INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

THE M/V "LOUISA" CASE
(SAINT VINCENT AND THE GRENADINES *v.* KINGDOM OF SPAIN)
List of cases: No. 18

JUDGMENT OF 28 MAY 2013

2013

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU NAVIRE « LOUISA »
(SAINT-VINCENT-ET-LES GRENADINES *c.* ROYAUME D'ESPAGNE)
Rôle des affaires : No. 18

ARRÊT DU 28 MAI 2013

SEPARATE OPINION OF JUDGE NDIAYE

(*Translation by the Registry*)

1. I have voted in favour of the Judgment as I am in agreement with the grounds set out by the Tribunal in respect of the main questions. Specifically, I concur with the arguments articulated in paragraphs 99, 141, 142 and 151, which read as follows:

> To enable the Tribunal to exercise its jurisdiction, Saint Vincent and the Grenadines must establish a link between the facts advanced and the provisions referred to by it and show that such provisions can sustain the claim or claims submitted by it. (Paragraph 99)
>
> The Tribunal observes that both the Application and the Memorial submitted by Saint Vincent and the Grenadines focus on alleged violations by Spain of articles 73, 87, 226, 245 and 303 of the Convention and reparations arising therefrom. These two documents do not refer to article 300, even in passing. After the closure of the written proceedings, Saint Vincent and the Grenadines presented its claim as one substantively based on article 300 and the alleged violations of human rights by Spain. (Paragraph 141)
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> The Tribunal considers that this reliance on article 300 of the Convention generated a new claim in comparison to the claims presented in the Application; it is not included substantively in the original claim, either directly or indirectly. The Tribunal further observes that for any new claim to be admitted it is a legal requirement that it must arise directly out of the application or be implicit in it (see *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at p. 266, para. 67). (Paragraph 142)
>
> For the foregoing reasons, the Tribunal concludes that no dispute concerning the interpretation or application of the Convention existed between the Parties at the time of the filing of the Application and that, therefore, it has no jurisdiction *ratione materiae* to entertain the present case. (Paragraph 151)

2. On the basis of the arguments set out above, the Tribunal explains that:

> In view of this finding, the Tribunal is not required to deal with the contention of Spain that Saint Vincent and the Grenadines has failed to satisfy the obligation under article 283 of the Convention to exchange views and that this has precluded its access to the Tribunal. (Paragraph 152)

3. I consider the decision that the Tribunal does not have jurisdiction to deal with the merits of the *M/V "Louisa" Case* to be well founded, but on a number of grounds which go beyond those set out in the Tribunal's Judgment. In my view, the Judgment could have dealt much more simply with the question of the jurisdiction of the Tribunal (I) and the question of the admissibility of the Application (II). In accordance with article 8, paragraph 6, of the Resolution on the Internal Judicial Practice of the Tribunal, this separate opinion concentrates on these two points of difference with the Judgment.

I. JURISDICTION OF THE TRIBUNAL

4. The Tribunal's "jurisdiction" in the substantive sense, that is the authority to exercise powers inherent in the role of judging, stems both from its Statute, as defined by the United Nations Convention on the Law of the Sea establishing it, and from the declarations by Saint Vincent and the Grenadines and by Spain recognising that jurisdiction in the present case. In judicial settlement, the two legal bases are distinct. Overall jurisdiction therefore stems from both the Statute and the consent of each Party. The consent of each Party permits the Tribunal to entertain the specific dispute between them. On the other hand, the powers that constitute "jurisdiction" in general stem from the Statute.

5. The Tribunal may deal with the merits of a case only if the conditions laid down by the parties and by its Statute are satisfied in the case at issue. The conditions laid down by the parties relate to the jurisdiction of the Tribunal while the conditions laid down in its Statute relate to the admissibility of the action. It is therefore for the parties and for the Tribunal to raise objections to the exercise of judicial power if any of those conditions is not satisfied.

6. The present case was brought before the Tribunal unilaterally by Saint Vincent and the Grenadines, the Applicant, availing itself of a compulsory jurisdiction mechanism. Spain, the Respondent, seeks to escape it, contesting the jurisdiction of the Tribunal and the admissibility of the Application.

7. Attention should be drawn, first of all, to a question which is difficult to address in so far as it may come under both jurisdiction and admissibility. Saint Vincent and the Grenadines included in its declaration accepting the jurisdiction of the Tribunal a condition – the only condition – excluding a certain type of dispute, limiting the Tribunal's jurisdiction to "disputes concerning the arrest or detention of its vessels" (declaration of 22 November 2010). A procedural objection concerning a dispute which does not fall within this category is an objection of lack of jurisdiction: the Tribunal may not entertain a case falling outside the jurisdiction defined by the two Parties.

8. On the other hand, even in the absence of such an objection, the Tribunal must declare inadmissible an action concerning a dispute falling outside its jurisdiction, namely "the arrest or detention of vessels", so that the conditions which the Parties laid down with a view to allowing it to settle their dispute are satisfied.

9. It should be noted that the only provisions of part XV, section 2, of the Convention relating to the scope of jurisdiction defined by the declaration of Saint Vincent and the Grenadines are the provisions of article 292, while Spain chooses the Tribunal as the means for the settlement of disputes concerning the interpretation or application of the Convention.

10. Pursuant to the procedural principle of reciprocity, the Tribunal has jurisdiction only in the areas of law which both declarations concern. In this case, its jurisdiction is limited to disputes concerning the arrest or detention of vessels under the Convention. Jurisdiction would thus be significantly narrowed. It would be based solely on articles 73 and 226 of the Convention, since prompt release proceedings are ruled out.

11. As the International Court of Justice has observed:

> In fact, 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; the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms, also in the *Nuclear Tests* cases:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected. (Ibid., p. 268, para. 46; p. 473, para. 49.)*
>
> (I.C.J. Reports 1984, para. 60)

12. The Tribunal had to examine with particular care the question of its jurisdiction, which is fundamental to the present case because the Parties disagree completely on this point. Saint Vincent and the Grenadines argues that the Tribunal has jurisdiction to consider the case on the merits (Memorial, para. 53). Spain contends that the Tribunal lacks jurisdiction to examine the merits of the case (Counter-Memorial, para. 50).

13. The International Court of Justice has also stated:

> Whereas the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States entitled to appear before the Court; whereas the Court has repeatedly stated that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction; and whereas the Court therefore has jurisdiction only between States parties to a dispute who have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned.
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> (*Georgia v. Russian Federation* (*Request for the Indication of Provisional Measures*)*, Order of 15 October 2008*, para. 84)

14. It is good that the Tribunal in its previous case-law has taken precautions in respect of the examination of its jurisdiction according to the nature of the proceedings brought before it.

15. It has held that:

> before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.
> (*M/V "SAIGA" Case* (*No. 2*) (*Saint Vincent and the Grenadines v. Guinea*), *Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, para. 29)

16. In the provisional measures phase of the present case, the Tribunal also stated that its Order of 23 December 2010 "in no way prejudges the question of the jurisdiction of the Tribunal to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of those questions" (*M/V "Louisa" Case* (*Saint Vincent and the Grenadines v. Kingdom of Spain*), *Provisional Measures, Order of 23 December 2010*, para. 80).

17. Saint Vincent and the Grenadines argues that the Tribunal has jurisdiction to examine the merits of the case. Spain claims that the Tribunal has no jurisdiction in the present case for three reasons.

18. First of all, the conditions set out in paragraph 1 of article 283 ("Obligation to exchange views") have not been met.

19. Second, the effective nationality of the vessels and the Applicant's right to protect the crew of the *Louisa* have not been confirmed.

20. Lastly, the conditions set out in article 295 ("Exhaustion of local remedies") of the Convention have not been met.

21. These latter two arguments are not conditions determining jurisdiction, or competence, but rather conditions for the admissibility of the action brought by Saint Vincent and the Grenadines relating to the validity of the proceedings. Diplomatic protection is examined in the law of international responsibility from the perspective of international claims for wrongful acts. The Convention does not mention them.

22. The distinction between jurisdiction and admissibility is of particular practical importance. Judicial decisions that do not adhere scrupulously to the limits imposed on jurisdiction can have a significant effect on the parties' expectations, especially since international courts rule at first and last instance. Similarly, the misclassification of a question of admissibility as a question of jurisdiction may unduly extend the scope of the parties' claims in fact and in law. Consequently, the Tribunal must always avoid deciding a question of admissibility when it examines its jurisdiction, that is to say the authority to exercise powers inherent in the role of judging, which stems both from its Statute, as defined by the Convention establishing it, and from the declarations by the parties recognising it in the case in question. It should be noted that, in judicial settlement, the two legal bases are distinct. The Tribunal may deal with the merits of the case only if the conditions laid down by the parties and by its Statute are satisfied in the case at issue. The former conditions relate to the jurisdiction of the Tribunal while the latter conditions relate to the admissibility of the action. The exercise of judicial power by the Tribunal is subject to these two types of conditions being satisfied.

