INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2012

Public sitting

held on Monday, 8 October 2012, at 10 a.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

THE M/V "LOUISA" CASE

(Saint Vincent and the Grenadines v. *Kingdom of Spain)*

Verbatim Record

Present:	President	Shunji Yanai
	Vice-President	Albert J. Hoffmann
	Judges	Vicente Marotta Rangel
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tafsir Malick Ndiaye
		José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Helmut Tuerk
		James L. Kateka
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
		Elsa Kelly
		David Attard
		Markiyan Kulyk
	Registrar	Philippe Gautier

Saint Vincent and the Grenadines is represented by:

Mr S. Cass Weiland, Esq., Patton Boggs LLP, Dallas, Texas, USA,

as Co-Agent, Counsel and Advocate;

and

Mr Robert A. Hawkins, Esq., Patton Boggs LLP, Dallas, Texas, USA,
Mr William H. Weiland, Esq., Houston, Texas, USA,

as Counsel and Advocates;

Mr Myron H. Nordquist, Esq., Center for Oceans Law and Policy, University of Virginia, School of Law, Charlottesville, Virginia, USA,

as Advocate;

Ms Dharshini Bandara, Esq., Fleet Hamburg LLP, Hamburg, Germany,

as Counsel.

The Kingdom of Spain is represented by:

Ms Concepción Escobar Hernández, Professor, International Law Department, Universidad Nacional de Educación a Distancia (UNED), Spain,

as Agent, Counsel and Advocate;

and

Mr José Martín y Pérez de Nanclares, Professor, Head of the International Law Division, Ministry of Foreign Affairs and Cooperation, International Law Department, Universidad de Salamanca, Spain,
Mr Mariano J. Aznar Gómez, Professor, International Law Department, University “Jaume I”, Castellón, Spain,
Mr Carlos Jiménez Piernas, Professor, International Law Department, Universidad de Alcalá de Henares, Spain,

as Counsel and Advocates;

Ms María del Rosario Ojinaga Ruiz, Associate Professor, International Law Department, Universidad de Cantabria, Spain,
Mr José Lorenzo Outón, Legal Adviser, Ministry of Foreign Affairs and Cooperation,

as Counsel;

Mr Diego Vázquez Teijeira, Technical Counsel at the Directorate-General of Energy and Mining Policy, Ministry of Industry, Energy and Tourism,

as Adviser.

THE PRESIDENT: *(Interpretation from French)***:** Good morning, ladies and gentlemen. I hope that you had a pleasant weekend, or at least, that part of the weekend that remained. Today, the Kingdom of Spain will be beginning its first round of pleadings in the *M/V Louisa* case. Before we start, I would like to inform the parties that Spain used three hours and 23 minutes of speaking time last week in its cross-examination of the witnesses and experts presented by Saint Vincent and the Grenadines. This speaking time is therefore deducted from Spain's allocated time and can be used by Saint Vincent and the Grenadines when they come to cross-examine the experts and witnesses presented by Spain. Now I will invite Ms Escobar Hernández, the Agent of Spain, to take the floor.

MS ESCOBAR HERNÁNDEZ *(Interpretation from French)***:** Good morning, Mr President. Good morning, Judges. I too hope that you had a good weekend and I would like to start by introducing the Spanish position. Mr President, Judges, as I said when introducing the Spanish delegation on 4 October, it is an honour and a privilege for me to be once again before you representing Spain in this case. All the way through the proceedings, which have been almost two years-long, Spain has always done its utmost to cooperate with your Tribunal, always bearing in mind the extremely important role which you have, that is, settling disputes that arise within the framework of the United Nations Convention on the Law of the Sea. I can assure you that it is also with this in mind that I appear before you today, because respect for the law and for international legal obligations is one of the hallmarks of Spanish foreign policy. As a result, an essential aspect of our international legal policy is also to support and cooperate with international bodies created to settle disputes peacefully, among which the International Tribunal for the Law of the Sea occupies a central position.

It is because your Tribunal has such an elevated position that in 2002 Spain recognized your jurisdiction in the dispute settlement system as set out in the United Nations Convention on the Law of the Sea by means of a unilateral declaration in accordance with article 287 of the Convention. Our declaration accepting the Tribunal's jurisdiction was made even though at the time there were no outstanding cases which would have had any specific direct interest for Spain, where we would have wished to bring proceedings before you. Furthermore, our declaration recognizes that your Tribunal has a very broad jurisdiction, the only restriction being disputes regarding the interpretation and application of articles 15, 74 and 83, regarding maritime border delimitations or any other dispute regarding historic bays and titles. In any case, I would like to draw your attention to the fact that we recognize your Tribunal as having a much broader jurisdiction than is available to the International Court of Justice. The fact that we have recognized the Tribunal's jurisdiction goes to show Spain's absolute confidence in the dispute settlement system established by the United Nations Convention on the Law of the Sea, and in particular in your Tribunal.

Having recognized the Tribunal's jurisdiction, Spain has never found it necessary to bring a case before you. However, since Saint Vincent and the Grenadines has done so, we had no hesitation whatsoever in participating in the dispute settlement system which we had willingly accepted on 19 July 2002. We are before you to respect an international legal obligation which Spain has already accepted. It is an honour for us to be before you, even though we are fully convinced that the conditions set out by

the Convention governing the exercise of your jurisdiction have not been respected by the Applicant, and that the provisions of the Convention on which Saint Vincent and the Grenadines has built its arguments have no connection with the facts relating to the detention of *M/V Louisa* in Puerto de Santa Maria in Cádiz.

Despite the firm conviction which I have just expressed, Spain has always absolutely cooperated with your Tribunal, quite simply because it is our duty to do so. This is true also because we have every confidence in your role as the body entitled to rule on questions of the law of the sea, and thus to guarantee the rights and interests recognized by the Convention on the Law of the Sea for all States Parties, be they large or small, whether they have general interests in the law of the sea, or specific interests regarding shipping, or perhaps even the system for the recognition of flags. Every State Party to the Convention has the same rights and the same responsibilities and obligations, and you, Judges, you, Mr President, you are one of the guarantees of these rights and obligations, and also the guarantee of the operation of an essential part of the Convention, that is to say, the dispute settlement system.

Mr President, I have no intention at this stage of going back to each and every argument already put forward by the Parties in the documents submitted to you during the written proceedings. The written submissions which underpin the proceedings are already available to you and you are familiar with their content. what we wish to do in the oral proceedings is to give you a clear, brief and practical overview of Spain's position regarding the elements on which the two Parties continue to disagree, and also to present to you opinions from experts and witnesses whose expertise could help shed light on the dispute which is taking place before you in these weeks.

In order to do this, however, we face quite some problems: firstly, because it is not easy, on the basis of the documents submitted by Saint Vincent and the Grenadines, to identify the subject-matter of their dispute with Spain. This difficulty has been compounded by the statements made by the Applicant's representatives during last week's hearings. Secondly, we have difficulties because during the written proceedings the Applicant created a large amount of confusion regarding the actual nature of the proceedings which it has initiated before your Tribunal. Thirdly, because almost all the aspects involved, and the subjects raised by the two Parties, continue to be very much disputed. There is no agreement on the jurisdiction of the Tribunal, there is no agreement on the provisions of the UN Convention on the Law of the Sea which apply in this particular case, and there is no agreement on the facts and the interpretation of the facts that are alleged by the Parties. Fourthly, because during the written proceedings and at the hearings, the Applicant has introduced elements creating constant confusion between the criminal proceedings before the national court, the *Juzgado de Instrucción No. 4* in Spain, the Magistrate Judge of the Criminal Court, and the present proceedings, which fall within the jurisdiction of your Tribunal. Totally different proceedings, which are intergovernmental and relate to laws, obligations and responsibilities of a State, not of an individual, and which must be based on international law.

And now, we have faced a fresh difficulty arising from the very surprising fact that Saint Vincent and the Grenadines have tried to change the case which has been

before you since 2010 during the hearings. Bearing in mind what we have been hearing in the last week, Mr President, may I say that Spain has the impression that it is suddenly dealing with a different case from the one in which we participated in the proceedings on Provisional Measures, and on the basis of which we presented our written submissions in response to the written submissions of the Applicant. It is not just that the arguments now put forward by Saint Vincent and the Grenadines are new and different from the ones set out in its written submissions. No, Mr President, the problem is that from what we have heard in the past week, in particular the statements made by Ms Forde, Co-Agent of the Applicant, and Professor Nordquist, the Applicant's Advocate, but also by some witnesses and experts, I must say, with the greatest respect to your Tribunal, that Spain has the impression that we have changed jurisdiction and that we have been transported by the Applicant to a tribunal specialising in human rights.

