DISSENTING OPINION OF JUDGE JESUS

1. My position of principle is that the case should have been dismissed on the basis of inadmissibility of the claims presented by Saint Vincent and the Grenadines and not on the basis of lack of jurisdiction of the Tribunal as such. I am of the view that the Tribunal has jurisdiction to entertain this case. Accordingly I could not join in the majority decision.

I shall detail my position in this regard:

A. Jurisdiction

2. At the outset, I would like to state that I agree with the analysis and the conclusions reached by the Tribunal that articles 73, 87, 226, 245 and 303 of the Convention are not applicable to the factual background of this case and, therefore, none of them can serve as legal grounds for establishing the jurisdiction of the Tribunal.

3. My main difference with the Tribunal's reasoning and conclusions concerns the applicability and the relevance of article 300 of the Convention as a legal basis on which to assert the Tribunal's jurisdiction in this case.

4. This difference in reasoning is as follows:

Saint Vincent and the Grenadines introduced article 300 of the Convention as a legal basis for the jurisdiction of the Tribunal at a late stage, after the closure of the written proceedings. It argued that this article provides the legal grounds on which the Tribunal could assert its jurisdiction to adjudicate upon the dispute. It failed though to establish or to demonstrate the link between this article and a provision of the Convention establishing any rights, jurisdiction or freedoms Spain's exercise of which may have involved an abuse of right, arguing that article 300 of the Convention could be "deployed independently".

5. The main arguments of Saint Vincent and the Grenadines adduced in this regard during the hearings are as follows: "A genuine dispute exists between the Parties over article 300 that in and of itself confers jurisdiction, on the merits, for this Tribunal, in this case" adding that "none can deny the legitimacy of

international law treaty obligations dealing with abuse of rights and, in the instant case, abuse with respect to both human and property rights. It adds that

> the doctrine of abuse of rights is closely related to the principles of good faith and due process, and that this occurred when the local authorities in Spain exercised their legal rights or authority in a manner that benefits from this exercise were unjustly disproportionate, to the detriment of Alba Avella, two Hungarian crewmen, Mario Avella and John Foster as well as to Saint Vincent and the Grenadines as a sovereign.

6. Spain counter-argues by stating that article 300 is applicable to each and every one of the provisions contained in the Convention, adding that the Applicant has not succeeded in identifying any such provisions of the Convention and further argues that it does not believe that article 300 has a life of its own. It concludes its position on this point by stating that Saint Vincent and the Grenadines has tried to introduce article 300 of the Convention as a new title of jurisdiction for alleged breach of human rights, the rights of the individuals arrested and the property rights of the owner of the "Louisa" and that, by so doing, the Applicant tried to "change the nature of the dispute" and present a new case.

7. The Tribunal – after concluding that articles 73, 87, 226, 245 and 303 of the Convention, as presented by the Applicant, had "no direct link to the question of jurisdiction" – dismissed the case, stating that, in its view,

> article 300 of the Convention cannot serve as a basis for the claims submitted by Saint Vincent and the Grenadines. (see para. 150 of Judgment).

8. The Tribunal, consequently, found that it had no jurisdiction to adjudicate on the case because it considered Saint Vincent and the Grenadines' argument on article 300 as introducing, in fact, a new dispute and therefore it concluded that

> [. . .] a dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character. (see para. 143 of Judgment)

9. The main reasoning developed in the Judgment on which the Tribunal relies to come to this conclusion may be summed up as follows:

> [B]oth the Application and the Memorial 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 of the Convention and its applicability to the facts of this case. 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.
>
> The Tribunal considers that the reliance on article 300 of the Convention generated a new claim in comparison to the claims presented in the Application; it is not included in the original claim [. . .]
> (see paras. 141 and 142 of Judgment).

To justify the dismissal of the case, the Tribunal continued its reasoning, observing "that it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it."

10. This is the background against which I will now examine the relevance of article 300 as a basis of jurisdiction of the Tribunal in this case.