23. On the first point – the obligation to exchange views – it should be noted that, in the system of the United Nations Convention on the Law of the Sea, negotiation acts as a preliminary or pre-litigation phase. If States opt to have recourse to the specific mechanisms set up by the Convention, they are required to observe a diplomatic phase before being able to bring the matter before a judicial body. Negotiation thus acts as an essential and fundamental preliminary step.

24. When a dispute arises between States Parties to the Convention concerning its interpretation or application, the parties to the dispute must "proceed expeditiously to an exchange of views" regarding its settlement by negotiation or other peaceful means (article 283(1)).

25. The Tribunal's jurisdiction is thus subject to a procedural precondition, since a matter may be brought before it only if there has been a prior exchange of views. Consequently, the Applicant is under a positive obligation to have attempted to exchange views. Article 283(1) echoes the *dictum* by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case: "before a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15).

26. Article 283(1) suggests that the Applicant must have attempted to initiate discussions on the case with the Respondent. As such, it establishes a procedural condition for bringing a matter before the Tribunal. Otherwise, the Tribunal must bear the – always immense – burden of characterizing a dispute the contours of which have not been outlined by the parties. The Applicant must therefore prove that this procedural precondition for bringing a matter before the Tribunal, laid down by that provision, has been met. In other words, if the obligation to exchange views is a precondition, has that condition been satisfied?

27. Where there is no evidence to show that there has been a genuine attempt to exchange views, the procedural precondition cannot be satisfied.

28. In the present case, the Tribunal was therefore required to ascertain whether Saint Vincent and the Grenadines genuinely attempted to exchange views with Spain regarding the settlement of their dispute by negotiation or other peaceful means, a substantive obligation incumbent on it under the Convention. To that end, the Tribunal had to examine the evidence furnished by the Parties.

29. According to the International Court of Justice:

> it is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations. Such resort fulfils three distinct functions. In the first place, it gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter. The Permanent Court of International Justice was aware of this when it stated in the *Mavrommatis* case that "before a dispute can be made the subject of an action in law, its subject-matter should have been clearly defined by means of diplomatic negotiations" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 15)
>
> In the second place, it encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication.
>
> In the third place, prior resort to negotiations or other methods of peaceful dispute settlement performs an important function in indicating the limit of consent given by States. The Court referred to this aspect reflecting the fundamental principle of consent in the *Armed Activities* case in the following terms:

> "[The Court's] jurisdiction is based on the consent of the parties and is confined to the extent accepted by them . . . When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon." (*Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v. Rwanda*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, paragraph 88)
> (*Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), *Preliminary Objections of 1 April 2011, Judgment*, para. 131).

30. Negotiation allows the subject-matter of the dispute to be clearly identified. It becomes a condition for jurisdiction. Negotiation is therefore a binding prerequisite in the system established by the Convention.

31. The situation is the same in other treaties: the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979, article 15(1) and (3), and the 1959 Antarctic Treaty, article VIII(2).

32. Other conventions make recourse to third parties subject to the failure of negotiation, for example the 1949 Revised General Act for the Pacific Settlement of International Disputes and the 1946 IMCO Convention.

33. Negotiation, which includes consultation and exchanges of views, is the means by which most international disputes are settled (United Nations, Handbook on Peaceful Settlement of Disputes (New York 1992), pp. 9-24). Furthermore, as stated in the Handbook:

> Exchange of views
> 26. Exchanges of views may also be considered as a form of consultations. They play an important role in the system established by the 1982 United Nations Convention on the Law of the Sea for the peaceful settlement of disputes arising from the interpretation and application of the Convention. Reference is made in this connection to article 283 of the Convention (. . .). (Paragraph 26)
>
> L'échange de vues
> 26. L'échange de vues peut aussi être considéré comme une forme de consultation. Il joue un rôle important dans le régime institué par la Convention des Nations Unies de 1982 sur le droit de la mer pour le règlement pacifique des différends relatifs à l'interprétation ou à l'application de la Convention. Il y a lieu de citer à cet égard l'article 283 de la Convention [. . .] (Paragraphe 26)

In addition:

> 28. A number of treaties place on the States Parties thereto an obligation to carry out "negotiations", "consultations", or "exchanges of views" whenever a controversy arises in connection with the treaty concerned. Examples of such treaties are the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68, annex, art. 15, para. 1), the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 84), the 1982 United Nations Convention on the Law of the Sea (art. 283, para. 1) and the 1959 Antarctic Treaty (art. VIII, para. 2). Under some of those treaties, parties to a dispute arising from the interpretation or application of the treaty are under an obligation to start the consultation or negotiation process without delay (see art. 283, para. 1, of the United Nations Convention on the Law of the Sea; art. 15, para. 2, of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies; and art. VIII, para. 2, of the Antarctic Treaty). (Paragraph 28)
>
> 28. Un certain nombre de traités font en effet obligation aux Etats parties de procéder à des « négociations », à des « consultations » ou à des « échanges de vues » chaque fois que naît un litige au sujet du traité en question. Il existe une disposition en ce sens dans l'Accord de 1979 régissant les activités des Etats sur la Lune et les autres corps célestes (résolution 34/68 de l'Assemblée générale, annexe, art. 15, par. 2); la Convention de Vienne de 1975 sur la représentation des Etats dans leurs relations avec les organisations internationales de caractère universel (art. 84); la Convention des Nations Unies de 1982 sur le droit de la mer (art. 283, par. 1), et le Traité de 1959 sur l'Antarctique (art. VIII, par. 2). Suivant certains de ces traités, les parties à un différend relatif à l'interprétation ou à l'application du traité sont tenues d'engager sans tarder le processus de consultation ou de négociation (voir l'article 283, par. 1, de la Convention des Nations Unies sur le droit de la mer, l'article 15, par. 2, de l'Accord régissant les activités des Etats sur la Lune et les autres corps célestes et l'article VIII, par. 2, du Traité sur l'Antarctique). (Paragraphe 28)

34. In the *North Sea Continental Shelf* cases, the International Court of Justice remarked that there was no need "to insist upon the fundamental character of this method of settlement" (*I.C.J. Reports 1969*, 3, p. 48). Similarly, in the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice observed that negotiation is a primary means for States to settle disputes, whether in their own interests or in the interests of their nationals, and that negotiations make it possible to define the subject-matter of the dispute before an action at law (*P.C.I.J., Series A, No. 2*, pp. 11-15).

35. However, there is no rule of international law requiring negotiations to be exhausted before recourse is had to other means of settlement, as the International Court of Justice and the Tribunal have pointed out:

– *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports. 1978*, p. 3

– *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392

– *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, para. 56

– *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia v. Singapore*), *Provisional Measures, International Tribunal for the Law of the Sea, Case No. 12*

36. In the final analysis, it can be stated that:

in the system established by the Convention, the obligation to exchange views constitutes a precondition for bringing proceedings. It is a special rule.

37. The Tribunal should have asked the following questions:

1. Did the two Parties proceed to an exchange of views regarding their dispute?

2. What is the status of the note verbale of 26 October 2010?

3. What is the status of the communications sent by the lawyers for the accused to the Spanish criminal court?

4. Do those communications make reference to the dispute brought before the Tribunal?

5. What is the status of the e-mails of 18 and 19 February 2010?

6. Are they a means or a mechanism for fulfilling the obligation to exchange views?

7. Can the Commissioner for Maritime Affairs in Geneva and the *Capitanía de Cádiz* conduct negotiations with the Applicant on behalf of the Respondent?

8. What status can be accorded to the meetings held after proceedings were brought (the four meetings)?

38. The Tribunal did not address its "jurisdiction", that is to say the authority to exercise powers inherent in the role of judging. Instead, it relied on arguments relating to the admissibility of the legal action brought by Saint Vincent and the Grenadines in order to decline jurisdiction. It states that to enable it to determine whether it has jurisdiction, Saint Vincent and the Grenadines must establish a link between the facts advanced and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by it (para. 99 of the Judgment). It should have been added that the dispute must be one which the Tribunal has jurisdiction to determine *ratione materiae* pursuant to the Convention. In other words, the dispute must exist and be justiciable. "The dispute must in principle exist at the time the Application is submitted to the Court" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libya v. United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25 and 26, paras. 42-44). Further, "in terms of the subject-matter of the dispute, to return to the terms of article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the dispute must be 'with respect to the interpretation or application of [the] Convention'" (*I.C.J., Georgia v. Russian Federation, Preliminary Objections of 1 April 2011, Judgment*, para. 30). The Tribunal conducted an examination of the applicability of the provisions invoked by Saint Vincent and the Grenadines and concludes that no dispute concerning the interpretation or application of the Convention existed between Spain and Saint Vincent and the Grenadines at the time the Application was filed and that, therefore, it has no jurisdiction *ratione materiae* to entertain the case before it (para. 151). The Tribunal explains that, in view of this finding, it is not required to deal with the contention of Spain that Saint Vincent and the Grenadines failed to satisfy the obligation under article 283 of the Convention to exchange views and that this has precluded its access to the Tribunal (para. 152). The Tribunal should not have set aside this examination because its formal jurisdiction stems both from its Statute, as defined by the Convention establishing it, and from the declarations by the Parties recognising it – or not – in the present case. Consequently, jurisdiction stems from both the Statute and the consent of each Party, it being understood that in the event of disagreement, the Tribunal decides in accordance with article 288(4) of the Convention. However, and despite this fact, the Tribunal ventured beyond the

purview of consideration, which allowed it to make its finding of a lack of jurisdiction, in order to rule on issues relating more to the merits of the case (see paras. 154 and 155 of the Judgment).

