Minutes of Public Sittings – Procès-verbal des audiences publiques

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

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 10, 11 AND 23 DECEMBER 2010

The M/V "Louisa" Case
(Saint Vincent and the Grenadines v. *Kingdom of Spain),*
Provisional Measures

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DES 10, 11 ET 23 DÉCEMBRE 2010

Affaire du navire « Louisa »
(Saint-Vincent-et-les Grenadines c. Royaume d'Espagne),
mesures conservatoires

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the revised verbatim records.

En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux révisés.

Note by the Registry: The revised verbatim records are available on the Tribunal's website at www.itlos.org.

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Minutes of the Public Sittings held on 10, 11 and 23 December 2010

Procès-verbal des audiences publiques des 10, 11 et 23 décembre 2010

PUBLIC SITTING HELD ON 10 DECEMBER 2010, 2.30 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK; *Registrar* GAUTIER.

Saint Vincent and the Grenadines is represented by:

Mr S. Cass Weiland, Esq.

as Co-Agent and Advocate;

and

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,

as Agent, Counsel and Advocate;

and

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,

as Adviser;

M/V "LOUISA"

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

as Technical Adviser.

AUDIENCE PUBLIQUE DU 10 DÉCEMBRE 2010, 14 H 30

Tribunal

Présents : M. JESUS, *Président*; M. TÜRK, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; M. GAUTIER, *Greffier*.

Saint-Vincent-et-les Grenadines est représenté par :

M. S. Cass Weiland, Esq.

comme co-agent et avocat;

et

M. William H. Weiland, Esq.

comme avocat;

M. Christoph Hasche,

comme conseil.

L'Espagne est représentée par :

Mme Concepción Escobar Hernández,
professeur et conseillère juridique, Ministère des affaires étrangères et de la coopération,

comme agent, conseil et avocat;

et

M. Mariano J. Aznar Gómez,
professeur, département de droit international, Université « Jaime I » (Castille), Espagne,

comme conseil et avocat;

M. Esteban Molina Martín,
responsable des questions de réglementation, direction générale des affaires maritimes, Ministère des travaux publics,

comme conseiller;

M. José Lorenzo Outón,
conseiller juridique adjoint, Ministère des affaires étrangères et de la coopération,

comme conseiller technique.

Opening of the Oral Proceedings
[PV.10/05/Rev.1, E, p. 1–2, F, p. 1–2]

The President:
On 24 November 2010, an Application instituting proceedings before the Tribunal was submitted by Saint Vincent and Grenadines against Spain in a dispute concerning the *M/V Louisa*. The case was named *The M/V "Louisa" Case* and entered in the List of cases as Case No.18. On the same day Saint Vincent and the Grenadines submitted a Request for the prescription of provisional measures under article 290, paragraph 1, of the United Nations Convention on the Law of the Sea.

This public sitting is being held to hear the parties present their arguments in the *M/V "Louisa" Case* in respect of the Request for the prescription of provisional measures.

I call on the Registrar to read out the submissions of Saint Vincent and the Grenadines as contained in its Request.

The Registrar:
The Applicant requests the Tribunal to prescribe the following provisional measures:

(a) declare that the Request is admissible;
(b) declare that the Respondent has violated Articles 73, 87, 226, 245 and 303 of the Convention;
(c) order the Respondent to release the M.V. Louisa and the Gemini III and return property seized;
(d) declare that the detention of any crew member was unlawful; and
(e) award reasonable attorneys' fees and costs associated with this request as established before the Tribunal.

The President:
On 24 November 2010 a copy of the Request was transmitted to the Government of Spain. By Order of 30 November 2010 the President of the Tribunal fixed 10 December 2010 as the date for the opening of the hearing of the case. On 8 December 2010, Spain filed its Statement in response regarding the Request of Saint Vincent and the Grenadines.

I now call on the Registrar to read the submissions of the Government of Spain.

The Registrar:
The Respondent requests the Tribunal:

(a) to reject the prescription of provisional measures requested by Saint Vincent and the Grenadines; and
(b) to order the Applicant to pay the costs incurred by the Respondent in connection with this request, including but not limited to Agents' fees, attorneys' fees, experts' fees, transportation, lodging, and subsistence.

The President:
In accordance with the Rules of the Tribunal, copies of the Request and the Statement in response are being made accessible to the public as of today. The Tribunal notes the presence in court of Mr S. Cass Weiland, the Co-Agent of Saint Vincent and the Grenadines, and of Ms Concepción Escobar Hernández, the Agent of Spain.

Mr Grahame Bollers, the Agent nominated by the Applicant, informed the Tribunal yesterday that he had to appear in court in Saint Vincent and the Grenadines on an "extremely urgent matter" and, therefore, was unable to attend the hearing today.

I now call on the Co-Agent of the Applicant to note the representation of Saint Vincent and the Grenadines. Mr Weiland, please tell us of Saint Vincent and the Grenadines.

Mr Weiland:
Thank you, Mr President. I confirm that I have the power to proceed, and I reiterate that the primary Agent, Mr Bollers, expresses his great regrets.

The President:
Thank you very much.

I now call on the Agent of Spain to note the representation of Spain.

Mme Escobar Hernández :
Merci, Monsieur le Président.

C'est un grand plaisir et un grand honneur d'être ici aujourd'hui, devant vous, pour vous présenter la délégation de l'Espagne. Merci.

The President:
Thank you Ms Escobar Hernández.

I now request the Co-Agent of Saint Vincent and the Grenadines to begin his statement.

Argument of Saint Vincent and the Grenadines

STATEMENT OF MR S. CASS WEILAND
CO-AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.10/5/Rev.1, E, p. 2–9]

Mr S. Cass Weiland:
Thank you, Mr President. May it please the Tribunal: I am Stephen Cass Weiland, and I am privileged to represent, as Co-Agent, Saint Vincent and the Grenadines in this Application for provisional measures.

Before I begin I would like to introduce formally the members of our delegation. With me today is Mr William Weiland. There is no coincidence about the name: he actually is my brother, and he has been a very able member of the delegation and has contributed mightily to our efforts. Also together with me at the counsel table today is Mr Christoph Hasche, an international lawyer based in Hamburg; and a member of his firm, a lawyer-to-be who is in the courtroom today, Ms Jennifer Kunze.

I would be remiss in not mentioning that my partner Robert Hawkins and my able long-term assistant Martha Rose have contributed tremendous amounts of time and energy to this application. As I said a moment ago, Mr Bollers, our primary Agent, expresses his regret that he cannot be here. He was due to arrive on Thursday afternoon, and the Prime Minister asked him to please stay and appear in court. Monday is the national elections in Saint Vincent and the Grenadines and there was a matter of extreme urgency that required his presence. My other Co-Agent is Ms Rochelle Forde, a very superb lawyer in Saint Vincent and the Grenadines, and a member of the legislature.

We have an extraordinarily tight schedule. There is a limited time allocated to our presentation and I intend to keep on that schedule and indeed give back some of my time this afternoon no doubt.

I think that starting with an outline of our position in this case would be useful despite our scheduling issues. I want to start by showing you what has brought us here today, if my assistant, Mr Travers Whittington, would display exhibit 1A. This is the *M/V Louisa*, a ship constructed in 1962, which was refurbished and set up by its owner to undertake some scientific investigation in the Bay of Cadiz, specifically looking for oil and gas deposits and, even more specifically, methane gas. The industry information is replete with commentaries that there are well-founded suspicions that there are very large methane deposits in the Bay of Cadiz, and the owner of Sage Maritime, the operator of the *Louisa*, is in the oil and gas business and undertook to explore in the Bay.

What has happened is that we have (exhibit 1A) the *Louisa* today. After arriving in Cadiz in 2004 the ship was seized by the Spanish authorities on February 1, 2006, and the ship was still at dock in Puerto de Santa Maria, which is adjacent to Cadiz.

The fact that we are nearing year six of this ship's captivity is a critical consideration to our case because as our evidence will show, we have no other place to go: this is the literal court of last resort for Saint Vincent and the Grenadines as the flag State and for the ship's owners. The evidence will show that they have tried every manoeuvre and legal mechanism possible in order to secure the ship's release.

We have filed a case on the merits and are seeking some $10 million in damages. That is not a subject of today's hearing. The Spanish papers have taken great pains to point out that the merits of this case are not before you today. We agree. We agree with that conclusion: of course they are not. However, what are before you are the issues relating to the analysis of the rights of the parties under article 290, paragraph 1. During the course of the afternoon we will explore that with you in detail and recount for you what we believe are the salient points

that entitle us to an order releasing the ships; and we address in this case not only the *Louisa*, which is flagged in Saint Vincent and the Grenadines, but also its tender, a work boat (exhibit 2) *Gemini III*.

Gemini III is not flagged in the Grenadines. Admittedly, it is probably registered in the United States. It is only 11 metres long but it does have value and it has been laid up now for almost five years.

The case that we are going to discuss this afternoon will address the equities of the two parties. Without going into the merits deeply we are going to describe for you why we think the equities in this case all lie with Saint Vincent. The papers that the Spanish have filed not only do not present a compelling reason for Spain to continue to hold these vessels; in our opinion, they do not articulate any reason why the vessels need to continue to be held.

We suspect that flag States like ours are extremely interested in the outcome of this case because there is an increasing propensity on the part of coastal States to seize vessels and hold them almost for ransom. There are recent reports about certain Mediterranean States seizing vessels on trumped-up charges and extorting payments for their release. That is not the case here and we are not addressing that, but we do believe that flag States world-wide are interested in this case to be decided under article 290.

The Tribunal has decided several prompt-release cases under article 292, and I do not think it is a stretch to suggest that there is some tension in the court over the length and breadth of article 292. It appears to deal only with pollution matters and fishing matters, and yet the very first case decided by this court dealt with bunkering of fishing vessels at sea. In that case Saint Vincent and the Grenadines, my client, asked the court to consider an expansive reading of article 292 – but let us not confine article 292 to just fishing incidents and pollution incidents.

While that point was not really reached in the *M/V "SAIGA" Case* because the court determined, I believe by a vote of 12 to 9, that the activities of a coastal State fit within the parameters of article 292 as written, there were suggestions by Members of the court:

> We do not need to read article 292 in an artificial way, in an overly expansive way, because we have article 290.

Judge David Anderson wrote:

> Part XV of the Convention is available to the flag State Party in the event of any abusive use by a coastal State Party of its powers of arrest and prosecution, whether on smuggling or any other criminal charges.

That, gentlemen, is what I suggest we have here. We have a situation where article 290, of course as part of Part XV of the statutes, is the exact vehicle for you to lay down some ground rules, and indeed some new law on under what circumstances a flag State can secure the release of its vessel.

Continuing the preview of what I expect to cover this afternoon, I will present to you one expert who will testify about the circumstances under which the ships, the *Louisa* and *Gemini III*, were boarded and searched on February 1, 2006. It is a rather curious set of procedures followed by the Spanish judge, and I would represent to you that we have the same judge in Spain who apparently launched an investigation of the activities of the *Louisa* some six months before issuing the order to have her boarded.

Really, this dates back to October 2005. The same judge has allowed this case just to drift, despite inquiries from the ship's owner, repeated inquiries. We will lay those out for

you, so that you will have no doubt that the owner and the flag State had made every effort to exhaust their remedies before coming here to you.

Let us begin with some analysis of what happened here and why we are entitled to relief. Exhibit 26 is another view of the ship as it was a few months ago. The *Louisa*, as I indicated briefly earlier, was rehabilitated in Jacksonville, Florida, and sailed to Cadiz in 2004. We have some pictures of the *Louisa* in exhibits 1A, B and C which show the refurbishment of the ship. The expedition that was being mounted here is critically important because there are provisions under statute that apply to scientific endeavours by vessels and, indeed, that relate to archaeological and historical items that may be at stake in the coastal seas.

I use the words "exhibit" and "annex" interchangeably, so please excuse me.

Annex 31 relates to the underpinnings of the idea of the shipowners to embark on this expedition. This is simply a map of the Bay of Cadiz which has many notations on it which suggest that there are methane deposits there. The idea, as explored by the man who owned the stock of Sage Maritime, Mr John Foster, who, as I mentioned, was in the oil and gas business, was to utilize a procedure that is extremely popular in the United States now, and that is that he would mount some drilling rigs on the shore and drill horizontally into the bay in order to tap these methane reserves. This procedure has been wildly successful in various parts of the world. Indeed, the technology has advanced so far that these horizontal drilling efforts can extend more than 50 miles. That was the idea. Mr Mark McAfee, who owns the consulting company dealing with Sage, wrote a letter (page 3 of this exhibit) explaining to Mr Foster what he had in mind. What he had in mind involved some particular pieces of equipment which apparently were heretofore unknown to the Spanish. If you would look at paragraph 1 of this exhibit, Neftco Exploration was suggesting that Foster use a piece of equipment called a "digital cesium magnetometer". He even gave him the type of specific model that he would propose to use. This magnetometer together with a sonar device (also referenced in this first paragraph of the letter written at the end of 2003) were items that were going to be towed in the Bay of Cadiz. It just so happens, as Spain has pointed out, magnetometers apparently are also used for treasure hunting. I can assure you that Sage Exploration was interested in methane gas. The last page of this exhibit is a chart provided to Sage, prior to the acquisition even of the vessel, which showed the manner in which the area would be first mapped and then analyzed for the purpose of tapping into these methane reserves.

The evidence suggests that after the ship arrived in Cadiz and was used for a period of time it was decided that it was not the right size, that this vessel was not going to work. They needed a much smaller vessel that would be able to tow these devices in the bay, so they acquired the *Gemini III*. After first they experimented by leasing someone else's work boat, *Gemini III* was acquired, I believe in the Netherlands, was removed down to the Bay of Cadiz and was used extensively to explore the bay. In the meantime the *Louisa* was docked and seldom moved. This investigation started, we believe, because Sage had contracted with a company called Tupet. It was represented to Sage, the shipowner, that Tupet had the proper permit from the Spanish Government that would permit this type of preliminary activity. It was also apparent that Tupet had acquired earlier permits and was somewhat known to Spanish authorities because they were able to secure a permit that extended their time and allow this new expedition to be launched. Spain in its papers, although they eschew the notion that the merits of the case are really at stake here, takes great pains to point out that the owner of the Tupet company was really a treasure hunter or was known to be interested in shipwrecks and that sort of thing, and that is a fact which we would stipulate to – perhaps they were – but the permit allowed the kind of exploration that Sage was interested in and so

they went forward. No doubt Sage's partnership with this company attracted increased attention from the Spanish authorities.

As you will hear at some point today, I am sure, consistent with this timeframe – unfortunately for Sage – a gigantic international incident occurred with respect of another company. The *Odyssey Explorer*, an admitted treasure hunting ship owned by US interests, was seized by the Spanish and accused of plundering some of their shipwreck sites illegally. We submit, by the way, that that legal activity emanated from no other place than Cadiz. There was a judge right down the hall in the courthouse in Cadiz dealing with the *Odyssey* and then Judge De Alegre apparently is advised that there is some shipwreck hunter out there known to own this Tupet company and he should look into them. For whatever reason, Sage gets caught up in this and here we are ending our fifth year of captivity with no evidence that the company Sage disturbed the patrimony of Spain in any way. The judge and the prosecutor just never made a case. After issuing an order on February 1 to search these two ships the judge had one of the crewmen, a man called Mario Avella (that is Avella, not Aveya – he is a US citizen of Italian extraction) arrested. Avella, who was in Spain and had come back to Spain from the United States to check on his daughter's status (because Spain also had his daughter arrested because she was on board the *Louisa*), ended up in jail for nine months. That is part of our ultimate damage case.

