INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2012

Public sitting

held on Wednesday, 10 October 2012, at 3 p.m.,

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

President Shunji Yanai presiding

THE M/V "LOUISA" CASE

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

Verbatim Record

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

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and

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and

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Mr Carlos Jiménez Piernas, Professor, International Law Department, Universidad de Alcalá de Henares, Spain,

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

as Counsel;

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

as Adviser.

THE PRESIDENT: Good afternoon. Before we start the hearing, I would like to refer to the objection raised by the Co-Agent of Saint Vincent and the Grenadines regarding a question put by the Agent of Spain during the examination of Mr Pallín, the expert, this morning. This question related to some electronic information contained on the hard disks of the computers. We have checked the procès-verbal and we understand that the information referred to by the Agent of Spain may be found in the Counter-Memorial at pages 20 to 32, so we understand that this is not the new issue.

(Interpretation from French) Now we will continue the examination of the expert, Mr Martín Pallín. I would remind you, sir, that you continue to be covered by the solemn declaration you made yesterday.

I now give the floor to Ms Escobar Hernández, and I would also remind you that the re-examination must not be used to raise any new points, that is to say points that were not raised during the examination or the cross-examination. Ms Escobar Hernández, please go ahead.

MS ESCOBAR HERNÁNDEZ *(Interpretation from French)***:** Thank you, President. I will of course bear in mind what you have said, and I assure you that I shall take very little time to bring this part of the sitting to a close.

Re-examined by MS ESCOBAR HERNÁNDEZ

MS ESCOBAR HERNÁNDEZ *(Interpretation from Spanish)***:** Good afternoon, Mr Martín Pallín. I want to ask you about something that has to do with the very finely honed question that you asked the Co-Agent relating to the functions of the court clerk. You explained the functions of the court clerk and you made a differentiation regarding the extent to which the court clerk has a general authority regarding questions involving the writing of reports and so on. You also said that he does not have authority regarding the detention of persons. Is that the case?

MR MARTÍN PALLÍN *(Interpretation from Spanish)***:** Yes, that is correct.

MS ESCOBAR HERNÁNDEZ *(Interpretation from Spanish)***:** In any case, I would like, if you will allow me, Mr President …

(Interpretation from French) Could I please ask you for clarification?

(Interpretation from Spanish) The functions of the court clerk, are they independent of the time limit for bringing people before the judge of 72 hours, as you mentioned in your prior testimony?

MR MARTÍN PALLÍN *(Interpretation from Spanish)***:** Yes, that is true. The court clerk has no authority to order someone to be arrested. What he or she can do is to attest to the date and time at which a person is brought before the judge and attest to the fact that they are present. Court clerks also have the authority to authenticate, to attest to the literal transcriptions of telephone conversations. The court clerk listens to these recordings and says that the transcriptions are in fact true. They attest to that like – pardon my saying so – a notary, and in the last few years the Spanish

procedural system requires all public hearings to be recorded on audio and video, so the court clerk watches these videos and attests to the fact that this audio and video does in fact correspond to the hearing with which it is labelled.

MS ESCOBAR HERNÁNDEZ *(Interpretation from Spanish)***:** My second and last question refers to a question that was posed to you by the distinguished Co-Agent of Saint Vincent and the Grenadines regarding the interrogation of Mr Foster by video conference. I am speaking with your authority, Mr President. If my memory does not fail me, Mr Weiland pointed out that there was in fact a judgment in cassation to the effect that the judge did not have any reason to have a testimony by video conference, and I am not going to go into the details of this document but now that it has been brought up, regarding Mr Foster, I am going to ask the following question. In the appeal, indeed, when the judge ordered Mr Foster to appear in Spain, exercising his legitimate authority, Mr Foster's legal representatives appealed and then a judgment was handed down which pointed out the following: that indeed there is a cooperation and legal assistance agreement with the United States and that it would be perfectly possible for Mr Foster to make his statement by video conference. However, it then adds that in any case it is for the judge to make this decision as to how someone who is a suspect, the accused, can testify. Is this a correct affirmation?

MR MARTÍN PALLÍN *(Interpretation from Spanish)***:** Yes, I agree. The decision is made by the judge, as the question just pointed out. The affected person is informed of their right to the possibility of activating the mechanisms to have a video conference, and in this case the judge should accede to this request. I want to point out one circumstance here. Spain is a country that receives millions of tourists, so we often have problems of tourists being taken from one place to another, and tourists who are affected by legal issues, and they are called as witnesses, and sometimes the witnesses come voluntarily before the court when the court is in session, and at other times video conferencing has been used. This is common in our legal system.

MS ESCOBAR HERNÁNDEZ *(Interpretation from Spanish)***:** But can the judge rule that under certain circumstances he needs to have the accused physically present in order to guarantee the immediacy of the interrogation? Is that reasonable?

MR MARTÍN PALLÍN *(Interpretation from Spanish)***:** What would be reasonable is that the judge would need to justify and give a reasoned motivation for why this person needs to be physically present and why a video conference is not sufficient. There needs to be a judicial decision on this, giving very good reasons to justify this.

MS ESCOBAR HERNÁNDEZ *(Interpretation from Spanish)***:** Thank you very much, Mr Martín Pallín.

(Interpretation from French) Thank you, Mr President. I have no further questions. As you know, Spain has no further witnesses or experts to call during the hearing. Thank you.

THE PRESIDENT: Thank you, Ms Escobar Hernández.

Mr Martín Pallín, thank you. Your examination has now finished and you may now withdraw.

(Interpretation from French) Now I give the floor to Ms Escobar Hernández once again.

MS ESCOBAR HERNÁNDEZ *(Interpretation from French)***:** Thank you, Mr President. As I informed you on Monday, my colleague Professor Jiménez Piernas will present Spain's position regarding the applicable substantive law in this case. With your permission, Mr President, I would invite you to give him the floor.

THE PRESIDENT *(Interpretation from French)***:** Thank you. Now, Mr Jiménez Piernas, you have the floor.

MR JIMÉNEZ PIERNAS *(Interpretation from French)***:** Mr President, Members of the Tribunal, I would like to begin by saying what a great honour it is to be appearing for the first time before the International Tribunal for the Law of the Sea in order to defend the legitimate interests of the Kingdom of Spain.

My colleagues, Ms Escobar Hernández and Mr Aznar Gómez, have examined the relevant facts of this case and the questions of jurisdiction and diplomatic protection. Ms Escobar Hernández, Agent of the Kingdom of Spain, has entrusted me with the task of addressing the rules of the law of the sea applicable to the facts under discussion, in accordance with the Statute and Rules of the Tribunal.