11. To determine whether article 300 could have offered a basis of the Tribunal's jurisdiction, as argued by Saint Vincent and the Grenadines, one has first to address the following questions:

a) Did the argument of Saint Vincent and the Grenadines proposing article 300 as a basis of the jurisdiction of the Tribunal introduce a new claim in comparison to the claims presented in the Application, a claim that is different in character, as concluded in paragraph 142 of the Judgment, or – though admittedly no direct reference was made to article 300 as such before the oral proceedings – was there an implicit reference in the Application or Memorial to the object and purpose of the abuse-of-right provision contained in article 300 of the Convention and, if so, could the Tribunal have taken such implicit reference to the content of article 300 as relevant for the purposes of establishing its jurisdiction?

b) Does the Convention regulation cover the maritime areas of Spain in which it is alleged that Spanish laws concerning these areas were violated by the M/V "Louisa" and the persons connected therewith, violations that led to the arrest or detention of that vessel and those persons?

c) Since, on the one hand, articles 73, 87, 226, 245 and 303 of the Convention presented by the Applicant were not accepted by the Tribunal, and rightly so, as legal grounds for the Tribunal's jurisdiction, and considering, on the other, that Saint Vincent and the Grenadines failed to indicate a provision of the Convention recognizing a right, a jurisdiction or a freedom which may have been exercised by Spain in a manner constituting an abuse of right, and which would then bring article 300 of the Convention into play, is it to be presumed that therefore, on these accounts only, the Tribunal has no jurisdiction to adjudicate upon the case, or indeed should the Tribunal itself attempt to find a legal basis in the Convention to establish its jurisdiction? In other words, is the Tribunal prevented, in the present case, from exercising its compétence de la compétence by itself finding a provision or provisions of the Convention on the basis of which it could assert its jurisdiction to entertain the merits of this case, in light of the stipulations of article 288, paragraph 4, of the Convention and article 58 of its Rules?

12. I will address the issues raised in these three questions in that order. The issues raised in the first question are:

a) Did the argument of Saint Vincent and the Grenadines, proposing article 300 as a basis of the jurisdiction of the Tribunal, introduce a new claim in comparison to the claims presented in the Application, a new claim that is different in character, as concluded in paragraph 142 of the Judgment?

b) or – although, admittedly, no direct reference was made to article 300 as such in the Application or in the Memorial – was there an implicit reference in those proceedings to the object and purpose of the abuse-of-right provision contained in article 300 of the Convention?

c) and, if so, could the Tribunal have taken the implicit reference to the content of article 300 as relevant for the purpose of establishing its jurisdiction?

13. As to the first issue raised in this question, that is, the character of the new claim, the Tribunal concluded 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 in the original claim," and "it is a legal requirement that any claim to be admitted it must arise directly out of the application or be implicit in it" (see para. 142 of Judgment).

14. While I agree with the Tribunal that a new claim which is different in character in comparison to the claim made in the application is not acceptable unless it was implicit in the application – and, I would add here, the Memorial, in keeping with the relevant jurisprudence – the factual background of this case does not seem to support the conclusion of the Tribunal that "article 300 of the Convention cannot serve as a basis for the claims submitted by Saint Vincent and the Grenadines" because it introduced a new claim that was not included or implicit in the original claim submitted in the Application.

15. In my view, the Applicant's argument introducing article 300 as legal ground for the jurisdiction of the Tribunal does not constitute a new claim. As I see it, this article-300 argument follows the same line of logic of earlier arguments articulated in the Application and Memorial, where the Applicant's main assumption is that Spain, after the arrest, was abusing its rights "with respect to both human and property rights", by not indicting the persons connected therewith and by not forfeiting the vessels, or by not setting a bond for their release. That is the underlying idea that can be drawn from several allegations by the Applicant, though expressed in different forms, some of which are quoted in paragraphs 18 to 20 of this opinion.

16. Therefore, it appears to me that the conclusion of the Tribunal that the Applicant's article-300 argument introduced a new claim does not take full account of what is stated in this regard in the Application and the Memorial. The only thing that is new in this belated argument on jurisdiction made by the Applicant is the direct reference to article 300 of the Convention.

