Freedom of Navigation and the Unlamented Demise of Absolutism

Foreign ministry in-house international lawyers are occasionally called on to explain to their principals, when a case in which their State is a party fails to reach the merits because of a successful preliminary objection to jurisdiction or admissibility, that normally this does not mean that the State has actually won or lost the dispute. An exception, one of the peculiarities of litigation before international courts and tribunals whose jurisdiction is limited *ratione materiae*, is that a formal outcome of lack of jurisdiction can, anomalously, also indicate that the applicant State’s case was so weak that it did not survive an initial screening, not even getting to the merits where the dismissal of the claim would have been a foregone conclusion. Such was the mostly well-deserved fate of the *M/V Louisa* case,¹ saved from being a fiasco from start to finish for the applicant, Saint Vincent and the Grenadines, only by the late addition of a claim for breach of Article 300 of the United Nations Convention on the Law of the Sea (UNCLOS),² of whose soundness it managed to persuade one of the

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21 judges of the International Tribunal for the Law of the Sea (ITLOS),\(^3\) and another three that it was at least a proper basis of jurisdiction for ITLOS.\(^4\) As this is the first time that an independent claim of abuse of rights has been ventilated before an international court or tribunal [will need to be checked], no doubt it is for this that the case will mostly be remembered. This article, however, discusses a different claim in the case, which concerned the prolonged detention in a Spanish port of the Vincentian-flagged ship the *M/V Louisa* and its (US-flagged) tender for allegedly illegally removing underwater cultural heritage objects from Spain’s territorial sea, where it was licensed to explore for oil. Of the five articles of UNCLOS that Spain was alleged to have breached,\(^5\) the facts emerging from the application instituting proceedings\(^6\) did not support even plausible arguments in respect of four of them, so it is unsurprising that ITLOS found it impossible to avoid taking a dismissive attitude towards these.\(^7\) This was also the conclusion ITLOS reached as to the fifth, Article


\(5\) Articles 73, 87, 226, 245 and 303.


\(7\) This was among the reasons that Judge Treves gave for coming to the view that ITLOS “manifestly” lacked jurisdiction to entertain these claims: *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Provisional Measures, Dissenting Opinion of Judge Treves, ITLOS Reports 2008-2010, p.87, at 92 (paragraph 15).
87, subparagraph 1(a), though for the reason advanced below it is regrettable that ITLOS did not see fit to accord it fuller treatment, if only to deal with and dispose definitively of an unpersuasive contrary precedent in a national court, even though the ultimate implied decision – no breach by Spain – is surely correct. This article first considers in the broad the object of Article 87, subparagraph 1(a), freedom of navigation, before turning to the unconvincing precedent just mentioned and then the M/V Louisa case, both the provisional measures phase where several noteworthy separate and dissenting opinions were delivered and the (quasi-)merits phase where the same occurred again, before drawing conclusions.

Two possible perspectives on the high seas

There has long been no doubt about the status as customary international law of the freedom of navigation on the high seas found in Article 87 of UNCLOS:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, _inter alia_, both for coastal and land-locked States: (a) freedom of navigation;…

This text is virtually identical to Article 2 of the 1958 High Seas Convention,^8^ the second paragraph of whose preamble affirms “the following provisions as generally declaratory of established principles of international law”. Unaltered too is the nature of the high seas, laid down thus in Article 89 of UNCLOS: “No State may validly purport to subject any part of the high seas to its sovereignty.”^9^ Hence the only thing that significantly changed thanks to UNCLOS was the spatial extent of the high seas, now reduced by the exclusive economic zone (EEZ) which can extend up to 200

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^9^ The equivalent in the High Seas Convention, _supra_ n 8, is in the first sentence of Article 2.
nautical miles from the territorial sea baseline (Article 57), but even that is deceptive, because in the EEZ the freedom of navigation, though subject to the new jurisdiction that the coastal State now has, still applies: Article 58, paragraph 1. Thus the freedom of navigation begins at the outer limit of the territorial sea, now fixed at a maximum of 12 nautical miles from the baseline (Article 3).

There are two ways of looking at the high seas. One is the historical perspective (if one goes back far enough in time, what we now call the high seas was all there was – descended from the public law of the Roman Empire first stated by Marcianus, as recorded in Justinian’s Digest, as “the sea and its coasts are common to all men” (communis omnium naturali jure). On this view, everything that has happened since, including the general recognition of zones of national sovereignty and jurisdiction beginning with the territorial sea through to the most recent zones (the EEZ and archipelagic waters), is a process of gradual whittling away of the high seas, to be resisted as much for sentimental reasons as because of fears of expansion of coastal State jurisdiction, as illustrated by a remark attributed to President Reagan: “We’re policed and patrolled on land and there is so much regulation that I kind of thought that when you go out on the high seas you can do as you want.” This leaves the freedom of navigation as the default setting; in so far as it is not abolished or qualified by other positive law, it continues to apply.


11 Though this postdates Grotius, to whom the modern doctrine of freedom of navigation is attributed, he was willing to concede that the impossibility of occupation of the sea, on which he based his reasoning, did not extend to certain narrow bodies of water in the immediate vicinity of the coast such as bays or straits: H. Grotius, The Freedom of the Seas Or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade (translated by R. van Deman Magoffin) (New York: Carnegie Endowment for International Peace, 1916), at 31 and 37.

12 L. Cannon, “Public Perception Seems Split in Its Perception of Reagan”, The Washington Post, 12 July 1982 at 3; the remark was made at the 29 June 1982 meeting of the National Security Council at which the decision that the US would not sign UNCLOS was taken.
The other view (preferred by the author) is dictated by modern pragmatism, starting from the position that the law exists to serve human beings, who after all are land-dwelling creatures unable to survive beyond a short period in the ocean, though make use of it they certainly do. This attitude is encapsulated by the pithy phrase “The land dominates the sea”, enunciated by the International Court of Justice (ICJ) in the *North Sea Continental Shelf* cases.\(^{13}\) It is also consistent with the negative definition of the high seas in modern times: in both the High Seas Convention\(^ {14}\) and Article 86 of UNCLOS\(^ {15}\) it is defined as what is left over after all the other zones encompassing the water column (internal waters and territorial sea in the older treaty; these plus archipelagic waters and the EEZ in UNCLOS) are accounted for.

Even supporters of the first view do not normally insist that the freedom of navigation is absolute. This would have precluded not only any willingness of States to conclude the various International Maritime Organization (IMO) conventions dealing with the safety of navigation and the avoidance of collisions that place limited constraints on navigation,\(^ {16}\) and deprived that organisation of much of its *raison d’être*, but also the requirement in paragraph 2 of Article 87 that the exercise of any of the freedoms of

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\(^{13}\) *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, p. 3 at 51 (paragraph 96).

\(^{14}\) *Supra* n 8, Article 1.