Let us remember that this case was brought before the Tribunal by virtue of the Convention on the Law of the Sea dated 1982, which from now on I shall refer to as the Convention. According to article 293(1) of the Convention and article 23 of the Statute of the Tribunal, the applicable law corresponds to the provisions of *"this Convention and other rules of international law not incompatible with this Convention"*.

This Tribunal is already familiar with the Spanish position from the written proceedings. None of the provisions of the Convention invoked by the Applicant would be applicable to the facts of this case, and the Tribunal therefore lacks jurisdiction *ratione materiae*. The *Louisa* was detained as a result of criminal proceedings in Spain arising from alleged crimes committed in our territory, in our internal waters and our territorial sea. These domestic criminal proceedings and all ancillary actions are no more than the expression of the sovereignty of the Kingdom of Spain, based on compliance with domestic regulations and international law. Spain has never ceased to adhere scrupulously to the Convention.

That being said, Spain takes the view that this Tribunal has no jurisdiction *ratione materiae* in this case. In this connection, we wish to draw your attention to the unfounded and confused allegations of the Applicant.

To this end, we must clearly distinguish between the written and oral proceedings in this case. Why? Because the Applicant is making use of an old procedural manoeuvre, which we might call the "new case" tactic or strategy. This consists in

substantially modifying the arguments put forward in the written phase and replacing them with completely new and unfamiliar reasoning, so that the Applicant now presents the case in a different light, with the clear intention of gaining an advantage in the final settlement. This strategy shows that the other Party considered the round of written proceedings to have been lost from the standpoint of the Memorials and annexes. This is a deplorable and generally unsuccessful option, but it nevertheless puts the other Party in a difficult position and is particularly tiresome for the Tribunal. In addition, the Applicant has laid a second trap for the Tribunal, and we will deal with that later.

Mr President, this introduction merely reflects our puzzlement at what has happened in this oral phase, where we have heard a completely different version of the facts and a radical transformation of Saint Vincent and the Grenadines' request, which reveal their true intentions. Having opportunistically accepted this Tribunal's jurisdiction, the Applicant uses the *Louisa*, under its flag, in order to attack Spain under the Convention. Once the two Parties stand face to face before the Tribunal, however, all of a sudden the written proceedings turn out to have no connection with its oral presentations.

Nevertheless, Mr President, Members of the Tribunal, the Kingdom of Spain was prepared to appear before this Tribunal and debate how the law of the sea should be applied in this case, and that is indeed what we wish to do. In its written pleadings, its Memorial and Reply, the Applicant basically argued that Spain had breached articles 73, 87, 226, 227 and 245 of the Convention. The invocation of these articles was illogical and inconsistent with this case, and we shall touch on this matter in due course. We shall also refute the "new case" presented in this oral phase, and all of the new arguments insofar as they relate to the law of the sea.

The dispute in question must be defined objectively, as a prerequisite for any Tribunal to exercise its judicial function. It is not enough for one Party to allege the existence of a dispute with the other Party, and it cannot be sufficient for the Applicant to allege that Spain has breached certain articles of the Convention, thereby incurring international responsibility. It is for this reason that Spain affirms that there is strictly no dispute that the International Tribunal for the Law of the Sea could or should settle.

Against that background, the articles of the Convention cited by the Applicant are clearly not applicable to this case if they are interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. We can see, of course, that the Applicant's reasoning in the written phase is totally lacking in logic and legal cogency.

To summarize our position, which will be developed in due course, Spain considers it obvious that the *Louisa* was not fishing in Spain's exclusive economic zone; that it was voluntarily moored at a Spanish port and had been there for several months; that it was not because of the pollution of the waters under Spanish sovereignty and jurisdiction that the Spanish authorities searched and detained the vessel; that the *Louisa* was not in fact engaged in scientific research within the meaning of the Convention; and that obviously the legal actions taken against the vessel and its owners were completely unconnected with any such reasons.

We can therefore see that the normative content of articles 73, 226, 227 and 245 of the Convention, as invoked by the Applicant during the written phase, provide no legal basis for its claims. On the contrary, they establish a firm basis for the application of Spanish law and fishing legislation in the exclusive economic zone (article 73); our right to prevent pollution of the marine environment under our sovereignty or jurisdiction (articles 226 and 227); and our exclusive right to regulate marine scientific research in our territorial sea (article 245) and, of course, our internal waters.

Nevertheless, we would like to make it clear that Spain has never been in breach of the Convention in this case. The Applicant contends that, by arresting the *Louisa*, Spain breached articles 73, 87, 226, 227, 245 of the Convention, as well as article 303, although no reasons for this claim were given in the Memorial, and it was subsequently withdrawn in the Reply.

As regards article 73, this deals with the enforcement of the laws and regulations of a State in its exclusive economic zone. The opposing Party claimed that Spain had not fulfilled its obligation to release the *Louisa* promptly by establishing a bond or other reasonable guarantee, and its obligation to notify the flag State promptly of the action taken against the *Louisa*. But it goes without saying that article 73 deals with the arrest of fishing vessels in the exclusive economic zone and has nothing to do with the present case. No other interpretation of the article is possible in accordance with article 31(1) of the 1969 Vienna Convention.

The *Louisa* was never engaged in fisheries exploration or exploitation in the waters of Spain's exclusive economic zone. It has never fished in Spain's exclusive economic zone. The *Louisa* is not a fishing vessel. The *Louisa* was boarded, searched and subsequently detained, on the orders of a judge, in Spanish waters while moored at Puerto Santa Maria in the Cádiz region and was accused of activities harmful to the underwater cultural heritage in Spain's internal and territorial waters. We have given sufficient proof of that in the written phase, and now again in the oral phase. Within these waters, Spain has always exercised its sovereignty in accordance with the Convention and other rules of international law, such as the right of innocent passage through territorial waters, which, of course, are not relevant to this case. There is, therefore, no legal justification for applying article 73 of the Convention in this case.

The same is true of article 87 of the Convention, which deals with freedom on the high seas, and more specifically the freedom of navigation – article 87(1)(a). The Applicant alleged that the detention of the *Louisa* in a Spanish port involved restricting this particular right, thereby causing prejudice. This reasoning misinterprets the real meaning of the article, which refers to a custom well established in general international law. It is not at all logical to compare the detention of the *Louisa* in a Spanish port with any alleged infringement of the right to navigate freely on the high seas, *a fortiori* if the Spanish accusation against the vessel involves a breach of Spanish laws and regulations in its internal and territorial waters.

