THE OBLIGATION TO EXCHANGE VIEWS
BEFORE THE INTERNATIONAL TRIBUNAL
FOR THE LAW OF THE SEA:
A CRITICAL APPRAISAL

BY

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ABSTRACT

In 2006, Spanish authorities decided the immobilisation of the vessel Louisa, a vessel flying Saint Vincent and the Grenadines’ flag, due to its illicit activities against underwater cultural heritage in Spanish internal waters and territorial sea. The flag State filled an application against Spain before the International Tribunal for the Law of the Sea complaining that Spain had violated the UN Convention on the Law of the Sea with that immobilisation. In its Judgement of 28 May 2013 the Tribunal concluded that it had no jurisdiction *ratione materiae* to entertain an application since no dispute concerning the interpretation or application of LOSC existed between the Parties. However, Spain had argued not only a lack of jurisdiction *ratione materiae* but that the Tribunal should have dismissed the case the applicant had not fulfilled the obligation to exchange of views as established in Article 283(1) LOSC. That question was not dealt with by the Tribunal in its Judgement, thus avoiding any discussion of the content and scope of that important procedural obligation. This Article tries to offer a critical appraisal of the position of the Tribunal in the Louisa case with regard the obligation to exchange of views as established in LOSC, bearing in mind the general principle as embodied by current general international law and its application by the ITLOS in the different cases submitted before it.

RéSUMÉ

En 2006, les autorités espagnoles ont décidé d’immobiliser le navire Louisa, un navire battant pavillon de Saint-Vincent-et-les-Grenadines, en raison des activités illicites qu’il menait à l’encontre du patrimoine culturel subaquatique situé dans les eaux intérieures et la mer territoriale espagnoles. L’État du pavillon a introduit une action contre l’Espagne devant le Tribunal international du droit de la mer en considérant que l’Espagne avait violé la Convention des Nations

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Unies sur le droit de la mer à l’occasion de cette immobilisation. Dans son arrêt du 28 mai 2013, le Tribunal a conclu qu’il n’était pas compétent *ratione materiae* pour connaître de cette action dès lors qu’aucun différend concernant l’interprétation ou l’application de la Convention n’existait entre les parties. Cependant, l’Espagne avait fait valoir que le Tribunal n’était pas compétent, non seulement *ratione materiae*, mais également du fait que le requérant n’avait pas procédé à l’échange de vues prévu à l’article 283(1) de la Convention. Cette question n’a pas été traitée par le Tribunal dans son jugement, évitant ainsi toute discussion sur le contenu et la portée de cette importante obligation procédurale. Cet article tente de réaliser une évaluation critique de la position du Tribunal dans l’affaire *Louisa* au sujet de l’obligation de procéder à des échanges de vues prévue par la Convention, en gardant à l’esprit le principe général compris en droit international général actuel et son application par le TIDM dans les différentes affaires qui lui ont été soumises.

I. — Introduction

In its Judgement of 28 May 2013, the International Tribunal for the Law of the Sea (hereinafter, “ITLOS” or “the Tribunal”) decided it had no jurisdiction to entertain the application filed by Saint Vincent and the Grenadines against the Kingdom of Spain. (1) This case arose from the 2006 immobilisation of the vessel *Louisa*, when it was docked at a Spanish port, by Spanish judicial authorities due to illicit activities performed by and from that vessel against underwater cultural heritage in Spanish internal waters and territorial sea. More than four years later, on 24 November 2010, the vessel’s flag State, Saint Vincent and the Grenadines, filed an application against Spain, accompanied by a request for the prescription of provisional measures. (2) The claim argued that Spain had violated the UN Convention on the Law of the Sea (hereinafter, “LOSC”) (3) and Spanish domestic


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law. (4) With regard to the LOSC, Saint Vincent and the Grenadines argued that Spain had violated Articles 73 (enforcement of laws and regulations of the coastal State in the exclusive economic zone), 87 (freedom of the high seas), 226 and 227 (investigation of foreign vessels with regard to the protection and preservation of the marine environment), 245 (marine scientific research) and 303 (archaeological and historical objects found at sea). (5) During the oral phase, Saint Vincent and the Grenadines argued that Spain had also violated Article 300 LOSC (good faith and abuse of rights). The Tribunal decided, as adamantly argued by Spain from the very beginning of the case, that none of these allegations was founded and, consequently, concluded 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 had no jurisdiction ratione materiae to entertain the present case.” (6)

However, Spain had argued not only a lack of jurisdiction ratione materiae but that the Tribunal should have dismissed the case from the start since Saint Vincent and the Grenadines had not fulfilled the obligation to engage in a previous exchange of views as established in Article 283(1) LOSC. Under the title “Obligation to exchange views”, this Article reads as follows:

“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.”

