INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 2010

23 December 2010

List of Cases:
No. 18

THE M/V "LOUISA" CASE
(SAINT VINCENT AND THE GRENADINES *v.* KINGDOM OF SPAIN)

Request for provisional measures

ORDER

Present: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN, PAIK; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to articles 287, paragraph 4, and 290, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") and articles 21 and 25 of the Statute of the Tribunal (hereinafter "the Statute"),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter "the Rules"),

Having regard to the Application submitted to the Tribunal by Saint Vincent and the Grenadines on 24 November 2010, instituting proceedings against the Kingdom of Spain (hereinafter “Spain”), concerning the M/V “Louisa”,

Having regard to the Request submitted by Saint Vincent and the Grenadines to the Tribunal on the same date for the prescription of provisional measures by the Tribunal pursuant to articles 287, paragraph 1 (a), and 290, paragraph 1, of the Convention,

Makes the following Order:

1. *Whereas* Saint Vincent and the Grenadines and Spain are States Parties to the Convention;

2. *Whereas*, by letter dated 15 October 2010, addressed to the Registrar of the Tribunal, the Attorney-General of Saint Vincent and the Grenadines notified the Registrar of the appointment of Mr G. Grahame Bollers as Agent, and Mr S. Cass Weiland, and Ms Rochelle Forde as Co-Agents for Saint Vincent and the Grenadines;

3. *Whereas*, by letter dated 23 November 2010, received electronically by the Registry of the Tribunal on 24 November 2010, Saint Vincent and the Grenadines, through its Agent, Mr G. Grahame Bollers, filed an Application instituting proceedings against Spain in a dispute concerning the detention of the M/V “Louisa”, the original of which was received by the Registry on 9 December 2010;

4. *Whereas*, by the same letter, a Request from Saint Vincent and the Grenadines for the prescription of provisional measures under article 290, paragraph 1, of the Convention was filed, the original of which was received by the Registry on 9 December 2010;

5. *Whereas,* on 24 November 2010, certified copies of the Application and the Request were sent by the Registrar to the Minister of Foreign Affairs and Cooperation of Spain, and also in care of the Ambassador of Spain to Germany;

6. *Whereas*, by letter dated 25 November 2010, the Minister of Foreign Affairs and Cooperation of Spain notified the Registrar of the appointment of Ms Concepción Escobar Hernández, Legal Adviser of the Ministry of Foreign Affairs and Cooperation, as Agent for Spain;

7. *Whereas,* in its Application submitted on 24 November 2010*,* Saint Vincent and the Grenadines proposed that the Application and the Request for provisional measures should be referred to the Chamber of Summary Procedure of the Tribunal, pursuant to article 15, paragraph 3, of the Statute;

8. *Whereas,* by Note Verbale dated 24 November 2010, the Registrar invited the Government of Spain to communicate its position whether it accepted the said proposal at its earliest convenience, but not later than 26 November 2010;

9. *Whereas*, by communication dated 26 November 2010, the Agent of Spain informed the Tribunal that Spain did not agree with the request of Saint Vincent and the Grenadines for the case to be heard by the Chamber of Summary Procedure and, instead, requested that the Tribunal hear and determine the case pursuant to article 13, paragraph 3, of the Statute;

10. *Whereas*, pursuant to article 90, paragraph 2, of the Rules, the President of the Tribunal (hereinafter “the President”), by Order dated 30 November 2010, fixed 10 December 2010 as the date for the opening of the hearing, the notice of which was communicated forthwith to the parties;

11. *Whereas,* by note dated 24 November 2010 from the Registrar, States Parties to the Convention were notified of the Application and the Request, in accordance with article 24, paragraph 3, of the Statute, and whereas,

pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Secretary-General of the United Nations was similarly notified on 26 November 2010;

12. *Whereas*, on 29 November 2010, in accordance with article 73 of the Rules, the President, by teleconference with the Agents of the parties, ascertained the views of the parties regarding the procedure for the hearing;

13. *Whereas,* on 6 December 2010, the Registrar sent a letter to the Agent of Saint Vincent and the Grenadines requesting the completion of documentation and whereas Saint Vincent and the Grenadines submitted the requested documents on 9 and 16 December 2010;

14. *Whereas*, on 7 December 2010, pursuant to article 72 of the Rules, Saint Vincent and the Grenadines submitted information regarding an expert whom it intended to call before the Tribunal;

15. *Whereas*, on 8 December 2010, by electronic mail, Spain filed with the Registry its Response, a certified copy of which was transmitted to the Agent of Saint Vincent and the Grenadines on the same date, the original of which was filed with the Registry on 11 December 2010;

16. *Whereas,* on 9 December 2010, the Registrar sent to the Agent of Spain a letter requesting additional documents, which were submitted on 11 December 2010;

17. *Whereas*, on 9 December 2010, the parties submitted documents pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal;

18. *Whereas,* on 9 December 2010, Saint Vincent and the Grenadines submitted a Supplemental Memorandum in support of its Request for the prescription of provisional measures and a revised set of Annexes thereto;

19. *Whereas,* the Supplemental Memorandum and the revised set of Annexes were transmitted to the Agent of Spain on the same date;

20. *Whereas,* on 9 December 2010, by electronic mail addressed to the Registrar, the Agent of the Applicant informed the Tribunal that he had to appear in court in Saint Vincent and the Grenadines “on an extremely urgent matter” and was unable to attend the hearing at the Tribunal;

21. *Whereas,* in accordance with article 68 of the Rules, the Tribunal held initial deliberations on 9 December 2010 concerning the written pleadings and the conduct of the case and decided, pursuant to article 76, paragraph 1, of the Rules, to raise several questions which the Tribunal wished the parties to address;

22. *Whereas*, on 9 December 2010, in accordance with article 45 of the Rules, the President held consultations with the Co-Agent of the Applicant and the Agent of the Respondent, with regard to questions of procedure, and transmitted to them copies of the list of questions which the Tribunal wished the parties to address;

23. *Whereas*, pursuant to article 67, paragraph 2, of the Rules, copies of the Request and the Response and the documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings;

24. *Whereas* oral statements were made at four public sittings, held on 10 and 11 December 2010, by the following:

On behalf of Saint Vincent and the Grenadines:

Mr S. Cass Weiland, Esq., Advocate,
as Co-Agent;

On behalf of Spain:

Ms Concepción Escobar Hernández, Professor,
Legal Adviser of the Ministry of Foreign Affairs and Cooperation,
as Agent, *Counsel and Advocate,*

Mr Mariano J. Aznar Gómez, Professor,
International Law Department, University “Jaume I” (Castellón), Spain,
as Counsel and Advocate;

25. *Whereas*, in the course of the oral proceedings, a number of exhibits, including maps, photographs, and extracts from documents, were displayed by the parties on video monitors;

26. *Whereas,* on 10 December 2010, Mr Javier Moscoso del Prado Muñoz was called as an expert by Saint Vincent and the Grenadines, and, having made the solemn declaration under article 79, subparagraph (b), of the Rules, was examined by the Co-Agent of Saint Vincent and the Grenadines and cross-examined by the Agent of Spain;

27. *Whereas,* on 11 December 2010, pursuant to article 76, paragraph 1, of the Rules, the Tribunal decided to raise a further question which it wished the parties to address;

28. *Whereas,* on 11 December 2010, during the oral proceedings, Saint Vincent and the Grenadines submitted to the Tribunal the following documents, copies of which were forwarded to Spain by the Registrar on the same date: “expert opinion” dated 10 December 2010, of the *Ingenieurbüro Weselmann*, Hamburg; “report” dated 17 October 2007 of the *Museo Nacional de Arqueología Marítima de Cartagena*; and “pleading” dated 22 February 2008, submitted to the *Juzgado de Instrucción No. 4* of Cadiz;

29. *Whereas,* on 11 December 2010, the Agent of Spain submitted to the Tribunal a copy of an indictment issued by the *Juzgado de Instrucción No. 4* of Cadiz dated 27 October 2010, according to which charges have been brought against several alleged perpetrators ("*presuntos autores*") concerning a continuing crime of damage to the Spanish historical patrimony ("*delito continuado de daños en el patrimonio histórico español*") and a related crime of possession or storing of arms ("*delito conexo al anterior de tenencia o depósito de armas*");

