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Public sitting

held on Saturday, 11 December 2010, at 9.30 a.m.,

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

President José Luís Jesus presiding

THE M/V "LOUISA" CASE

(Request for provisional measures)

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

Verbatim Record

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

Saint Vincent and the Grenadines is represented by:

Mr S. Cass Weiland, Esq.

as Co-Agent and Advocate;

Mr William H. Weiland, Esq.

as Advocate;

Mr Christoph Hasche

as Counsel.

Spain is represented by:

Ms Concepción Escobar Hernández, Professor, Legal Adviser, Ministry of Foreign Affairs and Cooperation, Spain,

as Agent, Counsel and Advocate;

Mr Mariano J. Aznar Gómez, Professor, International Law Department, Universitat Jaume I (Castellón), Spain,

as Counsel and Advocate;

Mr Esteban Molina Martín, Desk Officer for Regulatory Matters, Directorate General for Maritime Affairs, Ministry of Public Works, Spain,

as Adviser;

José Lorenzo Outón, Assistant Legal Adviser, Ministry of Foreign Affairs and Cooperation, Spain,

as Technical Adviser.

The sitting was called to order at 9.35 a.m.

THE PRESIDENT: Good morning. Today we will continue the hearing in the *M/V "Louisa" Case*. Before I give the floor to the Agent of Spain, may I remind the Respondent that 43 minutes of the time allocated to them were already used yesterday for the cross-examination of the expert. Therefore, there is a remaining speaking time of two hours and 17 minutes. A break will be taken at 10.45. Ms Escobar Hernández, you have the floor.

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

Mr President, distinguished Members of the court, as I have already said yesterday, it is a great honour for me to have this opportunity to appear before you on behalf of Spain, and specifically taking into account that this is the very first time that Spain has been called to appear before your esteemed court as a party to the proceedings.

For this reason, allow me, Mr President, to start off by saying that I would like to make a formal declaration of the importance that the Kingdom of Spain attributes to the specific settlement of disputes in general and judicial settlement in particular. It is for this reason that Spain has made a great effort to accept unilaterally over the last years the jurisdiction of international tribunals and courts, amongst which, *inter alia*, allow me to cite in particular the International Court of Justice and your Tribunal, the International Tribunal for the Law of the Sea. For Spain, the acceptance of the compulsory jurisdiction of these tribunals is part of the pact that my country has made with the rule of law, which must always be present as a fundamental principle both domestically as well as in the field of international relations.

As a consequence, Mr President, distinguished Members of the court, you can be confident that Spain has full confidence in you. We have come here today to appear before you to participate in loyal fashion and in good faith in the proceedings, thus contributing to the progressive consolidation of your Tribunal. Having said that, I cannot remain silent about another element which is of major importance for us, namely the willingness to contribute to proceedings based on the principle of both equity and equality of arms.

After this declaration of principle, Mr President, I should wish to present to you the other members of the Spanish delegation who have accompanied me today in this courtroom:

- To start with, Professor Aznar Gómez, who is Professor of International Law at the Universitat Jaume 1 and a specialist in the international protection of underwater cultural patrimony. He will be part of the delegation as Counsellor Advocate and will plead later.

- Secondly, Mr Esteban Molina Martin, Desk Officer for Regulatory Matters in the Directorate General for Maritime Affairs in the Ministry of Public Works. That is the ministry responsible for all subjects relative to ports and to navigation. This gentleman is part of our delegation as adviser.

- Last, we have Mr José Lorenzo Outón, Assistant Legal Adviser, Ministry of Foreign Affairs and Cooperation. He is part of the delegation as a technical adviser.

Mr President, at the start of Spain's oral pleadings, allow me to say a few words with respect to the facts which lay at the heart of this case which has been put to you. Although you have a considerable amount of information, my delegation considers it essential to make a succinct reference to the facts, taking into account that the Applicant has made an interpretation of these facts that Spain feels obliged to challenge.

In consequence, although my colleague, Professor Aznar Gómez, will revisit the facts later on, to the extent that these are facts key to the request for provisional measures, I would wish to draw your attention to the following facts.

1. The detention of the *Louisa* subsequent to a judicial investigation was done because it was a necessary instrument for the commission of a crime. Such detention has no relationship whatsoever with activities of scientific research alleged by the Applicant in this respect. Allow me to underscore a number of uncertainties contained in the application of Saint Vincent and the Grenadines and in the so-called supplementary comments filed on 9 December, after the filing by Spain of our statement in reply and which have been rehearsed yet again in the oral argument of its Co-Agent.

   According to the interpretation of the Applicant, the ships *Louisa* and *Gemini III* were carrying out activities of scientific research to identify the presence of gas/methane, in the subsoil of the Bay of Cadiz. Mr President, even were one to set aside the fact that sufficient evidence exists to conclude that these two vessels were indeed participating in activities plundering Spanish archaeological patrimony in the Bay of Cadiz, I would simply like to draw your attention to the fact that these two vessels could not possibly carry out scientific research activities with a view to obtaining information on the existence of gas in this area because had they done so, they would have done so unlawfully.

Indeed, if you read the permit presented by the Applicant under annex 6, it is very clearly indicated that the aim pursued by the petitioner, namely to obtain a permit, and I am quoting here, for the (*continues in English*) "execution of a DEMO of cartographic echo from a study of video-photo reviewed in the matter". (*Continues in French, interpretation*) On the basis of this request, the Ministry of the Environment, that is the DG of the shore, allocated an authorization to Tupet for, and I quote again, (*continues in English*) "the extraction of samples of the sea floor in order to carry out a report of the Environmental Medium Impact of the marine fund".

(*Continues in French*)

I cannot understand, Mr President, how you could deduce from such a permit any kind of authorization for activities relating to the exploration and research

on the existence of hydrocarbons as the other side would have you believe. These kinds of activities are subject to a regime which is much more stringent than those relating to scientific research in the maritime area.