Furthermore, the *Louisa* was not legally entitled to navigate before it was detained. The flag State, Saint Vincent and the Grenadines, and the port State, Spain, are obliged to check that a vessel is in compliance with international standards, and the *Louisa* had not renewed the certificates required under the SOLAS and MARPOL Conventions. These had expired in March 2005, one year before the *Louisa* was detained, and they were needed by the *Louisa* in order to continue to navigate safely. The *Louisa* could not navigate because it was being held in a Spanish port as a result of a judicial action, but it could not navigate as a general matter, because it no longer satisfied the necessary conditions. One of the duties of a flag State, under article 94 of the Convention, is to take such measures as are necessary to guarantee maritime safety and to ensure that every vessel is regularly examined in accordance with the relevant international standards – article 94(3), (4) and (5). The responsibility in this regard falls particularly to the flag State, and it would seem that the Applicant has not met its obligations here.

The Applicant also complained of a breach by Spain of articles 226 and 227 of the Convention. Suffice it to recall that these articles deal with the investigation of foreign vessels under articles 216, 218 and 220, and non-discrimination with respect to foreign vessels – article 227, in Part XII of the Convention, which is concerned with the protection and preservation of the marine environment. These two articles appear in Section 7, dealing with legal guarantees for vessels when they are subject to acts of authority or enforcement measures carried out by other States, in accordance with articles 216, 218 and 220 of the Convention, which I have already cited. However, these articles point out that such measures, and the limits on them, relate to investigation by the coastal State of foreign vessels suspected of polluting the marine environment. That is not the case for the *Louisa*, which was not detained because of activities polluting the waters under Spanish sovereignty or jurisdiction, but was accused of completely different offences – offences against the underwater cultural heritage.

With regard to article 227 of the Convention, which, it should be recalled, is included in Part XII of the Convention, the Applicant complained of discrimination against the *Louisa*, in breach of that article and in comparison with the Spanish company Repsol, which has been exploiting gas deposits in the Gulf of Cádiz since 1995. This allegation is absurd, bearing in mind the facts that we have proved during the written and oral phases. The *Louisa* had no authorization to carry out any hydrocarbon exploration, so that it was absolutely impossible for it to enter into competition with Repsol.

In addition, the allegation concerning article 227 is completely irrelevant to any permits or authorizations for hydrocarbon exploration and exploitation which a State may offer in its internal waters and territorial sea, in accordance with its domestic law and, where applicable, with international law.

Such authorizations or permits are issued at the discretion of the State and its competent internal authorities. Indeed, the Spanish authorities, fully in keeping with their powers in this matter, granted an authorization to Sage to carry out certain environmental work in the Gulf of Cádiz. This, though, was eventually used illegally by the company. The Spanish authorities then cancelled the relevant permits once it was established that fraud had taken place.

THE PRESIDENT *(Interpretation from French)***:** Excuse me, Mr Jiménez Piernas, could I ask you to speak a little more slowly? It seems that the interpreters are having some difficulty keeping up with you.

MR JIMÉNEZ PIERNAS *(Interpretation from French)***:** Thank you. I apologize.

The Applicant has also alleged a breach of article 245 of the Convention, which deals with the regulation of marine scientific research in the territorial sea. This article states that, according to general international law on the subject, marine scientific research in the territorial sea can be conducted only with the consent of the coastal State and under the conditions set forth by the coastal State. It is well known that the main restriction on the sovereignty of a coastal State in its territorial sea is that it must allow innocent passage for third-country vessels (article 17 of the Convention).

However, innocent passage is excluded and deemed "prejudicial to the peace, good order or security of the coastal State if the vessel engages in "the carrying out of research or survey activities" (article 19(2)(j) of the Convention). At least, and *a fortiori*, this rule applies equally to internal waters, but it differs, as one might expect, from what is laid down in the Convention with regard to the exclusive economic zone and the continental shelf.

There is no doubt that Sage had used a Ministry of the Environment authorization to carry out certain research activities in the Gulf of Cádiz. The permit was issued by the Spanish authorities in the exercise of their sovereignty, more specifically, by the General Directorate of Coasts.

In Spain, as a highly qualified expert has already testified to this Tribunal, we have a number of different classes of authorizations and permits for this kind of work. We could not in any case say that the law of the sea alone confers a right to obtain such authorizations and permits from a coastal State, and even less within its internal waters. That said, we have clearly proved that the permit obtained by Sage was not used in good faith; thus, the *Louisa* was not detained because it was suspected of breaching the conditions governing the administrative authorization issued to it by the Spanish authorities, but only because it had been used in order to conceal activities harmful to the underwater cultural heritage, and in addition because it was illegally in possession of weapons of war in our internal waters and territorial sea. That has nothing to do with the authorization that the *Louisa* was granted and had made improper use of.

In other words, it was simply because of unlawful, criminal activities, which are punishable under the Spanish Criminal Code, that the vessel was detained. The activities in question were completely different from the ones provided for in the authorization mentioned earlier. There are, therefore, no grounds for the allegations under article 245 of the Convention.

The Applicant also complained of a breach of article 303 of the Convention, which says what must be done with archaeological and historical objects found at sea.

Let me recall the object and purpose of that article. The main purpose is to establish collaboration between States Parties in order to protect the underwater heritage, as stated in paragraph 1. We know that the Applicant voted in favour of adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage, on 2 November 2001, and subsequently ratified it on 8 November 2010, thereby accepting all the consequences flowing from article 18 of the 1969 Vienna Convention with regard to the obligation not to defeat the object and purpose of a treaty prior to its entry into force, when a State has signed it, and to the extent that it has not declared its intention to withdraw from the treaty. This means that Saint Vincent and the Grenadines, having signed the Convention, must be particularly diligent in preventive action and, indeed, in collaborating with other States Parties such as Spain in combating the looting of the heritage by vessels of any flag, but particularly by vessels flying its own flag.

Article 303(2) also strengthens the powers of the coastal State in the zone contiguous to its territorial sea in such a way that it may presume that the removal of archaeological or historical remains from that area without its authorization constitutes an infringement within its territory or territorial sea of the laws and regulations referred to in article 33, which concerns contiguous zones. This is no doubt further proof of the *vis expansiva* of the powers of coastal States over the waters adjacent to their coasts in the new law of the sea, which further underscores the appropriateness of the powers exercised by Spain within its waters in order to protect cultural heritage.

I must draw the attention of the Tribunal to this aspect, which is a particularly sensitive one for the many States that, over the years, have suffered from the looting of their underwater cultural heritage. In conclusion, on the basis of an interpretation "in good faith" of all these articles, and also in accordance with the common meaning of the terms of the treaty (see the Convention), in the context of these factors and having regard to their object and purpose, the detention of the *Louisa*, when it had been berthed for several months in a Spanish port, was an act that was entirely in compliance with the Spanish laws and regulations governing the protection of our cultural heritage and the prevention of illegal possession of weapons, even more so when they are weapons of war, which certainly cannot be construed as restricting freedom of navigation on the high seas, nor can this be seen as discrimination against the *Louisa* once we have ascertained the non-applicability of article 227 in this case.

