

## **Minutes of Public Sitings – 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 FROM 4 TO 12 OCTOBER 2012 AND ON 28 MAY 2013

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

**PROCÈS-VERBAL DES AUDIENCES PUBLIQUES**

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES  
TENUES DU 4 AU 12 OCTOBRE 2012 ET LE 28 MAI 2013

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

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.

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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.

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Note by the Registry: The corrected verbatim records are available on the Tribunal's website at [www.itlos.org](http://www.itlos.org).

Note du Greffe : Les procès-verbaux corrigés sont disponibles sur le site Internet du Tribunal : [www.tidm.org](http://www.tidm.org).

**Minutes of the Public Sitings  
held from 4 to 12 October 2012 and on 28 May 2013**

**Procès-verbal des audiences publiques  
tenues du 4 au 12 octobre 2012 et le 28 mai 2013**



4 October 2012, a.m.

**PUBLIC SITTING HELD ON 4 OCTOBER 2012, 10.00 A.M.**

**Tribunal**

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

**Saint Vincent and the Grenadines is represented by:**

Ms Rochelle A. Forde, Esq., Kingstown,  
Mr S. Cass Weiland, Esq., Patton Boggs LLP, Dallas, Texas, USA,

*as Co-Agents, Counsel and Advocates;*

*and*

Mr Robert A. Hawkins, Esq., Patton Boggs LLP, Dallas, Texas, USA,  
Mr William H. Weiland, Esq., Houston, Texas, USA,

*as Counsel and Advocates;*

Mr Myron H. Nordquist, Esq., Center for Oceans Law and Policy, University of Virginia,  
School of Law, Charlottesville, Virginia, USA,

*as Advocate;*

Ms Dharshini Bandara, Esq., Fleet Hamburg LLP, Hamburg, Germany,

*as Counsel.*

**The Kingdom of Spain is represented by:**

Ms Concepción Escobar Hernández, Professor, International Law Department, Universidad Nacional de Educación a Distancia (UNED), Spain,

*as Agent, Counsel and Advocate;*

*and*

Mr José Martín y Pérez de Nanclares, Professor, Head of the International Law Division,  
Ministry of Foreign Affairs and Cooperation, International Law Department, Universidad de Salamanca, Spain,

Mr Mariano J. Aznar Gómez, Professor, International Law Department, University “Jaume I”, Castellón, Spain,

## M/V "LOUISA"

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

*as Counsel and Advocates;*

Ms María del Rosario Ojinaga Ruiz, Associate Professor, International Law Department, Universidad de Cantabria, Spain,

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

*as Counsel;*

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

*as Adviser.*

4 octobre 2012, matin

**AUDIENCE PUBLIQUE TENUE LE 4 OCTOBRE 2012, 10 HEURES**

**Tribunal**

*Présents* : M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

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

Mme Rochelle A. Forde, Kingstown,  
M. S. Cass Weiland, Patton Boggs LLP, Dallas, Texas, Etats-Unis,

*comme co-agents, conseils et avocats ;*

*et*

M. Robert A. Hawkins, Patton Boggs LLP, Dallas, Texas, Etats-Unis,  
M. William H. Weiland, Houston, Texas, Etats-Unis,

*comme conseils et avocats ;*

M. Myron H. Nordquist, Center for Oceans Law and Policy, Université de Virginie, Institut de droit, Charlottesville, Virginie, Etats-Unis,

*comme avocat ;*

Mme Dharshini Bandara, Fleet Hamburg LLP, Hambourg, Allemagne,

*comme conseil.*

**Le Royaume d'Espagne est représenté par :**

Mme Concepción Escobar Hernández, professeur au département de droit international de l'Université nationale de téléenseignement (UNED), Espagne,

*comme agent, conseil et avocat ;*

*et*

M. José Martín y Pérez de Nanclares, chef de la Division du droit international, Ministère espagnol des affaires étrangères et de la coopération, professeur au Département de droit international de l'Université de Salamanque, Espagne,

M. Mariano J. Aznar Gómez, professeur au Département de droit international de l'Université « Jaime I », Castellón, Espagne,

## NAVIRE « LOUISA »

M. Carlos Jiménez Piernas, professeur au Département de droit international de l'Université de Alcalá de Henares, Espagne,

*comme conseils et avocats ;*

Mme María del Rosario Ojinaga Ruiz, professeur associé au Département de droit international de l'Université de Cantabrie, Espagne,

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

*comme conseils ;*

M. Diego Vázquez Teijeira, conseiller technique à la Direction générale de la politique énergétique et d'exploitation des ressources minérales, Ministère de l'industrie, de l'énergie et du tourisme,

*comme conseiller.*

OPENING OF THE ORAL PROCEEDINGS – 4 October 2012, a.m.

### **Opening of the Oral Proceedings**

[ITLOS/PV.12/C18/1/Rev.1, p. 1–6; TIDM/PV.12/A18/1/Rev.1, p. 1–6]

#### *The President:*

The Tribunal meets today pursuant to article 26 of its Statute to hear the parties' arguments on the merits of the case concerning the vessel *M/V Louisa*.

On 24 November 2010 an application instituting proceedings before the Tribunal was submitted by Saint Vincent and the 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. The Tribunal dealt with this request in a first phase of the proceedings. After a public hearing was held on 10 and 11 December 2010, the Tribunal issued an order on the request for the prescription of provisional measures on 23 December 2010.

I now call on the Registrar to summarize the procedure in the case further to the adoption of this order.

#### *Le Greffier :*

Merci Monsieur le Président.

Par une ordonnance du 12 janvier 2011, le Président du Tribunal a fixé les dates d'expiration des délais pour le dépôt des pièces de la procédure écrite relative au fond de l'affaire, à savoir le 11 mai 2011 pour le mémoire de Saint-Vincent-et-les Grenadines, et le 11 octobre 2011 pour le contre-mémoire de l'Espagne.

A la suite de demandes formulées par les Parties, les dates d'expiration des délais ont été reportées au 10 juin 2011 pour le mémoire et au 12 décembre 2011 pour le contre-mémoire, par deux ordonnances du Président datées respectivement du 28 avril 2011 et du 4 novembre 2011.

Le mémoire et le contre-mémoire ont été déposés dans les délais prescrits.

Par une ordonnance du 30 septembre 2011, le Tribunal a autorisé la soumission d'une réplique par Saint-Vincent-et-les Grenadines et d'une duplique par l'Espagne et a fixé les dates d'expiration des délais de dépôt de ces pièces au 11 décembre 2011 et au 11 février 2012, respectivement. Ces délais ont été par la suite reportés respectivement au 10 février 2012 et au 10 avril 2012 par une ordonnance du Président en date du 4 novembre 2011.

La réplique et la duplique ont été déposées dans les délais prescrits.

Je vais à présent, Monsieur le Président, donner lecture des conclusions des Parties.

S'agissant du demandeur, les conclusions sont contenues aux paragraphes 2 et 86 du mémoire de Saint-Vincent-et-les Grenadines.

*(Continued in English)* In paragraph 2:

The Applicant requests the Tribunal:

- (a) declare that the Memorial is admissible, that the allegations of the Applicant are well-founded, and that the Respondent has breached its obligations under the United Nations Convention on the Law of the Sea ("Convention");
- (b) order the Respondent to return the vessel *Louisa* and its tender, the *Gemini III*;
- (c) order the return of scientific research data and property held since 2006;

M/V “LOUISA”

- (d) order the Respondent to pay direct damages for its improper and illegal actions in the amount of \$5,000,000 (USD);
- (e) order the Respondent to pay consequential damages for its improper and illegal actions in the amount of \$25,000,000 (USD); 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.

In paragraph 86 of the Memorial:

- [T]he Applicant requests the Tribunal to prescribe the following 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 *MV Louisa* and the *Gemini III* and return property seized;
  - (d) declare that the detention of any crew member was unlawful;
  - (e) order reparations in the amount of 30,000,000 (USD); and
  - (f) award reasonable attorney’s fees and costs associated with this request as established before the Tribunal.

In its Counter-Memorial dated 12 December 2011 Spain makes the following submissions:

Spain respectfully asks the Tribunal to reject the requests made in paragraphs 2 and 86 of the Applicant’s Memorial. Spain therefore asks the Tribunal to make the following orders:

- (1) to declare that this honourable Tribunal has no jurisdiction in the case;
- (2) subsidiarily, to declare that the Applicant’s contention that Spain has breached its obligations under the Convention is not well-founded;
- (3) consequently, to reject each and all of the requests made by the Applicant; and
- (4) to order the Applicant to pay the costs incurred by the Respondent in connection with this case, including but not limited to Agents’ fees, attorneys’ fees, experts’ fees, transportation, lodging, and subsistence.

*The President:*

Thank you, Mr Registrar.

By a further order dated 4 July 2012 the Tribunal fixed 4 October 2012, that is today, as the date for the opening of the hearing. Pursuant to the Rules of the Tribunal, copies of the written pleadings are being made accessible to the public as of today. They will be placed on the Tribunal’s website. The hearing will also be transmitted live on this website.

The first round of the hearing will begin today and will close on Wednesday, 10 October 2012. The second round of the hearing will begin on Thursday, 11 October and will end on Friday, 12 October 2012.

I note the presence at the hearing of the Agent of Spain and of the Co-Agents, Counsel and Advocates of both parties. We have been informed by the Co-Agent of Saint Vincent and the Grenadines, Mr Weiland, that the Agent of Saint Vincent and the Grenadines, Mr Bollers, will not be present at the hearing. I therefore call on the Co-Agent, Mr S. Cass Weiland, to introduce the members of the delegation of Saint Vincent and the Grenadines.

## OPENING OF THE ORAL PROCEEDINGS – 4 October 2012, a.m.

*Mr Weiland:*

Thank you, Mr President. It is a privilege for me to be here again and to introduce the delegation of Saint Vincent and the Grenadines. Mr Bollers sends his regrets but we have present Ms Rochelle Forde, whom I would like to introduce first, as Co-Agent, originally appointed by the government to serve as Co-Agent with me. I will have more to say about Ms Forde in a few minutes, when she gives an opening statement for our side. I will say briefly now that she is a graduate of the University of the West Indies in Barbados and was admitted to the bar through the Society of Inner Temple in London.

We also are privileged to have as a member of our delegation on this round Mr Myron Nordquist. Mr Nordquist will serve as an advocate for our delegation and will make a presentation during the course of our case. He is a distinguished authority on the law of the sea. I believe many of you are acquainted with Mr Nordquist. He has formerly held several important positions in the United States and has served as an officer in the Marine Corps. He is a Professor of Law at the University of Virginia and Associate Director of the Center for Oceans Law and Policy. Mr Nordquist is author or editor of more than 50 books and numerous articles and, most importantly perhaps, he is the Editor-in-Chief of the Virginia Commentary on the Law of the Sea. He has served as the Alternate Representative and Secretary to the Third UN Conference on the Law of the Sea. He has also served as a Professor of Law at the United States Air Force Academy and the United States Naval War College.

It is really no exaggeration to describe Mr Nordquist as one of the world's premier authorities on the law of the sea and we are truly privileged to have him as a member of our delegation. We believe that you will find his presentation enlightening and persuasive.

Also present this morning as a member of our delegation again, as he was with me in December 2010, is Mr William Weiland, who serves as counsel. He is an international lawyer. Mr Weiland has served as an officer in the United States Army and has been a partner in a large United States law firm where he served as partner in charge of its office in Mexico City. Mr Weiland is listed in the Best Lawyers in America and in the Euromoney Guide to the World's Leading Energy and Resource Lawyers. I am truly blessed to have him as my brother.

We also have present this morning Mr Robert Hawkins. Mr Hawkins is a graduate of the Baylor University Law School and one of my most trusted partners. He is an outstanding writer and researcher and advocate in his own right.

We also have as our local counsel Ms Dharshini Bandara. Ms Bandara is a member of the firm Fleet Hamburg here in the city, and she is a qualified English barrister and the managing partner of that firm.

We also have our right-hand man, Mr Travis Whittington. Mr Whittington is an expert in audio-visual matters and, we hope, will help us keep things moving smoothly. He hails from the great state of Texas.

*The President:*

Thank you, Mr Weiland.

I now call on the Agent of Spain, Ms Concepción Escobar Hernández, to introduce the members of the Spanish delegation.

*Mme Escobar Hernández :*

Merci, Monsieur le Président, Messieurs les Juges. Permettez-moi, avant de présenter ma délégation, de vous assurer que pour moi, c'est un grand honneur et un privilège d'être à nouveau devant vous dans le cadre de l'affaire du navire « Louisa ».

M/V "LOUISA"

Conformément à la pratique du Tribunal, j'aimerais maintenant vous présenter les membres de la délégation espagnole.

M. José Martin est actuellement Chef du service juridique international du Ministère des affaires étrangères, mais j'aimerais faire remarquer qu'il est aussi professeur de droit international à l'université de Salamanque, l'une des universités espagnoles les plus anciennes et les plus réputées.

M. Aznar Gomez est professeur de droit international public à l'université de Castellón, dans la communauté valencienne. M. Aznar est l'un des plus grands experts dans le domaine du patrimoine culturel sous-marin. Il a notamment publié un très grand nombre d'articles et de travaux sur le sujet et l'UNESCO l'a d'ailleurs désigné membre du Comité d'experts appelé à établir une note explicative de la Convention sur la protection du patrimoine culturel subaquatique, question qui, comme vous le savez, est l'un des défis les plus importants qui reste à relever.

M. Carlos Jiménez Piernas est professeur de droit international public à l'université d'Alcalá de Henares, également l'une des plus prestigieuses universités d'Espagne. M. Jimenez Piernas est l'un des plus grands spécialistes du droit de la mer, en Espagne comme à l'étranger. Il a publié des travaux très importants concernant le droit de la mer et a été l'un des premiers universitaires à avoir travaillé sur certaines questions, notamment sur la structure des archipels aux fins de la Convention. Il participe activement à toutes les activités en relation avec le droit de la mer chez nous et à l'étranger. J'aimerais aussi faire remarquer qu'il a, à plusieurs reprises, été avocat et conseil devant la Cour internationale de Justice dans des affaires qui ont aussi trait au droit de la mer et à la délimitation.

Mme Rosario Ojinaga Ruiz est chargée de cours à l'université de Cantabrie, à Santander (il n'y a pas de traduction française du statut administratif qu'elle a chez nous, mais c'est un professeur de plein droit). Elle a travaillé chez nous dans tous les domaines relatifs aux travaux du Tribunal et a préparé une monographie en cours de publication, sur les procédures devant le Tribunal international du droit de la mer.

M. José Lorenzo Outon est diplomate ; il est conseiller juridique au service juridique international du Ministère des affaires étrangères et de la coopération, et suit – comme vous le savez très bien – la présente affaire depuis le début.

M. Diego Vázquez Teijeira est attaché à la Direction générale de la politique de l'énergie et des mines du Ministère de l'industrie, de l'énergie et du tourisme.

Voilà donc la délégation espagnole, Monsieur le Président, permettez, après la présentation de mes collègues et avant le début des audiences, de vous assurer encore une fois de la pleine coopération de ma délégation. Merci beaucoup, Monsieur le Président.

*The President:*

Thank you, Ms Escobar Hernández. Since both parties have indicated to the Tribunal that they intend to call a number of experts and witnesses, I wish to explain briefly the procedure that is to be followed in this regard.

Pursuant to article 80 of the Rules of the Tribunal, a witness or expert shall remain out of court before testifying. Only after a Party signals to me that it intends to call a witness or expert will I invite the witness or expert to enter the courtroom. Once the witness or expert has taken his or her place, the Registrar will ask the witness or expert to make the solemn declaration in accordance with article 79 of the Rules of the Tribunal. Different declarations are to be made by witnesses and experts, as set out in subparagraphs (a) and (b) of article 79 respectively. Witness-experts will make the declaration as provided for experts.

Under the control of the President, witnesses and experts will be examined first by the Agent, Co-Agents or counsel of the Party who has called them. After that, the other Party may cross-examine the witness or expert. If a cross-examination takes place, the Party calling

## OPENING OF THE ORAL PROCEEDINGS – 4 October 2012, a.m.

the witness or expert will, when the cross-examination is concluded, be asked if it wishes to re-examine. Of course, a re-examination shall not raise new issues but shall limit itself to the issues dealt with in cross-examination.

Thereafter, if the Tribunal wishes to put questions to the witness or expert, questions will be posed by the President on behalf of the Tribunal, or by individual Judges. After that, or if the Tribunal does not wish to put questions, the witness or expert will be allowed to withdraw.

In accordance with article 86, paragraph 5, of the Rules of the Tribunal, witnesses and experts will also have the opportunity to correct the verbatim record of their testimony produced by the Tribunal. However, in no case may such corrections affect the meaning and scope of the testimony given.

As a final procedural remark, let me highlight that, pursuant to article 71 of the Rules of the Tribunal, after the closure of the written proceedings, no further documents may be submitted to the Tribunal by either Party except with the consent of the other Party or if authorized by the Tribunal.

Do I understand that the first speaker on the Saint Vincent and the Grenadines side will be Ms Forde?

*Mr Weiland:*

Mr President, I have a brief statement to make and then I will introduce Ms Forde.

*The President:*

So, Mr Weiland, you have the floor.

M/V "LOUISA"

**Argument of Saint Vincent and the Grenadines**

STATEMENT OF MR S. CASS WEILAND  
 CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
 [ITLOS/PV.12/C18/1/Rev.1, p. 6–7]

*Mr S. Cass Weiland:*

As I mentioned a few minutes ago, Ms Rochelle Forde, my Co-Agent, will make an opening statement shortly but, before she does, I wish to give you a little bit of an introduction to the manner in which Saint Vincent and the Grenadines will present its case today. I think on 23 December 2010, most of you must have believed that you had seen the last of this case. Surely the Parties would somehow come together, something good would happen to the *Louisa* and the case would be concluded – after all, in December 2010 the ship had been illegally seized for more than four and a half years – but nothing has happened to the *Louisa*. We are back to see you, now to ask for substantial compensation for what the Respondent has done to the ship, has done to the crew, and has done to the owner of the ship – and has done to a bystander. We are going to present you with some real witnesses – not expert witnesses, necessarily – people who come to the Court, I am sure, with great trepidation to be before such an august body, not professional witnesses. They are going to tell their stories so you understand exactly what has happened in Cádiz.

In addition to some of the victims of the abuses heaped upon them by the Spanish, we are going to bring to you Mr Myron Nordquist, who is an eminent scholar and, as I said a few moments ago, surely a leading expert on law of the sea matters. I believe that you will find his remarks extremely interesting and, as I said, enlightening and persuasive.

We do not intend to try the case that has been going on in Cádiz now for about seven years – I think the Spanish may try to do that – but we are going to give you some information about what the *Louisa's* objective really was before it was illegally arrested and detained, now for so long. We will also present to you a witness who will tally what we believe to be the damages to which Saint Vincent and the Grenadines are entitled.

Our first presentation is going to be made by Ms Forde. I would like to give you a little more background on her qualifications, because we are indeed privileged to have her as appointed by the government as Co-Agent. As I mentioned, she is a graduate of the University of the West Indies and also of the Society of Inner Temple in London. She is a practising barrister and solicitor in Kingstown. She happens to be the mother of two small children and, despite that, carries on a very active law practice in Saint Vincent. She has served as a Senator and also as a Deputy Speaker of the House. Finally, she is a member of the Saint Vincent and the Grenadines Human Rights Association, which we believe is highly appropriate in this case.

May I present Ms Rochelle Forde?

*The President:*

Thank you.

I now give the floor to the further Co-Agent of Saint Vincent and the Grenadines, Ms Forde, to make her statement.

STATEMENT OF MS. FORDE – 4 October 2012, a.m.

STATEMENT OF MS FORDE  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/1/Rev.1, p. 7–17]

*Ms Forde:*

Mr President, Members of the Tribunal, we are grateful for the privilege today to present an overview of our case before the International Tribunal for the Law of the Sea. Saint Vincent and the Grenadines is a small country with limited resources, and it is a tribute to this Tribunal and the letter as well as the spirit of the 1982 Convention on the Law of the Sea that we have an opportunity to be heard on an equal footing with the Kingdom of Spain. We are here to seek justice, at long last, on a case where justice delayed is truly justice denied.

We recognize that this case raises issues involving the progressive development of international law in many respects. This is a modern Tribunal, however, and we are confident and assured that the Tribunal will hear all the facts, with an open mind, and render a fair legal judgment based on international law, as it is particularly embodied in article 300 of the 1982 Convention, which both parties are bound to honour.

There will be those who will seek to give a restrictive interpretation of the mandate of this Tribunal. However, there can be no legitimate assertion that a genuine dispute does not exist between the Applicant and the Respondent herein over the interpretation or application of article 300 in this specific case. While there are other provisions in the Convention that are also in dispute between the Parties, the arguments already presented in the record speak to an undeniable truth: that a genuine dispute exists between the Parties over article 300 that in and of itself confers jurisdiction, on the merits, for this Tribunal, in this case.

This case presents a most timely opportunity for this Tribunal, allowing it to assume its rightful place at the forefront of international courts and as a leader in progressive jurisprudence based on equal justice for all nations. We strongly urge that the Tribunal not yield to naysayers who deny the legitimacy of international law treaty obligations dealing with abuse of rights and, in the instant case, abuse with respect to both human and property rights.

Please allow me to briefly review the history and background of this case.

This dispute arose because a research vessel flying the flag of my country, Saint Vincent and the Grenadines, was seized by local authorities in Spain over six and a half years ago, on 1 February 2006, while docked in the port of Puerto Santa Maria near Cadiz. The *Louisa* has been detained ever since. Local Spanish authorities not only wrongfully imprisoned two persons at that time but also seized a second vessel, the *Gemini III*, a tender to the *Louisa*. An entire shipload of valuable equipment and computers was impounded, which included intellectual property of the rightful owners who are engaged in the oil and gas service industry. The Respondent now urges this Tribunal to condone these and subsequent procedural and substantive abuses while the Applicant will show why justice in this case has not been rendered in Spain.

The *Louisa* is, or was, a seagoing vessel flying the Applicant's flag that is operated by Sage Maritime Scientific Research Inc. (hereinafter referred to as "Sage"), a United States corporation registered in Texas. The owner is a United States corporate affiliate of Sage organized under the laws of the State of Texas, an entity called Sage Maritime Partners Limited, of which John Foster is a beneficial owner. The *Louisa* was flying the Saint Vincent and the Grenadines' flag at the time of detention and still retains the Applicant's nationality with registration maintained in Saint Vincent and the Grenadines. Due to its unreasonably prolonged detention, the estimated value of the *Louisa* is now unknown, but at the time of its detention its estimated value was approximately \$600,000 (USD). The appearance of the ship three years ago is captioned in the following photograph, as illustrated for your benefit.

## M/V "LOUISA"

Equipment on board the *Louisa* was valued at the time of detention at approximately \$800,000 (USD).

The *Gemini III* is a workboat of approximately 11 metres whose detention is part and parcel of this case against our flagship. When detained, it had a value of approximately \$200,000 (USD). We have illustrated a picture of the *Gemini III* for your convenience. This tender has been stored in a facility in Puerto Sherry, Spain, a location near Puerto Santa Maria, since on or about 1 February 2006.

The *Louisa* had several crew members, including its master, all of whom were Hungarian nationals except for one US citizen. The Respondent detained some of the crew for several days after the vessel's arrest. The master was never detained. However, a United States citizen, Mario Avella, was jailed unjustly and abused for many months. Another United States citizen – a young woman with no connection whatsoever to any alleged criminal activity – was arrested and also unjustly jailed for five days. The Respondent then grossly abused this young woman by refusing to return her passport to her for eight months, thus resulting in considerable unjustifiable hardship to the young woman, who at the time was only 21 years of age; what an entry into the world of adulthood! Two Hungarian crewmen had remained on board. They were jailed and once released, due in great part to the efforts of their local attorneys engaged by John Foster, the Spanish kept their passports and subjected them to terrible hardships as they effectively were confined to Spain with no income. You will also hear of the effect of these abuses on one of the beneficial owners of the ship himself – John Foster.

Mr President, Judges, this Tribunal cannot be expected to endorse such an abuse of a young woman's rights and the rights of the crew members. It appears obvious that the local judge, Louis de Diego Alegre, had no concern about the abuse of the rights of this young woman when he clearly held as a relevant consideration, "She is the daughter of the main person implicated in this case". That comes from the Order of 5 June 2006. Our respective States as members of the United Nations are honour bound to hold steadfast to the fundamental principle of respect for persons, property and their attendant rights, liberties and freedoms. No modern and progressive system of justice as represented by this Tribunal can approve the virtual "house arrest" by the unlawful detention of these persons.

This Tribunal will hear first-hand accounts of the illegal seizure of the vessels and equipment, the abuse of these foreign citizens' rights, and the unrepentant – indeed in several instances arrogant – conduct of certain Spanish officials for whom the Respondent is responsible.

Saint Vincent and the Grenadines is a small nation that is no longer a colonial possession. We have been independent since 1979 and will proudly celebrate 33 years of independence on 27 October 2012. We can stand before this Tribunal and seek justice as a sovereign State entitled to equal standing before the law with other sovereign States irrespective of our small size. We believe that modern history and current international civilized practices are on our side in condemning abusive conduct, and we are grateful for the opportunity presented here to expose such abuses. We are assured that this Tribunal will squarely face the issues presented and set honourable precedents for future actions by the nations of the international community.

In the records of this specific case we bring to your attention that no timely notice of the vessel's detention was transmitted by the Kingdom of Spain or received by Saint Vincent and the Grenadines. The burden of proof is on the Respondent to satisfy this requirement. On the contrary, in this case multiple pleas for justice were ignored (probably now to the regret of the central government of Spain) until the case was filed with the International Tribunal for the Law of the Sea.

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During the hearing on Provisional Measures in December 2010, the Respondent produced a copy of an alleged diplomatic note, issued after the seizure, which had no proof of delivery and of which the Applicant has no record of receiving. Most alarmingly, the content of the note failed to state that the vessels had been seized. It is therefore, on its face, substantively defective, as it failed to state that the vessels had been seized. This action does not meet even a minimal standard of notice under international law. At the very best, the note conveyed an equivocal message. Spain has now conceded that no notice was delivered prior to the seizure of the *Louisa* and that the captain did not give his consent to board. This Tribunal has been presented with highly credible testimony by the Applicant that the *Louisa* was seized in violation not only of Spanish law but also of UNCLOS and international law.

Throughout the “judicial procedure” in Spain, which in this case we submit is most unusual for a modern democratic nation, representatives of one of the beneficial owners, and our government as Agent for the Applicant, attempted all procedural and diplomatic measures available to obtain closure to these unfortunate circumstances now presented in this case. These efforts included attempting to obtain the release of the *Louisa*, the *Gemini III*, and their valuable equipment. These efforts entailed repeated travel to Cadiz, meetings with the local judge and prosecutor in Spain, meetings at the US Embassy in Madrid, a request directed to the Spanish Ambassador to the United States dated 27 April 2010, and a meeting in New York attended by colleague and Co-Agent for Saint Vincent and the Grenadines, Grahame Bollers. After this, the Applicant was reluctantly left with no choice but to challenge the good faith of the Respondent. Over six and a half years of justice delayed is truly not justice at all. We now look to this Tribunal to judge what has taken place and to let the international community know the true meaning of the 1982 Convention. We are indeed convinced that article 300 and other provisions, which we will and have cited, have meanings much different from those advanced by the Respondent.

With respect to the case before this honourable Tribunal, the representatives of the owner of our vessel repeatedly contacted and met in Cadiz with Magistrate Judge Louis de Diego Alegre and other officials attempting to obtain relief, and formal letters were sent to the judge dated 11 February 2009 and 27 August 2009 respectively. The pleas in the letters were ignored and not even the courtesy of a response was ever received. As of this date, one of the ship’s beneficial owner’s urgent attempts, with our full knowledge and support, to secure even the release of valuable computers has been unsuccessful. Property rights appertain to humans and are protected by article 300, and these rights have been grossly abused in this case.

What has been Spain’s response to these abusive actions? Foremost, Spain argues that the Tribunal has no jurisdiction on the merits of this case. Its position at this stage is that the Tribunal must ignore articles 300, 293(1) and basic tenets of international law, and refrain from deciding this case. Spain argues that ITLOS’s mandate deals only with selected articles in the Convention. Indeed, this Tribunal has decided upon matters focused on captured fishing vessels and boundary disputes. However, we believe that accepting such a limitation as proposed by Spain, based solely on cases decided to date, would be an undesirable precedent and a highly erroneous interpretation of the Tribunal’s authority and responsibility. We also believe that to do so would be to completely ignore and disregard various provisions of the Convention.

We wish to invite the Court to attune its mind to some pertinent issues of this case. In particular we speak to issues that the Tribunal previously addressed in its order of 23 December 2010.

## M/V “LOUISA”

## Exhaustion of Local Remedies

Our query is: how long does a sovereign State wait for the “local remedies” in this case to be exhausted in Spain? More particularly, what local remedies are actually available to the sovereign State of Saint Vincent and the Grenadines in the relevant Spanish provinces? The unfortunate reality in this case is that the stage is long overdue for this case to be concluded, and local remedies are more than exhausted.

In fact, the exhaustion of local remedies is not even required in the present case, as pointed out by Judge Paik in his separate opinion to the Tribunal’s Order of 23 December 2010, in which he stated at paragraph 9:

At this stage, I would simply like to point out that, with respect to the exhaustion of local remedies, the Applicant apparently claims that the breach of obligations by the Respondent under the relevant provisions of the Convention resulted in damage to what the Applicant perceives to be its own rights. It should be reminded that the Tribunal stated in the *M/V Saiga* (Case No. 2) that the claims in respect of such damage are not subject to the rule that local remedies must be exhausted. (*M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v Guinea)* Judgment of 1 July 1999, ITLOS Reports 1999, para. 98).

The Tribunal has, therefore, already made it clear that in cases where the claim is for damages the exhaustion of local remedies is not a prerequisite for the exercise of jurisdiction of this Tribunal. It is thus pellucidly clear, on the strict application of article 295, that international law does not require the exhaustion of local remedies in the circumstances of those in the instant case.

To be abundantly clear, this is our position with respect to local remedies: the rights of Saint Vincent and the Grenadines have been violated by the illegal seizure and detention of our flag vessel, the *Louisa*, and all abuses in respect to natural or juridical persons and property rights arise directly from the facts in the case that is before the Tribunal. We have waited for six and a half years for the local remedies, if any, to be extended to us, and we therefore cannot continue to wait in perpetuity. In the alternative, we reiterate the position of this Tribunal in the *M/V Saiga* No. 2 case and submit that a claim for damages, as is part of our claim here today, is not subject to the rule that local remedies must be exhausted. This Tribunal has already established – we submit correctly so – its position as it relates to the exhaustion of local remedies.

If, however, the Tribunal believes that the issue requires additional scrutiny, the Applicant’s position – fully supported by the facts already presented – is that there are no effective local remedies that could be further exhausted by persons suffering damages as a result of the illegal actions of Spain. There has not been the slightest hint, not a scintilla of an indication, of a willingness by Spain to settle this case. The Tribunal need look no further than the time line already provided by the Applicant in the records of the proceedings. The justice system in Spain has been disappointingly dysfunctional in this case, and it is submitted that the Tribunal must not allow persons injured by the illegal activity involved here to endure further and continued abuses with no end in sight. Indeed, this conclusion would represent a reasonable application of the rationale in the *M/V “SAIGA” (No. 2) Case*. This can only auger well for the development of jurisprudence in this area of the law, both for this Tribunal and elsewhere.

In any event, if applicable at all, the requirements of article 295 have been satisfied, and there have been numerous attempts by the Applicant to have this matter resolved. The Respondent disputes this interpretation or application of article 295 and argues that Saint

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Vincent and the Grenadines' claims can be heard only in a Spanish court. This Tribunal is therefore being told by the Respondent to ignore Treaty obligations, as the Respondent believes that exhaustion of local remedies is compulsory when there is any type of pending proceeding, even if the case has no end in sight. However, this Tribunal must ask itself: what is the pending proceeding? Saint Vincent and the Grenadines is not in litigation with Spain. To the best of our knowledge and information, the *Louisa* and *Gemini III* are not even named as parties in Spain. We submit that any argument as it relates to the necessity to exhaust local remedies is just a sleight-of-hand argument to prolong a case that by all reasonable standards should have been settled long, long ago.

Spain also argues that the owner of the vessels delayed the proceedings in Spain, as if to somehow suggest that our government or the vessels' owner had the comparably virtually unlimited resources of Spain. This argument is another disputed fact that the Tribunal may want to consider on the merits and, if necessary, we will show the Tribunal that this argument cannot be taken seriously in view of the abusive and totally unjustified delays caused in this case by the failures of the Spanish judicial system, especially at local levels. In this regard, we invite the Tribunal to direct its attention to our previously submitted detailed discussion at pages 17–21 of our Reply.

Please allow me next to address the final jurisdictional issue raised in Spain's Counter-Memorial.

#### Nationality of the Claim

In its Counter-Memorial, Spain calls into question the extent of the "nationality" of the claim, through strained arguments at best, that attempt to separate the *Louisa* from its crew, tender and owners. This can be found at pages 83–107 of the Counter-Memorial. This is another tactic by the Respondent to attempt to avoid jurisdiction by cleverly mischaracterizing facts, and this endeavour runs counter to clear precedent set by this Tribunal.

In paragraph 70 of its 6 August 2007 Final Judgment in the "*Tomimaru*" Case, the Tribunal found: "The juridical link between a State and a ship that is entitled to fly its flag produces a network of mutual rights and obligations, as indicated in article 94 of the Convention."

In paragraph 106 of its judgment on the merits of the *M/V "SAIGA" (No. 2) Case*, the Tribunal wrote:

... Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything in it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.

Spain attempts to distinguish the clear precedent set by the Tribunal by discussing the need for a genuine link between the flag State, the ship, its crew, its owners and tender, and vaguely alludes to problems faced by international tribunals in matters dealing with parties comprised of entities of various nationalities. (Counter-Memorial, paragraph 91)

Mr President, Judges, we wish to take this opportunity to remind the Respondent that this is the International Tribunal for the Law of the Sea. The decisions of this Tribunal are not overturned or disregarded simply because they do not suit a country's purposes: certainly not. To embark on arguments soliciting decisions contrary to those already settled before this Tribunal is, respectfully, a waste of the Tribunal's time.

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Further, may it please the Tribunal, the Applicant is far better qualified both factually and legally, to present evidence to this Tribunal on vessels flying its own flag.

In modern times, with a global economy, it would indeed be impossible for each person sustaining damage in a given case to be required to look for protection only from his or her national State. Such a procedure would also negate one of the essential values for the creation of an international tribunal such as this. Saint Vincent and the Grenadines is the proper country for both legal and practical reasons to seek reparations not only for the crew who were abused and imprisoned but also for the daughter of a crewman whose rights were despicably abused by her arrest, imprisonment and confinement in Spain.

Unless the position of the Respondent in this case is to assert that the rights of a daughter are meaningless, we ask: what country is better positioned to bring her abuses to the attention of this Tribunal? Again, the interests of justice enshrined in the Convention are best considered by this Tribunal, which can view this case as a whole in context. This Tribunal is the only venue with a complete set of facts about the case as a whole and, moreover, which has a duty under articles 288, 293 and 300 to consider the abuse of rights and denial of justice issues in this specific case.

#### Reparations

We submit the Saint Vincent and the Grenadines' declaration pursuant to article 287 does not limit the scope of the dispute.

The Applicant has sustained substantial harm, which is ongoing, and seeks substantial reparations from the responsible Party. In its Counter-Memorial Spain attempts to limit the scope of this dispute to claims under articles 28, 73, 97, 220 and 226 of the Convention (Counter-Memorial paragraph 135). Spain references Saint Vincent and the Grenadines' 22 November 2010 declaration, choosing the Tribunal as a means of settling disputes concerning the arrest or detention of its vessels as support for this argument (paragraph 132). Amazingly, in reaching its conclusion, Spain attempts to usurp a formal declaration of Saint Vincent and the Grenadines with one of its own construction and to construe the Law of the Sea Convention as if it allowed for reservations in this regard.

To be clear, Saint Vincent and the Grenadines has formally accepted the Tribunal as a means of settling the dispute in this case concerning the arrest and detention of one of its vessels. The Applicant has not excluded itself from any disputes concerning the interpretation of specific articles in UNCLOS. Spain's attempt to read Saint Vincent and the Grenadines' declaration as limiting the jurisdiction of the Tribunal to disputes concerning articles in the Convention that contain the words "arrest" or "detention" (i.e., articles 28, 73, 97 and 226 as suggested by Spain) attempts to replace a formal declaration of Saint Vincent and the Grenadines with one that better suits the Respondent's purposes here. The Applicant formally rejects the Respondent's interpretation of our actions.

We now turn to the information presented to the Tribunal. Information has come to light since the hearing on Provisional Measures in December 2010 which we believe mandates jurisdiction on the merits and warrants imposition of monetary remedial measures against the Kingdom of Spain.

May it please the Tribunal - for purely contextual and background purposes - we remind this Tribunal that at the Provisional Measures hearings, Spain conveniently produced two domestic tribunal orders not previously shared with the Applicant. The first was called an "indictment". This alleged order from a Cadiz magistrate was dated 27 October 2010. The order never was released publicly, and we fear it may have been manufactured to retaliate against the corporate ship-owner and its flag country for bringing the ITLOS action. Saint Vincent and the Grenadines, much less this Tribunal, was never advised as to how Spain's

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representatives obtained an alleged court document which we fear had been conveniently backdated to a time some six weeks prior to the December hearing.

Potentially an even more obvious and flagrant affront to the integrity of the Tribunal's process was seen in the alleged domestic order of 29 July 2010 (Respondent's Annex 9; Applicant's Annex 33). During the hearing in December 2010 the Kingdom of Spain urged the Tribunal to reject the claim that the *M/V Louisa* posed an environmental threat. In support of the notion that its port authorities were "monitoring" the ship, Spain suddenly produced this additional non-public order. Yet the document presented did not attach a critical report of the marine inspector, warning of a possible environmental threat. This may have been detrimental to the Respondent's arguments, but it simply was not attached. The Applicant has comforted itself by a most charitable conclusion that it must have been a plain error by Spain – perhaps caused by the ineptitude of some junior clerk in his failure to staple and attach the report of the marine inspector. The Applicant, however, has not been able to reconcile why the Kingdom of Spain has not corrected the record, even in a review of Annex 6 submitted by Spain with its Counter-Memorial and which contains a series of court orders from Cadiz. To be sure, nowhere to be found is the 29 July 2010 order, much less the report of the port captain warning of a possible environmental problem.

Mr President, Members of the Tribunal, no adjudicating body can be faulted if the conclusion is drawn that these are most curious and even bizarre occurrences. At a minimum these are certainly not proper exercises of due process.

We regret the necessity of raising these incidents, but believe that the very integrity of the Tribunal's processes is undermined by the non-disclosure of key documents under the circumstances just described. While the Respondent might dispute our conclusion, we believe that the actions are undeniably an abuse of rights, an abuse of due process and a denial of justice.

For the foregoing reasons, we believe that this Tribunal may enter a final judgment, and we urge it so to do.

The Spanish investigation: Spain apparently wishes to use this proceeding as a forum for waging a trial over whether the crew of the *Louisa* was prospecting for methane gas or shipwrecks. We believe they were properly and legally engaged in both activities.

We invite the Tribunal to recall that the Spanish arranged and issued the *Louisa's* permits. Yes, the Spanish Tupet company was interested in treasure and the contract contemplated the possibility of finding artefacts. It was also contemplated that at a further stage additional permits would be sought if significant artefacts were sighted; but those are not issues for the Tribunal's concern in this case. Those, honourable Judges, are issues for Spain to pursue in their domestic courts, if they so wish; although, parenthetically, it would be difficult to conceive of such a course of action now after the passage of such a long period of time – the evidence would be stale. Again, those issues are not to trouble the Tribunal in the instant case before it.

Please consider some facts. The ship was arrested on 1 February 2006.

Remarkably, over six and one-half years later there has never been a trial. Perhaps there will never be a trial in Andalusia. How could we know? How can over six years of delay and abuse be rectified?

But ITLOS is not a trial tribunal and the abuse of the Respondents cannot be further condoned or excused. The appropriate issues for ITLOS are: (1) Are the seizure and associated abuses acceptable under international law? (2) Are over six and one-half years of detention of the *Louisa* and its tender, the *Gemini III*, and the abuse of rights of Mario Avella, Alba Avella, John Foster and the two Hungarian crew members violations of article 300 or other articles under the Convention? (3) What damages should be awarded?

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So today we remind the Respondent in this case that we seek justice because in this case Spain has neither settled the matter nor given any signal that it will. Saint Vincent and the Grenadines is not charged in Spain. The *Louisa* and the *Gemini III* are not charged in Spain. We are here to present the illegal treatment of the ships, some members of the crew, the young woman Alba Avella and one of the beneficial owners of the *Louisa*. Also, we are here to explain why these violations necessitate reparations.

Finally, we emphasize that Saint Vincent and the Grenadines asserts as a basis for jurisdiction as well as relief, that a genuine dispute exists over articles 300 and 293(1) of the Convention. It is undeniable that the interpretation and application of articles 293(1) and 300 are relevant to this case.

The Tribunal is aware of the provisions contained in article 300 in Part XVI (General Provisions).

We urge that in this case Spain has violated this provision in at least the following ways: (1) by abusing the human rights of persons only remotely connected to the *Louisa*; (2) by holding the *Louisa* without charges since 1 February 2006; (3) by submitting apparently contrived documents to the Tribunal as previously discussed; and (4) by the discriminatory treatment of the Applicant when compared with the approach taken with other States on similar issues.

This fourth basis deserves elaboration. The Odyssey Marine Exploration vessel, the *Ocean Alert*, serves as a fitting example. According to published reports and facts known to us as a consequence of the court proceedings in Cadiz and Hamburg, Odyssey Marine Exploration, utilizing the *Odyssey Explorer*, salvaged 17 tonnes of gold and silver coins (with a value estimated at US \$500 million), exported them to the United States and then in April 2007 filed in US Courts for salvage rights.

In July 2007 the Spanish Guardia Civil seized the *Odyssey* vessel at sea and sent it to Algeciras to be searched. Several hours after the seizure the Guardia Civil returned passports to the crew and allowed most of them to depart the vessel – several hours after. The *Ocean Alert* was cleared to depart port two days after its seizure (i.e., days, not months – not six and one-half years as in this case.)

In October 2007 the Guardia Civil intercepted at sea and forced the *Odyssey Explorer* into port in Algeciras. The Guardia Civil arrested the ship's captain, charged him with grave disobedience and then released him the day after his arrest. The ship was released shortly thereafter. The ship's captain ultimately was declared innocent of the charges because, interestingly, the court determined the arrest of the vessel was illegal as it was made without proper advance notice being given to the flag State, the Bahamas.

Let us compare the discriminatory treatment of the Applicant's vessel, the *Louisa*. The Guardia Civil, in February 2006, boarded, searched and quarantined the *Louisa* and the *Gemini III*. The vessels had been in the port of Santa Maria for months, more than a year, in the case of the *Louisa*, their research activities having been completely terminated. Nonetheless the Spanish magistrate did not inform the diplomatic representatives of any flag State prior to ordering the arrest of the vessels. This Tribunal has heard an opinion from Don Javier Moscoso, former Attorney General of Spain, that the seizure was illegal during the proceedings held in December 2010 in Hamburg.

The two Hungarian crewmen were imprisoned and then detained in Spain for approximately eight months without trial.

A United States citizen, Mario Avella, who was attempting to fly from Lisbon to the United States, was arrested in the airport in Lisbon, removed to Spain, and imprisoned by the investigating magistrate for approximately seven months without trial and thereafter he was deprived of his passport for an additional twelve months.

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The daughter of the US citizen who was visiting Spain to study Spanish was arrested when the *Louisa* was boarded by the Guardia Civil. After a week in prison, the investigating magistrate refused to return her passport to her for several months and she was effectively imprisoned in Spain because she could not depart the country to return to her home.

This Tribunal is further reminded of the discriminatory treatment meted out to the *Louisa* when compared with the *Odyssey* in these material particulars. The *Odyssey's* vessel was engaged in pure treasure-hunting; the *Louisa* was not. The courts in the United States dispensed justice to Spain: \$500 million in treasure was quickly ordered to be repatriated. The courts in Spain have discriminated against Saint Vincent and the Grenadines and a beneficial owner of the *Louisa* since 2006. Justice in this case has still not been done after six and one-half years of abuse of human and property rights. Before this Tribunal, as stated as we have presented it in this case, squarely rest the abuses prohibited by UNCLOS and other international law principles.

In conclusion, the Kingdom of Spain's disdain for the judicial process of the Tribunal should not be rewarded. The Respondent has belittled and heaped scorn upon Saint Vincent and the Grenadines as it has sought to achieve justice here in this case. We urge you to consider the effect of precedent were this Tribunal to reward the non-disclosure of what appears to be contrived documents.

Spain wants to dictate the mandate for the Tribunal and restrict its authority. This must be rejected. The Applicant believes this Tribunal has full powers to resolve disputes concerning either interpretation or application of any of the articles in UNCLOS. Frankly, this is plainly the object and purpose for ITLOS, and this is being accomplished with great success.

Finally, we respectfully submit that Spain's view of the role of this Tribunal is far too restrictive. This is a modern Tribunal fully capable of considering progressive developments in international law, and the Applicant cannot consider a case more fitting for your determination.

Moreover, Saint Vincent and the Grenadines urges the Tribunal not only to accept jurisdiction on the merits of the case but to find the Respondent in violation of numerous provisions of the Convention and international law, and to award damages, legal fees, and costs.

President, Judges, by way of closing remarks the Applicant wishes to let this Tribunal and the Respondent know that even at this time, now today, we are still open to a settlement from Spain, provided it is adequate, reasonable and executed in a clearly defined, timely manner. I am obliged.

*The President:*

It is now 11.25 and a break is scheduled from 11.30 to noon. The next step will be the examination of a witness, and I see that it will not be possible to conclude that before the break, so may I take it that we have the break right now?

*Mr S. Cass Weiland:*

Yes, Mr President.

*(Break)*

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**Examination of Witnesses**

MS ALBA AVELLA, EXAMINED BY MR S. CASS WEILAND  
 CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
 [ITLOS/PV.12/C18/1/Rev.1, p. 17–46]

*The President:*

We will now continue the hearing. Mr Weiland.

*Mr S. Cass Weiland:*

Thank you, Mr President. May it please the Court, the Applicant would call its first witness, Ms Alba Avella.

*The President:*

Thank you, Mr Weiland.

The Tribunal will proceed to hear the witness, Ms Avella. She may now be brought into the courtroom.

I call upon the Registrar to administer the solemn declaration to be made by the witness.

*Registrar:*

Thank you, Mr President.

Good afternoon, Ms Avella. The witness is required to make a solemn declaration under article 79 of the rules of the Tribunal before making any statement before the Tribunal. You have been provided with the text of the declaration. May I invite you to make the solemn declaration.

*Ms Alba AVELLA is sworn in.*

*The President:*

I now give the floor to the Co-Agent of Saint Vincent and the Grenadines, Mr Weiland, to start the examination of the witness.

*Mr S. Cass Weiland:*

Ms Avella, would you please state your full name for the Tribunal?

*Ms Avella:*

Alba Avella.

*Mr S. Cass Weiland:*

What is your nationality?

*Ms Avella:*

I am a citizen of the United States of America.

*Mr S. Cass Weiland:*

Where do you live, Ms Avella?

*Ms Avella:*

I live in Denver, Colorado.

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*Mr S. Cass Weiland:*

Did you travel all the way from Denver in the last couple of days just to testify here?

*Ms Avella:*

Yes, sir.

*Mr S. Cass Weiland:*

Have you ever testified in court before?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

I would ask you to please listen to my questions and do not feel you have to hurry to answer. There is an interpreter involved in this process and if you give him a little time it would be appreciated. How old are you now?

*Ms Avella:*

I am 28 years old.

*Mr S. Cass Weiland:*

Tell the Tribunal just a little bit about yourself. Are you employed?

*Ms Avella:*

I am. I work at a property management company in Denver, Colorado, and I am also a yoga instructor.

*Mr S. Cass Weiland:*

You work for a firm that manages real property?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

You also do some yoga instructing?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

How long have you been involved in those two activities?

*Ms Avella:*

I have been at the property management company for a year and a half now and I have been teaching yoga for about four years now.

*Mr S. Cass Weiland:*

You are the daughter of Mario Avella. Is that right?

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*Ms Avella:*

That is correct, yes.

*Mr S. Cass Weiland:*

What kind of work does Mr Avella do?

*Ms Avella:*

He is an engineer, mechanic of sorts, on ships.

*Mr S. Cass Weiland:*

An engineer?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Does he do mechanic work, as far as you know?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

To your knowledge, has your dad ever been a ship captain?

*Ms Avella:*

Not that I am aware of, no.

*Mr S. Cass Weiland:*

When you were a child did he go to sea?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

So he worked on ships just in the shipyard?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Do you recall in August 2004 that your father became involved in a project that required him to go to Spain?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

What do you remember about that?

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*Ms Avella:*

He just mentioned that he was travelling overseas to do some work for his boss and that was all I knew of it.

*Mr S. Cass Weiland:*

Did there come a time that your dad invited you to travel to Spain and join him for a while?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

When did you first talk to Mario about that, that you can recall?

*Ms Avella:*

Mid-January of 2006.

*Mr S. Cass Weiland:*

Were you living in Denver at the time?

*Ms Avella:*

I was, yes.

*Mr S. Cass Weiland:*

Were you working?

*Ms Avella:*

Yes, and going to school.

*Mr S. Cass Weiland:*

In 2006 you were 21?

*Ms Avella:*

I was 21 at the time, yes.

*Mr S. Cass Weiland:*

Were you supporting yourself at the time?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Tell the Tribunal how you were supporting yourself, what you were doing, as a 21-year-old in Denver.

*Ms Avella:*

I was a server at a restaurant, as well as a maître d' and hostess at another restaurant. So I had two separate restaurant jobs while I was going to school as well.

*Mr S. Cass Weiland:*

You also went to school?

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*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Where did you go to school?

*Ms Avella:*

I went to a college called the Metropolitan State College of Denver.

*Mr S. Cass Weiland:*

What were you studying?

*Ms Avella:*

English was my major but I was doing my undergrad there.

*Mr S. Cass Weiland:*

And some liberal arts type things?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Had you been to Spain before?

*Ms Avella:*

I had never been to Spain before, no.

*Mr S. Cass Weiland:*

As a 21-year-old, had you travelled abroad very much?

*Ms Avella:*

I was an exchange student in Sweden when I was 14 for a month, and that was it.

*Mr S. Cass Weiland:*

So you had been to Sweden for a month even before high school?

*Ms Avella:*

Yes. I was very young.

*Mr S. Cass Weiland:*

Tell the Tribunal when you got to Spain where did you go?

*Ms Avella:*

When I got to Spain I was picked up by my father at the airport and we headed to the *Louisa*, to the boat that he was staying on.

*Mr S. Cass Weiland:*

You were staying on the *Louisa*?

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*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Had you ever seen the boat before then?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

Did you know what kind of work the *Louisa* was engaged in?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

We see here on our screens a picture of the *Louisa*. I believe the testimony is going to be that [it was taken] when it was first being refitted before it went to Spain. But what kind of shape was the ship in when you arrived?

*Ms Avella:*

It was in good shape. It was clean. It just looked like any other boat.

*Mr S. Cass Weiland:*

Let me ask you if it looked like this later picture.

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

This is a picture taken perhaps in 2009 or 2010.

*Ms Avella:*

It did not look like that.

*Mr S. Cass Weiland:*

Was it in that bad a shape?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

When you arrived at the airport, was that in Madrid or was that outside of the city?

*Ms Avella:*

It was in Jerez, where I arrived.

*Mr S. Cass Weiland:*

So you flew directly from Colorado to Jerez?

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*Ms Avella:*

No. I believe I connected in London Heathrow and then from London Heathrow to Madrid and then on to Jerez.

*Mr S. Cass Weiland:*

So it was a long trip.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

That was not something you were used to?

*Ms Avella:*

No, certainly not.

*Mr S. Cass Weiland:*

So your dad picked you up in Jerez and you went to the boat, the ship.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

You were going to live on the ship and take a vacation.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

I think you said that part of your objective was to study Spanish.

*Ms Avella:*

Yes, I was going to be enrolled in Spanish classes as well as travel around the country a little bit and just enjoy Spain.

*Mr S. Cass Weiland:*

Was the Spanish thing a serious idea? Had your dad investigated the possibility of where you might study?

*Ms Avella:*

Yes, he already had it all set up. We enrolled the following day, the next day that I was there, my first day.

*Mr S. Cass Weiland:*

Just very briefly, was it like a school?

*Ms Avella:*

It was a small school. It was just six or seven students, immersion learning, conversation and learning how to communicate with people in Spain, and it was right in the town of El Puerto.

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*Mr S. Cass Weiland:*  
In El Puerto?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
The Tribunal has heard the name El Puerto de Santa Maria.

*Ms Avella:*  
Yes, that is correct.

*Mr S. Cass Weiland:*  
That was the town that you were attending school?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Also nearby was docked the *Louisa*.

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
On the *Louisa*, of course, your father was living. Was there anybody else on the ship when you arrived?

*Ms Avella:*  
There were two Hungarian gentlemen who were on the boat as well.

*Mr S. Cass Weiland:*  
Can you remember their names?

*Ms Avella:*  
Yes, Alex and Zsolt were the two gentlemen.

*Mr S. Cass Weiland:*  
Alex and Zsolt?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Tell the Tribunal what you recall about the two Hungarian crewmen.

*Ms Avella:*  
They did not speak any English, very broken English. Alex was an older gentleman, very sweet. We nicknamed him “Geppetto” because he was a very nice, grandfatherly type

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gentleman. He cooked and helped maintain the cleanliness of the ship. Zsolt was a nice man. They were very warm.

*Mr S. Cass Weiland:*  
How was their English?

*Ms Avella:*  
Very broken.

*Mr S. Cass Weiland:*  
How was your Spanish?

*Ms Avella:*  
Very broken.

*Mr S. Cass Weiland:*  
How was your Hungarian?

*Ms Avella:*  
Nothing.

*Mr S. Cass Weiland:*  
So when it got to speaking Hungarian with "Geppetto" – is his actual name Gellert Sandor? Do you remember that?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
And Szuszy Zsolt?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Mr Sandor and Mr Zsolt will not be with us this week or next but you seem to be able to remember them pretty well for not being able to converse much.

*Ms Avella:*  
Well, we spent a lot of time together.

*Mr S. Cass Weiland:*  
We will get to that. When you got to the *Louisa* we have heard about its tender, a much smaller boat called *Gemini*. Was that nearby when you arrived?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
Did your dad take you out to see the *Gemini*?

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*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
I want to ask you about your first day or two on the boat. You say it was well kept.

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
We have heard more than a rumour actually – we have seen pictures – that the ship had rifles on board. Did your dad take you to see the rifles?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
You are a western girl. Did you ever shoot rifles?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
So you do not have any familiarity with weapons yourself?

*Ms Avella:*  
Not at all.

*Mr S. Cass Weiland:*  
It was not that one of the first things you did was to go down to the gunsafe and check out the rifles?

*Ms Avella:*  
No, I did not even know there was anything like that.

*Mr S. Cass Weiland:*  
We have also heard that the *Louisa* was involved in a massive international conspiracy to steal the patrimony of Spain. I am going to ask you, when you got on board did your dad take you on a tour around to see all the patrimony that they had been squirreling away for a couple of years?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
Did you see anything that seemed to resemble something – I am talking about when you first got on board – that came from under the sea?

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*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
We have heard stories about a laboratory, in a newspaper article, that was being conducted on the deck of the *Louisa*, where the crewmen were reconditioning patrimony that had been taken from the sea. Did you see anything like that?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
The record reflects that after you were on the ship a very short time your father departed. Is that right?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Tell the Tribunal what were the circumstances of your father's departure shortly after you arrived.

*Ms Avella:*  
It was a family emergency. His mother was extremely ill and he had to return back to attend to her, and that was it.

*Mr S. Cass Weiland:*  
I guess that came as a big surprise.

*Ms Avella:*  
Absolutely.

*Mr S. Cass Weiland:*  
I guess your dad was pretty upset.

*Ms Avella:*  
He was. I was as well.

*Mr S. Cass Weiland:*  
Your Spanish had not improved too much in the first three days?

*Ms Avella:*  
No, not at all.

*Mr S. Cass Weiland:*  
So what was the plan? Was there a plan? He was going to go back to the United States for a very short time?

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*Ms Avella:*

Yes. He said he was going to only be gone a few days and he would return as soon as he could.

*Mr S. Cass Weiland:*

I know 2006 is a long time ago but do you recall how many days you overlapped, so to speak, before he had to depart?

*Ms Avella:*

It was no more than a day or two. Two, maybe three days, I think it was. I cannot remember exactly.

*Mr S. Cass Weiland:*

Had you actually started Spanish by then?

*Ms Avella:*

Yes. I enrolled the day after I arrived and I started classes the next day.

*Mr S. Cass Weiland:*

So you had never been in Spain before. You had only been abroad for a month when you were 14 and your father was going to leave you on the *Louisa* with these two Hungarian gentlemen.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

I guess that was a bit of a tension-packed day or two.

*Ms Avella:*

Yes. I was a little nervous about it but they were very nice men and there was no threat there or anything like that. They very much took care of me while my father was away.

*Mr S. Cass Weiland:*

Did you continue with your Spanish after your dad left?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

How did you get around?

*Ms Avella:*

Alex had the little truck that was right near the *Louisa* and he drove me to and from class. Other than that, I walked around.

*Mr S. Cass Weiland:*

Was that by any chance the truck known as the Berlingo vehicle?

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*Ms Avella:*

The Berlingo, yes.

*Mr S. Cass Weiland:*

We have seen references to it here and there. So it is a small truck.

*Ms Avella:*

Just a small work truck, yes.

*Mr S. Cass Weiland:*

That belonged to the company that owned the *Louisa*?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

I want you to direct your attention now to 1 February 2006 and tell us what happened on that day. First of all, did you go to your Spanish class?

*Ms Avella:*

I did. My Spanish class started at 8 a.m. that morning.

*Mr S. Cass Weiland:*

I think the calendar would reflect that was a Wednesday.

*Ms Avella:*

It was a Wednesday, yes.

*Mr S. Cass Weiland:*

Wednesday, 1 February 2006 you went to Spanish. What happened after the Spanish class?

*Ms Avella:*

I left Spanish class. I was waiting for Alex to come pick me up to take me back to the *Louisa* and I waited for quite a while. I did not really know what had become of him and then a Guardia civil truck showed up.

*Mr S. Cass Weiland:*

You were waiting after your Spanish class out on the street?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

In Puerto de Santa Maria?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

The Hungarian, Mr Sandor, was supposed to pick you up?

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*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Instead, a truck with the Guardia Civil emblem on?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

So this was not a city policeman?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

You knew the Guardia Civil was the Federal Police of the State of Spain?

*Ms Avella:*

I know that now. I did not really know the details of them.

*Mr S. Cass Weiland:*

They looked like police.

*Ms Avella:*

They were official.

*Mr S. Cass Weiland:*

They had an official-looking car.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Did they have uniforms?

*Ms Avella:*

They were wearing uniforms, yes.

*Mr S. Cass Weiland:*

What did they say to you?

*Ms Avella:*

One gentleman approached me, asked if I was Alba. I said, “Yes.” He said, “Alex asked me to come and pick you up and take you back to the *Louisa*.”

*Mr S. Cass Weiland:*

By the way, do you remember how you were dressed that day?

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*Ms Avella:*

It was February so it was chilly. I had my black pea coat, jeans and a T-shirt.

*Mr S. Cass Weiland:*

Jeans and a T-shirt but you had your coat.

*Ms Avella:*

Yes, I had my coat with me.

*Mr S. Cass Weiland:*

So these fellows say that "Geppetto", Mr Sandor, had sent them to pick you up?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Did you think twice before you got in the truck?

*Ms Avella:*

I did. I did not really know what was going on but I had seen them on and around the port where the *Louisa* was and they had a guardhouse, so I recognized the truck and the official uniforms, but I did not really think anything of it. I just got into the truck and ...

*Mr S. Cass Weiland:*

So it is clear that the place where the *Louisa* was berthed had controlled access.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

So it was like controlled access.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

So there was a guardhouse and either these guys or similar looking fellows were in the guardhouse from time to time.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

You had been there four or five days by then?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

So you got in the truck, and what happened?

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*Ms Avella:*

We got into the truck and they drove me back to the *Louisa*.

*Mr S. Cass Weiland:*

As you drive up to the *Louisa*, what is going on on the ship on 1 February?

*Ms Avella:*

There was people everywhere. There was Guardia Civil trucks. There was people going on and off the boat. A bunch of gentlemen in suits.

*Mr S. Cass Weiland:*

You must have enquired of the gentlemen who were driving you “What is happening?”

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

What did they tell you?

*Ms Avella:*

They did not speak very much English. They escorted me on to the boat and there I was met by five or six gentlemen that were wearing suits, who asked me who I was and I told them who I was. I said I was Alba Avella and I said, “What is everyone doing here?” and they said that they were here to search the ship.

*Mr S. Cass Weiland:*

So they were there to search the ship and they had suits on. Did they show you any credentials or anything?

*Ms Avella:*

No. They stated that they had come down from Madrid and that they were here to search the ship.

*Mr S. Cass Weiland:*

So these were, at least it appeared these were Federal Police.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

This was not some city operation?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

They identified themselves from the outset as being from Madrid?

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*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
So what were Mr Sandor and Mr Zsolt doing?

*Ms Avella:*  
They were sitting on the boat. They were just sitting there and looking terrified and I was not really able to talk to them very much.

*Mr S. Cass Weiland:*  
For the reasons you have already expressed?

*Ms Avella:*  
Right.

*Mr S. Cass Weiland:*  
Your Hungarian was lacking and I am sure you all three were quite excited.

*Ms Avella:*  
I do not know if "excited" would be the term I would use but nervous and wondering what was going on, yes.

*Mr S. Cass Weiland:*  
So one of the officers explained they were doing a search of the boat.

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
What time of day was this approximately that you arrived at the *Louisa* and were put on board?

*Ms Avella:*  
It was mid-afternoon, mid-morning.

*Mr S. Cass Weiland:*  
Mid-morning?

*Ms Avella:*  
Between maybe 11 and 12.

*Mr S. Cass Weiland:*  
When was your Spanish class over?

*Ms Avella:*  
Class ended at ten and so I would say between 11 and 12 probably.

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*Mr S. Cass Weiland:*

You are on the boat probably before noon and they explain they are conducting a search. How long did you observe what was going on?

*Ms Avella:*

I observed them for the whole day.

*Mr S. Cass Weiland:*

Were you out on the deck?

*Ms Avella:*

There was a little kitchenette area that I sat at, and they were asking me some questions and asking me to follow them around and asking me questions about the boat and whose cabin was whose and things like that.

*Mr S. Cass Weiland:*

Were you able to communicate with at least some of these people in English?

*Ms Avella:*

Yes. It was very broken English but we were able to communicate enough.

*Mr S. Cass Weiland:*

Did you try to explain to them at all that “I just got here. I just arrived in the country, I do not know what you are asking me about”?

*Ms Avella:*

I did. When I first arrived on the boat one of the gentlemen asked me if I had my passport on me and I said yes and he asked if he could have it and I asked him, “Well, am I going to get it back?” and he said, “Yeah, eventually.”

*Mr S. Cass Weiland:*

I presume he looked at the passport?

*Ms Avella:*

He did look at the passport.

*Mr S. Cass Weiland:*

If a trained police officer looked at the passport and checked your entry stamp, I guess he would be able to tell that you were only in the country for a very few days.

*Ms Avella:*

You would think, yes.

*Mr S. Cass Weiland:*

You say they asked you to follow them around. What were they looking at? Did they explain what they were looking for?

*Ms Avella:*

They did not explain what they were looking for. They were just harassing me with questions.

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*Mr S. Cass Weiland:*  
What kind of questions?

*Ms Avella:*  
Like "Whose cabin is this?" "What is this?" "Where did this come from?"

*Mr S. Cass Weiland:*  
Slowly, please.

*Ms Avella:*  
I am sorry. "Whose cabin is this? Where did this come from? What are these books?" things like that.

*Mr S. Cass Weiland:*  
Did you have any answers to those questions?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
So did they take you down into the hold of the ship?

*Ms Avella:*  
Not at that time, no.

*Mr S. Cass Weiland:*  
Did they take you down into the hold at any time on that day?

*Ms Avella:*  
Not on that day, no.

*Mr S. Cass Weiland:*  
It moved towards dusk, so to speak, at the end of the day, what happened then?

*Ms Avella:*  
I was met by a friend of my dad's and she was able to communicate with the gentlemen from Madrid. She spoke fluent Spanish. They told me that they were going to take me to go see the *Gemini*, as I now know it, which was another boat that was in another marina.

*Mr S. Cass Weiland:*  
So a lady showed up who spoke fluent Spanish and she lived in the area?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
What was her name, just for the record?

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*Ms Avella:*

Her name was Anna.

*Mr S. Cass Weiland:*

You know her last name?

*Ms Avella:*

I cannot pronounce it. It was Milcarz, spelt M-i-l-c-a-r-z, I believe.

*Mr S. Cass Weiland:*

What was her nationality, if you know?

*Ms Avella:*

She was Polish.

*Mr S. Cass Weiland:*

She was a polish lady living in Puerto?

*Ms Avella:*

She had lived in Puerto for a while and was there working.

*Mr S. Cass Weiland:*

So she came and was she helping you communicate?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Did she explain to these officers that you were 21 years old and you had just arrived in the country?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

What happened then?

*Ms Avella:*

We got into the cars and they took us, the Hungarians in one car and myself in one car and Anna in one car, to the marina where the *Gemini* was and told me that I had to be witness to them searching that boat as well.

*Mr S. Cass Weiland:*

Let us go a little more slowly. About what time was that?

*Ms Avella:*

It was in the evening. It was dark.

*Mr S. Cass Weiland:*

Was it daylight?

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*Ms Avella:*

No, it was dark.

*Mr S. Cass Weiland:*

So they had been searching the boat ever since you arrived.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Who knows for how long? They get a car caravan of at least three cars and they head off.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

They said they were going to take you to the search of the *Gemini*. Did you know what the *Gemini* was?

*Ms Avella:*

Not at that time, I did not, no.

*Mr S. Cass Weiland:*

You had never even heard of it?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

So did you express some lack of information about the *Gemini* to these people?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Where was the *Gemini*?

*Ms Avella:*

It was in another marina. I now know it as Puerto Sherry but I did not know at the time where it was, where we were going.

*Mr S. Cass Weiland:*

How long did you drive? Do you remember?

*Ms Avella:*

Maybe 15, 20 minutes.

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*Mr S. Cass Weiland:*

So you drive in through this other marina and was the boat known as the *Gemini III* out of the water? Do you remember?

*Ms Avella:*

I do not remember.

*Mr S. Cass Weiland:*

It was getting dark or it was dark.

*Ms Avella:*

Yes, it was dark.

*Mr S. Cass Weiland:*

You had never seen it before.

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

What happened at that point? Did they board the boat and search it?

*Ms Avella:*

They did, and they were on there for a short time, and then they came off of it.

*Mr S. Cass Weiland:*

The evidence in the case is, or will be, that there was a lot of diving going on in connection with the work that the *Louisa* and the *Gemini* were doing. Did they recover a large amount of patrimony from the *Gemini*, a small amount or none at all?

*Ms Avella:*

Nothing that I saw.

*Mr S. Cass Weiland:*

I guess it is seven o'clock at night or something like that?

*Ms Avella:*

I would say, yes, around seven.

*Mr S. Cass Weiland:*

Is that a fair estimate?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

What happened then after you had looked at the *Gemini* for the first time?

*Ms Avella:*

They arrested me.

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*Mr S. Cass Weiland:*

They arrested you then. That must have seemed rather peculiar to you, that you were being arrested. What were they arresting you for?

*Ms Avella:*

They never said. They read me my rights and they told Anna that they were going to take me into custody. She was very upset about that and kept telling them, "No", that I was just there on vacation, that I had just arrived, and they read me my rights and put handcuffs on me.

*Mr S. Cass Weiland:*

They put handcuffs on you?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

I hate to ask this personal question, but were you a much larger lady in those days?

*Ms Avella:*

No; smaller, if anything.

*Mr S. Cass Weiland:*

What did they do with you once they had you in handcuffs?

*Ms Avella:*

They put me in the back of the car.

*Mr S. Cass Weiland:*

I have not heard about any female officers. Did they have some female officers come up and help out?

*Ms Avella:*

There were no female officers.

*Mr S. Cass Weiland:*

What did they do with you after they had put you in handcuffs and into one of the police cars?

*Ms Avella:*

They took me to a small jail in Cádiz.

*Mr S. Cass Weiland:*

They drove you to Cádiz?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Just tell the Tribunal about what happened when you arrived at the jail.

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*Ms Avella:*

They checked me in, I had to give them fingerprints, and they put me in a jail cell.

*Mr S. Cass Weiland:*

What was the jail cell like?

*Ms Avella:*

It was a small room in the basement of a police station. It was concrete and cold and there was a small camera in the corner of the ceiling.

*Mr S. Cass Weiland:*

There were cameras, so they had you under surveillance. You say that it was a small cell. Can you describe it in terms of length and width?

*Ms Avella:*

Maybe eight feet by eight feet; a concrete slab; no chair; nothing inside of it; just a hole.

*Mr S. Cass Weiland:*

Just a concrete slab?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

There was no built-in cot or sleeping place?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

You say that there was no chair in the cell?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

Was there at least a bath facility?

*Ms Avella:*

I would not call it a bathroom. It was a hole in the floor around the corner from the cell.

*Mr S. Cass Weiland:*

There was a hole in the floor?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

But it was not in the cell?

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*Ms Avella:*

No.

*Mr S. Cass Weiland:*

You had to get permission to get out of the cell to go?

*Ms Avella:*

Yes, I had to ask to go to the bathroom.

*Mr S. Cass Weiland:*

By then, of course, I presume in the 21<sup>st</sup> century Spain had a female officer to look after you?

*Ms Avella:*

There was never a female officer.

*Mr S. Cass Weiland:*

What was your mental condition? You are 21 years old, you have been arrested, handcuffed, driven to a basement cell, your father is in the United States, you do not speak Spanish. What was your feeling?

*Ms Avella:*

I was terrified. It was extremely scary and very hard. It was very scary.

*Mr S. Cass Weiland:*

Once you had decided to bed down for the night, did the guards bring you a couple of blankets or something?

*Ms Avella:*

No. I used my coat.

*Mr S. Cass Weiland:*

You used your pea coat?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

You slept on your pea coat?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

I guess that was pretty scary?

*Ms Avella:*

Yes, it was.

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*Mr S. Cass Weiland:*

What happened the next morning?

*Ms Avella:*

The next morning I was picked up by the same gentlemen who were there the previous day. They picked me up in the morning and told me that I had to go back to the *Louisa* to be a witness to all the things that they were taking off the boat.

*Mr S. Cass Weiland:*

Can I ask you again, please, do not hurry? We have to take this down and we have to interpret it.

*Ms Avella:*

Okay.

*Mr S. Cass Weiland:*

The same gentlemen appear. Did they handcuff you again or not this time?

*Ms Avella:*

No, they just put me in the back of a car.

*Mr S. Cass Weiland:*

Perhaps they had decided that you were not too much of a threat to their physical health?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

You drove back to the ship?

*Ms Avella:*

We drove back to the *Louisa*.

*Mr S. Cass Weiland:*

This is Thursday, 2 February?

*Ms Avella:*

Yes, Thursday, 2 February.

*Mr S. Cass Weiland:*

They wanted you to be a witness to the further investigation in the ship?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Did they not have enough people out there on the first day, or what was their thinking? Did they explain it?

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*Ms Avella:*

No, they did not. They did not talk to me at all.

*Mr S. Cass Weiland:*

Except that they told you that they wanted you to be a witness?

*Ms Avella:*

Right.

*Mr S. Cass Weiland:*

What happened when you got to the ship?

*Ms Avella:*

I arrived at the boat. Anna was there to meet me. Alex and Zsolt were there. They told me that I had to just sit there and wait while they investigated further.

*Mr S. Cass Weiland:*

Then they put you in the lower kitchen area again to sit?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

You say that Mr Sandor and Mr Zsolt were there. Had they been allowed to stay on the boat that night?

*Ms Avella:*

No. They were taken into custody as well.

*Mr S. Cass Weiland:*

They were handcuffed and led off to jail the night before as well?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Were they in your jail, or do you remember?

*Ms Avella:*

I do not know. I never saw them.

*Mr S. Cass Weiland:*

Let us talk about what happened on day two. They wanted you to watch the search, so did they ask you to follow them around again?

*Ms Avella:*

They did. They asked me a few questions about some of the material that was on the boat and then they asked me about the safe that was on the lower level of the ship.

## EXAMINATION OF WITNESSES – 4 October 2012, a.m.

*Mr S. Cass Weiland:*

So you went down into the hold?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

There were various pieces of equipment down there?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

They kept asking you, “What is this?” or “What is that?”?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Had you been down there and inspected all that before?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

You had never been even down to the hold?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

Did you tell them that you had never been there?

*Ms Avella:*

Yes, many times.

*Mr S. Cass Weiland:*

You mentioned something about the safe. What do you mean?

*Ms Avella:*

There was a large safe looking thing in the second level of the boat. They asked me what the combination was to the safe. I told them that I did not know. They said, “Who does know?” and I said, “I do not know”. Then they told me that I needed to call my father.

*Mr S. Cass Weiland:*

You then called your father to get the combination to the safe. That was the idea?

*Ms Avella:*

Yes.

M/V "LOUISA"

*Mr S. Cass Weiland:*

How did that go down? What happened there?

*Ms Avella:*

I was escorted by a Guardia Civil agent to where the guard house was.

*Mr S. Cass Weiland:*

That is the guard house for the dock area?

*Ms Avella:*

For the port area, and I was told to call my dad, and there was a phone there for me to use.

*Mr S. Cass Weiland:*

Of course, you had his number, so you used their phone and called your dad?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

That must have been an interesting phone call. You had not spoken to him since the events of the previous day?

*Ms Avella:*

No. The Guardia Civil told me that I could only ask for the combination of the safe. I was not allowed to tell him anything that was going on on the boat.

*Mr S. Cass Weiland:*

Can you tell the Tribunal what happened in that phone call?

*Ms Avella:*

I called my dad. I asked him what the combination was to the safe. He was very confused and did not know why I was asking that question. He picked up on my nervousness, I feel, and started asking me some 'yes' or 'no' questions, asking me if there were people on the boat, asking me what was going on, and I told him that I did not know what was going on. The Guardia Civil agent then saw that I was having a conversation with him and took the phone away from me and got on the phone with my dad. They asked him where the combination was to the safe and my dad was not able to give it to them.

*Mr S. Cass Weiland:*

He was not able to?

*Ms Avella:*

He did not know it.

*Mr S. Cass Weiland:*

After the discussion about getting into the safe, what happened with you and the police officers?

## EXAMINATION OF WITNESSES – 4 October 2012, a.m.

*Ms Avella:*

They took me back to the ship. I was talking to Anna about some stuff that had happened to me the night before in jail. She became extremely upset and was talking to the officials, and she was very upset with them. We were both very upset.

*Mr S. Cass Weiland:*

I know that when we talk about personal things it is difficult. I know that testifying in this court room is hard in itself. I want you to tell the Tribunal what was going on with you that day and why, among other things, Anna got so upset. By the way, Anna is just a little bit older than you or ...?

*Ms Avella:*

A few years older than myself, yes.

*Mr S. Cass Weiland:*

Tell them what was happening.

*Ms Avella:*

The night before I had started menstruating and I did not have any clothes, I did not have any female products, I did not have anything, so I told Anna this and that is when she got very upset.

*Mr S. Cass Weiland:*

She got very upset?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Was she speaking to these federal police officers in an animated fashion?

*Ms Avella:*

She was screaming at them.

*Mr S. Cass Weiland:*

Screaming?

*Ms Avella:*

Yelling and screaming and telling them how barbaric and horrible their treatment was and that this was absolutely absurd.

*Mr S. Cass Weiland:*

What was their reaction?

*Ms Avella:*

They had cut the power to the ship, but they told me that I could take a shower, so I took a freezing cold shower, and they told me that I was able to change my clothes.

*Mr S. Cass Weiland:*

You then changed into some new clothes?

## M/V "LOUISA"

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Did you pack a few to take with you?

*Ms Avella:*

They allowed me to pack a bag and take it with me.

*Mr S. Cass Weiland:*

Let us talk for a couple more minutes about the search that was going on on day two. You went around and did you see the results of the search in terms of what was happening to the ship itself?

*Ms Avella:*

It was being ransacked. My cabin was torn to pieces. They took my personal belongings.

*Mr S. Cass Weiland:*

We actually have some pictures that the record is going to indicate were taken some time after 2006. The ship was left like *this*. What is this first picture, if you could tell us?

*Ms Avella:*

That is the kitchen area. That is where we ate our meals.

*Mr S. Cass Weiland:*

Apparently they were searching for whatever in the cabinets in the kitchen, and this is how it was left?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

What about the cabins themselves? What happened then in the cabins?

*Ms Avella:*

They were torn apart. My cabin specifically, they threw my clothes everywhere, they took my computer, they took my camera, they started to take my suitcase until I told them that they were just my clothes, so they left the clothes, but they took my computer and my camera.

*Mr S. Cass Weiland:*

You had just brought a computer from Denver?

*Ms Avella:*

It was my school computer, yes.

*Mr S. Cass Weiland:*

Do you remember what kind it was?

## EXAMINATION OF WITNESSES – 4 October 2012, a.m.

*Ms Avella:*

It was a Dell laptop.

*Mr S. Cass Weiland:*

You say that they took a camera?

*Ms Avella:*

Yes, it was my brand new Nikon SLR camera.

*Mr S. Cass Weiland:*

Did you ever get that back?

*Ms Avella:*

No, nor my computer.

*Mr S. Cass Weiland:*

They never gave your computer back to you?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

They certainly did not give you your passport on that day, did they?

*Ms Avella:*

No, they did not.

*Mr S. Cass Weiland:*

After this excellent search is completed, I am going to ask you what happened that night, but before that, since patrimony is such a big issue – we are on day two now – did you see them take any evidence of sunken treasure or anything that resembled something that could have been taken from the sea?

*Ms Avella:*

I saw some rocks. They looked like maybe some concrete pieces. That was all I saw.

*Mr S. Cass Weiland:*

We have a picture that the Respondent introduced into evidence. It is Spain's Annex 16, for the record, and this is photograph number 7. We have tried to enhance this as much as we can, because it is quite difficult to tell what we are looking at here. It appears that in the back there are three rocks, as you say. Do any of these look familiar, or is it just impossible to remember?

*Ms Avella:*

I never saw them take this picture. It might have been.

*Mr S. Cass Weiland:*

You might have seen them take one or two of these off the ship?

M/V "LOUISA"

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Do you think that this picture might possibly depict the entire group of artefacts that the people on the *Louisa* are accused of collecting over a period of two years?

*Ms Avella:*

That is what I was told. That is what I know now.

*Mr S. Cass Weiland:*

So this photo 7 is possibly why we are here?

*Ms Avella:*

Apparently so.

*Mr S. Cass Weiland:*

What happened after they let you shower and change and the day wound down on day two? What happened then?

*Ms Avella:*

They told me that they were taking me back to the cell.

*Mr S. Cass Weiland:*

You had been arrested, or at least detained, for two days by then?

*Ms Avella:*

This was day two of my detainment.

*Mr S. Cass Weiland:*

Did you see a judge?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

Did they talk about taking you to see a judge?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

Perhaps Spain does not have any rules about seeing a judge, but for the first two days there was no judge?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

What was your reaction when they said, "Miss, we are going to take you back to jail"?

## EXAMINATION OF WITNESSES – 4 October 2012, a.m.

*Ms Avella:*

I was hysterical, terrified and hysterical.

*Mr S. Cass Weiland:*

Was that because you knew what was coming, you had been there before?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

When you say that you were hysterical, were you crying?

*Ms Avella:*

Yes, very much so.

*Mr S. Cass Weiland:*

Was Miss Anna still around?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

When the police announced that they were taking you back to jail, after everything that she had been doing on the day before and on that day to convince them that you were just a bystander, what was her reaction?

*Ms Avella:*

She was very agitated. She was very upset and very angry.

*Mr S. Cass Weiland:*

Was she speaking to them in Spanish?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Was she explaining to them in their own language what your situation was?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Notwithstanding that, I take it that you went off to jail?

*Ms Avella:*

They took me to the hospital first actually.

*Mr S. Cass Weiland:*

They took you to the hospital?

M/V "LOUISA"

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Why did they take you to the hospital?

*Ms Avella:*  
They took me there because they thought I would need a sedative because of how upset I was.

*Mr S. Cass Weiland:*  
They had to sedate you. That would be a healthy thing to do because you were so upset, in their minds?

*Ms Avella:*  
In their minds, yes.

*Mr S. Cass Weiland:*  
You went to the hospital to be sedated after being arrested on charges that were never made clear to you. What happened at the hospital?

*Ms Avella:*  
One of the agents was with me in a hospital room. A doctor came in. Neither of them spoke English. He asked me what was wrong. I could not tell him. I was not able to communicate with them very well. He told me that I should take *this*, and he handed me a small pill.

*Mr S. Cass Weiland:*  
The police in their wisdom take you to a hospital to see a doctor who does not speak English, and you are supposed to explain to the doctor why you are so upset?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
He gives you a pill anyway. Did it make you feel better?

*Ms Avella:*  
It put me to sleep.

*Mr S. Cass Weiland:*  
I guess that made the concrete floor a little more comfortable that night too?

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Were you taken back to the same cell?

## EXAMINATION OF WITNESSES – 4 October 2012, a.m.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Had they by any chance put a bed in the cell or anything?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

It was the same concrete floor?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

The same pea coat?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

The same hole in the floor to relieve yourself?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Did they give you anything to eat?

*Ms Avella:*

They offered me a sandwich. I was not in a right capacity to eat. I did not accept it. I was just exhausted at that point.

*Mr S. Cass Weiland:*

You got some sleep that night as a result of having had a pill?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

What happened on Friday morning?

*Ms Avella:*

On Friday morning I was taken to a courthouse and put in a cell in a courthouse.

*Mr S. Cass Weiland:*

Was that a courthouse in Cádiz, or do you not remember?

## M/V "LOUISA"

*Ms Avella:*

It was in Cádiz, yes.

*Mr S. Cass Weiland:*

They take you from one jail cell to another jail cell?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

This is a jail cell in the courthouse building, like in the masonry or something?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Did they try to explain to you the purpose of the trip to the courthouse?

*Ms Avella:*

They did not. None of the agents spoke English. They were not able to communicate with me.

*Mr S. Cass Weiland:*

You may have inferred, "Maybe I am going to see a judge, so I will finally get out of this situation"?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Had you been able to call your father?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

You had not been able to call your father for three days?

*Ms Avella:*

The only time I was able to call him was when I was told to ask him for the combination to the safe.

*Mr S. Cass Weiland:*

During this time, were the Hungarians also under arrest?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Mr Zsolt and Mr Sandor were also being imprisoned at least for this time?

## EXAMINATION OF WITNESSES – 4 October 2012, a.m.

*Ms Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Were they at the courthouse with you on the third day, or did you see them?

*Ms Avella:*  
I did not see them. I do not recall ever seeing them on that day, no.

*Mr S. Cass Weiland:*  
You still had not had any female guards?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
Maybe the police force does not employ females. What happened at the courthouse? You saw the judge and got a bail set like in a civilized country? What happened?

*Ms Avella:*  
No. I was sitting in the jail cell. I met my lawyer for the first time that morning. He told me that the judge was unable to see me that day and that I was going to be taken back to jail for the weekend.

*Mr S. Cass Weiland:*  
Maybe the judge was involved in another international patrimony conspiracy investigation. He could not see you?

*Ms Avella:*  
He could not see me.

*Mr S. Cass Weiland:*  
That was Friday afternoon?

*Ms Avella:*  
That was Friday.

*Mr S. Cass Weiland:*  
If he could not see you, you were not going to get out of jail for the weekend, were you?

*Ms Avella:*  
No.

*Mr S. Cass Weiland:*  
You did not get out of jail, did you?

*Ms Avella:*  
No.

M/V "LOUISA"

*Mr S. Cass Weiland:*

Where did the lawyer come from?

*Ms Avella:*

I am assuming that my father made some phone calls. I do not know.

*Mr S. Cass Weiland:*

A local lawyer appeared and at least gave you the word that after being in the holding cell most of the day the judge was too busy?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Was that Judge de Diego Alegre whom Ms Forde mentioned earlier on?

*Ms Avella:*

Yes, that was his name.

*Mr S. Cass Weiland:*

I guess by then you are getting to be a real veteran going back to your jail cell?

*Ms Avella:*

Feel better?

*Mr S. Cass Weiland:*

No, a veteran. You were used to it. You must have felt no apprehension at all?

*Ms Avella:*

No, that certainly was not the case. I was extremely terrified. I did not know what was going on.

*Mr S. Cass Weiland:*

On Friday at some time in the late afternoon you were taken back to the same cell that you had been in for Wednesday, Thursday and Friday morning?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Was the condition of the cell the same?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Mr President, I am watching my time a little bit. Would you just tell me when you would prefer to take a break? This might be a natural spot, but I will be happy to keep going until whenever you would prefer.

EXAMINATION OF WITNESSES – 4 October 2012, a.m.

*The President:*

I am sorry to tell you that we have almost reached the end of the morning session. It is very close to one o'clock, so would you like to continue the examination this afternoon?

*Mr S. Cass Weiland:*

With pleasure. If that is your preference, that is fine.

*The President:*

The examination of the witness will have to be continued this afternoon. The hearing will be resumed today at three o'clock. The sitting is now closed.

*(Luncheon adjournment)*

M/V "LOUISA"

**PUBLIC SITTING HELD ON 4 OCTOBER 2012, 3.00 P.M.****Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 4 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 4 OCTOBRE 2012, 15 HEURES****Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 4 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

Good afternoon. We will now continue the examination of the witness, Ms Avella.

EXAMINATION OF WITNESSES – 4 October 2012, p.m.

**Examination of Witnesses (continued)**

MS ALBA AVELLA, EXAMINED BY MR S. CASS WEILAND (CONTINUED)  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/2/Rev.1, p. 1–8]

*The President:*

Ms Avella, you are still covered by the declaration that you made this morning.

Mr Weiland, before you continue, let me say the following. The interpreters and the verbatim reporters have experienced some difficulties in following the examination of the witness. Could I ask you both, Mr Weiland and Ms Avella, to speak more slowly and allow for sufficient interpretation after the other finishes before continuing to speak. Thank you very much for your co-operation.

*Mr S. Cass Weiland:*

Thank you very much for that reminder, Mr President. I actually mentioned that to Ms Avella during the lunch break, and we will try and do better.

*The President:*

Thank you. Now you can continue.

*Mr S. Cass Weiland:*

Then I will proceed, Mr President.

Ms Avella, when we took our lunch break we had just had some testimony about your having been sent back to the jail in Cádiz for the weekend of Saturday and Sunday, February 4 and 5. Do you recall that?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Would you describe to the Court briefly what happened to you over the weekend?

*Ms Avella:*

Over the weekend I slept and cried a lot. I prayed. I was hoping that on Monday morning I would be released.

*Mr S. Cass Weiland:*

Was there an opportunity over the weekend to call your father?

*Ms Avella:*

No, there was not.

*Mr S. Cass Weiland:*

I have been remiss this morning in not mentioning your mother and your efforts to talk to your mother. Your mother was back in Colorado during this time – is that correct?

*Ms Avella:*

Yes, she lives in Denver.

M/V "LOUISA"

*Mr S. Cass Weiland:*

Was there some medical situation affecting your mother that heightened your own unease and tension in terms of the entire experience?

*Ms Avella:*

Yes. My mother is very ill. She has her second round of breast cancer. She was involved in her radiation and treatment while I was away.

*Mr S. Cass Weiland:*

You were not able to talk to her?

*Ms Avella:*

I was not able to talk to her, no.

*Mr S. Cass Weiland:*

In fact, were there any calls that you were able to make to anyone over the weekend?

*Ms Avella:*

No, I wasn't able to make any phone calls.

*Mr S. Cass Weiland:*

Did they let you out of your jail cell at all?

*Ms Avella:*

No, they did not.

*Mr S. Cass Weiland:*

So there was nothing like a recreation period or anything?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

On Monday morning, 6 February, and you had now been in jail since 1 February, what happened in terms of your relationship to the court process?

*Ms Avella:*

I was taken to the courthouse. I sat in a cell in the courthouse for a few hours, and then I was brought out to the judge's chambers and was met there by my lawyer and an interpreter.

*Mr S. Cass Weiland:*

Okay, so you now went to the judge's office?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Judge Luis Diego Alegre happened to be working on Monday?

## EXAMINATION OF WITNESSES — 4 October 2012, p.m.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

What happened in his office?

*Ms Avella:*

What happened was that my lawyer gave a statement to the judge asking for the release of my passport, explaining that I had only been there a few days, that I had had no involvement in what was going on. After he made his statement, the judge denied his request to return my passport and said that I could be released from jail, but I was not allowed to have my passport back.

*Mr S. Cass Weiland:*

Did the judge give any explanation as to why you, as essentially a foreign tourist, would be deprived of your identification like that?

*Ms Avella:*

He really had no explanation for me.

*Mr S. Cass Weiland:*

Were you prepared for that kind of a ruling?

*Ms Avella:*

No.

*Mr S. Cass Weiland:*

What was your situation as you left the courthouse on February 6? Did you have anywhere to live?

*Ms Avella:*

I had nowhere to live. I had no money, just a few euros in my pocket that my father had given me prior to him leaving. I had nothing, no cell phone, no identification, nothing.

*Mr S. Cass Weiland:*

You didn't even have a driver's licence?

*Ms Avella:*

I did not, no.

*Mr S. Cass Weiland:*

I take it that you had no job prospects!

*Ms Avella:*

No job prospects, no.

*Mr S. Cass Weiland:*

Despite being in the presence of some Spanish speakers for the last several days, your Spanish, I presume, was not up to par.

M/V "LOUISA"

*Ms Avella:*

No, it wasn't up to par.

*Mr S. Cass Weiland:*

So you did not speak the language; you did not have any money; you did not have any place to live, and you did not have any identification.

*Ms Avella:*

That is correct.

*Mr S. Cass Weiland:*

And the judge put you on the street in that situation.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

So what did you do?

*Ms Avella:*

Well, I went with my lawyer to his office. A friend of my father's met me there and arranged a hotel for that evening and gave me some money, and that was it.

*Mr S. Cass Weiland:*

So then at least you could start trying to obtain some way to call back to the United States.

*Ms Avella:*

Yes, I was able to speak with my mom, my sisters, my brother, back in Colorado.

*Mr S. Cass Weiland:*

What had become of the Hungarian crewmen, if you know?

*Ms Avella:*

The Hungarians met us as well after they had spoken with the judge. I presume - I didn't see them very much until after our release from jail, but a hotel and some money was provided for them as well.

*Mr S. Cass Weiland:*

Who was providing the money to the Hungarians?

*Ms Avella:*

At the time I really didn't know. I assumed it was my father or my father's boss that helped to provide that.

*Mr S. Cass Weiland:*

The Court has just heard that then you ended up in Spain for quite a while. Is that right?

*Ms Avella:*

Yes, that is correct.

## EXAMINATION OF WITNESSES – 4 October 2012, p.m.

*Mr S. Cass Weiland:*

When was your passport returned to you?

*Ms Avella:*

My passport was returned on October 9, 2006.

*Mr S. Cass Weiland:*

Tell the Court what life was like in Spain without a job, any money to speak of or any identification?

*Ms Avella:*

It was very lonely. My brother and my sister came out to visit me at one point. Other than that, I spent a lot of time by myself.

*Mr S. Cass Weiland:*

Did you attempt to get the US Government to assist?

*Ms Avella:*

I did. My sisters tried calling the Embassy. I physically went to the Embassy. They told me that because it was a legal matter that they could do nothing for me.

*Mr S. Cass Weiland:*

What about Mr Sandor and Mr Zsolt – were they also marooned?

*Ms Avella:*

I am sorry?

*Mr S. Cass Weiland:*

The two Hungarian crewmen, Mr Sandor and Mr Zsolt, were they in a similar predicament?

*Ms Avella:*

Yes, they were.

*Mr S. Cass Weiland:*

Was the Spanish lawyer giving you any indication as to how this might be resolved or when?

*Ms Avella:*

You know, he kept saying: “All this will be resolved in a couple of weeks.” A couple of weeks turned into a couple of months. I would check in with him periodically, towards the end of every month that I was there, and he kept telling me, “Oh, another thirty days, another thirty days” and there was no success in the return of my passport at that time.

*Mr S. Cass Weiland:*

We have not talked a lot about your father since your arrest other than a call about the gun closet. What was your dad trying to do during this time?

*Ms Avella:*

My dad was trying to help me. He was trying to be in touch with the lawyers at the time, trying to put pressure on them to get my passport released. He was providing me with, you know, fatherly support, and sending me money.

M/V "LOUISA"

*Mr S. Cass Weiland:*

Did there come a time when he actually came to Spain in an effort to help you exit the country?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

Tell the Court about that.

*Ms Avella:*

There was a time when we had made arrangements – he had made arrangements with the lawyer to meet him and try and speak with him. I spoke with him briefly and I informed him that I didn't think that it was the best idea because if he came back to Spain I was scared that he was going to be arrested as well.

*Mr S. Cass Weiland:*

Do you think that was part of the reason you were still there?

*Ms Avella:*

I did think that was part of the reason.

*Mr S. Cass Weiland:*

So they could entice him back?

*Ms Avella:*

I do feel that was, like, part of their reasoning, yes.

*Mr S. Cass Weiland:*

Well, he did come back and he did get arrested, so you were right. Tell the members of the Tribunal in so far as you know what happened when he came back to try to help you.

*Ms Avella:*

I know that he came back to try and help me. From what I heard from his lawyer, he was trying to go back to the United States to further assist me in my situation, and was then arrested.

*Mr S. Cass Weiland:*

Did he actually see you when he was in Spain and when he came back?

*Ms Avella:*

No, he didn't.

*Mr S. Cass Weiland:*

Why not?

*Ms Avella:*

I told him that I thought the Guardia Civil was following me around. I had recognized a couple – while my brother was visiting we were sitting in a restaurant, eating, and I had

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recognized one of the officers sitting at the same restaurant. When I saw him and recognized him he left very quickly, and I thought that they were following us. I thought that they were keeping surveillance on me, and so I told him that.

*Mr S. Cass Weiland:*

You told you are dad that?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

If he got arrested he would not be in a position to help you, I guess.

*Ms Avella:*

Right.

*Mr S. Cass Weiland:*

So as far as you know he was arrested on some kind of warrant when he reached Lisbon?

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

We will hear from your father so I will not pursue that with you, but you mentioned another lawyer became involved.

*Ms Avella:*

At the time another lawyer was put into contact with me from Madrid. He and his wife came down to El Puerto where I was living, and I met them for dinner. He informed me of what happened to my dad, and he informed me that because they had now arrested my father that he was very confident that my passport would be released back to me.

*Mr S. Cass Weiland:*

In what month was that?

*Ms Avella:*

That was May of 2006.

*Mr S. Cass Weiland:*

You said you did not actually get your passport until October.

*Ms Avella:*

That is correct.

*Mr S. Cass Weiland:*

So your father was arrested and in jail in May 2006, and you were living a hand-to-mouth existence?

*Ms Avella:*

Yes, absolutely. I was living very minimally during that time.

## M/V "LOUISA"

*Mr S. Cass Weiland:*

What about the money that you did have. Was that coming from the ship-owner?

*Ms Avella:*

Yes, it was. I would receive a Fedex package with some euros in it. I wasn't able to go to Western Union. I wasn't able to go to a bank or anything. I had no form of identification so we had to deal strictly with cash. I wasn't able to put a deposit down on an apartment or anything like that; so that's why I had to have assistance from other people to help me.

*Mr S. Cass Weiland:*

So the ship-owner literally had to send you currency.

*Ms Avella:*

Correct.

*Mr S. Cass Weiland:*

And he also sent currency for the Hungarians?

*Ms Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

The Hungarians had actually been hired by the ship management company, not by the ship-owner – is that right?

*Ms Avella:*

I guess so. I don't know.

*Mr S. Cass Weiland:*

So there came a time in October that you were able to pick up your passport. Was there any explanation as to why the court finally released your passport?

*Ms Avella:*

No. I didn't even meet with anyone. I literally walked into the courthouse with my lawyer and a secretary had me sign a piece of paper, and he handed me my passport.

*Mr S. Cass Weiland:*

That was what day in October?

*Ms Avella:*

October 9.

*Mr S. Cass Weiland:*

What day did you leave Spain?

*Ms Avella:*

October 10.

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*Mr S. Cass Weiland:*

Was there some other restriction on you when you were in Spain without your passport? Were you supposed to report in or something?

*Ms Avella:*

I had to check in every fifteen days to the court and get a stamp on a piece of paper.

*Mr S. Cass Weiland:*

How did that work? You mean you physically had to go to the courthouse?

