COUNTER-MEMORIAL OF THE KINGDOM OF SPAIN

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/V "LOUISA" CASE

SAINT VINCENT AND THE GRENADINES *v.* THE KINGDOM OF SPAIN

COUNTER-MEMORIAL

OF THE

KINGDOM OF SPAIN

12 DECEMBER 2011

COUNTER-MEMORIAL OF THE KINGDOM OF SPAIN

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PART I

CHAPTER 1

INTRODUCTION AND *RÉSUMÉ* OF THE KINGDOM OF SPAIN COUNTER-MEMORIAL

I. Introduction

1. Saint Vincent and the Grenadines has requested that the International Tribunal for the Law of the Sea ("Tribunal") consider the Memorial submitted on 10 June 2011 ("Memorial") which requested the Tribunal to:

> "(a) declare that the Memorial is admissible, that the allegations of the Applicant are well-founded, and that the Respondent has breached its obligations under the United Nations Convention on the Law of the Sea ("Convention");
>
> "(b) order the Respondent to return the vessel *Louisa* and its tender, the *Gemini III*;
>
> "(c) order the return of scientific research data and property held since 2006;
>
> "(d) order the Respondent to pay direct damages for its improper and illegal actions in the amount of $5,000,000 (USD);
>
> "(e) order the Respondent to pay consequential damages for its improper and illegal actions in the amount of $25,000,000 (USD); and
>
> "(f) order the Respondent to pay the costs incurred by the Applicant in connection with this request, including but not limited to Agent's fees, attorneys' fees, experts' fees, transportation, lodging, and subsistence." (paragraph 2)

2. In its "Request for Relief" (paragraph 86), Saint Vincent and the Grenadines contradictorily requests the Tribunal to "prescribe the following measures:

> "(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 *MV Louisa* and the *Gemini III* and return property seized;
>
> "(d) declare that the detention of any crew member was unlawful;
>
> "(e) order reparations in the amount of $30,000,000 (USD); and
>
> "(f) award reasonable attorneys' fees and costs associated with this request as established before the Tribunal."

3. Apparently, and depending on the sections and sub-sections of its Memorial, Saint Vincent and the Grenadines makes this request alleging that the Kingdom of Spain ("Spain") has breached its obligations with regard to Articles 73, 87, 226, 245 and 303 of the Convention. However, no elaboration has been found in the Memorial of an alleged violation of Article 303 of the Convention; and, paradoxically, some contentions about the alleged

violation of Article 227 were found in the Memorial. Spain notes, hence the incongruence of the Memorial submitted by Saint Vincent and the Grenadines, which does not clarify the legal basis of its *petitum* nor the arguments supporting them.

4. The factual origin of this case lies in the detention on 1 February 2006 of two vessels and their crews in Spanish territory, by Spanish authorities and under Spanish law. These two vessels are the *M/V Louisa* ("*Louisa*") —a general cargo vessel flying the Saint Vincent and the Grenadines flag— and the *Gemini III* —a motor-vessel flying the United States of America flag—. Both vessels are still under legitimate seizure by the Spanish authorities under Spanish law.

II. *Résumé* of the Counter-Memorial

5. As shall be explained in detail in the following pages of this Counter-Memorial, Spain rejects each and all of the claims made by Saint Vincent and the Grenadines in its Memorial. The reasons upon which Spain bases its opposition are essentially as follows:

(1) That the alleged facts are generally inaccurate and do not explain the true sequence of events that provoked the legitimate and licit arrest and seizure of the *Louisa*, the *Gemini III* and their crews by the Spanish authorities, in Spanish territory and under Spanish laws, and the subsequent decisions adopted;

(2) That, in any case, this honourable Tribunal has no jurisdiction in this case given that the Applicant has failed to comply, among others, with the procedural conditions established in Articles 283, 287 and 295 of the Convention and the concordant articles of the Rules of this Tribunal, as well as with the rules of general international law governing the peaceful settlement of disputes and the exercise of diplomatic protection;

(3) Subsidiarily, that this Tribunal lacks subject-matter jurisdiction because of the inexistence of a dispute on the interpretation and application of the Convention, and because none of the articles of the Convention confusedly alleged by the Applicant can serve as a legal basis for the claims and reparations sought.

6. Consequently, Spain respectfully asks the Tribunal to reject the requests made in paragraphs 2 and 86 of the Applicant's Memorial. Spain therefore asks the Tribunal to make the following orders:

(1) To declare that this honourable Tribunal has no jurisdiction in the case;

(2) Subsidiarily, to declare that the Applicant's contention that Spain has breached its obligations under the Convention is not well-founded;

(3) Consequently, to reject each and all of the requests made by the Applicant; and

(4) to order the Applicant to pay the costs incurred by the Respondent in connection with this case, including but not limited to Agent's fees, attorneys' fees, experts' fees, transportation, lodging and subsistence.

III. Plan of the Counter-Memorial

7. In order to clearly define the terms and extent of the dispute submitted to the jurisdiction of the Tribunal, if any, it is Spain's intention to summarize again the relevant facts with regard to the dispute (Chapter 2). Although clearly described by Spain in its Written Response of 8 December 2010 to the Request for Provisional Measures submitted by the Applicant on 24 November 2010 and the subsequent oral proceedings, Saint Vincent and the Grenadines' Memorial again offers a partial and inaccurate description of the facts surrounding the legal detention of the *Louisa* and the *Gemini III*, and their crews.

8. These facts, correctly explained again by Spain, will offer important data explaining why Spain considers that this Tribunal has no jurisdiction in the case (Chapter 3). But should the Tribunal consider it does have jurisdiction, Spain will explain the reasons supporting the contention that the Tribunal has no subject-matter jurisdiction in this case (Chapter 4). Spain will also give its opinion on the demands for reparation presented by the Applicant (Chapter 5). Finally, Spain will submit its conclusions and the Respondent's *petitum* in this phase on the merits of the case (Chapter 6).

9. As the Tribunal is perfectly aware, in the phase of provisional measures, Spain advanced some of the points discussed in this Counter-Memorial, particularly those related to the facts surrounding this case. In order to comply scrupulously with Guideline 2 of this Tribunal ("A pleading should be as short as possible", ITLOS/9), this Counter-Memorial will try to avoid repetitions and will focus on the main facts and legal arguments.

CHAPTER 2

STATEMENT OF FACTS

I. Introduction

10. In Chapter 2 ("Statement of facts") of the Spain's Written Response to the Request for provisional measures presented by Saint Vincent and the Grenadines, Spain summarized the facts from the arrival of the *Louisa* in Spanish waters on 20 August 2004 until the hearings of this case in its phase of provisional measures (10-11 December 2011).

11. As explained in paragraph 9 of this Counter-Memorial, it is not Spain's intention to repeat arguments of facts and law already heard by this Tribunal, unless strictly necessary. Therefore, the following paragraphs of this Chapter will only recall or underline some facts that Spain considers of particular importance in this phase on the merits of the case, adding some new facts and updating the Tribunal with the relevant facts occurred since 11 December 2010 up today.

12. As mere introductory information, Spain recalls the following basic data surrounding the facts of the case:

(1) The *Louisa* is a seagoing vessel operated by Sage Maritime Scientific Research Inc. ("Sage"), a U.S. Corporation registered in Texas, and was flying the flag of Saint Vincent and the Grenadines during the "critical dates" of this case.[1] The owner of the vessel is a U.S. corporate affiliate of Sage organized under the laws of the State of Texas, JBF Holdings, LLC. One of Sage's principal owners is Mr. John Foster. Its main representative in Spain was Mr. Roberto M. Avella. Both Mr. Foster and Mr. Avella are U.S. citizens.

(2) Sage was incorporated under Spanish laws as Sage Maritime S.L.U,[2] with corporate address at Avenida de San Pablo 2, off. 203, 28229 Villanueva del Pardillo (Madrid). Its Managing Director is Mr. Luis Angel Valero de Bernabé, and its Director of History and Documentation is Mr. Claudio Bonifacio.[3]

(3) The Applicant contends that in 2003 Sage "began to consider the Bay of Cadiz as an exploration prospect." Following the Applicant's reasoning, "[h]igh-resolution aeromagnetic images and a study prepared specifically for Sage in 2003 by Nefco Exploration confirmed to Sage that the Bay of Cadiz is one of the marine areas with greatest potential for petroleum accumulations in the world." (Memorial, paragraph 32) The only information provided to this Tribunal and the Respondent with regard to this study prepared by Nefco is included in Annex 31 of the Annexes to the

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[1] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1988*, p. 69, at p. 95, paragraph 66.

[2] See its website at http://sagemaritime.com/, accessed 1 December 2011.

[3] Another person involved in the case before the Spanish authorities is Mr. Anibal Beteta, the administrator of another Spanish society, Plangas, S.L. ("Plangas"), with corporate address at Calle Fabiola de Mora 3, 16630 Socuéllamos (Ciudad Real). The main business activity of this company has been the installation of gas supply to private houses and buildings in the surrounding area, i.e. La Mancha.

Memorial of Saint Vincent and the Grenadines: a copy of part of a nautical chart of the Bay of Cádiz, a letter by Nefco President to Mr. Foster recommending some equipment for underwater exploration preceded by a cover page and followed by a rudimentary map titled "Gravity Holdings Offshore Spain".

(4) However, on 20 May 2006 Mr. Avella declared before the Magistrate Judge of Criminal Court (*Juzgado de Instrucción* in Spanish) No. 4 of Cádiz as follows:

> "That he believed there was some confusion in the investigation, as the situation was exactly the opposite; it was Luis Angel Valero de Bernabe who about two years previously had gone to the United States and had asked them to help explore the sea bed in Spain, as he had administrative permits to do so. That what he had stated was true and this could be checked on the dates of these administrative permits. That Luis Angel Valero had asked Sage to come to Spain to work. That there was probably an agreement between Luis Angel and the American company, and subsequently they hired the defendant to work for them." (**Annex 1)**

It should be stressed that it is the representative of Sage in Spain who declares that it was Mr. Valero who invited Sage to come to Spain, contrary to what has been said by Saint Vincent and the Grenadines and by Sage.

(5) Spain reminds this Tribunal that neither Mr. Valero nor Mr. Bonifacio nor Mr. Beteta have been previously engaged personally or professionally in reputed underwater mining research, or in maritime scientific research related to the protection of the marine environment. However, all three persons have been closely linked with suspicious activities concerning the cultural heritage. Mr. Valero is the administrator of Tupet Sociedad de Pesquisa Maritima, *S.A.* ("Tupet"), a company mainly engaged in the search for and excavation of underwater archaeological objects; and Mr. Bonifacio is well known in Spain as a supplier of historical information to treasure-hunting companies.

(6) Mr. Foster, Mr. Avella, Mr. Valero and Mr. Bonifacio are currently being prosecuted in the criminal proceedings that also involve the *Louisa*, some members of its crew and some owners of the vessel. This criminal process is described in Criminal Indictment (*Auto de Procesamiento*) No. 1/2010, of 27 October 2010, before the Magistrate Judge of Criminal Court No. 4 of Cádiz. (**Annex 2**)

II. The illicit activities of the Louisa in Spanish internal waters and territorial sea

13. The Applicant contends that the *Louisa* was in Spanish territorial sea conducting magnetic surveys of the sea floor of the Bay of Cádiz to locate and record indications of oil and methane gas. Saint Vincent and the Grenadines further maintains that as a result of the alleged research,[4] "Sage entered into an agreement with a Spanish partner, which obtained *what Sage believed to be an appropriate permit* [...]" (Memorial, paragraph 33, emphasis

[4] See *supra* paragraph 12(3).

added). To develop these activities, Sage dispatched the *Louisa* to Spain in August 2004 and, in February 2005, an affiliate of Sage purchased the *Gemini III*. However, "due to navigation issues relating to the size of the *Louisa* [...] the *Gemini III*, rather than the *Louisa*,[5] performed additional survey work in the Bay of Cadiz and served as a tender to the *Louisa* during the first few months of 2005. All operations ceased, however, in April 2005." (Memorial, paragraph 19)

14. During all these months, the *Louisa* (and its tender) performed various covert activities in Spanish waters of the Bay of Cádiz. The area covered by the permit is reproduced in **Annex 3** to this Counter-Memorial. As occurred during the phase on provisional measures, the only permit that the Applicant is able to show to this Tribunal is the document reproduced in Annex 6 to its Memorial. This is a photocopy of an authorization issued on 5 April 2004 by the General Directorate of the Coasts (*Dirección General de Costas* in Spanish, a department of what is currently denominated *Ministerio del Medio Ambiente, y Medio Rural y Marino*, Ministry of the Environment, Rural and Marine Affairs) ("Costas") to Tupet, administered by Mr. Valero. The English translation of the permit, insofar as it has been delivered to the Respondent, is neither official nor complete.[6]

15. From January to November 2005, Plangas requested and obtained several permits for the same (or similar) purposes as the permit referred to above, but in other (albeit nearby) areas, indicating that the vessel engaged in these activities would be the *Gemini III*.[7] Plangas installed on the *Gemini III* two abnormal deflectors at the stern of the vessel that, adapted to the propellers, are typically used by treasure hunters to stir up the sand in shallow waters and uncover valuable objects embedded at the bottom of the sea. The system is shown in **Photograph 1**.

16. Since then, no other permit has been applied for or issued by the Spanish authorities. Rather, a criminal investigation under judicial authority was initiated after a private complaint was lodged with the *Guardia Civil* on 14 October 2005. During this investigation, a close link was established between the *Louisa* and the *Gemini III* and their crews, and between Sage personnel and Mr. Valero, Mr. Bonifacio, Mr. Beteta and Mr. Mazzara, among others.

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[5] It should be recalled that from 29 October 2004 the *Louisa* was voluntarily docked in the Spanish port of *El Puerto de Santa María*.

[6] This permit simply renews previous permits, which the Tribunal may review in paragraph 19 of the Written Response of Spain to the Request for provisional measures in this case.

[7] On 4 May 2005, Plangas applied for a modification in the permit, attempting to obtain permission to use the hydrodynamic flux created by the propellers of a new vessel —the *Maru-K-III*, owned by Mr. Mazzara— and aimed towards the seabed, stirring up sand and sea-mud, in an improper technical attempt to reach the inner stratus. No permit was issued on this latter application. Rather, on 6 December 2005, agents of the Spanish Civil Guard ("*Guardia Civil*") inspected the *Maru-K-III* and initiated official proceedings against Mr. Mazzara —who displayed aggressive behaviour towards the agents— because of the violation of the permit and because of the structural changes made to the vessel, which impeded its navigational use under Spanish laws and regulations. As a result, the permit issued to Plangas was cancelled and administrative charges initiated against Plangas and Mr. Mazzara. On 9 December 2005, the provisional seizure of the *Maru-K-III* was decided.

(1) The *Louisa* was engaged in illicit activities…

17. From October 2005 onwards, the *Guardia Civil* investigated the activities on board the *Louisa* and the *Gemini* III and around the dock of *El Puerto de Santa María,* by the persons involved with Sage and the two vessels. A clear link was established between the two vessels, with the *Louisa* docked at the Spanish port being the main operational centre and the *Gemini III*, its tender, operating beyond the permitted areas[8] and continuously docking alongside the *Louisa* as shown in **Photograph 2**.

18. As explained in the Written Response of Spain to the Request for provisional measures in this case, the *Guardia Civil*, the Cádiz Centre for Underwater Archaeology and the Port authorities gathered information (visual, telematic and through various witnesses) about the positions of the *Gemini III* during the following months. As shown in **Annex 4**, all these positions coincided with well-known underwater cultural heritage sites. Furthermore, the equipment and appurtenances on board the *Louisa* and the *Gemini III* did not correspond to the normal type used either for conducting magnetic surveys of the seabed of the Bay of Cádiz to locate and record indications of oil and methane gas, or for demonstrating echo-sound cartography and video-photography and extracting samples from the bottom of the sea in order to complete an environmental impact research and report.[9] (**Annex 5.1**) On the contrary, the equipment aboard the *Louisa* and the *Gemini III* includes the typical tools of underwater cultural heritage looters. (**Annex 5.2**)

19. During this period, under judicial authorization of the Magistrate Court of Criminal Court No. 4 of Cádiz, the *Guardia Civil* investigated the activities of Mr. Avella, Mr. Valero, Mr. Bonifacio, Mr. Mazzara, Mr. Beteta and some other crew members from the *Louisa* and the *Gemini III*. From this investigation, it could be inferred that all of them, acting from the *Louisa* and using the *Gemini III*, were looting Spanish heritage from different archaeological underwater sites.

(2) … in Spanish waters

20. Once again, Spain wishes to clarify an aspect of fact: the exact location of the activities of the *Louisa* and the exact location of the activities of the *Gemini III*.