Additionally, the rights to which article 245 refers are applicable to the accused and not to the Applicant; they are therefore also inapplicable.

Lastly, I must add that Spain has exercised the powers provided for in the Convention in article 303(1), which requires the Applicant to cooperate in good faith with Spain to prevent and sanction the removal of archaeological objects in sovereign Spanish waters.

Mr President, might I, at this juncture, make a few comments on the powers of coastal States in their internal waters and in their ports? You may rest assured, Mr President, I would not be so discourteous as to give a lecture on the law of the

sea. However, I believe that there are a few salient points relating to the legal regime governing internal waters that should be recalled here.

The Convention barely touches on internal waters. The sole purpose of articles 8 and 11 is delimitation in order to distinguish them from the territorial sea. Those articles define internal waters as those lying between the land and the territorial sea, including the waters of ports. The only indication we find regarding the legal nature of internal waters is brief but important. This is to be found in article 2(1) of the Convention, which states that "the sovereignty of a coastal State extends, beyond its land territory and internal waters … to an adjacent belt of sea, described as the territorial sea".

From this it may be inferred that for the Convention the legal regime applicable to internal waters is subsumed into that of the State's land territory; and consequently the Convention pays very little attention to internal waters.

As a consequence of this, there is no right of use of these waters for third States. The exploitation of natural resources and coastal shipping remain reserved solely for citizens of the coastal State. We have to look at the domestic legislation of the coastal States concerned and at comparative law to try to get a rough idea of the main thrust of the current legal regime because it is ultimately a matter of domestic law.

In international practice in this respect we are seeing a tendency to restrict freedom of access to ports for foreign merchant shipping, based on the traditional customary principle of freedom of trade and of navigation. Behind this tendency is the increased power of port States. They are very much concerned with the safety of shipping and controlling pollution. Article 25(2) of the Convention recognizes that a coastal State is entitled to regulate and even to prevent access to its ports, and this provision is further confirmed by the international case law.

Article 211(3) of the Convention (Part XII, on the protection and preservation of the marine environment) acknowledges the power of the port State to establish "particular requirements … for the entry … into their ports or internal waters".

In other words, the legal status of internal waters, including entry to and berthing in ports is, in principle, entrusted to the legislation and jurisdiction of the coastal State, which exercises its powers over those waters with no possible restrictions imposed by international law, except as regards the customary principle of freedom of trade and navigation, and unless there is a special regime established, for instance, as a result of a treaty.

Spanish domestic law has nothing new to offer in this regard that is worthy of mention. The applicable legal regime is based on the guarantee of free access to Spanish ports for foreign merchant vessels, save in exceptional cases or for reasons of health or public policy. Of course, all this is obviously subject to the ships respecting Spanish laws and regulations during their time in port.

In view of what I have just stated, Mr President, I consider that it would be untenable to criticize before this Tribunal the fact that a Spanish judge ordered the entry and

search of the *Louisa* when it had been berthed in a Spanish port for several months, and following a prior police investigation into alleged offences against Spanish cultural heritage, whose criminal status is also laid down in our Criminal Code.

This case involves a ship whose master, a Hungarian national, had disappeared; and in addition Saint Vincent and the Grenadines has no consular representation in Spain. How can you assert under those circumstances that the Spanish judge violated the internal order by exercising his criminal jurisdiction over this ship when he decided to expedite some procedural formalities because of the urgent need to safeguard potential evidence, while still making sure that there was never any abuse of the rights of defence? I will not go into the subsequent development of the criminal proceedings. My colleagues have dealt with this and will do so at a later stage.

Finally, Mr President, can I offer a few observations on the strategy of the Applicant, which has drastically modified its position during this oral phase, ditching all the Convention articles that were invoked at the written stage and forgetting all the arguments that it put forward. Under what pretext? Article 300 of the Convention (good faith and abuse of rights) states:

> States Parties shall fulfill 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.

The Applicant argues, and rightly so, that on several occasions the Respondent has quoted article 300 during the written proceedings; so why would the Applicant not be able to do the same? The purpose of the Applicant is two-fold. First, to convince us that there is a genuine case, that there is a real dispute, because the Applicant contends that there is at least one serious difference with Spain regarding the interpretation of article 300 of the Convention.

Article 288(1) indeed confirms that the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention.

The Applicant is trying to build a sufficient legal bedrock, however minimal and artificial, to try to direct the Tribunal, to give it jurisdiction and to ensure that it hears the case on the merits.

Unlike Spain, the Applicant does not wish to apply the "good faith" principle to one or more specific rules in the Convention in order to facilitate its concrete interpretation. Spain’s view is that good faith is a fundamental guiding principle underpinning the entire Convention. However, Saint Vincent and the Grenadines claims to go further still: it is proposing good faith as a substantive and autonomous general legal principle which would allow the Tribunal to resolve this case, leaving aside any other specific rule of the Convention; in other words going beyond the law of the sea and as though it were almost equivalent to equity.

The Applicant is critical of an allegedly restrictive interpretation of the Convention and proposes a rather free and creative reading; and this option is presented as a splendid opportunity for the progressive development of international law through a

kind of judge-made law; and this is no doubt the real trick that the Applicant is playing on this Tribunal.

The Applicant states that the abuse of rights doctrine gives article 300 sufficient content which is independent of the rest of the articles in the Convention. From the Applicant's standpoint, article 300 is a sort of open window through which any infringement of international law can be hooked up to the Convention, which would always give this Tribunal jurisdiction. That is what the Applicant is really interested in in this case. That would be why the alleged violation of the fundamental rights of the US citizens appeared.

That, then, is the Applicant's interpretation of article 300; but does this interpretation hold up? Let us look at the *travaux préparatoires* for the Convention. According to the codification exercise performed by the Third United Nations Conference on the Law of the Sea, such a broad interpretation of article 300 of the Convention is impossible. The Applicant has not, one single time, quoted the official records from the Third Conference in support of such a bald assertion. There is no better interpretation of article 300 than the customary one, in other words legal common sense.

Article 300 supports and underpins the interpretation of the other articles of the Convention, as was the intention of the consensus. It is a constantly repeated provision that good faith is among the founding principles of the contemporary international order, with the normative content enshrined in General Assembly Resolution 2625 (XXV) from 1970. Article 300 originates from a proposal from Mexico. It was then passed on to the appropriate working group for discussion and negotiation. At that point its wording was revised and simplified. The Mexican delegation welcomed the success of its initiative and it claimed "to balance the rights, powers and freedom accorded to the various parties concerned under the Convention".