II. ADMISSIBILITY OF THE LEGAL ACTION BROUGHT BY SAINT VINCENT AND THE GRENADINES

39. "The action is the right of the author of a claim to be heard on its merits so that the judge may declare it founded or unfounded. For the opposing party, the action is the right to contest the merit of that claim" (New French Code of Civil Procedure of 5 December 1975, article 30). A distinction must be drawn between the right of action and the right invoked on the merits (or substantive right), because the existence of the right of action does not necessarily give rise to the right which is invoked on the merits and justifies the proceedings. The right of action is also distinct from the claim in which it finds expression. The judicial claim or Application consists in the exercise of the right of action. Where a matter is duly brought before it on the basis of its jurisdiction *ratione materiae*, the Tribunal must be satisfied that the action before it is admissible, that is to say it performs its judicial function of hearing and determining the claims and objections of the Parties. It must therefore review whether the conditions for bringing an action are met, in the absence of which the proceedings would be irregular and the Application declared inadmissible.

40. The contentious-jurisdiction function of courts and tribunals leads them to entertain disputes which must be settled on the basis of the law. This means that the dispute must exist and be justiciable.

41. The International Court of Justice has established the regime governing "disputes":

> The Court recalls its established case-law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) Whether there is a dispute in a given case is a matter for "objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa* (*Ethiopia* v. *South Africa; Liberia* v. *South Africa*), *Preliminary*

Objections, Judgment, I.C.J. Reports 1962, p. 328) (and most recently *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo* v. *Rwanda*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90). The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

The dispute must in principle exist at the time the Application is submitted to the Court (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United Kingdom*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 42-44; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *United States of America*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44); the Parties were in agreement with this proposition. Further, in terms of the subject-matter of the dispute, to return to the terms of Article 22 of CERD, the dispute must be "with respect to the interpretation or application of [the] Convention". While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice. The Parties agree that that express specification does not appear in this case. (*I.C.J., Georgia v. Russian Federation, Preliminary Objections of 1 April 2011, Judgment*, para. 30)

42. The disagreement and the conflict in question constitute a dispute only if they arise in connection with a claim which a State addresses to another State, which

refuses to accede to it; international litigation does not include either abstract disputes or even differences of view on the conduct to be adopted in a particular case: the underlying concept implies the expression of claims, and not just arguments, between the parties; and a dispute arises only where a State demands certain conduct of another State and is opposed by it. (See, to this effect, *South West Africa* cases (*Ethiopia v. South Africa; Liberia v. South Africa*), *Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 319. The Court rules, on page 32, that "it must be shown that the claim of one party is positively opposed by the other".)

43. This restriction is particularly important for judicial settlement mechanisms, since it is necessary to determine at what time a dispute arises and the obligation comes into existence to submit it for adjudication in accordance with a prior undertaking. A dispute is a legal dispute where "the parties are in conflict as to their respective rights". The forms of this conflict are various. Difficulties arise where the existence of a conflict is contested and needs to be confirmed.

44. It should be borne in mind that the factual origin of this case lies in the detention on 1 February 2006 of two vessels and the arrest of their crews in Spanish territory, by Spanish authorities and under Spanish law. Both vessels are still being held by the Spanish authorities.

45. The Kingdom of Spain considers that, at the time the Applicant filed its Application, no dispute existed between Saint Vincent and the Grenadines and Spain and that, should such a dispute have existed, the claims by Saint Vincent and the Grenadines are manifestly unfounded and lack the necessary legal support to be upheld by the Tribunal (Counter-Memorial, para. 50). The case record shows several kinds of disagreement, which cast particular doubt on the very existence of a dispute for the purposes of international law between Saint Vincent and the Grenadines and Spain:

46. (a) Disagreements concerning the substantive relevance of rules (whether customary norms or general legal principles):

For example, Saint Vincent and the Grenadines invokes article 300 of the Convention, which Spain considers to be irrelevant. Spain explains that "despite the importance of the principle, it is very difficult to find specific rules on good faith in international conventions and treaties. Indeed, good faith has remained part of the fundamental principles of international law, yet without being specifically included in most treaty texts, even in the major treaties, the so-called codification treaties" (oral statement by Ms Escobar Hernández of 10 October 2012, pp. 1 and 2).

47. (b) Disagreements concerning the validity of treaty obligations:

For example, without denying the existence of the rules cited by Saint Vincent and the Grenadines, namely the provisions of the Convention, Spain considers that they are not binding on it and do not apply in relations between the two Parties. It states: "Spain has breached no rule or principle of international law by detaining the *Louisa*. The *Louisa* was detained in full conformity with international law and Spanish domestic law". Further on, Spain continues, "the detention of the *Louisa* occurred in the context of the exercise by Spain of its criminal jurisdiction, in particular with regard to certain crimes against the underwater cultural heritage, the protection and conservation of which were voluntarily accepted by Spain in line with a number of international legal instruments,. . . the Convention on the Law of the Sea and the 2001 UNESCO Convention" (oral statement by Ms Escobar Hernández of 12 October 2012, points 5 and 6, pp. 8 and 9).

48. (c) Disagreements concerning the interpretation of instruments:

For example, the Kingdom of Spain states that it is bound by the Convention but argues that the Convention does not impose the obligations which Saint Vincent and the Grenadines claims are applicable to it. In addition, Spain expounds its arguments concerning the absolute non-existence of the infringements alleged by the Applicant, with a view to clarifying why it considers that the Tribunal does not have jurisdiction *ratione materiae* in the present case.

49. (d) Disagreements concerning the characterization of the facts:

For example, the problem of relevance to the facts of the case. Spain takes the view that Saint Vincent and the Grenadines has not satisfied the requirements laid down by its own claims (diplomatic protection). The facts do not fall within scope of the norm. Spain states that "the facts alleged by the Applicant do not correspond in any fashion to what happened in Spain within the framework of these criminal proceedings, where the detention of the *Louisa* was just one of the measures adopted by the competent judicial authorities. In both its Memorial and its Reply the Applicant has always stated clearly that the *Louisa* had arrived in Spain to carry out activities of hydrocarbon exploration; but it has not been able to demonstrate that it had a permit granted by the Spanish authorities, in exercise of the powers expressly conferred on it by the United Nations Convention on the Law of the Sea" (oral statement by Ms Escobar Hernández of 12 October 2012, cited above, point 7, p. 10).

50. (e) Disagreements concerning the choice of forum:

For example, Saint Vincent and the Grenadines puts forward arguments relating to human rights. Spain objects that it should go to Strasbourg. In Spain's view, "the so-called breaches of the rights of individuals and of property rights never took place. All the measures adopted by the Spanish authorities are wholly in keeping with the principle of good faith and do not constitute an abuse of rights", and the individuals in question "even have the right to go to the European Court, if they so wish" (oral statement of 12 October 2012, op. cit., point 9, pp. 15 and 17).

51. It should be noted that the obligation to negotiate on the subject-matter of the dispute can only stem from the existence of the dispute, which is itself contested by Spain.

52. It would seem that on the critical date, namely the date of the application initiating proceedings, the facts underlying the *M/V "Louisa" Case* actually fell within the scope of domestic law. The detention of the *Louisa* and the arrest of the crew members took place in the context of criminal proceedings in progress in Cadiz. Consequently, there is no dispute for the purposes of international law. And, if the dispute between Saint Vincent and the Grenadines and Spain had crystallized, the Tribunal would face a situation of *lis pendens*, as criminal proceedings are still in progress in Cadiz.

53. The circumstances surrounding the claim show that the view may legitimately be taken that the case was improperly initiated. The *Louisa* was detained by Spain before the critical date. The Spanish court ordered the precautionary seizure of the vessel and questioned individuals. Whatever remedies are available to those individuals in the Spanish legal order, the flag State cannot rely on the provisions of the Convention to bring proceedings against Spain before the Tribunal in the absence of a judgment from the court in Cadiz. If the Tribunal were to grant the claims and requests made by Saint Vincent and the Grenadines, it would be interfering in the very substance of a criminal case pending before the Spanish court having jurisdiction.