From the judge's order of February 1, where he has the police search the vessels, he actually considers the question of whether notice should be given to the flag country, and he rejects the idea. He decides that. There is language in this order, quite peculiar, that because there is a proliferation of flags of convenience countries, it is not necessary in this case to warn anybody or advise any consulate, to send any diplomatic note, just go out and search and board the vessels and search them. You will hear from Mr Moscoso that this is an absolute violation of Spanish law. To this day, we have never seen a subsequent order from the judge that actually authorized the quarantine of the vessel, the detention of the vessel. There are some things in the file where the port authority is reporting that the judge has ordered the detention of the vessel but we have never seen an order. Indeed, before I think it was Thursday night we never saw the order which is Spain's exhibit 9, supposedly issued in July 2010 – a very, very interesting order which we will cover later today and that will be addressed by Mr Moscoso.

Finally, I would mention, because there is a question propounded to us about an order issued by the judge, I believe on 27 November/29 November, this year, that we have never seen that order either. It was not included in the Spanish exhibits; it was just referenced.

If we analyze article 290, paragraph 1 (exhibit 22), we see that you are really faced with deciding two issues: can you prescribe some provisional measures to preserve the respective rights of the parties or to prevent serious harm to the marine environment? We suggest to you that the evidence in the case is going to show that Saint Vincent and the Grenadines satisfies both parts of article 290, paragraph 1. Why? Because the equities, the balancing that was really required of you under the rubric of protecting the respective rights of the parties, tilts completely in favour of Saint Vincent and the Grenadines. There are really no equities left for Spain after five years as to why they should hold these vessels.

On the environmental side, we would suggest to you that we have a 1962 model former ferry boat which has led a rather stressful life. It is laden with, we know, 5,000 gallons of lubrication oil, because it was put on the ship shortly before it was seized, and, I am told, amounts of diesel fuel. The Spanish suggest that that is no problem to the environment because we have someone monitoring whether the ship, I guess, is leaking any of this oil yet. We have not heard from them as to what they are doing to ensure that the ship stays at its moorings, but a large storm might move on to Puerto de Santa Maria area and break this ship off and let it drift out into the bay. We suggest to you that there is a definite threat to the

environment by leaving this ship docked in Puerto de Santa Maria for any significant additional time.

The other antecedent requirements of article 290 relate to a duly submitted dispute, which of course you have here, for which the Tribunal has jurisdiction under article 287. We can look at annex 10 and see the declaration of the Foreign Minister. I would say to you that Spain has complained that the declaration of the Foreign Minister of Saint Vincent came almost simultaneously with the filing of the action. In fact, Saint Vincent was most eager to file this action once it realized what had been going on here. I can barely describe the incredulity of the maritime authorities in Saint Vincent when they realized that one of their ships had been detained for some four years by the time they were first advised of it. We will review that evidence of the correspondence between Saint Vincent's Maritime Agency and Spanish authorities. In fact, however, the declaration was initially submitted, as some of the administrators of the Tribunal are aware, by the Attorney General of Saint Vincent, initially about two weeks before this, and the UN Treaty Section rejected that on the basis that the Attorney General was not an appropriate or satisfactory person; it had to be the Prime Minister or the Foreign Minister.

So, once that was submitted, the case was ripe for filing. We would say that we have a *bona fide* dispute here based on the claims that we are making in the underlying case. If you look at the provisions of your statutes that we are claiming had been violated, I think that you would agree that we have a *prima facie* case on several grounds. Article 87 of the [Convention] (annex 17) speaks to freedom of the high seas. This ship has been denied access to the sea for, as I said, we are beginning the sixth year of the denial of access to the high seas. In the statute, article 245 (annex 19) relates to the conduct and promotion of scientific studies. We would say that we are in full agreement that a coastal State can control that activity. We thought the shipowner in Saint Vincent, the flag country, would say, "We thought we had the proper permit to conduct scientific studies. Apparently for want of the proper permit, we have been detained for five years". The same kind of comment could be said with respect to article 303 relating to archaeological and historical studies. Article 303 talks about the right of a coastal State to regulate that kind of activity as well. Being fully aware of that, Saint Vincent's response would be: "What kind of a permit do you really need that will help you avoid arrest and detention for five years? Is this not a traffic ticket situation?" especially when there are no valuable artefacts that were recovered. You know of course that Spain's investigation of the *Louisa* also relates to the fact that there were weapons on board the ship. I read with great interest the disdain of Spain when they responded to our papers about why the weapons were on the ships. I do not think I need to really provide much analysis to describe to this august panel about the 21st century phenomenon of piracy. The record shows that Sage is not a professional shipping company; it relies on suggestions, information, consulting from outside sources. Sage hired what they thought to be one of the most experienced and indeed famous shipping management companies in the world, Seascot. Seascot suggested putting some weapons on board; it is dangerous out there, not necessarily in the Bay of Cadiz but if the ship is routed to the east coast of Africa, into the Mediterranean somewhere, have a few rifles on the ship. The evidence will show that the owner of the vessel proceeded to procure the weapons that were suggested and did so in a manner completely consistent with US law. We have exhibits 24 and 25 that we have submitted to the Tribunal that merely show the manner in which these weapons were procured – open and obvious, in complete compliance with US law. Weapons were put on board for protection. By the way, only the Captain had the key to the locked gun compartment in the hold of the *Louisa* but in order to seize the weapons, the Spanish had to blow open the locked gun compartment in the hold of the ship. So we have always contended that there was a completely specious

argument that somehow the owners of the *Louisa* had violated Spain's laws relating to weapons.

Let me move on to talk about one of Spain's primary complaints and that is our perhaps over-reliance on the analogy between articles 290 and 292. We have suggested to the Tribunal that the case history of article 292 is perhaps instructive, perhaps useful, for you to consider as to whether or not provisional measures are available to us under article 290, and again perhaps we have over-relied on the analogy because this is not an article 292 case. We are not suggesting that but there are aspects of the analysis that the Tribunal has been through in the past cases. You have had many prompt release cases, far more than you have ever had under article 290, where the issue was release of a ship. In fact, I am not aware of one that you have had except perhaps the first, the *M/V "SAIGA" Case*, that was somewhat unclear.

In any event, we described some of the bases for relief under 292 in our papers such as "has the ship been held long enough?" and the answer is: obviously it has, and what other provisions, at least in case law under article 292, might be useful to look at and support the position of Saint Vincent? Again, we think that the Tribunal has an opportunity here to embark on a whole new agenda with respect to article 290 and flag States around the world are waiting for some relief under article 290, I believe because you have the authority, and we are asking you to make use of it in this case.

The Tribunal has traditionally been wary of extending its authority artificially, and the dissents in the *M/V "SAIGA" Case* have addressed those at some length, but we suggest to you here that the relief that we are seeking, if granted, would not be placing the Tribunal in some far off, inappropriate kind of area, that you can grant relief in this case and still be considered as a conservative implementation of article 290. The facts are just that much in favour of the flag State.

Really, as you are going to hear, Saint Vincent has been faced with, I guess you would say, a dysfunctional court system in Spain. How else could you describe the fact that few if any artefacts were ever discovered on board the *Louisa*? We have never heard exactly what they claim was recovered by personnel who were on the *Louisa* or on the *Gemini*. We never heard what areas of the bay these artefacts were supposedly taken from. What we have heard from the investigatory file or seen in the investigatory file is that all of the artefacts that the Spanish police were able to put together, whether they were seized from homes of some of the suspects, the Spaniards that I referenced earlier, or taken off the deck in plain view on the *Louisa*, all of those artefacts together were valued at under 3,000 euro.

Unless there are questions at this point, I would like to call Javier Moscoso as an expert, Mr President.

The President:

Thank you, Mr Weiland.

I now call upon the Registrar to administer the solemn declaration to be made by the interpreter and by the expert authorized by Saint Vincent and the Grenadines.

Examination of expert

MR JAVIER MOSCOSO, EXAMINED BY MR S. CASS WEILAND
CO-AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.10/5/Rev.1, E, p. 9–15]

Registrar:
Before the expert is called upon to make the solemn declaration, I call upon the interpreter provided by Saint Vincent and the Grenadines to interpret the testimony of the expert from Spanish into one of the official languages of the Tribunal, into English, to make the solemn declaration under article 85 of the Rules of the Tribunal.

The interpreter is sworn in (in English).

Mr Javier MOSCOSO is sworn in (in Spanish).

Mr Moscoso:
(Interpretation from Spanish) Your Lordships, if I may, before we move on to the examination -

The President:
You will have an opportunity when questioned by Mr Weiland to make the considerations you are about to make.

I now give the floor to Mr Weiland, advocate for Saint Vincent and the Grenadines, to start the examination of the expert.

Mr Moscoso:
(Interpretation from Spanish) Your Lordship, if I may, I wanted to greet the Tribunal, the President and all the members of this high Tribunal. I would also like to greet the delegation of Spain, my country. I know very well the responsibility and the honour it is for me to be here. As a member of Spain, I want to greet you.

The President:
Thank you.

Mr Weiland?

Mr S. Cass Weiland:
Mr Moscoso, can you hear and understand my question?

Mr Moscoso:
(Interpretation from Spanish) No, I am sorry, I do not hear the interpretation. *(The earphones were adjusted.)*

Mr S. Cass Weiland:
You are Javier Moscoso?

Mr Moscoso:
(Interpretation from Spanish) Yes.

Mr S. Cass Weiland:
Would you tell the Tribunal briefly your educational and professional background?

Mr Moscoso:
(Interpretation from Spanish) I am a Doctor of Law. I am retired now but I have been a member of the prosecution of the Ministry of Spain. I was Attorney General of Spain. I have been Speaker in the Parliament of Spain and a Minister for the Presidency during the first government of Mr Gonzales. Very briefly, that is a little of my career.

Mr S. Cass Weiland:
So you have served as a law professor and you have served in the executive branch of the Spanish Government?

Mr Moscoso:
(Interpretation from Spanish) Not a law professor, no. Years ago I was in charge of the Chair of Criminal Law at the University of Navarro and, yes, I have worked in the executive branch of the Government of Spain.

Mr S. Cass Weiland:
At one time you served as the Attorney General. Is that correct?

Mr Moscoso:
(Interpretation from Spanish) Yes, that is correct. For four years I was Attorney General.

Mr S. Cass Weiland:
Are you generally familiar with the facts of this case?

Mr Moscoso:
(Interpretation from Spanish) About one year ago, I was asked to give a legal opinion on the facts of the case. I studied the legal acts that were available. The defence of Mr Foster and the defence of Sage Maritime made available those documents to me. I also had a meeting with the prosecutor and with the judge in order to greet them and also to have another view on the facts and that is how I know the case because I studied the documents and I gave a legal opinion and that is how I came to know the case.

Mr S. Cass Weiland:
Were you asked by the Spanish lawyers for Sage to give that legal opinion?

Mr Moscoso:
(Interpretation from Spanish) Yes, the Spanish lawyers.

Mr S. Cass Weiland:
As part of your review of the facts of the case, have you had occasion to read and understand the details of what happened on February 1, 2006, when the *Louisa* and the *Gemini* were boarded and searched?

Mr Moscoso:
(Interpretation from Spanish) If my memory does not fail me, I think that is indeed the date when the ships were boarded and searched.

Mr S. Cass Weiland:
In your opinion as an expert in Spanish law and procedure, was the boarding of the *Louisa* legal?

Mr Moscoso:
(Interpretation from Spanish) I remember that the legal opinion I wrote gave special attention to that issue and in my opinion the acts when entering and searching were not legal, not correct from the legal point of view, and they were not correct because I understand that they took place without fulfilling Article 561 of our criminal law, which establishes the procedures for these sorts of things.

Mr S. Cass Weiland:
I will show you annex 27, which is a reproduction of the Spanish Article 561 that you have just referred to, in both Spanish and English. I know you are familiar with it yourself, and I would ask you to explain to the Tribunal what it was about the search and boarding of the vessels that makes the actions of the Spanish police illegal.

Mr Moscoso:
(Interpretation from Spanish) I would say it like this. The actions of the Spanish police were not illegal because they had an authorization from the Spanish judge. I think that the resolution of that judge in itself did not fulfill this law because it required either the authorization of the captain, or it needed to communicate the intention to the consulate of the country of flag. That was something that did not happen; the judge did not do this because in his opinion, as we can read from the justifications of the order of search, the article that we quote was not applicable. He says a series of things that I cannot share, but in his opinion he said that Article 561 is not to be applied. In my opinion, it is in force and it must be applied.

Mr S. Cass Weiland:
One of the things that the judge said in his order was that there was no need to notify the flag country because there was a proliferation of flags of convenience now. Is that not correct?

Mr Moscoso:
(Interpretation from Spanish) That is the opinion of the judge. I do not share that opinion.

Mr S. Cass Weiland:
But that was the judge's statement – correct?

Mr Moscoso:
(Interpretation from Spanish) In the resolution that orders the boarding and search, yes, the judge does make that declaration.

Mr S. Cass Weiland:
I think it is uncontroversial in this case that there was no notice to any authority in Saint Vincent prior to the boarding, and there was no permission from the captain, because the captain, who was employed by Seascot, had returned to Hungary. Is it your position that the boarding of the ships was improper or the judge's order in the boarding of the ships is improper absent one of those two things?

Mr Moscoso:
(Interpretation from Spanish) In my opinion, it was procedurally incorrect.

Mr S. Cass Weiland:
I ask you to consider some recent litigation in Spain over a treasure-hunter whose ship was called the *Odyssey Explorer*: has there been an opinion from a Spanish court relating to Article 561 in the *Odyssey* situation?

Mr Moscoso:
(Interpretation from Spanish) I imagine you are making reference to a sentence that I happen to know because I am interested in these matters, because the issue has come out in the press. I do not have the sentence to hand right now. If I remember correctly and I am fairly sure that I remember correctly, the captain of that ship, the *Odyssey*, was accused of disobedience because he opposed the search of his ship. There was a case in the Court in Cadiz and he has been considered free of all charges because according to this paragraph 561 of our law, he had the right to deny access to the police to search his ship, and the authorities had to consult the consulate of the flag country. That is what I remember from each case.

Mr S. Cass Weiland:
I would represent to the court that the opinion, the excerpts of which are reproduced at exhibit 29 in our papers, essentially are from a ruling that the captain of the *Odyssey Explorer* could not be prosecuted for denying entry on his ship, because the Spanish authorities had failed to give notice to the Bahamas, which is the flag country for that ship. It was a very highly publicized situation in Spain.

(To the witness) Now, I would ask the expert if he is aware of any effort by the judge in Cadiz in this case to notify Saint Vincent and the Grenadines of his intention to allow the boarding of the ship.

Mr Moscoso:
(Interpretation from Spanish) This is a question for me?

Mr S. Cass Weiland:
Yes.

Mr Moscoso:
(Interpretation from Spanish) In the documents that I could examine, before the police entered the ship there was no communication – in the documents that I was able to examine, at least – of anything in this sense. Some days later I do remember that the consulates of the different countries of the two ships were notified. That is what I know from the documents that I received from the lawyers' office in Madrid. That intention to notify the country came some days after the ship was searched, and in my opinion it should have come before the searching of the ship.