During both the provisional measures (7) and merits (8) phases, Spain contended that the requirements of Article 283 LOSC had not been satisfied since, in its view, there had been no exchange of views regarding the settlement of the dispute by negotiation or other peaceful means. However, in its Order on Provisional Measures, the Tribunal held that “the requirements of Article 283 of the Convention [were] to be regarded, in the circumstances of the present case, as having been satisfied.” (9) Given that it was only

(4) Saint Vincent and the Grenadines argued that the boarding of the Louisa without the prior permission of its captain or of the Consul of Saint Vincent and the Grenadines constituted a violation of Article 561 of the Spanish Code of Criminal Procedure in its 2006 wording (totally changed following a 2014 amendment). The Tribunal dismissed this contention, arguing not only that there is no provision in the LOSC requiring a port State to notify the flag State or obtain the authorisation of the flag State or of the master of a foreign vessel operated for commercial purposes such as the Louisa before boarding and searching such a vessel docked at its port, but also that it was not incumbent upon the Tribunal to determine whether Spain had violated Article 561 of its Code of Criminal Procedure by boarding the Louisa without authorisation. Louisa Judgement, para. 125.

(5) With regard to the latter, Saint Vincent and the Grenadines later stated that its mention was due to a “typographical error” and argued that Spain had actually violated Article 304 LOSC.

(6) Louisa Judgement, para. 151.

(7) Written Response of the Kingdom of Spain, paras. 76-87.

(8) Counter-memorial of Spain, paras. 51-82; and Rejoinder of Spain, paras. 13-32.

(9) Louisa Order, para. 63. See infra Section III(A).
assessing its *prima facie* jurisdiction in the Provisional Measures phase, the Tribunal considered that its Order

"in no way prejudice[d] 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 [left] unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of those questions." (10)

These questions were not, however, dealt with by the Tribunal in its Judgement on the Merits since, in view of its finding that there was no dispute *ratione materiae* between the parties, the Tribunal did not feel required “to deal with the contention of Spain that Saint Vincent and the Grenadines has failed to satisfy the obligation under Article 283 of the Convention to exchange views and that this has precluded its access to the Tribunal.” (11)

With this statement, the Tribunal abruptly ended the inquiry on whether Article 283 LOSC applied to the case and, even more importantly, avoided any discussion of the content and scope of the obligation established in that important Article of the Convention. Nevertheless, something was advanced in its Order on Provisional Measures, (12) which will be discussed in this paper, as it seems to deviate from the Tribunal’s previously quite clear doctrine on Article 283 LOSC. The following pages will offer a critical appraisal of the position of the ITLOS in the *Louisa* case with regard the obligation established in that article, bearing in mind the general principle as embodied by current general international law and its application by the ITLOS in the different cases submitted before it. (13)

II. — THE PREVIOUS EXCHANGE OF VIEWS AS A SPECIFIC OBLIGATION

Article 33 of the UN Charter recalls the general principle of the pacific settlement of disputes, under which

“[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice” (paragraph 1).

Although this proviso refers explicitly to disputes “the continuance of which is likely to endanger the maintenance of international peace and secu-

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(10) *Louisa Order*, para. 80.
(11) *Louisa Judgement*, para. 152.
(12) *Louisa Order*, paras. 54-65.
rity” (giving a special role to the UN Security Council in paragraph 2), it is generally acknowledged that Article 33 of the Charter reflects the two basic principles governing the pacific settlement of disputes: the obligation of conduct to settle international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered (Article 2(3) of the Charter) and the principle of free choice by States of the means to solve the dispute. (14)

Of all the classical means of dispute settlement indicatively proposed in Article 33 of the Charter, negotiation is cited first as it is commonly understood that the vast majority of disputes are solved by direct negotiations between the States concerned. (15) However, this does not necessarily mean that States are obliged to prioritise negotiations over any other peaceful means. As a general rule, recourse to an international tribunal or court is not precluded — unless otherwise agreed, as will be seen — due to the absence of previous negotiations or a prior exchange of views. (16)

1. — The general rule in international law

Negotiations encapsulate the “dégé minimum”, or “minimum content”, of the obligation to settle disputes peacefully, (17) and they figure in most general dispute settlement conventions (18) and other important conventions as well. (19) Indeed, as repeatedly stated by international courts, “the


(16) In the framework of the issues discussed in this article, it may generally be assumed that “exchange of views”, “negotiations” and “consultations” have a very similar procedural significance.

(17) P. Daillier et al., Droit International Public, 8th ed., Paris, LGDJ, 2009, pp. 924-925; or Tomuschat, supra, No. 14, at p. 123. For this author, “It is impossible to comply with this obligation without ever exchanging views on the issue concerned with the opposite party and trying thus to reach a solution by direct talks without any outside assistance” (ibid., pp. 123-124).

