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Lawrence A. Kogan on

'ARA Libertad' Case Ruling Suggests Ever-Expanding ITLOS Jurisdiction

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Introduction:

In the recently decided case of *ARA Libertad*¹, the International Tribunal for the Law of the Sea ("ITLOS")², once again, found grounds to expand its compulsory and binding subject matter jurisdiction,³ on this occasion, for the purpose of reviewing international law concepts neither expressly incorporated within the text of the United Nations Convention on the Law of the Sea ("UNCLOS", nor contained in other treaties conferring jurisdiction on the Tribunal.⁴ The decision, which also granted provisional relief notwithstanding the Applicant's arguable failure to plead sufficient law and facts supporting its allegations, has effectively overridden Respondent's sovereign domestic laws and caused potentially serious repercussions for international finance.

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- 1 See Order, *The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures* (Case No. 20) (Dec. 15, 2012), accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15_12_2012.pdf.
 - 2 ITLOS was established as an international judicial body pursuant to Annex VI of the United Nations Convention on the Law of the Sea (UNCLOS). Open to all State Parties, and potentially to all non-Parties, it functions as one of four dispute resolution mechanisms in matters concerning the Convention's interpretation and application. See UNCLOS Annex VI, Articles 1, 20, 21, accessible at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
 - 3 See The United Nations Convention on the Law of the Sea ("UNCLOS"), Article 296(1) (Dec. 10, 1982, 1833 U.N.T.S. 397) accessible at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. See also Jeremy Rabkin, *UNCLOS: Why the Precedents for Compulsory Arbitration Aren't Reassuring*, *Opinio Juris* (June 21, 2012), accessible at: <http://opiniojuris.org/2012/06/21/unclos-why-the-precedents-for-compulsory-arbitration-arent-reassuring/> (arguing that despite the narrow scope of UNCLOS Article 292 ('Prompt release of vessels and crews') which supports a 'narrow reading' of said provision, the ITLOS' majority nevertheless employed an "unrestricted interpretation" [actually, non-restrictive interpretation] of said provision in the 'prompt release' *M/V Saiga Case* over the dissenting opinions of western nation judges which the tribunal failed to repudiate in the subsequently decided *Camouco Case*, strongly suggesting that "there remains a risk... that ITLOS... will... over-reach in future 'prompt release' cases"). See also Judgment, *The M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release* (Case No. 1) at pars. 75-77, accessible at: <http://www.itlos.org/index.php?id=59&L=0#c566>; *Collective Dissenting Opinion of Vice President Wolfrum and Judge Yamamoto* at pars. 14-18, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_1/judgment_do_wolfrum_yamamoto_041297_eng.pdf; *Collective Dissenting Opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye* at pars. 23-26, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_1/judgment_do_park_nelson_chrao_vukas_ndiaye_041297_eng.pdf; Judgment, *The 'Camouco' Case (Panama v. France), Application for Prompt Release* (Case No. 5) (Feb. 7, 2000) at par. 63, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_5/Judgment.07.02.00.E.pdf.
 - 4 "The jurisdiction of the Tribunal comprises all disputes submitted to it in accordance with the Convention. It also extends to all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. To date, ten multilateral agreements have been concluded which confer jurisdiction on the Tribunal". See International Tribunal for the Law of the Sea, *The Tribunal*, accessible at: <http://www.itlos.org/index.php?id=15>.

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The ARA Libertad case was initiated by the Government of the Republic of Argentina during October 2012⁵ in response to the attempted forced boarding, seizure and detention and the arrest of the commander of an Argentine warship (Training Vessel, Frigate ARA Libertad)⁶ that had been anchored with the consent of the Government of the Republic of Ghana at the Ghanaian Port of Tema incident to a scheduled and authorized official State visit.⁷ These acts had been committed by Ghanaian port and maritime authority officials implementing a Ghanaian national court order issued in a private litigation commenced by the foreign corporate beneficial owner (Cayman Island-based investment firm, NML Capital Limited) of defaulted Argentine sovereign bonds to enforce a previously awarded (December 2006) final US Federal District Court judgment that was later reaffirmed in a (December 2011) English Consent Order.⁸ On November 14, 2012, the Government of Argentina filed with the ITLOS a 'Request for the Prescription of Provisional Measures' pursuant to UNCLOS Article 290(5) pending the constitution of an arbitral tribunal and institution of proceedings on the merits under UNCLOS Annex VII. This request aimed to secure the Argentine warship's resupply and unconditional release from the Tema port and the jurisdictional waters of Ghana.⁹ The Tribunal ultimately found in Argentina's favor and unanimously prescribed a provisional remedy that mirrored its request.¹⁰ The ARA Libertad was thereafter observed departing Ghana on December 19, 2012.¹¹

5 The Government of Argentina submitted a "Notification and Statement of Claims dated 29 October 2012...to Ghana on 30 October 2012 instituting arbitral proceedings under Annex VII to the Convention in a dispute concerning the "detention by Ghana [...] of the warship 'ARA Fragata Libertad'" of Argentina." See Order, *The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures* supra at Preamble par. 5.

6 See Order, *The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures* supra at pars. 13, 26, 76, 84.

7 *Id.*, at pars. 38, 42.