17. My interpretation of the facts is that, as stated, the new argument made by the Applicant on the basis of article 300 of the Convention did not introduce a new claim. But even if, for the sake of argument, one admits that the Applicant's

article-300 argument introduced a new claim, as concluded by the Tribunal, it is factually difficult to deny that, at the very least, the reasoning behind the article-300 argument was implicit in several instances in the Application and the Memorial and, as such, it should not have been considered as introducing a new claim which is different in character in comparison to the original claim.[1]

18. There are, indeed, several passages in the Application and the Memorial where Saint Vincent and the Grenadines raises, repeatedly, the issue having to do with, or bordering on, an abuse of right on the part of the Spanish authorities in connection with the arrests of the vessels and the persons connected therewith. Some examples:

On page 1 of the Application, Saint Vincent and the Grenadines, referring to Spain, states:

> After imprisoning members of the crew of the "*Louisa*" for various periods of time and seizing weapons which had been placed on board for defensive purposes, Respondent has continued to hold the vessels without bond, such that the vessels now have greatly diminished- if any – value. Respondent's lawlessness has resulted in the necessity of securing counsel in Spain, the United States, and Germany, and required the expenditure of enormous resources.

19. In the very introduction in the Memorial, it is stated:

> 1. Pursuant to an Application Instituting Proceedings filed on 23 November 2010, the origins of the dispute date to 2006. At this time, the continued intransigence of the Respondent, the complete deterioration of two vessels seized by the Respondent, and the direct and consequential damages resulting from Respondent's unlawful activity fully support and justify the relief sought herein.

20. Several other paragraphs of the Memorial echo the same idea of abuse of right, amongst them the following paragraphs:

23. Upon information and belief, the Spanish investigation included Mario Avella, the *Louisa* Crewmen, Sage and its owner and several Spanish citizens. The inquiry

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[1] *Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at p. 266, para. 67.

was initiated in Magistrate's Court N. 4 in Cadiz, under Judge de Diego Alegre. *After more than four and one-half (4 ½) years, no indictments were returned and no action to forfeit the vessels was ever undertaken*;

> 25. *Because of these procedural delays and lack of action by Respondent, the Louisa has deteriorated significantly in Puerto Santa Maria, to the point that she is completely unseaworthy and almost certainly a total loss.*

> 54. Based on its presentation in the hearing on Provisional Measures, we understand the *Respondent's defen[c]e on the merits to be based on the endless criminal investigation in Cadiz and the idea that the ship Louisa and the work-boat Gemini III are instruments of a crime. Thus, Respondent argues that the Spanish authorities are entitled to hold the ships for an indefinite amount of time* and that this Tribunal should avoid these important issues entirely

> 75. Rather, Spain has insisted that *the detention and consequent destruction of Louisa and Gemini III are simply justified by a criminal investigation underway since 2005 which should not be disturbed. Similarly, it argues that the illegal detention of Mario Avella and his daughter, Alba, involved the criminal investigation conducted by a provincial court. Responsibility cannot be denied with such ease.*

21. These passages put in evidence that the Applicant in several instances in its Application and Memorial addressed the issue of the abuse of right, an issue which is, undeniably, the object of article 300 of the Convention. Therefore, it can be said that the issue of abuse of right was implicit in the Application and Memorial. As stated by the Tribunal itself, referring to several ICJ pronouncements in this regard, "[. . .] any claim to be admitted must arise directly out of the application or be implicit in it".

22. In this context, it is to be noted that the term "application" should be understood to include claims made in the Memorial. "an applicant is entitled to adduce new grounds of jurisdiction even after having filed its application and the supplementary memorial",[2] and that "there is no doubt that the term application referred to in article 79 of the Rules (ICJ) has to be understood in a broad sense as referring to the claim of the applicant detailed not only in the application but also the ensuing memorial and possibly also during oral hearings. Although at such later stages the scope of the application may be particularised and clarified and to some extent also broadened, such 'development' of an application may not be used to introduce "new" claims. A dispute cannot be transformed into another one different in character".[3]

23. The question of a new claim and its character having been dealt with, it must now be established whether the Convention covers the maritime areas of Spain in which it is alleged that Spanish laws concerning these areas were violated by the M/V "Louisa" and the persons connected therewith, violations that led to the arrest or detention of that vessel and those persons. This leads to the issues raised by the second question listed above.