54. The record shows that the decisions taken by the Spanish judicial authorities comply fully with the applicable national legislation. In its claim Saint Vincent and the Grenadines alleges the existence of a dispute concerning the implementation by the Kingdom of Spain of its powers under the Convention on the Law of the Sea and the Convention on the Protection of the Underwater Cultural Heritage.

55. The major problem arising in the present case is that the Applicant does not indicate what might be the applicable law, and the hotchpotch of articles of the Convention which it invokes in support of its arguments are of dubious application.

56. The exercise of any contentious jurisdiction is subject to the existence of a dispute, which must be established *ab initio* by the court or tribunal hearing the case; otherwise, it must declare the claim inadmissible. The dispute stems from the open opposition between two wills expressly and successively declared. In its Advisory Opinion of 30 March 1950 in the *Interpretation of Peace Treaties* case, the ICJ stated: "Whether there exists an international dispute is a matter for objective determination" (p. 70). It explained in the *South West Africa* cases that: "a mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its nonexistence" (*Reports 1962*, p. 328). The dispute is defined by its inherent characteristics and not by the subjective classification given to it by the Parties. Not only is the existence of a dispute a precondition for the exercise of contentious jurisdiction, but the dispute must also be a real one.

57. In the legal sense of the expression, a real dispute means a dispute which is based on legal grounds such that the judicial resolution of the contested situation can have a legal effect on the legal positions of the parties. A close link must be established between the dispute and the exercise of the judicial function. In order to safeguard "the [Court's] judicial integrity", the ICJ refused to grant an application for a declaratory judgment in the *Case concerning the Northern Cameroons* (*Judgment of 2 December 1963, Reports 1963*, p. 15). The reality of the dispute can also be assessed for the purposes of proceedings with reference to the direct relations between the parties. The Applicant bears the burden of proof in relation to the crystallization of the dispute in its direct relations with the Respondent before the filing of the application initiating proceedings. This aspect of the dispute may possibly have consequences for its very existence. (See *South West Africa* cases, *cited above*, p. 328)

58. The *M/V "Louisa" Case* raises the major problem of the actuality of the dispute. The actuality of the dispute refers to the diplomatic approaches by the Applicant to the Respondent before the application initiating proceedings was filed. This is a condition for admissibility in relation to the contested situation, the purpose of which is to ensure that the case is ripe for adjudication. Prior diplomatic negotiations are an express condition determining jurisdiction. This rule is laid down by a number of international conventions specifying diplomatic efforts as a precondition:

– General Act, article 32(2);
– Covenant of the League of Nations, article 13;
– North Atlantic Treaty of 4 April 1949, article 4;
– Treaty establishing the Republic of Cyprus, 1960, article 10.

59. In the *M/V "Louisa" Case*, Spain (the Respondent) claims that Saint Vincent and the Grenadines (the Applicant) has failed to fulfil its obligations under paragraph 1 of article 283 of the United Nations Convention on the Law of the Sea.

60. In essence, the Respondent claims that negotiations between the Parties, which article 283 of the Convention makes a prerequisite for the institution of the compulsory procedures for the settlement of disputes defined in part XV of the Convention, did not take place.

61. It should be borne in mind that the factual origin of this case lies in the detention on 1 February 2006 of two vessels and the arrest of their crews in Spanish territory, by Spanish authorities and under Spanish law. Both vessels are still being held by the Spanish authorities under Spanish law (Counter-Memorial, para. 4).

62. In the view of Spain,

> Article 283(1) is a special rule under which the exchange of views . . . constitutes a precondition for a matter to be referred to the Tribunal (Counter-Memorial, paras. 58 and 68).
>
> The obligation to engage in prior negotiations must be met, logically, before bringing an action before the Tribunal (Rejoinder, paras. 14 and 32).
>
> It is not acceptable for the Applicant to pose rhetorical questions about the existence and nature of the "exchange of views" (Rejoinder, para. 14).

63. According to Spain, the general rule according to which there is no general rule to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to an international tribunal is overridden when there exists a special rule that does require such an exhaustion of diplomatic negotiations. This is clearly the case of article 283 of the Convention (Counter-Memorial, para. 55; Rejoinder, para. 20). Spain also invokes the *Cameroon/Nigeria*

and *Russian Federation/Georgia* cases (Counter-Memorial, paras. 55 and 56; Rejoinder, paras. 21, 22 and 27).

64. For Spain,

> The very purpose of the exchange of views accounts for its obligatory nature: it not only "gives notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter", but also "encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication" (Counter-Memorial, paras. 59 and 60; Rejoinder, para. 27).
>
> The first limit requires the actual existence of a real "exchange of views", which cannot be reduced to a single unilateral act by one of the parties, which would supposedly suffice in itself to conclude the pre-litigious phase. The second limit implies that the aim of the consultations must be to reach a settlement of the dispute through negotiation or through any other peaceful means, which precludes taking into consideration any other aim not directly related to the subject-matter of the dispute (Counter-Memorial, para. 62). Spain refers to the case-law of the ICJ (Counter-Memorial, para. 64; Rejoinder, para. 27).

65. According to Spain,

> No exchange of views on the dispute took place between the Applicant and Spain. Contrary to what is said in the Applicant's Memorial (paragraph 46), Saint Vincent and the Grenadines – to whom the obligation expressed in Article 283(1) of the Convention is directed – never contacted Spain nor exchanged any views regarding the settlement of any possible dispute concerning the detention of the *Louisa* under the Convention (Counter-Memorial, paras. 69 and 79; Rejoinder, para. 28).

66. As regards exhaustion of possibilities of settlement, the Respondent explains that "the Tribunal makes its assessment (paras. 63, 64 and 65 of the Order of 23 December 2010) only with respect to the phase of provisional measures and, therefore, it cannot be interpreted as a pronouncement which determines the final decision on its jurisdiction on the merits" (Counter-Memorial, para. 53). With reference to the *Southern Bluefin Tuna* Case and the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, "the Tribunal has always demanded an effective 'exchange of views' between the Parties. This 'exchange of views' has been presented as an obligation of behaviour, not an obligation of result. Therefore, when its existence, over and above the results achieved,

has been 'objectively' verified – and only then – this Tribunal has considered the conditions of article 283 to have been met" (Counter-Memorial, paras. 65 to 67; Rejoinder, paras. 16 to 19).

67. The Applicant relies on the existence of the note verbale of 26 October 2010, communications and e-mails of 18 and 19 February 2010, and meetings held after the institution of proceedings. With regard to the note verbale of 26 October 2010, the Respondent points out that it was "the first and only official communication between the two States" (Counter-Memorial, para. 76). "Saint Vincent and the Grenadines never addressed Spain before the note verbale of 26 October 2010; in this note, Saint Vincent and the Grenadines made no mention whatsoever of the United Nations Convention on the Law of the Sea of 1982; and, furthermore, the note in itself forestalls any possibility of negotiation when it advises of the intention of Saint Vincent and the Grenadines 'to pursue an action before the International Tribunal for the Law of the Sea'" (Counter-Memorial, paras. 77 and 78; Rejoinder, paras. 30 and 31; for the note verbale, see Memorial, Annex 11).

68. As regards the other communications, Spain states that:

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

(Counter-Memorial, paras. 71 and 72; Rejoinder, para. 32)

69. As far as the e-mails of 18 and 19 February 2010 are concerned,

> These e-mails cannot be viewed as evidence of fulfilment of the obligation to proceed to an "exchange of views" pursuant to article 283(1) of the Convention. Neither the Office of the Commissioner for Maritime Affairs in Geneva nor the *Capitanía de Cádiz* have the competence to carry out such negotiations under international rules of diplomatic relations. In addition, the content of these

> communications cannot readily be considered as an "exchange of views" according to article 283(1) of the Convention, "regarding [the] settlement [of the dispute] by negotiation or other peaceful means".

(Counter-Memorial, paras. 72 to 75; for the e-mails, see Memorial, Annex 7)

70. As regards the meetings held after the institution of proceedings: "[i]f this has been possible after the lawsuit was brought, Spain expresses its surprise at not having seen those exchanges of views before the lawsuit was brought, which are necessary according to the Convention" (Counter-Memorial, para. 80). "Nevertheless, Spain also points out its opposition to any interpretation of these sudden and untimely consultations as the fulfilment of the condition imposed by the Convention for the valid submission of a case to this honourable Tribunal" (Counter-Memorial, para. 81).

71. According to the Applicant, "the Tribunal never suggested that the 'exchange of views' requirement under article 283(1) is not a precondition to accessing the Tribunal. The Tribunal, however, did not lend any meaning to the 'exchange of views' that would warrant reading it as requiring an exhaustion of diplomatic negotiations" (Reply, p. 11).

72. "Assuming additional 'exchanges of views' had taken place, would the position of the Parties differ today? The answer to this rhetorical question is an emphatic 'no'" (Reply, p. 8).

