REPLY OF SAINT VINCENT AND THE GRENADINES

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

MV LOUISA

SAINT VINCENT AND THE GRENADINES

v.

THE KINGDOM OF SPAIN

REPLY OF SAINT VINCENT AND THE GRENADINES TO THE COUNTER-MEMORIAL OF THE KINGDOM OF SPAIN

10 FEBRUARY 2012

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I. INTRODUCTION

Saint Vincent and the Grenadines maintains that its claims are well founded and reiterates that the heart of this dispute deals with the confiscation of a vessel under a foreign flag, an act that cannot be accepted by an international adjudicatory body. (*See Order in the "Grand Prince" Case for Prompt Release,* 20 April 2001, Separate Opinion of Judge Liang, Paragraph 10).

Saint Vincent and the Grenadines would also reiterate that the body of jurisprudence before this Tribunal is limited. The contours of the Convention have yet to be fully tested and many judges on this Tribunal have opined as to the perplexity of the scope of the Tribunal's jurisdiction.[1] In this regard, Saint Vincent and the Grenadines has sought to connect the facts of this dispute with the plain meaning of the articles invoked in this case.

Spain's Counter-Memorial is a continuation of the excuses and platitudes it has continually put forth in an effort to (1) avoid the jurisdiction of The International Tribunal for the Law of the Sea (hereinafter the "Tribunal"); and (2) deflect responsibility for its unlawful actions.

As Saint Vincent and the Grenadines will describe in this Reply, the facts are not as stated by Spain. Its effort to avoid responsibility for its outrageous behavior by claiming this Tribunal cannot possibly consider a case where the Respondent State is still applying its local remedies more than six (6) years after it began its local investigation should be rejected.

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[1] *See e.g.*, L. Dolliver M. Nelson, *The International Tribunal for the Law of the Sea: Some Issues*: Tullio Treves; *The Jurisdiction of the International Tribunal for the Law of the Sea*.

Of further critical importance to the Tribunal should be the fact that the Counter-Memorial fails to address the facts outlined by Saint Vincent and the Grenadines constituting Spain's fraud on the Tribunal. Spain has no defense to its actions. It managed to avert an adverse holding in December 2010 on the Application for Provisional Measures by presenting flawed documents. The Tribunal cannot accept Spain's fraudulent actions without penalty. To do so would erode its standing and call into question its ability to uphold the rights of smaller Member States.

II. JURISDICTION

(1) Introduction

Spain challenges the Tribunal's jurisdiction. It is the position of Saint Vincent and the Grenadines that the Tribunal has jurisdiction at this stage of the proceeding and, of course, had jurisdiction to consider the Application for Provisional Measures.

Some Members of the Tribunal, however, have expressed doubts about the existence of jurisdiction to hear the case on the Merits. Therefore, prior to and during a pre-hearing conference held in Hamburg on 13 January 2012, the representative of the Applicant repeatedly asked that the Tribunal decide the question of jurisdiction prior to the hearing on the Merits since after the filing of the replies of the two parties, the matter would be fully briefed.

(2) Finding *prima facie* jurisdiction supports finding jurisdiction over the Merits.

Saint Vincent and the Grenadines respectfully maintains that this honorable Tribunal has jurisdiction to hear the Merits of this case. In its Order of 23 December 2010 on Provisional Measures, the Tribunal held that it had *prima facie* jurisdiction over this dispute (paragraph 70). The Tribunal's reasoning for finding *prima facie* jurisdiction offers ample support for finding jurisdiction to decide the Merits. To summarize, the Tribunal took the following considerations in finding *prima facie* jurisdiction:

(i) "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."

(ii) "[n]either in the Charter [of the United Nations] 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 [ICJ]."

(iii) Saint Vincent and the Grenadines' *Note Verbale* sent to Spain, and Spain's subsequent failure to respond to the note, constituted a sufficient "exchange of views" for the purposes of Article 283 of the Convention.

(3) Confiscation of a vessel under a foreign flag, even if valid according to national law, cannot, *per se*, be accepted by an international adjudicatory body.

The heart of the present case deals with the confiscation of a foreign vessel and its tender and the detention of its crew. The very nature of this case falls within the direct purview of this Tribunal as expressed in various opinions by judges of this Tribunal:

> On the face of it, at least one provision invoked by the Applicant in its request, Article 87 of the Convention, may provide a basis for an arguable case on the Merits, in light of the Respondent's unreasonably long period of detention of the vessel without rendering an indictment or taking any of the necessary judicial procedures. Thus, it appears prima facie that "a dispute concerning the interpretation or application of the Convention" existed between the parties on the date the Application was filed. (Separate Opinion of Judge Paik to 23 December 2010 Order on Provisional Measures).

Judge Liang expressed a similar sentiment in his separate opinion to the 20 April 2001 Order in the *"Grand Prince" Case for Prompt Release*;

> Firstly, ... I believe that confiscation of a vessel under a foreign flag, even if valid according to national law, cannot, per se, be accepted by an international adjudicatory body if, in intent or effect, it would exclude the jurisdiction of that body or extirpate rights or an entire remedial scheme explicitly recognized in an important instrument with such wide participation as the 1982 Convention.

