REJOINDER 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

REJOINDER

OF THE

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10 APRIL 2012

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I. INTRODUCTION AND *RÉSUMÉ* OF THE REJOINDER OF THE KINGDOM OF SPAIN

1. Under Article 62.3 of the Rules of the Tribunal, "[a]reply and rejoinder shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them." It is the clear intention of the Kingdom of Spain ("Spain") not to repeat unless necessary the arguments and contentions already explicited in Spain's Counter-Memorial. However, given that Saint Vincent and the Grenadines adamantly insists on presenting misinformation, inaccuracies and even false statements, Spain is obliged to underline some of its previous reasonings.

2. The Reply of Saint Vincent and the Grenadines clearly shows this; far from presenting reasoned arguments in possible response to the well-founded statements made in Spain's Counter-Memorial, the Applicant once again simply criticises the legitimate and lawful detention of the *Louisa* and her crew by the Spanish authorities, without providing any new legal argument in support of its position.

3. Furthermore, in its Reply, Saint Vincent and the Grenadines includes unfounded claims, accusing Spain of "fraud on the Tribunal",[1] of having presented "flawed documents",[2] of having an "archaic, incompetent, hopelessly inefficient criminal justice system"[3], allegedly contaminated by the executive[4], of maintaining "a degree of hostility" and of "discrimination" against Saint Vincent and the Grenadines[5], of having used for its own benefit "equipment and information" aboard the *Louisa*[6] , and of having presented to the Tribunal a "secret order (...) for the convenience of the Spanish delegation in Hamburg"[7]. Spain considers these statements unbefitting of a legal document presented by a State before an international tribunal, and would like to believe that these, too, are the result of a "typographical error" such as that mentioned on page 29 of the Reply. But in view of the body of documentation presented by Saint Vincent and the Grenadines before this Tribunal on 10 February 2012, it is apparent that

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1 Reply of Saint Vincent and the Grenadines, at p. 2.
2 *Ibid.*
3 *Ibid*, at p. 6.
4 *Ibid*, at p. 6, note 2, and p. 25.
5 *Ibid*, at p. 27.
6 *Ibid*, at p. 28.
7 Reply of Saint Vincent and the Grenadines, at p. 20. The Applicant refers to the "Auto de Procesamiento" of 27 October 2010. With regard to this document, Spain wishes to recall that its Agent delivered this document to the Tribunal as explicitly requested by its President and only for the limited effects of the procedures of this case before the Tribunal.

this wish is not fulfilled. Accordingly, Spain is obliged to reaffirm that all these statements are unacceptable; as already observed in the Counter-Memorial, they are a sign that the Applicant, in the absence of solid legal arguments, seeks to distract the Tribunal's attention with empty calumnies.

4. We are before a Court of Law, which hears disputes brought before it regarding the interpretation and application of the United Nations Convention of the Law of the Sea ("Convention"), and which does not echo groundless lucubrations. Something of which Saint Vincent and the Grenadines seems to be unaware.

5. So as not to repeat arguments already made in its Counter-Memorial, Spain now wishes to draw attention to some of these lucubrations, which should be considered in terms of law and only in terms of law:

- remarkably, the Applicant confuses the *prima facie* jurisdiction of the Tribunal to decide upon provisional measures regarding Article 290 of the Convention with its jurisdiction on the merits;
- the Applicant continues to attempt to confound the rules, conditions and legal reasoning applicable to the prompt release procedure under Article 292 of the Convention with the rules, conditions and reasoning applicable to the exercise of diplomatic protection, which is the actual intent presented to the Tribunal by Saint Vincent and the Grenadines in this case;
- the Applicant seeks to establish that Article 283 of the Convention, simply, does not exist;
- the Applicant seeks to make use of the Tribunal as a court of review/appeal in a criminal proceedings —still in progress— before the Spanish courts, which are legitimately hearing a flagrant case of looting of underwater cultural heritage in Spanish territorial waters; and, in this regard, the Applicant continues with its strategy of permanent confusion between the domestic proceedings before the Spanish courts and the procedure before the Tribunal in Hamburg in this case, which has important consequences for the jurisdiction of this honourable Tribunal;
- the Applicant restates its unilateral declaration of intent, originally recognising that the jurisdiction of the Tribunal is limited exclusively to the "settlement of

disputes concerning the arrest or detention of its vessels", with the obvious goal of extending this jurisdiction to its own benefit (and does so after having brought the action and after proceeedings have begun!); and

- the Applicant seeks not only to delete Article 283 of the Convention but also to rewrite other Articles at its convenience, in an interpretation that diverges from the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, in accordance with well-established legal principles of treaty interpretation.

6. The purpose of this Rejoinder is to reply to the above-mentioned groundless lucubrations, while respectfully emphasising two aspects that Spain has previously stated in its Counter-Memorial: (i) that this Tribunal does not have jurisdiction, due to the non-compliance with certain procedural requirements; and (ii) this Tribunal does not have subject-matter jurisdiction, in view of the arguments put forward by Saint Vincent and the Grenadines in relation to the applicable law, namely the United Nations Convention of the Law of the Sea, in its material terms (rules that, according to Saint Vincent and the Grenadines, Spain has violated).

7. Both questions are closely related to the present case. In this sense, Spain wishes to recall the very apt views recently expressed by this Tribunal in its judgment of 14 March 2012, that "the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case."[8] Spain fully shares the argument made by the Tribunal. From this standpoint, Spain will again comment in this Rejoinder on all the questions raised concerning the jurisdiction of the Tribunal, focusing its replies particularly on the first four allegations made by Saint Vincent and the Grenadines (II). Subsequently, Spain will address the two final allegations made by the Applicant regarding certain aspects concerning the non-existence of subject-matter jurisdiction of this Tribunal (III).

II. THE ERRONEOUS ARGUMENTS OF SAINT VINCENT AND THE GRENADINES ON THE JURISDICTION OF THE TRIBUNAL

8. In a display of explanatory sleight-of-hand, Saint Vincent and the Grenadines seeks to

[8] *Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgement of 14 March 2012*, at paragraph 348.

show that *prima facie* jurisdiction and jurisdiction on the merits are one and the same (1); that all these jurisdictional questions must be solved under the procedural umbrella of Article 292 of the Convention, a path voluntarily neglected by the Applicant (2); that, nevertheless, and as a paradoxical consequence, Saint Vincent and the Grenadines might have the rare privilege of not being subject to Article 283 of the Convention (3); and that this honourable Tribunal can be transformed into a court of appeal against decisions by Spanish courts (4).

1. The Applicant's erroneous mixture of *prima facie* jurisdiction and jurisdiction on the merits

9. In order to decide on the adoption or otherwise of provisional measures, the Tribunal must simply be persuaded that "the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded"[9]. Like any other international court, during this phase of the proceedings, the Tribunal "need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case"[10]. Spain, with all respect, recalls that the Tribunal, in its Order dated 23 December 2011, merely carried out this provisional examination, in the understanding, on the one hand, that "the Tribunal does not need to establish definitively the existence of the rights claimed by Saint Vincent and the Grenadines"[11]; and, on the other, that this decision "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"[12].

10. The *prima facie* jurisdiction of the Tribunal does not necessarily become, as the Applicant seeks to show, jurisdiction over the merits of the case. Therefore, and on the contrary to what Saint Vincent and the Grenadines claims in its Reply, the Applicant's arguments cannot be accepted; these arguments, moreover, are based on incorrect deductions from the opinions expressed by some of the judges of this Tribunal. It is not acceptable to make use of the separate opinion given by Judge Paik, with respect to the Order dated 23

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

[10] *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 p. 147, paragraph 40.

[11] *M/V "Louisa" (Saint Vincent and the Grenadines v. Spain), Provisional measures, Order of 23 December 2011*, at paragraph 69.

[12] *Ibid.*, at paragraph 80.

December 2010[13], which referred *exclusively* to the *prima facie* jurisdiction of the Tribunal. The distinguished Judge's assessment of Article 87 of the Convention is limited exclusively to the question of the adoption or otherwise of provisional measures. Similarly, the separate opinion of Judge Laing in the case of the *Grand Prince* is utilised incorrectly[14], as in this case the discussion about the jurisdiction of the Tribunal should be viewed in the context of the application and particular procedure employed for prompt release, as provided for in Article 292 of the Convention.