Of course, Spain has no objection to being called before an international human rights tribunal. Indeed, we have willingly accepted the unlimited jurisdiction of the European Court of Human Rights and the jurisdiction of a number of other supervisory bodies established within the framework of the international system of human rights. I do not know whether the same applies to the Applicant but that is not for me to say.

However, the problem is not that we find ourselves before a human rights tribunal, Mr President. No, we are surprised because, in a completely unexpected way, the Applicant's statements have transported us from the city of Hamburg to the city of Strasbourg, without needing to get on a plane. Allow me to make this statement, with, of course, the greatest respect for your Tribunal and bearing in mind that it is for you to decide on your competence and jurisdiction, and that we have every confidence in the way in which you will perform your judicial role.

Bearing in mind the ideas I have just outlined, Mr President, I would like to dedicate the first part of my oral pleading to three main sections. Firstly, I would like briefly to summarise the facts underpinning the case brought by the Applicant, because we continue to believe that there is a degree of confusion regarding the facts themselves. Secondly, I would like to show you how the Spanish delegation intends to present its position to you and how we intend to organize our presentation. Thirdly, my intention is to finish the first oral pleading by looking at three key, foundational subjects, to which Spain wishes to draw your attention before we turn to more specific issues in the course of our pleadings. That is to say, firstly, identifying the subject-matter of the dispute in this case between Saint Vincent and the Grenadines and Spain; secondly, determining the nature of the current proceedings; and thirdly, the relationship, if one exists, between the Spanish criminal proceedings and the international proceedings before the International Tribunal for the Law of the Sea.

To start off with the facts, Mr President, I have no intention of repeating a long list of events with which your Tribunal is familiar but, bearing in mind that there is a difference in the interpretation of the facts, and in the light of last week's hearings, I would like to give you a quick run-through the facts which Spain considers relevant to the present case. Let me begin on 20 August 2004. The *Louisa* arrives in Spain under the Saint Vincent and the Grenadines flag. The *Louisa* is owned by a company

registered in the United States, Sage, whose capital would also appear to be American. According to the statement by the Applicant, which claims diplomatic protection for the vessel, the *Louisa* arrives in Spain intending to carry out marine research relating to exploration for hydrocarbons, which it appeared at the time, on the information available, might be present in the Bay of Cádiz and the Gulf of Cádiz. Sage claims that it held a permit from the competent Spanish authorities and this authorization, as it is called, was granted by the Directorate-General of Coasts, part of the Ministry of the Environment. It covered carrying out a cartographic study of the seabed and obtaining samples from the seabed in order to assess environmental impact. The authorization was valid for several zones, including one zone in the Bay of Cádiz and another in the Gulf of Cádiz. These two zones are in the Spanish internal waters and territorial sea.

Sage's representative on board the *Louisa* was Mr Mario Avella, who is not a specialist in the field of hydrocarbons. The ship's master and the crew also did not seem to have any particular connection either with scientific research or exploration or extraction of hydrocarbons. Saint Vincent and the Grenadines have produced no evidence of the presence on the boat of scientists specialising in that field of activity. After arriving in Spain, the *Louisa* berthed in Puerto de Santa Maria on 29 October 2004 with no apparent intention of putting out to sea again. The reasons for voluntarily docking the boat were unknown at the time, and it was only upon the application made to this Tribunal by Saint Vincent and the Grenadines that it was explained to us that the boat did not meet the necessary conditions for the proposed activity, in particular because of its volume, and for this reason Sage was supposed to have acquired another vessel, the *Gemini III*, a smaller boat, which was to assist the *Louisa* in confirming data which Sage already held before chartering the *Louisa*, using, in particular, divers to identify gas bubbles and metals. After the expiry of the validity of the permit granted by the Spanish authorities, and the completion of this supposed work on hydrocarbons in May 2005, the *Louisa* remained docked in the port.

On the basis of a criminal investigation by the competent security authorities (the Guardia Civil), the Spanish judicial authorities reached the conclusion that there was reason to suspect criminal acts against the Spanish submarine cultural heritage and that the *Louisa* was serving as a base for those criminal activities. Consequently, the Magistrate Judge of Criminal Court No. 4 in Cádiz issued an order to board and search the *Louisa* on 1 February 2006. At the same time, the court also issued a number of enter and search orders for the *Gemini III* and for the homes of a number of individuals who are deemed to have taken part in criminal activities. When the Spanish authorities arrived at the *Louisa* to enforce the order, the master had departed, and the representative of the ship owner was not on the boat either. You will remember the facts that were referred to last week.

On 15 March 2006 Spain communicated to the authorities of Saint Vincent and the Grenadines the fact that the *Louisa* had been subject to an entry and search procedure for all necessary purposes. This was done through diplomatic channels by means of a *note verbale* from the Spanish Embassy in Kingstown to the Ministry of Foreign Affairs and Trade of the Applicant. This *note verbale* was sent at the instruction of the Magistrate Judge of Criminal Court No. 4 in Cádiz and through

appropriate diplomatic channels, in other words the Spanish Embassy responsible for bilateral diplomatic relations with Saint Vincent and the Grenadines at that time.

During the search of the boat, the Guardia Civil, the judicial police in other words, found a number of archaeological artefacts and instruments such as a decompression chamber and a magnetometer, and the investigators also found a number of weapons in a closed locker. Some of those weapons fall under categories which are classified under Spanish legislation as weapons of war. It should be pointed out that these weapons had not been declared administratively or otherwise when the *Louisa* arrived at the Spanish port.

THE PRESIDENT *(Interpretation from French)***:** I am very sorry to interrupt, Ms Escobar Hernández. Could you speak a little slower to facilitate the work of the interpreters?

MS ESCOBAR HERNÁNDEZ *(Interpretation from French)***:** Mr President. I do apologize to the Tribunal and to the interpreters and I shall endeavour to speak slowly.

As I was saying, during the investigation, the Guardia Civil, the judicial police in this case, detained two members of the crew who were on board, and Ms Alba Jennifer Avella, who appeared as a witness before this Tribunal last week. Mario Avella, who you also heard give his witness statement last week, was detained in Lisbon on the basis of a European arrest warrant when he tried to leave Portugal and he was brought before the competent Spanish court on 19 May 2006. Other persons were also held in connection with the same investigation. On the basis of his jurisdiction, the Magistrate Judge of Criminal Court No. 4 in Cádiz opened *Diligencias preparatorias*, in other words a preliminary procedure, and he carried out investigations between 2006 and 2010, and on 1 March 2010 issued an order to establish a *Procedimento sumario* – this is the criminal procedure with the most guarantees which exists in Spain. On 27 October 2010 he then ordered an *Auto de Procesamiento* (indictment), which was communicated to all the interested parties in December 2010. They appealed against this in January 2011 and the proceedings remain *sub judice*.

The criminal proceedings were full of procedural difficulties and problems, due very largely to the activity of the persons being investigated, and we shall return to this later on, but I can state that the decisions made by the Spanish judicial authorities were neither arbitrary nor unreasonable in view of the circumstances, and that there is no denial of justice. Ever since its detention in January 2006 the *Louisa* has remained at the dock in the commercial port of Puerto de Santa Maria under the supervision of the Spanish authorities. Throughout the criminal proceedings in Spain, the Spanish administrative and judiciary authorities have expressed their concerns regarding the *Louisa*, the fact that it was remaining berthed for such a long time at Puerto de Santa Maria, the condition of the boat and the resulting costs. The authorities took the appropriate measures to ensure that the boat would be maintained under acceptable conditions in terms of its safety and the protection of the marine environment.

Sage's lawyers and representatives visited the boat on a number of occasions with the authorization of the competent court, and at least once without, while the boat was detained. However, neither the ship owner nor its legal representatives ever applied to the court for the return of the *Louisa*, nor did they respond to the request from the court to appoint a trusted person to look after the maintenance of the boat. It was only in 2011, after the Provisional Measures stage of the present proceedings before the International Tribunal for the Law of the Sea, that the owner's lawyers declined such a request. Following this negative response, on 12 July 2011 the Magistrate Judge appointed a custodian who was to maintain the vessel and report to the judge at the appropriate time.

In conclusion, could I recall here that all of the offences relevant to the detention of the *Louisa* took place in a maritime zone under Spanish sovereignty, in its internal waters and its territorial sea. In addition, the *Louisa* was no longer operating at the time. On the contrary, the *Louisa* had been voluntarily berthed at a Spanish commercial port for a long time, more than a year.