Mr S. Cass Weiland:
Can I ask you about the notification of Saint Vincent? I would ask my assistant to put Spain exhibit 5 up if he could. I will show you a better copy. *(Same handed)*

Mr Moscoso:
(Interpretation from Spanish) It is in English. Embassy of Spain; 2006; 15 March 2006 …

Mr S. Cass Weiland:
This is the document submitted by Spain allegedly relating to notification of the flag country, is it not?

Mr Moscoso:
(Interpretation from Spanish) It is the first time I see this document. I have no opinion on it.

Mr S. Cass Weiland:
Are you aware of any other document that Spain claims was used to notify the Saint Vincent authorities of the boarding of the ship?

Mr Moscoso:
(Interpretation from Spanish) No, but I would like to insist with respect to the legal opinion I drafted, I did take much care to search whether there was a previous notification and I can say that there was not. There were no previous notifications – later notifications, yes, but previous notifications, which is what matters for the legal opinion that I submitted, there was no type of previous consultation or previous notification, and I actually studied that quite in detail. I found no previous notification of any sort.

Mr S. Cass Weiland:
I come to the issue of quarantine or detention of the two ships. Have you seen an order from the Court specifically having the *Louisa* quarantined?

Mr Moscoso:
(Interpretation from Spanish) There was a declaration of the port police saying they were quarantining the ship by order of the judge, but I did not actually see that document from the judge. I do not know whether that order was an oral order or whether it was a written order. I have certainly never seen a written document, and it was not in the documents that I received.

Mr S. Cass Weiland:
In your opinion, was the quarantine appropriate under Spanish law?

Mr Moscoso:
(Interpretation from Spanish) Quarantine is not specifically regulated in our procedural laws. It is usually a measure that is taken in order to preserve items of evidence. It can also be used to stop illicit activities, for example. It is usually of very short duration. When a judge, whether it is an investigation judge or another, is informed of the possibility of a crime or a crime, that judge may make use of this quarantine, but it is not usual for that quarantine to be prolonged in time, and much less for several years. This is extremely rare and, frankly, I have never seen another case like this.

Mr S. Cass Weiland:
Was it possible for the Court in Cadiz to order some kind of less offensive relief other than to hold the ship for such a long time?

Mr Moscoso:
(Interpretation from Spanish) I think so, yes, because you see the problem is that if the judge in Cadiz understands that the ships are instruments of a crime – I do not share that opinion; I do not think they are instruments of a crime – but if the judge considers they are instruments of a crime, then he should apply Article 127 of our Penal Code. However, in Articles 127 and

128 of our Penal Code, it is said that if it is a matter of goods that have a legal use, they must be put in the hands of the owner or of a third person, imposing obligations on the person who is to be in charge of those goods. They both could be taken by the State only after a sentence, so what I think is appropriate is to have the goods deposed under guarantee. There is specific regulation on the conservation of elements of evidence, and the law understands that when the value of this instrument of the crime is much superior to the object of the crime, which in this case, if my memory does not fail me, was less than €3000 - that was the value estimated for the underwater objects that were found – if there is that imbalance between the value of the proof and the value of the crime, there is an obligation for the judge to place those goods in the hands of the owners. Therefore I think that that quarantine should have been ended very briefly with a motivated judicial decision that those ships would have been placed in the hands of their owners with the guarantees that civil legislation establishes.

The President:
I have been informed that the expert is speaking too fast. Would you slow down so that that might facilitate the interpretation into English of what you say? Thank you.

Mr S. Cass Weiland:
Sir, let me ask you this question before we end – I just have a couple more questions. Spain, in its papers that it recently filed, refers to the ship *Louisa* as if it was a knife in a murder case. That is the language of the Spanish argument. I take it from your opinion that you do not agree with it, but why is the ship not like a knife in a murder case?

Mr Moscoso:
(Interpretation from Spanish) It is often said that in law, everything is a matter of opinion, and this could also be a matter of opinion; but I think that both ships here are carrying out legal activities. They have corresponding permits, so there is a presumption of legality because what they are doing has already been authorized. It is, of course, possible that something other than what had been authorized may have happened, but the fact is that for the crime of which they are accused they do not need these ships. You can use much smaller ships, you can use other equipment. They are not the most adequate equipment for the crime that is being imputed to them. That is on the one hand, but on the other hand it is absolutely out of all proportion to quarantine two ships for almost five years when the value of the ships is so much higher than the value of the objects that were supposedly illegally found on the sea floor. That is the position that I do not share with the Spanish judge.

Mr S. Cass Weiland:
The Spanish delegation has provided us with an order, supposedly issued by the Court in Cadiz on 29 July this year, which we have not seen before; it was never served on Saint Vincent and on the owner. This is exhibit 9. I have a couple of questions about this for you. Have you seen this order yesterday?

Mr Moscoso:
(Interpretation from Spanish) Yes, because you gave it to me last night.

Mr S. Cass Weiland:
For your convenience I am going to give you a copy of that so you can read it. *(Same handed)* The order relates to three separate issues, does it not?

Mr Moscoso:
(Interpretation from Spanish) Yes.

Mr S. Cass Weiland:
This order was not translated for us but the third issue relates to the ships that are at issue in this case. Is that correct?

Mr Moscoso:
(Interpretation from Spanish) Yes, this is the case.

Mr S. Cass Weiland:
Would you tell the Tribunal: what is the judge suggesting there in the last sentence or two of his order?

Mr Moscoso:
(Interpretation from Spanish) First of all, I would like to call your attention to the fact that this is a photocopy that makes reference to an order that has no seal from the Court and is not signed. If this has been brought by the representation of the Spanish State, I admit that it would be genuine, and I trust my country, but I just happen to know that it has no seal or signature. When I read this order, I think that this is what should have happened four years ago, in my opinion. I think this order is fine; it is good; but I think it comes too late.

Mr S. Cass Weiland:
Is the judge suggesting that there are alternatives as to how to handle the *Louisa* in that order?

Mr Moscoso:
(Interpretation from Spanish) Yes. The expression that is used here, which is probably very particular to Spanish law, says *"lo que a su derecho interese"* which means that we have to say what we prefer. The party is given three options. They ask: "What do you want to happen on the maintenance of the ship? Do you want it to be sold or do you want it to be handed over to somebody who would take care of it?" What is happening here is that the judge is asking the owner of the ship to say what would be their preference for the ship.

The President:
Mr Weiland, you had asked the expert to read out the note and I think that was a good thing to do. You have been posing questions about the note but Judges are not privy to the content. Could I ask you to see to it that the note is read out so that we can have the benefit of its content.

Mr S. Cass Weiland:
I am sorry, Mr President, but I did not understand the question.

The President:
The exhibit you have just commented upon was not read out by the expert, so that we could be fully aware of the content and, therefore, understand very well the questions that you are posing to him. My question would be whether you would be in a position to have him reading out the exhibit.

Mr S. Cass Weiland:
It was an unfortunate situation because the order has not been translated, but I did want to elicit his opinion about one thing. Perhaps I could ask one final question about this document.

(To the witness) Mr Moscoso, the document uses the word "*subasta*". What does that mean, please?

Mr Moscoso:
(Interpretation from Spanish) It is a public auction. It is a sale in a public auction.

Mr S. Cass Weiland:
I have no further questions.

The President:
Thank you very much.

Pursuant to article 80 of the Rules of the Tribunal, an expert called by one party may also be examined by the other party. Therefore, I ask the Agent of Spain whether the Respondent wishes to examine the expert also.

Mme Escobar Hernández :
Merci, Monsieur le Président.

The President:
In that case, please take the floor and ask your questions.

MR JAVIER MOSCOSO, CROSS-EXAMINED BY MS ESCOBAR HERNÁNDEZ
AGENT OF SPAIN
[PV.10/5/Rev.1, E, p. 15–23, F, p. 16–25]

Mme Escobar Hernández :
Merci, Monsieur le Président. En premier lieu, je vous prie de me permettre de m'exprimer en espagnol car il me semblerait bizarre de m'adresser à un compatriote, et à un si digne compatriote, dans une langue qui n'est pas la langue commune. Ai-je votre permission pour le faire ?

The President:
Yes, please do.

Mme Escobar Hernández :
Merci bien, Monsieur le Président.

(*Interpretation from Spanish*) Good afternoon, Mr Moscoso. Would you please tell me your name, your first and last names. Are you Javier Moscoso del Prado, appointed as expert for Saint Vincent and the Grenadines to testify in this case on your understanding of the law and the facts of the detainment of the vessels *Louisa* and *Gemini III* and other legal matters related to Spanish law in relation to this case?

Mr Moscoso:
(Interpretation from Spanish) Yes – although I would not call myself an expert. I am a connoisseur of Spanish criminal law. Given what experts have done to the world economy, I

think it would be very dangerous to call me an expert and so I would call myself a connoisseur.

Ms Escobar Hernández:
(*Interpretation from Spanish*) In any case, you are appearing as an expert in accordance with the statute and rules of the Tribunal and you have been called to testify as an expert by the applicant. I want to ask you again about your professional background and policy where you have already referred to that, but I would like to ask you one question which I think would be useful. Could you indicate to us throughout your professional life what matters have you dealt with, with regard to boarding and the search and quarantine of foreign vessels and measures relating to the search and quarantine and the legal effects thereof and could you tell us when.

Mr Moscoso:
(Interpretation from Spanish) In my career professionally? Professionally, this is the first time. I have led a seminar in Seville on these issues and studied these issues but in my career I, up until today, have not dealt with that professionally.

Ms Escobar Hernández:
(*Interpretation from Spanish*) You led a seminar in a very prestigious university in Seville and taught postgraduate work in continuing education and you focused mainly on issues with regard to boarding and arrest of vessels specifically.

Mr Moscoso:
(Interpretation from Spanish) Not specifically boarding and arrest of vessels. It was a broader seminar that raised that matter and the issue of underwater treasures and the rights of others who find the treasures and the conflict of interests among territorial waters and non-territorial waters and problems related thereto.

Ms Escobar Hernández:
(*Interpretation from Spanish*) In your seminar did you approach the issue of boarding and arrest of vessels and the Spanish law that applies thereto?

Mr Moscoso:
(Interpretation from Spanish) No. I do not believe so.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Could you please indicate the approximate date of the seminar that was held?

Mr Moscoso:
(Interpretation from Spanish) I do not know exactly. It was about three years ago.

Ms Escobar Hernández:
(*Interpretation from Spanish*) At the time, Spain was having an open debate on this kind of issue of plundering of cultural heritage and underwater treasure.

Mr Moscoso:
(Interpretation from Spanish) It was because of the interest generated about that subject.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Yes, I understand. You said that you consider yourself a scholar of these matters. Could you indicate any scientific publications of yours, any work that you have led, seminars that led to published articles with regard to this kind of matter that might be of interest to this case, both with regard to the matters relating to the arrest and boarding of the vessels and also, if you would like, issues relating to the plundering of underwater cultural heritage in relation to the Seville seminar?

Mr Moscoso:
(Interpretation from Spanish) This issue you are asking about is so specific. Occasionally I publish articles, but not specifically on this issue. Last week, I published an article. It was not related to this specifically. It was on another matter that was legal. If you want specific publications, I cannot say that I have published anything specifically. I am a scholar and I understand the legal effects of boarding and search of vessels. I have studied related matters throughout my career.

Ms Escobar Hernández:
(*Interpretation from Spanish*) You said that last year you were asked to give an advisory opinion.

Mr Moscoso:
(Interpretation from Spanish) No, merely an advice.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Yes, it is not always easy to distinguish between an advisory opinion and merely an advice, but you were asked to give an opinion on the situation that occurred following the boarding and search of the *Louisa* and you also said that you went on visits to Cadiz.

Mr Moscoso:
(Interpretation from Spanish) One visit.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Could you tell us what the purpose of the visit in Cadiz was and who you talked to in Cadiz?

Mr Moscoso:
(Interpretation from Spanish) I met with the attorney in charge and the judge, the prosecutor and the judge, and it was a protocol visit. I did not say anything specifically, but I was accompanying the attorney for the defence of the interests of Sage and Mr Foster. He wanted to see the state of the *Louisa* and we went to Santa Maria port but we were not allowed to go on the ship and I recall that it was quarantined and some of the cordons had fallen but it was still cordoned off. My work has been based on the documents that I have been given.

Ms Escobar Hernández:
(*Interpretation from Spanish*) This opinion that you were asked to give and that you produced last year on the basis of the documents, is that an opinion that the Applicant asked that you give before the Tribunal, that is Saint Vincent and the Grenadines, or is it an opinion requested by the company that owns the vessel or the legal representative of one of those involved in the case?

Mr Moscoso:
(Interpretation from Spanish) It is an opinion that Mr Foster's law firm requested of me but it was mainly concerned with Mr Foster's situation with the procedural and legal issues relating to his interests, although, in addition, the company Sage was indirectly concerned but I was just asked to give an opinion with regard to Mr Foster's situation.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Did you provide any further counsel or assistance?

Mr Moscoso:
(Interpretation from Spanish) No.

Ms Escobar Hernández:
(Interpretation from Spanish) I would like, if I may, to ask a number of questions relating to the issues referred to with regard to the situation we are examining today.

(Poursuit en français) M. le Président, je voudrais tout d'abord revenir sur certains faits que je trouve très important. Je prie le Tribunal de tenir compte du fait que nous sommes dans une procédure en prescription de mesures conservatoires, pas dans une procédure au fond qui serait destinée à déterminer les éléments constitutifs de la violation par l'Espagne d'une obligation internationale compte tenu de la Convention des Nations Unies du droit de la mer.

The President:
Yes.

Mme Escobar Hernández :
Je vous remercie.

(*Interpretation from Spanish*) Mr Moscoso, you said that in your view Article 561 of the Criminal Procedural Law establishes the obligation to obtain a prior authorization from the vessel's captain or, failing that, to notify the boarding to the consulate. Could you tell me if in Spanish law there are any exceptions that would allow for the boarding and search of a vessel anywhere, including a domicile? Are there any exceptions that would allow for the boarding and search without notification?

Mr Moscoso:
(Interpretation from Spanish) I believe there are with regard to drugs trafficking, but I would have to check the legal texts to give you a more accurate answer. There are cases of that nature.

Ms Escobar Hernández:
(*Interpretation from Spanish*) There is no exception relating to the commission of a crime?

Mr Moscoso:
(Interpretation from Spanish) If it is a flagrant crime, then yes.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Is there not an exception with regard to the instrument of a crime?

Mr Moscoso:
(Interpretation from Spanish) In the case of an evident crime, yes, there are cases, due to urgency and the nature of certain crimes, where boarding may be ordered automatically by a judge, but this is specifically related to drug trafficking and terrorism crimes. If you want me to give you specific examples in positive Spanish law, I cannot give you an example here now.

Ms Escobar Hernández:
(*Interpretation from Spanish*) You have said that you do not share the opinion of the judge regarding the decision to order the search without notifying the captain and you have said you believe that this is mainly because at some point the judge made certain statements to the effect that it would be very dangerous, given the very large quantity of flags of convenience. Do you believe that the fact that the captain of the vessel was not available and was arrested a few days later in Lisbon as a result of a European arrest warrant has any bearing on the boarding and search without need for prior authorization?

