follow:

“Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation or application of the Convention.

“The Government of Spain declares, pursuant to the provisions of article 298, para. 1(a) of the Convention, that it does not accept the procedures provided for in part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.”¹³

Saint Vincent ratified the Convention on 1 October 1993 and made its declaration under Article 287 of the Convention on 2 November 2010. It reads as follow:

“In accordance with Article 287, of the 1982 United Nations Convention on the Law of the Sea of 10 December 1982 [...] the Government of Saint Vincent and the Grenadines declares that it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, as the means of settlement of disputes concerning the arrest or detention of its vessels.”

Both States disagree on the scope of the jurisdiction conferred on the Tribunal in the light of the terms used in the Applicant’s declaration. This issue, together with other issues raised by Spain regarding the “declaration *ad hoc*”¹⁴ made by Saint Vincent, was answered by the Tribunal on the basis of the assertion that:

“[...] the Convention does not preclude a declaration limited to a particular category of disputes or the possibility of making a declaration immediately before filing a case.”¹⁵

Firstly, considering that the terms used in the declaration of Saint Vincent were more limited than those of the Spanish declaration, the Tribunal made recourse to the ICJ’s jurisprudence on Article

¹³ BOE, n° 170, 17 July 2003. This declaration replaces that made by Spain upon ratification of UNCLOS choosing ICJ (BOE, n° 39, 14 February 1997).

¹⁴ Escobar, *supra* note 4, at 197.

¹⁵ Judgment, *supra* note 9, para. 79.

36(2) of its Statute¹⁶ and affirmed that, when two unilateral declarations are involved, “jurisdiction is conferred on the Tribunal only insofar as the dispute is covered by the more limited declaration”¹⁷. Moreover, that declaration is a unilateral act of a State and “particular emphasis should be placed on the intention of the State having made it”¹⁸. By this way, it came to the conclusion that the terms “disputes concerning the arrest or detention of its vessels” were not limited to those articles of UNCLOS which expressly contain the word “arrest” or “detention”, but was meant to cover “all claims connected with the arrest or detention of its vessels”¹⁹. In sum, regarding this question:

“The Tribunal therefore considers that the declaration of Saint Vincent and the Grenadines covers the arrest or detention of its vessels and all matters connected therewith”²⁰

This is a weighty precedent because the ITLOS has specifically admitted the inclusion of limitations *ratione materiae* to its jurisdiction in unilateral declarations made by States under Article 287 of the Convention. It bases its affirmation in practice of States both under Article 287 (1) of UNCLOS and Article 36 (2) of ICJ’s Statute²¹. Although the Tribunal did not mention specific examples of this practice by States parties in UNCLOS other than Saint Vincent, it was concurrently holding its proceeding in the controversy on *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*²². This case was 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 even as a specific dispute. Moreover, a more detained consideration of this question by the Tribunal, on the basis of a systematic interpretation of Part XV of UNCLOS²³, seems to be necessary. There are differences between the facultative jurisdiction of ICJ for States making declarations under Article 36 of the Statute and the compulsory jurisdiction system established in Section 2, Part XV, of UNCLOS; in particular, considering that the only exceptions

¹⁶ In particular, *Certain Norwegian Loans, Judgment*, I.C.J. Reports 1957, p. 9, at p. 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, p. 6, at p. 39, para. 88)

¹⁷ Judgment, *supra* note 9, para. 81.

¹⁸ *Ibid.*, para. 82.

¹⁹ *Ibid.*, para. 84.

²⁰ *Ibid.*

²¹ *Ibid.*, para. 80.

²² In October 2009 Bangladesh instituted proceeding against Myanmar under Annex VII of UNCLOS but the proceedings were subsequently transferred to the ITLOS (Case N° 16, *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*) on the basis of an agreement between the parties expressed by concordant declarations under Article 287 conferring jurisdiction to ITLOS. In fact, it was considered that the proceedings had been instituted by notification of a special agreement (Article 24 (1) of the Statute). The declaration of Bangladesh covers the settlement of the dispute between Bangladesh and both Myanmar and the Republic of India “relating to the delimitation of their maritime boundary in the Bay of Bengal”. The declaration of Myanmar was later revoked.

²³ In the *Artic Sunrise* Case, the ITLOS was confronted with the terms of Russian declaration under Article 298, which are broader than those terms of article 298, paragraph 2 or 3. Netherlands stated that States parties could not go further the categories of disputes specifically provided in those paragraphs, as confirmed by the terms of Article 298 (1) (b) and Article 309 of UNCLOS. In its order on provisional measures under Article 290 (5), the ITLOS hold by assuming *prima facie* this interpretation. But questions under discussion in the *Artic Sunrise* case and those arose in the “Louisa” are not the same, because the limitations in Russian declaration could lead even to the exclusion of the residual jurisdiction of the Arbitral Tribunal under Annex VII.

and limitations to applicability of compulsory procedures are those provided in Articles 297 and 298, and that Article 309 prohibits reservations to the Convention. Moreover, 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 UNCLOS, leads to the conclusion that matters excluded by virtue of that unilateral declarations fall, at last, into the residual jurisdiction of the arbitral tribunal²⁴. But, it is arguable that the inclusion of “reservations” in unilateral declarations under Article 287 could increase the risk of fragmentation of the object of the controversies and problems of coordination among courts and tribunals acting inside and outside the framework of the disputes settlement regime of UNCLOS. 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 criticism.

Secondly, the Tribunal made recourse to the jurisprudence of ICJ in the *Right of Passage Case*²⁵ when stated that an application filed on the same day of the deposit of a declaration is not in contradiction with the requirements of the Statute. The jurisprudence invoked by the ITLOS was not questioned by Spain, but it also alleged that the Applicant’s procedural behavior was in contravention of the principle of good faith²⁶. The declaration of Saint Vincent under Article 287 accepting the jurisdiction of the ITLOS was made two days before instituting proceedings against Spain. By that day the Applicant had already notified to the ITLOS the designation of its Agent. However, the main question was the Tribunal’s refusal to consider jointly both these arguments and those regarding the exchange of views requirement under Article 283 of the Convention *in order to exclude the unexpected recourse to jurisdictional procedures under section 2, Part XV, of UNCLOS*. Certainly, as the *travaux préparatoires* of the Convention²⁷ show, and Judge Anderson stated in the *Arctic Sunrise Case*, “[t]he main purpose underlying 283 is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it”²⁸.

PROVISIONAL MEASURES UNDER ARTICLE 290 (1) OF UNCLOS

The ITLOS has jurisdiction to prescribe provisional measures in two different situations. Under Article 290 (1) —which is applicable to all jurisdictional bodies empowered under Article 287— a court or tribunal which considers it has *prima facie* jurisdiction under Part XV of UNCLOS may

²⁴ Gautier, *supra* note 4, at 879. On the same issue, Tanaka, *supra* note 4, at 207.

²⁵ *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, (Preliminary Objections), [1957] I.C.J. Reports 125, at. 146).

²⁶ Professor Escobar has considered recently, the legitimate protection that Spain could be found in a clause like that included in the Spanish facultative declaration under Article 36 (2) of the ICJ’s Statute, in the light of the *Case Concerning the Legality of Use of Force (Yugoslavia v. Spain)*, *Provisional Measures*, Order of 2 June 1999, ICJ Reports, 1999, 761 (Escobar, *supra* note 4, at 200, 221).

²⁷ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume II, (Martinus Nijhoff Publishers, Leiden/Boston 1993); Vol. V Settlement of Disputes, General and Final Provisions: Articles 279 to 320, Annexes V, VI, VII, VIII and IX, Final Act, Annex I, Resolution I, III, and IV (Martinus Nijhoff Publishers, The Netherlands 1989); D. Anderson, “Article 283 of the UN Convention on the Law of the Sea”, in *Modern Law of the Sea. Selected Essays* (Martinus Nijhoff Publishers, Leiden/Boston, 2008) 591.