73. As for article 283, as a special rule:

> Spain's assertion not only attempts to introduce language and standards that are foreign to the Tribunal's interpretation of article 283(1), but it ignores the Tribunal's clear reliance on specific precedent set by the International Court of Justice (Reply, pp. 10 and 11).

74. With regard to the case-law of the ICJ (*Land and Maritime Boundary between Cameroon and Nigeria*; *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*):

> This holding offers nothing new as it relates to the present case. The Tribunal's methodology is consistent with that of the ICJ. Had the Tribunal found that an "exchange of views" did not occur it might have found that it lacked jurisdiction. It was satisfied, however, that an "exchange of views" had occurred and therefore held that it had *prima facie* jurisdiction (Reply, pp. 11 and 12).

75. On the subject of the Annex VII Arbitral Tribunal in *Guyana v. Suriname* (Reply, p. 8).

76. As regards the conditions laid down by article 283, the Applicant states that "[t]he obligation to engage in an 'exchange of views' does not require the exhaustion of diplomatic negotiations" (Reply, p. 10). "An 'exchange of views' does not rise to the level of 'exhaustion of diplomatic negotiations', a threshold that need not be met to bring a claim before this Tribunal" (Reply, p. 13). "Finally, Saint Vincent and the Grenadines would like to emphasize that its claims are based on very specific articles of the Convention and that the Applicant is in no way requesting that the Tribunal define the contours of the dispute." (Reply, p. 12).

77. In relation to the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Preliminary Objections, 1 April 2011*), "Spain misinterprets ICJ precedent" (Reply, p. 12). With regard to paragraph 125, "[m]ore importantly, it was merely recognized as an argument put forward by the Russian Federation but not a holding of the ICJ" (Reply, p. 12).

78. On the subject of compliance by the Parties with article 283: "in response to the request of the *Louisa*'s owner, the Saint Vincent and the Grenadines Maritime Administration attempted to contact Spanish authorities prior to filing this action" (Memorial, para. 46). "Both sides share the obligation of engaging in an 'exchange of views'. Spain was silent." (Reply, pp. 11 and 12).

79. As regards the exhaustion of possibilities of settlement: "While not explicit, the above consideration suggests that the Tribunal gave some effect to the determination of Saint Vincent and the Grenadines that the possibilities of settlement had been exhausted" (Reply, pp. 10 and 11). With reference to the *MOX Plant* case, "Saint Vincent and the Grenadines calls to the attention of the Tribunal that it considered that Ireland, as Applicant, informed the United Kingdom of the dispute under the Convention . . . Similarly, Saint Vincent and the Grenadines informed Spain of a dispute under the Convention" (Reply, p. 13).

80. On the subject of the note verbale of 26 October 2010, "Saint Vincent and the Grenadines submitted a note verbale notifying Spain that it objected to the continued detention of the ships, *M/V Louisa* and *Gemini III*, and that it intended to avail

itself of remedies under the Convention. Taken with consideration of the fact that Spain failed to respond to this note, the Tribunal found this communication to be an adequate 'exchange of views.'" (Reply, pp. 9 and 14).

81. With regard to the other communications, "the Saint Vincent and the Grenadines Maritime Administration attempted to contact Spanish authorities prior to filing this action" (Memorial, para. 46).

82. As the Tribunal stated in its Order of 23 December 2010: "the obligation to 'proceed expeditiously to an exchange of views' applies equally to both Parties to the dispute" (Order, para. 58). However, the initiative must normally be taken by the Applicant which avails itself of a compulsory jurisdiction mechanism and which must not only indicate the subject-matter of the dispute which is likely to crystallize, but also rely on the mechanisms for the settlement of disputes provided for in section 2 of part XV of the Convention. The situation would be different if the case were to be referred to the Tribunal by special agreement. However, in that instance negotiations would also have to be initiated in order to establish this.

83. As regards the meetings held after the institution of proceedings, the Applicant states that "Saint Vincent and the Grenadines met with representatives of Spain on four occasions after commencement of these proceedings in continued hopes of finding a resolution to no avail" (Reply, p. 10). "For some reason, Spain blithely referred to these attempts as extra-judicial acts . . .; nevertheless the ICJ has held that negotiations should be defined with less formality." (Reply, p. 13). "Indeed, there is nothing 'extra-judicial' about two-party negotiations prior to or after the initiation of judicial proceedings" (Reply, p. 13).

84. The Tribunal was required to examine carefully this note verbale, which was the first and only official communication between the two States (Memorial, Annex 11). It was sent less than one month before the Application was filed, after Saint Vincent and the Grenadines had recognized the jurisdiction of the Tribunal.

85. In that note verbale, the Applicant:

1. "objects to the Kingdom of Spain's continued detention of the ships the *M.V. Louisa* and its tender, the *Gemini III*";

2. "Saint Vincent and the Grenadines further objects to the failure to notify the flag country of the detention in contravention of Spanish and international law"; and

3. "Saint Vincent and the Grenadines plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter in the absence of immediate release of the ships and compensation for damage incurred as a result of this improper detention".

86. It would seem that on 26 October 2010, even before officially filing its declaration conferring jurisdiction on the Tribunal (on 12 November 2010) pursuant to article 287 of the Convention, Saint Vincent and the Grenadines had decided to initiate proceedings against Spain before the Tribunal.

87. That decision had been taken on 15 October 2010, since on that date the Attorney General of Saint Vincent and the Grenadines informed the Registrar of the Tribunal that she had authorised S. Cass Weiland and other lawyers to make an "Application and Request for Provisional Measures" to the Tribunal and that Grahame Bollers had been designated as the lead agent.

88. The purpose of the note verbale was therefore to inform the Respondent that proceedings had been initiated before the Tribunal. On that date, the Applicant did not intend to exchange views with the Respondent. Consequently, the Applicant neither commenced negotiations nor exchanged views with Spain before the case was referred to the Tribunal. In other words, the conditions set out in paragraph 1 of article 283 have not been met. It is precisely on the basis of that article, which essentially provides that the parties are required to exchange views before bringing a dispute before the Tribunal, and of the manifest absence of such an exchange, that the Tribunal could not but find that it was without jurisdiction to decide the M/V "Louisa" Case on the merits.

89. In the oral proceedings, the Applicant employed new arguments relating to the jurisdiction of the Tribunal. Saint Vincent and the Grenadines stated:

> The first major point offered by Applicant is to urge that ITLOS has jurisdiction on the merits in this case based on article 300 of the 1982 UN Convention on the Law of the Sea (hereinafter "Convention" or "UNCLOS"). To support the legal rationale for this point, the Tribunal is respectfully asked to direct its attention to the text of article 288(1) now displayed on the screen. While the Tribunal knows this provision by heart, a few brief comments are necessary about this article which is crucial in relation to the facts in the *Louisa* case. . . .

> With respect to the written text of article 288, Honourable Judges can see that the word "shall" is not "may". This means that if the rules in article 288 are satisfied, the Tribunal is duty bound to accept jurisdiction over this dispute on the merits; we are no longer just considering provisional measures. Another word to note in the 288 text is "any" which modifies the word "dispute". "Any" is an inclusive, comprehensive word that in ordinary usage means that the Tribunal is conferred wide latitude under the Convention to accept and decide disputes. Article 288 further provides that any dispute concerning – again connoting latitude – "the interpretation or application" of the Convention. The word "or" is carefully not written as an "and" as sometimes read. This thoughtful drafting is deliberate and consistent throughout the Convention. The importance is that the Tribunal may find separately or in combination either interpretation or application of the law in the Convention. To drive the point home, this means that satisfaction of either criteria of interpretation or application provides a sufficient basis to confer jurisdiction for this Tribunal to hear and decide a case. All of these words in the text expressly confer wide, not narrow, discretionary powers in this Tribunal with respect to jurisdiction. Lastly, article 288(1) requires that the dispute or disputes must be submitted in accordance with Part XV of the Convention titled "Settlement of Disputes". (Presentation to ITLOS by Professor Myron H. Nordquist, 5 October 2012, pp. 1-3).

90. As we know, "an additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis" (*Certain Norwegian Loans, I.C.J., Reports. 1957*, p. 25), "and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character" (*Société commerciale de Belgique, P.C.I.J., Series A/B No. 78*, p. 173), as the Court states. Both these conditions must be satisfied.

91. What are the Applicant's submissions?

In its Application (23 November 2010):

(1) Respondent has violated articles 73, 87, 226, 245 and 303 of the Convention;

(2) Applicant is entitled to damages as proven in the case on the merits, but not less than $10,000,000 (USD); and

(3) Applicant is entitled to all attorneys' fees, costs, and incidental expenses incurred.