(18) Article 1 of the General Act of Pacific Settlement of Disputes, 26 September 1928, 93 LNTS 343 (and its revised version of 28 April 1949, 71 UNTS 101); Article 2(2) of the American Treaty on Pacific Settlement (Pact of Bogotá), 30 April 1948, 30 UNTS 84; or Article 1 of the European Convention for the Peaceful Settlement of Disputes, 29 April 1957, 320 UNTS 243.

(19) Along with Article 283 LOSC, it may be seen, for example, in Article 8(2) of the Antarctic Treaty, 1 December 1959, 402 UNTS 71; Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195; Article 41 of the Vienna Convention on Succession of States in Respect of Treaties, 23 August 1978, 1946 UNTS 3; Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women, 18 December
judicial settlement of international disputes [...] is simply an alternative to the direct and friendly settlement of such disputes between the Parties.” (20)

However, the case law of the International Court of Justice (ICJ) clearly asserts that current general international law does not consider entering into (and concluding) a negotiation process to be a requisite for instituting judicial proceedings. (21) Whilst in the Aegean Sea case the Court recalled that “the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function”, (22) in the Cameroon v. Nigeria case the ICJ maintained that

“[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court.” (23)

The Court therefore explicitly denied the existence of a general rule whereby, prior to submitting a dispute before an adjudicative body, States are obliged to negotiate, let alone conclude any negotiations already underway. (24)

However, this dictum by the ICJ must be read in the context of that particular case. Actually, the Court went on to say “[a] precondition of this type [i.e. a duty to negotiate] may be embodied and is often included in comprom-

(21) Indeed, some ICJ decisions seem simply to reduce the previous exchange of views to a mere formality in the hands of States. In its Namibia case, the Court held that “[i]n practice the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted; it may be sufficient to show that an early deadlock was reached and that one side adamantly refused compromise.” Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, I.C.J. Reports 1970, p. 44, para. 85. For a complete analysis of negotiations in ICJ case law, see: K. WELLENS, Negotiations in the Case Law of the International Court of Justice. A Functional Analysis, Farnham, Ashgate, 2014. See also: S. TORRES BERNARDEZ, “Are Prior Negotiations a General Condition for Judicial Settlement by the International Court of Justice ?”, in C.A. ARMA BAREA and J.A. BARBERIS (eds), Liber Amicorum in Memoria of Judge J. M. Ruda, The Hague, Kluwer, 2000, pp. 507-525.
(24) As is well known, contrary to what was proposed by the Advisory Committee of Jurists in 1920, no such precondition was included in the Statute of the PCIJ or in the current ICJ Statute. See: Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes, pp. 679, 725-726.
sory clauses of treaties. It may also be included in a special agreement whose signatories then reserve the right to seise the Court only after a certain lapse of time […]” (25) Therefore, such a precondition is normally found to be a conventional rule. The Hague Court has continually been confronted with this type of clause and has had the opportunity to delimit the scope of this obligation: negotiations must be pursued in good faith and as far as possible with a view to concluding agreements (26) even though this standard obligation of conduct does not imply an obligation to reach an agreement. (27)

A new opportunity arose with the Case concerning application of the International Convention on the Elimination of all Forms of Racial Discrimination, in which the ICJ had to interpret the content and scope of Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination, (28) which obliged the parties to negotiate before submitting a claim to the ICJ. The absence of such previous negotiations led the Court to conclude that it had no jurisdiction to hear the case on the merits. (29)

Hence, only in the absence of such a conventional rule does the customary rule apply, whereby States are free to submit their claims directly to an international adjudicative body. This is precisely what happened in the Cameroon v. Nigeria case, in which the ICJ did not take into account the requirement of prior negotiations as a preclusive condition because Cameroon and Nigeria had appealed to the Court to delimit their maritime boundary by virtue of the compromissory clause described in Article 36(2) of the Court’s Statute rather than, for example, under the LOSC. (30)

Irrespective of this, the previous exchange of views between the parties to a dispute clearly performs different plausible functions in the international settlement of disputes. As the ICJ has explained, the exchange of views fulfils three basic functions:

(a) “it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter”, which is essential to the settlement thereof, and, where applicable, to limiting the scope of the dispute that can be submitted to an international tribunal;

(25) Land and Maritime Boundary…, Judgment, I.C.J. Reports 1998, p. 303, para. 56. Further reading of this decision brings us to its paragraphs 103-109 where the ICJ distinguished the cases where it has been seised on the basis of unconditioned declarations made under Article 36(2) of its Statute and the cases where it has been seised on the basis, for example, of the 1982 Convention on the Law of the Sea, i.e. a convention including the duty to negotiate.


(28) See supra note 19.