11. Finally, Spain respectfully takes the opportunity to reiterate to this Tribunal that the distinction between *prima facie* jurisdiction and jurisdiction on the merits is one that is accepted constantly and uniformly within international jurisprudence. This distinction, which is also accepted by the Tribunal in its case law, also featured in the recent judgment by the International Court of Justice in the case concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination,[15] which was referred to by Spain in its Counter-Memorial and of which this Tribunal is well aware.

2. The Applicant's continual confounding of Article 292 of the Convention and the complaint submitted to the Tribunal

12. In the case of the *M/V "Saiga" (No. 1)*, the Tribunal saw fit to clarify that "[t]he independence of proceedings under article 292 of the Convention vis-à-vis other international proceedings emerges from article 292 itself and from the Rules of the Tribunal [...] They are separate, independent proceedings."[16] However, Saint Vincent and the Grenadines seeks continually to blur the edges of the extraordinary procedure foreseen in Article 292 of the Convention and the ordinary contentious procedures to which this case refers. This is permanently done in the Applicant's Reply, either by quoting continuosly this Tribunal's decisions in previous prompt release cases (not applicable to this case) or by evoking this special jurisprudence in connection with facts and circumstances quite different from those present in prompt release cases. Spain must recall again its surprise and preoccupation about this strategy whose final purpose is to pervert and confuse the different procedures by which this Tribunal performs its duties. This strategy further goes against what the Applicant

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[13] Reply of Saint Vincent and the Grenadines, at p. 3.

[14] Reply of Saint Vincent and the Grenadines, at pp. 3-4.

[15] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), I.C.J. Reports 2011.*

[16] *M/V "Saiga" (No.1) (Saint Vincent and the Grenadines v. Guinea), Prompt Release, Judgement of 4 December 1997*, at paragraph 50.

expressly declares, that its intention is to guarantee the freedom of navigation of its vessels and that this freedom, allegedly, is the main right violated by Spain. However, the Applicant never reacted properly and in due time through the prompt release procedure particularly foreseen by the Convention for those cases. Its intention to use now this specialised procedure —and its also specialized principles and requirements— must be catalogued as a fraudulent act in light of the Convention and with regard to this honourable Tribunal.

3. The Applicant's false arguments on Article 283 of the Convention

13. The Tribunal's assessment of its jurisdiction must be made at every stage of the proceedings and according to the legal nature of each stage. Although Saint Vincent and the Grenadines attempts to ignore this, "[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."[17] This requires, in particular, determining the fulfilment of the preliminary requirements set out in the Convention, among which Article 283 is an important aspect, and one that Saint Vincent and the Grenadines wishes to ignore.

14. In this respect, it is not acceptable for the Applicant to pose rhetorical questions about the existence and nature of the "exchange of views", to which the same Applicant replies equally rhetorically[18]. Saint Vincent and the Grenadines ignores a basic principle of international procedural law according to which the obligation to engage in *prior* negotiations must be met, logically, *before* bringing an action before an international tribunal. Thus, the Applicant's argument is absurd and intended, obsessively, to confound the Tribunal. It is alleged that the parties entered into negotiations regarding the dispute when so required. This claim is, quite simply, false. As can be seen in the Reply made by Saint Vincent and the Grenadines, the dates of these "negotiations" are all subsequent to the presentation of the action.

15. Furthermore, in relation to prior negotiations, Saint Vincent and the Grenadines once again erroneously employs the jurisprudence of the Tribunal in its arguments regarding subject-matter jurisdiction. In the first place, in a startling manoeuvre, the Applicant interprets

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[17] *The "Grand Prince" Case (Belize v. France), Prompt Release, Judgement of 20 April 2001*, at paragraph 77.

[18] Reply of Saint Vincent and the Grenadines, at p. 6.

this precedent in quite the opposite sense to that of the Arbitral Tribunal's decision[19]. In the paragraph transcribed on page 7 of the Reply, the Arbitral Tribunal —*not* the present Tribunal— stated that Guyana "was not under any obligation to engage in a separate set of exchanges of views with Suriname on issues of threat or use of force" because these issues were considered "incidental to the real dispute between the Parties" and, therefore, "[t]hese issues can be considered as being subsumed within the main dispute."[20] *A sensu contrario*, the Arbitral Tribunal would have been obliged to evaluate the exchange of views required by Article 283 of the Convention. And it is none other than the Applicant —in this case, quite correctly— who observes that the Arbitral Tribunal "concluded that [...] an "Exchange of views" *is necessary* [...]"[21].

16. Another erroneous citation of this Tribunal's jurisprudence is the incomplete presentation of the doctrine established in the *Southern Bluefin Tuna* and *Mox Plant* cases. In the first of these, as Spain has tirelessly observed, the Tribunal held, firstly, that "negotiations and consultations *have taken place between the parties* and that the records show that these negotiations were considered by Australia and New Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea"[22]. The Tribunal went on to state "that Australia and New Zealand have invoked the provisions of the Convention *in diplomatic notes* addressed to Japan in respect of those negotiations"[23]. And finally, the Tribunal took the view that "Australia and New Zealand have stated that the negotiations had terminated"[24]. Only then did the Tribunal declare that "a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes *that the possibilities of settlement have been exhausted*"[25]. Therefore, the Tribunal clearly ascertained: (1) that a negotiation had taken place; (2) that during the same, the Convention had been invoked in diplomatic notes. Having made these two findings, it was concluded that negotiations should not be continued, as the possibilities of reaching an agreement had been exhausted.

17. In the *MOX Plant Case*, although the Tribunal did not state expressly that the conditions

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[19] In fact, the Applicant is making reference to the *Arbitral Award of 17 September 2007 (Arbitral tribunal constituted pursuant to article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea, in the matter of an arbitration between Guyana and Suriname)*, available at the Permanent Court of Arbitration website.

[20] *Arbitral Award of 17 September 2007*, at p. 133, paragraph 410.

[21] Reply of Saint Vincent and the Grenadines, at p. 7.

[22] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999*, at paragraph 57, emphasis added.

[23] *Ibid.*, at paragraph 58, emphasis added.

[24] *Ibid.*, at paragraph 59.

[25] *Ibid.*, at paragraph 60, emphasis added.

set out in Article 283 had been met, it did consider that both Ireland and the United Kingdom had sought an exchange of views and that, in particular, "in its letter written as early as 30 July 1999, [Ireland] had drawn the attention of the United Kingdom to the dispute under the Convention and that *further exchange of correspondence on the matter took place* up to the submission of the dispute to the Annex VII arbitral tribunal"[26]. Again, the Tribunal took into account that there had been a negotiation, in which the Convention was discussed.

18. This same position has been maintained in subsequent practice. Thus, in the *Case Concerning Land Reclamation*, the Tribunal again analysed the scope of Article 283 of the Convention and, in view of the lengthy succession of negotiation meetings between the parties to the dispute, held that the conditions of Article 283 had been met[27].

19. In summary, the Tribunal has *always* demanded an effective "exchange of views" between the parties. This "exchange of views" has been presented as an obligation of behaviour, not an obligation of result. Therefore, when its existence, over and above the results achieved, has been "objectively" verified —and only then— this Tribunal has considered the conditions of Article 283 to have been met. As clearly said by former President Chandrasekhara Rao, "[t]he requirement of [article 283] 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 dicharged in good faith, and it is the duty of the Tribunal to examine whether this is beign done." [28]

20. Paradoxically, for Saint Vincent and the Grenadines this Article 283 does not exist in the Convention[29]. In a self-serving interpretation of the jurisprudence of this Tribunal and that of the International Court of Justice ("ICJ" or "Court"), Saint Vincent and the Grenadines

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[26] *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, at paragraph 58, emphasis added.

[27] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional measures*, at paragraphs 33-51.

[28] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional measures, Separate Opinion of Judge Chandrasekhara Rao*, at p. 11.