> Secondly, as I understand it, in cases other than violations of neutrality status during wartime, under international law there is a substantial presumption against the legality of confiscation of vested rights or property owned by foreigners in the circumstances outlined in the preceding paragraph, particularly when such rights or property consist of foreign flag vessels found on the high seas or otherwise outside the territorial jurisdiction and normal prescriptive competence of the confiscator, as here. As I noted about the exclusive economic zone in the *M/V "Saiga" (No. 2) Case 3*, article 73 and other provisions of Part V of the Convention do acknowledge the existence of some coastal State jurisdiction and prescriptive competence over vessels concurrent with that of the flag State. Of course, the grant to coastal States of that jurisdiction and competence is limited to aspects of the largely economic sovereignty over natural resources and, at face value, does not specify, require or apparently envisage confiscation – a type of measure which was not tolerated in the high seas by the pre-1982 law. Furthermore, I am unaware of any textual or other credible evidence that Part V of the Convention necessarily implies such a potentially draconian penalty.
>
> Thirdly, in view of the foregoing paragraph, it needs to be carefully examined whether such confiscation as described in paragraphs 10 and 11 is a type of measure "adopted by [the coastal State] in conformity with this Convention," in the terms of article 73, paragraph 1.
>
> Finally, such confiscation raises significant questions about due process and the essential humanitarian and economic motivations and concerns to which I have alluded in paragraph 9. Therefore, *prima facie*, its justifiability also needs to be carefully examined. (Paragraph 10-13)

We recognize that the Tribunal's decision regarding *prima facie* jurisdiction is not dispositive of whether there is jurisdiction to decide the case on the Merits. As noted, however, the fundamental considerations which led an overwhelming majority of the Tribunal to conclude in favor of Saint Vincent and the Grenadines in December 2010, militate in favor of finding jurisdiction at this stage of the proceedings.

III. PRESENCE OF A DISPUTE

(1) A dispute exists

Spain does not fully develop this argument, but mentions in passing that it does not believe that a dispute, in fact, exists (Counter-Memorial, Paragraph 50). The Tribunal effectively disposed of this argument in its prior Order. (*See* 23 December 2010 Order on Provisional Measures, Paragraph 56.):

> Considering that article 283 of the Convention applies 'when a dispute arises' and that in the circumstances of this case, it appears *prima facie* that a dispute as to the interpretation and application of provisions of the Convention existed between the parties on the date on which the Application was filed;

(2) The Applicant's claims are well founded.

The Spanish position patronizes this Tribunal. To say that no dispute exists is to ignore more than six years of evidence! The local Spanish court illegally seized the *Louisa* and its tender, and patiently waited for the ships to deteriorate into scrap. So now the Spanish State finds itself in the unenviable position of defending lawlessness.

IV. EXCHANGE OF VIEWS

(1) The Tribunal has already held that an adequate "exchange of views" occurred

In its Order of 23 December 2010 on Provisional Measures, the Tribunal found that an adequate "exchange of views" occurred in accordance with Article 283(1). (Paragraph 65). In its Counter-Memorial Spain argues that this holding applies only with respect to the request for provisional measures. Saint Vincent and the Grenadines disagrees.

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The simplistic nature of Spain's argument could best be countered by posing a question to the Respondent: Assuming additional "exchanges of views" had taken place, would the position of the parties differ today?

The answer to this rhetorical question is an emphatic "no." And the Tribunal is presumably no longer viewing the issue of "exchange of views" as it was in December 2010. To the contrary, the parties have had many more months to exchange views since the Application for Provisional Measures. In fact, representatives of Saint Vincent and the Grenadines have met with representatives of the Respondent on the following occasions:

11 December 2010:	Hamburg
3 March 2011:	Madrid
14 October 2011:	Madrid
10 November 2011:	New York

As implied, if not completely admitted in the Counter-Memorial, Spain's position has always been that its central Government is subservient to the courts of instruction in Cadiz. Thus, these local courts dictate the outcome of international disputes involving sovereigns. For this reason, "exchanges of views" by the Member States themselves are of no value. The argument of the Respondent is totally disingenuous. Its position in this case is that the Tribunal must defer to the archaic, incompetent, hopelessly inefficient criminal justice system in a Spanish province. But this Tribunal need not accept such an outcome. If the Respondent's central

government insists on deferring to a court of instruction in Cadiz, the Tribunal is free to disagree and there is no valid argument to the contrary.[2]

Moreover, prior decisions of the Tribunal support the conclusion that: (1) jurisdiction exists without the need for further exchange of views; and (2) the Tribunal's holding in the *Guyana v. Surinam* arbitration regarding "exchange of views" should apply to the hearing of the Merits of the case:

> This dispute has as its principal concern the determination of the course of the maritime boundary between the two Parties – Guyana and Suriname. The Parties have, as the history of the dispute testifies, sought for decades to reach agreement on their common maritime boundary. The CGX incident of 3 June 2000, whether designated as a "border incident" or as "law enforcement activity", may be considered incidental to the real dispute between the Parties. *The Tribunal, therefore, finds that in the particular circumstances, 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. These issues can be considered as being subsumed within the main dispute.* (The Arbitral Tribunal, *In the Matter of an Arbitration Between Guyana and Suriname*, Paragraph 410) (*emphasis added*).

The Arbitral Tribunal, in making this holding, considered Article 283(1) of the Convention and the *Southern Bluefin Tuna* and *MOX Plant* cases. It concluded that while an "exchange of views" is necessary, there need not be a separate set of exchanges of views so long as subsequent claims are incidental to the greater dispute to which an adequate "exchange of views" was already found.

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[2] Apparently, the Respondent defers to its investigative judges on a selective basis. Here, Spain argues that it, as a sovereign, and this Tribunal must defer to the Instructing Judge in Cadiz. Yet, on 9 February 2012, the Spanish Supreme Court took strong action to discipline such a judge, Baltasar Garzon, in an unrelated matter. *See New York Times*; 10 February 2012.