(b) "it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication"; and

c) "prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States." (31)

To sum up, the exchange of views essentially contains a general mandate for the States parties to a dispute to express their opinions on the controversy itself, on the way in which the dispute can be settled and, if possible, on the settlement of the dispute from a substantive point of view, thereby facilitating the correct functioning of the dispute settlement system.

Finally, the very functions of the consultations procedure imply that it cannot consist of "mere protests or disputations." (32) Nor can such negotiations be reduced to "the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims." (33) On the contrary, consultations are meant to be "a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute." (34) At all times, "these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question." (35)

2. — *The specific rule under the Law of the Sea Convention*

The functions so described by the ICJ, typical of the recourse to prior negotiations and consultations, are paramount to determining the nature and scope of the obligation of conduct embodied in Article 2(3) of the UN Charter. They are part of the dispute settlement system to which they belong. The LOSC establishes its own dispute settlement system. (36)

According to Article 286 LOSC, "[s]ubject to section 3 [LOSC], any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted

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at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." The obvious aim of this Article is to ensure that disputes concerning the interpretation or application of the LOSC are only subjected to judicial settlement when they cannot be settled by other peaceful means in accordance with Section 1 of Part XV LOSC. As one commentator has aptly argued,

"[t]he inclusion of an obligation to exchange views was designed to cater to the wishes of delegations [in the Third UN Conference on the Law of the Sea] that the primary obligation of parties to a dispute should be to make every effort to settle the matter through negotiations." (37)

Such is also the sense of Article 283(1) LOSC, according to which a previous “exchange of views” is a necessary condition to be able to bring a dispute before the Tribunal (as well as to engage in any of the other peaceful means provided for in Part XV LOSC). Moreover, such an “exchange of views” has a specific aim, which the Convention defines as follows: the exchange of views must concern the “settlement [of the dispute] by negotiation or other peaceful means.” In this sense, the exchange of views foreseen in that Article seems to differ from “negotiations” stricto sensu in that it must be conducted prior to any other means of dispute settlement, including “negotiation” or recourse to the ITLOS. However, just as the jurisprudence and doctrine seem to suggest, there is no clear pattern identifying the thin line, if any, that separates the mere “exchange of views” from “negotiations.” (38) Indeed, as we will see in the next section, the ITLOS has not clearly distinguished between the two concepts.

In any case, and although expressed in general terms, Article 283(1) LOSC is not a vague obligation included in the Convention as a term of art. Accordingly, it must be construed in a manner enabling it to have appropriate effects (39) and it must be given a full sense. (40) The wording of the title of Article 283 (“Obligation to exchange views”, emphasis added) and the compulsory nature of its text (“the parties to the dispute shall proceed expeditiously to an exchange of views”, emphasis added) does not need further


(38) The ICJ, citing its previous jurisprudence in the South West Africa case, accepted a less formalistic view on negotiations, recognising that “diplomacy by conference or parliamentary diplomacy” might be considered negotiations. However, as already noted, it did not accept as such “mere protest or disputations”. Case concerning... (Georgia v. Russian Federation), I.C.J. Reports 2011, p. 133, para. 160.


(40) Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 24; see also Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 25, para. 51.
interpretation: the parties to a dispute concerning the interpretation or application of the Convention are obliged to exchange their views regarding its settlement. (41) Actually, this compulsory nature is not only predicated for previous consultations but for subsequent consultations required after a dispute settlement has been reached. (42) As summarised in one of the main doctrinal commentaries to the UN Convention on the Law of the Sea,

"[t]he obligation specified in this Article is not limited to an initial exchange of views at the commencement of a dispute. It is a continuing obligation applicable at every stage of the dispute. In particular, as is made clear in paragraph 2, the obligation to exchange views on further means of settling a dispute revives whenever a procedure accepted by the parties for settlement of a particular dispute has been terminated without a satisfactory result and no settlement of the dispute has been reached. In such a case, the parties would have to exchange views again with regard to the next procedure to be used to settle the dispute. There might be further resort to negotiations in good faith, or the parties might agree to use another procedure. This provision ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all parties concerned." (43)

The exchange of views, negotiations or consultations therefore have a dual nature: they are both a means of settling disputes under the LOSC and a compulsory precondition before seizing any other of the means foreseen in the LOSC. (44)

III. — ITLOS PRACTICE

As noted above, in its Order on Provisional Measures in the Louisa case, the Hamburg Tribunal held that in the circumstances of that case the requirements of Article 283 LOSC were to be regarded as having been satisfied. The Tribunal arrived at this conclusion based on two kinds of arguments: (1) one derived from its own previous jurisprudence whereby "a State Party is not obliged to continue with an exchange of views when it concludes that the

(41) In the arbitral phase of the MOX Plant Case (Ireland v. United Kingdom), the Arbitral Tribunal recalled this when answering the question raised by the United Kingdom: “there has clearly been an exchange of views between the Parties, as required under Article 283 of the Convention […].” MOX Plant Case (Ireland v. United Kingdom), Order No. 3 on Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures, 24 June 2003, para. 18 (emphasis added).

