WRITTEN RESPONSE OF THE KINGDOM OF SPAIN

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

THE M/V "LOUISA" CASE

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

REQUEST FOR THE PRESCRIPTION OF PROVISIONAL MEASURES UNDER ARTICLE 290, PARAGRAPH 1, OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

WRITTEN RESPONSE

OF THE

KINGDOM OF SPAIN

8 December 2010

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PART I

CHAPTER 1

INTRODUCTION AND RÉSUMÉ OF THE KINGDOM OF SPAIN'S RESPONSE

I. Introduction

1. On 24 November 2010, only five days after the deposit of its Declaration of Acceptance of the International Tribunal of the Law of the Sea ("Tribunal") in accordance with Article 287 of the United Nations Convention on the Law of the Sea of 10 December 1982 ("Convention"), Saint Vincent and the Grenadines instituted proceedings against the Kingdom of Spain ("Spain"). These proceedings included an Application instituting proceedings ("Application") and a Request for the Prescription of Provisional Measures under Article 290 of the Convention ("Request").

2. In its *petitum* the Applicant requests the Tribunal, by means of provisional relief, to:

(a) "declare that the Tribunal has jurisdiction under Articles 287 and 290 of the Convention to hear the request for Provisional Measures concerning the detention of the vessel, the *M/V Louisa* ("the *Louisa*"), in breach of the Respondent's obligations under various articles of the Convention, including 73 (notification of arrest), 87 (freedom of the high seas), 226 (investigations), 245 (scientific research), and 303 (archaeological objects)."

(b) "declare that the request is admissible, that the allegations of the Applicant are well-founded, and that the Respondent has breached its obligations under the Convention;"

(c) "order the Respondent to release the vessel *Louisa* and its tender, the *Gemini III*, upon such terms and conditions as the Tribunal shall consider reasonable;"

(d) "order the return of scientific research, information, and property held since 2006; and"

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

3. The Applicant further requests that the case be resolved through the summary procedure pursuant to the Convention, Annex VI, Article 15, paragraph 3. Spain objected to this request through a communication, via e-mail, by the Agent of Spain to the Registrar of the Tribunal, on 26 November 2010.

II. *Résumé* of the Response

4. As shall be explained in detail in the following pages of this Written Response, Spain rejects the prescription of provisional measures requested by Saint Vincent and the Grenadines. The reasons upon which Spain bases its opposition are essentially as follows:

(1) The Applicant's request constitutes an abuse of the legal process, particularly due to:

(a) the deliberate and unjustified entangling between the prompt release procedure (a question for the merits) and the provisional measures procedure (an

incidental procedure), trying to obtain through the latter what should be in any case foreclosed through the prompt release procedure, which is not applicable to the facts discussed in this case; and

(b) the pretension to obtain in an incidental process a *prima facie* decision on the merits, hence perverting the incidental nature of the provisional measures procedure.

(2) The Applicant has voluntarily placed itself in a contentious ordinary process and, in this particular case, has submitted itself to the regime foreseen in Article 290, Paragraph 1, of the Convention. Consequently, the present procedure must be ruled exclusively by the norms and principles that govern the prescription of provisional measures, which undoubtedly are of an extraordinary nature. In the case of prescription of such kind of measures, under no circumstances could the latter prejudice or affect any international or domestic legal process on the same facts.

(3) In any case, Spain considers that the Applicant's request for provisional measures does not comply with any of the conditions that should allow this Tribunal to indicate such measures:

(a) the Applicant's Request plainly fails to satisfy the *prima facie* jurisdiction of this Tribunal and does not fulfil the procedural requisites foreseen in Articles 283 and 295 of the Convention;

(b) the Applicant cannot demonstrate the urgency; and

(c) the Applicant further fails to prove that the prescription of the requested provisional measures be necessary in order to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

(4) Furthermore, Spain considers that the provisional measures must not be prescribed due to two more substantive motives:

(a) the requested measures necessarily suppose a judgement on the merits; and

(b) the requested measures do not respect the necessary balance between the legal interests of the Parties to the dispute —which the Tribunal must be aware of— since the priority measures requested (the release of the vessel and the return of objects and documents seized from it) should have as an immediate consequence the impossibility for the Spanish criminal courts to perform their judicial function due to the absence of particular pieces of conviction closely related to the offences prosecuted.

5. Consequently, Spain asks the Tribunal to decline to make the orders sought in paragraph 2 of the Applicant's Request for the prescription of Provisional Measures. Spain therefore asks the Tribunal to make the following orders:

(1) to reject the provisional measures requested by the Applicant;

(2) to declare that the Applicant's contention that Spain has breached its obligations under the Convention supposes a request which seeks to obtain a judgement on the merits and, therefore, it must not be dealt with by the Tribunal in this incidental phase of the proceedings;

(3) incidentally, that in any case this last contention by the Applicant is not well-

founded; and

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

III. Plan of the Response

6. In order to clearly define the terms and extent of the dispute submitted to the jurisdiction of this honourable Tribunal, it is Spain's intention to describe the relevant facts with regard to the dispute. Through this Statement of Facts, Spain attempts to offer to the Tribunal clear guidance around the object of the *litis*, partially and unfairly submitted by the Applicant. Spain also provides further elements that it considers must be kept in record by the Tribunal to decide on the indication of provisional measures (Chapter 2).

7. Subsequently, there will be discussion of some procedural issues raised by the Applicant's attitude and particularly relevant to this incidental process which exclusively refers to the prescription of provisional measures (Chapter 3). Following on, this response will include Spain's allegations with regard to the specific provisional measures requested by the Applicant (Chapter 4). Finally, Spain will submit its conclusions and the Respondent's *petitum* in this incidental process (Chapter 5).

CHAPTER 2

STATEMENT OF FACTS

I. Introduction

8. The Kingdom of Spain and Saint Vincent and the Grenadines are both parties to the Convention.

9. Spain deposited on 19 July 2002 the following Declaration under Article 287, paragraph 1, of the Convention:

> Pursuant to particle 287, paragraph 1, the Government of Spain declares that it chooses the International Tribunal for the Law of the Sea and the International Court of Justice as means for the settlement of disputes concerning the interpretation and application of the Convention.

10. On 19 November 2010, the Ministry of Foreign Affairs, Commerce and Trade of Saint Vincent and the Grenadines informed the depositary of the Convention about its formal Declaration under Article 287, paragraph 1, of the Convention under the following terms:

> In accordance with Article 287, of the 1982 United Nations Convention on the Law of the Sea of 10 December 1982, I have the honour to inform you that the Government of Saint Vincent and the Grenadines declares that it chooses the International Tribunal for the Law of the Sea established in accordance with Annex VI, *as the means of settlement of disputes concerning the arrest or detention of its vessels*. (emphasis added)

II. The activities of the *Louise* in Spanish territorial sea

A. Introduction

11. The Applicant contends that the *Louisa* was a seagoing vessel operated by Sage Maritime Scientific Research Inc. ("Sage"), a U.S. Corporation registered in Texas. The owner of the vessel is a United States corporate affiliate of Sage organized under the laws of the State of Texas, JBF Holdings, LLC. One of Sage's principal owners is Mr. John Foster. Its main representative in Spain was Mr. Roberto M. Avella. Both Mr. Foster and Mr. Avella are U.S. citizens.

12. Sage entered in contact with several persons in Spain, particularly Mr. Luis A. Valero de Bernabé, Mr. Claudio Bonifacio, Mr. Roberto Mazzara and Mr. Anibal Beteta. In order to facilitate their activities in Spain, Sage was incorporated under Spanish laws as Sage Maritime S.L.U,[1] with corporate address at Avenida de San Pablo 2, off. 203, 28229 Villanueva del Pardillo (Madrid). Its Director General is Mr. Luis Angel Valero de Bernabé, with its Director of History and Documentation being Mr. Claudio Bonifacio. For his part, Mr. Mazzara, an Italian citizen, collaborated materially and instrumentally in the activities organised and centred in the *Louisa* with its own vessel —the *Maru-K-III*, with Spanish flag— and its appurtenances (including several nozzles and suction flexible pipes). Neither Mr. Valero, nor Mr. Bonifacio or Mr. Mazzara have been previously engaged personally or professionally in reputed underwater mining research, nor in maritime scientific research

[1] See its website at http://sagemaritime.com/index2.html, accessed 1 December 2010.

related to the protection of marine environment. All have been, however, closely linked to activities connected with underwater cultural heritage. Hence, Mr. Valero is the administrator of Tupet Sociedad de Pesquisa Maritima, *S.A.* ("Tupet"), a company mainly engaged in the search and excavation of underwater archaeological objects. For his part, Mr. Anibal Beteta is the administrator of another Spanish society, Plangas, S.L. ("Plangas"), with corporate address at Calle Fabiola de Mora 3, 16630 Socuéllamos (Ciudad Real), its main and unique business activity being the installation of gas supply to private houses and buildings in the surrounding area, i.e. La Mancha.