In fact, according to applicable law in Spain, and I am quoting the applicable norm, that is the Royal Decree, *Real Decreto* 2362/1976 of 30 July 1976, any real authentic permit relative to activities of research and/or exploration on hydrocarbons is subject to authorization by the Ministry of Industry, but Tupet has never had such an authorization from this Ministry.

As a consequence, it is very difficult to understand and conclude that those activities conducted by the *Louisa* and the *Gemini III* were lawful activities pursuant to the United Nations Convention on the Law of the Sea because there is a contradiction between the evidence that we have submitted and the clear declarations made by the Co-Agent of Saint Vincent and the Grenadines.

2. I would like to draw your attention to the fact that the detention of the *MV Louisa* took place in the commercial port of Puerto de Santa Maria, which is a town very close to Cadiz where the *Louisa* was tied up pretty much since the end of 2004. As a consequence, all those facts presumed to have been committed by the accused on board the *Louisa* and with the usage of the *Louisa* were committed in a Spanish port, and that means in the territorial waters of Spain. This applies both to those activities relative to the archaeological patrimony and the unlawful storage of weapons of war.

3. You have to realize that the detention of the *Gemini III* took place in the dry dock of Puerto Sherry; in other words, on Spanish territory itself. It seems difficult to determine absolutely the maritime areas where this vessel navigated. In any case, I am quite sure that those areas where the *Gemini III* sailed should at least be known to the owners of that vessel, but let us say according to the information which is part of those files of the police services running the investigation – *Unidad Central Operativa de la Guardia Civil* – or the coordinates expressly marked on the charts and on other documents seized during the *Guardia Civil* investigations refer to areas which fall within the territorial waters of Spain. Furthermore, I would wish to draw your attention to the fact that the permit to which the Applicant refers as founding the legality of the two vessels includes the coordinates of the only maritime areas where scientific research activities would be authorized. As I have already said, that maritime area facing the Bay of Cadiz is wholly included in the internal or territorial waters of Spain. I should wish, if you allow me, Mr President, to refer to annex 1 of our statement in reply which contains a chart with a clear indication of the zones of research authorized by the Directorate General of the shore. You can see it on the screen now. (Indicating)

Thank you.

The comments that I have just made relate to the second point which I would wish to address during this my first intervention – the subject of the request filed by Saint Vincent and the Grenadines, which is the source of these extraordinary proceedings which your Tribunal has before it today.

You can be sure, Mr President, that I have no intention of raising at this stage of the proceedings any elements which will need to be debated if the need arises in the proceedings on the merits, but I cannot remain silent at least on the fact that for Spain at least, the subject in dispute does not seem to have been clearly mapped out, either in the main application or in the request for provisional measures. Indeed, if you read attentively these two requests and the submission contained therein, you can only really come to a rather paradoxical conclusion:

i. At first glance, the main application seems to indicate that the other side considers that Spain breached a number of norms of the Convention, namely those contained in articles 73, 87, 226, 246 and 303. Let me say at the outset that of course these are important norms, but these are norms that refer to central aspects of the Law of the Sea, namely the regime governing the EEZ, freedom of navigation, the regime governing maritime scientific research, the regime applicable to archaeological objects found at sea. All these breaches are alleged purely because seized in a Spanish port, detained in a Spanish port, were two vessels which are reputed to have participated as a necessary instrument in the commission of a crime – participated in activities in Spain which are presumed to be criminal actions and which, I am persuaded you will agree with me, can only be qualified as a form of legitimate exercise of Spanish criminal jurisdiction. I insist, Mr President, that I am not opening any debates on the merits here, but allow me at least to pinpoint the excessive nature of the alleged subject of the dispute.

ii. Strangely, the arguments on the merits of the application of Saint Vincent and the Grenadines are not developed in the application itself, but only in the request for the prescription of provisional measures, and in this request it seems to us in any event that the subject of the dispute is mapped out in much clearer fashion, namely that the seizing of *M/V Louisa* is unlawful and the Spanish authorities thus should be obliged to order its prompt release.

I would wish to draw your attention to this subject because Spain considers that this difference of approach may have serious consequences on the present proceedings for the prescription of provisional measures because, let us not forget, on the one side there must be a relationship between the application on the merits and the submission of the provisional measures. On the other side, let us also recall that pursuant to a general principle of law, well established both internationally and domestically, one cannot make the same claims in incidental proceedings as one can wholly or partially in the proceedings on the merits.

Even more than this, one must ask this question: if in reality the subject of the request for a prescription of provisional measures may not be the real subject of the dispute that has led the Applicant to file a claim before your esteemed Tribunal, namely to obtain purely and simply the release of the vessels detained in Spain or equivalent compensation. This is a claim, as we have already declared in our reply and which we will have the opportunity to underscore at an opportune moment, that is supported by no provision contained in the Convention.

However, Mr President, distinguished Members of the court, in the opinion of Spain the subject of the dispute seems to be much more serious than that and has to be put in the general remit of International Law of the Sea and the jurisdiction of sovereign States over diverse maritime areas. Let me say again that this is not the opportune moment to deal with this subject unless, of course, it is to establish a link between the subject of the main application and the request for provisional measures because the existence of that link is a *sine qua non*, an essential precondition for the exercise of incidental jurisdiction.

Mr President, the third question I would like to address in my statement is that of the applicability to this case of rules for proceedings on the prompt release of vessels pursuant to article 292 of the Convention, on which Saint Vincent and the Grenadines has built a major part of its argument with the sole purpose of obtaining, purely and simply, the release of the *Louisa* without entering into other elements that could be behind the ordering of the detention of the vessel, which are part of the rights of Spain recognized not only by the Convention on the Law of the Sea but also by well-established international customary rules.