Once consensus had been reached on three articles of the Convention, including articles 301 (peaceful uses of the seas) and 302 (disclosure of information), the President of the Conference stated: "The article on good faith and abuse of rights was to be interpreted as meaning that the abuse of rights was in relation to those of other States."

In short, it was claimed that the rights and obligations of States with different interests should be interpreted in good faith, for instance the relations between a coastal State and a landlocked neighbouring State. The powers and freedoms identified by the Convention must be exercised without any form of abuse of rights, contrary to the letter and the spirit of the Convention. In our case, article 300 requires that no form of abusive advantage should be accepted when the Convention is applied, either on the part of the port State, here Spain, or on the part of the flag State, here Saint Vincent and the Grenadines.

Article 300 does not therefore have a life of its own. That is the meaning that Spain has given to that article throughout these proceedings. The proposal made by the Applicant therefore runs counter to the Convention because, were it to be applied,

this would entail too broad an extension of the jurisdiction of this Tribunal, which is certainly not provided for by the Convention.

It should be added that such an interpretation of article 300 would be very bad news for the further development of international jurisdiction, whose purpose is the robust development *ratione materiae* of the international order. As we know, the contemporary international order has seen an increase in the number of specialized normative systems, such as the international law of the sea or international human rights law, and this normative diversity is characteristic of modern international law and has been accompanied by the establishment of new courts and tribunals responsible for the judicial review of the application of the relevant rules in each of these specialized regimes.

This Tribunal, like others in the field of human rights, is an excellent example. This is a positive development in the international order, which is now subject to better judicial review.

Mr President, having said that, I must however conclude by reiterating that Spain does not object at all to the application of article 300 of the Convention as a founding principle of contemporary international law which plays a significant role in the interpretation of the rules of that legal order.

Mr President, Members of the Tribunal, I thank you most warmly for your kind attention.

THE PRESIDENT: Thank you, Mr Jiménez Piernas. I shall now invite Ms Escobar Hernández to take the floor.

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

As I told you on Monday, when presenting the structure of the statements by the Spanish delegation, I would like to look at a number of questions relating to article 300.

Mr President, Members of the Tribunal, as my colleague Professor Jiménez Piernas quite rightly emphasised, article 300 of UNCLOS is a clear expression of the good faith principle, a fundamental principle to be found in every legal order, and which also has its place in international law. It will not be necessary to explain to such a distinguished bench of judges a principle which can already be found in the UN Charter and also in Resolution 2625 (XXV) on the principles of international law affecting friendly relations and cooperation amongst States, to both of which my colleague has referred.

However, despite the importance of the principle, allow me to remind you how difficult it is to find specific rules on good faith in international conventions and treaties. Indeed, in most cases good faith has remained part of the fundamental principles of international law, yet without being specifically set down in most treaty texts, even in the major so-called “codification” treaties, with the possible exception of the reference to good faith in the Vienna Convention on the Law of Treaties.

Nevertheless, the Convention on the Law of the Sea is one of the rare exceptions to general practice. Without any doubt, for very good reasons which have already been set out by Professor Jiménez Piernas, the States decided to include in the Convention a specific clause on good faith whose scope is already announced by the very heading of the article, "Good faith and abuse of rights". In other words, these are two sides of the same coin.

But what is the significance of article 300? Is it possible to identify any specific feature of the principle of good faith contained in this article when set against the principle of good faith within the framework of general international law?

The answer must be "no" from the substantive standpoint. We have here a category which is well established in international law but does not have any substantive features of its own. But if one looks at the normative scope of article 300, we do find a specific feature which absolutely cannot be disregarded, even if it is obvious: that article was drafted expressly for the purposes of the Convention on the Law of the Sea.

The assertions which I have just made have a number of consequences.

The first is that article 300 has no application outside the Convention on the Law of the Sea.

The second is that the principle of good faith and the prohibition of the abuse of rights must be applied within the framework defined in article 300, namely – and I am quoting here – that of "*the rights,…, jurisdiction and … freedoms recognized in [the] Convention".*

Thirdly, given that this is a treaty provision, it must be interpreted in line with the Vienna Convention on the Law of Treaties, that is to say, articles 31 et seq. Here I would like to cite article 31(1), which is especially relevant. It stipulates that:

> A treaty shall be interpreted in good faith" – good faith again – "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

In any event, the drafting of article 300 does not provide us with pointers to the interpretation of its object and purpose, except perhaps the fact that it comes in part XVI of the Convention entitled "General provisions", which permits us to draw our first conclusion, namely that the scope of the principle of good faith and the prohibition of the abuse of rights is not limited to any given part of the Convention. Quite the contrary; the principle of good faith is applicable to each and every one of the provisions contained in the Convention, but always within the framework and the bounds of the Convention.

Nevertheless, despite its general scope, the principle of good faith, that is, article 300, has not been the subject of continuous or notable case-law from this Tribunal. As you will be well aware, article 300 has been relied on in this Tribunal in two contentious cases, namely the *Bluefin Tuna* case and the case concerning *Land Reclamation by Singapore in and around the Straits of Johor*. In addition, article 300

was also taken into account in the Advisory Opinion on the *responsibilities and obligations of States sponsoring persons and entities with respect to activities in the area.*

In the two contentious cases which I have just mentioned, article 300 has always been relied on by the Parties "in conjunction with" other provisions of the Convention. The Tribunal in turn has not found it necessary to rule specifically on article 300.

Nevertheless, in the second of the cases cited, Judges Nelson and Anderson issued declarations or stated their opinions on the principle of good faith, without however making any explicit reference to article 300.

In the case of the advisory opinion, the Tribunal did give a ruling on article 300, but again in relation to article 4, paragraph 24 of Annex III to the Convention, in other words linking it to another provision of the Convention.

In that context, the Tribunal had recourse to the principle of good faith and referred *expressis verbis* to article 300 as criteria for interpreting the margin of discretion enjoyed by a State in the process of "the adoption of laws and regulations and the taking of administrative measures".

Consequently, one may conclude that whenever article 300 was taken into consideration in the said cases, it was always in connection with one or more other provisions of the Convention and not as an autonomous convention provision capable of producing legal effects in itself and in isolation.

As I already said in my first statement before this Tribunal on Monday last, Spain shares this view on the applicability of article 300 within the framework of the Convention, and Spain considers - we consider - that the obligation of good faith and the prohibition of the abuse of rights must be applied to each and every provision of the Convention. By contrast, the Applicant has explicitly stated that article 300 may be applied as a new basis of jurisdiction.