13. Mr. Foster, Mr. Avella, Mr. Valero, Mr. Bonifacio, Mr. Mazzara and Mr. Beteta are currently accused in the criminal proceedings that also involve the *Louisa*, some members of its crew and some owners of the vessel. This criminal process is contained in the Criminal Indictment (*Auto de Procesamiento*) No. 1/2010, of 27 October 2010, before Mr. Luis de Diego Alegre, the Magistrate Judge of the Criminal Court (*Juzgado de instruccion* in Spanish) No. 4 of Cádiz.

14. The *Louisa* flies the flag of the Applicant, Saint Vincent and the Grenadines. Its "tender vessel", the *Gemini III*, apparently flies the flag of the United States of America and is owned by Sage. On 5 September 2005, one of the detainees and accused —Mr. Beteta— submitted to the Spanish Authorities an application for provisional Spanish flagging of the *Gemini III*.

15. Given that the *Gemini III* has never flown the Applicant's flag, particularly in the critical dates involved in this process,[2] under no circumstances is there the effective bond of nationality between the *Gemini III* and Saint Vincent and the Grenadines necessary for the admissibility of a request before an international court or tribunal.[3] Therefore, it is the Respondent's view that any provisional measure requested by the Applicant only refers to the *Louisa*.

B. The relevant facts between August 2004 and October 2005

16. On 20 August 2004, the *Louisa* arrived Spain and finally docked on 29 October 2004 at the commercial dock of El Puerto de Santa María (36° 35' 00" N, 6° 14' 00" W), a port three-and-a-half nautical miles north-east of the port of Cádiz and under the administrative authority of the *Capitanía Marítima* of Cádiz. Since then, the *Louisa* has never abandoned the dock of El Puerto de Santa María.

17. The Applicant contends that the *Louisa* was in Spanish territorial sea conducting magnetic surveys of the sea floor of the Bay of Cádiz to locate and record indications of oil and methane gas. It is also alleged that "due to navigation issues relating to the size of the *Louisa*, in February 2005, another Sage affiliate purchased a smaller vessel, the *Gemini III*. The *Gemini III*, rather than the *Louisa*, performed additional survey work in the Bay of Cadiz and served as a tender to the *Louisa* during the first few months of 2005. All operations ceased, however, in April 2005." (Request, p. 6, para. 18)

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

[3] See among others *Biens britaniques au Maroc espagnol (Espagne/Royaume Uni), R.S.A.*, II, p. 706; *The Panevezys-Saldutiskis Railway Case, Judgement of February 28th 1939, P.C.I.J. Series A/B, No. 76*, p. 16; or *Nottebohm Case (second phase), Judgement of April 6th, 1955: I.C.J. Reports 1955*, p. 4. See also Article 44(a) of the Articles on State Responsibility for internationally wrongful acts as a codification of the principle, stating that "[t]he responsibility of a State may not be invoked if ... [t]he claim is not brought in accordance with any applicable rule relating to the nationality of claims." UNGA Resolution 56/83, 28 January 2002, Annex.

18. The Applicant also contends that Sage undertook this action "pursuant to an official permit granted to the Spanish partner" (Request, p. 5). The only permit that the Applicant is able to show to this Tribunal is a document reproduced in Annex VI to the Request. This is a photocopy of an authorization issued on 5 April 2004 by the General Directorate of the Coasts (*Dirección General de Costas* in Spanish, a department of the currently denominated Ministry of the Environment, Marine and Rural Affairs) ("Costas") to Tupet, administered by Mr. Valero. The English translation of the permit, insofar as it has been delivered to the Respondent, is neither official nor complete.

19. That permit simply renews previous permits that must be known by this Tribunal. The *iter* is as follows:

(1) On 23 September 2003, Tupet submitted to Costas an application for a permit to carry out a demonstration of echo-sound cartography and video-photography of several points on the Spanish coasts. A six(6)-month permit was given by Costas on 23 and 30 September 2003, reminding Tupet that this permit did not exempt it from applying for and obtaining any other permit required for the undertaking of Tupet's activities;

(2) On 24 February 2004, Tupet applied for a one(1)-year renovation of its permit, further asking to be allowed to anchor in the areas permitted and communicating that a bigger vessel should be needed for the activities, announcing that the name and flag of that vessel would be properly submitted. A one(1)-year permit was given by Costas on 3 March 2004, again reminding Tupet that this permit did not exempt it from applying for and obtaining any other permit needed for the undertaking of Tupet's activities;

(3) On 5 April 2004, Tupet submitted an additional application in order to be permitted to extract samples from the seabed in order to complete research that would be included in an environmental report of the impact of maritime trafficking upon the sea floor. The application specified a particular area:

36° 31' 00" N, 36° 35' 00" N, 6° 19' 00" W, 6° 27' 00" W
36° 58' 00" N, 37° 35' 00" N, 6° 51' 00" W, 7° 08' 00" W

The area delimited by these points may be seen in **Annex 1**.
On 5 April 2004, Costas accepted this submission and included it in its previous permit issued on 3 March 2004. This is the only permit exhibited by the Applicant in this case.

(4) On 29 July 2004, Tupet informed Costas that the vessel referred to in its application of 24 February 2004 was the *Louisa*, adding further that Mr. Beteta should be the contact person with regard to the activities of Tupet and the *Louisa*.

(5) On 24 January 2005, Mr. Beteta as administrator of Plangas submitted a new application for permits for the same (or similar) purposes as the permits referred above, but in some other (albeit close) areas, indicating that the vessel engaged in these activities would be the *Maru-K-III*, owned by Mr. Mazzara. A one(1)-year permit was issued by Costas on 14 March 2005 with similar conditions to those summarised above.

(6) On 4 May 2005, Plangas applied for a modification in the permit, attempting to obtain permission to use a hydrodynamic flux created by the propellers of the vessel towards the seabed, removing sand and sea-mud, in an improper technical attempt

to reach the inner stratus. No permit was issued on this last application. Rather, on 6 December 2005, agents of the Spanish Civil Guard ("Guardia Civil") inspected the *Maru-K-III* and denounced Mr. Mazzara —who displayed aggressive behaviour against the agents— because of the violation of the permit referred to in the previous paragraph and because of the structural changes introduced to the vessel, which impeded its navigational uses under Spanish laws and regulations. As a result, the permit issued to Plangas was terminated and administrative charges initiated against Plangas and Mr. Mazara. On 9 December 2005, the provisional seizure of the *Maru-K-III* was decided.

(7) In the meantime, on 21 October 2005, Plangas submitted an application in order to be allowed to use a new vessel —the *Gemini III*— for the activities included in the permit granted by Costas on 14 March 2005. Costas authorized this on 3 November 2005

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

C. The relevant facts between October 2005 and February 2006

21. From October 2005 onwards, the Guardia Civil investigated the activities on board the Louisa, the *Gemini* III and around the dock of El Puerto de Santa María and the persons involved with Sage and the two vessels. A clear link was established between the two vessels, with the *Louisa* being the main operational centre and the *Gemini III*, its tender boat, operating out of the permitted areas and continuously docking alongside the *Louisa* as shown in **Photograph 1**.

22. Since then, the Guardia Civil, the Centre for Underwater Archaeology of Cádiz and the Port authorities were gathering information (visual, telematic and through various witnesses) about the positions of the *Gemini III* during the following months. All positions coincided with well-known underwater cultural heritage sites. Further, the equipment and appurtenances on board the *Louisa* and the *Gemini III* did not respond to the normal type used either for the conducting of magnetic surveys of the sea floor of the Bay of Cádiz to locate and record indications of oil and methane gas, or for the realisation of a demo of echo-sound cartography and video-photography and the extracting of samples from the bottom of the sea in order to complete an environmental impact research and report.