Although the Co-Agent of Saint Vincent has specifically declared that the Applicant admits that the prompt release procedure is not applicable in this case, this does not prevent them, however, from mixing or even confusing the standards and principles that inspire, or should inspire according to his opinion, the procedures for provisional measures and for prompt release by stating that the Tribunal is now facing a major opportunity to make a new interpretation, an extensive interpretation of provisional measures, an instrument with a great potential in the opinion of the Applicant. And to do so, Saint Vincent continues to introduce within the framework of the procedure for provisional measures some principles that are applicable to the procedure for prompt release.

One can understand this defence strategy on the part of Saint Vincent, to appeal to the procedure for prompt release (or to the principles behind the procedure) that would enable the Applicant to obtain the release of the *Louisa* without being obliged to enter into a new complex discussion that is probably less favourable to his position, such as the possibly illegal nature of the activities led by the *Louisa* against Spain, contrary not only to Spanish and domestic law but also – and I can only underline this – the standards of international law, certain of which have even been accepted today by Saint Vincent. But of course, while we understand this defence strategy on the part of Saint Vincent, Spain cannot share this view.

Mr President, it seems to me that it is not necessary to go back into the arguments that were developed yesterday in depth in our statement of response, but allow me to make a simple summary of our position.

1. As your Tribunal has said on several occasions, the procedure of prompt release is an independent procedure;

2. It has a very clear objective: it is a remedy to guarantee that any State Party to the Convention will respect the duty to grant release of a vessel and, if necessary, release of its crew after the posting of a reasonable bond, but within the terms specified in the Convention.

3. The procedure of prompt release is not general in scope; on the contrary, it only applies in cases where the obligation for prompt release is provided specifically in the standard of the Convention, and this would only be contained in articles 73, paragraph 2, 220, paragraph 7, and 226, paragraph 1.

In this respect I would like to draw the attention of the Tribunal to the fact that the obligation of prompt release limits the rights of the coastal State and consequently should be interpreted in a restrictive way. This prevents, in our opinion, the application of the obligation of prompt release beyond the situations specifically provided for in the Convention. Any other conclusion would be translated into the imposition on States – and I do not know on what basis – of obligations to which they have not given their consent. It goes without saying that such a conclusion is simply in contradiction with the law of treaties.

However, the restrictive characteristic and the limit of the obligation of prompt release of vessels has, and should have, consequences at the level of the procedure of prompt release that should also be interpreted in a restricted way because this is the instrument to guarantee the application of the duty of prompt release.

It is only from this point of view that you can understand that the only objective of the prompt release procedure is to fulfil the obligation, after fixing and posting a sufficient security, without the Tribunal being obliged to enter into the qualification of the justification of the detention. A limitation that does not apply, except in the choice made by the Convention to support certain activities that develop in certain maritime areas - that is, relative to the exploitation of resources in the Economic Zone and against maritime pollution.

In another situation, it is possible that the case of the detention of a vessel should be submitted to the Tribunal, but of course in any other case not included in articles 73, 220 and 226; your Tribunal would be called upon to decide in advance on the merits of the detention before arriving at any conclusion on the release of the vessel.

The consequences of all that I have said on these cases in point are clear.

1. There is no connection between the detention of the *Louisa* and articles 73, 220 and 226.

2. It is not possible to apply prompt release procedures as such to the present case.

3. It is not possible either, as Saint Vincent and the Grenadines seems to claim, to apply to this case the principles that are the basis of this type of procedure. In particular, it is not possible for the Tribunal to conclude that the obligation of Spain to grant the prompt release of the *Louisa* without having previously decided on the justification and the claim of the Applicant, according to which the detention of the *Louisa* would be in violation of the Convention. It is not possible to arrive at this conclusion without deciding on the merits of the case, which is not permitted at the present stage, because we are placed by the will of Saint Vincent and the Grenadines to proceedings on provisional measures.

Mr President, I would like to conclude this part of my intervention with a few comments on the prior obligation to exchange views according to article 283 and the obligation to exhaust local remedies (article 295) as necessary conditions for the Tribunal to exercise its jurisdiction, to which we have referred in our written statement of reply. These are obviously different conditions, but the Applicant is trying to present them as having one and the same goal, that is the continuous effort of the Applicant or the owners of the *Louisa* to find a solution to the problem of detention.

Mr President, Spain can only repudiate this idea. Saint Vincent has made no effort to have a prior exchange of views nor have the owners of the *Louisa* made any effort to obtain the prompt release of the vessel that is the object of the request for provisional measures.

The Co-Agent of Saint Vincent said yesterday that Spain had never notified the authorities of this State about the situation of the *Louisa.* Furthermore, he called into question not only the existence of the *note verbale* from Spain, but the validity of the means of communication of this *note verbale* because it was not addressed to the Office of the High Commissioner for Maritime Affairs of Saint Vincent, which, curiously enough, is based in Geneva.

First of all, Mr President and esteemed Judges, I must confirm my indignation for the first of these statements of the Co-Agent of Saint Vincent and to openly express my surprise at the statements, which reflect the absolute ignorance on the part of the Co-Agent of Saint Vincent and the Grenadines of the elementary standards of diplomatic communication. First of all, *notes verbales* do not specifically require a stamp of receipt, and I refer you simply to the *note verbale* of Saint Vincent of 27 October 2010, which was included in the file by the Applicant, without referring to the Spanish State practice on the submission of *notes verbales.* Secondly, I remind you that according to the Vienna Convention on Diplomatic Relations any official communication between the dispatching State and the receiving State should be done via the embassy of the dispatching State and the Ministry of Foreign Affairs of the receiving State; and this was the procedure followed by Spain. It is a procedure that, on the other hand, has not been followed by Saint Vincent in communicating this decision to submit a request to the Tribunal. Saint Vincent preferred to send a *note verbale* through its diplomatic mission at the United Nations in New York addressed to the Permanent Mission of Spain, a procedure that is absolutely inadequate for bilateral diplomatic relations between States that have diplomatic permanent relations.

