INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

2010

Public sitting
held on Saturday, 11 December 2010, at 3.30 p.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
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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;*

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

*as Technical Adviser.*
The sitting was called to order at 3.35 p.m.

MR PRESIDENT: I will now give the floor to the Co-Agent of Saint Vincent and the Grenadines.

MR WEILAND: Thank you, Mr President. I would say at the outset that we much appreciate the Tribunal for its ability to respond rapidly to our request for the prescription of provisional measures and for the courtesy and the patience that the Members of the Tribunal have shown over the course of the last two days.

I heard this morning that the Applicant has “constantly endeavoured to confound the rulings of the Tribunal”. I was not aware of that before this morning and assure you that it has not been our intent to confound the Rules of the Tribunal. I – probably just me and not the members of my delegation – was accused of making statements that were wholly out of place in this environment. In fact, I believe the Agent of Spain mentioned I was “absolutely ignorant in matters of diplomatic transactions”. I would say that I have heard that before – usually from my wife – but not about diplomatic transactions, so if I have offended any Members of the Tribunal in addition to the Spanish delegation, I certainly apologize.

But I am a lawyer and advocate. I am not a politician – and, obviously, I am not a diplomat. My role is to enforce the rights of Saint Vincent and the Grenadines to the best of my ability. This afternoon I am going to take on many of the comments that have been made by the Spanish delegation today and in the papers that were filed earlier. I hope that I can do so with sufficient diplomacy so as not to draw their ire to a greater extent.

Let me say that we are disappointed with many of the factual assertions made by the Spanish representatives. We know that they have had a short time to prepare for this hearing and we are confident that none of those were made intentionally, but I do plan to advise you of some of those factual misstatements as we go along here.

I want to address, first, a couple of the more common complaints of respondents who have appeared here before you in other cases and again in this proceeding. You frequently hear the complaint that the Applicant has not exhausted its remedies. We certainly have heard that from Spain. I would say that from a practical or commonsense standpoint, you cannot listen to the evidence and the arguments and believe that there is anything else that Saint Vincent and the Grenadines should have done before bringing this matter to Hamburg. There are always things that they could do. For any applicant there are always things that the applicant could do: another meeting, another phone call, another diplomatic note. But if you are going to insist that the parties negotiate everything to death, then there is no reason for a Tribunal such as this. As I said, from a commonsense standpoint you cannot read those letters to the Ambassador of Spain, the missive from the Marine Administration of Saint Vincent, and consider the numerous visits and meetings with the officials and colleagues, and think that there should have been more antecedents.

We heard from both members of the Spanish delegation: “the owners have made no effort to obtain a release of the vessel. They complained about their innocence in their letters but they never filed anything in court”. Really the “exhaustion” argument...
of Spain is at two levels: the owners of the ships have not exhausted their remedies
in the courts of Spain and the diplomats of Saint Vincent have not exhausted their
remedies on other planes.

I would say that the Spanish delegation may not be aware of some things that have
been filed in the courthouse in Cadiz over the years, because in fact the
representatives of the shipowner have requested specifically that the ship be
released. After hearing that today, therefore, we have put together a couple of
additional annexes for you which have been forwarded to the Registrar.

I would like to ask my colleague to explain the pleading of 22 February 2008
(annex 26) that was filed by lawyers representing the shipowners. The pleading has
been submitted in Spanish and translated into English. I would like to read a portion
of this. Isabel Gómez, for your information, has served as a local counsel in Cadiz in
addition to the Spanish lawyers in Madrid who have been retained. This particular
letter is signed by both Ms Gómez and also by José Antonio Lopez, the principal
attorney in Madrid. The letter says:

Despite being legitimate owners of these ships, my clients suffer complete
ignorance of their current situation.

During a visit carried out by some of their representatives to the port of Santa
Maria they were able to confirm the presence there of the ship Louise in quite a
deplorable state of conservation and the whole information they obtained from
the port authorities was that the ship had been quarantined by the Court to
which I have the honour to present this.

They [the representatives] were unable to find out anything about the ship
Gemini III which was not in the port.

It is easy to understand that the situation of neglect in which these two ships
presumably find themselves produces very serious economic prejudice to their
owners, both from the point of view of their permanent deterioration as because
of their administrative situation before the port authorities.

