

DISSENTING OPINION OF JUDGE GOLITSYN

1. 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”).

2. 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.

3. 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.

4. 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.

5. 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.

6. 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”.

7. 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.

8. 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”.

9. 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.

10. 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.

11. As noted on page 935 of *The Statute of the International Court of Justice: A Commentary* (ed. Andreas Zimmermann 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’”.

12. 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).

13. 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”.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

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

(signed) V. Golitsyn