\(^{15}\) *Supra* n 2, Article 86.

the high seas, navigation included, must take place with due regard for the exercise by other States and their nationals of the same or a different freedom.\textsuperscript{17}

Unlike the freedom of fishing, which is now heavily qualified in UNCLOS Article 87, subparagraph 1(e) by cross-reference to the many rules of Articles 116-120, because the old assumption of inexhaustibility of fish stocks has long since been shown to be untrue, and a fish caught by X is not available for catching by Y, freedom of navigation endures largely unscathed because there is normally no scarcity of the only “commodity” on which it depends – ocean space. In most parts of the ocean beyond the territorial sea there is more than enough room to accommodate the comings and goings of all the ships making use of the freedom of navigation, but certain areas are subject to congestion and the risk that two ships will (inadvertently) seek to occupy the same space at the same time, i.e. collide. On this view, the survival of the high seas at all is principally due to the fact that it has not yet been affected by the modern trend of economic efficiency, which dictates that scarcities and the problems they cause on each part of the world’s surface, ocean as well as land, are best managed if there is a single identifiable owner responsible for its regulatory upkeep, leading in most contexts to rights of a proprietary or quasi-proprietary nature. The high seas’ character as a commons remains unchallenged only because managing the ocean

\textsuperscript{17} The exact wording is “These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas…”, the equivalent phrase in the last sentence of Article 2 of the High Seas Convention, supra n 8, was the slightly weaker “reasonable regard”. D. Anderson, “ Freedoms of the High Seas in the Modern Law of the Sea”, in D. Freestone, R. Barnes and D.M. Ong (eds), The Law of the Sea: Progress and Prospects (Oxford University Press, 2006), 327 at 332 denies that there is any difference in meaning between the two phrases, but if that is the case it is not clear why the negotiators of UNCLOS thought fit to change the wording. The author has usually been able to convince his students otherwise by drawing their attention to the signs placed at several points on the perimeter of the campus of his institution, which enjoin cyclists to proceed with “due regard for the safety of pedestrians”, and inviting them to consider whether as pedestrians they would feel safer if “due” were to be changed to “reasonable”.

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becomes ever more costly the farther out to sea one goes, so that beyond a certain point the cost of good management is likely to exceed the economic benefit derivable from exclusive jurisdiction. Because law, no less than nature, abhors a vacuum, some system of law must be found to govern human activities on the high seas, and this is the purpose served by the rule of exclusive jurisdiction of the flag State on the high seas found in both UNCLOS\textsuperscript{18} and before it the High Seas Convention.\textsuperscript{19} In other words, the high seas are likely to be with us for a very long time to come, and as long as this is so, the flag-State rule, or something like it, would need to be invented if it did not already exist.

Most of the time, therefore, these two ways of looking at the high seas can co-exist because they do not lead to any practical difference in outcomes – the observer standing on dry land looking out to sea, or the mariner viewing from mid-ocean the steady encroachment of coastal State jurisdiction on the common domain. Occasionally, however, questions arise that lead to different answers depending on the perspective from which one starts, as illustrated by two recent cases in which the high seas freedom of navigation was invoked on behalf of ships not actually on the high seas at the time.

**Absolutism looking from sea to land – Sellers v. Maritime Safety Inspector\textsuperscript{20}**

The earlier of the two cases, this was a successful further appeal by Sellers against the dismissal by Morris J in the New Zealand High Court of a first appeal against his conviction in the District Court for leaving the port of Opua without having a radio and emergency locator beacon on board the *Nimbus*, the Maltese-registered cutter of

\textsuperscript{18} Supra n 2, Article 92(1).

\textsuperscript{19} Supra n 8, Article 6(1).

\textsuperscript{20} [1999] 2 NZLR 44.
which he was the master. Doing so was in breach of s 21(1) of the Maritime Transport Act 1994 (NZ), which as far as material is in the following terms:

No master of a pleasure craft shall permit that pleasure craft to depart from any port in New Zealand for any place outside New Zealand unless…(b) The Director is satisfied that the pleasure craft and its safety equipment are adequate for the voyage.[]

The Director of the Maritime Safety Authority, an office created under s. 439(1) of the Act, had published a guideline specifying that, for the safety equipment of any pleasure craft to be considered adequate for the purposes of s. 21(1)(b), it would have to include at a minimum a radio and emergency locator beacon;\footnote{Ibid., at 46.} in evidence he stated that its rationale was as an attempt to make search and rescue efforts more effective.\footnote{Ibid., at 48-49.} Sellers objected on philosophical-cum-religious grounds to the requirement to carry emergency equipment.\footnote{Ibid., at 46.} The prosecution took place after the *Nimbus* returned to the same port several months later. Counsel for Sellers argued that his conviction infringed the flag State’s freedom of navigation on the high seas, thus rendering it invalid, as the Act, properly interpreted, could not conflict with New Zealand’s international legal obligations. That is, the Act should be read down so as to be consistent with those obligations.

The judgment of the Court of Appeal was delivered by Keith J (now Judge Keith of the ICJ), who noted that the Act was in part intended to give effect to UNCLOS\footnote{Ibid., at 57. UNCLOS was not, however, among the conventions declared for the purposes of s.5(b) of the Act under the Maritime Transport Act (Conventions) Order 1994 (NZ) (SR 1994/273), cl 2 and Schedule.} (although the Act did not incorporate UNCLOS into New Zealand law, hence its
applicability as an unincorporated treaty was due to the fact that the relevant provisions codified customary international law, which is treated as part of the common law). Despite correctly stating the position under Article 92 of UNCLOS that the “state of nationality of a ship (the flag state) has exclusive jurisdiction over the ship when it is on the high seas”, and observing that s.21(1) created an offence that was committed within (or at the moment of departure from) New Zealand’s internal waters, the Court thereafter proceeded to treat this as being equivalent to the wider notion of exclusive jurisdiction over a ship in relation to the high seas. Although Article 87 was not actually mentioned by the Court, the freedom of navigation it embodies was, in the finding that

[t]he effect, if not the purpose, of the provision [i.e. s.21(1)(b)] is to place requirements on the exercise of the freedom to navigate on the high seas by reference to the adequacy of the ship, her crew and her equipment for the voyage(…).

It concluded that under international law a port State

has no general power to unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have effect on the high seas. Any requirements cannot go beyond those generally accepted, especially in the maritime conventions and regulations; we were referred to no generally accepted requirements relating to the equipment particularly in issue in this case so far as pleasure craft were concerned.

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25 Ibid., at 46-47.
26 Ibid., at 48.
27 Ibid.
28 Ibid., at 57.
The Court also relied on Article 21, paragraph 2 of UNCLOS, which restricts in the same way the rights of coastal States to prescribe laws on the construction, design, equipment and manning of ships passing through their territorial sea in the exercise of the right of innocent passage.\(^{29}\) It may be conceded that had the *Nimbus* merely been passing through New Zealand’s territorial sea on the way to a New Zealand port (or not intending to enter a port), it could not have been stopped, and Sellers could have not been prosecuted, for not having the prescribed safety equipment on board, without violating the flag State’s right of innocent passage.\(^{30}\) Similarly, a putative offence of entering the territorial sea (from either the seaward or landward side) without such equipment would be contrary to UNCLOS. But the *Nimbus* was not stopped, and that is not where the offence was committed. It is significant that UNCLOS makes no parallel provision for internal waters including ports;\(^ {31}\) rather, the assumption underlying the general reference in UNCLOS Article 25, paragraph 2 to conditions that States can impose on the entry of foreign ships into their ports,\(^ {32}\) and the specific reference to anti-pollution conditions in Article 211, paragraph 3, is that port States can exclude those ships not satisfying the conditions (as long as they have not taken on other treaty obligations requiring them to admit certain ships, for example those of a particular nationality). This extends on the drafting principle *expressio uniuς est

\(^{29}\) *Ibid.*, at 54.

\(^{30}\) By analogy with the hot pursuit exception to the flag State rule in UNCLOS Article 111, however, a pursuit for the offence in question, begun and maintained under the right conditions, could culminate in stopping the *Nimbus* in the territorial sea on the way out – though not on the way back in some months later.

\(^{31}\) Ports are taken to be internal waters because they lie landward of the baseline from which the breadth of the territorial sea is measured (UNCLOS, *supra* n 2, Article 8(1)), the outermost permanent harbour works forming part of the baseline (*ibid.*, Article 11).

\(^{32}\) The *locus classicus* in this respect is the statement of the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports* 1986, p.14 at 111 (paragraph 213): “It is…by virtue of its sovereignty that the coastal State may regulate access to its ports”.