21. As already stated, the *Louisa* arrived in Cádiz on 20 August 2004 and, after several activities conducted in the Spanish territorial sea or internal waters, finally docked on 29 October 2004 at the commercial dock of *El Puerto de Santa María*.[10] Since then, the *Louisa* has never left the dock of *El Puerto de Santa María*. The *Louisa* was detained when it was voluntarily docked in a Spanish port. The same can be said with regard to the *Gemini III*.

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[8] For example, in his declaration before the Magistrate Judge on 20 May 2006 (see **Annex 1**), Mr. Avella recognizes that archaeological objects were found at the site known as *La piedra que revienta*, about 20 n.m. south-east of the city of Cádiz and well outside the area covered by the permits. This is a well-known archaeological site, given its close historical and geographical connection with the Battle of Trafalgar of 1805.

[9] Spanish authorities had also begun to have serious concerns about the probable presence of several unreported weapons of war on board the *Louisa*.

[10] *El Puerto de Santa María* is a port three-and-a-half nautical miles northeast of the port of Cádiz and under the administrative authority of the *Capitanía Marítima* of Cádiz. Its geographical coordinates are 36° 35' 00" N, 6° 14' 00" W.

22. Both in its Request for provisional measures (paragraph 18) and in its Memorial (paragraphs 17-21) the Applicant confirms that the *Louisa* and the *Gemini III* operated in Spanish internal waters or territorial sea ("the Bay of Cádiz"). The Applicant also confirms that both vessels were finally detained in a Spanish port (Memorial, paragraph 21).

23. Both vessels were detained because of their activities in the internal waters and territorial sea of Spain. To sum up, the locations of the *Louisa* and the *Gemini III* during the "critical dates" of their illicit activities were in Spanish internal waters or territorial sea, that is, in marine areas that fall under the exclusive sovereignty of the Kingdom of Spain pursuant to the rules of general international law on the scope of territorial jurisdiction recognised in article 2(1) of the Convention: "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

II. The seizure of the vessel

24. Once the Spanish authorities realised that the *Louisa* was engaged in other, quite different and unauthorized activities, a criminal investigation began, the result of which was the final detention of the vessel and the *Gemini III* on 1 February 2006.[11] On that date, both vessels were boarded at the docks of *El Puerto de Santa María* by Spanish judicial authorities following a criminal indictment issued by Criminal Court No. 4 of Cádiz, under strong suspicion of:

(1) criminal offences against the laws and regulations on the protection of the Spanish cultural heritage; and

(2) the illegal presence of weapons of war aboard the *Louisa* without any perceptive permit issued by Spanish authorities and required under international and national laws.

Some members of the crew, but not the Master, were detained and released once the Magistrate Judge had taken their statements, as required under Spanish criminal procedural law. When arrested, and as shown in **Photograph 3** taken on 15 November 2005, the *Louisa* already presented evident deterioration of its hull and appurtenances.[12] The photographs shown by the Applicant in Annex 1 of its Request neither properly nor convincingly show the date when the images were taken.

25. Between 3 February and 6 February 2006, in accordance with the obligations imposed on Spain by the Vienna Convention on Consular Relations, of 24 April 1963,[13] Spanish authorities informed the detainees' consular authorities of their legal situation. (**Annex 6**)

26. During the judicial inspection of the vessels and at the homes and offices of some of the detainees, as ordered by the Magistrate Judge, the Spanish authorities found among others:

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[11] The two vessels have been detained since then. The *Louisa* remains at the dock of *El Puerto de Santa María*, and the *Gemini III* remains at the dock of Puerto Sherry, a port located less than one-and-a-half nautical miles from *El Puerto de Santa María*.

[12] This question will be further discussed in this Counter-Memorial. See *infra* paragraphs 35-41.

[13] Entered into force on 19 March 1967. 596 *UNTS* 261. Entered into force for Spain on 5 March 1970.

(1) several nautical charts and other nautical documents with locations and geographical points coincident with known archaeological sites (**Photographs 4 and 5**);

(2) numerous archaeological objects plundered without technical care and expertise and removed from their historical, geographical, natural and archaeological context (**Photographs 6 to 10**); and

(3) several unreported weapons locked in a gun cupboard in the vessel. Among the weapons, five M15 assault rifles, as shown in **Photograph 11**.

III. The subsequent activities by Spanish judicial and administrative authorities

27. Since the seizure of the *Louisa*, the vessel has been under judicial control and under the technical surveillance of the *Capitanía Marítima de Cádiz*. As detailed in the next section, on several occasions the Magistrate Judge offered Sage the possibility of inspecting the vessel and carrying out maintenance.

(1) The legal process before the Spanish authorities

28. Once the criminal legal process had begun in Spain against Sage, the *Louisa* and various persons concerned, the following relevant decisions, requests and orders were issued by the Magistrate Court of Criminal Court No. 4 of Cádiz:[14]

(1) On 6 March 2006, the Magistrate Judge authorized the Officers of the Port Authority to visit the vessel, to carry out maintenance activities and to verify the security of the vessel. (**Annex 8**) Since then, several maintenance activities have been performed by the *Capitanía Marítima de Cádiz*;

(2) On 8 November 2007, Mr. Foster applied to be officially represented at the trial. This was initially denied due to a procedural default. Once this problem was resolved —the trial was postponed several times due to the refusal of Mr. Foster to appear before the Tribunal—, on 10 June 2008 the Magistrate Judge accepted the appearance of Mr. Foster and decided to have a hearing with him on 15 July 2008 at 11 a.m. Sage and all other persons involved in the criminal process have been duly represented by an attorney since the very beginning of the process and all judicial decisions have been duly communicated under the legal guarantees imposed upon Spain by international and national law;

(3) On 22 February 2008, Sage asked the Magistrate Judge to be allowed to visit the *Louisa*. On 22 July 2008, once the procedural position of Mr. Foster was resolved, the Magistrate Judge asked Sage to designate a qualified person to make all

[14] It must be underlined that, as already explained in the phase of provisional measures, due to the "fog" of persons, companies and activities directly or indirectly involved in the case, the case was (and still is) particularly difficult to deal with. Accordingly, the Magistrate Judge decided to follow a *Procedimiento Sumario* which —not being a "summary" procedure as might be inferred from its name—, is the one with most legal safeguards and privileges for the accused. Paradoxically, though not surprisingly, Mr. Foster appealed this decision.

necessary arrangements in the vessel to keep it in a proper state; (**Annex 9**)

(4) On 11 July 2008 Mr. Foster informed the Magistrate Judge that he would not be coming to Spain and that he wanted to declare through video conferencing;

(5) On 22 July 2008, the Magistrate Judge decided not to accept Mr. Foster's proposal and ordered that Mr. Foster must declare as a defendant before him on 30 September 2008. This decision, after being appealed by Mr. Foster before the Court of Appeal (the *Audiencia*), was confirmed by the lower court on 16 March 2009 and by the upper court on 18 September 2009;

(6) On 18 February 2009, the Magistrate Judge received a fresh request from the owners of the *Louisa* to visit and make some repairs (if needed) to the vessel. The Magistrate Judge accepted this visit on 25 February 2009 and decided that the visit should take place on 3 March 2009. On 2 March 2009, a postponement of the visit by Sage was received, with the Magistrate Judge accepting this and deciding that the visit should take place on 5 March 2009. (**Annex 10**) Mr. Avella and his attorneys, accompanied by the judicial authorities, visited the *Louisa* on 5 March 2009;

(7) On 1 March 2010, the Magistrate Judge issued the criminal procedure document No. 1/2010 against the persons directly involved in the case, transforming the case into a "summary procedure" (*procedimiento sumario*), which provided more procedural safeguards for the accused persons; (**Annex 11**)

(8) On 29 July 2010, the Magistrate Judge again asked Sage to submit to the court its decision regarding the maintenance of the vessel. (**Annex 12**) This request was delivered again on 27 January 2011. On 3 February 2011, a request was received from Sage, asking the Magistrate Judge to decide on maintenance and repair activities;[15]

(9) On 27 October 2010, the Magistrate Court issued the Order of indictment against all the persons involved in the case, including Mr. Foster, Mr. Avella, Mr. Valero de Bernabé, Mr. Bonifacio, Mr. Beteta and Mr. Mazzara, as authors of an alleged crime against the Spanish cultural heritage (Article 323 of the Spanish Criminal Code).[16] (**Annex 2**) Furthermore, the Magistrate Judge decided,

(a) to impose a bond of ten thousand (10,000) euros on each of the accused except Mr. Foster and Mr. Avella, on each of whom a bond of thirty thousand (30,000) euros was imposed;

(b) to order Mr. Foster to declare in person before the Magistrate Judge, warning him of the procedural and criminal consequences of any breach of this

[15] The Magistrate Judge decided on 23 March 2011 to order the Guardia Civil to submit a report on the situation of both the *Louisa* and the *Gemini III* vessels. The Guardia Civil delivered to the Magistrate Judge the technical reports made by the *Capitanía Marítima de Cádiz* on 2 and 3 December 2010. (**Annex 13**)

[16] Mr. Foster and Avella have also been accused of a crime against Spanish regulations on the possession and handling of weapons of war (Articles 566 and 567 of the Spanish Criminal Code).

obligation;[17]

(c) given the silence of Sage with regard to the maintenance of the *Louisa*, to announce through the appropriate legal media the auction of the vessel, giving three days to all interested persons, the public attorney and the State attorney to receive their legal opinion; and

(d) to remind the parties to the procedure of the three days' lapse for an interlocutory appeal (*recurso de reforma* in Spanish) and the five days' lapse for a general appeal (*recurso de apelación* in Spanish).

(10) After the public prosecutor submitted both an interlocutory appeal and a general appeal in order to include new charges against the indicted persons, and the legal representation of Mr. Foster also submitted an appeal against the Order of Indictment of 27 October 2010, the Magistrate Judge resolved these appeals on 31 October 2011 accepting the appeal submitted by the public prosecutor and rejecting the appeal by Mr. Foster.

(11) Previously, on 22 July 2011, the Magistrate Judge had again asked Sage to designate a qualified person to make all necessary arrangements in the vessel to keep it in a proper state. In a communication received on 24 October 2011, Sage declared it would not designate any such person and exonerated itself from responsibility for the maintenance of the vessel. The Magistrate Judge then decided on 10 November 2011 to order the *Capitanía Marítima de Cádiz* to designate a suitable person. (**Annex 14**)

(2) Position of Sage and the Applicant during the domestic process

29. Sage, as the owner of the vessel, and Saint Vincent and the Grenadines, as the Applicant in this proceedings, have maintained an ambiguous, somewhat obstructive position during the domestic process summarized in this Chapter. In fact, Saint Vincent and the Grenadines was totally absent from the process until the submission of its request before this Tribunal.

30. The Applicant contends that it has sustained serious attempts to resolve this detention through the Respondent's legal system. (Memorial, paragraph 13) However, since Sage (and, particularly, Mr. Foster) first appeared before the Spanish criminal courts, they have opposed the domestic procedure with all and any kind of legal obstacles. This attitude by Sage, together with the complications inherent to the case, has been the main cause of the lengthy procedures discussed before Criminal Court No. 4 of Cádiz.

31. As an example, and leaving aside the different appeals made by other indicted persons in the criminal procedure which have made the entire process even more drawn out, Sage and its direct related persons (Mr. Foster and Mr. Avella) have opposed the legal decisions of the Magistrate Judge – through permissible appeals – on at least five occasions: on 28 January

[17] In the same Order the Magistrate Judge decided that the date for Mr. Foster to declare should be 30 March 2011. Notwithstanding this, Mr. Foster never appeared personally before the Criminal Court.

2008 (*recurso de reforma*), on 3 July 2008 (*recurso de reforma*), on 31 July 2008 (*recurso de reforma*), on 16 April 2009 (*recurso de apelación*) and on 22 March 2010 (*recurso de apelación*). This accounts, in part, for the length of the process, but also demonstrates the procedural safeguards and the possibilities of due process always open to all indicted persons during criminal procedures before the Spanish judicial authorities. It should be noted, moreover, that these procedures have not been yet exhausted and that the merits of the case are still pending before the criminal courts of Spain.

32. Normally, when Sage submitted a request to the Spanish judicial authorities, this was granted, if properly submitted and legally well-founded. However, Saint Vincent and the Grenadines cannot uphold some of the items included in its Memorial. In several paragraphs (*ad. ex.* 14, 36, 41-43 or 83) it is contended that Sage requested of the Spanish authorities the return of electronic data, also seized as evidence in the criminal justice procedure. Sage never properly submitted this request before the Magistrate Judge, nor has it submitted any proof thereof before this Tribunal. Saint Vincent and the Grenadines submitted this request before this Tribunal in its request for Provisional Measures only on 23 November 2010. This Tribunal did not take any decision on the matter in its Order on Provisional Measures of 23 December 2010. Nevertheless, when the Magistrate Judge was asked for the very first time the return of the date through the appropriate procedure, on 12 July 2011 he authorized the return of a copy of the electronic data to Sage, asking the latter to identify the persons authorized to receive this data and scheduling a meeting to download the data on 27 July 2011. After notification on 18 July 2011, the copy of the documents was delivered to the interested parties on 27 July and 2 August 2011. (**Annex 15)**

33. Saint Vincent and the Grenadines never submitted any claim before the Spanish courts seeking the release of the *Louisa*.[18] Saint Vincent and the Grenadines never used the "prompt release of vessels and crews" procedure available under Article 292 of the Convention, a procedure well known to this Tribunal and the Applicant. The latter voluntarily decided to submit a generic claim under the principles, rules and conditions of diplomatic protection, but also sought to transfer to an international tribunal a legitimate domestic legal process that is *pendent lite*. This Counter-Memorial will deal with these questions later (*infra* paragraphs 108-121) but at this point Spain recalls a general principle stated by this Tribunal in the *Tomimaru Case* with regard to the prompt release procedure but applicable in general to the attitude of flag States regarding their detained vessels in third States:

> "In this context, the Tribunal emphasizes that, considering the objective of article 292 of the Convention, *it is incumbent upon the flag State to act in a timely manner*. This objective can only be achieved if the shipowner and the flag State take action within reasonable time either to have recourse to the national judicial system of the detaining

[18] Contrary to what it is said in the Memorial (paragraph 27), Sage never submitted any claim before the Spanish authorities urging the release of the vessel, a possibility open to it under Spanish law, and one paradoxically neglected by Sage.

State or to initiate the prompt release procedure under article 292 of the Convention."[19]

34. No submission for the release of the *Louisa* was made, either by the owners of the vessel or by the flag State. Yet, on the other hand, no serious effort was made by Sage to perform routine maintenance and conservation operations to the vessel.

(3) The state of the vessel and its inspection

35. Both in its Request for provisional measures and in its Memorial on the merits, the Applicant has obsessively asserted that due to the detention of the *Louisa* – which is transmuted into "intransigence of the Respondent" (Memorial, paragraph 1), the vessel began to deteriorate to the extent that it is currently "completely unseaworthy and almost certainly a total loss". For the Applicant, at the time of the detention, the value of the *Louisa* was approximately $600,000 (USD) and the equipment on board was estimated to be worth approximately $800,000 (USD). (Memorial, paragraph 9)

36. Under the information mostly provided by the Applicant, the *Louisa* (ex. *Orcadia*) was built in 1962 in Aberdeen, U.K. It is a passenger/general cargo ship, not a research ship. In almost 50 years, at least five different companies have owned it, more than four different companies have operated it and it has been flagged by three different States: the United Kingdom (1962-1994), Belize (1994-1999) and Saint Vincent and the Grenadines (1999-to date). The *Louisa* has been declassed at least twice: on January 1995 (Lloyd's Register) and in November 2005 (Germanischer Lloyd).

37. As explained by Spain in the hearings of this case in its phase of provisional measures,[20]

(1) the last inspection of the vessel was made on 16 August 2004 in Ponta Delgada, Portugal, where it was inspected under the SOLAS as reported by the Paris Memorandum of Understanding on Port State Control ("Paris MoU").[21] With two defects detected, the *Louisa*'s certificate expired on 31 March 2005;

(2) the last survey of the vessel under Annex I of the MARPOL Convention[22] was carried out on 1 August 2004 and the certificate expired on 31 March 2005;

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[19] *"Tomimaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007*, p. 74, at paragraph 77, emphasis added.

[20] ITLOS/PV.10/6/Rev.1, pp. 15-16.

[21] *International Convention for the Safety of Life at Sea*, 1 November 1974, as amended (SOLAS 1974), in force since 25 May 1980. 1184 *UNTS* 3. In force for Saint Vincent and the Grenadines since 28 January 1984 (Protocol 1978 on 13 October 1987; Protocol 1988 on 9 January 2002). Data for 30 September 2011. Source: Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, available electronically at <http://www.imo.org/>.