*Ms Avella:*

Yes, I had to physically go to the courthouse. I had to meet – I guess it would be similar to a probation officer of some sort over in the United States. That is what I was comparing it to. I had to check in with him and he had to sign off on my piece of paper that I had.

*Mr S. Cass Weiland:*

You said you did spend some time in Madrid during all of these months.

*Ms Avella:*

I did. My father's lawyer and his wife kind of took me under their wing and invited me up to Madrid to stay with them for a while, and Juan was nice enough to take me to the courthouse in Madrid and check in there.

*Mr S. Cass Weiland:*

So you were able to do it in Madrid if you happened to be staying there.

*Ms Avella:*

Yes.

*Mr S. Cass Weiland:*

I wanted to ask you about the consequences of your unexpected forced time in Spain. What happened to your job that you had left for a vacation for two weeks?

*Ms Avella:*

I lost both my jobs. I lost my credits at my college. I was forced to resign from school and I was sued by my room-mate for not paying rent and for breaking the lease on the apartment.

*Mr S. Cass Weiland:*

So you had a room-mate in Denver; you go off for a couple of weeks' vacation; you don't return; she was stuck with the rent; she actually sued you for the back rent, your share.

*Ms Avella:*

Yes. When I returned to the United States I was served with papers of a civil law suit against myself.

*Mr S. Cass Weiland:*

What about your jobs? You say you were terminated from your jobs.

*Ms Avella:*

Yes, I was terminated from both my jobs.

## M/V "LOUISA"

*Mr S. Cass Weiland:*

Where did you live when you got back?

*Ms Avella:*

I moved in with my mother.

*Mr S. Cass Weiland:*

Were you able to enroll back in college?

*Ms Avella:*

I was not. October was the middle of the semester. I had to wait until the following spring to re-take and re-do all of my classes that I had missed.

*Mr S. Cass Weiland:*

Ms Avella, based on what you have told us do you think that you are entitled to some compensation or reparation for what has happened to you?

*Ms Avella:*

I feel that I am, yes.

*Mr S. Cass Weiland:*

Do you feel that the Government of Spain was responsible for what happened to you?

*Ms Avella:*

I do, yes.

*Mr S. Cass Weiland:*

To your knowledge were you ever charged with any crime?

*Ms Avella:*

Not to my knowledge. To this day I still don't know what the charge was. I was never given an explanation.

*Mr S. Cass Weiland:*

That is all the questions I have, Mr President.

*The President:*

Under article 80 of the Rules of the Tribunal a witness called by one Party may also be examined by the other Party.

Therefore, I ask the agents of Spain whether the Respondent wishes to cross-examine the witness. I give the floor to the Agent of Spain to cross-examine the witness.

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MME ALBA AVELLA, CONTRE-INTERROGÉE PAR MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE  
[ITLOS/PV.12/C18/2/Rev.1, p. 8–15; TIDM/PV.12/A18/2/Rev.1, p. 9–16]

*Mme Escobar Hernández :*

Merci, Monsieur le Président. J'espère que maintenant vous pourrez suivre l'interprétation, Madame. Je parlerai très lentement pour faciliter l'interprétation et que vous puissiez être sûre que vous avez bien compris tout ce que je vais dire et pour vous faciliter votre témoignage.

Avant de commencer mon contre-interrogatoire, j'aimerais très sincèrement vous remercier de votre témoignage. Je veux vous remercier pour être venue ici depuis les Etats-Unis, vous avez pris du temps pour venir devant ce Tribunal, tenant compte qu'il y a des éléments dans la procédure qui, d'après la Partie demanderesse, Saint-Vincent-et-les Grenadines, sont en relation avec votre détention à Cadix. Alors je vous remercie très sincèrement et surtout, je vous remercie parce que vous avez accepté l'énorme responsabilité prise par tout témoin et par tout expert de prêter témoignage ou de faire des déclarations sous serment, tenant compte du fait que dans les Etats démocratiques, le serment devant un tribunal est quelque chose de très important, de très sérieux et que, bien sûr, prêter serment devant un tribunal en Espagne comme aux Etats-Unis est tellement important que je suis sûre que vous connaissez très bien cela. Alors, je vous remercie très sincèrement d'avoir pris la décision de venir ici et d'être consciente que vous êtes sous serment.

Je vais essayer de vous poser certaines questions qui sont en relation avec l'interrogatoire qui a été déjà fait par M. Weiland. Est-ce que vous pouvez nous dire quel est le jour de votre arrivée à Cadix ?

*Ms Avella:*

I arrived at the end of January. I can't remember the exact date. I believe it was the 29<sup>th</sup> or 30<sup>th</sup> – I am sorry, the 27<sup>th</sup> or 28<sup>th</sup> of January – perhaps the 25<sup>th</sup>. I can't remember the exact date, but it was the last week of January.

*Mme Escobar Hernández :*

Vous ne vous rappelez pas la date exacte, mais, approximativement, vous diriez que vous êtes arrivée à quelle date ?

*Ms Avella:*

I would say January 26, January 25, January 26 – something like that.

*Mme Escobar Hernández :*

Vous êtes arrivée à Cadix pour rencontrer votre père. J'imagine qu'il y avait longtemps que vous ne l'aviez pas rencontré car il était en Espagne. J'imagine aussi que vous avez été choquée par le fait qu'il a dû quitter l'Espagne tout de suite, et pas seulement choquée, j'imagine ; j'essaie de me mettre à votre place, peut-être même déçue de ne pas pouvoir partager avec votre père votre séjour en Espagne. C'est cela ?

*Ms Avella:*

Yes, very disappointed.

*Mme Escobar Hernández :*

Vous avez dit que votre père a été obligé de quitter l'Espagne car votre grand-mère est devenue malade et qu'il a été obligé de partir vers les Etats-Unis pour s'occuper de sa mère. C'est vrai, ça ?

M/V "LOUISA"

*Ms Avella:*

Yes, that was the case.

*Mme Escobar Hernández :*

Merci. Est-ce que vous vous pouvez rappeler si à un certain moment à Cadix vous avez déclaré que votre père était parti pour Texas pour participer à un projet dont vous ne connaissez pas le contenu ?

*Ms Avella:*

He said that he was going to take care of his mother and there were a few things that he had to take care of while he was there as well, a few other things. He didn't go into detail about it so I don't know what it entailed.

*Mme Escobar Hernández :*

Alors le fait que votre père est parti pour les Etats-Unis, ce n'est pas seulement lié au fait que votre grand-mère est tombée malade ?

*Ms Avella:*

Yes, I guess so.

*Mme Escobar Hernández :*

Votre grand-mère est tombée malade.

*Ms Avella:*

Well, as I said before, my grandmother was ill. He went back to help tend to her and said he had a couple of other things he had to take care of while he was there.

*Mme Escobar Hernández :*

Lors de l'interrogatoire, vous avez fait une déclaration devant les autorités espagnoles, les avez-vous informées du fait que votre père était parti parce que votre grand-mère est tombée malade ?

*Ms Avella:*

I don't remember what I said.

*Mme Escobar Hernández :*

Merci beaucoup, Madame. Vous êtes arrivée à la date que vous avez signalée d'une façon pas tellement claire, pas tellement précise. Quand votre père est-il parti pour les Etats-Unis ?

*Ms Avella:*

It was two or three days after I arrived.

*Mme Escobar Hernández :*

Est-ce que votre père vous a laissé entre les mains d'une personne de confiance en Espagne qui devait s'occuper de vous, en tenant surtout compte du fait que c'était la première fois que vous étiez en Espagne, que vous n'aviez quitté les Etats-Unis qu'une seule fois ? Vous avez dit, si je me souviens bien de votre déclaration préalable, que vous avez passé un mois en Suède quand vous étiez âgée de 14 ans ou quelque chose comme cela. Donc, vous ne connaissiez pas du tout l'espagnol et votre père était obligé de quitter subitement le pays ? Vous a-t-il laissée entre les mains de quelqu'un de confiance ?

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*Ms Avella:*

He left me with the two Hungarian crewmen. Alex, as I said before, was a very nice man, very fatherly to me, as well as Anna, the friend that spoke Spanish and was just a few years older than myself; he also informed her to look after me.

*Mme Escobar Hernández :*

D'accord. Vous nous avez dit, si je me souviens bien, que les membres de l'équipage de nationalité hongroise ne parlaient pas du tout espagnol. Comment pouvaient-ils vous aider pour votre séjour sur le territoire de l'Espagne, pour vous aider à organiser vos cours de langue espagnole, etc., chez nous ?

*Ms Avella:*

They did not have to organize my Spanish classes. They were already organized for me. Anna, as I said before, was fluent in Spanish and was able to meet me every morning or help take me back from Spanish class if Alex was unable to pick me up, but Alex was there to drive me to class and pick me up from class and help cook me dinner.

*Mme Escobar Hernández :*

D'accord. Alors, quelle était votre relation avec Mme Anna ? Excusez-moi, je ne prononce pas bien le nom de famille. Je dirai simplement Anna pour faciliter les choses.

*Ms Avella:*

I just met her prior to my father leaving, and she was just a nice girl, fluent in Spanish, she had lived in El Puerto for a while so she knew the town and a few friends there that she would take me to a couple of bars, a restaurant, throughout that time.

*Mme Escobar Hernández :*

Où avez-vous fait la connaissance d'Anna ?

*Ms Avella:*

I just met her after I enrolled in my Spanish class, probably the day after I arrived in Spain. I cannot remember the exact time but I think within one or two days of my arrival.

*Mme Escobar Hernández :*

Vous venez de nous dire que votre père est allé vous chercher à l'aéroport, à Jerez, l'aéroport le plus proche de Cadix. Je comprends très bien qu'il est allé vous chercher, mais après, qu'avez-vous fait ce jour-là ?

*Ms Avella:*

We went back to the ship, I dropped off my suitcase, we spent some time with Alex and Zsolt, we went and enrolled in my Spanish class and had dinner. I think I met Anna that night for dinner. I believe that it was either the first night or the second night that I met Anna for dinner with my father.

*Mme Escobar Hernández :*

Et à partir de ce moment-là, Anna est devenue votre point de contact en Espagne. Est-ce cela ou je me trompe ?

M/V "LOUISA"

*Ms Avella:*

Yes.

*Mme Escobar Hernández :*

Au moment où M. Weiland vous a posé la question sur votre déposition, votre témoignage devant le juge national, vous avez dit que Mme Anna vous avait porté assistance, en tant qu'interprète, devant le juge national. Vous venez de le dire. Si je ne me trompe pas, mais je peux me tromper, Monsieur le Président, et je parle sous votre haute autorité, bien sûr, vous avez dit que vous aviez fait la connaissance de Mme Anna ce jour-là ? C'est-à-dire au moins 10 jours après la date de votre arrivée, si je fais un calcul, proche de la date de l'arrivée et de la date où s'est produite l'entrée du « Louisa », la date à laquelle vous avez été détenue par la Guardia Civil, etc.

*Ms Avella:*

I did not meet her ... She was not my interpreter with the judge. I was appointed an interpreter with the judge. I met Anna ... Anna was helping me interpret when the Guardia Civil was on the ship after it was seized.

*Mme Escobar Hernández :*

Peut-être est-ce là mon erreur. Vous avez dit qu'elle a été votre interprète au moment où vous aviez prêté déclaration devant la Guardia Civil et que c'est à ce moment que vous avez fait la connaissance de Mme Anna.

*Ms Avella:*

No, I met her prior to that.

*Mme Escobar Hernández :*

C'était une personne que vous connaissiez bien, qui était la personne de confiance de votre père lors de votre séjour en Espagne ?

*Ms Avella:*

I do not understand the question. I am sorry.

*Mme Escobar Hernández :*

Je répète. J'essaie de le présenter de façon plus facile pour que vous puissiez le comprendre. Vous avez fait la connaissance d'Anna tout de suite quand vous êtes arrivée en Espagne, à Cadix. Après ce moment, elle est devenue une personne de confiance pour vous, qui a été en charge de votre séjour en Espagne, de votre présence en Espagne, surtout après le départ de votre père d'Espagne. Est-ce cela ?

*Ms Avella:*

Yes, that is correct.

*Mme Escobar Hernández :*

Merci, Madame. Pourriez-vous nous dire où vous avez été logée dans Cadix jusqu'au moment où le juge compétent a ordonné l'immobilisation du bateau « Louisa » ? Quel a été votre logement à Cadix jusqu'au moment où le bateau « Louisa » a été immobilisée ?

*Ms Avella:*I was staying on the boat, on the *Louisa*, prior to it being seized.

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*Mme Escobar Hernández :*

Etes-vous sûre d'avoir toujours séjourné à bord du « Louisa » jusqu'au moment où le bateau a été saisi ? Pouvez-vous le confirmer ?

*Ms Avella:*

Yes, that is correct.

*Mme Escobar Hernández :*

Vous souvenez-vous si, dans les déclarations que vous avez faites en Espagne, vous avez affirmé que vous ne séjourniez pas dans le « Louisa », mais chez Mme Anna, avec l'adresse 80 porte de Santa María, Cadix, et que dans le bateau, vous n'aviez fait que laisser vos bagages et toutes vos affaires ?

*Ms Avella:*

The Guardia Civil had asked me for an address for where I was staying. I did not know what the address was for the *Louisa*. It was a boat, so I did not have any address to give them, so Anna provided her address as a local address to use as a place of residence. I stayed with her maybe one night as a friendly sleep-over but I mostly slept on the boat.

*Mme Escobar Hernández :*

Vous êtes sûre que la Guardia Civil vous a demandé tout simplement une adresse pour la communication ou que la Guardia Civil vous a demandé où vous habitez ?

*Ms Avella:*

They asked me if I was staying on the boat. I said yes, and they asked me if I had stayed on the boat, and I said that I was staying there and that I had occasionally stayed with Anna. I think one night was all I stayed with her.

*Mme Escobar Hernández :*

Vous en êtes sûre ? Vous pouvez le confirmer devant le Tribunal ?

*Ms Avella:*

Yes. I cannot remember exactly what I said to the Guardia Civil.

*Mme Escobar Hernández :*

En tout cas, vous avez fait une déclaration devant la Guardia Civil. Vous avez été soutenue par un avocat. Je reviendrai plus tard sur cela. Vous avez signé l'acte du témoignage. Vous ne pouvez pas vous rappeler ce que vous avez dit exactement à la Guardia Civil ?

*Ms Avella:*

My lawyer was never around when the Guardia Civil was interrogating me, so that is inaccurate. I was never approached by the Guardia Civil with my lawyer present.

*Mme Escobar Hernández :*

Etes-vous sûre de ce que vous venez de dire ?

*Ms Avella:*

Yes. I cannot remember. It was such a long time ago.

M/V "LOUISA"

*Mme Escobar Hernández :*

En tout cas, avez-vous eu un avocat avec vous lors de la deuxième déclaration devant le juge ?

*Ms Avella:*

I only made one statement to the judge, and yes, my lawyer was present at that time.

*Mme Escobar Hernández :*

Pouvez-vous vous rappeler ce que vous avez dit à l'occasion de votre déclaration et de votre témoignage devant le juge ?

*Ms Avella:*

I do not remember what exactly was said. It was an extremely emotional time. I do not remember what was said.

*Mme Escobar Hernández :*

Je vous comprends. Merci. Laissez-moi vous poser une autre question. Puis je reviendrai sur la période de détention, etc. Vous nous avez dit d'abord que votre père était ingénieur, mécanicien. Pouvez-vous nous dire exactement quelle était la profession de votre père, à l'époque bien sûr ?

*Ms Avella:*

I understood him to be a mechanic, helping on the boat for mechanical purposes. I did not really discuss with him the details of his job description.

*Mme Escobar Hernández :*

Bien. C'est ce que vous avez déclaré devant la Guardia Civil ?

*Ms Avella:*

I do not remember what I told the Guardia Civil. They were extremely intimidating. There were a lot of them around. I cannot recall what I said to them.

*Mme Escobar Hernández :*

C'est dommage, car votre témoignage serait très intéressant et très important pour le Tribunal si vous pouviez vous souvenir de ce que vous avez fait et dit dans le processus à Cadix. Mais je laisse cela. Pourriez-vous nous dire quelle était, si vous en aviez connaissance, la relation entre votre père et M. Foster, et comment votre père a fait la connaissance de M. Foster, ou au contraire, comment M. Foster a fait la connaissance de votre père ?

*Ms Avella:*

My father knew Mr Foster from after the time I had already left home. I had moved down to Denver after I graduated high school and my father had taken himself to Texas, and that is where he met him and worked for him. I do not know what exactly he did for him.

*Mme Escobar Hernández :*

Vous ne savez pas comment a commencé la relation entre votre père et M. Foster ?

*Ms Avella:*

My father was a house builder in Steamboat. I believe that he was continuing on with that in Texas. I believe that that is how they met. I believe he helped build a house for Mr Foster.

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*Mme Escobar Hernández :*

Vous souvenez-vous avoir déclaré cela devant les autorités espagnoles ?

*Ms Avella:*

I may have. I do not recall.

*Mme Escobar Hernández :*

Merci. Mais j'ai un petit doute. Pour être sûre de ce que vous venez de déclarer : votre père était ingénieur, votre père était mécanicien, votre père travaillait sur les bateaux ou votre père était constructeur ? Son travail principal était la construction de bâtiments et est-ce à ce titre qu'il est entré en contact avec M. Foster ?

*Ms Avella:*

Yes. I am sorry. I am not sure I understand what the question is.

*Mme Escobar Hernández :*

Vous avez dit que votre père était ingénieur. Vous avez dit que votre père était mécanicien – je n'ai pas de doute sur ce point.. Vous l'avez dit. Maintenant, vous venez d'indiquer que votre père était aussi constructeur de bâtiments et qu'il avait bâti même une maison pour M. Foster ; que c'est lors de la construction de ce bâtiment, de cette maison pour M. Foster, qu'ils sont entrés en contact. Ma question est la suivante : quelle est l'activité de votre père ? Il était constructeur, ingénieur, mécanicien ? Que faisait-il dans le bateau « Louisa » ?

*Ms Avella:*

At the time in Steamboat he was a house builder. Prior to that he built boats down in Florida, where we lived prior to moving to Steamboat. He is educated in many different fields, so yes, he is all three essentially. At the time when we lived in Steamboat he was a house builder.

*Mme Escobar Hernández :*

Vous rappelez-vous si vous avez dit quelque chose à cet égard à Cadix ?

*Ms Avella:*

They never ... They asked me where my father was. I do not remember them asking me what his profession was. I do not recall that question coming from the Guardia Civil.

*Mme Escobar Hernández :*

Prenez votre temps, prenez votre temps. Pouvez-vous vous souvenir si vous avez fait une déclaration, si on vous a posé des questions à cet égard ou si jamais vous avez fait une déclaration à cet égard. Prenez votre temps, nous ne sommes pas pressés.

*Ms Avella:*

At the time they were asking me a lot of questions about things that I had no idea about. As the passport stated, as I stated, I had only been there a few days. I did not know why they were asking me these questions. They were extremely abrasive with me, extremely intimidating to me. I cannot remember what exactly word for word question was asked to me. I am sorry.

M/V "LOUISA"

*Mme Escobar Hernández :*

Vous venez de dire que vous étiez tellement nerveuse, tellement soucieuse, je ne veux pas me tromper mais vous avez même dit, dans votre déclaration préalable, que vous étiez dans une situation d'hystérie à cause de votre détention et de la situation dans laquelle vous étiez à Cadix. Je peux comprendre qu'une jeune fille qui est en dehors de son pays, qui est détenue dans le cadre d'une procédure pénale, peut être en situation de nervosité. C'est normal. Pouvez-vous me dire quelque chose ? Pensez-vous qu'un citoyen espagnol, à 20 ans, à peu près le même âge que vous aviez au moment de votre détention à Cadix, serait dans les mêmes conditions de... Comment dire ?... Ne serait pas sûr..., se considérerait pressé. Se considérerait dans une situation d'insécurité, si vous me permettez de le dire, si le FBI le détenait à Denver par exemple?

*Ms Avella:*

OK.

*Mme Escobar Hernández :*

Vous voulez que je répète ou vous avez compris ?

*Ms Avella:*

Can I imagine a person in a similar situation? If that is what you are asking, yes.

*Mme Escobar Hernández :*

Serait-il dans la même situation s'il se trouvait à Denver, au Bureau fédéral d'investigation et que le FBI délivrait un acte de détention et commençait une procédure ?

*Ms Avella:*

It would not be the same situation. I was not offered a lawyer, I was not offered a phone call, I was not offered anything like that, I was not read any charges against me, so no, that would not happen in the States with the FBI. No.

*Mme Escobar Hernández :*

Pour vous, la situation serait tout à fait différente ? Une espagnole se rend aux Etats-Unis, elle est détenue par le FBI, et elle ne sera pas en situation d'insécurité ni d'incertitude ?

*Ms Avella:*

I am sure they would be, but they would not have been treated the same way that I was treated by the Guardia Civil. I think that it would have been quite different. The same emotions would probably be there but I do not think that the FBI would have acted the same as the Guardia Civil.

*Mme Escobar Hernández :*

Pensez-vous que l'autorité policière qui, en Espagne, a la compétence pour exercer les fonctions de police judiciaire, qui est toujours chargée des enquêtes de détention des personnes, de contrôle des frontières, de contrôle des immigrants, etc. Pensez-vous que la Guardia Civil n'a pas un niveau suffisant pour être considérée comme une institution d'investigation semblable à ce que pourrait être le FBI ? La situation serait pire ? N'a-t-elle pas la capacité, les instruments pour réagir ?

*Ms Avella:*

I do not know.

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INTERVENTION OF MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/2/Rev.1, p. 15–16; TIDM/PV.12/A18/Rev.1, p. 16]

*Mr Weiland:*

Excuse me, Mr President. I have to object to questions that would be obviously beyond the competence of the witness. There is no predicate to show that she would be familiar with FBI practices. There is no predicate to know that she would have anything to do with the Guardia Civil practices other than what she experienced. I also object to the question because it was a triple, compound question and totally unfair and indecipherable.

*The President:*

May I ask the Agent of Spain to reformulate your question.

*Mme Escobar Hernández :*

Bien, Monsieur le Président. Je vais reformuler la question, si vous me le permettez. Mais en tout cas, ce n'est pas moi qui ai posé la question de la relation et la comparaison entre la Guardia Civil et le Bureau fédéral d'investigation aux Etats-Unis. Cela a été le témoin elle-même. Je m'y réfère. Je vais reformuler la question.

M/V "LOUISA"

MME ALBA AVELLA, CONTRE-INTERROGÉE PAR MME ESCOBAR HERNÁNDEZ  
(SUITE)  
AGENT DE L'ESPAGNE  
[ITLOS/PV.12/C18/2/Rev.1, p. 16–17; TIDM/PV.12/A18/2/Rev.1, p. 16–18]

*Mme Escobar Hernández :*

Pourriez-vous me répondre tout simplement ? Pensez-vous, Madame, que d'après votre connaissance, votre expérience, je n'appelle pas une réponse d'un technicien, parce que vous êtes ici en tant que témoin. C'est pour dire les faits et ce que vous pensez des faits. C'est ce que je veux vous poser. C'est pourquoi vous êtes ici. Pensez-vous, Madame, qu'un citoyen espagnol dans les mêmes conditions, qui est détenu à Denver par le FBI aurait plus de droits pour garantir sa liberté et sa sécurité qu'un citoyen des Etats-Unis chez nous, d'après l'activité de la Guardia Civil ? C'est une question.

*Ms Avella:*

Yes.

*Mme Escobar Hernández :*

Merci. Vous avez fait, pendant votre déclaration préalable, référence à plusieurs reprises au fait que vous aviez des problèmes à pouvoir comprendre, à pouvoir communiquer avec la Guardia Civil, avec les personnes qui étaient entrées en contact avec vous pendant et après la détention, car personne ne connaissait l'anglais ou parlait un anglais un peu, j'essaie de me rappeler ce que vous avez dit, « broken English ». Pouvez-vous le confirmer ?

*Ms Avella:*

Yes, they spoke broken English. The Guardia Civil spoke barely English. The gentlemen that were in suits from Madrid spoke some English, again, not extremely strong English but they spoke some.

*Mme Escobar Hernández :*

Merci. Je reviendrai après sur le fait de l'interprète. Mais je vais vous poser une question. Je peux comprendre que du fait que l'anglais est votre langue maternelle, vous aviez des difficultés à communiquer en Espagne avec des personnes qui parlent notre langue. Cette situation serait-elle différente pour un espagnol détenu aux Etats-Unis, et qui ne parlerait que l'espagnol ?

*Ms Avella:*

I do not know. I guess not.

*Mme Escobar Hernández :*

Vous ne le savez pas mais vous pensez que non ?

*Ms Avella:*

I think they would probably have a hard time understanding but, again, I do not know how it would work over in the United States. I do not know how that works, if they would have brought in an interpreter right away or if they would have just spoken to them and interrogated them in English. I have no idea.

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*Mme Escobar Hernández :*

Merci beaucoup. Lorsque vous avez été détenue, vous avez dit que vous n'aviez vu le juge que quelques jours après, que la Guardia Civil était devant vous et que c'était le seul contact que vous aviez avec les autorités espagnoles. On est allé vous chercher à la sortie de votre cours d'espagnol. Vous avez dit que vous aviez été amenée au navire. Après, vous avez assisté à l'arraisonnement et aux perquisitions du « Louisa » et, les jours suivants, aux perquisitions du « Gemini », qui était en cale sèche à ce stade. Vous souvenez-vous s'il y avait quelqu'un de plus avec la Guardia Civil ?

*Ms Avella:*

No, there was no one, and I was never taken to the police station on that first day. I was taken back to the Louisa, and it was just two agents from the Guardia Civil.

*Mme Escobar Hernández :*

C'est tout – deux agents seulement ?

*Ms Avella:*

Who picked me up and brought me back to the *Louisa*, yes, it was two agents.

*Mme Escobar Hernández :*

Vous souvenez-vous si, au moment où vous avez été à bord du « Louisa » et le moment de la perquisition, le jour suivant quand s'est produite la perquisition du « Gemini III », vous souvenez-vous si le secrétaire judiciaire – j'emploie les mots en espagnol, mais cela équivaut à un greffier du tribunal – si le secrétaire judiciaire ou le greffier était à ce moment-là à bord du « Louisa » et du « Gemini » alors que y vous étiez?

*Ms Avella:*

The judiciary assistant, no, there were just the Guardia Civil agents and, like I said, the gentlemen in suits from Madrid who took me over to where the *Gemini* was.

*Mme Escobar Hernández :*

Je vous prie encore d'essayer de vous rappeler ce qui s'est passé ce jour-là car vous êtes sous serment.

M/V "LOUISA"

INTERVENTION OF MR S. CASS WEILAND  
 CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
 [ITLOS/PV.12/C18/2/Rev.1, p. 17–18; TIDM/PV.12/A18/2/Rev.1, p. 18-19]

*Mr Weiland:*

I object to this lawyer continually lecturing the witness about being under oath. It is improper to continue to remind the witness that she is under oath, and I strongly object to it.

*The President:*

Do you have the interpretation, Ms Escobar Hernández?

*Mme Escobar Hernández :*

L'interprétation se fait en même temps que M. Weiland s'exprime. Pouvez-vous répéter, je vous en serais très reconnaissante.

*The President:*

Ms Escobar Hernández did not get the interpretation. She heard your statement and the interpretation at the same time. Would you please repeat your point?

*Mr Weiland:*

I am happy to do so, Mr President. I think Ms Escobar Hernández speaks very adequate English, but just so that the record is clear, I am objecting. I allowed her to try to lecture the witness at the outset about the importance of the oath. That in itself is improper, but now she continues to do that. It is an improper technique of interrogating a witness and I strongly object to her continually referring the witness to the fact that she is under oath. It is meant to imply that she is giving deceitful answers and I object to it. It is improper.

*The President:*

Thank you, Mr Weiland.

Ms Escobar Hernández, when you refer to the witness being under oath, what do you mean exactly? Are you referring to the declaration that she made here or in the Spanish court?

*Mme Escobar Hernández :*

Merci, Monsieur le Président, pas tout à fait. Dans ma première intervention, lorsque j'ai dit au témoin qu'elle est sous serment, c'est pour la remercier très vivement de la responsabilité qu'elle accepte. Ce n'est pas mon intention de faire pression sur le témoin. C'est tout simplement pour constater un fait qui est très important dans le système judiciaire espagnol et dans d'autres systèmes judiciaires et, bien sûr, devant le Tribunal international du droit de la mer.

Je ne fais pas référence constamment, dans mon interrogatoire, au fait que madame est sous serment. Je ne l'ai dit qu'une seule fois. Je l'ai dit parce que c'est utile pour le Tribunal, tout simplement. Quand je fais référence au serment, je me réfère tout simplement au serment qu'elle a prêté ce matin devant cet honorable Tribunal. C'est tout. Si vous préférez que je ne fasse pas référence à cela, je peux garder le silence, mais c'est un fait qu'elle a prêté serment. Je n'essaie que de l'aider et, bien sûr, de rappeler ce fait et de lui demander de se le rappeler. C'est tout, Monsieur le Président, je n'ai aucune autre intention. En tout cas, Monsieur le Président, je me permets de dire que nous sommes dans une procédure dans laquelle la déclaration d'un témoin se base sur l'interrogatoire de la partie qui appelle le témoin, le contre-interrogatoire, et il serait possible que le témoin soit à nouveau interrogé. Jamais je

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n'ai essayé d'intervenir au moment où le co-agent de Saint-Vincent-et-les Grenadines était en train de poser des questions. C'est ce que je voulais dire, Monsieur le Président. Si vous ne voulez pas que je me réfère au serment, pour moi ce n'est pas nécessaire, cela figure au procès-verbal de la session.

*The President:*

I think it is very clear that she is still covered by the solemn declaration that she made this morning, so I do not think it is necessary to repeat it.

*Mme Escobar Hernández :*

Alors, je ne le ferai pas, Monsieur le Président.

M/V "LOUISA"

MME ALBA AVELLA, CONTRE-INTERROGÉE PAR MME ESCOBAR HERNÁNDEZ  
(SUITE)  
AGENT DE L'ESPAGNE  
[ITLOS/PV.12/C18/2/Rev.1, p. 18–25; TIDM/PV.12/A18/2/Rev.1, p. 19–27]

*Mme Escobar Hernández :*

Je reviens à la question que je venais de vous poser. Vous souvenez-vous si, lors de la perquisition, au moment où vous avez été détenue, il y avait un greffier, un secrétaire judiciaire ? Y avait-il une commission judiciaire en charge de cette activité ou tout simplement y avait-il seulement des agents de la Guardia Civil ?

*Ms Avella:*

Again, two police officers picked me up. We were taken to the *Louisa*. There were many people around. Nobody showed me any badge, nobody identified themselves as a judicial supervisor, so I do not know.

*Mme Escobar Hernández :*

Merci, Madame.

Au moment où vous avez été détenue par la Guardia Civil, les agents de la Guardia Civil, vous ont-ils lu votre droit constitutionnel, vos droits fondamentaux d'après la Constitution espagnole ?

*Ms Avella:*

They did. They read me my rights while we were observing the *Gemini*. Anna was there and she interpreted them for me.

*Mme Escobar Hernández :*

Merci.

Avez-vous été informée que vous pouviez communiquer avec quelqu'un de votre famille ?

*Ms Avella:*

I do not remember what the rights were. They may have said that, but I was not offered the opportunity to do so.

*Mme Escobar Hernández :*

Avez-vous été informée que vous aviez le droit de nommer un avocat ?

*Ms Avella:*

I believe that those rights were read to me, yes. Again, I was extremely emotional and I was not really listening when he was reading me those rights, because I was shocked that I was being arrested. I do not remember.

*Mme Escobar Hernández :*

Avez-vous été informée que vous aviez le droit de passer un examen médical pour garantir votre situation personnelle devant un hôpital ou un médecin en Espagne ?

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*Ms Avella:*

Again, I am sorry, I do not remember exactly what was said in the rights that were read to me.

*Mme Escobar Hernández :*

En tout cas, vous ne pouvez pas dire que tout cela ne vous a pas été communiqué. Vous avez le sentiment de ne pas vous rappeler. Mon interprétation est-elle correcte ?

*Ms Avella:*

Yes.

*Mme Escobar Hernández :*

Merci beaucoup.

Vous avez eu un interprète pour traduire de l'espagnol vers l'anglais, ce qui était en plus votre droit.

*Ms Avella:*

Yes. Anna was not appointed as my interpreter. She was there as my friend and she just happened to tell me what the officer was saying to me.

*Mme Escobar Hernández :*

Vous avez eu un interprète. Quelqu'un vous interprétait-il ce que l'agent vous disait ?

*Ms Avella:*

Yes.

*Mme Escobar Hernández :*

Vous avez eu un avocat ?

*Ms Avella:*

I met my lawyer on Friday morning. That was the first time I met my lawyer.

*Mme Escobar Hernández :*

Merci. Pourriez-vous nous dire si vous avez nommé directement un avocat ou si l'avocat a été nommé par le juge dans la procédure du système de l'assistance judiciaire gratuite. C'est vous ou le juge qui a nommé l'avocat ?

*Ms Avella:*

I do not know. I had nothing to do with it. I showed up on Friday morning and a gentleman approached me and said, "I am your lawyer."

*Mme Escobar Hernández :*

Vous avez dit dans votre déclaration préalable que vous pensiez que c'était votre père qui avait envoyé l'avocat pour vous aider. Pouvez-vous le confirmer ?

*Ms Avella:*

Yes, I thought it was my father or my father's boss or someone who had called him.

*Mme Escobar Hernández :*

Dans ce cas, vous avez eu le droit de pouvoir choisir votre avocat.

M/V “LOUISA”

Pour ce qui fait référence aux conditions de détention, vous nous avez dit à plusieurs reprises qu'il n'y avait pas de policiers de sexe féminin parmi les agents qui vous ont détenue, qui vous ont gardée à vue. Il n'y avait pas de femmes agents de la Guardia Civil, agents de police. Vous pouvez le confirmer ?

*Ms Avella:*

Yes, I can confirm that.

*Mme Escobar Hernández :*

Vous avez été détenue en même temps que les deux membres de l'équipage de nationalité hongroise, des hommes. Avez-vous été détenue et gardée par la police nationale de l'Espagne avec deux hommes ?

*Ms Avella:*

No, I was in a cell by myself.

*Mme Escobar Hernández :*

Merci. Dans la salle toute proche de la cellule où vous étiez, y avait-il d'autres messieurs, y avait-il des femmes ou étiez-vous toute seule ?

*Ms Avella:*

Over the weekend I heard some men's voices in other cells. I did not see anybody else.

*Mme Escobar Hernández :*

Vous n'avez vu personne, homme ou femme, proche de vous ?

*Ms Avella:*

No. There was just an officer who would come in to offer me food. Other than that, I did not see anyone.

*Mme Escobar Hernández :*

Merci beaucoup.

Vous avez parlé du fait que, pendant votre détention, vous aviez été dans des situations absolument pénibles, que la situation était terrible. Je ne veux pas revenir sur la cellule qui était plus grande ou plus petite, etc. Je ne veux pas revenir sur cela. Mais j'aimerais vous poser quelques questions. La situation était tellement terrible que, à votre avis – vous venez de le déclarer, c'est votre sentiment, je n'ai rien à dire à cet égard – vous étiez tellement stressée que la situation était insupportable. A peu près, si je me souviens bien.

Tenant compte de cela, qu'avez-vous fait ? Avez-vous contacté votre avocat pour présenter un recours et demander immédiatement votre liberté ? Avez-vous présenté un recours de l'*habeas corpus*, très connu en Espagne et aux Etats-Unis ?

*Ms Avella:*

No. I was very young and scared. I had no idea what was going on. I did not know what kind of questions I should ask. I did not know who I should ask for. I never asked for any of that.

*Mme Escobar Hernández :*

Votre avocat ne vous a pas conseillée non plus ?

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*Ms Avella:*

It was very hard to communicate with my lawyer without the interpreter. As I said before, I met with the lawyer on Friday morning. That was the first time I had met him. He said that he was going to take care of everything and that I was going to get my passport back and going to be able to go home.

*Mme Escobar Hernández :*

Vous avez compris que l'avocat vous disait – j'imagine en espagnol – que tout allait bien aller, qu'il allait s'occuper de vous, qu'il allait présenter une demande pour obtenir un écrit afin de demander le retour du passeport. Est-ce cela ?

*Ms Avella:*

Yes. Anna was there to meet me at the court on Friday morning. She was able to help me understand what Philippe was telling me.

*Mme Escobar Hernández :*

D'accord. Anna était là, elle pouvait vous aider à comprendre ce que l'avocat vous disait. Vous n'avez pas posé la possibilité d'introduire une instance, un recours pour demander votre liberté immédiate ?

*Ms Avella:*

Of course I did. I repeated multiple times that I had just arrived in Spain, that I was there for a vacation, that I wanted to go home and that I wanted my passport back. My requests were very clear.

*Mme Escobar Hernández :*

Merci.

Encore une autre question à cet égard sur l'aide que vous avez reçue. Vous êtes une citoyenne des Etats-Unis. Les Etats-Unis sont très fiers d'essayer toujours de défendre, d'accorder la protection à leurs nationaux à l'étranger. Par conséquent, ils font toujours l'exercice de l'assistance consulaire.

Le consul des Etats-Unis à Séville a été notifié du fait que vous étiez détenue. Cela a été fait tout de suite par fax. Je ne me souviens pas ce que vous avez dit dans votre déclaration préalable. EÊtes-vous allée, ou quelqu'un de votre famille est-il allé, pendant la détention, chez le consul à Séville pour réclamer l'assistance consulaire et la protection du consul des Etats-Unis à Séville ?

*Ms Avella:*

Yes, we did. After I was released from jail, when my sister came over to visit we made a trip over to Seville to visit the Consulate and ask them for their assistance.

*Mme Escobar Hernández :*

Ma question est tout à fait différente. Je parle de la période de détention. C'est pendant la période de détention que vous étiez dans une situation de pression très forte. Vous aviez une forte insécurité. Je serais dans cette situation, j'appellerais tout de suite mon consul. Mais, je vous prie, Monsieur le Président, d'exclure ce que je viens de dire. Avez-vous fait cette démarche auprès du consul à Séville, compte tenu du fait que le consul était informé par les autorités judiciaires et policières espagnoles qu'il y avait un ressortissant des Etats-Unis détenu à Cadix ?

M/V "LOUISA"

*Mr Weiland:*

Excuse me. I hate to object, and please forgive me. She is testifying about a document that is not in evidence in this Tribunal. She has said at least twice that the Consulate was notified. I believe that she used the term "immediately", but there is no evidence of that in the record and I object to it. If she had thought that the judge had notified the Consulate, she should have put that document in the record. If she has done and I am mistaken, I would like to see it on the board.

*The President:*

I do not think the Agent of Spain is referring to any document. Was any document included in the written proceedings? If so, please show it to us.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je vais faire une remarque. J'avais fait une référence à un fait, je n'avais pas fait de référence à un document concret. Mais, en tout cas, si vous regardez dans le contre-mémoire du Royaume d'Espagne, dans l'annexe 6.1, un acte a été dressé par les autorités qui ont détenu Mme Avella, que je vais lire en anglais :

*(Continues in English)* In Cádiz, at 22.00 hours on 3 February 2006, at the Civil Guard headquarters, the Investigating Judge ordered the present report to be issued, stating officially that:

At the above time, notification was sent by FAX to the United States Consulate in the city of Seville of the arrest of ALBA JENNIFER AVELLA

...

*(Poursuit en français)* Vous avez l'original en espagnol et la traduction en anglais. Je me réfère à l'annexe 6, paragraphe 1.

*The President:*

Yes, that is in the document that you presented earlier. You may continue.

*Mme Escobar Hernández :*

Merci, Monsieur le Président.

Vous avez dit que votre passeport avait été retenu au moment de la détention et que vous aviez fait une démarche pour demander le retour du passeport. Que s'est-il passé à l'égard de ces démarches ? Quand avez-vous introduit la demande pour obtenir le retour du passeport ? Vous vous rappelez ?

*Ms Avella:*

I remember going to Seville a few weeks after I was released and asking them for their assistance. That was the time when I put in a request for my passport. Again my lawyer was the one who said that he was taking care of everything, and I trusted him that he was going to do that.

*Mme Escobar Hernández :*

Je comprends très bien que vous fassiez confiance à votre avocat, c'est normal. Mais je ne vous pose pas cette question. Je vous demande si votre avocat a demandé au juge qui a ordonné la rétention de votre passeport de vous le rendre. Vous avez dit que cela avait été fait dans votre déclaration préalable.

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*Ms Avella:*

That is correct. That did happen.

*Mme Escobar Hernández :*

Pouvez-vous nous dire si le juge a répondu à votre demande, à votre pétition ?

*Ms Avella:*

I believe that the response was “no”, because I did not get my passport back.

*Mme Escobar Hernández :*

Mais vous ne savez pas s'il y a eu une réponse ?

*Ms Avella:*

When I met with the judge on Monday my lawyer made a statement requesting the passport back and the judge denied it and said that I had to stay in Spain, that I could be released from jail but that my passport was not going to be returned to me.

*Mme Escobar Hernández :*

Pouvez-vous nous dire quelles étaient les raisons invoquées par le juge pour dire : « *Non, je ne vais pas vous rendre votre passeport* »?

*Ms Avella:*

The only explanation that I can remember was that while this investigation was ongoing I was not allowed to leave.

*Mme Escobar Hernández :*

Vous souvenez-vous si votre avocat vous avait indiquée que la rétention du passeport était moins grave que toute autre mesure qui pourrait être prise à votre égard par le juge ? Votre avocat vous a-t-il dit quelque chose à cet égard ?

*Ms Avella:*

No, he never said anything like that.

*Mme Escobar Hernández :*

Merci. Je comprends très bien que l'on fait toujours confiance aux avocats quand on est dans une telle situation.

Une fois que vous avez été mise en liberté provisoire, et avant la date où l'on vous a rendu le passeport, où avez-vous séjourné en Espagne ? Où avez-vous séjourné à Cadix ?

*Ms Avella:*

I was actually in Puerto de Santa Maria. An apartment was arranged for me and a separate apartment in the same building for the Hungarians. That is where I stayed for most of the time until my father's lawyer came down from Madrid and he and his wife graciously invited me to stay with them in Madrid.

*Mme Escobar Hernández :*

A quel moment avez-vous su que vos camarades de Hongrie avaient demandé aux juges de pouvoir séjourné à bord du « Louisa » ? Qu'avez-vous fait à cet égard ?

M/V "LOUISA"

*Ms Avella:*

I do not recall that. I do not remember. They were not able to, because they had an apartment, so they were staying at the apartment. I do not know whether they had requested to stay on the *Louisa*. I do not remember.

*Mme Escobar Hernández :*

J'imagine que cela a dû coûter très cher.

Vous avez fait référence aux pertes et aux dommages que vous avez subis dans votre travail et dans vos études aux Etats-Unis à cause de la détention dont vous avez été l'objet en Espagne, à Cadix. Je peux bien comprendre ce que vous avez dit. Pourriez-vous répondre à ma dernière question ? Est-ce que ces dommages auraient été différents si vous aviez été détenue aux Etats-Unis ?

*Ms Avella:*

I do not think so, no. It probably would have been the same. I would have lost my job. I would not have been able to work if I had been detained in the United States.

*Mme Escobar Hernández :*

Merci.

Pour finir, vous avez été obligée, comme vous venez de le dire, de rester en Espagne jusqu'en novembre 2006. Pendant cette période ou après, une fois que vous n'avez plus fait l'objet d'une procédure pénale, que cela a été décidé par le juge, une fois que vous êtes restée en Espagne, une fois... Je m'excuse Monsieur, comme on m'a passé une note, j'ai perdu le fil, je vous prie de m'excuser.

Vous venez de dire que vous avez subi des dommages importants au plan professionnel et au plan de votre formation universitaire.. Vous venez de dire aussi que, peut-être, la situation aurait été la même si vous aviez été détenue aux Etats-Unis. Mais ma dernière question va dans une autre direction. Est-ce que vous avez présenté un recours, une réclamation devant les autorités judiciaires ou administratives espagnoles, une fois que le juge a déclaré que vous ne faisiez plus l'objet d'une procédure pénale. C'est-à-dire que l'on n'a pas confirmé, que l'on n'a pas dit que vous étiez innocente ; on a dit que vous sortiez de la procédure, mais vous n'aviez pas déjà été accusée ou inculpée.

Avez-vous essayé de présenter un recours ou d'obtenir une indemnité auprès des autorités judiciaires ou administratives espagnoles pour les faits que vous avez dû affronter, ces dommages dont vous venez de parler ?

*Ms Avella:*

No, I didn't have the ability to do so. When my passport was returned to me I immediately left and went back to the United States.

*The President:*

Madam Escobar Hernández, it is 4.30 p.m. and at this stage the Tribunal will withdraw for a break of thirty minutes, so we will continue the hearing at five past five.

*(Adjournment)**The President:*

We will now continue the hearing.

Madam Escobar Hernández, you have the floor.

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*Mme Escobar Hernández :*

Merci Monsieur le Président. Je voudrais simplement poser deux ou trois courtes questions à Mme Avella.

Mme Avella, dans sa déclaration préalable, a dit qu'elle séjournait sur le bateau, elle a même fait une évaluation de la situation du « Louisa » en disant qu'il était propre, qu'il était en ordre. Je ne me souviens pas exactement des mots, mais c'est à peu près cela sinon, Madame, vous me corrigerez, il n'y a aucun problème. Elle a fait une évaluation du bateau. Pour ce faire, est-ce que je peux vous demander, Madame, si vous avez visité toutes et chacune des parties du bateau ? Est-ce que vous connaissez tout le bateau, les magasins, la direction du bateau, les logements, etc. ?

*Ms Avella:*

No, I didn't spend much time in all areas of the boat. I mostly spent time in my cabin and the kitchen area, the living area – but that area was clean.

*Mme Escobar Hernández :*

Merci Madame. Une dernière question. Ce matin, dans votre déclaration, on vous a posé une question relative à une photographie qui était incluse dans les annexes du contre-mémoire de l'Espagne, c'est une photographie sur laquelle on peut voir des rochers, des objets un peu étranges au premier regard, avec une structure pas trop habituelle à voir. Est-ce que vous pouvez confirmer que vous avez vu ces objets sur le bateau ?

*Ms Avella:*

I saw what looked like rocks, pieces of concrete.

*Mme Escobar Hernández :*

Mais en tout cas, vous avez vu les objets sur le bateau ?

*Ms Avella:*

Yes.

*Mme Escobar Hernández :*

Merci beaucoup, Madame. Une dernière question, et ainsi j'aurai fini, Monsieur le Président, je vous le promets. Est-ce que cela n'a pas appelé votre attention de trouver sur le bateau ce type d'objets ? Est-ce que cela n'a pas touché votre curiosité pour savoir ce qu'était ce type d'objets ?

*Ms Avella:*

No, they looked like pieces of rock. I didn't have any curiosity about it.

*Mme Escobar Hernández :*

D'accord, merci. Merci Monsieur le Président. Pour l'instant, à ce stade, c'est ma dernière question au témoin.

*The President:*

A witness who was cross-examined by the other Party may be re-examined by the Party who had called the witness. Therefore I ask the Co-Agent of Saint Vincent and the Grenadines whether the Applicant wishes to re-examine the witness. I wish to repeat that no new issues should be raised during the re-examination.

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*Mr S. Cass Weiland:*

Mr President, we have no further questions.

*The President:*

Ms Avella, thank you for your testimony. Your examination is now finished. You may withdraw. Thank you again.

EXAMINATION OF WITNESSES – 4 October 2012, p.m.

**Examination of Witnesses (continued)**

MR MARIO AVELLA, EXAMINED BY MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/2/Rev.1, p. 25–42]

*Mr S. Cass Weiland:*

We are prepared to call our next witness, Mr Mario Avella.

*The President:*

Yes, please. The Tribunal will then proceed to hear the witness, Mr Avella. He may now be brought into the courtroom.

I call upon the Registrar to administer the solemn declaration to be made by the witness.

*Registrar:*

Thank you, Mr President.

Mr Avella, Good afternoon. A witness is required to make a solemn declaration under article 79 of the rules of the Tribunal before making any statement before the Tribunal. The declaration is in front of you. May I invite you, Mr Avella, to make the solemn declaration.

*Mr Mario AVELLA is sworn in.*

*Registrar:*

Thank you, Mr Avella. Please be seated.

Mr President.

*The President:*

I now give the floor to the Co-Agent of Saint Vincent and the Grenadines, Mr Weiland, to start the examination of the witness.

*Mr S. Cass Weiland:*

Mr Avella, would you please state your name for the Tribunal?

*Mr Avella:*

Yes, Mario Avella.

*Mr S. Cass Weiland:*

What nationality are you, sir?

*Mr Avella:*

I am a citizen of the United States of America.

*Mr S. Cass Weiland:*

Where do you live presently?

*Mr Avella:*

I presently live in Paris, France.

M/V "LOUISA"

*Mr S. Cass Weiland:*

Tell us just before we start a little something about your family. We have met your daughter Alba Avella. Do you have other children?

*Mr Avella:*

As a matter of fact I have three daughters, one that is 32, another that is 30 years old and the youngest being Alba, 28.

*Mr S. Cass Weiland:*

We have asked you to come here today from Paris to discuss with us your experience with the *Louisa* and with the Spanish judicial system in general. Before we get to that point I would like to ask you a few questions about your work background. What are you doing for a living these days?

*Mr Avella:*

Currently a marine technician where I work on hydraulic systems on ships.

*Mr S. Cass Weiland:*

If your daughter described you as a marine engineer or a marine mechanic would those be descriptive terms that might fit some of the work you have done over the years?

*Mr Avella:*

Marine engineering, yes.

*Mr S. Cass Weiland:*

Where do you do most of your work – in Paris?

*Mr Avella:*

No, actually I work throughout the Mediterranean, mostly in the south of France in the shipyards in Marseilles.

*Mr S. Cass Weiland:*

What have you done in the past that would sum up your work career because we have heard some testimony that is quite varied?

*Mr Avella:*

I spent quite a bit of my career building boats in Florida – around fifteen years. Then I was also involved in many stages of my life in new home construction.

*Mr S. Cass Weiland:*

Did you do some of that in Colorado?

*Mr Avella:*

In Colorado and Texas, and specifically on the mechanical systems that go into new home construction.

*Mr S. Cass Weiland:*

Do you use your marine engineering background in terms of mechanical systems in residential applications?

## EXAMINATION OF WITNESSES – 4 October 2012, p.m.

*Mr Avella:*  
That is correct.

*Mr S. Cass Weiland:*  
Did you get involved in the ship-building business at an early age?

*Mr Avella:*  
Would you repeat the question?

*Mr S. Cass Weiland:*  
Did you get involved in ship construction and ship maintenance at a relatively early age?

*Mr Avella:*  
Yes, when I was a young man I started out as a fitter/welder in the Brooklyn Shipyard in New York.

*Mr S. Cass Weiland:*  
As a welder?

*Mr Avella:*  
Fitter and welder, yes.

*Mr S. Cass Weiland:*  
How old are you today, sir?

*Mr Avella:*  
I am 54.

*Mr S. Cass Weiland:*  
We know you spent time in Spain. Before you went to Spain had you ever been involved in any oil or gas-related ventures?

*Mr Avella:*  
Before I went to Spain I did some work in Guyana, South America, on a project that had to do with methane gas recovery.

*Mr S. Cass Weiland:*  
How did you come to work in Guyana?

*Mr Avella:*  
I was working for an affiliate of Sage Maritime Research.

*Mr S. Cass Weiland:*  
Sage is the same company that is the owner of the *Louisa* – is that correct?

*Mr Avella:*  
Yes.

*Mr S. Cass Weiland:*  
And the *Gemini III*?

## M/V "LOUISA"

*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

So this Guyana venture was an outgrowth of interests of the owner of Sage?

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

Who is that?

*Mr Avella:*

That is Mr John Foster.

*Mr S. Cass Weiland:*

Based on your experience in Guyana and with Mr Foster in general do you know whether he has a history of involvement with oil and gas-related ventures?

*Mr Avella:*

Yes, it is my understanding that Sage has a long history of oil and gas research in Texas and throughout the United States and other places in the world.

*Mr S. Cass Weiland:*

Had you worked overseas at all before making the trip down to Guyana?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

Have you ever been involved in searching for shipwrecks or doing anything related to treasure-hunting in your career?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

Tell the Tribunal, if you will, please, sir, why did Mr Foster and Sage get involved with acquiring the *Louisa* and going to Spain? What is you are understanding?

*Mr Avella:*

My understanding of the project was that we were to map the sea floor and do research for oil and gas exploration – geological survey and so forth.

*Mr S. Cass Weiland:*

Do you know how Sage got interested in prospecting in that area of the world?

## EXAMINATION OF WITNESSES – 4 October 2012, p.m.

*Mr Avella:*

I believe that they had info that was brought to them - some research or preliminary study that was done to ...

*Mr S. Cass Weiland:*

Let me show you Annex 31, page 30. This is a letter which is in evidence. It has been submitted long ago from Nefco Exploration to Mr Foster dated 18 December 2003. Do you see that, sir?

*Mr Avella:*

Yes, I do.

*Mr S. Cass Weiland:*

Can you see in December of 2003 Mr Mark McAfee is proposing equipment actually for hydrocarbon exploration in the Bay of Cádiz?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Is this the type of proposal or preliminary information that you were just referring to that interested Sage and Mr Foster in going to this area of Spain?

*Mr Avella:*

Clearly, yes.

*Mr S. Cass Weiland:*

Let me show you what Mr McAfee also provided to Mr Foster, which is a map of the area. I know we have many maps in this case, and we will see, probably, far better versions of the map, but this is Mr McAfee dealing with Mr Foster as early as December 2003. Is that right?

*Mr Avella:*

I don't see a date on this map, but I am assuming it is the attachment to the letter.

*Mr S. Cass Weiland:*

Yes, sir. Finally, McAfee was also providing Foster with some preliminary gravity-related information with this letter. Do you see that, sir?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

This is not your area of expertise, is it?

*Mr Avella:*

Not at all.

*Mr S. Cass Weiland:*

But you became involved because of your ability to work on ships and to handle some of the operational aspects of it – is that right?

## M/V "LOUISA"

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

Tell the Tribunal a little bit about the actual acquisition of the *Louisa* and what your role in that was.

*Mr Avella:*

The *Louisa* was acquired in Jacksonville, Florida, as a general cargo ship, and it was re-fitted at that time for the survey work necessary for research.

*Mr S. Cass Weiland:*

What had the ship been used for before that? What had it been doing prior to the acquisition by Sage?

*Mr Avella:*

The ship, as I said, was berthed in Jacksonville, Florida, and it was in good condition to get underway; so the re-fit consisted basically of installing the equipment necessary for the survey work that we needed.

*Mr S. Cass Weiland:*

What kind of equipment was required? I am not asking you to give us an inventory of everything that you put on the ship, but please give the members of the Tribunal some information about how you re-fitted the ship.

*Mr Avella:*

Besides the general necessities of bringing it into compliance to get underway, which are many, it was also fitted with diving equipment and sonar equipment – and that is what I know of as far as the survey equipment is concerned.

*Mr S. Cass Weiland:*

We will come back to what some of the uses of this equipment were. Did you become familiar with what sort of legal authorization Sage would have to go into the Bay of Cádiz and conduct ops?

*Mr Avella:*

During the time I was working on the ship, preparing it, I was informed that we had some sort of permits, authorization to work in the waters off the coast of Spain.

*Mr S. Cass Weiland:*

Are you familiar with the fact that Mr Foster was approached by someone who had a permit, who offered to joint-venture with him?

*Mr Avella:*

Yes, I am.

*Mr S. Cass Weiland:*

Eventually, are you familiar with the fact that the contract was signed at the Spanish company called Tupet?

## EXAMINATION OF WITNESSES – 4 October 2012, p.m.

*Mr Avella:*

Yes, I am.

*Mr S. Cass Weiland:*

Do you recall some of the basic tenets of that contract?

*Mr Avella:*

I believe the contract gave us the right to work in that area because of the permits that the Spanish company had, and that we would share all the data that we collected during the time we worked there.

*Mr S. Cass Weiland:*

The principal behind Tupet was interested in wrecks and shipwrecks. Is that your understanding?

*Mr Avella:*

That is my understanding, yes.

*Mr S. Cass Weiland:*

So the contract provided that if by happenstance some wreck was discovered that Tupet would take further action?

*Mr Avella:*

That is my understanding, yes.

*Mr S. Cass Weiland:*

And they would require further permits?

*Mr Avella:*

That they would – you know, acquire whatever necessary for them to continue their work.

*Mr S. Cass Weiland:*

So Foster was interested in fast prospecting and he signs up with the Tupet company, which has a permit, and sends you to Spain to develop that for him and his oil interests. Is that basically what happened here?

*Mr Avella:*

Yes, he sent the ship to Spain, and I accompanied the ship, as an engineer on board.

*Mr S. Cass Weiland:*

Even before the *Louisa* sailed from Jacksonville, did Sage dispatch some personnel to begin to collect data?

*Mr Avella:*

Prior to the arrival of the *Louisa* there was survey work conducted in the Gulf of Cádiz.

*Mr S. Cass Weiland:*

That was Sage personnel. What kind of craft or boat did they use to conduct that preliminary survey work?

## M/V "LOUISA"

*Mr Avella:*

I wasn't familiar with the boat itself, but I believe it was around an 11-metre work-type vessel.

*Mr S. Cass Weiland:*

Did they tow something? *This* picture on our screen now is of the *Gemini*, is it not?

*Mr Avella:*

Yes, it is.

*Mr S. Cass Weiland:*

To your knowledge was the boat that was used for some preliminary survey work similar to the *Gemini*?

*Mr Avella:*

Yes, work-type platform, yes.

*Mr S. Cass Weiland:*

What sort of instruments were actually deployed?

*Mr Avella:*

The general instruments deployed would have been side scan sonar and caesium magnetometers.

*Mr S. Cass Weiland:*

Are those the kinds of things that Mr McAfee was touting in his original letter we saw in December 2003?

*Mr Avella:*

In that letter I just read, yes.

*Mr S. Cass Weiland:*

You are saying that some of this data had already been collected by the time the *Louisa* arrived in Spain?

*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

So what was the plan in terms of the use of the *Louisa* and your own activity once you got there?

*Mr Avella:*

The plan was that the *Louisa* should conduct a follow-up survey and research work based on the data that was collected prior to its arrival.

*Mr S. Cass Weiland:*

We have a facsimile of - this map was developed in 2004, I believe, prior to the *Louisa*'s arrival. Do you recognize that?

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*Mr Avella:*

Yes, I have seen this before.

*Mr S. Cass Weiland:*

You realize that the coordinates have been removed from this map for confidentiality reasons.

*Mr Avella:*

Generally that is the practice.

*Mr S. Cass Weiland:*

Did you understand that Sage considered this map to be valuable?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

After you arrived on scene with the *Louisa* did you and the personnel assigned by Sage do follow-up work to develop leads that this map represented?

*Mr Avella:*

Based on the initial data, which was depicted in this map, yes.

*Mr S. Cass Weiland:*

I am getting a little ahead of myself so let me ask you this. When did the *Louisa* arrive on scene in the Cádiz area?

*Mr Avella:*

Middle of August 2004.

*Mr S. Cass Weiland:*

What did you do initially? You accompanied the ship over?

*Mr Avella:*

I did.

*Mr S. Cass Weiland:*

In terms of the equipping of the ship I did want to go back just for one second and ask you about a very sensitive subject, and that is the fact that the *Louisa* apparently had five rifles in some kind of a secure area – it has been described as a safe. Can you tell the Tribunal anything about the acquisition of those rifles and the reason therefor?

*Mr Avella:*

I know that in preparation for this voyage and in preparation of the ship in general there were many audits that were conducted, one of them being a security plan that was written for the ship. Therefore, in the security plan it spelled out the acquisition, I think, and the storage of such things as rifles, yes.

## M/V "LOUISA"

*Mr S. Cass Weiland:*

In your experience with Sage and knowing Foster, had he ever mounted a marine type expedition like this himself or through one of his companies that you are aware of?

*Mr Avella:*

No, this seemed to be the first time that Sage would have been in a maritime ---

*Mr S. Cass Weiland:*

He did not expect you to captain the ship?

*Mr Avella:*

No, I am not qualified.

*Mr S. Cass Weiland:*

You are not qualified. Back in December of 2010 the Respondent in this case suggested that you were actually the captain of the ship and introduced evidence that the captain of the ship had been captured in Lisbon. Was that a true statement?

*Mr Avella:*

Well, no, that is mistaken.

*Mr S. Cass Weiland:*

Let me ask you this then: if you were not the captain of the ship, who was and how did Sage go about crewing this vessel?

*Mr Avella:*

The vessel was crewed and managed by a ship's management company called ASP SeaScott from Glasgow, Scotland. Their role was – as ship's manager they do the safety systems, security systems, crew management and provide the crew for the ship – and in this case they did, and they provided the ship with a captain who was of Hungarian nationality, as was the other crew members.

*Mr S. Cass Weiland:*

How many crew members were there?

*Mr Avella:*

The minimum manning of the ship was seven. There was actually eight Hungarian crewmen for the crossing.

*Mr S. Cass Weiland:*

Do you remember the name of the captain? I am not sure his name is in the record of this case any more.

*Mr Avella:*

Well, I always knew him and called him "Captain Lazlo" but I didn't know his last name. It was hard, I think, to pronounce as well, so we all just called him Captain Lazlo.

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*Mr S. Cass Weiland:*

We have also heard testimony about two members of the crew who happened to have the misfortune of being on board in February 2006, Mr Zsolt and Mr Sandor. Did you become acquainted with them?

*Mr Avella:*

They were also Hungarian nationals that were actually part of the original crew and had gone on rotation and came back, and they were provided to us by the ship's management company.

*Mr S. Cass Weiland:*

Did you help Sage acquire ASP SeaScot as a manager, a recommendation in that regard?

*Mr Avella:*

I made initial contact, I believe, with ASP SeaScot and had to liaise with them in a few areas of the technical management of the ship.

*Mr S. Cass Weiland:*

Why was this ASP SeaScot chosen?

*Mr Avella:*

They were chosen because they were a very reputable ship management company and they in fact had experience with a vessel of the type that the *Louisa* was.

*Mr S. Cass Weiland:*

What about classing of the ship? Was the ship classed after it was acquired and before it sailed?

*Mr Avella:*

It was actually under class when it was acquired. Germanischer Lloyd was the class society that did all the audits of the ship, and in fact it remained that way and that is how she sailed, under GL class.

*Mr S. Cass Weiland:*

We have before us a facsimile of Annex 24 and this relates back to the acquisition of the rifles that ended up on the ship. If I can ask you to home in on the top of the form here, this form indicates that it is an official department of the Treasury, the Bureau for Alcohol, Tobacco and Firearms. Are you familiar with this particular document, Mr Avella?

*Mr Avella:*

Yes, this is a document that is used in the United States for the acquisition of arms.

*Mr S. Cass Weiland:*

Who was your procurement officer during the time that you were refitting the *Louisa*?

*Mr Avella:*

At the time of the refit in Florida, a gentleman named Charles Fornabio was the procurement officer.

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*Mr S. Cass Weiland:*

I see his name there and I see his signature at the bottom. So when SeaScot indicated in its security plan that you were supposed to have rifles on board – is that what happened?

*Mr Avella:*

Yes, correct.

*Mr S. Cass Weiland:*

The procurement officer went out and bought some rifles. Is that what happened?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Did that seem unusual to you or extraordinarily inappropriate?

*Mr Avella:*

Not to me, it was not. It was in the security plan so it did not seem odd.

*Mr S. Cass Weiland:*

We see that this form accounts for three Bushmaster brand XM15 rifles being purchased here for placement on the *Louisa*, and it looks like, in July, late July of 2004, shortly before you sailed. Is that correct?

*Mr Avella:*

That would be before we sailed, yes.

*Mr S. Cass Weiland:*

Were these automatic weapons or were these single shot, if you know the difference?

*Mr Avella:*

It is not, again, my area of expertise but they certainly were not automatic rifles, to my understanding.

*Mr S. Cass Weiland:*

Could we look at number 25? I do not want to labour this point. It is late in the afternoon. This is another one of these forms, is it not, Mr Avella?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

If we go to page 2, we see that Mr Fornabio purchased the other two Bushmaster XM15s for placement on the ship on the same day. Is that right?

*Mr Avella:*

Yes.

## EXAMINATION OF WITNESSES – 4 October 2012, p.m.

*Mr S. Cass Weiland:*

There is no secret that the *Louisa* sailed from Jacksonville, Florida in August with these five rifles on board.

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

In fact, there was a shotgun involved too, was there not?

*Mr Avella:*

There was a shotgun on board when we acquired the vessel that we found in the general clean-up of the ship.

*Mr S. Cass Weiland:*

Did that end up being stored with these rifles?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

We have heard a little testimony about the method by which the rifles were stored, and again, I am somewhat reluctant to deal with minutiae but since rifles apparently are a major part of the investigation in Cádiz which has been going on for seven years, let us talk about the storage of the weapons on board the ship. Could you tell the Tribunal exactly how these rifles and the one shotgun were stored on the *Louisa*?

*Mr Avella:*

Certainly. Under direction of the ship's management company, they said that any time a ship sails with any kind of arms, they needed to be locked up in a secure locker. In fact, there was a safe installed on the ship and welded into a bulkhead.

*Mr S. Cass Weiland:*

So you brought on a safe, welded it into the bulkhead of the ship?

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

Was the safe also behind some additional thing?

*Mr Avella:*

It was also in a steel locker with a padlock on the door.

*Mr S. Cass Weiland:*

So it was in a steel locker with a padlock and then inside the locker one would find a safe with these rifles?

*Mr Avella:*

Inside the steel locker there was a safe and then inside the safe would be the rifles, yes.

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*Mr S. Cass Weiland:*

Who had access to the rifles while it was in port, most importantly, in Puerto de Santa Maria?

*Mr Avella:*

Nobody but the Master would have access to that.

*Mr S. Cass Weiland:*

Did you ever have the combination to the lock of the locker in the hold there?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

Were one or more of the rifles ever taken out and used while you were in Spain?

*Mr Avella:*

No, absolutely not.

*Mr S. Cass Weiland:*

Do you remember whether any of them were ever taken out?

*Mr Avella:*

In Jacksonville, prior to the ship leaving the US, there was some training exercises conducted, yes.

*Mr S. Cass Weiland:*

Let me return now to your arrival in the Cádiz area around the middle of August 2004. Was the ship berthed or what happened with the *Louisa* when you came on the scene?

*Mr Avella:*

When she arrived in August, she would have anchored offshore.

*Mr S. Cass Weiland:*

How long did she stay anchored offshore?

*Mr Avella:*

She stayed anchored until approximately October of that year. I do not remember the exact date when she went into port but it was early October.

*Mr S. Cass Weiland:*

Did Lazlo, the captain, stay with you during the period of time it was anchored in the bay?

*Mr Avella:*

Always.

*Mr S. Cass Weiland:*

He was always on board?

## EXAMINATION OF WITNESSES – 4 October 2012, p.m.

*Mr Avella:*

Yes, he was always the captain.

*Mr S. Cass Weiland:*

Did you move the ship from time to time?

*Mr Avella:*

It did move to different areas and anchor in various places offshore, yes.

*Mr S. Cass Weiland:*

What was the purpose of that?

*Mr Avella:*

The purpose of that was for it to allow the tender to conduct some follow-up survey work.

*Mr S. Cass Weiland:*

What kind of survey work? What do you mean by follow-up survey work?

*Mr Avella:*

It is my understanding that the data that we had acquired prior to the ship arriving also needed additional proofing and information that goes along with that. Consequently, the tender would leave the *Louisa* in the general area where she was anchored and divers would investigate the sea bottom.

*Mr S. Cass Weiland:*

The Spanish delegation in December 2010 was extraordinarily interested in the fact that you had this dive gear on board. Only treasure hunters have dive gear. Explain to the members of the Tribunal in a little more detail why it is that people who are prospecting for oil and gas under water would actually dive and take a look at the sea floor.

*Mr Avella:*

The purposes for diving in those instances are to observe the geology on the sea floor, for one, and to record and observe different formations and prove out what is seen on electronic equipment.

*Mr S. Cass Weiland:*

You have already testified that there was some kind of contract with Tupet that if by happenstance you found a wreck or some evidence of a shipwreck, that data would be given to Tupet and they would follow up on it. Do you recall that testimony?

*Mr Avella:*

That is correct. Yes I do.

*Mr S. Cass Weiland:*

Did you ever find a shipwreck?

*Mr Avella:*

No.

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*Mr S. Cass Weiland:*

We have seen some what you would call rocks that had holes drilled in them. Do you know anything about those?

*Mr Avella:*

I know I have seen items like that on board, some rocks with holes in them, as you describe, is all I know them as.

*Mr S. Cass Weiland:*

You know them as what?

*Mr Avella:*

As a rock with a hole in it. That is what it was. I do not know how else to describe it.

*Mr S. Cass Weiland:*

Did you ever yourself go under water and bring up anything you considered to be an artefact that might be related to the cultural heritage of Spain?

*Mr Avella:*

No, I did not.

*Mr S. Cass Weiland:*

Did you ever see any indication on board the ship that one of the divers had perhaps brought something up that he found on the sandy bottom?

*Mr Avella:*

Yes. In fact, what is pictured there are some few rocks that the divers collected and it appears to be some rusty cannonballs.

*Mr S. Cass Weiland:*

It is my understanding that you have previously said that you thought you had seen at least one of these rocks with a hole in it at some point on the deck of the ship.

*Mr Avella:*

That is correct, yes. I do not know if they are these rocks but I mean, they looked like it.

*Mr S. Cass Weiland:*

You told me that you have an idea what these rocks are used for. Tell the Tribunal what you have discovered while traversing the area offshore Cádiz and the fishing operations that are conducted there.

*Mr Avella:*

Having spent some time there during that period, it was clear that the type of fishing that is done in that area of the world is done with nets, the tuna fishing, and those nets are stretched out in the ocean there and they were weighted down, because they are quite long.

*Mr S. Cass Weiland:*

You are not saying that these are necessarily fishing net rocks, are you?

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*Mr Avella:*

I would not know if they were used for that purpose but it is pretty logical to deduce that.

*Mr S. Cass Weiland:*

When you saw one on the deck of the ship, did it occur to you that one of the divers must have brought up one of these fishing net weights?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

After you arrived offshore in 2004 you say that the ship was berthed sometime in October?

*Mr Avella:*

Yes, in early October she went to port.

*Mr S. Cass Weiland:*

Did you stay on the ship during the winter?

*Mr Avella:*

Not all winter. I actually returned home for Christmas.

*Mr S. Cass Weiland:*

By the spring of 2005 what was happening in terms of the relationship between Sage and this Tupet company?

*Mr Avella:*

Later, in the spring of 2005, it is my understanding that the various permits expired, I believe some time in April 2005.

*Mr S. Cass Weiland:*

Their permit was expiring?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

What did the owner of Sage indicate to you that he wanted done with the ship?

*Mr Avella:*

At that time he indicated that we should commence preparing the ship to get under way and to go back to the United States.

*Mr S. Cass Weiland:*

Did that happen?

*Mr Avella:*

No, it did not.

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*Mr S. Cass Weiland:*  
Why not?

*Mr Avella:*  
There was not a full crew on board. At the time we had only two engineers on rotation because she was alongside, so we began preparations to get everything in order to be able to make a crossing, which would mean unbunkering fuel and crewing and various maintenance things, and some audits by the class society.

*Mr S. Cass Weiland:*  
What about the workboat known as the *Gemini*. Where was it at this time? We are talking now about the time frame 2005 and the expiration of the permit.

*Mr Avella:*  
The *Gemini* was usually berthed alongside the *Louisa* for various reasons of maintenance and so forth, and there was another company that had permits to also work in Spain and they expressed an interest in leasing the *Gemini*.

*Mr S. Cass Weiland:*  
Another Spanish company expressed interest in leasing the *Gemini* from Sage?

*Mr Avella:*  
That is correct.

*Mr S. Cass Weiland:*  
The *Gemini* was really just the property of Sage, was it not?

*Mr Avella:*  
It was.

*Mr S. Cass Weiland:*  
I think there is an outstanding question about the nationality of the ship. Was the *Gemini* large enough to have a flag registration, or was it flagged, so to speak?

*Mr Avella:*  
It was not flagged. Personally I do not know where the break-off point is between flags and whether it is necessary in size, but she was basically the tender to the *Louisa*, so she did not have her own flag, so to speak.

*Mr S. Cass Weiland:*  
Someone expresses an interest in leasing the *Gemini*, yet Sage is about to close down its operations and bring the ship back. I take it that someone decided that they would lease the *Gemini* to this other company. Is that right?

*Mr Avella:*  
In fact, they did, yes.

*Mr S. Cass Weiland:*  
Did you decide or were you asked to stay on and oversee the well-being of the *Gemini* and the *Louisa*?

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*Mr Avella:*

In a sense, yes. I was already there and my duties were to get the *Louisa* ready to get under way, and that also included safeguarding and maintaining the *Gemini* during the lease period.

*Mr S. Cass Weiland:*

Did you work at all with the lessee of the *Gemini* during the summer of 2005?

*Mr Avella:*

I was on board at various times and went out on it as an engineer to make sure that things were running right and so forth, and that the ship was handled properly and was not abused.

*Mr S. Cass Weiland:*

Did this other Spanish company appear to have permits for whatever operations it was undertaking?

*Mr Avella:*

Yes. I do not read Spanish, but the permits indicated that we had authorization to work off the coast of Spain.

*Mr S. Cass Weiland:*

What were they supposed to be doing?

*Mr Avella:*

They were conducting ---

*Mr S. Cass Weiland:*

I know that you do not read Spanish, but how was it ---

*Mr Avella:*

It was my understanding. I was informed, that they were conducting environmental studies and surveys of sand strata.

*Mr S. Cass Weiland:*

What was the name of the company, by the way?

*Mr Avella:*

Plangas.

*Mr S. Cass Weiland:*

Plangas has its own permit or permits and you stuck around to oversee the well-being of the *Gemini* during that summer. Did Plangas find any shipwrecks that you are aware of during that summer?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

Did you do any shipwreck searching yourself during the summer of 2005?

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*Mr Avella:*

No, I did not have enough time for that.

*Mr S. Cass Weiland:*

We have talked about permits. Back in December 2010 we were entering into the course of the hearing and apparently Sage and Tupet had the wrong type of permit to do what they were doing. While you were there working on the *Louisa* in 2004, were you ever advised that the permit was inadequate or improper?

*Mr Avella:*

Nobody ever told me that, no.

*Mr S. Cass Weiland:*

Did you ever run into the federal police out on the water while you were working with the *Louisa*?

*Mr Avella:*

Yes. Being in the coastal waters of Spain, we were obviously there, so we were boarded by the Guardia Civil, I can remember, on quite a few occasions to control our permits and documents and inspect what we were doing.

*Mr S. Cass Weiland:*

I take it that you are saying that the *Louisa* and the *Gemini* were just operating out in the open?

*Mr Avella:*

Clearly, yes.

*Mr S. Cass Weiland:*

There was no secret about what they were doing?

*Mr Avella:*

No, there could not be. We were out in open water within seeing distance to the shore.

*Mr S. Cass Weiland:*

Between the *Gemini* and the *Louisa*, how many times do you think the federal police boarded the vessels and inspected your documents?

*Mr Avella:*

I would say a minimum of five times.

*Mr S. Cass Weiland:*

While the *Gemini* was being leased by Plangas, are you aware whether the Guardia Civil stopped the *Gemini* to look at the Plangas permit?

*Mr Avella:*

Yes. I was on board twice when the Guardia Civil stopped the *Gemini*.

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*Mr S. Cass Weiland:*

We have seen a picture of the *Gemini III* with these large aluminium deflectors on the back of the ship. Were there ever any deflectors on the back of the *Gemini* when it was stopped by the Guardia Civil?

*Mr Avella:*

Yes. I can say that on one occasion I was there when the Guardia Civil stopped the *Gemini* and it had been fitted with ---

*Mr S. Cass Weiland:*

In fact, you said that these aluminium deflectors were actually the successors and that before they were installed you had something else. Is that right?

*Mr Avella:*

Before these were installed there were some others that were on board, yes.

*Mr S. Cass Weiland:*

That was during the time that it was leased by Plangas?

*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

The fire deflectors were while it was leased by Plangas?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

You were on the *Gemini* at least once when these deflectors were installed and the Guardia stopped you?

*Mr Avella:*

That is correct. They were not always on the ship. In other words, they were removable, so consequently they were not always on the ---

*Mr S. Cass Weiland:*

I am asking you to search your recollection and tell the Tribunal whether you can recall a time when they were actually installed when you were stopped?

*Mr Avella:*

Absolutely.

*Mr S. Cass Weiland:*

There was at least one time that you can recall?

*Mr Avella:*

Yes.

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*Mr S. Cass Weiland:*

Was the owner of Plangas arrested or hauled into court or anything for having this mechanism on the back of its ---

*Mr Avella:*

No. We were sent on our way.

*Mr S. Cass Weiland:*

Mr President, I believe that we are at a point in the presentation by Mr Mario Avella at which we are going to start to talk about the whole visit of Alba Avella and related events, and I would respectfully suggest that perhaps this is a natural time to break.

*The President:*

Thank you very much, Mr Weiland. We have reached the end of this afternoon's sitting. The Pleadings will have to be continued tomorrow morning. The Pleading will be resumed tomorrow at 10 a.m. The sitting is now closed.

*(The sitting closes at 17.55 hours)*

5 October 2012, a.m.

**PUBLIC SITTING HELD ON 5 OCTOBER 2012, 10.00 A.M.**

**Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 4 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 5 OCTOBRE 2012, 10 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 4 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

Good morning. We will continue today with the hearing in the *M/V "Louisa" Case*. The witness Mr Avella will be examined further.

M/V "LOUISA"

**Examination of Witnesses (continued)**

MR MARIO AVELLA, EXAMINED BY MR S. CASS WEILAND (CONTINUED)  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/3/Rev.1, p. 1–23]

*The President:*

Mr Avella, you are still covered by the declaration that you made yesterday.

*Mr Avella:*

I understand.

*The President:*

Please be seated.

Mr Avella, may I ask you to make the work of the interpreters and the verbatim reporters easier by speaking slowly and allow a sufficient interval after the questions from Mr Weiland before giving your responses? I made the same request yesterday of Mr Weiland and your daughter. I appreciated their full cooperation, and I thank you in advance.

Please continue the examination, Mr Weiland.

*Mr S. Cass Weiland:*

Thank you, Mr President. I have already expressed my apologies to your court personnel this morning for our failure to adhere to the guidelines. I am sure that we will do better today.

Mr Avella, yesterday we talked about your background. We talked about your decision to participate in the expedition, if you will, to Spain with the *Louisa*. We covered the years 2004 and 2005 and you testified that the *Louisa* was docked for the winter, certainly by January of 2006. Is that correct?

*Mr Avella:*

The first time she went to the dock was in October 2004.

*Mr S. Cass Weiland:*

I am talking about the winter of 2005/2006 and I am going to direct your attention to January 2006. At that time the ship was docked. Is that correct?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

That was my mistake, but I just want to set the background for you so that we can catch up with where we were yesterday. In January 2006 the *Louisa* was docked in Puerto de Santa Maria and you invited your daughter to come to visit. Is that correct?

*Mr Avella:*

Yes, I did.

*Mr S. Cass Weiland:*

Would you tell the Tribunal briefly about the circumstances under which you thought that it would be a good idea for her to come to Spain?

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*Mr Avella:*

I asked her to come to Spain to visit me because my duties were not so busy that I could not spend some time with her, and I had not seen her for a good period of two years, so I wanted to have her come and see the country, learn some of the language, take her around, show her some of the history and enjoy some downtime with my daughter.

*Mr S. Cass Weiland:*

When did she take you up on your offer? Do you recall approximately when she arrived?

*Mr Avella:*

She arrived in the latter part of January. I do not recall the exact date – maybe in the week of the 24<sup>th</sup> or 25<sup>th</sup>.

*Mr S. Cass Weiland:*

What were your duties in terms of the *Louisa* or the *Gemini III* at that time?

*Mr Avella:*

The *Gemini* was in dry dock at the time, so there was not much that required my attention. The *Louisa* was in the process of getting into shape so that it could get under way. There were two engineers on board who were performing some of the tasks, but we were on standby a little bit because we had to arrange for the ship's management company to have a crew and take on fuel and all the different things that you need.

*Mr S. Cass Weiland:*

The engineers at the time were Mr Sandor and Mr Zsolt?

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

Had you become well acquainted with those two gentlemen by then?

*Mr Avella:*

Yes. I had worked with them over the course of the two years, so I knew them quite well.

*Mr S. Cass Weiland:*

Were they actually involved with the *Louisa* from the time that you were in Jacksonville?

*Mr Avella:*

Yes, that is correct. They came on board in Jacksonville in the initial preparations of the ship.

*Mr S. Cass Weiland:*

You felt like you knew them well and trusted them?

*Mr Avella:*

Yes. I actually had a bond with Alex, or Sandor, because he was such a nice gentleman, and actually my mother was Hungarian. She was an immigrant to the United States, so we had some things in common.

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*Mr S. Cass Weiland:*

Your mother was Hungarian and he is a somewhat elderly guy or older gentleman?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

That became important because we understand that shortly after your daughter's arrival you were called back to the United States. Is that right?

*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

By that time you had her enrolled in Spanish classes?

*Mr Avella:*

Yes. I wanted her to get right into the language as soon as she got there, so I took her and enrolled her in a nice course in Puerto de Santa Maria.

*Mr S. Cass Weiland:*

What occasioned the necessity for you to return to the United States shortly after her arrival?

*Mr Avella:*

It was necessary for me to go back to the United States on short notice because I got information from my family that my mother was quite ill and there was nobody who could help to attend to what she needed at the time, so I was the designated person in the family to get back and assist her.

*Mr S. Cass Weiland:*

We have heard that there were some other things that you could attend to if you were in the States on a short-term basis. Is that also correct?

*Mr Avella:*

Yes, there were other duties that I could take care of quickly before returning to Spain.

*Mr S. Cass Weiland:*

Some of those related to the return of the *Louisa*, for example?

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

I would imagine that you had some hesitancy about leaving your daughter in Spain right after she had arrived. Is that correct?

*Mr Avella:*

It was not a planned trip at all. In fact, I was not really happy about leaving because she had just arrived and we had all these plans to see the country and travel around and have some quality time together, and it took me very much by surprise. Consequently, it was very

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difficult, but it was pressing that I needed to get back, and I knew that she was going to be okay because she had a good person on board to take care of her, to cook for her and to drive her around where she needed to go, and I knew that she would be occupied with her school. I also introduced her to another young lady who spoke very good English and Spanish, so I felt like she would be okay.

*Mr S. Cass Weiland:*

That other young lady was the Polish girl who was just a few years older than your daughter?

*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

Your daughter was living on the *Louisa* when you left?

*Mr Avella:*

Yes, she was.

*Mr S. Cass Weiland:*

She had all her gear stowed in one of the cabins?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

On 1 February did you get a call from your daughter?

*Mr Avella:*

Yes, I did.

*Mr S. Cass Weiland:*

Tell us about the phone call.

*Mr Avella:*

She called me on my cell phone and asked me if she could have the combination to a safe on board the ship, and of course immediately that struck me as “What is going on here?” because there would be no reason for her to ask me for something like that, and in fact I wondered why she even knew that there was a safe on board the ship.

*Mr S. Cass Weiland:*

You were not aware that she even knew there was a safe?

*Mr Avella:*

That is correct. She would not know that there was a safe on board. Immediately I was confused, but I knew that something had to be very wrong.

*Mr S. Cass Weiland:*

Did you end up speaking to the federal police on the same phone call?

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*Mr Avella:*

Yes, because I started to ask her some questions – to please tell me what she needed this for and what was going on, and she was not able to answer me because I understand that she was under the guard of the Guardia Civil, and in fact somebody had taken the phone away from her and had got on the phone to me and identified himself as a Guardia Civil.

*Mr S. Cass Weiland:*

Do you remember what he asked you and what you told him?

*Mr Avella:*

I do. I remember that he asked me for the combination for the safe. Of course, I told him "I do not have a combination for the safe" and that I did not know the combination for the safe, but that I could possibly call the office of the owner of the ship and try to find out if that information was available.

*Mr S. Cass Weiland:*

You say to the Tribunal that of course you did not have the combination to the safe. Why do you say that?

*Mr Avella:*

It was told to us that nobody would have the combination for that safe because nobody should have access to what was in the safe. Only the master on board the ship would be allowed to have access there.

*Mr S. Cass Weiland:*

The safe that we are talking about is a safe that stored these rifles that we have seen. Is that correct?

*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

And the shotgun?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

What did you do after this strange call from your daughter?

*Mr Avella:*

Immediately I was distressed, for one. I waited a little while and tried to call her back on her cell phone and, of course, got no answer, so I attempted to call the engineers on board and in fact could not get an answer there either. I had called Anna, because of course I had everybody's contact numbers, and she told me that the Guardia Civil was on board and had seized the ship and detained everybody.

*Mr S. Cass Weiland:*

After those phone calls, what did you do?

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*Mr Avella:*

Immediately I packed a bag and went to the airport to get on a plane.

*Mr S. Cass Weiland:*

What happened when you got on the plane? You were flying to Spain?

*Mr Avella:*

Correct.

*Mr S. Cass Weiland:*

You were flying to Spain to help your daughter?

*Mr Avella:*

I was flying to Spain to immediately try to take charge of the situation, because my daughter was there, the two engineers were there, the ship had been boarded and arrested, so naturally, and especially in the case of my daughter, I was making my way there as fast as possible.

*Mr S. Cass Weiland:*

Is it therefore fair to say that you left for the airport before you knew that your daughter had even been arrested, or did Anna convey that information to you?

*Mr Avella:*

Anna conveyed the information to me. By the time I was able to get a flight and make arrangements, I learned that they had taken Alba to jail.

*Mr S. Cass Weiland:*

What about a lawyer? There was some possible confusion yesterday. Do you know whether a lawyer was appointed by the court, or did you become involved in trying to obtain the services of a lawyer for your daughter?

*Mr Avella:*

Immediately I knew that we would have to have a lawyer, so I contacted the office of Sage and got information from them of a lawyer to contact as soon as I arrived to Spain.

*Mr S. Cass Weiland:*

Did Sage have a lawyer ready to go or did Sage have to make its own enquiries?

*Mr Avella:*

We did not have a lawyer on standby. They had to make enquiries.

*Mr S. Cass Weiland:*

By the time you boarded a flight to Spain, did you have the name or the contact information of some lawyer who you thought was going to be doing the representation?

*Mr Avella:*

I do not believe so. I did not get that information until I arrived in Spain.

*Mr S. Cass Weiland:*

Until you landed?

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*Mr Avella:*  
Yes.

*Mr S. Cass Weiland:*  
Then what did you do?

*Mr Avella:*  
I immediately went to Puerto de Santa Maria to meet the lawyer and try to understand what was going on and try to get my daughter released.

*Mr S. Cass Weiland:*  
What did the lawyer tell you?

*Mr Avella:*  
By then I think it was Thursday afternoon or evening, and the lawyer told me that ---

*Mr S. Cass Weiland:*  
Let me interrupt you, sir. The record indicates that she was arrested on Wednesday, 1 February. You were already in Spain by Thursday night, as best you recall?

*Mr Avella:*  
Yes, that is what I recall, because I literally dropped everything and went to the airport.

*Mr S. Cass Weiland:*  
Please proceed.

*Mr Avella:*  
I made contact with the lawyer and he told me that the next day he would be appearing on behalf of my daughter, and this was after we had to do a few formalities in retaining him, and that he would appear the next day and have my daughter released.

*Mr S. Cass Weiland:*  
Formalities such as money?

*Mr Avella:*  
Correct.

*Mr S. Cass Weiland:*  
Lawyers sometimes appreciate that! You got this lawyer some funds and he told you that he would appear in court the next day, Friday 3 February. Did he give you a prediction of what would happen?

*Mr Avella:*  
After talking to him, he knew that my daughter had nothing to do with any kind of allegations that would be brought on behalf of the ship. I explained to him that she had just arrived. I explained the whole situation that we have talked about. He understood and said, "Yes, of course. I will appear on her behalf tomorrow and we will have her out".

*Mr S. Cass Weiland:*  
"We will have her out"?

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*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

What did he say about your situation and the jeopardy that you might face?

*Mr Avella:*

He instructed me to wait, to just stand by and wait for him to get my daughter out, and he would start to clear up all this, because I explained to him as briefly and as completely as I could what I knew of the situation, which was not very much. I did not know why the Guardia had boarded the ship. It was important that he understood that, whatever was going on, we were not involved with anything criminal.

*Mr S. Cass Weiland:*

On Friday did he go to the courthouse, as far as you know, and come back and give you a report?

*Mr Avella:*

Yes, he went to the courthouse. I waited around most of the day and he contacted me and said that the judge would not see her and that she would have to spend the weekend.

*Mr S. Cass Weiland:*

She would have to stay in jail for the weekend, and what did you do? Did that upset you?

*Mr Avella:*

The first thing I did was argue a lot and scream a lot. I could not understand what he was talking about, why he could not get my daughter released on such an issue like this, which was ridiculous. Of course, I was extremely upset to that point because I knew that she was in jail, and even more so after I found out that she was not getting out. I was extremely upset.

*Mr S. Cass Weiland:*

What happened after this report from the lawyer that your daughter was going to be in jail? Did he give you any more information about what he thought the case involved or what these people were interested in?

*Mr Avella:*

The only information that he could give me at the time was that he said that they had found guns on board the ship, so this is a very big deal, but I do not have any more information. He used the term “justice secret”.

*Mr S. Cass Weiland:*

“Justice secret”?

*Mr Avella:*

Yes, he used that term and I asked him to explain that. He said, “That means that the case is secret” and that we could not find anything out about it. Actually I was flabbergasted. I never knew of anything like that. I am not a lawyer and I do not know anything about the system so much in the United States or Spain, but it seemed odd to me, coming from America, that you

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would not be able to find out what the allegations were or what the reasons were or what was going on.

*Mr S. Cass Weiland:*

What did he tell you about the importance of the fact that there were rifles on board the ship?

*Mr Avella:*

I think he expressed that it was an extreme situation, but also he did not know any particulars about ships and maritime law and things like that, so he expressed to me that it was a grave situation that there would be any kinds of weapon on board, and I tried to explain to him that from what I knew of it, they were on board but were locked up securely, as they should have been.

*Mr S. Cass Weiland:*

What happened then? What did you do? Did he give you any advice?

*Mr Avella:*

He did. I wanted to go to the Guardia Civil station and talk to them and make a declaration, to say "What is going on? What are you doing holding my daughter? This is crazy and ridiculous. She obviously had nothing to do with anything here, so can we not just clear this up?" The attorney adamantly told me, "No, do not go there, because this is a grave situation with these weapons and they are just going to throw you in jail and leave you there for 15 years. You need to just wait and go away and I will have all this cleared up".

*Mr S. Cass Weiland:*

You said to him, "I am going to the police station and take care of this. I am going to explain my daughter's situation"?

*Mr Avella:*

Absolutely.

*Mr S. Cass Weiland:*

You had no fear for your own situation at that time, because you had not been involved in any criminal activity?

*Mr Avella:*

Absolutely not, but certainly I was afraid. I did not know what was going on in a foreign country like that and the fact that they could throw a young girl in jail for doing absolutely nothing, so there was some fear involved.

*Mr S. Cass Weiland:*

When he told you that they would throw you in jail for 15 years and he was adamant about you not going to the police station, did you take his advice?

*Mr Avella:*

I did, reluctantly.

*Mr S. Cass Weiland:*

At the same time he was assuring you, "Do not worry. On Monday I will have her out." Is that what you said?

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*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

Did he predict at all that once she was released this judge might take her passport and keep her marooned in Spain for months?

*Mr Avella:*

The subject never came up. I never imagined that that would happen.

*Mr S. Cass Weiland:*

Your thinking was, “If I follow the lawyer’s advice and return to the United States, my daughter will be right behind me”?

*Mr Avella:*

Yes. I put my faith in that.

*Mr S. Cass Weiland:*

What happened?

*Mr Avella:*

It turns out that she did get out on that Monday, but they held her passport, and actually I did not know how long ... There was not really a time frame. They just said, “You have to stay in Spain while this is being investigated and you have to appear and check in every 1<sup>st</sup> and 15<sup>th</sup> or whenever we call you”.

*Mr S. Cass Weiland:*

After you returned to the United States were you getting reports from the lawyer in Cádiz that the matter would be cleared up in a relatively short time?

*Mr Avella:*

Yes, especially initially, the lawyer said that he needed to work on it, that it would take a few weeks maximum, that he would get her passport back, and just to try to be relaxed, which was impossible, and wait.

*Mr S. Cass Weiland:*

And send more money?

*Mr Avella:*

Correct.

*Mr S. Cass Weiland:*

After your daughter was released but not allowed to leave, give the court some sense of what you and the lawyer were doing, what Sage personnel were doing, so that they can appreciate that.

*Mr Avella:*

It was a very stressful time, because she was released and the two engineers were released but not allowed to go back on ship, so they had no place to live, they had no way to get to their

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personal belongings, they had no identification and they had no money, so I had to try to support and organize them as much as possible. When I say "support" I mean that I had to try to figure out how they were going to get an apartment, how they were going to live, how they were going to survive.

*Mr S. Cass Weiland:*

So you had been in Spain off and on by then for about 18 months. You had friends and contacts we have heard about – Anna – and a friend who met her at the lawyer's office, helped get her into a hotel when she was released from jail. Were all those things that you were working on when you were back in the States?

*Mr Avella:*

Yes. I did everything possible, called as many people as I could to try and help to secure an apartment.

*Mr S. Cass Weiland:*

Did you arrange for her family to come and visit her?

*Mr Avella:*

I did. I arranged for Alba's sister to come visit her. She has a half-brother that also came down to visit her and to help give her support, to help in organizing all the things that she needed to live.

*Mr S. Cass Weiland:*

What happened then after weeks go by and the lawyer's prediction about the short-term nature of this did not come true?

*Mr Avella:*

Well, weeks go by and you are very anxious and stressed, and another couple of weeks go by and you are getting even more, and finally two months go by and still nothing has happened, nothing has moved. The lawyer is still telling me that he is working on it but it is still a secret.

*Mr S. Cass Weiland:*

Even after two months?

*Mr Avella:*

Yes, which is just, again, very hard for me to comprehend. And so I finally had enough and I said I have to meet the lawyer and have to go to the embassy in Spain; I have to make a declaration; I have to do something to get my daughter released.

*Mr S. Cass Weiland:*

So what did you do?

*Mr Avella:*

I flew to Lisbon, Portugal, and rented a car to drive and to meet them, to meet my daughter and to meet the attorney with the intention to go to the embassy because I felt that phone calls weren't enough. You can't – you just don't seem to get the response from phone calls. I felt I had to go there personally and really, you know, push to get something resolved.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr S. Cass Weiland:*

What happened after you got to the Cádiz area generally with the rental car?

*Mr Avella:*

I was in contact with my daughter on her cell phone and we arranged to meet and I called the lawyer to make arrangements to meet him. At the same time we were trying to all get together. I wanted to meet actually in Jerez and we could go to Seville to the embassy and try and petition some help there.

*Mr S. Cass Weiland:*

To the consulate you mean?

*Mr Avella:*

Yes, the US Consulate. My daughter called me and said, you know: “Dad, they are following me. There are plain-clothes Guardia Civil people following me, so please don’t come and see me because they are going to arrest you.”

*Mr S. Cass Weiland:*

So what happened?

*Mr Avella:*

Well, again reluctantly I turned around and I went back. I said: How are we going to ...” We talked about it on the phone and we reasoned how am I going to be able to continue to support and help them keep the flow of information coming as much as possible and keep putting pressure on the lawyers and so forth if I am incarcerated. Again, I left – very difficult.

*Mr S. Cass Weiland:*

She tells you: “If you come and meet me, there are people following us and you will be arrested and you will not be able to help me if you are in jail.” Is that basically what she was telling you?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

And that is what she knew to be a fact.

*Mr Avella:*

That is what I assumed.

*Mr S. Cass Weiland:*

That is what happened in the end, isn’t it?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

So you decide you cannot be much help to her if you are incarcerated so you reluctantly leave the area in your rental car and go back to Lisbon.

M/V "LOUISA"

*Mr Avella:*  
Yes.

*Mr S. Cass Weiland:*  
What happened in Lisbon?

*Mr Avella:*  
I went through passport control and apparently my passport was flagged and they detained me at the airport.

*Mr S. Cass Weiland:*  
I want you to tell the Tribunal first, when they arrested you in Lisbon, what did they tell you you were charged with?

*Mr Avella:*  
All the information I had in Lisbon was that there was a European arrest warrant for me and I asked them on what charges and they said they can't tell me.

*Mr S. Cass Weiland:*  
They could not tell you what you were charged with.

*Mr Avella:*  
No.

*Mr S. Cass Weiland:*  
Did they put you in jail in Lisbon?

*Mr Avella:*  
Yes, they did.

*Mr S. Cass Weiland:*  
What jail did they put you in?

*Mr Avella:*  
They took me to a facility in the city that was a very old prison.