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Saint Vincent and the Grenadines maintains that this is reasonable and should be applied in the present case. Saint Vincent and the Grenadines submitted a *Note Verbale* notifying Spain that it objected to the continued detention of the ships, *M/V Louisa* and *Gemini III* and that it intended to avail itself of remedies under the Convention. Taken with consideration of the fact that Spain failed to respond to this note, the Tribunal found this communication to be an adequate "exchange of views." The Merits of this case deal with the exact same set of events as the case for Provisional Measures (i.e. the same dispute); and like the case for Provisional Measures, the Merits are rooted in claims stemming from the Convention.

Furthermore, in its Order of 23 December 2010 on Provisional Measures, this Tribunal maintained the following consideration in concluding that it had *prima facie* jurisdiction:

> ... that the Tribunal has held 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" (*Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures*, Order of 27 August 1999, paragraph 60), and 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" (*MOX Plant (Ireland v. United Kingdom), Provisional Measures*, Order of 3 December 2001, paragraph 60). (Paragraph 63)

While not explicit, the above consideration suggests that the Tribunal gave some effect to the determination of Saint Vincent and the Grenadines that the possibilities of settlement had been exhausted. This position is further supported by the fact that Saint Vincent and the Grenadines met with representatives of Spain on four occasions after commencement of these proceedings in continued hopes of finding a resolution to no avail. With respect to the rhetorical question posed at the beginning of this section, it is clear that the attempt of Saint Vincent and the

Grenadines to engage in a further exchange of views did not alter the position of the parties as they stand today.

Finally, Saint Vincent and the Grenadines notes that the threshold for what constitutes an "exchange of views" does not change based on the nature of the underlying claim according to the Convention. If the Tribunal were to find such to be the case it would call into question its previous jurisprudence regarding "exchanges of views." Indeed, the Tribunal has never suggested that the question might depend on the nature of the claims.

(2) The obligation to engage in an "exchange of views" does not require the exhaustion of diplomatic negotiations

In its Counter-Memorial, Spain argues that there exists a "specific norm that creates the obligation of previous consultations as a condition to bring a matter before the Tribunal." (Counter-Memorial, Paragraphs 54-58). Spain's assertion not only attempts to introduce language and standards that are foreign to the Tribunal's interpretation of Article 283(1), but it ignores the Tribunal's clear reliance on specific precedent set by the International Court of Justice: "Neither in the Charter [of the United Nations] 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" (Order, paragraph 64 (*citing 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)).

Spain concedes that while general international law does not establish exhaustion of diplomatic negotiations as a precondition to access to an international court, it does

not apply when a particular rule obliges States to exchange views. (Counter-Memorial, Paragraph 55). It goes on to cite two International Court of Justice cases in which the Court discussed exhaustion of negotiation as a precondition to accessing the court.

There are several errors implicit in Spain's analysis. First, it appears the Tribunal's reference to the lack of general international law requiring exhaustion of negotiation as a precondition to access international courts was part of the Tribunal's diligence in exploring provisions beyond the Convention that would oblige Saint Vincent and the Grenadines to engage in diplomatic negotiations. The Tribunal at no time suggested that general international law diminished the requirement of Article 283(1) to "exchange views." To the contrary, the Tribunal attempted to look to international law to enhance the requirements of Article 283(1), but ultimately saw no reason to do so.

Second, Spain attempts to convince the Tribunal to disregard its thorough and generous reading of Article 283(1) in favor finding the exhaustion of diplomatic negotiations as a precondition for a matter to be referred to the Tribunal. (Counter-Memorial of the Kingdom of Spain, Paragraph 56). It does so by analogizing two ICJ cases, the first of which is the *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination*. Spain notes that in the case the Court found that it had no jurisdiction because previous negotiations had not occurred pursuant Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter CERD) (Paragraphs 132-ff). This holding offers nothing new as it relates to the present case. The Tribunal's methodology is consistent with that of the ICJ. Had the Tribunal found

that an "exchange of views" did not occur it might have found that it lacked jurisdiction. It was satisfied, however, that an "exchange of views" had occurred and therefore held that it had *prima facie* jurisdiction. Of course, the Respondent's position would also further limit the scope of cases to be decided by this Tribunal, an institution that has had fewer than 20 cases brought before it since its establishment.

Spain also references the decision by the ICJ in the *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria* in support of the proposition that exhaustion of diplomatic negotiations constitutes a precondition for access to the Tribunal. (Counter-Memorial for the Kingdom of Spain, Paragraph 56). This is simply an incorrect reading of the case. While the *Nigeria* case raises the question of whether sufficient negotiations had taken place, with respect to Part XV of the Convention, prior to Cameroon bringing a claim before the Court, the ICJ declined to make any findings on the questions because the Court determined that the Convention was not implicated by the manner in which Cameroon submitted its claim to the Court. (Paragraph 109).

The Tribunal never suggested that the "exchange of views" requirement under Article 283(1) is not a precondition to accessing the Tribunal. The Tribunal, however, did not lend any meaning to the "exchange of views" that would warrant reading it as requiring an exhaustion of diplomatic negotiations.

(3) Both sides share the obligation of engaging in an "exchange of views." Spain was silent

In finding that an "exchange of views" occurred for the purposes of Article 283(1) of the Convention, the Tribunal, in its Order of 23 December 2010, noted in paragraph

58 that "the obligation to proceed expeditiously to an exchange of views" applies equally to both parties to the dispute." (*Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures,* Order of 8 October 2003, paragraph 38).

In its Counter-Memorial, Spain suggests that Saint Vincent and the Grenadines failed to engage in an "exchange of views" in accordance with the "function" of Article 283 (Part I, Chapter 3, II(1)(b)). To summarize, Spain argues that an exchange of views requires, "a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute." (Paragraph 64, *citing Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (ICJ Reports 2011 at paragraph 157)). Spain goes on to suggest that to do otherwise would "would be tantamount to imposing on the [Tribunal] the heavy burden of determining a dispute the contours of which the Parties have not determined." (Paragraph 62 (citing *Case Concerning the Elimination of all Forms of Racial Discrimination* (ICJ Reports 2011 at paragraph 160)).