²⁸ Case N° 21, *The Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, *Provisional Measures*, Order of 2 November 2014, Declaration of Judge ad hoc Anderson, at 1, para 3.

prescribe provisional measures. Under Article 290 (5) where an arbitral tribunal has not yet been constituted and the parties have failed within two weeks to agree on submission of the request to a court or tribunal then ITLOS may prescribe provisional measures if it considers, *prima facie*, that the tribunal which is to be constituted will have jurisdiction and that the urgency of the situation so requires. While Article 290 (1) reflects accepted notions of incidental jurisdiction, the residual jurisdiction provided for in Article 290 (5) is considered to be “a relative innovation in international practice”²⁹. To date, two cases —the M/V “SAIGA” (Nº 2) and the M/V “*Louisa*” — were submitted to ITLOS under Article 290 (1)³⁰. The residual jurisdiction under Article 290 (5) has been applied in the *Southern Bluefin Tuna*, *MOX Plant*, *Land Reclamation by Singapore in and around the Strait of Johor*, *ARA Libertad* and the *Artic Sunrise*.

Article 290 defines the powers of the Tribunal to prescribe provisional measures differently from the ICJ’s Statute. Firstly, Article 290 (3) empowers the Tribunal to prescribe, modify or revoke provisional measures only at the request of a party to the dispute and after the parties have been given an opportunity to be heard, whereas the ICJ may prescribe provisional measures *proprio motu*³¹. Secondly, Article 290 (6) establishes without ambiguity the binding nature of the provisional measures lay down by ITLOS³². Furthermore, by virtue of Article 95 of the Rules, parties have an obligation to inform the Tribunal as soon as possible as to its compliance with any provisional measures it has prescribed³³. Thirdly, under Article 89(5) of the Rules, the ITLOS may prescribe measures different in whole or in part from those requested by the parties³⁴.

(1) *Prima facie* Jurisdiction of the ITLOS

Before prescribing provisional measures under Article 290 (1), the Tribunal must satisfy itself that *prima facie* it has jurisdiction over the main dispute. 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) Case. In its Order in the M/V “*Louisa*” Case:

“Considering that, at this stage of the proceedings, the Tribunal does not need to establish definitively the existence of the rights claimed by Saint Vincent and the Grenadines, and that, in its Order of 11 March 1998 on provisional measures in the M/V “SAIGA” (No. 2) Case, the Tribunal stated that “before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded”

²⁹ S. Rosenne, “The International Tribunal for the Law of the Sea: Survey for 1999” 15 *Int’l J Marine and Coastal L* (2000) 442, at 467 [Survey for 1999]; P. Tomka and G.H., Hernández, “Provisional Measures in the International Tribunal for the Law of the Sea”, in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rudiger Wolfrum* (Brill, Leiden 2011)1763.

³⁰ The request for provisional measures in M/V “SAIGA” (Nº 2) case was originally submitted to the Tribunal under Article 290(5), but later it was considered duly submitted under Article 290 (1).

³¹ Article 41 of ICJ’s Statute.

³² Rosenne notes that Article 290 was also designed to avoid the ambiguity regarding an order of the ICJ indicating provisional measures, which was finally settled in *La Grand (Germany v. United States)*, Judgment, ICJ Reports 2001, at 501—506 (*supra* note 29, at 45).

³³ In contrast with Article 78 of the ICJ Rules of Court.

³⁴ T. Treves, “Provisional Measures Pending the Constitution of an Arbitral Tribunal”, in *Studi di Diritto Internazionale in Onore di Gaetano Arangio—Ruiz*, (Editoriale Scientifica, Napoli, 2004) 1243, at 1252.

(M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998, p.24, at p.37, para. 29).³⁵

The innovative character of the M/V “*Louisa*” proceedings on provisional measures has been recognized regarding, at least, the two following points³⁶. For the first time, having found it had *prima facie* jurisdiction at the stage of the proceedings of provisional measures, the ITLOS held that it lacked jurisdiction to deal with the merits of the case. Also, for the first time, the Tribunal held that there were no reasons to prescribe provisional measures, neither the measures solicited by the Applicant, nor any other measures decided by the Tribunal³⁷. Even if the application on request of provisional measures can be described as “a poorly argued application that in places appears to muddle provisional measures with the quite separate prompt—release—of—vessels procedures”³⁸, the M/V “*Louisa*” Case was nonetheless at this stage of the proceedings a real case of interest. The main debates were about the “low threshold” on *prima facie* jurisdiction and in the interpretation of the prior exchanges of views requirements under Article 283. In addition, Spain expressed its objections to the admissibility of the claims, but the Tribunal decided that this matter should be considered at a later stage of the proceedings³⁹.

(a) *The Existence of a Dispute Relating to the Interpretation or Application of UNCLOS*

In its Order, the Tribunal considered the existence of unilateral declarations of States parties accepting its jurisdiction under Article 287, as well as the Applicant’s invocation of several dispositions of the Convention in support of its claims. However, it did not examine the relevance of those provisions or its connection with the facts under discussion in the case⁴⁰. It merely found, in relation to the *Louisa* but reserving its decision on the *Gemini III*⁴¹, that,

“[...] in the circumstances of this case, it appears *prima facie* that a dispute as to the interpretation and application of provisions of the Convention existed between the parties on the date on which the Application was filed.”⁴²

The case law of the ITLOS confirms it has adopted a *low threshold on prima facie jurisdiction* as that assumed by the ICJ in the *Anglo—Iranian Oil Co Case*⁴³. Nonetheless, as contented by Judge Cot, regarding the *Louisa* there was not “the slightest shred of evidence of *prima facie* jurisdiction”⁴⁴. Also, Judges Golitsyn, Treves and Wolfrum posed compelling reasons on the inexistence of an international

³⁵ Provisional Measures, Order, *supra* note 8, para. 69.

³⁶ Tanaka, *supra* note 4, at 205.

³⁷ Escobar, *supra* note 4, at 182.

³⁸ Churchill, *supra* note 4, at 505.

³⁹ Provisional Measures, Order, *supra* nota 8, para. 67.

⁴⁰ Churchill, *supra* note 4, at 505. In the same way, Tanaka, *supra* note 4, at 208 and 210.

⁴¹ Provisional Measures, Order, *supra* note 8, paras. 43-45.

⁴² *Ibid.*, para. 56.

⁴³ When adopting interim measures, the ICJ stated that “it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction” and hold it had *prima facie* jurisdiction but if found it lacked jurisdiction on the merits (*Anglo-Iranian Oil Co. (United Kingdom v. Iran) (Interim Measures)*, Order, [1951] I.C.J., Reports 89, at 93)).

⁴⁴ Provisional Measures, Order, *supra* note 8, Dissenting Opinion of Judge Cot, para. 1.

maritime dispute and *prima facie* lack of jurisdiction of the Tribunal⁴⁵. Thereof, the posterior determination that the Tribunal lacked jurisdiction *ratione materiae* has been described as “a dramatic taramount”⁴⁶. Doctrinal criticism had been previously expressed regarding the ITLOS’s approach to *prima facie* jurisdiction in the *Southern Bluefin Tuna* and *MOX Plant Case*. The reason for that criticism was, more specifically, the treatment given by ITLOS to the concurrence of jurisdictions or related actions issues⁴⁷ arising in cases of treaty parallelism, as provided for in Article 282 of UNCLOS.:

“[...] the assertion by ITLOS of such a low threshold of *prima facie* jurisdiction in these applications has been the subject of heavy criticism. The failure of ITLOS to closely delineate the parameters of the dispute before it prior to making a finding of *prima facie* jurisdiction has been blamed for its apparently avaricious jurisdictional grab even in the face of competing treaty jurisdictions under which the disputes arguably more properly fell⁴⁸.