In any case, Saint Vincent has known since 15 March 2010 that the Spanish authorities had instituted legal proceedings against the *Louisa*, and it remained silent until 2009, the date on which the Applicant merely engaged in informal consultation by e-mail to the *Capitanía Marítima de Cadiz*, the competent authority for navigation in the region of Cadiz. This informal consultation referred to the situation of the *Louisa* and was a consultation that, in spite of the response confirming that the vessel had been detailed by the order of a Spanish judge, did not give rise to any official reaction on the part of Saint Vincent. Not until a month before the submission of the request, and in any case before the filing of the declaration of acceptance of the jurisdiction of the International Tribunal for the Law of the Sea, did Saint Vincent

send Spain a communication that they intended to submit a request to the Tribunal. Do you think that what I have just said is sufficient to fulfil the obligation of exchange of views provided for by article 283 of the Convention? Allow me to express the opposition of Spain to this conclusion: it is not possible to arrive at such a conclusion.

Furthermore, the Co-Agent of Saint Vincent said in his statement that the Applicant had done everything possible to draw the attention of the Spanish authorities to the situation of the *Louisa*. He cited a letter that had been sent to the Ambassador of Spain in Washington and another letter that had been sent to the Consul General of Spain in Houston, which was accompanied by a complaint addressed to the General Counsel of the Judiciary. I can inform you that some months ago the General Counsel had received this complaint. Let me ask you: are these letters official letters from the Applicant, Saint Vincent and the Grenadine, or are they letters from the advocates of the owner of the *Louisa* or of Sage? Of course, they are not letters from the Applicant and, furthermore, they were sent to diplomatic agents of Spain accredited to the United States and not to the diplomatic agents of Spain accredited to Saint Vincent. One cannot understand this choice.

Thus, it does not seem to us to be possible to conclude that these alleged communications of an official nature would be sufficient to fulfil the obligation to maintain consultations before submitting a request to the International Tribunal for the Law of the Sea.

In regard to the exhaustion of local remedies, Spain considers that this is a necessary condition in this particular case because no-one can forget in terms of international law that we are confronted with a typical case of exercise of diplomatic protection by Saint Vincent in respect of a vessel registered in this country; but in this area they are asking for diplomatic protection and of course by legal means various activities listed in the application of Saint Vincent and repeated by its Co-Agent do not seem to us to be sufficient either in order to meet this condition. In fact, at this stage of the proceedings we can only remind ourselves that most of the activities of the owners of the *Louisa* of which Saint Vincent has informed us are quite informal activities – visits and certain letters and so on – and do not constitute the use, on the part of the owner of the vessel, of legal actions of a sufficient nature to affirm his rights. Can you tell me when the owner asked the Spanish courts for the release of the *Louisa*? To my knowledge, never, yet the owner, Sage, has been a party to the criminal proceedings since 2008.

Consequently I must also conclude that the condition of exhaustion of local remedies has not been fulfilled by the subject who had the right and means to do so: the owner of the vessel.

Mr President, this concludes my intervention for the moment. I ask you to give the floor to Professor Aznar Gómez. Thank you for listening so intently, Mr President, esteemed Judges.

Professor AZNAR GÓMEZ: Mr President, distinguished Members of the Tribunal, it is an honour to appear before you for my very first time to continue the present

submission on behalf of the Kingdom of Spain in response to the request of provisional measures submitted by Saint Vincent and the Grenadines.

As the Agent of Spain, Professor Escobar, has underlined, this is an incidental proceeding before the Tribunal in order to ascertain whether the provisional measures demanded by the Applicant must be prescribed or not.

The rules and principles governing this legal assessment are expressly provided for, or implied, in article 290 of the Law of the Sea Convention, the Statute of this Tribunal and its Rules. To use the expression of Judge Wolfrum in one of his reputed scientific publications: in addition to these rules and principles, a clear and well-established body of international jurisprudence helps us to define the exact legal framework of the incidental procedure of provisional measures.

To sum up: provisional measures constitute an exceptional form of relief indicated only if necessary and appropriate, and their indication is, therefore, a discretionary decision. Provisional measures aim to preserve the respective rights of the parties in a situation of urgency. But provisional measures can be indicated only when a *prima facie* jurisdiction on the merits has been satisfied.

When all these conditions are met, then – and only then – an international court may prescribe, if so decided, the provisional measures demanded by the parties or any others, different in whole or in part, from those requested by the parties.

The wording of article 290 of the Convention expressly provides, or implies, the conditions summarized above: (a) the Tribunal must consider "that *prima facie* it has jurisdiction"; (b) that it "may prescribe any provisional measures"; (c) "which it considers appropriate under the cirumstances"; (d) "to preserve the respective rights of the parties to the dispute … pending the final decision".

Nothing is expressly said about urgency in article 290 of the Convention. Nothing is expressly said either in the Statute of the International Court of Justice. However, The Hague Court has continuously reminded – as two years ago in the *Convention of Racial Discrimination Case* between Georgia and Russia – that "the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision". This principle forms part of that "well-established body of international jurisprudence". And, in this sense, article 290 of the Convention includes an additional purpose for the interim relief: "to prevent serious – I repeat: serious – harm to the marine environment", which also clearly implies the matter of urgency, as the *MOX Plant Case* reveals.

Therefore, *prima facie* jurisdiction, necessity and urgency are the core three elements to be assessed in order to be able to prescribe the provisional measures by this Tribunal.

But this Tribunal, in order to be able to so decide, must also know the true facts of the case to assess that necessity and urgency. Let me then, Mr President, summarize the facts that Spain considers of the main importance to ease the judgment of this Tribunal in this incidental phase of the procedure.

As indicated in Chapter 2 of the Written Response of Spain, in this case we are facing a scenario with two, or even three, vessels: the *Louisa*, the *Gemini III* and the *Maru-K-III* – although the only one under discussion here is the *Louisa*; several companies – incorporated in both the United States and in Spain; and a group of persons which includes the owners of the vessels, the owners of the companies, legal attorneys, crewmembers, divers, treasure hunters and even housing gas providers.