Mr Moscoso:
(Interpretation from Spanish) No, I do not think so, for one reason: the judge has to give a reason for his decision and he has to say that the article does not apply. If it had happened that way, that would have been all right, but the judge declared that the article does not apply. It was not because of the absence of the captain.

Ms Escobar Hernández:
(*Interpretation from Spanish*) According to the documents provided by Mr Foster's law firm, do you have any awareness as to whether the order was appealed? If there was an appeal against the order, what is the effect of the ruling?

Mr Moscoso:
(Interpretation from Spanish) That might have been the case more recently. I cannot recall any events such as that. I understand that the folios have been increasing and there will be new documents but I do not have recollection to that effect.

Ms Escobar Hernández:
(*Interpretation from Spanish*) With regard to the quarantines, you have said that the quarantine was not necessary. Depending on certain conditions, you said that it can be necessary initially but that it was no longer necessary after a certain time and that it went on too long. How would you describe the vessel, the *Louisa*? Do you believe that it is being quarantined temporarily on a provisional basis?

Mr Moscoso:
(Interpretation from Spanish) There has not been a decision of provisional arrest. There is only an order to quarantine. When I was looking at the documents, I saw that the judge called for a quarantine.

Ms Escobar Hernández:
(*Interpretation from Spanish*) The *Louisa* is currently docked at Puerto de Santa Maria. Do you believe that it is a necessary instrument to commit a crime? I am not asking you to state whether or not a crime was committed. I am not going to ask your opinion on that but, if the judge did find that there was sufficient evidence of a crime, do you believe that the vessel could be called under the well-established jurisprudence of the Spanish Supreme Court?

Could it be seen as a necessary means to commit a crime? Keeping in mind the crimes that have been alleged.

Mr Moscoso:
(Interpretation from Spanish) Well, as I said, the law is open to opinion and I would not say that myself, but I know that there are judges who would.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Can you tell me why you think that is excessive?

Mr Moscoso:
(Interpretation from Spanish) I think it is excessive because after a search and after keeping the vessel for several months, it should have become clear that the evidence is scant and not of great value and it should have been deduced that the vessel was carrying out certain activities that were not paying off and I think the interpretation whereby it was meant to commit a crime is probably disproportionate, but that is not the problem I highlighted. I was highlighting the fact of the situation that the vessel has not been regularized. If it was an instrument of crime, then it should be proven and that situation should be regularized.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Let me ask you a general question relating to your experience as a prosecutor for several years and a State prosecutor. Let us assume a different crime. Let us now forget the plunder of underwater cultural heritage but let us assume that there might be a crime relating to drug trafficking and the crime is committed, for example, by altering the internal structure of a vehicle for the purpose of transporting drugs from Portugal to Spain, for example. How would that vehicle be qualified or classified? Would it be an instrument of a crime? Would that vehicle have to be the subject of a provisional measures embargo and kept by the judiciary throughout the proceedings?

Mr Moscoso:
(Interpretation from Spanish) I believe so, yes. In an obvious case like that under Article 127, the judge would have to make a ruling stating that the vessel would be under provisional embargo and then civil law would apply and the situation would have to be regularized. In this case it has not been.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Then there would be a need for a legal decision … I am just asking a question. Then it would be necessary to have a judicial order for a provisional embargo for a road vehicle?

Mr Moscoso:
(Interpretation from Spanish) You are asking me. Well, the confiscation of instruments of a crime relates to the punishment. Article 127 states that the instruments of a crime can be confiscated and logically there is a time frame between the confiscation and the guilty sentence. If arms and other things are found under Article 127 – we are talking about vehicles – ships, planes – the judge has to determine the status of those vehicles.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Thank you, but can you say that the confiscation only takes place in relation to the sentence?

Mr Moscoso:
(Interpretation from Spanish) Yes.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Moving to the second question, which I think is of interest because it was raised in the application for provisional measures, and this relates to the merits of the case, you said that you were not aware of the *note verbale* sent by Spain to Saint Vincent and the Grenadines on 5 March 2006 stating that there had been the boarding and search of the vessel. Can you explain to us what the boarding and search of the vessel actually involved?

Mr Moscoso:
(Interpretation from Spanish), they go on to the vessel and look for any evidence of the crime. I think that is clear. I do not understand your question.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Could you just explain what a boarding and search of the vessel involved, just in case the court is not aware?

Mr Moscoso:
(Interpretation from Spanish) It involves going on to the ship and a search for instruments and objects relating to the alleged crime.

Ms Escobar Hernández:
(*Interpretation from Spanish*) The objects that might be found on the vessel on the occasion of the boarding and search and that might be presumed to be evidence relating to the acts under investigation, this would be the result of lengthy investigation by the *Guardia Civil*. It is not just a decision pulled out of a hat overnight. The things that are found on the vessel, could they be seen to be integral to the case, for example nautical charts, computers and data on the computers? Would it be legitimate to hold those items in the judiciary so that the State may carry out the necessary judicial proceedings?

Mr Moscoso:
(Interpretation from Spanish) Yes.

The President:
We have a technical problem to solve. We had planned to have a recess now at 4.15 – in fact, we are already late by two and a half minutes – and to resume in 30 minutes from now. I would have allowed this examination to go on, had it not been for the technical problem related to interpretation. If we do not interrupt now, then we will not have interpretation from Spanish into English because there are technical rules to be abided by in respect to the rest that interpreters should have. Therefore, I decide that we are now going to go into recess. We will come back 30 minutes from now as planned. We will resume with your cross-examination of the expert.

(Short break)

The President:
We shall now resume our meeting.

Mme Escobar Hernández :
Merci, Monsieur le Président, je vais essayer d'être plus brève que dans ma première intervention.

(*Interpretation from Spanish*) Earlier you raised the matter of diplomatic channels. I am not going to continue asking about the *note verbale* that Spain duly submitted to the authorities of Saint Vincent and Grenadines to inform them that there had been the boarding and search, but I would like you to give me your opinion on one document that I am going to show, with the permission of the President. This is a document on the notification to the consulate of persons detained.

Mr S. Cass Weiland:
Excuse me, could we ask the representative of Spain to speak more slowly because we have some Spanish speakers on this side and we are afraid that the interpretation is somewhat lacking? Slower questioning, I believe, would help.

The President:
Thank you very much. I have made that point in respect of the expert.

I reciprocate the same question to the Agent of Spain. If both of you could speak in a way that the interpreter might get everything that you are saying and put it into English, I would appreciate it.

Mme Escobar Hernández :
J'essaierai de faire de mon mieux

(*Interpretation from Spanish*) The document that I have just handed to you, Mr Moscoso, is a document from the *Guardia Civil*, which I believe was not necessary because it was general knowledge, but it is a document by the *Guardia Civil* saying that at a given time the consular authorities of the US and the consular authorities of Hungary and Spain were notified of the detention of those individuals who were arrested on the vessel. Mr Moscoso, would you be so kind as to read out the paragraph relating to the notification?

Mr Moscoso:
(Interpretation from Spanish) At the time indicated by fax, notification was given of the arrest of Anibal Beteta. There is a number in parentheses, "17005632" to the Consulate of the United States in Seville and the detainees, "(000541)" and "CJ036896" to the Consulate of Hungary in Malaga.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Could you tell us if this letter is the letter normally sent when foreign nationals are arrested by the Spanish authorities?

Mr Moscoso:
(Interpretation from Spanish) Yes, this is the letter sent to consulates.

Ms Escobar Hernández:
(*Interpretation from Spanish*) The document I have given you, if the President allows, I will include in the folio with respect to a possible ruling on the merits of the case. If the Tribunal wishes, I could provide it, but it has to be translated into English. This is a document issued by the central operations unit at the *Guardia Civil*. Mr Moscoso, do you believe, as an expert, that this document is a reliable one? Is it faithful?

Mr Moscoso:
(Interpretation from Spanish) Well, if you are presenting it … It does not have a seal. It is signed.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Does it have a heading and an address?

Mr Moscoso:
(Interpretation from Spanish) Yes – sorry, it does have a seal of the UCO.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Thank you very much. You can keep the document if you so wish.

Previously you raised the matter in the previous examination of the meaning of one paragraph that is contained in an order from the magistrate judge of Criminal Court No. 4 in Cadiz, examining a case that is dated 29 July 2010. It refers to the future use of the vessel. Previously Mr Moscoso was asked this, but if the President allows I would like for Mr Moscoso, since this document is included in the folio – and I received the English translation of the annexes that were only in Spanish, and in keeping with the Rules of the Tribunal, I will submit them to the Tribunal – but I would like for Mr Moscoso to read out the last paragraphs of this order in full so that I can ask him a question. Do I have your permission?

The President:
If he accepts to read that paragraph, which you are asking him to read – I see no objection to that.

Mr S. Cass Weiland:
We have no objection. We would like the document translated eventually.

The President:
Thank you. It will be translated as the Agent of Spain has informed us.

Mr Moscoso:
(Interpretation from Spanish) Mr President, I am happy to read this although I have not been called as an expert reader! I am happy to do that. *(The witness reads out the relevant paragraphs in Spanish)*

Ms Escobar Hernández:
(*Interpretation from Spanish*) Before you explain what is meant by the word *subasta*, auction, the legal meaning of that word, can you indicate what is being referred to in this paragraph when it mentioned the three possible options?

Mr Moscoso:
(Interpretation from Spanish) Before I answer the question that the representative of the Respondent asked, I would say that I believe this decision of the judge is correct but too late, and this should have happened four years ago. This option, return to the owner of the vessel, could have been operational. I also said that the vessel could be considered an instrument of crime or not – that is a matter of opinion. You likened it to a knife and in that case Decree 76

would apply. I believe it is subject to opinion, but I would say one thing of interest: the *Odyssey*, which, as the Tribunal knows, found a treasure of great value and it was detained for three days in a Spanish port and it was then released by the judge; so in that clear case the judge thought it was an instrument of crime in spite of the proceedings. So these are disagreements among judges that can be explained, but I believe that in this case we are examining there is no merit.

Q *Ms Escobar Hernández:*
(*Interpretation from Spanish*) I am sorry, Mr Moscoso, I am grateful for your clarification on the *Odyssey* case, although it is a different case to this one. I do not think we should confuse the cases but I am grateful for your comment because it allows for comparison. My question was if you could tell us what is meant by "timely measures" for auction, return to third party, or the third option which is covered in this letter.

Mr Moscoso:
(Interpretation from Spanish) It means that the judge is requesting Sage Maritime to indicate their preference from two options because there is a third option with regard to the maintenance of the *Louisa*. It appears to say: "How should we maintain the vessel; or should it be turned over to a third party or auctioned?" They are asked to make a choice between the three options.

Ms Escobar Hernández:
(*Interpretation from Spanish*) So the owner of the vessel is being given the option to give their view on the fate of the vessel.

Mr Moscoso:
(Interpretation from Spanish) Yes.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Just one last question, and then I will conclude: in accordance with Spanish legislation that is applicable today, is it possible to proceed to the auction of this vessel? Without the favourable opinion of the State bodies present in the case – and here I am referring to the Prosecutor General, the State and the State lawyers, can the Tribunal decide in favour of auction if the Ministry or lawyers of the State object?

Mr S. Cass Weiland:
I have to object. The translation that I just got seemed to be asking him what the Tribunal could do. There is no way that this expert could testify about what the Tribunal's authority could be. It is complete speculation.

The President:
Thank you very much.
Could you please reformulate your question?

Ms Escobar Hernández:
(*Interpretation from Spanish*) Yes, Mr President, of course I can. Thank you.
(To the witness) In accordance with Spanish legislation what requirements have to be met for a vessel that has been placed in the judiciary as part of the proceedings to be auctioned?

Mr Moscoso:
(Interpretation from Spanish) Well, I believe that would take time to answer. At the risk of giving a hasty response I would say that the parties in the case would have to be heard and as far as I see the decree on confiscations would entail that it would have first to be found an instrument of crime. In this case, there is provision for an auction when the objects of licit trade have not been given back to their owners. Then they can be auctioned after two or three years from the date of confiscation or alienation from the interested party.

Ms Escobar Hernández:
(*Interpretation from Spanish*) Thank you.

Mr President, I have no further questions. I would like to thank you for your patience. Please allow me to sincerely thank Mr Moscoso for so kindly answering our questions in great detail. Thank you.

The President:
I thank Mr Javier Moscodo del Prado Muñoz for his testimony. Your examination is now finished and you may withdraw, Sir. *(The witness withdraws)*

I now give the floor to the Co-Agent of Saint Vincent and the Grenadines to conclude his statement.

STATEMENT OF MR S. CASS WEILAND – 10 December 2010, p.m.

Argument of Saint Vincent and the Grenadines (continued)

STATEMENT OF MR S. CASS WEILAND
CO-AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.10/5/Rev.1, E, p. 23–29]

Mr S. Cass Weiland:
Thank you, Mr President. Before I complete my presentation of some prepared issues that I think should be addressed, I must comment upon some of the issues raised in the cross-examination of Mr Moscoso.

We have now heard from the Spanish in their papers and in a question to the witness about their annex 5, which I believe we are in a position to display to the court – fortunately this is one document that is in English. I would like to direct the court's attention to this because Spain has attributed significance to this document as having notified Saint Vincent and the Grenadines of the search and seizure of the vessel. I would suggest to you that the words "search" and "seizure" are nowhere mentioned here. The word "boarding" is not used. Indeed, when Saint Vincent and the Grenadines inquired of Spain as to whether they had ever given notice, the Government official demurred and merely referred the maritime administration to the Court.

I think it is a blatant misrepresentation for Spain to suggest a notification was effective or that it actually gave Saint Vincent notice of anything. If I am sitting in Kingston, and if this was delivered – there is no indication that it was delivered to Saint Vincent – in fact the stamp on it is the Spanish stamp, not a stamp as received by our authorities – I read this and it says: "We have the honour to inform you that the Court in Cadiz processed the entry and registration of the vessel". I think the court has a question about the meaning of those words. I do, too. In fact, I read it with great interest last night, especially as I read the paperwork that Spain presented, alleging that that was notice to the flag State. Well, it was notice way too late. Even March 15 was far too late in 2006. I suggest to the court that it was not notice, whether it was timely or untimely. It is not notice.

I would like to present some information to the court relating to the timing of this action because I believe that it is possible for you to wonder why we are here now. I will show you annex 30, which is a brief form of a chronology of several important events in this matter, all of which are either admitted by Spain or we have substantiation for.

So that the court understands, the first several items relate to the arrest of the vessel and the imprisonment of Mr Avella. I would like to direct your attention to 2007. After the owner tried to allow the court proceeding to run its course in Cadiz it began to, utilizing their lawyers, attempt to meet with the prosecutor and the judge to figure out just what was going on with this ship. I would remind the court that the *Louisa*'s owner was not a professional shipowner. In fact, the records would eventually show in this case that the owner of the *Louisa* and the *Gemini III* had no knowledge at the time that Saint Vincent had never been notified; it just assumed Saint Vincent had been notified, and that these kinds of things took time for the Spanish judicial system to play out.

By 2007 the owners were becoming much more active. As indicated here, there was a meeting with the prosecutor, who expressed little interest in this matter in 2007. Then months go by, with no action from the judge, no indictments, no charges, no museum estimates or appraisals of the few little artefacts that were found; and so the owner stepped up his efforts to secure the release. I would urge you to consider that the shipowner's efforts in this regard to exhaust his remedies are imputed to the flag State, so Saint Vincent gets credit for the efforts of the owner to release the ship. Those are not just a nullity; they cannot be ignored.