24. As shown in paragraph 45 of the Judgment, "[t]he M/V 'Louisa' arrived in the port of Cadiz (Spain) on 20 August 2004. [f]rom the time of its arrival in Cadiz until October 2004, the M/V "Louisa" conducted operations in the territorial sea and the internal waters of Spain". Spain admits that the arrests took place on account of alleged violations by the "Louisa" and the persons connected therewith of Spanish laws concerning internal waters, as well as its territorial sea.

25. It thus seems beyond doubt that the arrests concern violations of Spanish law in the territorial sea and in internal waters, indistinctively. This brings into play article 2 of the Convention concerning the territorial sea.

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[2] Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, *The Statute of the International Court of Justice, A Commentary*, Oxford University Press, 2006, article 36, para. 6, p. 646.

[3] *Ibid*., article 36, para. 6, p. 644. See also *Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 240, 262, para. 58, *Societé Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, pp. 160, 173, and other cases cited by Zimmermann.

26. While the provisions of the Convention, in the circumstances of this case, may not cover the arrests that took place for alleged violations of Spanish law concerning its internal waters, the same cannot be said in relation to the arrests made by the Spanish authorities for alleged violations of Spanish law concerning its territorial sea.

27. Having concluded that the article-300 argument of the Applicant introduced a claim that is implicit in the Application and Memorial, and that the arrests or detentions in this case were also made for alleged violations of Spanish laws applicable to the territorial sea, a maritime area, therefore, covered by the Convention, I will now attempt to establish the grounds for the jurisdiction of the Tribunal. The issues involved in this regard may be framed as follows:

a) Since, on the one hand, articles 73, 87, 226, 245 and 303 of the Convention presented by the Applicant were not accepted by the Tribunal, and rightly so, as legal grounds for the Tribunal's jurisdiction, and considering, on the other, that Saint Vincent and the Grenadines failed to indicate a provision of the Convention recognizing a right, a jurisdiction or a freedom which may have been exercised by Spain in a manner constituting an abuse of right, and which would then bring article 300 of the Convention into play, is it to be presumed that therefore, on these accounts only, the Tribunal has no jurisdiction to adjudicate upon the case?

b) or indeed should the Tribunal itself attempt to find a legal basis in the Convention to establish its jurisdiction? In other words, is the Tribunal prevented, in the present case, from exercising its compétence de la compétence by itself finding a provision or provisions of the Convention on the basis of which it could assert its jurisdiction to entertain the merits of this case, in light of the stipulations of article 288, paragraph 4, of the Convention and article 58 of its Rules?

28. Though, as mentioned in the beginning of this opinion, I agree with the analysis and conclusions of the Tribunal's decision in that, contrary to the arguments adduced by Saint Vincent and the Grenadines, articles 73, 87, 226, 227 and 303 do not provide a legal basis for the jurisdiction of the Tribunal, in my view the Tribunal could have asserted its jurisdiction to adjudicate upon this dispute based on article 300 in conjunction with article 2, paragraph 3, both of the Convention.

29. Article 300 (Good faith and abuse of rights) states that:

> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

30. This article applies, in a direct way, the well-established doctrine of abuse of right to the law of the sea, as contained in the Convention, establishing certain limits on the manner in which States may exercise their rights, jurisdiction and freedoms recognized by the Convention

31. I will not enter here into an analysis of the ambit of application of this article to the substance of this case, nor into an examination of whether any provision of the Convention has actually been exercised in an abusive manner by Spain. That is an assessment that would only have been required if and when consideration on the merits of this case were to take place, based on the evidence produced.