The Applicant has based its line of argument on the establishment of a direct link between article 300 and the violation of individual rights, such as human rights in general or property rights, without identifying any link with one or more Convention provisions. Thus, the Co-Agent of Saint Vincent and the Grenadines said: "Property rights appertain to humans and are protected by article 300."

Allow me to raise a question at this juncture: on what legal foundations in the Convention?

My colleague Professor Jiménez Piernas has addressed the jurisdictional dimension of the statements made during the hearings by the distinguished delegation of Saint Vincent and the Grenadines, and for the time being I do not think it necessary to revisit the subject. On the other hand, I should like to make a number of comments on the relationship between article 300 and human rights.

Although the Convention is not a human rights instrument, it must be admitted that human rights are taken into consideration in the process of applying the Convention.

This has happened on a number of occasions but, as your former colleagues Judges Treves and Vukas said, this Tribunal has invariably dealt with human rights within the framework of prompt release cases, doubtless as a consequence of the specific nature of this procedure and taking account of the fact that in prompt release cases we are dealing with the detention of the ship and the detention of the crew, always because the ship is being detained. This means that the interference with the rights of the crew is directly linked to an act (the ship's detention) which is expressly provided for in the Convention as the basis for the special jurisdiction of the Tribunal in urgent proceedings of this kind.

In all the cases where such a link has been adduced – let me just mention the *Juno Trader* case and the *Tomimaru* case – it is therefore possible to find a connection between human rights and the relevant provisions of the Convention – in this case, specific rules governing prompt release proceedings.

This close relationship between prompt release proceedings and violations of the rights of crew members, as a basis for finding that the Convention has been breached, was particularly well established in the individual opinion of Judge Treves in the *Juno Trader* case in 2004. Allow me to quote it, Mr President, even though you are very familiar with the texts:

> In a prompt release case unnecessary use of force and violations of due process and of human rights in general may be relevant in various ways. In particular, lack of due process when it consists in late communication of charges, in delay and uncertainty as to the procedure followed by the authorities, a lack of action by the authorities, may justify a claim that the obligation of prompt release has been violated even when the time elapsed might not be seen as excessive had it been employed in orderly proceedings with full respect of due process requirements. The same may apply when lack of due process is used to reach quickly the conclusion of domestic proceedings without seriously affording a possibility to consider arguments in favour of the detained vessel and crew. In both cases unnecessary use of force and violations of human rights and due process of law are elements that must also be taken into consideration in fixing a bond or guarantee that can be considered as reasonable. The idea of abuse of rights is very close to that of lack of reasonableness, and consideration of article 300 of the Convention should not be outside the scope of the complex process that brings the Tribunal to fixing a guarantee it considers reasonable. In a similar vein, Vice- President, as he then was...

This is Judge Treves speaking:

> ... Vice-President Nelson, in his separate opinion to the Monte Confurco judgment, observed that in article 292 "the notion of reasonableness is used to curb the arbitrary exercise of the discretionary power granted to coastal states."

Following this line of argument, the conclusion is clear. The alleged human rights violations cited in the individual opinion of Judge Treves are directly related to the object and purpose of the Convention provisions relating to prompt release proceedings, namely to facilitate the freedom of navigation of the detained vessel

within a *reasonable* period of time, on the sole condition of the setting of a *reasonable* bond granted by a national authority within the framework of *reasonable* domestic proceedings conducted with due process, but of course without these conditions and guarantees impinging on the final outcome of the domestic proceedings on the merits of the vessel's detention, which do not fall within the jurisdiction of this Tribunal.

All this makes obvious sense: the alleged violations of human rights cited in the individual opinion result exclusively from the detention of the ship, which in itself is the sole basis for the acts of domestic law affecting the crew.

However, the Tribunal has never ruled *in abstracto* on alleged breaches of human rights, nor on an alleged violation of due process as the sole basis for finding a breach of UNCLOS. Furthermore, this is merely a consequence of the specific jurisdiction of the Tribunal. Since it is a tribunal specializing in the law of the sea, it may undoubtedly decide on the rules of international law which are not incompatible with the Convention, but it cannot remain silent on the Convention nor disregard it and choose other, different, rules that are not included in the Convention in finding that it has been breached. Yet this is exactly what the Applicant is proposing that you do.

What actually happened in Cádiz? The Spanish judicial authorities carried out an investigation regarding certain acts constituting a crime. Within the framework of that investigation, the judicial authorities took a number of measures, including the detention of the *Louisa*, the detention of certain individuals and the adoption of provisional measures to ensure that the investigation could proceed correctly (for example withholding of a passport, obligation to appear every fifteen days before the judge*)*, but each of these acts, namely the detention of the ship and the detention of individuals, is independent, as is well evidenced by the fact that certain individuals have been indicted who were not on the ship but who, in the judge's view, were participants in the criminal acts under investigation.

There is, of course, a connection between the detention of the *Louisa* and the judicial measures taken with respect to certain persons, but the connection is not the detention of the *Louisa*, unlike that which happens in prompt release proceedings. The connection relates to criminal acts committed against Spain's sub-aquatic cultural heritage. The *Louisa* is detained because it is an instrument for the committing of a crime; the individuals are detained and charges are brought on the grounds of their participation in criminal acts. In this case, allow me to say, Mr President, we are unable to identify those provisions of UNCLOS which could possibly have been infringed by Spain merely by initiating criminal proceedings such as those which are under way in Cádiz, nor can we identify how the exercise of criminal jurisdiction in the instant case could possibly constitute an abuse of rights.

The aim of the proceedings is to protect our sub-aquatic cultural heritage, which is an obligation falling to Spain under article 303 of the Convention and under the UNESCO Convention which has been cited on a number of occasions in this chamber. The proceedings are progressing in conformity with Spanish law, both substantively and procedurally, and thirdly, the proceedings, though they have been under way for six years now, have breached no rights of the defence, they have not

led to defencelessness on the part of the accused, and the proceedings have respected their human rights.

The Applicant has attempted, not during the written proceedings but during the oral statements, specifically through the witness testimony of Ms Avella and Mr Avella, to show how the Spanish authorities disregarded the human rights of these two individuals. The Applicant's representatives even used expressions such as "systematic human rights violations" and "inhumane and degrading treatment", claims which are, without doubt, very serious and which, had they really taken place, would have surely merited recourse to the Spanish and even the European system of human rights protection, but, as always, the representatives of Saint Vincent and the Grenadines have made these serious accusations without any legal reasoning to buttress them.