30. *Whereas* a copy of the indictment was forwarded to Saint Vincent and the Grenadines by the Registrar on the same date;

31. *Whereas*, in the Application submitted on 24 November 2010, Saint Vincent and the Grenadines requested the Tribunal to adjudge and declare:

1. Respondent has violated Articles 73, 87, 226, 245 and 303 of the Convention;

2. Applicant is entitled to damages as proven in the case on the merits, but not less than $10,000,000 (USD); and

3. Applicant is entitled to all attorneys' fees, costs, and incidental expenses incurred;

32. *Whereas* the provisional measures requested by Saint Vincent and the Grenadines in the Request to the Tribunal filed on 24 November 2010 are as follows:

(a) declare that the Request is admissible;

(b) declare that the Respondent has violated Articles 73, 87, 226, 245 and 303 of the Convention;

(c) order the Respondent to release the *M.V. Louisa* and *Gemini III* and return property seized;

(d) declare that the detention of any crew member was unlawful; and

(e) award reasonable attorneys' fees and costs associated with this request as established before the Tribunal;

33. *Whereas,* at the public sitting held on 11 December 2010, the Co-Agent of Saint Vincent and the Grenadines made the following final submissions:

> The Applicant requests the Tribunal, by means of provisional relief, to:
>
> (a) declare that the Tribunal has jurisdiction under Articles 287 and 290 of the Convention to hear the Request for Provisional Measures concerning the detention of the vessel, the *M.V. Louisa*;
>
> (b) declare that the Request is admissible, that the allegations of the Applicant are well-founded, and that the Respondent has breached its obligations under the Convention;
>
> (c) order the Respondent to release the vessel *Louisa* and its tender, the *Gemini III*, upon such terms and conditions as the Tribunal shall consider reasonable, but without bond or other further economic hardship;
>
> (d) order the return of scientific research, information, and property held since 2006;
>
> (e) prescribe such other provisional measures as may be appropriate such as issuing an order requiring the Spanish Agent to meet with the Applicant's Agent or representatives to resolve the matter, or other important measures; and
>
> (f) order the Respondent pay the costs incurred by the Applicant in connection with this Request, including but not limited to Agents' fees, attorneys' fees, experts' fees, transportation, lodging, and subsistence;

34. *Whereas,* in its Response, Spain requests the Tribunal:

> (1) to reject the prescription of provisional measures requested by Saint Vincent and the Grenadines; and
>
> (2) to order the Applicant to pay the costs incurred by the Respondent in connection with this request, including but

> not limited to Agent's fees, attorneys' fees, experts' fees, transportation, lodging, and subsistence;

35. *Whereas* the final submissions made by the Agent of Spain at the public sitting held on 11 December 2010 are as follows:

> Spain requests the Tribunal:
>
> (a) To reject the request for the prescription of provisional measures submitted by Saint Vincent and the Grenadines;
>
> (b) To reject the prescription of all the provisional measures requested by the Applicant; and
>
> (c) To order Saint Vincent and the Grenadines to pay the fees of the Agent and the rest of the Spanish delegation within reasonable limits and the costs arising from this application, as fixed by the Tribunal;

36. *Considering* that, on 24 November 2010, in accordance with article 287 of the Convention, Saint Vincent and the Grenadines instituted proceedings against Spain in a dispute concerning the M/V "Louisa";

37. *Considering* that, on the same date, Saint Vincent and the Grenadines submitted to the Tribunal a Request for provisional measures, pursuant to article 290, paragraph 1, of the Convention;

38. *Considering* that article 290, paragraph 1, of the Convention provides that:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, 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;

39. *Considering* that, before prescribing provisional measures under article 290, paragraph 1, of the Convention, the Tribunal must satisfy itself

that *prima facie* it has jurisdiction over the dispute concerning the M/V "Louisa", submitted to it on 24 November 2010;

40. *Considering* that, in a depositary notification, dated 7 August 2002, the Secretary-General of the United Nations communicated the information that, on 19 July 2002, Spain had submitted a Declaration choosing the Tribunal and the International Court of Justice "as a means for the settlement of disputes concerning the interpretation or application of the Convention";

41. *Considering* that, in a depositary notification dated 22 November 2010, the Secretary-General of the United Nations communicated the information that, on 22 November 2010, Saint Vincent and the Grenadines had submitted a Declaration choosing the Tribunal "as the means for the settlement of disputes concerning the arrest or detention of its vessels";

42. *Considering* that the status of Saint Vincent and the Grenadines as the flag State of the M/V "Louisa" is not in dispute between the parties;

43. *Considering* that both parties indicated that the "Gemini III" was not flying the flag of Saint Vincent and the Grenadines at the time of the arrest;

44. *Considering* that, in its Request, the Applicant refers to the "Gemini III" as a tender of the M/V "Louisa";

45. *Considering* that, in the view of the Tribunal, the issue of the status of the "Gemini III" should be examined at a future stage of the proceedings;

46. *Considering* that, in its Application, Saint Vincent and the Grenadines contends that "[t]he Tribunal has jurisdiction to consider this Application, pursuant to Articles 73, 87, 226, 245, 290, 292 and 303" of the Convention;

47. *Considering* that, in its Request for the prescription of provisional measures, Saint Vincent and the Grenadines requests the Tribunal to "declare that the Tribunal has jurisdiction under Articles 287 and 290 of the Convention

to hear the Request for Provisional Measures concerning the detention of the vessel, the *M.V. Louisa* (…), in breach of the Respondent's obligations under various articles of the Convention, including 73 (notification of arrest), 87 (freedom of the high seas), 226 (investigations), 245 (scientific research), and 303 (archaeological objects)";

48. *Considering* that, during the hearing, Saint Vincent and the Grenadines maintained that *prima facie* jurisdiction could be established "on several grounds", including articles 87, 245 and 303 of the Convention;

49. *Considering* that, in its final submissions on 11 December 2010, Saint Vincent and the Grenadines requested the Tribunal to "declare that the Tribunal has jurisdiction under Articles 287 and 290 of the Convention to hear the Request for Provisional Measures concerning the detention of the vessel, the *M.V. Louisa";*

50. *Considering* that Spain stated in its Response that, "although there may be a *prima facie* jurisdiction of the Tribunal, there are no reasons compelling it to prescribe the requested provisional measures";

51. *Considering* that, during the hearing, Spain maintained that the arguments which it had presented "point [to] the inexistence of *prima facie* jurisdiction of this Tribunal for the prescription of provisional measures";

52. *Considering* that, in its final submissions on 11 December 2010, Spain requested the Tribunal, *inter alia, "*to reject the request for the prescription of provisional measures submitted by Saint Vincent and the Grenadines";

53. *Considering* that Spain stated during the hearing that the M/V "Louisa" had not been detained for any offences relating to articles 73 and 226 of the Convention, that the facts of the case did not reveal any violation of articles 87, 245, and 303 of the Convention, and that the vessel had been detained by Spain in the exercise of its criminal jurisdiction, for its participation, as an

instrument, in the commission of crimes in the internal waters and possibly also in the territorial sea of Spain;

54. *Considering* that Spain contends that the requirements of article 283 of the Convention have not been satisfied since, in its view, there has been no exchange of views regarding the settlement of the dispute by negotiation or other peaceful means;

55. *Considerin*g that article 283, paragraph 1, of the Convention 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;

56. C*onsidering* that article 283 of the Convention applies "when a dispute arises" and that in the circumstances of this case, it appears *prima facie* that a dispute as to the interpretation and application of provisions of the Convention existed between the parties on the date on which the Application was filed;

57. *Considering* that article 283 of the Convention only requires the parties to "proceed expeditiously to an exchange of views" regarding the settlement of the dispute "by negotiation or other peaceful means";

58. *Considering* that the obligation to "proceed expeditiously to an exchange of views" applies equally to both parties to the dispute (*Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 19, paragraph 38);

59. *Considering* that Saint Vincent and the Grenadines stated that, on several occasions prior to the institution of these proceedings, its maritime administration had requested from the port authorities of Spain further

information about the detention of the M/V “Louisa” but had not received such information;