8 See The "ARA Libertad" Case, *Annexes to the Request for Provisional Measures submitted by Argentina*, at Annex A(3), accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_annexes_A-K.pdf. On December 29, 2012, Argentina was reported to have "urg[ed] a U.S. appeals court to reverse an order requiring the country to pay \$1.33 billion to creditors who did not participate in its two debt restructurings, a legal case that could have huge ramifications for global debt markets...The case stems from Argentina's \$100 billion sovereign debt default 11 years ago. Argentina is trying to avoid paying the holdout creditors, who refused to take part in massive debt restructurings in 2005 and 2010." See Nate Raymond and Jonathan Stempel, *Argentina Asks U.S. Court to Block Payouts for Debt Holdouts*, Thompson Reuters (Dec. 29, 2012), accessible at: http://newsandinsight.thomsonreuters.com/New_York/News/2012/12_-_December/Argentina_asks_U_S_court_to_block_payouts_for_debt_holdouts/. See also Agustino Fontevicchia, *The Real Story Of How A Hedge Fund Detained A Vessel In Ghana And Even Went For Argentina's 'Air Force One'*, Forbes (10/5/12), accessible at: <http://www.forbes.com/sites/afontevicchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/>.

9 See The "ARA Libertad" Case, *Request for Provisional Measures submitted by Argentina* (Nov. 14, 2012) at pars. 2, 28, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf.

10 "THE TRIBUNAL...unanimously Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention: Ghana shall forthwith and unconditionally release the frigate ARA Libertad, shall ensure that the frigate ARA Libertad, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate ARA Libertad is resupplied to that end." See Order, *The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures* supra, at par. 108(1).

11 See Chris Stein, *Argentina Naval Ship Leaves Ghana After Detention*, AFP (Dec. 19, 2012), accessible at: <http://www.google.com/hostednews/afp/article/ALeqM5ggZQh9GvLL1UJV9A4K2parHTqxmA?docId=CNG.0b0d9d5a4086bbeffe>

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The Reasoning Underlying the Tribunal Majority's Decision:**Grounds for Finding Prima Facie Jurisdiction to Prescribe Provisional Measures**

The Tribunal majority's decision to prescribe a provisional remedy pursuant to UNCLOS Article 290(5)¹² was based on its initial determination and satisfaction "that prima facie the Annex VII arbitral tribunal would have jurisdiction" in the matter.¹³ While such determination did not require it to "establish definitively the existence of the rights claimed by Argentina," the majority reasoned that the Tribunal was obliged to ensure that "the provisions invoked by the Applicant appear[ed] prima facie to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded".¹⁴ In this regard, although Argentina had alleged that the Tribunal possessed prima facie jurisdiction to prescribe a provisional remedy because Ghana had violated multiple UNCLOS provisions, including Articles 18(1)(b) (Argentina's right of innocent passage through Ghana's territorial sea, to and from Ghana's internal waters), 32 (the sovereign immunity of Argentina's warship operated for non-commercial purposes, as determined under customary or general international laws beyond the text of the Convention), 87(1)(a) (Argentina's right of freedom of navigation through the high seas), and 90 (Argentina's right of navigation on the high seas),¹⁵ the Tribunal's majority concluded that Articles 18(1)(b), 87 and 90 did "not relate to the immunity of warships in internal waters and therefore [did] not seem to provide a basis for prima facie jurisdiction of the Annex VII arbitral tribunal, within the meaning of UNCLOS Article 290(5)."¹⁶

Instead, the Tribunal's majority found that only UNCLOS Article 32¹⁷ "afford[ed] a basis on which prima facie jurisdiction of the Annex VII arbitral tribunal might be founded."¹⁸ It

[433604c641a2e.191](http://www.reuters.com/article/2012/12/19/us-ghana-argentina-ship-idUSBRE8B11AF20121219); *Detained Argentine Naval Ship Leaves Ghana*, Reuters (Dec. 19, 2012), accessible at: <http://www.reuters.com/article/2012/12/19/us-ghana-argentina-ship-idUSBRE8B11AF20121219>.

12 See UNCLOS Article 290(5).

13 See Order, *The "ARA Libertad" Case (Argentina v. Ghana)*, *Provisional Measures* supra at pars. 37, 67.

14 *Id.*, at par. 60.

15 See *The "ARA Libertad" Case, Request for Provisional Measures submitted by Argentina* supra at par. 23.

16 See Order, *The "ARA Libertad" Case (Argentina v. Ghana)*, *Provisional Measures* supra at par. 61.

17 UNCLOS Article 32 provides that, "With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes." UNCLOS Article 30 provides that, "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." UNCLOS Article 31 provides that, "The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law." Article 32's reference to "exceptions as are contained in subsection A" refers to subsection A of UNCLOS Section 3 which sets forth rules applicable and exceptions to the right of 'All Ships' to innocent passage in the territorial seas of a coastal state. Article 32 is located within subsection C of

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reasoned that Article 32's prescription that "nothing in this Convention affects the immunities of warships" was not geographically limited in scope,¹⁹ Article 32's placement within Part II of the Convention relating mostly to the territorial sea did not preclude its application to all maritime areas as evidenced by "the definition of warships provided for in article 29",²⁰ and that the Parties' opposing submissions and supporting arguments concerning the applicability of UNCLOS Article 32²¹ to the matter reflected the existence of an apparent dispute and "difference of opinion...between the Parties' concerning the applicability of [UNCLOS Article 32 of] the Convention".²²

The Tribunal majority's decision to prescribe a provisional remedy pursuant to UNCLOS Article 290(5), furthermore, was based on its initial determination that Argentina was eligible to initiate a request for provisional measures because it had previously satisfied its obligation under Article 283(1). The Tribunal majority reasoned, in other words, that Argentina had 'exchanged views' with Ghana in an effort to resolve the dispute,²³ which, in any event, it was not obligated to continue if "it conclude[d] that the possibilities of reaching agreement ha[d] been exhausted".²⁴

Grounds for Prescribing Provisional Measures

The Tribunal's majority found Convention authority upon which to base its prescription of provisional measures to exist partly within Article 290(1), which permits a court or tribunal already constituted that considers itself to possess prima facie jurisdiction under UNCLOS Part XV to prescribe appropriate provisional measures in order "to preserve

UNCLOS Section 3, which sets forth rules applicable to warships and other government ships operation for non-commercial purposes.