By the time Saint Vincent was advised of the ship's detention by the owners, they became aware that the owner had made all sorts of efforts in his own right.

We have a series of meetings that occur and letters. Then on 12 February 2010, we have the port authority queried by the maritime administration. In view of the cross-examination of Mr Moscoso, I think it is appropriate to look at annex 7 and consider just what transpired here. Keep in mind that by early this year, the owner had contacted the Saint Vincent authorities to inquire what their view of the detention of one of their ships was after four years. So the maritime administration, rather incredulous that one of their ships could have been detained for so long without their knowledge, sends a message to the port captain and another official.

What are they informed of? They are not sent this annex 5, which the Spanish have represented to be some kind of notice to Saint Vincent; this annex 5 is not sent out to the people in Geneva, the office of Saint Vincent, the maritime administration: no, instead what is received is basically the kind of message that you get, "do not bother us". In fact, the Spanish representative says: "The *Louisa* was detained by resolution of the penal judge". That is news to Saint Vincent; that is news to the owner, because we have never seen a resolution of detention, as Mr Moscoso testified. We have never seen one. The port authority can say nothing more about this.

Meanwhile, the people in Geneva are saying on 19 February: "Kindly provide details of the resolution for the detention, the date and the reason for the detention". The response is: "The ship is in the dock at Puerto de Santa Maria by order of the Tribunal. For any information go to the Tribunal". We have not seen the order. Apparently, the port captain has – at least he thinks he has – the right to continue to hold the ship.

After this inquiry, on 27 April, Mr William Weiland writes to the Spanish Ambassador, which is annex 4. What does the Spanish Ambassador have to say about this? Nothing! I represent to you that it is a very nice letter, on a nice law firm's letterhead: you would think that perhaps the Spanish could go to the trouble to respond in some form to this letter. The Spanish say nothing.

They do not point to this annex (annex 5): "We do not notice". They do not say: "The judge is going to confiscate and sell your ship". Nothing. On 13 October of this year, the President of Sage, Linda Thomas, files a formal complaint with the Consulate of Spain in Texas (annex 8). The complaint is delivered in the Spanish language for the convenience of the Consulate (annex 8B). Not that the Spanish in Texas cannot speak English – I am sure they can – but for their convenience it is delivered in Spanish. There is no response whatsoever.

We hear from Spain that we have moved too quickly; that this is unfair; that we should have had more negotiations.

Finally, on October 26 a diplomatic note was sent (annex 11) and, indeed, it said, "We plan to file an action". I suggest to the court that the notion that we have not exhausted our remedies or for some reason this action is premature is ridiculous. It is the start of year six and up until now Spain has shown no interest – no interest. But apparently the judge got wind of this, because we were told two days after we filed that he has issued some mysterious new order. I am anxious to see that order. It sounds like retaliation to me but we will look at it with great interest when it finally arrives.

We have these efforts that we have made and, as I said, the efforts of the owner should be credited to the flag country because they are aware of these efforts and they are substantial and they are sufficient. After considering that, we would suggest that you go back to a balancing of interests. Whose interests predominate here in order to satisfy the requirements of article 290, paragraph 1, relating to the respective interests of the parties. As I said earlier today, we think that requires some kind of balancing of interests. The Spanish

have suggested in their cross-examination of Mr Moscoso that this is indeed some kind of instrument of a crime, this ship *Louisa* and this ship *Gemini III*, not to mention all of the equipment and everything taken off this ship. We have at least six computers that they confiscated. In some jurisdictions when the police take a computer they download the information and give the computer back. That did not happen here. They made no effort to return anything. Valuable, valuable gear was confiscated, and when the ship was finally looked at in 2009 we were told, "The gear is all stored in Seville somewhere, don't worry about it". This gear, valuable diving gear, is depreciating every day. The methane gas exploration required divers to go down to the sea floor and inspect what was on the sea floor, what was there. In the Bay of Cadiz you have oil seeping up through the sand. They have all of that. They are going to give none of it back, it sounds like, because it is instruments of a crime. Maybe sometime in the next five years we will get around to having a trial, where the owners, the people who were personnel on the ship, are acquitted, and we will get back eventually useless equipment. That is unfair and that is an illustration of how the balance of equities in this case is with Saint Vincent.

What is on those computers? I am going to touch on that. Those computers recorded what our towed instruments were registering; extremely valuable information about the electromagnetic propensities and properties of the floor of the Bay of Cadiz. We have been given none of those back. Fortunately, some of those reports, at least one or two, were printed out approximately a year earlier and taken back to the owner's headquarters. What is happening with oil and gas exploration in the Bay of Cadiz? Public reports indicate it is moving forward. What company has one of the major interests in exploring the Bay of Cadiz? The Spanish oil company Repsol. I am not going to stand here today and suggest that Repsol is using our information of our computers that they have had for five years but I do not really like the notion that we are not exploring the Bay of Cadiz and they are – we being the shipowner.

How long do they have to keep this equipment? "These ships are instruments of crime. We have to continue to have them tied up at the dock," says Spain. The fundamental issue seems to be they are evidence of some kind. They are evidence of crime. I ask you: do they intend to drive the boat into the courtroom or something? Why is a picture of the boat not adequate? We have lots of them. We will give them the pictures. The notion of keeping the boat until the case is over is absurd. If they are going to forfeit the boat/confiscate the boat/sell it as an instrument of crime, when is that going to happen? The shipowner has some rights about confiscation. There is no order to confiscate the ships. Yet time goes by.

What is time doing to the ship? I would like to look at a couple of additional exhibits. Exhibit 26 is the ship in an early 2010 photograph laden with at least 5,000 gallons of lube oil and untold amounts of diesel. The ship was not getting to be in any better shape. If you look at exhibit 12, included in our documents, you see some more views of the ship, including some interior views of what kind of condition Spain has left the ship in. It is no wonder that the judge apparently issued an order in July of this year, unbeknownst to us, unseen by the owner or the flag State, asking: "Would you like to sell the ship at a public auction?" I say that that indicates a lack of interest on the part of the judge in this supposed instrumentality of a crime. I suggest to you that that is why we spent some time with Mr Moscoso over this Spanish order that Spain has included in its documents (exhibit 9). What does it mean? It came, unfortunately, in Spanish, but that is all right; you have now heard from Mr Moscoso and you have heard the translation of it. The judge sitting in Cadiz, every once in a while, awakens and I think he must be driving to work or something, and says, "You know, we have a couple of ships here and we are starting year six and maybe somebody is going to grade my report card and question me about this, so I will issue an order. We won't send it to the lawyers for the shipowner, we won't send it to Saint Vincent, but we will let it lie in the file

as if I gave the owners the prerogatives: "Do you want us just to sell the ship for you?" Spain – I really have to ask about their good faith – is arguing vehemently that it is an instrument of a crime that has to continue to be tied up in the port. It is a specious argument that you have to tie that ship up into year six and the *Gemini III* has to be kept up out of the water and retained. For what purpose, as we go into year six, when the judge himself is suggesting: "It's okay with me if we just sell it at public auction"?

I am going to ask permission, Mr President, to consult with my colleagues in a moment before I end my presentation – which will not be a minute too soon, I am sure. It is already 5.30 in the evening. I want to take a few minutes, maybe a very few minutes, to talk about the questions which we understand interest some Members of the Tribunal. We were advised in a conference last evening to think about some questions that have percolated up already; indeed, there may be some more, and I will certainly try to answer them this afternoon if I can. If I may, Mr President, I am just going to walk through these.

The first question is addressed to the Applicant. The question is: would it be possible to provide information as to the flag State of the tender? Again the tender is only 11 metres long. I think it is registered in the United States with some kind of minor license because it is a small boat. It has not been flagged in Saint Vincent. There is no registration that the owners pay in Saint Vincent.

The next question is about the permit. Saint Vincent has been told there was a permit that these shipowners were using to explore the bay. You have heard quite a bit about the permit already. The question is: was the permit contained in annex 6, for the prescription of provisional measures, preceded by other permits? If so, is it possible to submit a copy of the initial permit? The response to the question is: we think it was preceded by other permits. Saint Vincent has been advised by the shipowner that when the shipowner entered into a contract with this Tupet company, Sage was under the impression that Tupet had all the authority it needed and in fact had secured several permits – several permits over time, Spain's papers suggest that it was a renewal that was at issue here. We have no quarrel with that. In fact, we think it supports the position of the shipowner that he simply was utilizing a permit that had been granted over and over.

I should mention parenthetically that the evidence in the case will eventually show that when the personnel of Sage were out canvassing or touring the bay, whether it was in the *Louisa* or in the *Gemini III*, they were stopped by the *Guardia Civil*, who asked to see the permit and consider what they were doing out there. I think the answer to the question is: yes, it was some kind of extension of permit authority.

The last question addressed to the Applicant is: would it be possible to provide evidence on the risk for the marine environment posed by this vessel? Indeed it is, and I am delighted that the question was asked. We have some formal information and I am going to tender it to the Tribunal in just a moment.

Before we get to that point, however, I would invite your attention to annex 2. There are several documents that we provided in connection with our application relating to the ownership of the *Louisa* and its particulars. If you look at exhibit 2B and exhibit 2C you can learn more about the ship. When I say to you that the ship was constructed in 1962 and worked as a ferry in Scotland for several years, I am not making that up. At least, that is what the official documents that accompanied the ship so indicate. There is a lot of wear and tear on this ship. I think it is uncontroversial that there are petroleum products on this ship. The ship is not being looked after. Spain suggests in the papers that it is being "monitored". Someone was going by and seeing if the oil was leaking out of it, I guess.

We have a document that we want to tender to the court. We had already been in touch with an expert on this issue and we asked him to prepare a very short report on the

environmental threat posed by the continued detention of the vessel. May I approach the clerk, Mr President, and distribute this?

The President:
Yes, please.

Mr S. Cass Weiland:
Pursuant to article 90, paragraph 3, of your Rules, we understand that the Tribunal may accept evidence up until the time of the termination of the hearing. We would suggest, therefore, that the submission of this document is timely. *(Same handed)*

May I be so presumptuous as to read this document? It is in your possession. I would point to just one small part of it on the first page and say for the record that this document is produced by an expert in Hamburg by the name of Bernd Holst, in this Weselmann firm which is expert on these issues, I would represent to you. Mr Holst says: "We see a high risk that water ingress to the vessel can be sustained, which can cause flooding of some compartments of the vessel and possibly flooding of the complete vessel. This subsequently will cause oil contamination as the vessel's tanks as well as machineries most probably still contain lube oil and possibly also fuel oil".

We submit that in response to the specific questions of the Tribunal.

Now I would like to address these final questions that were primarily the responsibility, I guess, of the Respondent team to answer, but I would like to suggest some responses of Saint Vincent.

The first question is: would it be possible to clarify the meaning of the term from the Number 4 Court in Cadiz "processed the entry in the registration of the vessel *Louisa*"? I have already talked about that and I think it is going to be most interesting to hear what Spain has to say, but I would suggest to you that the real inquiry should be: what was the normal meaning of those words? What would an administrative person sitting in an office in Kingstown, Saint Vincent and the Grenadines have thought when they received that missive, if it was ever delivered? We do not have evidence that it was. I am sure that Spain would suggest that means they have announced that the ships have been boarded and detained. But it does not say that, of course.

The next question is: would it be possible to produce a copy of the criminal indictment – that is how it is referred to in Spain's papers – at 27 October 2010 referred to in paragraph 13 of their statement? We would very much like to see that also. One would think that after several trips to see the judge and the prosecutor, to have a lawyer stationed in Cadiz who goes to the courthouse weekly, if not daily, that this order of 27 October might have been delivered to the shipowner's lawyers, if not to the flag State. We have not seen it.

The last question is also extremely incisive. The last question is: in which maritime areas did the alleged offence that led to the arrest of the *Louisa* and the *Gemini III* take place? We would like to know what areas. We know it was in the economic zone. We know it was in the Bay of Cadiz, if that is the question. Of more interest to the shipowner, however, is where specifically were we supposed to have been in the Bay that perhaps we were not allowed to be? Or perhaps you think we were looking for a ship wreck. Tell us, after five years – please, tell us – where were we that we were not supposed to be? We look forward to that answer too, because the judge in Cadiz has not notified us and certainly not notified the flag country of anything, much less the details of the alleged criminal activity.

I thank you for your patience. I am prepared to answer any questions, if there are any *ad hoc* questions, Mr President.

The President:
Thank you. I take it that you have concluded your submission.

Mr S. Cass Weiland:
That concludes my presentation.

The President:
Thank you very much.

This brings us to the end of today's proceedings. The pleading will be resumed tomorrow morning at 9.30, as planned, when we will hear the statement of Spain. The sitting is now closed.

(The sitting closes at 5.45 p.m.)

PUBLIC SITTING HELD ON 11 DECEMBER 2010, 9.30 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines: [See sitting of 10 December 2010, 2.30 p.m.]

For Spain: [See sitting of 10 December 2010, 2.30 p.m.]

AUDIENCE PUBLIQUE DU 11 DÉCEMBRE 2010, 9 H 30

Tribunal

Présents : M. JESUS, *Président*; M. TÜRK, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines : [Voir l'audience du 10 décembre 2010, 14 h 30]

Pour l'Espagne : [Voir l'audience du 10 décembre 2010, 14 h 30]

The President:

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

Ms Escobar Hernández, you have the floor.

Plaidoirie de l'Espagne

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ
AGENT DE L'ESPAGNE
[PV.10/06/Rev.1, F, p.1–8]

Mme Escobar Hernández :
Merci, Monsieur le Président.

Monsieur le Président Messieurs les Juges. Comme je l'ai déjà dit hier, c'est un grand honneur pour moi de comparaître devant vous pour représenter l'Espagne, en particulier compte tenu du fait que c'est la première fois que l'Espagne est appelée à comparaître devant vous en qualité de partie au procès.

Pour cette raison, permettez-moi, Monsieur le Président, de faire dés l'abord, une déclaration formelle sur l'importance que le Royaume d'Espagne attribue au règlement pacifique des différends et au règlement judiciaire en particulier. C'est pour cette raison que l'Espagne a fait un grand effort depuis quelques années pour accepter unilatéralement la compétence des tribunaux internationaux, parmi lesquels, permettez-moi de citer en particulier, la Cour internationale de justice et le Tribunal international du droit de la mer. Pour l'Espagne, l'acceptation de la compétence obligatoire de ces tribunaux fait partie des liens de mon pays avec l'Etat de droit, le *rule of law*, qui doit être toujours présent comme un principe fondamental de gouvernement, tant au plan interne qu'au plan international.

En conséquence, Monsieur le Président, Messieurs les Juges, vous pouvez être sûrs que l'Espagne fait pleine confiance à votre juridiction et que nous sommes venus aujourd'hui devant vous, prêts à participer d'une manière loyale et de bonne foi au procès, contribuant ainsi à la consolidation progressive de votre Tribunal. Mais, en même temps, je ne puis passer sous silence un autre élément qui est d'une grande importance pour nous : la volonté de contribuer à un procès fondé sur le principe de l'équité et de l'égalité des armes.

