DISSENTING OPINION OF JUDGE WOLFRUM

1. I sincerely regret that I am unable to join the decision of the Tribunal assertingthat it has *prima facie* jurisdiction to deal with the merits of the *M/V "Louisa" Case* 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 hatever judgment may finally be rendered. This objective is reflected, although in bbreviated 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, aragraph 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 isan 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 *prima 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 (*I.C.J. 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, I.C.J. 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) (I.C.J. Reports 1995*, p. 288 et seq.) is enlightening. In this case, the applicant had invoked a paragraph ("Paragraph 63") 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, I.C.J. 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 the 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