In view of the facts that I have just summarized, Spain considers that, contrary to the statements made by the Applicant, there has been no breach of the UN Convention on the Law of the Sea that could be attributed to Spain. The detention of the *Louisa* is simply the exercise of Spain's sovereign right to exercise its criminal jurisdiction in accordance with domestic and international law. I should also like to draw your attention to the fact that over these years and until November 2010, the Applicant, Saint Vincent and the Grenadines, has remained silent.

Mr President, I will now move on to a presentation of the structure of Spain's position. As we stated in our Counter-Memorial and Reply, Spain's view is that this honourable Tribunal does not have jurisdiction in this case and that the application by Saint Vincent and the Grenadines must be declared inadmissible. It is not our intention to repeat the arguments already put forward in the written submissions, but we will briefly present the most salient points of the arguments contained in our pleadings. These will be presented to you today by my colleague Professor Aznar and by me.

In addition, and as a principal argument, Spain considers that your Tribunal does not have jurisdiction *ratione materiae* because the substantive articles upon which the Applicant has based its case do not apply to this case. My colleague Professor Jiménez Piernas will be addressing that subject. Professor Jiménez Piernas will also address other matters pertaining to the United Nations Convention on the Law of the Sea that were raised by the Applicant, and in particular a number of questions pertaining to article 300. Thirdly, and in the alternative, we shall be addressing the damages claimed by the Applicant's representatives. Professor Jiménez Piernas will also address that part of our statement, with the assistance of Professor Aznar.

To conclude, Spain's intention is to provide a response to each and every one of the new arguments made by the Applicant during the hearings – in particular those concerning so-called violations of human rights and a denial of justice. I myself shall plead on this subject, and on other considerations pertaining to article 300. Additionally, it is our intention to call four experts whose names have been given to

you and who will talk about the Spanish legal and judicial system, about hydrocarbon exploration, and about matters relating to submarine cultural heritage.

Could I now move to the substantive part, in other words comments on the three core questions to which I have referred as structural in nature?

The existence, subject-matter and scope of the alleged dispute

Let me start with a series of comments on a subject that I consider essential to the present case, namely the existence of a dispute, its subject-matter (if the dispute exists) and the scope thereof. All these subjects are of great importance if you consider that, according to the Convention, the Tribunal has jurisdiction to rule on a dispute which, in any case, must relate to the application or interpretation of the Convention, articles 286 and 288(1). I would draw your attention to article 287, which of course you know far better than I.

Accordingly, if the Tribunal has jurisdiction only over disputes concerning the interpretation and application of the Convention, it is very important to have a clear idea on two matters. First, is there a dispute? Secondly, does the dispute, if there is one, bear on the interpretation and/or application of the Convention? The importance of the first question is self-explanatory. As is well established in the international case law, the existence of a dispute is the precondition for the exercise of jurisdiction by a judicial body, and the existence of a dispute is an objective matter; it is not enough for one party simply to claim that there is a dispute.

But what is a dispute? Obviously, I would not presume to give a lecture on international law, but would simply like to draw attention to what I consider to be the most important questions.

What is the meaning of a dispute?

Essentially, we are talking here about an objective concept, which was clearly defined by the Permanent Court as far back as 1924 in the Mavrommatis case as a *(Continued in English)* "... disagreement on a point of law or fact, or conflict of legal views or interests."

(Interpretation from French) That definition is so clear that this International Tribunal itself adopted it *expressis verbis* in its case law in the *Southern Bluefin Tuna* case.

To sum up, the dispute in this case, if it exists, must relate to the objective determination of a disagreement on a point of fact or law, or a conflict of legal views or interests between Saint Vincent and the Grenadines and Spain concerning solely, for purposes of definition, the interpretation or application of the Convention on the Law of the Sea, even though the Tribunal must take account of other general rules of international law.

However, if we take that vantage point, establishing the existence of such a dispute is not easy in this case, particularly if you consider that the Applicant merely states in all the written pleadings that Spain has breached articles 73, 87, 226, 227 and 245 of the Convention, and also refers to article 303 of the Convention, albeit without

providing any legal arguments regarding the scope of those articles and their relevance to the present case.

Can we consider that such an assertion is sufficient to conclude that a dispute exists? Spain's answer must be "no", and I recall the decision of the International Court of Justice in the *Oil Platforms* case, *Preliminary Objections*, where the Court held that: (*Continued in English)*

> The Court cannot limit itself to noting that one of the parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.

(*Interpretation from French)*: It is not my intention now to set out in detail all of Spain's arguments pertaining to the Tribunal's lack of jurisdiction *ratione materiae* in this case. We shall return to this subject later.

However, at this stage, I cannot ignore the fact that, by dint of its behaviour, Saint Vincent and the Grenadines has introduced an element of uncertainty as regards the determination of the existence of a dispute and its subject-matter and scope; and it is seeking to take advantage of that uncertainty.

However, as Spain has pointed out several times orally and in writing, it cannot be said that, at the time the Application was filed, there was no dispute between Saint Vincent and the Grenadines and Spain concerning the application or interpretation of the United Nations Convention on the Law of the Sea. Moreover, the absence of a prior exchange of views, as required by article 283 of the Convention, has complicated the situation and made it even more difficult to determine the existence and subject-matter of such a dispute.

Indeed, as the Tribunal well knows, all we have is the *Note Verbale* of 26 October 2010, in which Saint Vincent and the Grenadines asserts unilaterally that the *Louisa* has been illegally detained by Spain contrary to Spanish domestic law and international law, and perhaps also the Convention on the Law of the Sea, announcing unilaterally once again its intention to institute proceedings before this Tribunal if Spain were not prepared to submit to the unilateral conditions imposed by Saint Vincent and the Grenadines – in other words, prompt release of the vessel – and all this at a date when Saint Vincent and the Grenadines had not even accepted the jurisdiction of this Tribunal, which it did 26 days later.

It goes without saying that the result of this behaviour is that Saint Vincent and the Grenadines has put your Tribunal in a difficult position because, as has already been stated by the International Court of Justice, such a situation *(Continued in English)*

> ... would be tantamount to imposing on the [Tribunal] the heavy burden of determining a dispute the contours of which the Parties have not determined. (Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination.

(Interpretation from French): Mr President, despite everything that I have just said, Spain will make every effort to identify a dispute – and its scope -- which could legitimately be submitted for your consideration, even though this exercise has become even more difficult than before following the Applicant's pleadings before you last week.

Let me start with two points: first, the declaration by Saint Vincent and the Grenadines recognizing the Tribunal's jurisdiction, and the *petitum* in Saint Vincent's Memorial.

Given their status as Applicant, you might consider that it is in their declaration and their *petitum* that this, and a great deal of other, information could be found for the purpose of determining the existence and the scope of a dispute. This seems only logical, because, after all, Saint Vincent and the Grenadines is the Applicant and one might expect these documents to provide the material that could be used to determine the existence and the scope of a dispute.

With your permission, I shall start with an analysis of the declaration whereby the Applicant accepts your Tribunal's jurisdiction. Its scope is extremely limited, despite what has been said by Saint Vincent and the Grenadines in its pleadings and certain documents.

According to that declaration, Saint Vincent and the Grenadines, on 22 November 2010, chose the International Tribunal for the Law of the Sea *(Continued in English)* "... as the means of settlement of disputes concerning the arrest or detention of its vessels."

(Interpretation from French): This gives us one substantive element on which to base an attempt to identify the scope of any dispute that the Tribunal might have to deal with in relation to the Applicant: quite simply, disputes concerning the arrest and detention of the vessel but absolutely nothing else. But in any case there is a close connection with a specific event, the arrest of the *Louisa* as referred to in the Application instituting proceedings filed the day after Saint Vincent and the Grenadines accepted the Tribunal's jurisdiction.

In any case, if we start from that declaration, an initial conclusion may be drawn, namely that a dispute may only be submitted to the Tribunal if it deals with "the arrest and detention" of one of its vessels, that is, a vessel bearing the flag of the Applicant. Nothing else, absolutely nothing else. The Applicant itself has placed very tight limits on the jurisdiction of the Tribunal. However, let me ask a question: was the *Louisa* arrested or detained in the sense in which these terms are used in the Convention? Spain would say "no".

The second element that could be helpful in determining the scope of what the Applicant alleges to be the dispute, if not its existence, is the *petitum* in its Memorial. In this connection, what does Saint Vincent and the Grenadines ask the Tribunal to decide?

To answer that, one need only read paragraph 86 of the Memorial:

(a) declare that its Request is admissible – a procedural *petitum*;
(b) declare that the Respondent has violated articles 73, 87, 226, 245 and 303 of the Convention;
(c) order the Respondent to release the *MV Louisa* and *Gemini III* and return property seized;
(d) declare that the detention of any crew member was unlawful;
(e) order reparations in the amount of $30 million; and
(f) award reasonable attorneys' fees and costs associated with this request as established before the Tribunal – a question on which we had a very interesting exchange before this Tribunal last week.