Furthermore, regarding reference to the facts, I would just like to draw your attention at this stage to the weaknesses which became apparent during the witness testimony of Ms Avella and Mr Avella. Mr President, distinguished Members of the Tribunal, Spain is wholly in agreement with the application of article 300 of the Convention. How could we oppose the application of a provision which contains a fundamental principle of contemporary international law? But where is the connection between a provision of the Convention and the so-called violation of human rights which ought to underpin any analysis of Spain's good faith and alleged abuse of rights? Because only if rights are abused in connection with the Convention can article 300 be applicable.

Allow me to say, Mr President, distinguished Members of the Tribunal, that such a connection exists nowhere, save perhaps in the intention, in the self-serving wish of the Applicant to make very serious claims before you (violation of human rights, breach of due process, denial of justice) in order to attempt, by the use of these eye-catching headlines, to attract your attention to a so-called case where they cannot identify a single point of support in the Convention whose correct application and interpretation you ensure.

To conclude, Mr President, let me now say a few words on the general scope of article 300. I think I will have time. As I said previously, article 300 is a general provision which has to apply horizontally vis-à-vis the entire Convention. By its very nature, it is a provision which should inform the interpretation and application of each and every one of the provisions in the Convention. Let me repeat this once again, each and every one of the provisions of the Convention, and that includes – it goes without saying – the provisions relating to the dispute settlement system. If the respect of good faith and the prohibition of the abuse of rights are principles which cannot be waived, whatever the circumstances, these rules and principles have a special importance when we speak of the dispute settlement system. A dispute settlement system, specifically if it is a judicial settlement system, cannot prosper without good faith. Even worse, I would say that such a system would lose its entire effectiveness and its credibility if good faith is not permanently present. I am absolutely sure that you know that full well. That is indeed your function on a daily basis.

What I have just said leads me to the last subject which I should like to mention at this stage of the hearings. The Applicant seems to believe that good faith is some sort of concept which should apply in Spain - and the Applicant is right to think so - that good faith should apply when we are talking about the rights of individuals - and once again, the Applicant is right to think so - and finally, that Saint Vincent and the Grenadines has the right to demand that these principles be respected before you - and, once again, the Applicant is right to think so. But, Mr President, the Applicant completely disregards the fact that the principle of good faith and the prohibition of the abuse of rights also protects Spain, first of all, and that good faith and the prohibition of the abuse of rights must also be respected in the exercise of the procedural rights conferred on the Parties to the Convention, second. In short, good faith and the prohibition of the abuse of rights are part and parcel of the procedural rules that apply in the present case.

It is not my intention at this juncture of the hearings to set out a long list of grievances that Spain could complain of with respect to the Applicant, but allow me at least to state that the way in which the Applicant recognized your jurisdiction – even if it is well within its rights – is not the most compatible with good faith and the prohibition of the abuse of rights. Furthermore, nor are the constant confusion between prompt release proceedings and ordinary proceedings, and the constant confusion between domestic proceedings and international proceedings. Finally, certain strategies developed by the Applicant are also wholly incompatible with good faith and the prohibition of the abuse of rights, namely changing, completely unexpectedly and at the last minute, and only in the oral proceedings, the arguments on which the Applicant claims to base its application. This hardly bears testimony to the respect that all parties to judicial proceedings must pay to the principle of good faith and the prohibition of the abuse of rights.

This observation brings me to the end of my last intervention in this first round of oral argument, Mr President, distinguished Members of the Tribunal. I would like to thank you for your patience and your kind attention. Thank you very much, Mr President.

THE PRESIDENT *(Interpretation from French)***:** Thank you, Ms Escobar Hernández. It is now 4.30 p.m. and so the Tribunal will have a 30-minute break right now. If you wish, you can continue your presentation when the sitting resumes at 5.00 p.m.

MS ESCOBAR HERNÁNDEZ *(Interpretation from French)***:** No, I have finished my presentation, Mr President, but I would like to call another colleague after the break.

THE PRESIDENT *(Interpretation from French)***:** That is what I expected. We will meet again at five o'clock.

(Break)

THE PRESIDENT *(Interpretation from French)***:** Ms Escobar Hernández, it is my understanding that Professor Jiménez Piernas wishes to speak. Mr Jiménez Piernas, you have the floor.

MR JIMÉNEZ PIERNAS *(Interpretation from French)***:** Mr President, Members of the Tribunal, I am once again honoured to appear before this Tribunal to address some

general aspects of the international responsibility of States as they relate to this case. Mr President and Members of the Tribunal, I would not like this to sound like an *ex cathedra* lesson. There are, however, a number of general points and comments that are worth making in response to the Applicant's interventions.

Article 304 of the Convention clearly establishes that all matters relating to State responsibility must respect the existing rules regarding responsibility under general international law. The Convention therefore offers us no particular regime for international responsibility.

The principle on which the international responsibility regime is built states that every internationally wrongful act of a State entails the international responsibility of that State and consequently gives rise to a new international legal relationship. This principle is enshrined in article 1 of the draft articles on responsibility of States for internationally wrongful acts, which I shall henceforth call the "draft articles", adopted by the International Law Commission at its fifty-third session in 2001 and subsequently submitted to the United Nations General Assembly. In this presentation we will be following the structure of the draft articles quite closely.

Article 2 spells out the conditions required to establish the existence of an internationally wrongful act committed by a State; in other words, it seeks to identify the elements that make up such an act. Two such are identified: firstly, the conduct concerned must be attributable to a State under international law; and, secondly, for the act committed by the State to give rise to responsibility, that conduct must in itself be a breach of an international legal obligation of the State.

The expression "breach of an international obligation of the State" is a long-established expression and it applies to both treaty-based and non-treaty-based obligations. There is no exception to the principle set forth in article 2.

In the present case there is no violation by Spain of any international obligation to the Applicant; consequently, Spain has not committed an internationally wrongful act and therefore bears no form of international responsibility whatever. Thus, there is no obligation to make good. However, let me nonetheless offer a few general comments on this case in reply to the Applicant's arguments, in the alternative.

First, a word of warning: a State act may be qualified as being "internationally wrongful" solely under international law, not under domestic law and not even under United States domestic law. Articles 3 and 32 of the draft articles state that the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful or unlawful by domestic law. This is worth recalling, Mr President, in so far as the Applicant's US lawyers have had the nerve to produce before this honourable Tribunal the latest edition of the *Restatement* as if it were a source of authority which helps them to qualify the conduct of the Spanish authorities in this case and which guides you in your job. May I also point out to the other party that general international law in this case was most appropriately set by the Commission's draft articles, which are the result of many years of work and a fairly solid consensus among the international community - well beyond the United States of America - including all the Members of the United Nations.