*Mr S. Cass Weiland:*  
A prison?

*Mr Avella:*  
Yes.

*Mr S. Cass Weiland:*  
What happened to you there?

*Mr Avella:*  
Well, they took me there and I was checked in and put in a cell, and waited.

*Mr S. Cass Weiland:*  
Were there other people in the cell?

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Avella:*

Yes, one other.

*Mr S. Cass Weiland:*

What was he charged with?

*Mr Avella:*

I believe it was drug-trafficking or something like that.

*Mr S. Cass Weiland:*

So what happened when you were in jail in Lisbon? How long did you stay in jail?

*Mr Avella:*

Well, they put me in front of a judge in Lisbon, as I imagine they would have to do. They asked me if I wanted to resist extradition to Spain. I said: “Why would I want to do that? I want to get back there. I want to go to Spain right now because this has to get cleared up. What am I going to do sitting there in Portugal when it is not going to matter – you guys can’t do anything for me so I have got to get back to Spain.” Of course, they told me that as long as I was agreeing with that and signed a paper they would put the wheels in motion to extradite me to Spain.

*Mr S. Cass Weiland:*

How many days did that take?

*Mr Avella:*

I think it was ten days.

*Mr S. Cass Weiland:*

After ten days they transported you to Spain?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

They took you out to the airport and flew you over to Jerez?

*Mr Avella:*

No, they transported me within Portugal to the border, to another facility, and I spent the night there. The next morning they took me across the border to Spain and handed me over to the officials there.

*Mr S. Cass Weiland:*

Did the Portuguese police restrain you in some way on the trip to the border?

*Mr Avella:*

Yes, I was always handcuffed of course.

*Mr S. Cass Weiland:*

Did they tell you they handcuffed you because you were charged with a violent crime?

## M/V "LOUISA"

*Mr Avella:*

Well, they didn't really explain to me any – either way or the other. They just handcuffed me and took me away.

*Mr S. Cass Weiland:*

So then you were turned over to the Spanish police?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

How did that transfer occur?

*Mr Avella:*

Yes, they took me across the border and we met some Spanish officials and they asked me to identify myself and they said: "Do you know why you are here?" I said: "No, not really", and they just kind of chuckled.

*Mr S. Cass Weiland:*

Chuckled?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Did they produce a document that said, "This is the charge, Mr Avella; we are taking you to jail"?

*Mr Avella:*

No, not that I can recall.

*Mr S. Cass Weiland:*

The Spanish police transported you to Cádiz or to where?

*Mr Avella:*

After going to another facility somewhere across the border and waiting a few hours – I don't remember exactly but it was the same day, I believe, where two officers took me in a van to Cádiz.

*Mr S. Cass Weiland:*

They took you in a van to Cádiz. Did they handcuff you?

*Mr Avella:*

Yes, they did.

*Mr S. Cass Weiland:*

What were the conditions in the van?

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Avella:*

Well, just a bare, small van, with nothing in the back basically – empty.

*Mr S. Cass Weiland:*

No seat or anything?

*Mr Avella:*

No, just the floor.

*Mr S. Cass Weiland:*

How long did it take to drive over there, if you recall?

*Mr Avella:*

It took a long time. I can't be sure if it was six or eight hours, something along those lines, but it was a long ride, yes.

*Mr S. Cass Weiland:*

Did they take care of any of your personal needs on the trip?

*Mr Avella:*

No, they didn't really pay attention much. They just put me in the back and got on the road and stopped for lunch and kept going, and all the time I just was handcuffed in the back.

*Mr S. Cass Weiland:*

They stopped for lunch and left you handcuffed in the back of the van?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Did they take you out and take you into the men's room or anything?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

The entire six to eight hours?

*Mr Avella:*

The entire time.

*Mr S. Cass Weiland:*

Where did they actually take you first – to see the judge immediately so that you could understand what the charges were?

*Mr Avella:*

It was my understanding that they were taking me directly to the judge, and of course I didn't know – really disorientated and not knowing anything. I went to a holding cell in a building, which I assumed was the courthouse.

M/V "LOUISA"

*Mr S. Cass Weiland:*

At some point you did see some kind of judicial authority – is that right?

*Mr Avella:*

First, I was interviewed by my lawyer and then we went to see the judge.

*Mr S. Cass Weiland:*

So a lawyer came to see you.

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Was that the same lawyer your daughter had been using?

*Mr Avella:*

No. This was a lawyer from Madrid.

*Mr S. Cass Weiland:*

When you were in the custody of the Portuguese did they allow you to make any calls?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

How did this lawyer from Madrid appear?

*Mr Avella:*

Once I was in the prison in Portugal I was able to use a phone. There was some sort of phone there that – I don't remember exactly how it worked, how you had to put money in it or something like that, and I could make a call.

*Mr S. Cass Weiland:*

Did the ship-owner arrange for you to have a lawyer?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

And the lawyer came from Madrid?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

And the lawyer accompanied you to see the judge?

*Mr Avella:*

Yes.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr S. Cass Weiland:*

Was this the same Judge de Diego Alegre who had done such a fine job with your daughter?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

What did he say to you? What was the first thing that this judge in Cádiz said to you?

*Mr Avella:*

I remember going up to the chambers of the judge expecting to finally tell my story and say that, you know, what was going on here and trying to explain that it was – they had everything wrong. Before we actually sat down to be official, so to speak, the judge asked me – because he spoke pretty good English and he said: “So do you hunt alligators in Texas with those guns?” Actually, he said “in Florida” – “Do you hunt alligators in Florida?”

*Mr S. Cass Weiland:*

So he was mocking you.

*Mr Avella:*

I don't even – I didn't even make a response because it was so out of the blue and off the wall.

*Mr S. Cass Weiland:*

Did he set bail then and explain to you in some detail what the charges were and that sort of thing?

*Mr Avella:*

Well, at that time they finally told me that I was charged with all these crazy trumped-up charges of trafficking weapons of war and – you know, trafficking patrimony of Spain – you know, like I was some international drug-trafficker or something like that, you know. That is what they described. We had a short interview. He asked me a few questions – do I know who this is, do I know who that is and things like that. He said: “Okay, that's enough” and they took me back to the holding cell. Then the lawyer came down and said: “Well, it could be worse, but you are going to have to go to prison, but don't worry because we will get this cleared up. We will get it cleared up. I will have you out in two weeks.”

*Mr S. Cass Weiland:*

“I will have you out in two weeks” – is that what the lawyer told you?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

He was confident.

*Mr Avella:*

I wasn't really confident in anybody, but he was confident.

## M/V "LOUISA"

*Mr S. Cass Weiland:*

You mean that the lawyer was confident, or it seemed like he was?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

At that time, when you hear about trafficking in the patrimony of Spain have you any idea what he was even talking about?

*Mr Avella:*

Well – to the judge?

*Mr S. Cass Weiland:*

Yes. Had you seen any of that kind of activity or been involved in it?

*Mr Avella:*

Well, certainly not, and there was questions directed in that, but I don't remember my exact testimony, you know, it was so long ago. But I am sure he asked some questions of shipwreck or patrimony or, you know, taking things from the sea or ...

*Mr S. Cass Weiland:*

Did the lawyer's prediction about two weeks in jail come true?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

How long did you stay in jail?

*Mr Avella:*

I was incarcerated in prison for nine months.

*Mr S. Cass Weiland:*

For nine months. At the end of nine months did you get a trial?

*Mr Avella:*

Oh, no.

*Mr S. Cass Weiland:*

So this arrest occurred in May 2006 – is that correct?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Now we are in October of 2012. Have you had a trial yet?

*Mr Avella:*

No, there has been no trial.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr S. Cass Weiland:*

Are you familiar with the rather complex criminal procedural rules in Spain?

*Mr Avella:*

Well, I have gotten somewhat familiar over the years because it is still something that is hanging over me.

*Mr S. Cass Weiland:*

The court was presented, much to our surprise, with something called an indictment in December 2010, when we were last here. The lawyers in the case certainly had never seen that document. When that document was shown to you had you ever seen that document, that they called an indictment?

*Mr Avella:*

No.

*Mr S. Cass Weiland:*

We came to understand that that was some kind of a charge at the investigatory court, but that the case still needed to be referred to a higher court, to a trial court. Is that your understanding?

*Mr Avella:*

Yes, I believe it has to go up different levels in the court system.

*Mr S. Cass Weiland:*

Has your case been referred to the trial court yet, after these many years?

*Mr Avella:*

Not that I have ever been informed of.

*Mr S. Cass Weiland:*

Tell the members of the Tribunal, not in graphic terms but in a few words what it was like in the Spanish prison for nine months.

*Mr Avella:*

It was an older facility that was run-down and needing repair, overcrowded, where you have people in cells that are designed for two that there was four people in - basically pretty poor conditions, no real programmes for exercise or no activity, no use of the library.

*Mr S. Cass Weiland:*

Did you learn from your lawyer while you were incarcerated just what the Spanish claimed to have taken off the *Louisa* during their two-day search in February 2006? For example, do you know if the Spanish ever provided your lawyer with an inventory of the search?

*Mr Avella:*

Not that I have ever seen.

*Mr S. Cass Weiland:*

Perhaps we will see that.

## M/V "LOUISA"

*Mr Avella:*

Did the judge set bail for you so that perhaps the ship-owner could provide funds to release you from prison?

*Mr Avella:*

After nine months, I guess with repeated requests and work from the attorneys, I was released on a bond, a very substantial bond of €30,000.

*Mr S. Cass Weiland:*

Was there a bond set in May of 2006, when you were first sent to prison?

*Mr Avella:*

Well, no; it was only after nine months in prison that they set a bond.

*Mr S. Cass Weiland:*

So the ship-owner sent funds to secure your release?

*Mr Avella:*

Yes, he did.

*Mr S. Cass Weiland:*

The ship-owner now, despite the lack of any obligation on its part, had been supporting your daughter – is that right?

*Mr Avella:*

That is correct. That was the only way she could – I mean, once I was in jail I had no way of getting an income to her or anything, so the ship-owner was paying for her apartment and giving her subsistence money and sending me a little money in prison so I could buy a cup of coffee.

*Mr S. Cass Weiland:*

Just so it is clear, the irony here is rather striking. You had resisted the urge to go to the authorities in an effort to secure the release of your daughter initially.

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

The lawyers in Spain said: "Don't do that because they will arrest you and your daughter will still be here." Correct?

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

But you could not resist the urge; you go to Spain again and you end up getting arrested and your daughter is still in Spain for months. Is that what happened?

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Avella:*

It is exactly what happened. I couldn't just stand by and allow them to do that to my daughter. I mean it was killing me.

*Mr S. Cass Weiland:*

So we now have the rather bizarre situation of your daughter, whose passport has been taken by the police, by the court, coming to visit you in prison in Spain: is that what happened?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

How often did she come and see you – we have a little reunion of the Avella family every once in a while?

*Mr Avella:*

I think she was allowed to come – I think it was a weekend, on a Sunday, once every couple of weeks for an hour or two.

*Mr S. Cass Weiland:*

By the way, what was the name of the prison?

*Mr Avella:*

Puerto Dos. That's how I knew it.

*Mr S. Cass Weiland:*

After these nine months or so you got some kind of a passport. Tell the Judges how you finally – excuse me, after nine months or so you got out of jail first. Let's talk about that. What did you do when you got out of jail?

*Mr Avella:*

Yes, after nine months I was released on bond and instructed to appear every 1<sup>st</sup> and 15<sup>th</sup>, check in, so to speak, and have a document stamped; and that would be my obligation, so there I was.

*Mr S. Cass Weiland:*

The court had made the decision to keep your passport – is that right?

*Mr Avella:*

Yes, they had my passport.

*Mr S. Cass Weiland:*

So now you will enter into the same situation that your daughter faced.

*Mr Avella:*

The same situation: no passport, no money, no place to live.

*Mr S. Cass Weiland:*

Did you receive funds from the ship-owner?

M/V "LOUISA"

*Mr Avella:*  
Yes, I did.

*Mr S. Cass Weiland:*  
What month were you released from jail?

*Mr Avella:*  
February. It was February.

*Mr S. Cass Weiland:*  
2007?

*Mr Avella:*  
Yes.

*Mr S. Cass Weiland:*  
By this time your daughter has been allowed to depart the country.

*Mr Avella:*  
Thankfully, yes, she had left prior to that. She had left the year before, at the end of the year before. I had been there over the Christmas time and so forth, and she was back in the United States by then.

*Mr S. Cass Weiland:*  
Did your lawyer from Madrid make efforts to obtain the passport from the court so that you could leave the country?

*Mr Avella:*  
Well, we – I am sure that he petitioned the court on numerous occasions, because I asked and I pleaded with him, the US Embassy and Consulate office and so forth, not as much to leave the country because I was obligated to check in every 1<sup>st</sup> and 15<sup>th</sup>, but I couldn't – I had no identification and I couldn't do anything. I couldn't even go to a bank and withdraw money if somebody had put funds in for me. I couldn't open an account. I was stuck. I tried to find work but without identification it is very difficult. So I asked for the relief because I needed something that would allow me to survive while I was there waiting for them to resolve these issues.

*Mr S. Cass Weiland:*  
Are you still under some restrictions from the court in Cádiz in 2012?

*Mr Avella:*  
Yes, as far as I understand it I have to appear whenever called.

*Mr S. Cass Weiland:*  
Were you called to appear in 2011, five years after you had been arrested?

*Mr Avella:*  
Yes, there was an order for me to appear in 2011 to be interviewed or answer questions in Cádiz by another judge.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr S. Cass Weiland:*

By that time you had a passport?

*Mr Avella:*

Yes, I did.

*Mr S. Cass Weiland:*

And by that time you had a job?

*Mr Avella:*

Yes, I did.

*Mr S. Cass Weiland:*

How did you get a passport?

*Mr Avella:*

I got a passport back in August 2008. I received a new passport from the US Consulate's office in Barcelona after ---

*Mr S. Cass Weiland:*

Excuse me. So that is clear, the passport you received did not come from the court; it came from the US Consulate? They issued you a new one?

*Mr Avella:*

They finally did, yes.

*Mr S. Cass Weiland:*

Did they do that with the knowledge of the court?

*Mr Avella:*

They did, because we spent many months trying to pressure them to understand that how can you leave this person without a passport, which is the main document you need to travel around and to be able to find work and to be a normal citizen. So US attorneys were very strong in convincing the Consulate's office to issue me a passport but they still were reluctant until they had an order from the judge.

*Mr S. Cass Weiland:*

So the judge actually issued an order allowing the US Government to issue you some kind of a temporary passport. Is that right?

*Mr Avella:*

Yes, the judge finally issued an order that it would be OK for them to give me a passport but it should only be a temporary passport.

*Mr S. Cass Weiland:*

There is no such thing in the US government passport world, is there?

*Mr Avella:*

That is what they told me. They said, "There is no such thing so we are just going to give you a passport."

M/V "LOUISA"

*Mr S. Cass Weiland:*

Since then you have still been subject to the call of the court in Cádiz – correct?

*Mr Avella:*

That is correct. I still have to appear whenever called, and in fact I still live in Europe, partly because of that. I got a passport back in 2008 and nothing is cleared up. I found work and I have stayed around to try and get this thing resolved finally.

*Mr S. Cass Weiland:*

By the way, you actually married a French lady – is that right – since you have been living in Europe all this time?

*Mr Avella:*

Yes, I got married two years ago to a French woman.

*Mr S. Cass Weiland:*

When you were summoned to Cádiz in March of 2011, years after this search of the vessel, what happened on that occasion? Do you remember?

*Mr Avella:*

I travelled to Cádiz to appear.

*Mr S. Cass Weiland:*

Do you remember where you were, how far you had to travel?

*Mr Avella:*

Yes, I had to come from – I do not remember if I was in the south of France or Italy. I move around a lot, working shipyard to shipyard around the Mediterranean, so I had to leave work and travel to Cádiz to appear.

*Mr S. Cass Weiland:*

What was the purpose of the court appearance in March of 2011, as far as you understood?

*Mr Avella:*

I thought the purpose was to finally clear up these matters. I went there with the intention and with the hope that this new judge – because it was a different judge than I saw five years prior – in the same court though – would listen to the arguments that these charges that are so grave have nothing to do with me, and we produced documents and made arguments and she asked me a few questions more and nothing came of it.

*Mr S. Cass Weiland:*

Did the lawyers for the ship owner travel to Cádiz on that occasion in expectation of meeting with the judge?

*Mr Avella:*

Yes, there was a lawyer from Jerez, a lawyer from Madrid, and lawyers from the United States that travelled there.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr S. Cass Weiland:*

Were the lawyers from the United States allowed to attend the Spanish proceedings?

*Mr Avella:*

What I recall is that they were not allowed to go into the proceedings at that time, at my questioning. They allowed the Spanish lawyers in but not the American lawyers but expressed that the American lawyers could meet with the judge after we were done with my testimony.

*Mr S. Cass Weiland:*

After you had this proceeding with the Spanish judge did the clerk of the court come out and inform the American lawyers that the judge had received a call from Madrid and that she would not be able to meet with them?

*Mr Avella:*

Yes, that is exactly what the clerk said.

*Mr S. Cass Weiland:*

You had your liberty restrained from March 2006, really until today, but certainly until you received your passport some 27 months later. Do you think your rights have been violated by the Spanish Government?

*Mr Avella:*

In my opinion, clearly I have been abused and my rights have been violated.

*Mr S. Cass Weiland:*

Do you feel you have been denied justice by the Spanish system?

*Mr Avella:*

Absolutely.

*Mr S. Cass Weiland:*

What do you think this proceeding, if you can call it that, in Spain has cost you personally? Let us talk first about the more mundane things. What sort of tools and personal possessions did you have on the *Louisa*?

*Mr Avella:*

As I have stated, I am an engineer, a technician, a mechanic, that fixes systems in ships and things like that, and I have tools of my trade, expensive tools, that were on board the *Louisa*.

*Mr S. Cass Weiland:*

Do you have a great quantity of them?

*Mr Avella:*

Yes. There was a large amount.

*Mr S. Cass Weiland:*

It was easy to transport them because you put them on the ship in Jacksonville.

M/V "LOUISA"

*Mr Avella:*  
That is correct.

*Mr S. Cass Weiland:*  
How much do you think all those tools were worth?

*Mr Avella:*  
They were tools that I had accumulated over many years of my career but clearly they amounted to – and I looked it over carefully – in the neighbourhood of 60,000 euros.

*Mr S. Cass Weiland:*  
What about your ability to work as a technical guy in the shipyards of Europe without your tools? Do you think that inhibits your income or your ability to get work?

*Mr Avella:*  
Fortunately, my ability to get work in some capacity is because of these [hands], but if I had the tools, it certainly commands a much higher daily rate. If an engineer shows up in the kind of work that I do, that is well equipped, you get a much better wage per day.

*Mr S. Cass Weiland:*  
Some of the work you do, I think it is fair to say, is highly technical. Is that correct?

*Mr Avella:*  
It is.

*Mr S. Cass Weiland:*  
You work on stabilizers of very expensive yachts and things like that?

*Mr Avella:*  
I do.

*Mr S. Cass Weiland:*  
What sort of a daily rate do you think you could have commanded during all of the time that you were, first, in jail, and then released without a passport?

*Mr Avella:*  
I can only tell you today what it is. I do not know. It has not changed much since the time I was in prison but today in this industry, because I work it every day, an engineer that shows up with the tools necessary to perform the job, the rate is about 1,000 euros a day, 100 an hour.

*Mr S. Cass Weiland:*  
I just want to ask you a couple of additional questions because it occurred to me that you actually were allowed on the *Louisa* at one point in about 2009. Is that correct?

*Mr Avella:*  
Yes, that is correct. I was in Puerto de Santa Maria in 2009 to board the ship.

*Mr S. Cass Weiland:*  
A judge issued an order allowing you and some lawyers to go on the ship. Is that right?

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Avella:*

Yes, that is correct.

*Mr S. Cass Weiland:*

Could we have those pictures of the interior of the *Louisa* from 2009, please? Did you take some pictures while you were there?

*Mr Avella:*

Yes, I did.

*Mr S. Cass Weiland:*

We have several pictures of what the interior of the ship looked like and I believe at least one or two of the exterior of the ship. How would you describe the condition of the ship when you went on in 2009, some three years ago?

*Mr Avella:*

First of all, it broke my heart to see the condition of the ship because she was a beautiful old ship, but in any case, it was completely ransacked throughout, everywhere, and many things were gone and ripped off the wall, and critical pieces on the bridge were gone. She was basically just left to rust, not moored properly, beating against the quay, a lot of damage to the side of the hull. She was listing to port, there was water in the bilge. It was a mess.

*Mr S. Cass Weiland:*

This picture that is on the screen now indicates some apparent damage to the side of the vessel on the dockside. Did you notice that?

*Mr Avella:*

This shows some but not nearly the extent of the damage that the stern of the ship had on that port side. That was because there was no proper cushioning ever maintained against the quay, and the mooring lines were not working properly, so she was beating up against the quay for ever.

*Mr S. Cass Weiland:*

As far as you know, assuming the *Louisa* has not sunk at the dock, is it still there, after all these years?

*Mr Avella:*

It was there when I was there in 2009 but I could not tell you today. As far as I know, I imagine it must be.

*Mr S. Cass Weiland:*

Did you go in the hold of the ship in 2009?

*Mr Avella:*

I am sorry?

*Mr S. Cass Weiland:*

Did you go down below in 2009?

## M/V "LOUISA"

*Mr Avella:*

Yes, I did.

*Mr S. Cass Weiland:*

You had some flashlights and things. There was no power on the ship, was there?

*Mr Avella:*

It is a dead ship. There is no power.

*Mr S. Cass Weiland:*

Did you notice that all the equipment, expensive equipment, that had been put on the ship had been removed?

*Mr Avella:*

She had been stripped of all the equipment.

*Mr S. Cass Weiland:*

Did you ever see the order from the Spanish court allowing the Guardia Civil to start to use the equipment that had been taken off the ship itself?

*Mr Avella:*

Yes, I was shown that order that said that they could appropriate and use all the equipment that they had taken from the ship.

*Mr S. Cass Weiland:*

May I have a moment, Mr President? *(Pause)* We have no further questions, Mr President.

*The President:*

Thank you very much, Mr Weiland.

Pursuant to article 80 of the Rules of the Tribunal, a witness called by one Party may also be examined by the other Party. Therefore, I ask the Agent of Spain whether the Respondent wishes to cross-examine the witness.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je vous demande d'autoriser mon collègue, M. Aznar Gómez, à procéder à un contre-interrogatoire du témoin.

MR MARIO AVELLA, CROSS-EXAMINED BY MR AZNAR GÓMEZ  
COUNSEL OF SPAIN  
[ITLOS/PV.12/C18/3/Rev.1, p. 24–34]

*Mr Aznar Gómez:*

Thank you, Mr President. Let me first say, Mr President, distinguished Judges, that it is a privilege and an honour to appear again before this Tribunal.

Good morning, Mr Avella.

*Mr Avella:*

Hello.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Aznar Gómez:*

Mr Avella, yesterday you expressly said that the *Louisa* sailed to Spain unclassified. Do you know that this is a breach of international law and International Maritime Organization standards, particularly the Paris Memorandum of Understanding, in force for St Vincent and the Grenadines since 1984?

*Mr Avella:*

I do not understand what you are asking, sir.

*Mr Aznar Gómez:*

You said that you were sailing across the Atlantic Ocean with a vessel unclassified.

*Mr Avella:*

No, that is not correct.

*Mr Aznar Gómez:*

You said this yesterday, as far as I remember.

*Mr Avella:*

I think you misunderstood. I said it was “under class”, not “unclassified”. The term is “under class” which means that it is under a class society, with full compliance.

*Mr Aznar Gómez:*

In 2004?

*Mr Avella:*

That is correct.

*Mr Aznar Gómez:*

You are sure about this, the MARPOL and the SOLAS certification?

*Mr Avella:*

Absolutely. Every regulation was up to standard and audited by Germanischer Lloyd, and we have the class certificate before we even can clear port state control and sail.

*Mr Aznar Gómez:*

The last port control was not done in 2000?

*Mr Avella:*

Excuse me?

*Mr Aznar Gómez:*

The last port control was done in 2000, as I remember, and you must do the port control every two years.

*Mr Avella:*

Actually, you do not do port control every two years. You do the audits of the class society every five years.

M/V "LOUISA"

*Mr Aznar Gómez:*  
Are you sure of that?

*Mr Avella:*  
Yes.

*Mr Aznar Gómez:*  
Anyway, did you or your company report any problems, if any, with the classification to the flag state, to St Vincent and the Grenadines?

*Mr Avella:*  
Did I report any problems?

*Mr Aznar Gómez:*  
Yes.

*Mr Avella:*  
What type of problems?

*Mr Aznar Gómez:*  
Classification.

*Mr Avella:*  
First of all, it was not my responsibility to report any problems to any authority. It was my responsibility to take the audits that were generated by the inspectors of Germanischer Lloyd and bring up to standard any deficiencies that they may find during the inspection of the ship, whereas then they re-inspect, see that those deficiencies are brought up to standard, and issue their class certificate.

*Mr Aznar Gómez:*  
During all this process, did the flag State connect with the owner of the vessel to be sure that every single certificate and classification stamps were correctly done?

*Mr Avella:*  
I am having a little difficult time understanding with your accent.

*Mr Aznar Gómez:*  
Excuse me.

*Mr Avella:*  
I am sorry. It is not you, it is me; I am a little hard of hearing sometimes. I am sorry.

*Mr Aznar Gómez:*  
I will try to speak a little bit louder.

*Mr Avella:*  
You are asking what, again?

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Aznar Gómez:*

If the flag State contacted at any time with the owner of the vessel in order to check that all the classification documents are OK, are correct.

*Mr Avella:*

It is my understanding that that would be normal. The Master of the vessel is responsible to make sure that all its certificates are in order and current.

*Mr Aznar Gómez:*

But you are not sure about this?

*Mr Avella:*

I am sure that all the certificates were in order and current, yes.

*Mr Aznar Gómez:*

No, no. I am just questioning you if there is this surveillance by the flag State about the correctness of all this.

*Mr Avella:*

I believe that there is always a relationship between the class society, the flag, all of the requirements necessary to be in order.

*Mr Aznar Gómez:*

Did you have any contact with the flag State of your vessel?

*Mr Avella:*

Did I personally?

*Mr Aznar Gómez:*

Yes.

*Mr Avella:*

No.

*Mr Aznar Gómez:*

Mr Avella, you also said yesterday that, before sailing to Spain, some fittings were made to the *Louisa*, particularly, if I am not wrong, the installation of diving equipment and sonar, navigation sonar. Is that right?

*Mr Avella:*

Yes.

*Mr Aznar Gómez:*

Navigation sonar. It is an old vessel.

*Mr Avella:*

Navigation sonar?

*Mr Aznar Gómez:*

Yes, sonar that usually vessels have in order to be aware of the depth.

## M/V "LOUISA"

*Mr Avella:*

I believe that, at least on a ship such as that, there is no such thing as navigation sonar. That is radar. Sonar is something else.

*Mr Aznar Gómez:*

It is newer. It is for new vessels, is it not?

*Mr Avella:*

I imagine.

*Mr Aznar Gómez:*

Yes, not for such old vessels. Mr Avella, apparently you were in charge of all operations of Sage in Spain, and particularly of all operations of the *Louisa* and the *Gemini III*. In your declaration under penalty of perjury made on 2 February 2012 and included in Applicant's Memorial and Reply as annex 43, you only say that you worked for Sage primarily as an engineer on the *Louisa*. Yesterday and today you said that among a lot of things you have done, you are a marine technician. The problem with this is that Sage apparently sent you and the *Louisa* to Spanish waters to make marine oil and gas prospects. Are you a specialist in marine oil and gas prospects too?

*Mr Avella:*

No.

*Mr Aznar Gómez:*

Yesterday you also talked about some working experience in South America related to oil and gas. How long did it last? You yesterday said that you worked in South America with Sage.

*Mr Avella:*

Yes.

*Mr Aznar Gómez:*

Oil and gas prospecting. Is that correct?

*Mr Avella:*

Yes.

*Mr Aznar Gómez:*

How long did it last, your experience in South America, how many years?

*Mr Avella:*

I said it had to do with methane gas recovery, and I was there for only a few months.

*Mr Aznar Gómez:*

Only a few months. OK. Just out of curiosity, because you just said in one of your last answers, did Sage not provide you with the necessary tools to perform your duties aboard? You said that you have lost, I heard, 60,000 euros worth of tools aboard the *Louisa* which belonged to you.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Avella:*

That is correct.

*Mr Aznar Gómez:*

So the owner of the ship did not provide you with the tools to perform your duties aboard?

*Mr Avella:*

What I said was that in my capacity as an engineer and as a person that fixes systems on board and repairs and is in charge of maintenance and upkeep, and in my case, as in many cases, an engineer like that can arrive with his own tools to perform those tasks, because a ship generally does not have enough on board. They have specific tools for the main engines and generators and so forth, but other types of tools are not necessarily around, so that is why in my career I show up with the tools, and in fact it commands a better price per day for my services.

*Mr Aznar Gómez:*

Perhaps this is more useful in North America but, as far as I know, not in the rest of the world, at least here in Europe. That was just curiosity. In Annex 36 of the Applicant's Memorial and Reply several letters and a telefax are reproduced informing about part of the relationship between Sage, ASP SeaScot and Mertramar. It becomes apparently clear that Mertramar only served as Sage's ship agent in Spain from the arrival of the *Louisa* to Spanish port in October 2004 until 23 August 2005. Which company, if any, substituted Mertramar in that responsibility from 23 August 2005 up to the immobilization of the vessel on 1 February 2006?

*Mr Avella:*

I have no idea.

*Mr Aznar Gómez:*

Which company was then in charge of the control and maintenance of the war weapons aboard the *Louisa*?

*Mr Avella:*

I am sorry? Which company was in charge of?

*Mr Aznar Gómez:*

The control and maintenance. It has been said in a lot of documents that Sage was not responsible, that it is ASP SeaScot or Mertramar, the companies responsible for managing all the questions about the entry of weapons and the control of these weapons when in Spanish territory. Once Mertramar ends its contract with Sage, which company substituted for this task in August?

*Mr Avella:*

I do not know. It was not my job to be in the administrative, paperwork. That seems like more of a job for the Master.

*Mr Aznar Gómez:*

When the Master was not on board the vessel, for example, when the vessel was immobilized, the captain was not aboard – actually it looks like he left Spain some weeks earlier – who was then in charge of war weapons?

M/V "LOUISA"

*Mr Avella:*

In charge of what?

*Mr Aznar Gómez:*

In charge of the weapons?

*Mr Avella:*

Nobody.

*Mr Aznar Gómez:*

Nobody? Let me pose another question. Do you really think that a research vessel, planning to sail in European waters, particularly in waters under strict surveillance, being so close to the Straits of Gibraltar, actually needs war weapons aboard? Let me tell you that I was born in Cádiz and the last time we saw Sir Francis Drake was in 1596.

*Mr Avella:*

I do not know what you are asking me.

*Mr Aznar Gómez:*

Do you still consider that the weapons were necessary aboard because of this threat of pirates?

*Mr Avella:*

Again, that was not my decision or my responsibility or duties. Those were of other people. I cannot speculate on why they were needed or any of that.

*Mr Aznar Gómez:*

Mr Avella, in the personal affidavit of Ms Linda Thomas, your boss in Sage, included as Annex 41 to St Vincent and the Grenadines Memorial and Reply, it is implied that Sage developed an alleged project involving oil and gas in the Bay of Cádiz from 2003 to 2005. It is actually said that the survey was satisfied in May of 2005. Hence, what were you doing in Spanish territory aboard the *Louisa* and the *Gemini* from May 2005 up to the immobilization of the vessel on 1 February 2006?

*Mr Avella:*

What ...?

*Mr Aznar Gómez:*

What were you doing aboard the vessel?

*Mr Avella:*

During what dates?

*Mr Aznar Gómez:*

Once allegedly the prospects were finished in May 2005 up to the immobilization of the vessel.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Avella:*

From May 2005 up till the arrest of the vessel, you are saying? You said “immobilization of the vessel”. Do you mean the arrest?

*Mr Aznar Gómez:*

Yes, the immobilization. It is a legal term.

*Mr Avella:*

What was the vessel doing?

*Mr Aznar Gómez:*

The vessel and the crew.

*Mr Avella:*

Maintenance and upkeep, waiting for the next destination, waiting for instructions, various duties and chores.

*Mr Aznar Gómez:*

Waiting? Interesting.

*The President:*

Mr Aznar Gomez, I am sorry to interrupt you but we have reached 11.30 and the Tribunal will withdraw for 30 minutes. We will continue the hearing at noon.

*(Break)*

*The President:*

Mr Aznar Gómez, you may continue the examination of the witness.

*Mr Aznar Gómez:*

Mr Avella, it has been said that there is a little problem with the translation into French. This is probably because of my awful English. Could you please wait for a moment before you answer my questions in order to facilitate the translation?

*Mr Avella:*

I am sorry.

*Mr Aznar Gómez:*

No, it is perhaps my accent. Mr Avella, yesterday you said that you had no relation with treasure hunters. Is this okay?

*Mr Avella:*

I believe I said that I am not a treasure hunter, and I have never been one.

*Mr Aznar Gómez:*

It is completely clear for me that yesterday you said that you are not a treasure hunter, but you also said that you have no relation with treasure hunters?

*Mr Avella:*

Me personally, no.

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*Mr Aznar Gómez:*

Mr Avella, what was your relationship with Mr Valero and Mr Bonifacio?

*Mr Avella:*

My relationship with them was that they were part of a project where I was on board the ship to perform my duties, and that was it. I had no real relationship with them.

*Mr Aznar Gómez:*

Did you know, Mr Avella, that these persons, Mr Valero and Mr Bonifacio, were well known people to be closely linked with treasure hunting in Spanish waters?

*Mr Avella:*

I heard that they were, yes.

*Mr Aznar Gómez:*

You heard this?

*Mr Avella:*

Yes.

*Mr Aznar Gómez:*

Mr Avella, do you know that Sage, your company, had concluded an agreement with Mr Valero and that shipwrecks were discussed?

*Mr Avella:*

I was aware of a relationship with Sage and a company called Tupet, but Sage is not my company. I was employed by Sage.

*Mr Aznar Gómez:*

Another curiosity. If you were looking for oil and gas in Spanish waters, why did you need the co-operation of an alleged historian, Mr Bonifacio?

*Mr Avella:*

Excuse me? Why did I need ...?

*Mr Aznar Gómez:*

Why did Sage need the co-operation of an alleged historian on shipwrecks?

*Mr Avella:*

It is my understanding that we produce data. Sage as a company and the project produces data that was to be shared with another Spanish company, Tupet.

*Mr Aznar Gómez:*

So it was not a responsibility of Sage?

*Mr Avella:*

What was not a responsibility of Sage?

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Aznar Gómez:*

The use of this data to be given to other companies.

*Mr Avella:*

I am sorry, the use of ...?

*Mr Aznar Gómez:*

This data, allegedly gathered by Sage, to be shared with other companies.

*Mr Avella:*

It was the agreement to share the data, yes.

*Mr Aznar Gómez:*

But it was a contract signed with Mr Valero?

*Mr Avella:*

That was my understanding.

*Mr Aznar Gómez:*

Mr Avella, let me now return to the concrete stones – I think that was the term used yesterday – found aboard the *Louisa*. Yesterday the distinguished Co-Agent of Saint Vincent and the Grenadines said that they might be stones used by fishermen in their nets as a possibility. Would you agree with me that if fishermen used these stones, for example, 100 years ago, they would be anyway under the Spanish legislation and the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage?

*Mr Avella:*

I would not know.

*Mr Aznar Gómez:*

As a lawyer, I can confirm this to you. Yesterday you also said that the *Gemini III* was gathering previous geological data, also using divers, which at least is curious. You also said that others had previously done this work during 2003 up to 2005. Sage bought the *Gemini III* in February 2005. What geological data are we talking about?

*Mr Avella:*

It is my understanding that it is geological data that is required through mapping and electronic data.

*Mr Aznar Gómez:*

How did you get that previous geological data?

*Mr Avella:*

That was acquired by compiling sonar data and magnetometer data.

*Mr Aznar Gómez:*

Prior to the arrival of the *Louisa* and the *Gemini III* to Spanish waters?

*Mr Avella:*

That is correct.

M/V "LOUISA"

*Mr Aznar Gómez:*

Under what permits?

*Mr Avella:*

I am assuming with the permits that were being used. I was not here then. I arrived with the *Louisa*.

*Mr Aznar Gómez:*

Permits used in 2003, you guess?

*Mr Avella:*

Our work only began in 2004, so I do not know what transpired in 2003.

*Mr Aznar Gómez:*

Mr Avella, Spain states on page 313 of its Counter-Memorial that you declared before the Spanish judge the following words: that you believed there was some confusion in the investigation as the situation was exactly the opposite. It was Luis Valero who about two years previously, that is 2003, had gone to the United States and had asked Sage to help explore the seabed in Spain as he had an administrative permit to do so; that Luis Valero had asked Sage to come to Spain to work; that there was probably an agreement between Luis Valero and the American company, that is Sage, and subsequently they hired you to work for them. Let me please clarify myself. It was Sage that decided to come to Spanish waters to look for oil and gas based on alleged previous technical researches or Sage was invited by Mr Valero to come to Spanish waters. Which was first, Mr Avella?

*Mr Avella:*

What I know, because I was not involved in all the administrative issues and contractual issues and so forth, is that Mr Valero came to the United States to make an agreement with Sage.

*Mr Aznar Gómez:*

So a well known treasure hunter went to the US to invite you to come to Spain?

*Mr Avella:*

Or to share data that was produced by a survey company.

*Mr Aznar Gómez:*

Mr Avella, let me go back again to the classification of the vessel. I am talking about Annex 17 of the Spanish Counter-Memorial. It is an email from Mertramar, talking about the classification of the vessel. Did you know that, as reported by the Paris Memorandum of Understanding database, the International Ship Security Certificate issued by Det Norske Veritas had expired on 29 January 2005; that the Cargo Ship Safety Construction Certificate issued by Germanischer Lloyd had expired on 31 March 2005; that the Cargo Ship Safety Equipment Certificate issued by Germanischer Lloyd had expired on 31 March 2005; that the Cargo Ship Safety Radio Certificate issued by Germanischer Lloyd had expired on the same date; that the Load Lines Certificates issued by Germanischer Lloyd had also expired on that date; that the Oil Pollution Prevention Certificate issued by Germanischer Lloyd had also expired on that date; and that the Safety Management Certificate issued by Det Norske Veritas had expired on 29 January 2005? It is a long list.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Avella:*

Are you asking me whether I am aware of that email?

*Mr Aznar Gómez:*

No- that all these classifications had expired.

*Mr Avella:*

No, I was not aware of that.

*Mr Aznar Gómez:*

Because you were a simple technician aboard?

*Mr Avella:*

I was an engineer on board.

*Mr Aznar Gómez:*

Does that mean that you were not, so to say, the representative of Sage aboard the *Louisa*?

*Mr Avella:*

I was an employee of Sage.

*Mr Aznar Gómez:*

Just that?

*Mr Avella:*

Yes.

*Mr Aznar Gómez:*

Did you have any general or administrative responsibility aboard the vessel?

*Mr Avella:*

To the point that if there was something that needed to be brought into compliance, the defect would be brought to my attention and I would have to do what was necessary to bring it into compliance.

*Mr Aznar Gómez:*

This perhaps gives an answer to my following queries. Who paid the €3,000 port fees of the *Louisa* on 1 September 2005?

*Mr Avella:*

Sage would have paid.

*Mr Aznar Gómez:*

Not you?

*Mr Avella:*

Not me. It is the Sage company. I would not be paying the port fees.

M/V "LOUISA"

*Mr Aznar Gómez:*

Do you remember if you signed the fees payment on behalf of Sage?

*Mr Avella:*

I remember that I delivered the payment to the port, yes.

*Mr Aznar Gómez:*

It is more or less the same for my next question. It was you who signed the official entry of the *Gemini III* to Port Sherry on 15 December 2005?

*Mr Avella:*

I was there to receive the ship, yes.

*Mr Aznar Gómez:*

You signed the entry, the administrative document?

*Mr Avella:*

Yes, I would imagine. I do not recall, but if you say that I signed that document, I am sure I must have done.

*Mr Aznar Gómez:*

No, I am simply asking you. Anyway, would you agree with me that those kinds of function were administrative functions aboard?

*Mr Avella:*

It has been my experience that any time you are complying with audits and defects along the way and a certificate is issued for someone who has brought things into compliance, you sign that document to say "Yes, I have brought this into compliance". It would be your responsibility, so if you are calling that an administrative duty, then ---

*Mr Aznar Gómez:*

You were the man of Sage for the *Louisa*, so to say?

*Mr Avella:*

For those responsibilities, yes.

*Mr Aznar Gómez:*

Mr President, I have a final question before asking you to give the floor again to the Agent of Spain.

Mr Avella, did you inform the owner of the vessels about their immobilization, and when?

*Mr Avella:*

I did inform the owner about the arrest of the vessel immediately when I knew.

*Mr Aznar Gómez:*

When you knew that this occurred?

*Mr Avella:*

I am sure that it would have been the first day that ---

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mr Aznar Gómez:*

Were you in Spain or in the United States?

*Mr Avella:*

I was in the United States.

*Mr Aznar Gómez:*

Thank you very much, Mr Avella.

Mr President, could you please give the floor to the Agent of Spain?

*The President:*

Thank you, Mr Aznar Gómez.

Ms Escobar Hernández, you have the floor.

M. MARIO AVELLA, CONTRE-INTERROGÉE PAR MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE

[ITLOS/PV.12/C18/3/Rev.1, p. 34–42; TIDM/PV.12/A18/3/Rev.1, p. 37–46]

*Mme Escobar Hernández :*

Merci Monsieur le Président et bonjour Monsieur Avella.

*Mr Avella:*

Good morning.

*Mme Escobar Hernández :*

Je vais essayer de parler lentement pour les interprètes et pour que vous puissiez bien comprendre mes questions. Vous avez fait référence ce matin, en réponse à mes questions, à certains points à l'égard desquels j'avais déjà posé des questions hier à votre fille, Mme Alba Jennifer Avella. Je ne veux pas revenir sur l'interrogatoire de votre fille, bien sûr, mais permettez-moi, car vous avez fait référence à cela, que je lise le premier paragraphe qui est inclus dans votre déclaration devant le juge d'instruction n° 4 de Cadix, le 20 mai 2006, c'est-à-dire aussitôt que vous avez été mis à disposition des autorités judiciaires espagnoles, après votre détention à Lisbonne et après que les autorités du Portugal vous ont remis à l'Espagne.

Je me permets, Monsieur le Président, de lire le texte en anglais pour faciliter la compréhension du témoin.

*(Continues in English)* That when the ship *Louisa* was registered he was in the United States and that he came to Spain when his daughter was arrested; that he was in Spain when his daughter was arrested and that he could have come to make a statement but his solicitor advised him not to do so; that he was advised by his solicitor that he could not do anything in Spain and that the best thing to do would be to return to this country.

*(Poursuit en français)* C'est correct, Monsieur Avella?

*Mr Avella:*

Yes.

M/V "LOUISA"

*Mme Escobar Hernández :*

Quand est-ce que vous êtes arrivé en Espagne, une fois que vous avez appris la détention de votre fille... A quelle date ? Quand ?

*Mr Avella:*

I do not remember exactly the date. I believe that it would have been 3 February. I can remember the day of the week more than I can remember the date.

*Mme Escobar Hernández :*

Par quel aéroport êtes-vous entré en Espagne ?

*Mr Avella:*

I believe it was Madrid.

*Mme Escobar Hernández :*

En tout cas, vous êtes entré par un aéroport espagnol.

*Mr Avella:*

Yes, if I am not mistaken.

*Mme Escobar Hernández :*

Merci. Pour en revenir au dossier, vous avez employé les mots « secret de justice ». Je me permets de dire, pour que cela soit consigné dans les procès-verbaux, que c'est la traduction d'un incident, d'une situation judiciaire qui existe chez nous dans la procédure criminelle. Elle s'appelle « *secreto del sumario* », soit secret de l'instruction. Vous avez fait référence au secret de justice et vous avez dit que l'avocat de votre fille avec lequel vous avez été en contact d'une manière continue ne vous a pas expliqué ce qu'était le « secret de justice » pour que vous puissiez vous faire une idée de la situation dans laquelle se trouvait la procédure criminelle et vous renseigner sur la situation dans laquelle se trouvait votre fille ?

*Mr Avella:*

I was not aware of the specific charges.

*Mme Escobar Hernández :*

Vous pouvez répéter votre réponse ?

*Mr Avella:*

I said that I was not aware of the specific charges.

*Mme Escobar Hernández :*

Oui mais le « secret de justice », ce n'est pas un chef d'accusation. C'est une situation procédurale qui existe dans le cadre de la procédure pénale. Je comprends très bien que vous n'êtes pas un expert en droit, et moins encore un expert en droit espagnol, je le comprends tout à fait bien, mais est-ce que l'avocat qui représentait votre fille ne vous a pas expliqué ce qu'était le secret judiciaire ?

*Mr Avella:*

Yes.

## EXAMINATION OF WITNESSES – 5 October 2012, a.m.

*Mme Escobar Hernández :*

Alors, il ne vous a pas expliqué de quoi il s'agissait.

*Mr Avella:*

What he explained to me was that it meant that the many areas of the case, including information, were secret and not available.

*Mme Escobar Hernández :*

Merci. Alors avez-vous essayé de rendre visite à votre fille au centre de détention, à la police nationale ?

*Mr Avella:*

No.

*Mme Escobar Hernández :*

Avez-vous essayé d'aller à la police ou chez le juge pour leur raconter ce qui s'est passé sur le bateau ou, si vous préférez, que faisait le bateau à Cadix avant le 1<sup>er</sup> février 2006, tout cela, bien sûr, dans l'intention d'aider votre fille et d'essayer d'obtenir sa libération aussitôt que possible ?

*Mr Avella:*

No.

*Mme Escobar Hernández :*

Vous avez dit dans votre témoignage aujourd'hui - je lis le texte de votre témoignage devant le juge à Cadix-... Pardon, je m'excuse, Monsieur le Président, je retourne au début de la question. Vous avez dit d'abord, dans votre témoignage aujourd'hui, qu'au moment où vous êtes parti des Etats-Unis pour aller aider votre fille, ce qui est tout à fait naturel et tout à fait normal et compréhensible, vous ne connaissiez pas encore l'avocat. Que vous aviez tout simplement un contact, qu'il fallait se renseigner chez l'avocat pour qu'il s'occupe de votre fille ainsi que, si je ne me trompe pas non plus, des membres de l'équipage de nationalité hongroise. Mais, en tout cas, qu'il s'occupe de votre fille. Est-ce correct ?

*Mr S. Cass Weiland:*

Mr President, I am sorry for the interruption but I must interpose an objection in that counsel is talking about a document that he does not have in front of him, of course – which is acceptable – but it is not a verbatim transcript. This interview of Mr Avella is simply a statement of notes that are written down by a clerk in the judge's office, as we understand it; and counsel is representing that he said this and he said that. I just want the Tribunal to understand that there is no transcript of what he actually said.

*Le Président :*

Madame Escobar, vous pouvez reprendre votre examen sur la base de ce que M. Weiland vient de dire.

*Mme Escobar Hernández :*

Merci beaucoup, Monsieur le Président. Je n'ai pas bien compris ce que M. Weiland vient de dire, et je ne sais pas s'il considère qu'il n'y a pas un procès-verbal de l'entretien ou de la déclaration qui a eu lieu chez le juge en Espagne au moment auquel le témoin aurait dit que

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*(Continued in English)* « he was in Spain when his daughter was arrested and that he would then come to make a statement but his solicitors advised him not to go ».

*(Poursuit en français)* Est-ce le document dont vous parliez, M. Weiland ? Parce que ce document est un document officiel. Ce document est dans le rapport, qui est dans les documents qui ont été soumis à cet honorable Tribunal. Je me réfère à l'annexe 1 du contre-mémoire de l'Espagne. C'est la déclaration de M. Avella devant le juge. C'est un document officiel du judiciaire espagnol qui a été rendu, le moment venu, et dans les temps exacts de la procédure où on doit présenter le document devant ce Tribunal.

Alors, Monsieur le Président, je ne comprends pas la question. J'ai peut-être mal compris la question de M. Weiland, mais s'il se réfère à ce document, j'aimerais appeler l'attention du Tribunal sur le fait que c'est tout de même la deuxième fois que l'on essaie de soulever des objections à l'utilisation d'un document qui est dans les rapports de la procédure écrite.

*The President:*

Would you clarify which document you are referring to?

*Mr S. Cass Weiland:*

Mr President, to be clear I am not objecting to the document. The document is Annex 1; I have it in front of me. My point is that it is not a transcript of what Mr Avella said; it is someone's notes, and counsel has referred to things that he has said, but it is not a transcript of what he said; it is only notes. I wish for the Tribunal to understand that, but I have no objection to Annex 1.

*The President:*

Thank you, Mr Weiland, for your clarification.

*(Poursuit en français)* Madame, vous pouvez continuer votre examen.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je comprends très bien que M. Weiland ne comprend pas le système judiciaire espagnol. C'est clair pour le Tribunal, j'espère, à ce stade. Mais c'est, en tout cas, la façon ordinaire de refléter les déclarations des témoins devant le juge. Cela a une telle validité pour les juges, pour le secrétaire général, pardon, pour le secrétaire judiciaire, pour le greffé et pour tous les accusés, que même la personne qui fait le témoignage doit signer le document. Je vous rappelle que la signature de M. Avella est dans le document original en espagnol à la page 47. Alors je ne comprends pas l'objection, Monsieur le Président, je m'excuse.

En tout cas, je remercie mon collègue de m'avoir signalé cela. Je dois aussi ajouter que le témoignage de M. Avella a été fait avec l'assistance d'une interprète, Mme Ana Maria González Asencio, avec un document d'identité qui est sur le même document. A ma connaissance, même si je peux me tromper, je ne connais pas tous les dossiers, mais ce n'est pas le même cas pour d'autres. Je peux dire, Monsieur le Président, qu'à ma connaissance je n'ai aucune information que cette déclaration aurait fait l'objet d'un recours pour annuler la déclaration de M. Avella.

Vous avez dit, ce matin, que vous ne connaissiez pas encore l'avocat lorsque vous arrivez. Je comprends, vous avez téléphoné pour obtenir le nom de la personne qui pourrait s'occuper de votre fille, et c'est tout à fait normal. Je me pose la question suivante : vous ne connaissez pas l'avocat, mais quand même, vous lui avez tellement fait confiance que vous avez accepté sa suggestion de ne pas aller chez les autorités judiciaires ou policières en Espagne, et que vous avez même accepté, quelques jours après, leurs suggestions, recommandations – je ne veux pas faire question du mot, pensez à ce qui vous convient le mieux –, pour quitter

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l'Espagne et vous rendre aux Etats-Unis. Est-ce que le monsieur était extrêmement convaincant ?

*Mr Avella:*

Again, as you said, I am not an expert in the Spanish legal system, but when you retain a lawyer you put your trust in him to give you the correct information and to advise you on the best procedures.

*Mme Escobar Hernández :*

Si la détention de votre fille était intervenue aux Etats-Unis, à Denver, auriez-vous agi de la même façon ? Vous seriez-vous abstenu d'aller auprès de la police ou chez le juge pour expliquer la situation ? N'auriez-vous pas demandé à rendre visite à votre fille ?

*Mr Avella:*

I think if I was in the same situation I would do the same thing, hire a lawyer and go by their advice.

*Mme Escobar Hernández :*

Je comprends très bien que vous étiez très soucieux de la situation de votre fille et que cela vous a amené à prendre cette décision. En tout cas, l'avocat vous a conseillé de quitter l'Espagne et d'aller aux Etats-Unis. Quand êtes-vous parti pour la première fois aux Etats-Unis après votre retour début octobre ?

*Mr Avella:*

I can't recall the date but it was soon during that period.

*Mme Escobar Hernández :*

A peu près combien de jours ? Je ne vous demande pas la date exacte mais combien de jours à peu près ?

*Mr Avella:*

Roughly two days.

*Mme Escobar Hernández :*

Quelles ont été les raisons qui vous ont amené à quitter l'Espagne, sur les conseils de votre avocat, et à laisser votre fille en Espagne dans une situation à laquelle vous avez fait référence, et sur laquelle je n'ai aucune opinion, aucun avis, mais vous y avez fait référence. Vous l'avez laissée sans connaître l'espagnol, sans pouvoir parler l'espagnol, sans argent peut-être et surtout sans passeport, sans qu'elle ait une pièce d'identité ? Quelles en ont été les raisons ? Etaient-ce simplement les conseils de l'avocat ?

*Mr Avella:*

As I said, the lawyer's advice was to allow him to do his job and get my daughter released.

*Mme Escobar Hernández :*

Etait-ce incompatible avec votre présence en Espagne pour pouvoir être avec votre fille, qui a été mise en liberté provisoire le 6 ?

*Mr Avella:*

Would you repeat the question, please?

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*Mme Escobar Hernández :*

Oui. Vous venez de dire que vous avez suivi le conseil de l'avocat, ce que je comprends très bien, et que vous aviez l'intention de le laisser faire son travail, mais est-ce que votre présence en Espagne était incompatible avec le travail de votre avocat, de l'avocat de votre fille, je m'excuse, qui avait l'intention de sortir votre fille de prison, du centre de détention ?

*Mr Avella:*

No.

*Mme Escobar Hernández :*

Merci. Vous êtes retourné en Espagne quelques mois après pour la deuxième fois. Quelles ont été les raisons essentielles qui ont changé votre décision de rentrer aux Etats-Unis ? A un moment, vous avez pensé que le mieux était d'aller aux Etats-Unis et, quelques mois après, du mois de février au mois de mai, qu'il était important ou utile pour votre fille que vous rentriez à nouveau en Espagne ou reveniez en Espagne. Quelles sont les raisons ?

*Mr Avella:*

The reason was to try and push the attorneys, the consulate, whoever I could talk to, to get something done to release my daughter from her detention in Spain.

*Mme Escobar Hernández :*

Et ceci n'était pas possible au mois de février quand vous avez quitté l'Espagne ?

*Mr Avella:*

Apparently not.

*Mme Escobar Hernández :*

Merci. Vous avez dit que vous êtes arrivé en Espagne par l'aéroport de Lisbonne et que là, vous avez loué une voiture pour vous rendre directement en Espagne, bien sûr à travers la frontière, mais une frontière où je dois dire il n'y a pas de contrôle car il s'agit d'une frontière soumise au système « Schengen ». Vous êtes arrivé par l'aéroport de Lisbonne, vous avez loué une voiture. Vous avez dit d'abord que le voyage du centre de détention au Portugal jusqu'au centre de détention et au juge en Espagne était un très long voyage. Quelles ont été les raisons qui vous ont amené à entrer en Europe par Lisbonne et non directement à travers, par exemple, Madrid, comme vous l'avez fait lors de votre première visite, ou Jerez qui a été normalement l'aéroport par lequel votre fille hier nous a dit que vous étiez entré, en tout cas par lequel elle était entrée, qui est tout proche de El Puerto de Santa María et de Cadix ?

*Mr Avella:*

I am not sure what the deciding factor was to use the Portugal - or Lisbon airport. It could have been any European city, obviously, but I think it was based on availability of flights and what was going to get me there as quick as possible.

*Mme Escobar Hernández :*

Tout simplement, cela m'étonne un peu car s'il y a bien sûr des questions de disponibilité des vols des Etats-Unis vers l'Espagne, l'aéroport normal d'arrivée est Madrid, il y a plusieurs vols, je ne peux pas dire maintenant combien, mais c'est Madrid ou en tout cas Barcelone. Vous avez dit ce matin que votre fille vous a informé qu'elle était l'objet de... - je m'excuse, Monsieur le Président, mais je ne trouve pas le mot en français, je vais essayer de

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m'exprimer -, que votre fille était l'objet de filatures, qu'il y avait quelqu'un de la police qui était derrière elle, etc., qu'elle l'avait appris, et qu'elle vous a communiqué cette situation en disant : « Ecoute, papa, quelqu'un me suit et c'est quelqu'un de la police que je connais ». Est-ce que vous avez porté cette situation à la connaissance de votre avocat ou de l'avocat qui était en charge de votre fille ?

*Mr Avella:*  
Yes.

*Mme Escobar Hernández :*  
Est-ce que vous avez présenté une dénonciation à la police ou au juge pour identifier la personne qui faisait cela, pour quelles raisons, et pour savoir s'il y avait un mandat, un ordre judiciaire qui le permettait ?

*Mr Avella:*  
No.

*Mme Escobar Hernández :*  
Votre fille vous a communiqué qu'elle avait l'impression – elle ne pouvait pas en être sûre – que vous alliez être détenu par la police espagnole. Si je ne me trompe pas – c'est ce que j'ai entendu ce matin mais je parle sous votre autorité, Monsieur le Président –, vous avez dit que votre fille vous a conseillé de partir car vous alliez être détenu, et vous l'avez fait. Est-ce que votre avocat vous a conseillé... Vous avez communiqué cela à votre avocat ? Est-ce qu'il vous a conseillé de partir, de quitter l'Espagne ?

*Mr Avella:*  
Yes.

*Mme Escobar Hernández :*  
Votre avocat, l'avocat qui était déjà en charge ? C'est l'avocat de Madrid ou l'avocat qui avait été nommé pour votre fille, le premier avocat ?

*Mr Avella:*  
My daughter's.

*Mme Escobar Hernández :*  
Celui de votre fille, merci. Vous avez été détenu à Lisbonne sur la base d'un ordre européen de détention. Savez-vous ce qu'est un tel ordre ?

*Mr Avella:*  
No.

*Mme Escobar Hernández :*  
Avez-vous eu un avocat à Lisbonne, au moment de votre détention, qui a pu vous expliquer ce qu'était cet ordre ?

*Mr Avella:*  
Yes.

M/V "LOUISA"

*Mme Escobar Hernández :*  
Qu'est-ce qu'il vous a dit ?

*Mr Avella:*  
About what?

*Mme Escobar Hernández :*  
Sur la nature de l'ordre européen de détention, ce qui allait se passer avec vous ?

*Mr Avella:*  
Well, it was a woman actually, not "he", who explained to me the procedure that there are allegations against me in Spain, and that is why there was the detention order, and that I have the choice to dispute extradition or choose extradition to Spain to face the charges.

*Mme Escobar Hernández :*  
Vous pensez que vous étiez à ce stade dans une procédure d'extradition ?

*Mr Avella:*  
There was no extradition procedure under way. What I said was that I was explained that before extradition procedures could be initiated, I would have to agree to be extradited to Spain or disagree to that.

*Mme Escobar Hernández :*  
Merci. Permettez-moi de faire une observation un peu ironique pour détendre l'atmosphère : c'est qu'il ne faut pas toujours faire confiance à ce que disent les avocats. En effet, l'ordre européen de détention ou le mandat d'arrêt européen n'est pas une procédure de détention, mais un système spécial de coopération dans le cadre de l'Union européenne, qui garantit absolument tous les droits de la défense. En tout cas, vous venez de dire que l'on vous a indiqué, que vous avez été informé des charges pour lesquelles le mandat d'arrêt avait été lancé par un juge espagnol. Est-ce cela ?

*Mr Avella:*  
No, it is not correct.

*Mme Escobar Hernández :*  
Alors, que vous a-t-on dit ? Personne ne vous a informé des charges contre vous ?

*Mr Avella:*  
That is correct. They told me that they couldn't do that because of the justice secret.

*Mme Escobar Hernández :*  
Votre avocat vous l'a dit ?

*Mr Avella:*  
No, this was the judge in Portugal that was asking me whether I wanted to be extradited to Spain or to remain in Portugal and challenge the extradition.

*Mme Escobar Hernández :*  
Avez-vous présenté un recours contre la décision du juge portugais de vous arrêter ? Parce que vous avez un avocat. Vous venez de dire que vous avez un avocat, une femme.

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*Mr Avella:*

Yes, I immediately agreed to allow extradition to Spain so that I could try and begin to clear up these issues. I didn't want to stay in Portugal and dispute extradition because I felt that the prudent thing to do would be to go and face the charges, which is what I have been trying to do from the beginning, to clarify everything and to get them to release my daughter.

*Mme Escobar Hernández :*

Je comprends votre réponse. En tout cas, vous ne pourriez jamais vous opposer à une procédure d'extradition. Car je rappelle que le système de l'ordre européen n'est pas un système d'extradition, c'est un système de coopération. Le juge qui ordonne la détention de la personne a tout à fait l'obligation de rendre publiques pour la personne qui a été détenue les charges qui pèsent contre elle. Combien de jours avez-vous été au Portugal ?

*Mr Avella:*

I was in Portugal ten days.

*Mme Escobar Hernández :*

Quel jour avez-vous été transféré – pour faciliter la compréhension de quelqu'un qui n'est pas expert en droit – et mis à la disposition de la juridiction espagnole, du juge espagnol ?

*Mr Avella:*

I don't remember the date.

*Mme Escobar Hernández :*

N'est-ce pas le 19 mai ? Cela vous dit quelque chose ?

*Mr Avella:*

19 May sounds correct, when I appeared in front of a Spanish judge.

*Mme Escobar Hernández :*

Quel jour avez-vous été interrogé par le juge à Cadix ?

*Mr Avella:*

I believe that day that you just said. That was the day that I was put in front of the Spanish magistrate.

*Mme Escobar Hernández :*

Et quel a été le jour, si vous vous souvenez, où le juge de Cadix a ordonné votre mise en détention provisoire ? Vous vous souvenez ?

*Mr Avella:*

The same day that I saw him.

*Mme Escobar Hernández :*

Merci. Alors, pas de délai dans l'exercice de la justice, pas de déni de justice. Vous avez dit que votre passeport a été retenu et que vous n'avez eu un passeport que l'année 2008. Cela veut dire quelques mois après la détention et quelques jours après la décision du juge de retenir le passeport. Est-ce cela ? Ai-je bien compris ?

M/V "LOUISA"

*Mr Avella:*

Yes, some time, about two years, yes.

*Mme Escobar Hernández :*

Vous avez dit que la rétention du passeport vous a causé un grave préjudice, car vous n'aviez pas de pièce d'identité. A cause du fait que vous n'aviez pas de pièce d'identité, vous ne pouviez pas ouvrir un compte bancaire ; vous ne pouviez rien faire. Vous ne pouviez pas essayer d'obtenir un travail, etc. Est-ce cela ? Ai-je bien compris ?

*Mr Avella:*

That is correct.

*Mme Escobar Hernández :*

Pouvez-vous me confirmer que votre avocat, le jour où vous avez été amené devant le juge à Cadix, le 19 ou le 20 mai 2006, a fait l'offre au juge de retenir votre passeport au lieu d'ordonner une mesure de détention provisoire ?

*Mr Avella:*

I don't remember exactly, but he may have asked the judge for that, yes.

*Mme Escobar Hernández :*

Je vous remercie de votre coopération.

Monsieur le Président, je n'ai aucune autre question à poser. Merci.

*Le Président :*

Merci beaucoup, Madame Escobar Hernández.

*(Continues in English)* A witness who is cross-examined by the other Party may be re-examined by the Party who has called the witness. Therefore I ask the Co-Agent of Saint Vincent and the Grenadines whether the Applicant wishes to re-examine the witness.

*Mr S. Cass Weiland:*

Yes, Mr President, I have some re-examination.

*The President:*

We have reached almost one o'clock, so can you do that in the afternoon?

*Mr S. Cass Weiland:*

Yes, sir.

*The President:*

The meeting will resume at three o'clock, so the morning's meeting is adjourned. Thank you very much.

*(The sitting closes at 1 p.m.)*

5 October 2012, p.m.

**PUBLIC SITTING HELD ON 5 OCTOBER 2012, 3.00 P.M.**

**Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 4 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 5 OCTOBRE 2012, 15 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 4 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

Good afternoon. We will now continue the examination of the witness, Mr Avella.

M/V "LOUISA"

**Examination of Witnesses (continued)**

MR MARIO AVELLA, RE-EXAMINED BY MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/4/Rev.1, p. 1–3]

*The President:*

Mr Avella, you continue to be covered by the declaration you made yesterday.

*Mr Avella:*

I understand.

*The President:*

I give the floor to the Co-Agent of Saint Vincent and the Grenadines to re-examine the witness. I wish to repeat that no new issue should be raised during the re-examination.

Mr Weiland, you have the floor.

*Mr S. Cass Weiland:*

Thank you, Mr President. I have just a very few questions for Mr Avella.

The first thing I would like to discuss briefly, Mr Avella, is the testimony you gave in response to some questions about your decision to enter and attempt to exit the country via Lisbon. Do you remember those questions from the representatives of the Respondent?

*Mr Avella:*

I do.

*Mr S. Cass Weiland:*

You mentioned that there were some scheduling and other issues. You are not suggesting to the Tribunal that you were by then not interested in avoiding arrest, are you?

*Mr Avella:*

No. On the contrary, I was concerned about that.

*Mr S. Cass Weiland:*

What did you mean when you said you recalled that perhaps there were some scheduling issues?

*Mr Avella:*

The fact is I was flying in from Paris, not from America, for one, and that had a lot to do with the flights available and what I could get at the timing that was necessary, and also I believe that it is almost as close if not closer to Puerto de Santa Maria than Madrid is.

*Mr S. Cass Weiland:*

So you were going to rent a car and drive, and Lisbon is actually closer, is it not?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Just so the record here is clear, you were interested in avoiding arrest?

## EXAMINATION OF WITNESSES – 5 October 2012, p.m.

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

Because you knew that if you were arrested, you could not help your daughter.

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

In the meantime, you had been in Paris, working the phones.

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

There was some testimony requested of you regarding the state of repair of the Louisa and whether it had the requisite certificates and was in compliance with regulations. Do you recall those questions?

*Mr Avella:*

I do.

*Mr S. Cass Weiland:*

I believe that Saint Vincent and the Grenadines had submitted some old certificates at the time of the Provisional Measures, ones that we were able to acquire from the ship owner or something. Are you sure that the Louisa was in compliance when it left Jacksonville?

*Mr Avella:*

Absolutely sure.

*Mr S. Cass Weiland:*

Why do you recall that with such certitude?

*Mr Avella:*

There is no way for a ship to sail like that, because it has to clear what is called port state control prior to it leaving the United States, which regulates and audits all those certificates and makes sure that they are current.

*Mr S. Cass Weiland:*

I think Mr Aznar Gómez actually referred to Spain Annex 17. I would ask that we take a look at that to perhaps just elaborate on this point. This was referred to as an email that was sent from someone to someone else. This is not an email that you received, is it?

*Mr Avella:*

No.

M/V "LOUISA"

*Mr S. Cass Weiland:*

You see on the first page of Annex 17 that there is a series of items mentioned. I believe Mr Aznar Gómez asked you if you were aware in 2005 if all of these specific items were expiring. I guess you would call them certificates of some kind. I think your response was no, you did not know all these items were expiring. Do you recall that?

*Mr Avella:*

I do.

*Mr S. Cass Weiland:*

You did testify that the *Louisa* in 2005, after the contract with Tupet had expired and the permit of Tupet had expired, was supposed to leave but was not ready. Do you recall that?

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

Let me see page 2, please. I believe this might be blown up a little bit if possible. This is, I guess, the English translation of at least the first part of the email. Do you see the third paragraph of one sentence there? Would you read that to me?

*Mr Avella:*

Yes. It states: "To renew these certificates the ship must remain in port."

*Mr S. Cass Weiland:*

Just so it is clear, one of the principal reasons the *Louisa* had not returned to the United States in the spring of 2005 was because all of these various issues had to be addressed?

*Mr Avella:*

That is correct.

*Mr S. Cass Weiland:*

Finally, I am going to ask you this question, Mr Avella. Do you recall being asked about Mr Valero, who, I guess, was the owner of Tupet?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

With his colleague, Mr Bonifacio?

*Mr Avella:*

Yes.

*Mr S. Cass Weiland:*

I think they were introduced to you during questioning as "known treasure hunters"?

*Mr Avella:*

That was what was said, yes.

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*Mr S. Cass Weiland:*

If Mr Valero was a “known treasure hunter” to the Spanish, do you have any idea how his company could have acquired the permit that you showed to the Guardia Civil repeatedly when the ships were stopped out in the bay?

*Mr Avella:*

I do not know. I have no idea.

*Mr S. Cass Weiland:*

That is all I have, Mr President.

*The President:*

Thank you very much.

Mr Avella, thank you for your testimony. Your examination is now finished. You may withdraw.

*Mr Avella:*

Thank you.

*The President:*

Mr Weiland, you have the floor.

*Mr S. Cass Weiland:*

As we continue our case, Mr President, the next order of business is for us to present some excerpts from the direct testimony of Javier Moscoso, who testified during the proceeding on 10 and 11 December 2010, and I wish to make it clear that under our rules this is not being presented as new evidence, but it is evidence that is part of the case, since it was introduced in the Provisional Measures phase and Mr Moscoso took a solemn oath. We believe that it is relatively short, and it is important for the Tribunal to be reminded of Mr Moscoso’s testimony. Mr William Weiland will present that, if the Court please.

*The President:*

Mr William Weiland, you have the floor.

M/V "LOUISA"

**Argument of Saint Vincent and the Grenadines (continued)**

STATEMENT OF MR W. WEILAND  
 COUNSEL OF SAINT VINCENT AND THE GRENADINES  
 [ITLOS/PV.12/C18/4/Rev.1, p. 3–9]

*Mr W. Weiland:*

Mr President, Members of the Tribunal, thank you for allowing me to appear today. It is an honour and a pleasure. I am going to read from the transcription of the testimony of Don Javier Moscoso. I am going to leave out, for the sake of brevity, the early parts in which the witness made a solemn declaration, and the greeting that the witness offered the Tribunal and the Spanish delegation. There was also a brief resolution of some technical problems. I think, for the sake of clarity and to shorten this a little bit, I will ask you to consider when I refer to the word "Question" that the question is a question posed by Mr Weiland to the witness and when I refer to the word "Answer" the word is a reference to the answer to Mr Weiland's question made by Don Javier Moscoso.

The first question that Mr Weiland posed to Mr Moscoso was:

Q You are Javier Moscoso?

A (*Interpretation from Spanish*) Yes.

Q Would you tell the Tribunal briefly your educational and professional background?

A (*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.

Q So you have served as a law professor and you have served in the executive branch of the Spanish Government?

A (*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.

Q At one time you served as the Attorney General. Is that correct?

A (*Interpretation from Spanish*) Yes, that is correct. For four years I was Attorney General.

Q Are you generally familiar with the facts of this case?

A (*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.

Q Were you asked by the Spanish lawyers for Sage to give that legal opinion?

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A (*Interpretation from Spanish*) Yes, the Spanish lawyers.

Q 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?

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

Q In your opinion as an expert in Spanish law and procedure, was the boarding of the *Louisa* legal?

A (*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.

Q I will show you annex 27...

Mr Whittington, could you put that up for us, please? This was put up at the time of the hearing.

...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.

A (*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 fulfil 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.

Q 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?

A (*Interpretation from Spanish*) That is the opinion of the judge. I do not share that opinion.

Q But that was the judge's statement – correct?

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

Q 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

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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?

A (*Interpretation from Spanish*) In my opinion, it was procedurally incorrect.

Q 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?

A (*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.

Then Mr Weiland makes a statement:

I would represent to the court that the opinion, the excerpts of which are reproduced at exhibit 29 in our papers ...

Mr Whittington will just put that up.

...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 publicised 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.

A (*Interpretation from Spanish*) This is a question for me?

Q Yes.

A (*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.

Q 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.

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I am not putting that up. That exhibit was put up at the time.

A (*Interpretation from Spanish*) It is in English. Embassy of Spain; 2006; 15 March 2006 ...

Q This is the document submitted by Spain allegedly relating to notification of the flag country, is it not?

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

Q Are you aware of any other document that Spain claims was used to notify the Saint Vincent authorities of the boarding of the ship?

A (*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.

Q 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?

A (*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.

Q In your opinion, was the quarantine appropriate under Spanish law?

A (*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.

Q 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?

A (*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 deposited under guarantee. There is specific regulation on

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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.

There is a statement by the President indicating that the expert at that point was speaking too fast. Then there is a statement by Mr 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?

A (*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.

Q 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?

A (*Interpretation from Spanish*) Yes, because you gave it to me last night.

Q 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?

A (*Interpretation from Spanish*) Yes.

Q 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?

A (*Interpretation from Spanish*) Yes, this is the case.

Q Would you tell the Tribunal: what is the judge suggesting there in the last sentence or two of his order?

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A (*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.

Q Is the judge suggesting that there are alternatives as to how to handle the *Louisa* in that order?

A (*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?

A (*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.

*Mr W. Weiland:*

That is the end of the transcription of the direct examination of Don Javier Moscoso.

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*The President:*

Thank you, Mr William Weiland.

Ms Forde, you have the floor.

*Ms Forde:*

Mr President, Members of the Tribunal, next for the Applicant is Professor Myron Nordquist. He serves as Advocate for the Applicant and his qualifications have already been made known to the Tribunal.

*The President:*

Professor Nordquist, you have the floor.

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**Argument of Saint Vincent and the Grenadines (continued)**

STATEMENT OF MR NORDQUIST  
ADVOCATE OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/4/Rev.1, p. 9–27]

*Mr Nordquist:*

Mr President and honourable Judges, it is a great privilege to appear today before the International Tribunal for the Law of the Sea as an Advocate for the Applicant in this hearing on the *Louisa* case. This appearance is the fulfillment of a lifetime dream not only to see a vibrant court functioning pursuant to a virtually universal Convention – the number of parties is now up to 163, as last week Ecuador came into the party category – but also an exciting opportunity for me personally to make a small contribution to the progressive development of international law. We can believe that supporters of the peaceful settlement of disputes section in the Convention are smiling with satisfaction at the great success of the Tribunal. The *Louisa* presents a challenging case, perhaps even a landmark case, in the progressive development of international law. The Tribunal has yet to decide its jurisdiction on the merits and questions relating to admissibility as well as to the merits themselves. The Applicant and the Respondent are submitting arguments in respect of these questions, and the Tribunal has yet to make a final decision on the submissions of both parties with respect to the cost allocations in the proceedings. This is, so to speak, a full plate of work, and we ought to promptly turn now to the tasks at hand.

The first major point offered by the Applicant is to urge that the Tribunal has jurisdiction on the merits in this case based on article 300 of the Convention. The legal rationale to support this point is in the text of article 288(1), which I now ask be displayed on your screen. The Tribunal knows this provision by heart, but a few brief comments are necessary since it is crucial in relation to the facts in the *Louisa* case.

As a preliminary comment, we are pleased that both the Applicant and the Respondent chose ITLOS in this case as the means for settlement of disputes concerning the interpretation or application of the Convention. We recall that in paragraph 9 of the ITLOS Order of 23 December 2010 Spain requested that the Tribunal hear and determine this case pursuant to article 13, paragraph 3 of the UNCLOS Statute. Also, in paragraph 37 of its Order, the Court notes that the Applicant instituted proceedings in accordance with article 287 of the Convention.

With respect to the written text of article 288, all can recall that the word “shall” is not “may”. This means that if the rules in article 288 are satisfied, the Tribunal is duty bound to accept jurisdiction over this dispute on the merits. Another word to note in the article 288 text is “any”, which modifies the word “dispute”. “Any” is an inclusive, comprehensive word that in ordinary usage here means that the Tribunal is conferred with wide latitude under the Convention to accept and decide disputes. Article 288 further provides in its text for any dispute concerning – another word connoting judicial latitude – “the interpretation or application of the Convention”. The word “or” is carefully not written as “and”, as it is sometimes read. This thoughtful drafting is deliberate and consistent throughout the Convention. Its importance is that the Tribunal may find separately or in combination either interpretation or application of the law on the Convention. To drive the point home, this means that satisfaction of either interpretation or application provides a sufficient basis to confer jurisdiction for this Tribunal to hear and decide a case. All the words in the text thus expressly confer wide, not narrow, discretionary powers to this Tribunal with respect to jurisdiction. Lastly, article 288(1) requires that the dispute or disputes must be submitted in accordance with Part XV of the Convention, titled “Settlement of Disputes”.

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Mr President and honourable Judges, the Applicant will identify several specific articles in the Convention that require ITLOS to assume jurisdiction on the merits in this case. As mentioned, the first to be identified and therefore discussed is article 300, the text of which is now displayed on the screen. Perhaps the Tribunal recalls that the Respondent expressly cites article 300 in paragraph 75 of the Response to the Applicant's request for provisional measures dated 8 December 2010, and again specifically cites article 300 in the context of the doctrine of abuse of process in paragraphs 186, 187, 188, 189 and 190 of its Counter-Memorial dated 12 December 2011. Indeed, the Respondent bases virtually its entire argument for cost reimbursements in this case, now before this Tribunal, on article 300. It is respectfully submitted that the Respondent is therefore estopped from asserting with any credibility that article 300 is not relevant to this case. The Applicant indeed agrees that article 300 is highly relevant but at the same time fundamentally disputes the Respondent's interpretation and/or application of article 300 in relation to the facts in this case.

The immediate impression from examining the text in article 300 is that this article embodies a general principle of international law which is packed with meaning. The text of article 300 is concisely formulated, but it is apparent that the sovereign States that agreed to this provision, including the Applicant and the Respondent, could only have intended that this Tribunal interpret or apply article 300 on the basis of the facts of a particular case. Some might argue that article 300 opens the door to a form of judicial legislation. Truthfully, there is a degree of merit to that argument as, while unmistakably incorporating the abuse of rights doctrine into the law that this Tribunal must consider, little further guidance is given in the Convention. The Applicant respectfully submits that this does not mean that article 300 is devoid of meaning and can be discarded. The article was deliberately placed in the Convention near the end of the negotiations at the Third UN Conference on the Law of the Sea to remind this Tribunal of a specific body of public international law that the Tribunal must consider in every case; by that I mean that international law is inherent in all your decisions, not that article 300 is relevant in every case. The article can be accurately characterized as inviting a broad interpretation and a liberal application. While the determinations are up to this Tribunal, the Applicant urges the Tribunal to accept the responsibilities entailed in article 300, since they are plainly delegated by the State Parties to the Convention. We believe that the Tribunal can and ought to rise to the challenge of the progressive development of international law delegated to it in article 300 and apply the abuse of rights doctrine, which is well rooted in international law, to the particular facts in the *Louisa* case. We reiterate that the Tribunal has the authority, and indeed in the Applicant's view the obligation expressly provided in article 300 of the Convention, to interpret as well as apply the international law doctrine on abuse of rights to the particular facts in the *Louisa* case.

What are some of those most noteworthy facts? There are voluminous records and documents in this case. We have already pointed out that the record shows that the Applicant completely and totally disputes the Respondent's interpretation or/and application of article 300 in this case. However, if any doubt could remain, the Applicant herewith again states that it fundamentally and totally rejects the interpretation and/or application of article 300 as advanced by the Respondent in the pleadings. The Respondent might argue that technically its express reliance on article 300 earlier was limited to the terms in article 294(1) pertaining to prompt release matters. This might ring true as a convenient argument to ward off jurisdiction on the merits, but what rationale could the Respondent provide for why article 300 ought to allow Spain relief pursuant to article 294(1) but not pursuant to article 288? Could it convince the Tribunal that Spain ought to be able to argue how article 300 helps its argument but that the Applicant may not refer to it? This would hardly be due process – a cardinal principle for ITLOS and a key element in many of its decisions, including this one.

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Hopefully the Respondent will not again try to dictate what law the Tribunal may consider, as the conclusion is self-evident to all in this room that the Respondent and the Applicant fundamentally disagree on the interpretation of article 300, given the facts in this case. The Applicant asserts that on the merits the abuses inflicted by local Spanish officials warrant remedies in its favour. The Respondent will of course speak for itself, but it is fully predictable that Spain categorically disputes the position of Saint Vincent and the Grenadines with respect to the interpretation or application of article 300.

The Respondent prepared diligently for this hearing. Therefore, the Respondent must be held to have been aware of the abuses inflicted by local authorities on Alba Avella, as we heard in her testimony yesterday. Those familiar with international law know that a sovereign State is responsible for the acts of officials or official bodies, national or local, even if the acts were not authorized by or even known to the responsible national authorities; indeed, even if expressly forbidden by domestic law. A related principle is that a State is responsible for human rights violations by an official where condoned by the responsible governmental authorities of that State. These principles and rules apply in this case. The Applicant submits that Spain has consistently and firmly denied its responsibilities under certain rules of international law as well as under article 300 of the Convention. It is as if the Respondent had no legal obligation to abide, at all levels of its government and judicial system, by the Universal Declaration of Human Rights and its subsequent treaties. This subject will be developed later in this presentation.

Briefly stated, the doctrine of abuse of rights cited in article 300 is founded on the obligation of States under international law to act in good faith in fulfilling their treaty commitments. Oppenheim explains that the doctrine arises when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by legitimate considerations of its own advantage. Thus, even if technically acting within the law, a State may incur liability by abusing its rights. The Applicant maintains that the record shows that Spain has violated its obligations with respect to the Applicant under the Convention. Part of the violation is that the arrests and subsequent treatment of certain persons and the detention of the vessel *Louisa* were illegal. In the latter case, the local authorities did not have prior consent to board and search the *Louisa* from either the master or the Applicant, as required by both Spanish and international law. We are reminded that a sovereign State does not lose its rights and responsibilities under international law for its flag vessels, owners or crew simply because they dock in a foreign port. We are also reminded that the Tribunal and the Respondent are deemed to be aware that the obligations of the customary law of human rights are obligations on all States. Therefore, any State may pursue remedies for their violation, even if the individual victim is not a national of the complaining State and the violation does not affect any other particular interest of that State. This basic right of human beings was cited in the *Barcelona Traction* case on page 176.

What then are salient laws and facts in the *Louisa* case for the Tribunal to consider in its analysis of abuse of rights and human rights doctrine? Before this Tribunal the Applicant is seeking justice for injuries suffered both by itself as a sovereign State as well as by natural and juridical persons for whom it is responsible as a flag State or for whom international law gives it remedies for breaches by the Respondent in this case. We assert that the violations of treaty obligations and customary international law and other injuries arise in this case as a direct result of actions by the Respondent's local officials. To emphasize the point, the Applicant states that the Respondent's disregard of treaty and customary international law obligations arose directly from Spain's illegal arrests and detention of the Applicant's flag vessel the *Louisa*. The Applicant seeks remedies here for these violations as provided by UNCLOS and international law. We sincerely regret that up to this stage in the proceedings

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that Respondent steadfastly and firmly denies any responsibility or liability for any abusive actions or other international law infractions whether by its officials in Cádiz or elsewhere in Spain. This case ought to have been settled already.

The attention of the President and honourable Judges is now directed to the testimony heard yesterday from Alba Avella, whose mistreatment was first indicated in the Applicant's Memorial of 10 June 2011. She is not a national of Saint Vincent and the Grenadines. That is not legally required, however, for the human rights abuses inflicted upon her were obligations that may be taken up by all States. Moreover, they are inextricably woven into the facts in the *Louisa* case. Without doubt, she would not have been abused in the manner as described but for the illegal seizure and detention of the *Louisa* by the Respondent in February 2006. Her injuries are part and parcel of this dispute. An additional fact for the Tribunal to consider is that she is a citizen of the United States. Since the United States is unfortunately not a Party to the Convention, United States citizens have no recourse to this Tribunal. Fortunately for Alba Avella, given the facts in this case, the Applicant is willing and able to bring her abuses to the attention of this Tribunal. In brief, ITLOS is her only recourse to justice.

The Applicant urges that this Tribunal assumes its fulsome powers and lawful jurisdiction as expressly contemplated in the Convention. We ask ITLOS specifically to consider that article 300 mandates that justice in a given case such as that of Alba Avella be found by the Tribunal to consist of more than technical rules mechanically interpreted or applied, especially when the inherent rights of human beings are abused. The framers of the Convention deliberately made article 300 an overarching part of the Convention precisely because they wisely concluded that all factual and legal circumstances could not be predicted and covered by explicit rules. Article 300 fills a gap by authorizing this Tribunal to find justice in cases of abuse. The State Parties in article 300 empowered the ITLOS with residual authority to hear about instances of injustice and to provide remedies where merited. Today, the Tribunal has a rare opportunity to discharge that sacred duty in this case that is now squarely before it.

What are the most relevant factors pertaining to Alba Avella found in the records? The Applicant respectfully refers the Judges to recollections taken from her formal statement and sworn testimony given in full just yesterday.

As a 21-year-old student Alba Avella flew over to Spain in 2006 for a brief visit with her father. Her father, as we know, was a member of the small crew left on the *Louisa* to help maintain the vessel and bring it up to international standards for future sailing, while moored in a Spanish port. Alba planned to take and did take Spanish lessons during her short visit to Spain and, to save her family money on accommodations, she was allowed to use the vessel essentially as a dormitory. Within four days of her arrival, while waiting on the street outside her Spanish language classroom, two uniformed policemen approached Alba. They falsely told her that they had been sent by one of the *Louisa*'s maintenance crew to provide her with a ride back to the ship. She naively believed them and voluntarily allowed the two officials to escort her back to the vessel. Once there, while frightened and intimidated, she was severely interrogated by several men about treasure-hunting and gun-locker matters of which she had no knowledge whatsoever. She was nevertheless arrested and jailed for five days by local authorities under the appalling conditions that she explained yesterday.

Alba Avella at this stage was taken into custody while just an innocent bystander near a suspected crime scene, but the actual facts for her arrest and subsequent abuse were even worse than she fully realized at first. She was deliberately held as a hostage by local officials solely because she was the daughter of Mario Avella. This fact was expressed by the local magistrate in his order pertaining to her in early February 2006. Simply being an innocent bystander and a daughter of a suspected offender under investigation is not an acceptable

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reason to arrest and jail any human being under any recognizable system of justice. This was a fundamental violation of her human rights, due process and more.

Honourable Judges, the abuses of Alba in this case provide a textbook example of an abuse of rights violation under any definition of fairness or justice contemplated in article 300. Even a minimal exercise of good faith and, yes, competence in standard interrogation techniques by the local officials would have readily established beyond doubt that Alba was not a crew member. The young woman was simply a tourist visiting her father, who was a working member of the *Louisa* crew. A glance at her passport (as the officials certainly did) would have easily proved that she had been in Spain for only a few days. During this entire period she was there, the *Louisa* was tied up in port; it was not conducting any of the offshore surveys which the officials were supposedly investigating. Any Spanish official acting in good faith could not conclude anything other than that Alba Avella was an innocent bystander to whatever alleged wrongdoing they were investigating. This Tribunal, and surely even the Respondent, can understand why Alba Avella was arrested without being informed of any charges: there were no charges of any merit whatsoever to cite. She was arrested and taken hostage only to entice her father back to Spain. This abusive action is an inexcusable violation of the Convention, which is expressly proscribed by article 300. The Applicant urges this abuse of Alba Avella to be admitted by the Respondent and certainly not to be condoned by this Tribunal.

Five days after her detention in the degrading and unsanitary confinement she described under oath, the young woman was allowed to appear before a local magistrate. With full understanding that Alba Avella was to be used as “bait” to attract her father, the magistrate not only ordered confiscation of her passport but also the taking of her personal possessions, including her computer and new camera.

She testified yesterday that her passport was taken and kept by magistrate order depriving her of official identification for eight months starting in early February 2006. We hope that the Respondent does not take satisfaction in the fact that the heavy-handed hostage-taking scheme worked. Alba’s father, Mario Avella, did return to help his young daughter in distress and he was arrested in early May, 2006. We may now perhaps focus on the factual circumstances surrounding Mario Avella in this case.

Mario Avella, also a national of the United States, had to leave Spain, to his great distress, shortly after his daughter had arrived to visit him. His departure was an emergency as Mario’s aged mother was seriously ill and he was summoned home by his family to tend to her needs. Mario had gathered from the unusual questions and Alba’s phone call on a police telephone that there were troubles in Spain concerning the *Louisa*. Alba did her best in intimidating circumstances to follow the script dictated by local investigators who already were taking advantage of the frightened young female under their highly effective control.

Alba continued to be held hostage as a practical matter after her and even her father’s release from jail as a result of the abusive confiscation of her passport by the local authorities. This abuse was much more severe than the imposition of a fine or the posting of a bond, the common juridical practice, had the actual motivation for the official actions against her been to assure that she appear at a trial. We note here that there has still been no trial after six and a half years. The Tribunal can only imagine the magnitude of abuse if she and other victims were still confined in Spain six and a half years later waiting for trial. Unreasonable delay in due process is an independent injustice not only for the humans involved but for the vessel, *Louisa*, which also has not after six and a half years been charged with any offences (so far as the Applicant’s beneficial owners or their counsel know). None have had a trial in court. This is an abuse of human and property rights especially in the case of John Foster, which will be discussed later.

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Unjustly denied a passport for some eight months, Alba could not leave Spain nor exercise her fundamental right to return to her home. Eight months is an excessive period for official abuse and a denial of justice on its face for an innocent bystander in a non-violent case. Without a passport, Alba was unable to seek gainful employment because without a passport she could not get a permit to work in Spain. She testified in front of this Tribunal that no charges were ever filed against her, but she was nevertheless treated as a criminal for over eight months, including being followed around by local authorities and having her personal telephone calls intercepted. Can there be any doubt left in the Tribunal's mind that such treatment was abusive in the sense proscribed by article 300?

Adding insult to injury, Alba Avella was also ordered by the local magistrate to check in with local officials basically every fifteen days to confirm that she was still in Spain. These officials were well aware of the harsh consequences in punishing this innocent young woman. The local authorities who inflicted the abuse have not to this day offered a reasonable explanation for their actions and certainly no apology has been given to Alba. It is incomprehensible and unacceptable that decent officials could be proud of the bullying done to this young woman. Apparently, however, the Respondent, that is legally accountable to this Tribunal for these abuses, has adopted the legal posture for this case that fully embraces these abusive procedures by its local authorities. In fact we all witnessed yesterday continuing badgering of Alba as a witness before this Tribunal.

Senior officials should have wanted to stop such unjustifiable sanctions on others in the future. Without such assurances the interests of justice cry out for a firm condemnation by the Tribunal in this case, of the treaty and customary law human rights violations by Spain.

In the interests of full disclosures of the facts in this case, the Applicant adds that local counsel retained by John Foster, one of the beneficial owners of the vessel (acting not from any sense of legal obligation but just out of plain human sympathy for Alba's treatment) was finally successful in recovering some of her confiscated personal possessions. The local officials, however, could not find her camera or computer, which had disappeared while in their official custody. This is a small but in some ways symbolic example of their incompetence and another abuse inflicted on Alba.

Mario Avella also testified yesterday before this Tribunal that he did return to Spain in a vain effort to help his daughter who was in desperate circumstances without her passport. We know that the father was arrested *en route* from Portugal pursuant to an Interpol arrest warrant issued on the basis of information provided by judicial authorities in Cádiz. We can expect that a similar warrant from Interpol has been issued for John Foster, since he is charged in the same so-called indictment document with Mario. We shall return to this point later.

Mario, like Alba, was jailed for the first time in his life by a local magistrate in Cádiz. Thereafter he was confined without trial for nearly nine months in degrading and unsanitary conditions. Following his release from what must have been a very long nine months indeed, local authorities still kept his passport for more than 18 months, denying him not only his human right to return home but also his ability to obtain a work permit in Spain to support himself. As a matter of basic human rights, how was Mario to pay for his room and board? Again, it was only through the strenuous (and in some ways bizarre as well as costly) efforts of attorneys hired by the beneficial owner of the *Louisa*, John Foster, that Mario was able to secure a new passport from United States' officials at the end of 2007.

The background was that after the facts pertaining to his abuse and denial of justice were effectively made known by the US Co-Agent of the Applicant in this case, US officials simply cancelled Mario's confiscated passport and issued him a new one. Common sense and Mario's testimony yesterday revealed that after 27 months of official abuse in Spain by its so-called judicial system, he was financially destitute.

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Six years after his arrest the threat of conviction for what can be characterized as minor offences still hangs over him. Whatever a just penalty would be, even assuming the charges had validity, Mario has been punished enough. The abusive and unjust actions of local authorities in keeping him in prison without trial inflicted actual punishment far in excess of the needs of justice for any of the so-called “crimes”. The facts strongly suggest that Mario’s case was ignored by the central Government in Madrid until the Applicant filed proceedings with ITLOS.

Now the Respondent must defend the morally indefensible actions of the local officials in Cádiz who may not have known or simply did not care to know about Spain’s treaty or customary law obligations such as are embodied in the Convention and international law.

Part of the international law doctrine of abuse of rights this Tribunal is asked to consider is whether the offence charged is comparable to the victim’s abuse. This comparison helps Judges to determine whether there is an abuse of rights or a denial of justice violation based on the facts of a given case. While Alba Avella was not charged with any offence, for the good reason that there was none to charge, it is necessary to inquire into the two offences alleged by the magistrate judge in Cádiz to determine whether there were abuses and/or denial of justice for Mario Avella and/or John Foster. Stated another way, this inquiry is necessary to evaluate whether the abuses and/or denial of justice violations the Applicant alleges for the daughter and father and one of the beneficial owners of the *Louisa*, John Foster, were disproportionate to the offences charged by the Respondent’s local authorities.

For the Tribunal to make this comparison it is necessary to examine the offences charged. Please note here that there are in the records only two so-called “crimes” alleged. These two so-called alleged “crimes” are charged against two victims, Mario Avella and John Foster. Please bear in mind that the seriousness of the charges must be measured over six and a half years of abuses and unjust actions by the Respondent’s local officials. What comes out of this comparison?

Paragraph 29 of the ITLOS Order dated 23 December 2010 is seen on the screen and can be seen as summarizing two charges as follows:

*Whereas*, on 11 December 2010, the Agent of Spain submitted to the Tribunal a copy of an indictment issued by the *Juzgado de Instrucción No. 4* of Cadiz dated 27 October 2010, according to which charges have been brought against several alleged perpetrators (*‘presuntos autores’*) concerning a continuing crime of damage to the Spanish historical patrimony (*‘delito continuado de daños en el patrimonio histórico español’*) and a related crime of possession or storing of arms (*‘delito conexo al anterior de tenencia o depósito de armas’*) ...

The first point of law and fact to ask based on the paragraph shown on the screen is what was the “continuing damage” to the Spanish “historical patrimony”? The Respondent twice submitted in the record six photographs alleged as being the treasure confiscated by local authorities – we think it was alleged to be from the *Louisa*. We are not sure why otherwise the Respondent would put it in. The Respondent has never substantiated these allegations. Further, even were the origin of the artefacts proved, the Respondent never has submitted any credible proof about the value of the objects depicted. From the naked eye, the Tribunal Judges, using a little common sense, can conclude that the objects are of nominal value – more on this later.

Even if some artefacts had been found on the *Louisa*, Mario Avella and John Foster have submitted documents and uncontested testimony in which they deny any knowledge about the purported “evidence”. There is also the fact that these men have many years of professional

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work having nothing to do with looking for treasure. This certainly adds credibility to their declarations.

Counsel for the Applicant has advanced a good-faith belief that local authorities backdated the so-called indictment document to facilitate dismissal of this case by this Tribunal. The Tribunal may or may not find that such an offensive and due-process violation occurred, but in any event the indictment charges are, on their face, legally defective. How could any individual defend against such vague allegations? Why after over six years of investigation is there not even an allegation in the indictment of a specific intent by either of the victims to steal or appropriate any artefacts? Almost all of the main judicial systems of the world require a specific intent for the crime of larceny, if that is what the allegations are supposed to imply. The undeniable fact is that there was no such specific intent in what appear to be the bases advanced by the Respondent. Neither Mario Avella nor John Foster were focused on "treasure"; they were searching for potential gas deposits with expensive side-scan sonar on the *Louisa* that also, coincidentally, can sometimes show anomalies on the sea floor of possible interest to treasure-hunters. Frankly, the managers of the *Louisa* made a mistake, in my view, in entering into a contract with treasure-seekers who represented that the same data Sage planned to gather about the sea floor near Cádiz might reveal possible treasure sites. The contractors represented that they had a general permit to survey indicating consent by the Government of Spain to conduct the research. There was no sneaking around; local officials saw their activities and boarded the *Louisa* and its small tender to examine the permit they had. Documents were checked by police several times, and no problems noted. No work was stopped. The survey work continued within easy sight of shore.

The dark depths of the Bay of Cádiz require a physical check by divers on the bottom of the sea floor to check out whether anomalies have gas prospects. The divers look for gas bubbles and metal objects - it would not be good to put a drill bit through the center of a safe - and other scientific indications by a physical ground check. These procedures might have provided an incidental opportunity to look for treasure by the treasure-hunters but Mario testified he was not interested in treasure-hunting activities, and John Foster was certainly preoccupied with higher-level management matters in Texas. The point is that neither Mario Avella nor John Foster had any specific intent or corresponding actions to justify criminal charges as indicated in the so-called indictment. Good faith in carrying out treaty obligations long ago called for dismissal of the vague, minor charges against them. An order from this Tribunal would be just that condemns the misuse of passport confiscations for individuals who, under widely accepted human rights doctrine are to be presumed innocent, not guilty. In light of its treaty and international law obligations, the right thing for Spain to do would have been to settle this case long ago.