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*exclusio alterius* to rules on the construction, design, equipment and manning of ships: the restrictions on the coastal State’s legislative powers apply in the territorial sea but not in its ports, and in return for permission to enter the port, foreign ships may need to submit voluntarily to rules affecting their conduct in the territorial sea, and indeed on the high seas, to which they could not otherwise be subject. Were it otherwise, the United States would not have been able, long before the IMO moved to phase out single-hulled tankers, to close its ports to them in the Oil Pollution Act of 1990 (by establishing double hull requirements both for new and existing tankers in order to be allowed to continue operating to and from US ports beyond certain dates).  

Given the references in the Maritime Transport Act to compliance with and implementation of international maritime conventions to which New Zealand is party, the Court stressed that s.21 of the Act, whose purpose is to assist the Maritime Safety Authority in carrying out its search and rescue obligations under the IMO Search and Rescue Convention, had to be understood and interpreted in the light of how international law limited the regulatory jurisdiction of port States. In order for the powers of the Director not to exceed what was permitted by international law, the Court held that those powers must be “read as subject to the relevant rules of international law” and the restrictions they placed on port States’ powers. It said

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34 46 USC s.3703a, inserted by s.4115 of the Act (PL 101-380). See also Patterson v. Bark Eudora (1903) 190 US 169 at 178, where the US Supreme Court said per Brewer J that “the implied consent to permit [foreign merchant vessels] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose.”

35 Supra n 16 (last item).

36 Sellers v. Maritime Safety Inspector, supra n 20, at 59.
that “national law in this area has been essentially governed by and derived from international law with the consequence that national law is to be read, if at all possible, consistently with the related international law.” The Director of Maritime Safety was therefore required to exercise his powers consistently with the jurisdictional limitations imposed at the relevant time by international law, which did not permit New Zealand to exercise jurisdiction over foreign-flagged vessels (though they might in future evolve in that direction, much as the shrinking scope of State immunity was broadening coastal States’ jurisdiction in other ways without any legislative amendment taking place). In other words, under s. 21 the Director was confined to doing no more than “ensure compliance with accepted international standards and rules, to the extent that they allow that judgment to be made by a coastal state”. So interpreted, s. 21 did not authorise the Director to require foreign-flagged pleasure craft to carry specific equipment, leading the Court to quash the conviction and sentence.

As one commentator states,

[t]he net effect of the Court’s gloss – as international law currently stands and as far as foreign-flagged yachts are concerned – is to erase s 21 from the statute book. The Director of Maritime Safety cannot require foreign yachts to carry even basic safety equipment while they are within New Zealand’s search and rescue area. This result cannot be reconciled with the plain wording of s 21, which, although of general scope, does not seem to be particularly ambiguous or unclear.  

37 Ibid., at 62.  
38 Ibid.  
39 Ibid., at 61.  
40 Ibid., at 62.  
Now there is nothing unusual in courts in common law jurisdictions construing statutes in accordance with what they conceive to be the broad purpose of the treaty to which the statute gives effect in domestic law, as the House of Lords has done in the United Kingdom in *The Jade; The Eschersheim* in relation to s.1 of the Administration of Justice Act 1956, giving effect to the International Convention relating to the Arrest of Seagoing Ships.42

As the Act was passed to enable Her Majesty’s Government to give effect to the obligations in international law which it would assume on ratifying the Convention to which it was a signatory, the rule of statutory construction laid down in *Salomon v. Customs and Excise Commissioners* [1967] 2 Q.B. 116 and *Post Office v. Estuary Radio Ltd.* [1968] 2 Q.B. 740 is applicable. If there be any difference between the language of the statutory provision and that of the corresponding provision of the Convention, the statutory language should be construed in the same sense as that of the Convention if the words of the statute are reasonably capable of bearing that meaning.43

Yet, it is submitted, there was no need for the Court of Appeal to read down the Maritime Transport Act in the way it did, for the simple reason that there was no conflict with the international law of the sea. Such conflict as the Court believed existed could only come about from the conviction of Sellers interfering with the right of Malta as the flag State of the *Nimbus* to have it return to the high seas.

The Court declined to read down the territorial scope of the Act to exclude the high seas and innocent passage in the territorial sea, on the basis that the words “for the voyage”, as defined elsewhere in the Act, clearly applied to a voyage to a port outside

42 Brussels, 10 May 1952; 439 UNTS 193.

43 *Owners of the motor vessel Erkowit v. Owners of the ship Jade; Owners of cargo lately laden on board the motor vessel Erkowit v. Owners of the ship Eschersheim* [1976] 1 All ER 920 at 924 per Lord Diplock.
New Zealand. But it was unnecessary to do so at all since the act with which Sellers was charged was not committed either on the high seas or in the territorial sea. Indeed, the Court would not have perceived any need to read down the Act had it not “read it up” in the first place, on the unsatisfactory basis that what the Act in reality sought to do was to require all pleasure craft departing New Zealand to have a radio and emergency locator beacon in the part of the ocean where New Zealand under the Search and Rescue Convention would have the responsibility to rescue them should they encounter trouble. Yet, while this may well have been the New Zealand authorities’ desired outcome, it does not explain why the Act did not simply impose such an obligation if that were so. Of course, it is obvious that to subject a specified area of the high seas to legislation directly applicable to foreign craft in this way would have exceeded New Zealand’s jurisdiction at international law – but the Act did not do this even indirectly. What the parliamentary draftsmen appear to have tried to do instead is to use the full extent of that permissible jurisdiction in order to achieve a result as close as possible to the assumed desideratum, while still falling some way short of it. That is, the master of any foreign craft lacking the prescribed equipment on arrival in a New Zealand port would need to purchase it in order to leave; the authorities could then rely on the inertia of most mariners, having made that investment, to make the most of it by keeping the equipment on board even after the obligation to do so had ceased. The Court of Appeal fails to give any credit for this restraint in electing to read the Act as though Parliament was not merely motivated by but actually intending to enact the inferred jurisdiction-exceeding policy – but this makes sense only if Sellers could have been prosecuted even if he had possessed the

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44 Sellers v. Maritime Safety Inspector, supra n 20, at 60; the Court also considered and rejected two other possible interpretations that would avoid the Director’s powers in s.21 conflicting with international law: exclusion of foreign pleasure craft from the scope of the section, or limitation of the section’s spatial application so as not to extend to the high seas: at 59-60.

45 Supra n 16 (last item).

required equipment at the moment of leaving port but thereafter, his religious objections outweighing his inertia, jettisoned it. That, however, does not seem possible, given how the Act is drafted. The offence of which Sellers was convicted was completed in New Zealand’s internal waters – or, more precisely, at the boundary between internal waters and the territorial sea, the point beyond which Parliament appears to have intended that he would be beyond the reach of the Act, in order not to infringe against the prohibition in UNCLOS Article 21, paragraph 2 on legislating on equipment to be carried by ships in the territorial sea other than so as to enact international standards.46 Hence, it can be deduced that what motivated the Court in the way it applied Article 92 must have been the (mis)apprehension that convicting the master of a foreign-flagged vessel would wrongfully interfere with the vessel’s return to the high seas, where it would enjoy its flag State’s freedom of navigation. In other words, the Court unnecessarily subordinated the right of New Zealand as the port State within its own port to that of the flag State in regaining access to the high seas.47