As evidenced in the jurisprudence of ICJ and other international courts and tribunals, the risk of contradiction between the decision on *prima facie* jurisdiction and the decision on jurisdiction on the merits by the competent Court or Tribunal could not be entirely preclude⁴⁹, but such a situation is a very exceptional one. As stated by Judge Wolfrum, “provisional measures are binding on the parties to the dispute and constitutes an infringement of the sovereign rights of the responding State”⁵⁰. In order to diminish the risk of that contradiction it will be desirable to minimize the difference between the decision of *prima facie* jurisdiction and that of jurisdiction on the merits, especially when the Tribunal is called upon to decide *prima facie* on its own jurisdiction under Article 290 (1)⁵¹. In the view of Judge Treves, even at the stage on provisional measures, the requirements for determination of the existence of a dispute set out in the jurisprudence of the PCIJ in *Mavrommatis Case* and the ICJ in *South West Africa*, and accepted by ITLOS in its Order in the *Southern Bluefin Tuna Cases*⁵², must be read together with the requirement that, in the case of the Tribunal, the dispute must concern the interpretation or application of the Convention⁵³.

⁴⁵ *Ibid.*, Dissenting Opinion of Judge Golitsyn, paras. 4-6; Dissenting Opinion of Judge Wolfrum, paras. 19-26. In addition, Judge Treves linked the arguments on the inexistence of a dispute —as defined by PCIJ in the *Mavrommatis Palestine Concessions Case*— to the no satisfaction of prior exchanges of views requirement under Article 283, arguing that there were no opposition of views between the parties concerning the interpretation or application of the dispositions of UNCLOS when the application was submitted to the Tribunal by Saint Vincent (Dissenting Opinion of Judge Treves, paras. 2-7).

⁴⁶ Churchill, *supra* note 2, at 6. Previously, considering the dissenting opinions of some judges at the stage of provisional measures, he wrote: “It is to be hoped that they will influence their colleagues to take a more robust view of jurisdictional issues when it comes to the main proceedings in this case. On the basis of the documentation available at the time of writing, it is difficult to see that there has been any breach of the LOSC by Spain” (Churchill, *supra* note 4, at 508).

⁴⁷ Y. Kerbrat, “Le différend relative à l’usine Mox de Sellafield (Irlande/Royaume—Uni): connexité des procédures et droit d’accès à l’information en matière environnementale”, *AFDI* (2004), 607-623.

⁴⁸ 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.

⁴⁹ *Georgia v. Russian Federation case, (Preliminary Objections)*, [2011], I.C.J., Reports 70.

⁵⁰ Provisional Measures, Order, *supra* note 8, Dissenting Opinion of Judge Wolfrum, para. 11; Tanaka, *supra* note 4, at 216.

⁵¹ *Ibid.*, para. 7.

⁵² ITLOS Reports 1999, p. 280., para. 44

⁵³ Provisional Measures, Order, *supra* note 8, Dissenting Opinion of Judge Treves, para. 6.

(b) *Exchange of Views under Article 283 of UNCLOS*

In *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* Case⁵⁴, the ICJ confirmed that there is not a rule of general international law establishing the obligation of exhaustion of diplomatic negotiations as a precondition for a matter to be referred to an international court or tribunal⁵⁵. Nonetheless, the requirement of previous negotiation, consultation or exchange of views can be found in conventional clauses as a part of a particular dispute settlement regime⁵⁶. The UNCLOS includes this special rule in Article 283, which reads as follows:

“1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means;

“2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.”

Spain contented that the requirement set out in article 283 in order to facilitate the settlement of disputes without the need to resort to judicial or arbitral proceedings had not been satisfied⁵⁷. On its side, the Applicant mentioned several approaches made by legal representatives of Sage and by its maritime administration to the port authorities of Spain for further information about the detention of the *Louisa*⁵⁸. There was not clarification on the importance conferred on these acts by the Tribunal, but four judges in their dissenting opinions posed arguments against the consideration of these contacts, “nor at the level of national governments”⁵⁹, as an exchange of views in the sense of the article 283.

Then, the main question was about the *Note Verbale* dated 26 October 2010, sent to the Permanent Mission of Spain to the United Nations in New York, by the Permanent Mission of Saint Vincent to the United Nations in New York, informing it objected to the Kingdom of Spain’s continued detention of the ships *Louisa* and *Gemini III* and announcing its plans to pursue an action before the International Tribunal for the Law of the Sea. The absence of reaction from Spain was

⁵⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, at p. 303, paragraph 56). On this matter, Torres Bernárdez, S, “Are Prior Negotiations a General Condition for Judicial Settlement by the International Court of Justice?”, in Armas Barea, C.A./Barberis, J.A. (eds.): *Liber Amicorum in Memoriam of Judge J.M. Ruda*, Kluwer, The Hague, 2000.

⁵⁵ J.L., Charney, “Compromisary Clauses and the Jurisdiction of the International Court of Justice”, 81 AJIL (1987), 859-864; E. Kirgis, *Prior Consultation in International Law: A Study of State Practice* (University Press of Virginia, Charlottesville, 1983).

⁵⁶ Another relevant example of this special rule could be found in Article 21 of the Convention on the Elimination of All Forms of Discrimination, interpreted by the ICJ in a very severe way in the *Application of the Convention on the Elimination of All Forms of Discrimination* Case, Preliminary Objections, Judgment of 1 April 2011 (Cortés, *supra* note 4. at 8). The same issues were confronted by the ICJ in the *Obligation to Prosecute or Extradite Case (Belgium v. Senegal)* Judgment of 20 July 2012. There are more examples of these clauses in the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly Resolution 34/68, annex, Art. 15, para.1) and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Article 64). On this practice, see the *Manuel sur le règlement pacifique des différends* (Nations Unies, New York 1992).

⁵⁷ Written Response of the Kingdom of Spain, *supra* note 6, para. 25. Presentation by Professor Aznar Gómez, Counsel and Advocate of Spain, ITLOS/PV.10/6Rev.I, at 12.

⁵⁸ Provisional Measures, Order, *supra* note 8, para 59.

⁵⁹ *Ibid.*, Opinion of Judge Golitsyn, 3; Dissenting Opinion of Judge Wolfrum, para. 28.

open to discussion between the parties but, in any case, as noted by Judge Treves in their dissenting opinion, Saint Vincent merely express its purpose to institute proceedings against Spain, but did not give any indication of its claims or rights nor about its intention to proceed to an exchange of views to settle the dispute through negotiations or other means⁶⁰. Then, these could be interpreted as a lack of that intention, as confirmed by the fact that the Applicant sent its Note Verbal to Spain when it had already notified the Tribunal the appointment of its Agent and made its declaration of the acceptance of the jurisdiction of the Tribunal a few days before filing the application.