Applicant is not asking this Tribunal to take any action with respect to others named in the so-called indictment that are not properly considered for fair consideration before this Tribunal. We do ask for consideration for the innocent bystander, the members of the crew, and for one of the beneficial owners of the *Louisa*, John Foster, as well as for the Applicant.

As noted, the alleged offence is substantively defective in that the elements of the alleged crime are too vague to be enforceable under the law of nations. For example, what is the meaning of "continuing damage to the Spanish patrimony"? The burden of proof is certainly on Spain to show continuing damage. After six and a half years of abuse, with no persuasive evidence of serious wrongdoing, the presumption of innocence for Mario Avella and John Foster ought to be persuasive before this Tribunal. Indeed, the interests of justice cry out for this Tribunal to bring unconscionable official harassment of Mario Avella and John Foster to an end.

Our understanding is that under both the Constitution of Spain and certainly under general international law, these two persons are to be presumed innocent until proven guilty.

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This is part of accepted human rights doctrine as well. The facts in the records of this case do not contain even a hint of credible evidence to justify the continued harassment by local authorities of either Mario Avella or John Foster on the sham charges of “continuing damages to the Spanish patrimony”.

*The President:*

Mr Nordquist, I am sorry to interrupt you but we have reached 4.30 and a break is scheduled from 4.30 to 5 o'clock. Are you going to finish in a minute?

*Mr Nordquist:*

It is probably better to take a break now.

*The President:*

The Tribunal will withdraw at this stage and we will continue in 30 minutes. Thank you very much.

*(Break)*

*The President:*

We will now continue the hearing.

Mr Nordquist, you have the floor.

*Mr Nordquist:*

Thank you, Mr President. As mentioned before the break, a relevant method for determining abuse of rights and denial of justice doctrines is to compare the proportionality of an alleged offence with the punishment meted out to victims. For this exercise, it is necessary to make a comparison, often done in relative monetary values, of what is in this case the value of the likely “treasure” in comparison to the harm to the victims. We cannot be sure about the value of the “treasure” reportedly substantiating the alleged offences. Assume, however – and perhaps we can have the slide up – that we take Respondent’s inventory list of 10 large and 10 small cannon balls, a few rocks with centre holes drilled, and several pieces of broken pottery in the photograph as actually depicting the “treasure” taken from the *Louisa*. The value of this “treasure” based on other Respondent submissions of similar appearing artefacts is nominal. The alleged “treasure”, assuming it was taken from the *Louisa*, does not even begin to compare in value with the gold and silver booty Spain brought home from the New World as a colonial power in one of its typical treasure ships. Since Spain is a party to the Convention on Underwater Cultural Heritage, part of the response to a question asked by the Tribunal is that if the cannon balls were of British origin, could Spain count them as part of its historic patrimony? I think in the Battle of Trafalgar there were an equal number of British cannon balls fired. As I understand, under the proper interpretation of the Underwater Cultural Heritage Convention, the protocol would be to return the cannon balls to England. We have no established facts, as I have indicated, about the origin of the cannon balls, and maybe it is not even possible to determine this. If we could, my understanding is that they should be returned to their rightful owners. Certainly, I think the policies of Spain are to never relinquish their rights to sunken treasure off their flag vessels, no matter how old.

One factual clarification may be necessary to assist the Tribunal and to reduce confusion with respect to the cannon balls. They can be fairly characterized as “weapons” of war. It is hard to imagine what other use you would make of a cannon ball. The Tribunal will recall that the small arms found in the gun locker on the *Louisa* were also characterized by Respondent as “weapons of war”. In fact, the small arms shown in the photograph were

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found on the *Louisa* but they were small arms designed for civilian use, and properly sold and documented when the vessel originally sailed.

Respondent and local authorities filed charges based on “continuing damages”. After a review of the “treasure”, we cannot answer the question of what are the continuing damages, and what legal connection is there between the two charges made by Spain, as best we can decipher, and Mario Avella or John Foster?

To assess whether the doctrines of abuse of rights or denial of justice are applicable, consider again, for example, the relative relationship between the punishment inflicted on Mario Avella in comparison to the harm charged in the indictment drafted by the local authorities in Cádiz. Mario was imprisoned for nine months without trial. That fact is uncontroverted. The local magistrate in Cádiz then confiscated his passport for 18 more months, making the denial of his legal rights as a human being to travel home effective for 27 months, over two years. Today, even at this stage of hearings in this Tribunal, Mario Avella still has no clear idea of the alleged crimes with which he is charged.

After confiscating the vessel *Louisa* under the flag of the Applicant, of which he is one of the beneficial owners, John Foster also stands charged, or apparently charged, with a “continuing crime against Spanish patrimony”. In his particular case, these abusive and unnecessary actions by local officials are harsh punishment. The reason is that John Foster has been in the business of collecting data on prospective oil and gas deposits around the world for over 30 years. He has no record of treasure hunting at all. John Foster also has only a vague idea of the alleged charges against him, which have not been clarified, although the local authorities have had over six years to do so.

Applicant has not only pointed to his sworn denial of the charges in what is possibly a back-dated indictment, but detailed the abuse of rights and denials of justice violations by local authorities for both Mario Avella and John Foster. Consider that a vessel flying the flag of the Applicant is seen by John Foster and his counsel as having been unlawfully seized and is now under the threat of forfeiture according to recent documents. Thus the official abuses persist after six and a half years due to what can be fairly characterized as unprofessional police work and continuing abuse of judicial discretion, particularly by local authorities in Cádiz.

Respondent apparently argues that the two charges alluded to in the so-called indictment are supposed to justify six and a half years of abuses. Applicant contends that, in light of article 300 in the Convention, abuse of human rights, including their property rights, is a legitimate and necessary source of law for this Tribunal to examine. This is particularly so with Alba Avella, Mario Avella, the two Hungarian crewmen, John Foster and the Applicant itself. The vague offences alleged in the indictment do not fairly apply to them by any reasonable standard of due process or justice.

The Tribunal is respectfully next asked to examine the second charge, about the storage of the five rifles, one shotgun, and one pistol that were actually discovered in a gun locker aboard the *Louisa*. A picture of what the Respondent in its pleadings repeatedly describes as “weapons of war” is on the screen. At the outset Applicant stresses that neither Mario Avella nor John Foster had any reasonable or legal connection to any gun locker offence that would remotely justify the charges in the so-called indictment. The record in this case is clear that neither possessed nor stored the arms in question in any criminal sense as charged. Rather, the rights of both victims have been abused, and both have been denied justice in this case. We stress that Applicant believes that the real wrong revealed before this Tribunal is the illegal and unreasonable conduct of local authorities in Cádiz. That is the conduct meriting correction by this Tribunal.

The record shows that the small arms were secured in a steel gun locker on the *Louisa* at the time of its detention on 1 February 2006. Honourable Judges will recall that the local

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authorities bullied Alba while being interrogated on the *Louisa* into telephoning her father in the United States to ask about gaining access to the steel gun locker. They learned, because these officials were listening to her conversation without her father's permission, as might be required under US law, that he did not know, but he thought that the Master of the vessel kept the key to the metal outer locker and held the safe combination. Every crewman on the *Louisa* was concerned about measures regarding self-defence against pirates. There is no contention that there are pirates in the bay in Spain but this vessel was a seagoing vessel and was awaiting its next assignment. Very competent and responsible management officials in Scotland routinely asked that the so-called "weapons of war" be placed securely in the gun locker on the *Louisa*. As a member of the crew, Mario was therefore generally aware of the existence of the gun locker. He did not know what was in it. He was not, however, responsible in any legal sense. He had no key and he did not know the combination to the safe where the guns were kept.

The local authorities could not wait. In the light of the facts available clearly in the records, a reasonable speculation can be offered that they may have believed that the safe contained truly valuable "treasure". The record is, of course, as mentioned, silent on what actually motivated the local authorities with such a sense of urgency. In any event, the investigators cut the padlock on the outer steel door and then blasted off the second combination lock on the steel gun safe inside. The contents were probably disappointing for the local officials, as there was no true treasure. Inside they found just the normal small arms, now routinely carried on cargo vessels that need self-defence means against pirates.

Would any reasonable person believe that the local officials actually thought they had discovered weapons of war when they saw what was inside the gun locker? Did they think these were the kind of weapons that would be peddled to an arms dealer? Highly unlikely. The five rifles were civilian small arms, without even a thumb lever to select automatic fire. Some weapons of war! Documents made available to this Tribunal persuasively indicate that the few small arms were there based on a responsible recommendation from a highly respected ship management company in Scotland that had been hired by the beneficial owners of the *Louisa* to outfit it properly for its purposes.

The persons responsible for listing the small arms on the manifest or obtaining a routine administrative authorization from local officials may not have done what, in retrospect, they should have done; perhaps it was just as a result of an honest mistake by whomever was responsible for such administrative matters on the *Louisa*. Based on the handling of Alba's personal computer and new camera, it is not unreasonable to wonder if the authorization paperwork may have been misplaced by a local official, who might have been perhaps lax in his duties. In any event, the paperwork was either lost or not done properly, and at all events, the miscue was not attributable in any plausible legal sense to Mario Avella or John Foster, the parties named in connection with this crime.

It strains belief beyond reasonable limits to suggest that either of them intended or acted to harbour "weapons of war". The accurate facts, not exaggerated ones, are that neither of them had any role in the alleged improper procedures constituting the second charge. William Shakespeare's adage comes to mind: this charge is "Much Ado About Nothing."

Every relevant fact in the record points to the conclusion that the charges against Mario Avella and John Foster were unfounded as a matter of both fact and law. If these two men did somehow deserve official sanctions, that might be in the form of a small administrative fine as a penalty which could have been quickly paid and they could have moved on in their lives. Instead, these minor offences have been blown out of all proportion, and the rights of Mario Avella and John Foster under article 300 of the Convention have been abused. Moreover, both have been denied justice under international law doctrine, in violation in both cases of Spain's solemn treaty obligations.

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Frankly speaking, honourable Judges, it is slightly embarrassing to discuss these flimsy charges before this august Tribunal during an international proceeding such as this. It challenges good faith to conceive that the minor infractions alleged against remotely connected persons, and the absence of the usual elements of a crime being alleged such as specific intent, could be the justification for the abuses and denial of justice in Respondent's case over a period of six and a half years. It would not be an appropriate remedy to send this case back to Spain, condoning perhaps six and a half more years without a trial. Frankly, one of the witnesses characterized the charges as being trumped up and cooked up at the last minute to cover bureaucratic ineptitude.

In its Memorials, Respondent has done its best to make these alleged infractions seem really serious, but there was no realistic threat to the peace, good order or security of Cádiz from the few small arms securely locked in a steel safe on the *Louisa*. By comparison, it is staggering how much grievous harm was inflicted on a working-level member of the crew on Applicant's vessel and the scorn heaped on its generous beneficial owner, or, at least, one of the beneficial owners.

Vigorous advocacy by the Respondent to justify this abusive behaviour by local officials compounds the injustice in this case. Applicant suggests that this only serves to reinforce the validity of a finding by this Tribunal that abuses of rights and denial of justice are justified violations of the Convention and international law. It is respectfully suggested that the Tribunal needs to send a clear lesson out, not only to Spain but to the world at large. As mentioned, there has never been any sign of compromise or interest expressed in settlement from the Respondent. There is no prospect that the passage of more years of the curious form of judicial processing that Spain condones in this case will lead to a just result in Spain for either Mario Avella or John Foster.

There is one final matter of importance that must be considered by the Tribunal in this case. It is fully predictable from the records already submitted that an irreconcilable dispute exists between Applicant and Respondent concerning the interpretation and/or application of article 295 in the Convention. Applicant contends that the doctrines of abuse of right and/or denial of justice are exceptions to the general rule of international law that normally require exhaustion of local remedies. Respondent has consistently argued that there is a requirement in this case to allow local authorities to finish the unduly delayed legal proceedings prior to the Tribunal having any jurisdiction on the merits. Applicant respectfully suggests that it is an undeniable conclusion that a genuine dispute exists between Applicant and Respondent over the interpretation and/or application of article 295 in the Convention based on the facts in this case.

With respect to the legal doctrine of exhaustion of remedies, Applicant submits that there is nothing further to exhaust in the case of Alba Avella. No local remedies are pending and none are contemplated, to the best of Applicant's knowledge and belief. This is also true with respect to the two Hungarian crewmen who were unlawfully arrested, imprisoned without trial, and denied their passports for eight months, until they were returned through the efforts of John Foster's lawyers. All these individuals merit equitable remedies from this Tribunal for their abuses and denial of justice.

With respect to Mario Avella, the two charges, as best we can understand, referenced in paragraph 29 of this Tribunal's Order above remain pending according to the so-called indictment conveniently introduced by the Respondent at the very end of the last hearing before this Tribunal without an opportunity for rebuttal. The Applicant contends that the so-called indictment was a complete surprise and a violation of due process in the sense that Mario Avella and John Foster and their legal advisers could hardly prepare to rebut charges before this Tribunal contained in a document they had never seen before 11 December 2010. If the Applicant's assertions are accepted as valid by this Tribunal, this would be a serious

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breach of due process as there was no fair opportunity to be heard. It would be helpful if the Respondent would disabuse this Tribunal of any role that Spanish officials played with respect to the timing and content of the so-called indictment. When was it drafted and by whom? The tender of the document was not a shock in one sense, in that its revelation at the last minute was consistent with the continued abuse of due process that Mario Avella and John Foster have experienced at the hands of local authorities in Cádiz for the past six and a half years.

We are mindful that in paragraph 65 of its Order dated 23 December 2010 the Tribunal noted that the obligation to exchange views was satisfied, but that in paragraph 68 held that the exhaustion of remedies issues would remain open. Paragraph 80 is also clear that the Order in “no way” prejudices jurisdiction on the merits or the admissibility of the Application or the issue of cost payments to either Party.

A discussion of the topic of exhaustion of remedies is therefore necessary, in that the Applicant contends that in this case the Respondent violated article 300 in relation to both the Applicant itself as a sovereign nation and to private individuals and corporations for whom the Applicant is responsible under the Convention and international law. The Applicant further contends that the Respondent denied justice as that doctrine is understood in international law, and that appropriate remedies for these violations can only be determined if this Tribunal accepts jurisdiction on the merits in accordance with the Convention, the Tribunal Statute and the Rules of the Court.

What then are the key rules and principles that pertain to abuse of rights and denial of justice doctrines with respect to facts about exhaustion of remedies in this case? The Applicant has already asserted that the Tribunal is mandated by the Convention to interpret and apply article 300 to the particular facts of this case. The Applicant has also noted that the doctrine of abuse of rights is closely related to the principles of good faith and due process. The Applicant contends that an abuse of rights occurred when local authorities in Spain exercised their legal rights or authority in a manner that benefits from this exercise were unjustly disproportionate, to the detriment of Alba Avella, two Hungarian crewmen, Mario Avella, and John Foster as well as to Saint Vincent and the Grenadines as a sovereign. Spain is deemed to have abused its rights and to have acted in bad faith in that the local authorities grossly exceeded their powers and legitimate interests as repeatedly described in this proceeding. The Applicant contends that the Respondent be estopped from further exercising its rights in this case and be held liable for damages to the Applicant, Mario Avella, the two Hungarian crewmen and John Foster. The Respondent has used its rights in violation of moral rules, good faith and straightforward elementary fairness in this case. The punishments inflicted upon the named injured parties were grossly disproportionate to the seriousness of the relatively minor offences alleged in the so-called indictment.

As an innocent bystander, Alba Avella was subjected to degrading and inhuman treatment, to an investigation of offences alleged by others, and was intimidated for many months, suffering additional hardship without justification by confiscation of her passport by local officials in Cádiz. She was forced to spend many painful hours in the company of true criminals even while waiting to report, as ordered by the local magistrate, to the courthouse in Cádiz or Madrid. Her father, Mario Avella, was jailed without charges or trial for nine months. For an additional 18 months Mario Avella was denied the right to find work, to earn a living or to return home as his passport was confiscated by court order for a total of 27 months. John Foster’s personal and property rights were abused by local authorities and to this day continue to be abused. Without any reasonable or legal connection to his person, sham charges have been alleged against him and he can reasonably expect that he would be arrested based on information provided to Interpol from local authorities in Cádiz were he to resume his normal way of conducting his international business of 30 years’ duration, that is

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to search for oil or gas data throughout the world. Moreover, as one of the beneficial owners of the *Louisa*, John Foster has been subject to six and a half years of agony, watching the deterioration of his and the other beneficial owners' vessel, the *Louisa*, and related equipment due to the unlawful arrest and irresponsible custody thereafter by local authorities in Cádiz.

All these actions by the Respondent violate the article 300 treaty obligations to Saint Vincent and the Grenadines. The violations for which the Respondent is responsible under both the Convention and international law amount to a denial of justice to natural and juridical persons, which, as the flag State of the *Louisa*, the Applicant has the right and duty to protect. The victims were crewmen and a daughter of one of them, as well as a beneficial owner of the vessel, John Foster. The treatment of Alba Avella, Mario Avella, two Hungarians and John Foster reveals an undeniable fact of an excessively long period of over six years of abuse and a denial of procedural and substantive fairness. This excessive delay has imposed a disproportionate punishment that vitiates the normal rule of exhaustion of remedies under international law.

Further, there is no requirement under international law to exhaust local remedies when the claims for injuries suffered in this case by the Applicant, Alba Avella, Mario Avella, two Hungarian crewmen and John Foster are firmly denied by the Respondent. The Respondent will speak for itself, just as the facts do, before this Tribunal on this issue. However, the Applicant respectfully submits that immediate, final and binding justice is long overdue and that further delays in resolution, for example by sending this case back to be further considered by Spain, would be futile and unjust.

The Restatement (Third) of Foreign Relations Law, which is readily available to the Tribunal in its library, published in the United States, is a familiar source of authority for the Judges to rely on for this matter. The Re-statement discusses in great depth the doctrine of denial of justice with respect to a State's responsibility for injuries to nationals of other States. Reference is also made to the principal human rights instruments such as the Universal Declaration and the International Covenant on Civil and Political Rights. It would certainly be presumptuous of me to argue that I am a human rights expert, but Members of this Tribunal are recognized worldwide as human rights experts; still I know injustice when I see it. Injustices include, for example, the right to return to one's country and the customary law requirement that foreign nationals be accorded equal protection of the law with only reasonable distinctions being acceptable between nationals and aliens – that is, I guess, security concerns of nations. The host State is responsible for injury when the exercise of police powers exceed an international standard of reasonableness. A State such as Spain in this case is also responsible if it fails to provide an alien with remedies such as would be provided by the major legal systems of the world. Denials of justice can, in principle, reach to juridical persons, such as Sage in this case.

The Restatement (Third) cites examples of denials of due process in criminal proceedings as arbitrary arrest, unlawful or prolonged detention, prolonged arbitrary imprisonment, delayed trial, failure to render a decision, denial of an interpreter and inhuman treatment. Section 712(1) of the Restatement expressly provides that a sovereign State is responsible under international law for injury resulting from its taking of the property of a national of another State. Examples would be Alba's "lost" computer and camera, as would the valuable misplaced equipment taken from the *Louisa*, the confiscation of the *Gemini III*, and of course the execution of Spain's latest threat to sell the *Louisa* at auction. Confiscatory action is action that "prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property ..." Despite lengthy submissions by the Respondent, there is no indication that Spain is prepared to pay damages or provide just compensation for any of the wrongdoings recited.

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The Applicant respectfully suggests that it is up to this Tribunal to order a suitable remedy to finally settle this case for all concerned. No legal qualification formula defining just compensation as a remedy can suit all facts and circumstances. That is why the Tribunal was delegated the authority, and indeed the duty, to apply article 300. Fair market value has been the normal judicial standard – that is, the value of the property at the time of the taking. The Tribunal has the discretion to consider the pain and suffering of individuals as well as future earnings of natural and judicial persons in its analysis of a just settlement. The Tribunal is respectfully reminded that a temporary, lawful deprivation of property may ripen into a taking, particularly in a case such as this where there have been six and a half years of deprivation.

The Applicant is aware that the claims for compensation on behalf of John Foster in particular are espoused by the Applicant not only in its capacity as a flag State but also in its capacity as a sovereign in the family of nations with human rights duties owed to every human being, including respect for property. In this case, the Applicant considers itself to have a special obligation also to espouse the cited violations of the doctrine of abuse of rights and denial of justice for Alba Avella, Mario Avella, two Hungarian crewmen (Gellert Sandor and Suzusky Zsolt), as well as for John Foster. The Applicant reminds the Tribunal that, as a small country with very limited resources, it is also entitled to equitable financial relief in this case. The Tribunal is reminded at the end that if the Applicant does not take up these causes for relief, no justice will ever be done.

The Applicant accordingly respectfully submits that Saint Vincent and the Grenadines has a right to offer diplomatic protection in this case against violations by Spain of the Convention and international law as previously discussed. We recite the law in the Restatement, in section 713, that there is no need to exhaust remedies that are “clearly sham or inadequate, or their application is unreasonably prolonged. There is no need to exhaust local remedies when the claim is for injury for which the respondent state firmly denies responsibility.” Consequently, there is no need for further exhaustion of remedies, and the Tribunal is respectfully requested to find long delayed justice in a final and binding decision on the merits.

Thank you, Mr President and honourable Judges.

*The President:*

Thank you, Mr Nordquist. It is now 5.47. I would like to know how Mr Cass Weiland would like to proceed. I understand that you wish to examine an expert, but we have very little time this evening, so are you prepared to do that tomorrow morning?

*Mr S. Cass Weiland:*

Mr President, we are prepared to proceed for a while with our next witness or to adjourn according to whatever is your wish. I can tell you that we expect to end our case early tomorrow. We will not require the entire day. We have two witnesses, the second of whom is of somewhat inexact length, but I do not expect us to be here all day tomorrow on our case.

*The President:*

Thank you very much.

I understand that this brings us to the end of today’s sitting. The pleading will be resumed tomorrow at 10 o’clock. The sitting is now closed.

*(The sitting closes at 5.48 p.m.)*

M/V "LOUISA"

**PUBLIC SITTING HELD ON 6 OCTOBER 2012, 10.00 A.M.****Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 4 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 6 OCTOBRE 2012, 10 HEURES****Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 4 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

Good morning. Today we will continue the hearing in the *MV "Louisa" Case*.

EXAMINATION OF EXPERTS – 6 October 2012, a.m.

**Examination of Experts**

MR MARK MCAFEE, EXAMINED BY MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/5/Rev.1, p. 1–12]

*The President:*

I understand that we are going to have two experts.

May I ask Mr Weiland who will be the first expert?

*Mr S. Cass Weiland:*

The first expert, Mr President, will be Mark McAfee.

*The President:*

Thank you very much, Mr Weiland. The Tribunal then will proceed to hear the expert, Mr McAfee. Now he will be brought into the courtroom.

I now call upon the Registrar to administer the solemn declaration to be made by the expert.

*The Registrar:*

Good morning, Mr McAfee. Pursuant to Article 79 of the rules of the Tribunal, before making any evidence every expert shall make a solemn declaration. You have been provided with the text of the solemn declaration. May I invite you, Mr McAfee, to make the solemn declaration.

*Mr Mark McAfee is sworn in.*

*The Registrar:*

Thank you, Mr McAfee.

Mr President.

*The President:*

I now give the floor to the Co-Agent of St Vincent and the Grenadines, Mr Weiland, to start the examination of the expert.

*Mr S. Cass Weiland:*

Good morning Mr McAfee.

*Mr McAfee:*

Good morning.

*Mr S. Cass Weiland:*

Welcome to this beautiful day, Saturday, in Hamburg. Would you give us your full name, please, sir?

*Mr McAfee:*

My name is Wesley Mark McAfee.

*Mr S. Cass Weiland:*

What is your nationality?

M/V "LOUISA"

*Mr McAfee:*  
US.

*Mr S. Cass Weiland:*  
Where do you live these days?

*Mr McAfee:*  
I live in Montgomery, Texas.

*Mr S. Cass Weiland:*  
Is that a community outside the city of Houston?

*Mr McAfee:*  
Yes, it is.

*Mr S. Cass Weiland:*  
Is Houston considered one of the primary energy centres in the world as far as you are concerned?

*Mr McAfee:*  
We claim it is.

*Mr S. Cass Weiland:*  
How old are you these days?

*Mr McAfee:*  
I am sorry?

*Mr S. Cass Weiland:*  
How old are you, sir?

*Mr McAfee:*  
I am 70 years old.

*Mr S. Cass Weiland:*  
We have asked you to come here from Montgomery, Texas, to talk to us a little bit about the oil and gas business because we have an understanding that you have some background in that area and we understand that there is some possible confusion about the ship-owner's intention in connection with the ship, that is the focal point of this case. Let me ask you first to tell the Tribunal what your background in the oil and gas business is.

*Mr McAfee:*  
I have drilled and owned oil and gas production. I have operated large oil companies. I currently consult and have consulted for major oil companies and major oil service companies like Halliburton, Cameron, National Oilwell, Baker Hughes, and Schlumberger.

*Mr S. Cass Weiland:*  
Tell the Tribunal a little bit, or at least the highlights of your work experience in the petroleum industry.

## EXAMINATION OF EXPERTS – 6 October 2012, a.m.

*Mr McAfee:*

My background started off as electronics and I first worked – my first commercial job I worked at IBM in Huntsville, Alabama, during a moon push, and I worked on scientific computers, programming, that fired the rockets used on the Gemini and Apollo system for the moon shot. IBM then moved me to another location and I worked on the first start of teleprocessing equipment, which is, you know, a predecessor to the Internet many, many years ago.

*Mr S. Cass Weiland:*

Predecessor to the Internet?

*Mr McAfee:*

Yes, sir.

*Mr S. Cass Weiland:*

We had a Vice President of the United States who claimed he invented the Internet. Would you confirm that?

*Mr McAfee:*

I don't know. Anyway, I went to work for a company in Tulsa, Oklahoma, where I converted analogue seismic data to digital data so it could be processed digitally instead of just being printed out on a printer. At that company I was there for three years and I became interested in using computers for manufacturing, so I left and started a company selling and building machines that used computers for manufacturing.

*Mr S. Cass Weiland:*

Let me just interrupt you for a second. That Tulsa company you referred to became Telex – is that right?

*Mr McAfee:*

That is correct, yes.

*Mr S. Cass Weiland:*

What did you do after you started your own company?

*Mr McAfee:*

We built – it was early on manufacturing for tubular parts for the oilfield, so I purchased specially built machines in Japan for threading pipe. Then I became president of an American/Russian joint venture oil company in the Komi Republic.

*Mr S. Cass Weiland:*

In the Komi Republic of Russia?

*Mr McAfee:*

That is correct, in Russia.

*Mr S. Cass Weiland:*

Tell us a little bit about that.

## M/V “LOUISA”

*Mr McAfee:*

It was the early nineties and the Russians – they knew – they were very astute to the technology of oil and gas. They lacked the funding to complete the projects and so they sought a joint venture partner to help them with their projects. That is where I learned another way to make exploration for oil and gas while I was in Russia, using the Russian technology. Then, after I left Russia, because we lost pipeline use – we couldn’t generate any cash – my partner – my lawyer became my partner in Russia and we drilled and produced oil wells in Texas. We had 150 wells that we produced. We also owned 10% of a rotary drill company. We had drill rigs out drilling in different types of formations. Since the mid-seventies we started consulting for different companies for different completions and for problem wells.

*Mr S. Cass Weiland:*

What do you mean by “completions”?

*Mr McAfee:*

After a well is drilled you have to complete the well so it will give up its hydrocarbons, and during this period of time fracking was invented during this period of time I was working. There are different ways to do fracking so we worked on different stages in the fracking business.

*Mr S. Cass Weiland:*

I think that we are not going to try to describe in much detail the state of the oil and gas industry these days, but you have hit on an important point there that I think deserves at least a little bit of elaboration because you used the term “fracking” and that is a critically important aspect of modern energy production, is it not?

*Mr McAfee:*

Yes, it is.

*Mr S. Cass Weiland:*

Would you explain what you mean by it, just very briefly?

*Mr McAfee:*

Basically, hydrocarbons are locked inside shale or rock and you can’t get communication to the well, and if you break it up into little pieces you get communication and it allows the wells to breathe and give up their hydrocarbons.

*Mr S. Cass Weiland:*

So you explode the rock formations and that is called fracking.

*Mr McAfee:*

Yes, that is correct. Then we invented different tools to decommission offshore wells in the Gulf of Mexico that we have patents on. That is what we are presently doing, and we are also presently consulting with major oil companies in the North Sea about how to shut their wells in.

*Mr S. Cass Weiland:*

So you have actually invented tools that are used in the oil business?

## EXAMINATION OF EXPERTS – 6 October 2012, a.m.

*Mr McAfee:*  
That is correct.

*Mr S. Cass Weiland:*  
Do you have fairly extensive experience in the Gulf of Mexico?

*Mr McAfee:*  
That is correct.

*Mr S. Cass Weiland:*  
There is a lot of hydrocarbon production in the Gulf of Mexico – is that correct?

*Mr McAfee:*  
Yes.

*Mr S. Cass Weiland:*  
Let us just talk for a couple of minutes about how someone who is interested in developing oil reserves decides where to go in the world to explore.

*Mr McAfee:*  
Of course, the world is vast and wide and you have to find a place that you are allowed to produce the oil and gas, and then you look to see if there is oil and gas in that area. The first thing you do is you do remote sensing surveys. You use geo satellites. You use satellites to find oil seeps. You do air magnet surveys. You do gravity surveys. If those things come back positive, then you go and spend a lot more money to do more detailed surveys.

*Mr S. Cass Weiland:*  
We have a description from a public source – I believe it is Shell oil company's website that we will put on the board, the 2007 pyramid. This is simply a two-page reference that might be useful. If we go to page 2, you are familiar with this, are you not, Mr McAfee?

*Mr McAfee:*  
Yes, I am.

*Mr S. Cass Weiland:*  
There is a description here of non-seismic methods. Can you elaborate on the importance of that in terms of initial decisions to look for oil and gas?

*Mr McAfee:*  
It explains that they use remote sensing satellites and aircraft to map large areas quickly, which is a lot less expensive than doing it the other way, and they use radar and thermal energy. This particular one is talking about a brand-new system now that they are using, that Shell likes, that uses a system for conductivity.

*Mr S. Cass Weiland:*  
Shell is one of the largest corporations in the world, not to mention largest oil producers, but what about if you are a smaller company with limited resources? How can a company like that control its costs and try to develop something that would be valuable?

M/V "LOUISA"

*Mr McAfee:*

Almost all companies start off with looking for oil seeps. All the major oil finds in the world had been found originally with oil seeps, like in Pennsylvania, in our country, Spindletop, and Iran was found that way, and Russia, Vietnam, with oil seeps. It shows the presence of oil. Almost all original oil development in the ocean was looking for oil seeps and so there are companies that specialize with radar oil seeps, looking for the oil on top of the ocean.

*Mr S. Cass Weiland:*

I know that you have consulted with or consider somewhat authoritatively a gentleman by the name of Dale Bird, who has written extensively about interpreting magnetometer data, for example. Can you discuss that with us?

*Mr McAfee:*

Yes. Magnetometers have always been used to find where the basement is located and if you have a basement it means you have a bowl, so there will be sedimentation that fills that basement, and without the sedimentation you have no trapping mechanicals that could trap the oil. Also because of computer systems today magnetic data is processed differently and you can see a lot about the formation, like if it has fractures, which is extremely important, whereas seismic will not show a fracture.

*Mr S. Cass Weiland:*

I am reading a line from this article by Mr Bird which says that magnetic data are not just for the basement any more. In this case there have been some papers or memoranda submitted by the Respondent that criticize the utility of magnetic data at least for use in exploring in the Bay of Cádiz or the Gulf of Cádiz. What would you say about that?

*Mr McAfee:*

Actually, the magnetic data is usually – if you don't have oil seeps and you want to make a survey – is always the next survey that you make. It's absolutely essentially as used in the oil business.

*Mr S. Cass Weiland:*

I have heard about using seismic data to develop hydrocarbon research. Is it cheaper and more efficient to start with magnetic data and the side-scan sonar that we have heard about?

*Mr McAfee:*

The least expensive way of course is to find the oil coming out the ground, then magnetic data; then you run gravity data with the magnetic data also. We use a complete suite of non-seismic information to find oil and gas. As a matter of fact, Russia, when I got to Russia – they had never used seismic at all in any way, and they were one of the world's largest producers of oil and gas. So seismic is a great tool – in fact I know the man who invented 3D seismic – he is a friend of mine – and there is a lot of drop holes that are drilled on seismic. Seismic tells you about the formation structure; it doesn't tell you if there is oil and gas there.

*Mr S. Cass Weiland:*

You had another article that you recommended called *From Black Magic to Swarms: Hydrocarbon Exploration Using Non-Seismic Technologies*. What do you consider the lesson that this article imparts?

## EXAMINATION OF EXPERTS – 6 October 2012, a.m.

*Mr McAfee:*

It is basically that you use magnetics, airborne magnetics, magnetics and gravity – different kinds of methodologies – before you spend the huge amounts of moneys that are required with - for seismic information.

*Mr S. Cass Weiland:*

We have heard quite a bit about a company called Sage Scientific. We are aware that it is one of a series of companies, and one of the principal shareholders is John Foster. Are you acquainted with Mr Foster and some of his companies?

*Mr McAfee:*

Yes, I have worked for different projects for Mr Foster for a number of years in the oil and gas business.

*Mr S. Cass Weiland:*

You have worked with him in connection with oil exploration and development?

*Mr McAfee:*

Yes, that is correct.

*Mr S. Cass Weiland:*

Where have you done that work?

*Mr McAfee:*

The company that I was president of in Russia was Mr Foster's company – for three years. I worked in Vietnam, in the South China Sea; I made 16 trips to Colombia; Bulgaria; and of course we worked in Texas and other places in the United States.

*Mr S. Cass Weiland:*

So it is safe to say that you and Mr Foster are pretty close.

*Mr McAfee:*

Yes, we are.

*Mr S. Cass Weiland:*

You have had various projects over the years.

*Mr McAfee:*

That is correct.

*Mr S. Cass Weiland:*

Did there come a time when you talked to Mr Foster about the possibility of developing something in Spain?

*Mr McAfee:*

Yes, that is correct.

*Mr S. Cass Weiland:*

When approximately was that?

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*Mr McAfee:*

I believe it was 2003, something like that.

*Mr S. Cass Weiland:*

2003. Tell the Tribunal, if you will, about your initial conversations with Foster about the possibility of doing some work in Spain.

*Mr McAfee:*

He mentioned the possibility that he possibly could get a permit for searching, and of course the oil business is really a very small business and usually you know what is going on pretty much every place through the journals, if you read the journals all the time. So there had been lots of articles, many, many articles, about the outflow from Gibraltar and the Bay of Cádiz. There was a lot of articles about that, and there are some Texas oil companies, not all, had worked in that area on the other side of the Mediterranean; so we were familiar with that information. We knew that Chevron at one time had a lease in that area and that they let it go.

*Mr S. Cass Weiland:*

So when you started to talk to John about the possibility of doing work in Spain you had read all kinds of things about the potential over there.

*Mr McAfee:*

I had just read in publications, yes.

*Mr S. Cass Weiland:*

There was lots of publicly available information about oil prospects all over the world.

*Mr McAfee:*

That is correct.

*Mr S. Cass Weiland:*

What did you do, if anything, in terms of following up on the idea?

*Mr McAfee:*

I secured radar satellite oil seep data from a company in England that we used to buy data from for oil seeps. What we were looking for is just – we look for oil and gas; we don't look for anything else; we just look for oil and gas. We don't really care about structure or anything else. We are oil people and we want oil and gas, so if there is oil and gas there that is what we look for. So it showed, with like five or six satellite passes that there were active oil seeps in that area.

*Mr S. Cass Weiland:*

Did you go out and acquire from a public source some information about oil seeps off the coast of Cádiz?

*Mr McAfee:*

Yes.

*Mr S. Cass Weiland:*

From a company called Infoterra?

## EXAMINATION OF EXPERTS – 6 October 2012, a.m.

*Mr McAfee:*  
Yes.

*Mr S. Cass Weiland:*  
That is publicly available.

*Mr McAfee:*  
That is correct.

*Mr S. Cass Weiland:*  
Let us look at the map on the screen from Infoterra. Tell us what we are looking at here, Mr McAfee.

*Mr McAfee:*  
*There* is the Bay of Cádiz. You see all the little ships. That means that each satellite pass those ships – some ship was at anchor there. And then the blue is the fluorescent oil of active oil seeps. If it were a dead oil of course it would show as a black line. If you just look over to the left side you can see that right in that area there is a black line. That is from a ship – that's pollution from a ship. So it showed that there is active oil seeps in this area, which means that they are coming from some formation some place.

*Mr S. Cass Weiland:*  
Mr Whittington, do you have the December 2003 letter that Mr McAfee sent to Mr Foster?  
While he is looking for that, after you had seen this kind of activity did you go to Foster and suggest that there were ways that he could get into this or he could try to make something of his permit availability, that he could use that for developing something off Cádiz?

*Mr McAfee:*  
Yes, I did.

*Mr S. Cass Weiland:*  
We have seen this letter in the last couple of days. Is this the letter that you wrote to Mr Foster on December 18, 2003?

*Mr McAfee:*  
That is correct.

*Mr S. Cass Weiland:*  
In the first paragraph you are making a proposal and you are talking about use of a magnetometer and the use of specifically a geometrics G-882. There is also a reference to a digital side-scan sonar. Are these methods that a smaller player in the industry might have used in the initial stages to see if he could develop some data that a larger company might be interested in buying?

*Mr McAfee:*  
This actually is what even a huge company would do on the front end.

*Mr S. Cass Weiland:*  
Even a huge company would use this.

M/V "LOUISA"

*Mr McAfee:*

Yes, that is correct.

*Mr S. Cass Weiland:*

But a company with limited resources might start out, develop data and be in a position to either find a joint venture partner or sell the data – is that correct?

*Mr McAfee:*

Yes, but if I might add, along with this I acquired gravity data also before I made this recommendation.

*Mr S. Cass Weiland:*

Let us look at pages 3 and 4 of this exhibit. Is this some gravity information that you developed and attached when you provided this to Mr Foster back in 2003?

*Mr McAfee:*

Yes, we actually had the gravity data itself. This is the track of acquiring the gravity data, and I had Mr Tom Austin of Austin Exploration in Houston, who is one of the premier explorers of oil and gas worldwide, interpret the gravity data. It showed structure.

*Mr S. Cass Weiland:*

So you and Foster were beginning to make some investments in trying to capitalize on this opportunity he might have in Spain: is that a fair way to describe it?

*Mr McAfee:*

That is correct.

*Mr S. Cass Weiland:*

I want to talk to you about this G-882 magnetometer because I have seen a document, a memorandum of some kind, submitted by the Respondent with its papers – not, as I recall a sworn statement but some kind of a paper that criticizes the use of this magnetometer G-882. Do you have any comment about the utility of the G-882 when it comes to prospecting for oil as opposed to, perhaps, just looking for metal objects under the water?

*Mr McAfee:*

The caesium mag is one of the first mags. It has a very, very high resolution, and the higher the resolution is, the better you can process the data, and the fact of the matter is that Austin Exploration also uses the exact same instrument for their major oil companies for looking for oil and gas, and all the streamers that are pulled down, so acquiring 3D, they almost all have this magnetometer also on the fins.

*Mr S. Cass Weiland:*

You consider Tom Austin and his company, Austin Exploration, to be extraordinarily relevant as an outstanding authority in the area?

*Mr McAfee:*

They are one of the two largest companies that look for oil and gas.

## EXAMINATION OF EXPERTS — 6 October 2012, a.m.

*Mr S. Cass Weiland:*

I think we have a picture of Mr Austin's home page that actually touts the utility of a G-882. Are you familiar with this public document that is on the screen now, Mr McAfee?

*Mr McAfee:*

Yes, sir, I am.

*Mr S. Cass Weiland:*

He seems to be recommending the G-882 right here on his website, and offering that. He is not in the shipwreck business, as far as you know, is he?

*Mr McAfee:*

No, sir, he is not.

*Mr S. Cass Weiland:*

There is evidence in this case that the expedition, if you will, from Sage included towing around the Bay of Cádiz a side scan sonar device. Can you describe the use of that in terms of prospecting for oil and gas?

*Mr McAfee:*

The side scan sonar has a lot of work in the offshore business. The fact of the matter is there have been lots of side scan sonars towed in the Gulf of Cádiz to find the mud volcanoes. Often gas is spewing out of the area. The side scan sonar can be used to find leaks. It forms a cloud in the water. The escaping gas and oil forms a cloud in the water, and it is more opaque than the water, and you get a return off of a side scan sonar. You also can do -- this particular one not real good sub-bottom profiling -- but you can get sub-bottom profile, and of course, also it does pick up man-made objects on the sea floor, which, knowing where those man-made objects are, allows, when you post-process your magnetic data, to take those into account so they do not give you bad information. You remove those man-made objects from there.

*Mr S. Cass Weiland:*

Would side scan sonar be something that has been used extensively offshore in various places in the world?

*Mr McAfee:*

As a matter of fact, the BP fiasco in the Gulf of Louisiana of the big blow-out, the US Government came in with side scan sonars and they found a well a mile away that was leaking using side scan sonar, so it is kind of a normal thing that is used in the business.

*Mr S. Cass Weiland:*

After you developed the magnetometer data and the sonar data, would it be unusual then for someone who is trying to develop data that he could sell or use to joint-venture with a larger company to have people dive some of these areas that have been shown to look promising, inspect them first-hand?

*Mr McAfee:*

If you dive, it has to be at a depth where you can dive to, and most of the things that we do now are so deep that you have to use robotics to do it, but the geochemistry and the microbial investigation can only be done with a sample, with a soil sample, and of course, on the

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surface we take soil samples before we ever drill to be sure that there is a presence of hydrocarbons, and I do not know what they did with this. I have no idea. I did not think it was necessary, you know, so I do not know what they did. I have no idea.

*Mr S. Cass Weiland:*

You mentioned that when you are talking about a deep water situation you have to use robotics. Would that be what they call an ROV?

*Mr McAfee:*

That is correct.

*Mr S. Cass Weiland:*

Again, the paper submitted by the Respondent seems to be quite critical of the fact that the *Louisa* apparently had an ROV on board. Are you saying that ROVs are used extensively in the offshore oil and gas search business?

*Mr McAfee:*

They are used in the offshore business for lots of reasons. Oceaneering in Houston have over 500 ROVs, and they use them for – it is easier to look than it is just to guess.

*Mr S. Cass Weiland:*

Oceaneering is a large oil and gas company in Houston?

*Mr McAfee:*

It is a robotic company.

*Mr S. Cass Weiland:*

As far as you know, they have 500 or more of these ROVs that they deploy around the world?

*Mr McAfee:*

That is correct.

*Mr S. Cass Weiland:*

I want to talk to you about some maps that you have brought with you. We have first a map that accompanied an article relating to the integrated ocean drilling programme. I believe, one of the Respondent's experts was a co-author of this article. This page of the article that Mr Derek Stow is one of the authors of has an interesting map. I believe you were looking at this article and recommended that this map be something that the Tribunal be aware of. It is demonstrated on the board now. It is figure 4 from the article. Could you tell us what we are looking at, without getting too technical?

*Mr McAfee:*

You see an area that has been well mowed with seismic information.

*Mr S. Cass Weiland:*

Well mowed?

## EXAMINATION OF EXPERTS – 6 October 2012, a.m.

*Mr McAfee:*

Yes, that is what it is called: mowing the yard. Even the US Government in 1992 took readings.

*Mr S. Cass Weiland:*

Does this map show seismic data that was developed or does it also show some sonar and gravity data?

*Mr McAfee:*

They show that they have taken some gravity core, and I suspect that when the US Government did their seismic and sonar, I think they did that for a military reason at that point in time. They also took gravity data, and the gravity data we required was not in the area of our search area, so that is one of the reasons we went further north, to get more information. This information was held close by the oil companies, and it was not public information as far as the data itself, just that it had been run. Over in Portugal we could get any of that data we wanted, but here none of this data was available.

*Mr S. Cass Weiland:*

We have another map. If you go to the fractal hydraulics files from the worldpress.com, which I think is something that we need to look at this morning, here we have a map of Spain with various regions mapped out. What do you consider to be the relevance of this, Mr McAfee?

*Mr McAfee:*

Can you go down to the bay and increase the size, please?

*Mr S. Cass Weiland:*

So now we have that portion of the map before us that is segmented out. Would you describe what we are looking at here? We have got some red and some green areas.

*Mr McAfee:*

The red areas are actually in production now of oil and gas in that area, gas in the outside into the Gulf, and the area that I recommended Mr Foster to look at was the area between the Gulf and the land. As you see, the structures usually follow out into the ocean. That is how in 1947 Kerr-McGee, they followed an onshore oil field to offshore, and they drilled the first oil well. The green areas ---

*Mr S. Cass Weiland:*

Excuse me. Let me interrupt. You are referring to a situation that occurred years ago in the Gulf of Mexico?

*Mr McAfee:*

That is correct.

*Mr S. Cass Weiland:*

In that instance the engineers followed the path of production on land out into the Gulf?

*Mr McAfee:*

That is correct.

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*Mr S. Cass Weiland:*

That was one of the first offshore oil wells?

*Mr McAfee:*

That was the first offshore well.

*Mr S. Cass Weiland:*

On this map we are looking at a series of red, as I understand it, production permits, or what they call exploitation permits, that run in a pattern down to the coast, and then offshore we see Poseidon Norte. That is actually Repsol's production operation, is it not?

*Mr McAfee:*

Yes, sir, it is.

*Mr S. Cass Weiland:*

So you recommended to Foster that if he had a permit that overlapped any of this area, he ought to use it. Is that right?

*Mr McAfee:*

That is correct.

*Mr S. Cass Weiland:*

If we look at the map which the Respondent submitted in its Provisional Measures material as Annex No. 1, this is a map of the two permit areas that were listed in the original Tupet permit. Is that your understanding?

*Mr McAfee:*

Yes, sir, that is correct. It is interesting. If you go back to the previous picture, now someone thinks it is interesting. The green boxes there, over the bay, that someone has a search permit in that area now.

*Mr S. Cass Weiland:*

So these green areas relate to search permits and the red areas relate to exploitation permits?

*Mr McAfee:*

I think that is correct.

*Mr S. Cass Weiland:*

I think we are going to hear some bitter criticism of us for even attempting to explore right offshore Cádiz. Would that surprise you?

*Mr McAfee:*

I just do not think that people are familiar with how structures actually work in the oil and gas business.

*Mr S. Cass Weiland:*

May I have a moment, Mr President?

*The President:*

Yes.

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*(Pause)*

*Mr S. Cass Weiland:*

Mr President, we have no further questions of Mr McAfee at this time.

*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 cross-examine the expert.

*Mme Escobar Hernández :*

Monsieur le Président, je vous demande d'appeler M. Aznar Gómez, qui fera le contre-interrogatoire.

*The President:*

Mr Aznar Gómez, you have the floor.

MR MARK MCAFEE, CROSS-EXAMINED BY MR AZNAR GÓMEZ  
COUNSEL OF SPAIN  
[ITLOS/PV.12/C18/5/Rev.1, p. 12–17]

*Mr Aznar Gómez:*

Good morning, Mr President, distinguished Judges.

Good morning, Mr McAfee.

*Mr McAfee:*

Good morning.

*Mr Aznar Gómez:*

From your testimony now, I think I have clear what was first. You were not here, but I was wondering what was first. You have said that when you met Mr Foster he told you that he had the possibility to use some permits in Spain, so now I think this is clear. Mr McAfee, you are here before this Tribunal as an expert in marine hydrocarbon exploration, as stated in the letter of 10 August 2012 that the Co-Agent of St Vincent and the Grenadines sent to the Registrar of the Tribunal. Could you please remind us of your experience during the last five years in marine hydrocarbon exploration? How many projects have you directed or developed in the last five years, please?

*Mr McAfee:*

I have directed none personally.

*Mr Aznar Gómez:*

No project at all in the last five years?

*Mr McAfee:*

No, sir, I did not say I did not do projects. What I directed, sir.

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*Mr Aznar Gómez:*

Are you a geologist or something similar?

*Mr McAfee:*

No, sir.

*Mr Aznar Gómez:*

Can we agree that most of your work is to manufacture or even invent the pieces for drilling and for oil prospects, and to advise about their use?

*Mr McAfee:*

We do both, sir. We are an engineering company, and we use the latest state-of-the-art technology to find oil and gas. We have found three green fields ourselves.

*Mr Aznar Gómez:*

What is your experience or your company experience in the scientific and commercial evaluation, the assessment, of geological data in oil and gas?

*Mr McAfee:*

We look for oil. We do not look at geology, sir.

*Mr Aznar Gómez:*

How can you manage to look for oil without a previous assessment of geological data?

*Mr McAfee:*

We hire geologists and geophysicists to interpret data, but when we look for oil and gas, we really do not care what the geology is.

*Mr Aznar Gómez:*

You simply go and drill?

*Mr McAfee:*

No, sir. We do remote sensing.

*Mr Aznar Gómez:*

Remote sensing?

*Mr McAfee:*

That is correct.

*Mr Aznar Gómez:*

Just remote sensing?

*Mr McAfee:*

That is correct.

*Mr Aznar Gómez:*

Why do you recommend this use of magnetometers and RÓV and handy metal detectors and so on?

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*Mr McAfee:*

I recommend the use of a magnetometer and side scan sonar.

*Mr Aznar Gómez:*

Side scan sonar?

*Mr McAfee:*

Yes.

*Mr Aznar Gómez:*

Mr McAfee, in your affidavit of 19 September 2007, reproduced as annex 40 of the Applicant's Memorial and Reply, you say: "In 2004 and 2005, I reviewed data produced by Sage in the Bay of Cádiz ..." - I repeat, the Bay of Cádiz, not the Gulf of Cádiz - "... and determined that it demonstrated the absolute accuracy of my earlier conclusions about the presence of hydrocarbons in the area." How was that data produced?

*Mr McAfee:*

I reviewed the information we had previous. We had the gravity data. I had Mr Austin look at the gravity data, and we had the course of the seeps, and then we had Landsat information, and it still made sense, just as a possibility. I saw no data from the survey itself.

*Mr Aznar Gómez:*

Thank you, Mr McAfee. Now let me go to your letter to Mr Foster of 18 September 2003 attached to your affidavit and also reproduced in annex 40. You talk about the Rio Vinalopo concession as a reference. Do you know where this concession is located?

*Mr McAfee:*

No, sir, I do not at this point. It is 2003.

*Mr Aznar Gómez:*

Have you ever been in Spain?

*Mr McAfee:*

No, sir.

*Mr Aznar Gómez:*

Do you know that this concession is in the other part of Spain, on the Mediterranean, and a ground concession in the province of Alicante, close to Benidorm, a very well known touristic city?

*Mr McAfee:*

No, sir.

*Mr Aznar Gómez:*

Not in the gulf, not in the Bay of Cádiz.

*Mr McAfee:*

No.

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*Mr Aznar Gómez:*

In that letter of September 2003 you also referred to some hydrocarbon reports dated in 1980, but also in 1921, and referring to another quite old report of 1929, and this perhaps explains why Sage needed a historian on its team. You say to Mr Foster that "This area of Spain ..." - the Bay of Cádiz, it must be understood - "... reminds me of southern Louisiana. Like turning back the clock to 1929." These are your words, Mr McAfee, but I cannot understand you. Could you explain this to me, please?

*Mr McAfee:*

What I was looking for was the area onshore, which we showed, the structure onshore also. We also showed structure going out into the bay, that it would be a possibility that there would be a tracking mechanism. The mud flow from the gulf environment area into the Gulf of Mexico filled up the Gulf with mud over millions and millions of years, and the same thing happened in this area.

*Mr Aznar Gómez:*

So you were comparing the situation in a completely different part of the world, the southern part of Louisiana.

*Mr McAfee:*

Yes, that is correct.

*Mr Aznar Gómez:*

With the Bay of Cádiz.

*Mr McAfee:*

That is correct.

*Mr Aznar Gómez:*

As an expert in marine hydrocarbon exploration. Mr McAfee, yesterday the distinguished Professor Nordquist said that the divers Sage used were looking for gas bubbles. You have just said that you have never been in Spain, so you have never dived in the Bay of Cádiz, I guess.

*Mr McAfee:*

No, sir.

*Mr Aznar Gómez:*

Do you know that the average visibility is 5-7 metres?

*Mr McAfee:*

No.

*Mr Aznar Gómez:*

As an expert in marine hydrocarbon exploration, how could scuba divers be used in oil and gas prospects?

*Mr McAfee:*

The only way I would think they would be used would be to take samples.

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*Mr Aznar Gómez:*  
To take samples?

*Mr McAfee:*  
Yes.

*Mr Aznar Gómez:*  
Mr McAfee, it has been repeatedly said here, and also in the written proceedings, that Sage is a great oil and gas holding with great experience in oil and gas prospects. Now, with this project, you said that you were, so to say, beginning; it was the first time that Sage got involved in marine hydrocarbons exploration, and therefore only used limited tools to gather or confirm these data in order to sell these data to other companies.

*Mr McAfee:*  
I do not know what they were going to do with the data. I had no idea what he would do with that.

*Mr Aznar Gómez:*  
In any case, you have said that you were using remote sensing, aero-magnetism and some other very fashionable techniques of gathering data and so on, in order to have more detailed surveys and so on. Would you agree with me that it is better to use accurate, free information for this?

*Mr McAfee:*  
What kind of information?

*Mr Aznar Gómez:*  
The information of geological data on the Bay of Cádiz.

*Mr McAfee:*  
If it were available, yes.

*Mr Aznar Gómez:*  
As an expert, do you know whether in Spain it does exist, a public database with all known geological data to be used for marine research?

*Mr McAfee:*  
No. I was told ... I used a company in England to get geological data and they said the information was not available.

*Mr Aznar Gómez:*  
But you, as a marine hydrocarbons specialist, do not search, do not look for the possibility of free, available data on geological records that could show Sage that perhaps there is commercially exploited oil and gas in the Bay of Cádiz?

*Mr McAfee:*  
I do not know of any geological data that is free anywhere in the world, to be honest with you. You usually have to purchase it at extreme expense. There are seismic exchanges where we buy data and, of course, our seismic exchange has nothing here, so we had to rely on a

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company in England that has seismic exchange, and they said this information was not available.

*Mr Aznar Gómez:*

But, as an expert, do you ever try to see if in Spain or elsewhere this accurate, not simple, not even, so to say, for public consumption, published reports and so on, accurate data, is available?

*Mr McAfee:*

Of course.

*Mr Aznar Gómez:*

As an expert, you did not search for this possibility, given that Mr Foster and the company are so convinced to come to Spain to explore oil prospects?

*Mr McAfee:*

I personally purchased seismic data but I was told it was not available here.

*Mr Aznar Gómez:*

You did not evaluate that possibility?

*Mr McAfee:*

Yes, I evaluated. I was told it was held closely and it was not possible. It was not public.

*Mr Aznar Gómez:*

It was not public?

*Mr McAfee:*

I was told that the data was held closely, which a lot of data is, and it was not public.

*Mr Aznar Gómez:*

Who told you this?

*Mr McAfee:*

This was the company in England that has the Portugal, right next to Spain. They have all the data available right next to this area. They have no data here available.

*Mr Aznar Gómez:*

So a company in England told you that these data were not available for Spain. Not even the Spanish people that got the permits and went to Mr Foster to invite him and his company to come to Spain suggested to you the possibility, as an expert in marine hydrocarbon exploration?

*Mr McAfee:*

I do not know what his people told him, but I talked with the people in England less than three weeks ago and asked the same, exact question, and I got the same, exact answer.

*Mr Aznar Gómez:*

That there is no free, available information in Spain about these geological data?

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*Mr McAfee:*

They had nothing available.

*Mr Aznar Gómez:*

Nothing available?

*Mr McAfee:*

They had nothing available.

*Mr Aznar Gómez:*

Thank you, Mr McAfee.

Thank you, Mr President.

*The President:*

Thank you very much, Mr Aznar Gómez.

An expert who is cross-examined by the other Party may be re-examined by the Party who has called the expert. Therefore I ask the Co-Agent of Saint Vincent and the Grenadines whether the Applicant wishes to re-examine the expert.

*Mr S. Cass Weiland:*

Thank you, Mr President. I just have a couple of questions.

MR MARK MCAFEE, RE-EXAMINED BY MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/5/Rev.1, p. 17–18]

*Mr S. Cass Weiland:*

Mr McAfee, the people you are talking to in England are telling you that there is no seismic available. Is that right?

*Mr McAfee:*

Yes, I talked to the company in England, so there is none available. That is correct.

*Mr S. Cass Weiland:*

There is one other point that I just want to clarify about Sage. Is it fair to say that Sage has what are sometimes called affiliates or companies that are controlled by the same shareholders that go by different names?

*Mr McAfee:*

Yes.

*Mr S. Cass Weiland:*

For example, Sage had an affiliate that was involved in the Russia project. Is that right?

*Mr McAfee:*

Yes.

*Mr S. Cass Weiland:*

Do you remember the company that was used in that case?

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*Mr McAfee:*

Greenstone Europe.

*Mr S. Cass Weiland:*

It is typical at least in the US for a businessman to incorporate a new entity for each project that he undertakes. Is that right?

*Mr McAfee:*

That is normal

*Mr S. Cass Weiland:*

Thank you, Mr President. Those are all the questions that I have for Mr McAfee. May he be excused?

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INTERVENTION PAR MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE  
[ITLOS/PV.12/C18/5/Rev.1, p. 18; TIDM/PV.12/A18/5/Rev.1, p. 21]

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je voudrais seulement objecter aux questions qui viennent d'être posées, car M. Weiland a introduit de nouvelles questions qui n'étaient pas apparues pendant leur premier interrogatoire ni dans l'interrogatoire de l'Espagne. Merci.

*Le Président :*

Merci Madame, j'ai bien pris note de votre objection.

*(Continues in English)* I recognize that Judge Cot has a question to ask the expert.

## NAVIRE « LOUISA »

QUESTION POSÉE À M. MCAFEE PAR M. LE JUGE COT  
[ITLOS/PV.12/C18/5/Rev.1, p. 18–19; TIDM/PV.12/A18/5/Rev.1, p. 21]

*M. le juge Cot :*

Monsieur McAfee, bonjour et bienvenue à Hambourg. Je voulais vous poser une question sur les plongeurs. Je ne sais pas, d'ailleurs, si vous pourrez y répondre. Il faudrait peut-être que M. Cass Weiland apporte des éléments complémentaires. Vous nous avez donc indiqué que les plongeurs sont d'utilisation commune pour faire des prélèvements dans la zone à explorer et dans le cadre de cet ensemble de techniques de recherche fort intéressantes que vous nous avez expliquées. Est-ce que vous pouvez nous dire si ces plongeurs étaient des plongeurs employés, et donc payés, par la société Sage, ou si c'était des plongeurs qui étaient aussi employés et aussi payés par la société Tupet ou les deux, je ne sais pas.

*Mr McAfee:*

Neither do I, sir.

*M. Cot :*

Voulez-vous que je répète ?

*Mr McAfee:*

No, I don't know. I did not understand.

*M. Cot :*

Pouvez-vous dire si les plongeurs employés dans le cadre de la recherche et pour faire des prélèvements dans cette affaire étaient employés par la société Sage ou s'ils étaient aussi employés par la société Tupet ou s'ils étaient employés par les deux. Voilà ma question.

*Mr McAfee:*

No, sir, I have no idea who they were paid by. I do not know who they were employed by and I do not actually know what they did, sir.

*M. Cot :*

Merci.

*Le Président :*

Merci, Monsieur le Juge Cot.

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RESPONSE OF MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
TO THE INTERVENTION OF MS ESCOBAR HERNÁNDEZ  
[ITLOS/PV.12/C18/5/Rev.1, p. 19]

*Mr S. Cass Weiland:*

Mr President, would you like me to respond to the objection?

*The President:*

Yes, Mr Weiland, you have the floor.

*Mr S. Cass Weiland:*

I would say that the questions on re-direct were not new material. He was asked whether the Sage company had only undertaken this project as its first project and we were clarifying that the beneficial owners used a different company for every project. I think that it was very related. He was then asked repeatedly about the availability of data, and I think that it was appropriate to clarify his enquiry to the British company, so I would say that I was not opening up any new area.

In response to Judge Cot, I would say that we will have some information about the employment of the divers. In fact, our next witness, Mr Mesch, will be questioned by my colleague Ms Forde, and we are ready to proceed with Mr Mesch whenever you are ready, Mr President.

*The President:*

Thank you, Mr Weiland. As to your response to the objection raised by the Spanish side, let us check the verbatim record later.

I understand that now the examination of the expert has finished. I would like to thank you, Mr McAfee, for your testimony. Your examination is now finished and you may withdraw.

*Mr McAfee:*

Thank you, sir.

*The President:*

I understand that Saint Vincent and the Grenadines would like to call another expert. May Mr Mesch be brought to the courtroom?

I call upon the Registrar to administer the solemn declaration to be made by the expert.

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**Examination of Experts (continued)**

MR FREDERICK PALMER MESCH, EXAMINED BY MS FORDE  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[TTLOS/PV.12/C18/5/Rev.1, p. 19–31]

*The Registrar:*

Mr Mesch, good morning.

*Mr Mesch:*

Good morning.

*The Registrar:*

Pursuant to article 79 of the rules, before giving any evidence to the Tribunal, every expert shall make a solemn declaration. You have been provided with the text of the solemn declaration. May I invite you now, Mr Mesch, to make the solemn declaration?

*Mr Frederick Palmer MESCH III is sworn in.*

*The President:*

I now give the floor to the Co-Agent of Saint Vincent and the Grenadines, Ms Forde, to start the examination of the expert.

You have the floor.

*Ms Forde:*

Good morning, Mr President, Members of the Tribunal.

Mr Mesch, before we begin, I invite you to speak slowly for the benefit of the court reporters and the interpreters. I will also endeavour to speak slowly for the same purpose. After I have asked you a question, just give a little time before you respond so that the translation is effected.

Mr President, I hope I have not overstepped on your territory.

*The President:*

Thank you very much for your reminder of that important point.

*Ms Forde:*

Mr Mesch, could you please identify yourself for the Members of the Tribunal?

*Mr Mesch:*

My full name is Frederick Palmer Mesch III, but I go by Derick, so you can please call me Derick.

*Ms Forde:*

Where do you reside?

*Mr Mesch:*

I reside in Fort Worth, Texas in the United States.

*Ms Forde:*

What do you currently do for a living?

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*Mr Mesch:*

I practise public accountancy at a firm called Mesch, McBride and Cooper, but I also have a law degree as well – a licence to practise law in the State of Texas.

*Ms Forde:*

Could you outline for the Court some of your current responsibilities?

*Mr Mesch:*

My current responsibilities are to provide tax and business and financial advice to my clients. We prepare their business and personal tax returns. We also audit the financial statements of some of our clients and provide opinions as to the legitimacy and accuracy of their financial statements to banks and other stakeholders.

*Ms Forde:*

Mr President, may I ask whether Mr Mesch's speed is okay for the Tribunal?

*The President:*

It is all right. Thank you.

*Ms Forde:*

Mr Mesch, do you have experience in your work of clients involved in the oil and gas industry?

*Mr Mesch:*

Yes. Being from the State of Texas, we have a lot of clients that are in the oil and gas business that touch on various aspects of it. We have clients that are independent oil and gas investors, clients that manufacture oil and gas equipment, and clients that service oil and gas wells and oil and gas activities.

*Ms Forde:*

In your professional capacity, what do you do for those clients?

*Mr Mesch:*

I prepare their business tax returns, provide them with financial advice and assist in auditing their financial statements.

*The President:*

I am sorry to interrupt, Mr Mesch. I thought that your speed was all right, but perhaps you can slow down a little, and that would be even more helpful.

*Mr Mesch:*

Okay, I will slow down.

*The President:*

Thank you very much.

*Ms Forde:*

We are going to slow you down a little bit. For the benefit of the Tribunal, I will repeat the last question. Could you indicate what you do for your clients in the oil and gas industry?

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*Mr Mesch:*

We prepare their business tax returns in the United States. We also provide them with financial advice and we audit their financial statements as well.

*Ms Forde:*

Mr President, is that better?

*The President:*

Yes. Thank you.

*Ms Forde:*

Mr Mesch, will you describe your educational background?

*Mr Mesch:*

I have a Bachelors in Accounting from Oklahoma State University in the United States; I have a degree in Law from the University of Tulsa in the United States; and an LL.M, or Master of Laws, in Taxation from the University of Florida in the United States.

*Ms Forde:*

You indicated that you are currently with the firm Mesch, McBride and Cooper?

*Mr Mesch:*

Yes.

*Ms Forde:*

Please tell us about your professional experience prior to joining your current firm.

*Mr Mesch:*

Immediately after graduating from the University of Florida, I worked for Ernst and Young in both their Dallas and New York City offices. Ernst and Young is one of the four largest public accounting firms in the world. In that capacity, primarily I did tax due diligence and tax structuring in a division that they call their Transaction Advisory Services Group, which was Ernst and Young's umbrella brand for their merger and acquisition practice.

*Ms Forde:*

You would also have analysed and quantified financial and tax models for leveraged buy-outs?

*Mr Mesch:*

That is right. Most of the companies that we worked with were large public companies as well as large private investment firms in the US, but they typically had a global presence.

*Ms Forde:*

Were some of those companies in the oil and gas industry?

*Mr Mesch:*

Yes. During my tenure in their Dallas office, their Dallas and Houston offices worked very close together and they had a lot of large public oil and gas companies as well as private oil and gas companies. The oil and gas business has a lot of sectors that services touch upon, so

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we did work for exploration and production companies, mid-stream companies like pipeline companies, as well as companies that manufactured equipment that was used in the oil and gas business.

*Ms Forde:*

You would have done work for Exxon Mobil?

*Mr Mesch:*

That was one client that we did work with, yes.

*Ms Forde:*

Also Gomez Gas?

*Mr Mesch:*

That was also one client of the firm, yes.

*Ms Forde:*

When did you begin work with the current firm to which you are attached?

*Mr Mesch:*

I began work in 2008.

*Ms Forde:*

Are Sage Maritime and/or John Foster clients of your firm?

*Mr Mesch:*

Yes, Sage and/or John Foster have been clients of Mesch, McBride and Cooper for over three decades.

*Ms Forde:*

Do you know what work Sage and John Foster primarily engaged with?

*Mr Mesch:*

Sage was primarily engaged in the exploration of oil and gas, and it is one of several companies that John Foster has established in the past to explore for oil and gas. John is also involved in real estate businesses, information technology companies and other industries.

*Ms Forde:*

You said that Mr Foster is a client of your firm. Is it also correct to say that your firm has served him both in domestic and international oil and gas ventures for the past 30 years – three decades or thereabouts?

*Mr Mesch:*

That is right. John Foster has explored for oil and gas in other parts of the world. In addition to this venture in Spain, he has explored for oil and gas in Russia, Colombia and I think French Guyana. There are a few other countries as well, but I cannot recall them.

*Ms Forde:*

So his exploration pursuits are not limited just to Spain. As you say, he has explored in Russia, Colombia and French Guyana?

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*Mr Mesch:*

That is right. He also has a lot of interest in oil and gas activities in the United States as well.

*Ms Forde:*

Can you please describe what you have been requested to do in connection with this dispute between Saint Vincent and the Grenadines and the Kingdom of Spain?

*Mr Mesch:*

I have been asked to provide damages in three general areas, or assist in quantifying damages in three general areas. The first would be direct economic damages that have been suffered by the Applicant. Primarily, they would be out-of-pocket direct costs that have been paid with regard to this venture. The second would be to try to quantify the indirect economic damages or the lost opportunity costs associated with the loss of scientific data and what it could be used for or maybe sold for on the market. Finally, I have been asked to try to come up with some type of reasonable quantification for the damages that have been suffered by several people in respect of the violation of their human rights.

*Ms Forde:*

Let us be clear. You have been asked to quantify direct damages, damages associated with lost opportunity and to put a value on compensatory damages suffered as a result of human rights violations and the deprivation of property?

*Mr Mesch:*

Yes.

*Ms Forde:*

We will talk in more detail in a moment about specific information that you have received, but could you please describe generally the type of information that you have received as part of your testimony here, or leading up to your testimony here?

*Mr Mesch:*

I have looked at some of the documents that have been annexed for this Tribunal; I have reviewed some internal files at our firm for some of the financial affairs of Sage and/or John Foster with regards to this venture; I have looked at Sage's general books and records, its general ledgers, check registers, financial statements and tax returns. Also, Sage has a file in our firm because it was examined by the United States Internal Revenue Service for the years 2004 and 2005. The Internal Revenue Service is the administrative agency that ---

*Ms Forde:*

We will come to that in a little while. You are talking the language of accountancy, which sometimes is a little difficult to digest for the ordinary man, or woman for that matter, so I am going to take it little by little. You said that you have read the annexes and have had an opportunity to review the accounts etcetera of Sage. Would it be fair to say that you have also had an opportunity to look at the accounting and legal fees and expenses incurred in this matter?

*Mr Mesch:*

Yes. I have looked at costs that were incurred for 2004 through to 2006 that have been shown as an annex, as well as costs that have been incurred beyond that date.

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*Ms Forde:*

Did you do anything else?

*Mr Mesch:*

I have also talked to and interviewed Mario and Alba Avella, and I have read some of their statements as well.

*Ms Forde:*

You have said that your testimony involves three aspects of damages requested by Saint Vincent and the Grenadines in this matter. Let us deal with them one at a time, and remember your pace. You have mentioned direct economic damage. Can you speak a little about what types of cost are included?

*Mr Mesch:*

Some of the costs that had been incurred in this venture are obviously the cost of the vessel, improvements that have been made to the vessel, contractor fees, labour fees, insurance and other types of equipment that were on the vessel, as well as professional fees that have been involved in this ongoing dispute.

*Ms Forde:*

You have talked about labour costs. Do you know whether divers were paid by Sage?

*Mr Mesch:*

I believe there are records that show that people were paid.

*Ms Forde:*

Do you know or have you had any indication that the company Tupet also had divers on board the *Louisa*?

*Mr Mesch:*

I believe so.

*Ms Forde:*

Let us talk now a little about total costs. Could you give us a little background? For the benefit of the Tribunal, we are still in the area of direct economic damages. Can you give us a little insight into the total costs?

*Mr Mesch:*

When I went back and reviewed all the documents that I had available, I took the total costs that are enumerated in Annex 45 for the years 2004, 2005 and 2006, and all the out-of-pocket cash expenditure for those years totals \$2,629,593. In addition, I looked at the depreciation schedule to look at the actual original purchase cost of the boat, which appeared to be outside of the costs incurred shown in Annex 45, and those costs totalled approximately \$438,000. Some improvements were made to the boat and they were captured within Annex 45, but not the original purchase. Beyond 2006 through to the present, Sage and/or John Foster have incurred approximately \$1.7 million in professional fees and other costs regarding this venture.

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*Ms Forde:*

Can you assist us by giving a total?

*Mr Mesch:*

The grand total for all those categories and costs is \$4,775,144.

*Ms Forde:*

Have you or your firm had occasion to analyse these expenses prior to this matter and provide an opinion on their legitimacy?

*Mr Mesch:*

Yes. We prepared the business tax returns for Sage for 2004 through to 2006. It is posted in Annex 45. Some of those costs were within that return, and the Internal Revenue Service, which is the administrative agency in the United States that administers and enforces US tax law, also formed a field exam of Sage's tax returns for their 2004 and 2005 years.

*Ms Forde:*

With regard to that Internal Revenue Service exam, what exactly would that audit have involved?

*Mr Mesch:*

There are two general types of exam that I would say the Internal Revenue Service conducts. One is a very simple, what we call a mailbox exam. It is correspondence through letter. You do not have a case that is assigned to a particular person and no one physically comes out and talks to you or examines anything other than what is provided through mail correspondence. The more rigorous exam, like the one that Sage went through, is what we call a field exam, where an actual agent is assigned to the case. The agent comes out either to Sage's office or our office and personally inspects all the company's books and records. They have broad investigatory powers, so they can request copies of bank statements, look at check registers and financial statements, interview company officers, interview vendors, and they have a lot of power to discover information that may assist them in their exam.

*Ms Forde:*

Is it correct to say that the US authorities were provided with every opportunity to challenge the legitimacy of Sage's operations and the expenses incurred?

*Mr Mesch:*

That is right. When the field exam is conducted the agent has really two primary tasks. One is their ---

*Ms Forde:*

Can you slow down a little bit?

*Mr Mesch:*

I am sorry. The agent will have two primary tasks. One is to assess whether or not the dollar amounts that were reported were actual, real cash transactions that came from a source of money, that are not fake. The second is just to ask whether or not the expenses claimed are in fact legitimate business expenses and not personal in nature, because if they are personal in nature they would deny the deductions and indirectly increase John Foster's tax liability to the US Government.

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*Ms Forde:*

In terms of any penalties for misinformation to the US authorities when they are conducting such an investigation, do you have any knowledge of what the penalties might be?

*Mr Mesch:*

I have never lied to the Internal Revenue Service, and if I did I would probably be fearful of going to jail. I basically treat any information that goes to the IRS as under the penalty of perjury.

*Ms Forde:*

You said that Sage was subjected to such an investigation by the IRS. How was the audit concerning Sage's oil and gas expenditures concluded?

*Mr Mesch:*

In the original information request that the IRS provided, they specifically were looking for some of the records that I had reviewed. They also wanted documentation and verification of that Sage was in fact involved in an oil and gas exploration. In the end, the IRS concluded by issuing what we call a "no change" letter, which is the best result you could possibly get. The IRS come in, they examine your books and say, "We do not disagree with what you have found", which is an indirect way of saying that they agree with what we have found.

*Ms Forde:*

I will make no comment, but yes. What was the next category of damages that you looked at?

*Mr Mesch:*

The second category of damages that I looked at was lost opportunity damages that the Applicant suffered – lost opportunities in the way of lost scientific data, which if held, could be very valuable in either selling to another oil and gas company or using it as a means to partner into a well off the coast of Spain.

*Ms Forde:*

What can make this data valuable?

*Mr Mesch:*

If you have geological and geographical information that took a lot of money to find and pay for, you could use that data to then team up with another oil and gas company to show them where the oil and gas is, and you contribute the intellectual property and your other partner or the other firm would contribute cash and drilling know-how, and you would split the production that comes out of the well.

*Ms Forde:*

Is it therefore fair to say that it is expensive to compile the data?

*Mr Mesch:*

Yes, it is.

*Ms Forde:*

Would it also be reasonable and fair to say that technical or scientific data is the lifeblood of oil and gas companies?

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*Mr Mesch:*

Yes.

*Ms Forde:*

Basically, without that, they cannot operate?

*Mr Mesch:*

That is right.

*Ms Forde:*

We are still in the indirect damages stage. What is the amount, and could you explain to the Tribunal how you came to arrive at that amount?

*Mr Mesch:*

Lost opportunity damages can be difficult to quantify, so in my discussions with our other oil and gas expert, Mark McAfee, and with my general knowledge of dealing with oil and gas companies both at Ernst and Young and with my current employer, I have seen deals where you would take the scientific data, partner with another firm and then take a profit split from what is produced out of the well, and that can range anywhere between the lower end of the range, maybe 10 per cent of the production of the well, upwards to half or maybe more of the production of the well.

*Ms Forde:*

We are looking at a split in a range between 10 and 50 per cent?

*Mr Mesch:*

Yes.

*Ms Forde:*

In this particular case, could you give us actual dollar amounts for this range?

*Mr Mesch:*

It is difficult to value, but a simple way of thinking of it would be to take the costs of drilling a shallow water well off the coast of Spain, take that dollar amount and then apply the percentages of interest that you could potentially obtain, and that would be the dollar amount of lost opportunities that you ---

*The President:*

Ms Forde, may I interrupt you? We have reached 11.30, so at this stage the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at noon. Before adjourning, on behalf of the interpreters and the verbatim reporters, I would like to thank you very much for your co-operation, which has made their work much easier.

*Ms Forde:*

I am obliged, Mr President.

*(Break)*

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*The President:*

We will continue the hearing.

Ms Forde, you have the floor.

*Ms Forde:*

Without, again, trying to overstep on the President's domain I wish to remind you that you are still covered by the oath that you took earlier. Mr Mesch, before the break we had been discussing various categories of damages and you had started with the category, as you term it, of indirect damages of lost economic opportunities. I am going to ask you for consistency's sake – it is a relatively short category as I understand it – to start with that particular category, with the Tribunal's permission. Thank you, Mr President. You said that this category touched on concerns as related to data and data compilation.

*Mr Mesch:*

Yes.

*Ms Forde:*

And the future use of such data.

*Mr Mesch:*

Yes.

*Ms Forde:*

Including the possible sale of that data.

*Mr Mesch:*

Yes.

*Ms Forde:*

This is where we would have just about left off. Can you give us the amounts in terms of dollar value perhaps, and indicate to the Tribunal how you would have arrived at these calculations as they relate to this specific case?

*Mr Mesch:*

I would actually give a range of a value and not a specific dollar amount. The range I would give is anywhere between, I would say, US \$3.5 million upwards of maybe \$25 million; and how I arrived at that figure was as we discussed before, that in an oil and gas venture like this you could use scientific data to buy in to a producing well or a well to be produced and obtain a 10% to 50% interest in that well. My understanding of how much it costs to drill a shallow water well such as that off the coast of Spain could cost anywhere between US \$35 million and US \$50 million; so 10% of the 35 million would be at the lower end of the range, and then a \$50 million well would be perhaps at the high end of the range.

*Ms Forde:*

Could you repeat for me the actual range of figures, just for my benefit and for the benefit of the Tribunal and others here?

*Mr Mesch:*

Sure. The actual range I would give would be between US \$3.5 million to US \$25 million.

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*Ms Forde:*

Between US \$3.5 million and US \$25 million.

*Mr Mesch:*

Yes.

*Ms Forde:*

I invite you to turn attention to the third category of damages. I believe that was more along the line of compensatory damages.

*Mr Mesch:*

Yes.

*Ms Forde:*

For the purposes of restoration, it would be fair to say?

*Mr Mesch:*

Yes. The third category of reparations or restitution type damages would be looking at the violation of human rights that had occurred for the Avellas and the two Hungarian crewmen. Human rights violations is a very difficult thing to try and put a dollar amount on. It is very difficult to put a dollar amount on someone's liberty or life or incarceration. During my interviews with Mario, he told me that the person ---

*Ms Forde:*

I am sorry, when you say "Mario" you mean Mario Avella?

*Mr Mesch:*

Yes, excuse me. During my conversations with him he told me that a marine engineer of his skill set with his own tools and equipment could command a premium of €1,000 a day as a wage for doing his line of work. So in coming up with some type of compensatory damages for Mario, I used that as a starting point or a guide post for coming up with compensatory damages.

*Ms Forde:*

€1,000.

*Mr Mesch:*

€1,000 per day. If you take that as the starting point and you look at the fact that he was incarcerated for nine months, unable to work and provide for himself, and then he was without a passport or the ability to work for an additional 18 months, that is a total of 27 months without work; and if you take €1,000 a day and you assume 30 days in a month for those 27 months, that is 810 days times €1,000, which is €810,000.

*Ms Forde:*

In relation to Mario Avella we are thinking of compensatory damages in the sum of €810,000.

*Mr Mesch:*

Yes, to put him back in the position that he would have been had he not had his liberty restricted and had the ability to work and provide for himself.

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*Ms Forde:*

To put him in the position, as it were, prior to any human rights violations.

*Mr Mesch:*

Yes.

*Ms Forde:*

Have you done any calculations as it relates to Alba Avella?

*Mr Mesch:*

For Alba it is again difficult to come up with a figure or a dollar amount for someone's freedom, so I would actually put a dollar figure for Alba Avella the same as her father. She described this experience to me as a very traumatic, very lonely experience, and then she had to drop out of school. If that had happened to me during my educational experience I would have had a very different outcome. So I think €1,000 for the restriction on her freedom is reasonable. It is my understanding from her that she was incarcerated for five days and she had her passport taken and the inability to work for approximately nine months; so again assuming an average of 30 days per month, that takes her to 275 days. Times €1,000 a day is €275,000.

*Ms Forde:*

So for Alba Avella we are looking at compensation in the range of €275,000.

*Mr Mesch:*

Yes. I might also add that she told me that she had been deprived of— or it was taken or seized, her laptop and her Nikon camera. I just presume that perhaps maybe €1,500 could replace that property at today's retail price.

*Ms Forde:*

So by way of a total, inclusive of the new camera and the laptop what would you say is the total compensatory damages for Alba?

*Mr Mesch:*

€276,500.

*Ms Forde:*

If I can take you to the Hungarian crewmen, can you assist us?

*Mr Mesch:*

Again, just like Alba and Mario, it is very difficult to value someone's restriction on liberty or loss of liberty, so it is my understanding that the two Hungarian crewmen were also incarcerated and were deprived of their passports for the same amount of time as Alba. I would use the exact same guide post as we used for Mario, at €1,000 a day for them as well. So using that same line of reasoning, you would come out to 275 days of lost or restricted liberty, and at €1,000 that puts each Hungarian crewman at €275,000.

*Ms Forde:*

Each Hungarian crewman at €275,000

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*Mr Mesch:*

Yes.

*Ms Forde:*

What about one of the beneficial owners of the vessel, John Foster?

*Mr Mesch:*

John is a very difficult person to try to put any type of damages on. It is my understanding that he has decided to not travel to Europe because of this ongoing dispute with Spain, and he has basically just been in the United States, even though he does business abroad. I would say it is a limited restriction on his liberty because he still, obviously, resides in the United States.

*Ms Forde:*

You said that he does business abroad.

*Mr Mesch:*

Yes.

*Ms Forde:*

You would have known him and his company for a number of years. In his regular business transactions did that entail his travel to European countries?

*Mr Mesch:*

I don't know the details of his day-to-day travel schedule but I do know that he does do business abroad. I can only imagine that it would interfere with that. I would actually suggest really just a token amount for John Foster, a type of recognition that liberty has been restricted for him. Maybe if you use the same logic as Mario, just one day at €1,000, so a total of just €1,000 for Mr Foster.

*Ms Forde:*

€1,000 for Mr Foster.

*Mr Mesch:*

Yes.

*Ms Forde:*

Under your first category, your first heading of direct damages, I would have asked a question as it particularly related to divers. I ask this question as it is a question asked directly by the Tribunal, and from your review of the account records, as it were, for Sage, you say that there were divers paid by Sage.

*Mr Mesch:*

Yes.

*Ms Forde:*

You are also aware that there were other divers on the *Louisa* who were employed by the Tupet company.

*Mr Mesch:*

It is my understanding that that is correct.

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*Ms Forde:*

And of course it would be remiss of me, Mr Mesch, if I did not ask for your opinion as it relates to compensation for the sovereign State of Saint Vincent and the Grenadines. Can you assist us in giving what you in your professional capacity would term “reasonable” compensation?

*Mr Mesch:*

Sure. In going through really all three categories of damages, it is my understanding under international law and in parts of at least European law that it is different than the United States in that it only looks to compensatory damages only; there is no punitive nature involved like we have in the United States. So here we are trying to come up with some type of restitutorial damages. I would think that a dollar figure that could put Saint Vincent whole as far as its out-of-pocket expenses for travel, professional fees and other matters to bring this case forth would be a reasonable compensatory damage. In light of all of the professional fees that Sage has incurred, I think that a 250,000 euro or dollar figure is well within a range of something that is reasonable for Saint Vincent.

*Ms Forde:*

€250,000 would be reasonable compensatory damage for the sovereign State of Saint Vincent and the Grenadines?

*Mr Mesch:*

Yes.

*Ms Forde:*

Thank you very much, Mr Mesch.

Mr President, those are the questions that I have for Mr Mesch.

*The President:*

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 cross-examine the expert.

*Mme Escobar Hernández :*

C'est mon collègue, M. Aznar Gómez, qui va poser les questions.

*The President:*

Mr Aznar, you have the floor.

MR FREDERICK PALMER MESCH, CROSS-EXAMINED BY MR AZNAR GÓMEZ  
COUNSEL OF SPAIN  
[ITLOS/PV.12/C18/5/Rev.1, p. 31–35]

*Mr Aznar Gómez:*

Good morning, Mr Mesch. We have a problem: I have a terrible accent; you have, shall we say, a complicated accent; and we are talking about accountancy! So let us talk very smoothly and slowly in order not only to facilitate the task of the interpreters but also my understanding

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of all this complicated stuff. Could you please tell me, how many times you have quantified damages to vessels, how many vessels?

*Mr Mesch:*

I have testified in other cases before where damages have been involved but I can't say how many.

*Mr Aznar Gómez:*

One time?

*Mr Mesch:*

No.

*Mr Aznar Gómez:*

Do you remember one previous case?

*Mr Mesch:*

Yes, I remember at least one other time, yes.

*Mr Aznar Gómez:*

The only documents given by Saint Vincent and the Grenadines with regard to the possible costs related to the immobilization of the *Louisa* are included as annex 45 in the Applicant's Memorial and Reply. They are euphemistically entitled "Damage Evidence". Apart from the fact that the term "evidence" before an international tribunal cannot be used simply referring to several disordered transactions lifted from unidentified accounts or references without any official stamp or seal, these lists are alleged transaction lists of 2004, 2005 and 2006 – this is correct?

*Mr Mesch:*

Yes, this reflects financial transactions that occurred during those years.

*Mr Aznar Gómez:*

The *Louisa* was immobilized on 1 February 2006. Could you explain how the data of 2004, 2005 and that of January 2006 may serve as any kind of serious evidence of alleged damage caused by Spain to a vessel operated by Sage?

*Mr Mesch:*

Well, if the data was seized by Spain, then that data would no longer be available for the Applicant to use.

*Mr Aznar Gómez:*

So you base the damages caused by my country to an American company on data when the vessel was operated by this American company.

*Mr Mesch:*

This would only be in reference to the second prong of indirect damages. The direct damages are the actual funds that were expensed during the course of this venture.

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*Mr Aznar Gómez:*

Then let us go to these indirect damages. The previous witness, Mr McAfee, in his affidavit of 19 September 2007, reproduced annex 40 of the Applicant's Memorial and Reply. It is said: "In 2004 and 2005 I reviewed data produced by Sage in the Bay of Cádiz and determined that it demonstrated the absolute accuracy of my earlier conclusions about the presence of hydrocarbons in the area." Therefore the valuable data had already been sent to the United States and technically assessed by Mr McAfee by 2005. What lost opportunity damages are we then talking about?

*Mr Mesch:*

First of all, I am not a petroleum engineer or a geologist. I do not in my day-to-day duties analyse technical oil and gas materials. My calculations for the interim damages were based on what a typical oil and gas venture may produce. So if you have valuable scientific data, this is the type of transaction that one could enter into. It is really just offered up as a range showing that this type of data can be valuable and it is used by businessmen to partner and venture with other oil and gas companies.

*Mr Aznar Gómez:*

Before asking you a question on what you have just said there is another clarification. All these lost opportunity damages that you evaluate are attributed to the vessel or to the American company, or to Sage?

*Mr Mesch:*

It is really Sage as a whole.

*Mr Aznar Gómez:*

Sage as a whole, not to the vessel.

*Mr Mesch:*

But scientific data that the company would have an interest in that would have been on board the vessel.

*Mr Aznar Gómez:*

So we are talking about damages to a company. You have evaluated a percentage of future oil production and this link with what you have just said, answering my previous question. A percentage of future oil production as the possible lost opportunity damage.

*Mr Mesch:*

Not exactly. The figures that I have come up with are just based on a proxy for the cost that would be incurred to actually develop a well. It does not take into account future profits that would be earned from the well.

*Mr Aznar Gómez:*

But keep in mind a possible future commercial exploitation of this.

*Mr Mesch:*

Yes.

*Mr Aznar Gómez:*

But how you were able to do this without any oil production at all?

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*Mr Mesch:*

That is right, you do not need oil production for these calculations; this is based on the costs that it would take in order to drill and start the production process.

*Mr Aznar Gómez:*

Yes, but if there is no possibility to drill how can you evaluate this?

*Mr Mesch:*

I am assuming there is a possibility to drill.

*Mr Aznar Gómez:*

You are assuming that there will be a drilling in Spanish waters?

*Mr Mesch:*

Yes.

*Mr Aznar Gómez:*

Would you agree that if that oil production is zero because Sage has no possibility to drill, the percentage of zero would be zero?

*Mr Mesch:*

Yes, if they have no ability to drill it would be zero, but if they had the ability to drill the figures would go far higher.

*Mr Aznar Gómez:*

Do you know the permits that were used by Sage?

*Mr Mesch:*

I do not know.

*Mr Aznar Gómez:*

How can you evaluate as lost opportunity damage if these permits were only for a cartographic map and environmental impact and absolutely not for oil and gas prospects?

*Mr Mesch:*

Again, I am not a legal expert on permits and the applications to drill for oil off the coast of Spain – I am sorry.

*Mr Aznar Gómez:*

Correct me if I am wrong: if you are quantifying damages, and particularly lost opportunity damages that you have said – I think we can agree to evaluate lost opportunity damages is quite complicated.

*Mr Mesch:*

Yes.

*Mr Aznar Gómez:*

If these lost opportunity damages are supposed to be based on data gathered under an environmental permit and not an oil and gas prospect permit, how can you evaluate this?

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*Mr Mesch:*

I am assuming that you can get an oil and gas permit and drill there. This is based on the assumption that a well could legally be drilled.

*Mr Aznar Gómez:*

Mr Mesch, in Spain, if you buy a car you are obliged to pass several and timely technical inspections. I guess you have something similar in the US.

*Mr Mesch:*

Yes.

*Mr Aznar Gómez:*

If you decided to sell your car without this inspection the car devaluates significantly, does it not?

*Mr Mesch:*

Sure, sure, yes.

*Mr Aznar Gómez:*

You have proposed an economic evaluation of the vessel. Have you visited or asked to visit the *Louisa*?

*Mr Mesch:*

I have not but I have seen photographs of the boat before its departure and I have seen photographs of it that were a couple of years old, and it is clear from just a plain man's eye the deterioration.

*Mr Aznar Gómez:*

But you have never been on board the *Louisa*?

*Mr Mesch:*

No.

*Mr Aznar Gómez:*

Have you seen annex 2 of Saint Vincent and the Grenadines' Memorial? How did you assess the value of the vessel as an accountant and its alleged deterioration, keeping in mind that, first, the last inspection by the flag State was carried out in 2004 and that the last inspection of the port State control was carried out in 2005, that is before the immobilization; and that the official certificates of seaworthiness of the vessel had expired by March 2005, that is before the immobilization. Let me pose this question another way. Almost one year before its immobilization the *Louisa* had no classification at all. It had not passed its technical inspection, like cars. It had no classification at all with any official classification agency. Have you considered that this considerably devalues the value of the vessel?

*Mr Mesch:*

No, I did not consider that at all. The types of costs in the first category were pure dollar outlays that Sage had made on this vessel. I did not take into account any type of fair market value or sales precedents to look at what was the vessel purchased at. I simply looked at what

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it cost to purchase the vessel and the costs that went into the vessel, and then I presumed it has only zero scrap value now, and that is the difference between the damages.

*Mr Aznar Gómez:*

Unclassed, it has no accounting value.

*Mr Mesch:*

Whether it is classed or not, whether something has a licence or not, all I know is that money was paid for the vessel and it is now worth virtually nothing.

*Mr Aznar Gómez:*

Yes, but I can pay a thousand dollars for a vessel and if I do not take the utmost care, passing all the technical inspections and so on, and suddenly I want to sell my vessel, the buyer of the vessel will ask me: "Are all the papers for the vessel correct? Has it passed all the inspections?" – and I say: "No." then in that case the price will be lower. Can you agree with me in general terms?

*Mr Mesch:*

I would agree, but I would find it difficult to believe that someone would pay expenses for a vehicle that would be impounded if they are never going to get it back.

*Mr Aznar Gómez:*

Mr Mesch, I began my intervention with a joke but now I am very serious, because at the very end you were talking about human rights. Before asking the President of the Tribunal to give the floor to the Agent of Spain, let me just pose you some very, very simple questions. Have you, in your professional life, had any experience evaluating human rights damages?

*Mr Mesch:*

Fortunately, I have never had to do that before.

*Mr Aznar Gómez:*

Are you familiar with the evaluation of damages to human rights in international adjudication: the rules, the standards, the evidence used?

*Mr Mesch:*

In law school we talk about compensatory-type damages or punitive damages, to the loss of liberty or life, in the United States.

*Mr Aznar Gómez:*

You talk about loss of labour opportunity, only that.

*Mr Mesch:*

Yes, because it is very difficult to put a value on a person's freedom.

*Mr Aznar Gómez:*

We are talking about human rights.

*Mr Mesch:*

That is right.

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*Mr Aznar Gómez:*

This is very serious. Just a last question, not on human rights, before asking the President to give the floor to the Agent of Spain. You have said that Sage paid all the attorneys' fees for this case.

*Mr Mesch:*

They did not pay all the attorneys' fees. Saint Vincent had their own costs.

*Mr Aznar Gómez:*

But Sage paid you, for example, to be here.

*Mr Mesch:*

Yes.

*Mr Aznar Gómez:*

Thank you very much.

Mr President, could you please give the floor to the Agent of Spain?

*The President:*

Yes.

Ms Hernández, you have the floor.

M. FREDERICK PALMER MESCH, CONTRE-INTERROGÉ PAR MME ESCOBAR HERNÁNDEZ (SUITE)  
AGENT DE L'ESPAGNE  
[ITLOS/PV.12/C18/5/Rev.1, p. 36–40; TIDM/PV.12/A18/5/Rev.1, p. 40–45]

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Excusez-moi mais je prends mon temps pour mettre en place le système d'interprétation. Excusez-moi pour la perte de temps.

(*S'adresse à l'expert*) J'aimerais dire que, à ce stade, mon problème n'est pas mon mauvais accent en anglais. Mon problème et votre problème, c'est que moi-même je parle français et vous parlez anglais. Cela oblige à une traduction, à une interprétation pour que vous soyez sûr de ce que je vais vous dire, du contenu des questions, etc. Je vais donc parler tout doucement à l'intention des interprètes. Je vous prie, Monsieur, de prendre votre temps, de ne pas vous presser pour bien comprendre afin de pouvoir répondre aux questions.

Puis-je commencer, Monsieur le Président ?

*The President:*

I would ask you, Mr Mesch, to speak even more slowly, because your statement will be translated into French and Ms Escobar Hernández's French will be translated into English, so we need more time. Thank you for your cooperation.

*Mme Escobar Hernández :*

Bonjour, Monsieur Mesch, et merci d'être venu ici pour prêter témoignage. Comme mon collègue le professeur Aznar Gómez vient de le dire, quand on parle des droits de l'homme, on parle de quelque chose de très important. On parle de quelque chose de très important parce que les droits de l'homme sont à la base de la dignité humaine. Sans droits de l'homme, il n'y a pas de dignité humaine. Sans droits de l'homme, il n'y a pas de système politique

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démocratique, il n'y a pas de vrai *rule of law* [état de droit], il n'y a pas de règles de vie entre tous, qui pourraient être considérées comme des règles à la hauteur de l'homme. Pour finir, le droit est fait pour l'homme. Je voulais faire cette remarque à ce stade car j'aimerais vous poser certaines questions concrètes. Puis-je vous poser certaines questions sur une réponse que vous venez de donner à mon collègue, le P<sup>r</sup> Aznar Gómez, en disant que faire une évaluation du dommage subi par une personne dans le domaine des droits de l'homme est une chose très difficile à faire. En effet, c'est tout à fait difficile à faire, mais il y a des mécanismes pour le faire. Il y a des mécanismes, il y a des expertises, il y a des pratiques, il y a des jurisprudences.

A première vue, Monsieur, à l'égard de M. Mario Avella, vous avez dit que vous aviez fait un calcul du dommage, de la réparation à laquelle, en principe, il aurait droit, en tenant compte d'une déclaration unilatérale qui a été faite par l'intéressé lui-même. M. Avella vous a dit : « Dans des conditions normales, avec les instruments dont j'ai la propriété, je pourrais obtenir un salaire par jour autour de... » Je ne me souviens pas si c'était 1 000 euros ou 1 000 dollars, mais c'est égal. Peut-être 1 000 euros, peut-être 1 000 dollars, ce n'est pas important à ce stade. Vous avez basé toute votre évaluation technique, professionnelle, sur une déclaration unilatérale du propre intéressé qui vous dit : « Je pourrais gagner 1 000 dollars. » Et si jamais il vous avait dit : « Ecoutez, je pourrais gagner 5 000 dollars » ou « je pourrais gagner 20 000 dollars », qu'auriez-vous fait ? Est-ce qu'il n'y a pas, dans votre cadre de travail, des données de référence pour le salaire d'une personne qui réalise un certain type de travail dans certaines conditions ? Bien sûr pas une quantité, vous avez tout à fait raison ; cela doit être un minimum et un maximum. Mais n'y a-t-il pas de données ?

*Mr Mesch:*

The numbers that I quantified were simply using his statement as a guide. It is, like I said, difficult, if not impossible, to come up with a value on someone's liberty, so all I attempted to do was try to use the logic and the reason of putting a man back into the position that he would have been in had he had his freedom and his tools to work for himself.

*Mme Escobar Hernández :*

Merci, mais ce que vous avez dit, c'est que vous avez fait le calcul en tenant compte de ce que, s'il avait été en liberté absolue, il aurait pu gagner 1 000 dollars par jour. C'est à peu près ce que vous avez dit ?