This *petitum* raises one initial question. The Applicant requests the Tribunal to rule on matters arising from the Law of the Sea Convention, but also to grant requests which, in principle, are not based solely on Spanish domestic law, in particular declaring illegal the arrest of crew members.

However, if the determination of the subject of the dispute on the basis of the *petitum* is difficult and problematic, the confusion regarding such determination was further increased by the Respondent's pleadings.

Both Ms Forde and Professor Nordquist developed their pleadings on the basis of an alleged breach of human rights, the rights of individuals arrested and the property rights of the owner of the *Louisa*, as well as a denial of justice – all these arguments in connection with article 300 of the Convention.

Although we shall subsequently return to these subjects, let me now draw the Tribunal's attention to the obvious fact that the Applicant is trying to change the nature of the dispute.

According to the Applicant's new arguments, what is now the subject-matter of the dispute? Is it the detention of the *Louisa*, that is, the arrest or detention of a vessel flying the flag of Saint Vincent and the Grenadines? Or is it the rights of individuals alleged to have suffered damage in the context of a criminal procedure in which the *Louisa* was detained? It is true that it was detained, but the criminal procedure relates not to the detention of the vessel but to a criminal investigation concerning offences against the underwater cultural heritage. The detention of the *Louisa* is simply one of the decisions made by the investigating judge.

Mr President, if I may, I would like to finish my words on this topic with two comments.

1. Spain continues to insist that there is no real dispute based on the application of the substantive provisions of the Convention.

2. Saint Vincent and the Grenadines has attempted to change the basis of its Application by introducing new lines of argument and presenting the alleged dispute in a manner quite different from that which the Applicant set out in its written submissions, perhaps because it came to the conclusion that its references to articles 73, 87, 226, 227 and 245 of the Convention had no legal basis. I do not know. Be that as it may, such conduct is incompatible with the rules of adversary

procedure and the principle of equality of arms, which must be respected in proceedings before the Tribunal.

The nature of the proceedings

Mr President, the second general point that I would now like to raise in this introductory statement concerns the nature of the proceedings that have been brought before you.

As we have already said several times, this is not a special, extraordinary and summary procedure regarding the prompt release of the vessel, as provided for in article 292 and following of the Convention. For that kind of procedure the Convention gives automatic jurisdiction to your Tribunal. Bearing in mind the special nature and the object and purpose of these proceedings, States have established special rules and principles in the Convention, based on a presumption in favour of navigation for the detained vessel.

However, if I may be allowed to make another comment, proceedings of that kind are also subject to precise rules regarding the time frame within which proceedings can be brought before your Tribunal. In such proceedings, the Tribunal has no jurisdiction to rule on the lawfulness of the detention or on any damages that the flag State may claim on the basis of the detention.

Mr President, honourable Judges, the points I have described do not at all obtain in today's proceedings. Saint Vincent and the Grenadines would have been entitled to bring proceedings for the prompt release of the vessels, but it did not do so, although it was well aware of the *Louisa*'s situation after the transmission of Spain's *Note Verbale*. In its written submissions and in last week's pleadings, the Applicant continues to insist that the *Note Verbale* does not exist, but this is completely incompatible with the rules governing relations and communications between two sovereign States and with the customary practice relating to *Notes Verbales*.

Let me now think aloud on a subject that may be of interest to you. Could Spain be reproached for a lack of due diligence on the part of the authorities of Saint Vincent and the Grenadines, or to put it another way, could it be objected that Spain was responsible for the lack of due diligence by the owners of the vessel if they did not ask the flag State to undertake the procedure for prompt release within the prescribed time-limits?

At this point I have to say that we must not forget that the prompt release procedure is usually initiated at the request of the owner of the ship that has been detained. Although this fact is not necessarily reflected in the Convention, it is clearly what happens and no one familiar with the law of the sea would deny this. It is quite clear that the owner of the *Louisa* at the time was well aware of the legal situation of the vessel and of the fact that it had been detained by the Spanish judicial authorities.

That was clearly established last week when we heard testimony from a number of individuals before this Tribunal.

However, the Applicant did not exercise its right at the proper time and now seeks, five years after the exhaustion of the deadline set in the Convention, to exercise another right (one deliberately acquired only one day before the institution of proceedings by means of a unilateral declaration of acceptance of jurisdiction), but still outside the prescribed time frame. The applicant is attempting to exercise this right, albeit in the same conceptual framework - at least that is the attempt being made – as if this were being done under the prompt release procedure. And it is seeking to do this on the basis of the claim that some rules and some principles peculiar to this special type of proceeding are also applicable to any other proceedings where there is some kind of connection with the detention of a vessel. I would draw your attention to the references made by Ms Forde to prompt release proceedings.

Mr President, as I will explain later, we are faced with ordinary contentious proceedings, proceedings used by the Applicant as a means of exercising diplomatic protection for a vessel flying its flag, that is to say the *Louisa*, and by extension it is also seeking to exercise this protection for certain members of the crew, not all the crew, and even for the owner of the vessel and Ms Avella who, according to Professor Nordquist, was simply a bystander.

For the first time in these proceedings, the representatives of Saint Vincent and the Grenadines have accepted before your Tribunal, during their pleadings, the fact that the Applicant intends to exercise diplomatic protection. That is all well and good; but what diplomatic protection and for whom?

We find ourselves before a tribunal responsible for applying and interpreting the Convention on the Law of the Sea, and you will agree with me that, at the very least, a connection must be found with one or more substantive law of the sea provisions. But what connection is there? According to the Applicant, the connection that would make it possible to exercise diplomatic protection for certain individuals is article 300 of the Convention alone.

Let me say clearly that Spain has no objection to the application of article 300 which, by its very nature, is simply a specific expression of the general principle of good faith. It must always therefore be looked at in relation to each and every provision of the Convention.

However, what provisions of the Convention connected with article 300 would make it possible to exercise diplomatic protection before your Tribunal in this particular case? The Applicant has not succeeded in identifying any such provisions. We will come back to these questions at a later stage.

Bearing in mind that Saint Vincent and the Grenadines at least has accepted that we are faced with an ordinary adversary procedure concerned with the exercise of diplomatic protection, I would like to remind you that diplomatic protection is subject to rules and conditions which, logically, without any doubt, must apply to this case; in particular the rules regarding the nationality of the claimant, the exhaustion of local remedies, and in certain cases the requirement of “clean hands”. I will come back to that at a later stage in the course of Spain’s pleadings.

Finally, Mr President, I would like to make a brief comment on the third and last of the subjects I mentioned at the beginning of my statement, that is to say the relationship between international and national proceedings in this particular case.

It is quite clear that there is a degree of overlap between the facts underlying this case and the facts underlying the criminal case that is under way in Spain; but such overlap is not necessarily anomalous in the system of dispute settlement before international tribunals.

Thus, facts that take place within a State may frequently be projected on to the international stage, and these facts may have been or may even continue to be the subject of proceedings before national judicial bodies. Furthermore, this overlap is always at the very heart of any exercise of diplomatic protection.

That having been said, an overlap, a coincidence of this kind, cannot entitle us to confuse the international and local proceedings. Sadly, Saint Vincent and the Grenadines, in both the written and the oral phases, has engaged in an exercise of mixing up the proceedings.

I will give you a few examples.

- The Applicant confuses international law and the applicable domestic law by seeking to portray them as an indivisible whole or, indeed, a *totum revolutum* of normative provisions.

- The Applicant confuses subjects over which domestic tribunals and international tribunals have separate jurisdiction, by claiming that acts performed by one or another player may be interchangeable.

- The Applicant seeks to establish a link between the Spanish judicial authorities and the legal representation of Spain before this honourable Tribunal. Perhaps their aim is to conjure up in your mind the false idea of dishonest practice by one or the other party with regard to Saint Vincent and the Grenadines and to individuals who are subject to criminal proceedings in Spain. I do not wish to dwell on that subject at this stage, but I consider it to be such importance that it should be drawn to the Tribunal's attention at the outset.

In its written submissions, its pleadings and the witness and expert presentations, any alert observer can see that the Applicant appears to have the intention of transforming this honourable Tribunal for the Law of the Sea into a tribunal that would have the role of replacing Spanish tribunals in the functions that are part of their inalienable right to sovereignty, and further to replace them in the exercise of criminal law functions.

This is not the time to go into those arguments in further detail, but I must draw your attention to this issue because it could have significant consequences in the current case, and it would be wise for the Tribunal to bear this in mind.