The Applicant contends that the *Louisa* was in the Spanish territorial sea conducting magnetic surveys of the sea floor of the Bay of Cadiz to locate and record indications of oil and methane gas. However, during the domestic investigation and judicial procedures in Spain that ended with the seizure of the *Louisa* in Spanish internal waters, several facts were disclosed with crystal clarity: that all these vessels companies and persons tried to conceal, under alleged mining activities, their true purpose: the looting of underwater cultural heritage in Spanish waters.

In this incidental phase of the procedure, there is no room for entering into the merits. However, let me simply remind to the distinguished Members of this Tribunal some relevant facts that occurred between the arrival of the *Louisa* in Spain, and even before, and its seizure in February 2006.

From September 2003, the Tupet Company began to apply before the Spanish administration for a permit to "carry out a demonstration of echo-sound cartography and video-photography of several points on the Spanish coasts". Since then, Tupet was renovating its permits, adding a new activity (to extract samples from the seabed); adding a new purpose (to complete an environmental report on the impact of maritime trafficking upon the sea floor); and announcing the arrival of a vessel: the *Louisa*.

Since its arrival in Spanish waters, and based on the commercial dock of Puerto de Santa Maria, in the Bay of Cadiz, which [it] never abandoned since October 2004, the *Louisa* became the centre of operations of the alleged activities, using the *Gemini III* as its tender boat which used to dock alongside the starboard beam of the *Louisa* (as shown in photograph 1). During these months, their activities targeted not on marine zones with suspected or presumed oil and methane gas reserves but, curiously, on well-known archaeological areas and sites.

This logically forced some Spanish agencies to initiate a criminal investigation under the authority of a magistrate judge. Since October 2005, this magistrate judge was receiving a huge amount of information gathered particularly from the *Guardia Civil*, but also from the Andalusian Centre for Underwater Archaeology in Cadiz and different private persons that witnessed the activities on and around the *Louisa*. Another fact was added to the investigation: the magistrate judge received sound information about the presence on board the *Louisa* of several unreported weapons, including five M15 war rifles (as shown in photograph 11). Once the Spanish authorities were convinced that the *Louisa* was engaged in other, quite different and unauthorized activities under Spanish and international law, the magistrate judge decided the detention of the vessels on 1 February 2006.

Onboard the *Louisa* were found different archaeological objects, some documents to ease their location, the instruments to detect and extract them from the seabed and the means to conceal them to avoid any administrative or criminal indictment.

Among the objects, the Tribunal may see different archaeological pieces (some of them shown in photographs 7 to 10) that denote a twofold purpose: that people onboard the *Louisa* were looting any kind of archaeological objects and that they were doing it, of course, without any care or scientific purpose. The proof of that can be found not only in the written documents of the Applicant, but also in yesterday's hearings when my distinguished opponent in this case again and again neglected the irreparable damage to an archaeological site, notwithstanding the particular – and very relative – monetary value of a, perhaps, 2000 years old "broken piece of pottery".

Among the instruments – excuse me, Mr President, if I am now a little bit cynical – that were found the typical *atelier* in a sea-mining vessel: a magnetometer (like the one shown in photograph 2); an ROV for metal detection (as shown in photograph 5); and, of course, diving equipment, indispensable for detection of oil and methane gas in the seabed.

Moreover, as the Members of the Tribunal may see in photograph 12, the *Louisa* tender boat, the *Gemini III* , was noticeably equipped with two abnormal deflectors at the stern of the vessel that, adapted to propellers, are typically used by treasure hunters to remove the sand in shallow waters and disclose valuable objects embedded at the bottom of the sea.

Finally, among the means to conceal the archaeological objects, photograph 6 shows an air-compressed diving tank with a sectioned shell, also typically used by treasure hunters, who place objects within the tank, hide them with the plastic semi-capsule cover and pass through customs and police controls inadvertently.

Mr President, the *Louisa* was legally detained by Spanish authorities, strictly following domestic and international law. But this is not the case now, in this incidental procedure of provisional measures. However, this Tribunal must know the facts as proved by the documented Written Response of Spain.

Since the detention of the vessel, the *Louisa* has been under judicial control.

The detention provoked several legal reactions from the owners of the vessel, but the Applicant had no reaction at all. Only 58 months and 24 days later, the Applicant comes to this honourable Tribunal contending the release of the *Louisa* as a provisional measure.

In the meantime, as can be seen in paragraph 36 and following of the Written Response of Spain, Sage, as the owner of the vessel, and Saint Vincent and the Grenadines, as the Applicant in these proceedings, have maintained an ambiguous position during the domestic process before the Spanish courts. The Applicant contends in its Request that: "[it has] sustained serious attempts to resolve this detention through the Respondent's legal system". However, since Sage (and particularly Mr Foster) appeared before the Spanish criminal courts, they have

opposed the domestic procedure with all and any kind of legal obstacle. The Applicant must, I repeat, submit any claim before Spanish courts in order to obtain the release of the *Louisa*.

Sage has had the opportunity to visit the vessel. Apparently it has realized that the *Louisa* did not (and does not) need any kind of maintenance or reparation onboard. It is to be underlined that neither the Applicant nor the owners asked for reparation on the vessel, notwithstanding the offer made by the magistrate judge to appoint a sailor-person decided by Sage to do this.

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

Mr President, this was the general attitude of the Applicant and the persons and companies involved in the case. Under the opinion of Spain, as we will see later, the Applicant has demonstrated neither true nor urgent interest on the state of the *Louisa*, its maintenance and its security.

Now, Saint Vincent and the Grenadines comes to this honourable Tribunal under article 290 of the Convention demanding the release of the *Louisa* as a provisional measure.

The Agent of Spain has already dealt with the Applicant's intentions to mix and blur the prompt release procedure pursuant to article 292 of the Convention and this incidental procedure of interim relief. As already explained, the Applicant has voluntarily placed itself under the rules and principles that govern the prescription of provisional measures in this Tribunal, which undoubtedly are of an extraordinary nature.