For these reasons and without prejudice to what Your Lordship may decide with
respect to the legal representation that we have requested …

- and that is a reference to what I hate to call “the battle”, but the great difficulty that
these Madrid lawyers were having obtaining an order from the Court allowing them
to represent Sage –

… we respectfully come to request that we may be informed as soon as
possible of the current situation of the above-mentioned ships; or alternatively,
if were possible, that you order the lifting of the ship’s quarantine so that we
may take the appropriate measures for their maintenance and conservation, in
order to avoid economic prejudices which could become extremely serious.

I would represent to you that they have become extremely serious. Hundreds of
thousands of euro of insurance and lawyer fees and other administrative costs the
owners of these ships have endured since they were improperly quarantined or
detained by the judge in Cadiz.

We would also mention once again that although Spain has referred repeatedly to
the fact that the ships are supposedly evidence of crime, Spain has yet to produce
an order from a Spanish Court detaining the ships. There is nothing in the record
where the judge has ordered the quarantine of the ships, except the message which
you heard about from our expert, who said that in reading the file he saw a letter
from the police that said the judge had ordered the ships sealed or quarantine. But
there is no public order in the record to that effect.

Spain would point you to an order of 29 July 2010, which was neither served on
Saint Vincent and the Grenadines nor the lawyers for the shipowners where the
judge is making some oblique reference to asking the owners how they want to
maintain the ships. You heard Mr Moscoso say, “That was a very appropriate order.
It just should have come four years ago”. We would say that the ships are not
necessary to make a criminal case. The crude analogies that they have made to
some drug trafficking fishing boat is, we would say, merely an appeal, no doubt, to
your concern that by invoking article 290, we are going to start a problem with
coastal States’ arrest of drug traffickers. This is not that kind of a case. With a
normal drug trafficking case around the world, the ships would be seized and their
sale ordered long before this kind of event takes place. These ships are still sitting
there because the judicial establishment in Cadiz does not know what to do with
them.

I said in the early stages of this hearing yesterday that our suspicion was – and still
is – that the judge thought this operation was another treasure-hunting expedition
like the Odyssey Explorer, which made international news. It turned out that it was
not. It was a few pieces of pottery that some divers picked up off the sand at the
bottom of the bay.

They are trapped. What do we do with this case? Let us do nothing. Let us try
doing nothing and just leave the ships at anchor on the dock or pull Gemini III out of
the water and leave it there to dry rot.

Speaking of some pieces of pottery and some treasure hunting implements, they
showed you some metal detectors, some large aluminum sand blasters, and there is
a reference in their papers to compartments for storage and maintenance, no doubt
of pieces excavated from the seabed. That is what they found on the Louisa –
compartments, empty compartments but compartments for pieces of pottery and
artefacts that are excavated from the seabed.

In response to that, we have brought you the official report the judge ordered from
the National Museum of Marine Archeology. This is from the Court file in Cadiz. We
have submitted it to the Registrar as a document this afternoon, which I hope you
have. For the purpose of completeness, we have given you the entire report but for
the purpose of practicality, given the time involved, we have only translated a portion
of it. That portion is right at the end of the report, under paragraph 4, where the
museum administration is summing up its findings about these pieces of pottery that
were turned into it by the police. They say:
It is not possible to evaluate that any of the objects belong to a shipwreck since the museum does not know their origin. The frequency of striations on the objects and the abundance of accretions on them suggest that they were found on the surface of the sea floor and were not buried, since the striations are produced from the friction with the sea floor and the movement of the sea, and the accretions appear when the object is found on the surface of the sea floor and can be colonized by fauna. Therefore, from the objects deposited with the museum, it can only be inferred that they were not buried beneath the seafloor and therefore it was not necessary to remove earth to recover them. Additionally, they remained in that state for sufficient time to be striated, severely in some cases, by the friction of the pieces against the seafloor and the movement of the sea.

We present that to you not in an effort to persuade you to look even more deeply at the merits of the case – we will have another opportunity for that – but to counter specifically the allegations that were made this morning about all of this treasure-hunting gear that was supposedly on board and what the purposes were.

I would also comment in passing that the objects that were identified by the delegation of Spain this morning in pictures were not necessarily taken from the Louisa. There was this investigation that went on for months and people’s homes were searched, et cetera. I do not believe they are here today claiming that those objects came off the Louisa necessarily. Why is that important? That is because if you are judging the equities involved here, it is appropriate for you to look at just what have the Spanish come up with after almost five years. As we enter into year six, what could the Court expect the Spanish to find as new evidence of possible criminal activity? I would suggest to you the answer is “nothing”. There is not going to be any new evidence, so what you have are some antiquities, the value of which is stated in this report, less than 3,000 euro total, and some weapons that were recommended to be put on the ship by the shipping agent at a time now, with the passage of time, when we see more and more piracy, and we know that Spain has authorized the arming of its own merchant ships now. Perhaps that is one of the reasons they have not pursued the arms case that they referred to.