[29] As summarized in the main doctrinal commentary to the Convention, "[t]he obligation specified in this article is not limited to an initial exchange of views at the commencement of a dispute. It is a continuing obligation applicable at every stage of the dispute. In particular, as is made clear in paragraph 2, the obligation to exchange views on further means of settling a dispute revives whenever a procedure accepted by the parties for settlement of a particular dispute has been terminated without a satisfactory result and no settlement of the dispute has been reached. In such a case, the parties would have to exchange views again with regard to the next procedure to be used to settle the dispute. There might be further resort to negotiations in good faith, or the parties might agree to use another procedure. This provision ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all parties concerned." M.H. Nordquist, S. Rosenne and L.B. Sohn (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary* (Vol. 5, Leiden: M. Nijhoff, 1989), at p 29, footnotes omitted.

attempts to convince the Tribunal that the requirement for prior negotiations, set out in Article 283 of the Convention, is an invention by Spain, arising from a trivial recommendation that the Montego Bay negotiators had no real intention of making, ignoring that "[t]he inclusion of an obligation to exchange views was designed to cater to the wishes of delegations [in the Third UN Conference on the Law of the Sea] that the primary obligation of parties to a dispute should be to make every effort to settle the matter through negotiations"[30]. Saint Vincent and the Grenadines overlooks the very nature of the Tribunal and its jurisdiction, which comes into existence, indeed, when steps have not been taken to resolve the dispute by means of direct negotiation between the parties. This is the general rule, and resort to the Tribunal —as to any international court— is the exception[31]. Similarly, the *general* rule according to which there is no general rule to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to an international tribunal, is overridden —as a by product of *lex speciales derogat generalis*— when there exists a *special* rule that does require such an exhaustion of diplomatic negotiations. This is clearly the case of Article 283 of the Convention.

21. Furthermore, Saint Vincent and the Grenadines attempts to skew the Tribunal's interpretation of the ICJ judgment in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*[32]. In this matter, the Court found that "[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court"[33]. Saint Vincent and the Grenadines ceases to scrutinise the Court's jurisprudence when it is in its interest not to do so. Thus, it fails to acknowledge that the Court itself, in continuation of the above paragraph, recalls that "[a] precondition of this type may be embodied and *is often included* in compromissory clauses of treaties. It may also be included in a special agreement whose signatories then reserve the right to seise the Court only after a

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[30] N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: CUP, 2005), at p. 33.

[31] As aptly recalled by the ICJ in the *North Sea Continental Shelf* case, the obligation to negotiate "merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted." *North Sea Continental Shelf (Federal Republic of Germany/Denmark), Judgement of 20 February 1969, I.C.J. Reports 1969*, at p. 47, paragraph 86.

[32] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgement, I.C.J. Reports 1998*, p. 275.

[33] *Ibid.*, at p. 303, paragraph 56.

certain lapse of time [...]"[34]. This is precisely the situation of Article 283 of the United Nations Convention on the Law of the Sea, which imposes this prior condition, before an action may be brought to the tribunals described in Part XV of the Convention. In this respect, let us recall that the Court at The Hague did not take into account the requirement of prior negotiations as a preclusive condition in the above-cited case, because Cameroon and Nigeria had resorted to the Court by virtue of the compromissory clause described in Article 36.2 of its Statute, *and not by virtue of the United Nations Convention on the Law of the Sea*, in which case it would have been necessary to apply Article 283 and to require prior negotiations. Saint Vincent and the Grenadines, paradoxically, offers a similar argument in Spain's favour when it accepts that "the ICJ declined to make any findings on the question *because* the Court determined that the Convention was not implicated by the manner in which Cameroon submitted its claim to the Court"[35]. Indeed, the jurisdiction of the Court in this matter *was not based on the Convention* —which would have expressly required the application of its Article 283— but rather on Article 36.2 of the Statute of the Court, which determines its jurisdiction and does not, in principle, impose the performance of any prior procedural obligations.

22. Therefore, when a dispute is brought before the Court with respect to a Convention that does incorporate the obligation that prior negotiations be held —as is the case of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 21 December 1965, in which Article 22 states that prior negotiations are a preclusive condition[36]— it first evaluates the interpretation made by the parties of this requirement, before resolving the dispute on its interpretation and application. This was clearly done by the ICJ in its Judgement of 1 April 2011 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* with which this Tribunal is perfectly well acquainted.

23. Georgia —like Saint Vincent and the Grenadines in the present case— held that the phrase "which is not settled by negotiation or by the procedures expressly provided for [...]" should be understood "as imposing no affirmative obligation for the Parties to have attempted

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[34] *Ibid.*

[35] Reply of Saint Vincent and the Grenadines, at p. 11, emphasis added.

[36] Article 22 of CERD reads as follows: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

to resolve the dispute through negotiation or through the procedures established by CERD. According to Georgia, all that is required is that, as a matter of fact, the dispute has not been so resolved[37]. Georgia, moreover, based its arguments on an earlier judgment by the Court in the same case, but in the phase of provisional measures, according to which "the phrase 'any dispute ... which is not settled by negotiation or by the procedure expressly provided for in this Convention' does not, in its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court"[38]. The Court then had to clarify the scope of this statement in a way that is particularly relevant to the present case before this Tribunal.

24. On this question, Spain wishes to recall that the Court indicated in its 2008 decision on provisional measures that "Article 22 *does suggest* that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD"[39]. But in its definitive decision on jurisdiction in 2011, it was made quite clear that "this provisional conclusion [of its Order of 2008] is without prejudice to the Court's definitive decision on the question of whether it has jurisdiction to deal with the merits of the case, which is to be addressed after consideration of the written and oral pleadings of both Parties"[40]. That is, a quite similar wording as this Tribunal stipulated in its decision of 23 December 2010 on provisional measures: that this 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)

25. On the question of whether Article 22 of CERD constituted a prior condition for resorting to the Court, the ruling was equally clear. After confirming the applicability of the principle of *effet utile* in treaty interpretation[41], a principle that is equally applicable to the present case, the Court rejected the arguments put forward by Georgia, quite clearly: "By

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[37] *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 118 in fine.

[38] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, at p. 388, paragraph 114.

[39] *Ibid.*, emphasis added.

[40] *Application of the International Convention..., I.C.J. Reports 2011*, at paragraph 129.

[41] *Ibid.*, at paragraph 133.

interpreting Article 22 of CERD to mean, as Georgia contends, that all that is needed is that, as a matter of fact, the dispute had not been resolved (through negotiations or through the procedures established by CERD), a key phrase of this provision would become devoid of any effect."[42] And after analysing, in other treaties, provisions similar to Article 22 of CERD debated in the Court, it was observed that in these cases "where the compromissory clause was comparable to that included in CERD, the Court has interpreted the reference to negotiations as constituting a precondition to seisin"[43].

26. It must be further underlined a question of some significance: the very wording of Article 22 of CERD, in comparison with Article 283 of the Convention. While the former, as we have seen, according to the ICJ "does suggest that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD"[44], Article 283 of the Convention establishes an *obligation* to exchange views, as the title of the Article itself says. Its text, as Spain had occasion to recall in its Counter-Memorial, is drafted in terms that are clear, precise and binding: "the parties to the dispute *shall proceed* expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means." (Emphasis added). As an evident consequence, on interpreting Article 283 of the Convention in accordance with the ordinary meaning to be given to its terms, and requiring its *effet utile*[45], before submitting a dispute to the Tribunal, the parties involved *must* proceed to effective prior negotiations[46]. In the *MOX Plant Case (Ireland* v. *United Kingdom)*, in its Order No. 3, the Arbitral Tribunal reminded us of this when answering to the question raised by the United Kingdom: "there has clearly been an exchange of views between the Parties, *as required* under Article 283 of the Convention [...]"[47]. The Tribunal is one of the means for the settlement of disputes described in Section 2 of Part XV of the Convention. And as another Arbitral Tribunal clarified in another case,

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[42] *Ibid.*

[43] *Ibid.*, at paragraph 140.

[44] *Ibid.*, emphasis added.

[45] It is an interpretative principle of international law that "in case of doubt the clauses of a special agreement by which a dispute is referred to [a court], must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects" (*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 further *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24; and *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 25, para. 51.

[46] Thus, no credit at all can be given to the statement by Saint Vincent and the Grenadines that "Spain attempts to convince the Tribunal to disregard its thorough and generous Reading of Article 283(1) in favor of finding the exhaustion of diplomatic negotiations as a precondition for a matter to be referred to the Tribunal." Reply of Saint Vincent and the Grenadines, at p. 10.