[22] *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, as modified by the 1978 Protocol (MARPOL 73/78), in force since 2 October 1983. 1340 *UNTS* 184. In force for Saint Vincent and the Grenadines since 28 January 1984 (Optional Annex III on 1 July 1992; Optional Annex IV on 27 September 2003; Optional Annex V on 31 December 1988; and Protocol 1997 on 26 February 2009). Data for 30 September 2011. Source: Status of Multilateral Conventions and Instruments in respect of which the

(3) the last survey of the hull, as prescribed by the SOLAS Convention —two every five years— was performed in 2000 and its renewal from March 2005 onwards is absent.[23] This is very important since, as Chapter I, regulation 19 (c) of the SOLAS Convention, as amended, says, in these circumstances:

> "the officer carrying out the control shall take steps to ensure that the ship shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board."

And this was done by the *Capitanía Marítima* of Cádiz on 15 February 2005 when it informed the ship's agent that the vessel's certificate needed to be renewed and required said agent to so inform the Master of the *Louisa*. **(Annex 17)**

38. Therefore, prior to the detention of the vessel in February 2006, the Applicant had already failed to comply with the international standards and precautionary rules on the maintenance of its flag vessels, as established in several conventions, under which Saint Vincent and the Grenadines is obliged as a State party. At present, and unfortunately for the Applicant, Saint Vincent and the Grenadines *is not* in the list of "Flags meeting low risk criteria" of the Paris MoU.[24]

39. The Applicant seeks to convince this Tribunal that the *Louisa* arrived in Spain in 2004 in correct condition, almost immaculate. In fact, the attorneys for Sage and Saint Vincent and the Grenadines have shown the Tribunal ten disordered photographs, all of them included in Annexes 1 and 12 of its Memorial: Annex 1 presents three old photographs of the vessel (probably from 1962) and one allegedly taken in 2006; and Annex 12 has one 2009 photo of the portside beam and five photos of several decks.

40. Spain in its **Photograph 3** shows the *Louisa* and the *Gemini III* docked alongside the starboard of the *Louisa*. This was the state of the vessel forty-five (45) days prior to the detention. It can be seen that the conditions of the vessel are very far from those that the Applicant has attempted to show. The *Louisa* was already in poor condition and, needless to say, the absence of any kind of interest or supervision by the owners —notwithstanding the repeated warnings made and authorisations granted by Criminal Court No. 4 of Cádiz to them— has led to the vessel's further deterioration.

International Maritime Organization or its Secretary-General performs depositary or other functions, available electronically at <http://www.imo.org/>.

[23] The Applicant itself submits to this honourable Tribunal as Annex 34 a letter on the *Louisa* from *Ingenierutbüro Waselman GMBH* which explicitly says that "the last inspections by the flag state were carried out in 2004. That last inspections of the port state control were carried out in 2000. Furthermore the class has been suspended at least in March but most probably already prior to this date."

[24] In accordance with Annex 7, paragraph 12 of the (amended) Paris MoU, an up-to-date list is published of flag States which meet the flag criteria for a low risk ship (white list + IMO Audit). Flags whose total number of inspections over a 3-year rolling period do not meet the minimum of 30 are not included in the Paris MoU Black-Grey-White list. Consequently some flags cannot meet the criteria for their ships to qualify as Low Risk Ships under the Paris MoU, despite having undergone the IMO VIMSAS audit. The listing of flags having met the flag criteria for a Low Risk Ship —which includes the Kingdom of Spain— is for Paris MoU inspection purposes only and should not be used in any other context. (Excerpt from the Paris MoU webpage, accessed 8 October 2011). Accordingly, this listing can be properly used in this context, when discussing the fulfilment or otherwise of the Paris MoU by the *Louisa*.

41. This circumstance might have arisen because Sage was not accustomed to managing seagoing ships; in fact, the company "never owned a vessel." (Annex 5, Letter from S. Cass Weiland, Agent of Saint Vincent and the Grenadines, to the Magistrate Judge) But this is not the case of Saint Vincent and the Grenadines, with an important fleet flying its flag, and obliged by the duties imposed upon it by Article 94 of the Convention, among others.

CHAPTER 3

JURISDICTION OF THE TRIBUNAL

I. The Tribunal has to satisfy itself that it has jurisdiction

42. Spain considers that this honourable Tribunal has no jurisdiction in this case.

43. In its Order of 23 December 2010 on provisional measures, the Tribunal, despite its decision not to prescribe such measures (paragraph 83) held that "it [had] *prima facie* jurisdiction over the dispute." (paragraph 70). Nevertheless, it should be noted that the Tribunal made such a statement, pursuant to its previous jurisprudence, only in relation to and for the sole purposes of the decision on provisional measures. Consequently, the decision reveals no indication whatsoever of the Tribunal's final pronouncement concerning its jurisdiction on the merits of this case.

44. Indeed, the Tribunal, in its Order of 11 March 1998 on provisional measures in the *M/V "Saiga" (No. 2) Case*, recalled the general procedural principle according to which

> "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."[25]

This principle was also recently recalled by the International Court of Justice ("ICJ" or "Court") when it recalled that, to indicate provisional measures, "the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case."[26]

45. This rule was adopted *in casu* in its Order of 23 December 2010 when the Tribunal considered that, when deciding on provisional measures, "the Tribunal does not need to establish definitively the existence of the rights claimed by Saint Vincent and the Grenadines" (paragraph 69). But, at the same time, the Tribunal recalled that its 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." (paragraph 80)

46. Therefore, notwithstanding the assertion of *prima facie* jurisdiction with regard only to the prescription of provisional measures, prior to any decision on the merits, the jurisdiction of the Tribunal on the merits must be established.

47. This Tribunal observed in the *M/V "Saiga" (No. 2) Case* that, even where there is no disagreement between the parties regarding the jurisdiction of the Tribunal, which is not the case here, "the Tribunal must satisfy itself that it has jurisdiction to deal with the case as

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[25] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures, Order of 11 March 1998,* paragraph 29.

[26] *Certain activities carried out by Nicaragua in the border area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, paragraph 49; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139, at 147, paragraph 40.

submitted" (Judgment of 1 July 1999, paragraph 40). Likewise, in the *Grand Prince Case*, the Tribunal further stressed that

> "[a]ccording to the settled jurisprudence in international adjudication, a tribunal must at all times be satisfied that it has jurisdiction to entertain the case submitted to it. For this purpose, it has the power to examine *proprio motu* the basis of its jurisdiction." (Judgement of 20 April 2001, paragraph 77).

This settled jurisprudence evokes what the ICJ observed in the *Appeal Relating to the Jurisdiction of the ICAO Council* case: that "[t]he Court must however always be satisfied that it has jurisdiction, and must if necessary go into the matter *proprio motu*."[27].

48. The assessment by a Tribunal of its own jurisdiction to deal with the merits of a case is, on the other hand, autonomous and it is not linked to its decision on *prima facie* jurisdiction for the adoption of provisional measures. Therefore it is not unusual for a Tribunal to decide on *prima facie* jurisdiction and jurisdiction on the merits on different terms within the same case. The recent ICJ's *Case concerning application of the Internacional Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* is a good example of this judicial practice.

49. In the view of Spain, in this case we face an identical situation. Moreover, at this juncture, the decision on the jurisdiction is particularly important, since there is a disagreement between the Parties regarding this issue. Saint Vincent and the Grenadines contends that the Tribunal has jurisdiction to consider the case on the merits (Memorial, paragraph 53). Spain respectfully contends, for the reasons explained below, that the Tribunal has no jurisdiction to consider the case on the merits.

II. Absence of jurisdiction in this case

50. Spain contends that this honourable Tribunal lacks jurisdiction in this case because

(a) the conditions established in Article 283(1) ("Obligation to exchange views") have not been fulfilled;

(b) the effective nationality of the vessels and the right of the Applicant to protect the crew of the *Louisa* has not been confirmed; and

(c) the conditions established in Article 295 ("Exhaustion of local remedies") of the Convention have not been fulfilled.

Furthermore, Spain considers that, at the time the Applicant filed its application, no dispute existed between Saint Vincent and the Grenadines and Spain and that, alternatively, should such a dispute have existed, the claims by Saint Vincent and the Grenadines are manifestly unfounded and lack the necessary legal support to be taken into account by the Tribunal.

(1) Absence of previous exchange of views

51. According to Article 286 of the Convention,

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[27] *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46, at p. 52.

> "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section".

52. The obvious aim of this article of the Convention is to condition the subjection of a dispute regarding the interpretation or the application of the Convention to the judicial settlement only when other peaceful means have not been able to settle it, according to the 1st Section of Part XV of the Convention. Such is also the sense of Article 283(1) of the Convention:

> "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."

According to this article, a previous "exchange of views" is a necessary condition so as to be able to bring the dispute before the Tribunal. And such "exchange of views" also has a specific aim, defined in the Convention in the following way: the exchange of views has to take place "regarding [the] settlement [of the dispute] by negotiation or other peaceful means".

53. In paragraph 65 of its Order on provisional measures of 23 December 2010 the Tribunal held that "the requirements of article 283 of the Convention are to be regarded, in the circumstances of the present case, as having been satisfied". The Tribunal arrived at this conclusion on the basis of two arguments:

(1) that there does not exist in international law "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" (Order, paragraph 64);[28] and

(2) 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" (Order, paragraph 63).[29]

In the opinion of Spain, the Tribunal makes its assessment only with respect to the phase of provisional measures and, therefore, it cannot be interpreted as a pronouncement which determines the final decision on its jurisdiction on the merits. Taking into account that the Tribunal itself established in its Order of 23 December 2011 that the latter "leaves unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of 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" (paragraph 80), Spain considers that these arguments may be revisited in view of the jurisprudence of the ICJ itself and of this Tribunal, bearing in mind the facts of this case and on the basis of the following arguments.

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[28] *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.

[29] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001*, paragraph 60; and *Southern Bluefin Tuna (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999,* paragraph 60 ("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").

(a) Existence of a specific norm that creates the obligation of previous consultations as a condition to bring a matter before the Tribunal

54. Although expressed in general terms, Article 283(1) of the Convention is not a vague obligation included in the Convention as a common term of art. Accordingly, it must be given its full sense, as international jurisprudence has done repeatedly.[30] Indeed, "the judicial settlement of international disputes [...] is simply an alternative to the direct and friendly settlement of such disputes between the Parties [...]"[31].

55. It may be true that there is no general rule upon which the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to an international court or tribunal. But this refers to *general international law* as the ICJ made clear in its decision on 1998 between Cameroon and Nigeria, and does not apply when there exist a *particular rule* obliging States to exchange views prior to taking recourse to an international adjudicative body. The ICJ has continually addressed with this type of clause: this very year, in the *Case concerning application of the International Convention on the Elimination of all Forms of Racial Discrimination*, the ICJ had to interpret the content and extent of Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.[32] It was precisely the specific clause obliging the parties to negotiate before probable proceedings before the ICJ (Article 22), and the absence of such previous negotiation, which led the Tribunal to conclude that it had no jurisdiction to hear the case on the merits.

56. Without any doubt, Article 283(1) of the Convention is one of these *particular rules*. The wording of the title of Article 283 ("*Obligation* to exchange views", emphasis added) and the compulsory meaning of its text ("the parties to the dispute *shall proceed* to an exchange of views", emphasis added) does not need further interpretation: the parties to a dispute concerning the interpretation or application of the Convention are obliged to exchange their views regarding its settlement. Further reading of the decision by the ICJ in the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* brings us to paragraphs 103-109 of the decision where the ICJ distinguished the cases where it has been seized on the basis of unconditioned declarations made under Article 36(2) of its Statute and the cases where it has been seized on the basis, precisely, of the 1982 Convention on the Law of the Sea. In the latter case, the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Tribunal. Similarly, in their Dissenting opinions to the Order on provisional measures to the present case, Judges Wolfrum and Treves identify precisely Article 283(1) of the Convention as a "[deviation] from the procedural law under general international law" (Wolfrum, paragraph 28) or as "an exception to general international law" (Treves, paragraph 9).

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[30] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949,* p. 24; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* p. 25, paragraph 51.

[31] *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A. No. 22,* p. 13; see also *Frontier Dispute (Burkina Faso* v. *Republic of Mali), I.C.J. Reports 1986,* p. 577, paragraph 46, *Passage through the Great Belt (Finland* v. *Denmark), I.C.J. Reports 1991,* p. 20, and *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court, Judgement, I.C.J. Reports 2000,* p. 33, paragraph 52.

[32] *Case concerning application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, I.C.J. Reports 2011,* paragraphs 132 ff.

57. In addition, the obligation to engage in prior consultations as a condition to submit a matter to arbitration or to the International Tribunal for the Law of the Sea itself, has appeared again in the latest of the cases brought before this Tribunal, *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*. In the documents published by the Tribunal, there is an unequivocal reference to Article 283 of the Convention as the formal legal basis of the communications addressed by Panama (Applicant) to Bissau Guinea (Respondent).

58. On the basis of the aforementioned considerations, Spain contents that Article 283 (1) is a special rule establishing the "exchange of views regarding [the] settlement [of the dispute] by negotiation or other peaceful means" as a precondition for a matter to be referred to the Tribunal; a precondition that this Tribunal has taken seriously, as reflected in its jurisprudence.[33]

(b) *The functions of "exchange of views"*

59. The prior "exchange of views" required by the Convention aims at different functions or goals directly linked to the dispute settlement system of the Convention itself, which does not consider an arbitral settlement or a judicial one as the sole mechanisms available to settle a controversy nor even as the main ones, with certain exceptions included in the Convention. Therefore, the "exchange of views" reflects the wide range of possibilities, which the States in a dispute have, and this explains why Article 283 does not consider the "exchange of views" as merely one category of means of settlement of disputes (negotiation), but it refers to "negotiation or other peaceful means". In short, the "exchange of views" required by the Convention contains essentially a general mandate so that the States Parties can express their opinions on the controversy itself, on the way in which a dispute can be settled and, if possible, on the settlement of the difference from a substantial point of view. It is, therefore, an obligation of behaviour that, if not fulfilled, prevents the correct development of the system of settlement of disputes designed by the Convention. And it is precisely because of this, that it constitutes a limit to the exercise of jurisdiction by this Tribunal.

60. The significance of the prior resort to consultations is directly related to the functions of this kind of consultations, which have been defined by the International Court of Justice in a precise way as follows:

(a) "It gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter", which is essential to its settlement, and, if appropriate, to limit the range of the controversy which can be submitted to an international tribunal;

(b) "It encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication"; and

[33] As resumed by former President Rao in his Separate Opinion to the Order of 8 October 2003 on provisional measures in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures*: "[t]he requirement of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done."(paragraph 11)

(c) "In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States.[34]

61. These functions, typical of the resort to prior negotiations and consultations, are paramount in order to fix the nature and scope of the obligation of behaviour. They are part of the dispute settlement system to which they belong. Therefore, the rules included therein must necessarily "be construed in a manner enabling the clauses themselves to have appropriate effects;"[35] *i.e.*, "it would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort [...] occurring in a special agreement should be devoid of purport or effect."[36]

62. These statements are fully applicable to the obligation contained in Article 283 (1) of the United Nations Convention on the Law of the Sea, and need to be taken into account in order to establish the type of behaviour which will be sufficient to fulfil the aforementioned obligation. In this regard, Spain wishes to recall that even though it is true that the behavioural obligation as defined in the aforementioned article is broad in scope, it is also true that this obligation has two limits. The first limit requires the actual existence of a real "exchange of views", which cannot be reduced to a single unilateral act by one of the parties, which would supposedly suffice in itself to conclude the pre-litigious phase. The second limit implies that the aim of the consultations must be to reach a settlement of the dispute through negotiation or through any other peaceful means, which precludes taking into consideration any other aim not directly related to the subject matter of the dispute.

63. In the present case, the absence of exchanges of views has a crucial, and perverse, effect on the exercise of jurisdiction by the Court since it "would be tantamount to imposing on the [Tribunal] the heavy burden of determining a dispute the contours of which the Parties have not determined."[37]

64. The very functions pertaining to the consultations procedure do not allow, as established by the International Court of Justice, such functions to be mistaken for "mere protests or disputations".[38] Nor can such functions be reduced to "the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims."[39] Far from that, consultations are meant to be "a genuine attempt by one of the disputing parties to

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[34] *Case concerning application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgement, I.C.J. Reports 2011*, paragraph 131.

[35] *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13.

[36] *Corfu Channel (United Kingdom v Albania), Merits, Judgment, I.C.J. Reports 1949, at p. 24.*

[37] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objections of the Russian Federation, vol. 1, at p. 87, paragraph 4.13.

[38] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, I.C.J. Reports 2011*, at paragraph 160.

[39] *Ibid.*, at paragraph 157.

engage in discussions with the other disputing party, with a view to resolving the dispute."[40] And in any case, "these negotiations must relate to the subject matter of the treaty containing the compromissory clause. In other words, the subject matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question."[41] In this case, that treaty is the United Nations Convention on the Law of the Sea.