(42) Paragraph 2 of Article 283 LOSC states that “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.”


(44) Contrary to what happens with conciliation under Article 284(1) LOSC, in which disputing States may be invited, but are not obliged to engage.
possibilities of reaching agreement have been exhausted” (45) and (2) the inexistence of a general rule to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Tribunal, following the ICJ *dictum* in the *Cameroon v. Nigeria* case. (46)

When the assertion that “a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted” is examined in isolation, it could be construed that the standard for satisfying Article 283(1) LOSC had been set by the Tribunal in a subjective manner: once one Party affirms that the possibilities of reaching agreement have been exhausted, they have been exhausted. This “subjective interpretation”, however, would strip that Article of its true meaning, given that the Tribunal has progressively interpreted it more and more “objectively”, not only in the three cases in which Article 283(1) LOSC was previously discussed — the *Southern Bluefin Tuna* case in 1999, the *MOX Plant* case in 2001 and the *Land Reclamation* case in 2003 — but also in the two cases in which it has been discussed since the *Louisa* case — the *ARA Libertad* case in 2012 and the *Artic Sunrise* case in 2013. Furthermore, in all these cases, the exchange of views does not essentially differ from the concept of negotiations or consultations, as the purpose of all three — namely, to reach an agreement on the dispute or on how to settle it — seems to be the same.

1. — *The practice before the Louisa case*

That “subjective” interpretation may derive from the relatively brief considerations on Article 283(1) LOSC set down by the Tribunal in the *Southern Bluefin Tuna* case, (47) in which the dispositive paragraph 61 (declaring the obligation to exchange views fulfilled) immediately follows two paragraphs in which the Tribunal, somewhat brusquely, affirms that “Australia and New Zealand [had] stated that negotiations had terminated” (paragraph 59) and, consequently, that “in view of the Tribunal, a State party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted” (paragraph 60). However, a more careful reading of this Order offers quite a different view.

(45) *Louisa Order*, para. 63.
(47) *Southern Bluefin Tuna* (*New Zealand v. Japan; Australia v. Japan*), *Provisional Measures*, Order of 27 August 1999. ITLOS Cases Nos. 3 & 4. It must be kept in mind that this case ended in the provisional measures phase and the cited Order discussed only the Tribunal’s *prima facie* jurisdiction.
The Tribunal held, first, that “negotiations and consultations [had] taken place between the parties and that the records [showed] that these negotiations were considered by Australia and New Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea.” (48) The Tribunal went on to state “that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations.” (49) Finally, the Tribunal took the view that “Australia and New Zealand have stated that the negotiations had terminated.” (50) Only then did the Tribunal declare that “a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted.” (51)

Therefore, the Tribunal clearly ascertained: (1) that a negotiation had taken place; and (2) that during the same, the LOSC had been invoked in diplomatic notes. Having made these two findings, it concluded that the negotiations should not be continued, as the possibilities of reaching an agreement had been exhausted, and both sides in the dispute had assumed it.

This same position was maintained in subsequent practice with regard to Article 283(1) LOSC. In the MOX Plant case, (52) although the Tribunal did not expressly state that the conditions set out in Article 283 had been met, it did consider that both Ireland and the United Kingdom had sought an exchange of views and that, in particular, “in its letter written as early as 30 July 1999, [Ireland] had drawn the attention of the United Kingdom to the dispute under the Convention and that further exchange of correspondence on the matter took place up to the submission of the dispute to the Annex VII arbitral tribunal.” (53) Again, the Tribunal took into account that there had been a negotiation in which the Convention was discussed.

Finally, in the Land Reclamation case, the Tribunal, after analysing the scope of Article 283(1) LOSC and in view of the lengthy succession of negotiation meetings between the parties to the dispute (including diplomatic notes and agreements on senior diplomatic meetings), held that the conditions of Article 283 had been met. (54)

In the three cases cited above, a clear common pattern can be seen: far from leaving it solely in the hands of the Parties to determine whether or not Article 283(1) LOSC has been fulfilled, the Tribunal itself determines

(48) Southern Bluefin Tuna case, para. 57, emphasis added.
(49) Ibid., at para. 58, emphasis added.
(50) Ibid., at para. 59.
(51) Ibid., at para. 60, emphasis added.
(52) MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Case No. 10.
(53) Ibid., para. 58, emphasis added.
(54) Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional measures, ITLOS Case No. 12, paras. 33-51 (another case discussed only in its provisional measures phase).
“that negotiations and consultations have taken place between the parties”; (55) that during these negotiations a dispute on the Convention has been discussed; (56) and that the parties—both parties—are indeed unable to settle the dispute. (57) The Tribunal does not distinguish between the exchange of views, negotiations and consultations but, rather, uses the terms interchangeably.