Again Spain misinterprets (and ironically, in favor of Saint Vincent and the Grenadines, mis-cites) ICJ precedent. Paragraph 160 of the *Case Concerning Elimination of all Forms of Racial Discrimination* actually reads:

> ... ascertainment of whether negotiations, as distinct from mere protests or disputations, have taken place, and whether they have failed or become futile or deadlocked, are essentially questions of fact "for consideration in each case" (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 13). Notwithstanding this observation, the jurisprudence of the Court has outlined general criteria against which to ascertain whether negotiations have taken place. In this regard, *the Court has come to accept less formalism in what can be*

> *considered negotiations* and has recognized "diplomacy by conference or parliamentary diplomacy" (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa*), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346) (*emphasis added*).

Spain's quote regarding the threat of putting the Tribunal in a position where it would have to define the contours of a dispute is actually from paragraph 125 of the ICJ opinion. More importantly, it was merely recognized as an argument put forward by the Russian Federation but not a holding of the ICJ. Finally, Saint Vincent and the Grenadines would like to emphasize that its claims are based on very specific articles of the Convention and that the Applicant is in no way requesting that the Tribunal define the contours of the dispute.

Setting the function of the Article 283(1) requirement to "exchange views" aside, Spain overlooks one major fact in its Counter-Memorial: Spain was silent. Saint Vincent and the Grenadines submitted the *Note Verbale* notifying Spain that it objected to the continued detention of the ships, *M/V Louisa* and *Gemini III* and that it intended to avail itself of remedies under the Convention absent immediate release of the ships. Spain failed to respond. And local authorities failed to take appropriate action when contacted by registration officials in Geneva.

Furthermore, Saint Vincent and the Grenadines arranged to meet with Spanish representatives on four different occasions during this proceeding in hopes of achieving resolution. For some reason, Spain blithely referred to these attempts as extra judicial acts (Paragraph 119); nevertheless the ICJ has held that negotiations should be defined with less formality. *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p.

346). Indeed, there is nothing "extra-judicial" about two-party negotiations prior to or after the initiation of *judicial* proceedings. Nevertheless, the continued attempts of Saint Vincent and the Grenadines to negotiate with Spain can be described as nothing short of a genuine effort to find a resolution.

In conclusion, -Spain accuses Saint Vincent and the Grenadines of unilaterally ending any possibility of a diplomatic negotiation. However, it disregards the fact that Spain has failed to respond to the genuine attempts of Saint Vincent and the Grenadines' to engage in discussions with a view to resolving the dispute. (*Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (ICJ Reports 2011 at paragraph 157).

(4) An "exchange of views" does not rise to the level of "exhaustion of diplomatic negotiations," a threshold that need not be met to bring a claim before this Tribunal

Spain asserts that by filing this claim, Saint Vincent and the Grenadines unilaterally ended any possibility of a diplomatic solution. (Counter-Memorial, Paragraph 77). This, of course, is not true. The door to negotiate has always been open and Saint Vincent and the Grenadines has tried to engage Spain, but Spain continues its silence. Spain attempts to characterize the actions of Saint Vincent and the Grenadines' as unilaterally seizing this Tribunal, but the fact of the matter is that Spain has declined to entertain Saint Vincent and the Grenadines' attempts to negotiate.

As is frequently cited from the Tribunal's Order of 3 December 2001 in *The MOX Plant Case*, "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." (Paragraph 60). Saint Vincent and the Grenadines calls to the attention of the Tribunal that it considered that Ireland, as applicant, informed the United Kingdom of the dispute under the Convention and that an exchange of correspondence on the matter took place *up to submission of the dispute* to the Annex VII arbitral tribunal. (Paragraph 58).

Similarly, Saint Vincent and the Grenadines informed Spain of a dispute under the Convention. But beyond maintaining correspondence on the matter up to submission of the dispute to the Tribunal, Saint Vincent and the Grenadines, as well as the ships' owner, continued to reach out to Spain in an attempt to negotiate. Spain was silent prior to submission of this dispute and remains silent during the course of these proceedings to the invitations of Saint Vincent and the Grenadines and the owner seeking resolution.

V. EXHAUSTION OF LOCAL REMEDIES REQUIREMENT OF ARTICLE 29 OF THE CONVENTION IS NOT APPLICABLE

(1) Applicant's claims render Art. 295 inapplicable

In its Counter-Memorial, Spain argues that Saint Vincent and the Grenadines did not properly fulfill its obligation to exhaust local remedies in accordance with Article 295 of the Convention. Saint Vincent and the Grenadines maintains that exhaustion of local remedies is not required in the present case as elaborated by Judge Paik in his separate opinion to the Tribunal's 23 December 2010 Order:

> At this stage, I would simply like to point out that, with respect to the exhaustion of local remedies, the Applicant apparently claims that the breach of obligations by the Respondent under the relevant provisions of the Convention resulted in damage to what the Applicant perceives to be its own rights. It should be reminded that the Tribunal stated in the M/V "SAIGA" (No. 2) Case that the claims in respect of such damage are not

> subject to the rule that local remedies must be exhausted (M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports 1999, para. 98). (Separate Opinion of Judge Paik, paragraph 9.)