*Mr Mesch:*

Yes, that's the reasoning.

*Mme Escobar Hernández :*

Je comprends votre raisonnement dans une certaine partie ou dans une certaine direction. Mais n'y a-t-il pas d'autres moyens pour déterminer d'une façon plus objective la valeur du dommage, du manque à gagner de M. Avella, par exemple ? Par exemple, le salaire qu'il recevait de Sage.

*Mr Mesch:*

Sure, you could use customary wages due, but, again, this was simply used as a guide. Are you going to use the same standard to apply for time incarcerated as the same as time that you are without a passport and unable to work? Maybe it is worse to be free in a country but unable to work than incarcerated; at least you are provided with food and shelter. I simply just took his word on it and said, "That sounds reasonable" and applied his concept of \$1,000 a day by the number of days that he was unable to work as a free man, and of course, there

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probably are other ways to calculate all sorts of damages, but this is simply one means that I find reasonable. Of course, it is up to the Tribunal to determine what they find reasonable as to the violation of human rights.

*Mme Escobar Hernández :*

Vous avez utilisé les mêmes paramètres pour déterminer le manque à gagner du dommage subi par les deux membres de l'équipage de nationalité hongroise. Est-ce cela ? Ai-je bien compris ?

*Mr Mesch:*

Yes.

*Mme Escobar Hernández :*

Les deux membres de nationalité hongroise exerçaient-ils le même type d'activité, le même genre d'activité que M. Avella ?

*Mr Mesch:*

I do not know.

*Mme Escobar Hernández :*

Est-ce qu'ils auraient eu la même opportunité que pourrait avoir eue M. Avella de trouver un travail similaire avec un salaire similaire s'ils avaient été en liberté ? Je ne sais pas si je m'exprime bien.

*Mr Mesch:*

I believe I understand you but I do not know.

*Mme Escobar Hernández :*

Alors, vous n'avez pas tenu compte de tous ces éléments dans le processus d'évaluation des dommages, de la détermination du manque à gagner ?

*Mr Mesch:*

No, I did not.

*Mme Escobar Hernández :*

Alors, pas de proportionnalité. A l'égard de Mlle Avella, pourriez-vous répéter, parce que je n'ai pas bien compris, votre discours lorsque vous avez indiqué comment vous avez effectué l'évaluation du dommage d'Alba Avella. Pouvez-vous le répéter, s'il vous plaît ?

*Mr Mesch:*

I simply used the same reasoning as Mario, because this is so difficult to quantify. I looked at Mario's statement and I looked at the statements that Alba made to me and thought there were a lot of factors that come in. There are age differences, one was working, one was in university. I simply thought that \$1,000 a day sounded like a reasonable proxy for Mario and thought that the same could apply to the daughter. If this had happened to me, I would be asking for much more.

*Mme Escobar Hernández :*

A l'égard de M. Foster, pendant votre déclaration, vous avez dit que M. Foster, qui était inculpé en Espagne, avait une certaine limitation de mouvements. Vous avez dit – je parle

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sous l'autorité du Président car nous n'avons pas encore le procès-verbal – que la difficulté de liberté n'était pas tellement grave car il vivait habituellement aux Etats-Unis. Répondant à la question qui vous a été posée par la co-agent de Saint-Vincent-et-les Grenadines, Mme Forde, vous avez affirmé qu'il voyageait, qu'il devait quitter le pays, etc. Est-ce vrai ? Pouvez-vous confirmer ce que je viens de dire ?

*Mr Mesch:*

I said that he had the ability to travel within the United States, and in factoring John Foster's damages, he is in a completely different category, because he was able to work for himself in the United States. He was not in the United States without any form of identity or ability to provide for himself. So I believe it is very difficult to compare the two. That is why I only put a nominal or token-gesture amount for the restriction on John Foster's liberty.

*Mme Escobar Hernández :*

Tenant compte de cela, vous considérez que 1 000 euros est un chiffre suffisant pour répondre aux dommages de M. Foster. Est-ce cela ?

*Mr Mesch:*

Absolutely not, but in order to calculate a damage for John Foster's inability to travel, you would probably be venturing into punitive damages territory, so I simply thought it would be a very difficult, if not impossible, task for John Foster, and that is why I came up with just the nominal or token payment amount.

*Mme Escobar Hernández :*

Il semble que les 1 000 dollars soient, à ce stade, un chiffre magique ! A l'égard de Saint-Vincent-et-les Grenadines, si je ne me trompe pas, vous dites que, s'agissant des dommages auxquels aurait droit Saint-Vincent-et-les Grenadines, c'est-à-dire la Partie demanderesse à cette procédure, qu'il faudrait inclure les frais ou les coûts professionnels encourus par l'entreprise Sage. C'est cela ? Ma compréhension est-elle bonne ?

*Mr Mesch:*

Some of the professional expenses are included in my damages calculation in my first category of direct damages, yes.

*Mme Escobar Hernández :*

Quels types de frais ? A quels types de coûts la société Sage aurait-elle été confrontée et dont il faudrait tenir compte pour déterminer les dommages de Saint-Vincent-et-les Grenadines ?

*Mr Mesch:*

Some of the professional fees would be legal expenses for US attorneys and legal expenses for Spanish attorneys, to try to resolve this case prior to coming to this Tribunal.

*Mme Escobar Hernández :*

Alors, puis-je déduire de ce que vous venez de dire que c'est Sage qui paye les avocats américains et les avocats espagnols qui représentent Saint-Vincent-et-les Grenadines devant ce Tribunal ?

*Mr Mesch:*

Not all of them, no.

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*Mme Escobar Hernández :*  
Lesquels ?

*Mr Mesch:*  
I believe that Patton Boggs is being paid for by Sage but Saint Vincent is here on their own accord and Sage is not paying for any of their expenses whatsoever.

*Mme Escobar Hernández :*  
Alors, y a-t-il des frais professionnels des avocats présents devant ce Tribunal qui sont payés par Sage ou non ?

*Mr Mesch:*  
No, because Saint Vincent is here on their own accord, so the country of Saint Vincent, as far as I know, is paying their own way here. I have not seen any expenses for them.

*Mme Escobar Hernández :*  
Alors, quels sont les frais professionnels dont a dû répondre Sage et qui à ce moment devront être attribués à Saint-Vincent-et-les Grenadines pour demander des dommages-intérêts ?

*Mr Mesch:*  
They would be legal fees for the American attorneys and for the Spanish attorneys that represented them to try to resolve this case prior to coming to this Tribunal, as part of my damages in the first direct damages category.

*Mme Escobar Hernández :*  
Avant la saisine du Tribunal ? Est-ce bien cela ?

*Mr Mesch:*  
Yes.

*Mme Escobar Hernández :*  
Merci beaucoup. Pour finir, s'agissant de Saint-Vincent-et-les Grenadines, Etat absolument souverain et indépendant – je le dis de façon tout à fait claire : un Etat indépendant et souverain tel que Saint-Vincent-et-les Grenadines –, comment avez-vous évalué le dommage porté à la dignité et à la souveraineté de l'Etat – je comprends très bien parce que je me trouve dans une position très semblable à la sienne – auxquelles a fait référence à juste titre la co-agent de Saint-Vincent-et-les Grenadines, Mme Forde, dans sa première intervention jeudi dernier ?

*Mr Mesch:*  
I did not assess any damages to the dignity or the sovereignty of Saint Vincent. I simply tried to come up with an approximate figure to try to compensate Saint Vincent for its out-of-pocket legal expenses, time, and travel expenses that are incurred with this Tribunal. There is no punitive or damages beyond trying to put them back in the same position they would have been but for this Tribunal.

*Mme Escobar Hernández :*  
Merci. Je ne comprends pas la signification des mots « dommages-sanctions » à laquelle vous faites référence. En tout cas, j'aimerais rappeler votre témoignage préalable. Vous avez dit que pour l'évaluation des dommages qui font partie de la requête de Saint-Vincent-et-les

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Grenadines, vous avez évalué les dommages directs subis par le demandeur. Le demandeur, est Saint-Vincent-et-les Grenadines, c'est tout. Deuxièmement, les dommages directs et le manque à gagner correspondent à la perte des données scientifiques qui pourraient avoir été vendues sur le marché pour obtenir des bénéfices économiques. Troisièmement, les dommages subis par toute personne – vous avez mentionné lesquelles, je ne vais pas vous faire perdre du temps – au titre de la violation des droits de l'homme. C'est bien ce que vous avez dit ?

*Mr Mesch:*

My only comment to that statement would be that there is no punitive nature in any of these damages that I have calculated at all. They are all an attempt to provide direct economic damages only.

*Mme Escobar Hernández :*

Des dommages économiques directs. Vous n'avez évalué que des dommages économiques directs. C'est cela ?

*Mr Mesch:*

Yes.

*Mme Escobar Hernández :*

Comment avez-vous évalué les dommages dans le domaine des droits de l'homme, les dommages dans ce domaine étant plutôt des dommages sur le plan moral, des dommages qui font référence à la dignité même de la personne et au respect de ses propres droits ? Comment avez-vous évalué cela ? Si vous n'avez évalué que les dommages économiques directs, comment avez-vous procédé ?

*Mr Mesch:*

I assessed it based on using lost wages or the lost ability to earn a living as a proxy of direct damages for a violation of human rights. That is how I considered it a direct damage.

*Mme Escobar Hernández :*

Merci beaucoup. Je comprends très bien ce que vous avez fait. Merci de m'avoir rappelé comment vous avez procédé. En tout cas, je m'étonne que quand la Partie requérante essaie de présenter devant cet honorable Tribunal que nous sommes face à une très grave violation des droits de l'homme, elle ne tienne compte d'aucun élément relatif au droit international des droits de l'homme, droit qui a connu un très grand développement, à l'égard duquel il y a une très importante jurisprudence claire sur la façon de déterminer et d'identifier les dommages directs. Vous avez parlé, bien sûr, des dommages qui, le cas échéant, pourraient avoir été en relation avec une violation des droits de l'homme. Mais ce sont des dommages directs. S'il y avait un dommage direct en matière de droits de l'homme, le dommage serait ce que le co-agent de Saint-Vincent-et-les Grenadines a mentionné le premier jour et ce que le P<sup>f</sup> Nordquist a mentionné hier, ce qui pour l'Espagne n'est pas admissible. Ils ont dit qu'il y avait violation des droits de l'homme car il y avait déni de justice.

Merci, Monsieur le Président, je n'ai pas d'autres questions à poser.

*The President:*

Thank you, Ms Escobar Hernández.

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As an expert who is cross-examined by the other Party may be re-examined by the Party who had called the expert, I ask the Co-Agent of Saint Vincent and the Grenadines whether the Applicant wishes to re-examine the expert.

*Ms Forde:*

The Applicant does not wish to re-examine the expert, Mr President.

*The President:*

Thank you very much.

The examination of the expert is finished. Mr Mesch, you may withdraw. Thank you very much for your testimony.

*Mr Mesch:*

Thank you.

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STATEMENT OF MS FORDE  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/5/Rev.1, p. 41]

*Ms Forde:*

Mr President, if I might, that brings the case for the Applicant effectively to a close at this time. Further, with the Tribunal's indulgence, I would like to indicate, as I had previously done to you, Mr President, that today is the last day that I will appear in this matter before this honourable Tribunal. I have family and other professional matters that require my attendance in Saint Vincent and the Grenadines. I wish to take this opportunity, with your permission, to thank the Tribunal for hearing me, and also to express on behalf of my country our pleasure, once again, to be here. I also hope that the remainder of the proceedings will continue to flow smoothly as you then go off into your deliberations. Thank you again, Mr President and Members of the Tribunal. I am truly obliged.

*The President:*

Thank you very much. We were informed that you had other obligations, and I take this opportunity to thank you very much for your appearance at this Tribunal. We will miss you very much. Have a nice trip.

*Ms Forde:*

Thank you, Mr President.

*The President:*

Thank you. Mr Weiland, this means that the first round of argument by Saint Vincent and the Grenadines is concluded.

We will meet again on Monday, 8 October 2012 at 10 a.m. to hear the first round of oral arguments of Spain. Have a good weekend. The sitting is now closed.

*(The sitting closes at 1 p.m.)*

8 October 2012, a.m.

**PUBLIC SITTING HELD ON 8 OCTOBER 2012, 10.00 A.M.**

**Tribunal**

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

**Saint Vincent and the Grenadines is represented by:**

Mr S. Cass Weiland, Esq., Patton Boggs LLP, Dallas, Texas, USA,

*as Co-Agents, Counsel and Advocates;*

*and*

Mr Robert A. Hawkins, Esq., Patton Boggs LLP, Dallas, Texas, USA,  
Mr William H. Weiland, Esq., Houston, Texas, USA,

*as Counsel and Advocates;*

Mr Myron H. Nordquist, Esq., Center for Oceans Law and Policy, University of Virginia,  
School of Law, Charlottesville, Virginia, USA,

*as Advocate;*

Ms Dharshini Bandara, Esq., Fleet Hamburg LLP, Hamburg, Germany,

*as Counsel.*

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

NAVIRE « LOUISA »

**AUDIENCE PUBLIQUE TENUE LE 8 OCTOBRE 2012, 10 HEURES**

**Tribunal**

*Présents* : M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

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

M. S. Cass Weiland, Patton Boggs LLP, Dallas, Texas, Etats-Unis,

*comme co-agents, conseils et avocats ;*

*et*

M. Robert A. Hawkins, Patton Boggs LLP, Dallas, Texas, Etats-Unis,

M. William H. Weiland, Houston, Texas, Etats-Unis,

*comme conseils et avocats ;*

M. Myron H. Nordquist, Center for Oceans Law and Policy, Université de Virginie, Institut de droit, Charlottesville, Virginie, Etats-Unis,

*comme avocat ;*

Mme Dharshini Bandara, Fleet Hamburg LLP, Hambourg, Allemagne,

*comme conseil.*

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*Le Président :*

Bonjour Mesdames et Messieurs. J'espère que vous avez passé un agréable week-end.

Aujourd'hui, le Royaume d'Espagne va commencer son premier tour de plaidoiries dans l'affaire concernant le navire « Louisa ».

Avant de commencer, je souhaite informer les Parties que l'Espagne a utilisé 3 heures 23 minutes de temps de parole la semaine dernière, au cours du contre-interrogatoire des témoins et experts présentés par Saint-Vincent-et-les Grenadines. Ce temps de parole est déduit du temps alloué à l'Espagne et peut être utilisé par Saint-Vincent-et-les Grenadines dans le cadre du contre-interrogatoire des experts et témoins experts présentés par l'Espagne.

J'invite maintenant l'agent de l'Espagne, Mme Escobar Hernández, à prendre la parole.

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ - 8 octobre 2012, matin

### Plaidoirie de l'Espagne

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE  
[TIDM/PV.12/A18/6/Rev.1, p. 1–16]

*Mme Escobar Hernández :*

Bonjour, Monsieur le Président, Madame et Messieurs les Juges, j'espère aussi que vous avez passé un bon week-end.

Je me permets de commencer avec la présentation de la position de l'Espagne.

Monsieur le Président, Madame et Messieurs les Juges, comme je l'ai déjà dit au moment de la présentation de la délégation de l'Espagne le 4 octobre dernier, c'est pour moi un honneur et un privilège d'être à nouveau devant vous pour représenter l'Espagne dans la présente affaire.

Pendant toute la durée de la procédure (presque deux ans), l'Espagne a toujours fait de son mieux pour coopérer avec votre Tribunal, en gardant toujours à l'esprit la fonction si importante qui vous appartient : le règlement des différends nés dans le cadre de la Convention des Nations Unies sur le droit de la mer.

Je peux vous assurer que c'est dans le même esprit que je me trouve aujourd'hui devant vous, car le respect du droit et des engagements juridiques internationaux constitue l'une des marques de la politique étrangère de l'Espagne et, par conséquent, c'est aussi un élément essentiel de notre politique juridique internationale : le soutien et la coopération avec les organismes internationaux créés pour assurer le règlement pacifique des différends, parmi lesquels le Tribunal international du droit de la mer occupe une place centrale.

Cette haute valeur reconnue à votre Tribunal a amené l'Espagne à reconnaître en 2002 votre compétence dans le cadre du système de règlement des différends établi par la Convention des Nations Unies sur le droit de la mer, par le biais d'une déclaration unilatérale conformément à l'article 287 de la Convention.

De plus, notre déclaration d'acceptation de la compétence a été faite sans qu'il n'y ait à l'époque aucune affaire à régler sur laquelle l'Espagne aurait un intérêt concret et immédiat qui permette d'introduire une instance devant vous.

En outre, notre déclaration reconnaît à votre Tribunal une compétence très large, la seule exception étant les différends relatifs à l'interprétation ou à l'application des articles 15, 74 et 83 concernant la délimitation maritime ou tout autre différend ayant trait aux baies et aux titres historiques.

En tout cas, je veux attirer votre attention sur le fait que la reconnaissance de votre juridiction a une portée beaucoup plus large que celle qui concerne la Cour Internationale de Justice. Cette reconnaissance de la compétence du Tribunal montre fort bien la pleine confiance que l'Espagne fait au système de règlement de différends établi par la Convention et, en particulier, à votre Tribunal.

Après la reconnaissance de la compétence du Tribunal international du droit de la mer, l'Espagne n'a jamais considéré nécessaire d'introduire une instance devant vous. Mais, depuis que Saint-Vincent-et-les Grenadines l'a fait, nous n'avons eu aucune réticence à participer à un système de règlement des différends que nous avons accepté volontairement le 19 juillet 2002.

Nous sommes devant vous pour respecter une obligation juridique internationale acceptée par l'Espagne. Et nous sommes honorés d'être devant vous, même si nous sommes aussi fermement convaincus de ce que les conditions établies par la Convention, pour l'exercice de votre juridiction, n'ont pas été respectées par le demandeur et que les dispositions de la Convention sur lesquelles Saint-Vincent-et-les Grenadines a construit ses plaidoiries, n'ont

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rien à voir avec les faits qui sont à l'origine de l'immobilisation du navire « Louisa » à El Puerto de Santa María à Cadix.

Et pourtant, malgré la ferme conviction que je viens d'exprimer, l'Espagne a toujours coopéré sans réserve avec votre Tribunal. Tout simplement parce que c'est notre devoir et parce que nous faisons pleine confiance à votre rôle en tant qu'organisme chargé de dire le droit dans le domaine du droit de la mer et, par cette voie, de garantir les droits et les intérêts reconnus par la Convention des Nations Unies sur le droit de la mer à tous les Etats : qu'ils soient grands ou petits, qu'ils aient des intérêts généraux dans le domaine du droit de la mer ou bien des intérêts concrets liés tout simplement à la navigation ou, même, au système de reconnaissance du pavillon.

Chaque Etat Partie à la Convention a les mêmes droits et les mêmes responsabilités et obligations et vous, Monsieur le Président, Madame et Messieurs les Juges, vous êtes une des garanties de ces droits et de ces obligations, ainsi que la garantie du fonctionnement d'une partie essentielle de la Convention : le système de règlement des différends.

Monsieur le Président, ce n'est pas mon intention de revenir à ce stade sur chacun des arguments déjà formulés par les Parties dans les pièces qui vous ont été soumises pendant la procédure écrite. Les pièces écrites, qui constituent la base de la procédure, sont sous vos yeux et vous connaissez bien leur contenu.

Notre intention pendant la procédure orale est de vous présenter d'une façon claire, synthétique et pratique, la position de l'Espagne à l'égard des éléments qui opposent encore les deux Parties à la procédure, et de vous présenter aussi l'opinion des experts et témoins qui pourraient, par leur expertise, contribuer à éclaircir le débat qui, pendant ces deux semaines, se tient devant vous.

Mais pour ce faire, nous éprouvons pas mal de difficultés. D'abord, parce qu'il n'est pas facile, d'après les pièces écrites déposées par Saint-Vincent-et-les Grenadines, d'identifier l'objet du différend qui, à son avis, l'opposerait à l'Espagne. Une difficulté qui a augmenté à cause des déclarations faites par les représentants du demandeur pendant les audiences la semaine passée.

En deuxième lieu, nous avons des difficultés parce que, pendant la procédure écrite, le demandeur a introduit une très grande confusion sur la nature même de la procédure engagée devant votre Tribunal.

En troisième lieu, parce que presque tous les éléments en présence et les sujets qui ont été soulevés par les deux Parties continuent à faire l'objet d'une forte opposition :

- il n'y a pas d'accord sur la compétence du Tribunal ;
- il n'y a pas d'accord sur les dispositions de la Convention applicables en l'espèce ;
- il n'y a pas d'accord non plus sur les faits et sur l'interprétation des faits allégués par les Parties.

En quatrième lieu, parce que le demandeur a introduit dans le débat, dans la procédure écrite et pendant les audiences, des éléments de confusion continuels entre une procédure pénale qui se passe devant une juridiction nationale (le *Juzgado de Instrucción n° 4*, de Cadix – juge d'enquête) et la présente procédure, qui relève de la compétence de votre Tribunal : c'est-à-dire une procédure tout à fait différente, de nature intergouvernementale et relative à des droits, obligations et responsabilités de l'Etat - non de n'importe quel individu - qui doit se fonder sur le droit international.

## EXPOSÉ DE MME ESCOBAR HERNÁNDEZ - 8 octobre 2012, matin

Et pour finir, nous avons été placés face à la difficulté nouvelle soulevée par le fait tout à fait surprenant que Saint-Vincent-et-les Grenadines a prétendu, pendant les audiences, transformer l'affaire qui est devant vous depuis 2010.

En effet, compte tenu de ce que nous avons entendu tout au long de la semaine passée, permettez-moi, Monsieur le Président, de dire que l'Espagne a l'impression de se trouver soudain face à une autre affaire, différente de celle à laquelle nous avons participé lors de la procédure relative aux mesures conservatoires, et pour laquelle nous avons déposé nos pièces écrites en réponse aux pièces écrites déposées préalablement par le demandeur. Ce n'est pas seulement que les arguments avancés maintenant par Saint-Vincent-et-les Grenadines soient nouveaux et différents de ceux qui sont dans ses pièces écrites. Non, Monsieur le Président !

Le problème, c'est que d'après ce que nous venons d'entendre la semaine passée, en particulier dans les déclarations de Mme Forde, co-agent du demandeur, et du Pr Nordquist, avocat du demandeur, mais aussi de la part de certains témoins et experts, je suis obligée de dire, avec tout le respect que je vous dois, que l'Espagne a l'impression d'avoir changé de juridiction et d'avoir été transportée par le demandeur devant un tribunal spécialisé dans le domaine des droits de l'homme.

L'Espagne, bien sûr, n'a pas d'opposition à être traduite en justice devant un tribunal international des droits de l'homme. En fait, nous avons accepté volontiers, et sans limite, la compétence de la Cour européenne des droits de l'homme, ainsi que la compétence de nombreux autres organismes de contrôle créés dans le cadre du système international des droits de l'homme. Je ne sais pas si on peut dire de même du côté du demandeur, mais ce n'est pas à moi de dire cela.

Le problème, ce n'est pas d'être placés devant une juridiction des droits de l'homme, Monsieur le Président, mais notre surprise vient du fait que, de façon tout à fait inattendue et de par les déclarations du demandeur, nous sommes passés de Hambourg à Strasbourg, sans avoir eu besoin de prendre l'avion !

Je vous le dis avec tout le respect que je vous dois et sachant qu'il vous appartient d'établir votre compétence ; nous faisons pleine confiance à la façon dont vous allez exercer votre fonction judiciaire.

Compte tenu de toutes les réflexions que je viens d'exprimer, permettez-moi, Monsieur le Président, de consacrer mon premier exposé oral à trois importants volets, à savoir :

- premièrement, j'ai l'intention de faire un bref résumé des faits qui sont à l'origine de l'instance introduite par le demandeur, car nous continuons à croire qu'il y reste encore une certaine confusion à l'égard des faits eux-mêmes ;
- deuxièmement, j'aimerais vous montrer la manière dont la délégation espagnole entend vous présenter sa position et l'organisation de cette présentation ;
- troisièmement, je compte conclure cette première intervention orale avec l'analyse de trois sujets de caractère structurel et substantiel sur lesquels l'Espagne souhaite appeler votre attention avant de passer à des sujets plus concrets pendant nos plaidoiries, à savoir :
  - o l'identification de l'objet du différend qui, le cas échéant, opposerait Saint-Vincent-et-les Grenadines et l'Espagne ;
  - o la détermination de la nature de la procédure en cours ;
  - o la relation, pour autant qu'elle existe, entre la procédure pénale espagnole et la procédure internationale devant le Tribunal international du droit de la mer.

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**I. LES FAITS**

Monsieur le Président, ce n'est pas mon intention de revenir une fois de plus sur une longue liste d'événements que le Tribunal connaît très bien. Mais, compte tenu de la divergence d'interprétation des faits ainsi que des audiences de la semaine dernière, j'aimerais vous présenter un bref résumé des faits que l'Espagne considère pertinents pour la présente affaire.

1. Le 20 août 2004, le navire « Louisa », battant pavillon de Saint-Vincent-et-les Grenadines, arrive en Espagne. Le navire est propriété d'une société enregistrée aux Etats-Unis (Sage) et dont le capital semble être aussi américain.

2. D'après la déclaration du demandeur, qui prétend exercer la protection diplomatique sur le navire, le « Louisa » arrive en Espagne avec l'intention de faire des recherches marines relatives à l'exploration des hydrocarbures qui, selon les informations disponibles à l'époque, pourraient se trouver dans la zone de la baie de Cadix et du golfe de Cadix.

3. Sage affirme détenir un permis des autorités compétentes espagnoles. Ledit permis (autorisation) a été accordé par la *Dirección General de Costas* (Direction générale des côtes) du ministère de l'environnement. Il porte sur la réalisation d'une étude cartographique des fonds marins et sur le prélèvement d'échantillons sur les fonds marins pour évaluer l'impact environnemental. L'autorisation était valable pour plusieurs zones, parmi lesquelles une zone située dans la baie de Cadix et une autre dans le golfe de Cadix. Les deux zones se trouvent dans les eaux intérieures et la mer territoriale de l'Espagne.

4. Le représentant de Sage à bord du navire « Louisa » était M. Mario Avella, qui n'est pas un spécialiste des hydrocarbures. Le capitaine du navire et l'équipage ne semblent pas non plus avoir de liens étroits avec la recherche scientifique ni avec l'exploration ou l'exploitation des hydrocarbures. Pour finir, Saint-Vincent-et-les Grenadines n'a produit aucune preuve de la présence sur le navire de scientifiques spécialisés dans ce domaine d'activité.

5. Après son arrivée en Espagne, le « Louisa » a été amarré à El Puerto de Santa María le 29 octobre 2004, sans intention de naviguer à nouveau. Les raisons pour de cette immobilisation volontaire du navire étaient inconnues à l'époque. Ce n'est qu'à l'occasion de la requête présentée par Saint-Vincent-et-les Grenadines devant ce Tribunal que l'on nous a expliqué que le navire n'était pas adapté à l'activité envisagée, en particulier à cause de ses dimensions. Et que, pour cette raison, Sage était censée acheter un autre navire (le « Gemini III »), plus petit, qui devait assister le « Louisa » aux fins de la confirmation des données que Sage avait déjà en sa possession avant l'affrètement du « Louisa », en faisant appel – en particulier – à des plongeurs pour trouver « des bulles de gaz et des métaux ».

6. A l'expiration du permis accordé par les autorités espagnoles et à la fin des prétendues activités relatives aux hydrocarbures (autour de mai 2005), le « Louisa » a continué d'être amarré au port.

7. Sur la base d'une enquête pénale menée par les autorités compétentes (la Guardia Civil), les autorités judiciaires espagnoles sont arrivées à la conclusion qu'il y avait de bonnes raisons de croire que des atteintes à l'encontre du patrimoine culturel sous-marin espagnol étaient commises, et que le « Louisa » servait de base à ces activités criminelles.

8. Par conséquent, le juge du *Juzgado de Instrucción n° 4* de Cadix (juge d'enquête) a ordonné l'arraisonnement et la perquisition du « Louisa » le 1<sup>er</sup> février 2006. En même temps, le juge a émis également des ordonnances d'arraisonnement et de perquisition à l'égard du « Gemini III » et du domicile de plusieurs personnes réputées avoir participé à ces activités délictueuses.

9. Lorsque les autorités espagnoles sont arrivées pour appliquer l'ordonnance, le capitaine du « Louisa » était parti. En outre, le représentant de la compagnie propriétaire du « Louisa », n'était pas non plus à bord. Vous connaissez déjà les faits auxquels on a fait référence la semaine dernière.

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10. Le 15 mars 2006, l'Espagne a informé, à toutes fins utiles, les autorités de Saint-Vincent-et-les Grenadines du fait que le « Louisa » avait fait l'objet d'une procédure d'arraisonnement et de perquisition. Cette communication a eu lieu par voie diplomatique, par note verbale de l'ambassade d'Espagne à Kingstown au ministère des Affaires étrangères et du commerce du demandeur. Cette note verbale a été envoyée à l'instance du juge d'instruction n° 4 de Cadix, et par la voie diplomatique pertinente, à savoir l'ambassade d'Espagne chargée des relations diplomatiques bilatérales avec Saint-Vincent-et-les Grenadines à l'époque.

11. Pendant la perquisition du navire, la *Guardia Civil*, c'est-à-dire la police judiciaire, a trouvé plusieurs objets archéologiques et des instruments tels que des magnétomètres, caissons isobares, etc. Et, pour finir, les enquêteurs ont trouvé plusieurs armes dans une armoire fermée. Certaines de ces armes appartenaient à des catégories qui, d'après la législation espagnole, devraient être qualifiées comme « armes de guerre ». Il faut signaler – et j'appelle votre attention sur ce fait –, qu'aucune de ces armes n'avait fait l'objet d'une déclaration administrative ou autre au moment de l'arrivée du « Louisa » au port espagnol.

*Le Président :*

Madame Escobar, je suis désolé de vous interrompre, mais pouvez-vous parler un peu plus lentement pour que nos interprètes puissent vous suivre ?

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je présente mes excuses au Tribunal et aux interprètes. Je vais essayer de parler un peu plus lentement.

12. A cette occasion, la *Guardia Civil* (police judiciaire en l'occurrence) a mis en détention deux membres de l'équipage qui se trouvaient à bord, ainsi que Mme Alba Jennifer Avella, qui a comparu comme témoin devant vous la semaine passée. Monsieur Mario Avella, dont vous avez aussi entendu le témoignage la semaine passée, a été détenu à Lisbonne sur la base d'un mandat d'arrêt européen quand il a cherché à quitter le Portugal et a été mis à la disposition du juge espagnol compétent le 19 mai 2006. D'autres personnes ont été aussi détenues dans le cadre de la même enquête.

13. Sur la base de sa compétence, le juge d'instruction n° 4 de Cadix a ouvert des *Diligencias preparatorias* (dossiers ou travaux préalable). Il a mené des enquêtes pendant de 2006 à 2010 et, le 1<sup>er</sup> mars 2010, a ordonné l'ouverture d'un *Procedimiento Sumario*, la procédure pénale offrant le plus de garanties. Le 27 octobre 2010, il a émis un *Auto de Procesamiento* (acte d'accusation), qui a été notifié à tous les intéressés en décembre 2010. Les intéressés ont introduit un recours contre cette ordonnance de renvoi en janvier 2011. La procédure reste *sub judice*.

15. La procédure pénale, Monsieur le Président, s'est heurtée à d'innombrables difficultés et problèmes d'ordre procédural, dus dans une large mesure à l'activité même des personnes qui faisaient l'objet de l'enquête. Je reviendrai plus tard sur cette question. Mais je peux déjà affirmer que les décisions prises par les autorités judiciaires espagnoles n'ont été ni arbitraires ni déraisonnables, compte tenu des circonstances, et qu'il n'existe pas du tout de déni de justice.

16 Depuis son immobilisation, le 1<sup>er</sup> janvier 2006, le navire « Louisa » est toujours amarré au port commercial de El Puerto de Santa María, sous le contrôle des autorités espagnoles.

17. Tout au long de la procédure pénale menée en Espagne, les autorités espagnoles (judiciaires, administratives et autres) ont exprimé leur préoccupation concernant le « Louisa », le fait qu'il reste amarré pour longtemps à El Puerto de Santa María, l'état du navire et les coûts qui en découlent. Et ces autorités ont pris les mesures nécessaires pour

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garantir le maintien du navire dans un état acceptable du point de vue de sa sécurité et de la protection du milieu marin.

Les avocats et les représentants de Sage se sont rendus sur le navire à plusieurs reprises avec l'autorisation du juge compétent, et une fois au moins, sans l'autorisation du juge compétent alors que le navire était immobilisé. Néanmoins, ni le propriétaire du navire ni ses représentants légaux n'ont jamais demandé au juge que le « Louisa » leur soit rendu. Ils n'ont pas non plus réagi aux demandes du juge tendant à ce qu'une personne de confiance soit chargée d'assurer l'entretien du navire.

Ce n'est qu'en 2011, après la phase des mesures conservatoires dans la présente procédure devant le Tribunal international du droit de la mer, que les avocats du propriétaire du navire ont décliné cette invitation. A la suite de cette réponse négative de la part des intéressés, le juge d'instruction a, le 12 juillet 2011, désigné un gardien chargé de l'entretien du navire et qui devra le mettre à disposition du juge le moment voulu.

19. Et pour finir, permettez-moi de rappeler encore une fois que tous les faits incriminés à l'origine de l'immobilisation du « Louisa » ont eu lieu dans des zones maritimes relevant de la souveraineté de l'Espagne : dans ses eaux intérieures et dans sa mer territoriale. De plus, le « Louisa », à l'époque, ne naviguait plus. Au contraire, le « Louisa » était volontairement amarré dans un port commercial espagnol depuis longtemps, depuis plus d'un an.

Compte tenu des faits que je viens de résumer, l'Espagne considère que, contrairement à ce qui a été affirmé par le demandeur, il n'y a eu aucune violation de la Convention des Nations Unies sur le droit de la mer qui pourrait être attribuée à l'Espagne. L'immobilisation du « Louisa » relève tout simplement du droit souverain de l'Espagne d'exercer sa juridiction pénale conformément au droit interne et au droit international.

En outre, j'aimerais aussi appeler votre attention sur le fait que, pendant ces années et jusqu'à novembre 2010, le demandeur, c'est-à-dire Saint-Vincent-et-les Grenadines, est toujours resté silencieux.

Je passe maintenant, Monsieur le Président, à la présentation de la structure de la position de l'Espagne.

## II. STRUCTURE DE LA PRÉSENTATION DE LA POSITION DE L'ESPAGNE

Monsieur le Président, comme nous l'avons déjà affirmé dans notre contre-mémoire et dans notre duplique, l'Espagne considère que cet honorable Tribunal n'a pas compétence dans le cas d'espèce et que la requête de Saint-Vincent-et-les Grenadines doit être déclarée irrecevable.

Bien que ce ne soit pas notre intention de répéter les arguments qui ont été déjà développés dans les pièces écrites, nous présenterons brièvement les éléments les plus pertinents des arguments de nos plaidoiries. Ces éléments vous seront présentés aujourd'hui par mon collègue le Pr Aznar et par moi-même.

En outre, et à titre principal, l'Espagne considère que votre Tribunal n'a pas compétence *ratione materiae*, car les articles à contenu substantiel sur lesquels le demandeur fonde sa demande ne sont pas applicables en l'espèce. Mon collègue, le Pr Jiménez Piernas, vous présentera un exposé sur ce sujet. Il traitera aussi d'autres questions relatives à la Convention des Nations Unies sur le droit de la mer qui ont été soulevées par le demandeur, en particulier certains aspects de l'article 300.

En troisième lieu, à titre subsidiaire, nous allons vous présenter aussi nos plaidoiries sur la demande de réparation formulée par les représentants de Saint-Vincent-et-les Grenadines. Le Pr Jiménez Piernas sera le responsable de cette partie de nos exposés, avec la collaboration du Pr Aznar.

Et pour finir, l'Espagne a l'intention de répondre à chacun des nouveaux arguments présentés par le demandeur pendant les audiences, en particulier les plaidoiries relatives aux

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prétendues violations des droits de l'homme et au déni de justice. C'est moi-même qui plaiderai sur ce sujet, ainsi que sur d'autres considérations relatives à l'article 300.

En outre, nous entendons appeler quatre experts dont les noms vous ont été communiqués et qui vont traiter du système juridique et judiciaire espagnol, de l'exploration et de l'exploitation des hydrocarbures et des questions relatives au patrimoine culturel sous-marin.

Monsieur le Président, je vais maintenant me pencher sur la partie ayant plus de contenu substantiel, à savoir les commentaires sur les trois questions auxquelles je faisais référence en disant qu'il s'agissait de questions de nature structurelle et centrale.

### III. TROIS QUESTIONS DE CARACTÈRE STRUCTUREL ET SUBSTANTIEL

#### **L'existence, l'objet et la portée du prétendu différend**

Monsieur le Président, permettez-moi de vous présenter une série de commentaires sur un sujet qui nous semble essentiel pour la présente affaire, à savoir : l'éventuelle existence d'un différend, son objet (si tant est que le différend existe) et sa portée.

Tous ces sujets ont une très grande importance si on tient compte du fait que, d'après la Convention, le Tribunal a compétence pour statuer sur un différend qui, en tout cas, doit porter sur : « l'interprétation ou [...] l'application de la Convention » (articles 286 et 288, paragraphe 1). J'attire aussi votre attention sur l'article 287, que vous connaissez bien mieux que moi.

Par conséquent, si le Tribunal n'a de compétence qu'à l'égard de différends relatifs à l'interprétation ou à l'application de la Convention, il est extrêmement important d'avoir une idée claire sur les deux éléments suivants :

- i) est-ce qu'il existe un différend ?
- ii) est-ce que ledit différend, s'il existe, porte sur l'interprétation ou l'application de la Convention ?

L'importance de la première question n'appelle pas d'autres explications, car comme la jurisprudence internationale l'a affirmé de façon constante, l'existence d'un différend constitue la condition préalable de l'exercice de sa compétence par un organe judiciaire. L'existence d'un différend est une question objective, la simple allégation par une partie de l'existence dudit différend n'étant pas suffisante.

Mais, en quoi consiste le concept même de différend ? Je ne me permettrai pas de faire un cours en droit international, Monsieur le Président, je vous assure, mais simplement attirer l'attention sur des questions que je considère plus importantes.

Qu'entend-on par différend ?

Il s'agit d'un concept objectif qui avait déjà été clairement établi par la Cour permanente de Justice internationale en 1924, dans l'affaire « *Mavrommatis* », comme un « désaccord sur un point de droit ou de fait, [une contradiction, une opposition de thèses juridiques ou d'intérêts] ». Une définition tellement claire que le Tribunal de céans l'a adoptée dans sa jurisprudence *expressis verbis* dans les *Affaires du thon à nageoire bleue*.

En résumé, le différend dans la présente affaire, s'il existe, doit se référer à la détermination objective d'un désaccord sur un point de droit ou de fait, à un conflit d'intérêts ou d'avis juridiques entre Saint-Vincent-et-les Grenadines et l'Espagne relatif, exclusivement, à l'interprétation ou l'application de la Convention des Nations Unies sur le droit de la mer, même si le Tribunal devra tenir compte d'autres règles de droit international général pour la définition de l'existence d'un différend.

Mais, si on se place dans ce cadre, Monsieur le Président, la détermination de l'existence d'un tel différend n'est pas une tâche facile dans le cas d'espèce, compte tenu du fait que le demandeur se limite à affirmer, dans toutes ses pièces écrites, que l'Espagne a violé les

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articles 73, 87, 226, 227 et 245 de la Convention, en faisant aussi une référence à l'article 303 de la Convention. Et en tout cas, sans apporter aucune argumentation juridique sur la portée de ces articles et leur relation avec le cas d'espèce.

Est-ce que l'on peut considérer qu'une telle allégation est suffisante pour conclure à l'existence d'un différend ? La réponse, selon l'Espagne, doit être non. Et, à cet égard, permettez-moi de rappeler l'arrêt de la Cour internationale de Justice dans l'affaire des *Plates-formes pétrolières, exception préliminaire*, dans lequel la Cour a déclaré que :

La Cour ne peut se borner à constater que l'une des Parties soutient qu'il existe un tel différend et que l'autre le nie. Elle doit rechercher si les violations du traité de 1955 alléguées par l'Iran entrent ou non dans les prévisions de ce traité et si, par suite, le différend est de ceux dont la Cour est compétente pour connaître *ratione materiae*.

Ce n'est pas mon intention maintenant de développer les arguments de l'Espagne concernant l'absence de compétence du Tribunal *ratione materiae*. Nous reviendrons plus tard sur ce sujet.

Mais je ne peux passer sous silence à ce stade le fait que, par son comportement, Saint-Vincent-et-les Grenadines a introduit un élément d'incertitude quant à la détermination de l'existence, l'objet et la portée d'un prétendu différend, une incertitude dont il entend tirer avantage.

Par contre, comme l'Espagne l'a déjà signalé à plusieurs occasions, par écrit et oralement, on ne peut pas admettre qu'il existait au moment de l'introduction de l'instance un différend entre Saint-Vincent-et-les Grenadines et l'Espagne relatif à l'application ou l'interprétation de la Convention des Nations Unies sur le droit de la mer. En outre, et je tiens à le souligner, l'absence d'échanges de vues préalables, requis par l'article 283 de la Convention, a compliqué la situation et a rendu encore plus difficile tout exercice de détermination de l'existence et de l'objet d'un tel différend.

Car, comme le Tribunal le sait fort bien, il n'existe qu'une note verbale du 26 octobre 2010, dans laquelle Saint-Vincent-et-les Grenadines affirme, unilatéralement, que le « Louisa » a été illégalement immobilisé par l'Espagne, en violation du droit national espagnol et du droit international (peut-être de la Convention des Nations Unies sur le droit de la mer ?) et annonce son intention, à nouveau unilatéralement, d'introduire une instance devant le présent Tribunal au cas où l'Espagne ne se soumettrait pas aux conditions unilatérales imposées par Saint-Vincent-et-les Grenadines, à savoir : la mainlevée immédiate de l'immobilisation du navire. Et tout cela, Monsieur le Président, Madame et Messieurs les Juges, à une date où Saint-Vincent-et-les Grenadines n'avait même pas accepté la compétence du Tribunal, ce qu'il a fait 26 jours après.

Il va sans dire que ce comportement, suivi par l'introduction de l'instance le 22 novembre 2010, n'a pas tenu compte de l'obligation de procéder à des consultations ou à des échanges de vues préalables, sujet sur lequel nous reviendrons plus tard.

Mais, en tout cas, à ce stade, le résultat d'un tel comportement est que Saint-Vincent-et-les Grenadines a placé votre Tribunal dans une situation délicate, car –comme l'a dit la Cour internationale de Justice « [cela reviendrait à faire peser sur [le Tribunal] la lourde charge de caractériser un différend dont les parties n'ont pas indiqué les contours] » (*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011, p. 70*).

Monsieur le Président, malgré tout, l'Espagne s'efforcera de chercher des moyens d'identifier un différend qui pourrait valablement vous être soumis, ainsi que sa portée.

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Même si un tel défi (déjà difficile à relever) l'est devenu encore plus après les plaidoiries qui ont été faites devant vous par le demandeur la semaine dernière.

En tout cas, pour relever ce défi, permettez-moi de partir de deux éléments : la déclaration de reconnaissance de compétence du Tribunal faite par Saint-Vincent-et-les Grenadines en premier lieu, et le *petitum* contenu dans son mémoire, en second lieu.

Cela semble logique, car étant le demandeur, on pourrait considérer que c'est dans sa déclaration et dans son *petitum* qu'on peut trouver, au premier chef, les éléments qui, parmi beaucoup d'autres, permettront de déterminer l'existence et la portée d'un différend. La déclaration de reconnaissance de la compétence du Tribunal par Saint-Vincent-et-les Grenadines d'un côté, et de l'autre le *petitum* contenu dans son mémoire. Cela semble logique car étant la Partie demanderesse, on peut penser qu'en principe, ces documents peuvent constituer les éléments qui permettront de déterminer l'existence et la portée d'un différend.

J'aimerais commencer, si vous me le permettez, par l'analyse de la déclaration d'acceptation de la compétence du Tribunal, dont la portée est vraiment limitée, malgré ce qu'a essayé de dire Saint-Vincent-et-les Grenadines dans ses plaidoiries et certains de ses documents écrits.

Selon ladite déclaration, Saint-Vincent-et-les Grenadines a choisi, le 22 novembre 2010 : « Le Tribunal international du droit de la mer (...) [comme moyen de règlement des différends concernant la saisie ou l'immobilisation de ses navires] ».

Cette déclaration nous offre déjà un premier élément substantiel pour essayer d'identifier la portée de tout différend dont le Tribunal pourrait connaître avec le demandeur : tout simplement et d'une manière exclusive, les différends « concernant la saisie ou l'immobilisation de ses navires ». Rien d'autre. Mais en tout état de cause, il s'agit d'une compétence dont on peut voir le lien très étroit avec un cas spécifique : l'immobilisation du « Louisa », ce qui a donné lieu à l'introduction de l'instance le lendemain de l'acceptation de la compétence du Tribunal par Saint-Vincent-et-les Grenadines.

En tout cas, si on part de cette déclaration, on peut déjà tirer une première conclusion : un différend ne pourra être soumis au Tribunal que s'il porte sur « la saisie ou l'immobilisation » d'un de ses navires, c'est-à-dire un navire battant le pavillon du demandeur. Rien d'autre. Absolument rien d'autre. C'est le demandeur lui-même qui a fixé les limites très strictes de la compétence du Tribunal. Mais permettez-moi de poser une question non négligeable : est-ce que le « Louisa » a été « immobilisé » ou « saisi » au sens que ces termes ont dans la Convention des Nations Unies sur le droit de la mer ? L'Espagne ne le croit pas.

Le deuxième élément qui pourrait être utile pour déterminer, sinon l'existence, du moins la portée que le demandeur attribue au prétendu différend, c'est le *petitum* inclus dans son mémoire. Dans ce *petitum*, qu'est-ce que Saint-Vincent-et-les Grenadines demande au Tribunal de décider ?

Pour y répondre, il suffit de lire le paragraphe 87 dudit mémoire :

- a) dire que sa demande est recevable – un *petitum* procédural ;
- b) dire que le défendeur a violé les articles 73, 87, 226, 245 et 303 de la Convention ;
- c) ordonner au défendeur de procéder à la mainlevée de l'immobilisation du navire « Louisa » et de son navire auxiliaire, le « Gemini III », et de restituer le matériel saisi ;
- d) dire que l'arrestation des membres d'équipage était illégale ;

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- e) ordonner le paiement de réparations d'un montant de 30 millions de dollars des Etats-Unis ;
- f) condamner le défendeur à payer les honoraires des avocats et autres frais de justice associés à la présente requête, tels qu'ils auront été fixés par le Tribunal – question au sujet de laquelle il y a eu un très intéressant débat la semaine dernière devant ce Tribunal.

Ce *petitum* pose déjà un premier problème, car le demandeur prie le Tribunal de se prononcer sur des éléments qui relèvent de la Convention des Nations Unies sur le droit de la mer, mais aussi de faire droit à des demandes qui, en principe, n'ont qu'une base juridique en droit interne espagnol – je me réfère notamment au fait de déclarer illégale l'arrestation des membres de l'équipage.

Mais si la détermination de l'objet du différend sur la base du *petitum* du demandeur n'est pas claire et pose beaucoup de problèmes, la confusion a encore augmenté depuis les plaidoiries du demandeur.

En effet, tant Mme Forde que le Pr Nordquist ont fondé leurs plaidoiries sur une présumée violation des droits de l'homme, des droits des personnes arrêtées et du droit de propriété du propriétaire du « Louisa », ainsi que sur le déni de justice, tous arguments en connexion avec l'article 300 de la Convention.

Nous reviendrons sur ces sujets plus tard du point de vue du fond, mais permettez-moi, Monsieur le Président, d'attirer l'attention du Tribunal sur l'évidence : le demandeur essaie de changer l'objet du différend.

D'après la nouvelle argumentation du demandeur, quel est maintenant l'objet du litige ? L'immobilisation du « Louisa », c'est-à-dire la saisie ou l'immobilisation d'un navire battant le pavillon de Saint-Vincent-et-les Grenadines ? Ou sont-ce les droits des individus qui auraient subi un prétendu préjudice du fait d'une procédure pénale dans le cadre de laquelle le « Louisa » a été immobilisé – c'est vrai –, sachant que cette procédure ne porte pas sur l'immobilisation du navire, mais est une enquête pénale sur des atteintes au patrimoine culturel sous-marin. Une enquête ou l'immobilisation du « Louisa » n'est que l'une des décisions adoptées par le juge d'enquête ?

Monsieur le Président, permettez-moi de conclure mes commentaires sur ce premier sujet avec deux remarques :

1. L'Espagne continue de soutenir qu'il n'existe pas de différend réel fondé sur l'application des dispositions substantielles de la Convention ;
2. Saint-Vincent-et-les Grenadines a essayé de changer les bases de sa requête, en introduisant de nouveaux arguments et en définissant l'objet du prétendu différend d'une façon tout à fait différente de celle qu'il avait adoptée dans ses pièces écrites. Peut-être parce qu'il est arrivé à la conclusion que ses références aux articles 73, 87, 226, 227 et 245 de la Convention n'avaient aucune base juridique ? Je ne sais pas. Mais en tout cas, un tel comportement n'est pas compatible avec les règles de la procédure contradictoire ni avec le principe de l'égalité des armes, qui doit être respecté dans la procédure qui se tient devant vous.

#### **La nature de la procédure**

Monsieur le Président, la deuxième considération d'ordre général que j'aimerais formuler dans ce premier exposé introductif concerne la nature de la procédure engagée devant vous.

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Comme nous l'avons déjà dit à plusieurs reprises, il ne s'agit pas de la procédure spécialisée, extraordinaire et sommaire de la prompte mainlevée de l'immobilisation du navire prévue aux articles 292 et suivants de la Convention. Pour ce genre de procédure, la Convention a attribué à votre Tribunal une compétence automatique. Compte tenu de la spécificité, de l'objet et du but de cette procédure, les États ont établi, dans la Convention, des règles et principes spéciaux qui reposent sur le souci de faciliter le retour des navires immobilisés à la navigation.

Mais permettez-moi de remarquer, encore une fois, que ce type de procédure est soumis aussi à des règles précises relatives aux délais dans lesquels l'instance peut être introduite devant le Tribunal. Dans cette procédure, le Tribunal n'a pas compétence pour se prononcer sur le bien-fondé de l'immobilisation ou une quelconque indemnité que l'Etat du pavillon pourrait réclamer à raison de ladite immobilisation.

Monsieur le Président, Madame et Messieurs les Juges, ce que je viens de décrire n'est absolument pas le cas dans la présente affaire. Saint Vincent-et-les Grenadines aurait eu le droit d'introduire une instance dans le cadre de la procédure de la prompte mainlevée de l'immobilisation des navires, mais il ne l'a pas fait, bien qu'il ait eu pleine connaissance de la situation du « Louisa » après l'envoi de la note verbale de l'Espagne dont le demandeur continue de nier l'existence, dans les plaidoiries de la semaine dernière, mais aussi dans les documents écrits, d'une façon tout à fait incompatible avec les règles qui s'appliquent aux relations et aux communications entre deux Etats souverains et avec la pratique habituelle relative à l'envoi d'une note verbale.

Permettez-moi de faire une autre réflexion à haute voix, peut-être sera-telle digne d'intérêt : comment pourrait-on reprocher à l'Espagne le manque de diligence des autorités de Saint-Vincent-et-les Grenadines ou, si vous préférez, pourrait-on reprocher à l'Espagne le manque de diligence des propriétaires du navire qui n'ont pas demandé à l'Etat du pavillon d'engager la procédure de prompte mainlevée dans les délais prévus ?

Parce que, et je suis obligée de le dire ici, on ne doit pas oublier que la procédure de prompte mainlevée de l'immobilisation du navire est envisagée d'habitude à la demande du propriétaire du navire concerné. Bien que cette réalité ne soit pas envisagée dans la Convention, il s'agit d'une pratique évidente qu'aucune personne connaissant le droit de la mer n'ignore. Et il est évident que le propriétaire du « Louisa » connaissait très bien à l'époque la situation juridique du « Louisa » et de son immobilisation par les autorités judiciaires espagnoles.

Cette affirmation a été clairement démontrée la semaine dernière pendant le témoignage de certaines personnes qui ont comparu devant vous.

Or, le demandeur n'a pas exercé son droit au moment voulu, et prétend, cinq ans après l'expiration du délai prévu par la Convention, exercer un autre droit (qu'il a volontairement acquis un jour seulement avant l'introduction de l'instance et moyennant une déclaration unilatérale d'acceptation de la compétence). Le demandeur prétend exercer son droit, mais dans le même cadre conceptuel – il essaye du moins de le faire – que s'il s'agissait de la procédure de prompte mainlevée. Et il prétend pour cela que certaines règles et certains principes propres à cette procédure spéciale s'appliquent aussi à toute autre procédure, dès lors qu'elle a un lien quelconque avec l'immobilisation d'un navire. J'appelle votre attention sur les références que Mme Forde a faites à des affaires de prompte mainlevée.

Monsieur le Président, comme j'aurai l'occasion de l'expliquer plus tard, nous sommes face à une procédure contentieuse ordinaire. Une procédure que le demandeur a utilisée comme moyen d'exercer sa protection diplomatique à l'égard d'un navire qui arbore son pavillon (le « Louisa ») et, par extension, à l'égard de certains membres de l'équipage, pas de tout l'équipage, et même à l'égard du propriétaire du navire et d'une personne, Mme Avella, qui, selon l'expression du Pr Nordquist, était une « *simple spectatrice* ».

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Pour la première fois dans cette procédure, les représentants de Saint-Vincent-et-les Grenadines ont admis, devant votre Tribunal, pendant leurs plaidoiries, le fait que le demandeur a l'intention d'exercer sa protection diplomatique – ce que je respecte. Mais quelle protection diplomatique et à l'égard de qui ?

Si nous sommes devant une juridiction responsable de l'application et de l'interprétation de la Convention des Nations Unies sur le droit de la mer, en premier lieu, vous serez d'accord avec moi pour dire qu'il faudra au moins trouver une connexion avec une ou plusieurs dispositions substantielles du droit de la mer. Mais quelle est cette connexion ? D'après le demandeur, la connexion qui lui permettrait d'exercer la protection diplomatique à l'égard de certains individus n'est que l'article 300 de la Convention.

Je dois dire clairement que l'Espagne n'a aucune objection à l'application de l'article 300 qui, de par sa nature même, n'est que l'expression particulière du principe général de bonne foi et qui, dans ce sens, doit se lire toujours en connexion avec toute et chacune des dispositions de la Convention. Mais quelles sont les dispositions de la Convention, en connexion avec l'article 300, permettant l'exercice devant vous de la protection diplomatique en l'espèce ? Le demandeur n'arrive pas à nous dire quelles sont ces dispositions. Nous reviendrons plus tard sur ces questions.

Compte tenu du fait que Saint-Vincent-et-les Grenadines a au moins admis que nous sommes face à une procédure judiciaire ordinaire contradictoire qui concerne l'exercice de la protection diplomatique, permettez-moi de rappeler que la protection diplomatique est soumise à des règles et des conditions qui, logiquement, doivent s'appliquer sans ambiguïté à la présente procédure. En particulier, les règles relatives à la nationalité de la demande, l'épuisement des recours internes et, dans certaines conditions, la règle des « mains propres ». Je reviendrai sur ce sujet à un autre moment pendant les plaidoiries de l'Espagne.

#### **Procédure nationale et procédure internationale**

Et pour finir, Monsieur le Président, permettez-moi de faire un bref commentaire sur le dernier des sujets que je vous avais annoncés au début de mon exposé, en connexion avec ce troisième volet, à savoir les relations entre la procédure internationale et la procédure nationale dans le cas d'espèce.

Il est évident qu'il y a une certaine coïncidence entre les faits qui sont à l'origine de la présente procédure et les faits qui sont à l'origine de la procédure pénale qui se tient en Espagne. Mais cette coïncidence n'est pas nécessairement étrangère au système de règlement des différends devant les tribunaux internationaux.

Ainsi, on peut trouver fréquemment une projection sur le plan international de faits qui se sont produits à l'intérieur de l'Etat et qui ont fait, voire continuent à faire, l'objet d'une procédure devant les juridictions nationales. Bien plus, cette coïncidence se trouve toujours au cœur même de tout exercice de protection diplomatique.

Ceci dit, une telle coïncidence ne peut pas nous amener à mêler procédure internationale et procédure interne. Malheureusement, Saint-Vincent-et-les Grenadines s'est livré, pendant toute la procédure (écrite et orale) à un exercice de mélange des procédures.

J'aimerais vous en présenter certains exemples :

- le demandeur mélange le droit international et le droit interne applicable, en présentant en réalité ces deux types de normes comme un tout inséparable, voire en en faisant un « *totum revolutum* » normatif ;
- le demandeur mélange les sujets relevant légitimement des tribunaux internes et ceux qui relèvent légitimement des tribunaux internationaux, en prétendant que les actes des uns et des autres peuvent être échangeables ;

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- le demandeur essaie d'établir un lien entre les autorités judiciaires espagnoles et la représentation juridique de l'Espagne devant ce Tribunal (peut-être avec l'intention d'introduire dans votre esprit l'idée fausse que les uns et les autres ont eu un comportement malhonnête, tant à l'égard de Saint-Vincent-et-les Grenadines qu'à l'égard des personnes poursuivies en Espagne). Je ne vais pas me prononcer sur ce sujet à ce stade, mais je trouve que c'est un sujet tellement important qu'il faut le porter à l'attention du Tribunal dès le début des plaidoiries de l'Espagne.

Pour finir, tout observateur averti peut voir comment le demandeur semble, tant dans les pièces écrites que dans ses plaidoiries et lors de la présentation des témoins et des experts, avoir l'intention de transformer le Tribunal en un tribunal qui viendrait se substituer aux tribunaux espagnols dans l'exercice de fonctions indissociables de la souveraineté et, de plus, dans l'exercice de fonctions de nature pénale.

Ce n'est pas le moment de développer ces arguments. Mais je dois appeler votre attention sur ce sujet car il peut avoir, dans la présente procédure, des conséquences importantes dont le Tribunal voudra peut-être tenir compte.

#### **Conclusion**

Avec cette dernière observation, Monsieur le Président, je conclus mon premier exposé devant vous, et je m'excuse d'avoir présenté un exposé plus long que je n'aurais voulu. Je vous remercie, Monsieur le Président, Madame et Messieurs les Juges, de votre aimable attention.

Je vous prie, Monsieur le Président, d'appeler mon collègue, le Pr Aznar, pour présenter nos premières plaidoiries sur les questions relatives à la compétence de votre Tribunal.

*Le Président :*

Je vous remercie, Madame Escobar Hernández.

Je donne la parole à M. Aznar Gómez.

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COUNSEL OF SPAIN  
[ITLOS/PV.12/C18/6/Rev.1, p. 14–24]

*Mr Aznar Gómez:*

Thank you, Mr President.

Mr President, distinguished Judges, let me say again that it is a true honour and a privilege to appear again before this Tribunal to continue the present submission on behalf of my country, the Kingdom of Spain, in response to the Memorial and Reply submitted by Saint Vincent and the Grenadines in this case.

As the Agent of Spain has explained, I will address the initial questions on the position of Spain with regard to the jurisdiction of this honourable Tribunal. In particular, I will introduce the general motivation that drives Spain to affirm the plain absence of jurisdiction in this case.

Surprisingly, the Applicant seems to have abandoned all its reasoning submitted in its written pleadings and, last week, it suddenly tried to introduce article 300 as a new title of jurisdiction through a “broad interpretation and liberal application”, using the words of Professor Nordquist.

The Agent of Spain has already mentioned it and the Spanish delegation will further address this point later. By now, I should like to build a reasonable legal argument based on the Convention, and not rewriting the carefully drafted Convention of 1982, mostly because even article 300, as other articles in the Convention, expressly states that it must be interpreted and applied “in accordance with the Convention” and not without, or irrespective of, the Convention.

To that extent, I will address, first, a general introduction on questions of jurisdiction in this case; second, how the Applicant confuses the *prima facie* jurisdiction of the Tribunal to decide upon provisional measures with its jurisdiction on the merits; and, third, the application to this very case of article 283 of the Convention and how Saint Vincent and the Grenadines has not properly fulfilled this requisite, which is clearly established in the UN Convention on the Law of the Sea.

As already said, Spain considers that this honourable Tribunal has no jurisdiction in this case.

This Tribunal is the Tribunal for the Law of the Sea. What looks obvious for Spain, does not seem too clear to the Applicant.

As stated in article 21 of its Statute, the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with the UN Convention on the Law of the Sea. This implies that the procedural conditions established in the Convention do apply, particularly that endorsed in article 283 upon which

When a dispute arises between States Parties concerning the interpretation or application of this Convention, the Parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

It seems that Saint Vincent and the Grenadines believes this obligation of conduct does not apply.

Saint Vincent and the Grenadines believes that article 283 of the Convention is a simple term of art, without any *effet utile*. However, Professor Nordquist should recall his comment to article 283 in volume 5, p.29, of its Commentary to the Convention, published by its Law School when it says – and I quote *in extenso*:

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The obligation specified in this article is not limited to an initial exchange of views at the commencement of a dispute. It is a continuing obligation applicable at every stage of the dispute. In particular, as is made clear in paragraph 2, the obligation to exchange views on further means of settling a dispute revives whenever a procedure accepted by the parties for settlement of a particular dispute has been terminated without a satisfactory result and no settlement of the dispute has been reached. In such a case, the parties would have to exchange views again with regard to the next procedure to be used to settle the dispute. There might be further resort to negotiations in good faith, or the parties might agree to use another procedure. This provision ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all parties concerned.

This is because the primary obligation of parties to a dispute should be to make every effort to settle the matter through negotiations. This is the general rule in International law. The resort to a compulsory settlement of dispute procedure is the exception.

In this case, however, Saint Vincent and the Grenadines adamantly observes: (1) procedurally, that once the Tribunal declares its *prima facie* jurisdiction, the latter extends also to the merits; (2) materially, that there is no obligation to negotiate before coming to this honourable Tribunal; and (3) factually, that irrespective of this, negotiations took place between Saint Vincent and the Grenadines and Spain.

Mr President, let me address these contentions briefly, given that the Counter-Memorial and Rejoinder of Spain contain clear, authoritative and sound arguments rejecting all these erroneous arguments of the Applicant.

[This] Tribunal has yet to decide its jurisdiction on the merits and questions relating to admissibility as well.” These are not my words. These words were said last Friday by Professor Nordquist.

However, in its previous written position, Saint Vincent and the Grenadines took for granted that once the Tribunal said that it had *prima facie* jurisdiction, this jurisdiction extends also to the decision on the merits of the case. Fortunately, Professor Nordquist implicitly admitted that that previous assertion ignores a well-established international jurisprudence confirmed by this Tribunal from its very beginning. As said for example in paragraph 29 its Order of 11 March 1998 on provisional measures in the M/V “SAIGA” (No. 2) Case:

before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Tribunal might be founded.

Quite recently, in its case on certain activities carried out by Nicaragua in the border area, the International Court of Justice recalled again this same principle in paragraph 49; and this is what this Tribunal did in its Order of 23 December 2010 on provisional measures.

The Tribunal not only decided not to prescribe such measures, which is important with regard to its possible absence of jurisdiction on the merits following the *Saiga* interpretation;

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actually, what this Tribunal declared was that its decision on provisional measures in paragraph 80

in no way prejudices the question of the jurisdiction of the Tribunal to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the rights of Saint Vincent and the Grenadines and Spain to submit arguments in respect of those questions.

Therefore, notwithstanding the assertion of *prima facie* jurisdiction with regard to the prescription of provisional measures only, prior to any decision on the merits, the jurisdiction of the Tribunal must be established.

Using again the words of this Tribunal in the "Saiga" (No. 2) Case, even where there is no disagreement between the parties regarding the jurisdiction of the Tribunal -which is not the case here, "the Tribunal must satisfy itself that it has jurisdiction to deal with the case as submitted." That is paragraph 40.

The assessment by a Tribunal of its own jurisdiction to deal with the merits of a case is, on the other hand, autonomous and it is not linked to its decision on *prima facie* jurisdiction for the adoption of provisional measures. Hence it is not unusual for a Tribunal to decide on *prima facie* jurisdiction and jurisdiction on the merits on different terms within the same case. The recent ICJ's Case concerning application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation) is a good example of this judicial practice.

In the view of Spain, in this case we face a quite similar situation. Moreover, at this juncture, the decision on the jurisdiction is particularly crucial, since there is a disagreement between the Parties regarding this particular question.

The Applicant also tries to stress the idea that to declare it has no jurisdiction, this Tribunal would be violating its own judicial function.

The Applicant plainly ignores the fact that in a consensual system of peaceful solution of international disputes, one of the main building blocks of that judicial function is for a tribunal to be completely satisfied that it has jurisdiction to deal with the case on the merits.

In any case, Saint Vincent and the Grenadines further maintain that article 283 of the Convention does not apply, using erroneously the arguments of the Hague Court in the Case concerning the land and maritime boundary between Cameroon and Nigeria.

In its decision of 1998 in that case between Cameroon and Nigeria, the Court held in general terms that there is not any general rule upon which the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to an international court or tribunal. However, this assertion by The Hague Court must be interpreted keeping in mind, on the one hand, that that statement of the Court must be read in the context of the entire case decision, including its paragraphs 103 to 109, where the ICJ distinguished between the cases where it has been seized on the basis of unconditioned declarations made under article 36(2) of its Statute and the cases where it has been seized on the basis, precisely, of the Convention on the Law of the Sea.

In the latter, previous diplomatic negotiations between the States parties to the dispute constitutes a precondition for a matter to be referred to the Court.

On the other hand, that statement of the Court refers to general international law, as the ICJ itself explained in its decision, and does not apply when there exists a particular rule obliging States to exchange views prior to having recourse to an international adjudicative body. Without any doubt, article 283 of the Convention is one of those particular rules. The wording of the title of article 283, "Obligation to exchange views", and the compulsory

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meaning of its text, “the parties to the dispute shall proceed to an exchange of views”, are clear: the parties to a dispute concerning the interpretation or application of the Convention are obliged to exchange their views regarding its settlement prior to any resort to this honourable Tribunal.

The ICJ has been confronted continuously with this type of clauses: last year, in the Case concerning Georgia and Russia, the Court had to interpret the content and extent of article 22 of the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. The existence of that specific clause, which obliged the parties to negotiate before probable proceedings before the ICJ, and the absence of such previous negotiation, led the Tribunal to conclude that it had no jurisdiction to hear the case on the merits.

This very year, in the case between Belgium and Senegal, relating to the obligation to prosecute or extradite, the Court’s judgment of 20 July was also crystal clear with regard to the application of article 30, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, as a condition for jurisdiction.

In both cases, Mr President, the basis for jurisdiction of the Court was conventional -the 1965 Convention against Discrimination and the 1984 Convention against Torture; and in both cases there were an obligation to exchange views and to negotiate between the parties as a compulsory precondition to seize the Court. In both cases, finally, the Court meticulously reviewed the fulfilment of that precondition in order to decide on its jurisdiction.

In our case, we face a similar scenario: a conventional basis of jurisdiction - the Convention on the Law of the Sea - and a compulsory precondition - article 283, which places an obligation to proceed expeditiously to an exchange of views regarding the settlement of any dispute by negotiation or other peaceful means.

*(Break)*

*The President:*

Mr Aznar Gómez, please continue your pleadings.

*Mr Aznar Gómez:*

Thank you, Mr President. I was saying before the break that in our case we are facing a quite similar scenario to those I came to talk about: a conventional basis of jurisdiction, the Convention on the Law of the Sea, and a compulsory precondition, article 283, which obliges to proceed expeditiously to an exchange of views.

As resumed by former President Chandrasekhara Rao in his Separate Opinion to the Order of 8 October 2003 on Provisional Measures in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*:

[t]he requirement of this article regarding exchange of views is not an empty formality, to be dispensed with at the whims of a disputant. The obligation in this regard must be discharged in good faith, and it is the duty of the Tribunal to examine whether this is being done.

Let me follow the reasoning of the former President in the next few minutes.

First of all, article 283 is not an empty formality. To the contrary, the compulsory exchange of views foreseen in that article aims at different functions directly linked to the dispute settlement system of the Convention itself. The “exchange of views” required by the Convention contains essentially a general mandate so that the States Parties can express their

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opinions on the dispute itself, on the way in which such dispute can be settled and, if possible, on the settlement of the dispute from a substantial point of view.

It is, therefore, an obligation of behaviour that, if not fulfilled, prevents the correct development of the entire system of settlement of disputes designed by the Convention, and it is precisely because of this that it constitutes a limit to the exercise of jurisdiction by this Tribunal. In this regard, Spain wishes to recall that even though it is true that that behavioural obligation is wide in scope, it is also true that this obligation has two components. The first component requires the actual existence of a real "exchange of views", which cannot be reduced to a single unilateral act by one of the parties, which would supposedly suffice by itself to conclude the pre-litigious phase. The second component implies that the aim of the consultations must be to reach a settlement of the dispute through negotiation or through any other peaceful means, which precludes taking into consideration any other aim not directly related to the subject matter of the dispute.

As the ICJ resumed a few months ago in the case *relating to the Obligation to Prosecute or Extradite*, it must be ascertained whether there was:

... at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute. According to the Court's jurisprudence, "the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked".

But the Court also clearly stressed that "the requirement that the dispute 'cannot be settled through negotiation' could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies" as the Court concluded, that "no reasonable probability exists that further negotiations would lead to a settlement". Consultations are not "mere protests or disputations", nor are they reduced to "the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims." Far from that, consultations are meant to be "a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute."

In any case,

these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question.

Saint Vincent and the Grenadines contends that the standard for satisfying article 283 of the Convention has been set by this Tribunal in a subjective manner, that is, once the Applicant affirms that the possibilities of reaching agreement have been exhausted, they have been exhausted. This interpretation is unacceptable since it would empty the true meaning of article 283 of the Convention as it has been progressively interpreted by the Tribunal in the three cases where that article was particularly discussed: the *Southern Bluefin Tuna Case* in 1999, the *MOX Plant Case* in 2001 and the *Land Reclamation Case* in 2003.

In the *Southern Bluefin Tuna* case, the Tribunal first held that:

negotiations and consultations had taken place between the parties and that the records show that these negotiations were considered by Australia and New

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Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea.

The Tribunal went on to state “that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations”.

Therefore, the Tribunal clearly ascertained that a negotiation had taken place, and, second, that during the same negotiations the Convention had been invoked in diplomatic notes. Having made these two findings, and only then, was it concluded that negotiations should not be continued, as the possibilities of reaching an agreement had been exhausted.

In the *MOX Plant Case*, although the Tribunal did not expressly state that the conditions set out in article 283 had been met, it did consider that both Ireland and the United Kingdom had sought an exchange of views and that, in particular,

in its letter written as early as 30 July 1999, [Ireland] had drawn the attention of the United Kingdom to the dispute under the Convention and that further exchange of correspondence on the matter took place up to the submission of the dispute to the Annex VII arbitral tribunal.

Again, the Tribunal took into account that there had been a negotiation in which the Convention was discussed.

This same position has been maintained in subsequent practice. Thus, in the *Case Concerning Land Reclamation*, the Tribunal again analysed the scope of article 283 and, in view of the lengthy succession of negotiation meetings between the parties to the dispute, held that the conditions of article 283 had been met.

To sum up, Mr President, the Tribunal has always demanded an effective exchange of views between the parties with regard to the dispute about the Convention. This exchange of views has been presented as an obligation of behaviour, not an obligation of result. Therefore, when its existence, over and above the results achieved, has been “objectively” verified, and only then, has this Tribunal considered the conditions of article 283 to have been met.

It could be recalled that in the last case submitted to the Tribunal, the *Virginia G* case, there is also an unequivocal reference to article 283 of the Convention as the formal legal basis of the communications addressed by Panama as Applicant to Guinea Bissau, and this, Mr President, might be the normal behaviour of a party to the Convention when a dispute arises with other party of the Convention.

States Parties to the Convention, before having recourse to this honourable Tribunal, must have an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means. This exchange of views between the States imposed by article 283 of the Convention must be effective and based on good faith. However, none of these conditions are met in the attitude of Saint Vincent and the Grenadines.

Saint Vincent and the Grenadines never genuinely attempted to engage in negotiations with Spain. No single exchange of views on the dispute was made between the Applicant and Spain. Contrary to what is obsessively said in the Applicant’s Memorial and Reply, Saint Vincent and the Grenadines, to whom the obligation of exchange of views is directed, never contacted nor exchanged any views regarding the settlement of any possible dispute around the immobilization of the *Louisa* under the Convention.

Mr President, let me briefly review the facts around that immobilization to clarify again the attitude of the Applicant in this case.

As said by the Agent of Spain, the *Louisa* and its crew were immobilized on 1 February 2006. Less than a week later, the respective consular authorities were informed of the

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detentions. From that time onwards, the case was under the control of the competent judicial authorities of Spain that communicated any order, indictment and official decisions to those implied in the case.

On 15 March 2006, the Embassy of Spain in Kingston, following the customary rules of diplomatic communications, sent a *note verbale* to the Ministry of Foreign Affairs, Commerce and Trade of Saint Vincent and the Grenadines, officially informing the Applicant of the entry into and search of the *Louisa* “for any necessary procedures.”

What was the attitude of Saint Vincent and the Grenadines? Absolute silence.

The Applicant contends, mixing its international rights and obligations with the private company’s activities, that the following letters were sent: on 11 February 2009, a letter from the law firm Patton Boggs LLP, signed by Mr Cass Weiland, to the Magistrate Judge of Criminal Court No. 4 of Cádiz; on 27 April and 27 August 2010 two similar letters were sent from the law firm Kelly Hart & Hallman LLP, signed by Mr William Weiland, to the Ambassador of the Kingdom of Spain to the United States of America and to the Magistrate Judge of Criminal Court No. 4 of Cádiz, respectively; and finally, on 14 October 2010 a letter from the law firm Kelly Hart & Hallman LLP, signed again by Mr William Weiland, to the General Consul of Spain in Houston, Texas, with an attached letter from Ms Linda Thomas, Director of Sage Maritime, to the *Consejo General del Poder Judicial* of Spain was also sent. None of these communications was sent to the Spanish authorities by the Applicant but by the attorneys of some of the accused persons before the criminal tribunals in Spain. None of these communications and letters contained any reference to the “dispute” between Saint Vincent and the Grenadines and Spain under the Convention, the factual basis of the Application.

Consequently, under no circumstances can any of these documents be considered evidence of the fulfilment of the obligation to proceed to an “exchange of views” pursuant to article 283 of the Convention and the general rules of international law governing the diplomatic relations between States.

Saint Vincent and the Grenadines also contends that the two emails sent on 18 and 19 February 2010 were an attempt to contact the Spanish authority prior to filing this action.

The first email, dated 18 February 2010 and sent to the *Capitanía de Cádiz* without any formality or official seal from the Saint Vincent and the Grenadines’ Office of the Commissioner for Maritime Affairs in Geneva, just asked about the arrest of the *Louisa*. Some other details were requested in the second email.

On 19 February 2010, the *Capitanía de Cádiz* informed in two different emails that the vessel had been immobilized in a criminal procedure, giving its number and the criminal court to which the case was assigned, and forwarded all the information to the criminal court.

Of course, these emails cannot be seen either as evidence of the fulfilment of the obligation to proceed to an “exchange of views” pursuant to article 283 of the Convention. Neither the Office of the Commissioner for Maritime Affairs in Geneva nor the *Capitanía de Cádiz* enjoy the competence to carry out such negotiations under international-law rules of diplomatic relations. None of them proposed any exchange of views and none of them referred to the Convention and its possible violation by Spain.

The first and only official communication between the two States is a letter from the Permanent Mission of Saint Vincent and the Grenadines to the United Nations to the Permanent Mission of Spain to the United Nations, dated 26 October 2010. The most that can be said about this letter is that it does not follow the normal bilateral diplomatic communications between States. Spain has, and had, an accredited ambassador before Saint Vincent and the Grenadines, with residence then in Jamaica and today in Trinidad and Tobago.

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Anyway, more than four and a half years – if I am not wrong, 1,728 days – since the immobilization of the *Louisa*, the Applicant contacted Spain for the very first time, but what still astonished us is that the Applicant, in that letter, simply said, first, that Saint Vincent and the Grenadines objected to the detention of the *Louisa* and its tender, the *Gemini III*; second, that the Applicant further objected to the failure to notify the flag country of the “arrest” as “required by Spanish and international law”, which, as we have just seen, is absolutely false; and third, and I quote, that:

Saint Vincent and the Grenadines plans to pursue an action before the International Tribunal for the Law of the Sea to rectify the matter absent immediate release of the ship and settlement of damages incurred as a result of its improper detention.

Therefore, on 26 October 2010, even before having officially deposited its declaration of acceptance of the jurisdiction of this Tribunal under article 287 of the Convention, Saint Vincent and the Grenadines had already taken the decision to act against Spain before this Tribunal. With that letter, the Applicant voluntarily and unilaterally ended any chance of diplomatic consultations without giving any possible guidance on its claims that would have facilitated an exchange of views with Spain.

It is crystal clear from the wording of this sole and tardy official letter from the Applicant to the Respondent that the former would not proceed, even expeditiously, “to an exchange of views regarding [the settlement of the dispute] by negotiation or other peaceful means” as required by article 283 of the Convention. This constitutes a breach of the Convention by the Applicant that should clearly preclude its access to the Tribunal given that, paraphrasing this Tribunal in a positive sense, a State Party is obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have not been exhausted, and Saint Vincent and the Grenadines demonstrated that these possibilities had not yet been exhausted.

This is verified by the mere fact that, since the celebration of the hearings of the phase on Provisional Measures and, up to present, the Agents of both parties, at the initial request of the Applicant, and with Spain’s full participation, have maintained contacts in which opinions on the case and its eventual settlement have been exchanged. If that has been possible after the lawsuit, Spain has to express its surprise at not having seen those exchanges of views before the lawsuit was brought, which are necessary according to the Convention.

Nevertheless, Spain also wants to point out that these sudden and untimely consultations cannot be interpreted, in any circumstances, as the fulfilment of the condition required by article 283 of the Convention. Whatever the circumstances may be, the negotiations must be verified before the proceedings started, and a subsequent action cannot validate the initial error committed by Saint Vincent and the Grenadines.

The rest of the *iter* is well known by this Tribunal. On 15 October 2010, that is, even before the Applicant’s letter was sent to Spain, and, indeed, before the competence of the Tribunal had been accepted by Saint Vincent and the Grenadines, the Applicant informed the Tribunal of the appointment of its Agents and Co-Agents. On 22 November 2010, Saint Vincent and the Grenadines deposited its limited declaration of acceptance of the competence of the Tribunal, and on the next day, 23 November, Saint Vincent and the Grenadines filed its action against Spain. What willingness to exchange views by the Applicant can be deduced from this attitude? Plainly, none.

What else can be deduced from this attitude? Not just an evident expression of procedural bad faith on the part of Saint Vincent and the Grenadines but also, and undoubtedly, a real intent not to negotiate with Spain before resorting to this honourable Tribunal.

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I am concluding, Mr President, but, before finishing my statement, I should like to draw your attention again to the Applicant's intention to confuse, to blur, its actions with those of the physical and legal persons who face criminal charges in Spanish courts.

However, I repeat, the obligation set out in article 283 of the Convention is an obligation strictly between States, strictly between Saint Vincent and the Grenadines and Spain, the two Parties in this case, and that obligation must be discharged in good faith between both States, and only the States, before bringing an action to this Tribunal.

On the basis of what has been explained before this honourable Tribunal, which tries to summarize what is more extensively and plausibly referred to in the Counter-Memorial and the Rejoinder of the Kingdom of Spain, we respectfully submit that this Tribunal has no jurisdiction in this case, as the compulsory fulfilment of the exchange of views obligation according to article 283 has neither taken place nor been proved by the Applicant.

That ends my statement this morning, Mr President. Thank you for your attention. May I invite you, please, to give the floor again to the Agent of Spain?

*Le Président :*

Merci, Monsieur Aznar Gómez.

Je donne la parole à Mme Hernández. Vous avez la parole.

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AGENT DE L'ESPAGNE  
[TIDM/PV.12/A18/6/Rev.1, p. 27–34]

*Mme Escobar Hernández :*

Merci, Monsieur le Président.

Je n'ai qu'une demi-heure, je vais essayer de présenter les arguments concernant le deuxième volet relatif à la compétence, c'est-à-dire l'accomplissement des conditions qui sont en relation avec la protection diplomatique, mais en tout cas, je ferai de mon mieux pour parler lentement, même s'il fallait continuer l'après-midi.

*Le Président :*

Merci Madame.

*Mme Escobar Hernández :*

Monsieur le Président, comme mon collègue le Pr Aznar l'a déjà expliqué, l'Espagne soutient que le Tribunal n'a pas compétence en l'espèce, parce que les conditions prévues à l'article 283 de la Convention – « l'obligation de procéder à des échanges de vues » – n'ont pas été correctement remplies par Saint-Vincent-et-les Grenadines.

Mais il y a aussi d'autres raisons impérieuses de rejeter la demande de Saint-Vincent-et-les Grenadines, que j'ai abordées dans mon premier exposé. Comme je l'ai avancé, dans le but d'établir la compétence du Tribunal à statuer sur le fond de la demande présentée par Saint-Vincent-et-les Grenadines, il est particulièrement important d'identifier la nature de la réclamation et la procédure utilisée par le demandeur.

Comme l'Espagne l'a déjà souligné, la présente affaire ne saurait être assimilée à une procédure de prompt mainlevée de l'immobilisation d'un navire conformément à l'article 292 de la Convention. Au contraire, le demandeur recherche simplement une forme de protection diplomatique. Point n'est besoin d'analyser le contexte de la réclamation de Saint-Vincent-et-les Grenadines, qui constitue une voie ordinaire de la protection diplomatique. Il suffit d'analyser la teneur de cette réclamation qui se résume, pour l'essentiel, à la défense du droit d'un particulier (en l'espèce l'équipage et les propriétaires du « Louisa » et d'autres personnes) qui, selon le demandeur, aurait subi des dommages en conséquence de la violation du droit international et du droit interne par l'Espagne. Il est inutile d'insister sur le fait que c'est la définition même de la protection diplomatique, et vous le savez beaucoup mieux que moi.

En outre, le demandeur a admis, dans ses plaidoiries, que son intention en introduisant l'instance est maintenant d'exercer sa protection diplomatique. Une telle admission oblige à mettre l'accent sur les conditions qui doivent être remplies par tout Etat exerçant la protection diplomatique, qui s'appliquent pleinement en l'espèce et sont des règles du droit international général, car la Convention ne contient pas de règle particulière à l'égard de la protection diplomatique.

Monsieur le Président, pour mieux vous présenter la position de l'Espagne dans le contexte de la protection diplomatique dans la présente affaire, je consacrerai la première partie de mon intervention à l'absence de lien de nationalité. Après cela, je répondrai à la question concernant l'absence de la deuxième condition de la protection diplomatique, à savoir l'épuisement des recours internes.

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**La nationalité effective du navire et la situation particulière du « Gemini III » en l'espèce.**

L'un des éléments requis pour l'exercice de la protection diplomatique est sans conteste l'existence d'un lien de nationalité entre la personne ou l'entité lésée et le demandeur. Dans l'affaire en question, une telle nationalité devrait être définie, avant tout, s'agissant du navire immobilisé par les autorités espagnoles dans le cadre de la procédure pénale en cours. Et ce, pour une simple raison : l'unique lien officiel, voire « national » entre Saint-Vincent-et-les Grenadines et le contentieux est, en théorie, le « Louisa ».

En outre, la question de la « nationalité » du navire est déterminante pour définir la compétence du présent Tribunal parce qu'aux termes de la déclaration unilatérale de reconnaissance de la compétence faite par Saint-Vincent-et-les Grenadines, la compétence du Tribunal international du droit de la mer est limitée au cas suivant - je cite en français : « La saisie ou [...] l'immobilisation de ses navires ». Par cette déclaration, le demandeur a transformé la question de la nationalité ou du pavillon du navire en une condition essentielle qui va déterminer la compétence du Tribunal.

Par conséquent, en vue d'appliquer les règles générales de droit international relatives à l'exercice de la protection diplomatique et compte tenu de la volonté exprimée librement et unilatéralement par Saint-Vincent-et-les Grenadines, le Tribunal doit tout d'abord établir la nationalité du navire ou des navires lésés par l'immobilisation.

L'article 91 de la Convention dispose que chaque Etat fixe les conditions auxquelles il soumet l'attribution de sa nationalité aux navires, l'immatriculation des navires sur son territoire et le droit de battre son pavillon. Il précise aussi que les navires possèdent la nationalité de l'Etat dont ils sont autorisés à battre le pavillon. Le paragraphe 1 de l'article 91 se termine par une affirmation brève, mais complexe : « Il doit exister un lien substantiel entre l'Etat et le navire ». L'Espagne ne conteste en aucun cas le droit souverain qu'a le demandeur d'attribuer sa nationalité au « Louisa », de l'immatriculer et de lui accorder son pavillon. De plus, l'Espagne reconnaît entièrement - et l'a reconnu pendant toute la procédure - que le « Louisa » battait le pavillon de Saint-Vincent-et-les Grenadines aux « dates critiques » de l'espèce.

Néanmoins, il faut aussi rappeler que la Convention elle-même contient des éléments dont on ne peut négliger l'importance à l'égard de la détermination de la nationalité de la réclamation en relation avec le « Louisa ». Je me réfère en particulier à l'exigence de la « nationalité effective » et du « lien substantiel », je me réfère aussi au critère de l'autorité effective, de la juridiction effective et, par conséquent, de la responsabilité à l'égard du navire (voir les articles 91 et 94 de la Convention).

Cela étant, l'Espagne n'examinera pas ici de façon plus approfondie le fait que le « Louisa » battait le pavillon de Saint-Vincent-et-les Grenadines aux « dates critiques » de l'espèce. Un éclaircissement est cependant nécessaire s'agissant du statut juridique du « Gemini III ». Comme pendant la procédure écrite, le demandeur a tenté dans ses plaidoiries, sans trop se justifier du point de vue juridique, de faire examiner comme un tout le statut juridique du « Louisa » et de son prétendu « navire auxiliaire », le « Gemini III ». Or, le demandeur n'établit pas le lien de nationalité entre le « Gemini III » et Saint-Vincent-et-les Grenadines : ce navire n'a jamais battu son pavillon. Le demandeur, dans la documentation qu'il a fournie tout au long de la procédure, ne présente aucun moyen de preuve concernant le pavillon actuel et le pavillon passé, c'est-à-dire 2005, 2006, du « Gemini III ».

Maintenant, la lettre du directeur de Sage envoyée au *Consejo General del poder Judicial* (Conseil suprême de la magistrature en Espagne) le 14 octobre 2010, reproduite dans l'annexe 8 du mémoire de Saint-Vincent-et-les Grenadines, dit que le « Gemini III » battait le pavillon des Etats-Unis. Pendant les audiences, un témoin, M. Avella, nous a même dit que le « Gemini III » n'arborait, à l'époque, aucun pavillon, ce qui, si c'est vrai, est absolument

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contraire aux règles du droit de la mer applicables. En tout état de cause, le demandeur ne démontre pas que le « Gemini III » a battu pavillon de Saint-Vincent-et-les Grenadines à un quelconque moment. Le Tribunal « ne peut pas présumer l'existence d'un élément de preuve qui n'a pas été produit ». Je me réfère à l'arrêt dans le cadre du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant))*.

Le demandeur n'a pas contesté ce que l'ordonnance relative aux mesures conservatoires, dictées par votre Tribunal, rappelle avec justesse en son paragraphe 43, à savoir : « que le "Gemini III" ne battait pas pavillon de Saint-Vincent-et-les Grenadines au moment de l'immobilisation ». Comme indiqué plus haut, dans la déclaration qu'il a faite en application de l'article 287 de la Convention, le demandeur a explicitement limité la compétence du Tribunal au règlement des différends relatifs à la « saisie ou à l'immobilisation de ses navires ». A la date critique - mais même avant et tout autant à l'heure actuelle -, le « Gemini III » ne battait pas pavillon de Saint-Vincent-et-les Grenadines et, par conséquent, ne peut être inclus dans la catégorie que le demandeur appelle « ses navires ».

Il s'ensuit qu'en l'absence de lien de nationalité, le demandeur n'a aucun droit de saisir le Tribunal s'agissant du « Gemini III ». Cela est conforme au principe coutumier bien établi en droit international selon lequel la responsabilité de l'Etat peut uniquement être invoquée si la demande est présentée conformément aux règles applicables en matière de nationalité des réclamations, toujours en relation avec la protection diplomatique. Ce principe est codifié dans l'article 44 a) des articles sur la responsabilité de l'Etat pour faits internationalement illicites, approuvés par la Commission du droit international et dont l'Assemblée générale des Nations Unies a pris note. En conséquence, il n'y a aucunement lieu de se prévaloir du moindre point de droit en ce qui concerne le « Gemini III ». Le différend, pour autant qu'il existe, doit être circonscrit au « Louisa », comme le fait implicitement le demandeur au paragraphe 50 de son mémoire : « Saint-Vincent-et-les Grenadines est l'Etat du pavillon du navire immobilisé » - « du » au singulier, et non pas au pluriel.

En outre, comme l'a affirmé M. le juge Wolfrum dans son opinion dissidente jointe à l'ordonnance relative à la demande en prescription de mesures conservatoires (paragraphe 16), en aucun cas le « Louisa » et le « Gemini III », deux navires battant deux pavillons différents, ne sauraient être considérés comme une unité. Le Tribunal a précisé, dans l'*Affaire du navire « SAIGA » (No. 2)*, la notion de « navire comme constituant une unité », ce qui ne s'applique manifestement pas en l'espèce. Par conséquent, il n'y a pas lieu d'examiner en l'espèce une quelconque conséquence internationale de l'immobilisation licite du « Gemini III » par les autorités espagnoles.

Mais, dans le cas d'espèce, la nationalité de la réclamation doit être analysée aussi en relation avec certaines personnes morales ou physiques à l'égard desquelles le demandeur entend exercer sa protection diplomatique.

La liste de ces personnes a été établie par les représentants du demandeur tout au long des plaidoiries comme suit :

- Alba Jennifer Avella ;
- Mario Avella ;
- Les deux membres de l'équipage mis en détention à l'occasion de l'immobilisation du « Louisa » ;
- John Foster, propriétaire du « Louisa » et de la société Sage.

Aucune de ces personnes n'a la nationalité de Saint-Vincent-et-les Grenadines. Mme Avella, M. Avella et M. Foster sont des nationaux des Etats-Unis. Les deux membres de l'équipage ont la nationalité hongroise. Par conséquent, et sauf preuves contraires, le demandeur ne peut exercer sa protection diplomatique à l'égard d'aucune de ces personnes.

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Pour examiner cette question, il faut distinguer trois types de situations :

- i) celle des membres de l'équipage, c'est-à-dire deux personnes dont la nationalité est hongroise et une de nationalité américaine ;
- ii) celle de M. Foster, de nationalité américaine, qui est le propriétaire du « Louisa » ;
- iii) celle de Mme Avella qui, comme cela a été clairement indiqué dans les audiences publiques la semaine dernière, est une simple spectatrice de nationalité américaine.

**La nationalité de l'équipage et des autres personnes liées aux activités du « Louisa » et ses conséquences en l'espèce**

Permettez-moi maintenant d'aborder la nationalité de l'équipage et d'autres personnes liées à des activités du « Louisa » et les conséquences qui en découlent.

A cet égard, l'Espagne souhaite appeler à nouveau l'attention sur la nécessité de faire la distinction entre la procédure de prompt mainlevée (articles 292 et suivants) et la présente procédure ordinaire au titre de l'article 287 de la Convention. Cela revêt une importance particulière s'agissant de la protection de l'équipage car, aux termes de l'article 292, l'Etat du pavillon peut exercer une sorte de protection fonctionnelle en faveur de l'équipage, quelle qu'en soit la nationalité, uniquement dans le cas très spécifique de la procédure de prompt mainlevée, mais il peut le faire ! Il peut les protéger fonctionnellement.

Cette disposition n'est justifiée que par la nature exceptionnelle de la procédure sommaire, conçue comme une procédure d'urgence - quand je parle de procédure sommaire, je me réfère bien sûr à la procédure de mainlevée - et par le fait qu'il ne soit pas tenu compte du caractère d'urgence de la procédure si chaque membre de l'équipage devait, à titre individuel, s'adresser à l'Etat de sa nationalité, en particulier quand l'équipage, comme c'est le cas normalement, est très nombreux et appartient à des nationalités très variées.

Contrairement aux allégations du demandeur, dans tous les autres cas où un Etat saisit le Tribunal au motif de l'exercice de la protection diplomatique, il n'y a pas la moindre raison de conclure qu'il faudrait faire exception à la règle générale de droit international qui requiert l'existence d'un lien de nationalité et de ne pas l'appliquer en l'espèce. Par conséquent, Saint-Vincent-et-les Grenadines doit prouver l'existence d'un lien de nationalité pour introduire une instance judiciaire devant vous. De ce fait, le Tribunal ne peut pas se déclarer compétent s'agissant de réclamations touchant des personnes morales ou physiques n'ayant pas la nationalité du demandeur, en particulier :

- à l'égard des réclamations intéressant des membres de l'équipage qui sont de nationalité hongroise ou des Etats-Unis d'Amérique ;
- à l'égard des réclamations intéressant des propriétaires des navires qui, en tant que personnes physiques ou morales comme Sage, sont ressortissants des Etats-Unis ;
- dans le cas de Mme Avella, qui se trouvait sur le « Louisa », du moins c'est ce qui nous a été dit la semaine dernière, d'une manière accidentelle et fortuite.

L'absence de lien de nationalité est de plus renforcée par le fait que Saint-Vincent-et-les Grenadines n'a pas exercé de contrôle réel sur les activités des personnes susvisées et par l'absence de lien substantiel entre cet Etat et lesdites personnes. Cela confirme, à son tour, l'inexistence d'un lien formel ou substantiel susceptible de justifier le droit qu'aurait Saint-

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Vincent-et-les Grenadines d'exercer d'une manière autonome sa protection diplomatique au bénéfice de telles personnes.

Permettez-moi de commencer par une analyse plus détaillée de la situation de l'équipage. Il est exact que le Tribunal a statué sur « le navire comme constituant une unité », en incluant sous cette dénomination le navire et son équipage. Et c'est sans nul doute cette jurisprudence spécifique (toujours liée à la procédure de prompt mainlevée) qui a incité la Commission du droit international il y a quelques années à inclure dans son projet d'articles sur la protection diplomatique l'article 18, que vous connaissez très bien.

Néanmoins, l'Espagne estime que même cette disposition ne saurait être considérée comme un hypothétique fondement juridique permettant de reconnaître d'une façon automatique et sans aucune condition le droit qu'aurait, en général et en toutes circonstances, l'Etat du pavillon d'exercer sa protection diplomatique au bénéfice de l'équipage, et ce, pour les motifs ci-après :

- premièrement, l'article 18 est fondé sur la procédure de prompt mainlevée des navires et devra, par conséquent, être circonscrit à ce cadre ;
- deuxièmement, l'insertion de cette disposition dans le texte du projet d'articles a été controversée et a fait l'objet de vives critiques de la part des membres de la Commission de droit international et des représentants des Etats à la sixième Commission de l'Assemblée générale des Nations Unies ;
- troisièmement, en tout état de cause, cette disposition n'est pas en vigueur actuellement, puisque le projet d'articles n'a pas débouché sur une convention. En outre, elle ne reflète pas la pratique des Etats et l'on ne peut pas conclure qu'il s'agit d'une règle de droit coutumier.

En conséquence, l'Espagne ne doute pas que Saint-Vincent-et-les Grenadines n'a aucun droit d'exercer sa protection diplomatique en faveur de membres de l'équipage du « Louisa » qui ne sont pas ses ressortissants. Exercer la protection diplomatique, en l'absence d'un lien de nationalité, reviendrait à agir au mépris des règles du droit international qui fixent les conditions de l'exercice de la protection diplomatique et qui s'appliquent directement en l'espèce.

En outre, le fait d'étendre une telle protection à des personnes qui ne sont pas membres de l'équipage serait exorbitant et complètement injustifié. L'Espagne estime donc que l'impératif relatif au lien de nationalité avec le demandeur interdit catégoriquement d'exercer la protection diplomatique au profit de M. Foster, de nationalité américaine, qui n'a aucune relation avec l'Etat du pavillon.

Cela dit, pour le propriétaire du navire, la conclusion est obligée à l'égard de Mme Alba Avella qui, d'après sa déclaration devant le Tribunal, n'avait aucune relation avec le « Louisa » ni avec les activités de Sage, sauf le « point de contact » de son père qui lui aurait offert, toujours d'après sa propre déclaration, de séjourner sur le « Louisa ».