60. *Considering* that, by 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, the Applicant informed Spain that it “objects to the Kingdom of Spain’s continued detention of the ships the *M.V. Louisa* and its tender, the *Gemini III,”* and that Spain failed “to notify the flag country of the arrest as required by Spanish and international law” and that in the said Note Verbale, Saint Vincent and Grenadines also informed Spain of its “plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ships and settlement of damages incurred as a result of this improper detention”;

61. *Considering* that Spain did not react to the Note Verbale referred to in the preceding paragraph;

62. *Considering* that Saint Vincent and the Grenadines concluded that it had fulfilled the requirements of article 283 of the Convention;

63. *Considering* that the Tribunal has held 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” (*Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280 at p. 295, paragraph 60), and 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” (*MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, paragraph 60);

64. *Considering* that, as the International Court of Justice has stated, “[n]either in the Charter [of the United Nations] 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" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 303, paragraph 56);

65. *Considering* that, in the view of the Tribunal, the requirements of article 283 of the Convention are to be regarded, in the circumstances of the present case, as having been satisfied;

66. *Considering* that Spain contends that the Request does not fulfil the procedures required by article 295 of the Convention and that the condition of exhaustion of local remedies has not been fulfilled by the owner of the vessel;

67. *Considering* that Saint Vincent and the Grenadines maintains that the evidence shows that the owners "have tried every manoeuvre and legal mechanism possible in order to secure the ship's release";

68. *Considering* that, in the view of the Tribunal, the issue of exhaustion of local remedies should be examined at a future stage of the proceedings;

69. *Considering* that, at this stage of the proceedings, the Tribunal does not need to establish definitively the existence of the rights claimed by Saint Vincent and the Grenadines, and that, in its Order of 11 March 1998 on provisional measures in the M/V "SAIGA" (No. 2) case, the Tribunal stated that "before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded" (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 37, paragraph 29);

70. *Considering* that, for the above reasons, the Tribunal finds that it has *prima facie* jurisdiction over the dispute;

71. *Considering* that, in accordance with article 290, paragraph 1, of the Convention, the Tribunal may prescribe measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

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

73. *Considering* that the Applicant contends that "there is a definite threat to the environment by leaving this ship docked in El Puerto de Santa María for any significant additional time";

74. *Considering* that Spain, in its Response, stated that "there is no imminent threat or harm to the marine environment due to the presence of the *Louisa* in the commercial dock of El Puerto de Santa María" and that "the Port authorities are continuously monitoring the situation, paying special attention to the fuel still loaded in the vessel and the oil spread in the different conducts and pipes on board";

75. *Considering* that Spain, during the hearing, further stated that "[t]he *Capitanía Marítima* of Cadiz has an updated protocol for reacting against threats of any kind of environmental accident within the port of El Puerto de Santa María and the Bay of Cadiz";

76. *Considering* that article 192 of the Convention imposes an obligation on States to protect and preserve the marine environment;

77. *Considering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to prevent serious harm to the marine environment (*Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280 at p. 296, paragraph 77);

78. *Considering* that the Tribunal places on record the assurances given by Spain as specified in paragraphs 74 and 75;

79. *Considering* that any action or abstention by either party in order to avoid aggravation or extension of the dispute should not in any way be construed as a waiver of any of its claims or an admission of the claims of the other party to the dispute (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v*. Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, at p. 39, paragraph 44);

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

81. *Considering* that the Applicant requests the Tribunal to order the Respondent to pay the costs incurred by the Applicant in connection with the Request;

82. *Considering* that the Respondent requests the Tribunal to order the Applicant to pay the costs incurred by the Respondent in connection with the Request;

83. *For these reasons,*

THE TRIBUNAL,

1. By 17 votes to 4,

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

IN FAVOUR: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, PAIK;

AGAINST: *Judges* WOLFRUM, TREVES, COT, GOLITSYN.

2. By 17 votes to 4,

Reserves for consideration in its final decision the submissions made by both parties for costs in the present proceedings;

IN FAVOUR: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, PAIK;

AGAINST: *Judges* WOLFRUM, TREVES, COT, GOLITSYN.

Done in English and French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this twenty-third day of December, two thousand and ten, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Saint Vincent and the Grenadines and the Government of Spain, respectively.

(signed)
José Luís JESUS,
President

(signed)
Philippe GAUTIER,
Registrar

Judge PAIK appends a separate opinion to the Order of the Tribunal.

Judges WOLFRUM, TREVES, COT and GOLITSYN append dissenting opinions to the Order of the Tribunal.

SEPARATE OPINION OF JUDGE PAIK

1. While I voted for the operative part of the Order of the Tribunal, I would like to explain my reasoning with respect to the questions of *prima facie* jurisdiction and provisional measures.

2. The existence of *prima facie* jurisdiction is a prerequisite for the Tribunal to prescribe provisional measures. As the Tribunal recalls in paragraph 69 of the Order in this case, "before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded" (*M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, para. 29).

3. In this case, the Applicant contends that the Tribunal has jurisdiction to hear its request for provisional measures under articles 287 and 290 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"). Article 287 provides for the choice of procedure for "the settlement of disputes concerning the interpretation or application of this Convention"; in this case, both parities chose the Tribunal. Article 288, paragraph 1, provides that a court or tribunal referred to in article 287 shall have jurisdiction over "any dispute concerning the interpretation or application of this Convention". Thus, the first task of the Tribunal is to determine whether *prima facie* a dispute exists between the two parties and whether that dispute concerns the interpretation or application of the Convention.

4. In its Request for the prescription of provisional measures and in the public hearing, the Applicant claims that the M/V "Louisa" conducted an oil and gas survey in the waters of the Bay of Cadiz pursuant to the permits issued by the relevant Spanish authorities (Request, paragraph 58). The Applicant denies that the vessel was engaged in the criminal activity alleged by the Respondent. In its Application instituting proceedings before the Tribunal, the Applicant contends that the Respondent seized the M/V "Louisa" based on "erroneous information regarding the violations of Spain's historic patrimony". In this regard, the Applicant contends that the Respondent violated articles 73 (enforcement of laws and regulations of the coastal State), 87 (freedom of the high seas), 226 (investigation of foreign vessels), 245 (marine scientific research in the territorial sea) and 303 (archaeological and

historical objects found at sea) of the Convention.

5. On the other hand, the Respondent claimed in its oral statement that the M/V “Louisa” was not carrying out scientific research activities to identify the presence of gas or methane, but was instead engaged in the looting of underwater cultural heritage in the Spanish territorial sea or the contiguous zone. Thus, the ship is alleged to have been detained because it constituted clear evidence of a crime, a “piece of conviction (*pieza de convicción penal*)” in criminal proceedings before a Spanish court. The Respondent also rejects the relevance or applicability to the present case of those articles of the Convention invoked by the Applicant.

6. There appears to be disagreement between the parties over the critical facts related to the activities of the M/V “Louisa”. Thus, a dispute may exist between the two parties in the sense of, as the Permanent Court of International Justice (PCIJ) put it, a “disagreement on a point of law or fact, a conflict of legal views or of interests” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2*, p. 11). The question, then, is whether the dispute in the present case is concerned with the interpretation or application of the Convention. I have doubts about the applicability or relevance of the provisions invoked by the Applicant, and thus about the existence of jurisdiction of the Tribunal in a case on the merits based on those grounds.

7. These doubts notwithstanding, I was in favour of the Tribunal’s decision concerning the existence of *prima facie* jurisdiction for the following reason: while 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, 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.

8. Another procedural condition that the Tribunal must examine in order to determine its *prima facie* jurisdiction is whether the Applicant's claim is admissible. The Respondent contends that the Applicant failed to satisfy at least two conditions in this regard: the obligation to exchange views under article 283 of the Convention and the exhaustion of local remedies under article 295 of that instrument. As I concur with the Tribunal's reasoning regarding the question of admissibility, I have little to add on this point.