In any event, should the Tribunal decide to prescribe such kind of measures, under no circumstances could the latter prejudice or affect any international domestic legal process on the same facts. Therefore, the Applicant must convincingly prove that the release of the *Louisa* – as a provisional measure – would help to preserve the respective rights of both parties *pendent lite,* and that release of the *Louisa* is a matter of urgency. Unfortunately for the Applicant, none of these conditions has been complied for in this Request.

Let me go first into the details of these two arguments, leaving for the end of my exposition the question whether this Tribunal has a *prima facie* jurisdiction on the merits of the case.

Saint Vincent and the Grenadines must convince this Tribunal that the release of the *Louisa* as a provisional measure is necessary and appropriate. This implies an assessment of the imminent prejudice to one or both parties; and/or a serious harm to the marine environment.

With regard to the first condition – the imminent prejudice to one or both parties – the question to assess is the possible irreparable prejudice caused to each party in the dispute by the non-release of the *Louisa*. In the case of the Applicant, the prejudice

is the mere quantitative, although relative, alleged damage caused to a US company with no bond at all with Saint Vincent and the Grenadines. In the case of the Respondent, the *Louisa* – as well as other documents, information and property seized onboard – is a clear evidence of a crime, a "piece of conviction" in a criminal procedure. The *Louisa* – helped by *Gemini III* – is not a simple vehicle like any other used to commit an offence: it is an indispensable tool in the criminal activity allegedly performed by Sage and the rest of the private persons accused in the criminal procedure before Criminal Tribunal No. 4 of Cadiz.

Therefore, the question is: to whom would the requested provisional measures (that is, the release of the *Louisa* and some documents) cause irreparable damage? Clearly to the Respondent, the *Louisa* must be kept under seizure until the end of the domestic criminal process in Spain. This is mandatory under Spanish criminal law – although the "expert" yesterday could not remind it – and will not cause, under any circumstance, an irreparable damage to the Applicant.

As former Judge Mensah explained in his Separate Opinion in the *MOX Plant Case*, reminding well-founded international jurisprudence, "the prejudice of rights would be irreparable in the sense that it would not be possible to restore the injured party materially to the situation that would have prevailed without the infraction complained".

The Applicant, in the first page of its Memorandum, quotes the Dissenting Opinion of former Judge Anderson in the *M/V "SAIGA" Case*, but it quotes Judge Anderson's words improperly or, at least, not completely; and therefore out of context. The Applicant says that, and I quote: "Part XV of the Convention is available to the flag state party in the event of an abusive use by a coastal state party of its powers of arrest and prosecution, whether on smuggling or any other criminal charges". But what former Judge Anderson said in paragraph 13 of his Opinion was, and I quote again:

> The world is plagued by many types of smuggling, including narcotic drug smuggling. All types of vessels participate in this traffic, including fishing vessels entering the customs territory of a coastal State from the EEZ. Upon arrest, suspected smugglers are often refused bail for obvious reasons. International standards for the protection of human rights require that they be given a fair trial on a criminal charge. Upon conviction by a competent court, smugglers are often sentenced to monetary penalties, confiscation orders and imprisonment. Against that background, the Convention obviously does not confine permissible penalties in respect of smuggling offences to fines and confiscation orders (as, generally, in the case of fisheries offences in article 73) or to monetary penalties (as in the case of pollution offences in article 230); imprisonment remains available in regard to smuggling offences. Prompt release orders reduce the penalties available to the appropriate domestic forum and may even prejudice the holding of the trial in the first place.

Then it continues with the words quoted by the Applicant. The last sentence of paragraph 13 ends by saying: "In that perspective, article 292 is not the appropriate

remedy in such cases. In my opinion, the aspect of imprisonment should not be overlooked".

Mr President, in this case it is clear, fair and reasonable that the release of the *Louisa* – at this incidental stage of the proceedings and pending the domestic criminal process against its owners – will impose upon Spain a burden out of all proportion, an irremediable prejudice to its interests not only in its domestic realm but in the discussion, if any, upon the merits of this case. The prescription of the requested provision measures should impose a prejudice on the side of the Respondent. The measures are neither necessary nor appropriate and therefore should not be prescribed.

Let me now turn to the urgency. As explained in the written response of Spain and as can be deduced from my exposition, there are several reasons which demonstrate that there is no urgency in the release of the *Louisa*.

First, as already explained, the detention of the vessel was on 1 February 2006. The Request for provisional measures was submitted on 24 November 2010. Almost five years have elapsed without any kind of urgency on the part of the Applicant.

Second, does the detention of the *Louisa* directly cause the deterioration of the vessel, as argued by the Applicant? Clearly not. Of course time goes by – unfortunately, for all of us too – but the Applicant cannot properly convince this Tribunal about the deterioration of the vessel by simply submitting a set of undated photographs, some even older than me, and compare them with a final image where the *Louisa* is allegedly showing signs of erosion. In November 2005, the *Louisa* was already presenting similar signs of erosion, as can be seen in photograph 1 of our annex 10. The deterioration of the vessel has been normal. In any case, and notwithstanding the procedural obstacles continuously posed by the owners of the vessel, the latter were invited several times by the magistrate judge to visit the *Louisa* and to perform the necessary preservation measures. No preservation activity was decided, however, by Sage or by any other company or person authorized thereby.

Third, the *Capitanía Marítima* of Cadiz routinely performs verifications of port installations in order to assess the possible threat of harm to the marine environment, although in this phase we should assess not any kind of harm, but a serious harm to the marine environment in the port of Puerto de Santa Maria, as envisaged by article 89, paragraph 3, of the Rules. The *Louisa* is neither anchored offshore nor placed in a fragile environmental location. The *Capitanía Marítima* of Cadiz has an updated protocol for reacting against threats of any kind of environmental accident within the port of Puerto de Santa Maria and the Bay of Cadiz.