Nonetheless, the Tribunal, by referring to its jurisprudence in the *Southern Bluefin Tuna* and *MOX Plant* Cases, reaffirmed that “the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute”⁶¹ and that “a State Party is not obliged to pursue procedures under Part XV, section I, of the Convention when it concludes that the possibilities of settlement have been exhausted”⁶². Without providing more precision on its reasoning, the Tribunal finally stated that:

“[...] in the view of the Tribunal, the requirements of article 283 of the Convention are to be regarded, in the circumstances of the present case, as having been satisfied.”⁶³

The Order held by ITLOS in the *M/V “Louisa”* Case was not a clarifying precedent in the interpretation of the functional principle of exhaustion of diplomatic means as embodied in Article 283 of UNCLOS. On the contrary, it was the manifestation of disagreement about the standard of compliance with prior exchange of views requirement, both in the particular circumstances under discussion and in more general terms⁶⁴. The debates on the meaning of Article 283 reappeared in the *Artic Sunrise* Case. In opinion of some members of the Tribunal, the prior exchange of views means that a “negotiation or efforts to find a settlement by other peaceful means must take place”⁶⁵ while, in opinion of others, it requires exchange of views “regarding the most appropriate peaceful means of settlement, rather than the exhaustion of diplomatic negotiations over the substantive issues dividing the parties”⁶⁶. It seems at least admitted that “[t]he main purpose underlying 283 is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it”,

⁶⁰ *Ibid.*, Dissenting Opinion of Judge Treves, para. 11.

⁶¹ *Ibid.*, para. 58. Citing, *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, at 19, para. 38).

⁶² *Ibid.*, para. 63. Citing its jurisprudence in *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, at 295, para. 60; and *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, at 107, para. 60.

⁶³ *Ibid.*, para. 65.

⁶⁴ Judge Wolfrum rejected an interpretation of article 283 which “renders it meaningless” and noted, as well as Judge Treves, that the requirements of the article 283 must be taken seriously by the Tribunal (Provisional Measures, Order, *supra* note 6, Dissenting Opinion of Judge Wolfrum, paras. 27-28; Dissenting Opinion of Judge Treves, para. 10).

⁶⁵ *Case N° 19: The M/V “Virginia G” Case (Panama/Guineez-Bissau)*, Judgment of 14 April 2014, Dissenting Opinion of Judge Golitsyn, para. 7. This was also the interpretation posed by Judge Wolfrum in the *M/V “Louisa”* Case when arguing that the simple requirement of an exchange of views about the most appropriate way to settle the disputes is not in conformity with the terms of Article 283 (1), of the Convention. The reference to negotiation has “a distinct purpose clearly expressed in this provision namely to solve the dispute without recourse to the mechanisms set out in Section 2 of Part XV of the Convention (para. 27)”.

⁶⁶ *Ibid.*, Declaration of Judge ad hoc Anderson, para 3.

as supported by the *travaux préparatoires* to the Convention⁶⁷. In any case, as noted by Judge Chandrasekhara Rao, the exchange of views is a condition governing the jurisdiction of the court or tribunal competent under the dispositions of Section 2 of Part XV of UNCLOS and it should not be treated by ITLOS as a “meaningless formality to be dispensed with at the whims of a disputant”⁶⁸.

(2) The Denegation of Provisional Measures

In accordance with Article 290 (1) of UNCLOS, the ITLOS may prescribe measures “to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment”. Saint Vincent posed the question of the deterioration of the *Louisa* and the risk of releasing massive amounts of hydrocarbons in the port area (Puerto de Santa María)⁶⁹. However, Spain replied that the Port authorities were continuously monitoring the situation and the Capitanía Marítima of Cadiz had an updated protocol for reacting against threats of any kind of environmental accident within the port and the Bay of Cadiz. Placing on record the assurances given by Spain⁷⁰,

“[...] in the circumstances of this case, the Tribunal does not find that there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute before the Tribunal so as to warrant the prescription of the provisional measures requested by Saint Vincent and the Grenadines.”⁷¹

“Consequently, by 17 votes to 4:

“Finds that the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its powers to prescribe provisional measures under article 290, paragraph 1, of the Convention.”

After having denied the provisional measures requested by the Applicant, the ITLOS lead to the conclusion that any other measure or recommendation was required on the basis of its own appreciation. However, in other cases, as in the *MOX Plant Case* it imposed measures characterized by its “consensual approach”, since the Tribunal essentially was ordering cooperation between the parties in the prevention of pollution of the marine environment pending the decision on the merits⁷². In those cases, the ITLOS did not directly invoke the precautionary principle but seems instead to have invoked its own “precautionary approach”⁷³, requiring parties to act on the basis of “prudence and caution” in its provisional measures orders. The *M/V “Louisa” Case* was not thoroughly an exception because the Tribunal reaffirmed the obligation on States to protect and preserve the marine

⁶⁷ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume II, Martinus Nijhoff Publishers, Leiden/Boston, 1993; Vol. V Settlement of Disputes, General and Final Provisions: Articles 279 to 320, Annexes V, VI, VII, VIII and IX, Final Act, Annex I, Resolution I, III, and IV, Martinus Nijhoff Publishers, The Netherlands, 1989; Anderson, D. “Article 283 of the UN Convention on the Law of the Sea”, in *Modern Law of the Sea. Selected Essays*, Martinus Nijhoff Publishers, Leiden/Boston, 2008, pp. 591-607.

⁶⁸ *Case N° 12: Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, Separate Opinion of Judge Chandrasekhara Rao, para. 38.

⁶⁹ Request for Provisional Measures of Saint Vincent and the Grenadines, 23 November 2010, para. 63.

⁷⁰ Provisional Measures, Order, *supra* note 8, paras. 74–78.

⁷¹ *Ibid.*, para. 72.

⁷² *Case N°: 10: The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, paras. 82–84

⁷³ S. Marr, “The Southern Bluefin Tuna Cases: The Precautionary Approach and Conservation and Management of Fish Resources”, 11 *Euro J Int’l L* (2000), at 815.

environment under Article 192 of UNCLOS⁷⁴. Then, it merely added that “in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to prevent serious harm to the marine environment”⁷⁵.

Furthermore, some importance could be granted to the nature of the provisional measures requested by the Applicant: to order the release of the vessel *Louisa* and the returns of scientific research, information and property held since 2006. That provisional measures “were similar to measures which could have been ordered as the result of a decision on the merits. It would then seem difficult to grant such measures without already entering into the substance of the case”⁷⁶.

THE JUDGMENT: JURISDICTION AND ADMISSIBILITY MATTERS

The main question addressed by the Tribunal in its Judgment on the merits was that of jurisdiction *ratione materiae*. In order to determine the nature of the relation between jurisdiction *prima facie* at the stage of the proceedings on provisional measures and jurisdiction on the merits, special consideration must be granted to the following assertion in the Order on 23 December 2010:

“[...] Considering that the present Order in no way prejudices the question of the jurisdiction of the Tribunal to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of those questions (see ICJ Case concerning questions relating to the obligation to prosecute or extradite (*Belgium v. Senegal*), Provisional Measures, Order of 28 May 2009, paragraph. 74).”⁷⁷

In its Judgment the Tribunal examined jurisdictional issues posed by Spain concerning the inexistence of a dispute under the dispositions of UNCLOS. However, having determined that it had no jurisdiction *ratione materiae*, the ITLOS did not examine the arguments of Spain on Article 283 and those related to the admissibility of the claims —nationality of the reclamation and exhaustion of local remedies—.

(I) Jurisdiction *Ratione materiae*

When considering the existence of a dispute relating to the interpretation or application of UNCLOS, the Tribunal identifies the following two aspects of the M/V “*Louisa*” Case and deal with them successively:

“[...] The Tribunal notes that the case before it has two aspects: one involving the detention of the vessel and the persons connected therewith and the other concerning the treatment of these persons. The first aspect relates to the claim originally submitted by Saint Vincent and the Grenadines on the basis of articles 73, 87, 226, 227 and 303. The second aspect was introduced by Saint Vincent and the Grenadines on the basis of article 300 of the Convention only after the closure of the written proceedings. It was

⁷⁴ Provisional Measures, Order, *supra* note 8, para. 76.

⁷⁵ *Ibid.*, para. 77. Citing the jurisprudence of the Tribunal in *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, para. 77.

⁷⁶ Gautier, *supra* note 4, at 880.