23. During this period, under judicial authorization of the Magistrate Court of the Criminal Tribunal No. 4 of Cádiz, an investigation by the Guardia Civil took place on the activities of Mr. Avella, Mr. Valero, Mr. Mazzara, Mr. Betera and some other crew members from the *Louisa* and the *Gemini III*. From this investigation it could be inferred that:

(1) All of them, acting from the *Louisa* and using the *Gemini*, were looting Spanish heritage from different archaeological underwater sites under the general direction of Sage and Mr. Foster, represented in Spain by Mr. Avella, and following indications from Mr. Valero and Mr. Bonifacio;

(2) That some of them, initially sharing the same objectives, began to discuss the amounts and the way they could share the financial benefits;

(3) That at a particular moment, they began to betray each other; and

(4) That on board the *Louisa* was suspected the presence of several unreported war weapons.

24. Once the Spanish authorities realised that the *Louisa* was engaged in other, quite different and unauthorized activities, a criminal investigation began, the result of which was the final detention of the vessel and the *Gemini III* on 1 February 2006.

3. Seizure of the vessel

A. The facts

25. On 1 February 2006, the *Louisa* and the *Gemini III* were boarded at the docks of El Puerto de Santa María by Spanish judicial authorities following a criminal indictment issued by the Criminal Court No. 4 of Cádiz, under severe suspicion of:

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

(2) the illegal presence of weapons aboard the *Louisa*.

Some members of the crew, but not the Master, were detained and released once the Magistrate Judge took the prescribed declarations under Spanish criminal procedural law.

26. Among other equipment, on board the *Louisa* were found the following items:

(1) A G-882 Marine Magnometer, manufactured by *Geometrics* (similar to the one shown in **Photograph 2**), and as explained on its own commercial website "the G-882 system is particularly well suited for the detection and mapping of all sizes of ferrous objects. This includes anchors, chains, cables, pipelines, ballast stone and other scattered shipwreck debris, munitions of all sizes (UXO), aircraft, engines and any other object with magnetic expression." (see **Annex 2**).

(2) A Remoted Operated Vehicle (ROV) RMD-1 Metal Detector, manufactured by JW Fishers (**Photograph 3**) which, on its commercial website, offers its product as "a high performance pulse induction metal detector which can be attached to almost any ROV or towed underwater system … Pulse induction technology allows the RMD-1 to detect both ferrous and non-ferrous metal objects on or beneath the ocean floor *while ignoring minerals in the seabed.* The remote metal detector locates and tracks underwater pipelines, finds missing tools and dredge parts, locates weapons and unexploded ordnance, and *finds lost treasure.*" (emphasis added) (see **Annex 3**)

(3) A hyperbaric camera for diving safety activities and an air compressor for the loading of oxygen for diving equipment; (**Photograph 4**)

(4) Several cases and compartments for the storage and maintenance of pieces excavated from the seabed;

(5) Different manual metal detectors (**Photograph 5**), which in the Applicant's view must also be indispensable tools for the location of oil and gas in the waters of the Bay of Cádiz; and

(6) An air-compressed diving tank with a sectioned shell (**Photograph 6**), typically used by treasure hunters who place objects in the tank, hide them with the plastic

semi-capsule cover and pass them through customs and police controls.

27. On 3 February 2006, following the obligations imposed on Spain by the Vienna Convention on Consular Relations, of 24 April 1963 (596 *UNTS* 261), Spanish authorities began to inform the detainees' consular authorities of their legal situation. (**Annex 4**)

28. Contrary to what is stated in Applicant's Request (p. 4, para. 11), on 15 March 2006, a *Note verbale* was sent by the Embassy of Spain in Kingston to the Ministry of Foreign Affairs, Commerce & Trade of Saint Vincent and the Grenadines (**Annex 5**), officially informing the Applicant of the entry and registration of the *Louisa* "for any necessary procedures."

29. During the judicial inspection of the vessel ordered by the Magistrate Judge, different archaeological objects, some shown in **Photographs 7 to 10,** were found on board the *Louisa*. The Applicant's arguments about their monetary value plainly neglect the irremediable damage caused to the archaeological sites from where they were plundered without any scientific care or protocol.

30. Furthermore, on board the *Louisa* and at the homes and offices of some of the detainees several physical and electronic documents with relevant information about alleged underwater cultural sites were found. None of these documents clearly relate to the "location and recording of oil and methane gas."

31. Also on board the *Louisa*, several unreported weapons were found locked in a gun cupboard in the vessel. Among the weapons,[4] five M15 war rifle, as shown in **Photograph 11** were found.[5]

32. The *Gemini III*, as shown on **Photograph 12**, was noticeable equipped with two abnormal deflectors at the stern of the vessel that, adapted to the propellers, are typically used by treasure hunters to remove the sand in shallow waters and disclose valuable objects embedded at the bottom of the sea.

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

34. When arrested, and as shown in **Photograph** 1 taken on 15 November 2005, the *Louisa* already showed clear deterioration of its hull and appurtenances. Photographs shown by the Applicant in the Annex 1 of its Request neither properly nor convincingly show the date when the images were taken.

35. From 2006 onwards, the vessels have been under judicial control. As detailed further in the next section, on several occasions the Magistrate Judge permitted Sage the possibility of inspecting the vessel and carrying out maintenance. None of the latter were decided or proposed by the *Louisa's* owners.

B. Subsequent activities by Spanish judicial and administrative authorities

36. Once the criminal legal process begun in Spain against Sage, the *Louisa* and other

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[4] Including also one semi-automatic shotgun manufactured by Mossberg, calibre 12 mm., one pistol calibre 6,35 mm., and miscellaneous ammunition.

[5] The Applicant contends that "these weapons had been placed on board the *Louisa* for protection of its crew at the direction of ASP Seascot, the *Louisa's* shipping management firm, for protection against pirates." Request, p. 6, para. 20.

related persons, the following relevant decisions, indictments and orders were issued by the Magistrate Court of Criminal Court No. 4 of Cádiz:

(1) On 6 March 2006, the Magistrate Judge authorized the Officers of the Port Authority to visit the vessel, to make maintenance activities and to verify the security of the vessel; (**Annex 6**)

(2) On 8 November 2007, Mr. Foster tried to be officially represented at the trial. This was initially denied due to procedural default. Once this was resolved —it was postponed several times due to the refusal of Mr. Foster to appear before the Tribunal—, on 10 June 2008 the Magistrate Judge accepted the appearance of Mr. Foster and decided to have a hearing with him on 15 July 2008 at 11am. Sage had been duly represented by an attorney since the very beginning of the process;

(3) On 22 February 2008, Sage asked the Magistrate Judge to be allowed to visit the *Louisa*. On 22 July 2008, once the procedural position of Mr. Foster was resolved, the Magistrate Judge asked Sage to designate a sailor-person to make all necessary arrangements in the vessel to keep it in a proper state; (**Annex 7**)

(4) On 11 July 2009 Mr. Foster informed the Magistrate Judge that he would not be coming to Spain and that he wanted to declare through video conferencing;

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

(6) On 18 February 2009, the Magistrate Judge received a new request from the owners of the *Louisa* to visit and make some repairs (if any) to the vessel. The Magistrate Judge accepted this visit on 25 February 2009 and decided that the visit should take place on 3 March 2009. On 2 March 2009, a postponement of the visit by Sage was requested, with the Magistrate Judge accepting this and deciding that the visit should take place on 5 March 2009. (**Annex 8**) Mr. Avella and his attorneys, accompanied by the judicial authorities, visited the *Louisa* on 5 March 2009; and

(7) On 29 July 2010, the Magistrate Judge asked Sage again to submit to the court its decision regarding the maintenance of the vessel. (**Annex 9**)

37. Since then, no other visit has been requested from the Magistrate Judge. Sage did not ask to make any repairs to the vessel and no other procedural action was submitted before the Criminal Court No. 4 about this. However, on 29 July 2010, the Magistrate Judge asked Sage again to appoint someone to take charge of maintenance and repairs needed on board the *Louisa*.

38. On 1 March 2010, the Magistrate Judge issued the criminal procedure No. 1/2010 against the persons directly involved in the case.