### **Conclusions**

Monsieur le Président, au motif des arguments exposés dans les paragraphes qui précèdent, l'Espagne estime que le Tribunal n'a aucune compétence pour statuer au fond en l'affaire introduite par la requête de Saint-Vincent-et-les Grenadines, car cet Etat entend ainsi exercer sa protection diplomatique au profit de personnes qui n'ont aucun lien de nationalité avec lui - je me réfère bien sûr à la protection diplomatique vis-à-vis des personnes - au mépris - cela

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constituerait un mépris s'il le faisait - le plus complet de l'obligation fondamentale qu'il a de prouver la nationalité des droits prétendument lésés et de la réclamation correspondante.

En tout état de cause, si l'exercice de la protection diplomatique était jugé possible, une telle protection devrait être circonscrite au navire « Louisa ». Toute réclamation relative aux droits ou intérêts propres de tierces parties n'ayant aucun lien de nationalité avec Saint-Vincent-et-les Grenadines, qu'il s'agisse de personnes morales ou physiques, ne devrait tout simplement pas relever de la protection diplomatique.

Les représentants de Saint-Vincent-et-les Grenadines ont affirmé, dans leurs plaidoiries, que votre Tribunal devrait se déclarer compétent pour les réclamations relatives aux nationaux des Etats-Unis, car les Etats-Unis n'étant pas partie à la Convention, le pays de la nationalité des particuliers ne sera pas en mesure de venir devant votre tribunal et d'exercer sa protection diplomatique. Et d'ajouter que le Tribunal serait le seul moyen pour protéger les droits de Mme Avella, de M. Avella et de M. Foster. Permettez-moi, Monsieur le Président, en simplement deux minutes, de faire quelques commentaires à l'égard de ces arguments.

En premier lieu, il n'est pas possible, vous le savez très bien, et beaucoup mieux que moi-même, d'assimiler protection diplomatique et recours devant votre Tribunal. En fait, bien que la protection diplomatique puisse s'exercer à travers une réclamation en justice devant vous, il est aussi possible d'utiliser n'importe quel autre système de règlement pacifique des différends.

En deuxième lieu, le recours devant votre Tribunal n'est pas le seul instrument pour obtenir justice à l'égard des prétendus droits lésés de Mme Avella, de M. Avella et de M. Foster, en particulier, j'aimerais le faire remarquer, si on tient compte de la nature des droits prétendument lésés.

Et, troisièmement, et je termine, en tout état de cause, la non-ratification d'un traité international (la Convention) par un Etat souverain (les Etats-Unis) dans l'exercice de sa libre volonté et de sa libre souveraineté, ne peut constituer une base suffisante pour contourner les règles bien établies de la protection diplomatique en droit international selon lesquelles l'existence d'un lien de nationalité constitue la première des conditions essentielles pour l'exercice de la protection diplomatique.

Merci, Monsieur le Président. Si vous le voulez, je peux m'arrêter ici et continuer cet après-midi.

*The President:*

Thank you. If you wish to continue your presentation this afternoon, that brings us to the end of this morning's sitting. We will sit again at 3 p.m. The sitting is closed.

*(Luncheon adjournment)*

8 octobre 2012, après-midi

**PUBLIC SITTING HELD ON 8 OCTOBER 2012, 3.00 P.M.**

**Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 8 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 8 OCTOBRE 2012, 15 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 8 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*Le Président :*

Bon après-midi, Mesdames et Messieurs. Nous allons poursuivre, cet après-midi, les plaidoiries de l'Espagne, mais avant de redonner la parole à l'agent de l'Espagne, il nous faut d'abord nous occuper d'une tâche procédurale. Aujourd'hui, et pendant les jours suivants, le Tribunal va entendre des experts et des témoins experts qui vont s'exprimer en langue espagnole. Conformément au Règlement du Tribunal, les dépositions des experts et témoins experts seront interprétées de l'espagnol vers l'anglais, une des langues officielles du Tribunal, par une interprète mise à la disposition du Tribunal par la partie intéressée. L'interprète, Mme Dolores Dunn de Ayuso (*en anglais* : je ne sais pas si j'ai bien prononcé le nom), est présente avec nous. Je lui souhaite la bienvenue. Madame Dolores Dunn de Ayuso interprétera les déclarations faites en langue espagnole vers l'anglais et les interprètes du Tribunal interpréteront de l'anglais vers le français. Le même système s'appliquera, vice-versa, pour les questions posées aux experts en anglais ou en français.

Selon le Règlement du Tribunal, les interprètes mis à disposition par une Partie doivent faire une déclaration solennelle. Je prie donc le Greffier de bien vouloir demander à Mme Dolores Dunn de Ayuso de faire la déclaration solennelle.

*Le Greffier :*

Merci, Monsieur le Président.

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*(Continues in English)* Good afternoon, Ms Dunn de Ayuso. Interpreters provided by one of the parties are required to make a solemn declaration under article 85 of the Rules of the Tribunal before entering upon their duties. You have been provided with the text of the declaration. May I invite you to make the solemn declaration?

*The interpreter is sworn in.*

*The Registrar:*

Thank you, Ms Dunn de Ayuso, you can now go to the interpretation booth.

*Le Président :*

Je donne la parole à l'agent de l'Espagne pour continuer son exposé.

Madame Escobar Hernández, s'il vous plaît.

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ - 8 octobre 2012, après-midi

### **Plaidoirie de l'Espagne (suite)**

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ (SUITE)  
AGENT DE L'ESPAGNE  
[TIDM/PV.12/A18/7/Rev.1, p. 1–7]

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je vais continuer mon exposé et pour cela, permettez-moi d'aborder maintenant la question concernant le non-épuisement de voies de recours internes par le demandeur et ses conséquences sur la présente procédure.

#### **Non-épuisement des recours internes**

Au paragraphe 68 de l'ordonnance du 23 décembre 2010 relative à la demande en prescription de mesures conservatoires, vous avez estimé qu' « il conviendrait d'examiner la question de l'épuisement des recours internes à un stade ultérieur de la procédure ».

A cet égard, l'Espagne estime que Saint-Vincent-et-les Grenadines ne s'est pas correctement acquitté de l'obligation qui lui incombe d'épuiser les recours internes comme le requiert l'article 295 de la Convention, ainsi que les règles du droit international général applicables à la protection diplomatique.

Aux termes de l'article 295 de la Convention - je cite :

Un différend entre Etats Parties relatif à l'interprétation ou à l'application de la Convention peut être soumis aux procédures prévues à la présente section seulement après que les recours internes ont été épuisés selon ce que requiert le droit international.

Comme indiqué par le Tribunal dans l'*Affaire du navire « SAIGA » (No. 2)* :

la question de savoir si les recours internes doivent être épuisés trouve sa réponse dans le droit international. Le Tribunal doit, par conséquent, se référer au droit international pour s'assurer des conditions de l'application de cette règle et pour déterminer si ces conditions sont réunies en l'espèce.

Les cours et tribunaux internationaux, notamment votre Tribunal, ont déclaré par leur jurisprudence la nature juridique et l'étendue de ces principes coutumiers qui s'attachent à ce que : « L'Etat où la lésion a été commise puisse y remédier par ses propres moyens, dans le cadre de son ordre juridique interne » (affaire *Interhandel*).

Pour qu'une demande internationale soit recevable - je cite encore une fois :

Il suffit qu'on ait soumis la substance de la demande aux juridictions compétentes et qu'on ait persévéré aussi loin que le permettent les lois et les procédures locales et ce, sans succès (affaire *Electronica Sicula*).

Ce principe coutumier a été codifié dans l'article 44 b) du projet d'articles sur la responsabilité de l'Etat aux termes duquel - je cite :

La responsabilité de l'Etat ne peut pas être invoquée si [...] toutes les voies de recours internes disponibles et efficaces n'ont pas été épuisées au cas où la demande est soumise à la règle de l'épuisement des voies de recours interne.

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Pour un tribunal, l'allégation touchant le non-épuisement des recours internes soulève, sans le moindre doute, des problèmes de caractère préliminaire qui doivent être réglés immédiatement et indépendamment du fond (affaire *Barcelona Traction*).

Le co-agent de Saint-Vincent-et-les Grenadines a nié l'obligation d'épuiser les recours internes en essayant de nous présenter l'affaire du « Louisa » comme une affaire où les droits en cause sont seulement des droits directs de l'Etat demandeur, et en faisant appel à votre jurisprudence dans l'*Affaire du navire « SAIGA » (No. 2)*.

Mais l'argument proposé par le co-agent du demandeur est trompeur, car Mme Forde considère comme des droits directs de Saint-Vincent-et-les Grenadines, par exemple, tout dommage subi par toutes et chacune des personnes à l'égard desquelles le demandeur entend, sans aucune base, exercer sa protection diplomatique. Un tel argument n'est pas compatible avec les règles applicables en droit international général à l'égard de la protection diplomatique.

En effet, l'obligation d'épuisement préalable des recours internes est déterminée par la nature des droits qui sont revendiqués. Comme cela a été précisé à maintes reprises par la jurisprudence internationale, la règle de l'épuisement des recours internes ne s'applique pas aux violations des droits directs d'un Etat, c'est normal. Inversement, l'épuisement des recours internes est obligatoire dans les affaires comme celles dont le Tribunal est saisi, ayant trait à la protection diplomatique, lorsqu'un Etat revendique le respect du droit international en faveur de personnes ayant un lien de nationalité avec lui et dont le droit de l'Etat est simplement un droit indirect, à savoir le droit de faire respecter le droit international dans la personne de ses nationaux.

Votre Tribunal a accepté une telle distinction et a élaboré ce raisonnement en recourant à la notion de « lien juridictionnel ».

Dans l'*Affaire du navire « SAIGA » (No. 2)* invoquée par le co-agent du demandeur, le Tribunal a également traité le point de savoir si le « lien juridictionnel » existait entre l'Etat responsable et les personnes physiques ou morales au sujet desquelles le demandeur avait présenté des demandes. En l'espèce, ce qui était examiné était le lien juridictionnel concernant les activités dans la zone économique exclusive de la Guinée. Le Tribunal n'a pas conclu à l'existence d'un tel lien juridictionnel en raison de l'application exorbitante de la législation douanière de la Guinée dans sa zone économique exclusive.

De l'avis du Tribunal - je cite :

Le point de savoir si le lien juridictionnel nécessaire existait entre la Guinée et les personnes physiques ou morales au sujet desquelles Saint-Vincent-et-les Grenadines

- c'est encore une affaire à laquelle a participé Saint-Vincent-et-les Grenadines -

a présenté des demandes doit être déterminé à la lumière des conclusions du Tribunal sur la question de savoir si la Guinée était en droit, aux termes de la Convention, d'appliquer sa législation douanière dans son rayon des douanes. Si le Tribunal devait décider que la Guinée était en droit d'appliquer sa législation douanière dans son rayon des douanes, alors les activités que menait la *Saiga* pourraient être considérées comme relevant de la juridiction de la Guinée. Si, en revanche, l'application par la Guinée de sa législation douanière dans son rayon des douanes devait s'avérer contraire à la Convention, il s'ensuivrait qu'aucun lien juridictionnel n'a existé.

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Le Tribunal a conclu à l'inexistence d'un « lien juridictionnel » en suivant les allégations de Saint-Vincent-et-les Grenadines dans le cas d'espèce, selon lesquelles - je cite :

Un tel lien était inexistant en l'espèce, puisque le navire a été arraisonné en un lieu ne relevant pas de la juridiction territoriale de la Guinée et qu'il a été amené à l'intérieur de la juridiction de la Guinée par la force.

Le cas du « Louisa », permettez-moi de le dire, est diamétralement opposé.

Comme cela a été démontré s'agissant du « Louisa », le lien juridictionnel est très bien établi étant donné que toutes et chacune des activités des personnes physiques ou morales en faveur desquelles le demandeur soumet sa réclamation se sont déroulées dans les eaux intérieures et la mer territoriale espagnoles, zones relevant toutes deux de la juridiction exclusive du Royaume d'Espagne (article 2 de la Convention).

Par conséquent, et suivant le raisonnement du Tribunal, la règle coutumière de l'épuisement des recours internes s'applique bel et bien dans la présente affaire.

Monsieur le Président, le demandeur a soutenu dans sa demande en prescription de mesures conservatoires que – je cite :

c'est à regret qu'il a déposé sa requête et sa demande en prescription de mesures conservatoires, et seulement après que des efforts considérables et soutenus aient été déployés pour obtenir la mainlevée de cette immobilisation par le biais du système juridique du défendeur.

Dans son mémoire, le demandeur a répété que des – je cite :

représentants du propriétaire et des agents du demandeur ont effectué toutes les démarches procédurales et diplomatiques connues pour essayer d'obtenir le règlement de cette question, notamment la mainlevée de l'immobilisation du « Louisa » et du « Gemini III » et celle de la saisie de leur armement.

Ces efforts, d'après le demandeur, « ont tous été infructueux ».

Enfin, les représentants du demandeur, pendant les audiences la semaine passée, ont affirmé qu'un Etat souverain ne peut pas attendre six ans à cause du mauvais fonctionnement du système judiciaire des « *provinces espagnoles* » - je cite les mots exacts. En même temps, le co-agent du demandeur a déclaré que le demandeur ne se considère plus obligé d'épuiser les recours internes car tous les recours étaient déjà épuisés. En outre, Mme Forde s'interroge et interroge le Tribunal sur la procédure pendante qui devrait être épuisée. Elle ajoute que : « Saint-Vincent-et-les Grenadines n'est pas en procès avec l'Espagne. Le "Louisa" et le "Gemini III" ne sont pas, pour autant que nous le sachions, nommés en tant que parties en Espagne ». Ces affirmations sont manifestement inexactes et trompeuses. Permettez-moi de faire quelques commentaires à leur sujet.

Premièrement, le co-agent du demandeur se trompe absolument dans sa compréhension de l'épuisement des recours internes. Une telle condition, c'est-à-dire la condition d'épuiser préalablement les recours internes, s'adresse à l'Etat qui prétend exercer la protection diplomatique, mais il s'agit d'une condition qui doit être accomplie par les bénéficiaires de la protection diplomatique, c'est-à-dire par les personnes dont les droits directs ont été violés par un Etat tiers. Il est évident que ni Saint-Vincent-et-les Grenadines ni le « Louisa » ne sont inculpés dans le cadre du procès pénal à Cadix. Il est évident aussi que le demandeur n'est pas partie au procès. Mais le co-agent du demandeur passe sous silence le fait que Mme Avella, M. Avella et M. Foster ont été ou sont parties à la procédure pénale à Cadix et que, dans cette

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mesure, ils ont le droit de présenter des recours en défense de leurs intérêts et de leurs droits. Et que, par conséquent, ce qui est encore plus important - ils l'ont fait -, c'est à eux d'assurer l'épuisement préalable des recours internes.

En deuxième lieu, permettez-moi de dire que les affirmations du demandeur sont également trompeuses. Saint-Vincent-et-les Grenadines entend faire passer pour un épuisement des recours internes offerts par le droit espagnol :

- divers actes extrajudiciaires tels que plusieurs communications transmises à des personnes sans rapport direct avec la procédure pénale actuellement en cours devant les tribunaux espagnols, laquelle, selon le demandeur, serait à l'origine de la présente espèce ;
- ou encore plusieurs visites, entretiens, appels téléphoniques, ainsi que des lettres qui ont été envoyées au juge d'instruction du *Juzgado de instrucción* n° 4 de Cadix, mais qui ne sont pas de nature procédurale et qui ne font pas partie du dossier.

L'Espagne rappelle que les actes, seuls réputés remplir l'obligation visée à l'article 295 de la Convention, sont précisément les recours juridiques nationaux qui permettent de réparer les prétendus torts dont Saint-Vincent-et-les Grenadines se prévaut, c'est-à-dire des torts à l'égard de personnes concrètes. Une lecture attentive du *petitum* du mémoire de Saint-Vincent-et-les Grenadines montre qu'il a pour but d'obtenir :

- i) premièrement, la mainlevée de l'immobilisation du « Louisa » ;
- ii) deuxièmement, une déclaration sur la détention prétendument illicite des personnes impliquées dans l'affaire ;
- iii) troisièmement, l'obtention de la réparation des dommages directs et indirects prétendument subis en conséquence de l'immobilisation du navire.

Il n'est possible d'atteindre ces buts qu'en recourant aux procédures judiciaires régulières devant les tribunaux espagnols compétents. Ce n'est que moyennant ces procédures que les personnes prétendument lésées (particuliers et sociétés) peuvent prétendre obtenir réparation des dommages, pour autant qu'elles y aient droit. Par conséquent, seules ces procédures peuvent être employées pour respecter la règle de l'épuisement préalable des recours internes. Ces recours sont encore pendants dans une certaine mesure. Le Tribunal ne peut donc pas admettre l'affirmation du demandeur selon laquelle la condition imposée par l'article 295 de la Convention aurait été dûment satisfaite.

En troisième lieu, les affirmations du demandeur sont aussi trompeuses quand il affirme qu'il s'est produit un déni de justice par le biais du dépassement du délai raisonnable et que le comportement de l'Espagne est - je cite : « simplement un tour de passe-passe (...), afin de prolonger encore cette affaire - affaire qui, du reste, aurait dû être réglée il y a bien, bien longtemps ». Je me réfère à l'intervention du co-agent de Saint-Vincent-et-les Grenadines.

Avec cette affirmation, le co-agent de Saint-Vincent-et-les Grenadines essaie de conclure qu'étant donné les délais non raisonnables du procès, il ne serait pas nécessaire d'épuiser les recours internes.

Mais une lecture attentive du mémoire du demandeur montre que les particuliers et les sociétés en cause dans l'affaire interjettent, en quelque sorte, appel devant le présent Tribunal, à l'encontre de décisions légitimes adoptées par les tribunaux espagnols compétents. Bien que le présent Tribunal ne puisse se déclarer juridiction d'appel des tribunaux espagnols - et je suis absolument sûre que ce n'est pas l'intention du Tribunal de faire cela, mais c'est pour

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simplement poser une argumentation -, l'Espagne rappelle, comme elle l'a fait observer au paragraphe 28 du contre-mémoire, que les procédures pénales devant les tribunaux espagnols sont encore en cours et que, comme l'a fait observer la Cour internationale de justice dans l'affaire de *l'Interhandel*, la règle de l'épuisement des recours internes s'impose à plus forte raison quand des procédures internes sont en cours.

Comme l'a expliqué M. le Juge Cot dans son opinion dissidente jointe à l'ordonnance relative à la demande en prescription de mesures conservatoires en l'espèce - je cite : « La complexité de l'organisation mise en place et ses ramifications internationales expliquent la durée de l'instruction judiciaire dont on comprend qu'elle ait pris plusieurs années » (paragraphe 9).

Pour illustrer cette affirmation, permettez-moi de vous communiquer certaines données.

Le dossier de la procédure pénale à Cadix compte 17 tomes, soit plus de 6 500 pages. Il y a une salle - je peux vous l'assurer - qui est tout à fait pleine de pièces à conviction. Les intéressés ont présenté un nombre remarquable de communications écrites, de pétitions et de recours en défense de leurs droits, ce qui est légitime.

En outre, comme cela a déjà été résumé aux paragraphes 29 à 34 de notre contre-mémoire, les personnes et sociétés mises en cause dans la procédure pénale devant les tribunaux espagnols n'ont eu de cesse d'entraver le déroulement de cette procédure en lui opposant toutes sortes d'obstacles juridiques et procéduraux. Leurs recours ont retardé toutes les instances pénales. Les juridictions compétentes ont pris connaissance de ces recours et ont statué.

Nonobstant cela, une instance est encore pendante : il s'agit de l'appel interjeté par les prévenus contre la dernière ordonnance du juge d'instruction, datée du 31 octobre 2011, laquelle confirme l'acte d'accusation du 27 octobre 2010. Cela prouve que, même après la présentation du mémoire de Saint-Vincent-et-les Grenadines, les personnes au profit desquelles le demandeur prétend exercer sa protection diplomatique devant le Tribunal se prévalent encore des recours internes qui leur sont offerts par le droit espagnol pour défendre ce qu'ils considèrent être leurs droits légitimes. Il est difficile de trouver meilleur exemple de situation dans laquelle les recours internes visés à l'article 295 de la Convention n'ont pas encore été épuisés.

Monsieur le Président, pour finir au titre de l'Espagne, je ne saurais laisser passer sans réagir une insinuation faite par le demandeur, qui cherche à entretenir la confusion entre procédure judiciaire et autres actes extrajudiciaires, ce qui est inacceptable dans une situation comme celle de l'espèce, où les tribunaux espagnols, dans l'exercice de leurs fonctions judiciaires, ont ouvert une procédure pénale.

En effet, dans un Etat de droit, où les pouvoirs sont clairement séparés, les cours et tribunaux adoptent leurs décisions dans une indépendance absolue et sont uniquement guidés par la loi. Tel est le cas de l'Espagne où aucune « démarche diplomatique » ne permet d'obtenir le « règlement de cette question », c'est-à-dire d'une question judiciaire qui est devant un tribunal.

Plus tard, nous aurons l'occasion d'aborder la question plus en détail avec l'aide d'un des experts proposés par l'Espagne. Monsieur le Président, ainsi, je termine mon intervention. Merci, Monsieur le Président, Madame et Messieurs les Juges. Je vous remercie de votre aimable attention. Maintenant, Monsieur le Président, je vous prie, si vous en êtes d'accord, de bien vouloir appeler la première experte proposée par l'Espagne, Madame Carmen Martínez de Azagra Garde.

Merci Monsieur le Président.

*Le Président :*

Je vous remercie, Madame Hernández.

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Le Tribunal va donc maintenant entendre le témoin expert, Mme Martínez de Azagra  
Garde. Faites entrer le témoin expert, s'il vous plaît.

Je prie le Greffier de bien vouloir demander au témoin expert de faire sa déclaration.

EXAMINATION OF EXPERTS - 8 October 2012, p.m.

### Examination of Experts

MS CARMEN MARTÍNEZ DE AZAGRA GARDE, EXAMINED BY MS ESCOBAR HERNÁNDEZ  
AGENT OF SPAIN  
[ITLOS/PV.12/C18/7/Rev.1, p. 7–18; TIDM/PV.12/A18/7/Rev.1, p. 7–19]

*Le Greffier :*

Merci, Monsieur le Président.

*(Continues in English)* Good afternoon, Ms Martínez de Azagra Garde. An expert witness is required to make the solemn declaration provided for under article 79 of the Rules of the Tribunal before making any statement before the Tribunal. The text of the declaration is in front of you. May I invite you now, Ms Martínez de Azagra Garde, to make the solemn declaration.

*Ms Carmen MARTÍNEZ DE AZAGRA GARDE is sworn in.*

*Le Président :*

Bonjour, Madame l'expert témoin. Soyez la bienvenue au Tribunal. Avant de procéder à l'audition de l'expert, je voudrais rappeler qu'un tel interrogatoire est un exercice exigeant pour les interprètes et sténographes, surtout si ce ne sont pas deux langues qui sont impliquées mais trois langues. L'espagnol sera également utilisé et je prie donc les représentants des Parties et Mme Martínez de Azagra Garde, de bien vouloir parler lentement et de laisser un intervalle suffisant après la fin de chaque intervention pour que l'interprétation puisse être finie. Merci de votre coopération. Je donne maintenant la parole à l'agent de l'Espagne, Mme Hernández, et je la prie de commencer l'audition de l'expert.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Comme annoncé, je vais interroger ma compatriote en espagnol. Mais je tiens compte de tout ce que vous venez de dire. Je parlerai tout doucement et j'attendrai que la traduction soit faite en français pour faciliter les travaux des interprètes et la compréhension du Tribunal et de la Partie demandeur.

*Le Président :*

Je vous remercie.

*Mme Escobar Hernández :*

M'autorisez-vous à parler en espagnol ?

*Le Président :*

Oui. Je vous remercie de votre coopération.

*Ms Escobar Hernández (Interpretation from Spanish):*

Good afternoon. Thank you for coming here to make your statement before the Tribunal, just as other expert witnesses have also done. Could you please tell us your full name.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Good afternoon. My name is Carmen Martínez de Azagra Garde.

M/V “LOUISA”

*Ms Escobar Hernández (Interpretation from Spanish):*

What is your nationality?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I am Spanish.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you please give us some professional information about your career?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

As for my academic training, I have a degree in mining engineering. I studied from 1980-85 at the High Technical School of Mining Engineering at Madrid Polytechnic University, and then in 1987 I entered the National Corps of Mining Engineers after passing a competitive Civil Service exam. This is a specialized high-level corps of the Spanish national government, and it is under the aegis of the Ministry of Industry, Energy and Tourism. So since 1987 until today, for 25 years, I have been at the service of the administration, I have been a public servant. My career from 2000-07: I was at the Directorate-General for Energy Policy and Mining. I was a technical adviser. Then from 2007, in this same unit at the Subdirectorate-General for Hydrocarbons of the Directorate-General for Energy Policy and Mining and Tourism I acted as Assistant Deputy Director-General. At present, since 20 September 2012 I have been an adviser to the Office of the Secretary of State for Energy at the Ministry of Industry, Energy and Tourism. From now on, to simplify matters, I will just say “Ministry of Industry”, if that is all right.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you briefly describe the responsibilities involved in the positions that you have held at the Subdirectorate-General for Hydrocarbons? What tasks have you been carrying out for the last 12 years?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

As a technical adviser from 2000-07 I had two main responsibilities in my job. First was to supervise, control and process all of the administrative procedures required for carrying out activities involving exploration, research and exploitation of underground storage fields and deposits of hydrocarbons in Spain, and during that period I supervised more than 100 cases of this kind. Secondly, I supervised compliance with international obligations at the International Energy Agency and the European Union, as well as in the area of supply security for oil and gas that are established by these bodies, and I have taken part as an expert or as a member of the Spanish delegation in the SEQ, Standing Group on Emergency Questions, and the SOM, Standing Group on the Oil Market, at the International Energy Agency, and at the Oil Supply Group and Gas Coordination Group at the European Union, and as Assistant Deputy Director-General from 2007-2012 I have been mainly providing direct support and advice to the Subdirectorate of Hydrocarbons, and in other areas as well, and taking part in international fora regarding issues in this field, and also national and international studies.

*Ms Escobar Hernández (Interpretation from Spanish):*

Obviously, from what you have just told us, it is clear that you have a great deal of experience in the management of the concession of licences and authorizations in the hydrocarbons field. Could you explain to us the system of licences and authorizations

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required in Spain for a company or a private individual to be able to carry out activities of any kind related to exploration for and exploitation of hydrocarbons in Spanish waters?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

In Spain, Act 34/1998 of 7 October on the hydrocarbons sector establishes that underground hydrocarbon deposits and storage fields are in the public domain, that is to say, that they are the property of the state, and therefore in order to carry out any kind of activity involving exploration, research or exploitation of deposits or underground storage fields of hydrocarbons in marine waters, it is necessary to have an administrative authorization or an exploitation concession. There are three kinds. There is an authorization for exploration, there is a research permit, and there is an exploitation concession.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you please explain to us what is an authorization for exploration.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

An authorization for exploration is an *ad hoc* authorization that needs to be requested under Spanish law for carrying out any kind of work for exploration involving hydrocarbon exploration which uses geophysical or geochemical methods of prospecting. That includes marine work, aerial work, land work, even shallow surveys, that is to say, those that are less than 300 metres. These authorizations are requested from the Directorate-General of Energy Policy and Mining, and these cases are processed by the Subdirectorate-General of Hydrocarbons. These are authorizations that are granted in free waters, that is to say, they cannot encroach upon other areas that are already occupied, if you will, by research permits or exploitation concessions, that are in force. They do not grant the title holders any kind of priority or exclusivity as far as later permits are concerned. They are authorizations for specific tasks carried out during a very specific period of time, that can be three months to a year, and they are processed like a hydrocarbon case in the Subdirectorate-General.

*Ms Escobar Hernández (Interpretation from Spanish):*

How are research permits different?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Research permits are authorizations that grant their title holders an exclusive right to carry out actions or work of research and exploration in a certain area, and this exclusive nature remains during a period of six years, which can be exceptionally extended another three years.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you explain to us lastly what is an exploitation concession that you referred to just now?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Exploitation concessions grant their title holders the right to exploit and maintain and continue their research in a certain area during a period of 30 years, which can be extended by two successive periods of ten years each. They are also exclusive authorizations.

*Ms Escobar Hernández (Interpretation from Spanish):*

When you say that they are exclusive authorizations, what do you mean by that?

M/V “LOUISA”

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I mean that in these areas only the title holders of these concessions may carry out research work and exploitation of hydrocarbons.

*Le Président :*

Voulez-vous attendre un peu jusqu'à ce que l'autre intervenant ait fini sa déclaration ? Excusez-moi de vous interrompre. J'écoute le relais, c'est-à-dire l'interprétation de l'anglais vers le français. Je ferai un petit signe quand la deuxième interprétation sera finie.

*Ms Escobar Hernández (Interpretation from Spanish):*

What bodies of the Spanish administration take part in the process of examining these applications for authorization and have the authority to grant the authorizations that you just explained to us?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

For the authorizations for exploration, the competent Ministry which has the final decision is the Ministry of Industry. This Ministry, however, consults, for example, other ministries, like the Ministry of Infrastructure, on any matters involving, say, maritime navigation, or the Ministry of Environmental Affairs for any issue involving environmental protection, but the final decision rests with the Ministry of Industry. Research permits are granted by the Council of Ministers but the processing of these cases is carried out by the Ministry of Industry, and this ministry also has, in the case of research permits or investigation permits, an administrative registry, a special administrative registry, where the information on all applicants in order of priority is registered, and also any relevant data on these applicants. So the exploitation concessions are also granted by the Council of Ministers but the ministry that processes these cases is the Ministry of Industry.

*Ms Escobar Hernández (Interpretation from Spanish):*

In addition to the authorizations and permits that you have just referred to, is there any other system of authorization? Is there any other kind of authorization that could be granted by another body or agency of the Spanish public administration which would also make it possible to validly carry out activities involving exploration, research or exploitation of hydrocarbons in a marine environment?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No. As I just said, under the law, the activities related to the exploration, research and exploitation of hydrocarbons have special authorities, and only those authorities may grant the authorizations on a case-by-case basis.

*Ms Escobar Hernández (Interpretation from Spanish):*

You are going to see on the screen a permit. This permit was obtained by a company, Tupet, which made it available to the company Sage, and it authorises it to carry out certain activities. In light of what you just said, do you consider that this permit – read it, take your time – authorizes the interested companies to carry out any kind of research activity involving hydrocarbons in the zone in order to later acquire some sort of economic benefit?

*(Poursuit en français)* Monsieur le Président, si vous me le permettez, est-ce que je pourrais lire les paragraphes le plus importants car il n'est pas possible d'agrandir l'image ?

*Le Président :*

Oui, allez-y.

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*Ms Escobar Hernández (Interpretation from Spanish):*

The permit says the following:

We request permission to be able to extract samples from the sea bottom in order to expand a study for a report on the environmental impact on the seabed in the waters of Andalucía between Rota and Cádiz in the following coordinates.

If you would go to the second page, which is in annex 6, for the benefit of the Applicant, it concludes as follows:

This Directorate-General in exercising the authority established by article 110 of the Coasts Act sees no problem or inconvenience in authorizing, that is to say, it authorizes, the extraction of samples from the sea bottom for the purpose of carrying out a report on the environmental impact on the seabed regarding the points requested.

In light of the specific content of this authorization, do you believe that this authorization granted by the Directorate-General of the Coasts authorizes the interested company to carry out any kind of research involving hydrocarbons in the zone, logically in order to then obtain economic benefits, as all hydrocarbons activity is aimed at that end?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No. As you can see on the screen, this is a permit from the Ministry of Environmental Affairs, specifically, from the Directorate-General for Coasts and the Subdirector-General of Managing the Public and Marine and Land Domains. As I said before, for a research permit it is necessary to have an authorization from the Council of Ministers, and the permit that is up on the screen could in no case be considered a permit authorizing searches for hydrocarbons under Spanish law.

*Ms Escobar Hernández (Interpretation from Spanish):*

Taking into account your wide-ranging professional experience and your years of experience at the Subdirector-General of Hydrocarbons, and you said before that you have processed a large number of cases of this kind of application for permits, authorizations, concessions, over the course of more than ten years, I am asking you the following. Do you remember if any of the following companies, Sage Maritime Research Inc, Sage Maritime SLU, Tupet Sociedad de Pesquisa Marítima SA or Plangas SL, obtained, between the year 2000 and the year 2006, any authorization to carry out activities related to hydrocarbons in Spanish waters, specifically in the Bay of Cádiz or the Gulf of Cádiz?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No, there is no evidence of any reference to these companies. Under Spanish law, applications that are sent to the administration must be registered. I have looked at the corresponding archives, administrative registries, and I have been informed that there is no evidence of any case that has been filed, that is now open or that is being processed related to the companies that you just mentioned.

M/V "LOUISA"

*Ms Escobar Hernández (Interpretation from Spanish):*

Based on your professional experience, do you remember if any of these companies have presented any application during this time to carry out activities, or if there is any case file open where they are trying to obtain authorization in the area of hydrocarbons?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No, there is no evidence of any reference to these companies. As I said before, I have looked at the administrative registries, I have gone to see them, I have consulted with them, and they have told me that they have no evidence of any reference to them. In Spain, in order to open an administrative file, we start with the documents presented and registered by the companies, and there are no references to this in the registry.

*Ms Escobar Hernández (Interpretation from Spanish):*

What kind of companies can apply for the kind of authorization or permits that we were discussing before, that you were talking about before, to carry out activities related to hydrocarbons?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Under Spanish law, these activities can be requested by any company, Spanish or foreign, that meets the requirements, the legal requirements, technical requirements, economic requirements, established in Spanish law, particularly in so far as their legal capacity is concerned: in the articles of these companies there needs to be a reference to activities of exploration, investigation or exploitation of hydrocarbons.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you. Please allow me to move on to another set of questions. Within the different positions you have had at the Subdirectorate-General of Hydrocarbons, you have been responsible, as you said before, for processing and preparing cases involving different applications for authorizations and permits to carry out any kind of activity related to hydrocarbons in Spanish waters. Is that so?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you explain to us how the interested companies usually proceed in obtaining an authorization of this kind and what practices the Spanish public administration follows in this regard?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

If a company wants to carry out activities of exploration or investigation or exploitation of hydrocarbons in Spain, it usually contacts the Subdirectorate-General of Hydrocarbons of the Ministry of Industry. First it does this to find out what kind of technical documents are available regarding work or exploration work carried out before in the same area. If it wants information about other companies that have worked there before, these technical documents regarding this type of work carried out in the past are kept in a special Technical Archive on Hydrocarbons, and there is another reason why companies often contact us, you can see there on the screen a reference to the Technical Archive on Hydrocarbons which belongs to the Ministry of Industry. That is from our website. So, going back to your question, companies

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tend to contact us to find out the documents we have on file, to find out what is the applicable legislation and to find out ---

*Ms Escobar Hernández (Interpretation from Spanish):*

Please speak a little more slowly, so the interpreters can follow.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

So the companies tend to contact the Deputy Director General for Hydrocarbons in order to find out what the technical information is that is contained in this Technical Archive on Hydrocarbons, where all these documents are filed – any document generated by work involving exploration, research or exploitation of hydrocarbons carried out in the area by other companies in the past. Secondly, they contact us to find out what is the applicable Spanish legislation. Thirdly, they contact us in order to find out what different phases and administrative procedures are involved and which phase their document might be in.

There is the technical risk associated with any kind of exploration activity and research projects involving hydrocarbon deposits, a technical risk that is associated with the geological uncertainties of these deposits, and considerable investment needs to be mobilized in order to carry out these activities. For that reason, companies tend to contact us even before presenting an application in writing. They contact the Spanish administration informally. Specifically, they tend to contact the Subdirectorate-General of Hydrocarbons. The Spanish administration in its relationship with companies has total respect for the principles of legality and confidentiality, but it also maintains a very co-operative and open attitude, because by law, Spanish civil servants must treat all citizens and companies with complete respect, objectivity and non-discrimination in a professional manner.

Within this framework, it is our understanding that this kind of project has a singular nature; we understand that. This open, co-operative attitude on the part of the Spanish administration is very obvious, and that is because of the strategic interest of these activities to the State and because of the huge amount of investment involved in carrying out activities of this kind.

*Ms Escobar Hernández (Interpretation from Spanish):*

You were talking to us just now about the openness and co-operative attitude of the Spanish administration. You also talked about the principles of professional treatment in confidentiality, whether it is a foreign national or a Spanish applicant. Here I would like to ask you a question. Do you think that it is possible that a company could by mistake go to some other agency than the Subdirectorate-General of Hydrocarbons to ask for a hydrocarbons permit?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Maybe it was not familiar with the Spanish administration and perhaps would go to another unit of the administration, but in this case it would be informed, “Yes, you have made a mistake”, or if it had presented something in writing, whichever Director General had received this document would then send it on to the Director General for Energy Policy and Mines, because the general governing idea in the Spanish administration is to have a single place where documents can be presented, so if it is accidentally presented in the wrong place, it would be sent on to the correct one.

M/V “LOUISA”

*Ms Escobar Hernández (Interpretation from Spanish):*

Earlier you referred to the Technical Hydrocarbons Archive and you said that within this technical archive of hydrocarbons things were on file. Who can access this technical archive of hydrocarbons? Is it public or limited access?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

This archive is a public archive. As you can see, you can access it freely on the internet. It is free; there is no charge. Anyone can access it, whether an individual, a legal person, citizens, companies, universities, different public administrations, or any stakeholder who feels that the technical information contained in the archive could be of interest.

*Ms Escobar Hernández (Interpretation from Spanish):*

Is there any confidential information there, or is it all public?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

According to article 12 of Act 38/1998, the Hydrocarbons Act, all companies that carry out activities of exploration, research or exploitation of hydrocarbons in Spanish waters and in our territory must send to the Spanish administration, once they have carried out this work, the technical documents generated according to what they found out about the underground information. In the case of exploration authorizations, it is kept confidential during a period of seven years. In the case of technical information generated by research permits or exploitation concessions, these technical documents regarding the work that has been carried out are kept confidential for the entire time the permit or the concession is in force. For this reason, the free-of-charge access to the documents in this archive needs to be understood as referring to the public documents, not confidential documents. The confidential documents are made public only after expiry of the period during which the permit has to remain confidential.

*Ms Escobar Hernández (Interpretation from Spanish):*

If I have understood you correctly, all other companies that have received an authorization in Spain to carry out hydrocarbon activities are required to communicate the technical results of their work under certain conditions to the Technical Archive on Hydrocarbons. Is that correct?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes.

*Ms Escobar Hernández (Interpretation from Spanish):*

As far as you know, have any of the companies that I am now going to mention sent to the Technical Archive on Hydrocarbons any kind of technical information resulting from their research work on hydrocarbons regarding hydrocarbon campaigns that they may have carried out in Spain under Spanish authorization: Sage Maritime Research Inc, Sage Maritime SLU, Tupet Sociedad de Pesquisa Maritima SA and Plangas SL?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

There is no evidence of any reference. Having consulted the database of the Technical Archive on Hydrocarbons, I have been informed that none of the companies you have just mentioned has sent any technical information on work that they have carried out to the Special Technical Archive on Hydrocarbons.

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*Ms Escobar Hernández (Interpretation from Spanish):*

Is it compulsory for a company that wants to request a permit or an authorization to previously consult the Technical Archive on Hydrocarbons?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No, it is not compulsory. It is not required, but in practice companies do this. This is what companies usually do.

*Ms Escobar Hernández (Interpretation from Spanish):*

If I have understood you correctly, the Technical Archive on Hydrocarbons is actively consulted when a party is interested in finding out whether there are sufficient data that could be of interest to companies?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, that is right.

*Ms Escobar Hernández (Interpretation from Spanish):*

Do you know whether between 2000 and 2006 there was in the Technical Archive on Hydrocarbons any information regarding hydrocarbons in the Gulf of Cádiz?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes.

*Ms Escobar Hernández (Interpretation from Spanish):*

Because in 1995 concessions for exploitation were granted, and in this area there were different jobs that had been carried out since the 1980s, and the Applicant, Saint Vincent and the Grenadines, refers in its Memorial to activities of research and exploitation of hydrocarbons that would have been carried out at that time in the Gulf of Cádiz by different companies, and even if they had been carried out previously, could you inform us whether indeed in the zone of the Gulf of Cádiz right now work is being carried out or whether in the past work has been carried out involving activities of research, exploration et cetera related to hydrocarbons?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes. As I just said, in 1995 a concession for exploitation was granted to Poseidon North and Poseidon South. These are exploitation concessions that are still in force, and they were granted to Repsol. Then in 1996 other permits were granted to Hercules North and Hercules South, which expired in 2004. In 2002 and 2003 other blocks of permits were granted – the Calypso permits in 2002, the Circe and Marismas Marino North and Marino South in 2003, and those expired later in 2008 and 2009. As I said, that was six years after the permits first came into force. Right now only the exploitation concessions Poseidon North and Poseidon South are still in force. Only those two are still in force.

*Ms Escobar Hernández (Interpretation from Spanish):*

This means that in the Gulf of Cádiz there has been systematic study in the hydrocarbons area since the last third of the 20<sup>th</sup> century?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, that is right. The exploitation concessions Poseidon North and Poseidon South were granted in 1995, but before that, in 1987, there were already studies and research permits that

M/V “LOUISA”

had been granted. Really the research in the area began in the 1970s and became more intense in the late 80s.

*Ms Escobar Hernández (Interpretation from Spanish):*

On the screen we are going to show you a map showing squares or rectangles. The shaded areas represent different research permits and concessions of exploitation in the Gulf of Cádiz that correspond to 2004. The website of the Ministry of Industry is open to everybody and is free of charge. On the map you can see shaded areas that correspond to permits that you referred to earlier. Right across from the Bay of Cádiz in the yellow rectangle to the south, I am referring specifically to the Calypso and Circe permits, and to the north, the Marino North and Marino South permits. Can you explain to us the difference between the yellow areas and the red areas?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes. The red areas refer to exploitation concessions and the yellow areas refer to research permits.

*Ms Escobar Hernández (Interpretation from Spanish):*

When you answered my previous question you said that the Calypso, Circe and Marino permits – but maybe I have made a mistake here – had expired between 2008 and 2009. What happened after that? Had their title holders asked for exploitation concessions to do any more drilling to obtain more hydrocarbons?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No. As I said, they correspond to research permits that were in force in 2004. These permits were granted in 2002 and 2003, and in 2008 and 2009 they expired, so their title holders thereafter did not ask for an exploitation concession. I wanted to point out that just as this map has been published on the website of the Ministry of Industry and you or anyone can access this information, all the references to these permits, how they were granted, the periods for which they were in force, their title holders, their geographical co-ordinates, are published in the Spanish official State Gazette. Moreover, on this website, apart from this map, you can consult the statistics for the research and exploitation of hydrocarbons, which shows the situation of this petroleum resources environment in 2005/2005 and thereafter. It is all published on the website. All these statistics and references to these permits are published in the Spanish official State Gazette – *Boletín Oficial del Estado* in Spanish.

*Ms Escobar Hernández (Interpretation from Spanish):*

Going back to the question that I just asked you, the permits for the yellow zones are no longer in force, they have expired, and here something strikes me as especially interesting. To carry out an investigation in these zones, logically the company that carries out the investigation has to make a major investment. It has to draw up a plan, hire technicians and scientists, and assess its data and quantify the results. Is it common practice that after a research permit is granted, there is no concession to exploit the hydrocarbon resources that could have been found in that zone? Is that common practice?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

The request for an exploitation concession depends on the results obtained in the prior investigation carried out during the research work. When this ends, or even before when the research permit is in force, companies take a business decision. It is a decision motivated by business considerations. If companies have identified hydrocarbon deposits and they consider

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it technically and economically viable to exploit them under conditions that would be profitable, or sufficiently profitable, then they would ask for an exploitation concession, but only in those cases where the companies clearly see that the deposit is profitable. As I said, it is a business decision.

*Ms Escobar Hernández (Interpretation from Spanish):*

We are now going to see several maps on the screen. The first is a map that Spain has already presented for the Tribunal's consideration, where you can see two shaded areas. These are the areas where the Director General for Coasts had authorized research activity on an environmental impact study and to get sea-bottom samples for oceanographic purposes – and this authorization was given to the company Tupet – that is to say, the permits that according to the Applicant justify the research activity carried out by the *Louisa* in Spanish waters. Please look carefully at the map and, above all, look at where the two rectangles are. You are now going to see another map, which is the map that we have just looked at. This is a public map from 2004, the same year in which the authorization of Tupet was processed, where you can see the areas for which Spain had granted authorizations to companies to carry out investigation activities in the hydrocarbons area. Although the maps are not one on top of the other ... Could I just underline here that we have been unable to come up with an overlapping map. We wish to dispel any possible extant doubt as to the validity of the documents. I would like to reiterate that these are documents in the public domain anyhow. Looking at the map and the second map, do you believe that there is any overlapping of these areas? Do any of these zones coincide with each other as between the permit from the Directorate-General for Coasts and the permits from the Ministry of Industry on hydrocarbons?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, it is obvious that there is some overlapping there.

*Ms Escobar Hernández (Interpretation from Spanish):*

You are now going to see a third map, which corresponds to the situation in 2005. These are permits which at that time had been granted by the Spanish authorities for carrying out research of some kind or exploitation of hydrocarbons. Take a look at the map, please, and could you go back to the first map and go back to the other map? I am going to ask you the same question: do you think that there is any overlapping in these areas?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, it is obvious that in 2005 there was also overlapping in the two areas.

*Ms Escobar Hernández (Interpretation from Spanish):*

Given that there is overlapping in these zones, would it have been possible for Sage to carry out some kind of exploration activity involving hydrocarbons in these spaces in 2004/2005?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No, they could not, because they did not have the required legal authorization and, as I explained to you before, the research permits, the investigation permits, the exploitation concessions give an exclusive right to their title holders, and therefore no one else in these areas could have been carrying out activities of exploration or investigation in this area.

M/V "LOUISA"

*Ms Escobar Hernández (Interpretation from Spanish):*

To understand you correctly – and this is my last question, Mr President – if Sage had, as the Applicant maintains, carried out activity related to hydrocarbons in this zone, would that activity have been legal or would it have been against the law in Spain?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

It would be illegal because they did not have the required authorizations under Spanish law. In any case, in these zones they could not carry out any activity related to hydrocarbons.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you very much, Ms Martínez de Azagra Garde.

*Le Président :*

Merci beaucoup. Il est 16 heures 30. Le Tribunal va faire une pause d'une demi-heure. Nous reprendrons l'audience à 17 heures.

*(L'audience est suspendue.)*

*Le Président :*

Avant l'interruption de la séance, l'agent de l'Espagne a dit qu'elle avait conclu son interrogatoire de l'expert. Le Règlement du Tribunal dispose que les experts de l'une des parties peuvent être contre-interrogés par l'autre partie. Je demande donc au co-agent de Saint-Vincent-et-les Grenadines si le demandeur souhaite procéder à un contre-interrogatoire.

*(Continued in English)* Mr Weiland, do you wish to cross-examine the expert witness?

*Mr S. Cass Weiland:*

Yes, thank you, Mr President.

*The President:*

I would like to add also that the witness expert is still covered by the declaration she made earlier this afternoon. Thank you.

MS CARMEN MARTÍNEZ DE AZAGRA GARDE, CROSS-EXAMINED BY MR S.

CASS WEILAND

CO-AGENT OF SAINT VINCENT AND THE GRENADINES

[ITLOS/PV.12/C18/7/Rev.1, E, p. 18–27]

*Mr S. Cass Weiland:*

Good afternoon, Senora Martínez. My name is Stephen Cass Weiland, and I am a lawyer. I represent Saint Vincent and the Grenadines. We have an action here against Spain. Do you understand that?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, I do. Thank you. Good afternoon.

*Mr S. Cass Weiland:*

I have a few questions to ask you. On listening to your background I did not hear any private companies that you have worked for in your career. Have you worked for any private oil companies?

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*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, I have. I worked for Rio Tinto from 1985 to 1987. As I said, I ended my university studies at Madrid Polytechnic University at the higher technical school for mining engineers in 1985. My speciality is energy and combustibles and fuels, and so from 1985 to 1987 I was in the private sector.

*Mr S. Cass Weiland:*

You have worked for the Spanish Government since that time.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I am a civil servant of the Spanish public administration. I am a career civil servant. I am a member of a specialised corps of civil servants in the Spanish administration, and under the current legislation my contract with the Spanish Government, with the general state administration is lifelong.

*Mr S. Cass Weiland:*

You have a lifetime contract for the government?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Under current Spanish legislation, that is correct, I am a career civil servant.

*Mr S. Cass Weiland:*

No matter what you say today, you still have a job, right? I am just making a joke.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Sorry, I want to understand well what is being said and I realise it is very important what I say because I am under oath, and so obviously, as a civil servant of any administration in the world in any international organisation, it is a value that public servants have.

*Mr S. Cass Weiland:*

Let me ask you about the Gulf of Cádiz. I think your testimony was most interesting in showing what a varied, important area that is for hydrocarbon exploration. Is that a fair statement?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

There is a little nuance I would like to add here. All areas, all Spanish offshore areas are interesting. I focus logically within my testimony on the Gulf of Cádiz because the most relevant information here involves this area, but, having said that, there are other interesting zones in the Spanish offshore areas because, as you know, Spanish oil production is mainly in the Gulf of Lion, which is a very interesting area for oil companies around the world. It is between France and Spain. It is around Barcelona. That is the area where most oil is produced, and there is a lot of interest right now. In addition to that area, there is another area that is moving south in the former Shell field, which could be interesting in the future – all of that without saying that in the south there are indeed interesting areas and all the permits for investigation that are being given and sought around Malaga. In the north, there are some old fields, old gas fields that are now exhausted around the urban platform. It is the only gas storage area that is being exploited right now and has been for quite some time in Spain. Then the whole Cantabrian Sea area, which, for technical reasons – I wouldn't say it is out of the question. When you say "the most important zone" historically – you are right in the sense

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that that is where it began; there was a first phase of interest in that zone. But, as I said before, this initial interest that began – and note that this was in 1987 when Spain had the National Institute of Hydrocarbons, when it was a public activity – unfortunately this initial interest in the area, which was the motive for a lot of different permits, for a lot of work that was carried out in 2002, 2003 – from 2008 to 2009. Without it being ruled out now, it is not a priority area for companies. I would like to stress that – was I trying to stress this area? No. I talked about this area because I understand it was relevant. In Spain, in terms of oil, it is an area that is interesting, both offshore and on national territory.

*Mr S. Cass Weiland:*

I am going to ask you to do a favour for me and the members of the Tribunal also. I am going to ask you a question, and if you listen carefully I would like you to answer just that question. Then when I am finished, your lawyer will have a chance to ask more questions. Okay?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

All right.

*Mr S. Cass Weiland:*

Could we have the 2004 map that you had up there? While we are looking for some of the information that was shown to you earlier, let me ask you about the website that you have referred to many times. Can you recall when the website was first put up? What was the first year when the website was in action?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I would have to check to make sure. I think it was probably 2000. By the year 2000 it was already up and running. The Spanish administration, like other administrations, has been steadily incorporating IT. The website, I think, has been up more than ten years. I can't tell you the exact year, but I know that from 2000 and on, all of this was public and the Ministry of Industry had a website. Starting in 2010 I am sure. They probably did before, but I would need to ask my IT department at the Ministry to be able to give you rigorously correct information on that.

*Mr S. Cass Weiland:*

Do you keep a list or record of who visits your website?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, as we have been incorporating IT into our system in respect of formal consultations; when someone just clicks on the ministry website we – I say "we" as a Deputy Director General of Hydrocarbons – don't have a list of all of the individuals who click on the website; but if someone today, for example, were to make a request for information from the Technical Archive on Hydrocarbons, there is an email address and there is a computerised list of those who have accessed it. So if I understand you correctly, of everyone? No, but only all of those persons who have made a request for information that could be useful to them – sort of a formal request, if you will.

*Mr S. Cass Weiland:*

Yes, concerning anyone associated with Sage who made a casual visit to your website in 2003, you would not be able to verify that.

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*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No, but what I mean is ---

*Mr S. Cass Weiland:*

I would think the examination of the witness will take an extraordinarily long time if she does not just answer my question. I think the answer she said was "no", and if she would like to give an explanation to her lawyer, I would ask that you give her that direction.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Excuse me, I just want to be able to answer ---

*Le Président :*

Excusez-moi, puis-je donner la parole au conseil ?

## NAVIRE « LOUISA »

## INTERVENTION DE MME ESCOBAR HERNÁNDEZ

AGENT DE L'ESPAGNE

[ITLOS/PV.12/C18/7/Rev.1, p. 21; TIDM/PV.12/A18/7/Rev.1, p. 22–23]

*Mme Escobar Hernández :*

Monsieur le Président, ce n'est pas à moi de décider comment trancher ce point et comment le contre-interrogatoire doit être conduit, mais je voudrais appeler l'attention du Tribunal sur le fait que Mme Martínez de Azagra essaie de répondre à la question. Elle a dit qu'elle ne comprend pas bien la question et qu'elle aimerait avoir des éclaircissements. Je vous prie de faire consigner mon intervention dans le procès-verbal.

En ce qui concerne la demande faite par M. Weiland et le co-agent de Saint-Vincent-et-les Grenadines de projeter à nouveau la carte de 2004, je crois savoir que nous n'avons pas l'obligation de le faire. Ce nonobstant, dans un esprit de coopération avec le Tribunal, nous ferons projeter les cartes demandées par M. Weiland. En tout cas, Monsieur le Président, je voudrais aussi rappeler qu'il y a des règles de comportement et de procédure à respecter.

*The President:*

Thank you very much, Ms Escobar, and thank you for your co-operation.

May I ask Mr Weiland to ask your question again so that the expert witness can understand your question very well?

*Mr S. Cass Weiland:*

Yes, sir.

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MS MARTÍNEZ DE AZAGRA GARDE, CROSS-EXAMINED BY MR S. CASS  
WEILAND (CONTINUED)  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/7/Rev.1, p. 21–27]

*Mr S. Cass Weiland:*

It is a simple question: in 2003 if someone from Sage visited your website you would not have a record of that, would you?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I want to make sure I understand your question correctly. We are talking about access by anyone who just clicks on the site, any person from Sage for any reason – private, related to the company – any kind of access, random access to the website – is that what you are asking about?

*Mr S. Cass Weiland:*

Yes.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

All right, random occasional access to the website – that is not registered.

*Mr S. Cass Weiland:*

Now we have the 2004 map. I would ask you if you could tell us which company had the Calypso concession.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

The Calypso concession? Right now I would have to take a look at the website for the specific references, because they are published. I would have to look it up. It could be because of the companies in that area – I really would prefer to be precise. I would ask you yourself, or the Tribunal, I would ask the court, to take the opportunity to take a look because I don't want to just rely on my memory here. I would like to consult to see exactly which companies were the title-holders for Calypso. In the case they are only talking about the Poseidon concessions – so that's the case that I looked at for this case, the Poseidon North and the Poseidon South – the other authorisations, they have different title-holders, different companies, and I don't want to give the names of a company off the top of my head which could be incorrect. All of the title-holders – it is public information and they are included in the official registry. I don't have any problem with you looking it up and – or asking me again because just to do it out of my own memory – this is a very serious matter, and I wouldn't want to make a mistake.

*Mr S. Cass Weiland:*

Do you know what kind of survey work Calypso did in that area before its concession expired?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I would have to look that up but you could go on to the ministry website and see the exact list of work that was carried out.

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*Mr S. Cass Weiland:*

There were some papers filed in this case by someone associated with the Respondent where it is stated that there are clearly no hydrocarbons in the area, in the Bay of Cádiz. Have you concluded that yourself? I ask that question because the Calypso concession seems to be taken in part in the Bay of Cádiz.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Excuse me, could you please repeat exactly what your question is so that I can answer it exactly? I want to understand you correctly.

*Mr S. Cass Weiland:*

Let me go on to something else. Do you know what horizontal drilling is? Are you familiar with that method of extraction of oil and gas?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, of course.

*Mr S. Cass Weiland:*

Do you have any oil rigs on the coast of Spain that are drilling into the Gulf?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Excuse me, in the Gulf?

*Mr S. Cass Weiland:*

Sure.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Could you please ask the question more precisely? I don't understand your question. You are talking about whose oil rigs because the Spanish State is not the title-holder? The permits and concessions are held by companies and we are talking about the Gulf of Cádiz – we are talking about technical areas that are not what I was brought here to talk about, so could you please tell me exactly what you are asking me?

*Mr S. Cass Weiland:*

I was asking you if you were familiar with horizontal drilling where the oil company, not your agency, will place an oil rig on the shore and drill out into the open waters. Are you familiar with that?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, you mean horizontal drilling? Well, I am not a specialist but I am an engineer, and logically I have worked on these issues. Yes, I know it in general terms.

*Mr S. Cass Weiland:*

*(No microphone)* ... is it not?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Of course.

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*Mr S. Cass Weiland:*

Your agency seems to take the regulation of hydrocarbons very seriously – would you agree with me?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

First, I want to clarify that there is no agency here. We are talking about the Ministry of Industry, Energy and Tourism. I want to clarify this because there are other countries in the world, in Europe, that due to the volume of their exploratory activity and their exploitation of hydrocarbons do have national agencies with experts. We are talking about the Ministry of Energy, Industry and Tourism. We are talking about the Office of State Secretary for Energy, the Directorate-General for Energy Policy and Mines and the Subdirectorate-General for Hydrocarbons. We are talking about administrative units. Having said that ---

*Mr S. Cass Weiland:*

Really I am asking about your administrative unit and your Ministry of Industry's regulation, and my inference from your testimony is that you take regulation very seriously – is that true?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Logically because the principle of legality is absolutely always the guiding principle of all of the civil servants in any administration.

*Mr S. Cass Weiland:*

You said in your testimony that you regulate anyone who would do a survey even from the air – is that correct?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

That is true, yes, because that is what the regulations say.

*Mr S. Cass Weiland:*

Let me show you a map that we have that was introduced yesterday by a company. It is from a company called Infoterra. This is a map that is publicly available, and Mr McAfee testified about it. You see, this is taken from a satellite, and that is the Bay of Cádiz up on the right-hand side. Did you issue a permit to Infoterra for it to assemble this data?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I cannot make a statement on this map because I don't see any references here. I see no administrative reference. I have no information in order to make a rigorous and truthful statement regarding this map.

*Mr S. Cass Weiland:*

Would your ministry require a permit for a company that was taking satellite pictures of the area around Cádiz?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

That is a case which in all my years of experience has never appeared to me personally. I have never had the opportunity in this area. These are probably permits that were authorizations from before. As you know, the authorizations for exploration can include air or land work. When I started working in the Bay of Cádiz we were in a later phase of research. The air work – other kinds of air work or other kinds of technology are the first works that are carried out to investigate large areas. Indeed, air work is complementary to the

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geophysical work that is later carried out in the sea, and complementary to drilling work. I am not personally familiar with air work because it is not what is usually done, and personally, in all my years of experience, I have never had any situation like that, but I would obviously need to look at my records to make a completely accurate statement, but right now you have just shown me this map and I really couldn't tell you if this is a map that corresponds to any administrative case on file.

*Mr S. Cass Weiland:*

In connection with the ministry's regulation of its permit process, does the Guardia Civil assist you in policing that activity?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Excuse me, could you please repeat the question?

*Mr S. Cass Weiland:*

Are you familiar with the federal police force in Spain called the Guardia Civil?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes.

*Mr S. Cass Weiland:*

Would the Guardia Civil assist the ministry in enforcing permits?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No. The work of the Ministry of Industry is technical, and it is within a regulatory framework that is highly specific, which is Law 34/1998 of 7 October, the Hydrocarbons Act, and the Civil Guard, unless there is some particular – has reported a crime or a case that is in the courts where a report has been asked from the competent administration in the work involving administrative cases, the usual administrative cases are regarding authorizations for exploration, granting research permits, or exploitation concessions. The Civil Guard is not directly involved usually. In the areas of the Bay of Cádiz there could – and pardon me for not being more explicit for obvious reasons, but there could be – you realize the area – the Straits of Gibraltar – there are some kinds of installations or some kind of equipment, or locations that require special protection for national security reasons and for defence, and regarding activities of national protection. Only in this case and through the Council of Ministers with some very specific procedures could there be some kind of intervention of this nature. Would you please, since you have mentioned it – could you please put our map up again, the one with the research permits?

*Mr S. Cass Weiland:*

Let me ask you another question. You say that the matters relating to permits are "mere" regulatory matters – correct?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

The issue itself, no, the authorizations for specific work within a certain area – as I explained before, the research permit grants a company the right to carry out the different activities of exploration or research exclusively and there is a decree from the Council of Ministers that demarcates this when a company wants to carry out a specific programme of investigation, whether it is a seismic permission, physical prospecting or to do drilling, exploratory drilling, It asks for authorization, specific individualized authorization for this zone. This

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authorization is then submitted to the procedures established in environmental legislation and then the body that makes the final decision is the Ministry of Industry.

*Mr S. Cass Weiland:*

My question is really a simple question. Let me give you an example. Suppose your ministry discovers that someone is operating with the wrong kind of permit. Can you understand that part of my question so far?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes.

*Mr S. Cass Weiland:*

Once your ministry discovers that, that is an administrative matter that would be handled between the ministry and the permit holder – correct?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

To not get lost here, I would like to inject some nuance. You said that if the ministry discovers; the ministry assumes, takes as its starting point the assumption that companies are fulfilling their obligations correctly, in the sense that there is no inspection of ships. Our regulatory activity is focused on authorizations, positive authorizations, in the sense that the general State administration has peripheral organizations. The peripheral administration has areas like industry, energy, in the different autonomous communities, that is to say, Spain's regional administrations, and they are the ones that service the liaison between the activities in the field, out on the ground, with the general State administration, that is to say the national administration. So the national administration has engineers and technicians who are specialists, and they are stationed in different provinces, in different Spanish regions. So when you say "the ministry inspects", we need to make clear this is part of an entire administrative network. Directly within the ministry, the ministry is not acting in the regional administrations. We have direct responsibility in the areas of energy or industry in Andalucía, in the different provinces, and so these individuals are those who could then request information and so on.

*Mr S. Cass Weiland:*

We are having a little trouble here because you have just testified, as I understand it, that this company Sage had the wrong kind of permit to be out in the Gulf or the Bay, towing around some things, and I want the Members of the Tribunal to understand what the penalty is for that under Spanish law. We need to know. Is it a regulation, is it a little fine, or do you go arrest somebody?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Excuse me. Let us see. I did not say that this permit was wrong. I want that to be very clear. What I said was that this permit from the Directorate-General of Coasts, or this authorization, or this administrative resolution, is not an authorization granted within the framework of Law 34/1998. I did not say it was wrong. I do not want to make a statement here. I am a civil servant from the Ministry of Industry, Energy and Tourism, that is to say that this authorization is from another ministry, for other purposes. I am not saying it is wrong for other purposes, but I am saying it is not for hydrocarbons research.

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*Mr S. Cass Weiland:*

Thank you. We have a picture here of a small boat, and it is towing something. I want you to assume that the name of this boat is *Gemini III* and it is towing a sonar device. The owners of the boat are interested in finding hydrocarbons – just assume that – but the owners have a permit that is not issued by your ministry. They have the other permit that Ms Escobar Hernández showed you. Do you understand?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes.

*Mr S. Cass Weiland:*

What is the penalty for this company having the wrong permit, if you know? Perhaps you do not know. I do not know if that is your area.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

The Hydrocarbons Act, as I explained before, is the law regulating the hydrocarbons sector in Spain. It encompasses the entire chain of the hydrocarbons business. First of all, you have the general questions in title 1; title 2 is the legal system for exploration, research, and prospection for hydrocarbons; title 3 is liquid hydrocarbons; title 4 is gas hydrocarbons; and title 5 establishes the sanctions system. So, generally speaking, I would need to look exactly at what are the typifications, as you lawyers like to say, of the types of extractions produced, but one would have to, in the case that someone, or if someone reports a crime, there is a sanctions process. It is a complex sanctions process, and it guarantees the rights of those who are being administered in the sense of establishing whether a country has indeed carried out something that is untoward, but that is within the sphere of the hydrocarbons sector.

As far as the coast law is concerned, the Merchant Marine Act, or some other kind of law, I could not tell you. What I can tell you is that the sanctions that we are involved in and that we have resolutions on within the scope of Law 34/1998, they are analysed on a case-by-case basis, they have a compulsory report from the National Energy Commission and, *a priori*, without establishing the specific circumstances of the case, and certainly not in the case of a sanctions case, I could not quantify what is the sanction on a specific individual or company, because that is a very carefully regulated and very complex issue, and the sanctions process includes other administrative bodies within the ministry, and even the National Energy Commission, which is the regulatory body in the energy field, and therefore it is really, *a priori* and in general terms, not appropriate for me to make a statement regarding any specific amount as far as I know and as far as the Hydrocarbons Act is concerned.

*Mr S. Cass Weiland:*

I am going to assume, after ten years on the job, you are really not familiar with the regulatory sanctions that the ministry issues. Let me ask you another question – and I am almost finished. I know it is getting late. In ten years, do you recall any case where your ministry has asked the Guardia Civil to go and arrest somebody and put them in jail for months because they had the wrong permit? Can you give me any example of that, in your experience?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

I want to understand the question as well as I can. Let us see now. First of all, because it is an erroneous presupposition. You are saying that I do not know the amount of sanctions that are within the Spanish legal framework. Excuse me. The amount of the sanctions is typified, and it is set forth in the Hydrocarbons Act, in title 5, whether there is light sanction, serious

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sanctions, very serious sanctions. The amount, the level of sanctions, is specified, and so the sanctions can be different, and they are established on a case-by-case basis. Excuse me. I do not know the sanctions by heart, I do not know the amount of sanctions by heart but what I can tell you is that it is not that I do not know it; it is that they are quantified within certain levels of severity. So please. Moreover, if it helps the Tribunal to understand the sanctions system better, the Hydrocarbons Act in Spain regulates the entire chain of the hydrocarbons business, ranging from exploration all the way to supply of hydrocarbons. Excuse me. Wait a minute.

*Mr S. Cass Weiland:*

That is not my question. My question is, have you ever arrested anyone and put them in jail in ten years? Can you just answer that question and then we could perhaps be finished soon.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

But that is not my function, to arrest anyone or to inspect anyone. My function is to apply the authorization system for the hydrocarbons sector. I really do not understand very well that I was brought here as a civil servant, an expert in the hydrocarbons field, and why should I have to make a statement on arresting people? I really do not understand very well. I really do not understand you, sir. So I am trying to understand what you are getting at.

*Mr S. Cass Weiland:*

I am sorry you do not understand. I do not think I do either. I have no further questions.

*The President:*

Thank you, Mr Weiland.

*(Poursuit en français)* Les témoins experts qui ont été contre-interrogés par la partie adverse peuvent être à nouveau interrogés par la partie qui les a appelés. Donc je demande à l'agent de l'Espagne si elle souhaite procéder à un nouvel interrogatoire.

Mme Escobar Hernández?

MS CARMEN MARTÍNEZ DE AZAGRA GARDE, RE-EXAMINED BY MS ESCOBAR HERNÁNDEZ

AGENT OF SPAIN

[ITLOS/PV.12/C18/7/Rev.1, p. 27–30; TIDM/PV.12/A18/Rev.1, p. 29–32]

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Très brièvement et tout simplement, au sujet de certaines questions qui ont déjà été posées par le co-agent de Saint-Vincent-et-les Grenadines dans le contre-interrogatoire. Est-ce que vous me permettez de m'adresser en espagnol à Mme Martínez de Azagra ?

*The President:*

Please follow the same procedure. Thank you.

*Mme Escobar Hernández :*

Merci, Monsieur le Président.

*(Interpretation from Spanish)* Could you please tell us what is the difference, or better said, so that there is no doubt regarding the content of the question and it does not go beyond what the Co-Agent of the Applicant asked, what is the website of the Ministry of Industry?

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*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

The website of the Ministry of Industry, like the website of this international organization, is a website where any citizen – I myself when I was asked to come here – you can log on to the website and you can do searches to find out about the organization. It is a website like that of the International Tribunal for the Law of the Sea, but this website, if you are interested in energy or oil, you can gain access to the different public information that is available.

*Ms Escobar Hernández (Interpretation from Spanish):*

In order to obtain information from the technical archive on hydrocarbons, does the interested party have to make a specific request? Can the interested party directly access the website? Is there any registry of those who request information from the website?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes. Right now someone needs to send an email to the email address for the archive. This is registered, and then the requests are attended to. So these are requests from those who want more information than is on the website, because the website has lists of documents, lists of different kinds of work, it depends on the category, but it does not enable anyone to download, for volume reasons. People cannot download specific documents. Public documents, you have to request them from the archive. You cannot download them directly from the site. You can identify them on the site, and then the archive has the possibility to provide a Word document or a PDF document by email, whatever documents in the archive, to those who request it.

*Ms Escobar Hernández (Interpretation from Spanish):*

Is the name of the person or company consulting the technical archive registered?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes, that name is registered.

*Ms Escobar Hernández (Interpretation from Spanish):*

The Subdirectorate-General of Hydrocarbons, where you have been working until now, is that responsible for the sanctions?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

No, the Subdirectorate-General of Hydrocarbons is not responsible for sanctions. What we do is we process requests, we process cases, but the sanctioning process comes from a ministerial order.

*Ms Escobar Hernández (Interpretation from Spanish):*

The Subdirectorate-General of Hydrocarbons, is that responsible for processing requests for authorization?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*

Yes.

*Ms Escobar Hernández (Interpretation from Spanish):*

Authorizations for exploration of hydrocarbons?

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*Ms Martínez de Azagra Garde (Interpretation from Spanish):*  
Yes, yes, authorization for exploration of hydrocarbons, yes.

*Ms Escobar Hernández (Interpretation from Spanish):*  
The Subdirectorate-General of Hydrocarbons, does it have authority to grant any kind of authorization that is not linked to hydrocarbons, for example, for environmental activities?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*  
No.

*Ms Escobar Hernández (Interpretation from Spanish):*  
Thank you. One last question. I have special interest in this question and I want the Tribunal to know this. You said that you are a civil servant.

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*  
Yes.

*Ms Escobar Hernández (Interpretation from Spanish):*  
You said that you have a lifetime contract with the administration. Can you tell us what you mean when you say you have a lifetime contract with the administration?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*  
Excuse me. Civil servants in the Spanish administration, under Spanish legislation, they enter through a civil service exam process, a competitive civil service exam process, and in 1987 I entered my ministry through this competitive civil service exam process, and they freely decide that they are going to serve the Spanish administration, and they could also ask to not work for the administration, so only in the case of an administrative sanction or really singular cases do they retain their contract. Simply, they have to carry out their work as a civil servant, serving the general interest and at the service of the law.

*Ms Escobar Hernández (Interpretation from Spanish):*  
So in your post at the Subdirectorate-General for Hydrocarbons, are you in any way conditioned by a change of government after elections, for example?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*  
No. I have a technical position as a civil servant.

*Ms Escobar Hernández (Interpretation from Spanish):*  
Could you be taken off your job because you declare one thing or another in front of an international tribunal or in front of a national tribunal?

*Ms Martínez de Azagra Garde (Interpretation from Spanish):*  
No.

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

Thank you very much, Mr President. I have finished with my questions. I am going to go back to French now. Thank you very much, Mr President.

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*Le Président :*

Merci, Madame Escobar.

Il est 17 heures 50. Je crois qu'il est trop tard pour appeler un autre expert, donc puis-je considérer que nous sommes arrivés à la fin de l'audience de ce jour ?... Dans ce cas, les plaidoiries se poursuivront demain.

Nous reprendrons l'audience à 10 heures demain matin. La séance est levée.

*(La séance est levée.)*

9 October 2012, a.m.

**PUBLIC SITTING HELD ON 9 OCTOBER 2012, 10.00 A.M.**

**Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 8 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 9 OCTOBRE 2012, 10 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 8 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

Good morning. We will continue today the hearing in the *M/V "Louisa" Case*. Before I give the floor again to the Agent of Spain to continue, let me say one thing. I regret that yesterday evening when concluding the sitting I forgot to thank the expert witness Ms Martínez de Azagra Garde. Therefore, I would like to ask the delegation of Spain to convey to Ms Martínez de Azagra Garde the gratitude of the Tribunal for her testimony. She is still here?

Thank you very much, Ms Martínez de Azagra Garde. I am very glad to have you here again.

Ms Escobar Hernández, you have the floor.

*Mme Escobar Hernández :*

Merci, Monsieur le Président, Madame et Messieurs les Juges. Nous entendons continuer aujourd'hui avec la déposition de trois experts. Aussi, je vous prie de bien vouloir à présent appeler M. Dorrik Stow et je demande votre permission, Monsieur le Président, pour que mon collègue, le Pr Mariano Aznar Gómez, puisse poser des questions à M. Stow.

*The President:*

The Tribunal will proceed to hear the expert, Mr Stow. He may now be brought into the courtroom.

M/V "LOUISA"

**Examination of Experts (continued)**

MR DORRIK STOW, EXAMINED BY MR AZNAR GÓMEZ  
COUNSEL OF SPAIN  
[ITLOS/PV.12/C18/8/Rev.1, p. 1–10]

*The President:*

I now call upon the Registrar to administer the solemn declaration to be made by the expert.

*Le Greffier :*

Merci Monsieur le Président.

*(Continues in English)* Good morning, Mr Stow. Before giving any statement, an expert has to make the solemn declaration required under article 79 of the Rules of the Tribunal. You have the declaration in front of you. May I invite you, Mr Stow, to make the solemn declaration?

*Mr Dorrik STOW is sworn in.*

*The Registrar:*

Thank you, Mr Stow.

Mr President.

*The President:*

Thank you, Mr Registrar.

Before we start the examination of the expert, may I remind the Parties and you, Mr Stow, to speak slowly to facilitate the work of the interpreters and the verbatim reporters.

I now give the floor to Mr Aznar Gómez.

*Mr Aznar Gómez:*

Thank you, Mr President, distinguished Judges.

Good morning, Mr Stow. Could you please say your complete name, address and current affiliation?

*Mr Stow:*

I am Professor Dorrik Stow from the Institute of Petroleum Engineering, Heriot-Watt University, Edinburgh, United Kingdom.

*Mr Aznar Gómez:*

Could you please summarize your experience, national and international, in relation to geological research and geophysics studies of marine hydrocarbons?

*Mr Stow:*

I have been involved in geological and geophysical research, in exploration and in consultancy, for the oil industry for 35 years. I have worked nationally and internationally in many regions of the world. I am a marine geoscientist, geophysicist and petroleum geologist. I have five years of direct experience within the oil industry, in the British National Oil Corporation, in BP, and 30 years in the university working on research programmes and consultancies funded by the oil industry. I am currently the head of the Institute of Petroleum Engineering at Heriot-Watt University.

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*Mr Aznar Gómez:*

Have you any experience with geological research and geophysical studies of marine hydrocarbons in the Bay and Gulf of Cádiz?

*Mr Stow:*

Yes. I have been very interested and actively involved in the Gulf of Cádiz as a marine geologist and geophysicist since 1984. Most recently, in the past year, I was the chief scientist aboard an international ocean drilling programme, Expedition 339, looking very specifically at some deep-water targets and understanding of the outer shelf and upper slope regions of the Gulf of Cádiz.

*Mr Aznar Gómez:*

Have you ever heard about Sage Maritime Scientific Research Incorporated (Sage hereinafter) as a company that “has always been surveying and producing oil and gas”, as it is said by, among others, Mr Foster in his affidavit annexed as Annex 42 to the Applicant’s Memorial?

*Mr Stow:*

Before this case I had never heard of Sage at all. I asked several of my colleagues in the petroleum engineering department and nobody had heard of Sage before now.

*Mr Aznar Gómez:*

How could you describe the current hydrocarbon activities in the Gulf of Cádiz and particularly in the Bay of Cádiz?

*Mr Stow:*

As far as I know, there has been no interest in the Bay of Cádiz in terms of hydrocarbons, no interest in the very shallow waters or coastal areas. There is a growing interest in deeper parts of the Gulf of Cádiz and there has been for a number of years. Companies such as Repsol, Care and Energy BG Group have all expressed an interest in exploration in deeper waters.

*Mr Aznar Gómez:*

It has been described that quite recently there have been some methanogenic activities in the Gulf of Cádiz. Some have been reported by the mass media in Spain, such as incorporated in Annex 46 to Saint Vincent and the Grenadines’ Reply. Have you had an opportunity to come across this mass media article?

*Mr Stow:*

I did not see the mass media article before these proceedings, but I have known of the methanogenesis in the Gulf of Cádiz certainly.

*Mr Aznar Gómez:*

This mass media report – I am just structuring some of the sentences – said that the *Viscount of Eza*, an oceanographic vessel, not any other kind of vessel, was making this research in the outer edge of the continental shelf at depths ranging between 100 and 800 metres, that is not in shallow waters, and that the goal of that research was to know those areas and then propose them as areas to be protected as a feature of Spanish marine reserves. Do you think that these reported methanogenic activities somehow prove the suitability of the Gulf of Cádiz to produce oil and gas in commercial terms?

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*Mr Stow:*

They do not necessarily tell us anything about the commercial quantities of oil or gas that might be available. They do not necessarily tell us anything about oil and gas. Methane can be produced in two principal ways: one from the very shallow degradation or decomposition of organic matter near the surface of the sediments; this occurs everywhere in the ocean basins and sometimes the methane accumulates more readily. The second way is that it can be produced very much more deeply at one, two or three kilometres below the sea floor by thermal processes, and this type of methane indicates that there is generation potential in the Gulf. Certainly it is only in the deeper regions. The other thing that I would say in relation to the methanogenesis is that it is being studied most principally for the intriguing organic life that surrounds the methanogenic vents. It is a very interesting and different type of deep-water, if you like, coral reef, and that is the principal interest.

*Mr Aznar Gómez:*

That is why the main goal is to know these areas and to propose them as marine protected areas?

*Mr Stow:*

Exactly.

*Mr Aznar Gómez:*

Mr Stow, under the last report published by the Corporation of Strategic Reserves of Oil-based Products (CORES by its Spanish acronym), which can be publicly consulted on the web page of CORES, the average Spanish consumption of these oil-based products is about 400,000 GW hours. The main source of these products in the Gulf of Cádiz, not the Bay of Cádiz, is the offshore Poseidon platform. This installation, following this public data published by CORES, has contributed to an average of only 0.25 per cent to Spain's oil-based consumption in the past eight years. Would you agree with this general data?

*Mr Stow:*

Yes, that seems entirely reasonable.

*Mr Aznar Gómez:*

Do you know the average water depth where these offshore installations are operating?

*Mr Stow:*

The general water depths are in excess of about 100 metres, as far as I know. Certainly the exploration interest is generally deeper than that, down to 800 metres or more.

*Mr Aznar Gómez:*

Therefore, do you think that the conclusions of the report of the *Instituto Español de Oceanografía*, annexed as Annex 5.2 to the Spanish Counter-Memorial, is accurate with regard to the potential for the Bay of Cádiz to contain accumulation of petroleum?

*Mr Stow:*

Yes. I looked at this very carefully, of course, and it seems absolutely correct as far as I am concerned. The Bay and other coastal areas have very, very low priority for any kind of exploration.

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*Mr Aznar Gómez:*

On the screen now you can see a map of the targeted known points where the *Louisa* and its so-called tender boat, the *Gemini III*, have allegedly been gathering geological and geophysical data. From the point of view of geological research and geophysical studies of marine hydrocarbons, are those points the most probable location of possible hydrocarbons?

*Mr Stow:*

No, absolutely not. They are far too shallow and coastal, in my view.

*Mr Aznar Gómez:*

If you were the scientific director of an expedition in Spain such as described by Saint Vincent and the Grenadines, would you recommend those points in order to successfully look for hydrocarbons?

*Mr Stow:*

No, certainly not.

*Mr Aznar Gómez:*

Could you explain briefly what is meant by “magnetic signature” in relation to oil and gas? Do these kinds of hydrocarbon have that magnetic signature?

*Mr Stow:*

No. Oil and gas have no magnetic signature whatsoever. The only thing that we use magnetics for in hydrocarbon exploration is at a very, very large scale of hundreds or more square kilometres of area to establish the basic geology of the region. Principally, we are looking for areas with very thick sedimentary accumulations of mud, sand and silt. Magnetic properties in general can distinguish thick accumulations of sediment from other types of rock, but they have nothing to do with an oil and gas signature.

*Mr Aznar Gómez:*

Will you please now look at the screen? You will see a magnetometer and an ROV metal detector, which appear in Annex 10 of the Spanish written response in the phase of Provisional Measures in this case, which were found aboard the *Louisa* and the *Gemini III*. Could you briefly describe the possible use of a magnetometer in commercial oil and gas exploration and its use in conjunction with ROV metal detectors, please?

*Mr Stow:*

There is absolutely no use for a metal detector, plain and simple, in oil and gas exploration. With the magnetometer, the one that is shown is a very high resolution magnetometer that principally is used for very, very shallow surveying, “shallow” meaning near the sediment surface. All oil and gas is located very deep within the sediment column – one, two, three or more kilometres – so that this kind of magnetometer could not be used that way.

*Mr Aznar Gómez:*

Last Saturday Mr McAfee, the Applicant’s expert in marine hydrocarbons, told us that even a huge company would use a G-882 magnetometer. However, regarding what you have just declared, we can conclude that any serious, large hydrocarbons exploration company would never use such equipment, can we?

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*Mr Stow:*

As I say, the only use of magnetic data would be at a first, very, very large scale regional study of an area. In my experience, it is a different type of magnetometer that is used, which penetrates deep within the surface and gives a low resolution deeper. This is a very early stage of exploration and is normally performed by service companies, and the data is made available on databases or for sale, and if you wanted to look at the magnetics properties originally, you would certainly interrogate databases to do that; you would not go out with a little magnetometer.

*Mr Aznar Gómez:*

Would you then agree with the Neftco President, Mr McAfee, when in his letter of 18 December 2003, which you can see on the screen, reproduced as Annex 31 to Saint Vincent and the Grenadines' Memorial, he recommended the use of this particular magnetometer because "[it] is an ultra-sensitive/high sample rate marine magnetometer designed for shallow and deep oil and gas survey applications"?

*Mr Stow:*

I do not understand that at all in terms of exploration. It seems to be misguided and, as I say, a highly sensitive one looks only near the surface of the sediment, not deeper. You might use that sort of instrument if you were looking for cables or near-surface equipment that might interfere with siting an oil platform or something like that, but we are very far from siting an oil platform in that area at the moment, so I do not understand that at all.

*Mr Aznar Gómez:*

Let me turn again to the side scan sonar. During his declaration as an expert last Saturday, Mr McAfee was asked about the side scan sonar. I refer to the verbatim record, page 9, lines 24 and following, where he said:

The side scan sonar has a lot of work in the offshore business. The fact of the matter is there have been lots of side scan sonars towed in the Gulf of Cádiz to find the mud volcanoes. Often gas is spewing out of the area. The side scan sonar can be used to find leaks. It forms a cloud in the water. The escaping gas and oil forms a cloud in the water, and it is more opaque than the water, and you get a return off of a side scan sonar. You also can do ... This particular one does real good sub-bottom profiling, which you can get sub-bottom profile, and of course, also it does pick up manmade objects on the sea floor, which, knowing where those manmade objects are, allows, when you post-process your magnetic data, to take those into account so they do not give you bad information. You remove those manmade objects from there.

Do you have any comment on that?

*Mr Stow:*

I have used side scan sonar extensively in my research. It is a very, very useful technique for looking at again the very surface of the sea floor. As a marine geoscientist, I am very interested in the processes that operate at the surface, the currents that flow and so on. It does not look deep in the surface, below the surface, so is not used for oil and gas exploration at all. The only way it might be able to see the escape of hydrocarbons or gas is if that escape was more or less catastrophic, such as in blow-outs in the deep sea or the BP disaster in the Gulf of Mexico, when there would be a very steady stream of oil or gas escaping. That you

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could detect, but certainly the very, very slow and gentle seepage of methane and associated fluids from these mud volcanoes would not give a signature in the water column at all. They could not be seen.

*Mr Aznar Gómez:*

Then do you think that in relation to exploration for oil and gas in the Gulf of Cádiz, given the average depth, the instruments used by Sage are useful and accurate?

*Mr Stow:*

No. Quite simply, I think that it would be a complete waste of time to use those instruments for oil and gas.

*Mr Aznar Gómez:*

If you were the scientific director of an expedition such as that allegedly performed by the *Louisa* and the *Gemini III* in Spain, would you recommend the use of a magnetometer or side scan sonar?

*Mr Stow:*

No, not at all.

*Mr Aznar Gómez:*

And the use of hand-held metal detectors?

*Mr Stow:*

No, quite bizarre for oil and gas, certainly.

*Mr Aznar Gómez:*

Mr Stow, last Saturday the Applicant's expert on marine hydrocarbon prospects, Mr McAfee, also stated that when he or his company looked for oil and gas they did not really care what the geology was. I would like to read his exact words in order not to misrepresent him. On page 13, line 29, of the verbatim record his words were: "We look for oil. We do not look at geology, sir." I am not a geologist of course – I am even worse – but would you agree with me that this is a strange basis for exploring oil and gas?

*Mr Stow:*

If find it incredulous, I must say, and that is not only as a geoscientist and a petroleum geologist, but, very simply, any exploration well, for example, offshore these days, would cost at least \$100 million. Now you do not as any oil company spend that sort of money without very, very serious interrogation of the geology of the region, so I do not understand that.

*Mr Aznar Gómez:*

Another possibility, another methodology, described by Mr McAfee during his expert testimony was fracking. His explanation was:

Basically, hydrocarbons are locked inside shale or rock and you can't get communication to the well, and if you break it up into little pieces you get communication and it allows the wells to breathe and give up their hydrocarbons.

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My distinguished colleague the Co-Agent of Saint Vincent and the Grenadines then asked, “So you explode the rock formations and that is called fracking” and Mr McAfee said, “Yes, that is correct”.

In many countries surrounding Spain – for example, in France – so far as I know, fracking is prohibited. What do you think about fracking as a methodology?

*Mr Stow:*

It is a method that has become more and more common, particularly in the United States at the moment, for exploiting very, very tightly held gas and oil within deeply-buried solid rocks, and it is a hydraulic method of indeed exploding or fracturing the rocks deep underground. Again we are talking about one/two kilometres depth below the surface.

It has never been done offshore at all; it is a much more complicated process and would be much more expensive, and it is only a process for producing hydrocarbons once you have found them, yes.

*Mr Aznar Gómez:*

In any case I think this is the rationale behind the legislation that prohibits fracking and the environmental damage that it could create.

*Mr Stow:*

It is a big debate in many countries at the moment, whether it should be allowed or not, and certainly in a number of European countries there is a moratorium on fracking at all.

*Mr Aznar Gómez:*

Actually, last year this very Tribunal, in its advisory opinion, did not talk about fracking, but described quite well the responsibilities of States sponsoring deep-sea mining operations of the States, and the main rationale behind the advisory opinion was the application of the precautionary principle to mining activities in the deep seas. Dr Stow, if you were considering the possibility of exploring a new area, what would you do first? Do you think that consulting the national geological database is a common way of gathering free existing data?

*Mr Stow:*

Yes, this is very much the first step in any oil company. If you are exploring a new area, you find as much data as you can. You fully interrogate all public databases. You do as much background reading that has been published on the area as possible. In addition to remote geophysical surveys there will be a large amount of seismic data, which is one of the principal types of data set used, and you would have a geological and a geophysical team to assess this collected data.

*Mr Aznar Gómez:*

On the screen you can see a picture taken from the technical archives on hydrocarbons freely available in the Ministry of Industry, Energy and Tourism of Spain, as the Tribunal already knows. Can you explain to this honourable Tribunal the information collected or available in these archives, please?

*Mr Stow:*

Yes, this is a standard sort of archive that most nations with oil and gas interests – and that is most nations in the world now – will collate and will make available for industry to essentially attract industry to consider work or exploration based in their country or in their

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territorial waters; so it is a normal process. In fact, as a masters student of petroleum geoscientists and engineers, we often set them a task of preliminary exploration of a basin that we name around the world – it could be the Gulf of Cádiz or offshore UK. The first thing they would go to would be a national database of this sort.

*Mr Aznar Gómez:*

Apart from the Infoterra network prepared and organized by the United Nations Environmental Programme, which is a database of a huge amount of satellite images in order to survey the state of the environment on the protection – this is Infoterra of UNEP. Do you know an English company called Infoterra?

*Mr Stow:*

I don't personally know of Infoterra, no.

*Mr Aznar Gómez:*

Mr President, may I ask, as a mild retaliation to my distinguished colleagues of Saint Vincent and the Grenadines to put on the screen the blue photograph of Infoterra, the blue one with the spots of the vessels and some light blue oil seeps? Thank you.

This is, for the Applicant, an authoritative source of data for coming to Spanish waters to prospect for oil and gas. If you see this photograph, what could you interpret, as a specialist in marine oil and gas prospection?

*Mr Stow:*

It is difficult to say exactly as I don't have a precise location and scale, but it looks as though we have got the Bay of Cádiz and various ships around. The blue and the black will be oil slicks and pollutants in the water, I assume. This is very much – I mean if you are thinking in terms of oil and gas, this is a surface view of the oceans and is telling you simply about surface oil and gas, which will be entirely pollutant-based.

*Mr Aznar Gómez:*

In your professional oil and gas prospecting experience, have you ever seen the use of two abnormal deflectors as those installed in the stern of the *Gemini III* that can be seen on the screen and is reproduced in photograph 1 of Annex 16 of Spain's Memorial?

*Mr Stow:*

No, I do not think those are used at all. I know they are not used for oil and gas exploration. As far as I understand they are used for removing sediment from the surface.

*Mr Aznar Gómez:*

Would you recommend this methodology?

*Mr Stow:*

No, certainly not.

*Mr Aznar Gómez:*

Thank you, Professor. Do you think that the conclusions of the report of the Instituto Español de Oceanografía, Annex 5.1 of the Spanish Counter-Memorial, and the report of the Instituto Geológico y Minero de España, Annex 5.3 of the Spanish Counter-Memorial, are accurate

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with regard to the suitability of the vessels and the instruments for an oil and gas expedition as that alleged by Saint Vincent and the Grenadines?

*Mr Stow:*

Yes. Again, I read both Annex 5.1 and 5.3 very carefully. I think they are a very accurate and reasonable assessment. Certainly the equipment on board, the areas surveyed are simply not appropriate for oil and gas exploration, so I fully agree.

*Mr Aznar Gómez:*

What about the methodology described in these cases? Is it the normal methodology used in marine hydrocarbons research?

*Mr Stow:*

Not at all, no.

*Mr Aznar Gómez:*

Have you had occasion to read the scientific article written by De Baukelaer and others, published in 2003 by *Geo-Mar Letter*, pages 177-186 and reproduced as Annex 35 of Saint Vincent and the Grenadines' Memorial?

*Mr Stow:*

I have now read it, yes.

*Mr Aznar Gómez:*

Do you think that the methodology, the instruments and the use of personnel described in that article refer to a scientific survey similar to that alleged by Saint Vincent and the Grenadines in the Bay of Cádiz?

*Mr Stow:*

No, as far as I could see it was a very interesting, but a very specific case, particularly looking for gas seepage potentially from major gas hydrate deposits. Now, these gas hydrates are fairly near-surface deposits that occur under high pressures and cold temperatures, and therefore only occur in water depths in excess of 500 metres and perhaps up to 800 or even 1,000 metres of water depth. They have not yet been found, as far as I know, anywhere in the Gulf of Cádiz, but they are known from many other continental margins around the world.

*Mr Aznar Gómez:*

Do you think that an expert in marine hydrocarbons should have to be aboard the vessel, or at least close to the expedition during the main data-gathering days?

*Mr Stow:*

Yes. It is a very complex set of data that is being gathered in oil exploration and it needs significant interpretation by experts at the time, and with an ongoing programme of exploration you need investigation and understanding in real-time. That is usually carried out by experts on board a ship in consultation, often direct consultation, with further experts at a laboratory on land.

*Mr Aznar Gómez:*

Thank you. During the cross-examination made by Spain of the Applicant's witnesses and expert it was clearly demonstrated that there is no single evidence about the presence of a

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marine oil and gas expert aboard the *Louisa* or the *Gemini III* during the days that the vessels were sailing in Spanish waters. If you were the scientific director of an expedition such as that described by Saint Vincent and the Grenadines how would you be involved during the days of data-gathering?

*Mr Stow:*

I would either be on board the vessel myself or I would have selected a team of qualified experts to be on board in my place.

*Mr Aznar Gómez:*

Professor Stow, to the best of your knowledge and expertise, with the data both Saint Vincent and the Grenadines and Spain have already discussed in this case, do you think that the *Louisa*, the *Gemini III*, the equipment and the personnel aboard and the methodology described and used were the most appropriate to carry on a hydrocarbon survey in the Bay of Cádiz?

*Mr Stow:*

No. The answer is simply, no. There seems to be no reason for that selection of equipment, the high-resolution magnetometers, the metal detectors, the side-scan sonars – certainly not the divers from small ships working around the coast. Neither the equipment nor the ships nor the areas where they were working, as far as I can see, have any bearing on serious oil and gas exploration.

*Mr Aznar Gómez:*

Professor Stow, of course with the inherent limits implied in my following question and your presence here as an expert before this Tribunal, and given all the information you have on the activities described in this case, do you think that the vessels and people represented here by Saint Vincent and the Grenadines were exploring oil and gas in Spanish waters?

*Mr Stow:*

Quite frankly, no. It seems to me highly implausible.

*Mr Aznar Gómez:*

Thank you, Professor Stow, thank you, Mr President.

*The President:*

Thank you. 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 Co-Agent for Saint Vincent and the Grenadines whether the Applicant wishes to cross-examine the expert. Mr Weiland?

*Mr S. Cass Weiland:*

Yes, sir.

*The President:*

You have the floor.

M/V "LOUISA"

MR DORRIK STOW, CROSS-EXAMINED BY MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/8/Rev.1, p. 10–14]

*Mr S. Cass Weiland:*

Mr Stow, is there a difference between surveying an offshore area to determine the possibility of finding some hydrocarbons as opposed to exploration? Are those not terms of art in your industry?

*Mr Stow:*

As far as I can see, surveying is one of the parts of exploration.

*Mr S. Cass Weiland:*

It is the very first part usually.

*Mr Stow:*

As I said before, the first part is data-gathering. You first of all gather a lot of data from existing data sources, from national databanks, before you embark on any actual survey.

*Mr S. Cass Weiland:*

I think you testified that use of the magnetometer in shallow water would be reasonable if you were – especially if you were – doing a large-scale data-gathering effort. Is that fair to say?

*Mr Stow:*

No, what I said was that magnetometers of low resolution would be used over very, very large areas of either the sea floor or land, either towed behind a ship over hundreds of kilometres of area, or flown by plane – but, in actual fact, I am sure this data would exist in the national databank.

*Mr S. Cass Weiland:*

Well, if you did not have enough money to tow your devices around hundreds of kilometres, that would still be a reasonable activity if you are trying to map the sea bottom, at least in some parts of the area, would it not?

*Mr Stow:*

No, no, it does not work like that. If you do not have a lot of money, you interrogate the free national databank; but, secondly, you would not in any way use – target very small areas, which I see from the map were being targeted, with a magnetic survey because the magnetic survey can only look at very large areas and major rock differences.

*Mr S. Cass Weiland:*

What areas was Sage surveying?

*Mr Stow:*

They were surveying a series of – or looked from the map as though they were surveying a series of small areas along the coast and close to the coast.

*Mr S. Cass Weiland:*

What was the dimension of those areas? What maps are you talking about?

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*Mr Stow:*

The map that was shown – I do not remember the number – that has been shown in several of the views, and the areas are relatively small.

*Mr S. Cass Weiland:*

Views this morning?

*Mr Stow:*

Views this morning or in the documentation.

*Mr S. Cass Weiland:*

Mr President, would you ask them to put up the map that they call "targeted parts by the vessels"?

*The President:*

Yes.

*Mr S. Cass Weiland:*

Do you recall this map? You saw it just a few minutes ago.

*Mr Stow:*

Yes, yes.

*Mr S. Cass Weiland:*

What are the dimensions? What does this map show? Did you see it before you came in here this morning?

*Mr Stow:*

Yes, yes.

*Mr S. Cass Weiland:*

Okay, what is it?

*Mr Stow:*

It is the south coast of Spain, the Gulf of – the Bay of Cádiz and along the coastal areas, and it is a series of small circular areas with, I assume, targeted survey sites.

*Mr S. Cass Weiland:*

Targeted by whom?

*Mr Stow:*

By Sage?

*Mr S. Cass Weiland:*

Someone told you that?

*Mr Stow:*

I thought – well, it may well be, yes.

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*Mr S. Cass Weiland:*

Who told you that these are the areas targeted by Sage?

*Mr Stow:*

You tell me what they are.

*Mr S. Cass Weiland:*

Well, sir, I am sorry, I get to ask the questions. That's the beauty of this process that we are involved in.

*Mr Stow:*

But I tell you, you have to explain exactly what you are meaning. I mean, you know, what are you wanting me to ---

*Mr S. Cass Weiland:*

You have come in here, sir, and testified with great confidence about this map and I am asking you, who told you that this is where Sage went? You do not remember?

*Mr Stow:*

The previous counsel.

*Mr S. Cass Weiland:*

The Spanish counsel?

*Mr Stow:*

Exactly.