18 *Id.*, at par. 67.

19 *Id.*, at par. 63.

20 *Id.*, at par. 64.

21 UNCLOS Article 32 provides that, "With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."

UNCLOS Article 30 provides that, "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." UNCLOS Article 31 provides that, "The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law." Article 32's reference to "exceptions as are contained in subsection A" refers to subsection A of UNCLOS Section 3 which sets forth rules applicable and exceptions to the right of 'All Ships' to innocent passage in the territorial seas of a coastal state. Article 32 is located within subsection C of UNCLOS Section 3, which sets forth rules applicable to warships and other government ships operation for non-commercial purposes.

22 See Order, *The "ARA Libertad" Case (Argentina v. Ghana)*, *Provisional Measures* supra at pars. 65-66.

23 *Id.*, at pars. 69, 72.

24 *Id.*, at par. 71.

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the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.”²⁵

It then concluded that the prior activities undertaken by Ghana's Port Authority agents without Argentina's consent, including their detention, and attempts to forcibly board and move and prosecute the commander²⁶ of the Frigate ARA Libertad,²⁷ a warship which UNCLOS Article 29 recognizes as an expression of Argentina's sovereignty,²⁸ constituted a violation by Ghana of Argentina's sovereignty and the immunities Argentina (here, the ARA Libertad and its military staff) enjoys even in internal waters, including from prosecution, recognized as existing “under general international law”,²⁹ impaired the Parties' ability to “settle any dispute between them concerning the interpretation or application of this Convention by peaceful means”,³⁰ and served as a potential “source of conflict that may endanger friendly relations among States”.³¹ The Tribunal majority effectively ruled that Ghana's actions threatened to prejudice Argentina's rights, and consequently, impair “the preservation of the respective rights of the Parties”.³²

In addition, the Tribunal's majority found that Convention authority upon which to base its prescription of provisional measures exists partly within Article 290(5),³³ which permits the Tribunal to prescribe provisional measures if it “considers...that the urgency of the situation so requires.”³⁴ It then concluded that “the possibility that such actions may be repeated, demonstrate[d] the gravity of the situation and underline[d] the urgent need for measures pending the constitution of the Annex VII arbitral tribunal” - ³⁵ i.e., measures “that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties”.³⁶

25 *Id.*, at par. 74; UNCLOS Article 290(1).

26 *Id.*, at par. 84.

27 *Id.*, at par. 76.

28 *Id.*, at pars. 93-94.

29 *Id.*, at pars. 95, 98.

30 *Id.*, at par. 96.

31 *Id.*, at par. 97.

32 *Id.*, at pars. 74, 89, 90, 92, 100.

33 *Id.*, at par. 100.

34 See UNCLOS Article 290(5).

35 See Order, *The “ARA Libertad” Case (Argentina v. Ghana), Provisional Measures* supra at pars. 82, 99.

36 *Id.*, at par. 100.

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Individual Jurists' Competing Views Regarding Tribunal Prima Facie Jurisdiction to Entertain Provisional Measure Requests:

By concluding that the Annex VII tribunal not then constituted would have prima facie jurisdiction to prescribe a provisional remedy in this matter, within the meaning of UNLCOS Article 290(5), however, the Tribunal majority's Order failed to explain how it reached such determination without first addressing the Convention's more fundamental preconditions for finding ab initio that an Annex VII tribunal would have original jurisdiction prima facie to decide on the merits of the case under UNCLOS Part XV, within the meaning of Article 288(1).³⁷ It also failed to discuss the relationship between these two provisions.

These issues were more extensively addressed by the Tribunal's individual jurists. Indeed, the separate declaration and two of the opinions that accompanied the majority decision in this case strongly suggest that divergent views continue to prevail among Tribunal Members concerning the scope and extent of the Tribunal's prima facie jurisdiction to entertain a request for provisional measures.

ITLOS Prima Facie Jurisdiction is Limited

Two of the Tribunal's judges (Judges Wolfrum and Cot) disagreed with the Tribunal majority's finding on this point, strongly suggesting that the majority had not exercised sufficient judicial restraint – i.e., they may have overreached.³⁸ “Article 290, paragraph 5, of the Convention entrusts the Tribunal with the task of establishing whether prima facie an arbitral tribunal to be established has jurisdiction according to article 288 of the Convention³⁹...The Tribunal does not have to establish that the arbitral tribunal has jurisdiction to entertain the case on the merits”.⁴⁰ In their view, the Tribunal was required to, but did not, undertake three steps in order to ascertain whether such arbitral tribunal has jurisdiction prima facie to hear the matter. A Tribunal must decide: 1) which legal threshold applies; 2) whether a dispute exists between the Parties; and 3) whether the

37 The Tribunal made reference to Article 288(1) only insofar as it was quoted in the context of repeating Ghana's allegations. *Id.*, at par. 58.

38 See The “ARA Libertad” Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* at pars. 1-2, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Wolfrum-Cot_orig-no_gutter.pdf. “In our view the Tribunal does not construct its reasoning on this central issue as predetermined by the jurisprudence of the International Court of Justice and of this Tribunal.” *Id.*

39 *Id.*, at par. 2.