[47] *MOX Plant Case (Ireland v. United Kingdom), Order No. 3 on Suspension of Proceedings on Jurisdiction and Merits, and Request for further Provisional Measures, 24 June 2003*, para. 18.

"Section 2 of Part XV provides for compulsory procedures entailing binding decisions, which apply *where no settlement* has been reached by recourse to Section 1 (which lays down certain general provisions, including those aimed at the reaching of agreement through *negotiations* and other peaceful means)"[48].

27. As Spain stated in its Counter-Memorial, the very purpose of the exchange of views accounts for its obligatory nature: it not only "gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter", but also "encourages the Parties to attempt to settle their disputes by mutual agreement, thus avoiding recourse to binding third-party adjudication"[49]. Again, in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Georgia attempted —just as Saint Vincent and the Grenadines is attempting to do now— to persuade the Court that the threshold of the negotiations required by Article 222 of CERD —like Article 283 of the Convention— is minimal ("that even very brief informal discussions in either bilateral or multilateral settings involving, for example, a simple communication of protest to a silent or intractable party, would constitute negotiations. In sum, according to Georgia, any indirect exchange between the parties to a dispute would constitute negotiations")[50] and it is not even necessary to refer to the CERD ("Furthermore, Georgia contends that negotiations between the Parties in this case need not expressly refer to CERD or its substantive provisions")[51]. The Court, logically, rejected this re-interpretation of the CERD, and in the same way the re-interpretation that Saint Vincent and the Grenadines seeks to make of Article 283 of the Convention should be rejected:

- Not only did the Court hold "that negotiations are distinct from mere protests or disputations" but it held that "[n]egotiations entail more than 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"[52].

- The Court also recalled, according to classical jurisprudence, that negotiations require the parties "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

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48 *Barbados/Trinidad and Tobago, Arbitral Award of 11 April 2006*, p. 59, para. 191.
49 Counter-Memorial of Spain, para. 60.
50 *Application of the International Convention..., I.C.J. Reports 2011*, para. 153.
51 *Ibid.*, para.154.
52 *Ibid.*, para.157.

does not imply an obligation to reach agreement . . ."[53].

- The Court stated emphatically that "[m]anifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met"[54]; and
- Finally, the Court recalled that "to meet the precondition of negotiation in the compromissory clause of a treaty, 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."[55]

28. This Tribunal in different cases and several distinguished judges in their separate opinions have underlined the implied limit of the exchange of views as envisaged in Article 283 of the Convention, *i.e.* that a State Party to the Convention is not further obliged to exchange views when there is a clear deadlock and it may be concluded that the possibilities of reaching agreement have been exhausted. This is not the case here, where Saint Vincent and the Grenadines has not even initiate any minimal and proper exchange of views with Spain with regard the settlement of a dispute under the Convention, if any.

29. What has happened in the present case? Has Saint Vincent and the Granadines "genuinely attempted" to engage in negotiations with Spain? Borrowing again the wording of the ICJ in its Judgement of 2011, to answer this question, the Tribunal would need to ascertain whether the negotiations had failed, became futile, or reached a deadlock *before Saint Vincent and the Granadines submitted its claim to the Tribunal.*

30. Spain is obliged, once again, to recall certain facts that Saint Vincent and the Grenadines obstinately denies or seeks to re-interpret, if not re-invent:

- Saint Vincent and the Granadines *never* addressed Spain before the *Note Verbale* of 26 October 2010;
- In this *Note*, Saint Vincent and the Grenadines made no mention whatsover of the United Nations Convention on the Law of the Sea of 1982; and
- Furthermore, the *Note* in itself forestalls any possibility of negotiation when it advises of the intention of Saint Vincent and the Grenadines "to pursue an action before the

[53] *Ibid.*, para.158.
[54] *Ibid.*, para.159.
[55] *Ibid.*, para.161.

International Tribunal for the Law of the Sea [...]"

31. From this point, and even before, the facts are well known to the Tribunal. On 15 October 2010, that is, even before the *Note Verbale* was sent and indeed before the competence of the Tribunal had been accepted, Saint Vincent and the Grenadines informed the Tribunal of the appointment of its agents and co-agents. On 22 November 2010, Saint Vincent and the Grenadines deposited its declaration of acceptance of the competence of the Tribunal, and on the next day, 23 November, Saint Vincent and the Grenadines presented its action against Spain. What willingness to negotiate by the Applicant can be deduced from this attitude? None. What can be deduced from this attitude? Not just an evident expression of procedural bad faith on the part of Saint Vincent and the Grenadines but also, and undoubtedly, a real intent not to negotiate with Spain before resorting to this honourable Tribunal.

32. Before concluding this question, Spain must again draw attention to the Applicant's intention to confuse its actions with those of the physical and legal persons who face criminal charges in Spanish courts. The obligation set out in Article 283 of the Convention is one strictly between Saint Vincent and the Grenadines and Spain, and is one that must be discharged *before* bringing an action before the Tribunal. And under no concept may one party be substituted by individuals, who in this case are not even nationals of that party. Spain, moreover, reiterates that the concept of "exchanges of views" cannot be applied to mere requests for information on the situation of a vessel, exchanged between the maritime bodies of each of the States. The latter communications contain no elements that enable them to be termed "exchanges of views" for the purposes of the Convention. Finally, these communications were not followed by genuine acts of negotiation by the national authorities that are competent to represent and engage the State in international undertakings.

4. The Applicant's bad faith use of the Tribunal as a court of appeal against Spanish courts and procedures

33. To conclude this second set of items, Spain expresses its surprise at a fact that has been observed repeatedly during these proceedings, including in the stage of provisional measures: Saint Vincent and the Grenadines has surrepticiously attempted to turn the Tribunal into a court of appeal regarding the criminal trial that is still continuing in the Spanish courts. This is also apparent at various points in its Reply, for example when this case pursued in the Spanish

courts is confused with the present case before the Tribunal. Thus, the Applicant claims, emphatically, that "[t]he Spanish position patronizes this Tribunal. To say that no dispute exists is to ignore more than six years of evidence!"[56]. In its reference to this period of time, it is obvious that the Applicant is referring explicitly to a domestic legal proceeding. The dispute between Saint Vincent and the Grenadines and Spain that has been brought before this Tribunal is quite distinct and was not specifically identified (if at all) until late 2010. It was only then that two acts took place that might suggest to Spain that Saint Vincent and the Grenadines considered there was a dispute between the two parties: the delivery of the *Note Verbale* on 26 October and the submission of the complaint before this Tribunal on 23 November.

34. Spain is well aware that this Tribunal sees itself clearly as constituting an *international tribunal for the law of the sea*, not a court of appeal against decisions adopted by domestic courts. This was highlighted, for example, when the Tribunal discussed the bond in the prompt release proceedings, and observed that the Tribunal "is not an appellate forum against a decision of a national court."[57] If this is so with respect to the extraordinary proceedings for prompt release, the same holds *a fortiori* for a decision *pendente lite* of a national criminal court exercising its jurisdiction in the exercise of its legitimate sovereign competence.

35. Finally, in regard to this attempt to misrepresent the nature of the jurisdiction of this honourable Tribunal, Spain is obliged to draw the Tribunal's attention to one of the arguments repeatedly employed by Saint Vincent and the Grenadines: namely that the Government of Spain may legitimately intervene (and has not done so) in a legal proceeding brought before the domestic courts of justice in order to alter this proceeding, on the grounds that the latter might prejudice international relations or the international interests of the State. This implies a total lack of understanding of the principle of the separation of powers, as defined in the Spanish Constitution. Moreover, it lacks all relevance to the present case, unless the intention behind it is to induce this honourable Tribunal to consider (quite baselessly) that the Spanish legal-political and judicial systems are in a state of total collapse. Only in this sense may one view the references made in the Applicant's Reply concerning a recent judicial matter, which has received much attention in the media and which, nevertheless, has nothing to do with the present proceeding nor with the relations between the executive and the judicial authorities in

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[56] Reply of Saint Vincent and the Grenadines, at p. 5.