32. For the purposes of establishing whether, as argued by Saint Vincent and the Grenadines, the Tribunal has or does not have jurisdiction to adjudicate upon the dispute, based on article 300, there is no need, at this stage, to reach the conclusion that Spain exercised a right, jurisdiction or freedom recognized to it by the Convention in a manner which would constitute an abuse of right. This is a matter germane to the consideration on the merits, but certainly not to the stage of determination of whether or not the Tribunal has jurisdiction.

33. What is required in order to establish the jurisdiction of the Tribunal is the determination of whether the alleged abuse of right by Spain is related to, or concerns, any provision of the Convention recognizing a right, a jurisdiction or a freedom the exercise of which may have constituted an abuse of right.

34. It is clear to me that the letter and spirit of article 300 indicate that this article, at least as it relates to the provision on abuse of right, cannot per se apply, unless it is to be related to another provision concerning a right, jurisdiction or freedom recognized in the Convention which may have been exercised or implemented in an abusive manner by the coastal State.

35. As rightly pointed out by the Respondent, article 300 does not have a life of its own and cannot be relied on independently of other provisions of the Convention.

36. In my view though, article 2 of the Convention, in its paragraph 3, provides the link to article 300 that could have led the Tribunal to assert its jurisdiction to entertain this case.

37. The reasoning I relied on to establish such a link is the following:

Article 2, paragraph 1, establishes that "[t]he sovereignty of a coastal State extends, beyond its land territory [. . .], to an adjacent belt of sea, described as the territorial sea". The same article in its paragraph 3 states: "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law".

38. From these two paragraphs it seems clear that, while the Convention recognizes the sovereignty of the coastal State over the territorial sea, it establishes, at the same time, that this sovereignty is exercised subject to the Convention and the rules of international law. This, of course, is not to be construed as a limitation of the substantive rights, freedoms, jurisdictions or powers which the sovereignty of the costal State over the territorial sea entails. Indeed, article 2, paragraph 3, does not interfere at all with the substantive rights, powers, benefits and exclusiveness inherent in the coastal State sovereignty. Nonetheless, this paragraph is clear that in some instances there may be some limitations or qualifications as to the manner in which the coastal State should exercise its sovereignty over the territorial sea.

39. These limitations or qualifications are those that may result from the Convention or other rules of international law. There may indeed be several instances in the Convention in which the exercise of the sovereignty of the coastal State over its territorial sea is subject to certain limitations or qualifications. For example, articles 17, 21, paragraphs 1 to 3, article 24 and 26, all related to the innocent passage regime, configure one of such instances of situations in which limitations are imposed on the exercise by the coastal State of its sovereignty over the territorial sea.

40. The same may be said about the limitations imposed by article 300 on the manner in which the coastal State may exercise its "rights, jurisdictions and freedoms" recognised in the Convention. Under article 2, paragraph 3, of the Convention, the exercise of the rights, jurisdictions and freedoms of the coastal State based on, or inherent in, its sovereignty over the territorial sea are subject to the Convention and, therefore, to its article 300.

41. Some may argue that article 300 of the Convention cannot be linked to article 2, paragraph 3, of the Convention since, while the former article refers to rights, jurisdictions and freedoms recognised in the Convention, article 2, paragraph 3, of the Convention refers instead to the "sovereignty" of the coastal State over the territorial sea. To those who may argue along these lines I would say – without entering into the theoretical argument on what is the content of the concept of sovereignty over the territorial sea – that, as a matter of practice, the sovereignty of the coastal State over its territorial sea is translated into rights, jurisdictions and freedoms it exercises daily.

42. Therefore, when article 2, paragraph 3, of the Convention states that the exercise of coastal State sovereignty is subject to the Convention, this is to be interpreted as meaning that the exercise of the rights, jurisdictions and freedoms inherent in the coastal State's sovereignty over its territorial sea is subject to the Convention and other rules of international law.