Après cette déclaration de principe, Monsieur le Président, j'aimerais vous présenter les autres membres de la délégation espagnole qui aujourd'hui m'accompagnent dans la salle : En premier lieu, Monsieur le Professeur Aznar Gomez, professeur de droit international à l'Université Jaime 1, spécialiste en matière de protection internationale du patrimoine culturel subaquatique. Il fait partie de la délégation en qualité de conseil et avocat et va s'adresser au tribunal plus tard. En deuxième lieu, M. Esteban Molina Martin, ingénieur maritime, chef du service d'actualisation normative à la direction générale de la marine marchande du Ministère des travaux publics, le ministère responsable de tous les sujets relatifs aux ports et à la navigation chez nous. Il fait partie de la délégation en tant que conseil. Et, pour finir, M. José Lorenzo Outon, attaché au département juridique international du Ministère des affaires étrangères et de la coopération, que j'ai l'honneur de diriger. Il fait partie de la délégation en tant que conseil technique.

Monsieur le Président, pour commencer la plaidoirie de l'Espagne, permettez-moi de dire quelques mots à propos des faits à l'origine de l'affaire qui vous a été soumise. Bien que vous ayez devant vous un nombre important d'éléments d'information, ma délégation considère essentiel de faire une brève référence aux faits, tenant compte surtout que la partie requérante a fait une interprétation des faits que l'Espagne ne peut que contester.

En conséquence, bien que mon collègue, Monsieur le Professeur Aznar Gomez, va revenir plus tard sur les faits dans la mesure où il s'agit des faits d'intérêt pour la demande de mesures conservatoires, je me permets d'appeler votre attention sur les données suivantes :

En premier lieu, l'immobilisation du navire « Louisa » est intervenue après une enquête judiciaire et en tant qu'instrument nécessaire pour la commission d'un crime. Ladite immobilisation n'a aucune relation avec les activités de recherche scientifique alléguées par

la requérante. A cet égard, permettez-moi de souligner certaines incertitudes contenues dans la requête de Saint-Vincent-et-les Grenadines, dans ses soi-disant observations supplémentaires du 9 décembre (déposées après la soumission par l'Espagne de notre exposé en réponse), et qui ont été répétées à nouveau dans l'exposé oral du co-agent de Saint-Vincent-et-les Grenadines.

D'après l'interprétation de la requérante, les navires « Louisa » et « Gemini III » auraient réalisé des activités de recherche scientifique pour identifier la présence de gaz et de méthane dans le sous-sol de la baie de Cadix. Monsieur le Président, même si on pouvait laisser de côté le fait qu'il existe des éléments de preuve suffisants pour conclure à la participation de ces navires à des activités de pillage du patrimoine archéologique espagnol dans la baie de Cadix, je veux tout simplement appeler votre attention sur le fait que les deux navires ne pouvaient pas se livrer à des activités de recherche scientifique aux fins d'obtenir des informations sur l'existence de gaz dans la zone. Et s'ils l'avaient fait, ils l'auraient fait d'une manière illégale.

En effet, si vous lisez le permis présenté par la requérante comme annexe 6, il est très clairement indiqué le but poursuivi par le demandeur : il s'agit d'obtenir un permis pour, et je cite, « *execution of a DEMO of cartographic echo from a study of video-photo reviewed in the matter* ». Sur la base de cette demande, le Ministère de l'environnement a délivré une autorisation à Tupet pour, et je cite à nouveau, « *the extraction of samples of the sea floor in order to carry out a report of the Environmental Medium Impact of the marine fund* ».

Je ne peux pas comprendre, Monsieur le Président, comment on pourrait en déduire dudit permis une autorisation pour des activités qui ne sont que des activités d'exploration sur l'existence d'hydrocarbures tel qu'il a été déclaré par la partie requérante. Les activités d'exploration des hydrocarbures sont, comme vous le savez très bien, soumises à un régime beaucoup plus exigeant que le régime de la recherche scientifique marine.

En effet, d'après le droit applicable en Espagne, je cite la règle applicable, le décret royal 2362/1976, du 30 juillet 1976, « tout vrai permis relatif à toute activité d'exploration des hydrocarbures doit faire l'objet d'autorisation par le Ministère de l'Industrie ». Mais Tupet n'a jamais eu une autorisation pour la recherche octroyée par ce Ministère.

Par conséquent, il est vraiment difficile de pourvoir conclure que les activités menées par le navire « Louisa » et le navire « Gemini III » étaient des activités licites et conformes à la Convention des Nations Unies sur le droit de la mer, car il y a une contradiction entre les éléments de preuve qu'on a apportés et la déclaration expresse du co-agent de Saint-Vincent-et les Grenadines.

Second élément d'information : je voudrais appeler votre attention sur le fait que l'immobilisation du navire « Louisa » a eu lieu dans le port commercial de El Puerto de Santa Maria, ville proche de Cadix où le navire « Louisa » été amarré à peu près depuis la fin 2004. En conséquence, tous les faits présumés avoir été commis par les accusés à bord du navire « Louisa » et avec l'utilisation du navire « Louisa » ont été commis dans un port espagnol, voire dire dans les eaux intérieures de l'Espagne. Ceci dit, vaut tant pour les activités relatives au pillage du patrimoine archéologique que pour le dépôt illicite d'armes de guerre.

En troisième lieu, il convient également de tenir compte que l'immobilisation du navire « Gemini III » a eu lieu dans une « calle sèche » du port de Puerto Sherry, c'est-à-dire sur territoire espagnol. Il semble difficile de déterminer absolument les espaces marins où ce navire a développé ses activités. En tout cas, je suis sûre que les zones de navigation du navire « Gemini III » devraient être au moins bien connues par le propriétaire du bateau. Mais au moins, selon les informations que nous avons du côté de l'Espagne et qui font partie des dossiers du service de la police chargé de l'enquête - *la Unidad Central Operativa de la Guardia Civil,* l'Unité centrale opérative de la garde civile -, toutes les coordonnées expressément marquées sur les cartes et dans d'autres documents pris pendant l'enquête de la

garde civile, font référence à des lieux relevant des eaux intérieures de l'Espagne. En outre, je veux ici attirer votre attention sur le fait que le permis auquel la requérante fait référence comme fondement de la licéité de l'activité des deux navires, inclut toutes les coordonnées des seuls espaces où l'activité de recherche scientifique sera ou est autorisée. Comme je l'ai déjà dit, l'espace placé face à la baie de Cadix est tout entièrement compris dans les eaux intérieures et dans la mer territoriale. J'aimerais, si vous le permettez, Monsieur le Président, montrer l'annexe 1 à l'exposé en réponse de l'Espagne, qui contient une carte avec les indications des zones de recherche autorisées par la direction générale du littoral. Merci.

Les remarques que je viens de faire sont en relation avec le deuxième point que je voudrais exposer au cours de ma première intervention : l'objet de la demande introduite par Saint-Vincent-et-les Grenadines, à l'origine de la procédure extraordinaire dont votre Tribunal s'occupe aujourd'hui.

Vous pouvez être sûr, Monsieur le Président, que je n'ai aucune intention de soulever à ce stade de la procédure des éléments qui devront être débattus, le cas échéant, dans le cadre de la procédure sur le fond. Mais je ne peux pas passer sous silence le fait que, pour l'Espagne, l'objet de la différence n'apparaît pas clairement, ni dans la requête principale, ni dans la demande en prescription de mesures conservatoires. En fait, si on lit attentivement ces deux requêtes et les *petita* contenus dans chacun des documents, on pourrait arriver à une conclusion, si vous me permettez, paradoxale :

A première vue, d'après la requête principale, il semblerait que la partie demanderesse considère que l'Espagne aurait violé diverses normes de la Convention des Nations Unies sur le droit de la mer, contenues dans les articles 73, 87, 226, 246 et 303. Et, il faut le dire, il ne s'agit pas de normes non négligeables, mais de normes qui se réfèrent à des aspects essentiels du droit de la mer, voir : le régime de la zone économiques exclusive, la liberté de navigation, le régime de la recherche scientifique marine et le régime applicable aux objets archéologiques sous-marins. Et tout cela, toutes ces violations, par le simple fait d'avoir saisi et retenu dans un port espagnol deux navires réputés avoir participé en tant qu'élément nécessaire pour la commission du crime à des activités criminelles présumées en Espagne. Des actions qui, vous le conviendrez avec moi, ne peuvent être qualifiées que comme une forme d'exercice légitime de la souveraineté de l'Etat. J'insiste, Monsieur le Président, ce n'est pas mon intention d'ouvrir un débat sur le fond. Mais permettez-moi au moins de signaler le caractère excessif du prétendu objet de la demande.

Mais, bizarrement, les arguments sur le bienfondé de la demande de Saint-Vincent-et-les Grenadines ne se développent pas dans la requête principale, mais dans la demande en prescription des mesures conservatoires. Dans cette demande, il me semble que l'objet de la différence est dessiné d'une façon beaucoup plus concrète. L'immobilisation du navire « Louisa » est illégale et les autorités espagnoles seront obligées, par conséquent, d'ordonner sa prompte mainlevée.

Je voulais attirer votre attention sur ce sujet, car l'Espagne considère que cette différence d'approche peut avoir des conséquences sur la présente procédure en prescription de mesures conservatoires. En effet, il convient de ne pas oublier que, d'un côté, il doit y avoir une relation entre la demande sur le fond et le *petitum* des mesures conservatoires. Mais d'un autre côté, il faut rappeler que, d'après un principe général du droit bien établi tant au niveau international qu'au niveau interne, on ne peut pas prétendre avoir dans une procédure incidente ce que l'on prétend obtenir, en tout en en partie, dans la procédure sur le fond.

Mais, encore plus, il faut se poser la question de savoir si, en réalité, l'objet de la requête en prescription de mesures conservatoires n'est pas le vrai objet du différend qui mène la partie demanderesse à introduire une demande devant votre honorable Tribunal, c'est-à-dire : obtenir purement et simplement la mainlevée du navire retenu en Espagne ou un dédommagement par équivalence. Une prétention qui, comme nous l'avons déjà déclaré dans

notre exposé en réponse et que nous aurons l'opportunité de souligner le moment venu, n'est fondée sur la base d'aucune disposition de la Convention des Nations Unies sur le droit de la mer.

Pourtant, Monsieur le Président, Messieurs les Juges, de l'avis de l'Espagne, l'objet du différend semble être beaucoup plus sérieux que cela et se situe dans le domaine plus général du droit international de la mer et des compétences des Etats sur les divers espaces marins. Mais il n'est pas le moment opportun, j'insiste, de se pencher sur ce sujet, sauf bien entendu pour établir un lien entre l'objet de la requête principale et la demande en prescription de mesures conservatoires, dont l'existence est une condition *sine qua non* pour l'exercice même de la juridiction préliminaire.

Monsieur le Président, la troisième question à laquelle j'aimerais me référer dans mon exposé est celle de l'applicabilité, au cas d'espèce, des règles de la procédure de prompte mainlevée du navire, prévues à l'article 292 de la Convention, sur laquelle Saint-Vincent-et-les Grenadines a bâti une bonne partie de ses argumentations, avec pour seule intention, obtenir purement et simplement la mainlevée du navire « Louisa », sans entrer dans d'autres éléments qui pourraient se trouver à l'origine de l'immobilisation du navire et qui font partie des droits reconnus à l'Espagne, tant par la Convention des Nations Unies sur le droit de la mer que par des règles internationales coutumières bien établies.

Bien que le co-agent de Saint-Vincent-et-les Grenadines ait déclaré expressément hier que la partie requérante admet que la procédure de prompte mainlevée n'est pas applicable dans le cas d'espèce, cela ne l'empêche pas de continuer à mélanger, voire confondre, les normes et principes qu'inspirent - ou que devraient inspirer selon son opinion -, les procédures en prescription de mesures conservatoires et la procédure de la prompte mainlevée. Maintenant, alors que le Tribunal est face à une grande opportunité pour faire une nouvelle interprétation - ample -, une interprétation extensive des mesures conservatoires, un instrument avec un grand potentiel d'après l'opinion du requérant. Pour faire cela, Saint-Vincent-et-les Grenadines continue à introduire dans la procédure en prescription de mesures conservatoires, des éléments et des principes propres à la procédure de prompte mainlevée.

On peut bien comprendre cette stratégie de défense de la part de Saint-Vincent-et-les Grenadines. Recourir à la procédure de prompte mainlevée, ou aux principes inspirateurs de la procédure, permettrait à la partie requérante de prétendre à la mainlevée du navire « Louisa » sans être obligé d'entrer dans le débat beaucoup plus complexe et moins favorable à sa position, tel que la possible nature illicite des activités menées par le navire « Louisa » en Espagne, activités contraires non seulement au droit interne espagnol mais aussi, je veux le souligner, aux normes du droit international, dont certaines ont même été acceptées à ce jour par Saint-Vincent-et-les Grenadines. Mais, bien sûr, même si l'on peut comprendre la stratégie de défense de Saint-Vincent-et-les Grenadines, l'Espagne ne peut pas la partager.

Monsieur le Président, il me semble qu'il n'est pas nécessaire de revenir sur les arguments déjà développés en profondeur dans notre exposé en réponse, mais permettez-moi de faire un simple résumé de notre position :

1. Comme votre Tribunal l'a dit à plusieurs reprises, la procédure de prompte mainlevée est une procédure autonome.

2. La procédure de prompte mainlevée répond à un but très clair : il s'agit d'une voie de recours pour garantir que tout Etat Partie à la Convention va respecter le devoir d'accorder la mainlevée du navire, et le cas échéant, la mise en liberté de son équipage, après le dépôt d'une garantie raisonnable, mais dans les termes prévus dans la Convention.

3. La procédure de prompte mainlevée n'a pas une portée générale. Tout au contraire, elle ne s'applique pas que dans le cadre où ladite obligation de prompte mainlevée est prévue dans une norme spécifique de la Convention - articles 73, 220 et 226.

A cet égard, j'aimerais attirer l'attention du Tribunal sur le fait que l'obligation de mainlevée limite les droits de l'Etat côtier, et par conséquence, doit s'interpréter d'une manière restrictive. Ceci empêche, d'après notre avis, d'appliquer l'obligation de prompte mainlevée au-delà des situations expressément prévues dans la Convention. Toute autre conclusion conduirait immédiatement à imposer aux Etats (et je ne comprends pas sur quelle base), des obligations auxquelles ils n'ont pas donné leur consentement. Une telle conclusion est, cela va sans dire, simplement en contradiction évidente avec le droit des traités.

Mais le caractère restrictif et limité de l'obligation de prompte mainlevée des navires a, et doit avoir aussi, des conséquences sur le plan de la procédure de promptes mainlevées qui, elles aussi, doivent s'interpréter de manière restrictive car c'est l'instrument pour garantir l'application de l'obligation des mainlevées.

Seulement, de ce point de vue, on peut comprendre que le seul objet de la procédure de prompte mainlevée soit l'accomplissement même de l'obligation après la fixation et le dépôt d'une garantie suffisante sans que le Tribunal ne soit obligé d'entrer dans la qualification du bien-fondé de l'immobilisation. Il y a une limitation qui ne s'explique pas que par le choix fait par les Etats dans la Convention de privilégier certaines activités qui se développent dans certains espaces marins, à savoir l'exploitation de ressources dans la zone économique exclusive et la protection contre la pollution marine.

Dans toute une autre situation, il est bien possible que l'affaire de l'immobilisation du navire soit soumise au Tribunal, bien sûr, mais en tout cas, dans tous les autres cas non inclus dans les articles 73, 220 et 226, votre Tribunal sera appelé à se prononcer au préalable sur le bien-fondé de l'immobilisation avant d'arriver à aucune conclusion sur la mainlevée du navire.