[57] *The "Monte Confurco" Case (Seychelles v. France), Prompt Release, Judgement of 18 December 2000*, at paragraph 72.

Spain [58]. Or perhaps the Applicant is confusing the Spanish Supreme Court with a branch of the executive?

36. Indeed, Spain is firmly convinced that the Applicant's intention is to discredit the proceedings conducted by the Spanish Courts, no doubt with the purpose of introducing a measure of doubt over the inactivity or misconduct of such Courts, which may lead this honorable Tribunal to conclude that some form of international responsibility derived thereof could be attributable to Spain. Upon the said international responsibility Saint Vincent and the Grenadines would then ground its exorbitant claim in terms of a financial compensation for the damages supposedly suffered by the *Louisa*.

37. Nevertheless, as was highlighted by Judge Cott in its dissenting opinion attached to the Order of 23 December 2010, the Applicant would have erred in its election of the international jurisdiction to establish, if possible, the alleged responsibility derived from the alleged malfunctioning or delay by the Spanish Courts in exercising its jurisdictional powers [59]. Moreover, Spain must respectfully reiterate that the alleged inactivity of the Spanish Courts is not a fact. An example suffices to support this thesis: after several unsuccessful attempts to make the owner of the vessel designate a member of the crew charged with the maintenance of the vessel, so as to prevent its deterioration, and after the representatives of the SAGE formally rejected to meet this request, the judge in charge of the criminal proceedings taking place in Cádiz finally had to appoint a "Custodian" ("Depositario" in Spanish) tasked, among other things, with ensuring the maintenance of the vessel (see Annex). This appointment is clearly beneficial for the interests of the owner of the *Louisa*, which Saint Vincent and the Grenadines presumably intends to assert before this Tribunal.

38. Finally, Spain cannot but underline once more the fact that the Applicant apparently

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[58] On page 7, note 2, and page 25, with exact wording in both cases, the Applicant says "on February 2012, the Spanish Supreme Court took strong action to discipline such a judge, Baltasar Garzón, in an unrelated matter." Actually, what the Supreme Court did as the competent court in that case was to condemn Mr. Garzón for a violation of the basic guarantees of detained persons in their private communications with their attorneys while in prison.

[59] As said by Judge Cot, "Saint-Vincent-et-les Grenadines serait éventuellement en droit d'exercer sa protection diplomatique au profit des propriétaires du « Louisa », voire de son équipage. La Commission du droit international l'a rappelé en 2006 dans son projet d'articles sur la protection diplomatique et en particulier en son article 18. Saint-Vincent-et-les Grenadines peut, le cas échéant, demander le règlement du différend par les voies de droit qui lui sont ouvertes, notamment dans le cadre de l'article 33 de la Charte des Nations Unies. Mais en s'adressant à notre 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." *M/V "Louisa" (Saint Vincent and the Grenadines v. Spain), Provisional measures, Dissenting Opinion of Judge Cot*, at paragraph 27.

intends to assert before this honorable International Tribunal for the Law of the Sea a number of claims directly linked to the alleged deterioration and loss of value of the vessel Louisa as a result of its legal seizure in Spain in connection with certain criminal proceedings. These consequences, however, cannot at all be considered as the result of the breach of whatsoever rule of international law, especially of those rules contained in the United Nations Convention on the Law of the Sea. Quite to the contrary, such claims could be adequately pursued in the Spanish Courts in case such Courts should establish that no crime has been committed with the involvement of the vessel *Louisa*, something still to be determined. The need to establish this fact has caused the vessel to be immobilized and put in custody of the Spanish authorities.

39. Moreover, the Applicant's strategy of constant confusion between national and international proceedings has a negative effect on the scope and requirements of the jurisdiction of this Tribunal. Even though Spain has already referred to this matter in its Counter-Memorial, it now wishes to draw the attention to two issues contained in the Reply submitted by Saint Vincent and the Grenadines: the purpose of the claim and the exhaustion of domestic remedies. Both issues are intimately linked; yet they are dealt with in a contradictory manner in the Reply by Saint Vincent and the Grenadines. What is the actual purpose of the application? Is it to guarantee the freedom of navigation of the vessels registered under the flag of Saint Vincent and the Grenadines, or is it to obtain financial compensation for the alleged damages suffered by a company whose nationality is other than that of the Applicant? Is Saint Vincent asserting a right of its own or the right of the owners of the *Louisa*? Depending on the answers to the former questions the exhaustion of domestic remedies is to be seen or not as a requirement, and Saint Vincent and the Grenadines will accordingly be entitled or not to claim a compensation for the alleged deterioration of the *Louisa*. At any rate, however, the arguments advanced by the Applicant in its Reply are incongruous and contradict each other. This is no doubt the result of Saint Vincent and the Grenadines' strategy aimed at confusing internal and international proceedings, private and State interests and claims that can legitimately be pursued in national courts with claims to be presented before an international tribunal.

III. THE ABSOLUTE ABSENCE OF SUBJECT-MATTER JURISDICTION OF THE TRIBUNAL WITH REGARD TO UNCLOS

40. This honourable Tribunal lacks jurisdiction in the present case, an assertion that is also demonstated by an analysis of its subject-matter jurisdicion. The latter was voluntarily

reduced by Saint Vincent and the Grenadines when on 19 November 2010 it deposited its declaration accepting the compulsory jurisdiction of the Tribunal. This further limits the cases this Tribunal can be seised by Saint Vincent and the Grenadines, none of which has been properly submitted in the latter's application.

1. The voluntary limitation by the Applicant of the jurisdiction of the Tribunal

41. As unilateral acts by a State, declarations made under Article 298 of the Convention — such as those made under the facultative clause scheme now before the ICJ— "are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally [...]"[60]. Once made, however, because they are based on good faith, these declarations have the effect of creating legal obligations and other States concerned may then take them into consideration and rely on them and are entitled to require that such obligations be respected.[61] This has been clearly established in international law by international courts.[62]

42. The relevant words of these declarations must be interpreted in a "natural and reasonable way."[63] And the words in the Applicant's declaration of 19 November 2010 are crystal clear: it chose the Tribunal "as the means of settlement of disputes *concerning the arrest and detention of its vessels*" (emphasis added). Accordingly, only cases foreseen in the Convention relating to the arrest and detention of vessels may be argued by Saint Vincent and the Grenadines before this Tribunal. These cases, as summarised by Spain in its Counter-Memorial (paragraph 135), are basically limited to Articles 28, 73, 97, 220 and 226 of the Convention[64]; and, as accepted in international adjudication, a court or tribunal has to

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[60] *Military and Paramilitary Activities in and against United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 418, para. 59.

[61] See Guiding Principle No. 1 of the "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations", *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, UN Doc. A/61/10, at p. 370.

[62] *Nuclear Tests (Australia v. France; New Zealand v. France), Judgments of 20 December 1974, I.C.J. Reports 1974*, pp. 267-8, paras. 43 and 46 and pp. 472-3, paras. 46 and 49.

[63] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgement, I.C.J. Reports 1998*, at p. 454, para. 49. As further clarified by the Court in other case, "[n]o doubt custom and tradition have brought it about that a certain pattern of terminology is normally, as a matter of fact and convenience, employed by countries accepting the compulsory jurisdiction of the Court; but there is nothing mandatory about the employment of this language." *Case concerning the Temple of PreahVihear (Cambodia* v. *Thailand), Preliminary Objections, Judgement of 26 May 1961, I.C.J. Reports 1961*, at p. 32.

[64] Some other basis may be found in other articles and in other but related agreements. See, among others, D.H. Anderson, "Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreements", 11 *The International Journal of Marine and Coastal Law* (1996), pp. 165-177.

ascertain whether at the moment the proceedings are instituted "the two States accepted the 'same obligation' in relation to the subject-matter jurisdiction"[65].

43. However, Saint Vincent and the Grenadines states that "[i]n reaching this conclusion, Spain attempts to usurp a formal declaration of Saint Vincent and the Grenadines with one of its own construction" [66]. Under no circumstance has Spain attempted to "usurp" the Applicant's formal declaration accepting this Tribunal's jurisdiction. Spain simply applies the general rules of interpretation of these kinds of unilateral declaration that, although "not identical" with those established for the treaty interpretation, "apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance" of international courts and tribunals[67]. As acknowledged by the ICJ —applying analogously Article 31, paragraph 2, of the 1969 Vienna Convention— "to assess the intentions of the author of a unilateral act, account must be taken of all the circumstances in which the act occurred"[68].