⁷⁷ Merits, Judgment, *supra* note 9, para. 80

discussed during the oral proceedings and included in the final submissions of Saint Vincent and the Grenadines”⁷⁸.

(a) *Inexistence of a Dispute Relative to the Interpretation or Application of UNCLOS: The Original Claim*

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”⁷⁹. Later, in the *South West Africa* Cases, it added that “a mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proved its nonexistence”⁸⁰. One more, ITLOS made recourse to the case law of the ICJ when examined its jurisdiction *rationae materiae* and, citing the *Oil Platforms* Case⁸¹, it stated that:

“[...] 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.”⁸²

As the result of this analysis, ITLOS concludes that none of the articles of UNCLOS invoked by Saint Vincent could constitute a basis for its claims. Article 73 is excluded because the “*Louisa*” and its crew was not detained for the reason that the laws and regulations of Spain concerning the living resources in the exclusive economic zone had been violated⁸³; Article 87 cannot be interpreted in such a way as to grant the *Louisa* a right to leave the port and gain access to the high seas notwithstanding its detention in the context of criminal proceedings against it⁸⁴, as it will later confirm in the *ARA Libertad* case⁸⁵; Articles 226 and 227 applies to investigation of foreign vessels for violation of international rules and standards for the protection and preservation of the marine environment, but this was not the case of the *Louisa*⁸⁶. Regarding Article 245, thought the Applicant did not included it

⁷⁸ *Ibid.*, para. 96.

⁷⁹ *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania, First Phase*, (1950) ICJ Report 65, at 70: Second Phase, (1950), ICJ Report 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.

⁸⁰ *International Status of South West Africa (Advisory Opinion)*, (1950) ICJ Report, 65, at 74.

⁸¹ [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 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)

⁸² Merits, Judgment, *supra* note 9, para. 99.

⁸³ *Ibid.* paras. 100–105.

⁸⁴ *Ibid.* paras. 106–110. We can emphasize with Churchill the fact that this interpretation of article 287 which ITLOS latter adopted in the *ARA Libertad* Case was not previously adopted in proceedings on provisional measures in the “*Louisa*” Case (*supra* note 2, at 8)

In the *M/V “Louisa”* case Spain additionally argued that the certificates for the vessel under the SOLAS Convention and the MARPOL Convention had expired well before the detention of the “*Louisa*” on 1 February 2006. But, in view of its interpretation of article 83, the Tribunal did not considered it necessary to pronounce up on the arguments of the Parties related to the seaworthiness of the “*Louisa*”.

⁸⁵ Case N° 20: *The ARA Libertad Case (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2015.

⁸⁶ Merits, Judgment, *supra* note 9, paras. 111–113.

in its final submissions, the Tribunal stated that it could not be relevant⁸⁷. Finally, the Applicant recognized that Article 303 was erroneously cited in its Reply⁸⁸ and the Tribunal finds that the question of application of Article 304 –relative to responsibility and liability by damages— could arise only if it were to hold that it has jurisdiction to deal with the merits of the case⁸⁹. In sum, the Tribunal admitted the main argument of Spain since the legal actions taken against the vessel, its crew and its owners were completely unconnected with any such reasons foreseen in dispositions alleged by the Applicant.

Additionally, Saint Vincent contended that the boarding of the *Louisa* was in violation of general international law and also in violation of Article 561 of the Code of Criminal Procedure because it took place without the prior authorization of its captain or of the Consul of the flag State. In this way, the *Louisa* provides another precedent in the ITLOS jurisprudential interpretation of the Law of the Sea, in relation with the following conclusion:

“[...] The Tribunal notes that there is no provision in the Convention which requires a port State to notify the flag State or to obtain the authorization of the flag State or of the master of a foreign vessel operated for commercial purposes such as the M/V “*Louisa*” before boarding and searching such a vessel docked at its port. Further, it is not incumbent upon the Tribunal to determine whether Spain has violated article 561 of its Code of Criminal Procedure by boarding the M/V “*Louisa*” without authorization. The Tribunal considers that the arguments advanced by Saint Vincent and the Grenadines in this regard have no bearing on the question of its jurisdiction⁹⁰”.

(b) *Article 300 of UNCLOS: a New Jurisdictional Title for a New Claim*

The underlined contribution of the M/V “*Louisa*” Case to the development of the ITLOS’s jurisprudence was in relation to the applicability of the doctrine of abuse of rights in the area of the Law of the Sea⁹¹. The doctrine of abuse of rights is closely related to the principles of good faith and due process⁹². Article 300 of UNCLOS⁹³ reads as follows:

“States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”.

⁸⁷ *Ibid.*, paras. 114–117.

⁸⁸ *Ibid.*, paras. 118–119.

⁸⁹ *Ibid.*, paras. 120–123.

⁹⁰ *Ibid.*, para. 125

⁹¹ Tanaka, *supra* note 4, at 205.

⁹² A broad analysis of the jurisprudence of international courts and tribunals on the invocation of abuse of rights doctrine in Tanaka, pp. 212–213.

⁹³ Other complementary agreements or multilateral agreements relate to the purposes of the Convention contains similar dispositions on the abuse of rights doctrine: Article 34 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (8 September 1995); Article 33 of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (5 September 2000); Article 13, paragraph 8, of the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean (20 April 2001).

This doctrine was never questioned by Spain. On the contrary, Article 300 was invoked in its Response to the Applicant’s Request of provisional measures⁹⁴. Also, in its Counter-Memorial it made recourse to the doctrine of abuse of process by the part of the Applicant⁹⁵. Then, after the finalization of the written proceedings —when Saint Vincent announced to the Tribunal that “during public hearings its advocate will address certain jurisdictional issues, including but not limited to human rights violations related to, *inter alia*, basic precepts of international law and Article 300 of UNCLOS” —⁹⁶, Spain noted, in a letter to the Tribunal, that the announcement by the Applicant was in contradiction with the principle of “equal arms” and the most basic principles of due process⁹⁷.

During the hearings, Saint Vincent effectively replaced its previous claims with a completely new reasoning. Professor Nordquist outlined that “[t]he first major point offered by the Applicant [was] to urge that the Tribunal has jurisdiction on the merits in this case based on Article 300 of the Convention”⁹⁸. In this way, the new *Louisa* case was presented as “a challenging case, perhaps even a landmark case, in the progressive development of international law”⁹⁹:

“Briefly stated, the doctrine of abuse of rights cited in article 300 is founded on the obligation of States under international law to act in good faith in fulfilling their treaty commitments. Oppenheim explains that the doctrine arises when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by legitimate considerations of its own advantage. Thus, even if technically acting within the law, a State may incur liability by abusing its rights. The Applicant maintains that the record shows that Spain has violated its obligations with respect to the Applicant under the Convention. Part of the violation is that the arrests and subsequent treatment of certain persons and the detention of the vessel *Louisa* were illegal. In the latter case, the local authorities did not have prior consent to board and search the *Louisa* from either the Master or the Applicant, as required by both Spanish and international law¹⁰⁰.

By the part of Spain, Professor Escobar provided compelling arguments against the recourse to Article 300 as *a new title of jurisdiction for a new claim*¹⁰¹, when noting that:

“[...] principle of good faith and the prohibition of the abuse of rights must be applied within the framework defined in article 300, namely [...] “the rights ... jurisdiction and ... freedoms recognized in [the] Convention”.

“[...] In any event, the drafting of article 300 does not provide us with pointers to the interpretation of its object and purpose, except perhaps the fact that it comes in part XVI of the Convention entitled ‘General provisions’, which permits us to draw our first conclusion, namely that the scope of the principle of good faith and the prohibition of the abuse of rights is not limited to any given part of the Convention. Quite the contrary; the principle of good faith is applicable to each and every one of the provisions contained in the Convention, but always within the framework and the bounds of the Convention.”¹⁰²

⁹⁴ Provisional Measures, Written Response of the Kingdom of Spain, Part II, *supra* note 6, para. 75.