(c) *Exhaustion of the obligation to maintain exchanges of views*

65. Taking in isolation the assertion 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", it may be construed —as the Applicant does— that the standard for satisfying Article 283(1) of the Convention has been set by the Tribunal in a subjective manner: once the Applicant affirms that the possibilities of reaching agreement have been exhausted, they *have been exhausted.* This interpretation would pervert the true meaning of Article 283(1) of the Convention as it has been progressively interpreted by the Tribunal in the three cases where Article 283(1) was discussed: the *Southern Bluefin Tuna Case* in 1999, the *MOX Plant Case* in 2001 and the *Land Reclamation Case* in 2003.

66. That "subjective interpretation" may derive from the relatively short considerations on Article 283(1) of the Convention elaborated by the Tribunal in the *Southern Bluefin Tuna Case* (paragraphs 56-61); and that the dispositive paragraph 61 immediately follows two paragraphs where the Tribunal, perhaps brusquely, affirms that "Australia and New Zealand have stated that negotiations had terminated" (paragraph 59) and, consequently, that "in view of the Tribunal, 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" (paragraph 60). This is not the case in its orders on the *Mox Plant* and the *Land Reclamation* affairs, where the Tribunal explains in detail the long and complex negotiations carried out between Ireland and the United Kingdom, and between Malaysia and Singapore, respectively.

67. However, in the three cases cited above, a clear common pattern may be established: far from leaving only in the sole hands of the Applicant the decision that Article 283 (1) of the Convention has been fulfilled or not, the Tribunal has to determine "that negotiations and consultations *have taken place* between the parties";[42] that during these negotiations *a dispute on the Convention* has been discussed;[43] and that *in fact* the parties are unable to settle the dispute.[44]

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[40] *Ibid.*

[41] *Ibid.*, at paragraph 161.

[42] *Southern Bluefin Tuna Case*, paragraph 57, emphasis added. In the arbitral award on jurisdiction and admissibility, the tribunal took the view that "[n]egotiations have been prolonged, intense and serious." *Southern Bluefin Tuna Case (Australia v. Japan; New Zealand v. Japan), Award of Jurisdiction and Admissibility of 4 August 2000*, 119 *ILR* 508, paragraph 55.

[43] *SoutherBluefin Tuna Case*, paragraph 57; *MoxPlant Case*, paragraph 58 and 61; and *LandReclamation Case*, paragraph 49.

[44] *SoutherBluefin Tuna Case*, paragraph 59; *MoxPlant Case*, paragraph 59 and 61; and *LandReclamation Case*, paragraph 46.

68. States Parties to the Convention, before having recourse to this honourable Tribunal *must* engage in exchange of views regarding the settlement of the dispute by negotiation or other peaceful means. This exchange of views *between the States* imposed by Article 283(1) of the Convention must be *effective* and based on *good faith*.[45] Defining the content of the obligation to negotiate, the Permanent Court of International Justice ("PCIJ"), in its Advisory opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation to reach agreement.[46] None of these conditions are met in the attitude of Saint Vincent and the Grenadines.

69. No exchange of views on the dispute took place between the Applicant and Spain. Contrary to what is said in the Applicant's Memorial (paragraph 46), Saint Vincent and the Grenadines —to whom the obligation expressed in Article 283(1) of the Convention is directed— never contacted Spain nor exchanged any views regarding the settlement of any possible dispute concerning the detention of the *Louisa* under the Convention.

70. The *Louisa* and its crew were detained on 1 February 2006. Less than a week later, the respective consular authorities were informed of the detentions (**Annex 6**). From then onwards, the case was under the control of the competent judicial authorities of Spain, which communicated all orders, indictments and official decisions to those involved in the case. On 15 March 2006, the Embassy of Spain in Kingston sent a *Note verbale* to the Ministry of Foreign Affairs, Commerce & Trade of Saint Vincent and the Grenadines (**Annex 7**), officially informing the Applicant of the entry into and search of the *Louisa* "for any necessary procedures." What was the attitude of Saint Vincent and the Grenadines? Absolute silence.

71. The Applicant contends, confusing its international rights and obligations with Sage's activities, that the following letters were sent:

- On 11 February 2009, a letter from the law firm *Patton Boggs LLP* (signed by S. Case Weiland) to the Magistrate Judge of Criminal Court No. 4 of Cádiz;[47]
- On 27 April 2010 and 27 August 2010, two letters were sent from the law firm *Kelly Hart & Hallman LLP* (signed by William H. Weiland) to HE Jorge Dezcallar de

[45] *Railway Traffic between Lithuania and Poland, Advisory Opinion of 15 October 1931, P.C.I.J. Series A/B, No. 42, 1931*, p. 116; and *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 47-48, paragraphs 86-87.

[46] *P.C.I.J., Series A/B, No. 42*, p. 116.

[47] Memorial, Annex 5. This letter mainly insists on explanations about the weapons on board the *Louisa* and the exemption of liability of his clients.

Mazarredo, Ambassador of the Kingdom of Spain to the United States of America[48] and to the Magistrate Judge of Criminal Court No. 4 of Cádiz, respectively;[49] and

- Finally, on 14 October 2010, a letter from the law firm *Kelly Hart & Hallman LLP* (signed by William H. Weiland) to HE Miguel A. Fernández de Mazarambroz Bernadeu, General Consul of Spain in Houston, Texas, with an attached letter from Mrs. Linda K. Thomas, Director of Sage, to the *Consejo General del Poder Judicial* of Spain.[50]

72. None of these communications were sent to the Spanish authorities by the Applicant but, rather, by the attorneys of some of the accused before the criminal tribunal in Spain referred to above in Chapter 2. Furthermore, none of these communications and letters contained any reference to the "dispute" between Saint Vincent and the Grenadines and Spain under the Convention, the factual basis of the Application. Consequently, under no circumstance can any of these documents be considered as evidence of the fulfilment of the obligation to proceed to an "exchange of views" pursuant to Article 283(1) of the Convention.[51]

73. Saint Vincent and the Grenadines also contends that the two e-mails sent on 18 and 19 February 2010 (Memorial, Annex 7) were an attempt "to contact Spanish authority prior to filing this action." In the Applicant's view, "Spanish authorities did not provide any substantive responses, and this case ensued" (Memorial, paragraph 46).

74. The first e-mail, dated 18 February 2010 and sent to the *Capitanía de Cádiz* without any formality or official seal from the Saint Vincent and the Grenadines' Office of the Commissioner for Maritime Affairs in Geneva merely asked about the arrest of the *Louisa*. Some other details were requested in the second email. On 19 February 2010, the *Capitanía de Cádiz* informed in two separate e-mails that the vessel had been detained in regard to criminal proceedings (stating the reference number and the criminal court to which the case was assigned) and forwarded all the information to the criminal court.

75. These e-mails cannot be viewed as evidence of fulfilment of the obligation to proceed to an "exchange of views" pursuant to Article 283(1) of the Convention. Neither the Office of the Commissioner for Maritime Affairs in Geneva nor the *Capitanía de Cádiz* have the

[48] Memorial, Annex 4. Besides including amazing stories of pirates and suggesting that the Spanish judges were easily influenced by other trial cases involving completely different circumstances, the letter was not, and is not, any kind of succedaneum —and, of course, is not evidence— of a diplomatic exchange of views regarding the dispute between Saint Vincent and the Grenadines and the Kingdom of Spain.

[49] Memorial, Annex 5. In this letter, the legal representative of a private company —Sage— simply tries to explain the facts and to exonerate its clients from the accusation of possession of weapons of war on board the *Louisa*.

[50] Memorial, Annex 8. This attachment is a complaint placed before the General Council of the Judicial Power in Madrid formulating various allegations attempting again to explain Sage's activities in Spanish waters, to account for the possession of weapons of war on board the *Louisa*, to exonerate Sage from the activities of its divers regarding the plundering of Spanish underwater cultural heritage and to complain about the (alleged lack of) activity of the Magistrate Court in different phases of the criminal proceedings in Spain.

[51] Even between States, which is not the case here, the threshold recognised by the ICJ to accept that a exchange of views has been fulfilled is higher that such a series of protests. See *Armed activities on the territory of the Congo (New application: 2002), (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility, Judgement, I.C.J. Reports 2006*, p. 6, at pp. 40-41, paragraph 91.

competence to carry out such negotiations under international rules of diplomatic relations. In addition, the content of these communications cannot readily be considered as an "exchange of views" according to Article 283 (1) of the Convention, "regarding [the] settlement [of the dispute] by negotiation or other peaceful means".

76. The first and only official communication between the two States is reproduced in Annex 11 of the Memorial. This Annex reproduces a letter from the Permanent Mission of Saint Vincent and the Grenadines to the United Nations to the Permanent Mission of Spain to the United Nations, dated 26 October 2010, *i.e.*, more than four-and-a-half years since the detention of the *Louisa* and less than a month before the submission of the Application after Saint Vincent and the Grenadines accepted the jurisdiction of this Tribunal under Article 287 of the Convention.[52]

77. This is the only, and tardy, letter that refers to some kind of link between the Applicant and the vessel involved in these proceedings before the Tribunal. In this letter, the Applicant simply stated:

(1) that the Applicant "objects to the Kingdom of Spain's continued detention of the ships the *M.V. Louisa* and its tender, the *Gemini III*";
(2) that "Saint Vincent and the Grenadines further objects to the failure to notify the flag country of the arrest as required by Spanish and international law"; and
(3) 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 ship and settlement of damages incurred as a result of its improper detention." [*sic*]

Therefore, on 26 October 2010, even before having officially deposited its declaration of acceptance of the jurisdiction of the Tribunal under Article 287 of the Convention, Saint Vincent and the Grenadines had already taken the decision to act against Spain before this Tribunal.[53] With that letter, the Applicant voluntarily and unilaterally ended any chance of diplomatic negotiation without giving any possible guidance on its claims that would have facilitated an exchange of views with Spain.

78. It is crystal clear from the wording of this sole official letter from the Applicant to the Respondent that the former would not proceed, even expeditiously, "to an exchange of views regarding [the settlement of the dispute] by negotiation or other peaceful means" as required by Article 283(1) of the Convention. This constitutes a breach by the Applicant of the Convention that should preclude its access to the Tribunal given that, paraphrasing this

[52] See Memorial, Annex 10. The letter to the depositary of the Convention, the UN Secretary General is dated 12 November 2010.

[53] As suggest by Judge Treves in his Dissenting Opinion to the Order on provisional measures in this case, "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"." (paragraph 12)

Tribunal in a positive tense, a State Party is obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have not been exhausted.[54]

79. Spain fully concurs with the statement of the Court in its Order of 23 December 2010, in the sense that the obligation to maintain an exchange of views is addressed to both parties in the dispute (paragraph 58). Nevertheless, the Court should draw attention to the fact that such obligation cannot be fulfilled by the defendant State without the initiative and the participation of the claimant State, which: firstly, by definition, is the one that has to identify the existence of the alleged difference; *secondly*, wishes to avail itself of the mechanisms of settlement defined in the Convention; and, *finally*, is the one that should set in motion the mechanism of exchange of views envisaged under Article 283 (1) of the Convention. Obviously, with the circumstances of the case as described, Saint Vincent and the Grenadines has not accomplished in good faith such primary obligations, without which Spain could hardly participate in the process of exchange of views according to the Convention, or comply with the requirements of Article 283 (1).

80. Finally, Spain, as Respondent, draws the Tribunal's attention to the fact that this unilateral behaviour of Saint Vincent and the Grenadines in contravention of the Convention is both inexplicable and unjustifiable, taking into account that, since the celebration of the hearings for the establishment of the provisional measures and, up to present, the agents of both parties, at the initial request of Saint Vincent and the Grenadines and with Spain's full participation, have constantly maintained contacts in which opinions on the case and its eventual settlement have been exchanged. If this has been possible after the lawsuit was brought, Spain expresses its surprise at not having seen those exchanges of views before the lawsuit was brought, which are necessary according to the Convention.

81. Nevertheless, Spain also points out its opposition to any interpretation of these sudden and untimely consultations as the fulfilment of the condition imposed by the Convention for the valid submission of a case to this honourable Tribunal. Whatever the circumstances, such a condition should have been met *before* the proceedings started, and a subsequent action cannot validate the initial error committed by Saint Vincent and the Grenadines.

(d) *Conclusions*

82. On the basis of the previous paragraphs, Spain considers that the Court is not competent to hear the essence of the demand brought by Saint Vincent and the Grenadines, as the fulfilment of the question of the exchange of views according to Article 283 (1) has neither taken place nor been proved.

(2) Effective nationality of the claim

83. In order to establish the jurisdiction of the Tribunal so as to decide on the merits of the demand submitted by Saint Vincent and the Grenadines, it is especially important to identify the nature of the claim and the proceedings used by the Applicant. As Spain already highlighted during the phase of provisional measures, the present case cannot be confounded

[54] *The MOX Plant Case*, Order of 3 December 2001, paragraph 60.

with the proceedings of prompt release of vessels according to Article 292 of the Convention. On the contrary, the Applicant is merely seeking a form of diplomatic protection which is not subject to any special rule according to the Convention. Therefore, the conditions of admissibility of the claim must be submitted to the rules of general international law applicable to the exercise of diplomatic protection and to the definition of the international liability of the State. This is so because, as there is no autonomous, different system that should be applied specifically to the case, the Tribunal has to apply the general rules of international law which are applicable, taking into account what Judge Wolfrum, at that time President of the Tribunal, said about the Law of the Sea, which "should not be seen as an autonomous regime. It is part of general international law"[55].

84. The framework of the claim of Saint Vincent and the Grenadines as an ordinary way of diplomatic protection does not need further explanation. On the contrary, it is enough to analyse the substantial content of the claim, which is basically specified in the defence of the right of an individual (the *Louisa* , the crew and the proprietors of the vessel) who according to the Applicant, suffered damage due to the violation of the rules of International Law by Spain. It is unnecessary to insist on the fact that this is, precisely, the definition of diplomatic protection.

85. This judicial framework of the claim by Saint Vincent and the Grenadines obliges this honourable Tribunal, for the purposes of deciding on its jurisdiction on the merits of the matter, to analyse —at least— two basic elements. That is: i) the nationality of the claim; and, ii) the exhaustion of local remedies. We might include the relevance of taking into account the enforceability of the controversial requirement of "clean hands", recalling that the facts that caused the claim have their origin in criminal proceedings brought in Spain by actions classified as crimes liable to prosecution by the State under Spanish Law. Nevertheless, this latter requirement is not analysed individually in the present Chapter 3, as it is comprehensively discussed in the rest of this Counter-Memorial.

(a) The effective nationality of the ship and the particular situation of the Gemini III *in the case*

86. Without doubt, one of the elements required for the exercise of diplomatic protection is the nationality of the affected body by the allegedly illicit action which could be ascribed to Spain. In the case in question, such nationality should be defined, first of all, in relation with the vessel detained by the Spanish authorities in connection with the ongoing criminal proceedings. And that because of a simple reason: the only formal link between Saint Vincent and the Grenadines and the litigious matter is, in theory, the *Louisa*.

87. In addition, the question of the "nationality" of the vessel is determinant to define the jurisdiction of this Tribunal, because according to the unilateral declaration of acceptance of the jurisdiction made by Saint Vincent and the Grenadines, the jurisdiction of the International Tribunal on the Law of the Sea is limited to the following case: "concerning the

[55] *Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea to the International Law Commission*, Geneva, 31 July 2008, p. 6

arrest and detention of *its* vessels" (emphasis added). Although Spain does not want to return to the extremely special and limited jurisdictional range recognised by Saint Vincent and the Grenadines to this Tribunal, is it nevertheless necessary to remark that the Applicant has transformed the nationality/flag of the vessel into an essential requirement which will determine the jurisdiction of the Tribunal.

88. Consequently, in view of the application of the general rules of International Law that are applicable to the exercise of diplomatic protection, and to the free will expressed unilaterally by Saint Vincent and the Grenadines, this Tribunal must determine, first of all, the nationality of the vessel or vessels affected by the detention. From this point of view, Spain wants to offer the Tribunal the facts on this question.

89. Article 91 of the Convention establishes that every State shall fix the conditions for the granting of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. It also declares that ships have the nationality of the State whose flag they are entitled to fly. Article 91(1) ends with a brief, but complex assertion: "There must exist a genuine link between the State and the ship."

90. Spain, under no circumstance, disputes the sovereign right of Saint Vincent and the Grenadines to grant its nationality, to register and to assign its flag to the *Louisa*. In this respect —as the Tribunal did in the *M/V "Saiga" (No. 2) Case*— Spain considers that "Article 91 codifies a well-established rule of general international law".[56] Furthermore, Spain fully recognises that the *Louisa* was flying Saint Vincent and the Grenadines' flag during the "critical dates" of this case.

91. Spain is also aware of the problems that the successive changes of flag —like those occurred to the *Louisa* prior to the "critical dates"— have posed for this Tribunal when dealing, for example, with the *Saiga* or *Grand Prince* cases. Most of these problems facing international adjudicative bodies derive from the existence of a vessel with one nationality, owned by a person with a second nationality, operated by a crew with different nationalities, loaded with cargo owned by persons with other nationalities and insured by a company of another nationality. Cases of prompt release, of diplomatic protection or of general international responsibility are challenged by the active legitimation of one or several, sometimes opposed, States. Actually, not without criticisms within the Bench, this Tribunal changed its initial *ex parte* doctrine to an *ex officio* doctrine when verifying the nationality of the claim in the aforementioned cases. It is also true that both cases related to urgent situations calling for a decision on the prompt release of vessels and their crews.