CONCLUSION

That was my last comment, Mr President. This brings me to the end of my first presentation to you. I apologize if I have spoken at greater length than I had intended, but I would like to thank you, Mr President, honourable Judges, for your kind attention.

Mr President, may I now ask you to call on my colleague, Professor Aznar, to make our first presentation regarding the jurisdiction of your Tribunal?

THE PRESIDENT *(Interpretation from French)***:** Thank you, Ms Escobar Hernández. I now give the floor to Mr Aznar Gómez.

MR AZNAR GÓOMEZ: Thank you, Mr President.

Mr President, distinguished Judges, let me say again that it is a true honour and a privilege to appear again before this Tribunal to continue the present submission on behalf of my country, the Kingdom of Spain, in response to the Memorial and Reply submitted by Saint Vincent and the Grenadines in this case.

As the Agent of Spain has explained, I will address the initial questions on the position of Spain with regard to the jurisdiction of this honourable Tribunal. In particular, I will introduce the general motivation that drives Spain to affirm the plain absence of jurisdiction in this case.

Surprisingly, the Applicant seems to have abandoned all its reasoning submitted in its written pleadings and, last week, it suddenly tried to introduce article 300 as a new title of jurisdiction through a “broad interpretation and liberal application”, using the words of Professor Nordquist.

The Agent of Spain has already mentioned it and the Spanish delegation will further address this point later. By now, I should like to build a reasonable legal argument based on the Convention, and not rewriting the carefully drafted Convention of 1982, mostly because even article 300, as other articles in the Convention, expressly states that it must be interpreted and applied “in accordance with the Convention” and not without, or irrespective of, the Convention.

To that extent, I will address, first, a general introduction on questions of jurisdiction in this case; second, how the Applicant confuses the *prima facie* jurisdiction of the Tribunal to decide upon provisional measures with its jurisdiction on the merits; and, third, the application to this very case of article 283 of the Convention and how Saint Vincent and the Grenadines has not properly fulfilled this requisite, which is clearly established in the UN Convention on the Law of the Sea.

As already said, Spain considers that this honourable Tribunal has no jurisdiction in this case.

This Tribunal is the Tribunal for the Law of the Sea. What looks obvious for Spain, does not seem too clear to the Applicant.

As stated in article 21 of its Statute, the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the UN Convention on the Law of the Sea. This implies that the procedural conditions established in the Convention do apply, particularly that endorsed in article 283 upon which

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the Parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

It seems that Saint Vincent and the Grenadines believes this obligation of conduct does not apply.

Saint Vincent and the Grenadines believes that article 283 of the Convention is a simple term of art, without any *effet utile.* However, Professor Nordquist should recall his comment to article 283 in volume 5, p.29, of its Commentary to the Convention, published by its Law School when it says – and I quote *in extenso*:

> The 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.

This is because the primary obligation of parties to a dispute should be to make every effort to settle the matter through negotiations. This is the general rule in International law. The resort to a compulsory settlement of dispute procedure is the exception.

In this case, however, Saint Vincent and the Grenadines adamantly observes: (1) procedurally, that once the Tribunal declares its *prima facie* jurisdiction, the latter extends also to the merits; (2) materially, that there is no obligation to negotiate before coming to this honourable Tribunal; and (3) factually, that irrespective of this, negotiations took place between Saint Vincent and the Grenadines and Spain.

Mr President, let me address these contentions briefly, given that the Counter-Memorial and Rejoinder of Spain contain clear, authoritative and sound arguments rejecting all these erroneous arguments of the Applicant.

> [This] Tribunal has yet to decide its jurisdiction on the merits and questions relating to admissibility as well." These are not my words. These words were said last Friday by Professor Nordquist.

However, in its previous written position, Saint Vincent and the Grenadines took for granted that once the Tribunal said that it had *prima facie* jurisdiction, this jurisdiction extends also to the decision on the merits of the case. Fortunately, Professor Nordquist implicitly admitted that that previous assertion ignores a well-established international jurisprudence confirmed by this Tribunal from its very beginning. As said for example in paragraph 29 its Order of 11 March 1998 on provisional measures in the M/V "*SAIGA" (No. 2)* Case:

> before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.

Quite recently, in its case on certain activities carried out by Nicaragua in the border area, the International Court of Justice recalled again this same principle in paragraph 49; and this is what this Tribunal did in its Order of 23 December 2010 on provisional measures.

The Tribunal not only decided not to prescribe such measures, which is important with regard to its possible absence of jurisdiction on the merits following the *Saiga* interpretation; actually, what this Tribunal declared was that its decision on provisional measures in paragraph 80

> 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.

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

Using again the words of this Tribunal in the "*Saiga*" (No. 2) Case, even where there is no disagreement between the parties regarding the jurisdiction of the Tribunal - which is not the case here, "the Tribunal must satisfy itself that it has jurisdiction to deal with the case as submitted." That is paragraph 40.

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

In the view of Spain, in this case we face a quite similar situation. Moreover, at this juncture, the decision on the jurisdiction is particularly crucial, since there is a disagreement between the Parties regarding this particular question.

The Applicant also tries to stress the idea that to declare it has no jurisdiction, this Tribunal would be violating its own judicial function.

The Applicant plainly ignores the fact that in a consensual system of peaceful solution of international disputes, one of the main building blocks of that judicial function is for a tribunal to be completely satisfied that it has jurisdiction to deal with the case on the merits.

In any case, Saint Vincent and the Grenadines further maintain that article 283 of the Convention does not apply, using erroneously the arguments of the Hague Court in the Case concerning the land and maritime boundary between Cameroon and Nigeria.

In its decision of 1998 in that case between Cameroon and Nigeria, the Court held in general terms that there is not any general rule upon which the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to an international court or tribunal. However, this assertion by The Hague Court must be interpreted keeping in mind, on the one hand, that that statement of the Court must be read in the context of the entire case decision, including its paragraphs 103 to 109, where the ICJ distinguished between the cases where it has been seized on the basis of unconditioned declarations made under article 36(2) of its Statute and the cases where it has been seized on the basis, precisely, of the Convention on the Law of the Sea.

In the latter, previous diplomatic negotiations between the States parties to the dispute constitutes a precondition for a matter to be referred to the Court.

On the other hand, that statement of the Court refers to general international law, as the ICJ itself explained in its decision, and does not apply when there exists a particular rule obliging States to exchange views prior to having recourse to an international adjudicative body. Without any doubt, article 283 of the Convention is one of those particular rules. The wording of the title of article 283, “Obligation to exchange views”, and the compulsory meaning of its text, “the parties to the dispute shall proceed to an exchange of views”, are clear: the parties to a dispute concerning the interpretation or application of the Convention are obliged to exchange their views regarding its settlement prior to any resort to this honourable Tribunal.

The ICJ has been confronted continuously with this type of clauses: last year, in the Case concerning Georgia and Russia, the Court had to interpret the content and extent of article 22 of the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. The existence of that specific clause, which obliged the parties to negotiate before probable proceedings before the ICJ, and the absence of such previous negotiation, led the Tribunal to conclude that it had no jurisdiction to hear the case on the merits.

This very year, in the case between Belgium and Senegal, relating to the obligation to prosecute or extradite, the Court’s judgment of 20 July was also crystal clear with regard to the application of article 30, paragraph 1, of the Convention against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, as a condition for jurisdiction.

In both cases, Mr President, the basis for jurisdiction of the Court was conventional - the 1965 Convention against Discrimination and the 1984 Convention against Torture; and in both cases there were an obligation to exchange views and to negotiate between the parties as a compulsory precondition to seize the Court. In both cases, finally, the Court meticulously reviewed the fulfilment of that precondition in order to decide on its jurisdiction.

In our case, we face a similar scenario: a conventional basis of jurisdiction - the Convention on the Law of the Sea - and a compulsory precondition - article 283, which places an obligation to proceed expeditiously to an exchange of views regarding the settlement of any dispute by negotiation or other peaceful means.

(Break from 11.30 a.m. to noon)

THE PRESIDENT: Mr Aznar Gómez, please continue your pleadings.

MR AZNAR GÓOMEZ: Thank you, Mr President. I was saying before the break that in our case we are facing a quite similar scenario to those I came to talk about: a conventional basis of jurisdiction, the Convention on the Law of the Sea, and a compulsory precondition, article 283, which obliges to proceed expeditiously to an exchange of views.

As resumed by former President Chandrasekhara Rao in his Separate Opinion to the Order of 8 October 2003 on Provisional Measures in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore)*:

> [t]he requirement of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done.

Let me follow the reasoning of the former President in the next few minutes.