(*Application, 23 November 2010*)

In its final submissions (11 October 2012)

(a) declare that the Tribunal has jurisdiction over the Request;

(b) declare that the Request is admissible;

(c) declare that the Respondent has violated articles 73(2) and (4), 87, 226, 227, 300, and 303 of the Convention;

(d) order the Respondent to release the *Gemini III* and return property seized;

(e) declare that the boarding and detention of the *MV Louisa* and *Gemini III* was unlawful;

(f) declare that the detention of Mario Avella, Alba Avella, Geller Sandor and Szuszky Zsolt was unlawful and abused their human rights in violation of the Convention;

(g) declare that the Respondent denied justice to Mario Avella, Alba Avella, Geller Sandor, Szuszky Zsolt and John B. Foster and abused the property rights of John B. Foster;

(h) order that the Respondent is prohibited from retaliating against the interests of Mario Avella, Alba Avella, Geller Sandor, Szuszky Zsolt, John B. Foster and Sage Maritime Scientific Research, Inc., including the initiation of any procedure requesting the arrest, detention, or prosecution of these individuals or the seizure or forfeiture of their property in domestic Spanish courts;

(i) order that the Respondent is prohibited from undertaking any action against the interests of Mario Avella and John B. Foster, including the continued prosecution of these individuals in domestic Spanish courts;

(j) order reparations to individuals in the following amounts, plus interest at the lawful rate:

(1) Mario Avella: €810,000;
(2) Alba Avella: €275,000;
(3) Geller Sandor: €275,000;
(4) Szuszky Zsolt: €275,000;
(5) John B. Foster: €1,000.

(k) order reparations to Sage Maritime Scientific Research, Inc. in the amount of $4,755,144 (USD) for damages and an additional amount in the range of $3,500,000-$40,000,000 (USD) for lost business opportunities;

(l) order reparations to Saint Vincent and the Grenadines in the amount of €500,000 for costs and damages to its dignity, integrity, and vessel registration business; and

(m) award reasonable attorneys' fees and costs associated with this request, as established before the Tribunal, of not less than €500,000.

(*The M/V "Louisa" Case, Oral Proceedings, 11 October 2012, ITLOS/PV.12/C18/12*, pp. 14-15).

92. The rules applicable to changes made to the submissions made in the Application have been laid down in international case-law.

93. In the *Case concerning the Administration of the Prince von Pless* (*Preliminary Objections, P.C.I.J., Series A/B, No. 52*), the Permanent Court of International Justice held:

> whereas, under article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein. (p. 11)

94. In the *Société Commerciale de Belgique* case (*Belgium v. Greece*), (*P.C.I.J. Series A/B, No. 78*), the Permanent Court of International Justice stated:

> It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute. The Court has not hitherto had occasion to determine the limits of this liberty, but it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute. Similarly, a complete change in the basis of the case submitted to the Court might affect the Court's jurisdiction. (p. 160)

95. In that same case, the Court declared:

> The Court, however, considers that the special circumstances of this case as set out above, and more especially the absence of any objection on the part of the Agent for the Greek Government, render it advisable that it should take a broad view and not regard the present proceedings as irregular (p. 160)

96. In the *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, the International Court of Justice ruled, with regard to the Applicant's invocation, not in its Application but only in its Memorial, of a treaty as the basis for the Court's jurisdiction:

> The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that "the legal grounds upon which the jurisdiction of the Court is said to be based" should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified "as far as possible" in the application. An additional ground of jurisdiction may however be brought to the Court's attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (*Certain Norwegian Loans*, *I.C.J. Reports 1957*, p. 25), and provided also that the result is not to transform the

> dispute brought before the Court by the application into another dispute which is different in character (*Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78,* p. 173). Both these conditions are satisfied in the present case. (Para. 80)

97. In the *Case Concerning Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, the International Court of Justice had to rule on the admissibility of a claim made by Nauru concerning the overseas assets of the British Phosphate Commissioners. Against this background, the Court was faced with an

> Australian objection based on its contention that the Nauruan claim is a new one. Australia maintains that the claim in question is inadmissible on the ground that it appeared for the first time in the Nauruan Memorial; that Nauru has not proved the existence of any real link between that claim, on the one hand, and its claims relating to the alleged failure to observe the Trusteeship Agreement and to the rehabilitation of the phosphate lands, on the other; and that the claim in question seeks to transform the dispute brought before the Court into a dispute that would be of a different nature. (Para. 63)

98. The Court noted that:

> no reference to the disposal of the overseas assets of the British Phosphate Commissioners appears in Nauru's Application, either as an independent claim or in relation to the claim for reparation submitted, and . . . that, after reiterating the claims previously made in its Application, Nauru adds, at the end of its Memorial, the (relevant) submission. (Para. 64)

99. The Court also noted that:

> Consequently . . ., from a formal point of view, the claim relating to the overseas assets of the British Phosphate Commissioners, as presented in the Nauruan Memorial, is a new claim in relation to the claims presented in the Application. (Para. 65)

100. Nevertheless, the Court decided that it needed to consider "whether, although formally a new claim, the claim in question can be considered as included in the original claim in substance." (Para. 65)

101. Although the Court stated that "[i]t appears to the Court difficult to deny that links may exist between the claim made in the Memorial and the general context of the Application", it nevertheless expressed the opinion that

> for the claim relating to the overseas assets of the British Phosphate Commissioners to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 36) or must arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction* (*Federal Republic of Germany v. Iceland*), *Merits, I.C.J. Reports 1974*, p. 203, paragraph 72). The Court considers that these criteria are not satisfied in the present case. (Para. 67)

102. Furthermore, the Court ruled:

> while not seeking in any way to prejudge the question whether there existed, on the date of the filing of the Application, a dispute of a legal nature between the Parties as to the disposal of the overseas assets of the British Phosphate Commissioners, the Court is convinced that, if it had to entertain such a dispute on the merits, the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application. . . . (Para. 68)

103. The Court went on to cite the provisions of its Statute and its Rules:

> Article 40, paragraph 1, of the Statute of the Court provides that the "subject of the dispute" must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires "the precise nature of the claim" to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. (Para. 69)

104. Against this background, the Court made reference to the decisions of the Permanent Court of International Justice in the *Prince Von Pless* and *Société commerciale de Belgique* cases, and to its own Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility* (see above).

105. On that basis, the Court reached the following conclusion:

> In the light of the foregoing, the Court concludes that the Nauruan claim relating to the overseas assets of the British Phosphate Commissioners is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim. (Para. 70)

106. It also found that:

> The preliminary objection raised by Australia on this point is therefore well founded. It follows that it is not necessary for the Court to consider here the other objections of Australia with regard to the submissions of Nauru concerning the overseas assets of the British Phosphate Commissioners. (Para. 71)

107. In the case concerning *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Judgment, I.C.J. Reports 2003*, p. 161, the International Court of Justice had to address the following argument, raised by Iran against the admissibility of the counter-claim made by the United States of America:

> Iran contends that the United States has broadened the subject-matter of its claim beyond the submissions set out in its counter-claim by having, belatedly, added complaints relating to freedom of navigation to its complaints relating to freedom of commerce, and by having added new examples of breaches of freedom of maritime commerce in its Rejoinder in addition to the incidents already referred to in the counter-claim presented with the Counter-Memorial. (Para. 116)

108. Referring to its jurisprudence in the *Certain Phosphate Lands* and *Société commerciale de Belgique* cases, the Court stated:

> The issue raised by Iran is whether the United States is presenting a new claim. The Court is thus faced with identifying what is "a new claim" and what is merely "additional evidence relating to the original claim". It is well

established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings "transform the dispute brought before the Court into a dispute that would be of a different nature" (Para. 117).

109. It also ruled that "[*a*] *fortiori*, the same applies to the case of counter-claims" (para. 117).

110. The Court noted that:

> If it is the case, as contended by Iran, that the Court has before it something that "constitutes . . . a new claim, [so that] the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim" (*Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), *Preliminary Objections, I.C.J. Reports 1992*, p. 267, para. 70), then the Court will be bound to dismiss such new claim. (Para. 117)

111. In the opinion of the Court, however:

> the United States provided detailed particulars of further incidents substantiating, in its contention, its original claims. In the view of the Court, the United States has not, by doing so, transformed the subject of the dispute originally submitted to the Court, nor has it modified the substance of its counter-claim, which remains the same, i.e., alleged attacks by Iran on shipping, laying of mines and other military actions said to be "dangerous and detrimental to maritime commerce", thus breaching Iran's obligations to the United States under Article X, paragraph 1, of the 1995 Treaty. The Court therefore cannot uphold the objection of Iran. (Para. 118)

112. In the present case, the Applicant undertook instead to structure human-rights-related arguments around article 300 of the Convention with a view to establishing the jurisdiction of the Tribunal to hear the case on the merits. To that end, it went as far as making changes to its submissions. It is evident that there was no link with the subject-matter of the case on the critical date, the date on which the proceedings were brought. Consequently, the Tribunal is justified in ruling that it has no jurisdiction to decide the *M/V "Louisa" Case* on the merits. It could even have defined the regime applicable to article 300 of the Convention (para. 137 of the Judgment).