However, should the owners of the vessel and the Applicant in this case be so interested in the environment, why are they unable to show before this Tribunal the complete and up-to-date international certificates of the *Louisa* required by the International Maritime Organization for navigation under its rules and standards? The Applicant does not demonstrate whether this and the other certificates are still in force on the day of submission of its Application and Request before this Tribunal.

Let me add something of the utmost importance, clarified to some extent by the document that the Applicant kindly submitted yesterday to this Tribunal: the technical report by Mr Weselmann of 10 December 2010.

At the very outset, may I call the attention of the Tribunal to the fact that Mr Weselmann was never on board the *Louisa*? Actually, he has never seen the vessel. All the assessments he makes are from secondary sources, but there is another, more interesting, point, and not based on secondary sources but on official data, some of that provided also by the Applicant in its Request. In that report it is said that "the last inspections by the flag State were carried out in 2004"; that "the last inspections of the port State control were carried out in 2000"; and that "the class has been suspended at least in March 2005 but most probably prior to this date". Yet the *Louisa*, as shown in annex 1 of the Request, had a *Germanischer Lloyd* Classification Agency Certificate on Oil Pollution Prevention valid until 31 March 2005 only.

Therefore, Mr President, prior to the detention of the vessel in February 2006, the Applicant had already failed to comply with the international standards and precautionary rules on the maintenance of their flag vessels, as established in several conventions which oblige Saint Vincent and the Grenadines as a State Party.

The last survey of the vessel under annex 1 of the MARPOL Convention was done on 1 August 2004 and the certificate expired on 31 March 2005. The last survey of the vessel under the SOLAS, as reported by the Paris Memorandum of Understanding, was done in Portugal on 1 August 2004 and the certificate expired on 31 March 2005. The last survey of the bottom prescribed by the SOLAS Convention, two every five years, was done in 2000 and its renewal from March 2005 onwards is absent. This is very important since, as Chapter 1, regulation 19(c), of the SOLAS Convention, as amended, says, in these circumstances: "the officer carrying out the control shall take steps to ensure that the ship shall not sail until it can proceed to sea or leave the port for the purpose of proceeding to the appropriate repair yard without danger to the ship or persons on board". This was done by the *Capitanía Marítima* of Cadiz on 15 February 2005, when it informed the agent that the vessel's certificate was to be renewed and required to be informed when this happened.

Now the Applicant comes to this honourable Tribunal arguing urgency. Mr President, there is no urgency for the release of the *Louisa*. There is no urgency and there is no necessity for the prescription of provisional measures pursuant to article 290 of the Convention. Therefore, the Tribunal should have to reject the request of Saint Vincent and the Grenadines because of the absence of the two core conditions for the prescription of the provisional measures but also because of the non-existence of *prima facie* jurisdiction on the merits of this Tribunal as well.

Mr President, may I dedicate the final minutes of my exposition to this extremely important question? Article 290 of the Convention precisely begins its wording by reminding us that the Tribunal must consider that it has *prima facie* jurisdiction to prescribe the provisional measures. That is to say, this is the first threshold that must be crossed in order to assess the rest of the conditions of interim relief.

In this case, the Applicant contends that Spain has violated articles 73, 87, 226, 245 and 303 of the Convention.

Although the procedural phase is not the place to deal with this claim on the merits, it will be revealing briefly to review these five contentions in order to ascertain the *prima facie* jurisdiction of this Tribunal in the present case. For this, I must not only remind you of what was said both in the Application and the Request, but in the so-called supplemental memorandum suddenly submitted last Friday evening as well. On page 3 of this memorandum, the Applicant contends that the question is "whether a violation of law must be clearly established or otherwise proven by the Applicant before the Tribunal could free the vessels". For the Applicant, the answer is "definitely not".

As has already been said, in order to decide on its *prima facie* jurisdiction, the Tribunal must ascertain the relationship between the interim relief and the main claim. Once this has been ascertained, then the other conditions – necessity and urgency – are to be dealt with properly. Therefore, the questions for that *prima facie* jurisdiction are whether Spain has apparently violated articles 73, 87, 226, 245 and 303 of the Convention.

In its memorandum, the Applicant says that it "does not contend that the *Louisa* or the *Gemini III* were fishing vessels". It continues by saying that, "For some members of the Tribunal, this may end any further inquiry into the relevance of Article 73". I cannot but agree with this last sentence.

However, the Applicant continues by saying that it "is not relying on Article 73 for direct support of provisions measures…" and so is article 73 a legal base for the request or not? I wonder because the following arguments in the Applicant's memorandum are, plainly, unacceptable once one reads article 73 in good faith in accordance with the ordinary meaning to be given to the terms of the Article in their context and in the light of its object and purposes. Almost the same could be said with regard to the Applicant's "curious" interpretation of article 87. I will not expand on this.

With regard to article 226, the Applicant relies on the "spirit" of this article. It is not a problem of spirit but of the wording and the context of this proviso. As expressly stated in the Applicant's memorandum, "Spain has not claimed the *Louisa* and the *Gemini III* were polluting the Bay of Cadiz". Again, I cannot but agree. Therefore, may I ask why this Tribunal must invoke the spirit of article 226 when the detention of the *Louisa* had no relation to Part XII of the Convention?

The Applicant also contends that Spain breached its obligations under article 245 of the Convention. May I wonder how a coastal State may internationally violate its exclusive right to regulate, authorize and conduct marine scientific research in its territorial sea if, as that article continues by stating, this research "shall be conducted only with the express consent of and under the conditions set forth by the coastal State"?

The distinguished Members of this Tribunal have asked the Applicant whether other

permits preceded the permit contained in annex 6 of its Request. Yes, they did, and also followed by subsequent permits with a limited scope *ratione materiae*, and the permits obliged the Applicant to submit the results of the research to Spain and the owners of the *Louisa* never did that. The permits further obliged that they apply for supplementary permits if necessary and the owners of the *Louisa* never did that.