40 *Id.*, at par. 10. According to these judges, “the Tribunal has a more limited function” under Article 290(5) than it does generally under Article 288(1). *Id.*, at par. 11.

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Applicant's discourse with the Respondent presented facts and law indicating the presence of prima facie jurisdiction.⁴¹

According to Judges Wolfrum and Cot, the jurisprudence of the International Court of Justice, which applies equally to the decisions under UNCLOS article 290(1) and (5), is relevant for purposes of determining such a threshold. Such jurisprudence reflects that an international court or tribunal may not assume prima facie jurisdiction based merely on an applicant's invocation of "provisions which, read in an abstract way, may provide theoretically a basis for the jurisdiction of the court or tribunal in question."⁴² Rather, it instructs an international court or tribunal to "take into account...on a case-by-case basis...the facts which are known to it at the moment of deciding on provisional measures and to consider whether on this basis, together with the legal basis invoked by the applicant, prima facie jurisdiction on the merits may be established."⁴³ In other words, "the Tribunal has to exercise some restraint in questioning prima facie jurisdiction of the other court or tribunal...[o]ut of respect for [it]."⁴⁴ Such judicial deference reflects, in part, the Tribunal's interest in not having any provisional measure that it prescribes subsequently modified or revoked by the arbitral tribunal once constituted.⁴⁵

More importantly, however, such judicial deference reaffirms "the competences of the Tribunal under article 288 of the Convention [which] are limited to disputes concerning the interpretation and application of the Convention".⁴⁶ Thus, the Tribunal must first determine that the Parties have affirmatively shown that a legal 'dispute' exists between them.⁴⁷ The term 'dispute' was previously defined by the Tribunal, in *Southern Bluefin Tuna Cases*,⁴⁸ consistent with the jurisprudence of the International Court of Justice ("ICJ") and Permanent Court of International Justice ("PCIJ"), as a "disagreement on a

41 *Id.*, at par. 11.

42 *Id.*, at par. 16. See also The M/V "Louisa" Case, *Dissenting Opinion of Judge Wolfrum* at par. 12, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Dissenting_Opinion_of_Judge_Wolfrum_elec_signed_corr_for_publication.pdf.

43 See The "ARA Libertad" Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* supra at par. 16. See also The M/V "Louisa" Case, *Dissenting Opinion of Judge Wolfrum* supra, at par. 12.

44 See The "ARA Libertad" Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* supra at pars. 5, 10. See also The M/V "Louisa" Case, *Dissenting Opinion of Judge Wolfrum* supra, at par. 7.

45 *Id.*; UNCLOS Article 290(5), last sentence.

46 See The "ARA Libertad" Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* supra at par. 6. "Such limitation is the counterpart of and in fact balances the obligatory character of the dispute settlement system under Part XV of the Convention." *Id.* See also The M/V "Louisa" Case, *Dissenting Opinion of Judge Wolfrum* supra, at par. 14.

47 See The "ARA Libertad" Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* supra at pars. 17, 21.

48 See International Tribunal for the Law of the Sea, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)* Order (Aug. 27, 1999) at par. 44, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf.

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point of law or fact, a conflict of legal views or of interests” that “must be shown [by] the claim of one party [that it] is positively opposed by the other”.⁴⁹

In ARA Libertad, the Tribunal majority found that the dispute before the Tribunal and the Annex VII tribunal was that involving “the issue of immunity from jurisdiction and enforcement of warships in ports [which is] governed by public international law, as stated inter alia by the 1982 Convention...[and]...also by those other rules of international law referred to in article 293 of the Convention.”⁵⁰ It was not the “dispute between NML, claimant, and the Argentine Republic...[which]...is subject to private law and private international law...[and]...is governed by the law of the State of New York, the law of England or the law of Ghana.”⁵¹

Having confirmed the existence of a legal dispute between the Parties the Tribunal’s majority was then required to ascertain the scope of the dispute in light of the scope of the Tribunal’s jurisdiction. In light of ICJ jurisprudence embraced by the Tribunal, which holds that “the instrument invoked by the parties conferring jurisdiction [must] ‘appear[], prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded’”⁵², Judges Wolfrum and Cot found that the dispute between the Parties did not fall within the scope of the Tribunal’s jurisdiction. Article 288’s mandate to the Tribunal is limited - it is “only to decide on disputes concerning the interpretation and application of the Convention.”⁵³ While it is true that a court or tribunal having jurisdiction under Article 288(1) may, pursuant to UNCLOS Article 293(1), apply to a dispute general international law not incompatible with the Convention,⁵⁴ it is not true that “[a] dispute concerning the interpretation and application of a rule of customary law...[by itself]...triggers the competence of the Tribunal”.⁵⁵ This does not occur, “unless such rule of customary international law has been incorporated in the Convention.”⁵⁶

49 *Id.*, at par. 21, quoting *Mavrommatis Palestine Concessions (Greece v. Britain)*, Judgment No. 2, (1924), P.C.I.J., Series A, No. 2, p. 11, accessible at: http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm; *South West Africa, Preliminary Objections*, Judgment (Ethiopia v. South Africa; Liberia v. South Africa), I.C.J. Reports (1962), p. 328, accessible at: <http://www.icj-cij.org/docket/files/46/4887.pdf>.

50 *Id.*, at par. 20.

51 *Id.*, at par. 19. See also The “ARA Libertad” Case, *Separate Opinion of Judge Lucky* supra at par. 35.