Nationality of the vessels and protection of the crew of the *Louisa*

113. There are conditions to which the law of responsibility subjects a State's bringing of a claim in respect of injury which it attributes to an internationally

wrongful act whose initial victim is an individual. They are still valid where the claim, after first being submitted to, and rejected by, the respondent State, is then brought before a tribunal. Grounds for inadmissibility of the legal action include: the case being taken up by a State which, for want of an internationally valid link of nationality with the victim, lacks *locus standi*; the impossibility for the claimant State to assert a right of its own which it is entitled to enforce against the Respondent (absence of actionable interest); and the protected subject's conduct if deemed incorrect (clean-hands doctrine) or insufficiently diligent (exhaustion of local remedies).

114. Diplomatic protection may extend to all persons, whether natural or legal, entitled to the benefit of the nationality of the claimant State. It is thus normally nationality which is the basis for the link between the aggrieved individual and the claimant State. As the Permanent Court of International Justice stated in the *Panevezys-Saldutiskis Railway* case:

> in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection. (*Judgment of 28 February 1939* (*Estonia v. Lithuania*), *P.C.I.J., Series A/B, No. 76*, p. 28)

115. It is for each State to lay down, by its sovereign powers, the conditions for the acquisition and loss of nationality for subjects of law under its authority. It is an exclusive competence. As the Permanent Court stated, "in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within the reserved domain" (*Advisory Opinion of 7 February 1923* in the dispute between France and Great Britain as to the *Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., Series B, No. 4*, p. 24). That opinion was confirmed by the International Court of Justice in the *Nottebohm* case: "international law leaves it to each State to lay down the rules governing the grant of its own nationality" (*Judgment of 6 April 1955, I.C.J. Reports 1955*, p. 23).

116. The arbitral tribunal established to resolve the dispute concerning filleting within the Gulf of St. Lawrence held that a State's right to determine, by its own legislation, the conditions for the registration of vessels in general, and fishing vessels in particular, falls within the exclusive competence of that State (*award of*

17 July 1986, para. 27; see also *the M/V "SAIGA" (No. 2) Case* (*Saint Vincent and the Grenadines v. Guinea*), *Judgment, ITLOS, Reports 1999*, p. 10, paras. 103 to 109).

117. The question which arises is whether Saint Vincent and the Grenadines is entitled to protect the *Louisa* and the *Gemini III*. As regards the *Louisa*, Spain states that

> in view of the application of the general rules of international law that are applicable to the exercise of diplomatic protection, and to the free will expressed unilaterally by Saint Vincent and the Grenadines, this Tribunal must determine, first of all, the nationality of the vessel or vessels affected by the detention.
> (Counter-Memorial, para. 88)

118. According to Spain:

> 83. In order to establish the jurisdiction of the Tribunal so as to decide on the merits of the demand submitted by Saint Vincent and the Grenadines, it is especially important to identify the nature of the claim and the proceedings used by the Applicant. As Spain already highlighted during the phase of provisional measures, the present case cannot be confounded with the proceedings of prompt release of vessels according to Article 292 of the Convention. On the contrary, the Applicant is merely seeking a form of diplomatic protection which is not subject to any special rule according to the Convention. Therefore, the conditions of admissibility of the claim must be submitted to the rules of general international law applicable to the exercise of diplomatic protection and to the definition of the international liability of the State. This is so because, as there is no autonomous, different system that should be applied specifically to the case, the Tribunal has to apply the general rules of international law which are applicable, taking into account what Judge Wolfrum, at that time President of the Tribunal, said about the law of the sea, which "should not be seen as an autonomous regime. It is part of general international law".
>
> 84. On the contrary, it is enough to analyse the substantial content of the claim, which is basically specified in the defence of the right of an individual (the *Louisa*, the crew and the proprietors of the vessel) who according to the Applicant, suffered damage due to the violation of the rules of international

law by Spain. It is unnecessary to insist on the fact that this is, precisely, the definition of diplomatic protection.

85. This judicial framework of the claim by Saint Vincent and the Grenadines obliges this honourable Tribunal, for the purposes of deciding on its jurisdiction on the merits of the matter, to analyse – at least – two basic elements. That is: i) the nationality of the claim; and, ii) the exhaustion of local remedies. We might include the relevance of taking into account the enforceability of the controversial requirement of "clean hands", recalling that the facts that caused the claim have their origin in criminal proceedings brought in Spain by actions classified as crimes liable to prosecution by the State under Spanish Law. Nevertheless, this latter requirement is not analysed individually in the present Chapter 3, as it is comprehensively discussed in the rest of this Counter-Memorial.
(Counter-Memorial, paras. 83 to 85)

119. **With regard to the nationality of the *Louisa***: "Furthermore, Spain fully recognizes that the *Louisa* was flying Saint Vincent and the Grenadines' flag during the 'critical dates' of this case" (Counter-Memorial, para. 90; also para. 95)

Most of these problems facing international adjudicative bodies derive from the existence of a vessel with one nationality, owned by a person with a second nationality, operated by a crew with different nationalities, loaded with cargo owned by persons with other nationalities and insured by a company of another nationality.
(Counter-Memorial, para. 91)

120. **On the subject of the genuine link:**

94. The effective accomplishment of these duties should confirm the "genuine link" to which Article 91(1) refers. And the case before us does not show this "genuine link" between the *Louisa* and its flag State. However, and again in *the M/V "Saiga"* (*No. 2*) *Case*, the Tribunal seemed to reduce the extent of the "genuine link" only to evidence supporting that a ship is entitled to fly a flag only at the time of the incident giving rise to the dispute and during the dispute. (60 ibid., paras. 67-68). The facts summarized in this Counter-Memorial show that even before the arrival of the *Louisa* in Spanish waters, Saint

Vincent and the Grenadines had not complied with the obligations imposed upon it by Article 94 of the Convention. Perhaps further guidance from the Tribunal would be very useful for this and future cases.
(Counter-Memorial, para. 94)

121. Spain points out that:

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

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

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

aforementioned cases. It is also true that both cases related to urgent situations calling for a decision on the prompt release of vessels and their crews.

92. Article 91(1) *in fine* the Convention apparently adopts the criteria of "effective nationality". But as the International Law Commission clarifies in its Commentary to the Draft articles of Diplomatic Protection, this criterion has a limited scope apart from those cases of double and opposed nationality. In the case of a ship treated as a unit, a formal, more practical and policy-oriented answer may help to resolve these complex cases.

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

94. Saint Vincent and the Grenadines has duties imposed upon it by Article 94 of the Convention. The effective accomplishment of these duties should confirm the "genuine link" to which Article 91(1) refers. And the case before us does not show this "genuine link" between the *Louisa* and its flag State. However, and again in the *M/V "Saiga" (No. 2) Case*, the Tribunal seemed to reduce the extent of the "genuine link" only to evidence supporting that a ship is entitled to fly a flag only at the time of the incident giving rise to the dispute and during the dispute. The facts summarized in this Counter-Memorial show that even before the arrival of the *Louisa* in Spanish waters, Saint Vincent and the Grenadines had not complied with the obligations imposed upon it by Article 94 of the Convention. Perhaps further guidance from the Tribunal would be very useful for this and future cases.
(Counter-Memorial, paras. 89 to 94).

122. As far as the *Gemini III* is concerned,

> – As occurred during the phase of provisional measures, the Applicant is attempting to include and discuss as a "package" the legal status of the *Louisa* and its so-called "tender": the *Gemini III*. However, the Applicant again fails to establish the link of nationality between the *Gemini III* and St. Vincent and the Grenadines: this boat never carried its flag.
>
> (Counter-Memorial, para. 95)

> – As mentioned before, in its declaration pursuant to Article 287 of the Convention, of 22 November 2010, Saint Vincent and the Grenadines explicitly reduces the scope of the jurisdiction of the Tribunal to the settlement of disputes concerning the arrest or detention of its vessels.
>
> (Counter-Memorial, para. 97)

> – This Tribunal clarified in the *M/V "SAIGA" (No. 2) Case* the concept of "ship as a unit" (paragraph 106) which clearly does not apply in this case under any circumstance.
>
> (Counter-Memorial, para. 98)

123. According to Saint Vincent and the Grenadines, "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" (Memorial, para. 19; also para. 7).

124. As regards the *Louisa*, Spain recognizes that it was flying Saint Vincent and the Grenadines' flag during the critical dates of this case (Counter-Memorial, para. 90). Rather, the problem concerns the status of the *Gemini III*. Saint Vincent and the Grenadines claims that that vessel performed additional survey work in the Bay of Cadiz and served as a tender to the *Louisa* during the first few months of 2005 (Memorial, para. 19). However, Saint Vincent and the Grenadines is not very forthcoming on the flag flown by the *Gemini III*, which appeared without a flag, then flying the Dutch flag, and finally the United States flag. We know that under article 91 of the Convention, every State must fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Moreover, there must be a genuine link between the State and the vessel.