43. It would be absurd if article 300 of the Convention, which introduces directly into the law of the sea the well-known and universally accepted doctrine of abuse of right, applied to the exercise of the rights, jurisdictions and freedoms individually recognized in the Convention but not to the rights, jurisdictions and freedoms exercised by the coastal State based on, or inherent in, its sovereignty over the territorial sea. If such an absurd interpretation were to hold, it would lead to the *contrario sensu* conclusion, equally absurd, that the coastal State, in exercising its rights, jurisdictions and freedoms based on, or inherent in, its sovereignty over its territorial sea, could cause unnecessary harm or injury to other States, because the abuse-of-right limitation imposed by article 300 of the Convention did not apply to the territorial sea.

44. Indeed, as postulated by the abuse-of-right principle, no right, whether concerning the sea or the land, should be exercised in an arbitrary or malicious manner in such a way as to cause unnecessary harm or injury to others.

45. Article 300 merely states, in a direct way, for the law of the sea a general principle of law that applies equally to other fields of law, internal and international. The principle of abuse of right is a natural offspring of the good faith principle and, as such, its general applicability is to be expected even in situations in which it is not incorporated into a particular provision of a treaty or any other legal text. Its observance is of the essence if justice and peace are to prevail in inter-State relations.

46. The proceedings show that Saint Vincent and the Grenadines questioned the legality of the arrest and detention of the vessel "Louisa" and "Gemini III" and the persons connected therewith. It also repeatedly challenged the way the Spanish authorities were, throughout the detention period, exercising their jurisdiction over those vessels and persons, as shown in paragraph 18 to paragraph 20 of this opinion.

47. As I have already mentioned, for the sole purpose of establishing the basis of jurisdiction, it is immaterial to assess whether these allegations by Saint Vincent and the Grenadines are factually correct or not. That is an assessment that should be left to the merits. In my view, for the purpose of asserting its jurisdiction and that purpose alone, the Tribunal would have been justified in relying on article 300 and article 2, paragraph 3, of the Convention.

48. In this connection, a point may be made to the effect that Saint Vincent and the Grenadines did not provide the Tribunal with the link between article 300 and another provision of the Convention on the grounds of which jurisdiction could be established.

49. This leads me to the second issue raised in the third question: whether the Tribunal under its statutory and guiding rules should or should not itself find a title of jurisdiction in the Convention that would enable it to make the link between article 300 and article 2, paragraph 3, of the Convention, when the Applicant itself has failed to do so.

50. To address this point, I shall start with article 54, paragraph 2, of the Rules of the Tribunal, under Subsection I on Institution of Proceedings. This paragraph states: "The Application shall specify as far as possible the legal grounds upon which the jurisdiction of the Tribunal is said to be based [. . .]".

51. The Tribunal's position in this regard is that, for the determination whether it has jurisdiction, it "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 it submitted" (see para. 99 of Judgment).

52. My first observation on this conclusion is that the Tribunal does not follow its own jurisprudence in this regard. In the Grand Prince case, for example, the Tribunal rightly stated that it possessed the right to deal with all aspects of the question of jurisdiction, "whether or not they have been expressly raised

by the parties".[4] While I agree that the Applicant should specify the legal grounds for the Tribunal's jurisdiction, as required by article 54, paragraph 2, of the Rules, I am of the view that that specification should be made "as far as possible", to use the language of this article itself.

53. It appears from the text of the Judgment, including paragraph 99, that it is incumbent upon the Applicant to point to a provision or provisions of the Convention as a basis of jurisdiction, presuming that it is not the Tribunal's task in this case to find a basis of jurisdiction in the Convention as the legal title of jurisdiction.

54. This position of the Tribunal as reflected in the said paragraph 99 does not seem to square with either article 54, paragraph 2, of the Rules, as mentioned or, even worse, article 288, paragraph 4, of the Convention, whose content is translated into the said article 58 of the Rules of the Tribunal. It does not also follow the jurisprudence of international courts, including the Tribunal itself, as shown above.