Les conséquences de tout ce que je viens de dire sur les cas d'espèce sont claires :

1. Il n'y a pas de lien entre l'immobilisation du navire « Louisa » et les articles 73, 220 et 226.

2. Il n'est pas possible d'appliquer la procédure de prompte mainlevée en tant que telle en la présente affaire.

3. Il n'est pas possible non plus, comme semble le prétendre Saint-Vincent-et-les Grenadines, d'appliquer au cas d'espèce les principes qui sont à la base de ce type de procédure. En particulier, il n'est pas possible pour le Tribunal de conclure l'obligation de l'Espagne d'accorder la mainlevée du navire « Louisa » sans s'être prononcé au préalable sur le bien-fondé de la requérante selon laquelle l'immobilisation du navire« Louisa » serait contraire à la Convention. Et il n'est pas possible d'arriver à cette conclusion sans se prononcer sur le fond de l'affaire, ce qui n'est pas permis au présent stade car nous sommes placés, par la volonté de Saint-Vincent-et-les Grenadines, dans une procédure en prescription de mesures conservatoires.

Monsieur le Président, j'aimerais finir cette partie de mon intervention avec quelques mots sur l'obligation de consultation préalable (article 283) et l'obligation de l'épuisement de recours internes (article 295) comme des conditions nécessaires pour que le Tribunal puisse exercer sa compétence à laquelle nous avons déjà fait référence dans notre exposé en réponse. Il s'agit de deux conditions différentes, bien sûr, mais que le demandeur essaie de présenter comme ayant une seule manifestation : l'effort continu de la requérante par le propriétaire du navire « Louisa », de trouver une solution au problème de l'immobilisation.

Monsieur le Président, l'Espagne ne peut que rejeter cette affirmation. Saint-Vincent-et-les Grenadines n'a fait aucun effort pour avoir des consultations préalables avec l'Espagne ni le propriétaire du navire « Luisa » ont fait des efforts pour obtenir la prompte mainlevée du navire qui est l'objet de la requête en prescription de mesures conservatoires.

Le co-agent de Saint-Vincent-et-les Grenadines a déclaré hier que l'Espagne n'a jamais fait une notification aux autorités de cet Etat sur la situation du navire « Louisa » et,

en plus, il a mis en doute tant l'existence même d'une note verbale de l'Espagne que la validité de la voie de communication de cette note verbale, car il n'aurait pas été adressé au bureau du Haut-Commissaire de Saint-Vincent-et-les Grenadines pour des affaires maritimes de Saint-Vincent-et-les Grenadines que, c'est curieux, à son siège à Genève.

En premier lieu, Monsieur le Président, Messieurs les Juges, je dois exprimer mon indignation pour la première des affirmations du co-agent de Saint-Vincent-et-les Grenadines et manifester aussi publiquement ma surprise pour des affirmations qui reflètent la méconnaissance absolue des co-agents de Saint-Vincent-et-les Grenadines, des normes élémentaires de la communication diplomatique. En premier lieu, les notes verbales ne mentionnent pas d'un sceau de réception et je vous renvoie tout simplement à la note verbale de Saint-Vincent-et-les Grenadines en date du 27 octobre 2010, insérée au dossier par la requérante, sans qu'il soit nécessaire de faire référence à la pratique bien établie en matière de remise de note verbale. En deuxième lieu, je dois rappeler que, d'après la Convention de Vienne sur les relations diplomatiques, toute communication officielle entre l'Etat d'envoi et l'Etat hôte doit se faire à travers l'ambassade de l'Etat qui envoie et le Ministère des affaires étrangères de l'Etat hôte, et cela a été la procédure suivie par l'Espagne. Une procédure qui, par contre, n'a pas été suivie par Saint-Vincent-et-les Grenadines pour nous communiquer sa décision d'introduire une demande devant votre Tribunal : Saint-Vincent-et-les Grenadines a préféré envoyer une note verbale à travers sa mission diplomatique aux Nations Unies à New York, adressée à la mission permanente de l'Espagne; une procédure tout à fait inadéquate pour les relations diplomatiques bilatérales entre des Etats qui ont des relations diplomatiques permanentes.

En tout cas, Saint-Vincent-et-les Grenadines connaissait depuis le 15 mars 2010 que les autorités espagnoles avaient déclenché des procédures judiciaires contre le navire « Louisa » et a gardé le silence jusqu'en 2009, date à laquelle la requérante s'est limitée à faire une consultation informelle, voire un courriel, à la *Capitanía Marítima de Cadix*, l'autorité compétente pour la navigation dans la région de Cadix. Sa consultation informelle se référait à la situation du navire « Louisa ». Une consultation qui, malgré la réponse confirmant que le bateau était immobilisé sur ordre d'un juge espagnol, n'a provoqué aucune réaction officielle de la part de Saint-Vincent-et-les Grenadines. Et c'est seulement un mois avant l'introduction de l'instance, et en tout cas avant le dépôt de la déclaration d'acceptation de la compétence du Tribunal international du droit de la mer que Saint-Vincent-et-les Grenadines s'est adressé à l'Espagne pour lui communiquer qu'il avait l'intention d'introduire une demande, une instance devant votre Tribunal. Est-ce que vous pensez que ce que je viens de dire suffit pour remplir l'obligation de consultation préalable prévue à l'article 283 de la Convention ? Permettez-moi de dire que d'après l'Espagne il n'est pas possible d'arriver à une telle conclusion.

En outre, le co-agent de Saint-Vincent-et-les Grenadines a dit dans son exposé que la requérante avait fait tout ce qu'il était possible pour appeler l'attention des autorités espagnoles sur la situation du navire « Louisa ». Et il a cité une lettre envoyée à l'Ambassadeur d'Espagne aux Etats-Unis, et une autre lettre envoyée au Consul général de l'Espagne à Houston à laquelle était jointe une plainte adressée au Consul général des pouvoirs judiciaires. Je vous informe que cette plainte a été envoyée depuis plusieurs mois par les autorités espagnoles au Consul général du pouvoir judiciaire. Permettez-moi de poser une question : ces lettres sont-elles des lettres officielles du requérant, voire de Saint-Vincent-et-les Grenadines, ou par contre des lettres des avocats du propriétaire du navire « Louisa » ou de la société Sage Maritime? Bien sûr, il ne s'agissait pas de lettres de la requérante, et en outre, elles sont envoyées à des agents diplomatiques de l'Espagne accrédités aux Etats-Unis et non aux agents de l'Espagne accrédités à Saint-Vincent-et-les Grenadines.

Par conséquent, il ne nous semble pas possible de conclure que ces soit disant « communications officielles » suffisent pour accomplir l'obligation de maintenir des

consultations avant d'introduire une instance devant le Tribunal International du droit de la mer.

Pour ce qui est de la référence à l'épuisement des recours internes, l'Espagne considère qu'il s'agit d'une condition requise dans le cas d'espèce, car personne ne peut pas oublier que, du point de vue du droit international, nous sommes face à un cas typique d'exercice de la protection diplomatique de Saint-Vincent-et-les Grenadines à l'égard d'un navire immatriculé dans ce pays. Mais dans ces demandes, les demandes de la protection diplomatique qui peut s'exercer par voie de recours judiciaire, les diverses activités énumérées dans la requête de Saint-Vincent-et-les Grenadines et réitérées par son co-agent ne nous semblent pas suffisantes pour remplir cette condition. En effet, il suffit de rappeler à ce stade de la procédure que la plupart des activités des propriétaires du navire « Louisa » sur lesquelles Saint-Vincent-et-les Grenadines informe sont des activités tout à fait informelles (lettres, etc.), et ne constituent pas l'exercice par le propriétaire du bateau d'actions juridiques suffisantes pour obtenir le respect des droits qu'il prétend avoir. Est-ce que vous pouvez me dire quand le propriétaire a demandé judiciairement à l'Espagne la mainlevée du navire « Louisa » ? Jamais, à ma connaissance. Et, pourtant, le propriétaire, de la société Sage Maritime, est parti au procès pénal depuis 2008.

Par conséquent, je dois conclure que la condition de l'épuisement des recours internes n'a pas non plus été accomplie par le sujet qui avait le droit et le pouvoir de le faire : le propriétaire du navire.

Monsieur le Président, avec cette intervention, je finis maintenant et je vous prie de bien vouloir donner la parole à Monsieur le Professeur Aznar Gómez.

Merci de votre aimable attention, Monsieur le Président, Messieurs les Juges.

STATEMENT OF MR AZNAR GÓMEZ
COUNSEL OF SPAIN
[PV.10/06/Rev.1, E, p. 9–18]

Mr Aznar Gómez:

Mr President, distinguished Members of the Tribunal, it is an honour to appear before you for my very first time to continue the present submission on behalf of the Kingdom of Spain in response to the request of provisional measures submitted by Saint Vincent and the Grenadines.

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

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

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

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

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

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

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

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

As indicated in Chapter 2 of the Written Response of Spain, in this case we are facing a scenario with two, or even three, vessels: the *Louisa*, the *Gemini III* and the *Maru-K-III* –

although the only one under discussion here is the *Louisa*; several companies – incorporated in both the United States and in Spain; and a group of persons which includes the owners of the vessels, the owners of the companies, legal attorneys, crew members, divers, treasure hunters and even housing gas providers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In any event, should the Tribunal decide to prescribe such kind of measures, under no circumstances could the latter prejudice or affect any international domestic legal process on

the same facts. Therefore, the Applicant must convincingly prove that the release of the *Louisa* – as a provisional measure – would help to preserve the respective rights of both parties *pendent lite,* and that release of the *Louisa* is a matter of urgency. Unfortunately for the Applicant, none of these conditions has been complied for in this Request.

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

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

With regard to the first condition – the imminent prejudice to one or both parties – the question to assess is the possible irreparable prejudice caused to each party in the dispute by the non-release of the *Louisa.* In the case of the Applicant, the prejudice is the mere quantitative, although relative, alleged damage caused to a US company with no bond at all with Saint Vincent and the Grenadines. In the case of the Respondent, the *Louisa* – as well as other documents, information and property seized onboard – is a clear evidence of a crime, a "piece of conviction" in a criminal procedure. The *Louisa* – helped by *Gemini III* – is not a simple vehicle like any other used to commit an offence: it is an indispensable tool in the criminal activity allegedly performed by Sage and the rest of the private persons accused in the criminal procedure before Criminal Tribunal No. 4 of Cadiz.

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

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

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

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

> case of pollution offences in article 230); imprisonment remains available in regard to smuggling offences. Prompt release orders reduce the penalties available to the appropriate domestic forum and may even prejudice the holding of the trial in the first place.

Then it continues with the words quoted by the Applicant. The last sentence of paragraph 13 ends by saying: "In that perspective, article 292 is not the appropriate remedy in such cases. In my opinion, the aspect of imprisonment should not be overlooked".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As has already been said, in order to decide on its *prima facie* jurisdiction, the Tribunal must ascertain the relationship between the interim relief and the main claim. Once

this has been ascertained, then the other conditions – necessity and urgency – are to be dealt with properly. Therefore, the questions for that *prima facie* jurisdiction are whether Spain has apparently violated articles 73, 87, 226, 245 and 303 of the Convention.

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

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

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

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

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

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

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

(Short adjournment)

The President:
You may resume your statement, sir.

Mr Aznar Gómez:
Thank you, Mr President.

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

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

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

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

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

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

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

The President:

Thank you very much for your statement.

I now call on the Agent of Spain.

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ
AGENT DE L'ESPAGNE
[PV.10/06/Rev.1, F, p. 19–20]

Mme Escobar Hernández :
Merci, Monsieur le Président.

Après l'exposé de mon collègue, Monsieur le Professeur Aznar Gomez, je ne vais pas abuser de votre patience et je prends la parole tout simplement pour faire une remarque générale sur la bonne foi dans le cadre du procès, en premier lieu, et pour répondre surtout aux questions qui nous ont été transmises par le Président à l'occasion de la réunion préparatoire avec les agents, en second lieu.

Sur la bonne foi dans le cadre du procès, je ne désire pas introduire de nouveaux éléments qui m'obligeraient à prendre trop de temps. Je le sais, nous sommes déjà à la limite du temps qui nous a été alloué. Mais, au moins, j'aimerais appeler votre attention sur certaines circonstances qui, d'après l'Espagne, ont de l'intérêt pour le procès.

- Premièrement, la relation entre les dates de la note verbale envoyée par Saint- Vincent-et-les Grenadines à l'Espagne en octobre dernier. Par cette note verbale, on annonçait déjà l'introduction d'une demande d'instance. La date d'acceptation de la compétence du Tribunal plus de vingt jours après et la date de l'introduction de l'instance seulement cinq jours après le dépôt de la déclaration d'acceptation de la compétence.
- Deuxièmement, la portée même de la déclaration d'acceptation de la compétence, sur laquelle je ne vais pas faire de commentaire à ce stade.
- Troisièmement, la pratique constante de la partie requérante de mélanger et confondre les procédures et les règles applicables, et la pratique aussi constante de mélanger le rôle du requérant et des propriétaires du navire détenu.
- Quatrièmement, la pratique aussi constante de la requérante de vouloir entrer dans le fond, même si l'on dit que l'on ne veut pas entrer dans le fond, et même d'obtenir une révision anticipée du procès pénal qui se suit en Espagne et de discréditer les juges et d'autres autorités publiques espagnoles, même moyennant l'emploi de certaines expressions tout à fait étrangères au monde des relations internationales et, bien sûr, au monde des tribunaux internationaux.

Je ne veux tirer aucune conséquence de tout cela sur le plan de l'abus du droit dans le procès. Ce n'est pas mon intention. Mon intention est tout simplement, Monsieur le Président, Messieurs les Juges, de manifester notre souci par le besoin de garantir le respect de la bonne foi procédurale qui doit, sans aucun doute, inspirer toute procédure devant une cour de justice. Et nous sommes devant une cour de justice.

Monsieur le Président, pour ce qui fait référence aux questions que vous nous aviez transmises jeudi, je peux vous dire ceci :

En premier lieu, sur les zones marines où ont eu lieu les actes qui pourraient, le cas échéant, constituer des crimes, j'ai déjà dit que, selon les informations disponibles, ils ont eu lieu toujours dans les eaux intérieures et, éventuellement, dans la mer territoriale.

En deuxième lieu, sur la signification des termes *« the No. 4 Court in Cadiz processed the entry and registration of the vessel Louisa »*, l'expert appelé par Saint-Vincent-et-les Grenadines vous a donné déjà, hier, la réponse. Mais, pour répondre directement à votre question, je peux vous dire qu'une telle expression signifie que, suivant une ordonnance du juge pénal compétent, les autorités espagnoles ont entré et procédé à l'inspection du navire en cherchant tout élément de preuve utile pour le procès pénal. En conséquence, Saint-Vincent-et-les Grenadines connaissait sans aucun doute, le 15 mars 2006, qu'un bateau qui portait son drapeau et qui se trouvait à El Puerto Santa Maria dans une situation complexe du point de

vue de l'accomplissement des conditions exigibles pour la navigation, avait été l'objet d'une action judiciaire par les autorités espagnoles.