9. At this stage, I would simply like to point out that, with respect to the exhaustion of local remedies, the Applicant apparently claims that the breach of obligations by the Respondent under the relevant provisions of the Convention resulted in damage to what the Applicant perceives to be its own rights. It should be reminded that the Tribunal stated in the *M/V "SAIGA" (No. 2) Case* that the claims in respect of such damage are not subject to the rule that local remedies must be exhausted (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports 1999*, para. 98).

10. I concur with the Tribunal that the circumstances of this case are not such as to require the prescription of provisional measures. Under article 290 of the Convention, such measures may be prescribed in order to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment. It is clear that in the circumstances of this case, there is no real and imminent risk that irreparable prejudice may be caused to the rights of the parties so as to warrant the prescription of the provisional measures requested by the Applicant.

11. On the other hand, my view that, under the circumstances, it is neither necessary nor appropriate to prescribe provisional measures in order to prevent serious harm to the marine environment, as requested by the Applicant, may require some explanation.

12. Provisional measures aimed at preventing serious harm to the marine environment are a new and positive addition, introduced by the Convention, to the institution of provisional relief. This addition reflects the importance that the Convention attaches to protection and preservation of the marine environment under its Part XII. On the basis of this provision, in order to protect the marine environment in the interests of the international community, the Tribunal can prescribe measures that may go beyond the rights or interests of any of the parties to the dispute. Given the importance of this provision, where a request for provisional measures is made

on these grounds, the Tribunal should take it rather seriously.

13. That said, however, the prescription of provisional measures on these grounds is also subject to the conditions that are set out explicitly or implicitly in article 298, paragraph 1. Before prescribing such measures, the Tribunal should be satisfied, *inter alia*, that the evidence produced by the Applicant shows a credible risk of serious harm to the marine environment and that, under the circumstances, it is appropriate to take measures to prevent such harm.

14. The Applicant contends that "there is a definite threat to the environment by leaving the M/V "Louisa" docked in El Puerto de Santa Maria for any significant additional time". In support of this claim, it submitted the opinion of an expert based in Hamburg. On the other hand, the Respondent denies any possibility of serious harm to the marine environment as a result of the M/V "Louisa" remaining docked at the port and points out that the vessel is subject to continuous monitoring by the Spanish port authorities.

15. While the alarm raised by the Applicant is of a serious nature, the evidence that it has produced is hardly convincing. The expert's opinion submitted by the Applicant as proof of a high risk of harm to the marine environment was apparently drawn up in haste, without the expert having visited the port where the M/V "Louisa" is docked. Moreover, that opinion is more concerned with "flooding of an idle vessel" than with potential harm to the marine environment. Nowhere in the opinion is there any clear and specific indication of the possibility that such harm would result from the continued detention. The quantity of lubricating oil and diesel fuel on board the vessel, which has been indicated as a potential source of pollution, is relatively modest. Simply to allege that "without Tribunal intervention, the Louisa would simply sink at its dock, release massive amounts of hydrocarbons, endanger shipping in the port area and wreak havoc on its owner and flag country" (Request, para. 63) is not sufficient for the Tribunal to prescribe provisional measures.

16. In addition, the M/V "Louisa" is docked at a Spanish port and the Respondent assures the Tribunal that "[t]he *Capitanía Marítima* of *Cadiz* has an updated protocol for reacting against threats of any kind of environmental accidents within the port of El Puerto de Santa Maria and the Bay of Cadiz". Considering that, if and when pollution occurs, it is the Respondent that will suffer the most, there is no reason to believe that Spain is not as vigilant to the possibility of serious harm to the marine environment as it should be. While the Parties should always act with prudence and

caution with respect to the marine environment, neither is there any reason to doubt that the Respondent will do so under these circumstances. The fact that the vessel has been detained as evidence of a crime that allegedly took place in the territorial or internal waters of the Respondent makes the appropriateness of prescribing provisional measures all the more doubtful.

17. While the requirement of urgency is not explicitly set out in article 290, paragraph 1, there is no doubt that the very nature of provisional measures as an exceptional form of relief presupposes an element of urgency. However, I do not find that the circumstances of this case are such as to make the prescription of provisional measures necessary or appropriate as a matter of urgency.

18. Thus, while I fully endorse the importance of protection of the marine environment, the circumstances of the case fall far short of the basic requirements for the prescription of provisional measures, another equally important concern of which the Tribunal, as a judicial institution with *gravitas*, should be aware.

19. For the foregoing reasons, I voted in favour of the operative part of the Order.

(signed) J.-H. Paik

DISSENTING OPINION OF JUDGE WOLFRUM

1. I sincerely regret that I am unable to join the decision of the Tribunal asserting that it has *prima facie* jurisdiction to deal with the merits of the case M/V "Louisa" and therefore may prescribe provisional measures pursuant to article 290, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"). I note that the Tribunal does not prescribe measures to be undertaken by the Parties. However, in my view the Tribunal should have decided to decline the request for provisional measures by the Applicant for the lack of *prima facie* jurisdiction.

2. After an introductory remark on the procedural requirements for prescribing provisional measures under article 290, paragraph 1, of the Convention, this Dissent will discuss whether the Tribunal has *prima facie* jurisdiction to deal with the merits of the case and whether a sufficient exchange of views has taken place between the Parties as required under article 283 of the Convention.

Nature and objective of provisional measures

3. Provisional measures may only be requested and decided in the context of a case submitted on the merits. Provisional measures are meant to protect the object of the litigation in question and, thereby, the integrity of the decision as to the merits. Neither party to the conflict shall change the relevant situation that prevailed on the initiation of the proceedings on the merits and thus render the proceedings meaningless by frustrating its potential result. This equally embraces the objective to ensure the proper conduct of the proceedings or the possibility of the execution of whatever judgment may finally be rendered. This objective is reflected, although in abbreviated form, in article 290, paragraph 1, of the Convention which states that provisional measures are meant "to preserve the respective rights of the parties to the dispute ... pending the final decision". As will be explained below the Order of the Tribunal does not reflect this objective.

4. An additional objective of provisional measures has been added by article 290, paragraph 1, of the Convention. It refers to the prevention of serious harm to the

marine environment justifying the prescription of provisional measures thus reflecting the importance the Convention attaches to the protection of the marine environment. Referring to such justifications for provisional measures adds a new element to their objective which is not directly linked to the interests of the parties to the dispute and thus makes the Tribunal a mechanism working not only in the interest of the parties involved but in the one of the community of States. This mirrors the change of international law from a mere mechanism providing for the coordination of States' activities to a legal system which also recognizes and preserves common values of the community of States.

5. As far as their objectives are concerned, proceedings for the prescription of provisional measures differ from the prompt release proceedings provided for under article 292 of the Convention. The latter constitute a special procedure unrelated to a case on the merits. The only objective of the procedure under article 292 of the Convention is to decide whether and under which conditions a vessel arrested for violations of national laws in the exclusive economic zone of the arresting State has to be released after a reasonable bond or financial security has been posted. The prompt release procedure with its quasi-automaticity of posting a reasonable bond and the ensuing release of the vessel constitutes an infringement of a coastal State’s sovereignty. It is well established that this procedure is justified because it tries to balance the rights of a coastal State in the implementation and enforcement of its national laws in its exclusive economic zone and the interest of the flag State that the vessels under its flag may pursue their lawful activities until the case is decided upon the merits by the national courts concerned. It is not the objective of procedure under article 290 of the Convention to balance the interests of a flag State and a coastal State, contrary to what the Applicant seems to believe.

6. The Applicant, relying on article 73, paragraph 4, of the Convention, refers to an alleged failure of the Respondent to notify the Applicant as the flag State of the M/V “Louisa” of the seizure of the vessel. This obligation to notify belongs to the system of prompt release and according to the jurisprudence of the Tribunal this is an issue dealt with in the merits. Considering the different objectives of the two procedures it is not possible to use elements to be dealt with in the context of a request for prompt release, such as the obligation to notify the flag State of the

seizure of a vessel, for the procedure pursuant to article 290, paragraph 1, of the Convention as the Applicant suggests. Instead, article 36 of the Vienna Convention on Consular Relations is of relevance. This provision imposes notification requirements on a State in case it arrests nationals of a third State. Such obligation is applicable also to the arrest of crew members of a ship. The Respondent could demonstrate, however, that its authorities have complied with such obligation.