55. Article 54, paragraph 2, only requires that *the Application specify* "as far as possible" the legal grounds upon which the jurisdiction of the Tribunal is said to be based. My interpretation of this provision is that, while the Application shall specify, as far as possible, these legal grounds, that specification must not be seen as the end of the road. This provision should not be construed as leading necessarily to the finding that the Tribunal has no jurisdiction in the event that the legal grounds indicated in the Application do not appear to the Tribunal to afford a basis for its jurisdiction to adjudicate upon the case. This view seems to be supported by the phrase "shall specify as far as possible".

56. Indeed, the ultimate word on the legal basis for jurisdiction does not seem to rest with the Applicant or, for that matter, with the Respondent. Article 58 of the Rules of the Tribunal, a provision taken, as stated above, *ipsis verbis* from article 288, paragraph 4, of the Convention – whose terms are also similar to those of article 36, paragraph 6, of the ICJ Statute –, is clear when it states that "in the event of a dispute as to whether the Tribunal has jurisdiction, the matter

[4] *"Grand Prince"* (*Belize* v. *France*), *Prompt Release, Judgment, ITLOS Reports 2001*, p. 17, at p. 41, para. 79.

shall be decided by the Tribunal". The Tribunal is therefore ultimately free to determine the legal grounds for its jurisdiction in the event of a dispute thereon, as in the present case.

57. This interpretation is confirmed by the ICJ's jurisprudence, as reflected in the *Oil Platforms* (*Preliminary Objections*) case, "where the parties differed on the question whether the impugned actions constituted a violation of the treaty introduced as the title of jurisdiction producing a dispute as to the interpretation or application of that treaty":[5] In that case the ICJ stated:

> In order to answer that question the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists and the other denies it. It must ascertain whether the violations of the [title of jurisdiction] pleaded by Iran [the applicant] do or do not fall within the provisions of the title of jurisdiction and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain, pursuant to the title of jurisdiction [...].[6]

58. A well-known Commentary on the Statute of the International Court of Justice expresses similar views. Concerning article 36, paragraph 6, of the Statute of the Court, a rule similar to article 288, paragraph 4, of the Convention, that Commentary states: "It is a rule generally encountered in the statutes of international courts and tribunals that the judicial body concerned decides on its jurisdiction should any doubt arise. It enjoys Kompetenz-Kompetenz",[7] and "[...] The Court feels obligated to examine its jurisdiction ex-officio or proprio motu".[8]

59. In the present case the Tribunal found that it lacked jurisdiction to adjudicate upon the dispute, since articles 73, 87, 226, 245 and 303 of the Convention referred to by Saint Vincent and the Grenadines do not provide the legal grounds

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[5] Shabtai Rosenne, *Law and Practice in International Courts, The Law and Practice in the International Court 1920–2005, 4th Ed.*, Martinus Nijhoff Publishers, pp. 507, 508.

[6] *Ibid.*

[7] Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, *The Statute of the International Court of Justice, A Commentary*, Ed 2006, page 643, para 101.

[8] *Ibid.*, idem pp. 646-647.

for its claims (it meant jurisdiction) (see para. 98). The Tribunal failed to indicate whether, in its view, the Convention, as the title of jurisdiction, did or did not offer such grounds, as it should have, in compliance with article 288, paragraph 4, of the Convention and article 58 of the Rules.

60. On the other hand, the Tribunal's rejection of Saint Vincent and Grenadines' position that legal grounds for jurisdiction could be found in article 300 of the Convention, on the argument that the reference to such article was not included in the Application or in the Memorial (see para. 141 of Judgment) and that reliance on article 300 generated a new claim in comparison to the claims presented in the Application, does not seem an accurate interpretation of the relevant facts, as mentioned above.

61. On the basis of the reasoning developed above, I came to the conclusion that article 300, interpreted in conjunction with article 2, paragraph 3, of the Convention provides the legal ground for the jurisdiction of the Tribunal in the present case. For these reasons, I dissent from the majority decision on the issue of jurisdiction of the Tribunal.