46 Supra, text at n 29.

47 The oddness of this result may be gauged by asking whether a New Zealand court would now refuse to apply against a foreign ship a statute criminalising entry into a New Zealand port of any ship that had engaged in specified behaviour on the high seas, on the same ground that the statute was “really” regulating conduct on the high seas outside New Zealand’s jurisdiction at international law. The answer is not obvious, as unlike the situation in the Sellers case, where a ship in port wishing to return to the high seas cannot do so except by leaving port and thus exposing its master to s.21 of the Maritime Transport Act 1994 and its equivalent for other craft, nothing compels a ship on the high seas to enter a New Zealand port (except distress, but in that event a customary law right to enter port exists and it may be assumed that the New Zealand authorities would not prosecute), and a ship voluntarily present in a foreign port subjects itself to the legal system of the port State. If the answer is yes, New Zealand is needlessly limiting, if not depriving itself of, its power to impose conditions on entry into its ports assumed by UNCLOS Article 25(2) – see supra, text at nn 32 and 33 – and of the policy leverage this brings with it. But if the answer is no, it creates a distinction, incongruous in navigational terms, between entering and leaving a port.
Curiously, there is no mention in the judgment of the nationality of Sellers himself. If he were a New Zealand national, New Zealand would have criminal jurisdiction over him at international law even if the Court’s reasoning based on the *Nimbus* being a foreign vessel were correct, as Article 90 of UNCLOS, unlike its Article 116 equivalent on the freedom of fishing, mentions only States and not natural persons of their nationality: “Every State, whether coastal or landlocked, has the right to sail ships flying its flag on the high seas.” But he does seem at least to have been based in New Zealand, as it was only on his return to the same port after an absence of some months that he was charged with the offence committed by leaving it without the prescribed equipment.

The decision has not met with universal approbation, yet, although it is sometimes treated as an aberration, until recently there was no contrary authority on the central point under discussion. This is possibly because, despite there being no paucity of examples of ships and their masters being subjected to penal and administrative proceedings in foreign ports (most notoriously the master of the *Prestige* in Spain, whose case went as far as a Grand Chamber of the European Court of Human

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48 The most thoughtful defence of it is by D. Devine, “Port State Jurisdiction: A Judicial Contribution from New Zealand”, (2000) 24 Marine Policy 215 at 218, but it is ultimately unconvincing because it relies on a contrived distinction between *ex post facto* and *a priori* jurisdiction not known to international law, asserting that the former is permitted, to punish wrongdoing after the event, but not the latter, seeking to prevent undesirable occurrence X by banning Y which can lead to it or requiring Z which may forestall it, since X may never actually happen. This is equivalent to a distinction between legislating directly and indirectly to achieve a given end. It may be noted that formally a criminal conviction is always after the event – in this case, the relevant event was leaving port without the prescribed equipment.

Rights\textsuperscript{50}, these usually involve a sinking, grounding, collision or some other misadventure, meaning that the ship concerned is in no fit state to resume its voyage, so that even the most imaginative of counsel would be unlikely to think of raising the denial of high seas freedoms as a defence.\textsuperscript{51} Of the relatively few precedents cited to or by the Court of Appeal, in none of them were the facts on all fours with those of this case in denying the port State’s jurisdiction over a ship in or leaving port. Most are of no assistance in supporting the Court’s decision because they deal with acts of outright interference with a ship while it was on the high seas, which is clearly and uncontroversially impermissible.

The Court first discussed\textsuperscript{52} the well-known \textit{Lotus} case, in which a narrow majority of the Permanent Court of International Justice (PCIJ) found that there was nothing in the customary international law rules on jurisdiction to prevent Turkey from prosecuting in its port the responsible officer of a French ship for involuntary manslaughter of several persons on board a Turkish ship as a result of a collision

\textsuperscript{50} Mangouras \textit{v. Spain}, Application No. 12050/04 (2012) 54 EHRR 25; in 2012 the Gladstone Magistrates Court convicted the master and chief officer of the \textit{Shen Neng 1} which ran aground on Douglas Shoal off that Queensland port in 2010, sentencing them to a A$25,000 fine and three months’ imprisonment respectively: <http://www.abc.net.au/news/2012-11-14/captain-fined-25k-over-shen-neng-oil-spill/4370828> (visited on 17 June 2013).

\textsuperscript{51} The Master and Second Officer of the \textit{MV Rena}, which struck Astrolabe Reef off Tauranga in 2011, were charged under the Resource Management Act 1991 (NZ) and the Maritime Transport Act 1994 (NZ), as well as the Crimes Act 1961 (NZ): T. Leander, “Rena master and second officer accused of altering ship records”, \textit{Lloyd’s List}, 22 December 2011, 2. Both pleaded guilty to all charges against them (see J. Morton, “Rena captain jailed for 7 months”, <http://www.nzherald.co.nz.nz/news/article.cfm?c_id=1&objectid=10808468> (visited on 17 June 2013)), forgoing the opportunity to move the Tauranga District Court to dismiss the charges on the basis that it was bound to follow the Court of Appeal in \textit{Sellers} by reading down the Acts in question, doubtless because it would have been simple to distinguish the earlier case, as the ship, having broken in two, was unable to continue its voyage.

\textsuperscript{52} \textit{Sellers v. Maritime Safety Inspector, supra} n 20, at 49-51.

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between the two on the high seas.\(^53\) It laid emphasis on the overturning of this outcome in Article 1 of the International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation\(^54\) and subsequently also in Article 11, paragraph 1 of the High Seas Convention and Article 97, paragraph 1 of UNCLOS, which restrict prosecutions of mariners in this situation to the flag State of the ship aboard which they are serving or, except in the first-named convention above, the mariner’s own State of nationality. It is submitted, however, that this is beside the point, for the basis of Turkey’s criminal jurisdiction in that case was essentially quasi-territorial: not the presence in a Turkish port of the individual charged, but rather the assimilation of death caused by a collision on the high seas between ships flagged to States A and B to the situation, much used as an illustration by textbook writers, of a person in State A who shoots a gun across the border into State B, killing a person there. (Lest this be perceived as overly contrived, mention may be made of the \textit{Enrica Lexie} incident of February 2012, which sparked a dispute between Italy and India over the killing of two crewmembers aboard an Indian fishing vessel on the high seas. The deceased were shot from an Italian-flagged merchant ship by an Italian naval detachment posted on board to protect it from piracy, who suspected the vessel of piratical intentions.\(^55\)) Only one element of the \textit{actus reus} of the offence need have taken place in a State for that State to have jurisdiction over the crime, so where different elements occur in both States A and B, at international law both can legitimately try the person for the

\(^{53}\) \textit{The Case of the SS Lotus (France v. Turkey)} (1927), PCIJ Reports Series A, No 10.

\(^{54}\) Brussels, 10 May 1952; 439 UNTS 233.

\(^{55}\) In May 2012 the ship itself was released from detention pursuant to the order of the Supreme Court of India in \textit{MT Enrica Lexie \\& Anor v. Doramma \\& Ors}, Civil Appeal No. 4167/2012, but the same court confirmed in January 2013 that two Italian marines charged with the killings would be tried in an Indian federal court, where they and Italy would be able to argue that the courts of Italy, not of India, should have jurisdiction to try them: see D. Mahapatra, “Kerala can’t try Italian naval guards”, <http://timesofindia.indiatimes.com/india/Kerala-cant-try-Italian-naval-guards-Supreme-Court/articleshow/18081014.cms> (visited on 17 June 2013).

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crime. Note that the discredited equation of the ships with the territory of the flag States is not necessary to support this analogy – when the collision takes place on the high seas, the ships are still places where the law of States A and B respectively apply, the event of the collision bringing them momentarily into a situation of adjacency, as in the case of the cross-border shooting. In other words, the better view is that the Lotus was correctly decided according to the law as it then stood, and the subsequent reversal in the three conventions to which the Court of Appeal draws attention was motivated by policy considerations rather than a belief that the decision was wrong, even though, as a result of the preamble to the High Seas Convention, the treaty rule now also represents the position at customary international law. In changing the rule specifically for collisions, however, States cannot be taken to have circumscribed sub silentio at the same time the general jurisdiction of coastal States in their ports, and the original rule would, it is submitted, still apply to the Enrica Lexie incident.