92. Article 91(1) *in fine* the Convention apparently adopts the criteria of "effective nationality".[57] But as the International Law Commission clarifies in its Commentary to the Draft articles of Diplomatic Protection,[58] this criterion has a limited scope apart from those cases of double and opposed nationality. In the case of a ship treated as a unit, a formal, more

[56] *M/V "Saiga" (No. 2) Case*, Merits, Judgement of 1 July 1999, paragraph 63.

[57] *Nottebohm Case (second phase), Judgment of April 6th, 1955, I.C.J. Reports 1955*, p. 4, at p. 23.

[58] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 22-23, 42-43.

practical and policy-oriented answer may help to resolve these complex cases.

93. However, Article 91 of the Conventions cannot and must not be read in isolation. It is complemented by Article 94 adding the criteria of effective authority, jurisdiction and, therefore, responsibility over the vessel. The flag State has the exclusive right to give its flag to a ship; but it also has the duty to maintain a "genuine link" with the ship, a link of responsibility. This drove the Tribunal to confirm in the *M/V "Saiga" (No. 2) Case* that "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States."[59]

94. Saint Vincent and the Grenadines has duties imposed upon it by Article 94 of the Convention. The effective accomplishment of these duties should confirm the "genuine link" to which Article 91(1) refers. And the case before us does not show this "genuine link" between the *Louisa* and its flag State. However, and again in the *M/V "Saiga" (No. 2) Case*, the Tribunal seemed to reduce the extent of the "genuine link" only to evidence supporting that a ship is entitled to fly a flag only at the time of the incident giving rise to the dispute and during the dispute.[60] The facts summarized in this Counter-Memorial show that even before the arrival of the *Louisa* in Spanish waters, Saint Vincent and the Grenadines had not complied with the obligations imposed upon it by Article 94 of the Convention. Perhaps further guidance from the Tribunal would be very useful for this and future cases.

95. Having said that, Spain will not further discuss —unless necessary— the fact that the *Louisa* was flying Saint Vincent and the Grenadines' flag during the "critical dates" of this case. However, a clarification is necessary with regard to the legal status of the *Gemini III* in this process. As occurred during the phase of provisional measures, the Applicant is attempting to include and discuss as a "package" the legal status of the *Louisa* and its so-called "tender": the *Gemini III*. However, the Applicant again fails to establish the link of nationality between the *Gemini III* and St. Vincent and the Grenadines: this boat never carried its flag. In the documentation provided by the Applicant in this phase on the merits of the case, particularly Annex 3 to its Memorial, no evidence of the actual and past flag of the *Gemini III* is clearly provided.[61] In any case, the Applicant does not demonstrate that the *Gemini III* ever flew the flag of Saint Vincent and the Grenadines. This Tribunal cannot apply "a presumption of the existence of evidence which has not been produced."[62]

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[59] *M/V "Saiga" (No. 2) Case*, Merits, Judgement of 1 July 1999, paragraph 83.

[60] *Ibid.*, paragraphs 67-68.

[61] In the letter of the director of Sage to the *Consejo General del Poder Judicial* dated 14 October 2010 it is said that the *Gemini III* flies "the flag of the United States of America." (Memorial, Annex 8, p. 3) In the documents included in Annex 3 to the Memorial, it is declared that the *Gemini III* is "[r]egistered in the Netherlands with nr. 19666ZR2000." During its operation in Spanish waters, the *Gemini III* flew the flag of the United States of America.

[62] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgement of 11 September 1992, I.C.J. Reports 1992*, p. 351, at p. 399, paragraph 63.

96. The Applicant has not challenged what the Order on Provisional Measures correctly recalled in its paragraph 43, that is, "that the "Gemini III" was not flying the flag of Saint Vincent and the Grenadines at the time of the arrest".

97. As mentioned before, in its declaration pursuant to Article 287 of the Convention, of 22 November 2010, Saint Vincent and the Grenadines explicitly reduces the scope of the jurisdiction of the Tribunal to "the settlement of disputes concerning the arrest or detention of *its* vessels" (emphasis added). At the "critical date" —but even before and right now— the *Gemini III* did not fly the Saint Vincent and the Grenadines' flag and, therefore, cannot be included in the category named by the Applicant as "its vessels". Therefore, in the absence of the bond of nationality between the Applicant and the *Gemini III*, the former has no right to claim before this Tribunal with regard to that vessel. This follows the well-established customary principle of international law under which the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims, [63] codified in Article 44(a) of the articles on Responsibility of States for internationally wrongful acts, annexed to UNGA Res. A/56/83, 28 January 2002. As a consequence, there is no space of reference for any single point of law regarding the *Gemini III*. The dispute, if any, must be limited to the *Louisa*, as the Applicant implicitly does in paragraph 50 of its Memorial ("Saint Vincent and the Grenadines is the flag country of *the detained ship*", emphasized the singular of the assertion: ship and not ships).

98. Furthermore, as advanced by Judge Wolfrum in his Dissenting opinion to the Order on Provisional Measures (para. 16), under no circumstance may the *Louisa* and the *Gemini III* —two vessels with two different flags— be treated as a unit. This Tribunal clarified in the *M/V "SAIGA" (N° 2) Case* the concept of "ship as a unit" (para. 106) which clearly does not apply in this case under any circumstance. Therefore, there is no room to discuss in this case any international consequence of the lawful detention of the *Gemini III* by the Spanish authorities.

(b) *The nationality of the crew and of other persons related to the activities of Louisa: consequences in this case*

99. As shown by the content of the Memorial submitted by Saint Vincent and the Grenadines, the Applicant articulates its claim with a view to satisfying certain interests of various legal and natural persons, with respect to whom it can then exercise diplomatic protection, namely the members of the crew, other persons detained and prosecuted by the Spanish judicial authorities, and the owners of the vessel *Louisa*, the firm Sage in particular. Therefore, determining the existence of a nationality link between Saint Vincent and the Grenadines and such legal and natural persons is essential for ascertaining the jurisdiction of the Court over this case. For only if such nationality link exists will the necessary

[63] See among others *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12; *Biens britaniques au Maroc espagnol (Espagne/RoyaumeUni), R.S.A.*, II, p. 706; *The Panevezys-Saldutiskis Railway Case, Judgement of February 28th 1939, P.C.I.J. Series A/B, No. 76,* p. 16; or *Nottebohm Case (second phase), Judgement of April 6th, 1955: I.C.J. Reports 1955*, p. 4.

requirements be met for Saint Vincent and the Grenadines to be able to exercise diplomatic protection through an application admissible before this Tribunal.

100. In this regard, Spain wishes to draw attention again to the need to distinguish between the prompt release of vessels procedure (Article 292 of the Convention) and the present ordinary procedure based on Article 287 of the Convention. This is particularly significant regarding the protection of the crew because, according to the wording of Article 292, only in the very specific case of the prompt-release-of-vessels procedure is it possible for the flag State to exercise a sort of special protection over the crew regardless of nationality. This circumstance can only be justified by the exceptional nature of the summary procedure, set up as an urgent procedure, and the urgency of which would be impaired if each and every member of the crew had to turn to the State of his or her nationality, especially in the case of vessels with large crews.

101. Contrary to the Applicant's allegations, in the remaining where a State has submitted an application to the Tribunal on the grounds of the exercise of diplomatic protection, there is no reason whatsoever to conclude that the general rule of international law requiring a nationality link must be excepted and left unapplied. Therefore, as has been pointed out, Saint Vincent and the Grenadines must prove the existence of a nationality link in order to exercise a legal action before this honourable Tribunal. As a result, the Tribunal cannot pronounce itself competent regarding claims affecting legal or natural persons not having the nationality of the Applicant, in particular claims affecting members of the crew who are of Hungarian or U.S. nationality, or affecting the shipowners who, as either legal or natural persons, are nationals of the United States of America. The absence of nationality is moreover reinforced by the lack of control and the absence of a genuine link between Saint Vincent and the Grenadines and the activities of the above persons. This in turn confirms the inexistence of a formal or substantial link warranting the right of Saint Vincent and the Grenadines to exercise diplomatic protection over such persons in an autonomous manner.

102. It is true, however, that the Tribunal has pronounced itself on the "ship as a unit", including under this denomination both the vessel and the crew. And it was, beyond doubt, this specific case-law (always related to the prompt-release-of-vessels procedure) which prompted the International Law Commission to include Article 18 (Protection of ships' crews) in its Draft articles on Diplomatic Protection, according to which:

> "The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act".

103. Nevertheless, Spain considers that not even this provision can be regarded as a hypothetical legal basis to recognize, in general, the right of the flag State to exercise diplomatic protection of the crew as a general rule and under any circumstance. This is so for the following reasons:

(a) Article 18 is based on the procedure for the prompt release of vessels and should therefore be circumscribed within those boundaries;

(b) The inclusion of such provision in the Draft articles was highly controversial and subject to strong criticism by ILC members and by delegates in the Sixth Committee of the United Nations General Assembly; and

(c) At any rate, it is a provision that is currently not in force, given that the Draft articles have not resulted in a Convention. Moreover, it does not reflect State practice and it cannot be concluded that it is a rule of customary law.

104. Therefore, Spain has no doubt that Saint Vincent and the Grenadines has no right to exercise diplomatic protection over persons related to the *Louisa* that are not nationals of that State. Exercising diplomatic protection in the absence of the nationality link would be acting in disregard of the rules of international law establishing the conditions for the exercise of diplomatic protection, which apply directly to this case.

105. However, even if the Tribunal were inclined to reach the conclusion that it is possible for the flag State to exercise diplomatic protection over the crew even beyond the procedure established in Article 292 of the Convention, extending such protection to persons other than members of the crew would be exorbitant and totally unwarranted. Spain therefore considers that the need for a nationality link with the Applicant absolutely precludes the exercise of diplomatic protection over the shipowners, the consignees, the companies or other persons bearing some relation to the vessel but unrelated to the flag State. The consequences for the present case are obvious.

(c) *Conclusions*

106. On the grounds of the arguments expounded in the preceding paragraphs, Spain considers that this honourable Tribunal has no jurisdiction to decide on the merits of the application submitted by Saint Vincent and the Grenadines given that, by means of said application, the latter State intends to exercise diplomatic protection over persons not having any nationality link with the Applicant, in utter disregard of the basic requirement of proving the nationality of both the right allegedly violated and the corresponding claim.

107. In any case, if the exercise of diplomatic protection should be deemed possible, such protection should be circumscribed to the vessel *Louisa*. Any claim related to the rights or autonomous interests of third parties bearing no nationality link with Saint Vincent and the Grenadines, be they legal or natural persons, should be excluded from the scope of diplomatic protection. This, in practice, would result in the loss of grounds of most of the *petitum* (petitions) submitted by the Applicant.

(3) Non exhaustion of local remedies

108. In paragraph 68 of its Order of 23 December 2010 on provisional measures, the Tribunal considered that "the issue of exhaustion of local remedies should be examined at a future stage of the proceedings." In this regard, Spain considers that Saint Vincent and the

Grenadines has not properly fulfilled its obligation of exhaustion of local remedies as required by Article 295 of the Convention.

109. Article 295 of the Convention ("Exhaustion of local remedies") states that:

> "Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law."

As stated by this Tribunal in the *Saiga (No. 2) Case*, "the question whether local remedies must be exhausted is answered by international law. The Tribunal must, therefore, refer to international law in order to ascertain the requirements for the application of this rule and to determine whether or not those requirements are satisfied in the present case."[64]

110. International courts and tribunals —including this honourable Tribunal— have illuminated with their jurisprudence the legal nature and extent of this customary principle,[65] which seeks that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."[66] For an international claim to be admissible, "it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."[67]This customary rule has been codified in Article 44(b) of the articles on State Responsibility,[68] where it states that "the responsibility of a State may not be invoked if [...] the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."[69] For a tribunal, the decision on the allegation of failure to exhaust local remedies stands out as a clear-cut issue of a preliminary character that must be determined immediately and independently of the merits.[70]

111. The obligation of previous exhaustion of local remedies is conditioned by the nature of the rights that are claimed. As it has been repeatedly clarified by international jurisprudence, the rule of the exhaustion of local remedies does not apply when the right violated is a right of a State.[71] Conversely, the exhaustion of local remedies is compulsory in cases —like the one now before this Tribunal— of diplomatic protection when a State claims the respect of international law with regard persons with a bond of nationality. This Tribunal has elaborated this reasoning through the notion of "jurisdictional connection".

112. Hence, in the *Saiga (No. 2) Case*, this Tribunal also dealt with the condition of "jurisdictional connection" between the responsible State and the natural or juridical persons in respect of whom the applicant can make a claim. In that case, what was under discussion

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[64] *The M/V "Saiga" (No. 2) Case*, paragraph 96.
[65] *ElettronicaSiculaS.p.A. (ELSI), Judgement, I.C.J. Reports 1989*, paragraph 50.
[66] *Interhandel Case, Judgement of 21 March 1959, I.C.J. Reports 1959*, p. 27.
[67] *ElettronicaSicula..., I.C.J. Reports 1989*, paragraph 59.
[68] UNGA Resolution 56/83, 28 January 2002, Annex
[69] See also Article 15 of the 2006 Draft articles on Diplomatic Protection also reflects this principle. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10*(A/61/10).
[70] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgement, I.C.J. Reports 1964*, p. 46.
[71] *M/V "Saiga" (No. 2) Case, Merits*, Judgement of 1 July 1999, paragraph 98.

was the "jurisdictional connection" regarding activities in the exclusive economic zone ("EEZ") of Guinea. The Tribunal did not find this "jurisdiction connection" given the exorbitant application of Guinea's customs laws in its EZZ. For the Tribunal,

> "whether there was a necessary jurisdictional connection between Guinea and the natural or juridical persons in respect of whom Saint Vincent and the Grenadines made claims must be determined in the light of the findings of the Tribunal on the question whether Guinea's application of its customs laws in a customs radius was permitted under the Convention. If the Tribunal were to decide that Guinea was entitled to apply its customs laws in its customs radius, the activities of the *Saiga* could be deemed to have been within Guinea's jurisdiction. If, on the other hand, Guinea's application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed."[72]

113. The Tribunal adopted this decision once it was realised that "[t]he parties agree that a prerequisite for the application of the rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which causes the damage"[73]. The Tribunal found the absence of "jurisdictional connection" precisely following the allegations of Saint Vincent and the Grenadines upon which "this connection was absent in [that case] because the arrest of the ship took place outside the territorial jurisdiction of Guinea and the ship was brought within the jurisdiction of Guinea by force"[74]. With regard to the *Louisa*, the case is completely the contrary.

114. With regard to the *Louisa*, as has been demonstrated, the "jurisdictional connection" is well established given that any and all activities by the natural and juridical persons in respect of whom the Applicant is claiming occurred in Spanish internal waters and territorial sea, and both zones are under the exclusive jurisdiction of the Kingdom of Spain (Article 2 of the Convention). Consequently, and following the Tribunal's reasoning, the customary rule of exhaustion of local remedies does apply.

115. An attentive reading of the Memorial shows that the private persons and companies involved in the case seek a sort of appeal before this Tribunal against the legitimate decisions adopted by the competent Spanish courts. Although this Tribunal cannot vest itself as a court of appeal against the Spanish courts, Spain recalls that —as observed in paragraph 28 of this Counter-Memorial— the criminal proceedings before the Spanish criminal courts are still pending; and, as the ICJ observed in the *Interhandel Case*,[75] the rule of exhaustion of local remedies must be observed *a fortiori* when domestic proceedings are pending.

116. As explicated by Judge Cot in his Dissenting opinion to the Order on provisional measures in this case, "[l]a complexité de l'organisation mise en place et ses ramifications internationales expliquent la durée de l'instruction judiciaire, dont on comprend qu'elle ait pris plusieurs années." (paragraph 9: "The complexity of the investigation and its international ramifications account for the length of the preliminary judicial investigation; it

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[72] *M/V "Saiga" (No. 2) Case, Merits*, Judgement of 1 July 1999, paragraph 100.
[73] *Ibid.*, paragraph 99.
[74] *Ibid.*, paragraph 92.
[75] *Interhandel..., I.C.J. Reports 1959*, p. 27.

is therefore understandable that it has taken several years"). But, in any case, the procedure before the Spanish courts has not yet ended and, therefore, the rule of exhaustion of local remedies has not been properly fulfilled.