First of all, article 283 is not an empty formality. To the contrary, the compulsory exchange of views foreseen in that article aims at different functions directly linked to the dispute settlement system of the Convention itself. The “exchange of views” required by the Convention contains essentially a general mandate so that the States Parties can express their opinions on the dispute itself, on the way in which such dispute can be settled and, if possible, on the settlement of the dispute from a substantial point of view.

It is, therefore, an obligation of behaviour that, if not fulfilled, prevents the correct development of the entire system of settlement of disputes designed by the Convention, and it is precisely because of this that it constitutes a limit to the exercise of jurisdiction by this Tribunal. In this regard, Spain wishes to recall that even though it is true that that behavioural obligation is wide in scope, it is also true

that this obligation has two components. The first component requires the actual existence of a real "exchange of views", which cannot be reduced to a single unilateral act by one of the parties, which would supposedly suffice by itself to conclude the pre-litigious phase. The second component implies that the aim of the consultations must be to reach a settlement of the dispute through negotiation or through any other peaceful means, which precludes taking into consideration any other aim not directly related to the subject matter of the dispute.

As the ICJ resumed a few months ago in the case *relating to the Obligation to Prosecute or Extradite*, it must be ascertained whether there was:

> ... at the very least[,] 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. According to the Court's jurisprudence, "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked".

But the Court also clearly stressed that "the requirement that the dispute 'cannot be settled through negotiation' could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies" as the Court concluded, that "no reasonable probability exists that further negotiations would lead to a settlement". Consultations are not "mere protests or disputations", nor are they reduced to "the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims." Far from that, consultations are meant to be "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."

In any case,

> these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.

Saint Vincent and the Grenadines contends that the standard for satisfying article 283 of the Convention has been set by this Tribunal in a subjective manner, that is, once the Applicant affirms that the possibilities of reaching agreement have been exhausted, they have been exhausted. This interpretation is unacceptable since it would empty the true meaning of article 283 of the Convention as it has been progressively interpreted by the Tribunal in the three cases where that article was particularly discussed: the *Southern Bluefin Tuna Case* in 1999, the *MOX Plant Case* in 2001 and the *Land Reclamation Case* in 2003.

In the *Southern Bluefin Tuna* case, the Tribunal first held that:

> negotiations and consultations had 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.

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".

Therefore, the Tribunal clearly ascertained that a negotiation had taken place, and, second, that during the same negotiations the Convention had been invoked in diplomatic notes. Having made these two findings, and only then, was it concluded that negotiations should not be continued, as the possibilities of reaching an agreement had been exhausted.

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

Again, the Tribunal took into account that there had been a negotiation in which the Convention was discussed.

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 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.

To sum up, Mr President, the Tribunal has always demanded an effective exchange of views between the parties with regard to the dispute about the Convention. 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, has this Tribunal considered the conditions of article 283 to have been met.

It could be recalled that in the last case submitted to the Tribunal, the *Virginia G* case, there is also an unequivocal reference to article 283 of the Convention as the formal legal basis of the communications addressed by Panama as Applicant to Guinea Bissau, and this, Mr President, might be the normal behaviour of a party to the Convention when a dispute arises with other party of the Convention.

States Parties to the Convention, before having recourse to this honourable Tribunal, must have an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means. This exchange of views between the States imposed by article 283 of the Convention must be effective and based on good faith. However, none of these conditions are met in the attitude of Saint Vincent and the Grenadines.

Saint Vincent and the Grenadines never genuinely attempted to engage in negotiations with Spain. No single exchange of views on the dispute was made

between the Applicant and Spain. Contrary to what is obsessively said in the Applicant's Memorial and Reply, Saint Vincent and the Grenadines, to whom the obligation of exchange of views is directed, never contacted nor exchanged any views regarding the settlement of any possible dispute around the immobilization of the *Louisa* under the Convention.

Mr President, let me briefly review the facts around that immobilization to clarify again the attitude of the Applicant in this case.

As said by the Agent of Spain, the *Louisa* and its crew were immobilized on 1 February 2006. Less than a week later, the respective consular authorities were informed of the detentions. From that time onwards, the case was under the control of the competent judicial authorities of Spain that communicated any order, indictment and official decisions to those implied in the case.

On 15 March 2006, the Embassy of Spain in Kingston, following the customary rules of diplomatic communications, sent a *note verbale* to the Ministry of Foreign Affairs, Commerce and Trade of Saint Vincent and the Grenadines, officially informing the Applicant of the entry into and search of the *Louisa* "for any necessary procedures." What was the attitude of Saint Vincent and the Grenadines? Absolute silence.

The Applicant contends, mixing its international rights and obligations with the private company's activities, that the following letters were sent: on 11 February 2009, a letter from the law firm Patton Boggs LLP, signed by Mr Cass Weiland, to the Magistrate Judge of Criminal Court No. 4 of Cádiz; on 27 April and 27 August 2010 two similar letters were sent from the law firm Kelly Hart & Hallman LLP, signed by Mr William Weiland, to the Ambassador of the Kingdom of Spain to the United States of America and to the Magistrate Judge of Criminal Court No. 4 of Cádiz, respectively; and finally, on 14 October 2010 a letter from the law firm Kelly Hart & Hallman LLP, signed again by Mr William Weiland, to the General Consul of Spain in Houston, Texas, with an attached letter from Ms Linda Thomas, Director of Sage Maritime, to the *Consejo General del Poder Judicial* of Spain was also sent. None of these communications was sent to the Spanish authorities by the Applicant but by the attorneys of some of the accused persons before the criminal tribunals in Spain. None of these communications and letters contained any reference to the "dispute" between Saint Vincent and the Grenadines and Spain under the Convention, the factual basis of the Application.

Consequently, under no circumstances can any of these documents be considered evidence of the fulfilment of the obligation to proceed to an "exchange of views" pursuant to article 283 of the Convention and the general rules of international law governing the diplomatic relations between States.

Saint Vincent and the Grenadines also contends that the two emails sent on 18 and 19 February 2010 were an attempt to contact the Spanish authority prior to filing this action.

The first email, dated 18 February 2010 and sent to the *Capitanía de Cádiz* without any formality or official seal from the Saint Vincent and the Grenadines' Office of the

Commissioner for Maritime Affairs in Geneva, just asked about the arrest of the *Louisa*. Some other details were requested in the second email.

On 19 February 2010, the *Capitanía de Cádiz* informed in two different emails that the vessel had been immobilized in a criminal procedure, giving its number and the criminal court to which the case was assigned, and forwarded all the information to the criminal court.

Of course, these emails cannot be seen either as evidence of the fulfilment of the obligation to proceed to an "exchange of views" pursuant to article 283 of the Convention. Neither the Office of the Commissioner for Maritime Affairs in Geneva nor the *Capitanía de Cádiz* enjoy the competence to carry out such negotiations under international-law rules of diplomatic relations. None of them proposed any exchange of views and none of them referred to the Convention and its possible violation by Spain.

The first and only official communication between the two States is a letter from the Permanent Mission of Saint Vincent and the Grenadines to the United Nations to the Permanent Mission of Spain to the United Nations, dated 26 October 2010. The most that can be said about this letter is that it does not follow the normal bilateral diplomatic communications between States. Spain has, and had, an accredited ambassador before Saint Vincent and the Grenadines, with residence then in Jamaica and today in Trinidad and Tobago.

Anyway, more than four and a half years – if I am not wrong, 1,728 days – since the immobilization of the *Louisa*, the Applicant contacted Spain for the very first time, but what still astonished us is that the Applicant, in that letter, simply said, first, that Saint Vincent and the Grenadines objected to the detention of the *Louisa* and its tender, the *Gemini III*; second, that the Applicant further objected to the failure to notify the flag country of the "arrest" as "required by Spanish and international law", which, as we have just seen, is absolutely false; and third, and I quote, that:

> Saint Vincent and the Grenadines plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ship and settlement of damages incurred as a result of its improper detention.

Therefore, on 26 October 2010, even before having officially deposited its declaration of acceptance of the jurisdiction of this Tribunal under article 287 of the Convention, Saint Vincent and the Grenadines had already taken the decision to act against Spain before this Tribunal. With that letter, the Applicant voluntarily and unilaterally ended any chance of diplomatic consultations without giving any possible guidance on its claims that would have facilitated an exchange of views with Spain. It is crystal clear from the wording of this sole and tardy official letter from the Applicant to the Respondent that the former would not proceed, even expeditiously, "to an exchange of views regarding [the settlement of the dispute] by negotiation or other peaceful means" as required by article 283 of the Convention. This constitutes a breach of the Convention by the Applicant that should clearly preclude its access to the Tribunal given that, paraphrasing this Tribunal in a positive sense, a State Party is obliged to continue with an exchange of views when it concludes that the

possibilities of reaching agreement have not been exhausted, and Saint Vincent and the Grenadines demonstrated that these possibilities had not yet been exhausted.