44. Spain has already explained these circumstances, which clearly show that the Applicant's declaration limits the scope *ratione materiæ* of the compulsory jurisdiction of the Tribunal. Saint Vincent and the Grenadines made its declaration in the heat of the moment and simply hoped to obtain a jurisdictional basis quickly and easily in order to bring an action against Spain with respect to the legitimate and legal detention of the *Louisa*.

45. Saint Vincent and the Grenadines compares its declaration of 19 November 2010 with the Spanish declaration made on 19 July 2002, with the intention of expanding its own declaration. It advises that the interpretation made by Spain of its declaration "replaces a formal declaration of Saint Vincent and the Grenadines with one more to Spain's liking".[69] Spain has changed no declaration at all, nor does it seek to replace the words that Saint Vincent and the Grenadines *expressly* used in its declaration. It is not a question of liking, but rather one of *legally-relevant terms*, which in this case means they must be interpreted

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[65] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, pp. 420-421, paragraph 64.

[66] Reply of Saint Vincent and the Grenadines, at p. 24.

[67] *Fisheries Jurisdiction..., I.C.J. Reports 1998*, p. 453, para. 46. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment of 11 June 1998, I.C.J. Reports 1998*, p. 293, paragraph 30.

[68] *Frontier Dispute (Burkina Faso v. Republic of Mali), I.C.J. Reports 1986*, p. 574, paragraph 40; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, at p. 29, paragraph 53; and *Nuclear Tests (Australia v. France; New Zealand v. France), I.C.J. Reports 1974*, p. 269, paragraph 51, and p. 474, paragraph 53.

[69] Reply of Saint Vincent and the Grenadines, at p. 24.

"according to their natural and ordinary meaning in the context in which they occur [...]".[70]

46. And the facts reveal that Saint Vincent and the Grenadines voluntarily limited the competence *ratione materiæ* of this Tribunal to cases of the arrest and detention of its vessels. In view of the detention of one of its vessels, Saint Vincent and the Grenadines, possibly acting in haste, accepted *exclusively* the competence of this Tribunal concerning *precisely* cases of the detention of vessels under the Convention. It could have opted for a broader, general unilateral declaration, such as that deposited by Spain. However, in the light of what was declared at the time, Spain considers that in the current dispute, the only cases that can be judged —if any— would be those described in the allegations made by Saint Vincent and the Grenadines, which refer to cases of the arrest and detention of vessels under the Convention. These cases would be only those specified in Articles 73 and 226 of the Convention.

47. In addition, Saint Vincent and the Grenadines attempts to present itself as a "loving State" of this honourable Tribunal; on the contrary, apparently, to Spain (Reply, at p. 24). For Saint Vincent and the Grenadines, "Spain's view of the role of this Tribunal is too narrow." (Reply, at p. 29). The reality is quite the opposite: prior to late-2010, Saint Vincent and the Grenadines *never* accepted this Tribunal's general jurisdiction, and then only for this particular case in these particular circumstances.[71] This is clearly an *ad hoc* acceptance of jurisdiction. Spain, however, accepted the general jurisdiction of this Tribunal almost ten years ago, with the sole exception of a small number of marine delimitation affairs[72]. Saint Vincent and the Grenadines has accepted this Tribunal's jurisdiction *only* for the cases concerning the arrest and detention of its vessels. This is comprehensible in the case of a flag of convenience State such as Saint Vincent and the Grenadines. But it also clarifies the subject-matter jurisdiction a State consents to before an international tribunal or court.

2. The Applicant's attempt to rewrite the Convention

48. However, Saint Vincent and the Grenadines not only seeks to rewrite its own unilateral declaration, but also the Convention itself. And this is so despite the fact that in its Reply, the Applicant states that "Saint Vincent and the Granadines has sought to connect the facts of this

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[70] *Case concerning the Temple of PreahVihear (Cambodia v. Thailand), Preliminary Objections, Judgement of 26 May 1961, I.C.J. Reports 1961*, at p. 32.

[71] Spain deems it unnecessary to recall that the previous cases when Saint Vincent and the Grenadines was before this honourable Tribunal were always in relation to a prompt release procedure or in relation to an *ad hoc* special agreement after Saint Vincent and the Grenadines initially preferred an arbitral tribunal, not *this* Tribunal.

[72] In the same way as it has accepted the competence of the International Court of Justice.

dispute with the *plain meaning of the articles invoked in this case*",[73] which is shown to be false by the arguments set out in Section VII of its Reply. For example, Saint Vincent and the Grenadines, in alleging that Spain violated Article 73 of the Convention, states that "[w]hile Article 73 is located in Part V dealing with operations in the Exclusive Economic Zone, Saint Vincent and the Grenadines would highlight the *intent* of the article."[74] And subsequently, it remarks that "Articles 226 and 227 are indeed located in Section 7 of Part XII of the Convention; however, Saint Vincent and the Grenadines would urge that *they should not be read to deal strictly with matters relating to protection of the marine environment.*"[75]

49. These two examples illustrate what Spain has maintained since the start of this case: that there is no subject-matter jurisdiction; a complaint can hardly be based on articles contained within the 1982 Convention that quite plainly do not apply to the case. For this reason, Saint Vincent and the Grenadines is forced to resort to extravagant arguments that have nothing to do with "the plain meaning of the articles invoked in this case". In this respect, Spain draws the Tribunal's attention to the fact that the general rule of interpretation is clearly established in general international law and plainly codified in Article 31 of the Vienna Convention on the Law of Treaties, according to which a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Applicant's attempts to delete good faith, the ordinary meaning of the terms used in the Convention, their context, and its object and purpose are simply inadmissible.

50. In relation to Article 73 of the Convention, the Tribunal observed in its very first decision, on 4 December 1997, that "[a]rticle 73 is part of a group of provisions of the Convention (articles 61 to 73) which develop in detail the rule in article 56 as far as sovereign rights *for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone are concerned.*"[76] Article 73 of the Convention, thus, may only be invoked for the purpose of analysing the observance or otherwise of the rules regarding the rights to explore, exploit, conserve and manage the living resources of the Exclusive Economic Zone (EEZ). Under no concept was the *Louisa* detained for infringing any of these rights, as Spain has repeated incessantly. Indeed, the *Louisa* never operated in the

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[73] Reply of Saint Vincent and the Grenadines, at p. 1, emphasis added.
[74] *Ibid.*, at p. 25, emphasis added.
[75] *Ibid.*, at p. 27, emphasis added.
[76] *M/V "Saiga" (No. 1) (Saint Vincent and the Grenadines v. Guinea), Prompt Release*, at paragraph 66, emphasis added.

Spanish EEZ in the "critical dates" in this case, or even before.

51. The arguments put forward by Saint Vincent and the Grenadines are so topsy-turvy that they attempt, for example, to convert a logical line of argument by Judge Laing into support for their bizarre propositions. In seeking to find a semblance of competence *ratione materiæ*, they put forward Judge Laing's separate opinion in the *Grand Prince* case without realising that Judge Laing was referring expressly to the detention of "foreign flag vessels found *on the high seas* or otherwise *outside the territorial jurisdiction and normal prescriptive competence of the confiscator* [...]",[77] which is clearly not the case in the present circumstances, as the *Louisa* was detained in Spanish internal waters.

52. In relation with Article 226, Saint Vincent and the Grenadines' arguments are even more absurd. The Applicant argues that

> "Articles 226 and 227 are *indeed* located in Section 7 of Part XII of the Convention; however, Saint Vincent and the Grenadines would urge that *they should not be read to deal strictly with matters relating to protection of marine environment*. Articles 226 and 227 reflect values in international law that should be given consideration in this case, specifically freedom from undue seizure and inspection, and freedom from discrimination." (Reply, at p. 27, emphasis added).