Another critical element in your provisional release cases is urgency and I would like to address the matter of urgency for a few moments because I know several of you have written about that in your opinions and have expressed concern that a provisional measure application should be accompanied by some urgency requirement. We would say that article 290, paragraph 1, does not mention urgency. The word “urgency” or “urgent” is not in paragraph 1; it is in paragraph 5. So by means of elementary statutory construction, I would think that you would attribute some meaning to the fact that the treaty parties inserted the word “urgency” in paragraph 5 and not in paragraph 1. It does have some meaning but we would not concede, of course that the matter is not urgent or that urgency is not an important factor here. The question is: when does the arrest of ships whose environmental threat is real, as we showed with our report from the Hamburg expert yesterday, become an urgent matter that deserves your attention, and we would say that that time is now.

I know that Judge [Chandrasekhara] Rao and Judge Treves have suggested that this
is something that really must be considered in any request under article 290, but I think that if they analyze, and all of you, their colleagues, analyze the facts and the law that we presented, you can easily conclude the matter is sufficiently urgent to warrant some relief.

In some ways, the Spanish delegation presented evidence in an effort to refute our papers that were filed initially that just went too far. In trying to disprove our contentions, they ended up contributing to the actual proof of the matter, which was that our contentions were well-founded. Let me give you some examples of that. One of them I just mentioned: they talked about the compartments on the ship; these empty compartments were meant for artefacts that were excavated from the floor of the bay. Well, they have not brought any excavated artefacts yet. They were very proud of their note verbale that was sent supposedly to Saint Vincent on 15 March of 2006 – that is their exhibit 5, I believe – and yet that is the missive that uses the terms "for entry and registration of the Louisa for any necessary procedures". Our contention is: thank you very much, that is the kind of document that proves nothing for Spain. If I am a clerk, or a diplomat even in Saint Vincent, reading this that came over the wire, I would conclude: "Oh, one of our ships has docked in Cadiz and duly registered with the authorities there". If they are going to send a message diplomatically to Saint Vincent, it would be useful if they spelled out what they have actually done, but that certainly does not do that.

On the other hand, they criticize us for not dealing properly and completely with the courts and for delays. There are statements made both this morning and in their papers about the shipowner actually causing a lot of these delays because he has appealed each and every order of the Court. The poor judge in Cadiz is afflicted by the delaying tactics of this shipowner who will not come to Spain to testify.

I would like you just to consider that claim for a moment. There is a mutual assistance treaty for criminal matters between Spain and the United States; it is used frequently. It should be well known to the Spanish delegation and to the Spanish criminal authorities. Many of the countries from which you hail have similar treaties with the United States and that allows criminal authorities in country A to take testimony in the United States and receive the full cooperation of the United States Department of Justice and FBI if necessary, et cetera.

So what the shipowner suggested to the judge in Cadiz was: there is a treaty for this. I am not going to travel to Cadiz. After all, my consultant spent nine months in jail when he came back to Spain, but we would be happy to be interviewed. One of the letters is included in our initial submission; it is annex 5 (indicating). That is part B. There are two letters in that exhibit. On page 2 of this letter, there is a statement that Mr Foster would be happy to be interviewed. In the first paragraph it says: "There is a treaty between the United States and the Kingdom of Spain which provides for this. However, in this instance since Mr Foster is voluntarily appearing, we would suggest that the testimony can take place sooner if we have a simple agreement about the time and place". The shipowner and Mr Foster and his wife, who own the stock of Sage Maritime, have never been unavailable or unwilling to testify in this matter and have never repeated the process but when a judge orders his presence in Spain without legal justification, yes, he appeals that order and the Court of Appeal
says, "Judge there is a treaty. You cannot order a foreign citizen to travel to Spain". Unfortunately, Mr Foster had to do that twice.

Let me just touch on a couple of other issues that have been brought up by Spain today. There is some confusion, I think, about the permit that was granted to the commercial partner of Sage Maritime, this TUPE or Tupet Society.

I would encourage you to read the description of the permit experience that the Spanish have supplied in their pleadings. The *Louisa* shipowner was unaware that there even were prior permits, but this is an example of Spain providing some extra information, which we appreciate, perhaps thinking that it refuted our position. The fact is, as they have conceded, that permits were granted repeatedly. This permit that Sage Maritime relied on was just another in a series of permits. Today, for the first time, we hear that the permit was really not the correct one; it did not allow the kind of exploration that Sage thought it was entitled to do; but that is in the face of numerous incidents where the Spanish maritime police stopped the boats out in the bay and inspected - but never a word, "You are operating with the wrong permit here".