Once the Spanish authorities realized that these permits concealed quite a different purpose and that the *Louisa* was being used for a completely different object, the criminal investigation began and, as a consequence, the vessel was legally detained.

THE PRESIDENT: I am sorry to interrupt you but we have reached the time for a break. You will resume your statement after a 30 minute break.

(Short adjournment)

THE PRESIDENT: You may resume your statement, sir.

Professor AZNAR GÓMEZ: Thank you, Mr President. As I was saying before the recess, once the Spanish authorities realized that these permits concealed a quite different purpose and that the *Louisa* was being used for a completely different object, the criminal investigation began and, as a consequence, the vessel was legally detained.

It was detained, Mr President, because the *Louisa* had no permit, logically, to loot underwater cultural heritage in Spanish territorial sea or the contiguous zone; and, yes, my distinguished colleagues from Saint Vincent and the Grenadines, the permit "was not sufficient". Even more, you had no permit at all for doing what the *Louisa* and its crew were doing in Spanish sovereign waters.

In 2001, the Applicant voted in favour of the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage. Last month, Saint Vincent and the Grenadines ratified this Convention. In the meantime, the Applicant had the customary legal obligation to refrain from acts which would defeat the object and purpose of that Convention, as codified in Article 18 of the Vienna Convention on the Law of Treaties. It is to be supposed that the Applicant shares with us – as both States Parties to the same Convention – not only the idea but the general principle that the underwater cultural heritage must be protected and not destroyed by looting.

Mr President, Spain could understand that – from an exclusively substantive perspective – the alleging of those provisos of the Convention could constitute the basis for a *prima facie* jurisdiction of this Tribunal.

However, jurisdiction, although *prima facie*, must be further analyzed under the observations and considerations made in Chapter 3, sections I and IV, of our Written Response and summarized by the Agent of Spain in her oral exposition. This analysis must particularly assess the fulfilment of the procedural conditions examined when dealing with the "previous exchanges of views" and the "exhaustion of domestic remedies" in this case. In Spain's opinion, the arguments then revisited the point on the inexistence of *prima facie* jurisdiction of this Tribunal for the prescription of provisional measures.

For all these reasons, based on the application to the facts in this case of the rules and principles that govern the prescription of provisional measures in this Tribunal, the measures requested by Saint Vincent and the Grenadines must be plainly rejected.

Mr President, Members of the Tribunal, this concludes my statement. I respectfully ask the Tribunal now to call on Professor Escobar again to continue with the presentation of the Kingdom of Spain.

THE PRESIDENT: Thank you very much for your statement. I now call on the Agent of Spain.

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

After the presentation of my colleague, Professor Aznar, I have no wish to abuse your patience but I am taking the floor to make, quite simply, a general comment on the role of good faith within proceedings, and then to respond to those questions that we received from the President during the preparatory meeting with the Agents.

With respect to good faith in proceedings, I do not want to introduce new elements that would take up too much time: I know that we are already running out of our allocated time. This notwithstanding, however, I wish to draw your attention to certain circumstances that, according to Spain, are relevant and extremely germane to this case.

- First, in relation to the dates of the *note verbale* sent by Saint Vincent to Spain in October last, in the *note verbale* there was an announcement made that an application was going to be filed; then the date on which Saint Vincent accepted the Tribunal's jurisdiction, which was more than twenty days later; and the date of the filing of the application, which was only five days after the deposit of the declaration of acceptance of the Tribunal's jurisdiction.

- Second, the scope of the declaration of acceptance of jurisdiction, but I do not want to comment on that at this juncture.

- Third, the constant endeavours by the Applicant to confound and conflate the applicable proceedings and rules, and their constant practice of mixing up the role of the Applicant with that of the owners of the seized vessel.

- Fourth, the constant endeavours also on the part of the Applicant to get involved in the merits, even though say they will not get into the merits, and even to obtain a premature review of the criminal proceedings that are ongoing in Spain, including by discrediting the judges and other Spanish public authorities and employing certain turns of phrase that are wholly out of place in the world of international tribunals, and certainly in this Tribunal.

I do not want to draw any consequence from all this in terms of abuse of legal process; that is not my intention. My intention, Mr President and distinguished

Members of the court, is quite simply to demonstrate our concerns that procedural good faith will be respected because this, without any doubt, must lie at the heart of any proceedings in a court of law; and quite clearly we are in a court of law.

Mr President, with respect to those questions that you gave us on Thursday, let me say this:

1. With respect to the maritime areas where the alleged crimes may have taken place, I have alredy told you that according to available information they all took place within the internal waters and also possibly within the territorial sea.

2, With respect to the meaning of the terms, "the No.4 Court in Cadiz processed the entry and registration of the vessel *Louisa*", the expert called by Saint Vincent and the Grenadines gave you the answer to that question yesterday. However, to give you a direct reply to your question, let me tell you that such an expression signifies that on the order of a competent criminal judge, the Spanish authorities boarded and proceeded with inspection of a vessel, searching for any evidence that might be used in criminal proceedings. Consequently, Saint Vincent and the Grenadines doubtless were fully aware on 15 March 2006 that a vessel flying its flag, and which was located in Puerto de Santa Maria, had been the subject of judicial investigation and was in a rather complex situation should it wish to sail.

3. With respect to the indictment of 27 October 2010, allow me to inform the Tribunal that as Agent of Spain, and with respect to the current proceedings of provisional measures, I have already asked the competent services for a certified copy of that indictment in order to be able to place it in the case file. I will forward it to you with its English translation as soon as possible, perhaps even this afternoon.

I would like to thank you once again, Judges, for your kind attention.

THE PRESIDENT: The proceedings will resume at 3.30 this afternoon. In this context may I remind the parties that article 75, paragraph 2, of the Rules of the Tribunal provides the following: "At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Tribunal and transmitted to the other party".

The sitting is now closed.

(Adjournment)