7. It seems appropriate to refer to one further consideration concerning provisional measures under article 290 of the Convention. One has to distinguish between provisional measures taken under article 290, paragraph 1, of the Convention and those under article 290, paragraph 5, of the Convention. Whereas under article 290, paragraph 1, of the Convention the Tribunal is called upon to decide *prima facie* on its own jurisdiction, under article 290, paragraph 5, of the Convention it must decide on the p*rima facie* jurisdiction of another court or tribunal. Out of respect for the other court or tribunal the Tribunal had to exercise some restraint in questioning *prima facie* jurisdiction of such other court or tribunal. This should be taken into account in the context of this case when references are made to the decisions the Tribunal rendered under article 290, paragraph 5, of the Convention.

Prima facie jurisdiction

8. As stated above the Tribunal may prescribe provisional measures if the case is duly submitted, if the Tribunal has the jurisdiction to entertain the case on the merits – in this context I would like to refer to the dissent of Judge Golitsyn which I share -, if under the circumstances of the case a decision to preserve the rights of the parties is necessary, pending a final decision on the merits or if provisional measures are necessary to prevent serious harm to the marine environment. The Tribunal does not have to establish that it has jurisdiction to entertain the case on the merits; it is sufficient but also necessary to establish that it has jurisdiction *prima facie.*

9. Attempts have been made by parties to a conflict in their pleadings and in literature to specify the objective of provisional measures with the view to either limit

or to broaden the jurisdiction of the international court or tribunal in question since minimal guidance is provided by the statutes of the international courts and tribunals. It is through the case law of the International Court of Justice (ICJ) that different legal elements relating to provisional measures have evolved. This case law is of relevance beyond the Court for the jurisprudence of other international courts including this Tribunal. In particular, it provides guidance on what is meant by the notion *prima facie* jurisdiction and I see no reason why to deviate from this jurisprudence.

10. Since the Icelandic Fisheries cases the ICJ (*ICJ Reports 1972*, at p. 16 (para. 17)) uses a standard formula namely that the instrument invoked by the parties as conferring jurisdiction "appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded". The ICJ has further stated that, in taking such measures, it must remain within its jurisdiction both *ratione personae* and *ratione materiae* (*Land, Island and Maritime Frontier Dispute (Application to Intervene)*, *Judgment, ICJ Reports 1990*, at p. 134 (para. 98)). The ICJ denied the indication of provisional measures in several cases for lack of jurisdiction on the merits. In this context, the decision to deny the indication of provisional measures in the case *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)* (*ICJ Reports 1995*, p.288 et seq.) is enlightening. In this case, the applicant had invoked a paragraph ("Paragraph 36") of a previous judgment of the ICJ as the basis of jurisdiction. The ICJ dismissed both the request for provisional measures and the application stating that this paragraph could only be invoked in respect of atmospheric nuclear tests but not in respect of underground nuclear tests. This means that the ICJ did not simply follow the assertion of the applicant but found it necessary to compare the jurisdictional basis with the facts on which the claim of the applicant was based. In its Order of 15 October 2008 on *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation)* after having stated that both parties are parties to the said Convention and none of them had entered any reservation the ICJ, in examining whether it had *prima facie* jurisdiction, scrutinized carefully whether the actions undertaken by the Russian Federation were covered by article 22 of the International Convention on the Elimination of all Forms of Racial Discrimination (see

paragraphs 104-117). The ICJ correlated the alleged jurisdictional basis for entertaining the case on the merits with the claims advanced by the applicant and ascertained whether there was a link between the claims on the merits and the request for provisional measures.

11. It should always be borne in mind that the prescription of provisional measures constitutes an infringement of the sovereign rights of the responding State. This infringement is only legitimized if the State concerned has consented thereto by accepting the jurisdiction of the court or tribunal in question. This consideration is well reflected in the jurisprudence of the ICJ when it states that it gives jurisdiction over the merits 'fullest consideration compatible with the requirement of urgency' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America), Provisional Measures*, *ICJ Reports 1984*, at p. 179 (para. 25)).

12. On the basis of the jurisprudence of the ICJ it may be summarized that – for an international court or tribunal to assume *prima facie* jurisdiction – it is not sufficient that an applicant merely invokes provisions which, read in an abstract way, may provide theoretically a basis for the jurisdiction of the court or tribunal in question. On the contrary, it is necessary for the adjudicative body to take into account the facts which are known to it at the moment of deciding on provisional measures and to consider whether on this basis, together with legal basis invoked by the applicant, *prima facie* jurisdiction on the merits may be established. Such considerations cannot be left to the merits phase.

13. Turning now to the case before the Tribunal, it has to be established whether the Tribunal has *prima facie* jurisdiction to entertain the case on the merits. It is to be noted in this context that the Respondent challenged the *prima facie* jurisdiction of the Tribunal although it concentrated its arguments on the inappropriateness of the prescription of provisional measures. For example, in the hearing Spain maintained that the arguments it had presented "point [to] the inexistence of *prima facie* jurisdiction of this Tribunal for the prescription of provisional measures". In any case these statements by Spain are of no procedural relevance as long as they do not amount to acquiescing in the jurisdiction which is not the case. It is well established in international jurisprudence of this Tribunal and of the ICJ that jurisdiction has to be

established *proprio motu*. Even if the Respondent had not argued jurisdiction at all it would have been for the Tribunal to establish that it has *prima facie* jurisdiction.

14. According to article 288 of the Convention the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention if the parties to the dispute have chosen the Tribunal as the competent adjudicative body according to article 287 of the Convention. This makes it necessary to consider the declarations made by both parties under article 287 of the Convention.

15. The declaration of Saint Vincent and the Grenadines of 22 November 2010 reads:

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

The declaration of Spain of 19 July 2002 reads:

> Pursuant to article 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation and application of the Convention."
>
> The Government of Spain declares, pursuant to the provisions of article 298, para. 1(a) of the Convention, that it does not accept the procedures provided for in Part XV, section 2, with respect to the settlement of disputes concerning the interpretation or application of articles 15, 74 and 83 relating sea boundary delimitations, or those involving historic bays or titles.

16. On the basis of the declaration by Saint Vincent and the Grenadines it is evident that the Tribunal has no jurisdiction to entertain a case on the merits as far as *Gemini III* is concerned. The Declaration refers to "its" vessels which is meant to be understood as vessels under the flag of Saint Vincent and the Grenadines. According to the documents submitted by the Applicant *Gemini III* may have carried at a certain time the flag of the United States, however, it is certain that it has never

carried the flag of the Applicant as stated correctly in the Order. This alone is of relevance and not only excludes jurisdiction *prima facie* but finally. There is no room to refer this matter to the merits phase. I am aware that the Applicant has stated that *Gemini III* was just a small vessel acting in support of the M/V “Louisa” and therefore the two ships should be treated as a unit. The Tribunal has stated on several occasions that a ship and its crew should be treated as a unit – an approach which was widely endorsed. However, such approach, in my view, cannot be used in respect of a vessel under one flag and another vessel under a different flag. In essence that would mean that the Applicant would have the right to exercise its jurisdiction under article 94 of the Convention in respect of a vessel under the flag of another State.

17. For these reasons the Opinion will from now on only consider the M/V “Louisa”.

18. It is to be noted that the Declaration made by Saint Vincent and the Grenadines is limited. This means that the Tribunal has jurisdiction only to the extent where both declarations cover the identical legal ground which means ‘arrest and detention of its vessels’. It is appropriate to underline at this point that the Convention neither excludes such a limited declaration nor excludes the submission of a declaration briefly before filing a case.

19. The Applicant has requested the Tribunal to adjudge and declare: “Respondent has violated articles 73, 87, 226, 245 and 303; ...”.

20. I will now turn to examining whether the provisions invoked by the Applicant constitute *prima facie* a basis for founding jurisdiction of the Tribunal on them. In this context it should be noted that the Applicant only refers to violations of the Convention by the Respondent but does not invoke a violation of its own rights. Already this makes it doubtful that the Applicant has identified a sufficient basis for founding a *prima facie* jurisdiction of the Tribunal to decide claims of the Applicant on the merits.