⁹⁵ Merits, Counter-Memorial of the Kingdom of Spain, *supra* note 7, paras. 187–190.

⁹⁶ Merits, Judgment, *supra* note 9, para.127.

⁹⁷ *Ibid.*, para. 128.

⁹⁸ Presentation by Professor Nordquist, Counsel and Advocate of Saint Vincent and the Grenadines, Verbatim Record, 5 October 2012, ITLOS/PV.12/18/4, ITLOS/PV.12/C18/4, at 10, 47–48.

⁹⁹ *Ibid.*, at 10, 37–39.

¹⁰⁰ *Ibid.*, at 13.

¹⁰¹ Presentation by Professor Escobar Hernández, Agent, Counsel and Advocate of Spain, Verbatim Record, 10 October 2012, ITLOS/PV.12/C18/11, 10.

¹⁰² *Ibid.*, at 13.

Regarding the applicability of Article 300, Spain contended that a systematic interpretation of the UNCLOS in line with the Vienna Convention on the Law of Treaties leads to the conclusion that the doctrine of abuse of rights is applicable *in connection to the exercise of the rights, jurisdiction and freedoms recognized in the Convention*. Nonetheless, Saint Vincent had not succeeded in identifying any such provisions applicable to the *Louisa* Case. The lack of an autonomous applicability of Article 300 was supported by the *travaux préparatoires* for the Convention¹⁰³ and the ITLOS's case law¹⁰⁴. In two contentious cases —the *Bluefin Tuna* Case and the case concerning *Land Reclamation by Singapore in and around the Straits of Johor*¹⁰⁵— and in the consultative procedure on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*¹⁰⁶— Article 300 was relied on by the Parties always in conjunction with other provisions of the Convention. Finally, in its Judgment:

“The Tribunal finds that it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own. It becomes relevant only when “the rights, jurisdiction and freedoms “recognized” in the Convention are exercised in an abusive manner”¹⁰⁷.

The next issue expressly addressed by Spain was that of the relationship between Article 300 and human rights¹⁰⁸. While UNCLOS is not a human rights instrument, it must be admitted that human rights should be taken into consideration in the process of applying the Convention. This is quite apparent when considering the humanitarian dimension of the special proceedings on prompt release of vessels and its crews, in connection with alleged breaches of the dispositions of the Convention on this matter¹⁰⁹. However, the Tribunal has never ruled *in abstracto* on violations of due process and

¹⁰³ Presentation by Professor Jiménez Piernas, Counsel and Advocate of Spain, Verbatim Record, 10 October 2012 ITLOS/PV.12/C18/11, at. 11. See also, M.H. Nordquist, S. Rosenne, and L.B. Sohn, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Martinus Nijhoff, Dordrecht, 1989) at 150—152.

¹⁰⁴ Presentation by Professor Escobar, *supra* note 100.

Again in the *Duzgit Integrity* Case, in a dispute between Malta and São Tomé and Príncipe, Malta invoked Article 300 together with other disposition of UNCLOS before the Arbitral Tribunal constituted under Annex VII.

¹⁰⁵ In their Declarations, President Nelson and Judge Anderson, included arguments on the basis of the principle of good faith without however making any explicit reference to Article 300 (*supra* note 64).

¹⁰⁶ In its advisory opinion the Tribunal referred *expressis verbis* to article 300 as criteria for interpreting the margin of discretion enjoyed by a State in the process of the adoption of laws and regulations and the taking of administrative measures” (Case N° 17: *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1 February 2011, para. 230).

¹⁰⁷ Merits, Judgment, *supra* note 9, para. 137. The only argument defended by some Judges was that Article 300 could be linked to Article 2 (3) of the LOS Convention with respect to sovereignty within territorial sea being exercisable subject to the Convention and “other rules of international law” (Dissenting Opinion of Judge Jesus, para. 61; Dissenting Opinion of Judge Lucky, paras. 63—66; Separate Opinion of Judge Bougetaria, paras. 33—36).

¹⁰⁸ Presentation by Professor Escobar, *supra* note 100, at. 15—18.

¹⁰⁹ The “*Juno Trader*” and the “*Tomimaru*” Case could be mentioned. In its Separate Opinion in *Juno Trader* Case, Judge Treves examined in detail this matter: “[i]n a prompt—release case unnecessary use of force and violations of due process and of human rights in general may be relevant in various ways. In particular, lack of due process, when it consists in late communication of charges, in delay and uncertainty as to the procedure followed by the authorities, in lack of action by the authorities, may justify a claim that the obligation of prompt release has been violated even when the time elapsed might not be seen as excessive had it been employed in orderly proceedings with full respect of due process requirements. The same may apply when lack of due process is used to reach quickly the conclusion of domestic proceedings without seriously affording a possibility to consider arguments in favor of the detained vessel and crew. In both cases unnecessary use of force and violations of human rights and due process of law are elements that must also be taken into consideration in fixing a

human rights. This is merely a consequence of its specific jurisdiction as the International Tribunal for the Law of the Sea. Thereof, another controversial point of the *Louisa* Judgment was that, having established it lacked jurisdiction to entertain the case, the ITLOS made general pronouncements on obligations of States under general international human rights law¹¹⁰.

Another main issue, was the procedural dimension of the doctrine of abuse of rights as invoked by Spain. While Article 300 is a general provision applicable horizontally *vis-à-vis* the entire Convention¹¹¹ then, the principle of good faith and the prohibition of abuse of rights must be respected in the exercise of the procedural rights conferred on the Parties by the dispute settlement provisions of the Convention. In this way, Spain rejected the procedural maneuver of the Applicant’s—known as the “new case” strategy—, changing unexpectedly its arguments after the closure of the written proceedings by a new reasoning based, paradoxically, on Article 300. In its Judgment,

“The Tribunal considers that this reliance on article 300 of the Convention generated a new claim in comparison to the claims presented in the Application; it is not included in the original claim. The Tribunal further observes that it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it (see *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1992, p. 240, at p. 266, para. 67).

“[...] In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character.

“[...] The Tribunal may also refer in this connection to the jurisprudence of the Permanent Court of International Justice and the ICJ in interpreting the corresponding provisions in their Statutes and Rules. (*Prince von Pless Administration, Order of 4 February 1933*, P.C.I.J., Series A/B, No. 52, p. 11, at p. 14; *Société commerciale de Belgique, Judgment*, 1939, P.C.I.J., Series A/B, No. 78, p. 160, at p. 173; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Judgment*, I.C.J. Reports 2003, p. 161, at p. 213, para. 117)”¹¹².

The ITLOS found that recourse to Article 300 by the Applicant transformed the dispute into one of a different character. This was contrary to Articles 24 (1) and 54 of the Rules, which are considered as

bond or guarantee that can be considered as reasonable. The idea of abuse of rights is very close to that of lack of reasonableness and consideration of article 300 of the Convention should not be outside the scope of the complex process that brings the Tribunal to fixing a guarantee it considers reasonable” (*Case N°13: The “Juno Trader” Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Prompt Release, Judgment of 18 December 2004, Separate Opinion of Judge Treves, para. 5). In a similar vein, Vice-President Nelson, observed that in Article 292 “the notion of reasonableness is ...used to curb the arbitrary exercise of the discretionary power granted to coastal States” (*Case N° 6: The “Monte Confurco” Case (Seychelles v. France)*, Prompt Release, Judgment of 18 December 2000, Separate Opinion of Vice-President Nelson).