The only case cited in Sellers v. Maritime Safety Inspector that on the facts was remotely similar to the latter, as the ship was in port, was the United States Supreme Court decision of Lauritzen v. Larsen, in which the Court rejected a claim of the respondent, a Danish sailor aboard a Danish ship who had suffered personal injury in the Cuban port of Havana, by reading down a statute that on its face applied to “any seaman who shall suffer personal injury in the course of his employment”. That result falls far short, however, of compelling the Court of Appeal’s finding. Firstly, as the claim was in tort, the rules applicable are those of private international law, concerning which, on most analyses, public international law leaves States free to follow their own rules; the rules on jurisdiction in public international law cover criminal matters and on some views also public civil matters such as competition

56 (1953) 345 US 571.
law,\textsuperscript{57} with only a small minority of writers adopting the stance that all civil claims, and thus private international law itself, are subject to those rules.\textsuperscript{58} Secondly, even on the minority view, the tort in question had been committed outside the United States by one alien against another, and thus had no nexus with the United States,\textsuperscript{59} whereas Sellers’s offence was committed within waters assimilated to New Zealand territory.

In more recent times, \textit{Sellers v. Maritime Safety Inspector} was unsuccessfully relied on by the plaintiffs in \textit{Air Transport Association of America v. Secretary of State for Energy and Climate Change},\textsuperscript{60} referred to the European Court of Justice for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union\textsuperscript{61} by Ouseley J in the High Court of England and Wales.\textsuperscript{62} This was an attempt to overturn the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009,\textsuperscript{63} the United Kingdom legislation implementing European Union Directive

\begin{itemize}
\item \textsuperscript{57} See e.g. M. Shaw, \textit{International Law}, 6th edn (Cambridge University Press, 2008), at 652. This opens the way to the well-known phenomenon of forum-shopping, which may be undesirable but is not contrary to international law. For example United States courts have jurisdiction over civil claims arising out of collisions on the high seas, even where neither ship is US-flagged: \textit{The Belgenland} (1885) 114 US 355.
\item \textsuperscript{58} The best known exponent of this latter view is F.A. Mann, “The Doctrine of Jurisdiction in International Law” (1964) 111 Recueil des Cours de l’Académie de Droit International 1.
\item \textsuperscript{59} The fact that the respondent’s contract of employment had been made in New York did not constitute such a nexus, as this was a claim not in contract but in tort, and in any event the proper law of the contract was Danish law: \textit{Lauritzen v. Larsen}, supra n 56, at 588.
\item \textsuperscript{60} Case C-366/10, \textit{Air Transport Association of America, American Airlines Inc, Continental Airlines Inc, United Airlines Inc v. Secretary of State for Energy and Climate Change} [2012] 2 CMLR 4.
\item \textsuperscript{62} [2010] EWHC 1554 (Admin).
\item \textsuperscript{63} SI 2009/2301.
\end{itemize}
2008/101,\textsuperscript{64} which extended the European Union’s greenhouse gas emissions trading scheme in Directive 2003/87\textsuperscript{65} to operators of aircraft arriving in or departing from airports located in any of its Member States. One of the grounds argued was that subjecting such flights to an obligation to make indirect payments (via the surrender of allowances purchased, calculated on the entirety of the flight, including the overflight of other States’ territory and the high seas), amounted to a denial of the State of registration’s freedom of overflight of the high seas guaranteed by customary international law (and UNCLOS Article 87, subparagraph 1(b), though that was not pleaded, presumably because the plaintiffs’ aircraft were registered in the United States, not party to UNCLOS).

The Grand Chamber of the European Court of Justice held that the application of the Directive to foreign aircraft

founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States…does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.\textsuperscript{66}


\textsuperscript{66} Case C-366/10, supra n 60, at 162 (paragraph 125).
**A fortiori**, its application to such aircraft overflying the high seas did not “affect the principle of freedom to fly over the high seas since an aircraft flying over the high seas is not subject, in so far as it does so, to the allowance trading scheme.” 67 Rather, it was only the voluntary presence of the aircraft within the territory of a Member State as a consequence of its operator scheduling a commercial flight arriving at or departing from an airport in that territory that rendered it subject to the requirement to (purchase and) surrender allowances. No rule of custom therefore prevented the European Union from calculating the amount of allowances to be surrendered on the fuel consumed during the whole flight, as opposed to only the portion in or over its Member States’ territory and airspace. 68

This ruling was in line with the opinion of Advocate-General Kokott, 69 who had earlier also argued, taking as an example the fact that many States taxed their nationals’ worldwide income, that it was “by no means unusual for a State…to take into account in the exercise of its sovereignty circumstances that occur or have occurred outside its territorial jurisdiction.” 70 While there was thus no objection in principle to the extraterritorial operation of States’ laws, the Directive did not in fact have extraterritorial effect:

> Admittedly, it is undoubtedly true that, to some extent, account is thus taken of events that take place over the high seas… This might indirectly give airlines an incentive to conduct themselves in a particular way when flying over the high seas…, in particular to consume as little fuel as possible and expel as few

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greenhouse gases as possible. However, there is no concrete rule regarding their conduct within airspace outside the European Union.\footnote{Ibid., (paragraph 147) (italics in original).}

\textit{Sellers v. Maritime Safety Inspector} was not referred to in the judgment, having received short shrift from Advocate-General Kokott. While she chose not to take direct issue with that case, dismissing it instead as not relevant to aircraft,\footnote{Ibid., at 119 (paragraph 131 and footnote 126).} the analogy from the freedom of navigation to the freedom of overflight is a close one, hence, had she found the Court of Appeal’s reasoning at all persuasive, it would have been a simple matter for her to apply the analogy.

\textbf{Relativism looking from land to sea – The M/V Louisa}

It was not until 2010 that a shipping case was brought that offered an opportunity to reinstate what is, or ought always to have been, the orthodoxy in this regard. That case, between Saint Vincent and the Grenadines and Spain, was before ITLOS\footnote{This is because both Saint Vincent and the Grenadines and Spain have made declarations under Article 287 of UNCLOS, on 22 November 2010 and 19 July 2002 respectively, electing ITLOS as their preferred forum for settling disputes about the interpretation and application of that treaty: see the figure “1” against both States in the ITLOS column on the dispute settlement webpage of the UN Secretariat’s Division for Ocean Affairs and the Law of the Sea, <http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm> (visited on 17 June 2013).} and was initially the subject of an application for provisional measures under Article 290 of UNCLOS, which ITLOS declined to order.\footnote{\textit{M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008-2010,} p.58.} As already noted, four of the applicant’s five claims were weak to the point of hopelessness and need no discussion here, and the last-minute sixth claim which also failed to make much impression on ITLOS is likewise beyond the scope of this contribution, but it might have been possible for ITLOS to uphold the claim for breach of Article 87, had it shared the
assumption in *Sellers v. Maritime Safety Inspector* that the freedom of navigation of ships on the high seas is absolute, taking precedence even over the sovereign powers of a port State within its internal waters and territorial sea. This was confirmed by the Request for Provisional Measures, which reserved the full particulars of the alleged breach of Article 87 to the memorial to be filed, but stated that “provisional measures are appropriate based on Respondent’s failure to allow the Louisa to enjoy its rightful freedom of navigation and scientific research.”