C. Position of Sage and the Applicant during the domestic process

39. Sage, as the owner of the vessel, and Saint Vincent and the Grenadines, as the Applicant in this proceedings, have maintained a ambiguous position during the domestic process summarized in this Chapter.

40. The Applicant contends that "[it has] sustained and serious attempts to resolve this

detention through the Respondent's legal system." (Request, p. 14, para. 47). However, since Sage (and, particularly, Mr. Foster) appeared before the Spanish criminal tribunals, they have opposed the domestic procedure with all and any kind of legal obstacles. The Applicant, on its side, never submitted any claim before Spanish courts in order to obtain the release of the *Louisa*.

41. Actually, Sage and the Applicant have never demanded the release of the *Louisa* until its Application to this Tribunal, almost four (4) years after the detention of the vessel.

42. Sage has had the opportunity to visit the vessel. Apparently, it has realised that the *Louisa* did not (and does not) need any kind of maintenance or reparation on board. Only once suggested by the Spanish Magistrate Judge, some limited activities were done —not by Sage— to the *Louisa*.

43. To sum up, no submission for the release of the *Louisa* was done, neither by the owners of the vessel nor by the flag State. Yet, no serious effort was made by Sage to perform routine maintenance and conservation operations to the vessel.

CHAPTER 3

SOME PROCEDURAL ISSUES RAISED BY THE REQUEST ON PROVISIONAL MEASURES

I. Introduction

44. Before proceeding with the arguments directly related to the Request on Provisional Measures, Spain considers it necessary to formulate some observations on three questions that refer to procedural questions directly concerned by the Request and the Application:

(1) the time when Saint Vincent and the Grenadines deposited its Declaration pursuant Article 287 of the Convention, and its content;
(2) the Applicant's intention to mix and blur the procedure on provisional measures with the prompt release procedure; and
(3) the Applicant's breach of its obligation to exchange views with the Respondent and the non-exhaustion of local remedies.

II. Applicant's Declaration pursuant Article 287 of the Convention

45. Only five days after the communication to the Secretary-General of the United Nations of its Declaration pursuant Article 287 of the Convention, the Applicant submitted before this Tribunal an Application and a Request of Provisional Measures, further contending that the case be reviewed through the summary procedure foreseen in Article 15 of the Annex VI of the Convention. Spain admits that the acceptance of the jurisdiction of an international court, in this case this honourable Tribunal, is a right of the declaring State. Spain further accepts that the conduct of a State which has properly submitted an application in the framework of the remedies open to it does not amount to an abuse of process as such.[6] But at the same time, Spain contends that a court, in this cases, must ensure that this will in no way cause prejudice to Spain "with regard to both the establishment of the facts and the determination of the content of the applicable law."[7]

46. As the ICJ has declared, it is well known that

> declarations of acceptance of the compulsory jurisdiction ... are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations.[8]

But it is also well known that

> the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional-Clause system, *the principle of good faith plays an important role*.[9] (emphasis added)

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[6] See *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgement, I.C.J. Reports 1992*, p. 258, para. 38.

[7] *Ibid.*, p. 255, para. 36.

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

[9] *Ibid.*, para . 60.

47. In this regard, Spain considers that good faith has not governed the attitude of Saint Vincent and the Grenadines in this case: it has deposited an *ad hoc* Declaration, with a short time-limit and, as a result, it has impeded or at least made it difficult for the Respondent to respond to the establishment of the facts and the determination of the content of the applicable law. In addition, and at the same time, the Applicant tried to pursue the proceedings through the summary procedure foreseen in Article 15 of the Annex VI of the Convention.

48. The Applicant significantly reduces *ratione materiæ* its Declaration: it only admits the jurisdiction of the Tribunal "as the means of settlement of disputes concerning the arrest or detention of its vessels." But the Applicant must be aware that it is not only the "owner" of its Declaration pursuant to Article 287 of the Convention, but is its "servant" as well. It is a Declaration particularly suited for this controversy against Spain; actually, it simply conceals an *ad hoc* acceptance of jurisdiction. This assessment that the Declaration is an *ad hoc* declaration in this case can be easily proved by the fact that, on 26 October 2010, Saint Vincent and the Grenadines sent the Mission of Spain to the United Nations a *Note verbale* which advanced its intention to submit an application before this Tribunal; that is, *even before* the deposit of its Declaration pursuant Article 287 of the Convention. The Applicant's intention is, therefore, unequivocal.

49. Therefore, this plainly implies that between Spain and Saint Vincent and the Grenadines only disputes concerning the arrest or detention of their vessels could be judged by this honourable Tribunal. Based on the principle of reciprocity, the State which has made the wider acceptance of the jurisdiction of the Tribunal —Spain in this case— is enabled to rely upon the reservations to the acceptation laid down by the other Party —St Vincent and the Grenadines—.[10]

III. The blurring between the procedure for provisional measures and the prompt release procedure. The prompt release procedure is not applicable in the case

50. The applicant contends that Spain has violated Articles 73, 87, 226, 245 and 303 of the Convention.

51. Article 73 of the Convention ("Enforcement of laws and regulations of the coastal State") states as follows:

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

[10] See *Interhandel Case, Judgement of March 21st, 1959, I.C.J. Reports 1959*, p. 23.

4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

52. Article 87 of the Convention ("Freedom of the high seas") states as follows:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

53. Article 226 of the Convention ("Investigations of foreign vessels") states as follows:

1. (a) States shall not delay a foreign vessel longer than is essential for purposes of the investigations provided for in articles 216, 218 and 220. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when:

(i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents;

(ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or

(iii) the vessel is not carrying valid certificates and records.

(b) If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.

(c) Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV.

> 2. States shall cooperate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea.

54. Article 245 of the Convention ("Marine scientific research in the territorial sea") states as follows:

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

55. Finally, Article 303 of the Convention ("Archaeological and historical objects found at sea") states as follows:

> 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
> 2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that Article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

56. The Applicant therefore contends that Spain, by detaining the *Louisa*, has breached its international obligations with regard to the (a) the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, (b) the freedom of the high seas, (c) its obligations to prevent, reduce and control of the marine environment, (d) the exercise of its exclusive right to regulate, authorize and conduct marine scientific research in its territorial sea, and (e) the protection of underwater cultural heritage.

57. But, at the same time, the Applicant also makes a deliberate, clear choice. By submitting a Request for the Prescription of Provisional Measures, the Applicant places *motu propio* within the realm of Article 290 ("Provisional Measures") and not in the province of "Prompt Release" regulated in Article 292 of the Convention. However, the Applicant tries to mix both legal expedients, creating an "effect of confusion" or blurring the legal nature of the procedure on provisional measures and on the rules and principles that must be applied by this Tribunal when dealing with the Request. Therefore, all the arguments, quotations and opinions revisited by the Applicant in its Request might not be kept in record in this case. On the contrary, all the legal arguments must be constructed to deal with the conditions, purposes and extent of the "Provisional Measures", and not those relating to the "Prompt Release", given that they are different procedures governed consequently by different rules and principles.

58. In its previous jurisprudence, this tribunal has clearly distinguished between prompt release and provisional measures procedures. In the *Camouco Case*, it was held that

> The scope of the jurisdiction of the Tribunal in proceedings under Article 292 of the Convention encompasses only cases in which "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel

or its crew upon the posting of a reasonable bond or other financial security".[11]

59. The Applicant's request of provisional measures simply and essentially conceals a prompt release petition, which —in the Applicant's opinion— should have been submitted under Article 292 of the Convention. Actually, the Applicant admits that "because of its very nature, this matter incorporates elements of a Prompt Release Application pursuant to Article 292 [of the Convention]." (Request, p. 12, para. 42) However, as explicated by this Tribunal, "the independence of the proceedings under Article 292 of the Convention vis-à-vis other international proceedings emerges from Article 292 itself and from the Rules of the Tribunal."[12]

60. Article 292 of the Convention, established a particular procedure for the Prompt Release of vessels:

> 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
> 2. The application for release may be made only by or on behalf of the flag State of the vessel.
> 3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
> 4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

61. The specificity of the prompt release special summary procedure relies on the fact that it is not an incidental question submitted in a more ample dispute. Rather, it implies a precise, substantive procedure on a concrete dispute about the breach by the detaining State of its obligation of prompt release in those cases expressly foreseen in the Convention. Paraphrasing the words of this Tribunal in the *Monte Confurco* case, the prompt release procedure tries to establish a fair balance between two interests in place: the interest of the detaining State to take the appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crews from detention on the other.[13]

62. This is not the first time that Saint Vincent and the Grenadines has tried to convince this Tribunal that the prompt release tool goes beyond Article 292 of the Convention and can be contended in all the cases when a vessel is legally detained by a coastal State. However,

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[11] *Camouco Case*, para. 59. See also the *Monte Confurco Case*, para 63.