Spain argues that that the touchstone for determining whether Article 295 applies is whether there is a "jurisdictional connection" between the responsible State and the natural or juridical persons in respect of whom the applicant can make a claim. (paragraphs 112-14 (*citing M/V Saiga (No. 2)* Case, Merits, Judgment of 1 July 1999, paragraph 100)). This is incorrect. Prior to reaching the question of "jurisdictional connection" the Tribunal found that "the rule that local remedies must be exhausted is applicable when 'the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens ...'." (*M/V Saiga (No. 2)*, paragraph 98 (*citing* Article 22 of the Draft Articles on State Responsibility). The Tribunal went on to hold that the rights claimed by Saint Vincent and the Grenadines were to be described as direct violations of the rights of Saint Vincent and the Grenadines and that the damage to the persons involved in the operation of the ship arose from those violations. (Paragraphs 97-98).

The rights claimed by Saint Vincent and the Grenadines in the present case almost mirror those claimed in the *M/V Saiga (No. 2)* Case, namely the freedom of navigation and other internationally lawful uses of the sea. (Paragraph 97).

(2) If applicable, the requirements of Art. 295 have been satisfied after more than six (6) years

Spain argues that Saint Vincent and the Grenadines' claims can only be heard in a Spanish Court and that exhaustion of local remedies is compulsory when there is a pending proceeding (paragraph 111 and 120).

Spain also argues that the owner of the vessels has delayed the proceedings in Spain. Applicant would show the Tribunal that this argument cannot be considered seriously in view of the truly impressive, unjustified delays caused by the failure of the Spanish judicial system to move forward the pending proceeding.

Because Spain has highlighted this issue and attempted to excuse its remarkably slow criminal justice system by casting the ships' owner as responsible, a detailed analysis is appropriate.

1. On 15 November 2005, Spanish authorites opened an investigation into the activities conducted by the persons involved with the *Louisa* and its tender.

2. On 1 February 2006, Spanish authorities without notice to the flag state as required by Spanish law, boarded and searched the *Louisa*, quarantined it without ever giving notice to the owner and confiscated valuable property on board.

3. On 19 July 2007, sixteen (16) months later, the Magistrates Court No. 4 of Cadiz issued an order naming John B. Foster ("Foster"), the alleged owner of Sage Maritime Scientific Research, Inc. ("Sage") and others as subjects of its investigation into illegal activities. The Instructing Judge ordered a unit of the Spanish Guardia Civil to provide him the addresses in Spain of those listed in his order so that they could be called to give statements. As well as can be determined, the Guardia Civil never specifically responded. Yet, as early as November 2005, a report of the Guardia Civil had included the addresses in the United States of Sage (the owner, together with one of its affiliates) and Foster. The Instructing Judge, in accordance with Spanish law, could have initiated steps seeking to notify Foster to seek a statement from him but he never did. **[16 month delay caused by Spanish court]**

4. In October 2007, four (4) months after the Magistrate Court's order of 19 June 2007, even though neither Sage nor Foster ever had been served, representatives of Sage voluntarily met in Cadiz with the Fiscal (the Public Prosecutor assigned to the investigation), Angel M. Nunez Sanchez. The

Fiscal suggested that since notice never had been served, Sage's Spanish lawyer should file an appearance to facilitate communications. **[4 month delay caused by Spanish court]**

5. On 8 November 2007, Sage's Spanish lawyer filed a motion for leave to appear on behalf of Sage.

6. On 24 January 2008, ten (10) weeks later, the Instructing Judge denied the motion for leave to appear, claiming that the power of attorney granted by Sage authorizing its Spanish attorney to appear on its behalf had not been validly granted and that such a power of attorney could only be granted by its execution before a notary in Spain. The Instructing Judge either was not aware that both Spain and the United States were and are parties to the Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents or he purposely chose not to follow Spanish law. **[10 week delay caused by Spanish court]**

7. On 26 January 2008, two (2) days later, Sage's Spanish lawyer filed an appeal to reform the Instructing Judge's order that denied his appearance on behalf of Sage.

8. Seven (7) months later, the Instructing Judge issued an order dated 10 June 2008, granting Sage's Spanish lawyer leave to appear on behalf of Sage and ordering Foster to appear in Cadiz to give a statement. **[Spanish court delays decision on representation 7 months]**

9. Sage's Spanish lawyer then presented a motion on 10 July 2008, offering Foster's willingness to give his statement, in the United States, in accordance with the provisions of the Treaty on Mutual Legal Assistance in Criminal Matters between Spain and the United States registered by Spain on 23 August 1993 (Legal Assistance Treaty).

10. On 22 July 2008, one (1) month after Sage's motion offering to collaborate, the Instructing Judge denied Sage's motion stating that the Legal Assistance Treaty did not permit Foster to give his statement in the United States. The Instructing Judge, of course, was completely in error; statements regarding pending proceedings in Spain are frequently given in the United States pursuant to the provisions of the Legal Assistance Treaty. **[Spanish court's ignorance of international treaty causes new delays.]**

11. In the separate order also dated 22 July 2008 the Instructing Judge ordered that a letter dated 3 July 2008 from a unit of the Guardia Civil be entered into the record and that Sage be required to provide a sailor to perform routine maintenance. This order was absurd since it was entered two and one-half years after the quarantine of the *Louisa* and there were no crewmen who could be appointed. More importantly, the Instructing Judge did not abide by the recommendation contained in the letter that he admitted to the record, which stated "... you should be notified that, on similar occasions in the case of other Magistrate's Courts, in which ships have been found arrested by the

Judicial Authority, this latter [Judicial Authority] has designated a sailor from the crew to carry out the work of maintenance of the same, since ..., the ship requires a minimum of maintenance."