2. — The Louisa case and beyond

In the Louisa case, the Tribunal apparently deviated from this solid doctrine, although—as seen above—it did so in its Order on Provisional Measures, as there was no chance to do so in the merits phase.

The undisputed facts relating to that exchange of views were as follows: (58) the Louisa was detained on 1 February 2006. On 15 March 2006, the Embassy of Spain in Kingston sent a Note Verbale to the Ministry of Foreign Affairs, Commerce & Trade of Saint Vincent and the Grenadines, officially informing the Applicant of the boarding and search of the Louisa “for any necessary procedures.” From that point on, the case was under the control of the competent judicial authorities of Spain, which communicated any orders, indictments or official decisions to the individuals involved in the case. Saint Vincent and the Grenadines, however, did not react.

On 11 February 2009, a letter from the law firm Patton Boggs LLP—representing the US owners of the Louisa, as did the other law firms cited below—was sent to the Magistrate Judge of Criminal Court No. 4 of Cádiz (Spain); on 27 April 2010 and 27 August 2010, two letters were sent from the law firm Kelly Hart & Hallman LLP to the Ambassador of the Kingdom of Spain to the United States of America and to the Magistrate Judge of Criminal Court No. 4 of Cádiz, respectively; on 14 October 2010, a letter was sent from the law firm Kelly Hart & Hallman LLP to the General Consul of Spain in Houston, Texas, with an attached letter from the director of the US company that owned the Louisa to the Consejo General del Poder Judicial

(55) Southern Bluefin Tuna case, para. 57, emphasis added. In the arbitral award on jurisdiction and admissibility, the tribunal took the view that “Negotiations have been prolonged, intense and serious.” Southern Bluefin Tuna Case (Australia v. Japan; New Zealand v. Japan), Award of Jurisdiction and Admissibility of 4 August 2000, 23 UNRIAA 1, 119 ILR 508, para. 55.

(56) Southern Bluefin Tuna case, para. 57; MOX Plant case, paras. 58 and 61; and Land Reclamation case, para. 49.

(57) Southern Bluefin Tuna case, para. 59; MOX Plant case, paras. 59 and 61; and Land Reclamation case, para. 46.

(58) All the documents and quotations can be found in the Memorial of Saint Vincent and the Grenadines and its Annexes, and the Response to the Request of Provisional Measures, the Counter-Memorial and the Rejoinder of Spain. All these documents are available on the ITLOS webpage. They are also discussed in both the Louisa Order and the Louisa Judgement.
Finally, two e-mails were sent on 18 and 19 February 2010 from the Office of the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines in Geneva to the Capitanía de Cádiz (the local Spanish port authority) simply inquiring into the detention of the Louisa. As can be seen, none of these communications was sent to the Spanish authorities by the Applicant but rather by the attorneys of some of the owners of the Louisa who stood accused by the criminal court in Spain. Likewise, the emails were sent and received not through diplomatic channels between States but by port or subsidiary authorities thereof. Furthermore, none of the communications or letters contained any reference to a “dispute” between Saint Vincent and the Grenadines and Spain under the LOSC.

Following the dispatch of the Spanish Note Verbale of 2006 communicating the detention of the vessel, the first and only official communication between the two States was a letter sent from the Permanent Mission of Saint Vincent and the Grenadines to the United Nations to the Permanent Mission of Spain to the United Nations, dated 26 October 2010. In this letter, Saint Vincent and the Grenadines objected to “the Kingdom of Spain’s continued detention of the ship the M.V. Louisa [...]”; further objected “to the failure to notify the flag country of the arrest as required by Spanish and international law”; and announced that “Saint Vincent and the Grenadines [planned] to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ship and settlement of damages incurred as a result of its improper detention.”

Thus, on 26 October 2010, before even officially depositing its declaration of acceptance of the jurisdiction of the Tribunal under Article 287 LOSC, which it did not do until 22 November 2010, Saint Vincent and the Grenadines had already taken the decision to act against Spain before the ITLOS. There was therefore no prior exchange of views between Saint Vincent and the Grenadines and Spain. Whilst it is true that the obligation to engage in an exchange of views is addressed to both parties in a dispute, such an obligation cannot be properly fulfilled by the defendant State without the initiative and participation of the claimant State, which, by definition, is the one that (1) has to identify the existence of the alleged dispute, (2) wants to avail itself of the settlement mechanisms defined under the LOSC, and (3) should set in motion the mechanism of the exchange of views envisaged under Article 283(1) LOSC.