En troisième lieu, pour ce qui fait référence à l'ordonnance de mise en accusation 1/2010 du 27 octobre 2010, je dois informer le Tribunal que, en ma qualité d'agent de l'Espagne et au seul effet de la présente procédure de prescription des mesures conservatoires, j'ai déjà demandé au service compétent une copie de l'ordonnance aux fins de pouvoir l'incorporer au dossier de l'affaire. Je vous la transmettrai avec sa traduction en anglais sitôt que possible, peut-être cet après-midi même.

Je vous remercie à nouveau de votre aimable attention.

The President:

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

The sitting is now closed.

(The sitting closes at 11.35 a.m.)

PUBLIC SITTING HELD ON 11 DECEMBER 2010, 3.30 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines: [See sitting of 10 December 2010, 2.30 p.m.]

For Spain: [See sitting of 10 December 2010, 2.30 p.m.]

AUDIENCE PUBLIQUE DU 11 DÉCEMBRE 2010, 15 H 30

Tribunal

Présents : M. JESUS, *Président*; M. TÜRK, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines : [Voir l'audience du 10 décembre 2010, 14 h 30]

Pour l'Espagne : [Voir l'audience du 10 décembre 2010, 14 h 30]

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

Reply of Saint Vincent and the Grenadines

STATEMENT OF MR S. CASS WEILAND
CO-AGENT OF SAINT VINCENT AND THE GRENADINES
[PV.10/07/Rev.1, E, p. 1–8]

Mr S. Cass 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 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.

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 S. Cass 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.

(The sitting closes at 4.15 p.m.)

PUBLIC SITTING HELD ON 11 DECEMBER 2010, 7.00 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines: [See sitting of 10 December 2010, 2.30 p.m.]

For Spain: [See sitting of 10 December 2010, 2.30 p.m.]

AUDIENCE PUBLIQUE DU 11 DÉCEMBRE 2010, 19 H 00

Tribunal

Présents : M. JESUS, *Président*; M. TÜRK, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines : [Voir l'audience du 10 décembre 2010, 14 h 30]

Pour l'Espagne : [Voir l'audience du 10 décembre 2010, 14 h 30]

The President:
I give the floor to the Agent of Spain.

Réplique de l'Espagne

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ
AGENT DE L'ESPAGNE
[PV.10/08/Rev.1, F, p. 1–4]

Mme Escobar Hernández :
Merci Monsieur le Président.

Après avoir entendu le co-agent de Saint-Vincent-et-les Grenadines, je ne peux que confirmer mes commentaires de ce matin : la partie demanderesse continue sa stratégie consistant à tout mélanger et produire la confusion. Je m'excuse, Monsieur le Président, Messieurs les Juges, d'être obligée de le rappeler à nouveau.

Dans l'exposé qu'il vient de prononcer cet après-midi, l'agent de Saint-Vincent-et-les Grenadines a suscité un nombre de questions non négligeables. Plusieurs des questions soulevées ne font que répéter des arguments que le demandeur a déjà exprimés hier, par exemple, le permis pour la prétendue recherche scientifique dans le domaine des hydrocarbures, ou la nature et la valeur de la Note verbale de l'Espagne de 2010. D'autres commentaires ne sont que des exercices oratoires dont la finalité est de tenter de perdre le Tribunal dans des anecdotes qui n'ont rien à voir avec la situation du navire « Louisa » mais qui ont eu un fort impact médiatique, il faut le reconnaître, par exemple, les références à l'affaire du navire « l'Odyssé » ou la référence à la piraterie, situations qui toutes deux ont fait leur apparition après l'immobilisation du navire « Louisa ». D'autres questions, d'autres commentaires ont été formulés, avec comme stratégie de Saint-Vincent-et-les Grenadines de mépriser et d'anéantir le comportement des autorités espagnoles. J'ai même entendu dire par le co-agent de Saint-Vincent-et-les Grenadines qu'il pouvait très bien comprendre - car la délégation de l'Espagne n'avait pas eu assez de temps pour préparer sa défense - et que c'était la raison pour laquelle notre défense contenait des erreurs. Bien sûr, Monsieur le Président, je remercie très vivement la partie demanderesse pour la compréhension dont elle fait preuve à l'égard de notre travail, mais il appartient exclusivement aux Juges d'apprécier la valeur de la défense présentée par l'Espagne.

En résumé, il est déjà très tard après une journée très longue et ce n'est pas mon intention de donner une réponse à tous et à chacun des commentaires de Saint-Vincent-et-les Grenadines, d'un côté, parce que plusieurs de ces commentaires font référence au fond de l'affaire, ce dont le Tribunal n'est pas saisi à ce stade de la procédure, et d'un autre côté, parce que certains commentaires ne font pas référence à des questions de droit international général ou au droit de la mer sur lesquelles ce Tribunal doit se prononcer. Par conséquent, permettez-moi, Monsieur le Président, de choisir seulement certains des commentaires du co-agent de Saint-Vincent-et-les Grenadines qui sont plus directement liés à l'objet même des mesures conservatoires. Après cela, j'aimerais finir par une réponse, même si c'est une brève réponse, à la question que le Tribunal nous a posée - aux deux délégations - à la fin de cette matinée, avant bien sûr de lire les conclusions de l'Espagne.

Pour commencer avec les questions de droit international relatives aux mesures conservatoires, je vais traiter des points ci-après : l'épuisement des recours internes et l'urgence.

Contrairement à ce qui a été affirmé par la requérante, l'épuisement des recours internes n'est pas un sujet à résoudre exclusivement sur la base du bon sens. Tout au contraire, l'épuisement des recours internes est une catégorie bien établie en droit international, d'après laquelle il ne suffit pas d'entretenir des conversations, il ne suffit pas d'envoyer des lettres, il ne suffit pas de rendre visite aux juges, il ne suffit pas de rendre visite au procureur et de consulter celui-ci. L'épuisement des recours internes exige, de la partie qui

entend en bénéficier, l'exercice actif et réel de toutes les voies de recours à sa disposition dans l'ordre juridique de l'Etat qui, en principe, aurait causé le préjudice. Et de même, ne sont pas valables de nouvelles visites, de nouveaux contacts, de nouvelles lettres, ou bien d'autres actes destinés à des agents diplomatiques, avec la seule intention d'obtenir, par une voie indirecte, une satisfaction en droit. Ces comportements informels et non juridiques ont encore moins de valeur s'ils sont adoptés à l'égard d'agents diplomatiques qui, du fait de leur accréditation, n'ont rien à voir avec l'affaire. Et je voudrais ici rappeler, Monsieur le Président, que l'accréditation des agents diplomatiques n'est pas une question politique; c'est une question de droit international et elle se trouve au cœur du droit international.

En relation avec l'épuisement des recours internes, la requérante vient de nous présenter un nouveau document : un écrit adressé au juge par le représentant légal de la société Sage Maritime et de M. Foster le 21 février 2008, deux années après l'immobilisation du navire « Louisa », il faut le souligner. Dans ce document, les propriétaires du navire s'adressent au juge pour demander alternativement une de ces trois options :

i. d'obtenir toute l'information disponible sur la situation des navires « Louisa » et « Gemini III »;

ii. de permettre la levée des scellés ou

iii. d'obtenir toute autre mesure pour garantir le maintien des navires.

J'insiste : il s'agit de *petita* alternatifs, pas de *petita* cumulatifs. Et je ne vois pas où la mainlevée du navire est mentionnée.

En outre, la requérante apporte aussi un nouveau document pertinent, mais non traduit, et qui a seulement été produit en espagnol. Heureusement, je peux en bénéficier car c'est ma langue maternelle, mais bien sûr pour les Juges, ce n'est pas nécessairement le cas. Il s'agit d'un écrit de la *Guardia Civil* qui, en répondant au juge, informe que d'habitude, dans des situations semblables à celles du navire « Louisa », le propriétaire du navire désigne un matelot pour assurer les travaux de maintenance.

Et voilà ce que le juge a ordonné : il a adopté une ordonnance le 22 juillet 2008. Mais il est surprenant - je me permets de vous le dire, Messieurs les Juges - que le co-agent de Saint-Vincent-et-les Grenadines n'accepte même pas l'existence, ou pour le moins conteste la connaissance de ce document, de cette ordonnance du 22 juillet 2008, même si celle-ci se trouve dans les annexes présentées par l'Espagne. En ce qui concerne l'urgence, en réalité, tout a déjà été dit. Mais je souhaite au moins attirer votre attention sur un seul fait : le fait que Saint-Vincent-et-les Grenadines, qui se présente devant le Tribunal comme le grand défenseur de l'institution des mesures provisoires - ce que je peux comprendre - et qui même demande une interprétation extensive de cette institution, considère par contre qu'il ne faut pas prendre en considération l'urgence. Cela est bizarre, voire étonnant car dans tout système juridique, tant dans l'ordre interne que dans l'ordre international, le concept même de mesures conservatoires est essentiellement et indissolublement lié à l'urgence et au dommage irréparable qui pourrait se produire si les mesures conservatoires n'étaient pas adoptées avant la fin de la procédure principale, et donc avec urgence.

Pour finir, je voudrais aborder la question posée ce matin par le Tribunal. Je vais essayer de répondre à la question posée ce matin par le Tribunal, à savoir : quelle est la relation de la déclaration faite par la requérante sur la base de l'article 287 de la Convention avec la question de la juridiction *prima facie* du Tribunal?

En effet, l'Espagne a soulevé cette question dans son exposé en réponse. Vous avez eu l'occasion de lire les arguments de l'Espagne et, c'est vrai, je l'ai mentionné ce matin, à la fin de ma plaidoirie.

Pour affirmer d'une façon claire et en résumé l'opinion et l'avis de l'Espagne à l'égard de la question qui nous a été posée ce matin :

Premièrement, je souhaite exprimer notre souci à l'égard de la déclaration de reconnaissance de la compétence et de la manière dont elle a été formulée du point de vue procédural, (les dates, etc.) – je ne vais pas me répéter, cela n'en vaut pas la peine à ce stade – mais aussi du point de vue du contenu, car la portée de la déclaration la transforme, en fait, en une déclaration presque *ad hoc*, en une déclaration qui est très clairement destinée à permettre l'introduction d'une instance contre l'Espagne à l'égard d'une affaire - l'affaire du navire « Louisa » -, qui est en cours en Espagne depuis 2006 et qui a beaucoup d'implications sur lesquelles on pourrait avoir un débat au moment de la procédure au fond.

Deuxièmement, je dois vous dire que nous n'avons pas l'intention de mettre en question la décision d'un Etat de faire une déclaration d'acceptation de la compétence d'un Tribunal international au moment où il veut le faire. C'est le droit de tout Etat d'accepter la compétence d'un Tribunal international, c'est le droit de tout Etat d'introduire une instance au moment où il le considère important. L'Espagne, Messieurs les Juges, Monsieur le Président, connaît très bien la jurisprudence de la Cour internationale de justice dans plusieurs affaires où cette question s'est posée. Si vous me le permettez, je ne vais mentionner que la dernière affaire, l'affaire Nigeria contre Cameroun. La Cour a déclaré que la validité de la déclaration n'était soumise à aucune condition temporelle, et nous l'acceptons absolument sans aucun problème.

En même temps, cela ne veut pas dire que les conditions temporelles et autres qui entourent une déclaration concrète soient sans aucune signification juridique. Dans le cas d'espèce, je pense que cette signification juridique est claire : tant la procédure temporelle que le contenu de la déclaration ont eu des conséquences d'une importance que l'on ne peut pas mesurer à ce stade à l'égard de la position de l'Espagne au cours de la procédure et à l'égard de la possibilité de garantir les droits de l'Espagne à exercer la défense des droits légitimes qui lui sont octroyés par la Convention des Nations Unies sur le droit de la mer.

C'est de ce point de vue que l'Espagne considère que le contenu de la déclaration et la procédure de sa formulation pourraient avoir une certaine influence, si vous me le permettez, sur le plan de la détermination de la compétence *prima facie*. Et c'est dans la mesure où le Tribunal considère que ces éléments ont une incidence, soit sur les conditions de maintien des consultations préalables, soit sur une application correcte du principe de la bonne foi procédurale, à laquelle j'ai fait référence ce matin.

Monsieur le Président, par cette déclaration, j'ai répondu à la question qui nous a été posée ce matin. J'ai donc fini mon exposé oral et, si vous me le permettez, j'aimerais lire les conclusions de l'Espagne.

Conformément à l'article 75, paragraphe 2, du Règlement du Tribunal, l'Espagne présente les conclusions finales suivantes en relation à la demande de mesures conservatoires :

Le Royaume d'Espagne prie le Tribunal :

a) de rejeter la demande en prescription des mesures conservatoires présentée par Saint-Vincent-et-les Grenadines;

b) de rejeter la prescription de toutes les mesures conservatoires demandées par la partie requérante; et

c) d'accorder la prise en charge par Saint-Vincent-et-les-Grenadines des honoraires de l'agent et du reste de la délégation de l'Espagne dans des limites raisonnables, et celle des frais occasionnés par la présente demande, tels qu'ils seront fixés par le Tribunal.

J'en ai ainsi terminé, Monsieur le Président, Messieurs les Juges. Je n'ai qu'à vous assurer de la coopération pleine de l'Espagne dans cette affaire et toute autre affaire à l'égard de laquelle l'Espagne pourrait être appelée à comparaître devant le Tribunal.

Merci, Monsieur le Président.

Closure of the Oral Proceedings
[PV.10/08/Rev.1, E, p. 4–5]

The President:
Thank you, Ms Escobar Hernández.

This brings us to the end of the oral proceedings. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the Agents and counsel of both Saint Vincent and the Grenadines and Spain. I would also like to take this opportunity to thank both Agents for their exemplary spirit of cooperation.

The Registrar will now address questions in relation to documentation.

Le Greffier :
Monsieur le Président, conformément à l'article 86, paragraphe 4, du Règlement du Tribunal, les parties peuvent, sous le contrôle du Tribunal, corriger le compte rendu de leurs plaidoiries ou déclarations, sans pouvoir toutefois en modifier le sens et la portée. Ces corrections devront être transmises au Greffe le plus tôt possible, et au plus tard le mardi 14 décembre à midi, heure de Hambourg.

En outre, il est demandé aux parties de certifier que les documents qui ont été déposés, qui ne sont pas des originaux, sont des copies conformes et complètes des originaux du document. A cette fin, le Greffe leur remettra une liste de tous ces documents. Conformément aux lignes directrices pour la préparation et la présentation des affaires devant le Tribunal, il leur sera également demandé de fournir au Greffe des exemplaires supplémentaires de documents qui ont été fournis en trop petit nombre

Merci.

The President:
The Tribunal will now withdraw to deliberate on the result. The Order will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the Order. That date is 23 December 2010. The Agents will be informed reasonably in advance if there is any change in this schedule.

In accordance with the usual practice, I request the Agents kindly to remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the Order.

The sitting is now closed.

(The sitting closes at 7.25 p.m.)

M/V "LOUISA"

PUBLIC SITTING HELD ON 23 DECEMBER 2010, 11.00 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TÜRK; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines:

Mr Christoph Hasche

For Spain:

Mr Pérez-Villanueva Tovar,
Consul General of Spain in Hamburg

AUDIENCE PUBLIQUE DU 23 DÉCEMBRE 2010, 11 H 00

Tribunal

Présents : M. JESUS, *Président*; M. TÜRK, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines :

M. Christoph Hasche

Pour l'Espagne :

M. Pérez-Villanueva Tovar,
Consul général d'Espagne à Hambourg