The link between UNCLOS and the International Law of Human Rights—in particular, the International Covenant on Civil and Political Rights—had been alleged later by Netherlands in the *Artic Sunrise* Case. The ITLOS adopted an Order on provisional measures under article 290(5). But the decision on the merits is still pending before the arbitral tribunal constituted under Annex VII of the Convention.

¹¹⁰ Merits, Judgment, *supra* note 9, paras. 154-155. Some Judges rejected the inclusion of these references to human rights. Dissenting Opinion of Judge Jesus, paras. 68-69; Separate Opinion of Judge Bouguetaia, paras. 9-12.

¹¹¹ As noted by Tanaka, the prohibition of abuse of rights can also be seen in provisions with regard to an abuse of legal process, Article 294 (1); arbitral refusal, Article 297 (3) (b) (ii) and (iii); and excess of jurisdiction, Article 187 (b) (ii). (Tanaka, *supra* note 4, at 213)

¹¹² Merits, Judgment, *supra* note 9, paras. 142-144. Citing *Prince von Pless Administration, Order of 4 February 1933*, P.C.I.J. Series A/B No 52, p. 14; *Société Commerciale de Belgique, Judgment*, 1939, P.C.I.J. Series A/B No 78, p. 17; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1992, p. 265, para. 63); and *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Judgment*, I.C.J. Reports 2003, p. 213, para. 117.

essential from the point of view of legal security and the good administration of justice¹¹³. Some arguments were posed as to whether the late claim on the basis of Article 300 was a new claim or an additional claim¹¹⁴. But, in any case, these Judges rejected the admissibility of the claims¹¹⁵ or supported the lack of *ius standing* by the Applicant¹¹⁶. Later, when the application of the “*Louisa*” jurisprudence to the M/V “*Virginia G*” Case was debated, Judge Ndiaye asserted that the Tribunal could not recharacterize the dispute because it would be acting *ultra vires*¹¹⁷. Then, the Tribunal was to the conclusion in the M/V “*Louisa*” Case it lacked jurisdiction *ratione materiae*:

“[...] The Tribunal therefore is of the view that article 300 of the Convention cannot serve as a basis for the claims submitted by Saint Vincent and the Grenadines.

“[...] For the foregoing reasons, the Tribunal concludes that no dispute concerning the interpretation or application of the Convention existed between the Parties at the time of the filing of the Application and that, therefore, it has no jurisdiction *ratione materiae* to entertain the present case”¹¹⁸

(2) Admissibility of the claims: the nature of the procedure and claims and the rules on diplomatic protection

Having found it lacked jurisdiction *ratione materiae*, the ITLOS stated it was not necessary to consider the additional arguments of Spain concerning jurisdiction and admissibility¹¹⁹. It excluded a new discussion on the jurisdictional requirements of the exhaustion of exchange of views under Article 283¹²⁰. But the main question is the total absence of pronouncement on admissibility issues as alleged by Spain¹²¹.

The admissibility matters were connected with the determination of the nature of the proceedings and the claims held by the Applicant. *The M/V “Louisa” Case was an ordinary contentious procedure instituted by the flag State in order to seek diplomatic protection of the crew and other persons related to the activities of the vessel, including the proprietors.* Thereof, for Spain, the conditions of the admissibility of the claims were governed by the rules of general international law on diplomatic protection and liability of the State, as confirmed by pertinent dispositions of UNCLOS and the case law of the ITLOS. In particular, the rules regarding the nationality of the claim, the exhaustion of local remedies and, in certain cases, the requirement of “clean hands”, were thoroughly applicable to the *Louisa* case. It results from these rules that the remedy to natural and juridical persons affected were, if any, procedural action before the Spanish courts with the additional

¹¹³ Merits, Judgment, *supra* note 9, para. 148. Citing *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment I.C.J., Reports 1992, 240 at 267, para. 69.

¹¹⁴ *Ibid.*, Dissenting Opinion of Judge Jesus, paras. 14-21; Dissenting Opinion of Judge Lucky, para. 46; Separate Opinion of Judge Bouguetaia, para. 21; Separate Opinion of Judge Kateka, paras. 12-14.

¹¹⁵ *Ibid.*, Dissenting Opinion of Judge Jesus, para 65.

¹¹⁶ *Ibid.*, Separate Opinion of Judge Ndiaye, paras. 126-128.

¹¹⁷ Case No 19: *The M/V “Virginia G” Case (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, Dissenting Opinion of Judge Ndiaye, para. 125.

¹¹⁸ Merits, Judgment, *supra* note 9, paras. 150-151.

¹¹⁹ Judge Ndiaye and Judge Lucky considered these questions in their Separate and Dissenting Opinion, respectively. See too, Tanaka, *supra* note 4, at 15-16.

¹²⁰ On this matter, Merits, Judgment, *supra* note 9, Separate Opinion of Judge Kateka (para. 17) and Dissenting Opinion of Judge Lucky (paras 15-21).

¹²¹ On this matter, Merits, Judgment, *supra* note 9, Separate Opinion of Judge Ndiaye (paras. 129-143).

grant of an action before the European Court of Human Rights. At the time of the closure of the hearings in October 2012 the internal criminal proceedings were ongoing and, as Spain contented, not submission for the release of the *Louisa* had been made, neither by the owners of the vessel nor by the flag State¹²².

On the contrary, from the earliest stage of the proceedings, the presentation of the case by Saint Vincent caused confusion with the procedure on prompt release under Article 292 of UNCLOS¹²³. The Applicant made recourse to the rules, principles and jurisprudence of prompt release proceedings as if they were also applicable to any other proceedings where the claims posed by the flag State were in some kind of connection with the detention of the vessel. The main purpose was the recourse to the doctrine of *functional protection* by the flag State of crew’s members regardless their nationality — as established by the ITLOS in *The M/V “SAIGA”* (N° 2) Case¹²⁴— and the invocation of the exception to the rule of exhaustion of local remedies —as supported by the ITLOS in the *Monte Confurco* Case—. However, during hearings, the representatives of the Saint Vincent progressively were in necessity to admit that the Applicant was seeking to exercise *some category of diplomatic protection on the basis of Article 300*¹²⁵.

(a) *Nationality of the claim*

The first element required to the exercise of ordinary diplomatic protection is the nationality of the victim¹²⁶. Nonetheless, the only formal link between Saint Vincent and the litigious matter was its condition as the flying State of the *Louisa*. The incertitude about the nationality of the *Gemini III* was open. The Applicant argued that *Gemini III* was a tender of the *Louisa* inextricably linked to it and so was not required to have a flag of its own. But for the Tribunal the *Gemini III* was independent¹²⁷. Spain also discussed the effective nationality of the *Louisa* on the basis of the requirement of a “genuine link” under Article 91, as complemented by Article 94, of UNCLOS.

Nonetheless, the main question was the absence of the link of nationality between the Applicant and the natural and juridical persons, mostly nationals of USA, “for whom it [was] responsible as a flag State or for whom international law gives it remedies for breaches by the Respondent in this case”¹²⁸. Firstly, the legitimization of the Applicant seemed to be conceived as an extension of the mentioned doctrine on the “functional unity” of the ship and its crew, regardless its nationality, as

¹²² Presentation by Professor Aznar, *supra* note, at 12.

¹²³ The substantive and formal requirements of the prompt release of vessels and crews proceedings, Treves, T., “The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea”, 2 *The International Journal of Marine and Coastal Law* (1996) pp. 179-200.

¹²⁴ P. Gautier, “L’Etat du pavillon et la protection des intérêts liés au navire”, in M.J. Kohen, *La promotion de la Justice, des Droits de L’homme Et du Règlement des Conflits Par le Droit International*, (Martinus Nijhoff Publisher, The Netherlands, 2007) 717; J. Verhoeven, “Diplomatic Protection by the Flag State In Favour of the Crew of a Ship”, <https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/dipl.pdf>.