52 *Id.*, at par. 13, paraphrasing and quoting International Court of Justice, *Fisheries Jurisdiction Cases (United Kingdom of Great Britain and Northern Ireland v. Iceland) Interim Protection*, Order (Aug. 17, 1972) I.C.J. Reports 1972 at p. 16, par. 17, accessible at: <http://www.icj-cij.org/docket/files/55/5695.pdf>. See also The M/V “Louisa” Case, *Dissenting Opinion of Judge Wolfrum* supra, at par. 10.

53 *Id.*, at par. 7.

54 See UNCLOS Article 293(1).

55 See The “ARA Libertad” Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* supra at par. 7.

56 *Id.*

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According to Judges Wolfrum and Cot, since the principle governing internal waters which UNCLOS Article 2(1) “equates...with the land territory...is the sovereignty of the coastal State concerned”⁵⁷...limitations of the coastal State[s] sovereignty over internal waters cannot be assumed.”⁵⁸ Therefore, it cannot be assumed that “all activities of the coastal State in its internal waters and its ports are governed by the Convention and accordingly come under the jurisdiction of the Tribunal.”⁵⁹ The travaux préparatoires of the Convention and the legislative history concerning the treatment of internal waters instead confirm that “internal waters in principle are not covered by the Convention but by customary international law”.⁶⁰ In any event, Argentina failed to raise these points and present any contrary evidence in its request for provisional measures and the Tribunal majority failed to directly address this issue in its Order.

Furthermore, these judges found generally that “the question of the immunity of warships in foreign internal waters, including ports, is a rule of customary international law.”⁶¹ This principle was recently affirmed by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* Judgment,⁶² which observed that, “the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts”.⁶³

Moreover, these judges concluded that the Tribunal majority should have applied Article 31 of the Vienna Convention on the Law of Treaties to properly interpret “the text, context, object and purpose as well as the legislative history of [UNCLOS Article 32]”.⁶⁴ Had they done so, the Order would have reflected that the wording of UNCLOS 32 takes the immunity of warships for granted and “makes it plain that this provision does not establish the immunity of warships.”⁶⁵ In their view, Article 32 “constitutes a

57 *Id.*, at par. 24.

58 *Id.*, at par. 25.

59 *Id.*, at par. 34.

60 *Id.*, at pars. 26-34.

61 *Id.*, at par. 7.

62 See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* Judgment (Feb. 3, 2012), accessible at:

<http://www.icj-cij.org/docket/files/143/16883.pdf>.

63 See The “ARA Libertad” Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* supra at par. 20, quoting *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* Judgment supra, at par. 113. “Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.” See *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment supra, at par. 113.

64 See The “ARA Libertad” Case, *Joint Separate Opinion of Judge Wolfrum and Judge Cot* supra, at par. 40.

65 *Id.*, at par. 41.

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reference rather than a regulation in itself”, and thereby “corresponds to the last preambular paragraph of the Convention, which states: ‘Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law’”.⁶⁶ In addition, since Article 32 does not contain a regulation on immunity,⁶⁷ unlike Article 95 which is located in a different section of the Convention,⁶⁸ the limitations and exceptions to immunity that Article 32 addresses⁶⁹ are either those specifically referred to in “articles 30 and 31 and in subsection A of Section 3 (Innocent Passage in the Territorial Sea)”,⁷⁰ or those based “in customary international law and not in the Convention.”⁷¹

Moreover, Judges Wolfrum and Cot found that Article 32’s placement within Section 2 of the Convention focused on innocent passage in the territorial sea “means prima facie that this provision is meant to be applicable in the territorial sea only. One cannot disregard the location of a provision and the impact this location may have on the interpretation of the said regulation easily.”⁷² They also found that Article 32’s omission of the specific language contained in Article 29 – “for purposes of this Convention, ‘warship’ means...” – indicates that “the reference to the Convention has a different meaning in the context of [A]rticle 32”.⁷³

Lastly, these judges found that the legislative history of Article 32 supports their reading of such provision.⁷⁴ It “is well established in customary international law and recognized in legal doctrine...[t]hat warships in internal waters enjoy immunity from the exercise of coastal State jurisdiction, which includes immunity from judicial proceedings or any enforcement measure”.⁷⁵ However, this principle is not “being incorporated in the Convention” generally,⁷⁶ and “Article 32 of the Convention does not indicate that through it the customary international law is being incorporated into the Convention. It simply takes the immunity of warships as a fact.”⁷⁷

66 *Id.*

67 *Id.*, at par. 43.

68 UNCLOS Article 95 provides that, “Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.” It is located in Section 1, ‘General Provisions’ of Part VII, ‘High Seas’ of the UNCLOS.

69 *Id.*, at par. 42.

70 *Id.*, at par. 44. “[T]he Convention does not contain any further exceptions for the immunity of warships. Therefore it is unsustainable to conclude from this reference in article 32 of the Convention to the potential sources of exceptions that article 32 of the Convention is to be applied beyond the territorial sea.” *Id.*

71 *Id.*, at par. 43.

72 *Id.*, at par. 45.

73 *Id.* Thus, these judges argued that the Order “should have considered what it means to attribute a wider scope of application to article 32 of the Convention.” *Id.*

74 *Id.*, at par. 46.

75 *Id.*, at pars. 47-48.

76 *Id.*, at par. 7.

77 *Id.*, at par. 50.