(59) None of these letters discussed the legal situation of the Louisa under LOSC on behalf of Saint Vincent and the Grenadines, but rather the procedural status of the US citizens who owned the vessel and the criminal indictments issued against them by Spanish judicial authorities.
(60) See infra note 67.
(61) Indeed, Saint Vincent and the Grenadines had notified ITLOS of the appointment of its agent and co-agent on 15 October 2010, that is, before any other procedural decision was adopted.
However, the Tribunal took a different view in its Order on Provisional Measures: it first recalled that the obligation to ‘proceed expeditiously to an exchange of views’ applies equally to both parties to the dispute. (62) It then seemed to accept the contention of Saint Vincent and the Grenadines that it had requested further information about the detention of the Louisa (the two e-mails) from the Spanish port authorities but had not received it (63) and thus considered that Spain did not respond adequately to 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 and the Grenadines to the United Nations in New York. (64) Finally, the Tribunal, recalling its previous doctrine in the Southern Bluefin Tuna and MOX Plant cases, as well as the ICJ doctrine in the Cameroon v. Nigeria case, (65) considered that “the requirements of Article 283 of the Convention [were] to be regarded, in the circumstances of the present case, as having been satisfied.” (66)

The Tribunal thus examined only two e-mails simply requesting generic information, without making any reference to an international dispute under the LOSC or asking for an effective exchange of views. (67) It further considered that Spain had not answered the Note Verbale announcing the submission of the case to the ITLOS. However, it can just as easily be assumed that, with that letter, Saint Vincent and the Grenadines voluntarily and unilaterally put an end to any chance of diplomatic negotiations without

(62) Louisa Order, para. 58. The Tribunal quoted its doctrine in the Land Reclamation case, para. 38.
(63) Louisa Order, para. 59.
(64) Ibid., paras. 60-61.
(65) Ibid., paras. 63-64.
(67) The relevant text of these e-mails (and the answer from Spanish port authorities) is as follows: “Dear Sirs, It has been brought to our attention that the [Louisa] was arrested since March 2006 in the Puerto de Santa María. This Administration (the Applicant’s Office of the Commissioner for Maritime Affairs in Geneva) does not seem to have been advised of the arrest and you are hereby kindly requested to advise whether the vessel has indeed been arrested. Your urgent attention to this matter is appreciated” (mail of 18 February 2010, 16:55 CET). Answer form the Port Authority: “Dear Sir, Ref: Vessel Louisa, I inform to you that the vessel “Louisa” was detained by resolution of the Penal Judge, by one fault. In this case, the Port Authority does can say nothing about this matter” (mail of 19 February 2010, 11:25 CET). Subsequent mail from the Office of the Commissioner for Maritime Affairs: “[...] Kindly provide details of the resolution for the detention of the vessel (date, reason for detention, etc.) and advise whether a notification was sent to the St Vincent and the Grenadines Administration” (mail of 19 February 2010, 11:35 CET). Answer form the Spanish local Port Authority Legal Service: “The ship ‘Louisa’ is in the dock of Santa María’s port by order of the Tribunal de Instrucción nº 4 of Cádiz from October 29 2004 in procedure: DIL PREVIAS 2881/2005. For any information in this respect you should go to the Tribunal in question whose address is [...]” (mail of 19 February 2010, 12:11 CET). Reproduced as Annex 7 to the Saint Vincent and the Grenadines Memorial.
giving any guidance as to its claims that might have facilitated an exchange of views with Spain. (68)

Most intriguing of all, the Tribunal did not analyse the entire set of communications alleged by Saint Vincent and the Grenadines in light of the basic tenets of its previous doctrine and the principles embodied in Article 283(1) LOSC: an effective attempt to exchange views between States (as opposed to individuals or agencies that have not been authorised to conduct diplomatic negotiations) and the submission and identification of a dispute under the LOSC. This was actually ITLOS practice in subsequent cases submitted to it.

In the ARA Libertad case, (69) again in a provisional measures phase (i.e. discussing only its prima facie jurisdiction), the Tribunal considered that Argentina and Ghana had engaged in at least three undisputed exchanges of views, (70) took into account that Argentina maintained that “such exchanges of views and negotiations have failed to resolve the dispute” (71) and, after recalling its jurisprudence in the MOX Plant case, (72) considered that the requirements of Article 283 had been satisfied. (73) Likewise, in the Artic Sunrise case, (74) the Tribunal took into account the exchange of views between the Netherlands and the Russian Federation (mainly official correspondence between the two States) and also considered that “according to the Netherlands, the dispute was discussed on a number of occasions between the respective Ministers of Foreign Affairs.” (75) After considering that the Netherlands maintained that the possibilities to settle the dispute by negotiation or otherwise had been exhausted, (76) the Tribunal — again citing its MOX Plant case doctrine, further endorsed in the ARA Libertad case (77) — found that in the circumstances of the case, the requirements of Article 283 LOSC had been satisfied. (78)

(68) As suggested by Judge Treves in his Dissenting Opinion to the Order on Provisional Measures in this case, “it is apparent that Saint Vincent and the Grenadines had already decided to submit its case to the Tribunal” (para. 12).