21. As to the first application it has to be stated that article 73 of the Convention refers to the arrest and detention of vessels by the coastal State in the course of

ensuring the compliance with the laws and regulations concerning the conservation and management of fish stock in the exclusive economic zone. The M/V “Louisa” was arrested while being in a port of the Respondent for a considerable period of time. And the arrest was undertaken not for the reason of a violation of national rules concerning fishing but, amongst others, for an alleged violation of the rules of the Respondent on the protection of its underwater cultural heritage. Accordingly, by no stretch of imagination article 73 of the Convention may serve for a basis of jurisdiction of the Tribunal on the merits of the case.

22. As far as article 87 of the Convention is concerned it has to be noted that this provision deals with the freedom of the high seas, in particular the freedom of navigation. Evidently 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.

23. Article 226 of the Convention deals with the detention of vessels in connection with investigations under articles 216, 218 and 220 of the Convention which clearly is not the case here.

24. The Applicant has also invoked article 245 of the Convention as a basis of its claim. According to this provision it is the exclusive right of the coastal State to regulate, authorize and conduct marine scientific research in its territorial sea. Considering that this right is qualified as an exclusive one it is impossible that this provision may serve as a basis of a claim of the Applicant and for a legal dispute

between the Applicant and the Respondent. This provision clearly establishes that the Respondent has full power to permit or not to permit scientific research in its territorial sea and consequently excludes any right of the owner of the M/V “Louisa” to receive or retain a permit for scientific research. The restrictions on the Tribunal’s jurisdiction in accordance with article 297, paragraph 2(a), of the Convention should have been referred to in the Order.

25. Finally, article 303 of the Convention establishes competences of coastal States concerning archaeological objects removed from its territorial waters. It does not establish rights of other States and the Applicant has given no indication how and to what extent this provision may possibly serve as a basis for a claim of the Applicant and thus become the basis for a dispute between the parties.

26. On the basis of the foregoing I come to the conclusion that the Tribunal has no *prima facie* jurisdiction to entertain the case on the merits. The Application cannot be grounded on any of the provisions of the Convention referred to, which renders it not plausible. The notion of plausibility was used by the ICJ in its Order of 28 May 2009 in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, paragraph 60. It describes well the threshold for establishing *prima facie* jurisdiction and it would have been advisable to follow this jurisprudence.

Exchange of views

27. According to article 283, paragraph 1, of the Convention, States Parties shall proceed expeditiously to an exchange views regarding the settlement of a legal dispute before filing a case under Section 2 of Part XV of the Convention. The Tribunal has emphasized more than once the importance of an exchange of views amongst the parties (see, for example, *Order of 8 October 2003, Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, paragraphs 38 and seq. emphasized in the Separate Opinion by Judge Chandrasekhara Rao, who at paragraph 8 stated that the obligation to exchange views “is not an empty formality, to be dispensed with at the whims of a disputant.”). These negotiations have a distinct purpose clearly expressed in this provision namely to solve the

dispute without recourse to the mechanisms set out in Section 2 of Part XV of the Convention.

28. The Applicant stated that, on several occasions prior to the institution of proceedings by Saint Vincent and the Grenadines on 24 November 2010 its maritime administration had requested from the port authorities of Spain further information about the detention of the M/V “Louisa” but had not received such information. Although the lack of response is to be deplored, these requests, in my opinion, do not amount to an exchange of views according to article 283 of the Convention considering the object and purpose of this provision. Neither the maritime administration of the Applicant nor the port authorities of the Respondent can be regarded as being empowered to conduct diplomatic exchanges on behalf of their respective States. Equally the Note Verbale of 26 October 2010 by its very content did not invite to exchange views but rather announced the initiation of proceedings before the Tribunal. It should further be noted that the Applicant had appointed its Agents even before this Note Verbale which also is a clear indication that it intended to initiate proceedings without prior exchanges of view. As reflected in the jurisprudence of this Tribunal the obligation under article 283 of the Convention is not formality. As Judge Treves points out in his Dissenting Opinion, I had the privilege to read, the inclusion of the obligation to exchange views prior to the institution of proceedings as set out in article 283 of the Convention deviates from the procedural law under general international law. The way this provision has been applied in this case renders it meaningless.

Provisional measures prescribed by the Order

29. The Tribunal does not prescribe provisional measures, which I welcome. Although I am in favour of not prescribing provisional measures I voted against the operative part since the Tribunal should have declined the request for not having *prima facie* jurisdiction and for the requirements of article 283 of the Convention not having been met.

(signed) R. Wolfrum

DISSENTING OPINION OF JUDGE TREVES

1. While I agree with the decision of the Tribunal not to prescribe provisional measures in the present case, to my regret, I am not in a position to lend support to the present Order. In my view, the request is inadmissible for various reasons and the Tribunal lacks *prima facie* jurisdiction.

2. At the outset, I wish to make some remarks regarding the existence of a dispute in the present case. Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"), which is the provision applicable to the present request for provisional measures, requires that "a dispute" be duly submitted to this Tribunal (or, as the case may be, to another court or tribunal). This is the dispute on the merits, which is the object of the principal proceedings, not the dispute concerning the prescription of provisional measures in incidental proceedings.

3. It is well known that there is no definition of "dispute" in the Statute of the Tribunal, just as there is none in the Statute of the International Court of Justice (ICJ). The ICJ nevertheless formulated such a definition at a very early stage of its jurisprudence. In its 1924 judgment in the *Mavrommatis* case, the Permanent Court of Justice (PCIJ) had stated that, in order for a dispute to be in existence, there must be a "disagreement on a point of law or fact, a conflict of legal views or interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). The ICJ has often referred to this definition and has added some refinements, in particular the statement that "it must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The Tribunal adopted the definition given by the ICJ in its Order of 27 August 1999 in the *Southern Bluefin Tuna Cases (ITLOS Reports 1999*, p. 280 ff., at paragraph 44).

4. The disputes that may be submitted to a court or tribunal under the Convention are of a particular kind; they are disputes "concerning the interpretation or application of th[e] Convention" as provided in most of the provisions of Part XV of

that instrument. Only disputes “concerning the interpretation or application of the Convention” can be considered to be encompassed by the notion of “dispute” for the purposes of Part XV.

5. Consequently, the aforementioned requirements for determination of the existence of a dispute, set out in the jurisprudence of the PCIJ and the ICJ and accepted in that of this Tribunal, must be read together with the requirement that, in the case of the Tribunal, the dispute must concern the interpretation or application of the Convention. In other words, the requirement that there must be a “disagreement on a point of law or fact, a conflict of legal views or interests” and that “it must be shown that the claim of one party is positively opposed by the other” should be taken to mean that the disagreement and opposition in question must concern the interpretation or application of the Convention. In its 1996 judgment in the *Oil Platforms (preliminary objections) case*, in which – as in the case that the Tribunal has before it - both the title of jurisdiction and the allegedly violated provisions fall within the same treaty, the ICJ stated:

> [T]he Court cannot limit itself to noting that one of the parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (*Oil Platforms (Islamic Republic of Iran v*. *United States of America), Preliminary Objection, Judgment, I. C. J. Reports 1996,* p. 803 ff., at paragraph 16).

6. The requirements for the existence of a dispute with respect to the interpretation or application of the Convention must be satisfied at the time when the application is filed. That this is the “critical date” is generally accepted in the jurisprudence of the ICJ, as well as in scholarly writings. This point was recently made by the Court in a case which, like the one that the Tribunal has before it, concerned disputes which, pursuant to the convention that was invoked as a basis for jurisdiction, had to concern the interpretation or application of that convention. In its Order of 28 May 2009 in the *Questions relating to the Obligation to Prosecute or Extradite case*, quoting in support several earlier decisions, the ICJ stated:

> Whereas Article 30 of the Convention against Torture makes the Court's jurisdiction conditional on the existence of a "dispute between two or more States Parties concerning the interpretation or application of this Convention"; whereas, at this stage of the proceedings, the Court must begin by establishing whether, *prima facie*, such a dispute existed on the date the Application was filed, since, as a general rule, it is on that date, according to the Court's jurisprudence, that its jurisdiction must be considered… (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v*. Senegal)*, paragraph 46).