[12] *The M/V "Saiga" Case*, para. 50. Actually, a prompt release procedure ends with a "Judgement"; provisional measures are indicated in an "Order".

[13] *The "Monte Confurco" Case*, para. 70.

the right to the prompt release is restricted to those cases expressly provided for in the Convention.

63. In the *Saiga* Case, the current Applicant tried to rely on what could be termed a "non-restrictive interpretation" of Article 292. Quoting the words of this Tribunal,

> according to [Saint Vincent and the Grenadines'] interpretation the applicability of Article 292 to the arrest of a vessel in contravention of international law can also be argued, without reference to a specific provision of the Convention for the prompt release of vessels or their crews ... In the view of Saint Vincent and the Grenadines, it would be strange that the procedure for prompt release should be available in cases in which detention is permitted by the Convention (Articles 73, 220 and 226) and not in cases in which it is not permitted by it.[14]

64. However, the Tribunal did not follow this argument. It simply reminded that

> as regards the requirement of alleged non-compliance with the provisions of the Convention for the prompt release of vessels upon the posting of a reasonable bond or other financial security, three provisions of the Convention correspond expressly to this description: Article 73, paragraph 2; Article 220, paragraphs 6 and 7; and, at least to a certain extent, Article 226, paragraph 1(c).[15]

65. In any case, a condition might be necessarily satisfied before an order for the prompt release of an arrested vessel be made by the Tribunal: the Applicant must demonstrate that the detained State "has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security" (paragraph 1 of Article 292). There must exist a clear connection between the legal reasons behind the detention and arrest of the vessel and the actions taken by the detaining State referable to Articles alleged by the flag State. This poses not only the burden of proof on the latter's side but also obliges the Tribunal, under Article 113, paragraph 1 of its Rules, to

> determine in each case in accordance with Article 292 of the Convention whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded."

66. As expressed by Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye in their Dissenting Opinion to the *Saiga* Case, "without such a connection, the Tribunal must conclude that the allegation is not 'well founded.' "[16]

67. In this case, the Applicant unfoundedly tries to connect the prompt release of the *Louisa* with the measures adopted by Spain:

> (1) with regard to the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone (Article 73);
>
> (2) with regard to the freedom of the high seas (Article 87);
>
> (3) with regard to its obligations to prevent, reduce and control of the marine environment (Article 226);

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[14] *The M/V "Saiga" Case*, para. 53.

[15] *The M/V "Saiga" Case*, para. 52.

[16] Dissenting Opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, *The M/V "Saiga" Case*, para. 8.

(4) with regard to the exercise of its exclusive right to regulate, authorize and conduct marine scientific research in its territorial sea (Article 245); and

(5) with regard to the protection of underwater cultural heritage (Article 303).

68. As it was seen *supra* paragraph, this Tribunal has reduced the application of the prompt release to Articles 73, 220 and, *to certain extent*, 226.[17] It is in the context of these provisions that the obligation to promptly release must be read. Around none of them, however, can be established a clear connection between the legal reasons behind the detention of the vessel and the actions taken by the detaining State:

(1) Spain has not detained the *Louisa* in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in Spanish economic exclusive zone;

(2) Spain has not detained the *Louisa* because during its passage through Spanish territorial sea, it violated Spanish laws and regulations adopted in accordance with the Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels; and

(3) Spain has not detained the *Louisa* because it would present an unreasonable threat of damage to the marine environment.

69. As Spain has tried to demonstrate in Chapter 2 of this Response, the *Louisa* was detained because it was a clear evidence of a crime, a "piece of conviction" (*pieza de convicción penal* in Spanish) in a criminal process before the Criminal Tribunal No. 4 of Cádiz with no connection to any of the scenarios foreseen in Articles 73, 220 or 226 of the Convention. Moreover, both the *Louisa* and the *Gemini III* are necessary means for the commission of the crime, and must be observed by Spanish competent tribunals accordingly.

70. The Applicant has completely failed to demonstrate what it contends and, again, the *onus probandi* is on the Applicant's side, not on the Respondent's side. The Applicant has not produced any evidence that Spanish authorities proceeded against the *Louisa* because, for example, it was violating fishing laws in Spanish exclusive economic zone, that it was spilling fuel in this zone or in Spanish territorial sea, or that it actually supposed a threat to the marine environment.

71. And the Tribunal must be based on an examination of facts submitted by the parties and not independently of them. As this Tribunal particularly said on this in the *Saiga* Case,

> The Tribunal in this regard considers appropriate an approach based on assessing whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purposes ... The standard indicated seems particularly appropriate in view of the fact that, in the proceedings under article 292, the Tribunal has to evaluate "allegations" by the applicant that given provisions of the Convention are involved and objections by the detaining State based upon its own characterization of the rules of law on the basis of which it has acted.[18]

72. The Applicant contends that Spain also failed to officially notify the flag State of the

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[17] See further T. Treves: "The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea", 11 *The International Journal of Marine and Coastal Law* 179 (1996), at 182-185.

[18] *The M/V "Saiga" Case*, para. 51.

detention of the *Louisa* pursuant paragraph 4 of Article 73 of the Convention. Although this is not the appropriate procedural phase to deal with the merits of this argument, it must be noted that the Applicant is trying to construct (or to "de-construct") a theory on the time limit to submit a prompt release claim. It contends, arguing the *Camouco* Case, that this Tribunal has established that Article 292 of the Convention "does not require the flag State to file an application at any particular time after the detention of a vessel and its crew."[19] (Request, p. 13, para. 44) The Applicant adds that, likewise in the *Camouco* Case three (3) months had elapsed since the detention of the vessel, in the *Volga* Case ten (10) months passed and in the *Tomimaru* Case eight (8) months elapsed between the arrest of the vessel and the filing of the Application.

73. In Spain's opinion, this continued reference to the prompt release procedure and to the rules and principles that must inspire this Tribunal in that procedural framework conceals the Applicant's real purpose, which is to get through the incidental relief of provisional measures what it could not obtain under any circumstance through the prompt release procedure: the prompt release of the *Louisa*, an obligation that does not exist against Spain in the Convention.

74. The use of this *technique of blurring* with regard the provisional measures and the prompt release, along with the arguments underlined above by Spain about the Applicant's Declaration pursuant Article 287 of the Convention, may lead to a more general reflection about the role of *fairness* in this case. As this Tribunal knows, fairness means not only just or appropriate in the circumstances, but also obliges being in accordance with the rules or standards. Fairness is not a vague notion but, rather, it is closely linked to equity which, "as a legal concept is a direct emanation of justice."[20]

75. Along with the obligation endorsed in Article 300 of the Convention, under which "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right", one can legitimately wonder whether we are not facing here a case of "abuse of legal process" as foreseen in Article 294 of the Convention.

IV. Absence of previous "exchange of views" and non exhaustion of local remedies

76. Independently of what has been previously said, it cannot be obviated that, as stated in Article 286 of the Convention, the settlement of disputes requires the fulfilment of, at least, two conditions:

(1) the previous exchange of views; and

(2) the exhaustion of local remedies, in conformity with international law.

Saint Vincent and the Grenadines' Application and Request raise both questions.

A. Absence of previous "exchange of views"

77. Article 283, paragraph 1, of the Convention states that

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute *shall proceed* expeditiously to

[19] *The "Camouco" Case*, para. 54.

[20] *Continental Shelf (Tunisia/Lybian Arab Jamahiriya), Judgement, I.C.J. Reports 1982*, p. 60, para 71

an exchange of views regarding its settlement by negotiation or other peaceful means. (emphasis added)

Although expressed in general terms, though compulsory, this is not a vague obligation included in the Convention as a common term of art. It must be given a full sense as international jurisprudence has done repeatedly. Actually, "the judicial settlement of international disputes ... is simply an alternative to the direct and friendly settlement of such disputes between the Parties ..."[21] Consequently, paraphrasing The Hague Court, it is for this Tribunal to facilitate, so far as is compatible with its Statute, such direct and friendly settlement.