Because of the cursory treatment of the Article 87 claim in the decision on the merits, it is the pronouncements in the provisional measures phase of the *M/V Louisa case* that will have to serve as elucidation on the spatial scope of the freedom of navigation. For these purposes, that phase is notable not for the majority decision, but rather for the four dissenting opinions, those of Judges Wolfrum, Cot, Golitsyn and Treves, as well as the separate opinion of Judge Paik.

The decision of the majority was that “the circumstances, as they now present themselves to the Tribunal, are not such as to require the exercise of its powers to prescribe provisional measures under article 290, paragraph 1, of the Convention”, but it was not this conclusion with which the four judges disagreed – as it is clear from their dissenting opinions that none of them would have awarded provisional measures to Saint Vincent and the Grenadines – but the reasoning of the majority. For in order even to reach the question of whether the circumstances warranted

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76 *Supra* n 74.

77 *Ibid.*, at 70-71 (paragraph 83(1)).
provisional measures, the majority must first have found that ITLOS had jurisdiction to grant those measures, which depended on it being satisfied that *prima facie* it would have jurisdiction over the merits of the case.

Judge Wolfrum made plain the fundamental flaw in the applicant State’s submission:

As far as article 87 of the Convention is concerned…[e]vidently the Applicant takes the position that the arrest and detention of the M/V “Louisa” constitutes an infringement on the freedom of navigation. In my view this approach is not sustainable considering the situation of the vessel which was arrested, as the Applicant stated, when docked in a port of the Respondent for some time with no intention of sailing. It is hard to imagine how the arrest of a vessel in port in the course of national criminal proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme it would, in fact, mean that the principle of the freedom of navigation would render vessels immune from criminal prosecution since any arrest of a vessel, under which ground whatsoever, would violate the flag State’s right to enjoy the freedom of navigation. This leads me to the conclusion that on the facts provided by the Applicant article 87 of the Convention does not form a plausible basis for a claim of the Applicant.78

Judge Cot for his part ridiculed the conclusion to which the *reductio ad absurdum* led him:

[L’]existence d’une liberté fondamentale n’interdit pas l’exercice des pouvoirs de police et de justice par l’Etat côtier sur son propre territoire. Un tel raisonnement conduirait à considérer que le Premier Amendement à la

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Constitution des États-Unis, qui garantit le droit de réunion, interdirait l’interpellation à Chicago dans les années dix-neuf cent trente d’un suspect soupçonné de trafic illicite de boissons alcooliques au motif que celui-ci comptait se rendre à une réunion pacifique organisée à propos de la législation sur la prohibition.79

Not much less forthright was Judge Golitsyn:

Article 87 of the Convention...does not imply that action taken by the authorities of a coastal State, in accordance with its laws and regulations, against a foreign vessel owing to that vessel’s involvement in alleged violations of those laws and regulations in the internal or territorial waters of that State, constitutes infringement of the right of States Parties to the Convention to exercise freedom of navigation on the high seas.80

Judge Treves did not need to decide this point because in his view no dispute under UNCLOS existed at all,81 but agreed nonetheless with Judges Wolfrum and Golitsyn, adding that:

79 M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Dissenting Opinion of Judge Cot, ITLOS Reports 2008-2010, p.93, at 97 (paragraph 21). The official English translation renders this, with trivial inaccuracies, as:

[T]he existence of a basic freedom does not prohibit the coastal State from exercising the powers of its police and judiciary in its own territory. It is as if the First Amendment of the United States Constitution, which guarantees the right of assembly, had prevented the police from arresting a gentleman suspected of bootlegging in 1930s Chicago because he was going to attend a peaceful meeting on prohibition.

80 M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Dissenting Opinion of Judge Golitsyn, ITLOS Reports 2008-2010, p.100, at 104 (paragraph 19).

81 Dissenting Opinion of Judge Treves, supra n Error! Bookmark not defined., at 87-89 (paragraphs 2-8).
Jurisdiction on the basis of article 87 of that instrument [UNCLOS] seems to me, in the circumstances of the case, *prima facie* unfounded. I cannot, however, exclude the possibility that, upon attentive examination at a further phase of the case, the Tribunal might find in it a basis for its jurisdiction *ratione materiae*.  

The issue in the provisional measures hearing was not whether Spain’s detention of the *Louisa* constituted a breach of Article 87 of UNCLOS; that fell to be decided in the merits phase. Rather, the jurisdictional hurdle that an applicant must surmount is to show that jurisdiction exists *prima facie*, in the words of Article 290, paragraph 1:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part [XV, on dispute settlement generally]…, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

That is, the elements which the applicant must cumulatively prove in order for ITLOS to be properly seised of the merits of the dispute need to be at least arguably present, and there must be no obvious countervailing factor which would negative any of these. This, as Judge Paik observed, is hardly a formidable obstacle:

> [W]hile the provisions invoked by the Applicant as the legal basis of its claims do not appear to be manifestly related to the facts of the case, the Tribunal does not need to ascertain, at this stage, whether the allegation made by the Applicant are “sufficiently” arguable or plausible. The threshold of *prima facie* jurisdiction is rather low in the sense that all that is needed, at this stage,

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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. On the face of it, at least one provision invoked by the Applicant in its request, Article 87 of the Convention, may provide a basis for an arguable case on the merits, in light of the Respondent’s unreasonably long period of detention of the vessel without rendering an indictment or taking any of the necessary judicial procedures. Thus, it appears *prima facie* that “a dispute concerning the interpretation or application of the Convention” existed between the parties on the date the Application was filed.  

In the form that its argument on Article 87 ought to have taken (though, strangely, not much was in fact said about Article 87 in the written pleadings and nothing at all of substance by the applicant in the oral pleadings, with *Sellers v. Maritime Safety Inspector* bafflingly not even cited), a breach of the right of Saint Vincent and the Grenadines to freedom of navigation on the high seas for its ship the *Louisa* would have been not merely a consequence of, or otherwise dependent on, breach of some other provision of UNCLOS (such as Article 73, 226, 245 or 303 as claimed) or of another obligation having its origin elsewhere in international law (say the right of the

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84 The applicant’s first written pleadings were exceedingly thin (Memorial of Saint Vincent and the Grenadines, <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/Memorial_SVG.pdf> (visited on 17 June 2013), at 28 (paragraphs 72 and 73)), though the counter-memorial, reply and rejoinder were slightly more expansive: see *infra*, nn 94 and 95 and accompanying text.

85 The sole mention of Article 87 was by Spain, and that only briefly: see the transcript of the afternoon sitting of 11 October 2012 (ITLOS doc ITLOS/PV.12/C18/11, <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_18_merits/ITLOS_PV_12_C18_11_E.pdf>), at 5.
owners under human rights law to have the Spanish authorities’ allegations against their ships brought to trial without undue delay). To the contrary, even if there were no breach by Spain of any other obligation, it is possible – at least on the reasoning underlying *Sellers v. Maritime Safety Inspector* – for Article 87 to be breached independently of these, indeed the detention by Spain of the *Louisa* may in all other respects have been lawful, and rendered unlawful simply because of the effect it had in depriving that ship of the opportunity to exercise its flag State’s freedom of navigation on the high seas.