7. In the present case, no opposition of views concerning the interpretation or application of the Convention had taken place before the Application was submitted on 24 November 2010. As a matter of fact, it was only on that date, in the text of the Application, that the Convention was mentioned for the first time. It can therefore be concluded that the Request is inadmissible because there is no dispute meeting the necessary requirements. Thus, I cannot agree with the Order where it states that it appears *prima facie* that a dispute as to the interpretation and application of provisions of the Convention existed between the parties on the date in which the Application was filed.

8. In light of this conclusion as to the non-existence of a dispute concerning the interpretation or application of the Convention as at the date of the Application, it is unnecessary to consider whether the condition of admissibility set out in article 283, paragraph 1, of the Convention has been satisfied. This provision reads:

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

The provision requires that "a dispute arises" yet in this case, as I have shown, no dispute has arisen.

9. Even if, contrary to what has just been stated, one were to accept – as does the Order – that, at least *prima facie*, there exists a dispute meeting the requirements of the Convention, the requirement set out in article 283, paragraph 1, would not be met. That provision constitutes an exception to general international law, which, as

stated by the ICJ in its judgment in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (*ICJ Reports 1998*, p. 275 ff., paragraph 56), does not require that diplomatic exchanges be exhausted or even initiated prior to the submission of a case to a court or tribunal. In paragraph 109 of the same judgment, the Court, on the issue of disputes concerning the law of the sea, observes that the provisions of the Convention that require negotiation as a condition for admissibility are applicable only where the Court is seized under the Convention, not when it is seized on the basis of declarations accepting the "optional clause" under article 36, paragraph 2, of the Statute of the ICJ. The Court thus confirms that diplomatic exchanges are a special requirement applicable only within the framework of the Convention.

10. The requirement set out in article 283 of the Convention was introduced in order to facilitate the settlement of disputes without the need to resort to judicial or arbitral proceedings. It must be taken seriously, as the Tribunal has done in its jurisprudence. Of particular relevance to the present case are the occasions on which the Tribunal has had to decide on the prescription of provisional measures and, consequently, to determine *prima facie* its own jurisdiction or that of an arbitral tribunal duly seized under article 290, paragraph 5, of the Convention. In each of these cases, there had been a previous exchange of views between the parties. Thus, the question addressed in the Orders of the Tribunal was whether these could be deemed sufficient for the Applicant to conclude that all possibilities for reaching an agreement had been exhausted.

11. In the present case, the contacts between the parties cannot be qualified as the "exchange of views" envisaged in article 283. The requests for information submitted by the maritime administration of Saint Vincent and the Grenadines to the Spanish port authorities on 18 and 19 February 2010 are simply requests for information. They do not set out claims or invoke rights and thus cannot be considered an "exchanges of views" regarding the settlement of the dispute "by negotiation or other peaceful means". The Note Verbale sent by the Permanent Mission of Saint Vincent and the Grenadines to the United Nations in New York to the Permanent Mission of Spain to the United Nations in New York objects to the detention of the M/V "Louisa" and the "Gemini III" and to the fact that Spain has not

notified the flag State of the arrest of the two vessels. It does not, however, contain any indication that Saint Vincent and the Grenadines had the intention to exchange views regarding the settlement of the dispute “by negotiation or other peaceful means”.

12. The un-nuanced notification by Saint Vincent and the Grenadines of its plan “to pursue an action before the International Tribunal for the Law of the Sea” confirms the lack of any such intention, and perhaps even a lack of awareness of the requirement set out in article 283, paragraph 1; it is apparent that Saint Vincent and the Grenadines had already decided to submit its case to the Tribunal. In all likelihood, this decision had been taken at least as early as 15 October 2010, when the Attorney General of Saint Vincent and the Grenadines notified the Registry of the Tribunal that it had authorized Mr S. Cass Weiland and other attorneys to submit to the Tribunal an “Application and Request for Provisional Measures” and that Mr Grahame Bollers had been designated to “serve as lead Agent”. The Note Verbale of 26 October 2010 states that the request for provisional measures is made “in relation to the detention of the vessel M/V “Louisa” and its tender”. However, it gives no indication regarding the claims to be made in the principal proceedings that Saint Vincent and the Grenadines was required to initiate in order to be entitled to request provisional measures. Such indications would have been essential for defining the object of an exchange of views under article 283, paragraph 1.

13. As the Tribunal stated in its Order of 8 October 2003 in the *Case concerning Land Reclamation* (*ITLOS Reports* 2003, p. 10 ff., at paragraph 38), and again in the present Order, the obligation set out in article 283, paragraph 1, “applies equally to both parties to the dispute”. It nevertheless seems reasonable to assume that the claimant State has the burden to state its claims and to invite the other party to an exchange of views, which, in order to constitute a good-faith request, must be open to the possibility of a settlement “by negotiation or other peaceful means”. This has not happened in the present case. Perhaps Spain should have replied to the Note Verbale of 26 October 2010. It does not, however, seem possible to infer and to consider sufficient, as does the Order, that Saint Vincent and the Grenadines, a State that had already decided to submit a case to the Tribunal, should conclude that it had fulfilled the requirement set out in article 283, paragraph 1, when in fact no

exchange of views had taken place. As mentioned above, the jurisprudence of the Tribunal on this matter has always envisaged exchanges of views of a certain duration and seriousness. It should be noted that when the Note Verbale from Saint Vincent and the Grenadines announcing its intention to refer the case to the Tribunal was received by Spain, Saint Vincent and the Grenadines had not yet deposited its declaration of acceptance of the jurisdiction of the Tribunal under article 287 of the Convention. Spain's failure to respond might therefore be interpreted in light of the fact that an announcement, by a State that had not accepted the Tribunal's jurisdiction, of the intention to seize it with a case might not be considered to require an urgent reply. It should also be borne in mind that Saint Vincent and the Grenadines accepted the jurisdiction of the Tribunal only two days before submission of the Application.

14. The present Opinion could stop here as it has already put forward two grounds for a declaration of inadmissibility. I wish, however, to add few remarks on *prima facie* jurisdiction.

15. In my view, the provisions of the Convention which are alleged by Saint Vincent and the Grenadines to have been violated by Spain are not grounds on which the Tribunal's jurisdiction in the case on the merits can be based. I have had the privilege of reading the analysis of these provisions set out in Judge Wolfrum's and in Judge Golitsyn's dissenting Opinions and I share their conclusions. Let me only add that jurisdiction on the basis of articles 73, 226, 245 and 303 of the Convention appears to me to be unfounded, not only *prima facie* but manifestly. Jurisdiction on the basis of article 87 of that instrument 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*.

(signed) T. Treves

The English documents will soon be available on the Tribunal’s website

DISSENTING OPINION OF JUDGE GOLITSYN

It is with great regret that I submit the present opinion dissenting from the decision of the International Tribunal for the Law of the Sea (hereinafter "the Tribunal"), in which the Tribunal asserts that it has *prima facie* jurisdiction in the present case and therefore, if necessary, may prescribe provisional measures pursuant to article 290, paragraph 1, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention").

According to article 288 of the Convention, with the exception of cases arising in connection with international agreements related to its purposes, the Tribunal's jurisdiction is limited to the adjudication of disputes concerning the interpretation or application of the Convention which are submitted to it in accordance with Part XV thereof. In this respect, article 290, paragraph 1, of the Convention provides that the Tribunal is empowered to prescribe any provisional measures which it considers appropriate if the conditions set out in that paragraph are duly met.

Article 290, paragraph 1, lists three conditions for the Tribunal to be in a position to prescribe provisional measures. First, there must be a dispute between the parties; second, this dispute must be duly submitted to the Tribunal; and third, depending on whether the first two requirements are met and in light of other considerations, the Tribunal must have *prima facie* jurisdiction under Part XV of the Convention.

With reference to the first requirement, it should be observed that, by *note verbale,* dated 26 October 2010, Saint Vincent and the Grenadines informed Spain, through the latter's Permanent Mission to the United Nations in New York, that it objected to the "continued detention of the ships the *M.V. Louisa* and its tender, the *Gemini III*" and "to the failure to notify the flag country of the arrest as required by Spanish and international law". The *Louisa* is registered in Saint Vincent and the Grenadines and flies its flag, whereas the *Gemini III* is registered in the United States of America. Thus, the situation with respect to the latter ship is not relevant to the present case and therefore is not addressed in this opinion.