Saint Vincent and the Grenadines, after recognising the contextual absurdity of its argument (the Articles are *indeed* located in a non applicable part of the Convention in this case), urges that these articles be read for a completely different purpose. The true purpose of the entire Part XII of the Convention is clear and reflected in its Article 192: "States have the obligation to protect and preserve the marine environment." From this basic principle —which is not under discussion in the present case as a matter of fact or law— the Convention establishes a system of rights and duties modulated depending on the matter in question and on the rights and duties of coastal States, port States, flag States, etc. Some of these rights and duties are of behaviour or of result. None of them, however, is implied or discussed in the present case. The *Louisa* was not detained for purposes of the investigations provided for in Articles 216 (enforcement with respect to pollution by dumping), 218 (enforcement by port States in respect of any discharge from that vessel outside the internal waters, territorial sea or EEZ of that State) or 220 of the Convention (enforcement by coastal States for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the EEZ of that State), to which Article 226 refers. To sum up, in this case

[77] Reply of Saint Vincent and the Grenadines, at p. 4.

there is no dispute relating to the protection of the marine environment and possible enforcement measures adopted by Spain against a vessel flying Saint Vincent and the Grenadines' flag. Cases of seizure and inspection of vessels are clearly regulated in the Convention. These cases do not need to use the terms and conditions of other circumstances to be applicable. Actions against piracy or slavery, to combat drug trafficking or to remedy marine pollution are all regulated in their respective parts of the Convention. They cannot be viewed in isolation but must be read and interpreted properly. And this is not done by Saint Vincent and the Granadines when it tries to interpret the meaning of Article 226 of the Convention completely out of context.

53. Articles 73 and 226 of the Convention are not applicable to this case. And this is manifestly apparent. The attempts of Saint Vincent and the Grenadines to extend the Tribunal's competence to other precepts of the Convention would be equally unavailing because, as Spain explained quite clearly in its Counter-Memorial (paragraphs 142-168), Articles 87, 227 and 245 of the Convention[78] are just not applicable to the case *ratione materiae*.[79] Let us briefly refer to some aspects of these questions, which Saint Vincent and the Grenadines once again addressed erroneously:

- In relation to Article 87 of the Convention, Saint Vincent and the Grenadines states that the detention of the *Louisa* "abrogated the freedom of Saint Vincent and the Grenadines vessel to navigate in the high seas."[80] This assertion is not only false but inaccurate as well. It is false because the detention most certainly did not take place in the high seas, as required under Article 87. The detention of a foreign vessel *in the high seas*, except in the cases described in the Convention, would represent a violation of the Convention. But this was not the case: the *Louisa* was detained in Spanish internal waters.

  The claim by Saint Vincent and the Grenadines is, moreover, inaccurate because, even if we accepted their reasoning, according to which the detention of the *Louisa* in Spanish territorial waters inhibited the freedom of Saint Vincent and

[78] Finally, Saint Vincent and the Grenadines has clarified that its invocation of Article 303 of the Convention was due to a "typographical error" (Reply, at p. 29). Certainly, this invocation was remarkable, in view of the assault against the submarine cultural heritage carried out by the persons on board the vessel, a heritage that this Article is intended to protect and preserve.

[79] As Spain has observed, there is no basis whatsoever for jurisdiction, due to the declaration of acceptance of the competence of the Tribunal.

[80] Reply of Saint Vincent and the Grenadines, at p. 26.

the Grenadines in its right to freely navigate the high seas, this would lead to the *reductio ad absurdum* that the detention of the *Louisa* would also mean that Spain had violated the right of Saint Vincent and the Grenadines to lay submarine cables and pipelines, to navigate through the straits used for international navigation or —why not?— to protect the submarine cultural heritage.

- Furthermore —and in view of Spain's allegation that the freedom of navigation *in the high seas* that is referred to in the above Article is limited by the technical impossibility of navigation licensed by the Flag State, by reason of the non-compliance with the obligations imposed by Article 94 of the Convention— Saint Vincent and the Grenadines states that this same Article "does not condition freedom of the high seas on meeting international seaworthiness requirements."[81] Certainly, Article 87 of the Convention says nothing in this respect, but it was precisely Saint Vincent and the Grenadines that, in the case of *M/V "Saiga" Case (No. 2)* adduced as evidence of the "genuine link" between the ship and the Flag State its supervision of compliance with the latter's "seaworthiness requirements".[82] As the Tribunal observed in the cited case,

> "Saint Vincent and the Grenadines [called] attention to various facts which, according to it, provide evidence of this link. These include the fact that the owner of the Saiga is represented in Saint Vincent and the Grenadines by a company formed and established in that State and the fact that the Saiga is subject to the supervision of the Vincentian authorities to secure compliance with the International Convention for the Safety of Life at Sea (SOLAS), 1960 and 1974, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), and other conventions of the International Maritime Organization to which Saint Vincent and the Grenadines is a party. In addition, Saint Vincent and the Grenadines maintains that arrangements have been made to secure regular supervision of the vessel's seaworthiness through surveys, on at least an annual basis, conducted by reputable classification societies authorized for that purpose by Saint Vincent and the Grenadines."[83]

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[81] Reply of Saint Vincent and the Grenadines, at p. 26.

[82] On this question, it may be seen the study prepared by Professor R.R. Churchill for the International Transport Workers' federation titled *The meaning of the "genuine link" requirement in relation to the nationality of ships*, October 2000, available electronically at <http://www.itfglobal.org/seafarers/icons-site/images/ITF-Oct2000.pdf> (visited 12 March 2012). One of the conclusions drawn in this study reads as follows: "Where there is no genuine link between a ship and the State purporting to confer its nationality upon it, that State may not exercise diplomatic protection in respect of the ship." (at p. 5)

[83] *M/V "Saiga" Case (No. 2), Merits, Judgement of 1 July 1999*, para. 78.

In the opinion of Spain, Article 87 of the Convention is intimately linked with Articles 91 and 94. And the latter specifies the duties of the Flag State with regard to the seaworthiness of the vessel, a question expressly admitted by Saint Vincent and the Grenadines in the *M/V "Saiga" Case (No. 2)* as clarified in the preceding paragraph. Therefore, and given that the *Louisa* did not (and does not) comply with the international regulations cited by Saint Vincent and the Grenadines, it is the Applicant and not the Respondent which would impede the right of navigation of the *Louisa.*

- In relation to Article 227 of the Convention, Spain reiterates that it cannot accept, on the one hand, the manifest irrelevance of the allegations made by Saint Vincent and the Grenadines, in its attempt to persuade the Tribunal to apply a precept (Article 227) of Section 7 ("Safeguards") of Part XII of the Convention ("Protection and preservation of the marine environement") that has *nothing* to do with the case submitted to the Tribunal.

  And on the other hand, on no account may this Article be extracted from its context, which is what Saint Vincent and the Grenadines attempts to do when it states that "[it] should not be read to deal strictly with matters relating to protection of the marine environment."[84] As we have commented above, this is a recurrent strategy employed by the Applicant; when the corresponding law is not considered advantageous to its interests, the Applicant bends, distorts or, simply, invents it.

  Finally, and in this line of extreme flexibility in legal interpretation, Saint Vincent and the Grenadines again accuses Spain —baselessly— of a "degree of discrimination [...] unprecedented in the annals of the Tribunal's prior cases."[85] Spain maintains very cordial relations with Saint Vincent and the Grenadines, as shown by the friendly diplomatic relations enjoyed since 21 July 1986. Nevertheless, individual persons —whatever nationality they may have— who seek to make use of the flag of a friendly nation in order to commit offences against Spanish Law and cultural heritage, in Spanish waters, will inexorably be confronted by Spanish justice, in proper legal proceedings, and in this respect,

[84] Reply of Saint Vincent and the Grenadines, at p. 27.

[85] *Ibid.* Neither is it possible to accept the kind of argument reflected in p. 2 of Saint Vincent and the Grenadines' Reply, which places this Tribunal in a false scenario of "uphold[ing] the rights of smaller Member States." This is a fallacious argument that ignores the true meaning and history of this honourable Tribunal.

quite surely, we shall receive the support of governments such as that of Saint Vincent and the Grenadines given that both States are bound by the 2001 UNESCO Convention for the protection of the underwater cultural heritage.[86] In summary, Spain cannot see any reason for the allegations of grave discrimination made by the Applicant.