*Mr S. Cass Weiland:*

What evidence did they show you that Sage had ever visited any of these places?

*Mr Stow:*

I took that on trust. I thought this was an honest – I thought we had all signed an oath to tell the truth.

*Mr S. Cass Weiland:*

Let me ask you this. You are a consultant. You are a marine geologist, et cetera – correct?

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

You have spent five years with BP.

*Mr Stow:*

I have spent five years with the British National Oil Corporation and then with BP.

*Mr S. Cass Weiland:*

Then you retired to the university.

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*Mr Stow:*

No, I did not retire; I have taken up a career in the university. I first of all worked with the British National Oil Corporation; I then worked for the university; I then worked for BP; I then worked in the university.

*Mr S. Cass Weiland:*

So you have been in the university now for how many years in a row?

*Mr Stow:*

Since I was with BP last about ten years.

*Mr S. Cass Weiland:*

During that time did you make some discoveries of your own of commercially viable oil and gas prospects?

*Mr Stow:*

We work very closely, and I have worked very closely, with the industry as head of the Petroleum Engineering Department at the moment, in many, many different phases of oil exploration and production, certainly as consultants, as advisers, working on data and alongside industry personnel.

*Mr S. Cass Weiland:*

Actually that was not my question. Have you personally made discoveries of commercially viable hydrocarbon production areas?

*Mr Stow:*

No, that is not my business.

*Mr S. Cass Weiland:*

Mr McAfee testified that he personally had found three fields and managed 151 oil wells in his career, so would you at least grudgingly allow that Mr McAfee might know something about the business?

*Mr Stow:*

Oh, absolutely, yes, yes.

*Mr S. Cass Weiland:*

I was a little confused by some of the testimony about having scientists aboard because I thought in the very early phase of data-gathering, when, for example, a small ship is towing a side-scan sonar around, that that is a job for, like, technicians. You would not go and accompany a ship like that, would you, a small boat when it is towing ---

*Mr Stow:*

If you are using side-scan sonar it is a very real-time piece of equipment to look at what is going on on the sea floor at that time, but you want to interrogate and to use to determine where you go next. If what you are talking about oil and gas surveying where you have a marine geophysics ship that is towing the hydrophone array – kilometres behind the ship – then that is an earlier phase where you need the technical expertise on board but not the geoscientists at that stage.

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*Mr S. Cass Weiland:*

And you need a computer to record what is coming off the instrument – correct?

*Mr Stow:*

Yes, certainly.

*Mr S. Cass Weiland:*

Were you aware that after we – we being Sage in our ship – was out towing these things, recording all this material on computers, that the Spanish then kept the computers from February of 2006 until the present?

*Mr Stow:*

I did read that.

*Mr S. Cass Weiland:*

If you were on ship, how much would you charge the oil and gas promoter to be on ship for, say, one day?

*Mr Stow:*

It is a very difficult question that. I have been on many ships, many cruises, and certainly for most of them I am there as a scientist gathering data and I do not charge. I am interested in the data.

*Mr S. Cass Weiland:*

But you do consultant work for oil companies, you testified.

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

I presume you are paid.

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

So what would be your day rate for a consultant?

*Mr Stow:*

My day rate is about £1,500.

*Mr S. Cass Weiland:*

Pounds?

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

And is that your rate for today?

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*Mr Stow:*

I can't remember whether it is today or not, but I think this is inappropriate. Is it not inappropriate to ask these sorts of ---

*Mr S. Cass Weiland:*

I think we are entitled to know how much they are paying you to be here today. That is all I am asking.

## NAVIRE « LOUISA »

INTERVENTION DE MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE  
[ITLOS/PV.12/C18/7/Rev.1, p. 14; TIDM/PV.12/A18/7/Rev.1, p. 16]

*The President:*

Ms Escobar Hernández?

*Mme Escobar Hernández :*

Merci Monsieur le Président.

Je dois faire catégoriquement objection à la question qui vient d'être posée. Jamais on n'a posé une question s'agissant des montants reçus par les témoins, les experts, quelle que soit la Partie qui participe à cette procédure ! Cela relève des informations confidentielles internes de chaque délégation. Bien sûr, le moment venu, si ce Tribunal désire se prononcer sur les coûts, nous donnerons volontiers toute l'information au Tribunal. Mais pas lors de la déposition des témoins ou des experts.

Merci Monsieur le Président. Je regrette d'avoir eu à intervenir.

*The President:*

Madam Escobar, I also think that this question is not appropriate at this stage.

Mr Weiland.

*Mr S. Cass Weiland:*

Thank you, Mr President. I am sorry. Perhaps we will leave that confidential information for another day.

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MR DORRIK STOW, CROSS-EXAMINED BY MR S. CASS WEILAND (SUITE)  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/8/Rev.1, p. 14–18]

*Mr S. Cass Weiland:*

You testified that the unsworn memoranda that were submitted by Spain as Annex 5 were all in accordance with your professional understanding of issues relating to oil exploration. Do you remember that testimony?

*Mr Stow:*

I specifically referred to Annex 5.1, Annex 5.2 and Annex 5.3, and certainly I believe those were very accurate and reasonable.

*Mr S. Cass Weiland:*

In Annex 5.1, among other things – I am paraphrasing it slightly – the author, who by the way is Dr Victor Diaz-del-Rio Español – do you know him?

*Mr Stow:*

Yes, yes.

*Mr S. Cass Weiland:*

Is he a friend of yours?

*Mr Stow:*

He is a professional acquaintance.

*Mr S. Cass Weiland:*

So he is a government employee – correct?

*Mr Stow:*

Maybe. I don't know.

*Mr S. Cass Weiland:*

So you do not know him well.

*Mr Stow:*

I would not know his employment status. I do not know the system in Spain, which is different from the UK.

*Mr S. Cass Weiland:*

He says that the *Gemini III* has insufficient infrastructure to accommodate deep-penetration seismic prospecting equipment. Do you recall that?

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

Did you know that *Gemini III* had no seismic equipment at all? It was not interested in seismic. It is doing just a first-tier survey.

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*Mr Stow:*

Well, side-scan sonar is a seismic process.

*Mr S. Cass Weiland:*

So he concluded that the *Gemini III* was incapable of towing side-scan sonar and you agree with that?

*Mr Stow:*

No, no, he said it was incapable of deep-penetration side-scan research, seismic research. Side-scan sonar is very, very shallow penetration or surficial seismic research and it could do that, and he recognized that, but that was not deep.

*Mr S. Cass Weiland:*

So side-scan sonar, good for shallow water.

*Mr Stow:*

No, good for no penetration or shallow – very shallow penetration, any water depth.

*Mr S. Cass Weiland:*

It is showing you what is on the ---

*Mr Stow:*

Surface.

*Mr S. Cass Weiland:*

The surface of the sea floor.

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

If it picked up some picture of something you were not sure what it was – it might be one of these mud volcanoes you referred to – would it not be appropriate to send a diver down to explore that in some instances?

*Mr Stow:*

It depends entirely what you are doing. Divers would not be used in any kind of oil exploration.

*Mr S. Cass Weiland:*

Not in any kind?

*Mr Stow:*

No.

*Mr S. Cass Weiland:*

You have never had a diver go down in shallow water and check the anomalies on the sea floor?

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*Mr Stow:*

No. They will be there certainly for – once you have established an installation, a platform or a rig; then divers go down very regularly to check that that is working or if you have an installation on the sea floor such as a pipe producing from a field, then divers are used routinely where it is shallow enough for divers. If it is deeper you will use a remotely operated vehicle, a POV; but this is entirely for checking sub-surface installation and structure, not at the survey stage.

*Mr S. Cass Weiland:*

Is a mud volcano something that might have a good prospect for development?

*Mr Stow:*

No.

*Mr S. Cass Weiland:*

I thought you said they sometimes leak methane.

*Mr Stow:*

Exactly. For production, you do not want anything leaking.

*Mr S. Cass Weiland:*

Pardon?

*Mr Stow:*

For production of hydrocarbons or for finding a hydrocarbon trap, it must not leak. The whole of the oil industry is to look for something that is capped and sealed and does not leak. So you would avoid anything to do with a vent site such as a mud volcano.

*Mr S. Cass Weiland:*

You certainly would avoid any such underwater structure that might turn out to have metal in it – correct?

*Mr Stow:*

Metal is irrelevant.

*Mr S. Cass Weiland:*

It would not be irrelevant to someone who was interested in developing some anomaly that is on the sea floor, would it? You are not going to try to drill into some kind of cable that is lying on the sea floor or piece of wreck from a merchant ship that sank 25 years ago.

*Mr Stow:*

Absolutely, but the thing is that that is at a very, very different stage. If you have discovered what you think is a potential field, you will apply to the government to be able to license the block – well, you have licensed the block to be able to develop, and if you were granted a licence to develop a field, and this would be many, many years after exploration, you would then of course survey the sea floor.

*Mr S. Cass Weiland:*

Do you have evidence that no person related to Sage accessed this Spanish website that we have heard so much about?

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*Mr Stow:*

I have not looked into this matter.

*Mr S. Cass Weiland:*

The only other thing I am going to ask you about is this notion that exploring close to the coastline in the Gulf of Cádiz – by the way, do you know where the Gulf starts and the Bay stops? We have had a lot of confusion about that. I think you yourself have distinguished between the Bay and the Gulf, so where is the line drawn?

*Mr Stow:*

Do you want me to show you on a map?

*Mr S. Cass Weiland:*

Is there some way you could just describe it?

*Mr Stow:*

There is not an easy way to describe. I can point very clearly on a map where the Bay is and where the Gulf is, but the Bay is a very close to coastal region, the Gulf is the whole area between southern Iberia and northern Africa, which is a very large area.

*Mr S. Cass Weiland:*

Do you know where the Poseidon field is?

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

That is in the Gulf of Cádiz – correct?

*Mr Stow:*

Yes.

*Mr S. Cass Weiland:*

Does the Bay of Cádiz extend up to the area off the coast of Huelva?

*Mr Stow:*

No.

*Mr S. Cass Weiland:*

You said that in your professional opinion it is impossible for anyone to think that you could discover hydrocarbons in the area close to Cádiz. Is that correct or am I misunderstanding?

*Mr Stow:*

No, you are misquoting. I said it would be a very, very low priority exploration target.

*Mr S. Cass Weiland:*

Low priority?

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*Mr Stow:*  
Very low priority.

*Mr S. Cass Weiland:*  
So the big oil companies would certainly stay away from that, in your opinion?

*Mr Stow:*  
I would have thought any oil company would.

*Mr S. Cass Weiland:*  
Have you heard of this Calypso concession that Spain granted? We saw it yesterday.

*Mr Stow:*  
I am not familiar, no.

*Mr S. Cass Weiland:*  
Did they happen to mention to you that they had been issuing permits for exploration right off the city of Cádiz that extended right up to the breaker?

*Mr Stow:*  
Continental shelf?

*Mr S. Cass Weiland:*  
Right up to the edge of the city. Permits to explore. Who is Calypso?

*Mr Stow:*  
I certainly saw on one of the maps a large exploration area that in my view extended to the outer shelf edge and just beyond, which would have been from, in my estimation – although it did not have bathymetric contours, my estimation would have been that it was from about 200 metres to the coastal region, yes. That broad area, I would have thought that is a possible place to look.

*Mr S. Cass Weiland:*  
So within 200 metres?

*Mr Stow:*  
No, 200 metres water depth, which is the outer continental shelf/upper continental slope region.

*Mr S. Cass Weiland:*  
No, I am talking about not the western limit of the permit that was granted to Calypso; I am talking about the eastern limit.

*Mr Stow:*  
Yes, yes.

*Mr S. Cass Weiland:*  
Did you look at that?

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*Mr Stow:*

I did not see ... Again, there was no bathymetry on the contours, so I am not sure what the water depth was there.

*Mr S. Cass Weiland:*

Nothing further, Mr President.

*The President:*

Thank you, Mr Weiland.

An expert who was cross-examined by the other Party may be re-examined by the Party who had called the expert. Therefore, I ask the Agent of Spain whether the Respondent wishes to re-examine the expert.

*Mme Escobar Hernández :*

Non, merci, Monsieur le Président, nous n'avons pas l'intention de procéder à un réexamen. Je vous prie en tout cas de nous permettre d'afficher à l'écran une carte qui a été montrée dans cette salle d'audience, qui fait référence précisément au Calypso, tout simplement aux fins d'information du Tribunal. Si vous nous le permettez, nous le ferons.

*The President:*

Please proceed.

MR DORRIK STOW, RE-EXAMINED BY MR AZNAR GÓMEZ

COUNSEL OF SPAIN

[ITLOS/PV.12/C18/8/Rev.1, p. 18–19; TIDM/PV.12/A18/8/Rev.1, p. 21–22]

*Mr Aznar Gómez:*

Thank you, Mr President. This is not a very good map, not a high-scale map, but you do recognize the Bay of Cádiz?

*Mr Stow:*

Yes.

*Mr Aznar Gómez:*

Do you see the eastern corner of the Calypso in yellow?

*Mr Stow:*

Yes, yes.

*Mr Aznar Gómez:*

It could be said that this is just on the limit of the drawing of the straight line which closes this Bay?

*Mr Stow:*

Yes.

*Mr Aznar Gómez:*

Thank you, Mr Stow. Thank you, Mr President.

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*The President:*

I thank Mr Aznar Gómez.

Mr Stow, thank you very much for your testimony. Your examination is now finished so you may withdraw.

I would like to ask Ms Escobar Hernández, since we have 25 minutes left before the morning break, I would like to know how you would like to proceed.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Si cela vous convient, nous aimerions maintenant appeler un autre expert, le Pr Delgado, qui est déjà ici. Ainsi, nous pourrions tirer profit des 25 minutes qu'il nous reste avant la pause. Si cela vous convient, je vous prierais d'appeler le témoin. Ce sera à nouveau mon collègue, le Pr Aznar, qui posera les questions.

*The President:*

Thank you very much.

Before we continue with the examination of the next expert, there is a further procedural issue that we need to attend to. As I mentioned yesterday, several experts called by Spain during the course of these proceedings will make their statements in Spanish. Since Spanish is not one of the official languages of the Tribunal, it is incumbent upon Spain to provide interpretation from Spanish into one of the Tribunal's official languages. Interpreters provided by a Party need to make a solemn declaration, and in fact, one interpreter made such declaration yesterday. Spain has informed us that, in view of the amount of interpretation needed, they wish to provide a further interpreter, Mr Hernando Barrios, who I welcome to the Tribunal.

*Mme Escobar Hernández :*

Monsieur le Président, ce n'est pas pour introduire un élément de confusion, mais M. Delgado s'exprimera en anglais. Il n'a pas besoin d'interprète. Il parle anglais, en fait, c'est un citoyen des Etats-Unis.

*The President:*

Thank you, Ms Escobar Hernández.

Mr Barrios is there. This is for the next expert.

May I call now upon the Registrar to administer the solemn declaration which Mr Barros has to make.

*The Registrar:*

Thank you, Mr President.

Good morning, Mr Barrios. Interpreters provided by one of the Parties are required to make the solemn declaration under article 85 of the Rules of the Tribunal before entering upon their duties. You have been provided with the text of the declaration. May I therefore invite you, Mr Barrios, to make the solemn declaration?

*The interpreter is sworn in.*

*The President:*

I now give the floor to Ms Escobar Hernández to continue.

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*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je vous prie d'appeler M. Delgado pour continuer avec la présentation des experts. Je vous prie aussi d'autoriser mon collègue, le Pr Aznar, à poser les questions.

*The President:*

Thank you very much.

Mr Delgado has arrived. The Tribunal will proceed to hear the expert, Mr Delgado.

I call upon the Registrar to administer the solemn declaration to be made by the expert.

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**Examination of Experts (continued)**

MR JAMES PRESTON DELGADO, EXAMINED BY MR AZNAR GÓMEZ  
COUNSEL OF SPAIN  
[ITLOS/PV.12/C18/8/Rev.1, p. 20–31]

*The Registrar:*

Mr Delgado, pursuant to the rules of the Tribunal, before giving any statement, an expert must make the solemn declaration provided for under article 79 of the rules. You have the declaration in front of you. May I invite you now to make the solemn declaration?

*Mr James Preston DELGADO is sworn in.*

*The President:*

Thank you.

Before we start with the examination of the expert, may I remind the Parties, and you, Mr Delgado, to speak slowly to facilitate the work of the interpreters and the verbatim reporters. I now give the floor again to Mr Aznar Gómez to start the examination of the expert.

*Mr Aznar Gómez:*

Thank you, Mr President.

Good morning, Mr Delgado. Could you please say your complete name, address and current affiliation?

*Mr Delgado:*

My name is James Preston Delgado. I reside at 218 Dale Drive in Silver Spring, Maryland, in the United States. I currently hold the position of Director of Maritime Heritage in the Office of National Marine Sanctuaries in the National Oceanic and Atmospheric Administration in the United States Department of Commerce. I am not, however, here today in my official capacity.

*Mr Aznar Gómez:*

Thank you, Mr Delgado. Yes, Spain wants to underline that Mr Delgado is here as a professional and reputable archaeologist, and a professor, and that he is acting in his individual capacity, not representing the Government of the United States of America. Mr Delgado, could you please summarize your experience, national and international, in relation to underwater archaeological research?

*Mr Delgado:*

I have been engaged in the practice of maritime and underwater archaeology since 1978. I hold three degrees in Maritime History, with a PhD, doctorate, in archaeology. My work has involved a variety of projects archaeologically, which have ranged from smaller projects to large projects. The largest project I have most recently worked on has been the scientific mapping of the wreck site of the *Titanic* in the North Atlantic. That project is ongoing.

My field work has involved work not only in the United States and in several of the states of the United States, such as Texas, California, Oregon, Massachusetts, Florida and others, but also in other countries. I have worked in Japan, Chile, Cuba, Panama, Spain, Germany, Greenland, Canada, the Republic of the Marshall Islands and others. My project work has included initial research, surveys, documentation, excavation, post-excavation analysis and

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the publication of results from archaeological projects. In my professional capacity I have published a variety of books, some of them through university presses with a peer-reviewed jury process, on the results of my archaeological work. In addition, I have authored a number of reports and articles, again in peer-reviewed scientific publications. It is very important in my field to follow your field work with publication of the results, and the analysis also speaks to the need to share what you learn.

In addition to this work, I have also actively been engaged in the protection of sites as an archaeological administrator, both in my previous position with the United States Government, with the United States Department of Interior's National Park Service and as well in my current position. I have worked as a museum director, and I have also served in all of these positions on a variety of professional organizations, as well as scientific organizations. This has included tenure as a member for Canada before UNESCO's International Commission on Monuments and Sites on their International Committee on the Underwater Cultural Heritage. I currently also serve on the Site Protection Committee of the Archaeological Institute of America.

In my capacity as an archaeologist, I have also worked to share the results of my studies and projects with the public. This has involved other publications, books for a more public audience, on maritime history and archaeology, as well as articles, and I also spent the years between 2001-2007 as the host of an international television production for *National Geographic* called *The Sea Hunters*, in which we visited projects and shared those results with an audience in 172 international jurisdictions.

*Mr Aznar Gómez:*

That is all? (*Laughter*)

Excuse me, Mr President.

In the next days you will be receiving a medal in Toronto for your longstanding career as an archaeologist. Is that true?

*Mr Delgado:*

Yes, I am receiving the Vilhjalmur Stefansson Award for exploration, archaeology and mentoring in archaeology from my colleagues in Canada.

*Mr Aznar Gómez:*

Thank you, Mr Delgado. You have said, among other things, that, among other countries, you have an archaeological experience in Germany, in Japan, in Canada, in the United States and in Spain. I guess that to organize an underwater archaeological project in those countries you need to fully comply with their domestic legislation. Do you think that the legal conditions Spain imposed on your projects were similar or equivalent to those imposed by the US authorities, the German authorities, the Japanese authorities, or the Canadian authorities, for example?

*Mr Delgado:*

I do feel and know that the requirements of Spain were the same, with minor differences, as any other country that I have worked in. I should note that for five years I served with the Institute of Nautical Archaeology, which is an international non-governmental organization which conducts work around the world. It was founded by George Bass, who is considered the father of underwater or nautical archaeology, in Turkey more than 50 years ago. INA, as it is known, works internationally and, as its President, I was very familiar, not only with international law but also the specifics of the various countries in which we worked. My

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knowledge therefore was specific in regards to permit obligations as well as requirements and domestic law. There simply is no basic difference.

*Mr Aznar Gómez:*

The particular legislation of the Texas state?

*Mr Delgado:*

Texas is one of the most stringent states in the United States when it comes to the protection of underwater cultural heritage. This was the result of actions taken back in the previous decades, particularly the 1960s and the 1970s, when shipwrecks and other underwater cultural heritage were being disturbed by people who had no real interest in archaeology, and Texas enacted stronger legislation to protect sites as a result.

*Mr Aznar Gómez:*

Having said that, why do you think that other legislation, like Chinese, French legislation, or, for example, some African countries that now are developing a complete array of protective legislation with the assistance of UNESCO – why do you think that this legislation is so cautious in particular with underwater cultural heritage?

*Mr Delgado:*

There has been a growing sense in the last five decades of the exceptional significance and the fragility of underwater cultural heritage. The work done by George Bass, starting in Turkey and expanding through the Mediterranean, now encompasses the globe, and that is significant because, with 72 per cent of the world covered by water, one could argue successfully that the greatest record of humanity's activities, the means by which we have traded, not only commerce but ideas and even DNA, the means by which we have expanded into a more global culture, has come because of the unifying influence of the sea, and in many ways the clever ability of our species to adapt to this water environment, from the earliest humans, who we now feel did navigate by water to populate areas such as Australia, the spread of various native groups throughout the Caribbean, throughout Oceania, to the more modern activities of the last five centuries, which have created the world in which we now live, all of that is represented by what lies at the bottom of the seas, lakes and rivers.

Because of the environmental circumstances of burial in the deep sea, one might presume that things might just simply disappear because of that environment, but what we have found is that that is not the case. Shipwrecks in particular, as well as buried harbour sites, towns, that have been inundated as a result of sea level change, evidence exceptional levels of preservation. Off the coast of Spain, in the excavation of this one site, was a 2,700 year old Phoenician shipwreck, at a site called Bajo de la Campana off of Cartagena, where we found sacks of preserved pistachios, remains of other organic materials, and this is not unique; you find this in many sites and in many contexts. We even find the well-preserved remains of ships that otherwise would not be documented from the seafaring craft of antiquity to more modern vessels. In the very cafeteria down on the ground floor of this building is a model of the Cyrenean ship excavated off the coast of Cyprus, a classic Greek merchant vessel of antiquity whose form was basically unknown until that excavation raised pieces of that hull, which at the time of their recovery had the basic constitution or structure of a piece of soft cheese, which required extensive work in laboratories to make it capable of handling and reconstruction into not only the model but the preserved remains of the ship.

That fragility is what drives the importance of legislation and the need to protect these sites because, if not done carefully, without adequate resources or due care or diligence, or a

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scientific report, you are destroying priceless evidence of human activity that exists in perhaps the greatest museum of the world.

*Mr Aznar Gómez:*

So it could be said that an enormous part of the explanation of our shared history is beneath the waters.

*Mr Delgado:*

Yes.

*Mr Aznar Gómez:*

In these millions of books to be written about our history, how could you describe the archaeological importance of the Gulf, and particularly the Bay of Cádiz?

*Mr Delgado:*

In regards to the Gulf and the Bay of Cádiz, you are dealing with one of the most archaeologically significant and sensitive zones in the world. This is an area which has been known to have been colonized and the source of trade and activity since prehistoric times. In the classical period it was actively visited and traded, and had establishments created by Phoenicians, Greeks, Romans, the Arabic peoples who came, the subsequent great powers of Europe – all of this has left a very rich, detailed record in terms of underwater cultural heritage. It includes the remains of ports; of discarded, broken cargoes, when a voyage ended badly at its destination; it includes shipwrecks of different periods. In this, what you have then is a collection which some have estimated to be as many as thousands of shipwrecks in the Gulf and the Bay of Cádiz, from deep water to the shallower waters close to shore.

That heritage has been catalogued to some extent. The Institute of Nautical Archaeology in 1984, working with and for the Government of Spain and the Ministry of Culture, catalogued some 400 shipwrecks of considerable significance in the Bay of Cádiz. That included areas of five clusters where significant actions had resulted where larger groups of shipwrecks were located. The sites are seen to be important not only because they represent this long history but, in particular, they also represent the role of Spain as a leading maritime and naval power at the time of the opening of the New World and subsequent events, and in particular, from the 16<sup>th</sup> to the 19<sup>th</sup> centuries, you have a larger number of shipwrecks which reflect not only Spain's activities but its interactions with other powers. You have represented there, in addition to the range both in terms of time and types of ships and activities, what some have argued to be exceptional levels of preservation due to burial in harbour mud, and this has been asserted not only by archaeologists but by treasure hunters. Nigel Pickford, a British authority, has catalogued some 34 shipwrecks he says are of great importance in the Bay of Cádiz. His criterion, however, is the value or type of cargo. Robert Marx, another treasure hunter, calls the Bay of Cádiz the world's great archaeological treasure, primarily focusing on the levels of preservation, the wide range of ships and, again, the amount of money he feels could be made from shipwrecks in this area. Most recently in September 2010 in the Andalusian newspapers it was reported by those newspapers that €100 million worth of treasure was estimated to lie in the Bay of Cádiz. I do not know if that figure is accurate, but what I can say is that if the Bay of Cádiz is a bank, then the great treasure that lies at the bottom of it is in terms of human knowledge, not money.

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*The President:*

Mr Aznar Gómez, I am sorry to interrupt you. I understand you have many more questions to ask. We have reached 11.30 so the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at noon.

*(Break)*

*The President:*

We continue the hearing.

Mr Aznar Gómez, you have the floor.

*Mr Aznar Gómez:*

Thank you, Mr President.

Now that we know the objective importance of underwater cultural heritage for the explanation of the history of humankind and the objective or relative importance of the Gulf of Cádiz and this province, may I ask you whether you have any experience of this archaeological research in the Bay and the Gulf of Cádiz, please?

*Mr Delgado:*

As previously noted, while the Institute of Nautical Archaeology, which I have headed, did have explicit experience in the Bay of Cádiz, I personally have not, but I have worked in the Gulf of Cádiz in particular examining the data, the photomosaics, the photographs, video and other data recovered during the examination and subsequent recovery of materials from a shipwreck in international waters at one kilometre of depth, which, though analysis, I was able to determine was the Spanish navy frigate *Nuestra Señora de las Mercedes*, which was sunk in combat with British forces in October 1804. That examination was done as part of litigation and my identification and archaeological analysis was upheld at every subsequent level of legal review up to the United States Supreme Court.

*Mr Aznar Gómez:*

But the Bay of Cádiz is generally perfectly well known for archaeologists in different oceans around the world?

*Mr Delgado:*

I would say that the Bay of Cádiz is well known not only to archaeologists but to anyone who is a student of the history of underwater archaeology or who has an interest in treasure.

*Mr Aznar Gómez:*

So treasure hunters too. Have you had any experience with underwater treasure hunters both in Spanish waters and elsewhere?

*Mr Delgado:*

I have extensive experience with treasure hunters, though not working for them or with them. The case in Spain in particular involved the recovery of materials from the *Nuestra Señora de las Mercedes* by a US-based commercial firm that recovers treasure by the name of Odyssey Marine. In the United States I have dealt with treasure hunters both at a more amateur level to those which have larger companies, in part through my previous experience working with the US Department of the Interior National Parks Service, with the review of applications, and in assessing work for damage done by treasure hunters in different sites. I also was asked at the time of the passage of the United States domestic law on underwater cultural heritage, the

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Abandoned Shipwreck Act, to be one of two authors of guidelines issued by the government for the various states to administer underwater cultural heritage. The charge from the Congress was very clear: all values and all interested parties needed to be consulted and considered. So, in that vein, I journeyed to various meetings, held public hearings, met with treasure hunters, oversaw what was the party to whom treasure hunters expressed their views of the law and what they thought might be workable in a public meeting in Florida, visited Florida treasure hunter Mel Fisher in Key West, Florida, in his operation, and also personally inspected a treasure hunting operation in progress at the site of a British warship known as HMS DeBraak which was lost off the coast of Delaware, in Delaware Bay. So I am familiar with treasure hunters both on a theoretical and a practical basis, including business methods, equipment, techniques and approach.

*Mr Aznar Gómez:*

Mr Delgado, have you ever heard about Mr Luis Valero de Bernabé and Mr Claudio Bonifacio? Do you also know Mr Walter Cardona Bonet?

*Mr Delgado:*

I do not personally know those three gentlemen but I know of them. I have seen posts from Mr Bonifacio, for example, on the internet in treasure hunting forums. He has published a book on Spanish shipwrecks and their value as treasure. Mr Bonet has published a book as well on shipwrecks and their value. All of them are known to me through reading.

*Mr Aznar Gómez:*

Should you be interested to perform archaeological research in Spain, for example, would you contract Mr Valero and Mr Bonifacio as reputable persons in underwater archaeological research?

*Mr Delgado:*

I would not. From what I have observed and read in professional reviews by colleagues, their interests are not the same as mine, which are academically and scientifically focused, not commercial. In such a case, if I was to work in Spain, I would work closely in particular with the Spanish Government, as we did in Cartagena on the Phoenician shipwreck site.

*Mr Aznar Gómez:*

Mr Delgado, will you look at the map on the screen. This map, which appears as Annex 4 of the Counter-Memorial of Spain, shows the different targeted points by the vessels *Louisa* and *Gemini III*. Some of them are within the so-called permit areas but most of them are outside the permit areas. Are the areas marked by these points and those surrounding these points well known areas for archaeological research?

*Mr Delgado:*

Frankly, my first impression was that this was a map of shipwreck locations in and around the Bay of Cádiz. These points are all areas identified by the INA survey and others as particular zones of concentration of shipwrecks, but the entire Bay of Cádiz is archaeologically sensitive, and as of 2009 had actively been designated so, but again is a very sensitive area.

*Mr Aznar Gómez:*

On the next screen, overlapping the previous map, there are marked some well known wreckage areas of several fleets, vessels and other human remains in different moments of

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modern Spanish, European and also global history. Could you please identify and briefly underline their archaeological importance, and particularly that of the *Marcos del Puerto* fleet in the naval combat of 1656?

*Mr Delgado:*

All the referenced sites or areas reflect a period on which archaeologically we do not have as much information as we should. This period, which corresponds closely to an active period in Spain's history as a dominant power and as a power engaged actively in trade and commerce with Asia and with the then Spanish colonies in South and North America, is a period that is seen by many treasure hunters to be the ideal type of shipwreck to go after, because in their estimation – and I have seen this noted in their treasure hunting blogs and their other communications – Spanish ship equals treasure ship. I could therefore see why one might have an interest for financial reasons, but archaeologically, for me, this represents a period in which the world we know is forming. This is a period of the rise of a global economy. This is the beginning of a more global culture. Despite differences, this is a period into which Europe in particular is expanding and drawing upon resources from other parts of the world with immense consequences for the world, both positive and negative, and all of that would be reflected in the shipwrecks that you see down there.

In particular, let us just talk about the *Marcos del Puerto* squadron, which was lost in battle with an English fleet in 1656. This occurred during a six-year conflict known as the Anglo-Spanish war from 1654 to 1660. The English decided to intercept a squadron carrying money and did so right off of Cádiz, engaging the squadron, which was placed under the command of the *Marcos del Puerto*. In the action that followed, two ships out of the six escaped because they were driven ashore, two were captured, and two were sunk. What you have as a result is not only the archaeological remains of a battle but two ships in particular which, in essence by sinking and settling down into the seabed, despite whatever damage may have happened in the battle, whatever may have happened subsequently in terms of ongoing environmental change, represent a near time capsule that reflects not only those ships and the people on board but in particular where Spain was technologically and economically at that period.

*Mr Aznar Gómez:*

Based on your expertise, it is well known that both the *Almiranta* of that fleet – the galleon *San Francisco Javier* – and another targeted wreck, the *Fama Volante* were loaded with important amounts of silver bars and gold coins?

*Mr Delgado:*

It is well known. It has been published in particular in Nigel Pickford's book on treasures and shipwrecks and in others, and it is also available to anyone who does even a rudimentary level of research. The *San Francisco Javier*, for example, according to one treasure hunter's account, was said to have 600,000 pieces of eight, as they termed it, on board, as well as gold.

*Mr Aznar Gómez:*

Do you think that it is quite easy to gain access to information referring to these wreckage areas and their approximate location?

*Mr Delgado:*

It is very easy to gain an approximate location as well as the history of these wrecks. The story of these various battles, the story of the activities, has been written, and in particular the INA project of 1984 became a master's thesis by student Denise Lakey in 1987. That study,

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cataloguing some 400 wrecks and areas of significance, is available as an open-access, downloadable PDF file at Texas A&M University, which is the home of the Institute of Nautical Archaeology.

*Mr Aznar Gómez:*

Could you please now describe the possible use of a magnetometer in looting underwater cultural heritage and its use in conjunction with ROV metal detectors such as those that you can see on the screen and appear in Annex 10 of the Spanish written response in the phase of Provisional Measures in this case, which were found aboard the *Louisa* and the *Gemini III*?

*Mr Delgado:*

I am familiar with both. I have used both, as have my colleagues. The geometric G-882 is an exceptional instrument for locating underwater cultural heritage even with wooden shipwrecks, because it detects variations in the magnetic field caused by metallic objects such as cannons, anchors, cannonballs, iron ballast and things of that sort. The metal detector on the remotely-operated vehicle is more of a proximity instrument, but it is also invaluable in locating materials, and that is important in characterizing an underwater site, because a magnetic signature is a clear indication, when you are in an area where you have a distinct pattern, of a shipwreck, and my colleagues have been very skilled in characterizing and mapping a shipwreck site, for example, using this instrumentation prior to excavation.

*Mr Aznar Gómez:*

Could it then be said that the G-882 cesium magnetometer such as that used aboard the vessels the *Louisa* and the *Gemini III* is particularly accurate for the identification of archaeological remains in shallow waters, given its high resolution results particularly in relation to metallic remains such as silver, gold, lead?

*Mr Delgado:*

I am not a detailed expert in remote-sensing technology. I have only been the chief scientist working on expeditions where this has been deployed. What the technicians, some of them with PhDs in this technology, have said to me is that it is a very accurate instrument, that the cesium magnetometer in particular is a highly effective magnetometer as opposed to its predecessor, the proton precession magnetometer, and I have seen that borne out in the results of our own surveys. In particular, a recent magnetometer survey off the coast of Texas was done to characterize an iron-hull shipwreck buried in sand for the most part – a US navy ship sunk in combat. We looked carefully at the magnetometer data and what it suggested in terms of what lay beneath and then verified that most recently, thanks to hurricane and other storm erosion that exposed portions of the vessel's iron hull and machinery, and in each case where there was a precise magnetic target we found very distinct remains that we could characterize as the paddle wheels, the mounts for guns, for example.

*Mr Aznar Gómez:*

In your experience of treasure hunters, do they normally use these kinds of magnetometers and side scan sonar, if available?

*Mr Delgado:*

Absolutely.

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*Mr Aznar Gómez:*

In your experience of treasure hunters, do they normally use hand-held metal detectors such as those shown on the screen and found aboard the *Louisa* and the *Gemini III*, reproduced in photograph 5 of Annex 10 of Spain's written response in the phase of Provisional Measures?

*Mr Delgado:*

Yes, they do. That is a large number of hand-held metal detectors. On our projects we use them very carefully to characterize in a magnetometer zone where distinct smaller materials might be located, but they have particular applicability for finding coins – something that ordinarily we do not do.

*Mr Aznar Gómez:*

Are they used by divers?

*Mr Delgado:*

They are hand-held by a diver. I have deployed them myself. You hold it up in front of you, it clamps *here*, you move along the bottom, depending on visibility.

*Mr Aznar Gómez:*

Just for curiosity, Mr Delgado, do these hand-held metal detectors detect gas bubbles?

*Mr Delgado:*

I have never heard of that.

*Mr Aznar Gómez:*

It was just for curiosity. Mr Delgado, will you now please look at the two abnormal deflectors installed in the stern of the *Gemini III*, which can be seen and are reproduced in photograph 1 of Annex 16 of Spain's Memorial? In your experience of treasure hunters, do they normally use these deflectors to remove sand in shallow waters in order to disclose precious objects embedded in the sea floor?

*Mr Delgado:*

This technology was specifically developed by treasure hunters for treasure hunting. It was first used in Florida, in particular on Spanish shipwrecks in shallower depths. Treasure hunters refer to these as prop-wash deflectors, blasters, blowers. They are capable of taking the thrust and excavating in shallow waters up to 15 or more metres. You can excavate an additional seven-and-a-half metre deep hole rapidly to get to the bottom. As a general rule, we do not use these, because you have very little to no control in your excavation and the results can be damaging.

*Mr Aznar Gómez:*

Will you please look again at the screen? This is photograph number 6 of Annex 10. How would you describe these? Have you ever seen these, Mr Delgado?

*Mr Delgado:*

I have never seen this before. It is interesting to me that it is cut there. What you have here is the protector, the plastic or rubber boot that goes on the bottom of the tank. This looks to me to be a modification to make this tank into a storage vessel, which is not immediately visible or noticeable as such.

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*Mr Aznar Gómez:*

So it can be said that an object can be put inside, then put the yellow bottom, and then covered with the black rubber, so that the mark of the cutting of the tank cannot be seen?

*Mr Delgado:*

I could easily see it being used in this capacity.

*Mr Aznar Gómez:*

Let us now turn to the archaeological objects found aboard the *Louisa* and the *Gemini III* and the custody of those vessels. Some of them, but not all, are shown on the screen and are annexed as photographs 7 to 10 of Annex 10 of Spain's written response in the phase of Provisional Measures, and as photographs 6 to 10 of Annex 16 of Spain's Counter-Memorial. In the black market of cultural objects, what do you think would be their monetary value? Would you agree with the report made by the *Museo Nacional de Arqueología Subacuática*, which has been submitted by Saint Vincent and the Grenadines during the hearings in the Provisional Measures phase of this case?

*Mr Delgado:*

Without more information, just looking at the photographs, you have a range of material that includes what appear to be stone anchors from antiquity to materials that date to that time period of the 16<sup>th</sup>/17<sup>th</sup> centuries, up to perhaps the 19<sup>th</sup> century. I have read the report from the *Museo* and I agree in terms of what they say the artefacts are, such as a Dressel amphora, but I disagree on the valuation. In considering the value of underwater cultural heritage or artefacts such as this, you can look at a black market value. That black market value can vary depending on the context of the find. It is well known in the case of plundering antiquities, say from a tomb in a land-based country such as Italy, that, without a more distinct context, you can only say, "This is Etruscan from a certain period", for example. However, if you have context, it gains a higher value, but the true value is not measured in dollars or euros but measured in the context of the scientific information, and in that context is everything. To have artefacts such as these, which seemingly have been recovered without a plan, which have been recovered without preservation treatment, which one can see from the corrosion on the metal objects, including concretion, which is material formed around rusting metal objects, which in and by itself might appear valueless but yet in which on other sites we have seen well preserved organic remains, including paper, the context is lost. It is not dissimilar, if you looked at the history of the Bay of Cádiz as a series of volumes of history, artefacts such as this represent pages irreparably torn out of those books.

*Mr Aznar Gómez:*

Correct me if I am wrong, but it could be said that the value of these objects, once they have been de-contextualized, cannot be, but instead the damage to the archaeological site could be invaluable?

*Mr Delgado:*

For these artefacts to have been recovered in this fashion is to have destroyed practically all their value. The only possibility that sometimes exists when you see artefacts recovered is that in certain treasure hunting operations proof of a find is necessary. In some cases under admiralty law treasure hunters will recover an artefact and take it to an admiralty court to have the site arrested. Such was the case with *Odyssey Marine* and the *Nuestra Señora de las Mercedes*. In other cases, though, what we have seen is that people will recover artefacts, take them back to investors and say, "Here is our proof. We are looking for a ship of this time

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period. Here are artefacts that date from that period. You can see that we are getting close, so if you invest now, you can step up and have a share”. For now it is a cannonball, tomorrow it is a gold coin.

*Mr Aznar Gómez:*

So it is impossible to translate in monetary value the importance of an archaeological site. You have told us that, among other projects, for example, you have been fully engaged with the father of archaeology, George Bass in Turkey and how he has been involved for such a long time with the same sites in Turkey, so the destruction of this archaeological site would be irreparable and irremediable, would it?

*Mr Delgado:*

There is no way to characterize this monetarily. It is an irreparable loss when something like this happens. George Bass conducted an excavation off the coast of Turkey with his students – a site known as Uluburun. It is currently the oldest known shipwreck excavated. It was discovered and was at risk of being plundered, not because it was seen to have a rich treasure but because it had copper ingots, the basic raw commodity of the Bronze Age, in this 3,000-year-old shipwreck. Eleven seasons of field excavation later, fragile remains, including the world’s first open book tablet, organic remains such as ostrich eggs, a collection of gold – actually the largest collection of gold from a shipwreck in antiquity – all of this, when analyzed, demonstrated that twelve separate cultures in the Bronze Age were engaged in international trade, from Baltic amber to materials from Equatorial Africa, to the Levant, to the western Mediterranean; in short, a global trade in that time period, which re-wrote history, and had it been treated in this fashion, we would not have that.

*Mr Aznar Gómez:*

Dr Delgado, have you realized that in our conversations, if it can be so called, apart from when expressly referring to treasure hunters you and I have been talking about heritage and not about treasures, as Saint Vincent and the Grenadines’ pleadings and Memorial say?

*Mr Delgado:*

Yes, we have been talking about heritage. Heritage is important; it is why I became an archaeologist. I grew up watching prehistoric sites being bulldozed at a time when nobody cared. I saw human remains destroyed and skulls taken away as collector’s items. It was not just the disrespect to those thousands-of-years-old people; it was all that was being lost, and it was, I think, for me an opportunity to work with my colleagues to carefully find sites, to excavate. You cannot save it all but you can try.

*Mr Aznar Gómez:*

Let me pursue, if I may, a quite personal question. You are not only, so to say, a theoretical archaeologist; you are also a diver with long experience, and you have dived on a lot of archaeological sites. Not with the same experience, but I do also dive, and I had the opportunity to accompany your colleagues and suddenly see something in the bottom of the sea. Would you be able to compare your personal feeling when diving and you suddenly found this with your personal sensation when you suddenly see an artefact, an object decontextualised that some treasure hunters, or even accidentally, has been pulled out from the bottom of the sea? I know this is quite personal.

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*Mr Delgado:*

Archaeology is personal because it is the story of us as people throughout our time on this planet. Perhaps for me I can explain the feeling from the work I did in Japan. There we were, diving on shipwrecks associated with the invasion of Japan in 1281 by Kubla Khan, the Yüan Emperor of China and the Mongol leader, the great Khan of the Mongols. This episode is well known in history particularly to the Japanese because of the events that ended the invasion with the rise of a divine wind or Kamikaze. This, for seven hundred years, has resonated through Japan's history and the rest of the world's history. It is almost legendary, and yet on the bottom, working with my colleagues from Japan, we paused and suddenly discovered lying in the mud the fragmented remains of a soldier. You could tell this because the remains of his leather armour lay scattered about him. His helmet was to one side. His rice bowl was sitting there, and he had written in ink on the bottom his name, Wang, and his rank of centurion in the Khan's army. His sword lay close by him as he lay there, face down in the mud. That was an incomparable moment for me, as an archaeologist, because, one, despite the violence of the storms that sank the Khan's fleet, despite the intervention of seven centuries, what lay there on the bottom was a human being, part of something bigger than he might have ever imagined, someone who spoke as well through the analysis of his bones in fact that he was Chinese not Mongol, that he had been caught up in the Khan's empire and had gone there, as had 95% of those troops. As I looked at him I wondered if, seven centuries past, someone waited for him in Guangzhou, perhaps, never to return because of the events that led to him being there for us to find seven centuries later. I shudder to think what would have happened had someone gone and blown a hole through that mud to recover that helmet and scattered that leather armour or those fragments of bones.

*Mr Aznar Gómez:*

With the inherent limits implied in my following question, and your presence as an expert before this Tribunal, and given all the information you have on the activities described in this case, do you think that the vessels and people represented here by Saint Vincent and the Grenadines were exploring oil and gas in Spanish waters, or were they looting underwater cultural heritage?

*Mr Delgado:*

I can see no other rationale for being where they were specifically and deploying the type of equipment they were using and with the variety of artefacts found than the recovery of archaeological heritage.

*Mr Aznar Gómez:*

Thank you so much, Mr Delgado.

Mr President.

*The President:*

Pursuant to article 80 of the Rules of the Tribunal an expert called by one Party may also be examined by the other Parties.

Therefore, I ask the Co-Agent of Saint Vincent and the Grenadines whether the Applicant wishes to cross-examine the expert. Mr Weiland.

*Mr S. Cass Weiland:*

Yes, Mr President, I have quite a few things to talk to him about.

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*The President:*

You have the floor.

MR JAMES PRESTON DELGADO, CROSS-EXAMINED BY MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/8/Rev.1, p. 31–35]

*Mr S. Cass Weiland:*

Mr Delgado, you were introduced to us as an Adjunct Professor, University of Rhode Island. That is what the Spanish delegation gave us when we got our witness list. I presume among your many credentials that you must spend a little time in Rhode Island.

*Mr Delgado:*

I do. I am an Adjunct Professor in the Department of Oceanography, the Graduate School of Oceanography at the University of Rhode Island. I was asked to join the faculty because of my experience in particular in dealing with deep-water wrecks and because I was asked very specifically as well to sit on the undergraduate thesis committee for a student obtaining his PhD with shipwrecks in the Mediterranean. I have maintained my Adjunct Professorship with the University and consistently communicate with my colleagues there.

*Mr S. Cass Weiland:*

You seem like a famous guy. Why were you described as an Adjunct Professor in Rhode Island? Do you think perhaps the Spanish were trying to hide you until you came to testify? Did you talk to them about that?

*Mr Delgado:*

No, I did not, but let me be very clear on the position of the Government of the United States in regards to my presence here. I am not here officially. I have, however, cleared my participation as an expert witness with the US Government, with the State Department and as well within my own agency through departmental ethics lawyers all the way up to the Department of Commerce. My participation had to be approved even though I am here on holiday or vacation time and receiving no compensation. I still had to be clear that I was not appearing as a representative of the US Government, as an employee of the Department of Commerce, or as an archaeologist in the employ of the Government, sir.

*Mr S. Cass Weiland:*

You are on the payroll of the US Government but you are not being compensated by the Spanish for being here today – is that correct?

*Mr Delgado:*

That is correct.

*Mr S. Cass Weiland:*

Indeed the US Government has done quite a few favours for Spain when it comes to the subject of recovering shipwrecks and treasure, has it not?

*Mr Delgado:*

I do not know if I would characterize the US Government's actions in regards to Spain as doing favours. There are certain ---

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*Mr S. Cass Weiland:*

Excuse me. We had a little trouble yesterday – you were not here – so I am going to ask you if you would do me a favour because we have a lot of important Judges here and we want to try to ask questions and get answers and move through this. When I am finished, if there are unsaid things I am sure Counsel for the Respondent will get up and ask you so you will have a chance to say anything you think you would like to say. I do not want to cut you off, I really do not, but I do have several questions I would like to ask you.

You consulted on the case of *Nuestra Señora de Las Mercedes*, which was a recent case – correct?

*Mr Delgado:*

Before we go there you did actually cut me off in my previous answer.

*Mr S. Cass Weiland:*

We will go back to that. Let us just ask this one first. You consulted in connection with that case.

*Mr Delgado:*

Yes, I did.

*Mr S. Cass Weiland:*

That is a pretty notorious case because in that case the Odyssey ship, which was the *Odyssey Explorer* or *Ocean Alert*, had been offshore Cádiz and recovered quite a bit of artefacts from this ship. Which ship was it, do you know – or was it both?

*Mr Delgado:*

In the case of *Nuestra Señora de Las Mercedes*, sir, I actually did not participate in that case as an employee of the United States Government. That was prior to my return to public service. I was then at that time in my capacity as the President of the Institute of Nautical Archaeology, and in that case as well also served without compensation.

*Mr S. Cass Weiland:*

At that point you were on the payroll of the State of Texas.

*Mr Delgado:*

No, sir, I was on the payroll of this non-profit, non-governmental organization.

*Mr S. Cass Weiland:*

Was that associated with Texas University?

*Mr Delgado:*

It has an academic association.

*Mr S. Cass Weiland:*

Let us just talk about the *Nuestra Señora* – I will call it that, if it is all right with you.

*Mr Delgado:*

Sure.

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*Mr S. Cass Weiland:*

You consulted for Spain because the ship was – how far off the shore was the ship?

*Mr Delgado:*

The ship was a considerable distance offshore. I cannot remember exactly the total mileage.

*Mr S. Cass Weiland:*

Was it in the Gulf of Cádiz?

*Mr Delgado:*

Yes, it was.

*Mr S. Cass Weiland:*

So there is a ship offshore in the Gulf of Cádiz, and a United States corporation, which is actually a public company, is it not? It has shareholders.

*Mr Delgado:*

Yes.

*Mr S. Cass Weiland:*

They thought they had salvage rights because it was in international waters or something – correct?

*Mr Delgado:*

As events would bear out, they had asked the Spanish Government for a licence to recover cargo and other materials from shipwrecks in the Bay of Cádiz. That had not been granted. They turned off their location finders, their GPS. They went to this site, recovered artefacts, took them to Gibraltar, flew them to the United States and filed an admiralty claim, having done all this surreptitiously. They then litigated that for a period of time. I was asked, as an expert in underwater archaeology, not because of whom I worked for, to examine the material because (1) I had experience in vessels of the period; (2) I had experience of vessels which seemed to have suffered from loss due to explosion. In particular I have worked on the wreck of the *USS Arizona* at Pearl Harbour in Hawaii, a very well-known wreck to Americans.

*Mr S. Cass Weiland:*

I am sorry, I do not remember asking you about the *USS Arizona*.

*The President:*

I am sorry to interrupt you. Mr Delgado, would you please speak more slowly so that our interpreters can follow you, and also please try to allow some intervals between the statements of both of you? Thank you very much.

*Mr S. Cass Weiland:*

Yes, sir.

*Mr Delgado:*

I am contextualising the reasons why I was asked to be an expert on the *Nuestra Señora de Las Mercedes*, sir.

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*Mr S. Cass Weiland:*

Let me just say, your credentials are fantastic. You do not have to explain to me why you were asked to be an expert and talk about the *Nuestra Señora de Las Mercedes* and help Spain – okay? We understand. The answer to the question is "yes". My next question is, how much did Spain pay you for that work?

*Mr Delgado:*

Spain paid me nothing for that work.

*Mr S. Cass Weiland:*

Did you get any compensation at all?

*Mr Delgado:*

I drew my regular pay as President of the Institute of Nautical Archaeology while I did that work.

*Mr S. Cass Weiland:*

I think the Tribunal may be familiar with this scenario, but let us pace it out real quickly. First of all, is Odyssey Mel Fisher's company or is he a different shipwreck finder? If somebody mentioned Mel Fisher in Florida, is he associated with Odyssey?

*Mr Delgado:*

No, no. Fisher is deceased and has no relationship to Odyssey.

*Mr S. Cass Weiland:*

After the *Odyssey* recovered these artefacts and you mentioned they put in to Gibraltar and had the artefacts flown back to the United States – correct – and I have seen public reports that the artefacts might have been worth as much as \$500,000 – have you seen those reports, first of all?

*Mr Delgado:*

I have seen a wide range of varying values applied to the material that was recovered – not that low, much higher, but, yes, a wide range of reports in the press.

*Mr S. Cass Weiland:*

Do you have any professional opinion as to what they were worth?

*Mr Delgado:*

I have a distinct professional opinion as to what they were worth in terms of their archaeological context. I am not a coin dealer.

*Mr S. Cass Weiland:*

Let us talk about the opinion that you do have. What is it?

*Mr Delgado:*

The materials on the bottom reflect more than chests of silver and coins. When the *Nuestra Señora de Las Mercedes* was destroyed in cannon fire with British ships what went to the bottom was a floating community of Spanish sailors, marines and family members, including women and children. Sitting on the bottom in one kilometre of water you have the remains of

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those people, as reflected in their personal possessions, the provisions of the ship, including jars not dissimilar to the type that I just saw a photograph of – its mouth ---

*Mr S. Cass Weiland:*

We will come back to that.

*Mr Delgado:*

You have the remains of the ship itself; you have guns, cannons, you have the anchors, and you have the silver itself. All of that together is, in its context on the bottom, a time capsule that speaks to the *Nuestra Señora de Las Mercedes*. It speaks to the events of that day in battle and how the ship was destroyed. You can even trace as the ship is found – trailing debris drifted off with some survivors clinging to it. In some of the things that *Odyssey* recovered, for example – you find very distinct evidence of individuals, say a captain of the royal marines, whose breast plate was still preserved in a lump of that concretion that I talked about. Treasure hunters might see those coins as being a commodity that reflects a value if you melted them down, or if you sold them; but to me what they represent was a process by which the mineral wealth of the Americas were mined and extracted, converted into individually struck coins in a non-industrial process, and how these coins in particular were coming back to Spain at a time of tremendous international discord, the Napoleonic Wars.

*Mr S. Cass Weiland:*

Spain was robbing gold and silver from the Indians in Peru and Chile and that area of the world – right?

*The President:*

I am sorry to interrupt you, Mr Delgado, again. You are speeding again. Would you slow down?

Madam Escobar, you have the floor.

## NAVIRE « LOUISA »

INTERVENTION DE MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE

[ITLOS/PV.12/C18/7/Rev.1, p. 35–36; TIDM/PV.12/A18/7/Rev.1, p. 40–41]

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Je dois présenter une objection à l'affirmation qui vient d'être faite par le co-agent de Saint-Vincent-et-les Grenadines. Il a dit expressément que l'Espagne avait volé – je répète volé – l'argent au Pérou. Je veux vous informer, Monsieur le Président, même si je sais très bien que vous connaissez tout à fait l'histoire, qu'à l'époque, le Pérou était une partie des colonies de l'Espagne [...]. On a obtenu des minéraux et on a fait de la monnaie – je ne connais pas le mot en français, je m'excuse. Cette situation était très très intéressante, car je suis obligée de rappeler que l'Espagne, pendant la période des colonies, pendant la période coloniale au XVI<sup>ème</sup> et XVII<sup>ème</sup>, a battu monnaies dans les territoires sous son administration, qui faisaient partie du Royaume. La seule chose que l'on a faite, c'est transporter la monnaie du Pérou en Espagne.

Alors, je vous prie, Monsieur le Président, d'en prendre note et je prie le co-agent de Saint-Vincent-et-les Grenadines de ne pas faire des accusations aussi graves à l'égard des activités d'un Etat vis-à-vis d'un territoire qui était sous sa souveraineté et soumis à un système d'administration qui a été reconnu, avec tous ses défauts et problèmes, comme un système d'administration coloniale qui a permis la construction de tous les pays de l'Amérique latine, ainsi que l'établissement d'un système qui, heureusement, après l'indépendance, a permis à de nouvelles républiques indépendantes de se constituer en Etats indépendants et de devenir ce qu'ils sont maintenant : de grand Etats. Merci, Monsieur le Président.

*Le Président :*

Merci, Madame Escobar Hernández.

*(Continues in English.)* I do not want to get involved in historical discussions but I would appreciate it very much if, Mr Weiland, you could choose words ...

*Mr S. Cass Weiland:*

Yes, Mr President, I apologize. I apparently hit a nerve, and I did not realize that the colonial heritage of Spain was quite such a sensitive subject.

## EXAMINATION OF EXPERTS – 9 October 2012, a.m.

MR JAMES PRESTON DELGADO, CROSS-EXAMINED BY MR S. CASS WEILAND  
(CONTINUED)  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/8/Rev.1, p. 36–37]

*Mr S. Cass Weiland:*

Let me ask you finally if you will just tell us in some kind of dollar value what you think the damage to the colonial heritage or the archaeological heritage was as a result of the work of the *Odyssey* and those people? I believe that is where we were.

*Mr Delgado:*

In regard to the characterization of the actions of Spain, I will not offer an opinion. Scholars debate the activities of every colonial power ---

*Mr S. Cass Weiland:*

That is good because I am not asking you for that – okay? I am not asking you to go there.

*Mr Delgado:*

I appreciate that.

*Mr S. Cass Weiland:*

I am trying to get you back to the last question, which was: what was the value in your mind of what the *Odyssey* people took from the *Nuestra Señora* shipwreck? I am going to hook this up to something that is very important so that is why I am asking. We are not just talking about some historical episode that has no connection to our case.

*Mr Delgado:*

In finishing that answer it struck me that the characterization that you made is the same that *Odyssey* made actually, as treasure hunters, in regard to the case in characterizing the actions of Spain as some form of excuse. Now, in regard to dollar value, I can't begin to give you an answer in terms of the dollar value other than to say it would be very considerable if you factor in all of the time that would be necessary to properly do the work and to deal with this material that sat in buckets for years.

*Mr S. Cass Weiland:*

Okay, so now I want you to try – and it may be difficult for you because – I do not mean this derogatorily but you are a purist compared to the people on the *Odyssey* perhaps, who were more interested in the pure dollar value, market value of the coins and what-not that they brought up. What do you think the pure market value was of the artefacts? Just give me a range or even give me a range of what you have seen printed publicly.

*Mr Delgado:*

I do not believe in market value of artefacts. I find that values as expressed particularly in the press are often inflated. I find that values are often used as a marketing ploy. I find that values do not reflect the real costs. If you do not do archaeology properly then you avoid the costs of the type of work that was employed, say, at the Uluburun or with the Kubla Khan fleet. Those market values do not reflect in any way, shape or form the damage that is done by a gross calculation of market value, and we would not assign market value in assessing, say, the removal of Mayan tomb paintings from a site, say, at Kopan, for example, and say, "this is

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what it means on the market". The archaeological value is paramount and it has been damaged.

*Mr S. Cass Weiland:*

I was not in Mexico, Guatemala or Honduras; I am back over here in the Gulf of Cádiz, and I am wondering if you could give us a range of what the public reports were of the market value that the *Odyssey* took.

*Mr Delgado:*

A range of the public reports?

*Mr S. Cass Weiland:*

Yes.

*Mr Delgado:*

I had not paid much attention to it, so I am hesitant to just blurt out a number. I can't help you.

*Mr S. Cass Weiland:*

When I offered the number 500 million – I think that is what I said – 500,000 – the actual public reports were far, far higher than that, were they not? Were they not in the millions of dollars that you can recall?

*Mr Delgado:*

I think they were higher.

*Mr S. Cass Weiland:*

Possibly hundreds of millions.

*Mr Delgado:*

Possibly.

*Mr S. Cass Weiland:*

I meant to say 500 million – I mis-spoke earlier.

Should we take our break now, Mr President.

*The President:*

You still have questions?

*Mr S. Cass Weiland:*

I do, yes, sir.

*The President:*

We have reached almost one o'clock so I think we should take a break and will meet again at three o'clock this afternoon. Thank you very much. *Bon appetit.*

9 October 2012, p.m.

**PUBLIC SITTING HELD ON 9 OCTOBER 2012, 3.00 P.M.**

**Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 8 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 9 OCTOBRE 2012, 15 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 8 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

Good afternoon, Mr Weiland. You may now continue with the examination of the expert but before I give you the floor, I wish to remind you, Mr Delgado, that you continue to be covered by the declaration you made this morning. I also ask you to speak slowly.

Thank you. Mr Weiland, you have the floor.

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**Examination of Experts (continued)**

MR JAMES PRESTON DELGADO, CROSS-EXAMINED BY MR S. CASS WEILAND  
(CONTINUED)  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[TTLOS/PV.12/C18/9/Rev.1, p. 1–13]

*Mr S. Cass Weiland:*

Thank you, Mr President.

Mr Delgado, before we broke we were talking about the situation relating to Odyssey, which is a US company, privately trading. Do you recall that testimony in general?

*Mr Delgado:*

Yes, I do.

*Mr S. Cass Weiland:*

I just have a few questions based on your knowledge of that case, which sounds quite extensive. After the personnel on the *Odyssey* raised the artefacts, quite valuable – whatever amount we wish to ascribe to them, we agree that they are quite valuable – correct?

*Mr Delgado:*

I believe they are very archaeologically valuable.

*Mr S. Cass Weiland:*

I think you have testified that the ship put into Gibraltar, and the artefacts were unloaded and flown to the United States. What happened to the ship when it left Gibraltar?

*Mr Delgado:*

I believe the vessel returned to Spanish waters, where it encountered difficulties with Spanish authorities.

*Mr S. Cass Weiland:*

Yes, it did, did it not? In fact, the Spanish authorities forced the ship into the port of Algeciras, which is right next to Gibraltar, did they not?

*Mr Delgado:*

I believe so but I only would be relying on media reports.

*Mr S. Cass Weiland:*

Have you heard then that the Spanish authorities boarded the ship, which had just made off with, say, 500 million in artefacts? You have heard that, have you not?

*Mr Delgado:*

I read that in the newspaper.

*Mr S. Cass Weiland:*

The captain of the ship declined the Spanish invitation to allow them to board the ship. Do you remember reading that?

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*Mr Delgado:*

No, I do not.

*Mr S. Cass Weiland:*

We have admitted into the record of this case Exhibit 10, which the President advised me shortly before the start of the trial would be allowed. It is a public document. This is a document from the court in Spain relating to what happened after the ship was boarded. I am not going to ask you to read it, Mr Delgado, but I would appreciate it if you are in a position to confirm these facts based on your knowledge of the case. The captain declined to allow the Spanish on board, so he was charged with a criminal offence of grave disobedience, but the Spanish had neglected to either obtain his consent or to notify the flag State. Does that refresh your recollection of things you had read?

*Mr Delgado:*

No, it does not. I focused on the archaeology in this case and not the other aspects. That is the area of my expertise. So I am sorry, I cannot help you.

*Mr S. Cass Weiland:*

You are not aware then that the Spanish judge ruled on 24 May 2010 that the captain could not be convicted because Spain had failed to notify the flag State, which was the Bahamas, and had failed to secure the captain's agreement that the police board the ship? You are not aware of that?

*Mr Delgado:*

That was a question?

*Mr S. Cass Weiland:*

Yes.

*Mr Delgado:*

You are beyond my area of knowledge.

*Mr S. Cass Weiland:*

Let us go back into your area. I apologise. Meanwhile, back in the United States, Spain filed a suit against Odyssey – correct?

*Mr Delgado:*

Yes, I believe so.

*Mr S. Cass Weiland:*

That was in the Federal Court in Florida – correct?

*Mr Delgado:*

I believe so.

*Mr S. Cass Weiland:*

Was that when you started some consulting work for Spain?

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*Mr Delgado:*

That depends upon your definition of “consulting”. I was asked for my opinion on the nature of the recovered materials that were provided to Spain’s counsel through that legal process. As to where that was in those proceedings I cannot say. My involvement was very narrowly focused on looking at what *Odyssey* had provided to the court, in regard to the photos, video, inventory of artefacts, things of that nature, and I was solely asked to comment on the nature of the site and what those materials might represent.

*Mr S. Cass Weiland:*

OK, and if I mischaracterized the nature of your work I apologize but now we know what you were doing. You mentioned inventory of the artefacts. I am going to come back to that. Just tell the Tribunal then what happened in the litigation in the United States, just briefly. We do not need it blow by blow. What was the outcome?

*Mr Delgado:*

*Odyssey* lost the case and on every appeal lost the case up to the United States Supreme Court, which did not wish to hear the case. The artefacts were subsequently returned to Spain.

*Mr S. Cass Weiland:*

So there was an action held in the Federal Court in Florida, Spain prevailed in that case, it went on to appeal in an appellate court in Atlanta, Georgia, Spain again prevailed, and the Supreme Court declined to hear the case.

*Mr Delgado:*

I believe so, but I am not an attorney.

*Mr S. Cass Weiland:*

Then the Spanish Air Force flew over to Florida and picked up 500 million or so worth of artefacts and flew back to Spain – correct?

*Mr Delgado:*

I saw in the press that Spain had recovered the materials, which I think was more than simply coins. It was every bit of archaeological evidence that had been collected, with the exception, I believe, of some materials which *Odyssey* had left in Gibraltar.

*Mr S. Cass Weiland:*

Would it surprise you to hear that all of the things we have just talked about – the captain’s criminal problem, the *Odyssey* being forced into Algeciras, the litigation in the United States – all of that happened after the *Louisa* was arrested in Puerto de Santa Maria near Cádiz?

*Mr Delgado:*

I am afraid I do not understand your question.

*Mr S. Cass Weiland:*

Perhaps the Tribunal will, because the *Odyssey* is still docked, we think. It has not sunk yet at the dock. It is still there, and these other court systems have managed to resolve rather considerable issues. You know that no one on *Odyssey* was ever charged with theft of the Spanish heritage, were they?

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*Mr Delgado:*

You are beyond my knowledge.

*Mr S. Cass Weiland:*

Let us move to another issue. You were asked several questions about the property aboard the *Louisa* and the *Gemini III*. Do you remember those questions? I think you were shown some pictures. Let me ask you a little bit about that. Did the Spanish delegation show you an inventory of what was taken off the *Louisa*?

*Mr Delgado:*

No.

*Mr S. Cass Weiland:*

They showed you a museum report. I think you mentioned that.

*Mr Delgado:*

That was a document, I believe, provided by you.

*Mr S. Cass Weiland:*

Yes, when we were here two years ago.

*Mr Delgado:*

No, this is a document that I believe was provided by Saint Vincent and the Grenadines which says it is an assessment done by the Museum of Underwater Archaeology.

*Mr S. Cass Weiland:*

We will get to that in a minute but let us talk about some of the less important things first, if you will. Metal detectors – you found that they had several metal detectors on the *Louisa*. Correct? That is what you were told.

*Mr Delgado:*

That is what I saw in the photographs.

*Mr S. Cass Weiland:*

Yes, and they told you those came from the ship.

*Mr Delgado:*

Yes, in court, which I presume means, as it would elsewhere, that it is the truth.

*Mr S. Cass Weiland:*

We will see about that. The metal detectors, would they be used to search for artefacts under water when the water is particularly murky? Would that be something that you would try to use in clear water?

*Mr Delgado:*

You can use an underwater metal detector in any type of water situation. It is simply a metal detector that is looking for things that are below the surface, or, in some cases, a less trained eye might see something that looked to be a rock but which in fact could be metal.

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*Mr S. Cass Weiland:*

So it helps distinguish between what is metal and what is not?

*Mr Delgado:*

It does indeed.

*Mr S. Cass Weiland:*

For example, if you were trying to determine where the underwater cables ran, you might use a metal detector to be able to ferret that out.

*Mr Delgado:*

To use an underwater metal detector to try to find a submerged cable is like trying to shoot a rhinoceros with a pellet gun. There is no reason to use that small an instrument. You would have an overwhelming signal if you were wearing earphones. It would practically deafen you. One, if you are a competent mariner, you have charts, which show cables. Most cables are laid in areas where you are not supposed to be, and it would be something if, say, there was an older cable, that your magnetometer, which the vessel had, would clearly delineate that linear magnetic signature. So I can see no reason whatsoever for the use of a metal detector in that circumstance.

*Mr S. Cass Weiland:*

Are you an oil and gas guy? Have you ever prospected for oil and gas?

*Mr Delgado:*

No, I am not an "oil and gas guy". I have interacted with colleagues, particularly in the government, who are, and including my ---

*Mr S. Cass Weiland:*

Excuse me. Are you here to tell the Tribunal that oil exploration does not involve the use of sonar?

*Mr Delgado:*

I am here to explain the use of sonar in a professional capacity that I am familiar with, which is archaeology. I do know from interactions with my colleagues that the use of sonar in oil and gas is not usual other than in bottom characterization, and that is it.

*Mr S. Cass Weiland:*

It sounds like you are some kind of an expert in oil and gas, so let us talk about your experience in oil and gas. What colleagues are you talking about that provided you with this interesting information about sonar in the oil and gas context? Tell us that.

*Mr Delgado:*

Actually, sir, I told you I was not an expert in oil and gas. I merely reported what I had heard from colleagues. My expertise is in archaeology, and in that case, in the active use of sonar in archaeological projects, ranging from side scan sonar to multi-beam sonar, to the most recent application of high-definition imaging and mapping sonar.

*Mr S. Cass Weiland:*

Let me explain my problem. Yesterday we had testimony, quite surprising really, that indicated that Sage, which is the company that owned the ship that our country had issued the

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registration to, had gone into one of the hottest oil and gas areas of Spain, but then we hear later that, despite being in the hot area for oil and gas, maybe some of this is the wrong equipment. So I am just trying to see if you can help us with real knowledge of what kind of equipment someone who is doing a survey for oil and gas purposes would use. Do you feel qualified in that area?

*Mr Delgado:*

I feel strongly qualified to talk about equipment used in archaeological survey. Every piece of equipment I have been shown is used in archaeological survey, and effectively so, particularly when operating in shallow water environments. I would also say that the use of the prop wash deflectors I have never seen used in any application other than in the excavation of the bottom for underwater heritage, and not by people who seem to care about that heritage. It seems to me, based on my experience, which is decades long, to be – it is a treasure hunting tool, very specifically.

*Mr S. Cass Weiland:*

I do not think that is what I asked you.

*Mr Delgado:*

I believe it is.

*Mr S. Cass Weiland:*

I am asking you if you feel qualified to talk about what sort of instruments are used in oil and gas surveying, not archaeological. You must have misunderstood my question. Oil and gas surveying, sir.

*Mr Delgado:*

No, I understand your question. I am just curious as to why you are asking me that question since I am not an oil and gas person, or, as you phrased it, “guy”.

*Mr S. Cass Weiland:*

Every time we go down the road here you express some kind of a minor, perhaps, opinion about oil and gas matters, so I am just trying to get you to say once and for all if you are an oil and gas expert or not, because we are trying to determine how far we can rely on your testimony in the oil and gas area. I think I am hearing properly: you do not consider yourself an oil and gas expert, especially in the area that we are dealing with here in this case.

*Mr Delgado:*

I think you can rely on my testimony 100 per cent when it comes to the archaeological area.

*Mr S. Cass Weiland:*

That is good. Thank you. So now let us talk about the deflectors. You mentioned the deflectors that were put on the boat. Did the Spanish delegation advise you about any of the details of the picture that you saw with the deflectors? Did they give you any details about that? They just showed you a picture of a boat with some big aluminium things on the back?

*Mr Delgado:*

I was shown a photograph as a court document, I believe.

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*Mr S. Cass Weiland:*

There is one on screen. Did they give you any details about that?

*Mr Delgado:*

Other than that it was an exhibit in this case, no.

*Mr S. Cass Weiland:*

So you are not aware that these deflectors were placed on this boat, which is called the *Gemini III*, after it was leased to another company?

*Mr Delgado:*

I was asked specifically what these were and what they were used for. That other matter is beyond my knowledge or my ability to testify.

*Mr S. Cass Weiland:*

You are not aware that the company that leased the boat, called Plangas, sent a letter to the Ministry of the Environment saying, "I am going to put these deflectors on the back of my boat"?

*Mr Delgado:*

No.

*Mr S. Cass Weiland:*

We had an interesting picture of a scuba tank. You have scuba-dived. That is one of your specialties, is it not?

*Mr Delgado:*

Yes.

*Mr S. Cass Weiland:*

When you have tanks, are those tanks made out of aluminium usually?

*Mr Delgado:*

Tanks are made of aluminium, and they are made of steel.

*Mr S. Cass Weiland:*

Both?

*Mr Delgado:*

Yes.

*Mr S. Cass Weiland:*

Is it common to put these rubber shock absorbers on the bottom of tanks so that they do not get damaged, say if the ship shifts or something?

*Mr Delgado:*

It is a preferred technique. Not everybody does it.

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*Mr S. Cass Weiland:*

So the presence of a rubber disc that goes on the bottom of a scuba tank just in itself would not lead you to believe that there is anything nefarious about that?

*Mr Delgado:*

The presence of a rubber boot would not in any way indicate anything to me other than prudence in scuba diving. If it conceals a cut made in the bottom of the tank, that would lead anyone, I would imagine, to assume otherwise.

*Mr S. Cass Weiland:*

Have you, or people who work for you, ever had occasion, when a scuba tank has outlived its useful life, perhaps the regulator or valve on top is not working, do you ever cut them in two with a table saw on the boat? Have you ever seen that?

*Mr Delgado:*

No. Why would you do that?

*Mr S. Cass Weiland:*

So that no one mistakenly tries to fill the tank with air and re-use it.

*Mr Delgado:*

There are standard diving protocols in place to make sure that never happens. Perhaps you have not scuba-dived but, when you do, everything is very carefully regulated. There is someone on the boat who is the dive master. Their job is to ensure that tanks are safely filled with the right air, with the right mixture of gases if you are diving deeper. The consumption of gas, there is a regular log, there is an inventory of tanks, and every tank, prior to going into the field, is subjected to periodic maintenance and inspection, which includes both a visual inspection, called a VIP, as well as a pressure test, called a hydro inspection, and those are standard internationally, and so I can see no circumstance with any professional diving where you would have a tank that would be determined not to be useable in which someone would cut it.

*Mr S. Cass Weiland:*

Have you ever been out on the *Louisa* with some Hungarians and a couple of Spaniards and an American who had some scuba tanks and perhaps did not follow the international protocols?

*Mr Delgado:*

I have never been on the *Louisa* or sailed with any of these gentlemen.

*Mr S. Cass Weiland:*

Let us go back to the issue of the inventory. You have never seen an inventory of what was taken off the *Louisa*, have you? Is that your testimony?

*Mr Delgado:*

I have not seen an inventory. I have seen the report provided by you.

*Mr S. Cass Weiland:*

You understand that the museum report had a series of items that were collected in and around Cádiz. None of those items came off the *Louisa*. Do you understand that?

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*Mr Delgado:*

I do not understand that.

*Mr S. Cass Weiland:*

Did the Spanish tell you otherwise, your Spanish friends? What did they tell you about the museum report?

*Mr Delgado:*

I am not actually in a position to characterize the delegation from Spain as friends. Perhaps in time that might happen. For now, they would be colleagues. In regard to sharing information, I was provided your report and the photographs, with no other explanation.

*Mr S. Cass Weiland:*

I think it might be appropriate to make the record clear. Let us take a look at the museum report, which was entered into evidence after there was some discussion, generic discussion, about things taken off the *Louisa* in December of 2010, when we were last here. This is the order that was issued which provided for the inclusion of the report in the file. That is the first document we are looking at on the screen. I submit, Mr President, because the witness is not familiar with this document, the line there that begins with the word "contra" is the list of persons from whom these articles were taken. This is a list of persons from whom these articles were taken, as we understand it, and the report itself indicates the total value of all of these things – and the report had pictures. Did you see the pictures? I do not have the pictures on my exhibit here but the total value of all of these things was €2,950. Do you recall that, sir?

*Mr Delgado:*

First, for the record ---

*Mr S. Cass Weiland:*

First, do you recall that?

*Mr Delgado:*

First, for the record ---

*Mr S. Cass Weiland:*

Would you put the last page of the report up?

*Mr Delgado:*

As I was saying, first, for the record, I am familiar with this document, and said so earlier in my testimony. I am also, by the way, familiar with the museum and the laboratory in which this analysis was done, because it was done in Cartagena, and that is the museum and the laboratory that we used in the Bajo de la Campana ---

*Mr S. Cass Weiland:*

A first-rate museum.

*Mr Delgado:*

A very good museum that I think speaks powerfully to Spain's care and its ability to not only use words but effectively use resources to deal with their underwater cultural heritage for the

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good, not only of their citizens, but of all of the world, who learn from the results of their excavations. In this case I did see this economic valuation and did say earlier that I do not agree with the economic valuation, because, as I indicated, it is difficult – to my professional opinion, it is impossible – to place a dollar value on an artefact when those values can be speculative, they can be used merely to drive up market price or interest, and in many cases when a dollar value has been assessed, those valuations have been not only disputed but proven wrong, and, more to the point, in a case like this the value is not one of the price one might make in selling that artefact but rather its more priceless nature.

They were not asked to make a valuation of this material in regards to something other than money. As archaeologists and conservators, and knowing many of them personally, as colleagues, I know that the valuation they would have placed would have been different, and they would have noted that these materials, recovered without context other than the Bay of Cádiz, recovered improperly, recovered without due diligence or care for their conservation and treatment, which must begin the moment they leave the water, that they had been rendered practically valueless. So how do you quantify that then? Is it this dollar or euro amount, or is it what happened with the recovery of those materials, the destruction of the scientific information, the loss of their cultural context, and indeed, actions if they were left out on a boat without treatment that was counter to their long-term preservation?

I do not agree with this dollar value.

*Mr S. Cass Weiland:*

So actually things may be worth less if they have not been maintained properly and treated in the manner that they should be?

*Mr Delgado:*

If indeed your clients removed these without due diligence and care and left them on the boat in this fashion, then they have seriously damaged the cultural context. Let us take, for example ---

*Mr S. Cass Weiland:*

Just a moment. Before you go on, I appreciate the lecture and I am sure that the Members of the Tribunal do too, but let us try to answer a few more questions. You will have your chance with your colleagues from Spain. Unfortunately, we have to deal with numbers, not just the concept of items being priceless. Every item is priceless, but we cannot deal with that, so in this case to some extent Spain is stuck with the numbers from the museum. Again, you understand that none of those items came from the *Louisa*. Do you understand that?

*Mr Delgado:*

I do not understand that.

*Mr S. Cass Weiland:*

In the record of this case we do not have an inventory of anything that was taken off the *Louisa*. We have testimony from one young woman who said that some cannonballs and a rock looked familiar.

*Mr Delgado:*

I did not hear that testimony. I am dealing solely with exhibits presented to the court.

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*Mr S. Cass Weiland:*

You have mentioned the seriousness with which Spain handles matters relating to its cultural heritage, and we share that. We believe that that is an excellent idea. Saint Vincent and the Grenadines has signed and ratified the UNESCO treaty on the subject.

*Mr Delgado:*

That is wonderful news.

*Mr S. Cass Weiland:*

However, I want to ask you if you are familiar with the marine police that Spain employs to enforce its regulations in this area. Have you dealt with them at all?

*Mr Delgado:*

No. My dealings are solely with fellow archaeologists and the Ministry of Culture people.

*Mr S. Cass Weiland:*

We know that you have been in all these countries, and I think you have testified that you are familiar with their registration or permit requirements worldwide. When was the last time you got a permit in Spain, by the way?

*Mr Delgado:*

The last permit issued in Spain was in 2010.

*Mr S. Cass Weiland:*

To you?

*Mr Delgado:*

To the Institute, with me being the President, and therefore I would say that the authority rested with me, that the buck stopped with me.

*Mr S. Cass Weiland:*

That was for the Cartagena project?

*Mr Delgado:*

Yes, the Phoenician shipwreck.

*Mr S. Cass Weiland:*

You know that the Guardia Civil is out in these areas where all these shipwrecks are, checking people's permits and enforcing the law regularly, or it would not surprise you if they did, would it?

*Mr Delgado:*

It depends on the circumstances in a given day of police resources and where people are; and I say that not specifically with reference to Spain, though with the time on the Bajo de la Campana project, because the project was fully transparent, open and shared with all levels of the Spanish Government, the visits were few, and only once, I believe, did the Guardia Civil come out, as a formality, to observe. In the case of where we work, particularly in my experience in the National Parks Service, it is a question of how many available rangers or law enforcement people you have on any given day, how many vessels are in an area, what you may be able to do, what the coastguard in the United States would be able to do, and so it

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is difficult to characterize, in my opinion, how any activity or lack of activity represents a pattern of care or diligence.

*Mr S. Cass Weiland:*

But you are saying that even for an expedition such as you might mount, a really famous archaeologist, the Guardia Civil came and checked your papers? They have a Historical Patrimony Group of the Central Operations Unit. Are you familiar with that group?

*Mr Delgado:*

I have heard of that group, yes.

*Mr S. Cass Weiland:*

In this case there is testimony that the Guardia Civil stopped the *Louisa* and the *Gemini* several times and looked at their papers.

*Mr Delgado:*

Were those vessels ---

*Mr S. Cass Weiland:*

There was no arrest. There was no apparent concern about metal detectors and scuba tanks and things like that. Would that surprise you? That is my question. Would that surprise you?

*Mr Delgado:*

It would not surprise me if the equipment was not visible, if the metal detectors were perhaps concealed, if it was a mere courtesy stop. It could also be that your vessels were operating outside of a normal zone. There might be any number of reasons. On occasion, boardings or visits, particularly in the United States, can be a simple question of, "Do you have enough personal flotation devices?" So it is hard, having not been on the water on all these occasions on either vessel, to really say much of anything about that, and I really cannot characterize it.

*Mr S. Cass Weiland:*

You have testified that the Bay and Gulf of Cádiz have, if I am not mischaracterizing it, at least 400 shipwrecks out there. Do you think that if the Guardia Civil stopped a suspicious ship called the *Louisa* from Saint Vincent and the Grenadines, it would be worried about life preservers?

*Mr Delgado:*

You are beyond where I could even go in an answer, but I will say that, having been a park ranger, having worn a badge in a uniformed service, having worked on the water, you need due cause particularly to search a vessel, so even in an archaeologically sensitive area, if I were there as a law enforcement official, I would not always be in a position other than a visit to do more, unless something roused my suspicions, which seems to have been the case ultimately.

*Mr S. Cass Weiland:*

We are not really sure, are we, because we do not know what was ever taken off the ship, what the value of the stuff was. The testimony in the case was that in those pictures of the *Louisa*, there are big doors on the side of the ship, that the Guardia Civil pulled up, went into the hold, looked around at all the metal detectors and diving equipment, and they even had a decompression chamber on the ship, and it was all there for the Guardia Civil to look at. Does

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it surprise you that the ship was allowed to just sail off, and that it did not just happen once but it happened over and over?

*Mr Delgado:*

You are beyond my ability to comment. However, it strikes me as interesting that you have a scuba tank that is modified, which can be used to conceal, so unless there was a very diligent inspection of that or entering a decompression chamber, going into the bilges or other sealed areas – and I believe that the vessel had a safe – there is a variety of ways in which people can cleverly make sure that things are not seen.

*Mr S. Cass Weiland:*

They very cleverly put the rifles in the safe behind two locked doors, but we do not really need to talk about that. Have you ever known the federal police in any of these many jurisdictions that you have worked in to become involved in shipwreck hunting themselves?

*Mr Delgado:*

No.

*Mr S. Cass Weiland:*

Would it surprise you that all this alleged important shipwreck searching equipment that the Guardia Civil confiscated on 1 February 2006 sat around in a warehouse for two years and that the Guardia Civil then came in and asked the court if they could use Sage's equipment? Does that surprise you?

*Mr Delgado:*

In cases in the United States where we have had seizure of assets for offences, there are occasions on which that material is used. I cannot fathom why the request may have been made in this case, but in a seizure all assets can be used to the benefit of the public or the government.

*Mr S. Cass Weiland:*

I am going to interrupt you there, because now you are digging into an area that I know something about. I used to be a federal prosecutor. In the United States you have to forfeit stuff, you have to forfeit the equipment to the government before the FBI can just start using it?

*Mr Delgado:*

Have you ever prosecuted an ARPA case, sir?

*Mr S. Cass Weiland:*

No, but I have prosecuted a lot of different types. We have property rights in the United States and due process, and we do not just seize something and then give it to the police without a judicial action, some kind of a trial, some kind of an opportunity for the person whose goods were taken to defend himself. Let me just ask you to look at what is on your screen. The Guardia Civil wanted all these items ... Can we have it in English? Do you speak Spanish?

*Mr Delgado:*

Poorly.

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*Mr S. Cass Weiland:*

Me too, so let us look at the English, if we can have it. If we do not, it is my fault.

*Mr Delgado:*

While we are doing that, sir, just going back to that point, because you have not prosecuted an Archaeological Resources Protection Act case, there are circumstances in which people are caught and they do forfeit.

*Mr S. Cass Weiland:*

Let me give you an analogy. I defended a migrant bird case one time and those birds that the police seized had to be handled in a judicially appropriate manner, so I do not think that in the United States, or really anywhere else that I have ever heard of, you can take this equipment and then just give it to the police forces to use?

*Mr Delgado:*

No.

*Mr S. Cass Weiland:*

By the way, that was the last that Sage heard of it. This equipment is worth hundreds of thousands of dollars and it has not been seen again.

*Mr Delgado:*

In this case we are now moving well beyond what I could comment on as an archaeologist.

*Mr S. Cass Weiland:*

I apologize for that. I am just about finished. I am looking at my notes to see whether there is anything else that I need to ask you. You are not familiar with international law and the appropriate circumstances for boarding vessels, are you?

*Mr Delgado:*

I am an archaeologist, not a lawyer.

*Mr S. Cass Weiland:*

I think this is the last question that I want to ask you. In all your various activities in this business ... Actually I have two questions. First, is there something called the Speakers Bureau in the United States, where people can pay money to get personalities, or talent as they say, to come and give a speech to their group?

*Mr Delgado:*

There are such institutions.

*Mr S. Cass Weiland:*

Are you in the Speakers Group?

*Mr Delgado:*

Of the United States?

*Mr S. Cass Weiland:*

Yes.

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*Mr Delgado:*

No. I do, however, sit in the Speakers Bureau for Canada, talking on aspects of Canadian maritime history, occasionally more international subjects. It is not a lucrative trade by any means. It largely is to corporate clients, doctors, lawyers and others who want to be entertained with history or archaeology as opposed to having someone talk about their latest surgical technique or some clever application of the law. I have given, on average, two such presentations each year over the past several years, and I began this when I was a museum director in Canada.

*Mr S. Cass Weiland:*

Let me say that you are very good at it, sir.

*Mr Delgado:*

Thank you.

*Mr S. Cass Weiland:*

I am sure that you might get some more business through the Speakers Bureau. It just occurred to me as I listened to your testimony that the Spanish delegation has brought you from Washington DC to Hamburg to lecture us on archaeological issues. Do the Spanish have experts of their own who might be able to speak to these things, that you are aware of?

*Mr Delgado:*

I cannot speak for the Spanish.

*Mr S. Cass Weiland:*

I think you just have, but I wondered about that one issue, that one question.

*Mr Delgado:*

I believe I was asked because I have worked extensively around the world and could speak perhaps more authoritatively than one who has worked in one country. I have experience in this area in and around Spain, and I think I was asked not to give a lecture but actually to answer questions and to characterize things to the best of my knowledge, which I hope I have done, sir.

*Mr S. Cass Weiland:*

Thank you very much. No further questions, Mr President.

*The President:*

Thank you, Mr Weiland.

An expert who is cross-examined by the other Party may be re-examined by the Party who had called the expert. Therefore, I ask the Agent of Spain whether the Respondent wishes to re-examine the expert. Ms Escobar Hernández, you have the floor.

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M. JAMES PRESTON DELGADO, INTERROGÉ DE NOUVEAU PAR MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE  
[ITLOS/PV.12/C18/9/Rev.1, p. 13–14; TIDM/PV.12/A18/9/Rev.1, 15-16]

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Tout simplement une question. Est-ce que vous souvenez que pendant le contre-interrogatoire qui a été fait par Monsieur Weiland, le co-agent de Saint-Vincent-et-les Grenadines, celui-ci vous a parlé d'une société Plangas qui aurait envoyé une lettre aux autorités espagnoles pour dire qu'elle allait utiliser un déflecteur ?

*Mr Delgado:*

Yes, I do recall that.

*Mme Escobar Hernández :*

Merci, Monsieur Delgado.

Dans ce cas, Monsieur le Président, je dois faire une objection formelle devant le Tribunal parce que la lettre à laquelle s'est référé M. Weiland, le co-agent de Saint-Vincent-et-les Grenadines, est le document n° 8, qui a été présenté après la fin de la procédure écrite et qui n'a pas été accepté par le Tribunal. Monsieur le Président, je vous demande qu'il en soit pris note. Je parle sous votre autorité et celle du Greffier, mais je pense que c'est la deuxième fois que cela se produit. Merci beaucoup, Monsieur le Président.

*Le Président:*

Merci Madame.

*(Continues in English)* I took note of your objection. Let me check the documents in order to make sure whether it is included or not in the file. May I understand that the Respondent has no other questions to ask the expert?

Thank you very much. Mr Delgado, thank you for your testimony. Your examination is finished and you may withdraw.

*Mr Delgado:*

Thank you, Mr President.

*The President:*

Ms Escobar Hernández, may I ask you how you wish to continue?

*Mme Escobar Hernández :*

Monsieur le Président, merci. Je vous prie d'appeler M. Martín Pallín, le dernier expert que l'Espagne souhaite appeler devant vous.

*The President:*

Thank you, Ms Escobar Hernández.

The Tribunal will proceed to hear the expert Mr Martín Pallín. He may now be brought into the courtroom.

I now call upon the Registrar to administer the solemn declaration to be made by the expert.

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**Examination of Experts (continued)**

MR MARTÍN PALLÍN, EXAMINED BY MS ESCOBAR HERNÁNDEZ  
AGENT OF SPAIN  
[ITLOS/PV.12/C18/9/Rev.1, p. 14–31; TIDM/PV.12/A18/9/Rev.1, p. 16–34]

*Le Greffier :*

Bonjour Monsieur Martín Pallín. Monsieur, avant de déposer, les experts doivent faire la déclaration solennelle prévue à l'article 79 du Règlement du Tribunal. Le texte de cette déclaration vous a été remis - je vous invite à la prononcer.

*Mr Martín PALLÍN is sworn in.*

*Le Greffier :*

Merci Monsieur Martín Pallín. Veuillez prendre place je vous prie.

*The President:*

Thank you, Mr Registrar.

Before I give the floor again to Ms Escobar Hernández to start the examination of the expert, I wish to remind the representatives of the Parties and you, Mr Martín Pallín, that the work of the interpreters and the verbatim reporters is a complex task, even more so when, as will now be the case, not only English and French are used but also a third language, such as Spanish. I must therefore urge you to speak slowly and in particular to leave sufficient time after each of you has finished speaking before the other one starts to speak again. Our interpreters and verbatim reporters need intervals between different statements, and only then will it be possible that the interpreters can follow you.

Ms Escobar Hernández, you have the floor.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Comme hier, je vous remercie de me donner la possibilité de m'adresser en espagnol à Monsieur Martín Pallín. Je prends note de l'avertissement sur la nécessité de parler lentement. Je vous remercie, Monsieur le Président.

*(Interpretation from Spanish)* Good afternoon, Mr Martín Pallín. Thank you very much for coming to Hamburg to speak as an expert in this case. Could you please tell us your full name?

*Mr Pallín (Interpretation from Spanish):*

My name is José Antonio Martín Pallín.

*Ms Escobar Hernández (Interpretation from Spanish):*

What is your nationality?

*Mr Pallín (Interpretation from Spanish):*

I am a Spaniard.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you please indicate your professional experience?

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*Mr Pallín (Interpretation from Spanish):*

My professional experience is focused in the world of legal services. First of all, I served in the Public Prosecutor's Office for more than 20 years and then I was in the Supreme Court, in the criminal Chamber, for 22 years until I retired one year ago. I have also combined this activity with teaching at different Spanish universities.

*Ms Escobar Hernández (Interpretation from Spanish):*

During the period of time that you have had your professional activity as a public prosecutor and as a judge, have you always dealt with criminal cases?

*Mr Pallín (Interpretation from Spanish):*

Mainly. Especially when I was at the Public Prosecutor's Office I also dealt with administrative issues.

*Ms Escobar Hernández (Interpretation from Spanish):*

How many years have you been a judge in the Spanish Supreme Court, in the criminal court?

*Mr Pallín (Interpretation from Spanish):*

Twenty-two years, if I am not mistaken.

*Ms Escobar Hernández (Interpretation from Spanish):*

You just referred to your teaching activities, your academic activities, in different Spanish universities. Could you please tell us at which universities you have given classes and on what subjects?

*Mr Pallín (Interpretation from Spanish):*

I have done civil law at the Complutense University in Madrid and at the Autonomous University of Madrid. I have been a professor of criminal law at the University of La Laguna in the Canary Islands, Spain, and I have been a professor of criminal law at the Autonomous University in Madrid.

*Ms Escobar Hernández (Interpretation from Spanish):*

Within that academic activity you have taken part in seminars, courses for specialists, programmes for educating the general public on criminal law?

*Mr Pallín (Interpretation from Spanish):*

In Spain, the General Council of the Judiciary frequently organizes training courses for judges, and I have directed courses like that several times. I have also been a director for courses at Menéndez Pelayo International University, and I have taken part in Spain and in Latin America mainly in many courses involving procedural and criminal law.

*Ms Escobar Hernández (Interpretation from Spanish):*

Can you please tell us about articles or collaborations in books, any publications that you may have related to procedural law, criminal law or due process law?

*Mr Pallín (Interpretation from Spanish):*

Given my advanced age, I have had many opportunities to write articles. I have written quite a few articles, some commentaries on procedural texts in collaboration with other colleagues. There are so many that I could not tell you all of them by heart, but mainly I have had a special focus on these two aspects of criminal law regarding phone tapping as a method of

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investigation and of entry and search in closed places generally. These papers are published. They are all on the internet. You could look up the publications that I am talking about on the internet.

*Ms Escobar Hernández (Interpretation from Spanish):*

If I am not mistaken you have also had a great deal of important international activity related to the defence of the rule of law and guarantees. Could you please indicate whether right now you belong to any international institution of this kind?

*Mr Pallín (Interpretation from Spanish):*

Right now I am a member of the International Commission of Jurists, which has its headquarters in Geneva. There are sixty members from all around the world from all kinds of judicial systems and legal systems. Perhaps due to the fact that unfortunately I do not know English it has been centred more on Latin America. I basically participated in observation of transition processes, for example the trial involving the Argentine dictatorship. I was called as an expert in front of the court that tried Fujimori in Peru and I have had many other activities relating to human rights, mainly in Latin America, and at this time in the Maghreb in what is called the Arab Spring, because the Commission is very closely following the process of the drafting of the constitutions of Tunisia and Egypt.

*Ms Escobar Hernández (Interpretation from Spanish):*

You referred to the International Commission of Jurists. Amongst the main objectives of the International Commission of Jurists which, you are perfectly aware, is a private institution – it is not an international organization but it has enormous prestige world-wide – it collaborates actively on a large number of UN programmes and programmes of other international organizations – is to promote due process.

*Mr Pallín (Interpretation from Spanish):*

Of course. We could say that the two main points of reference are basically the two international covenants on civil and political rights and on economic, social and cultural rights. At this time we are carrying out a study on the possibilities of introducing the economic, social and cultural rights in international proceedings, but mainly the right to due process, in Anglo-Saxon terms – the right to a fair trial in our terminology. Those are the main objectives and concerns of the Commission.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you lastly tell us about your general activities in your promotion and protection of human rights?

*Mr Pallín (Interpretation from Spanish):*

I have been the President of the Pro-Human Rights Association of Spain, and I would like to say that the Commission has a consultative status at the UN and specifically the rules for the independence of judges and lawyers were drafted in collaboration with that Commission. With regard to human rights we have carried out a number of missions on the ground in situations of dictatorships, in the Southern Cone, specifically in Latin America in general.

*Ms Escobar Hernández (Interpretation from Spanish):*

Mr Martín Pallín, I see that you are very modest and that you have not said that you received Spain's national human rights prize.

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*Mr Pallín (Interpretation from Spanish):*

Yes, I have had the pleasure to have that honour.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you. After this brief introduction of your *résumé*, which is very long – and we do not have time to devote more space to that here – for the court’s benefit I am going to begin my examination. Could you please tell us if there is a provision of Spanish criminal law which makes damaging Spanish cultural heritage a punishable offence?

*Mr Pallín (Interpretation from Spanish):*

Spain’s legal system protects cultural heritage with criminal laws. It is included in the Criminal Code. There is a specific offence included in the Criminal Code of offences against cultural heritage. There are more generic offences; there is protection, administrative protection in the law known as the Spanish Historical Heritage Act, and there is a third form of protection in the Smuggling Act, which considers it an offence to smuggle or illicitly traffic goods taken from archaeological sites.

*Ms Escobar Hernández (Interpretation from Spanish):*

What is this offence in the Spanish Criminal Code to which you have just referred? You said that the criminal Code has an article that gives offences against historical heritage criminal status. What is that?

*Mr Pallín (Interpretation from Spanish):*

Article 323 of the Criminal Code has a sentence of one to three years and a fine of 12 to 24 months for anyone who damages an archaeological site. Moreover, there is a different and more generic definition for theft of such items: a theft is considered to have a longer sentence if the article stolen has archaeological value.

*Ms Escobar Hernández (Interpretation from Spanish):*

The provisions that you have just mentioned are of a general nature. Are they also applicable to the underwater or sub-aquatic cultural heritage located in Spanish waters?

*Mr Pallín (Interpretation from Spanish):*

Without a doubt. I am sorry, I have to ask the Tribunal to forgive me for being so hasty in my answers. Yes, of course, it is perfectly defined in article 323 and I didn’t say before that, moreover, the Smuggling Act has three to five-year sentences for unlawful exporting of goods that are classified as Spanish cultural heritage.

*Ms Escobar Hernández (Interpretation from Spanish):*

Given that the alleged offences investigated in Cádiz that we have been talking about throughout this case were committed in internal waters, in territorial sea, albeit with unequivocal support from the land, since there was a support network there – so in the event that the property was sold, do you think that Spanish judges have the authority to investigate these events?