So we find in an awfully delayed argument, an overdue argument, they come here and say today that the permit was wrong. If the permit was wrong, it is a traffic ticket situation and somebody should have received a fine and been able to go on their way.

They also have suggested that the people who were applying for the succession of permits were really interested in sunken treasure and shipwrecks, but then they go on to say in their pleadings that one of them, a man by the name of Beteta, had a company called Plangas. What was Plangas? According to Spain’s pleading, Plangas’s main and unique business activity was the installation of gas supply to private houses and buildings in the surrounding area. They go on to say at paragraph 19 of their pleadings that this same company, Plangas, filed another application for a permit after hours; it was granted and I believe they were going to lease the *Gemini* when it could not be sold by Sage. They were going to lease the boat and go out in it and prospect themselves. So here you have another company involved in the natural gas business, and yet the Spanish are saying we had the wrong kind of permit. It is a technical defence to our claims at best.

With that, I would ask you to just indulge me one additional moment. *(Pause)* I would note for the record that in our submission today, with the cover letter to the Registrar, we have again submitted the expert opinion of Mr Bernd Holst, whose letter we supplied yesterday about the potential grave consequences of continuing to have the *Louisa* laid up the way it is.

*(Pause)* If I could have one moment, Mr President? *(Pause)* My colleague has reminded me that we received a note relating to article 287. I would say, Mr President, that we were not aware that the Spanish delegation was actually complaining about the contents of our submission under article 287, but rather the timing: that the submission or the declaration jurisdiction came too late. We certainly think that substantively it was proper, and the Rules specify a time when it needs to be filed. I think that Saint Vincent and the Grenadines, after deciding to pursue this action,
realized that although it had taken advantage of the Convention already on occasion, it did not have a declaration on file with the Treaty Section of the UN which was sufficient to cover this proceedings, so they put one together and filed it. As I said yesterday, they actually submitted it some time before that via a signature of the Attorney General. The Treaty Section informed us that we had to obtain the signature of the Foreign Minister or the Prime Minister, so it was resubmitted.

I do not think there is anything else to be said about that. In all other respects, the declaration is adequate.

Later today, we will read into the record our final submission. For now, I would just say that the Tribunal has at its disposal a very valuable piece of legislation in Article 290. It is a resource that can be used for the benefit of flag States around the world, when it is exercised in the proper case. We think that this is that case and we would urge you to consider that it is time to free the *Louisa* and its tender.

**THE PRESIDENT:** Thank you very much. Mr Weiland, as I said this morning, at the close of the statement there is a formality to be complied with. It is referred to in article 75, paragraph 2, of the Rules of the Tribunal, which I quoted this morning, in which I said:

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.

Your last statement is now, so I would ask you to be kind enough to present your petition at this stage in accordance with article 75, paragraph 2. Thank you.

**MR WEILAND:** Thank you, Mr President. I am sorry about the confusion. I was under the impression that it was the very last item of business for the Tribunal.

In accordance with article 72, paragraph 2, of the Rules of the International Tribunal for the Law of the Sea, Applicant Saint Vincent and the Grenadines makes the following final submissions.

The Applicant requests the Tribunal, by means of provisional relief, to:

(a) declare that the Tribunal has jurisdiction under Articles 287 and 290 of the Convention to hear the Request for Provisional Measures concerning the detention of the vessel, the *M.V. Louisa*;

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

(c) order the Respondent to release the vessel *Louisa* and its tender, the *Gemini III*, upon such terms and conditions as the Tribunal shall consider reasonable, but without bond or other further economic hardship;
(d) order the return of scientific research, information, and property held since
2006;

(e) prescribe such other provisional measures as may be appropriate such as
issuing an order requiring the Spanish Agent to meet with the Applicant’s Agent
or representatives to resolve the matter, or other important measures; and

(f) order the Respondent pay the costs incurred by the Applicant in connection
with this Request, including but not limited to Agents’ fees, attorneys’ fees,
experts’ fees, transportation, lodging and subsistence.

Respectfully submitted, G. Grahame Bollers, Agent.

It is signed by myself, as Co-Agent, and it also indicates Mr Christoph Hasche as
local counsel.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Weiland.

The proceedings will resume at 7 p.m. today. The sitting is now closed.

(Adjournment)