It appears from the aforementioned *note verbale* that Saint Vincent and the Grenadines considers that the notification that its Ministry of Foreign Affairs, Commerce and Trade received from the Embassy of Spain on 15 March 2006, regarding the processing of "the entry and registration of the vessel *Louisa* flying the flag of Saint Vincent and the Grenadines" by the No. 4 Court of Cadiz on 1 February 2006, is inadequate. It may be assumed from this *note verbale* that, despite the almost four years that had elapsed between the detention of the *Louisa* and the notification by the Spanish Embassy, a dispute arose between the two parties regarding the continued detention of the vessel and the proper form of notification of such detention. However, it remains to be considered whether this dispute relates to the interpretation or application of the Convention, as provided for in article 288, paragraph 1, of the Convention, and therefore falls within the jurisdiction of the Tribunal. This issue is addressed in the last part of the present opinion.

As to the second requirement, both Spain and Saint Vincent and the Grenadines are parties to the Convention and, by declarations dated 19 July 2002 and 22 November 2010, respectively, pursuant to article 287, paragraph 1, of the Convention, they have both accepted the jurisdiction of the Tribunal for the settlement of disputes concerning the interpretation or application of the Convention. In the case of Saint Vincent and the Grenadines, however, the Tribunal was chosen as the means of settlement only of disputes "concerning the arrest or detention of its vessels".

It should be noted that the Convention obliges the parties to a dispute to exchange views; this obligation is contained in article 283, which falls within Section 1 ("General Provisions") of Part XV ("Settlement of Disputes") of the Convention. States Parties to the Convention are required to comply with these General Provisions before they resort to "compulsory procedures entailing binding decisions" (Part XV, Section 2, of the Convention). Article 283, paragraph 1, provides that:

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

Although the *Louisa* has been detained since 1 December 2006, the materials submitted by the parties and, in particular, by the Applicant, show no evidence of an exchange of views between the parties regarding the detention of the *Louisa* until that detention was questioned by Saint Vincent and the Grenadines in its *note verbale* of 26 October 2010. The contacts with the Spanish authorities by the American owner of the vessel and its representatives, mentioned by the Applicant in the written and oral proceedings, cannot be deemed to constitute "an exchange of views" between the parties within the meaning of article 283, paragraph 1, of the Convention. As noted above, there is no evidence that Saint Vincent and the Grenadines had acknowledged the existence of such a dispute between the parties prior to 26 October 2010, the date on which its *note verbale* was sent to Spain. Moreover, the aforementioned *note verbale* does not contain any invitation to an exchange of views, as required by article 283, paragraph 1, of the Convention. On the contrary, it states that Saint Vincent and the Grenadines "plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ships and settlement of damages incurred as a result of this improper detention".

Setting aside, for the moment, the issue of whether the dispute is relevant to the interpretation or application of the Convention, as the obligation to engage in an exchange of views regarding possible settlement of the dispute by negotiation has not been met in this case, the question arises whether the dispute has been "duly submitted" to the Tribunal as required under article 290, paragraph 1, of the Convention.

Lastly, the determination of whether the Tribunal has *prima facie* jurisdiction in this case cannot be made without considering whether, in light of the articles of the Convention invoked by the Applicant, the detention of the *Louisa* by the Spanish authorities raises any questions of law concerning the application or interpretation of the Convention. This requires an examination of the circumstances surrounding the detention of the vessel and the relevance to that detention of the provisions of the Convention invoked by the Applicant.

As noted on page 935 of *The Statute of the International Court of Justice: A Commentary* (ed. Andreas Zimmerman et al., Oxford, Oxford University Press, 2006), "[s]ince the *Icelandic Fisheries cases*, the Court's jurisprudence is constant in requiring that the instrument(s) invoked by the parties conferring jurisdiction 'appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded'".

According to the Indictment of 27 October 2010 by Criminal Court No 4 of Cadiz, the *Louisa* was seized "due to its direct relationship as an instrument for carrying out the crimes described" in the preceding paragraphs of the Indictment (Fifth Legal Reasoning). The Indictment states that the *Louisa* was used for activities "aimed at extracting archaeological material from sunken ships in Spanish waters" (Third Fact) which constituted the "continued crime of damaging Spanish historical patrimony" under article 323 of the Spanish Penal Code (First Legal Reasoning, first paragraph of the Order of the Court).

In its Application of 23 November 2010 instituting proceedings before the Tribunal, Saint Vincent and the Grenadines states that by detaining the *Louisa,* the Respondent breached its obligations "under various articles of the Convention", including articles 73, 87, 226, 245 and 303. In its Final Submissions, Saint Vincent and the Grenadines simply makes a general request that the Tribunal should declare that "the Respondent has breached its obligations under the Convention".

It is for the Applicant, not the Tribunal, to identify the provisions of the Convention which it considers relevant to the case and which are alleged to have been breached by Spain's detention of the *Louisa*. It is not sufficient to make general claims regarding the alleged breach by the Respondent of its obligations "under various articles of the Convention" or to make a statement that "the Respondent has breached its obligations under the Convention" as a whole. Thus, for the purposes of the current proceedings and for determination of the existence of *prima facie* jurisdiction of the Tribunal, it should be considered whether the provisions of articles 73, 87, 226, 245 and 303 of the Convention can be invoked in respect of the detention of the *Louisa*. It will be too late to undertake such examination at the stage of the proceedings on the merits since, unless these articles are relevant to the

detention of the *Louisa*, there are no grounds for the Tribunal to declare that it has *prima facie* jurisdiction under Part XV of the Convention.

The *Louisa* arrived in Spain on 20 August 2004. It was docked at El Puerto de Santa Maria, a port three and a half nautical miles north-east of Cadiz, on 29 October 2004 and has not been moved from that dock since then (para. 16 of the Written Response of Spain). It follows from the above that the vessel was detained in 2006 by the Spanish authorities while in the internal waters of that country. According to the Applicant and as confirmed by the Respondent, activities involving the *Louisa* were conducted in the Bay of Cadiz (para. 18 of the Application) in an area which, as explained by the Respondent, lies within the territorial waters of Spain.

Thus, the *Louisa* was detained by the authorities of Spain, in Spanish internal waters, for alleged criminal activities conducted in its territorial sea. These waters fall under the sovereignty of a coastal State, Spain, which, according to article 2 of the Convention is required to exercise sovereignty over its territorial sea subject to the Convention and other rules of international law; these concern primarily the right of innocent passage, which is not relevant in the present case.

For reasons that will be explained in the following paragraphs, none of the articles of the Convention invoked by the Applicant are relevant to the exercise by Spain of its sovereign rights over activities conducted in its internal or territorial waters.

Article 73 relates to the enforcement of laws and regulations of the coastal State in its exclusive economic zone and sets out the procedures to be followed in the case of the arrest of a foreign fishing vessel; article 87 concerns freedom of the high seas, providing that the high seas are open to all States and that freedom thereof comprises, *inter alia,* freedom of navigation; article 226 concerns the investigation by coastal States of foreign vessels involved in alleged pollution activities; article 245 concerns the exclusive right of coastal States to regulate, authorize and conduct marine scientific research in their territorial waters; and article 303 relates to the general duty of all States to protect objects of an archaeological and historical nature found at sea.

Article 87 of the Convention, on freedom of the high seas, attracted particular attention during the hearings. In that connection, I would like to point out that this article 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.

The *Louisa* was detained by the Spanish authorities in the exercise of Spain's sovereignty over its internal and territorial waters and in connection with alleged criminal activities committed therein. Thus, the provisions of the Convention invoked by the Applicant are of no relevance to the detention of the *Louisa* and the dispute between the parties does not relate to the interpretation or application of the aforementioned provisions of the Convention. Consequently, the Tribunal does not have *prima facie* jurisdiction in the case submitted to it.

For all these reasons, I cannot support the decision of the Tribunal asserting *prima facie* jurisdiction in the case before it.

(signed) V. Golitsyn