78. International jurisprudence has habitually dealt with this obligation and distinguished its legal nature when it is endorsed conventionally, as is the case. The wording of the title of Article 283 ("*Obligation* to exchange views", emphasis added) and the compulsory meaning of its text ("the parties to the dispute *shall proceed* to an exchange of views", emphasis added) does not need further interpretation: the parties to a dispute concerning the interpretation or application of the Convention are obliged to exchange their views regarding its settlement. Defining the content of the obligation to negotiate, the Permanent Court of International Justice ("PCIJ"), in its Advisory opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation to reach agreement.[22]

79. No exchange of views on the dispute was done between the Applicant and Spain. Contrary to what is said in the Applicant's Request (p. 10, para. 33), Saint Vincent and the Grenadines —to whom the obligation expressed in Article 283, paragraph 1, of the Convention is directed— never contacted nor exchanged any views regarding the settlement of any possible dispute around the detention of the *Louisa*.

80. The Applicant annexes a letter from William H. Weiland (supposedly an attorney of the law firm *Kelly Hart & Hallman LLP*) directed to HE Jorge Dezcallar de Mazarredo, Ambassador of the Kingdom of Spain to the United States of America. In this letter, the legal representative of a private company —Sage— simply tries to explain the facts and to exonerate its clients from the accusation of possession of war weapons on board the *Louisa*.[23] Besides including amazing stories of pirates and suggesting that the Spanish judges were easily influenced by other trial cases with completely different surrounding circumstances, the letter was not, and is not, any kind of succedaneum —and, of course, not an evidence— of a diplomatic exchange of views regarding the dispute between Saint Vincent and the Grenadines and the Kingdom of Spain.

81. Another letter included in the same Annex 5 of the Request, from a different attorney but acting again on behalf of Sage,[24] mainly insists on explanations about the weapons on board the *Louisa* and the exemption of liability of his clients. It has been Mr. Foster, putting

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

[22] *P.C.I.J., Series A7B, No. 42*, p. 116. See also *North Sea Continental Shelf, Judgement, I.C.J. Reports 1969*, pp. 47-48, para. 86-87.

[23] The letter signed by the same attorney sent on 27 August 2009 to the Magistrate Judge on duty (Request, Annex 5) simply abounded on this same question.

[24] And also on behalf of John Foster, one of Sage's principal owners, and David Trimble, a former worker for Sage.

an endless list of legal obstacles, who has delayed the criminal proceedings undergone before Spanish tribunals.

82. One more letter was sent from Sage —not from the Applicant— to the General Consul of Spain in Houston (Texas, U.S.) with an annexed letter of complaint for the Spanish General Council of the Judicial Power (*Consejo General del Poder Judicial*) (Annex 8 of the Request) to formulate different allegations again trying to explain Sage's activities in Spanish waters, to excuse the possession of war weapons on board the *Louisa*, to exonerate Sage of the activities of its divers regarding the plundering of Spanish underwater cultural heritage and to complain about the (lack of) activity of the Magistrate Court in different phases of the criminal proceedings in Spain.

83. However, none of these communications was sent to the Spanish authorities by the Applicant but by the attorneys of some of the accused before the criminal tribunal in Spain referred to above in Chapter 2. Furthermore, none of these communications and letters contain any reference to the "dispute" between Saint Vincent and the Grenadines and Spain, the factual basis of the Application. Consequently, none of these documents can be considered as evidence of the fulfilment of the obligation to proceed to an "exchange of views" pursuant Article 283, paragraph 1, of the Convention.

84. The only official communication between the two States is reproduced in Annex 11 of the Request. This Annex reproduces a letter from the Permanent Mission of Saint Vincent and the Grenadines to the United Nations to the Permanent Mission of Spain to the United Nations, of 26 October 2010, i.e., less than a month before the submission of the Application and before Saint Vincent and the Grenadines accepted the jurisdiction of this Tribunal under Article 287 of the Convention.

85. This is the unique and late letter that refers to some kind of link between the Applicant and the vessel incurred in these proceedings before the Tribunal.

86. In this letter, the Applicant simply stated:

(1) that the Applicant "objects to the Kingdom of Spain's continued detention of the ships the *M.V. Louisa* and its tender, the *Gemini III*";
(2) that "Saint Vincent and the Grenadines further objects to the failure to notify the flag country of the arrest as required by Spanish and international law"; and
(3) that "Saint Vincent and the Grenadines plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ship and settlement of damages incurred as a result of its improper detention."

Therefore, on 26 October 2010, Saint Vincent and the Grenadines had already taken the decision to act against Spain before the International Tribunal for the Law of the Sea. With that letter, the Applicant voluntarily and unilaterally ended any chance of diplomatic negotiation.

87. It is crystal clear from the wording of this unique official letter from the Applicant to the Respondent that the former would not proceed, even expeditiously, "to an exchange of views regarding its settlement by negotiation or other peaceful means" as requested by Article 283, paragraph 1, of the Convention. This constitutes a breach by the Applicant of the Convention that should preclude its access to the Tribunal given that, paraphrasing this Tribunal in a positive tense, a State Party is obliged to continue with an exchange of views

when it concludes that the possibilities of reaching agreement have not been exhausted.[25]

B. Non exhaustion of local remedies

88. Independently of the merits, the allegation of failure to exhaust local remedies stands out as a clear-cut issue of a preliminary character that can be determined immediately at the preliminary stage and on its own.[26] Article 295 of the Convention ("Exhaustion of local remedies") states that:

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

89. As said by this Tribunal in the *Saiga (No. 2)* Case, "the question whether local remedies must be exhausted is answered by international law. The Tribunal must, therefore, refer to international law in order to ascertain the requirements for the application of this rule and to determine whether or not those requirements are satisfied in the present case."[27]

90. Article 295 of the Convention reflects the general principle codified in Article 44(b) of the Articles on State Responsibility,[28] when it states that "the responsibility of a State may not be invoked if ... the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."[29] In the *Elettronica Sicula* Case, the International Court of Justice ("ICJ") further clarifies that "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success."[30]

91. The Applicant contends that "it has filed its Application and Request for Provisional Measures reluctantly and only after sustained and serious attempts to resolve this detention through the Respondent's legal system." (Request, p. 14, para. 47) This contention is plainly inaccurate and deceptive.

92. It is inaccurate because the persons and companies that the Applicant tries to defend before this Tribunal have continuously submitted all and any kind of legal obstacles to the procedures before the Spanish legal system:

(1) As can be seen in Chapter 1 of this Response, it was Sage and, particularly, Mr. Foster, who continuously impeded the fast tracking of the procedure: *firstly*, by appealing all and any single decision and order adopted by the Magistrate Judge from 2008 onwards; and, *secondly*, by violating the obligation to appear before the Criminal Tribunal in a clear breach of the bilateral international obligations between Spain and the United States of America on cooperation in criminal procedures.

(2) Furthermore, due to the "fog" of persons, companies and activities directly or indirectly involved in the case, the case was (and still is) particularly difficult to

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[25] *The MOX Plant Case*, Order of 3 December 2001, para. 60.

[26] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objectios, Judgement, I.C.J. Reports 1964*, p. 46.

[27] *The M/V "Saiga" (no. 2) Case*, para. 96.

[28] UNGA Resolution 56/83, 28 January 2002, Annex

[29] See also Article 15 of the 2006 Draft articles on Diplomatic Protection also reflects this principle. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10).

[30] *Elettronica Sicula S.p.A. (ELSI), Judgement, I.C.J. Reports 1989*, p. 46, para. 59.

deal with. Accordingly, the Magistrate Judge decided to maintain as a *Procedimiento Sumario* which —not being a "summary" procedure as might be inferred from its name—, is the one with more legal guarantees and privileges for the accused. Paradoxically, though not surprisingly, Mr. Foster also appealed this decision.