(70) Ibid., para. 69. These exchanges of views were a letter dated 4 October 2012 sent by the Minister of Foreign Affairs of Argentina to his Ghanaian counterpart, the requests made by the Argentine Ambassador to Ghana, and an Argentinian high-level delegation sent to Accra, which met with senior Ghanaian officials from 16 to 19 October 2012.

(71) Ibid., para. 70.

(72) Ibid., para. 71.

(73) Ibid., para. 72.

(74) The “Artic Sunrise” Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Case No. 22.


(76) Ibid., para. 75. It must be kept in mind that in this case the defendant — the Russian Federation — decided not to appear before the Tribunal and, therefore, did not oppose that Dutch assertion.

(77) Ibid., para. 76.

(78) Ibid., para. 77.
Therefore, the Tribunal again followed its well-established doctrine on the exchange of views ex Article 283(1) LOSC: the Tribunal has always demanded and verified an effective exchange of views on the dispute under the LOSC between the parties; it has presented this exchange of views, or negotiations or consultations — even if reduced to their minimum expression — as an obligation of conduct, rather than an obligation of result; and, finally, once it has "objectively" verified the existence of this exchange of views, regardless of the results achieved, then — and only then — has the Tribunal considered the conditions of Article 283 LOSC to have been met.

IV. — Conclusion

Unless otherwise agreed, States are not obliged to negotiate before submitting a dispute to an international adjudicative body. This is the general rule, which is overridden — as a by-product of the maxim lex speciales derogat generalis — when there exists a special rule (normally conventional) imposing the obligation to exchange views, negotiate or consult as a precondition to seize a tribunal or court. In such cases, that obligation must be fulfilled effectively and in good faith. This seems to be the general principle laid down by the ICJ, albeit hesitantly at times, in its jurisprudence.

Article 283(1) LOSC is one of these special rules. As expressed by ITLOS Judges Wolfrum and Treves, respectively, the obligation embodied in this Article is a “[deviation] from the procedural law under general international law” and “an exception to general international law.” (79) As stated by former ITLOS President Chandrasekhara Rao in a previous case, “The requirement of [Article 283] regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done.” (80)

Indeed, by their very nature, ITLOS and its jurisdiction only come to bear when steps have not been taken to resolve a dispute by means of direct negotiation between the parties. This is the general rule, and, as with any international court, recourse to the Tribunal is the exception. ITLOS is one of the means for the settlement of disputes described in Section 2 of Part XV of the Convention. As a Arbitral Tribunal clarified in another case, “Section 2 of Part XV provides for compulsory procedures entailing binding decisions, which apply where no settlement has been reached by recourse to Section 1

(79) *Louisa Order*, Dissenting Opinion of Judge Wolfrum (para. 28) and Dissenting Opinion of Judge Treves (para. 9).
(80) *Land Reclamation case*, Separate Opinion of Judge Chandrasekhara Rao, p. 11.
(which lays down certain general provisions, including those aimed at the reaching of agreement through negotiations and other peaceful means).” (81)

ITLOS in different cases, as well as several of its judges in separate opinions, has underlined the implied limit of the exchange of views as envisaged in Article 283 LOSC, i.e. that a State Party to the Convention is not further obliged to exchange views when there is a clear deadlock and it may be concluded that the possibilities of reaching agreement have been exhausted. (82) This seemed not to be the case in the Louisa affaire. Perhaps the Tribunal lowered the bar for the quantity and quality of consultations. Did this entail a distinction between the exchange of views and negotiations stricto sensu? (83) Only time will tell. For now, in light of its latest decisions in the ARA Libertad and Artic Sunrise cases, the Tribunal seems to have returned to its previous doctrine, which provided a clear idea about how to fulfil the obligation imposed upon States parties by Article 283(1) LOSC.


(82) It must also be underlined that the content and scope of Article 283 LOSC were addressed by ITLOS only during the discussions regarding the adoption of provisional measures, i.e. with a limited examination of its threshold of jurisdiction as the latter needed only to be prima facie.

(83) See Cortés Marín, Prior Consultations..., supra No. 13, at p. 16. For this author, the ITLOS jurisprudence suggests that “[a]s a result, it would seem sufficient that the claimant limits itself to informing the other party to the dispute of its intention to submit a case to judicial settlement. However, taking into account the recent jurisprudence of the ICJ, it seems that there should exist, at the very least, a preliminary exchange of views about the most appropriate way to settle the dispute.” Ibid., p. 26.