12. On 31 July 2008, Sage's Spanish lawyer filed an appeal seeking modification of the Instructing Judge's order of 22 July 2008 referenced in 10 above calling to the attention of the Instructing Judge that the Legal Assistance Treaty did permit statements to be given in a declarant's home country. This was an appeal of right and cannot be construed to be an attempt to delay the proceedings. Foster had the right to give his statement in the United States and had no obligation to waive that right.

13. On 16 March 2009, almost nine (9) months later, the Instructing Judge denied the 31 July 2008 appeal. This denial was not communicated to Foster for another month, *i.e.*, until April 2009. **[10 month delay of Spanish court.]**

14. On 14 April 2009, Sage's lawyer filed an appeal to the Audiencia Provincial of Cadiz of the Instructing Judge's denial of Foster's right to give his statement in the United States.

15. On 13 October 2009, Six (6) months later, Foster was notified of a ruling of the Audiencia Provincial in which the Audiencia Provincial ruled that unless Foster was personally served, he could not be required to give his testimony in Spain. **[6 months required for court of appeals to correct error of lower court.]**

16. Then on 1 March 2010, the Instructing Judge ordered that the "Ordinario" Proceeding then pending be converted into a "Sumario" Proceeding. Notwithstanding the opinion of the Audiencia Provincial that Foster could not be compelled to testify unless personally served, the Instructing Judge again ordered Foster to appear and give testimony in Spain. This order was notified to Foster's legal counsel on 16 March 2010.

17. Sage's Spanish legal counsel was required to file another appeal to the Audiencia Provincial on 21 March 2010 appealing the Instructing Judge's order that Foster give a statement in Spain. **[Spanish court continues to ignore international treaty causing new, lengthy delays.]**

18. On 3 June 2010, More than two (2) months later, Foster's legal counsel was notified of an opinion of the Audiencia Provincial issued on 21 May 2010 in which it stated that Foster could only be served in accordance with the provisions of the Treaty of Mutual Assistance and could not be compelled to appear by service on his legal counsel.

19. During the proceedings in Hamburg in December 2010 the Agent for Spain delivered to the Tribunal an order of the Magistrates Court purportedly dated 29 July 2010 in which Sage was ordered to declare "... what interest it has with respect to the maintenance of the ship, the designation of the depositary or the auction sale of same." This document had never been notified to Sage or any other of the parties being investigated in the proceedings in Cádiz. The

document was only notified to Sage's legal counsel on 31 January 2011. Moreover, Spain did not furnish the Tribunal a report from the Port Authority relating to the poor condition of the *Louisa*. The report was attached to the Order in the file in Cadiz! This action was critical since it was not known to Applicant, nor the Tribunal, in its consideration of Provisional Measures. On 13 December 2010, Sage's legal counsel filed a motion objecting to the delivery of notice of an order to a party that was not involved in the proceedings in Cádiz (the agent for Spain). **[Spanish court issues secret order for the convenience of Spanish delegation and releases it to the public 6 months later.]**

20. Also during the proceedings in Hamburg the agent of Spain presented to the Tribunal a document headed "Auto de Procesamiento" (a document which, if certain other formalities were satisfied but only if they were, could be viewed as an "indictment". This document was dated 27 October 2010 but it had never been notified to any of the parties in the proceedings in Cádiz and, in fact, was never disclosed to Sage's legal counsel until the day of the Hamburg proceedings. This document obviously was delivered by the agent for Spain at the December 2010 hearing in Hamburg to create doubt in the minds of the Justices of the Tribunal that the Tribunal should accept jurisdiction in view of ongoing criminal proceeding in Spain. This document only was officially notified to Sage's legal counsel on 13 December 2010. On that same day, Sage's legal counsel filed a motion objecting to the delivery of notice of an order to a party that was not involved in Cádiz (the agent for Spain). **[Another secret order issued for the convenience of the Spanish delegation in Hamburg]**

21. On 17 December 2010, Sage's lawyer filed an appeal of the Auto de Procesamiento.

22. Almost one (1) year later, on 31 October 2011, the Instructing Judge issued an order denying Sage's appeal of 17 December 2010. This denial was notified to Sage´s legal counsel on 10 November 2011. **[Spanish court delays action for almost 1 year]**

23. After a visit to Cádiz in the month of March 2011, the Instructing Judge who was named to replace the previous Instructing Judge, agreed that Foster could give his statement in the United States. Foster gave his statement via Skype transmission at the office of the Consulate General of Spain, in Houston, Texas on 21 July 2011. It should be noted that in order to facilitate the giving of the statement, Sage's legal counsel traveled from Madrid to Cadiz, a distance of more than 650 kilometers so that his computer could be used to effect the Skype communication from Cádiz as the Magistrates Court did not have facilities to permit the reception of Foster's statement.

24. Most recently, the Magistrate's Court notified Sage's legal counsel of a report prepared by the Port Authority of the Port of Cádiz. The order purportedly was drafted on 22 July 2011 but was not delivered to Sage's legal counsel until 20 October 2011.

For all of these reasons, Respondent's argument accusing other parties of being responsible for the delays in Cadiz should be rejected.

VI. NATIONALITY OF CLAIM

In its Counter-Memorial, Spain calls into question the nationality of the claim through strained arguments that attempt to separate the *Louisa* from its crew, tender, and owners. (Counter-Memorial, Paragraphs 83-107)

This Tribunal found in its 6 August 2007 Final Judgment in the *Tomimaru* Case the following: "The juridical link between a State and a ship that is entitled to fly its flag produces a network of mutual rights and obligations, as indicated in article 94 of the Convention." (Paragraph 70).

This Tribunal also found in its Judgment on the Merits of the *M/V "Saiga" (No. 2)* case the following:

> The provisions referred to in the preceding paragraph [Articles 94, 106, 110, 111, and 217] indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant. (Paragraph 106).