¹²⁵ Presentation by Professor Nordquist, *supra* note 97, at 27.

¹²⁶ *Mavrommatis Palestine Concession, Judgment N° 2*, 1924, P.C.J.I., Series A. N° 2, 12; *Biens britanniques au Marco espagnol (Espagne/RoyanneUni)*, R.S.A., II, p. 706; *The Panevezys-Saldutiskis Railway Case, Judgment of February 28th 1939*, P.C.J.I. Series A/B, N° 76, p. 16; *Notebhom Case (second phase), Judgment of April 6th*: I.C.J., Reports 1955, p. 4.

¹²⁷ Merits, Judgment, *supra* note 9, para. 87

¹²⁸ Presentation by Professor Nordquist, *supra* note 97, at 13.

admitted by the ITLOS in prompt release proceedings. Secondly, the legitimation of the Applicant was conceived as an *actio popularis* under the customary international law of human rights, including property rights¹²⁹.

Contrary to the Applicant's allegation, Spain stated that where a State submits to the Tribunal an application on the grounds of the exercise of diplomatic protection, there is no reason whatsoever to conclude that the general rule of international law requiring a nationality link must be expected and left unapplied. The jurisprudence on functional unity adopted by the ITLOS in the *M/V "SAIGA"* (Nº2) Case¹³⁰ prompted the International Law Commission to include article 18 (Protection of Ships's Crews) in its Articles on Diplomatic Protection on 2006¹³¹. However, this provision could not be regarded as the recognition of a general rule under any circumstance¹³². According to the wording of Article 292, in prompt release proceedings the flag State could exercise a sort of functional protection over the crew regardless of nationality, but this protection only can be justified by the nature and object of this summary procedure, particularly in cases of vessels with large crews¹³³.

(b) *Exhaustion of local remedies under article 295 of UNCLOS*

In the *M/V "SAIGA"* (Nº 2) Case¹³⁴, the ITLOS state that Article 295 of the Convention refers to the rules of general international law as established in the jurisprudence of international courts and tribunal and the process of codification of international law. This disposition reads as follows:

"Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law."

It is a well-established rule of customary international law that the obligation of exhaustion of local remedies is determined by the nature of the rights claimed. Saint Vincent contended that, in this case, Spain violated Article 300 in relation to both the Applicant itself as a sovereign nation and to private individuals and corporations for whom the Applicant was responsible under the Convention and international law¹³⁵. This matter was not considered by the Tribunal, so it did not hold on the

¹²⁹ *Ibid.*, at 21. In this regard, he stated that: "any State may pursue remedies for their violation, even if the individual victim is not a national of the complaining State and the violation does not affect any other particular interest of that State. This basic right of human beings was cited in the *Barcelona Traction* case" (*Ibid.*, at 13)

¹³⁰ "[...] the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant" (*Case Nº 2: The M/V "SAIGA"* (Nº 2) Case (*Saint Vincent and the Grenadines v. Guinea*), Judgment on 5 July 1990, para. 106)

¹³¹ It reads as follows: "The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act" (Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

¹³² Counter-Memorial, *supra* note 7, para. 105.

¹³³ *Ibid.*, para. 100.

¹³⁴ *Supra* note 125 para. 96.

¹³⁵ Presentation by Professor Nordquist, *supra* note 97, at 24.

applicability of the jurisprudence of the ITLOS in the “*Camouco*” Case¹³⁶ not in prompt release but in ordinary proceedings. Nonetheless, Spain noted that the Tribunal had developed its reasoning on the matter by reference to the concept of a “jurisdictional link”¹³⁷. The jurisdictional connection between Spain and the natural or juridical persons affected in relation to the detention of the *Louisa*, was undeniable because all the relevant activities of that persons took place inside the Spanish territorial waters and in areas within the exclusive jurisdiction of Spain. So, for Spain, the doctrine of the “*Camouco*” Case on the no exhaustion of local remedies was no applicable to the *Louisa* under any circumstance¹³⁸.

CONCLUSIONS

Tough the *M/V Louisa* Case was submitted to the ITLOS by virtue of a poorly argued or a manifestly unfounded application, it was finally a real case of interest, both at the stage of the proceedings on provisional measures and on the merits. Even, it established a new precedent on the application of the doctrine of abuse of rights (Article 300 of UNCLOS) in the area of the Law of the Sea.

Regarding the ITLOS’s reasoning on jurisdictional matters, both in the Order of 23 December 2010 on provisional measures and in the Judgment of 28 May 2013 on the Merits, two main conclusions could be drawn. Firstly, the broad assertion by the Tribunal that the Convention does not preclude a declaration by virtue of Article 287 limited to a particular category of disputes or the possibility of making a declaration immediately before filing a case, could be probably in need of a major clarification and improvement by the ITLOS in the future. Particularly, regarding the validity and effects of “reservations” *ratione materiae* to the jurisdiction of the Court or Tribunal competent under provisions of Section 2, Part XV, of UNCLOS. Secondly, the debates in the *M/V “Louisa”* Case have contributed to highlighting the disagreement among the members of the Tribunal regarding both the low threshold on *prima facie* jurisdiction and on exhaustion of prior exchange of views, as applied hitherto by the Tribunal. This is a matter of interest, because they are both prominent rules governing the jurisdiction of the ITLOS, and any other forum competent, by virtue of Articles 288 (1) and 283 (1) of UNCLOS. At the same time, it should be noted that the original

¹³⁶ “[...] In the view of the Tribunal, it is not logical to read the requirement of exhaustion of local remedies or any other analogous rule into article 292. Article 292 of the Convention is designed to free a ship and its crew from prolonged detention [...] Equally, it safeguards the interests of the coastal State by providing for release only upon the posting of a reasonable bond or other financial security determined by a court or tribunal referred to in article 292, without prejudice to the merits of the case in the domestic forum against the vessel, its owner or its crew.

[...] Article 292 provides for an independent remedy and not an appeal against a decision of a national court. No limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period” (Case N° 5: *The « Camouco » Case (Panama v. France)*, Prompt Release, Judgment of 7 February 2000, paras. 57–58).

¹³⁷ *Supra* note 125, para. 100.

¹³⁸ Counter-Memorial, *supra* note 7, para. 98.

tendency pro—jurisdiction assumed by ITLOS has found its exceptions in “*Grand Prince*” and the M/V “*Louisa*” Cases¹³⁹.

More important, the jurisprudence in the M/V “*Louisa*” Case is now relied by the ITLOS as evidenced in the M/V “*Virginia G*” Case, while completed with more explicit pronunciations about the burden and standard of proof on the existence of and abuse of rights under Article 300, necessarily in connection with the exercise of the rights, jurisdiction and freedoms recognized by the UNCLOS.

“Before proceeding to the examination of the question of whether article 300 of the Convention was violated in the present case, the Tribunal finds it necessary to refer to its jurisprudence on the issue in the M/V “*Louisa*” Case. In that case, the Tribunal found that ‘it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own’ and that ‘[i]t becomes relevant only when ‘the rights, jurisdiction and freedoms recognized’ in the Convention are exercised in an abusive manner’ (*The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment of 28 May 2013, para. 137)”¹⁴⁰.

In this way, the arguments posed by Spain have been incorporated into international jurisprudence. Considering this fact and the ruling of the ITLOS in its Judgment of 28 May 2013, it could be said that the final result of the M/V *Louisa* Case was highly favourable to Spain.

¹³⁹ Escobar, *supra* note 4, at 187.

¹⁴⁰ *Supra* note 114, paras. 395-396.