On this basis, it is submitted that the majority decision is to be preferred, albeit for a reason similar to that suggested by Judge Paik, as ITLOS had jurisdiction over the Article 87 element of the dispute not just *prima facie* but definitively, inasmuch as it ought to have turned on which of the two views of the freedom of navigation on the high seas in that article was ultimately found to be correct. This is irrespective of the fact that one of those views had much more to commend it than the other; as long as the weaker view is still arguable, as it was, this conclusion holds. Hence it is all the more significant that three of the four judges who penned dissenting opinions (Judge Treves being the exception, in view of the second sentence of the extract quoted above) would have denied ITLOS even *prima facie* jurisdiction, as they were implicitly saying that the *Sellers* position was not merely wrong, but was not even plausible. It is clear, therefore, that when the merits of this case were argued, Saint Vincent and the Grenadines already had little hope of convincing four of the 21 ITLOS judges that Spain had contravened Article 87 of UNCLOS, even though in theory there was still room for all but Judge Cot to change their minds. This could conceivably have happened on the ground that the Article 87 point fell outside the *ratio* of their dissents because they also found some logically anterior basis on which to deny the relief sought: this was true not only of Judge Treves,86 but equally of

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86 *Supra*, text at n 81.
Judges Wolfrum and Golitsyn, who would both have denied provisional measures for lack of fulfilment of the Article 283 condition to exchange views on the settlement of the dispute. 87

Judge Cot might well have taken his colourful comparison further, as the absurd consequences that he highlighted also arise closer to home in the law of the sea. Similar reasoning to Sellers would mean in addition that no fishing vessel could ever be detained for violating a coastal State’s fisheries laws in waters under its sovereignty or jurisdiction, as that would interfere with its freedom of fishing on the high seas in UNCLOS Article 87, subparagraph 1(e). The inherent improbability of that is underlined not only by the mere existence of the prompt release procedure of Article 292 for vessels detained for fisheries and pollution offences, which would then be unnecessary, but also the right to fish is expressed as applying to nationals in Article 116, which includes but is not limited to fishing vessels. That in turn would mean that States could never arrest and detain foreign nationals for offences committed even within their land territory, because that would prevent them from exercising their right to fish on the high seas, even if they had never engaged in fishing before or were doing so aboard another State’s vessel. It is no answer to say that the right extends only to those who make their living from fishing; why should fisherfolk alone be immune from the criminal laws of all States but their own? There

87 Judge Wolfrum said that the way the majority had applied Article 283, accepting a Note verbale threatening proceedings as amounting to the required exchange of views, “renders it meaningless”: Dissenting Opinion of Judge Wolfrum, supra n 78, at 85 (paragraph 28). Judge Golitsyn gave similar reasons for coming to the same conclusion: Dissenting Opinion of Judge Golitsyn, supra n 80, at 101-102 (paragraphs 7-9). Both appeared to treat Article 283 as a prior procedural step, not going to jurisdiction in the same way as would a manifest agreement by the parties to use some other dispute settlement mechanism entailing compulsory procedures leading to binding decisions (Article 282), or not to use the Part XV procedures at all (Article 281): Dissenting Opinion of Judge Wolfrum, supra n 78, at 85-86 (paragraphs 27-29); Dissenting Opinion of Judge Golitsyn, supra n 80, at 100 (paragraph 3).
exists an entire branch of public international law on the immunities enjoyed by States and the officials and diplomats who represent them, and the modern trend is that commercial activity in general has ceased to be subject to immunity, with a specific denial of immunity for commercial shipping operated by States, so Sellers reasoning would in practice perversely give an immunity to private persons engaged in an economic activity that not even the State itself would enjoy if it chose to engage in it.

**Final disposal of the case**

After such a promising build-up in the provisional measures phase, the merits judgment represents something of an anti-climax. The outcome on the freedom of navigation point was perhaps predictable from the moment that ITLOS declined to base its jurisdiction to prescribe provisional measures in the *ARA Libertad* case on Article 87, subparagraph 1(a), despite Argentina’s claim that Ghana had breached

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88 The United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly on 2 December 2004, not yet in force (see General Assembly resolution 59/38, Annex, reproduced at (2005) 44 *International Legal Materials* 803) provides in Article 10(1) that:

> If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

89 Article 16(1) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* n 88, is in the following terms:

> Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

90 The “ARA Libertad” Case (Argentina v. Ghana), * Provisional Measures, Order of 15 December 2012*,

this provision in detaining its warship in the port of Tema, arrested on the orders of a Ghanaian commercial court on the application of holders of Argentine bonds as security for the debt owed to them on which Argentina had defaulted. If prima facie jurisdiction could be found in the *M/V Louisa* case based in part on the Article 87 claim, even though no provisional measures were ordered, it ought surely also to have existed for this reason in the congruent context of the *ARA Libertad* case, where the very significant provisional measure of the ship’s release was ordered, since both vessels were in a port of the respondent State. Possibly the uncertainty as to whether, once it had regained its ship, Argentina would still wish to pursue the case on the merits made ITLOS reluctant to risk leaving this as the last word on the subject, as it would, at least superficially, in view of the success of the claim for the ship’s release, be perceived as reinforcing rather than contradicting *Sellers v. Maritime Safety Inspector*. But it need not have been the last word, given the opportunity in the merits phase of the *M/V Louisa* case to expound why the Article 87 claim must fail.

Only Judge Lucky accepted that there was a dispute over Article 87 of UNCLOS (among others), going so far as to aver that Ghana at least “appear[ed]” to have deprived the *Libertad* of its (i.e. Argentina’s) right under subparagraph 1(a). Judges

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92 The “ARA Libertad” Case (Argentina v. Ghana), *Provisional Measures*, Separate Opinion of Judge Lucky,

Wolfrum and Cot delivered a joint separate opinion consistent with their stance in the provisional measures of the *M/V Louisa* case, describing Argentina’s argument that the arrest and detention of the *ARA Libertad* infringed its freedom of navigation as not sustainable considering the situation of the vessel, which is detained in Tema, a port of the Respondent. It is hard to imagine how the detention of a vessel in port in the course of national civil proceedings can be construed as violating the freedom of navigation on the high seas. To take this argument to the extreme, it would, in fact, mean that the principle of the freedom of navigation would render all vessels immune from civil proceedings and in consequence from the implementation of the national law of the port State in question. This leads us to the [same] conclusion [as]…the Tribunal, that on the facts provided by the Applicant article 87 of the Convention does not form a plausible basis for a claim of the Applicant.\(^93\)

In the merits phase of the *M/V Louisa* case, Spain argued that the detention took place not on the high seas but while the *Louisa* “was docked voluntarily in a Spanish port”, contesting the absolutist interpretation of Article 87 by Saint Vincent and the Grenadines as rendering foreign vessels in port immune from criminal prosecution, an absurd perversion of “the true meaning of Article 87 of the Convention, [namely] a codification of the long-standing norm of *mare apertus* [sic].”\(^94\) Saint Vincent and the


Grenadines replied that the detention of the Louisa denied it access to the high seas, violating the freedom of vessels under its flag to navigate on the high seas, a freedom that “means very little if a port State is permitted to detain a foreign vessel under a thinly alleged violation of the port State’s laws”, particularly when the detention was prolonged by a delay of several years before any charge was formally brought. Denying that its reading of Article 87 would render vessels immune from criminal prosecution, Saint Vincent and the Grenadines indicated that it would not have objected to a lawful arrest of the Louisa and its tender, “nor does it suggest foreign vessels be permitted to use freedom of the high seas under Article 87 to escape criminal prosecution.” Yet “the manner in which Respondent arrested and detained the Louisa and its tender” rendered the arrests “illegal”, and they “abrogated the freedom of a Saint Vincent and the Grenadines vessel to navigate the high seas.”

Unmoved, ITLOS agreed with Spain that

Article 87 cannot be interpreted in such a way as to grant the M/V “Louisa” a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it. The Tribunal, therefore, concludes that the arguments advanced by Saint Vincent and the Grenadines do not establish that article 87 of the Convention could constitute a basis for the claims submitted by Saint Vincent and the Grenadines in respect of the detention of the M/V “Louisa”.