Spain attempts to negate this Tribunal's clear precedent by discussing the need for a "genuine link" between the flag state, the ship, its crew, its owners, and tender and vaguely alluding to problems faced by international tribunals in matters dealing with parties comprised of entities of various nationalities. (Counter-Memorial, Paragraph 91). The Tribunal, however, has come to the opposite conclusion:

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> The Tribunal must also call attention to an aspect of the matter which is not without significance in this case. This relates to two basic characteristics of modern maritime transport: the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship. A container vessel carries a large number of containers, and the persons with interests in them may be of many different nationalities. This may also be true in relation to cargo on board a break-bulk carrier. Any of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue.
>
> The Tribunal is, therefore, unable to accept Guinea's contention that Saint Vincent and the Grenadines is not entitled to present claims for damages in respect of natural and juridical persons who are not nationals of Saint Vincent and the Grenadines. (Judgment on the Merits, *M/V "Saiga" (No. 2)*, Paragraph 107-08).

Saint Vincent and the Grenadines agrees with the Tribunal. It would be unduly burdensome if each person sustaining damage were required to look for protection from their national State. Such a procedure would negate the very reason for the creation of an international tribunal such as this. Spain's contention would result in ludicrous situations such as a case involving a multi-national crew whose members were wrongly imprisoned. Would the crewmen be relegated to filing judicial actions in their multiple States?

Furthermore, to hold in favor of Spain on this issue would drastically negate the significance of the obligations, well grounded in international law, ascribed to the link between State and ship as emphasized by this Tribunal. This, of course, is a critical question and a holding in favor of Spain would vitiate this Court's authority and permanently limit its international stature.

Finally, after stating that it would not call into question the legitimacy of the *Louisa* flying the flag of Saint Vincent and the Grenadines, Spain argues that Saint Vincent and the Grenadines had not complied with an obligation imposed by Article 94. (Paragraph 94). Spain develops no specific facts to support this assertion, and merely refers the Tribunal to the general facts of the case. (Paragraph 94). In response, Saint Vincent and the Grenadines would like to refer the Tribunal to its Judgment of 20 April 2001 in the *Grand Prince Case*:

> In the *M/V "SAIGA" (No. 2)* Case, the Tribunal considered that the conduct of a flag State, 'at all times material to the dispute,' was an important consideration in determining the nationality or registration of a ship (*see* Judgment of 1 July 1999, paragraph 68). The Tribunal finds that the Applicant did not act 'at all times material to the dispute' on the basis that the Grand Prince was a vessel of its nationality. To the contrary, on 4 January 2001, Belize communicated to France, by means of a *Note Verbale* from the Ministry of Foreign Affairs, its decision to de-register the Grand Prince with effect from 4 January 2001.

This confirms that any claim as to the failure of a flag State to fulfill its obligation as the flag State must be supported by facts demonstrating affirmative steps taken by the flag State to disavow a vessel of its flag, a showing Spain has come nowhere near satisfying.

VII. REPARATIONS ARE REQUIRED BASED ON VIOLATIONS OF THE CONVENTION

(1) The Saint Vincent and the Grenadines declaration pursuant to Article 287 does not limit the scope of the dispute

In its Counter-Memorial, Spain attempts to limit the scope of this dispute to claims under Articles 28, 73, 97, 220, and 226 of the Convention. (Paragraph 135). Spain references Saint Vincent and the Grenadines' 22 November 2010 declaration choosing the Tribunal as a means of settling disputes concerning the arrest or

detention of its vessels as support for this position. (Paragraph 132). In reaching this conclusion, Spain attempts to usurp a formal declaration of Saint Vincent and the Grenadines with one of its own construction.

States acceding to the Convention are well aware of their right to not accept specific procedures provided for in the Convention. Moreover, Article 298 of the Convention outlines specific categories of disputes States may exclude from the procedures under the Convention.

If a State intends to exclude specific forms of dispute from the procedures prescribed in the Convention it will do so by referencing the specific Articles that implicate the disputes to be excluded. For example, in its 19 July 2002 declaration, Spain rejected the procedures provided for in Part XV, section 2 of the Convention with respect to settlement of disputes concerning the interpretation or application of Articles 15, 74, and 83.

Saint Vincent and the Grenadines has made no such declarations. Saint Vincent and the Grenadines formally accepts the Tribunal as a means of settlement of disputes concerning the arrest or detention of its vessels; moreover, it never excluded itself from disputes concerning the interpretation of specific Articles. Spain's attempt to read Saint Vincent and the Grenadines' declaration as limiting the jurisdiction of the Tribunal to disputes concerning articles in the Convention that contain the words "arrest," or "detention," (*i.e.*, Articles 28, 73, 97, and 226 as suggested by Spain) replaces a formal declaration of Saint Vincent and the Grenadines with one more to Spain's liking.

(2) Breaches of the Convention

(a) Article 73

Saint Vincent and the Grenadines reiterates that under Article 73 of the Convention, a coastal State is obligated to take the following actions with respect to arrested vessels, (1) promptly release the vessels and their crews upon posting of reasonable bond, and in cases of arrest or detention (2) promptly notify the flag State of the action taken.

While Article 73 is located in Part V dealing with operation in the Exclusive Economic Zone, Saint Vincent and the Grenadines would highlight the intent of the article. It does not exist to supplant local laws and procedures, but it serves to protect the basic rights of foreign vessels and their crews. The *Louisa* and its tender have been detained for more than six years without Respondent setting a bond or other security. Spain failed to notify the Flag State of the arrest of the *Louisa's* crewmen and failed to notify the flag state prior to, or even after, the action was taken.