- Finally, with respect to Article 245 of the Convention ("Marine scientific research in the territorial sea"), Spain must once again comment upon various inexactitudes and errors contained in the Reply by Saint Vincent and the Grenadines. In the first place, at no time did Spain accept in its Counter-Memorial "the applicability of Article 245 and other articles in this case."[87] This is plainly false. Spain explicitly said in its Counter-Memorial that "Article 245 cannot serve as a basis for a claim by Saint Vincent and the Grenadines against Spain." (paragraph 165 *in fine*). This assertion was made after a careful analysis of Article 245 of the Convention, which clearly revealed the complete irrelevance of this Article in the case now before the Tribunal.

54. This irrelevance, like that concerning the other articles of the Convention invoked by the Applicant, is tantamount to the inadmissibility of the breaches alleged by Saint Vincent and the Grenadines. It further amounts to the general absence of jurisdiction of the Tribunal in this case.

3. Absence of subject-matter jurisdiction amounts to the general absence of competence of the Tribunal

55. This honourable Tribunal lacks jurisdiction in this case. And this assertion could also be made with respect to its subject-matter jurisdiction. The latter was voluntarily reduced by Saint Vincent and the Grenadines when on 19 November 2010 it deposited its declaration accepting the jurisdiction of the Tribunal. The articles of the Convention invoked by the Applicant are simply inapplicable in the present case. The legal arguments proposed by Saint Vincent and the Grenadines are plainly inexistent or unacceptable. There is no true dispute regarding the application of the Convention to the present case in relation to these articles invoked by the Applicant.

56. Spain has repeatedly and respectfully stated that this Tribunal lacks jurisdiction in the

[86] 2 November 2001, in force since 2 January 2009. Text in 2562 *UNTS* (2009), 41 *ILM* 40 (2002). In force for Spain since 2 January 2009 and for Saint Vincent and the Grenadines since 8 February 2011.

[87] Reply of Saint Vincent and the Grenadines, at p. 27.

present case. It has been said that "[j]urisdiction relates to the capacity of [a tribunal] to decide a concrete case with a final and binding force. Competence, on the other hand, is more subjective. It includes both jurisdiction and the element of the propriety of the [tribunal]'s exercising its jurisdiction in the circumstances of the concrete case."[88] The concrete legal circumstances in this case are that none of the articles of the Convention invoked by the Applicant can form the legal basis for a case related to the facts now before this Tribunal. The Applicant cannot make grave accusations in a vacuum. It cannot simply evoke a series of articles from the Convention and affirm that licit and legitimate activities by a sovereign State in its sovereign waters are breaches of those articles without any serious legal elaboration of such articles, and then seek inconceivable reparation for illusory rights that were never violated. Spain has all confidence that this Tribunal will determine that the claims of Saint Vincent and the Grenadines are unfounded in law, and particularly with respect to the United Nations Convention of the Law of the Sea.

57. As stated above in this Rejoinder, "the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case"[89]. The concrete circumstances in this case mean that none of the articles invoked by Saint Vincent and the Grenadines are applicable here. There has been no violation by Spain of any of these articles because none of them create any right in favour of Saint Vincent and the Grenadines that is liable to be violated by Spain. When an international court or tribunal finds that an applicant cannot be considered to have clearly established any legal right or interest appertaining to it in the subject matter of the claim, then the court or tribunal must decline to give effect to them[90]. And this amounts to the general competence of the honourable Tribunal in this case. It amounts to the fact that, prior to the submission of its claim on 23 November 2010, Saint Vincent and the Grenadines *never exchanged views* on the possible application of the Convention to the legitimate seizure of the *Louisa* by Spanish authorities in Spanish waters. Subject matter jurisdiction is intimately interwined with the admissibility of any claim in this case. The merits and the procedure are in such proximity in this case that neither can be taken in isolation.

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[88] S. Rosenne, *The Law and Practice of the International Court of Justice 1920-1996* (Boston: Nijhoff, 1997), at p. 536.

[89] *Dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgement of 14 March 2012*, at paragraph 348.

[90] *South West Africa, Second Phase, Judgement, I.C.J. Judgement 1966*, pp. 18 and 51, paragraphs 4 and 99.

58. More than four years after the legitimate detention of the *Louisa*, Saint Vincent and the Grenadines appears before this Tribunal, attempting to use the arguments, but not the procedure, provided for in Article 292 of the Convention for the prompt release of vessels. Saint Vincent and the Grenadines voluntarily declined to make use of that Article and instead claimed diplomatic protection against Spain, under the general rules of international law, before this Tribunal. The Applicant, amid other attitudes reflecting bad faith, neglected to exchange views on its claim with Spain before the submission of its claim, as called for by Article 283 of the Convention. Instead, it addressed this Tribunal directly, seeking some kind of appeal against legitimate judicial decisions, which are still pending before Spain's domestic courts. And this is accompanied by absurd and unfounded allegations of breaches of several articles of the Convention which are clearly not applicable to the facts of the case. To sum up, this honourable Tribunal cannot and must not receive and decide the claims submitted by Saint Vincent and the Grenadines because it has no jurisdiction at all.

IV. CONCLUSIONS

59. It is true that jurisdiction is a complex issue, and one that is often debated before international courts, including this Tribunal. It is also true that there is a vast body of literature on this question[91]. In any case, to contest the jurisdiction of an international court or tribunal is not a measure *against* that court or tribunal. It is simply an invocation of procedural rights and, ultimately, is a proper use of law before an international adjudicative body. Saint Vincent and the Grenadines adamantly seeks to pervert the legitimate objections to jurisdiction of Spain, in disdain of the process before this Tribunal. This argument was clearly answered by Spain in its Counter-Memorial, and a simple review of Spain's general attitude with regard to the Tribunal and to this case in particular proves it to be manifestly unfounded. This is a Tribunal in law and for the law, with particular regard to the law of the sea as generally codified in the United Nations Convention of 1982.

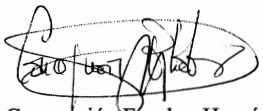
60. Legal arguments, and only legal arguments, are proper and useful in a dispute in this forum located in the Free and Hanseatic City of Hamburg. Legal arguments have been properly and plausibly made by Spain. Unfortunately for the legal process, no similar arguments can be found in Saint Vincent and the Grenadines' Memorial and Reply. The facts are simple: an old and almost unseaworthy vessel arrived in Spanish waters with the intention

[91] Spain refrains from citing this literature, which is well known by the Tribunal.

of looting underwater cultural heritage. The vessel was legitimately seized as part of a due process, still pending, against the accused persons. The flag State of the vessel never reacted, although a diplomatic note was sent by Spain to Saint Vincent and the Grenadines' authorities some weeks before the detention. The Applicant was absolutely silent until the eve —more than four years later— of an *ad hoc* and limited acceptance of the jurisdiction of the Tribunal and the hasty submission of an unfounded claim. No exchange of views, as required by the Convention, was even attempted. Not a single proper conversation was held between Saint Vincent and the Grenadines and Spain *before* the submission of the claim. No discussion of the facts and of possible solutions, if any, was proposed by the Applicant, which simply resorted to this Tribunal to argue the rights of third parties, individuals with no bond of nationality with the flag State and who are still being tried by the domestic criminal courts of Spain. In claiming diplomatic protection, although not properly grounded in law and not complying with well-established procedural requisites, Saint Vincent and the Grenadines is attempting to pervert the function of this Tribunal, transforming its normal *ratione materiæ* and *ratione personæ* into a court of appeal against a domestic criminal proceeding that is still pending before the Spanish courts. And this, ironically, while claiming that Spain has violated several articles of the United Nations Convention on the Law of the Sea that are not even remotely applicable to the facts discussed before this Tribunal. Finally, Saint Vincent and the Grenadines seeks exorbitant and unfounded reparation for the alleged violation of rights that it does not enjoy and, consequently, cannot be damaged by another State.

61. Spain respectfully asks the Tribunal to declare that it has no jurisdiction in this case; subsidiarily, Spain asks the Tribunal to declare that the Applicant's contention that Spain has breached its obligations under the Convention is manifestly unfounded. In consequence, Spain asks the Tribunal to reject each and all of the petitions made by Saint Vincent and the Grenadines, and moreover to oblige the latter to pay all the costs incurred by Spain in connection with this case.

Madrid, 10 April 2012



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