B. Admissibility

62. While, in my view, as reasoned above, the Tribunal had competence to decide on its jurisdiction in this case, and therefore it should have addressed the matter of its jurisdiction *ex-officio* or *proprio motu,* in the light of the different views of the Parties on this matter – obviously within the confines of the Convention as the title of jurisdiction and the Declarations under article 287 made by each one of the Parties –, it is for the Applicant to indicate clearly the claims it wishes to submit and the legal grounds on which the claims are to be founded. In the present case, this requirement does not seem to have been met by the Applicant.

63. All through the proceedings, from the Application to the final submissions, the Applicant has displayed some uneasiness and lack of clarity as to its claims and, especially, its difficulties in indicating the provisions of the Convention that supported its claims. Articles 73, 87, 226, 245, and 303, put forward by the Applicant for that purpose, clearly had no relationship whatsoever with the claims of the Applicant. The Applicant, as a last resort, presented article 300 to back its claims as if that article could be applied on its own or, as put by the Applicant, as if that article could be "deployed independently".

64. As I have reasoned above, article 300, to be applicable, has to be related to a provision conferring a right, a jurisdiction or a freedom recognized in the Convention the exercise of which may have taken place in a manner which would constitute an abuse of right. The Applicant failed to establish the link between article 300 and such a provision as a legal basis on which to found its claims. As PCIJ stated, "abuse of right cannot be presumed. It has to be demonstrated".[9]

65. Unlike in the case of jurisdiction, it is not for the Tribunal to find legal grounds for the admissibility of the claims presented by the Applicant. That is a role that belongs to the Applicant. The Applicant failed, in my view, to establish the legal foundation in the Convention for its claims in the present case. This raises the issue of inadmissibility of the Applicant's claims. On this ground, I am therefore in favour of the dismissal of this case.

C. Other issues

66. I do not share the approach taken by the Tribunal in paragraph 47 of the Judgment. The page-and-a-half transcription in the Judgment of the text of the agreement between Tupet Sociedad de Pesquisa Maritima S.A. and Sage Maritime Scientific Research could only make sense if it were an item of evidence in the event that the Tribunal were to adjudicate upon the merits of the dispute. Since the conclusion of the majority decision is that the Tribunal has no jurisdiction to entertain the case, I see no reason why the Tribunal should quote substantially that agreement in that context. The Tribunal cannot find that it lacks jurisdiction to entertain the case and, at the same time, reflect views in the Judgment that would only be justified in the context of consideration of the case on the merits.

67. Moreover, I do not subscribe to the idea underlying the expression of regret in this paragraph of the Judgment, as it presupposes that each party is obliged to produce documents in evidence to back its arguments or to contradict the arguments of the other party. In this regard, I follow the wise approach of the ICJ in the Corfu Channel Case, in which the ICJ drew no conclusion from the United Kingdom's refusal to produce a specific document the Court had requested. In the present case, there was not even a refusal by the Applicant to hand over the agreement to the Tribunal. It merely took a few days before the Applicant was able willingly to deliver the document to the Tribunal.

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[9] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

68. Finally, for reasons similar to those set out in paragraph 66, paragraphs 154 and 155 of the majority decision appear to me out of place. Here the Tribunal, reacting to the testimony as to the manner in which the Spanish authorities exercised their criminal jurisdiction over the persons concerned, such as the conditions of their detention, the treatment extended to them after their release and the delay in formally charging some of them (see paragraph 154 of the Judgment), expresses the view that "States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances" (see para. 155 of the Judgment).

69. There is nothing wrong with this statement. However, the Tribunal having concluded that it had no jurisdiction to adjudicate on this case, it should not act at the same time as if it had jurisdiction. I share the view of those who observe that "the principle in this respect must be [. . .] that 'when dealing with jurisdiction a tribunal should not encroach on the merits', because as Fitzmaurice observed 'if a tribunal should decide that it is incompetent, and should have made any pronouncement on the merits, it will have done precisely what it found itself without jurisdiction to do'".[10]

(*signed*) José-Luís Jesus

[10] Hugh Thirlway, *The Law and Procedure of the International Court of Justice*, Oxford University Press (2013), p. 1631.