As discussed earlier in this Reply, the Respondent takes one basic position. The Tribunal should not interfere with its criminal justice system because even the Spanish central government is unable to interfere with the (interminable) process. Saint Vincent and the Grenadines should be patient. The "wheels of justice" turn slowly in Spain.

Yet, on 9 February 2012, the Spanish Supreme Court decided it indeed had the power to discipline a "judge of instruction" when it convicted Judge Baltasar Garzon by a vote of 7-0. *See New York Times*, 10 Feb. 2012.

(b) Article 87

Article 87 of the convention provides all States with freedom to navigate the high seas. This freedom means very little if a port State is permitted to detain a foreign vessel under a thinly alleged violation of the port State's laws involving the vessel; particularly when it takes the port State sixteen (16) months to determine that the ship owner that he is a subject of an investigation and nearly five (5) years to formally render a charge.

Spain argues that Saint Vincent and the Grenadines' reading of Article 87 would render vessels immune from criminal prosecution. (Paragraph 151). This is not true. Saint Vincent and the Grenadines would not object to a legal arrest of the *Louisa* and its tender, nor does it suggest foreign vessels be permitted to use freedom of the high seas under Article 87 to escape criminal prosecution. However, Saint Vincent and the Grenadines objects to the manner in which Respondent arrested and detained the *Louisa* and its tender. These were illegal arrests. And these arrests abrogated the freedom of a Saint Vincent and the Grenadines vessel to navigate the high seas.

Finally, Spain's argument that the *Louisa* cannot navigate because it does not fulfill international requirements for seaworthiness and therefore should be denied rights under Article 87 is disingenuous. First, the *Louisa* deteriorated into its current unseaworthy state as a direct result of the Spain's actions. Second, Article 87 does not condition freedom to the high seas on meeting international seaworthiness requirements.

(c) Articles 226 and 227

Articles 226 and 227 are indeed located in Section 7 or 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. 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.

With respect to Article 226, a coastal or port State would be able to circumvent the reasonable protections offered to foreign vessels under Article 226 of the Convention by couching any investigation in a thin allegation of domestic law violation.

With respect to Article 227, Respondent maintains, "permits are granted under the discretion – not the discrimination – of the coastal State." (Paragraph 158). While this is true, Spain's actions have demonstrated a degree of hostility to the foreign interests represented in this dispute. Spain has continued to attempt to discredit the permits used by the *Louisa* and its operators to conduct exploration activities in Spanish waters. In fact, the degree of discrimination displayed by Respondent against the flag State, the shipowner, and the shipowner's State is unprecedented in the annuls of the Tribunal's prior cases.

(d) Article 245

Although Respondent challenges the Tribunal's "subject matter jurisdiction" over this dispute, the Counter-Memorial readily admits the applicability of Article 245 and other articles to this case. Article 245 states that Coastal States have the sovereign

right to regulate, authorize and conduct marine scientific research in their territorial sea. (Convention, Article 245). Spain attempts to justify its conduct under this Article by arguing that it had the exclusive right to withdraw or revoke the permit issued to Sage for its scientific research. (Counter-Memorial, Paragraphs 163-64). Yet, Spain also acknowledges that it must observe other States' rights to use the territorial sea under Article 19(2)(j) of the Convention for innocent passage. (Counter-Memorial, Paragraph 163).

Even though Spain may have the right to regulate scientific research in its territorial sea, it is not allowed to do so with impunity to other applicable articles in the Convention or international law. The seizure and continued detention of Applicant's vessels and Respondent's asserted justification for taking such actions go to the heart of the merits in this case. The undisputed fact remains that Applicant was conducting scientific research in Spain's territorial sea pursuant to validly authorized permits. Although Spain claims that it did not detain the *Louisa* for violating the permits (Paragraph 165), this Tribunal is to make that determination on the merits, including the propriety of Spain's decision to confiscate the scientific equipment and the use Respondent has made of that equipment and information for its own benefit.

Moreover, under no circumstances does Article 245 absolve Spain from liability and its responsibility to observe other rights of the Applicant under the Convention, Spain's own law, and other international law. Thus, Spain's argument that the Tribunal lacks jurisdiction under Article 245 should be rejected.

(e) Article 303 and 304

Finally, Spain argues that Applicant has not adequately alleged a violation of Article 303 of the Convention. (Counter-Memorial, Paragraphs 166-67). The opening Memorial of Saint Vincent and the Grenadines references both Articles 303 and 304 of the Convention. (Memorial, Paragraphs 3, 86). The reference to Article 303 in Paragraph 86 of the Memorial appears to be a typographical error in that Saint Vincent and the Grenadines is not claiming a substantive right under Article 303. Rather, this part of the Memorial should have referenced Article 304 which provides that Respondent's liability and responsibility to pay reparations to Applicant is not exclusively determined by provisions in the Convention, but is also found under jurisprudence of international law.

VIII. CONCLUSION

The Kingdom of Spain's disdain for the process of the Tribunal should not be rewarded. Its approach has been to belittle and heap scorn upon Saint Vincent and the Grenadines in its efforts to achieve justice here, then to supply the Tribunal with contrived documents and continuously claim the Tribunal lacks jurisdiction. In Spain's view, the Tribunal should only consider fishing boats and boundary disputes; certainly it should never punish lawlessness committed under the banner of "local criminal investigation."

Spain's view of the role of this Tribunal is too narrow. It is designed to provide cover for lawlessness. It depends on an unwillingness of the majority to enforce what we strongly believe is the mandate of the Convention.

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For all of these reasons, Saint Vincent and the Grenadines urges the Tribunal to accept jurisdiction, to find violations of Articles 73, 87, 226, 227, 245, and 304, and to award damages, legal fees, and costs as requested.

Respectfully submitted,

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