This is verified by the mere fact that, since the celebration of the hearings of the phase on Provisional Measures and, up to present, the Agents of both parties, at the initial request of the Applicant, and with Spain's full participation, have maintained contacts in which opinions on the case and its eventual settlement have been exchanged. If that has been possible after the lawsuit, Spain has to express its surprise at not having seen those exchanges of views before the lawsuit was brought, which are necessary according to the Convention.

Nevertheless, Spain also wants to point out that these sudden and untimely consultations cannot be interpreted, in any circumstances, as the fulfilment of the condition required by article 283 of the Convention. Whatever the circumstances may be, the negotiations must be verified before the proceedings started, and a subsequent action cannot validate the initial error committed by Saint Vincent and the Grenadines.

The rest of the *iter* is well known by this Tribunal. On 15 October 2010, that is, even before the Applicant's letter was sent to Spain, and, indeed, before the competence of the Tribunal had been accepted by Saint Vincent and the Grenadines, the Applicant informed the Tribunal of the appointment of its Agents and Co-Agents. On 22 November 2010, Saint Vincent and the Grenadines deposited its limited declaration of acceptance of the competence of the Tribunal, and on the next day, 23 November, Saint Vincent and the Grenadines filed its action against Spain. What willingness to exchange views by the Applicant can be deduced from this attitude? Plainly, none.

What else 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.

I am concluding, Mr President, but, before finishing my statement, I should like to draw your attention again to the Applicant's intention to confuse, to blur, its actions with those of the physical and legal persons who face criminal charges in Spanish courts.

However, I repeat, the obligation set out in article 283 of the Convention is an obligation strictly between States, strictly between Saint Vincent and the Grenadines and Spain, the two Parties in this case, and that obligation must be discharged in good faith between both States, and only the States, before bringing an action to this Tribunal.

On the basis of what has been explained before this honourable Tribunal, which tries to summarize what is more extensively and plausibly referred to in the Counter-Memorial and the Rejoinder of the Kingdom of Spain, we respectfully submit that this Tribunal has no jurisdiction in this case, as the compulsory fulfilment of the exchange of views obligation according to article 283 has neither taken place nor been proved by the Applicant.

That ends my statement this morning, Mr President. Thank you for your attention. May I invite you, please, to give the floor again to the Agent of Spain?

THE PRESIDENT *(Interpretation from French)***:** Thank you, Mr Aznar Gómez. I give the floor to Ms Hernández.

MS ESCOBAR HERNÁNDEZ *(Interpretation from French)***:** Thank you very much, Mr President.

I have only half an hour before me, but I will endeavour to present the arguments relating to the second aspect of jurisdiction, namely the fulfillment of the conditions linked to diplomatic protection. I shall try not to go too fast, even if I have to run into this afternoon.

Mr President, as my colleague Professor Aznar has already explained, Spain maintains that this honourable Tribunal does not have jurisdiction in the instant case. Why? Because the conditions laid down in article 283 of the Convention, namely the obligation to exchange views, have not been properly met by Saint Vincent and the Grenadines.

However, there are also other compelling reasons to dismiss the application by Saint Vincent and the Grenadines, which I addressed during my first presentation. As I told you, in order to establish the jurisdiction of your Tribunal to rule on the merits of the application presented by Saint Vincent and the Grenadines, it is particularly important to identify both the nature of the claim and the procedure utilized by the Applicant.

As Spain has already underscored, the instant case cannot be treated as prompt release proceedings pursuant to article 292 of the Convention. On the contrary, the Applicant is simply looking for a form of diplomatic protection. Therefore, there is no need to analyze the context of the claim made by Saint Vincent and the Grenadines, which is essentially the normal channel of diplomatic protection. It is sufficient to analyze the tenor of this claim, which can essentially be summarized as the protection of rights of individuals (in the present case, the crew, the owners of the *Louisa* and other persons), who according to the Applicant have suffered injury as a consequence of the infringement of international law and domestic law by Spain. There is no need to stress that this is the very definition of diplomatic protection; you know that far better than I.

Furthermore, the Applicant has accepted in its oral pleadings that its intention in bringing this case is now to exercise diplomatic protection. Such recognition requires us to highlight the conditions that must be met by any State exercising diplomatic protection, which become fully applicable in the instant case. These are rules of general international law, as the Convention itself does not contain any specific rules with respect to diplomatic protection.

Mr President, in order to give you the best presentation of Spain's position in the context of diplomatic protection in the present case, I am going to devote the first part of my statement to the absence of any link of nationality. Following that, I shall

respond to the question regarding the non-fulfillment of the second condition of diplomatic protection, namely the exhaustion of local remedies.

One of the required elements for the exercise of diplomatic protection is incontrovertibly the existence of a national link between the injured person or entity and the Applicant. In this case, such nationality needs to be defined above all in relation to the vessel detained by the Spanish authorities within the framework of the ongoing criminal proceedings, and that is for a simple reason: the sole official, "national" link between Saint Vincent and the Grenadines and the dispute is, in theory, the *Louisa*.

Furthermore, the question of the nationality of the vessel is crucial in determining the jurisdiction of this Tribunal, because under the terms of the unilateral declaration recognizing jurisdiction made by Saint Vincent and the Grenadines, the jurisdiction of the International Tribunal for the Law of the Sea is limited to "the arrest or detention of its vessels." By that declaration the Applicant has transformed the question of the nationality or the flag of the vessel into an essential condition, which will itself determine the jurisdiction of your Tribunal.

Consequently, with a view to applying the general rules of international law applicable to the exercise of diplomatic protection, and taking into account the will expressed freely and unilaterally by Saint Vincent and the Grenadines, the Tribunal must first establish the nationality of the vessel or vessels injured by the detention.

Article 91 of the Convention provides that every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. It also stipulates that ships have the nationality of the State whose flag they are entitled to fly. Paragraph 1 of article 91 ends with a very brief assertion, but it is a complex one: "There must exist a genuine link between the State and the ship."

Spain in no way challenges the Applicant's sovereign right to grant its nationality to the *Louisa*, to register it and to give it the right to fly its flag. Furthermore, Spain fully recognizes – and has recognized throughout the proceedings – that the *Louisa* was flying the flag of Saint Vincent and the Grenadines on the "critical dates" of this case.

Notwithstanding that, we must also recall that the Convention itself contains elements whose importance cannot be disregarded in determining the nationality of the claim in relation to the *Louisa*. I refer specifically to the requirement of "effective nationality" and a "genuine link", and also to the tests of effective authority, effective jurisdiction and consequently responsibility for the vessel. See articles 91 and 94 of the Convention.

Be that as it may, Spain will not examine in depth right now the fact that the *Louisa* was flying the flag of Saint Vincent and the Grenadines during the "critical dates" in the case. However, a clarification is none the less necessary regarding the legal status of the *Gemini III.* As in the written pleadings, during its oral argument the Applicant has attempted, without really giving much legal justification, to examine the legal status of the *Louisa* and its alleged "tender", the *Gemini III,* as a single unit. The Applicant has not succeeded in establishing a link of nationality between the *Gemini*

III and Saint Vincent and the Grenadines. That vessel has never flown its flag. In the documentation which it has supplied during the proceedings, the Applicant has presented no evidence regarding the current flag of the *Gemini III* or its flag at the time, that is 2005, 2006.

In the letter from the director of Sage sent to the *Consejo General del Poder Judicial*, the General Council of the Judiciary in Spain, dated 14 October 2010, which you can find in Annex 8 of the Memorial of Saint Vincent and the Grenadines, it is stated that the *Gemini III* flew the flag of the United State of America. During the hearing we have even been told by one witness, Mr Avella, that the *Gemini III* at that time did not fly any flag at all, which, if true, is wholly contrary to the applicable rules of the law of the sea. In any event, the Applicant has failed to demonstrate that the *Gemini III* flew the flag of Saint Vincent and the Grenadines at any moment in time. As the Tribunal well knows, it cannot apply "a presumption of the existence of evidence which has not been produced." I refer to the judgment in the Land, Island and Maritime Frontier Dispute, between El Salvador and Honduras with Nicaragua intervening.

The Applicant has not challenged the statement made in the Provisional Measures Order, in which you quite rightly wrote in paragraph 43: "the *Gemini III* was not flying the flag of Saint Vincent and the Grenadines at the time of the arrest." As I indicated earlier, in the declaration made under article 287 of the Convention, the Applicant explicitly limited the jurisdiction of the Tribunal to settlement of disputes concerning the "arrest or detention of *its* vessels". On the critical date, but also prior to that, and even today, the *Gemini III* was not flying the flag of Saint Vincent and the Grenadines. As a consequence, it cannot be included in the category that the Applicant calls "its vessels".