125. Furthermore, the flag State has obligations under article 94 of the Convention. The vessel must, *inter alia*, be entered in its register of ships. The flag State must also exercise its jurisdiction and control over the ship. The Applicant has not furnished any proof of implementation of the abovementioned provisions which could establish a link of nationality between Saint Vincent and the Grenadines and the *Gemini III*.

Consequently, in the absence of an internationally valid link of nationality with the *Gemini III*, the legal action brought by Saint Vincent and the Grenadines is inadmissible for want of *locus standi*.

126. As regards the crew members and other persons detained or prosecuted by the Spanish judicial authorities, Saint Vincent and the Grenadines seeks to exercise diplomatic protection for their benefit. Here too, it is essential to examine whether or not there exists a link of nationality between the Applicant and those persons in order to establish the jurisdiction of the Tribunal and the admissibility of the Application or action.

127. The Applicant relies on the system put in place for autonomous prompt release proceedings, in which the flag State is able to exercise protection in respect of the crew regardless of their nationality. The main purpose of urgent proceedings is to safeguard the interests of navigation. The Tribunal rules on the release of the vessel and/or the crew without prejudice to the merits of any case before the appropriate domestic forum (article 292, para. 3). For that reason, in such proceedings, it regards the vessel and its crew as a whole. It considers the "ship as a unit". The International Law Commission has recognised this principle in its Draft Articles on Diplomatic Protection, which are not yet in force. Article 18 thereof, on the subject of protection of ships' crews, reads as follows:

> The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act. (Draft Articles on Diplomatic Protection, UN General Assembly, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10)).

128. The detention and prosecution by the Spanish judicial authorities of crew members and of other persons may lead the States of which they are nationals to

exercise diplomatic protection in respect of them. The nationality of the persons concerned is therefore crucial. The crew members are Hungarian or United States nationals. The owners of the vessels, as natural or legal persons, are also nationals of the United States of America. However, the Applicant has not proven any internationally valid link of nationality existing between it and the persons in question. It therefore plainly lacks *locus standi*.

Exhaustion of local remedies (Convention, article 295)

129. Article 295 of the Convention provides:

> 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.

130. The purpose of this rule is to strike a balance between the sovereignty of States and the requirements of international law. Diplomatic protection is an exceptional means which can lead to international proceedings only after local remedies have been exhausted. The rule thus acts as an objection of inadmissibility available to the respondent State.

This means that the aggrieved individual may seek protection from his State only if he has first exhausted the local remedies afforded to him by the legal system of the State from which he is seeking reparation.

131. In the *ELSI case*, the ICJ outlined the essential characteristics of the rule. It stated:

> the local remedies rule does not, indeed cannot, require that a claim be presented to the municipal courts in a form, and with arguments, suited to an international tribunal, applying different law to different parties: 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. (*Judgment of 20 July 1989, I.C.J. Reports 1989*, para. 59)

132. The prior exhaustion of local remedies thus appears to be a condition for the admissibility of the claim. Is this rule applicable in the present case?

133. In the view of Spain,

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

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

134. For Saint Vincent and the Grenadines, "exhaustion of local remedies is not required in the present case" (Reply, p. 14).

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

> age to the persons involved in the operation of the ship arose from those violations.
> (Reply, p. 14)

135. "The rights claimed by Saint Vincent and the Grenadines in the present case almost mirror those claimed in the *M/V SAIGA* (*No. 2*) *Case*, namely the freedom of navigation and other internationally lawful uses of the sea". (Reply, p. 15)

136. If the exhaustion of local remedies rule applies, have the conditions laid down by article 295 of the Convention been met?

137. Spain states:

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

As regards:

(i) the proceedings in progress before the Spanish authorities and the Applicant's position in the course of the domestic proceedings:

138. Since the seizure of the *Louisa*, the vessel has been under judicial control and under the technical surveillance of the *Capitanía Marítima* of Cadiz. As detailed in the next section, on several occasions the investigating judge ("magistrate judge") offered Sage the possibility of inspecting the vessel and carrying out maintenance.

139. **The judicial proceedings before the Spanish authorities**

28. Once the criminal legal process had begun in Spain against Sage, the *Louisa* and various persons concerned, the following relevant decisions, requests and orders were issued by the Magistrate Judge 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 carry out maintenance activities and to verify the security of the vessel. (Annex 8) Since then, several maintenance activities have been performed by the *Capitanía Marítima de Cádiz*;

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

(3) On 22 February 2008, Sage asked the Magistrate Judge to be allowed to visit the *Louisa*. On 22 July 2008, once the procedural position of Mr Foster was resolved, the Magistrate Judge asked Sage to designate a qualified person to make all necessary arrangements in the vessel to keep it in a proper state; (Annex 9);

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

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

(6) On 18 February 2009, the Magistrate Judge received a fresh request from the owners of the *Louisa* to visit and make some repairs (if needed)

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

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

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

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

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

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

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

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

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

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

(Counter-Memorial, para. 28)

140. **Position of Sage and of the Applicant in the course of the national proceedings:**

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

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

31. As an example, and leaving aside the different appeals made by other indicted persons in the criminal procedure which have made the entire process even more drawn out, Sage and its direct related persons (Mr Foster and Mr Avella) have opposed the legal decisions of the Magistrate Judge – through permissible appeals – on at least five occasions: on 28 January 2008 (*recurso de reforma*), on 3 July 2008 (*recurso de reforma*), on 31 July 2008 (*recurso de reforma*), on 16 April 2009 (*recurso de apelación*) and on 22 March 2010 (*recurso de apelación*). This accounts, in part, for the length of the process, but also demonstrates the procedural safeguards and the possibilities of due process always open to all indicted persons during criminal procedures before the Spanish judicial authorities. It should be noted, moreover, that these procedures have not been yet exhausted and that the merits of the case are still pending before the criminal courts of Spain.

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

33. Saint Vincent and the Grenadines never submitted any claim before the Spanish courts seeking the release of the *Louisa*. Saint Vincent and the Grenadines never used the "prompt release of vessels and crews" procedure available under Article 292 of the Convention, a procedure well known to this

Tribunal and the Applicant. The latter voluntarily decided to submit a generic claim under the principles, rules and conditions of diplomatic protection, but also sought to transfer to an international tribunal a legitimate domestic legal process that is *pendent lite*. This Counter-Memorial will deal with these questions later (*infra* paragraphs 108-121) but at this point Spain recalls a general principle stated by this Tribunal in the *Tomimaru Case* with regard to the prompt release procedure but applicable in general to the attitude of flag States regarding their detained vessels in third States:

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

34. No submission for the release of the *Louisa* was made, either by the owners of the vessel or by the flag State. Yet, on the other hand, no serious effort was made by Sage to perform routine maintenance and conservation operations to the vessel.
(Counter-Memorial, paras. 27 to 34)

(ii) the Respondent's arguments to the effect that the Applicant is attempting to turn the Tribunal into a court of appeal regarding the criminal trial that is still continuing in the Spanish courts (*see Rejoinder, paras. 17 to 39*).

141. As regards the exhaustion of local remedies to rectify the damage alleged by the Applicant, the question which arises is whether Saint Vincent and the Grenadines brought the essence of its claim before the competent national courts and whether it pursued it as far as permitted by Spanish law and procedures, and without success, in accordance with settled case-law.

142. The record shows that on 15 March 2006 the Spanish authorities notified Saint Vincent and the Grenadines of the boarding and search of the *Louisa*. The Respondent duly communicated this information to it "for any necessary procedures". It was not until four years later that the Applicant reacted, sending several

e-mails to the *Capitanía Marítima de Cádiz* through the Office of its Commissioner for Maritime Affairs in Geneva. It did not take any measures concerning the *Louisa* before 26 October 2010, the date on which it informed Spain of its intention to initiate proceedings before the Tribunal. What is more, proceedings are still pending in the Spanish legal system.

143. In view of the circumstances of the present case, the conditions laid down by article 295 of the Convention have not been met. Consequently, the action brought by the Applicant is inadmissible.

144. All in all, it can be concluded that:

First, the conditions set out in paragraph 1 of article 283 have not been met. It is precisely on the basis of that article, which essentially provides that the parties are required to exchange views before bringing a dispute before the Tribunal, and of the manifest absence of such an exchange that the Tribunal could not but find that it was without jurisdiction to entertain the M/V "Louisa" Case on the merits.

Second, the Applicant has not proven any internationally valid link of nationality existing between it and the persons in question. It therefore plainly lacks *locus standi*.

Lastly, in view of the circumstances of the present case, the conditions laid down by article 295 of the United Nations Convention on the Law of the Sea have not been met. Consequently, the action brought by the Applicant is inadmissible.

(*signed*) T.M. Ndiaye