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Consequently, according to Judges Wolfrum and Cot, the Tribunal majority's interpretation of UNCLOS Article 32 as incorporating such customary international law unnecessarily and improperly expands the scope of the Tribunal's competence and jurisdiction, and thereby, potentially undermines the understanding reached by UNCLOS Parties and their respect for the Convention's compulsory but limited dispute settlement system.⁷⁸

Judge Wolfrum and Cot's opinion also addressed the issue of procedural estoppel and the related concept of detrimental reliance,⁷⁹ which must be strictly construed,⁸⁰ in the context of Ghana's ability to "object[] to the jurisdiction of the Annex VII tribunal and to the provisional measures th[e] Tribunal is entitled to prescribe".⁸¹ It found that Ghana was estopped from presenting any objection on the matter⁸² because of the government's conflicting legal positions concerning the international legal obligations Ghana owed to Argentina,⁸³ and its prior assurances to Argentina via diplomatic notes and Argentina's reliance upon them.⁸⁴

The position of Judges Wolfrum and Cot on the issue of estoppel was challenged by Judge Rao in his separate opinion.⁸⁵ After noting that the Order had not addressed whether "the doctrine of estoppel could also be invoked as a ground for opposing the judicial proceedings",⁸⁶ Judge Rao concluded that, "[e]ven if the doctrine of estoppel c[ould] be relied upon on the facts of this case, it may not have [had] a bearing on the prima facie jurisdiction of the Annex VII arbitral tribunal."⁸⁷ According to Judge Rao, the "Convention does not appear to support th[e] view...that the Tribunal can prescribe appropriate provisional measures since Ghana is estopped from presenting any

78 "Any attempt to broaden the jurisdictional power of the Tribunal and that of arbitral tribunals under Annex VII going beyond what is prescribed in article 288 of the Convention is not in keeping with the basic philosophy governing the dispute settlement system of the Convention. It undermines the understanding reached at the Third UN Conference on the Law of the Sea, namely that the dispute settlement system under the Convention will be mandatory but limited as far its scope is concerned. This limitation is not only reflected in the wording of article 288 of the Convention but equally in Section 3 of Part XV enumerating various limitations and exceptions. In our view this fundamental consideration has not been taken into account by the Order in interpreting article 32 of the Convention". *Id.*, at par. 6.

79 *Id.*, at pars. 60-62.

80 *Id.*, at par. 67.

81 *Id.*, at par. 59.

82 *Id.*, at pars. 58, 69.

83 *Id.*, at pars. 53-55.

84 *Id.*, at pars. 67-68.

85 See The "ARA Libertad" Case, *Separate Opinion of Judge Rao*, accessible at:

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15_12_2012_SepOp_Ch_Rao_E_.pdf.

86 *Id.*, at par. 9.

87 *Id.*, at par. 13.

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objection for such prescription in the particular circumstances of this case.”⁸⁸ Rather, in his estimation, the argument of estoppel or waiver is more appropriately addressed at the merits stage.⁸⁹

ITLOS Imposes a Low Threshold for Prima Facie Jurisdiction

According to Judge Paik, provisional measures proceedings entail “a rather low threshold of prima facie jurisdiction⁹⁰ [that] is balanced by more stringent requirements for the prescription of such measures, such as those of urgency and irreparability.”⁹¹ Thus, his opinion focuses mostly on the bases for granting the requested provisional measure.

In his view, urgency and irreparability are measured by reference to several factors, including: 1) “the nature of the rights or legal interests in respect of which the request for provisional measures is made”⁹²; 2) whether “prejudice to the rights of the parties is likely to occur before an arbitral tribunal has been constituted and become functional”;⁹³ 3) “the existence or otherwise of commitments or assurances given by the parties that an action prejudicial to the rights of the parties will not be taken”;⁹⁴ and 4) whether the measures requested “preserve the respective rights of the parties to the dispute” and “prevent...irreparable prejudice or harm to th[ose] rights...from occurring.”⁹⁵

In Judge Paik’s estimation, the Order demonstrates that the first factor was satisfied.⁹⁶ In his view, the Order reflects the Tribunal majority’s understanding that “Argentina[’s]...right...to enjoy the immunity of a warship in the port of a foreign State” was at stake, and its recognition that such right, which “constitutes one of the most important pillars of the ordre public of the oceans...[is]...clearly established in

88 *Id.*

89 *Id.*, at p. 14.

90 See The “ARA Libertad”, *Declaration of Judge Paik* at par. 1, accessible at:

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Paik_E_orig-no_gutter.pdf. “The threshold of prima facie jurisdiction is rather low in the sense that all that is needed, at this stage, is to establish that the Tribunal ‘might’ have jurisdiction over the merits. As long as the Tribunal finds that the Applicant has made an arguable or plausible case for jurisdiction on the merits, the requirement of prima facie jurisdiction should be considered to have been met.” See The M/V “Louisa” Case, *Dissenting Opinion of Judge Paik* at par. 7, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Separate_Opinion_of_Judge_Paik_electronically_signed.pdf.

91 See The “ARA Libertad”, *Declaration of Judge Paik* supra, at par. 1.

92 *Id.*, at par. 2.

93 *Id.*, at par. 3.

94 *Id.*, at par. 4.

95 *Id.*, at par. 5.

96 “[The] nature of the right and of its subject-matter suggests an element of urgency in the present case.” *Id.*, at par. 2.