93. The Applicant's contention is also deceptive because, as Spain stated in the previous section of this Response, Saint Vincent and the Grenadines *never* made any serious attempt to resolve the dispute. On 15 March 2006, the Applicant was already aware of the entry and registration of the *Louisa* by the Spanish judicial authorities; and Spain properly communicated this to Saint Vincent and the Grenadines "for any necessary procedure." However, the Applicant took no action with regard to the *Louisa* until 26 October 2010 when it simply announced to Spain the forthcoming action before this honourable Tribunal.

CHAPTER 4

THE PROVISIONAL MEASURES PURSUANT ARTICLE 290 OF THE CONVENTION IN THIS CASE

I. Introduction

94. In international law, provisional measures are intended to preserve the respective rights of the parties *pendente lite*, avoiding an irreparable prejudice to the object of a dispute in judicial proceedings.[31] The general conditions for the indications of provisional measures are a *prima facie* jurisdiction on the merits,[32] a relationship between the interim relief and the main claim,[33] the existence of a possible irreparable prejudice[34] and urgency.[35] Provisional measures are an incidental process —distinct from the merits—,[36] that must not prejudice the definitive solution of the case,[37] rejecting any demand which attempts to make the international court decide upon the merits.[38] International courts may also indicate the provisional measures *motu propio*.[39] As this Tribunal well knows, these conditions and limits have become crystalised into a clear and well-established body of jurisprudence.[40]

95. These building blocks construct the old vintage rule expressed by the Permanent Court of International Justice ("PCIJ") in 1939: "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not to allow any step of any kind to be taken which might aggravate

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[31] See a longstanding jurisprudence of the ICJ, i.e., in the *Anglo-Iranian Oil Co. Case, Order of July 5th, 1951, I.C.J. Reports 1951*, p. 93; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 16, para. 21 and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 34, para. 22; *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34; or *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p 257, para. 35; *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 15, para. 22.

[32] *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, I.C.J. Reports 1991*, p.15, para. 13-14.

[33] *Legal Status of the South-Eastern Territory of Greenland (Norway/Denmark), Provisional Measures, P.C.I.J., Series A/B, No. 48*, pp. 276 ff.

[34] *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo/Belgium), Provisional Measures, I.C.J. reports 2000)*, p. 201, para. 69.

[35] *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, I.C.J. Reports 2003*, p. 77 ff.

[36] *Interhandel Case (interim measures of protection), order of October 24th 1957: I.C.J. Reports 1957*, pp. 110-111.

[37] See the original declamation of this principle in the *Case concerning the Administration of the Prince von Pless (Germany/Poland), Provisional Measures, P.C.I.J. Series A/B, No. 54*, p. 153.

[38] *Factory at Chorzów (indemnities), Order of 21 November 1927, P.C.I.J., Series A No.* 12, p. 12.

[39] *Armed activities in the Territory of the Congo (Democratic Republi of the Congo/Uganda), Provisional Measures, I.C.J. Reports 2000*, p. 128, para 43.

[40] See as a complete *tour d'horizon* R. Wolfrum: "Provisional Measures of the International Tribunal for the Law of the Sea", in P. Chandrsekhara Rao & R. Khan (eds.), *The International Tribunal for the Law of the Sea: Law and Practice* 173 (The Hague, 2001).

or extend the dispute."[41] To sum up, and using the *résumé* of former Judge Mensah,[42] the provisional measures:

(1) constitute an *exceptional* form of relief indicated only if necessary and appropriate;

(2) their indication by a court or tribunal is a *discretionary* decision, that in some cases may be adopted *motu propio*, and different in whole or in part from those requested by the parties;

(3) can be indicated only when a *prima facie* jurisdiction on the merits has been satisfied;

(4) aim to *preserve the respective rights* of the parties; and

(5) are *urgent*.

96. These conditions have been adopted by this Tribunal, both in its constitutive instruments —the Convention, its Statute and its Rules— and in its limited but clear jurisprudence.

II. The Provisional measures in this Tribunal

97. In this Tribunal, provisional measures are governed by Article 290 of the Convention, Article 25 of the Statute of the Tribunal ("Statute"), and Articles 89 to 95 of its Rules. Contrary to what has been seen with regard to the prompt release mechanism, under a formalistic point of view the provisional measures —as has occurred in the majority of international tribunals— may be regarded as a matter of procedure.[43] Article 25 of the Statute is therefore located within its Section Three, which is dedicated to "Procedure".

98. Article 290 of the Convention devotes itself to "Provisional Measures" with the following terms:

> 1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.
> 2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist.
> 3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.
> 4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other States Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures.
> 5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the

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[41] *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199.

[42] T.A. Mensah: "Provisional Measures in the International Tribunal for the Law of the Sea", 62 *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 43 (2002), pp. 43-44.

[43] See K. Oellers-Frahm: "Article 41", in A. Zimmermannm Ch. Tomuschat anf K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary* (Oxford, 2006), p. 930.

> International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in accordance with paragraphs 1 to 4.
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> 6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

99. For its part, Article 25 of the Statute reads as follows:

> 1. In accordance with Article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures.
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> 2. If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, the provisional measures shall be prescribed by the chamber of summary procedure formed under Article 15, paragraph 3, of this Annex. Notwithstanding article 15, paragraph 4, of this Annex, such provisional measures may be adopted at the request of any party to the dispute. They shall be subject to review and revision by the Tribunal.

100. The wording of Article 290 of the Convention expressly provides, or implies, the conditions summarized above: (a) the Tribunal must consider "that *prima facie* it has jurisdiction", (b) it "*may* prescribe any provisional measures", (c) "which it considers *appropriate under the circumstances*", (d) "to *preserve the respective rights of the parties* to the dispute ... pending the final decision". With regard to *urgency*, as stated by former Judge Vukas,

> Urgency is not explicitly indicated in article 290, paragraph 1, of the Convention as a general condition for the prescription of provisional measures by a court or tribunal to which a dispute has been submitted. The situation is the same in respect of the International Court of Justice (I.C.J.). Neither the Statute, nor the Rules of the I.C.J. mention urgency. Yet, it is considered to be a prerequisite for indicating a provisional measure by the Court.[44]

Actually, if not in the Convention, the procedure prescribed in Article 25 of the Statute and the Rules of this Tribunal clearly implies *urgency*.

101. Last, but not least, due to its specific jurisdiction and competence, Article 290 of the Convention includes an additional purpose for the interim relief: "to prevent serious harm to the marine environment", which also clearly implies the matter of urgency, as the *MOX Plant* Case reveals.[45]

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[44] Dissenting Opinion of Judge Vukas to *The Southern Bluefin Tuna Cases*, para. 3. As the ICJ as declared, again following a longstanding jurisprudence, "the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision." *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 392, para 129.

[45] Although submitted under paragraph 5 of Article 290 of the Convention, which supposes a different scenario for interim relief, the Tribunal assessed the direct link between provisional measures and urgency, pending the constitution of the arbitral tribunal. *The MOX Plant Case*, paras. 73-79.

III. The provisional measures in this case

102. In this case, in order to prescribe the provisional measures requested by the Applicant, this Tribunal must therefore assess:

(1) Whether the Tribunal has a *prima facie* jurisdiction over the dispute;

(2) The necessity and appropriateness of the measures to preserve the rights of the parties to the dispute or to prevent serious harm to the marine environment *pendente lite*; and

(3) The urgency that justifies the prescription of the measures.

A. *Prima facie* jurisdiction

103. The Applicant contends that Spain has violated Articles 73, 87, 226, 245 and 303 of the Convention. Although this is not the procedural phase to deal with this claim on the merits, Spain could understand that —from an exclusively substantive perspective— the alleging of those provisos could constitute the basis for a *prima facie* jurisdiction of this Tribunal.

104. However, jurisdiction —although *prima facie*— must be analysed under the observations and considerations made by Spain in Chapter 3, sections II and IV, of this Response. This analysis must particularly assess the fulfilment of the procedural conditions examined in section 4 of Chapter 2 ("previous exchanges of views" and "exhaustion of domestic remedies") of this Response. The arguments revisited in that Chapter point to, in Spain's opinion, the inexistence of *prima facie* jurisdiction of this Tribunal for the prescription of provisional measures.

B. Necessity and appropriateness

105. Necessity and appropriateness imply here an assessment of imminent prejudice to one or both parties or serious harm to the marine environment and/or a risk of aggravation of the controversy. The parties have thus the obligation neither to aggravate the dispute nor to create an irremediable situation *pendente lite*.