117. The Applicant contended in its Request for provisional measures that "it has filed its Application and Request for Provisional Measures reluctantly and only after sustained and serious attempts to resolve this detention through the Respondent's legal system." (Request, paragraph 47). And in its Memorial, the Applicant repeated that "[r]epresentatives of the owner and agents for the Applicant have attempted every known procedural and diplomatic maneuver to obtain closure of this matter, including the release of the *Louisa*, the *Gemini III*, and their equipment [...] all to no avail." (paragraph 13) These contentions are plainly inaccurate and deceptive.

118. They are inaccurate because, as already summarized in paragraphs 29-34 of this Counter-Memorial, the persons and companies involved in the criminal proceedings before the Spanish courts have continually submitted all and every kind of legal obstacles to the procedures before the Spanish legal system. Their appeals have delayed all the criminal proceedings and have been responded to and resolved by the competent court. Notwithstanding this, still pending is the appeal of the accused persons against the latest Order of the Magistrate Judge of 31 October of 2011 confirming the Criminal Indictment of 27 October 2010. This proves that, even after the submission of the Memorial of Saint Vincent and the Grenadines, the persons on behalf of whom the Applicant claims diplomatic protection before this Tribunal are still using the local remedies available under Spanish domestic law to defend what they consider their legitimate rights. It is hard to find a better example where the local remedies referred to in Article 295 of the Convention *have not been yet exhausted.*

119. The Applicant's contentions are also deceptive and misleading. Saint Vincent and the Grenadines attempts to present as an exhaustion of Spanish local remedies various extra-judicial acts such as different communications delivered to persons with no direct relation with the criminal proceedings currently before Spanish courts (the origin of this case, in the Applicant's view); or several visits to and interviews with the Magistrate Judge of Criminal Court No. 4 of Cádiz.

120. Spain recalls that the only proper acts to fulfil the obligation foreseen in Article 295 of the Convention are, precisely, those domestic legal remedies through which the breaches alleged by Saint Vincent and the Grenadines can be repaired. An attentive reading of the *petitum* in Saint Vincent and the Grenadines' Memorial shows that its purposes are: *(i)* to obtain the liberation of the *Louisa*; *(ii)* to obtain a declaration on the unlawful detention of the persons involved in the case; and *(iii)* to obtain compensation for the alleged damage, direct and indirect, caused by the detention of the vessel. These purposes cannot be accomplished but through the proper judicial procedures before the competent Spanish courts. Only through these procedures can the allegedly damaged persons (individuals and corporations) contend the reparation of the breaches, if any. Therefore, only these procedures can be used to fulfil the rule of previous exhaustion of local remedies. These remedies are still pending and, as a

consequence, this Tribunal cannot admit the Applicant's contention that the requisite imposed in Article 295 of the Convention has been properly fulfilled.

121. Finally, Spain cannot leave unanswered an insinuation made in Saint Vincent and the Grenadines' contentions, by which the Applicant seeks to blur judicial procedures and other extrajudicial acts that are not acceptable in a situation where Spanish courts, in the exercise of their judicial functions, have initiated criminal proceedings, as in this case. In a State of law, with a clear separation of powers, courts and tribunals adopt their decisions with absolute independence and guided only by law. This is the case of Spain where no "diplomatic maneuver" can obtain the "closure of [the] matter".

IV. Conclusions

122. As Spain stated in paragraphs 29-34 of this Counter-Memorial, Saint Vincent and the Grenadines *never* made any serious attempt to resolve the dispute. On 15 March 2006, the Applicant was already aware of the entry into and search of the *Louisa* by the Spanish judicial authorities; and Spain properly communicated this to Saint Vincent and the Grenadines "for any necessary procedure." However, Saint Vincent and the Grenadines only reacted more than *four years later* through several e-mails from its Office of the Commissioner for Maritime Affairs in Geneva forwarded to the *Capitanía Marítima de Cádiz*; and the Applicant took no action with regard to the *Louisa* until 26 October 2010 when it simply announced to Spain the forthcoming action before this honourable Tribunal. Until that moment, Saint Vincent and the Grenadines had not performed a single act that can demonstrate it has fulfilled the requirements imposed by the Convention in order to submit a claim before this Tribunal.

123. To sum up, on the basis of what is declared in this Chapter of the Counter-Memorial, Spain respectfully considers that this Tribunal is not competent to decide on the merit of this case and that Saint Vincent and the Grenadines' claim must be declared inadmissible on the following grounds:

(1) Saint Vincent and the Grenadines has not fulfilled the obligation to engage in an exchange of views as foreseen in Article 283 (1) of the Convention;

(2) Saint Vincent and the Grenadines has not demonstrated the nationality of the claim, which is obligatory under the rules applicable to the diplomatic protection that it pretends to exert on behalf the *Louisa*, its crew and other third persons (individuals and corporations) involved in the activities of that vessel; and

(3) Saint Vincent and the Grenadines has not fulfilled the requisite of the exhaustion of the local remedies as foreseen in Article 295 of the Convention.

CHAPTER 4
SUBJECT-MATTER JURISDICTION OF THE TRIBUNAL

I. Introduction

124. As stated in Chapter 3 of this Counter-Memorial, Spain considers that the Tribunal does not have jurisdiction in the dispute (if any) before it. However, should the Tribunal consider it does have jurisdiction, Spain further considers that the Tribunal has no subject-matter jurisdiction.[76] Several interlinked arguments can be posed before this Tribunal:

(a) the limited scope of the declaration accepting the jurisdiction of the Tribunal deposited by Saint Vincent and the Grenadines on 19 November 2010 pursuant to Article 287 of the Convention;

(b) the explicit and voluntary position of the Applicant outside the procedure of prompt release of vessels and crews foreseen in Article 292 of the Convention and its claim under the general legal framework of diplomatic protection; and

(c) the unfounded and disordered allegation of Articles 73, 87, 226, 227, 245 and 303 of the Convention as the legal basis for the Applicant's claims and the absence of a logical and sound explanation for the legal arguments advanced by Saint Vincent and the Grenadines in its Memorial.

125. Therefore, as a preliminary assessment, an exact delimitation of the existence and the extent of the legal dispute (if any) between Saint Vincent and the Grenadines and Spain must be made. At the very outset, Spain recalls that, as clearly and repeatedly stated in the Convention, the dispute must concern in any case "the interpretation or application of [the] Convention" (Article 286). This is due to the fact that States parties to the Convention are free to choose among several means for the settlement of "disputes concerning the interpretation of application of [the] Convention" (Article 287(1)); and the court and tribunals referred to in this article "shall have jurisdiction over any dispute concerning the interpretation or application of [the] Convention [...]" (Article 288(1) of the Convention).

126. The above applies to this Tribunal, whose jurisdiction, under Article 21 of its Statute, "comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." In the present case, the alleged dispute has been exclusively submitted to the Tribunal in accordance with the 1982 Convention on the Law of the Sea. Under Article 23 of the Statute and Article 293(1) of the Convention, in the present case the applicable law should be the Convention.

127. An international dispute is commonly defined using the terms of the Permanent Court of International Justice ("PCIJ") as a "disagreement on a point of law or fact, or conflict of

[76] This question of merits, which is of a priority nature – as observed by the ICJ in the *South West Africa Case* – differs from the one concerning their standing before the Court itself, which has a preliminary nature and may be the object of a decision either on preliminary exceptions or on an earlier phase of the proceedings. *South West Africa, Second Phase, Judgement, I.C.J. Reports 1966*, pp. 18 and 51, paragraphs 4 and 99.

legal views or of interests".[77] In its Order of 27 August 1999, in the *Southern Bluefin Tuna Cases*, the Tribunal adopted *expressis verbis* this definition.[78] The existence of a dispute —a matter of objective determination[79]— is the primary condition for a court or tribunal to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute.[80]

128. Therefore, the dispute before this Tribunal should be reduced to the objective determination of a disagreement on a point of law or fact, or a conflict of legal views or of interests, between Saint Vincent and the Grenadines and Spain regarding the interpretation or the application of the Convention.

129. In this case, Saint Vincent and the Grenadines unfoundedly contends that Spain has breached some of its obligations under Spanish law (Memorial, paragraphs 54-62) and international law (*ibid.*, paragraphs 63 ff.). Obviously, the first set of contentions does not, under any circumstance, fall within the competence of this Tribunal unless the dispute constitutes a challenge to the legality of Spanish law with regard to the Convention, which is clearly not the case. Furthermore, all the disordered arguments in the Memorial devoted to explaining that "Spain violated its own law" attempt to use this Tribunal as an appellate court of Spanish judicial decisions that are still pending, which is utterly unacceptable.

130. The problem in this case is twofold: first, no arguments are made by Saint Vincent and the Grenadines with regard to the content and extent of applicable law in this case; and, second, in any case, the articles of the Convention evoked by the Applicant are manifestly inapplicable in this case. There is no true elaboration on the legal arguments of Saint Vincent and the Grenadines regarding the applicable law in this case; and the same could be said with regard to the alleged violations of the Convention. As this Counter-Memorial shows in its paragraphs 142-168, the articles of the Convention evoked by Saint Vincent and the Grenadines are plainly not applicable to the facts as clarified by Spain in this Memorial: the *Louisa* was not fishing in the Spanish EEZ, the *Louisa* was voluntarily docked in a Spanish port, the *Louisa* was not investigated and arrested because it was polluting Spanish maritime zones and the *Louisa,* in fact, was not engaged in scientific marine research as envisaged in the Convention; and, in any case, its arrest was not because of any marine research activities being carried out .

131. In any case, all these arguments must be assessed before the subject-matter jurisdiction of the Tribunal, a jurisdiction primarily delimited by the extent of both parties' acceptance of that jurisdiction through their declarations pursuant to Article 287 of the Convention.

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[77] *Mavrommatis Palestine Concessions, Judgement No. 2, 1924, P.C.I.J. Series A, No. 2*, at p. 11.

[78] *Southern Bluefin Tuna Cases, ITLOS Reports 1999*, paragraph 44.

[79] *Interpretation of Peace Treaties, I.C.J. Reports 1950*, p. 74.

[80] *Nuclear Tests (Australia v. France), Judgement of 20 December 1974, I.C.J. Reports 1974*, p. 260, paragraph 24.

II. The Applicant's declaration pursuant to Article 287 of the Convention and its effects on the dispute

132. The formal Declaration of Saint Vincent and the Grenadines under Article 287 of the Convention deposited before the UN Secretary-General on 22 November 2010 reads as follows:

> "In accordance with Article 287, of the 1982 United Nations Convention on the Law of the Sea of 10 December 1982, I have the honour to inform you that the Government of Saint Vincent and the Grenadines declares that it chooses the International Tribunal of 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*." (emphasis added)

133. For its part, the Spanish Declaration of 19 July 2002 pursuant to Article 287 of the Convention reads as follows:

> "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 the 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."

134. Saint Vincent and the Grenadines explicitly and voluntarily reduces the jurisdiction of this Tribunal to the settlement of disputes concerning *exclusively* the cases of arrest and detention of Saint Vincent and the Grenadines' vessels under the Convention. No other dispute can be receivable by this Tribunal. By the effect of reciprocity —a well-established procedural principle recognised by the ICJ in several cases[81]— this Tribunal would have jurisdiction only to the extent that both Declarations cover identical legal grounds. In this case, this is clearly limited to disputes concerning the arrest and detention of vessels under the Convention.

135. These cases are limited to Article 28 ("*Civil jurisdiction in relation to foreign ships*"), Article 73 ("*Enforcement of laws and regulations of the coastal State*"), Article 97 ("*Penal jurisdiction in matters of collision or any other incident of navigation*"), Article 220 ("*Enforcement by coastal States*") and Article 226 ("*Investigation of foreign vessels*"). Although Spain will elaborate later on the applicability of some of these articles in this case, these legal bases must be confronted with Saint Vincent and the Grenadines' legal claims upon the Convention in this case. This will elucidate the sole cases where the Tribunal would

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[81] Among others, *Certain Norwegian Loans, Judgement of July 6th, 1957, I.C.J. Reports 1975*, at pp. 23-24; *Case concerning the Right of Passage over Indian territory (preliminary objections), Judgement of November 26th, 1957, I.C.J. Reports 1957*, at p. 145; *Interhandel Case, Judgement of March 21st, 1959, I.C.J. Reports 1959*, at p. 23; or *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1983*, at pp. 419-421, paragraphs 62-64.

have jurisdiction, in view of the unilateral declaration of the Applicant under Article 287 of the Convention.

136. Saint Vincent and the Grenadines claims Articles 73, 87, 226, 227, 245 and 303 of the Convention as the legal basis of its Memorial. Therefore, after crossing the two lists of Articles, the jurisdiction of this Tribunal in the present case would be reduced to disputes (if any) concerning only Articles 73 and 226 of the Convention. Neither Article 87 nor Articles 227, 245 or 303 deal with the arrest or detention of vessels. Therefore, for jurisdictional purposes, they cannot be the legal basis for any claim of Saint Vincent and the Grenadines before this Tribunal.

III. The absence of legal elaboration of the Applicant's contentions

137. One of the main problems in responding to the Memorial presented by Saint Vincent and the Grenadines is that of identifying the legal arguments advanced by the Applicant. Leaving aside the recurrent strategy used by Saint Vincent and the Grenadines – highlighted and criticised by Spain in the phase of provisional measures – of transferring the conditions and procedures for the prompt release of vessels and crews under Article 292 of the Convention to a complete different factual and legal scenario,[82] the Applicant simply declares in general terms that Spain has breached its obligations under the Convention.

138. The international responsibility of another State can be invoked by the injured State if the obligation breached is owed to that State individually. Responsibility can also be invoked by a State if the obligation breached is owed to a group of States including that State, or to the international community as a whole, and the breach of the obligation specifically affects that State.[83] Consequently, the injured State must demonstrate that there does exist a clear violation of its own rights by the State responsible. As Judge Golitsyn said in his Dissenting opinion to the Order on provisional measures in this case, "[i]t 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." (paragraph 14) Unfortunately for Saint Vincent and the Grenadines, this is the case of its Memorial. The Applicant simply, and unfoundedly, states that Spain has violated some articles of the Convention and that these violations produce Spain's international responsibility.

139. In its 1996 judgment in the *Oil Platforms (preliminary objections) Case*, 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

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[82] This Tribunal has already clarified the conditions, nature and extent of the prompt release procedure, and its differences with other contentions regarding seized vessels under other articles of the Convention. See particularly *"Camouco" (Panama* v. *France), Prompt Release, Judgment, ITLOS Reports 2000,* p. 10; *"Monte Confurco" (Seychelles* v. *France), Prompt Release, Judgment, ITLOS Reports 2000,* p. 86; or *"Volga" (Russian Federation* v. *Australia), Prompt Release, Judgment, ITLOS Reports 2002,* p. 10.

[83] Article 42 of the Articles on Responsibility of States for internationally wrongful acts, annexed to UNGA Res. A/56/83, 28 January 2002

and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain."[84]

As in the case now before the Tribunal, both the title of jurisdiction and the provisions allegedly violated fall within the same treaty: the 1982 Convention of the Law of the Sea. As Spain seeks to show in the following paragraphs, the allegations of the Applicant are manifestly unfounded when interpreting the articles evoked, in accordance with the ordinary meaning to be given to their texts in their context and in the light of their object and purpose.

140. Contrary to what is contended by Saint Vincent and the Grenadines – and as advanced by Spain in the phase of provisional measures – the provisions of the Convention alleged by the Applicant in its Memorial (Articles 73, 226, 227 and 245) cannot be the legal basis for the contentions because none of them recognise rights to the Applicant; on the contrary, they identify well established rights of the respondent, namely the right to enforce national legislation protecting fishing stocks in the Spanish EEZ (Article 73), the right to prevent pollution to the marine environment under Spain's sovereignty or jurisdiction (Articles 226 and 227) and the exclusive right to regulate scientific marine research in the territorial sea (Article 245). Indeed, the Memorial is constructed around alleged violations of the Convention by the Respondent but cannot explain how these breaches violate the Applicant's own rights. In particular, it is stated repeatedly by the Applicant that the detention of the *Louisa* violates Saint Vincent and the Grenadines' right to navigate, as purportedly covered by Article 87 of the Convention. Notwithstanding further elaboration in this Counter-Memorial (*infra* paragraphs 149-154), Spain recalls that the *Louisa* was not detained when enjoying this general and well-established right to be enjoyed *in the high seas*. To the contrary, the vessel was detained in the internal waters of Spain, accused of well-proven acts against Spanish laws and regulations.

141. Saint Vincent and the Grenadines' Memorial says merely that Spain has breached the Convention but is unable to justify this allegation with a logical legal discourse. Much of this inability is due to the clear non-applicability of the articles invoked by the applicant to the facts in this case, which means, in consequence, there is no dispute that can and should be resolved by this Tribunal.

IV. The inexistence of the alleged breaches of the Convention

142. Notwithstanding the fact that this Counter-Memorial should only deal with the contentions concerning Articles 73 and 226 of the Convention, as explained in paragraphs 132-136, Spain wishes to elaborate its arguments about the absolute inexistence of the breaches alleged by the Applicant in order to clarify why Spain considers this honourable Tribunal to lack subject-matter jurisdiction.