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international law”.⁹⁷ In addition, it reflects the Tribunal majority’s understanding that a “warship is an expression of the sovereignty of the State and an instrument of war...any dispute involving [which] has the potential to disrupt peace and security”.⁹⁸ Judge Paik also found that the second factor was satisfied due to the existence of several ongoing and pending legal proceedings in Ghana related to the frigate ARA Libertad the outcome and finality of which were “unknown” and which “ha[d] the potential further to aggravate the situation”.⁹⁹ Furthermore, Judge Paik found that the third factor was satisfied, because the Ghana Port and Harbour Authority’s affidavit, which confirmed the warship’s access to water and electricity and the crew’s protection against harassment or psychological aggression, could not assure the ARA Libertad or its crew that they were “safe from further measures of constraint that might be ordered by the courts of Ghana.”¹⁰⁰ Moreover, Judge Paik found that the fourth factor was satisfied, because of the nature of the rights at stake and the likelihood that further violations of such rights would render any material reparation of them potentially insufficient to prevent irreparable harm.¹⁰¹ Consequently, in his view, the Tribunal possessed prima facie jurisdiction to consider the granting of a provisional measure because “the requirements for the prescription of provisional measures, in particular those of urgency and irreparability, [had been]...met in this case.”¹⁰²

Lastly, in Judge Paik’s view, the most important factor that a Tribunal should consider prior to determining the content of possible provisional measures¹⁰³ is whether the desired measure would “preserv[e] the ‘respective’ rights of...both parties...to the dispute”.¹⁰⁴ According to Judge Paik, “[p]rovisional measures that preserve the rights of one party but prejudice those of the other party cannot be considered appropriate”.¹⁰⁵ Since the facts had revealed that Argentina, unlike Ghana, had clearly identified those of its rights that needed to be preserved, the judge concluded that “[t]he unconditional release of the ARA Libertad” would preserve the rights of Argentina without affecting or prejudicing those of Ghana.¹⁰⁶

97 *Id.*

98 *Id.*

99 *Id.*, at par. 3.

100 *Id.*, at par. 4.

101 *Id.*, at par. 5.

102 *Id.*, at par. 7.

103 *Id.*, at par. 8.

104 *Id.*, at par. 9.

105 *Id.*

106 *Id.*

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The separate opinion of Judge Lucky¹⁰⁷ reflects that he, as well, subscribes to the more permissive view towards ITLOS prima facie jurisdiction. According to Judge Lucky, since “international law and the relevant articles in the Convention should be considered as a whole...[UNCLOS A]rticle 32 can be deemed to include internal waters...[even if it does] “not explicitly exclude the immunity of warships in internal waters”.¹⁰⁸ He believes that such a “pragmatic approach”, which takes into account “the circumstances of the case”, is called for “where the law is silent, in order to enable the Convention’s provisions to be interpreted “in congruence with other rules of international law which guarantee such immunity”.¹⁰⁹ Consequently, despite the absence within UNCLOS of any express incorporation of general or customary international law relating to such issues, Judge Lucky “would hold that the [the Argentine warship] ARA Libertad has the right of immunity in the internal waters of Ghana, and that a wide interpretation of [Article 32] is suitable.”¹¹⁰

The Judge based his conclusion on the following reasoning. He agreed that, prior to granting a request for provisional measures, the Tribunal “must ensure that prima facie the arbitral tribunal which is to be constituted under Annex VII would have jurisdiction over the dispute.”¹¹¹ In doing so, the Tribunal must be careful “not [to] encroach upon the jurisdiction of the Annex VII arbitral tribunal...[by]...determin[ing] any contentious issue on the merits of the case”.¹¹² The Judge also agreed that, “pending the constitution of an arbitral tribunal to which the dispute is being submitted...the Tribunal may prescribe provisional measures...[pursuant to]...Article 290(5)...if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.”¹¹³ Furthermore, he agreed that, different legal standards of proof apply to prima facie jurisdiction and jurisdiction on the merits determinations.¹¹⁴

According to the Judge, the Tribunal was satisfied that Argentina had identified a legal basis giving rise to a claim under the Convention, which entailed “a dispute concerning the interpretation or application of the Convention”, within the meaning of Article 288(1).¹¹⁵ In his view, since “the parties ha[d] presented differing arguments on the

107 See The “ARA Libertad” Case, *Separate Opinion of Judge Lucky*, accessible at:

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Ord_15.12.2012_SepOp_Lucky_E_orig-no_gutter.pdf.

108 *Id.*, at par. 38.

109 *Id.*

110 *Id.*

111 *Id.*, at par. 5.

112 *Id.*, at par. 7.

113 *Id.*, at par. 8.

114 *Id.*, at par. 11.

115 *Id.*, at pars. 6, 11.

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scope of the application of [A]rticle 32 of the Convention [i.e., with respect to the issue of immunities], which confirmed the existence of “a dispute over the interpretation or application of [UNCLOS Article 32]”,¹¹⁶ it [was] necessary...[for an Annex VII arbitral tribunal¹¹⁷]...to examine the relevant articles in the Convention...including Article 32]...to determine whether they are interrelated.”¹¹⁸

Moreover, Judge Lucky opines that he would have gone further than did the Tribunal's majority by finding the existence of prima facie jurisdiction based on the interpretation or application of other Convention provisions. For example, the Judge would have ruled that Ghana, “by preventing the vessel from leaving its berth to proceed as innocently as it came...[had also]...depriv[ed] the ARA Libertad of its rights under articles 18, 87(1) and 90 of the Convention”¹¹⁹ which, presumably, would have vested the Tribunal with prima facie jurisdiction to consider the Parties' disputed interpretations of articles 18, 87(1) and 90 of the Convention.¹²⁰

Conclusion:

The recent ITLOS decision in ARA Libertad reflects the ongoing effort of the Tribunal's jurists to expand the international jurisdiction, influence and impact of this UNCLOS-related body,¹²¹ which has rendered decisions in only twenty cases as a selected alternative dispute settlement forum since its formation sixteen years ago.¹²² Unfortunately, such ambitiousness, on this occasion, has come at the expense of

116 *Id.*

117 *Id.*, at pars. 24.