Article 12 of the draft articles establishes that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation. It must therefore be a matter of an international obligation, regardless of the opinion offered on the subject by the Applicant's American lawyers. In the case with which we are concerned, European standards on criminal procedure are very strict, as is demonstrated by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which is also in force for Spain, and the very considerable body of case law of the European Court of Human Rights, together with, as already mentioned today, a highly qualified expert (*inaudible*).

In the same way, the United States lawyers, on behalf of the Applicant, have also tried to play down and even ridicule the importance of the finding of weapons of war (assault rifles) when the *Louisa* was searched. We understand that the history of their country has given them a different perspective compared to that of European countries on this matter. However, we think it would be a good thing for them to show the same respect for these cultural differences with regard to the illegal possession of firearms. International law exists so as to set the rules to be shared by all States, beyond such particular customs or attitudes, however respectable they may be.

I should also remind the Applicant's lawyers that there has been an extension of the practice of not exercising diplomatic protection for an individual when the State of whom he is a national has reason to doubt the conduct of its citizen, considering it risky, irregular or simply inappropriate, in other words contrary to domestic or international law. This is intended to facilitate maintaining fluid and cordial bilateral relations so as to avoid disputes in which reasonable doubts could arise as to the conduct of individuals allegedly injured. However, we should not forget that in this case it is not the State of nationality that claims to exercise diplomatic protection, but another State that does not meet the prerequisites to do so.

Along the same lines, article 39 of the Commission's draft articles stipulates that *"[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought".* Sometimes the injured State or the individual victim of the breach has in fact materially contributed to the damage by some wilful or negligent act or omission; these situations are known to national legal systems under terms such as "contributory negligence", "comparative fault", "victim's own fault" or various other phrases.

Article 39 thus recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. The question of contribution to one's own injury is most frequently raised when it comes to compensation, but the principle can also be relevant in other forms of reparation. The International Law Commission points out in its commentary on the article that "if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition". We must note here that any act or omission,

whether intentional or by negligence, that contributes to injury may be imputable to the injured State or to any person or entity on behalf of whom reparations are requested.

Finally, we will now deal with the vessel *Louisa* as the actual, main object of the claim for damages lodged by Saint Vincent and the Grenadines against Spain. We will disregard all the other claims regarding personal injuries, which are clearly unfounded, as demonstrated in the evidence and legal arguments put forward by Spain throughout the written and oral proceedings.

When a State commits an internationally wrongful act, that act gives rise to new obligations, in particular the obligation to put right injury suffered. This involves full reparation of the injury caused by the internationally wrongful act, bearing in mind that this involves all injury, whether material or intangible.

There are a number of different types of reparation available. The Applicant has gone exclusively for the compensation option, that is to say the payment of a certain sum of money, and I would say that the sum of money has been calculated in a very sloppy manner, as Spain has shown, using the witnesses and documents put forward by the Applicant.

However, the State responsible for an internationally wrongful act is obliged to make good the damage caused by this act and must provide compensation if the injury cannot be undone. The law on international responsibility would make it possible to carry out material repair, which is normal when ships are involved, if there are no insuperable obstacles standing in the way, such as repair being impossible or disproportionate. The Applicant rejected this option at a very early stage, and that is not surprising. The *Louisa* was and is worth almost nothing. In addition, the *Louisa* has already performed its main task, which was to provide the Applicant with a contact point and a trap to use the law of the sea before this honourable Tribunal.

That is why the Applicant's lawyers are not requesting that the *Louisa* be returned. They have decided to focus on compensation. Well, what damage would be subject to compensation under international law?

International law establishes that compensation must cover all injury that can be assessed in monetary terms.

The valuation rules to be applied in calculating damages vary according to the substance of the primary obligations involved, the conduct of the various parties and, in more general terms, the objective of achieving an equitable and acceptable solution. The calculation of compensation is based on the Applicant's loss of property rights to which they were entitled. This loss is normally calculated according to particular categories of injury. Among those categories you will find, above all, the compensation of the capital value and compensation of loss of earnings – *lucrum cessans*.

Compensation of the capital value of goods that have been confiscated, destroyed or simply damaged because of an internationally wrongful act is normally calculated on the basis of the fair market value of the item concerned. In view of the item that we

are talking about here, the *Louisa*, it does not seem very difficult to calculate its potential market value, which would be extremely low in view of its physical, technical and legal state, having been abandoned by its owners despite the Spanish authorities repeatedly inviting them to work on its maintenance.

In some cases compensation for loss of earnings may be appropriate. International tribunals have taken account of loss of earnings when calculating an amount of compensation. Nevertheless, compensation for loss of earnings in practice is less common than compensation of calculable losses. In this case, the Applicant appears to be claiming the loss of profits from income-generating property – a loss that occurred between the date on which the *Louisa* was detained and the date of the settlement of the dispute.

However, in this case that loss – known in English as lost opportunities damages – turns on an alleged loss of the opportunity to use certain data which supposedly was stored on hard disks. It has been proved by Spain, first, that that data was available to the Applicant from the moment of detention, although Sage's lawyers did not ask the judge for its return until 2011, and, secondly, that the data was not "sensitive", since it was already known to the Applicant before the *Louisa* was detained, or was already in the public domain, available free of charge to all persons genuinely interested in oil prospecting activities.

Those are our general comments regarding international responsibility in this case. Nevertheless, Spain reserves its right to return to the injury allegedly suffered by the Applicant.

Thank you very much for your attention, Mr President, Members of the Tribunal.

THE PRESIDENT *(Interpretation from French)***:** Thank you very much, Mr Jiménez Piernas. Am I to understand that that brings us to the end of Spain's contributions? I will give the floor to Ms Escobar Hernández.

MS ESCOBAR HERNÁNDEZ *(Interpretation from French)***:** Thank you, Mr President. Yes, indeed, that was the last statement in the first round of hearings from Spain. Now that we have finished our pleadings on behalf of Spain, Mr President, may I be allowed to express the gratitude of the Spanish delegation not only for your kind attention but also the patience and cooperation that you have displayed in view of the fact that two of our expert witnesses and experts were speaking in Spanish. The translation was complicated and it made things more difficult for you. Thank you once again most sincerely, Mr President. On behalf of Spain, I can say that we have now finished our first round. Thank you.

THE PRESIDENT *(Interpretation from French)***:** Thank you, Ms Escobar Hernández, for your kind cooperation.

This brings us to the end of the first round of pleadings. We will meet again tomorrow afternoon, Thursday 11 October, at 3 p.m. for the second round of pleadings. We will hear from Saint Vincent and the Grenadines, bearing in mind that Spain will have its second round of pleadings on Friday 12 October, again starting at 3 o'clock.

The sitting is closed.

(*The sitting closed at 5.24 p.m.*)