143. In its Memorial, the Applicant intriguingly contends that with the seizure of the *Louisa* Spain violated Articles 73, 87, 226, 227 and 245 of the Convention. Although included in the phase of provisional measures in this Memorial, a violation of Article 303 of the Convention

[84] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996,* p. 803, at p. 810, paragraph 16.

is alleged but not legally elaborated in this phase. Therefore, this Counter-Memorial will not deal with that argument unless otherwise needed. Furthermore, and giving the reasons argued in this Counter-Memorial (see *supra* paragraph 9), the arguments elaborated hereinafter will be brief and to the point, in order not to repeat the arguments already made in the phase on provisional measures.

(1) *The alleged violation of Article 73 of the Convention*

144. Under the particular title of "Enforcement of laws and regulations of the coastal State", Article 73 of the Convention reads as follows:

> "1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
> "2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
> "3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
> "4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

145. In a quite curious interpretation of this article, the Applicant tries to convince this Tribunal that Spain was "under an obligation to fix a reasonable bond or other security in respect of arrested vessels and their crew and to release the arrested vessel promptly upon the posting of the bond or security" (Memorial, paragraph 65); that Spain had "failed to effectively notify the flag State in violation of Article 73(4) of the Convention" (Memorial, paragraph 66); and that Spain "was under an obligation to actually notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed (Memorial, paragraph 67).

146. However, the Applicant overlooks that Article 73 of the Convention, under the label "Enforcement of laws and regulations of the coastal State", refers to a faculty of the coastal State to ensure compliance with its laws and regulations concerning the conservation and management of the natural resources *in its exclusive economic zone* (EEZ).[85] As Judge Cot stresses in his Dissenting opinion to the Order on Provisional Measures in this case, "[l]'article 73, cité par le demandeur, concerne la saisi de navires de pêche dans la zone économique exclusive et n'a aucun rapport avec le cas en espèce" (paragraph 18: "article 73, to which the Applicant refers, concerns the arrest and detention of fishing vessels in the Exclusive Economic Zone; it has no relation to the present case."). This is the correct

[85] In the *Juno Trader Case,* Saint Vincent and the Grenadines' agent clearly stated that Article 73 —*ratione materiæ*— "specifically concerns detention of vessels in the event of illegal fishing [...]." *Juno Trader Case*, Applicant on behalf of Saint Vincent and the Grenadines, at p. 20, paragraph 110.

interpretation of this article in accordance with the ordinary meaning to be given to its text in their context and in the light of its object and purpose.

147. As clarified above, the *Louisa* was never engaged in activities related to the exploration and exploitation of the fisheries in the Spanish EEZ. Actually, under the permits alleged by the Applicant, it never operated in the Spanish EZZ. Moreover, the *Louisa* was detained in a Spanish port (*El Puerto de Santa María*) because of its illicit activities against the underwater cultural heritage in Spanish internal waters and territorial sea. Paragraph 16 of Judge Golitsyn's Dissenting opinion to the Order on Provisional Measures in this case summarized the situation perfectly well:

> "[T]he *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."

148. The *Louisa* and the *Gemini III* are not fishing vessels.[86] This is plainly admitted by the Applicant in its "Supplemental Memorandum" to the Request of Provisional Measures submitted by Saint Vincent and the Grenadines on 10 December 2010 (at p. 4). As further admitted by the Applicant and clearly explained by Spain, neither vessel was ever engaged in activities directed at "the living resources in the [Spanish] exclusive economic zone". Both vessels operated only within the Spanish internal waters and territorial sea. Therefore, and using the words of Judge Wolfrum in its Dissenting opinion to the Order on Provisional Measures, "by no stretch of imagination article 73 of the Convention may serve as a basis of jurisdiction of the Tribunal on the merits of the case" (paragraph 21).

(2) *The alleged violation of Article 87 of the Convention*

149. A similar situation is encountered with regard to the alleged violation of Article 87 of the Convention. As is well known, under the title of "Freedom of the High Seas", this article restates the general principle under which, in particular,

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

150. The Applicant, mixing arguments related to primary and secondary norms, simply states that because of the seizure, the *Louisa* is unable to enjoy its rights to freely navigate in the high seas. Under the terms of its Memorial, "[t]he *Louisa* and the *Gemini III* have been denied access to the high seas and Applicant is entitled to damage as a result." (paragraph 73).

151. These arguments are absurd, as is that employed by the Applicant in attempting to pervert the true meaning of Article 87 of the Convention, a codification of the long-standing

[86] See further ITLOS/PV.10/6/Rev.1, p. 16.

norm of *mare apertus*. As Judge Golitsyn clearly explains in his Dissenting opinion to the Order on provisional measures in this case, Article 87

> "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." (paragraph 19)

Similar thoughts were expressed by Judge Wolfrum, in his dissenting opinion, as follows:

> "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". (paragraphe 22)

This is also the opinion of Spain as explicitly or implicitly stated in this Counter-Memorial and in the Written response to the Request for provisional measures in this case.

152. But there is also another argument against the absurd contention of Saint Vincent and the Grenadines. The *Louisa* cannot legally navigate, and it is the obligation of Saint Vincent and the Grenadines (as the flag State) and of Spain (as the port State) to control the fulfilment by the *Louisa* of the legal rules and standards with regard to the seaworthiness of the ship.

153. As previously explained in this Counter-Memorial (*supra* paragraph 37), the last inspection of the vessel under the SOLAS Convention was carried out on 16 August 2004 and the certificate expired on 31 March 2005; the last survey of the vessel under Annex I of the MARPOL Convention was made on 1 August 2004 and the certificate expired on 31 March 2005; and the last survey of the ship's hull, as prescribed by the SOLAS Convention was performed in 2000 and its necessary renewal from March 2005 onwards is absent. Spain also recalls in this Counter-Memorial that under Chapter I, regulation 19 (c) of the SOLAS Convention, as amended,

> "the officer carrying out the control shall take steps to ensure that the ship shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board."

154. Therefore, the *Louisa* cannot navigate, not only because of its current legitimate seizure in a Spanish port by Spanish authorities but also because it does not fulfil the international requirements for seaworthiness. The responsibility for this lies with Saint Vincent and the Grenadines. If and when the criminal procedure before the Spanish courts permits the release of the *Louisa*, the Applicant would have to demonstrate the seaworthiness of its vessel as generally obliged by Article 94 of the Convention. Therefore, the contention that Spain has violated Article 87 of the Convention by its seizure of the *Louisa* not only goes against the correct interpretation of this article in accordance with the ordinary meaning to be given to its text in context and in the light of its object and purpose, but also against logic and the facts surrounding the *Louisa*.

(3) *The alleged violation of Articles 226 and 227 of the Convention*

155. Articles 226 and 227 of the Convention read as follows:

> "Article 226
> *Investigation of foreign vessels*
> "1. (a) States shall not delay a foreign vessel longer than is essential for purposes of the investigations provided for in articles 216, 218 and 220. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when:
> (i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents;
> (ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or
> (iii) the vessel is not carrying valid certificates and records.
> "(b) If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.
> "(c) Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV.
> "2. States shall cooperate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea."
>
> "Article 227
> *Non-discrimination with respect to foreign vessels*
> "In exercising their rights and performing their duties under this Part, States shall not discriminate in form or in fact against vessels of any other State."

156. Article 226 of the Convention is located in Section 7 ("Safeguards") of Part XII of the Conventions devoted to the "Protection and Preservation of the Marine Environment". That article deals with the limits and obligations of States, including coastal States, when deciding enforcement actions *ex* Articles 216, 218 and 220 of the Convention. However, all these enforcement measures, and therefore the limits upon them, concern the investigations by coastal States of foreign vessels involved in alleged pollution activities of the marine environment. This is not the case here. Spain did not arrest the *Louisa* because it was polluting marine areas under the sovereignty or jurisdiction of Spain.

157. With regard to Article 227 of the Convention, which also refers to Part XII of the Convention, and with the utmost respect to this Tribunal and the Applicant, one cannot take seriously the contention stated in paragraphs 69 *in fine* and 71 of the Memorial which unfoundedly affirms that "the treatment of the foreign vessels, *Louisa* and *Gemini III*, is

discriminatory in violation of Article 227 of the Convention" and that "[i]n the meantime, at least one Spanish company, Repsol, is presently engaged in developing methane gas reserves to the exclusion of foreign interests, such as those dispatched the *Louisa* and the *Gemini III*. The actions of the Spanish state are truly discriminatory and violate Art. 245 and Art. 227."

158. These allegations not only ignore the meaning of Article 227 (and of Article 245) but pervert the true facts of the case as well. Under no circumstance did Spain arrest the *Louisa* because it was carrying the flag of Saint Vincent and the Grenadines, and such serious accusations must not be made in the total absence of underlying truth. Permits under the Convention may vary depending on the object and purpose, and they are granted under the conditions set forth in the Convention and the domestic laws of the coastal State. Permits are granted under the discretion —not the discrimination— of the coastal State.

159. In this case, the best evidence of the non-discrimination of Spanish authorities with regard to Saint Vincent and the Grenadines is that these same authorities granted a permit that was used by Sage. The conditions under which Spain granted and cancelled that permit are not under discussion here: it enters within the domestic realm of Spain and falls under the margin of appreciation and discretion of Spanish authorities as provided for in the Convention. Once Spanish authorities were convinced of the misuse by Sage and Tupet of the permits granted, they decided to cancel them and to grant no other permit to the accused companies and persons involved in criminal activities.

160. Finally, Spain does not find it necessary to answer the manifestly unfounded allegations of Saint Vincent and the Grenadines with regard to the activities of any other private company granted permits in Spanish sovereign waters. The Applicant goes even farther and ventures to say that "Sage and its Consultants believe the intellectual property [allegedly stored as electronic data] has immense value and *could have been sold to a large international petroleum company*." (Memorial, p. 33 at paragraph 83, emphasis added). It goes on to affirm : "[t]hese technical findings and related research are effectively confirmed by the fact that Repsol is now actively engaged in producing gas in the area as shown above. In fact, Repsol reopened its efforts to produce in 2009, after Spanish authorities has seized the *Louisa* and Sage's computers" (Memorial, paragraph 36). It subsequently concludes with the very grave accusation that "[m]uch of this valuable information has been converted by the Respondent in violation of Articles 226 and 245 of the Convention" (Memorial, at paragraph 43). Spain reserves all rights under domestic and international law to respond to this libel. Suffice to say here that Repsol —the only company cited *expressis verbis* by the Applicant— has been operating its offshore gas platform (the *Poseidon* offshore installation) since the early 1990s and in a different location from that described in the permits granted to Sage. **(Annexes 5.2 and 5.3)**

(4) *The alleged violation of Article 245 of the Convention*

161. Saint Vincent and the Grenadines further contends that Spain violated Article 245 of the Convention. Under the title of "Marine scientific research in the territorial sea", this article reads as follows:

> "Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea. Marine scientific research therein shall be conducted only with the express consent of and under the conditions set forth by the coastal State."

162. As explicitly stated in the Memorial, "Applicant's owner had obtained a permit pursuant to Respondent's regulatory scheme to conduct research in the territorial sea (Bay of Cádiz) and thus has the express consent of the State to operate." (Memorial, paragraph 70). Under another curious interpretation of the Convention, from the Applicant's arguments it might be inferred that a permit issued under Article 245 of the Convention is irrevocable and granted *ad calendas græcas*.

163. Article 245 of the Convention clearly reflects the sovereign right of the coastal State to regulate, authorize and conduct marine scientific research in its territorial sea. As expressly stated in this article, "[m]arine scientific research therein shall be conducted *only with the express consent* of and *under the conditions set forth by the coastal State*." (emphasis added) Contrary to what is regulated in the Convention with regard to marine scientific research in the EEZ and the continental shelf, the control over this research when conducted in the territorial sea (and, *a fortiori*, in internal waters) is an exclusive right of the coastal State. The main servitude any State must accept in its territorial sea —the innocent passage of third States' vessels— is also expressly limited by this exclusive right: any unauthorised research or survey activities would render the passage non-innocent (Article 19(2)(j) of the Convention).

164. The coastal State may decide, condition or reverse any permit granted whenever it considers this to be in accordance with the Convention and with domestic law and regulations. There are different kinds of permits, each of which is granted under different conditions and always on a temporary basis. Under no circumstance to applicant to such a permit can expect the right to be granted a permit to conduct marine scientific research in the territorial sea (or the internal waters) of any State.

165. However, what must be underlined here is that the *Louisa* was not seized because of the violation of the permits and the conditions established herein. The *Louisa* was seized because it was used to manifestly violate Spanish legislation (including its Criminal Code) with regard to the protection of the underwater cultural heritage and the possession and handling of weapons of war in Spanish territory. As a consequence, Article 245 cannot serve as a basis for a claim by Saint Vincent and the Grenadines against Spain.

(5) *The alleged (but not elaborated) violation of Article 303 of the Convention*

166. Finally, Saint Vincent and the Grenadines contends that Spain violated Article 303 of the Convention. Under the title "Archaeological and historical objects found at sea", this article reads as follows:

> "1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
> "2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article

without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

"3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

"4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."

167. As already stated, and contrary to what was done by the Applicant in the Provisional Measure phase,[87] not a single word is devoted in the Memorial to legally argue how Spain might have violated Article 303 of the Convention. Perhaps this is due to the manifestly absurd allegations then made by the Applicant, which demonstrate profound ignorance of the nature and content of Article 303 of the Convention.

168. Suffice to say that this Article is a proviso that establishes a clear duty of behaviour, granting a coastal State a particular faculty within its contiguous zone and recalling other international obligations on States parties. Let us also recall that Saint Vincent and the Grenadines, on 2 November 2001, voted in favour of the adoption of the UNESCO Convention for the Protection of the Underwater Cultural Heritage.[88] On 8 November 2010, Saint Vincent and the Grenadines ratified this Convention. In consequence, the Applicant was then under the customary legal obligation to refrain from acts which would defeat the object and purpose of that Convention, as codified in Article 18 of the Vienna Convention on the Law of Treaties. The attitude of the *Louisa* and its crew does not seem to comply with what was expected of a vessel flying Saint Vincent and the Grenadines' flag.

V. Conclusions

169. Spain contends that this honourable Tribunal has no subject-matter jurisdiction. Due to the interplay of Applicant and Respondent's declarations under Article 287 of the Convention, this Tribunal has jurisdiction only over cases concerning the arrest or detention of vessels as provided for in the Convention. These cases, in this question submitted by Saint Vincent and the Grenadines under the general principles of diplomatic protection —and not under the framework of the prompt release foreseen in Article 292 of the Convention— would be limited to situations contemplated in the Articles of the Convention voluntarily evoked by the Applicant in its Memorial and dealing with the arrest or detention of vessels. The problem then is twofold: those articles are limited to Articles 73 and 226, and Saint Vincent and the

[87] In its Request for Provisional Measures, Saint Vincent and the Grenadines' arguments were as follows: "[Article 303], interpreted in good faith in accordance with the ordinary meaning to be given to its language suggests that Applicant has a duty to cooperate with Respondent in protecting objects of a historical nature. Here, the evidence apparently shows that personnel on the *Louisa* recovered several cannon balls, some pieces of pottery, and a stone with a hole in it. The Respondent's expert valued this cache at approximately € 3000 Euros. These are items found in restaurants and hotels throughout the coast of Spain! For this, Respondent imprisoned a crewman for eight months and arrested two vessels for more than four and one-half years. Clearly, these actions exceed what is permissible under Article 303, and Applicant is entitled to provisional measures as a result." (at pp. 20-21)

[88] Adopted by the UNESCO General Assembly on 2 November 2001. Official text at *UNESCO, Official records of the General Conference, 31st Session, Paris, 15 October to 3 November 2001, volume 1*, pp. 50-61.

Grenadines' Memorial contains no plausible argument concerning these or the other articles evoked.

170. Furthermore, despite this limited scope of subject-matter jurisdiction, the other articles evoked by the Applicant —Articles 87, 227, 245 and 303— are not only inapplicable to the facts but moreover are minimally elaborated. There are no plausible arguments within Saint Vincent and the Grenadines' Memorial beyond a general and unfounded assertion that Spain has violated these articles of the Convention. However, under the correct interpretation of each article in accordance with the ordinary meaning to be given to its text in its context and in the light of its object and purpose, the licit seizure of the *Louisa* when voluntarily docked in a Spanish port in accordance with Spanish laws and regulations cannot imply a violation of the freedom of navigation of the vessel on the high seas; nor can it imply any kind of discrimination, notwithstanding the limited scope of Article 227 in this case; it cannot be seen as a breach of a right that, in this case, belongs to the Respondent and not to the Applicant under Article 245; and, finally, it cannot in any case be taken as a lack of cooperation under Article 303 of the Convention, which, precisely, obliges Saint Vincent and the Grenadines to refrain from plundering the Spanish underwater cultural heritage as was done in Spanish sovereign waters by the *Louisa* and its crew.

