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)* (*I.C.J. 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