Judge Lucky’s dissent, in which he stated that “even if given the widest and most generous interpretation, article 87 cannot be deemed to include the territorial sea or

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96 M/V Louisa, Merits, supra n 1, paragraph 109.
internal waters”,97 was not entirely in line with what he had said in the *ARA Libertad* case. Characterising as “novel” the contention of Saint Vincent and the Grenadines that Spain had “committed an infringement of the right to freedom of navigation” by preventing the *Louisa* from leaving port for the high seas, he conceded:

This may be so in a case where a vessel is detained without just cause. However, in the instant case, the vessel is the subject matter of criminal charges and until it is released by the municipal court, it cannot leave the port. In fact, Spain contends, and I agree, that this article is not applicable, because the vessel is subject to and is an exhibit in criminal proceedings, an investigation and charges under Spanish law and, under such law, is not permitted to leave.98

It is not clear from his statement that “[t]he sovereignty of a State must be respected and so too the laws of the State”99 why a distinction should be drawn between a State’s criminal laws, under which detention of foreign vessels in port should be permitted, and its criminal laws, under which it should not.

Once again it was Judge Paik who gave the most extensive consideration to the question, reviewing the matter in his declaration in the light of his separate opinion in the provisional measures phase. He began by pointing out in relation to Article 87 that the task of ITLOS at this stage was not to determine whether or not Spain violated the provisions invoked by Saint Vincent and the Grenadines, which was essentially a question of the merits, but to determine whether those provisions could

98 Ibid., paragraph 35.
99 Ibid., paragraph 37.
cover the claims made by Saint Vincent and the Grenadines and thus be applicable.\textsuperscript{100} That is, the question of the actual jurisdiction of ITLOS, as opposed to its \textit{prima facie} jurisdiction, was still a preliminary question needing to be answered affirmatively for those claims to succeed.

Judge Paik alone noticed that Argentina had made a similar argument to that of Saint Vincent and the Grenadines with respect to the detention of the \textit{ARA Libertad}.\textsuperscript{101} He continued:

\begin{quote}
Article 87 of the Convention, which provides for the freedom of the high seas, imposes upon States an obligation not to impede that freedom. The question is then whether the freedom of the high seas, in particular freedom of navigation, provided for in this provision includes the right of a State to have access to the high seas to enjoy that freedom, or whether such freedom can be extended to include the right of the flag State to ensure that a vessel of its nationality can leave a port of the coastal State without undue interference from it.\textsuperscript{102}
\end{quote}

Turning next to how the phrase “freedom of navigation” had been interpreted in previous international litigation, Judge Paik persuasively distinguished the broad interpretation it had been given by the PCIJ in the \textit{Oscar Chinn Case}, which concerned fluvial navigation in the Belgian Congo, as comprising “freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers”\textsuperscript{103} and the ICJ’s finding

\begin{footnotes}
\item[101] \textit{Ibid.}, paragraph 22.
\item[102] \textit{Ibid.}, paragraph 23.
\item[103] \textit{The Oscar Chinn Case} (1934), PCIJ Reports Series A/B, No 63, at p. 83.
\end{footnotes}
in the *Nicaragua case* that “the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed” by a treaty providing for “freedom of commerce and navigation” between the two States’ territories.\(^{104}\) This was due in both cases to the context of the treaties in force between the parties to these disputes, the 1919 Convention of Saint-Germain-en-Laye \(^{105}\) and the 1956 US-Nicaragua Treaty of Friendship, Commerce and Navigation\(^{106}\) respectively, which were typical of freedom of navigation clauses in such treaties in granting the right of access for vessels of either party to ports and waters of the other party open to foreign commerce and navigation. By contrast, the freedom of navigation invoked by Saint Vincent and the Grenadines was one of the high seas freedoms listed in UNCLOS Article 87, paragraph 1, a provision that applied only to the high seas and, by cross-reference from Article 58, paragraph 1, to the EEZ.\(^{107}\)

For good measure, his declaration also distinguished Article 125, paragraph 1 of UNCLOS, which secures to landlocked States “the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas”, together with its predecessor, Article 3, paragraph 1 of the 1958 Convention on the High Seas, which provides that “[i]n order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea”. In both instruments, however, the right

\(^{104}\) *Military and Paramilitary Activities in and against Nicaragua, supra* n 32, at 139 (paragraph 278).


\(^{107}\) Declaration of Judge Paik, *supra* n 100, paragraphs 24 and 25.
of free access to and from the sea was confined to landlocked States and could not create a general right of access for all States.\textsuperscript{108}

Finally, Judge Paik recalled that “[t]he scope, extent and nature of the rights and obligations of States Parties vary in the different zones” newly established by or recognised under UNCLOS, this spatial division constituting the very “basis for the international legal order for the seas and oceans under the Convention”, so that it was “essential, in interpreting the Convention, to refer clearly to the maritime zones and the context in which specific rights or obligations are provided for.”\textsuperscript{109} He thus concluded that “[t]o extend the freedom of the high seas to include a right…to have access to the high seas to enjoy that freedom is warranted neither by the text of the relevant provisions or the context of the Convention, nor by established State practice on this matter”, preventing Article 87 from supplying a foundation for the claim of Saint Vincent and the Grenadines.\textsuperscript{110}

**Concluding remarks**

Despite the unmeritorious nature of the case it brought, therefore, Saint Vincent and the Grenadines may have unwittingly done the law of the sea a service by pursuing it to the end, even though a more realistic litigant might well have dropped it long before. The welcome result is that ITLOS has found no infringement of the freedom of navigation on the high seas that it claimed on behalf of the *Louisa*, putting paid to the notion that the freedom overrides even the territorial sovereignty of States over foreign ships that are voluntarily present in their ports. The only note of caution that is required is that it would have been preferable for the reasoning of ITLOS to have been explicit, rather than by necessary implication, so one should not be

\textsuperscript{108} Ibid., paragraph 26.
\textsuperscript{109} Ibid., paragraph 27.
\textsuperscript{110} Ibid., paragraph 29.
overconfident that we have indeed seen the last of this unattractive argument. Had the applicant’s argument based on UNCLOS Article 87 succeeded, the law of the sea might have found itself at the start of another swing of the pendulum back towards the original all-encompassing and absolute nature of the freedom of the seas. Would States willingly have absorbed this blow to their regulatory powers? To the present author that seems difficult to conceive and, while it once took 25 years and a subsequent treaty to overturn a decision of an international court on a related matter (the Lotus case above\textsuperscript{111}), now there are faster ways, such as the annual General Assembly debate on Oceans and the Law of the Sea, in which they could make their dissatisfaction known, even if there were insufficient consensus for this to be reflected in the subsequent resolution. Meanwhile an unexpected side-effect would be that potentially a new defence for shipowners and seafarers charged with offences arising out of shipwreck or pollution incidents would have become available, at least in situations where the ship is still not beyond repair and thus has some hope of exercising its flag State’s freedom of navigation on the high seas.\textsuperscript{112} The consequences of that would be unpredictable, but largely a matter for private maritime lawyers, who may be the only ones with a systemic cause to regret the outcome of the \textit{M/V Louisa} case.

\textsuperscript{111} Supra n 53 and surrounding text.

\textsuperscript{112} Although this was not true of the \textit{Louisa}, that was alleged to be the result of lack of maintenance during its prolonged detention – see Request for Prescription of Provisional Measures, \textit{supra} n 75, at 7 (paragraphs 23 and 25) – and the cost of restoring its seaworthiness presumably accounted for all or part or all of the sum of $4,755,144 claimed by way of reparations for the losses suffered by the owner of the detained vessel: \textit{M/V Louisa, Merits, supra} n 1, at paragraph 43(k).