118 *Id.*, at pars. 13, 27.

119 *Id.*, at pars. 26, 28-30.

120 *Id.*, at par. 29.

121 “*The International Tribunal for the Law of the Sea is a well-oiled piece of machinery at the disposal of all States involved in maritime activities.* Throughout the...years since its establishment in Hamburg, it has proven its ability to react promptly to requests for urgent decisions and expeditiously and studiously to requests for decisions in less urgent and more complicated cases. In all cases it has become well-known for its fairness and user-friendliness. *The Tribunal could, however, be used more. There is a huge potential lying idle. This is certainly something of concern to the judges and States Parties.* It might, nevertheless, turn out to the advantage of interested parties, as it ensures full attention and expeditious treatment of new cases, especially if concerned with such important maritime activities as those in which the oil and gas industry is involved” (emphasis added). See Tullio Treves, *The International Tribunal for the Law of the Sea and the Oil and Gas Industry*, presentation made at the Second International Oil and Gas Conference –Managing Risk –Dispute Avoidance and Resolution (Sept. 20-21, 2007) at p. 12, accessible at: http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/treves_oil_gas_200907_eng.pdf (wherein this Judge of the International Tribunal for the Law of the Sea (ITLOS) discussed the alternate and compulsory jurisdiction of the Tribunal to hear various types of disputes).

122 See International Tribunal for the Law of the Sea, *List of Cases*, accessible at: <http://www.itlos.org/index.php?id=35&L=0>. “The Tribunal came into existence following the entry into force of the Convention on 16 November 1994. After the election of the first judges on 1 August 1996, the Tribunal took up its work in Hamburg on 1 October 1996. The official inauguration of the Tribunal was held on 18 October 1996.” See International Tribunal for the Law of the Sea, *General Information*, accessible at: <http://www.itlos.org/index.php?id=8>.

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private domestic and international law, national sovereignty,¹²³ and the international market for sovereign debt.¹²⁴ While legal commentators may endeavor, for purposes of minimizing the effect of this ruling, to seize upon the divergent views and explanations conveyed by some Tribunal Members as discussed above, they will be unable to dismiss the unanimity of the ARA Libertad decision, which had been notably lacking in the ITLOS' prior controversial ruling in the M/V Louisa case.¹²⁵

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123 See, e.g., Peter Pham, *Law of the Sea Tribunal Ruling Muddies the Waters Not Just For Ghana*, Ghana Business News (Dec. 20, 2012), accessible at: <http://www.ghanabusinessnews.com/2012/12/20/law-of-the-sea-tribunal-ruling-muddies-the-waters-not-just-for-ghana/>.

124 International investors should be very concerned in light of the ICJ's recent ruling in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* Judgment, discussed briefly in this article, of which Ghana's legal representatives at the ITLOS was likely aware. During the oral hearings of this case, the legal representative for Ghana, Professor Philippe Sands, made the following comments: "We do not see that Argentina has put anything before the Tribunal which allows an argument to be made that the Convention precludes it, for example, from waiving immunity by prior written agreement in respect of a vessel that is located in another State's internal waters. That is not a matter for this Tribunal in interpreting a contractual agreement governed by New York law in a bond issued in a faraway place. Plainly, no such rule is to be found in article 18 or 32 or 87 or 90. It is, we say, as simple as that but we go one step further, just by way of closing. If ITLOS were to accede to this, astonishing as that would be, it would effectively be saying that an international court, at a provisional measures phase, could overturn the express choice-of-law provision by the parties to a contract and say that the immunity has not been waived. That is a decision which would have very significant and global consequences. It would create huge uncertainty in the commercial marketplace not just for sovereign bond issues, of which, as you all know, there is a great number, but also for a great number of other commercial transactions in which security is a vitally important matter." See The "ARA Libertad" Case, *Oral Proceedings – Verbatim Record* (Nov. 30, 2012, 12 Noon) at p. 9, lines 48-50; p. 10, lines 1-16, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/Verbatim_Records/ITLOS_PV_12_C20_4_E.pdf.

125 See Order, *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Case No. 18) (Dec. 23, 2010), accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Order_23-12-10_final_E_elec_signed_corr_for_publication.pdf. The ITLOS' ruling in the M/V Louisa case was notable because it triggered four articulate dissenting opinions and one separate opinion challenging, if not questioning, the Tribunal's finding of *prima facie* jurisdiction, notwithstanding the Tribunal's subsequent determination that provisional measures were not warranted. *Id.*, at par. 83(1). See The M/V "Louisa" Case, *Dissenting Opinion of Judge Paik*, supra; The M/V "Louisa" Case, *Dissenting Opinion of Judge Wolfrum* supra; The M/V "Louisa" Case, *Dissenting Opinion of Judge Treves*, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Dissenting_Opinion_of_Judge_Treves_electronically_signed.pdf; The M/V "Louisa" Case, *Dissenting Opinion of Judge Cot*, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Dissenting_Opinion_of_Judge_Cot_E_edited_version_corr_for_publication.pdf; The M/V "Louisa" Case, *Dissenting Opinion of Judge Golitsyn*, accessible at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_prov_meas/Dissenting_Opinion_of_Judge_Golitsyn_elec_signed_corr_for_publication.pdf.

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