CHAPTER 5
REPARATION

171. Saint Vincent and the Grenadines' Memorial makes a disordered argumentation about the reparation sought. Arguing Article 304 of the Convention (paragraph 3) and some reasoning of the Tribunal in the *M/V "Saiga" (No. 2) Case* (paragraph 77) as authority, the Memorial tries to contend that "the business losses, direct and consequential and, indeed, the deprivation of liberty and the pain and suffering inflicted by the Respondent during the now almost six (6) years of "investigation" over the trivial and inconsequential matters supposedly involved entitles it to damages." (paragraph 76) The Applicant goes on to state that "the company has suffered extraordinarily substantial consequential damages as a result of the loss of its survey work based on preliminary data which was produced during the scientific expeditions and returned to the Louisa' owner in the United States." (paragraph 83) This is so, because, according to the Applicant, "Sage`s plan, rather than conducting its own drilling and development programs, was to gather information and sell it to others. It intended to find and would have found a buyer for the information it developed during the course of its exploration program in the Bay of Cadiz. The strategy was failed, however, because Respondant confiscated all of the computers that were found aboard the *Louisa* and generally disrupted the company to the extent that it was rendered inoperable. The computers contained almost all of the information collected in the survey program" (Memorial, paragraph 41).

172. The texts reproduced from the Memorial in the previous paragraph again demonstrate the absence of any legal argument supporting a serious contention on international responsibility before an international tribunal. They again illustrate the abuse of jurisdiction continuously present in all the Applicant's arguments .

173. No provision on responsibility or liability is foreseen in the Convention with regard to a claim of diplomatic protection. Therefore, Article 304 of the Convention refers the question to "existing rules and the development of further rules regarding responsibility and liability under international law." These rules are well known by this Tribunal, which has had the occasion to apply them in previous cases, and they have been generally codified in the Articles on "Responsibility of States for internationally wrongful acts" adopted by the International Law Commission in 2001 ("ILC Articles").[89] As recalled by the Tribunal in its recent advisory opinion of 1 February 2011,

> "account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility. Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked as such by the Tribunal *(The M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999,* □p. 10, at paragraph 171) as well as by the ICJ (for example, *Armed Activities on the Territory of the Congo*

[89] UNGA Res. A/56/83, 28 January 2002

(Democratic Republic of Congo v. Uganda), Judgment, ICJ Reports 2005, p. 168, at paragraph 160)."[90]

174. In general terms, every internationally wrongful act of a State entails the international responsibility of that State. The characterization of an act of a State as internationally wrongful is governed by international law and the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. However, as codified in Article 44 of the ILC Articles,

> "The responsibility of a State may not be invoked if:
>
> "(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
>
> "(*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

175. As detailed in this Counter-Memorial, neither of these two compulsory conditions are fulfilled in Saint Vincent and the Grenadines' claim before the Tribunal. As recalled previously, the Applicant seeks to act on behalf of a company that has allegedly suffered "extraordinarily substantial consequential damages as a result of the loss of its survey work based on preliminary data which was produced during the scientific expeditions and returned to the Louisa' owner in the United States." Therefore, Saint Vincent and the Grenadines is defending a US company in a procedure of diplomatic protection, and thus fails to meet the requirement of effective nationality imposed by international law.[91] Furthermore, the Applicant is seeking to do so while this US company in still litigating before the Spanish courts, which have been carrying out "six (6) years of "investigation" over the trivial and inconsequential matters". Therefore, the persons (natural and legal) "defended" by Saint Vincent and the Grenadines in this case before the Tribunal have not yet exhausted the domestic remedies as obliged by general international law.

176. But even should both procedural requirements be resolved, the origin of the alleged responsibility of Spain is completely absent. As required by the general rules of international law, the responsibility of a State can only be claimed when this State has committed an international wrongful act; and there exists an international wrongful act of a State only when conduct consisting of an action or omission constitutes a breach of an international obligation of this State, *i.e.* said conduct is not in conformity with what is required of it by that obligation, regardless of its origin or character. Spain has not breached any international obligation imposed upon it by the Convention —the only legal province of jurisdiction and competence of the Tribunal in this case— with the seizure of the *Louisa*. Spain has legitimately seized under domestic and international law a private vessel, owned by an American company and with a distant relation with the Applicant in this case, which was

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[90] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory opinion, 1 February 2011, ITLOS Reports 2011*, at paragraph 169.

[91] In paragraph 81 of its Memorial, Saint Vincent and the Grenadines contends that it seeks reparation, for example, for damages to the *Gemini III*, a US vessel, "for the violation of human rights of Alba and Mario Avella", two US citizens, and for the "value of intellectual property, specifically the lost profits of the owner", another US company.

plundering underwater cultural heritage within the internal waters and territorial sea of Spain. Contrary to what is unfoundedly alleged by Saint Vincent and the Grenadines, the *Louisa* was not seized because it was illegally fishing in the Spanish EEZ or polluting the marine environment. It was legally seized because it was violating Spanish and international law rules governing, among other aspects, the protection of underwater cultural heritage. Consequently, if there is no responsibility of Spain for violation of its international obligations, one can hardly conclude there is any duty to make reparation.

177. In conclusion, Spain wishes to express its conviction that by means of the present petition, Saint Vincent and the Grenadines (and, in fact, the company Sage) appears to be attempting to obtain a financial benefit, which would only arise from the alleged factual consequences of the legitimate action of the Spanish courts in seizing and applying the Spanish criminal code to a ship detained in a Spanish port. This is absolutely unacceptable under the general rules governing State responsibility. With even less reason can one accept the curious claim that Sage could have obtained a hypothetical and substantial income from the sale of a report produced following a marine scientific research survey carried out under an administrative authorization granted by the competent Spanish authorities, an authorization whose relevance to the purpose declared by the U.S. firm (and by Saint Vincent and the Grenadines) is highly questionable. Indeed, the party authorised to carry out the survey, and the holder of the authorization, had the obligation to deliver any such report to the Spanish authorities, as stated in paragraph 9 of the authorization granted by the Directorate General of Coasts, which Saint Vincent and Grenadines claims in its Memorial as the legal basis for the activity performed by the ship *Louisa* (and by the *Gemini III*) in the Bay of Cádiz (**Annex 6 of the Applicant's Memorial**).[92]

[92] "9. Finalizado el Estudio deberá entregarse copia del mismo, junto con el informe del Impacto Medio Ambiental del fondo marino a esta Dirección General de Costas" ("9. If finalizad the Study should be delivered copy of the same one, along with the report of the Environmental Medium impact f the sea floor to this General Coastal Direction", *translation by the Applicant*).

CHAPTER 6
CONCLUSIONS OF THE KINGDOM OF SPAIN'S COUNTER-MEMORIAL

I. Conclusions

178. This dispute, if any, does not relate to the Convention on the Law of the Sea. The *Louisa* —a vessel flying Saint Vincent and the Grenadines' flag and operated by a U.S. company— and its crew and personnel —a multinational group of persons, none of whom are nationals of Saint Vincent and the Grenadines— were plundering underwater cultural heritage in Spanish sovereign waters. The *Louisa* was correctly detained and seized in Spain by competent Spanish authorities under Spanish criminal laws and regulations. In accordance with the 1963 Vienna Convention on Consular relations, these decisions were correctly and in timely fashion communicated to the appropriate Consular authorities. A judicial process was then initiated before the appropriate judicial authorities. Should the detained persons and the owners of the vessels consider that these proceedings are violating their rights, once local remedies have been exhausted, they may use the procedures envisaged in different legal instruments in force. But not before this honourable Tribunal for the Law of the Sea.

179. Saint Vincent and the Grenadines cannot submit a claim before this Tribunal in violation of the Convention. The latter obliges any applicant State to proceed to an exchange of views regarding the settlement of any dispute by negotiation or other peaceful means (Article 283 (1)). Saint Vincent and the Grenadines has not even remotely attempted to exchange views with Spain with regard to the legitimate seizure of the *Louisa*. On the contrary, Saint Vincent and the Grenadines came directly to this Tribunal, avoiding the prompt release procedure, and contending in an exercise of diplomatic protection that Spain has violated Saint Vincent and the Grenadines' rights. However, Saint Vincent and the Grenadines ignores the fact that diplomatic protection requires the proper fulfilment of two well-accepted conditions in international law: the effective nationality of the claim and the previous exhaustion of local remedies.

180. The Applicant has properly fulfilled neither of these conditions in this case. Although the *Louisa* was flying Saint Vincent and the Grenadines' flag, the latter did not comply with the obligations and responsibilities stated in Article 94 of the Convention, thus eroding the genuine link referred to in Article 91 of the same Convention. Saint Vincent and the Grenadines also takes the position of defending non-nationals —persons and corporations— before this Tribunal, again failing to comply with the effective nationality requisite imposed by general international law.

181. Before this Tribunal, Saint Vincent and the Grenadines further ignores the fact that general international law imposes a second requisite in order to properly submit a claim of diplomatic protection: the previous exhaustion of local remedies. The persons represented by Saint Vincent and the Grenadines before this Tribunal have not yet exhausted those remedies. During this phase on the merits, those persons —let us recall, non-nationals of Saint Vincent and the Grenadines— are still submitting appeals before Spanish courts under Spanish

criminal procedural laws. In this regard, Saint Vincent and the Grenadines has breached the obligation imposed in Article 295 of the Convention. Under the latter Article, any dispute between States Parties concerning the interpretation or application of the Convention may be submitted to this Tribunal only after local remedies have been exhausted where this is required by international law; and international law precisely imposes this condition when dealing with a case of diplomatic protection, as is the case here.

182. Over and above these jurisdictional failures, although closely related to them, Saint Vincent and the Grenadines is not able to demonstrate to this Tribunal any evidence at all of the alleged breaches of the Convention, purportedly committed by Spain. Due to its unilateral declaration under Article 287 of the Convention, Saint Vincent and the Grenadines has unilaterally and voluntarily limited the competence of the Tribunal to cases concerning the arrest or detention of its vessels. However, and without any sound legal arguments, Saint Vincent and the Grenadines contends that Spain has breached an array of provisos in the Convention that have no relation with the arrest or detention of vessels. Only Article 226 refers to the detention of vessels, but refers explicitly to cases of protection and preservation of the marine environment. This is not the case before the Tribunal: Saint Vincent and the Grenadines' vessel was seized because it was used for plundering underwater cultural heritage in Spanish sovereign waters. Therefore, there is no subject-matter jurisdiction. Saint Vincent and the Grenadines cannot simply list a series of articles in the Convention and allege without any legal elaboration that Spain has breached them. Before an international Tribunal, arguments must be serious and based on internationally applicable rules in accordance with the ordinary meaning to be given to their text, in context and in the light of their object and purpose. Unfortunately for the Applicant, this is not the case of Saint Vincent and the Grenadines' Memorial.

183. As clearly explained by Judge Cot in his Dissenting Opinion to the Order on Provisional Measures in this case, "en s'adressant à [ce] Tribunal, le demandeur s'est trompé d'adresse. Le Tribunal international du droit de la mer n'a aucune compétence pour se saisir d'une affaire qui ne concerne en rien l'interprétation et l'application de la Convention des Nations Unies sur le droit de la mer." (paragraph 27: "in applying to [this] Tribunal, the Applicant has come to the wrong address. The International Tribunal for the Law of the Sea has no jurisdiction to examine a case that in no way concerns the interpretation and application of the United Nations Convention on the Law of the Sea."). What the Applicant is attempting before this honourable Tribunal is simply to appeal against legitimate jurisdictional decisions legally adopted by the Spanish courts and which are still pending ultimate resolution. In a clear case of abuse of jurisdiction, Saint Vincent and the Grenadines' has not submitted a cognizable claim on the interpretation or application of the Convention on the Law of the Sea.

II. Costs

184. This abuse of jurisdiction drives Spain to request that the Tribunal grant its request for the costs incurred in this case as the Respondent. Spain has demonstrated in this Counter-Memorial (and also in its response to the Request on Provisional Measures) that Saint

Vincent and the Grenadines has acted in an improper way before this Tribunal, obliging Spain to react before the Tribunal and to be burdened with the costs incurred in connection with this case, including but not limited to Agents' fees, attorneys' fees, experts' fees, transportation, lodging and subsistence.

185. Article 34 of its Statute establishes that "[u]nless otherwise decided by the Tribunal, each party shall bear its own costs." A similar proviso is included in Article 64 of the ICJ Statute. For the ICJ, "[a]n award of costs in derogation of this general principle, and imposing on one of the parties the obligation to reimburse expenses incurred by its adversary, requires not only an express decision, but also a statement of reasons in support."[93]

186. It is true that neither the Permanent Court nor the ICJ —nor this Tribunal— have deviated from this rule, since they have never found compelling reasons to do so, although the Court has admitted "the possibility of exceptions, in circumstances which [article 64] does not specify [...]"[94]. One such exception could be for abuse of process.

187. Spain is perfectly aware that the "abuse of process" —as an incidental, preliminary proceeding before this Tribunal— is clearly foreseen in Article 294, paragraph 1, of the Convention and in Article 96 of the Rules of the Tribunal. However, Spain decided not to use that procedural right when answering the manifestly unfounded requests of Saint Vincent and the Grenadines. Spain decided to appear before this honourable Tribunal to discuss and clarify not only its legal position in this case but also to reaffirm its solemn commitment to the peaceful solution of disputes instituted in this Tribunal. Spain also seeks to clarify points of law before this Tribunal, with a view to assisting it in its challenging task of clarifying and applying *in casu* the international law of the sea and international law in general.

188. However, Spain recalls that in a time of severe financial crisis, when the case before this honourable Tribunal has warranted the utmost legal attention and diligence by the public servants of Spain's Government, the costs incurred by the Spanish civil service must be burdened on the Applicant. As an arbitral award declared in 1934, "[i]n strict justice, [the costs of an adjudication] should be borne by the losing party".[95] This assertion is even more warranted when the case essentially concerns the defence of a private claim, with only a tenuous connection with the applicant State. An applicant State that, as Spain contends, did not properly try to exchange views and negotiate with Spain any possible solution to the legal and factual problems posed by the detention of the *Louisa*, as expressed in Article 283 of the Convention; an applicant State that did not, previous to this international procedure, verify whether the private persons and companies involved had exhausted local remedies in Spain, as obliged by general international law and Article 285 of the Convention; an applicant State

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[93] *Application for Review of Judgement No. 158 of the United nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, paragraph 98. See also *Request for Interpretation of the Judgement of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria* v. *Cameroon), I.C.J. Reports 1999*, p. 31, at pp. 39-40, paragraph 18.

[94] *Request for Interpretation..., I.C.J. Reports 1999*, paragraph 18.

[95] *Pensions of officials of the Saar Territory (Germany/Governing Commission of the Saar Territory)*, RIAA, vol. III, p. 1555, at p. 1567.

that did not ensure the condition and navigational operability of its vessel as required by Article 94 of the Convention.

189. In the *Juno Trader Case*, Saint Vincent and the Grenadines' agent argued as follows:

> "[The Tribunal] may take the "heterodox" decision which is nevertheless provided for in article 34 of its Statute, if it considers that, given the circumstances, the party whose submissions are rejected was not far from evidencing an abuse of rights in the sense of article 300 of the Convention."[96]

This is exactly the case here: the Applicant has not only evidenced in its application to this honourable Tribunal an "abuse of rights in the sense of article 300 of the Convention" but an abuse of jurisdiction implied in Article 294 of the same Convention and Article 96 of the Rules of the Tribunal.

190. Therefore, Spain respectfully calls upon this Tribunal to order the Applicant to pay the costs incurred by the Respondent in connection with this case, as determined by the Tribunal, including but not limited to Agents' fees, attorneys' fees, experts' fees, transportation, lodging, and subsistence. Spain contends that these expenses amount to no less than four hundred thousand (400,000€) Euros.

III. *Petitum*

191. Taking into account the facts and legal arguments included in this Counter-Memorial, Spain respectfully asks the Tribunal to reject the requests made in paragraphs 2 and 86 of the Applicant's Memorial. Spain therefore asks the Tribunal to make the following orders:

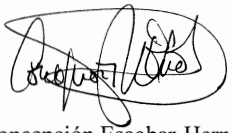
(5) to declare that this honourable Tribunal has no jurisdiction in the case;

(6) subsidiarily, to declare that the Applicant's contention that Spain has breached its obligations under the Convention is not well-founded;

(7) consequently, to reject each and all of the requests made by the Applicant; and

(8) to order the Applicant to pay the costs incurred by the Respondent in connection with this case, including but not limited to Agents' fees, attorneys' fees, experts' fees, transportation, lodging, and subsistence.

Madrid, 12 December 2011



Prof. Dr. Concepción Escobar-Hernández

Agent of the Kingdom of Spain

[96] *Juno Trader Case*, Applicant on behalf of Saint Vincent and the Grenadines, at 26, paragraph 142.