106. As former Judge Mensah summarized in his Separate Opinion to the *MOX Plant* Case,

> In considering a request for the prescription of provisional measures under article 290, this Tribunal is governed by both paragraphs 1 and 5 of that article. Paragraph 1 sets out the parameters and conditions for the prescription of provisional measures in general. As the article puts it, provisional measures may be prescribed if the court or tribunal to which a request is addressed considers that such measures are "appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision". The jurisprudence of international judicial bodies makes it clear that provisional measures are essentially exceptional and discretionary in nature, and are only appropriate if the court or tribunal to which a request is addressed is satisfied that two conditions have been met. The first condition is that the court or tribunal must find that the rights of either one or other of the parties might be prejudiced without the prescription of such measures, i.e. if there is a credible possibility that such prejudice of rights might occur. The second condition is that the prejudice of rights would be irreparable in the sense that it would not be possible to restore the injured party materially to the situation that would have prevailed without the infraction complained of, or that the infraction "could

not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form" (case concerning the *Denunciation of the Treaty of 2 November* 1865 between China and Belgium, P.C.I.J., Series A, No. 8, p. 7). In the case of a request under article 290 of the Convention provisional measures may also be prescribed to prevent serious harm to the marine environment.[46]

107. It must be underlined at the very outset that the Applicant's request does not include any preservative measure, as might be logical: it does not ask for the preservation of the *Louisa*, nor does it ask for an urgent adoption of environmental caution. It simply requests the release of the vessel based on, as clarified in Chapter 3 of this Response, an unfounded legal basis of the Convention.

108. As will be detailed in the next section when dealing with urgency,[47] at present there is no imminent threat or harm to the maritime environment due to the presence of the *Louisa* in the commercial dock of El Puerto de Santa María. The Port authorities are continuously monitoring the situation, paying special attention to the fuel still loaded in the vessel and the oil spread in the different conducts and pipes on board.

109. At least on the Respondent's side, there is no intention to aggravate the dispute. The mere fact that it is before the Tribunal —although in an unfair situation caused by the Applicant— evidences the willingness of Spain to solve this dispute. Spain understands that the resort to an established and previously accepted judicial mean —like this honourable Tribunal— does not suppose any kind of aggravation of the dispute. On the contrary: Spain wishes to clarify the questions submitted to the Tribunal in order to avoid new requests like this one being submitted by Saint Vincent and the Grenadines.

110. Rather, the question is the possible *irreparable* prejudice caused to each party in the dispute by the non-release of the *Louisa*. In the case of the Applicant, the prejudice is the mere quantitative, although relative, alleged damage caused to a U.S. company with no bond at all with Saint Vincent and the Grenadines. In the case of the Respondent, the *Louisa* —as well as other documents, information and property seized on board— is clear evidence of a crime, a "piece of conviction" (*pieza de convicción penal* in Spanish) in a criminal procedure. Like the knife in a murder, like a specially modified car for smuggling cocaine, the *Louisa* — and the *Gemini III*— is not a simple vehicle, like any other, used to commit a crime: it is an indispensable tool in the criminal activity allegedly performed by Sage and the rest of the private persons accused in the criminal procedure before the Criminal Tribunal No. 4 of Cádiz.

111. Therefore, the question is: to whom would the requested provisional measures, i.e., the release of the *Louisa* and some documents, cause an irreparable damage? Clearly to the Respondent, which in the absence of the vessel as evidence of the crimes will be unable to continue the prosecution of the accused in the criminal procedure with all the procedural guarantees imposed by domestic and international law. The *Louisa* must be kept under seizure until the end of the domestic criminal process in Spain. And this will not cause, under any circumstance, an *irreparable* damage to the Applicant.

112. Revisiting again the words of former Judge Mensah, who based himself on well-founded international jurisprudence, "the prejudice of rights would be irreparable in the sense that *it would not be possible to restore the injured party materially* to the situation that would have prevailed without the infraction complained." (emphasis added) In this case, the alleged

[46] Separate Opinion of Judge Mensah, *The MOX Plant Case*, without page or paragraph number.

[47] See *infra* paragraph.

infraction committed by Spain, if any, "could ... be made good simply by the payment of an indemnity or by compensation or restitution in some other material form."[48]

113. It is a general principle of international law, codified in Article 31, paragraph 1, of the Articles on Responsibility of States for internationally wrongful acts ("Articles"),[49] that "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[50] However, in this case, and at this incidental stage of the procedure on provisional measures, Spain does not admit under any circumstance that it has committed an international wrongful act.

114. In any case, it is clear, fair and reasonable that the release of the *Louisa*, at this incidental stage of the proceedings and pending the domestic criminal process against its owners, will impose upon Spain a burden out of all proportion, an irremediable prejudice to its interests not only in its domestic realm but in the discussion, if any, upon the merits of this case.

C. Urgency

115. Finally, with regard to the third requirement to prescribe provisional measures — urgency—, there are several reasons which demonstrate that there is no urgency in the release of the *Louisa*:

(1) First, the detention of the vessel was on 1 February 2006. The request for provisional measures was submitted on 24 November 2010. More than four years elapsed without any kind of urgency on the part of the Applicant;

(2) Second, urgency may come into the case only with regard to the possible deterioration and damage to the vessel, *directly caused by its detention*. The Applicant tries to convince the Tribunal that this deterioration actually occurred by submitting a set of undated photographs (Request, Annex 1) to be compared with a final image where the *Louisa* is allegedly showing signs of erosion. In a quite different set of physically or electronically-dated photographs, Spain can show that by November 2005 the *Louisa* was already presenting similar signs of erosion. The deterioration of the vessel has been minimal and, in any case and notwithstanding the procedural obstacles continuously posed by the owners of the vessel, the latter were invited several times by the Magistrate Judge to visit the *Louisa* and to perform the necessary preservation measures. No preservation activity was decided however by Sage or by any other company or person authorized hereby.

(3) Third, the *Capitanía Marítima* of Cádiz routinely performs verifications of port installations in order to assess the possible threats of "serious harm" to the marine environment in the port of El Puerto de Santa María, as envisaged by Article 89, paragraph 3, of the Rules. The *Louisa* is neither anchored offshore, nor placed in a fragile environmental location. The *Capitanía Marítima* of Cádiz has an updated protocol for reacting against threats of any kind of environmental accidents within

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[48] *Denunciation of the Treaty of 2 November 1865 between China and Belgium, P.C.I.J., Series A, No. 8*, p. 7.

[49] UNGA Resolution 56/83, 12 December 2001, Annex.

[50] *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, N° 9*, p. 21; *Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119; *Armed activities in the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgement, I.C.J. Reports 2005*, p. 257, para 259.

the port of El Puerto de Santa María. There are no circumstances, as briefly and unfoundedly alleged by the Applicant, where "without Tribunal intervention, the *Louisa* would simply sink at its dock, release massive amounts of hydrocarbons, endanger shipping in the port area and wreak havoc on its owner and flag country." (Request, p. 22, para 63)

(4) Last, but not least, following the documentation annexed by the Applicant, the *Louisa* had a valid *Germanischer Lloyd* Classification Agency Certificate on Oil Pollution Prevention until 31 March 2005 only. (Request, Annex 1) The Applicant does not submit any other official document that provides evidence that, on that date, the *Louisa* had the rest of the compulsory certificates needed for navigation under the International Maritime Organisation's rules and standards. The Applicant neither demonstrates whether these certificates, if any, are still in force on the day of submission of its Application and Request before this Tribunal.

116. To sum up, there is no urgency for the release of the *Louisa*

117. Having made it clear that, although there may be a *prima facie* jurisdiction of the Tribunal, there are no reasons compelling it to prescribe the requested provisional measures. There is no necessity and there is no urgency.

118. For all the reasons summarized above, Spain contends that the conditions prescribed in the Convention and in general international law for the prescription of provisional measures pursuant to Article 290 of the Convention are not present in this case and, therefore, the Tribunal must reject their prescription.

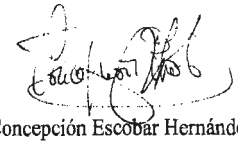
CONCLUSION

119. For all the reasons set out above, Spain requests the Tribunal:

(1) to reject the prescription of provisional measures requested by Saint Vincent and the Grenadines; and

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

Respectfully submitted,



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