It follows that in the absence of this link of nationality, the Applicant has no right to seise the Tribunal with respect to the *Gemini III*. That is in conformity with the customary principle, which is well established in international law, that the responsibility of the State may be invoked only if the claim is brought in accordance with the applicable rules relating to the nationality of claims, always under the aegis of diplomatic protection. This principle is codified in article 44(a) of the articles on State Responsibility for Internationally Wrongful Acts approved by the International Law Commission, of which the UN General Assembly took note. Consequently, there is no need to rely on any point of law with respect to the *Gemini III*. The dispute, to the extent that one exists, must be limited to the *Louisa*, as the Applicant implies in paragraph 50 of its Memorial: "Saint Vincent and the Grenadines is the flag country of the *detained ship*", in the singular, not in the plural.

Furthermore, as Judge Wolfrum stated in paragraph 16 of his dissenting opinion annexed to the Provisional Measures Order, in no case can the *Louisa* and the *Gemini III*, two vessels flying two different flags, be treated as a unit. In the *Saiga (No. 2)* case, the Tribunal precisely defined the concept of the ship as a unit, which clearly does not apply in this case. As a consequence, in this case there is no need to examine any possible international consequence of the lawful detention of the *Gemini III* by the Spanish authorities.

However, in the instant case the nationality of the claim also has to be analyzed with regard to certain natural or legal persons over whom the Applicant seeks to exercise

diplomatic protection. The list of these persons has been established by the Applicant's representatives as follows: Alba Jennifer Avella; Mario Avella; the two members of the crew taken into custody when the *Louisa* was detained; and John Foster, the owner of the *Louisa* and of Sage. None of those persons has the nationality of Saint Vincent and the Grenadines. Ms Avella and Mr Foster are US nationals. The two members of the crew are Hungarian nationals. Consequently, without proof to the contrary, the Applicant cannot exercise diplomatic protection over any of those individuals.

To address this problem, we need to distinguish between three types of situation: first, the crew members, two Hungarian nationals and one US national; secondly, Mr Foster, the owner of the *Louisa*, who has American nationality; and, thirdly, Ms Avella, who, as we heard was clearly indicated during last week's public hearings, was a bystander with US nationality.

Perhaps you will now allow me to look at the nationality of the crew and the other persons linked to the activities of the *Louisa* and the consequences in this particular case. Spain would like once again to draw attention to the need to distinguish between prompt release proceedings – this is article 292 et seq. of the Convention – and the present proceedings under article 287 of the Convention. This has particular importance with respect to the protection of the crew, because under article 292 the flag State may exercise a kind of functional protection of the crew, whatever their nationality may be, but solely in the very specific case of prompt release proceedings. But it can be done. That is a kind of functional protection. However, this provision is justified only by the exceptional nature of the summary proceedings, conceived as urgent proceedings – I refer, of course, to the prompt release proceedings here – and by the fact that the urgent nature of the proceedings would not be taken into account were each member of the crew obliged individually to address himself or herself to the State of his or her nationality, especially if, as is the case normally, you have a large crew with a lot of different nationalities.

Contrary to the Applicant's assertions, in all other cases where a State seises the Tribunal on the grounds of exercising diplomatic protection there is not the slightest reason to conclude that any exceptions need to be made to the general rule of international law which requires the existence of a link of nationality, or to refrain from applying it in the present case. As a consequence, Saint Vincent and the Grenadines has to prove the existence of a link of nationality to bring a case before this Tribunal. Thus, this Tribunal cannot find that it has jurisdiction over claims with respect to natural or legal persons who do not have the nationality of the Applicant, specifically with respect to claims concerning members of the crew who are Hungarian nationals or US nationals, or over claims relating to the owners of the vessels who, as natural or legal persons like Sage, are United States nationals, or over Ms Avella, who came into contact with the *Louisa*, at least she said last week, in accidental and adjective fashion.

The absence of a link of nationality is further reinforced by the fact that Saint Vincent and the Grenadines exercised no real control over the activities of the persons just mentioned, and by the absence of a genuine link between that State and those persons. This confirms the absence of any formal or genuine link capable of justifying the right that Saint Vincent and the Grenadines allegedly has autonomously

to exercise its diplomatic protection over these persons.

If you will allow me to commence a more detailed analysis of the crew situation, it is true that the Tribunal has ruled on "the ship as a unit", including under this heading both the vessel and its crew. It is doubtless this specific case law, still linked to prompt release proceedings, which led the International Law Commission to include in its draft articles on diplomatic protection article 18, of which I am sure you are fully aware.

Notwithstanding this, Spain is of the opinion that even this provision cannot be considered to provide any hypothetical legal basis enabling the automatic and unconditional recognition of the right that a flag State might have, in general and in every circumstance, to exercise its diplomatic protection over the crew; and that is for the following reasons.

First, article 18 is based on prompt release proceedings and thus needs to be restricted to that situation; secondly, the insertion of that provision in the text of the draft articles was controversial and at the time was subject to fierce criticism from members of the International Law Commission and the States' representatives on the Sixth Committee of the United Nations General Assembly; thirdly, in any event this provision is not currently in force, since the draft articles have not led to a Convention. Furthermore, they do not reflect State practice, and thus one cannot conclude that we are talking about a rule of customary law.

As a consequence, Spain has no doubt that Saint Vincent and the Grenadines has no right whatsoever to exercise its diplomatic protection over the members of the crew of the *Louisa* who are not its nationals. Exercising diplomatic protection in the absence of a link of nationality would be tantamount to flouting the rules of international law which establish the conditions for the exercise of diplomatic protection and which apply directly in this case.

Furthermore, extending such protection to persons who are not members of the crew would be excessive and completely unjustified. Spain is therefore of the opinion that the imperative relating to the link of nationality with the Applicant categorically prohibits the exercise of diplomatic protection over Mr Foster, a US national, who has no link with the flag State.

Having said that with regard to the ship owner, the same conclusion follows with respect of Alba Avella who, according to her statement before the Tribunal, had no link with the *Louisa* or with the activities of Sage, apart from her father's "point of contact", who, according to her own statement, offered her to stay on board the *Louisa*.

Mr President, on the basis of the arguments that I have just set out, Spain is of the opinion that the Tribunal has no jurisdiction to rule on the merits of this case brought by the application of Saint Vincent and the Grenadines because that State thus seeks to exercise its diplomatic protection over persons who have no link of nationality with it. I refer, of course, to diplomatic protection over persons. This would totally disregard the fundamental obligation upon it to prove the nationality of the rights allegedly breached and of the corresponding claim.

In any event, if the exercise of diplomatic protection were deemed possible, such protection would have to be limited to the *Louisa*. All claims relating to the specific rights or interests of third parties with no link of nationality with Saint Vincent and the Grenadines, whether they be natural or legal persons, should not fall under diplomatic protection, full stop. The representatives of Saint Vincent and the Grenadines have asserted in their oral pleadings that your Tribunal should accept its jurisdiction over claims relating to US nationals since, as the US is not party to the Convention, the State of nationality of those individuals would not be able to appear before this Tribunal and exercise diplomatic protection. In addition, the Tribunal would be the only means to protect the rights of Mr Avella, Ms Avella and Mr Foster.

If you will allow me, Mr President, to make a few brief comments about these arguments in two short minutes, first, one cannot – and you know it much better than I – subsume diplomatic protection with recourse before your Tribunal. Indeed, even though diplomatic protection can be exercised through a legal claim before your Tribunal, it is also possible to use any other system of peaceful dispute settlement.

Secondly, recourse before your Tribunal is not the only instrument for obtaining justice with respect to the allegedly breached rights of Ms Avella, Mr Avella and Mr Foster, specifically if you take into account the nature of the rights that have allegedly been violated.

Thirdly – and this brings me to the end – in any event the non-ratification of an international treaty, in this case the Convention, by a sovereign State, in this case the United States, in the exercise of its free will and its free sovereignty, cannot constitute a sufficient basis to circumvent the well established rules of diplomatic protection under international law, according to which the existence of a link of nationality is the first of the essential conditions required for the exercise of diplomatic protection.

Thank you very much, Mr President. I could stop now, if that is your wish, and continue this afternoon.

THE PRESIDENT: Thank you. If you wish to continue your presentation this afternoon, that brings us to the end of this morning's sitting. We will sit again at 3 p.m. The sitting is closed.

(*Luncheon adjournment*)