*Mr Pallín (Interpretation from Spanish):*

Spanish judges unquestionably have jurisdiction over these criminal acts when the investigation could begin on land and later be extended to the vessel *Louisa* that was the subject of the entry and search warrant. As far as territorial jurisdiction is concerned, that

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corresponds to the court of the place in question, which I believe is Criminal Court No. 4 of Cádiz.

*Ms Escobar Hernández (Interpretation from Spanish):*

You refer to the specific jurisdiction of the Magistrate Judge of Criminal Court No. 4 in Cádiz, so could you therefore say that this judge is the judge "predetermined by law" for the investigation of these acts?

*Mr Pallín (Interpretation from Spanish):*

Undoubtedly. The general rule, the absolute rule of our procedural system is that the jurisdiction of the judge of the place where the criminal act was committed prevails, and no one has questioned that the place where this act was committed was not the Bay or the territory of Cádiz. This has not been questioned.

*Ms Escobar Hernández (Interpretation from Spanish):*

So when we are talking about the judge being predetermined by law, what does that mean? Who is the judge predetermined by law? What relationship does this have with due process?

*Mr Pallín (Interpretation from Spanish):*

The Spanish Constitution, which is from 1978, includes the phrase from the European Convention and other conventions, the internationally accepted expression of "judge established by law", and our Constitution calls this the judge predetermined or established, if you wish – it means the same thing – by law. So it is perfectly constitutional and it is totally in keeping with international conventions.

*Ms Escobar Hernández (Interpretation from Spanish):*

The judge predetermined by law – is this a guarantee in the criminal process? Is it a guarantee of protecting human rights in a criminal proceeding?

*Mr Pallín (Interpretation from Spanish):*

All procedural systems, all international conventions, establish the idea of the judge predetermined by law or the judge established by law as a guarantee in order to eliminate the possibility of suspicion that either a legislator or someone in power might hand-pick a judge *ad hoc*. So it is to ensure the guarantee of impartiality and objectivity; and this is guaranteed by the figure of the judge predetermined by law.

*Ms Escobar Hernández (Interpretation from Spanish):*

I am going to go back to the issue of offences against historical heritage that were the reason behind the seizure of the *Louisa*. Do you think it was reasonable for the judge to order at that time the entry and search of the *Louisa* and also of the *Gemini III*?

*Mr Pallín (Interpretation from Spanish):*

According to the information that I have, the judge, before ordering the entry into the ship, had been conducting an investigation which, according to the reports of the Guardia Civil, which has in Spain the consideration of, shall we say, judicial police – the Guardia Civil had provided the judge with information regarding the possible existence of a network that included a network on land to the point that a member of the Guardia Civil was detained on suspicion of disloyalty in the performance of his duties. The investigation reached the conclusion that objects that were part of the underwater cultural heritage of Spain could be on board, inside the ship the *Louisa*. It is certainly logical and normal for any judge, any

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investigating judge, to follow this line of investigation; and in my opinion it was totally reasonable. Spanish procedural law authorizes this measure and the judge, in the exercise of the authority granted to him under the law, used it, because he believed that it was reasonable, and I share his opinion.

*Mr S. Cass Weiland:*

Excuse me, this seems to be an important opinion. I would like to bring something to your attention. It is not clear to us what he is basing his opinion on. There are 15 volumes of the court documents, and I would like to know if he has read the court documents or just what the opinion is based on.

*The President:*

May I ask Mr Martín Pallín to repeat your statement to clarify if it is a statement of fact or opinion?

*Mr Pallín (Interpretation from Spanish):*

Sorry, Mr President, I understood that the cross-examination will come later but I have no inconvenience in replying to this question. I have no problem. I have not seen it personally, but from what I have seen, the judicial investigation is very voluminous. It covers more than a thousand or more pages of paper, and I have not read the thousand pages or so. I have read the report from the Guardia Civil. As I have said, they are the judicial police of Spain, and the report from the Guardia Civil informs the judge that there may be the remains of sub-aquatic cultural heritage within the ship. In these circumstances I think, and the judge – I think that any judge in fact, as a consequence of this information, this report, may, if he deems it necessary, in his criterion, order the entry and search of the ship. The investigating officials who carry out the investigation so inform the judge, and the judge is the only person who could take that decision. If my experience is of any worth, had I been the judge of Cádiz I would have taken the same position.

*The President:*

Does it satisfy your question, Mr Weiland?

*Mr S. Cass Weiland:*

Yes, thank you very much, Mr President. I understand to a greater extent now.

*The President:*

Thank you very much.

Ms Escobar Hernández, please proceed.

*Ms Escobar Hernández (Interpretation from Spanish):*

I wanted to point out that this is quite unusual and that the cross-examination should come later and not now. Obviously the Party who has called the witness can examine the witness, so I would ask the Agent from Saint Vincent and the Grenadines to ask questions at the right moment.

*(Poursuit en français)* La seule chose que je voulais dire, c'est que M. Martín Pallín a déjà fait référence au système d'interrogatoire devant le Tribunal. Je dis tout simplement – vous l'avez dit très clairement tout au long de la procédure – que l'Espagne a toujours respecté l'ordre d'intervention. Je serais reconnaissante – je ne l'en prie pas parce que ce n'est pas ma fonction, je n'ai pas le pouvoir de le faire – je serais reconnaissante au co-agent de Saint-Vincent-et-les Grenadines d'attendre pour poser une quelconque question. Il aura l'occasion

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et le droit de le faire, mais à son tour. Je pense que c'est ce qui est prévu dans le Règlement du Tribunal. C'est pour cela que je me permets de le lui dire. En deuxième lieu, Monsieur le Président, je veux dire autre chose. La référence à l'information de la Guardia Civil et le fait que la Guardia Civil avait envoyé des communications au juge pour l'informer de ce qui, à son avis, était en train de se passer sur le « Louisa » dans le cadre de cette opération. En outre, c'est une opération bien connue en Espagne, que M. Weiland connaît très bien ; c'est l'opération « Bahía », ces informations sont incluses dans l'ordonnance d'accusation et l'*auto de procesamiento* qui est dans le dossier soumis au Tribunal et qui fait partie du dossier de l'affaire. Ce n'est pas un fait nouveau, absolument pas.

*The President:*

As to the first point of procedure I would like to ask Mr Weiland to wait a little bit until you have the chance to cross-examine the expert.

I ask Ms Escobar Hernández to continue your examination.

*Ms Escobar Hernández (Interpretation from Spanish):*

Mr Pallín, you said that, in your judgement, taking into account your professional experience, so bearing in mind what we usually call *l'expertise* – experience is well recognized in any legal system – on the basis of your experience and your expertise you have said that you would also have ordered the entry and search of the *Louisa*. I am not going to ask you this again, but I would like to ask you about another matter. Do you think that the Cádiz judge could have adopted measures other than those of searching and entering the ship, to follow this criminal investigation? Do you think other measures could have been taken by the judge?

*Mr Pallín (Interpretation from Spanish):*

There are investigation measures that a judge has to take, depending on the case, to continue the investigation, which restrict fundamental rights and the right to privacy, like tapping a phone or entering and searching premises. The case law, both of the Inter-American Court of Human Rights and the Strasbourg Court, has established that these measures have to be adopted as a last measure, a last resort; i.e., if there are less invasive measures that can be adopted which do not restrict human rights to such an extent, they have to be adopted instead. In this case I think what we were talking about is searching for sub-aquatic cultural heritage artefacts that were presumably on the boat, so there was little other alternative, frankly. If this had not been done the risk would have been of losing the evidence or having the evidence destroyed in fact.

*Ms Escobar Hernández (Interpretation from Spanish):*

The entry and search of the ship took place on 1 February 2006. In order to do this the Magistrate Judge of Criminal Court No. 4 of Cádiz gave a ruling and issued a warrant to enter and search the ship – i.e., a judicial decision whereby the entry and the search of the ship were ordered. Is this in line with Spanish law and with the right to due process in law?

*Mr Pallín (Interpretation from Spanish):*

Yes. As I already said, the Spanish judicial system is, in certain ways, the heir of the French system, and requires the judge to hand down a decision, an order – using Spanish terminology – and this judicial ruling not only orders the entry and search but what is more important in my opinion is that it explains and gives the reasons and grounds behind such a decision. This is very much what we find in this order that was handed down by this investigating judge. I have this order in front of me and I have read it and it seems to me, if I am allowed to do so – if the President allows me to do so I can read a paragraph of this,

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which says the judge states that he adopts the decision in order to avoid the plunder of the Spanish sub-aquatic archaeological heritage, and because a risk exists that this evidence may be removed from the ship and the court may be deprived of the possibility of taking action. So these are the reasons the judge gives in his order or decision of 1 February 2006.

*The President:*

Ms Escobar Hernández, I do apologize for interrupting you, but it is half past four and I do believe you have quite a few more questions on your list;

*(Poursuit en français)* Le Tribunal se retire pour une pause de 30 minutes. Nous reprendrons l'audience à 17 heures.

*(Break)*

*The President:*

Ms Escobar Hernández, you may continue the examination of the expert, but before giving you the floor, I would like to mention one thing. Before the break there was a question raised concerning the document that was referred to by the Applicant. I would like to confirm that the letter referred to by the Co-Agent of Saint Vincent and the Grenadines as a document filed after the closure of the written procedure, which is, I understand Exhibit 8, was transmitted by a letter dated 25 September this year, but, as stated by the Agent of Spain, the Tribunal did not authorize the production of this document. That being said, the information referred to by the Co-Agent of Saint Vincent and the Grenadines may be found in paragraph 37, page 14, of the Memorial of Saint Vincent and the Grenadines as well as in paragraph 15, page 14, of the Counter-Memorial of Spain. So the fact concerning the deflector on *Gemini III* is known but the document was not a filed document, so perhaps we can refer to the fact in the record but without referring to the document. I hope that will solve the problem. Thank you.

*(Poursuit en français)* Madame Escobar, vous avez la parole.

*Mme Escobar Hernández :*

Merci Monsieur le Président. Je vous remercie de l'information que vous venez de nous donner. En effet, je n'ai pas fait référence... Quand j'ai objecté, je n'ai pas objecté sur le fait, mais sur la référence expresse dans la salle d'audience à un document qui avait été présenté par le co-agent de Saint-Vincent-et-les Grenadines et sur lequel l'Espagne avait objecté en tant que document non en relation avec le déflecteur. Par conséquent, en tant que document, il ne pouvait pas être fait référence à cela. En tout cas, je vous remercie très vivement de toutes les explications que vous nous avez données.

*Le Président :*

Merci de cette déclaration. C'est aussi ce que j'ai compris.

*Mme Escobar Hernández :*

Merci Monsieur le Président.

*(Interpretation from Spanish)* Sir, before finishing the first part of the examination, I asked whether you consider that there was another option instead of ordering the entry and search of the ship. You have already answered this question but can you answer the same question again, please?

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*Mr Pallín (Interpretation from Spanish):*

The general rule, as I was saying before, was that the judicial investigation, by encroaching on, by a judicial decision, obviously, fundamental rights such as the right to privacy, is exceptional and can only be permissible when other measures are not available, i.e. confirming what I said before, and I think that in this case there were not any alternative measures available to the judge in fact.

*Ms Escobar Hernández (Interpretation from Spanish):*

During the actual entry and search, the court clerk was present, who actually recorded in writing what happened there. Can you please explain what is a court clerk’s role in Spain and what functions he or she has?

*Mr Pallín (Interpretation from Spanish):*

In the Spanish procedural system, in order for entry and search to be carried out, in the first place what we need, as we said before, is a court decision, and the judge orders the search, orders what is called in Spain a judicial commission. The judge’s presence is not required because in the Spanish judicial system the court clerk, apart from having the functions of, for example, the *greffier* in a French court, also has functions we call – I do not know if the expression is correct or common – is acting effectively as a public notary in a judicial process. A court clerk’s written record documents have the same value and authenticity as a public notary’s intervention in a last will and testament, for example, or in a private contract. This is a specific category of court clerks in Spain, this power to act as public notaries, so much so that our case law has set down without question that if a court clerk is not present in a search and entry, the actual procedure of entering and searching is absolutely null and void. What makes this entry and search valid is the actual presence of the court clerk and this is an absolute guarantee because a court clerk under his or her responsibility attests that the actual entry and search has been carried out exactly as he or she attests in the actual written record of the entry and search.

*Ms Escobar Hernández (Interpretation from Spanish):*

The Applicant has pointed out that the entry and search of the *Louisa* was carried out illegally because the judicial commission which carried out the entry and search was not authorized by the ship’s captain, who was actually not on the ship at the time, and possibly was not even in Spain at the time, and indeed, has apparently never been in Spain, or by the consul of Saint Vincent and the Grenadines, and that this authorization by either the consul of Saint Vincent and the Grenadines or of the ship’s captain was an absolute requirement under article 561 of the Criminal Procedure Act. Could you kindly explain what the wording of article 561 is and the actual meaning and content of that article?

*Mr Pallín (Interpretation from Spanish):*

Article 561 of the Criminal Procedure Act is within a bloc of articles, 30-something articles in fact, in which the Spanish legislature regulates entry and search of private homes, entry and searches in closed areas which are not deemed to be private homes, and entry and searches even, for example, in the royal palace. I include the words “the royal palace” because this Act is actually from 1882. So article 561 also dates back to 1882. So the 19<sup>th</sup> century is a long way back in time. After this, for example, the Constitution of 1978 came into force and the Spanish courts have been in a position to interpret pre-constitutional rules from the 19<sup>th</sup> century in the light of the constitutional text which is now in force and, what is more important, in the light of the international treaties in the area of human rights which Spain has ratified or signed, more specifically, in the light of the International Covenant on

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Civil and Political Rights and the European Convention on Human Rights, and also in line with the case law the Strasbourg Court has handed down. It is true that article 561 is still in force and that article 561 does require the authorization of either the captain or, if the captain is not present, of the consul of the flag State of the ship, but as far as I know, the captain was not present and he was not actually traceable, and had been so for a long time, and the consul was also untraceable. This situation ---

*Ms Escobar Hernández (Interpretation from Spanish):*

I am sorry. If I could interrupt you to ask two questions to clarify your replies.

*(Poursuit en français) Puis-je, Monsieur le Président ?*

*(Le Président acquiesce.)*

*(Interpretation from Spanish)* Firstly, you said that you need either the authorization of the ship's captain or the authorization of the consul if the ship's captain is unavailable. What happens if the ship's captain is actually on board the ship but refuses to give the authorization? Is the authorization of the consul then necessary if the captain does not give it?

*Mr Pallín (Interpretation from Spanish):*

In this case I think we ought to distinguish. We are talking here of course of investigating criminal offences, for it is not entering a ship for business purposes or to seize goods in a civil procedure. We are talking here of investigating criminal offences, which could be *in flagrante delicto*, i.e. an offence which is being committed at that very moment. In the case of crimes detected in the act, case law in Spain has clearly set out that the authorization of either the captain or of the consul is not required. In this case, as I said before, a risk did exist of evidence and exhibits disappearing, and therefore the judge had to assess this risk at the time of taking the decision, and thus, in my opinion, I think that the decision to enter the ship was correct, in so far as a judge considered that there was a risk of evidence disappearing, or even possibly the risk of possible suspects having committed this offence actually disappearing.

I must say that article 561 has caused a great debate in Spain and also in Strasbourg, especially in the light of searches of ships in the case of drug trafficking offences. This is not the case, obviously, we are studying now, but precisely in various occasions – I do not recall how many now, frankly – Spain has been taken to the Strasbourg Court for alleged violations of the rules regulating the entry and search of premises. This can be looked up in any legal database of case law: in the *Prado Bugallo* case, a very well known case, because he is a well known drug trafficker, who was a focus of attention and of media coverage in Spain, the Strasbourg Court rejected the claim by *Prado Bugallo* that his rights had been violated in so far as Spanish legislation had been infringed because it is considered that there were irregularities but that such irregularities did not cause the search and entry proceedings to be null and void. They only caused the search and entry proceedings to be irregular.

According to our constitutional system, only proceedings that violate the essential requirements and produce a situation of defencelessness for the party being abused are null and void. In this case, for example, the maximum guarantee for any person who was actually on board the ship was the presence of the court clerk, who was there, and therefore I consider, and also the Strasbourg Court would consider, that no defencelessness is caused. It is an irregularity, if you want, and if this can be of any use, Spain is now amending, indeed, actually the whole legislation in criminal procedures, and it is all being updated, but what was in force at the time of the case when the entry and search was actually carried out was article 561, as interpreted as I have just outlined.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you please indicate what decision of the Strasbourg Court you are referring to?

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*Mr Pallín (Interpretation from Spanish):*

It is a decision. It is not a judgment. It is a non-admission to consideration.

*Ms Escobar Hernández (Interpretation from Spanish):*

Can you refer to the case and date, please?

*Mr Pallín (Interpretation from Spanish):*

It is No. 21218/09. The date is 18 October 2011 and it is case 21218/09 and as I say, there are many other decisions – this is not the only one – which actually concur with this one.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you very much. Before continuing, I would like to point out ...

*(Poursuit en français)* Avant de poursuivre, Monsieur le Président, je voudrais faire une remarque concernant une affirmation qui a été faite par M. Martín Pallín sur le consul de Saint-Vincent-et-les Grenadines.

*(Interpretation from Spanish)* As far as you are aware, is there a consulate in Spain for Saint Vincent and the Grenadines?

*Mr Pallín (Interpretation from Spanish):*

Frankly, I do not know, but I imagine, but the judge could have verified this very easily.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you, Mr Pallín.

*(Poursuit en français)* Monsieur le Président, je tiens à informer qu'il n'y a pas en Espagne de consulat de Saint-Vincent-et-les Grenadines. Il n'y a pas même un consulat honoraire, ce qui est relativement fréquent dans la pratique. Mais ce n'est pas la seule chose sur laquelle je voudrais transmettre des informations au Tribunal. Bien qu'entre l'Espagne et Saint-Vincent-et-les Grenadines, il y ait des relations diplomatiques, Saint-Vincent-et-les Grenadines n'a jamais désigné de consul où que ce soit dans le monde qui serait compétent, qui serait responsable s'agissant des activités propres d'un consul en relation avec l'Espagne.

Monsieur le Président, M. Martín Pallín a fait référence à la décision dans l'affaire Prado Bugallo qui s'est déroulée devant la Cour européenne des droits de l'homme. Il a fait référence au contenu de cet arrêt. J'ai l'intention de revenir sur ce sujet dans ma plaidoirie, plus tard. En tout cas, compte tenu du fait qu'il s'agit d'une information qui, à mon avis, est pertinente - mais c'est à vous de décider si c'est pertinent ou non - et surtout compte tenu du fait qu'il s'agit d'une décision publique qui est publiée sur le site Internet du Conseil de l'Europe et dans la base de données de la Cour européenne des droits de l'homme, je vous demande, Monsieur le Président, votre permission pour pouvoir présenter sur l'écran certains éléments relatifs à ladite décision. Il s'agit de la décision du 18 octobre 2011, adoptée en réponse à la requête n° 21218/09, introduite par M. José Ramón Prado Bugallo contre l'Espagne. En plus, j'ai une copie pour le co-agent de Saint-Vincent-et-les Grenadines si vous m'autorisez à donner les copies et à présenter sur l'écran certains paragraphes de la décision.

*Le Président :*

Si cette information appartient au domaine public, vous pouvez la montrer, vous référer à cette décision.

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*Mme Escobar Hernández :*

C'est tout à fait public. Nous pouvons même montrer sur l'écran la base de données où elle se trouve pour que, bien sûr, la distinguée délégation de Saint-Vincent-et-les Grenadines mais aussi les juges, vous, les membres du Tribunal, puissent voir la base de données de la Cour européenne des droits de l'homme ; il s'agit d'une base de données publique et gratuite. On peut y accéder directement ou à travers le site Internet du Conseil de l'Europe.

*Le Président :*

Merci. Vous pouvez continuer, Madame.

*Mr S. Cass Weiland:*

Mr President, we have no objection. We point out that the copy we have is in French.

*The President:*

Thank you very much.

*Ms Escobar Hernández (Interpretation from Spanish):*

It is indeed in French, Mr President. The copy that I have just given to Mr Weiland is in French. This is the only language in which there was an official publication of information from the European Court of Human Rights database. Of course, French is an official language of the Tribunal, and I believe that the Parties are entitled to use either language. I have given this copy to Mr Weiland to ensure that there is equality of arms, as it were. Obviously we can certainly have it translated into English, if necessary, by the Saint Vincent and the Grenadines translation department.

On the screen here we have the first of the items that I mentioned. In line 2 you will see the reference to *Prado Bugallo v. Spain*, 21218/09. It is also indicated that it is available only in French, and then there is the decision in the third section. The date of adoption is 18 October 2011, and once again it is stated that it is available only in French.

*The President:*

Thank you, Ms Escobar Hernández. If it is one paragraph, you can quote it in French and it will be interpreted into English.

*Mme Escobar Hernández :*

Je commence par la partie intitulé « En fait ». Son paragraphe 3 est ainsi conçu : « Dans le cadre d'une enquête judiciaire portant sur un trafic international de stupéfiants, le 15 août 2001, ... ». Suit le passage que je considère le plus pertinent, et c'est pour cela qu'il est surligné en bleu : « ... la police espagnole intercepta, dans les eaux internationales, un bateau de pêche dénommé le *Tatiana*, immatriculé au Togo ». Passons maintenant au paragraphe 4. A partir des mots en rouge, il se lit comme suit :

Le lendemain, les agents de police en charge de l'enquête informèrent par téléphone le consulat honoraire du Togo à Madrid de l'interception du *Tatiana*, en laissant un message sur le répondeur automatique. Le 21 août 2001, ils firent connaître par télécopie l'interception du bateau au consulat, en précisant les personnes qui avaient été arrêtées à bord.

J'appelle votre attention sur le fait que la communication aux autorités du Togo a été faite après l'arraisonnement du bateau.

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Vient ensuite, en bleu, l'argument avancé par le demandeur, c'est-à-dire le moyen de défense utilisé par M. Prado Bugallo :

Pour ce qui est de l'abordage et de la perquisition du *Tatiana* dans les eaux internationales, le requérant et les autres inculpés alléguèrent qu'ils étaient nuls, dans la mesure où les agents de police n'avaient pas préalablement sollicité du consulat du Togo une autorisation, alors que le bateau battait pavillon togolais.

Je vais lire maintenant les arguments avancés par l'*Audiencia Nacional*, qui est la plus haute juridiction espagnole, sous le contrôle du Tribunal suprême, dont M. Pallín a été membre. Voici donc les arguments qu'elle avance. L'*Audiencia Nacional* est la juridiction la plus élevée en matière pénale et connaît des infractions à caractère international et des affaires de terrorisme, de contrefaçon, etc. Je cite :

Par ailleurs, l'*Audiencia Nacional* nota que le Tribunal suprême s'était également prononcé sur cette question dans le cadre d'un pourvoi en cassation présenté par la République du Togo contre une décision de la première section de la chambre pénale de l'*Audiencia Nacional*, ayant rejeté son déclinatoire de compétence tiré du fait qu'il s'agissait de délits commis dans les eaux internationales. Dans son arrêt du 25 novembre 2003, le Tribunal suprême considéra que l'omission de solliciter l'autorisation de l'Etat du pavillon, exigée par l'article 4.1 de la Convention de Vienne contre le trafic illicite de stupéfiants et substances psychotropes et l'article 561 du Code de procédure pénale, n'emportait pas les conséquences alléguées par le Togo. De l'avis du Tribunal suprême, cette omission constituait, en tout état de cause, une irrégularité qui n'invalide pas l'abordage du bateau ni n'étendait ses conséquences à l'appréciation de la preuve obtenue sans autorisation.

Le Tribunal suprême considéra que le non-respect de la norme exigeant la demande d'autorisation ne portait pas atteinte aux droits des personnes accusées, ne constituait pas un motif de nullité de la procédure et ne conditionnait pas la juridiction de l'Etat exercée par celui-ci conformément au droit international.

Est-ce que je lis assez lentement pour les interprètes ?

*The President:*

Yes.

*Mme Escobar Hernández :*

Je finirai avec la décision qui a été prise par la Cour européenne des droits de l'homme. En réponse à la requête présentée par M. Prado Bugallo, et plus particulièrement aux arguments relatifs à la perquisition, la Cour européenne déclare ce qui suit :

À cet égard, la Cour rappelle que c'est d'abord aux autorités nationales et spécialement aux cours et tribunaux, qu'il incombe d'interpréter le droit interne et international pertinent et qu'elle ne substituera pas sa propre interprétation du droit à la leur en l'absence d'arbitraire.

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En outre, la Cour européenne des droits de l'homme a considéré que les arguments du requérant étaient mal fondés, et elle a déclaré sa requête irrecevable. Je cite le passage pertinent de la décision de la Cour européenne:

En l'espèce, la cour note que tant l'*Audiencia Nacional* que le Tribunal suprême ont considéré que l'interception du *Tatiana* avait été autorisée et effectuée en conformité avec les dispositions du droit interne et des conventions internationales en la matière. Ils ont pris en compte le fait que le pavillon arboré par le *Tatiana* n'était pas connu des responsables et qu'une fois le pavillon connu, le consulat honoraire de la République du Togo avait été informé par téléphone et par fax de l'interception du bateau. Par ailleurs, les tribunaux internes considérèrent que la juridiction espagnole était compétente pour connaître les faits litigieux, indépendamment du pavillon sous lequel naviguait le *Tatiana*, dans la mesure où la destination finale de la cocaïne était l'Espagne, où les acheteurs de la drogue étaient espagnols et où une partie des activités délictuelles avait eu lieu sur le territoire espagnol. Cette conclusion était renforcée par le fait que le pavillon était de complaisance et qu'il n'existait pas un lien substantiel entre le navire et l'État du pavillon, comme l'exige le droit international en la matière.

C'est tout, Monsieur le Président.

Prenant en compte l'ensemble de ces éléments, la Cour européenne des droits de l'homme a conclu que le procès conduit en Espagne avait revêtu un caractère équitable.

*The President:*

Thank you very much. Do you have further questions?

*Ms Escobar Hernández:*

Yes.

*The President:*

Please continue.

*Ms Escobar Hernández (Interpretation from Spanish):*

Mr Martín Pallín, on the occasion of the entry and search of the ship, the arrest of two persons took place, two members of the crew who were actually on the ship, and the arrest of Ms Alba Avella. The first were of Hungarian nationality and Ms Avella was of US nationality. In these circumstances, bearing in mind the situation of entry and search, were these arrests actually reasonable within our ongoing judicial investigation or not?

*Mr Pallín (Interpretation from Spanish):*

The entry and search takes place at any place, a ship or any other premises, where there is evidence to be found, where evidence relating to the crime can be found, and this evidence, as well as individuals who may be related to the offence, could be within these premises, the judge is very much authorized by the law, and the judge is the one who has to decide, to assess the circumstances of the case, and if he considers that there is a risk of abscondment of possible suspects or that the investigation could be prejudiced in any way or that the evidence could be destroyed, he is very much authorized, perfectly authorized, by the law to order the arrest of these persons provisionally. The general rule is that an arrest cannot last more than

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what is reasonable – the time that the judge considers necessary in order to ensure the success of the investigation. In this case, he acted correctly ---

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you, Mr Martín Pallín. I want to ask you something else now, if you do not mind. You said before that the judge is very much authorized to order the arrest of individuals who are suspicious or are actually on the premises when the search is carried out and a person who was suspected of actually being close on the premises searched. Do you think that this practice or this power that judges have, a Spanish judge has, of arresting provisionally these individuals in relation to a judicial investigation, which includes the entry and search, as you have already told us before, is in line with Spanish law? Is it only a Spanish practice, arresting these persons, or in other countries, generally in judicial investigations, are people arrested in these circumstances on a provisional basis?

*Mr Pallín (Interpretation from Spanish):*

As far as I know, this is foreseen in other legislations under the continental law system – for example, in France and in Italy, in most countries in Latin America, and of course in any other procedural system in which the judge is the person responsible for taking these decisions, in order to ensure, I repeat, the success of the investigation. It is his responsibility and the Constitution itself entrusts only to the judge the adoption of these decisions, which is obviously a decision which is solely limited to the personal freedom of individuals. All continental legal systems, including the Spanish one, do establish, of course, a maximum period of remand in custody. The judge is responsible for assessing when this detention is no longer appropriate, but in any case the law does set a maximum time limit, so a person can only be remanded in custody up to a maximum of half of the penalty that could be imposed as a result of the offence. For example, if the hypothetical offence penalty can be eight years, a judge can never keep somebody remanded in custody for more than four years. It might seem excessive, but this is the rule that is set out in our legislation. It is an exception, and the Constitution does require the judge to order a person to be set free when that deprivation of freedom is no longer necessary for the investigation.

*Ms Escobar Hernández (Interpretation from Spanish):*

Ms Alba Avella, as you know, was arrested on 1 February and was handed over to the judge on 3 February at Puerto de Santa Maria and immediately afterwards was handed over to Magistrate Judge of Criminal Court No. 4 of Cádiz on that same day. Can you tell us the actual time limit in Spain for a person to be put at a judge's disposal once that person has been arrested within the framework of a judicial investigation? Just explain to us – it may be obvious to you but just generally, as there are so many legal systems we are talking about here. From the moment the police actually arrest somebody to the time that person must be handed over and be brought before a judge, what is the time limit? There is a maximum time limit within those two moments. What I am saying here is it is not that the person is not under judicial control; I am just saying simply that that person has been arrested by the police but has not been brought to the judge physically yet. What is the time limit? What is the maximum time allowed between the arrest of a person and that person being put at the disposal of the judge and being physically brought before the judge?

*Mr Pallín (Interpretation from Spanish):*

According to article 17 of the Constitution, the maximum time limit is 72 hours. In this case we have a special circumstance, that the arrest actually takes place before the court clerk, so

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in some way there was already a judicial control or judicial knowledge of the arrest, because the court clerk was present, but in general terms the time limit is 72 hours.

*Ms Escobar Hernández (Interpretation from Spanish):*

On 6 February of that same year, logically, the Magistrate Judge of Criminal Court No. 4 of Cádiz heard Ms Avella, questioned her, and he ordered her provisional release on that same day, but when he ordered her to be set free he did withhold her passport, so in practice a judicial retention of the passport took place. What sense is there behind retaining judicially a passport? Can you kindly explain this to us, please?

*Mr Pallín (Interpretation from Spanish):*

The fact the person was released immediately after being questioned confirms what I said before. The judge listened to the person who had been arrested, considered that it was not necessary for that person to be deprived of her freedom further, and ordered her to be set free. As a precautionary measure he decided to withhold her passport with the purpose of that person not being able to leave Spain. This measure is most common and is in line with what I said before. It is a measure which is less restrictive, so to speak, of human freedom. It does not deprive her of freedom, but it simply prevents a person from leaving Spain. So a person can move absolutely freely within Spain but the fact that she does not have a passport any more prevents her, as far as possible, from leaving Spain and removing herself from the court's action.

*Ms Escobar Hernández (Interpretation from Spanish):*

If a person whose passport has been withheld by a Spanish court were to need – were to have an absolute need to leave Spain for some reason, or were to declare that she must leave Spain for some reason, can she ask the judge for special leave to travel on this occasion?

*Mr Pallín (Interpretation from Spanish):*

Any person who is in that situation, i.e. that his or her passport has been withheld, may obviously address the judge at any moment in time and request the passport to be returned because, in his or her judgement, the measure is no longer required, or may request special leave from the judge to leave Spain to go abroad for some justified reason, for example, family reasons or professional reasons. In my long experience I have known cases of people, very important people in Spanish life, political life, economic life and business life, artists, who have found themselves in this situation, and the judge has authorized them in a specific case, for example, to give a lecture at an American university. So the judge did grant this authorization to leave Spain and to come back, and that is what he did; he went out, gave the lecture and came back.

*Ms Escobar Hernández (Interpretation from Spanish):*

Withholding a passport is a measure that only exists in Spain or it is something found in other legal systems in other countries?

*Mr Pallín (Interpretation from Spanish):*

This measure is used in many other countries. For example, if you allow me to comment as a personal comment, at present within the Schengen territory, for example, which we have within the European Union, this measure is no longer as important as it was at other times, since one can move quite freely within this area, but this measure is still very much in the law. It does exist and it is very much used.

M/V “LOUISA”

*Ms Escobar Hernández (Interpretation from Spanish):*

Ms Avella was released without any charges, and in fact was not charged subsequently. In your professional life have you found yourself in a situation like this one, where a person has actually been arrested in a criminal investigation, a judicial investigation, was later on not formally charged, and in fact is released, and the proceedings regarding that person are dismissed? Have you seen this happening in your professional life?

*Mr Pallín (Interpretation from Spanish):*

It is relatively common. A person who is deprived of freedom and then is not charged with any offence, or in other cases is actually formally acquitted after the trial, is indeed entitled to request damages, damages to be indemnified, for example, material damages, having lost their job, for example, or professional income or personal damages, for example, having appeared in the media, having been detained and suspected of a crime. But this general rule has to apply to every case. In this case one has to look at whether the duration of the deprivation of liberty is sufficiently short in order to decide whether or not the judge did act in line with the law. I cannot give a general rule here. I would examine each case on its own merits and decide whether that person is entitled to indemnity, but certainly both the Spanish Constitution and the law grant that person the right to claim damages from the State for having been deprived of freedom.

*Ms Escobar Hernández (Interpretation from Spanish):*

In other words, it is not something absolutely extraordinary, and it is not equivalent to a denial of justice for a person who has actually been investigated not to be prosecuted afterwards.

*Mr Pallín (Interpretation from Spanish):*

Of course not, otherwise judges would not be able to work. In all legal systems the law itself recognizes the possibility of a judicial error. Of course, we judges, because of our work and because we have to take decisions – sometimes the decisions are wrong. That is why, if a decision has been wrong, a person who has suffered loss can claim compensation.

*Ms Escobar Hernández (Interpretation from Spanish):*

You said before that there was a right to reparation. How would you claim? Before whom would you claim damages, for the damages caused by this judicial decision?

*Mr Pallín (Interpretation from Spanish):*

The Spanish system, as I said before, in the Constitution itself, establishes the right of citizens to claim damages, what the Constitution defines as the normal functioning of the judicial system, and more specifically, the claim is made before the General Council of the Judiciary, which is a constitutional body which governs judges, and the actual money is paid by the Ministry of Justice from its ordinary budget. This is the theory and the law. In practice, at times the claim for damages is actually upheld, and in other cases the claim for damages is rejected.

*The President:*

May I know if you still have many questions to ask?

*Mme Escobar Hernández :*

Oui, Monsieur le Président, je voudrais poursuivre cet interrogatoire demain matin.

EXAMINATION OF EXPERTS – 9 October 2012, p.m.

*The President:*

The examination of the expert Mr Martín Pallín will have to be continued tomorrow morning. The hearing will be resumed tomorrow, 10 October, at 10 a.m. The sitting is closed.

*(The sitting closes at 6.04 p.m.)*

M/V "LOUISA"

**PUBLIC SITTING HELD ON 10 OCTOBER 2012, 10.00 A.M.****Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 8 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 10 OCTOBRE 2012, 10 HEURES****Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 8 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*Le Président :*

Bonjour, Mesdames et Messieurs. Nous allons poursuivre nos plaidoiries. Hier soir, nous avons interrompu l'audition de l'expert, M. Martín Pallín, et nous allons poursuivre cette audition. Je vous rappelle, Monsieur Martín Pallín, que vous continuez d'être lié par la déclaration que vous avez faite hier.

Avant de poursuivre, je voudrais rappeler qu'une telle audition est un exercice exigeant pour les interprètes et les sténographes, surtout lorsqu'il fait intervenir trois langues : l'anglais, le français et l'espagnol. Je prie donc de nouveau les représentants des Parties, et vous, Monsieur Martín Pallín, de bien vouloir parler lentement et de laisser un intervalle suffisant après la fin de chaque intervention, pour que les interprètes puissent achever l'interprétation de celle-ci. Merci de votre coopération.

Je donne maintenant la parole à l'agent de l'Espagne, Mme Escobar Hernández. Je la prie de continuer l'audition de l'expert.

S'il vous plaît, Madame.

*Mme Escobar Hernández :*

Bonjour Monsieur le Président, Madame et Messieurs les Juges. Avec votre permission, je continuerai au point où nous avons arrêté hier l'audition.

EXAMINATION OF EXPERTS – 10 October 2012, a.m.

**Examination of Experts (continued)**

MR MARTÍN PALLÍN, EXAMINED BY MS ESCOBAR HERNÁNDEZ (CONTINUED)  
AGENT OF SPAIN  
[ITLOS/PV.12/C18/10/Rev.1, p. 1–11; TIDM/PV.12/A18/10/Rev.1, p. 1–12]

*Ms Escobar Hernández (Interpretation from Spanish):*

Good morning, Mr Martín Pallín. We are going to continue your interrogation at the point where we left off yesterday. My next question refers to Mr Avella. Mr Avella testified before this Tribunal last week. He was arrested in Portugal and handed over to the Spanish authorities by the Portuguese authorities after having been arrested at Lisbon airport. This was by virtue of a European arrest warrant. Does this conform to Spanish law?

*Mr Pallín (Interpretation from Spanish):*

Yes, this is absolutely in accordance with Spanish law. It is the usual procedure within the European Union, and I want to point out simply that the country receiving the order and carrying it out needs to make sure that it meets the formal requirements established under the law.

*Ms Escobar Hernández (Interpretation from Spanish):*

From the arrest of Mr Avella in Portugal, from when he was brought before the Spanish authorities, which Mr Avella said happened ten days after he was arrested, a time during which he was not under the custody of the Spanish authorities but the Portuguese authorities – but from when he was brought before Spanish legal authorities, Mr Avella under a provisional arrest warrant and he was kept in custody, a period of between eight and nine months passed, depending on how this is calculated. During this period, that is to say from the time he was brought before the competent Spanish judge, Mr Avella lodged various appeals with the Spanish courts, asking to be released, asking then for his bail to be reduced, for the bail that had been determined by the judge to be reduced and so on. Does this seem to you to be a reasonable period in light of the investigation that was underway?

*Mr Pallín (Interpretation from Spanish):*

I have explained yesterday that the period of time depends on the circumstances of the case and on the investigations that the judge considers to be essential. The Spanish system, as I have said, has mechanisms for appeal so that cases can be reconsidered in the case that someone is deprived of their liberty and without any need to use legal counsel – or if someone does not have legal counsel they can make a request to the judge for them to be released. The period is considered by the judge based on the needs of the investigation.

*Ms Escobar Hernández (Interpretation from Spanish):*

During this time that he was in provisional custody can this be considered a violation of the rights to due process of the arrested individual?

*Mr Pallín (Interpretation from Spanish):*

Not at all. This is a normal procedure in any proceedings, but I will say it once again: his right of defence is guaranteed - the possibility of using all of the evidence that he considers to be necessary in his defence.

M/V "LOUISA"

*Ms Escobar Hernández (Interpretation from Spanish):*

During the entry and search of the *Louisa*, the Guardia Civil found different objects that have already been referred to here, in this Tribunal, over the last two weeks. Among the objects found by the Guardia Civil were some computers. In accordance with Spanish law, what does the seizure of this property, of these computers, involve?

*Mr Pallín (Interpretation from Spanish):*

Computers could be instruments or effective means for committing an offence. The Spanish judge can order that these computers be seized and sealed always in the presence of the court clerk, who provides accreditation that this seal has been placed, as is logical. In order to decrypt the content of the computer, there is a technical procedure and the judge requests the assistance of technicians so that they can then examine the contents of the computer. Spanish law clearly establishes that the judge has the obligation to hand over any content that has no reference or direct relationship with the crime being investigated. There could be confidential information, private information, commercial information. All of this information the judge needs to eliminate because that is of no interest to the investigation, and the judge collects and maintains under his custody everything that could be of interest to the investigation.

*Ms Escobar Hernández (Interpretation from Spanish):*

Can the interested parties at some time ask for a copy of the contents of the hard drive, of the data that is on these computers?

*Mr Pallín (Interpretation from Spanish):*

Of course, unless, in an exceptional case, and for a limited period of time which cannot be any longer than three months, but which can be extended another three months, the judge declared that this case was a secret investigation; but if not, then the information can be requested from the judge and they can be shown the evidence that the judge has and they can also ask for a technician designated by them to read this information to make sure, to show that the technique used to decode, if you will, the information has been correctly done. This is part of the right of defence of the accused under our law.

*Mme Escobar Hernández :*

A propos de la question que je viens de poser à M. Martin Pallín, j'aimerais maintenant, avec tout le respect que je dois au Tribunal, appeler l'attention du Tribunal sur le fait que la première fois que le représentant de la société Sage et de M. Foster a demandé une copie du disque où étaient conservées toutes les données se trouvant dans les ordinateurs – données considérées par le demandeur comme contenant des informations de nature commerciale très importantes et qui l'intéressaient –, une fois qu'il l'a demandée dans les délais prévus par la loi, la copie du disque dur et des bases de données a été remise à M. Foster et aux représentants de M. Foster et de la société Sage.

*Mr S. Cass Weiland:*

Mr President, I would like to lodge an objection to the statement of the Agent of Spain. She has just referred to records that are not in the record of this case. She has referred to documents that they have not submitted to this Tribunal; and so we object.

*The President:*

Thank you, Mr Weiland. Let us check if the document is included in the file or not.

## EXAMINATION OF EXPERTS – 10 October 2012, a.m.

*Mme Escobar Hernández :*

Monsieur le Président, est-ce que vous me permettez de continuer, pendant que mes collègues cherchent le document pour vous donner la réponse ?

*Le Président:*

Madame Escobar Hernández, poursuivez s'il-vous-plaît.

*Ms Escobar Hernández (Interpretation from Spanish):*

How would you view the participation of the *Louisa* in committing the alleged criminal acts against Spain's sub-aquatic cultural heritage, which is under consideration here? That is to say, what is your opinion regarding the participation? To what extent did the *Louisa* participate in committing these alleged offences?

*Mr Pallín (Interpretation from Spanish):*

My opinion is that it was an essential instrument, a necessary instrument for the committing of these offences against Spain's sub-aquatic cultural heritage. The ship is the instrument for the committing of this crime and therefore the judge, if he considers it necessary, can take measures regarding this instrument used for committing the offence.

*Ms Escobar Hernández (Interpretation from Spanish):*

You said that the ship, the *Louisa*, is a necessary instrument for the committing of the crime. Taking this into account, what measures could a judge take regarding the instruments for the committing of a crime?

*Mr Pallín (Interpretation from Spanish):*

Our procedural law establishes the judge's authority to order. I do not know if the expression can be correctly translated – the confiscation, if you will, of the instrument for the committing of the crime. It may be kept under custody for two reasons: (1) so that it can be evidence in the event that there is a hearing; also so that it can be destroyed if it is an asset that comes from illicit trafficking, for example drugs; or it could be sold or used in the service of the State. It becomes the property of the State as long as – I repeat, as long as it is considered an instrument for committing the crime. If not, it is considered an economic asset and it could be used to defray the possible economic responsibilities or liabilities that are established in the case.

*Ms Escobar Hernández (Interpretation from Spanish):*

So this asset, this instrument for committing the crime is currently under the custody of the Spanish authorities.

*Mr Pallín (Interpretation from Spanish):*

That is right because, as I said – I repeat – it is a piece of evidence that in the event that a trial is held needs to be managed as evidence. In the event that the judge considers that there is no offence and that the case needs to be dismissed, then the judge is compelled to return these assets to their owners.

*Ms Escobar Hernández (Interpretation from Spanish):*

You said to us that what the judge does, using a word that is somewhat difficult to translate from Spanish – it is a specific word in legal terms – what is called a *decomiso*, which could be considered a seizure. What do you mean by this? Is the judge authorized to retain this asset when there is a *decomiso* or seizure?

## M/V "LOUISA"

*Mr Pallín (Interpretation from Spanish):*

Yes, the purpose for this is laid down within our procedural law and within the Criminal Code. Basically its purpose is for cases involving drug trafficking but it is also for any other kind of offence, also in the case of smuggling of works of art.

*Ms Escobar Hernández (Interpretation from Spanish):*

According to Spanish practice, if I am not mistaken, when judges detain goods of this kind – a ship, an automobile – usually what they do is seal it. They put a physical seal on the object. Is that the case? Is it usual that the object is physically sealed, a seal is placed on the object?

*Mr Pallín (Interpretation from Spanish):*

It depends on the nature of the object. If it is, for example, drugs, they are destroyed and a sample is kept. If they are objects which, because of their nature, could be considered perishable, then they are sold and in the case of something like a ship it is ordered that they be sealed, and also the administration, that is, the measures necessary for its maintenance until such time as the definitive hearing is held.

*Ms Escobar Hernández (Interpretation from Spanish):*

Regarding the maintenance you have just referred to, if I am not mistaken, the general practice is for the judge to ask the owner to designate a person whom he trusts, so that this trusted individual, whether it is a seaman, a member of the crew, a representative – the person who is best situated to be able to know about this asset and protect the rights of the owner of the ship. Is that correct?

*Mr Pallín (Interpretation from Spanish):*

Indeed, that is the case. If the owner of a ship does not designate anyone, then the judge should choose a person who has some knowledge of the maintenance of ships.

*Ms Escobar Hernández (Interpretation from Spanish):*

Let us suppose that the owners of the ship, once it has been sealed, now it is detained because it is considered to be an instrument of committing the crime – let us say that this detention is not in accordance with the law, that is to say it goes against some rule of the law applicable in the specific case, could the owners make a written request to the judge for the ship be returned to them?

*Mr Pallín (Interpretation from Spanish):*

Of course. At any time, in the same way that, as we have said before, one can ask to be released, one can ask for the seal to be broken or for the conditions under which the maintenance and conservation of the ship are carried out to be altered.

*Ms Escobar Hernández (Interpretation from Spanish):*

We have already talked about the situation of the ship, what kind of a ship it is, how it was sealed. What could happen to the ship, the *Louisa*, once the criminal proceedings in Spain are concluded? Could you explain that for everyone so that everyone can understand this?

*Mr Pallín (Interpretation from Spanish):*

If the investigation process does not move forward because the judge considers that he has not been able to obtain sufficient evidence to present to the court hearing the case and then seeks to dismiss the case, then the ship must be returned. Of course, the owners can

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reasonably consider that some damage had been caused and that they could ask for the corresponding damages; but if the investigation continues to move forward and a trial is held, if the accused is acquitted then, again, the ship has to be returned again with the same consequences. If the accused is convicted, then the ship becomes the property of the State.

*Ms Escobar Hernández (Interpretation from Spanish):*

Just to get this clear in my mind, because I am not a specialist in Spanish domestic law but in international law, only when there is a conviction, when the competent judge is of the reasoned opinion that there has been an offence, only under these circumstances may the ship not be returned?

*Mr Pallín (Interpretation from Spanish):*

That is the case.

*Ms Escobar Hernández (Interpretation from Spanish):*

At present, there is still no verdict, as you well know and as the Applicant has constantly been telling us over the course of these hearings. On various occasions over the past six years, the judge has asked the legal representatives of both Sage and the proprietor, Mr Foster, above all after they had already become parties in the case, parties in the proceedings – they have been asked to take the necessary measures for the ship's maintenance. The judge has authorized a visit to the ship by the legal representatives in Spain of Sage and of Mr Foster. It has also allowed them to be accompanied by lawyers who are not parties to the case but who were sent by Mr Foster and by private individuals or Mr Cass Weiland, so that they could visit the ship. They could see the ship, witness its current condition, and they were allowed to take photographs which have been displayed openly as evidence here in this Tribunal. They have been asked on more than one occasion to appoint a seaman to look after the ship's maintenance, as I said before. This seems to be customary and it is well known to all of the lawyers who deal with these issues in Spain.

Furthermore, on one occasion there was an entry in the ship without authorization by persons related to Sage and related to Mr Foster in spite of the fact that the ship was under seal and, as I said, they were asked by the judge on various occasions to appoint a seaman to take care of maintaining the ship because it is someone that they trusted, someone in whom could be placed the trust of the owner, and it would be understood that this person would best protect the interests of the owners. However, the interested parties did not respond to the request. The judge of criminal court No. 4 of Cádiz, at the request of the Spanish port authorities, and also after consulting with the parties in the proceedings, gave an order on 27 July 2010 in which he asked all the interested parties, that is to say, the parties involved in the case, those who were suspected of having participated in this process, also the owner of the ship, who is also suspected of having taken part in the offence, to give their views on the different options for maintaining the ship. After this, in the indictment that you know, because it was presented to this Tribunal, it was formally requested in accordance with the Provisional Measures, and after consulting with the authorities, to send a copy which was made available to this Tribunal, in this indictment once again the issue was raised of maintaining the ship, of what was to be done with the ship.

Only at this time, that is to say, only in early 2011, did the legal representatives of the owners of the ship in Spain – at this time it was Mrs García Coronil, who acted as the lawyer, as the formal representative who receives the documents, sends the documents of the persons involved in the case – only then did they say that they were not going to appoint a seaman to look after the ship's maintenance and this was not Sage's responsibility. This response led the judge to appoint a custodian for the ship and that person was to be put in charge of the ship.

M/V “LOUISA”

Taking into account what I just said, Mr Pallín, what is your opinion of the actions of the judge, asking that a seaman be appointed on more than one occasion, asking that a seaman be appointed as the person designated to take care of the ship, and finally that some kind of custodian be appointed to take care of the ship?

*Mr Pallín (Interpretation from Spanish):*

If everything that you have just said is what is reflected in the documents in the case, I consider that the judge has acted correctly, that he has tried to exhaust all of the possibilities that he has at his disposal to conserve the ship, to maintain the ship, and in what you have just told me there was inactivity on the part of the owners of the ship, and finally the legal solution is to appoint a custodian, that is to say, a person who is responsible for the custody and maintenance of the ship. This is simply an administrator, an administrator who is delegated by the judge with the sole function of maintaining the ship.

*Ms Escobar Hernández (Interpretation from Spanish):*

So then, by appointing a custodian for the ship, the judge has not in any way transferred the ownership of the ship? Has the judge granted ownership of the ship to the custodian or does the ship *Louisa* continue to be the property of Sage and Mr Foster?

*Mr Pallín (Interpretation from Spanish):*

In no case can the concept of depositing the ship be considered to change its ownership unless there is some legal sanction. In this case the proceedings are still *sub judice*. It needs to be determined to whom the ship will legitimately belong, whether or not there is a conviction or an acquittal.

*Ms Escobar Hernández (Interpretation from Spanish):*

Could you explain the custodian's role to us?

*Mr Pallín (Interpretation from Spanish):*

Any administrator of a ship, whether it is – any expert would know what the work involved is in maintaining a ship.

*Ms Escobar Hernández (Interpretation from Spanish):*

Can the judge at any time demand that ... what can the judge do?

*Mr Pallín (Interpretation from Spanish):*

The judge in reality, what he can do is change the person who is the administrator of the vessel. If the judge trusts that person, he keeps the vessel under these conditions until the end of the investigation, if there is a case, even because the custodian himself renounces this function because it is difficult or it is a problem for him personally, he can request that the judge take away this duty and the judge can appoint someone else but usually it is the same person from the beginning to the end.

*Ms Escobar Hernández (Interpretation from Spanish):*

So the depositary has the function of taking care of the ship.

*Mr Pallín (Interpretation from Spanish):*

So if this ship, as I just said, is then returned, then obviously the custodian no longer has a job.

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*Le Président :*

Excusez-moi de vous interrompre, Monsieur Martín Pallín, mais voulez-vous attendre un peu jusqu'à ce que la question soit traduite en français ou en anglais ? Merci.

*Mme Escobar Hernández :*

Merci Monsieur le Président. Je sais, mais c'est toujours compliqué de l'indiquer.

*(Continues in Spanish)* To finish off, I would like to ask you some questions about an issue which has been raised insistently by the Applicant with regard to the informing of this Court about the indictment of 2010. As you know, because it is here in our record and it is an issue that has been brought up both by the Applicant and by the Defendant in the different pleadings, the judge informed us when he had issued the order of 27 October 2010, when in my function as agent of Spain I requested information to be able to prepare the case and the legitimate defence of Spain - since without information it would be impossible to exercise the legitimate right to defence of the State - when he was asked for information, the judge said to me that on 27 October 2010 he had sent a request, and Spain referred to the fact that this request insisted on the need to continue this custody through 2010, and we have this in different documents in the proceedings. In public hearings that were held before this Tribunal, if I am not mistaken, Mr President, on 10 December 2010 the President of the Tribunal asked the Spanish delegation if it could provide a copy of the indictment, as it was of interest to the Tribunal to know the contents of the indictment.

I informed the Tribunal at the time that I did not have a copy of the indictment. I knew that it existed but at that time, in the strictest sense, I did not have a copy, so I got in touch with the competent authorities and I asked them about the possibility that they send to the Spanish delegation a copy of the indictment so that the Tribunal could then examine this document of interest. The copy was sent by the judge in charge of the court at that time, it was urgently translated into English, because, naturally, the document was in Spanish, and on 11 December 2010, in my position as the Agent of Spain, I then submitted a copy, you will remember, of this indictment, with a letter indicating that the indictment was placed at the disposal of the Tribunal at the request of the Applicant, and for the sole effect that this document be placed in evidence. I am reminding you of the intention – I am reminding you – this does not have anything directly to do with Mr Martín Pallín's testimony.

The Applicant, Saint Vincent and the Grenadines, has alleged subsequently, and you can see this in various documents and communiqués, that the defendants received no previous notification of this indictment, a circumstance which the Agent of Spain did not know and could not know, given the fact that, as the Agent of Spain, I am not personally involved in the case, I am not a party to the case in Cádiz. So based on this, alleging that the notification was produced before the notification of the document to the interested parties, the Applicant, Saint Vincent and the Grenadines, has repeatedly stated that there has been a violation of Spanish law and has even insinuated, and even said literally, that there has been collusion between the Agent of Spain and the competent Investigating Judge No.4, who issued the indictment, that there has been collusion on their part, and he said that the judge would have issued this indictment following instructions – we have not been told from whom but it is presumed logically it is from Spain's legal counsel before this Tribunal – and that also the judge had predated this indictment.

I say this again: that the judge had predated this indictment, that is to say, that he had issued the indictment when the hearing for provisional measures was carried out, and that afterwards, on 27 October, this was done for the purpose of prejudicing the interests of those who are accused in this indictment in the criminal case in Cádiz, and at the same time to benefit the interests of the defence of Spain in the present proceedings.

M/V "LOUISA"

Since this is, I think, of a considerable importance, because it refers to the idea of good faith and of good practice in proceedings, I must call to the attention of the Tribunal the circumstance, and I would like, with your permission, to ask several questions of the expert.

*The President:*

Yes.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you.

Mr Martín Pallín, could you tell us about the nature of the notification of an indictment? What is an indictment, and why is one notified of an indictment?

*Mr Pallín (Interpretation from Spanish):*

According to Spanish procedural law, the judge, the investigating judge, when he considers that he is further enough along in the investigation and that he has proof – of course, this is evidence that an act has been committed that could be characterized as an offence – and that then the person appears who is the possible author or authors of the crime, he then issues, because that is what the law determines, an indictment. The indictment needs to include all the facts which, according to law, are what he considers to be the evidence, and he has to designate this, he has to indicate this to someone, these need to be indicated, and it is a guarantee that it meets the provisions of the European Convention and the International Covenant on Civil Rights. If someone is accused of a crime, they have the right to know what are the accusations being made against them, and so this indictment is notified to the interested parties, of course to those who are accused, to the prosecutor's office, to the lawyers of the State if they are parties in the case.

*Ms Escobar Hernández (Interpretation from Spanish):*

When is a notification of an indictment made?

*Mr Pallín (Interpretation from Spanish):*

It depends on a lot of factors. If the accused is being detained, notification is immediate. If the accused is free, he needs to be traced, because this person is free and they need to find him and he needs to be notified. If he is outside of Spain, that makes it even more complicated to serve notification. So then there are international mechanisms that need to be put into place for the legal papers to be served, but I stress that this is notification of the content of the indictment, and the accused person needs to know what the facts are, what he is being accused of, in order to establish his defence. He could appeal the indictment or could prepare for the hearings. This indictment, as I explained yesterday, in our system, is attested by the court clerk, and there is a statement that says, "This is sent and ordered by the judge before me, the court clerk, and I attest to this". So the date and content cannot be changed, because to say the contrary would be to accuse someone of a very serious crime, of forgery, and that, in my opinion, has not occurred and it is absolutely impossible for me to imagine that it could occur.

*Ms Escobar Hernández (Interpretation from Spanish):*

Here is a question regarding the time limits. The indictment was delivered on 27 October 2010 and the parties received notification of it between 10 and 13 December 2010. Mr President, I found this out later, when I was asked to be informed about how the notification occurred. On the 10<sup>th</sup> there had already been a notification to the prosecutor's office and they had already begun to send the communication, but those are minor details and I am not going

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to go into whether the communication period began one day before or one day after. So the indictment was delivered on 27 October. The parties were notified between 10 and 13 December. It is true that there is a month and a half between the time that an indictment was delivered and the time when all of the parties were notified, all of the accused were notified. As you explained, Mr Martín Pallín, what elements are in play here when determining how people can be informed or notified more quickly, less quickly?

I am not going to go into that. What I want to ask you about is, you referred to the fact that the notification of the indictment has the purpose of letting the accused person know about the charges against him on the one hand, and on the other hand that the accused can present the appeals that he considers appropriate or opportune. Based on the information that I am going to provide for you now – these are facts, pure facts, and, if I am not mistaken, they are included in the last piece of written evidence presented by Spain – the prosecutor's office and some of the accused have lodged appeals. This was recognized immediately after they received notification, within the time limits established by law, and these appeals are still in progress. There has been a first response to the first appeal and we are still waiting for a ruling on the next appeal.

I would like to point out here, because some of the accused, either because they are not in Spain or have not been in Spain for a very long time, or because, in keeping with an obstructionist tactic that we have seen here in practice, they appointed their lawyers but they have not appointed their new lawyers, and so they are not legally represented and therefore the proceedings cannot continue, but it is true that there has been a first response and we are still waiting for the response to the final appeal on this issue. So as soon as the interested parties were notified, that is to say, the prosecutor's office, how, as the representative of public interest – because we seem to be forgetting here that in Spain, in the criminal proceedings, the prosecutor's office is also one of the parties, and it represents the public interest and the defence of constitutional values, and the defence of due process. So taking into account the fact that the public prosecutor's office lodged an appeal, and that there have been other people who have been accused who have also lodged appeals, could you say that this delay in the notification of the indictment which occurred, did this delay cause any kind of prejudice or damage to the right to defence of the accused?

*Mr Pallín (Interpretation from Spanish):*

No, not at all. From the time that they have had knowledge of this, from that moment on, from that moment on is when we begin calculating the deadline for lodging an appeal, not before, so of course they have been able to formalise anything in the allegations that may have been made in order to impugn the indictment. You can examine them. You have them, and therefore I do not think that in any way that their right to defence has been infringed, nor has there been any lack of defence on their part, nor have they been left defenceless.

*Ms Escobar Hernández (Interpretation from Spanish):*

One last thing about this issue here. In this specific case, in the notification which is late but which has enabled them to exercise their right to defence, has this generated any kind of infringement or violation of the fundamental rights or the human rights of the accused?

*Mr Pallín (Interpretation from Spanish):*

Not at all. I believe, as I just said, the arguments that they consider necessary in order to impugn the indictment, they are available to them. They can make these allegations before a higher court, that is to say, according to our terminology, the Provisional High Court of Cádiz and the Provisional Court of Cádiz would then decide whether to uphold the indictment or, on the contrary, if they consider that it is unfounded and therefore it is dismissed and rendered

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null and void. Moreover, within our system this section of the court that is formed by three judges cannot then take part in the hearings because it would be within the concept of the judge who has been "contaminated", so it would be an abusive appeal and you would not be able to take part in the appeal because that is a guarantee for the accused to see that his case is being shown to a court that has no other involvement in the actions that are going to be tried.

*Ms Escobar Hernández (Interpretation from Spanish):*

I have one last question, Mr President. I am referring here to your extensive professional experience. I am asking you, as a person who was a prosecutor for 20 years, you were a member of the public prosecutor's office for 20 years, you were then a judge for 22 years, as you told us yesterday – and not just any judge; you were a judge of the Supreme Court of the country, the highest level in the country, where all of the criminal appeals wind up, and you were in the second court, which is within the Supreme Court the chamber that is devoted to criminal proceedings. So, given your experience - and you can please remind me here, because this is relevant to the question that I am going to ask you now - do you think that it is possible for a Spanish judge to deliver an indictment on instructions from a body that is not part of the proceedings?

*Mr Pallín (Interpretation from Spanish):*

I think I have already said that it is impossible and, moreover, if somebody of the executive branch or any other State authority were to interfere or request a judge to deliver this or that indictment, that is a crime, and that is included in the criminal code. It is called attacking the independence of a judge. It is a model in which there is maintenance of the independence of the judge and therefore I consider it absolutely impossible that a representative of the executive branch could make a request of a judge and ask him to deliver this or that sentence or indictment.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you very much, Mr Martín Pallín.

*(Poursuit en français)* Merci, Monsieur le Président. J'en ai terminé avec cette partie de l'examen.

*The President:*

Before I ask the Co-Agent of Saint Vincent and the Grenadines whether he wishes to cross-examine, I would like to raise one question. One of our judges would like to ask a question of Mr Martín Pallín. It is about the role of the court clerk, to which you made reference on several occasions. I would like to ask Judge Lucky to ask a short question, to which I hope Mr Martín Pallín will give a short answer.

QUESTION TO MR MARTÍN PALLÍN BY JUDGE LUCKY

[ITLOS/PV.12/C18/10/Rev.1, p. 11–12]

*Judge Lucky:*

Mr Pallín, good morning. It is very good to have a fellow judge from a national court here. The question is very short. Yesterday you said that in this case we have a special circumstance, that the arrest actually takes place before the court clerk, so, in summary, there is already a judicial control or judicial knowledge of the arrest because the court clerk was present. The question simply is this: does the court clerk in these circumstances have the

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powers of a judge, and in the absence of the judge, is the judicial authority of the judge conferred on the court clerk in all circumstances?

*Mr Pallín (Interpretation from Spanish):*

Not exactly. The court clerk has a special mission, which is the form in which the entry and search is carried out. He goes with the judicial commission and he describes the place and the objects found. It is almost like a literary story, a description of the place. I will give an example. It is like a movie: there is the pistol over *here*, bodies over *here*, so that is the specific mission of the court clerk. As to personal arrest, he has no authority. He simply attests to the fact that this has happened, and the judge is the only one who has the authority to agree to whether or not the accused should be kept under detention. He attests to the fact that everything that happened there has actually happened, that he saw it. Now, with the new technologies, sometimes the court clerk even uses recording technology so that the whole scene that has been searched can be seen perfectly, and this kind of recording has the same authority as a document that has been attested to by a notary.

*The President:*

Thank you for your explanation. 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 Co-Agent of Saint Vincent and the Grenadines whether the Applicant wishes to cross-examine the expert.

*Mr S. Cass Weiland:*

Thank you, Mr President. I have some questions.

*The President:*

You have the floor.

MR MARTÍN PALLÍN, CROSS-EXAMINED BY MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/10/Rev.1, p. 12–28]

*Mr S. Cass Weiland:*

I want to ask you first of all a follow up question to your last bit of testimony. In this case did the court clerk make a record of everything that was taken off the ship? You said that that is one of his primary duties.

*Mr Pallín (Interpretation from Spanish):*

The court clerk, according to all procedural law, draws up a succinct certified record of the events. Originally it was written by hand. As I said before, we now have new technologies, and this allows us to reflect otherwise what has actually happened. It is very much up to the court clerk what technology he uses, and obviously it also depends on the technical means available at that time. This written certified record must exist and it will be more or less complete. It is something that our law allows.

*Mr S. Cass Weiland:*

My question, sir, is: have you seen the record?

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*Mr Pallin (Interpretation from Spanish):*  
No, I have not seen the written record.

*Mr S. Cass Weiland:*  
I want to go back and try to separate your testimony from the testimony of the Agent of Spain, but I think that a good place to start is with article 561 of your Criminal Code. May we see that? It is Annex 27 to the Applicant's Memorial. This article was also produced for the Tribunal during the Provisional Measures hearing. Your nation observes the rule of law. Would you agree with me on that simple proposition?

*Mr Pallin (Interpretation from Spanish):*  
Absolutely, of course.

*Mr S. Cass Weiland:*  
Your rule of law includes article 561 and it also includes a recognition by Spain of basic human rights. Would you agree with me on that?

*Mr Pallin (Interpretation from Spanish):*  
Of course.

*Mr S. Cass Weiland:*  
Your law also recognizes the presumption of innocence?

*Mr Pallin (Interpretation from Spanish):*  
In effect.

*Mr S. Cass Weiland:*  
Your law recognizes that justice cannot be denied to citizens and even non-citizens of Spain. Is that correct?

*Mr Pallin (Interpretation from Spanish):*  
More than that.

*Mr S. Cass Weiland:*  
In your law is there a sense of proportionality when it comes to a criminal enforcement? By this I mean, to use an extreme example, that your law would not punish someone with ten years in jail for stealing a loaf of bread. There is a sense of proportionality, that the punishment should fit the crime alleged. Is that the case?

*Mr Pallin (Interpretation from Spanish):*  
I am not sure that I have understood correctly. You talk of stealing a bank or stealing a boat? I did not quite understand. Oh, you meant a loaf of bread. In effect, the principle of proportionality is very much a basic principle of the civil law. We also look to Italian law, with Beccaria, who set out this principle.

*Mr S. Cass Weiland:*  
Now let me focus on article 561 for a moment, because I was somewhat confused by your testimony yesterday. I believe you said that article 561 was in effect on 1 February 2006 and that this is still the law in Spain, at least that this particular provision has not been revoked?

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*Mr Pallin (Interpretation from Spanish):*

Yes, in effect the article is in force and has not been repealed.

*Mr S. Cass Weiland:*

I would like to explore with you for just a couple of minutes this morning the exception or exceptions to the law, because Saint Vincent and the Grenadines has produced an eminent authority from Spain – I think you know him – Javier Moscoso, who has testified in the earlier proceeding that the Spanish judge violated this provision and that that rendered the search illegal. Your testimony seems to be that you can violate 561, that that is okay under some circumstances, and I would like to clarify those circumstances. First, you testified that if it is a cocaine dealer, at least in some instances apparently, 561 does not apply. Is that what you testified to yesterday?

*Mr Pallin (Interpretation from Spanish):*

I think I have not understood your question. Cocaine traffic is not covered by 561? No. What I said was that 561 is not applicable if an offence detected *in flagrante delicto* was involved, or that what was involved was the possible loss of evidence of a crime. That is what I said. I never spoke of the fact that 561 was not applicable to cocaine dealers.

*Mr S. Cass Weiland:*

Why do you say that? Article 561 does not include any language which says, “This article does not apply if the judge or magistrate believes that evidence might be removed from the ship”. It does not say that. Where does this idea come from?

*Mr Pallin (Interpretation from Spanish):*

This idea comes from the general rules that authorizes a judge to adopt all those measures directed at ensuring that the effects, elements, tools or instruments of a crime are not lost. But I want to clarify that in the case of an entry and search there are several exceptions, some deriving from anti-terrorist legislation, which obviously is not the case here, and other exceptions that derive from the existence of entry for humanitarian reasons – for example, when entry to a ship is necessary for humanitarian reasons – or in the case of criminal offences, for example, when entry to a ship is necessary in order to ensure that certain measures adopted in administrative or business procedures are applied. There are many exceptions to this article. I do not want to linger on and explain in detail, as though it were a university lecture, all the variants of and exceptions to this article, but in this specific case we are facing requirements or provisions that are not essential requirements of the procedure.

Our constitution of 1978 obliges us to interpret this article in the light of the constitution of 1978, and our judicial system obliges judges to interpret this article in the light of the European Convention of Human Rights, which, as we all know, contains a provision that all those measures which are necessary in an accredited society are accepted in order to prevent the commission of crimes. What would be the consequence of entering a ship without the authorization of the captain? Obviously the captain is there. If the captain is not there or even outside Spain, or without the authorization of the consulate, if it is available as well, of course, the consequence would be that the judge is authorizing a search and, the court clerk being present, no essential formality of the procedure has been violated. It is a habitual procedure in a democratic society in order to prosecute crimes.

*Mr S. Cass Weiland:*

Is there an exception for ships that fly flags of convenience? As you know, that is the excuse the judge gave. His explanation was that you do not need to consult with Saint Vincent and

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the Grenadines because the ship flies a flag of convenience, and we have a proliferation of flags of convenience. Is that something that is a new exception to article 561?

*Mr Pallín (Interpretation from Spanish):*

Not necessarily. I am not an expert in the law of the sea, but I believe that there is an article in the Convention –I think article 91 – which mentions the fact that there has to be a genuine link between the flag country and the ship itself. There has to be a genuine link, not an artificial link, a sort of uncontrolled connection. I think it is the last paragraph of article 91. I read it yesterday and that is why I seem to remember it. Perhaps a judge considered, as was the case in the case of Prado Bugallo set out yesterday, that really the link, the connection, was not sufficiently genuine and true between the flag country and the ship. Perhaps the judge interpreted it this way. I do not know, but that is a possibility.

*Mr S. Cass Weiland:*

You do not know whether the judge had that in his mind. Is he a student of the law of the sea?

*Mr Pallín (Interpretation from Spanish):*

I really do not know what judges have in mind, Spanish judges generally.

*Mr S. Cass Weiland:*

There was also testimony to the fact that Saint Vincent and the Grenadines does not have a consulate in Spain. Can you tell us whether Spain has a consulate in Saint Vincent and the Grenadines?

*Mr Pallín (Interpretation from Spanish):*

I do not know this. I do not work in a foreign office. I do not know.

*Mr S. Cass Weiland:*

I can tell you that they do not have an embassy there either, but I do not think that would excuse my country from contacting the Spanish Embassy in Trinidad if there was an issue about searching a ship, but that is another question. You are not suggesting to this Tribunal that the absence of a consulate relieves the judge of the necessity to contact the flag country, are you?

*Mr Pallín (Interpretation from Spanish):*

No, I am not suggesting that at all. What I am forming is that if a judge is suspicious or has reasonable doubts that there was evidence and possibly even persons related to the offence on board a ship, he surely could not wait for three months for the ship to wait at the dock in order to obtain authorization. Judges in criminal investigations have to act in line with the nature of the criminal offence that is being investigated; and, of course, as I said before, I do think that he acted correctly. Mr President, if I am allowed an example, if a criminal offence is committed in the form of a fight, a brawl, between sailors, should the judge then wait for months for the authorization to come up if the captain is not present or the consulate is not available? I think the answer is quite sincerely "no".

*Mr S. Cass Weiland:*

Have you considered whether the judge could just post a policeman at the dock and take the time to contact the consulate of Saint Vincent and the Grenadines? That would ensure that nothing was removed from the ship. It is a typical thing in some countries all over the world.

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*Mr Pallín (Interpretation from Spanish):*

All the countries that I know of allow the possibility for police presence to be established around a ship for people and things to be removed from the ship, but it also depends on the circumstances and the characteristics of the place. In this case it was a ship, not a building, and perhaps the evidence can be destroyed through other means. Unfortunately, there is no mathematical rule. The judge has to act in line with the circumstances of the case and the place where things are happening.

*Mr S. Cass Weiland:*

Did you know that the judge had begun investigating the matter in 2005 and that the ship had been tied up in the dock for over a year?

*Mr Pallín (Interpretation from Spanish):*

Yes, I am aware of this.

*Mr S. Cass Weiland:*

Did you know that the tender to the *Louisa*, which is called the *Gemini III*, was completely out of the water and in storage?

*Mr Pallín (Interpretation from Spanish):*

Do you refer to the time that the entry and search was carried out or do you refer to the time you are mentioning?

*Mr S. Cass Weiland:*

The time of the search.

*Mr Pallín (Interpretation from Spanish):*

I think so.

*Mr S. Cass Weiland:*

I want to ask you about the issue of human rights. Are you the former president of the Human Rights Association of Spain?

*Mr Pallín (Interpretation from Spanish):*

Yes, I am.

*Mr S. Cass Weiland:*

You have come here to condone, to express your approval of, the manner in which the persons associated with the *Louisa* were treated by the Spanish judge and by the Spanish federal police?

*Mr Pallín (Interpretation from Spanish):*

I think the question is captious. I am not here to approve anything. I am here to give my opinion.

*Mr S. Cass Weiland:*

You are here to give your opinion, which expresses approval of the manner in which these people were treated. Is that correct?

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*Mr Pallín (Interpretation from Spanish):*

That is a criterion that the judge will have to decide.

*Mr S. Cass Weiland:*

No, sir. I am trying to determine exactly the purpose for which you appear here in terms of the human rights allegations that Saint Vincent and the Grenadines has lodged. You are obviously an important scholar, an authority on human rights. I listened very intently while you were asked questions about the treatment of these people and it was my inference that you were expressing your approval of their treatment, that you do not believe that their human rights were violated. Can you confirm that, or would you indicate that that was not your intention?

*Mr Pallín (Interpretation from Spanish):*

If you were more specific, in what cases, in which circumstances, which persons were involved and at what time, I could reply, but you are asking such a generalized question of approval that I am not here to approve anything but to give my opinion on things.

*Mr S. Cass Weiland:*

We will take it up after the break in more detail, if that is all right, Mr President, but I just have one final question so that we can consider this during the break. I believe that you answered some questions in general terms about this issue, but I want to know whether you have read the transcripts that are produced every day. Have you read the transcripts of the testimony of Ms Avella and Mr Avella?

*Mr Pallín (Interpretation from Spanish):*

No, not fully. I have not read them fully.

*Mr S. Cass Weiland:*

Perhaps you could take a look at those during the break. I have no more questions at this time until we come back.

*The President:*

Thank you, Mr Weiland.

We have reached 11.30. The Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at noon.

*(Break)*

*The President:*

Mr Weiland, you may continue with the examination of the expert. You have the floor.

*Mr S. Cass Weiland:*

Thank you, Mr President.

Judge, I had started to talk a little bit about human rights before we broke and I would like to go back to article 561 for one moment, if you will. We have had some documents presented to the Tribunal relating to an important case in Spain. The treasure-hunter *Odyssey Explorer* with \$500 million worth of treasure was forced ashore in Algeciras. Various things happened after that. The captain was charged. Are you familiar with the matter in general?

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*Mr Pallin (Interpretation from Spanish):*

I think I am familiar with general aspects of that case.

*Mr S. Cass Weiland:*

The decision of the judge in that case was that the authorities had failed to obtain the permission of the captain and they had failed to notify the flag State, which was the Bahamas, and therefore they found that the captain of the ship could not be convicted of grave disobedience for refusing to allow entry. The court cited 561 as good law. By the way the case also indicated that the Bahamas has no consulate in Spain. That did not seem to matter to the judge. So my question to you, before we go on to other things is: should the Tribunal rely on the language of 561, on the testimony of Javier Moscoso, and on the decision in the *Odyssey* case in order to determine what the law is; or should they rely on this opinion from the European Human Rights Tribunal in Strasbourg that you talked about yesterday? Which should they do?

*Mr Pallin (Interpretation from Spanish):*

As is well known, under the continental system – the continental system is not based on precedent, contrary to the Anglo-Saxon system or the common-law system. Under the continental system law must be interpreted by the judge on a case-by-case basis. I am familiar with – and I know this because I have been a member of the Supreme Court – that what is ideal is to unify, have a uniform interpretation of the law, but reality has much more in the way of nuance. In the *Odyssey* case I believe that the question – I did not understand it fully in all of its true meaning – I think the question refers to whether the captain committed or not the offence of disobedience. Indeed, I think he did not commit the offence of disobedience but I do not really know. If you would be so kind as to be more specific regarding the relationship between the *Odyssey* and the *Louisa*, could you clarify that so I can answer you more precisely.

*Mr S. Cass Weiland:*

We referred to the *Odyssey* decision because it is recent, because it involves a ship which was allegedly involved in taking Spanish patrimony and because Saint Vincent and the Grenadines has contended that the Spanish authorities violated Spanish law and international law by boarding the ship and seizing the ship in the manner in which they did. So if you compare the situation with the *Odyssey* you see that the judge, in a very important case, agreed that the Spanish authorities must obtain the approval of the flag State before boarding a vessel if the captain is either unavailable or unwilling to allow it. So in the context of this case we consider that relevant. Would you not?

*Mr Pallin (Interpretation from Spanish):*

Again, it is not exactly the same situation. In the case of the ship the *Louisa*, it was docked; it is not a ship that was navigating in territorial waters. Secondly, article 561 was involved, I believe, if I remember correctly, for the purpose – I repeat – to rule that the captain was not guilty of the offence of disobedience. As far as these references – well, I am aware of them because of reading them in the newspapers – I believe that the US courts intervened in everything regarding the activities, the occupation, the ownership, the title-holders, regarding – as far as Spain and the treasure on board the ship was concerned. But I still cannot – I fail to see the relationship here. If you are referring – do not think I am trying to avoid your question. If you are referring to application of article 561, indeed under criminal procedural law, not the criminal code but the criminal procedures law, really the circumstances, in my opinion, are different.

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*Mr S. Cass Weiland:*

Okay. Well, we will let the Tribunal consider how different they might be. Let us turn our attention to human rights. I had asked if you would be so kind as to take a look at the transcripts of some witnesses during the break and I realize that it was a very short break and that was probably not particularly possible, but before we start I will ask you if you have read the transcripts of the Avellas now.

*Mr Pallín (Interpretation from Spanish):*

No, no I have not read them.

*Mr S. Cass Weiland:*

So let me help you with the facts, and if I mistake any fact I apologize. I am sure the Tribunal will recall the facts better than I, but I am going to summarize some facts for you and ask you your opinion as an expert in human rights as to whether the actions of the authorities were appropriate – not from a legal sense, because you have already testified it was acceptable to put Ms Avella in jail and Mr Avella in jail. I believe you indicated that it was acceptable to take passports, et cetera. Now I want to ask you from the human rights perspective what you think of this.

This young woman, Alba Avella, appeared and testified that she was 21 years old in February 2006. She arrived in Spain approximately three days earlier and the Spanish picked her up off the street where she had been studying Spanish and took her back to the vessel. When she arrived at the vessel it was being searched, so her freedom was limited at the time the authorities picked her up off the street. I think any jurisdiction would agree with that. She was effectively under arrest by that time. She was told to stay on the ship the entire day, after which eventually she was formally put under arrest, handcuffed, put in the back of a police car. There were no female officers. We have yet to hear whether Guardia Civil even has any female officers. She was driven to a jail in Cádiz. She was not instructed as to what the charges were. There were no charges. There was no order from the court relating to her whatsoever. She was put in a jail cell by herself, with a camera watching her. She was given no chair, no cot, no blanket. She spent the night on the concrete with her coat. There were no female officers. If she had to relieve herself there was a nice camera watching. I ask you, as an expert in human rights, do you think at that point in time, on February 1, in the evening when she was trying to fall asleep – say at ten o'clock at night – do you think at that point in time her human rights had been violated by the Spanish authorities?

*Mr Pallín (Interpretation from Spanish):*

I would ask you once again to please not make abstract references to human rights. I think the question that you want to ask me is whether or not her right to physical integrity, moral integrity, to personal dignity, to the right to not receive cruel, inhuman or degrading punishment – if these were infringed on, because these are human rights that are used a lot in the dialectics of confrontation, political confrontation. They are quite volatile and I would like to focus on specific rights. Trying to follow your very long story here, first of all why did she have to be on the ship? It was a guarantee for her because thus she was ensured that the legal commission was not going to alter anything on the ship or create false evidence against her; so that was for her own sake, her own guarantee. Then she was taken off in handcuffs. Well, in my personal opinion handcuffs should be used as little as possible, but not only in Spain, in any country of the world. I am not in favour of handcuffing people violently. That she was taken off in a police van? Well, I think that is the usual way of taking persons to detention centres. That there were no female Guardia Civil officers, I can assure you that

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there are very many. I do not know what the percentage is but there are many female officers of the Guardia Civil in Spain.

As to having cameras inside what we call the cell or the detention centre, well, this is a demand – excuse me this is a recommendation from the Council of Europe to avoid people being mistreated, and that is why cameras are kept in cells as long as they respect their privacy and that these are not recordings that infringe on their privacy. It is another guarantee. Unfortunately, I think that in Spain there are many detention centres that do not have cameras. I do not know if the one in Cádiz has cameras or not. As to the right to be informed of the charges against her, well at this time the police were going through the ritual that you in the United States have exported through your films: “You have the right to remain silent; you have the right to not say anything that could be used against you; you have the right to a lawyer; anything you say may be used against you” – all that sort of thing that we have all accepted because we consider that to be a guarantee. As to the detention unquestionably producing a situation of nervousness and so on – well, of course, I agree fully with you. If that is as far as your question goes, well, I think if I have left something unanswered go ahead and ask me, but I think that is as far as I go.

*Mr S. Cass Weiland:*

You mention there are various aspects of the general term “human rights”. You are much more aware of those sub-categories than I with your background, but my question really is for you to express an opinion which would encompass all the various sub-categories such as cruel punishment, physical integrity, invasion of privacy. Do you believe up to that point of time, on the night of February 1, any of those rights had been violated, based on the story I have told you?

*Mr Pallín (Interpretation from Spanish):*

To answer as to physical integrity from what you have just told me, no, I do not think so. Regarding her right to privacy – well, I really cannot give you a specific answer. I would have to see the circumstances under which all of this occurred, but in any case this lady had the opportunity to put any allegations in writing before a Spanish judge. If she is not convinced by the decision of the Spanish judge she can appeal to the hierarchical superior, the Spanish judge. She can make allegations during the hearing, a public hearing, where any Spanish citizen can be present and watching the trial. Even if someone – if there is enough interest it can be put on television. She has the right to allege this before the Supreme Court, and she can even have a case of nullification if the evidence against her can show this. She could ask for redress. I think the system even enables her to get as far as Strasbourg where she can make these allegations, and I think there are many decisions here in Strasbourg to this effect, and it could affect any country.

*Mr S. Cass Weiland:*

Sir, we are on television and we are not going to Strasbourg. We are not going to pass the buck, as they say in the United States, to another court for some other group to decide about this woman’s rights. I am asking you whether you believe, whether you are willing to condone what happened to her, just as of the night of February 1 in terms of violation of her civil rights, because I have a lot more things that happened to her after February 1 that we have not even got to yet. My question is: would you approve of the actions of the authorities as they related to Ms Avella as of ten o’clock at night on 1 February 2006?

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*Mr Pallín (Interpretation from Spanish):*

I think I have already answered your question, but if you insist on asking me again I can only tell you that I would have to have been there to see what happened. I would need to see what conditions were in the police van and how she was brought. I have already told you what I think about handcuffs. It is not that I approve or disapprove; I just do not think it is a method that should be generalized as you see on television around the world. Regarding the conditions under which she was detained, I do not know. I do not know what the conditions of the cell were. Specifically the Human Rights Association – we visit detention centres in order to make sure that they have adequate conditions. Now, if according to your version – if your version does in fact precisely and exactly reflect reality, then I think that the conditions of detention could have been better. They could have been improved.

*Mr S. Cass Weiland:*

Let us talk about what happened to her the next day. The evidence here, which is uncontroverted evidence so far – my description of the jail cell was uncontroverted by the Spanish delegation. Her description of the jail cell was uncontroverted. Let us talk about the next day. She wakes up in the morning on the concrete floor with her coat. She realizes that her menstrual period is beginning. She is in extreme misery. She has not been allowed to call her parents. She is loaded up in the police car and taken back to the ship. She is now becoming extremely agitated and worried. There is still no female police officer. At the end of the day she is taken back to the same jail cell. She is not charged with any crime. Do you think her human rights are being violated at that point?

*Mr Pallín (Interpretation from Spanish):*

You are referring to a personal situation, a very specific personal situation. Again, what are the human rights of a detained person? According to the international text, international protocols and international law the right not to be physically or psychologically mistreated – if she suffered psychologically that is an issue which could be reported and the courts could assess whether, pursuant to international standards, this could be considered mistreatment because of psychological intimidation. Spanish law has the offence of torture, that is to say receiving cruel, inhuman and degrading treatment. Any Spanish citizen, any foreign citizen, can report this to the Spanish courts. I think this is very clear. I would imagine that Ms Avella has had lawyers and has had opportunities to present these kinds of reports or allegations.

*Mr S. Cass Weiland:*

Let me suggest to you, Ms Avella at the time of this incident was 21 years old and she was a yoga instructor in Denver, Colorado. It is quite difficult to retain a lawyer in Spain with her money. You mentioned psychological issues. Let me add another feature of what happened to her as she was taken back to jail on the second night, because now she knew what was ahead. Her testimony is – and we have heard nothing from the Civil Guard or the judge or anyone. We heard her testimony, which is uncontroverted, that she became hysterical knowing what was ahead and the police took her to the hospital and the judge sedated her. At that point do you think her human rights had been violated by the Spanish authorities?

*Mr Pallín (Interpretation from Spanish):*

Regarding the lawyer, I remind you that the Spanish system has free State lawyers – those are public defenders who are available to persons who want to report these kinds of events. Now, as to defending illegality, the ombudsman for illegality can do so. Perhaps you are not fully aware of this but there is the Institute of the Ombudsman, the Defensor del Pueblo. She could

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have made a report to the police about it. So you are asking me about the attitude of the judge and the Guardia Civil? I do not know if I have really understood your question very well.

*Mr S. Cass Weiland:*

I was describing her personal circumstances and now you are telling me about ombudsmen. Sir, at this point in her experience with the authorities they had not even told her the charge, much less “you can call an ombudsman if you feel like we are mistreating you”. Would you approve that from a standpoint of human rights as the way the woman was treated over these first two days? Would you think it was appropriate?

*Mr Pallin (Interpretation from Spanish):*

Sir, as far as the interpreter has translated for me, if she was treated this way for two years – excuse me, two days. Yes, I will repeat once again that once she was out she could talk to her family; she could talk to lawyers. I do not know if she talked to you, if she had the opportunity to talk to you. Any person in any system knows what are the mechanisms that they have to report these kinds of treatment, and therefore she had the opportunity to do so. I repeat. We have always maintained, from my position as President of the Human Rights Association and of course in my position as a prosecutor and as a judge that the conditions under which people are detained need to respect the rights of any detained person. That is included in all of the universal jurisprudence, and any deviation from this – well, of course, I do not approve.

*Mr S. Cass Weiland:*

Do you have any daughters?

*Mr Pallin (Interpretation from Spanish):*

Mr President, I have two marvellous granddaughters, but I only have two sons.

*Mr S. Cass Weiland:*

I have a daughter who is 20 years old, and I do not think she would know if she was treated this way to call the Ombudsman, especially if she was not allowed a phone call. So let me ask you about another aspect of Ms Avella’s treatment. I heard you say two days of this treatment is probably OK. I think that is what you said. How many days of similar treatment have to elapse before, in your opinion, it would be a violation of her rights and it would just be inappropriate under Spanish law and under human rights law? How many days? Two days is OK, but after that, three days, four days?

*Mr Pallin (Interpretation from Spanish):*

I do not know, Mr Attorney, if there is a problem with the interpretation. Are you insinuating that I measure the violation of human rights in days, in minutes, in hours? I think that is an affirmation that I would not make, that I have not made, and that I would not admit be made before any court of justice. Human rights are not measured in hours or even in minutes. If they are violated, you could torture someone in five minutes. So I really do not understand the question. That is badly done and there is no duration that is admissible.

*Mr S. Cass Weiland:*

I apologize profusely. I agree completely that violation of human rights cannot be measured in hours or days. I thought you said – and again, I apologize, because I must have misunderstood – that the situation that Ms Avella faced after the first two days was somehow understandable and acceptable. Was I mistaken?

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*Mr Pallin (Interpretation from Spanish):*  
You are deeply mistaken.

*Mr S. Cass Weiland:*  
So the situation she faced after two days was not acceptable, in your opinion as an expert in this area?

*Mr Pallin (Interpretation from Spanish):*  
What are you referring to when you say "acceptable"?

*Mr S. Cass Weiland:*  
In terms of her rights, in terms of her human rights.

*Mr Pallin (Interpretation from Spanish):*  
I repeat again, to which rights are you referring?

*Mr S. Cass Weiland:*  
I thought I had made that clear: all categories of human rights, cruel punishment, physical integrity, right to privacy, communication with the outside world, anything that you would like to include in the category would be OK with me.

*Mr Pallin (Interpretation from Spanish):*  
I have said before and I will repeat again, physical integrity and what you have said, if we understand physical integrity to be being beaten or any other sign of physical violence, you have not described anything that I have heard of that nature. We already know what the conditions are of any person who is detained in a detention centre, psychologically speaking. No-one is calm. I think Kafka defined it better than anyone in *The Trial*, when he said no-one can be calm under these circumstances, and everything you are talking about later about personal conditions of Ms Avella are unfortunate and I have responded with what I thought was appropriate.

*Mr S. Cass Weiland:*  
I will advise you that Ms Avella spent several more days in jail, without charge, and then when she was released her passport was taken. You testified earlier today that taking one's passport was acceptable practice in Spain – correct?

*Mr Pallin (Interpretation from Spanish):*  
In Spain and in many other countries.

*Mr S. Cass Weiland:*  
I believe you also testified that the investigation was ongoing and that that legitimized the judge's decision. Do you recall that testimony?

*Mr Pallin (Interpretation from Spanish):*  
Excuse me. I need the translation. I cannot hear the interpreters. Can the question be repeated?

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*Mr S. Cass Weiland:*

Yes. I was thinking that you testified earlier today that it was your understanding that the investigation by the judge in court No. 4 was ongoing and that that made it acceptable to take Ms Avella's passport away. Is that correct?

*Mr Pallín (Interpretation from Spanish):*

As an element to avoid that evidence could be destroyed or to place obstacles in the way of an investigation, yes, but I think the measure of retaining the passport was not eternal. It was returned, as happens in most cases. The passport is retained during the time that the judge considers, rightly or wrongly, according to the different opinions, necessary, but I do not think the passport was confiscated. It was returned. Am I right?

*Mr S. Cass Weiland:*

Yes, it was. Do you know when it was returned, how many days, weeks or months later?

*Mr Pallín (Interpretation from Spanish):*

No, I do not know exactly but what makes me feel better about this is that it was returned.

*Mr S. Cass Weiland:*

I will represent to you that it was returned about eight or nine months later and that the court provided no mechanism for her to live in Spain. Is that appropriate, in your mind, as an expert in human rights?

*Mr Pallín (Interpretation from Spanish):*

You are asking me whether the Spanish, French, Italian, German, Belgian court has the responsibility to offer a *modus vivendi* to all detained persons. Is that your question?

*Mr S. Cass Weiland:*

I am asking you to look at the overall situation here. Her passport indicated that at the time of her detention she had been in the country for three days. I am assuming that all of your Guardia Civil are intelligent and excellent readers. Is it reasonable to detain a young woman who has been in the country for three days studying Spanish for nine months in the country? How could that be reasonable, under any scenario that you can think of?

*Mr Pallín (Interpretation from Spanish):*

The Guardia Civil officers do not detain anyone for nine months. It is the judge who does so. It was the judge who considered that this was reasonable, and undoubtedly that could be considered excessive, and one would have to evaluate that on a case-by-case basis.

*Mr S. Cass Weiland:*

What would you look to to evaluate the reasonableness of that detention ordered by the judge? What would you look to, as a human rights expert, to determine the reasonableness of the judge's order?

*Mr Pallín (Interpretation from Spanish):*

According to the circumstances of the case, pre-trial custody, as its very name indicates, is conditional, it is a cautionary measure within our system, and it is the concept of *favor libertatis*, which means that we need to be in favour of freedom, of having someone enjoy their freedom while they are waiting for their trial. The exception is prison. Those are the

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norms that we have set forth and pursuant to the jurisprudence and case law of the Supreme Court and the Constitutional Court, these are carried out.

What is a reasonable time? Since you are asking me such a generic question, I would say perhaps a serial killer or a mass murderer, like the one from that Norwegian island last year, I think it is best for them to be in prison until the trial is over and then to serve their sentence but if you are asking me such an abstract question, I would have to say that I cannot give you an example. There is a reasonable period of time according to the specific case where this measure is being applied, and it can be argued instead of eight months it should have been five months or four or three. If you want, we can enter into a debate of this kind, and I could recognize that this could in fact be debated. It is debatable.

*The President:*

I am sorry to interrupt you, Mr Weiland. The Registry has calculated the time you have spent so far and according to that calculation, the time allocated to your cross-examination will be exhausted by 12.53, so you still have around 15 minutes. I wanted you to know that in advance.

*Mr S. Cass Weiland:*

Thank you very much, Mr President. I was aware that I had some time constraints here, and I have a lot of things to cover, so I will certainly move on. Thank you very much for reminding me of that.

We heard some speeches this morning from the lawyer for Spain. I just want to ask you about your knowledge of these things. She represented many things, such as that there was an order from July of 2010 that gave the ship owner some alternatives of what to do with the ship. Do you recall her mentioning that?

*Mr Pallin (Interpretation from Spanish):*

Yes, I do recall it.

*Mr S. Cass Weiland:*

Do you know that there was also an order that John Foster – by the way, did you know that order that I just mentioned from July was also not notified to the parties, similarly to the order of October of 2010? Were you aware of that?

*Mr Pallin (Interpretation from Spanish):*

Which order are you referring to? To the order ordering the ship to be seized?

*Mr S. Cass Weiland:*

No, sir. There was an order that you testified about extensively this morning, the indictment from October.

*Mr Pallin (Interpretation from Spanish):*

Yes.

*Mr S. Cass Weiland:*

Now I am asking you about an earlier order of July 2010. Did you know that order was also not notified to the parties?

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*Mr Pallín (Interpretation from Spanish):*

I did not know, but it is going to be reflected in the written record of the proceedings if they were notified or not, and in any case, the reason why this order was not notified is going to appear in the written record of the proceedings and it is going to be found there.

*Mr S. Cass Weiland:*

It was notified about six months later. I am sorry to move quickly but I really must. Are your judges in Spain supposed to be knowledgeable about international treaties?

*Mr Pallín (Interpretation from Spanish):*

Of course.

*Mr S. Cass Weiland:*

Did you know that the Judge de Diego in Cádiz twice – twice – ordered the beneficial owner of the *Louisa* to travel from Texas to Cádiz to give a statement in this case, in violation of the Treaty of Mutual Assistance between the United States and Spain?

*Mr Pallín (Interpretation from Spanish):*

The judge can demand, order any person abroad to appear in Spain to be questioned, and this person can also do that voluntarily; nothing stops a person from taking a plane, appearing before a court and making a statement. However, you are right, there are treaties, bilateral treaties, of judicial assistance with the United States in particular, which do make it possible, via voluntary commissions or any other instrument of international judicial assistance, to obtain statements in the place of origin, where the person is. I understand there were difficulties there, and after a certain period of time that questioning did take place by video conference. Please correct me if I am wrong. So that proves that the system did work, the video conference did take place, but perhaps in any other system there would be no problem in appearing before a court voluntarily, before a national court, whether Spanish, French or Belgian, in order to give a statement, but no rights were violated because in fact, at the end of the day the video conference was held and the treaty was respected.

*Mr S. Cass Weiland:*

I am going to ask you, sir, to please refrain from giving a speech with your answer. We need short answers at this point. I would much appreciate that. Yes, a video conference occurred, and that is because Mr John Foster had been urging the court to allow that for several years. Are you aware of that?

*Mr Pallín (Interpretation from Spanish):*

Yes. Let me repeat it. The video conference did take place. The reason why it was delayed must be reflected in the written record of the proceedings.

*Mr S. Cass Weiland:*

Yes, because the judge in Cádiz continually issued orders requiring his physical presence in Spain, in violation of the treaty, and two times the courts of appeal had to reverse the judge in Cádiz. You are aware of that, are you not?

*Mr Pallín (Interpretation from Spanish):*

I repeat yet again, the judge is absolutely entitled to demand the presence of a person before him. If a treaty is in place, obviously, he is obliged to use it, so that if at the end he does use

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it, the ultimate consequence, what is really important for the case – I know there is a debate around it – is that the treaty was scrupulously respected.

*Mr S. Cass Weiland:*

Counsel for Spain alleged, much to our amazement, that the representatives of Sage had made some illegal or unauthorized entry on the *Louisa*. Do you know what the counsel was referring to?

*Mr Pallín (Interpretation from Spanish):*

I do not know exactly. Normally in this case authorization is asked from the judge and the judge usually gives leave to withdraw, to recover personal effects, but I am not quite sure what happened here.

*Mr S. Cass Weiland:*

Are you familiar with article 151 of the law of criminal procedure in Spain?

*Mr Pallín (Interpretation from Spanish):*

Yes.

*Mr S. Cass Weiland:*

Does that require these court orders to be notified to the parties within three days?

*Mr Pallín (Interpretation from Spanish):*

Yes, notification to the parties is obviously compulsory, because the party must know what decision is going to be taken against that party. Obviously, the notifying period, as I have explained, depends on many circumstances, and on some occasions – I have no reservations in recognizing this – it can happen due to the not too correct functioning of the office of the judge, but obviously notices were served scrupulously.

*Mr S. Cass Weiland:*

You justify that there was no prejudice to the parties because the investigation, whatever it was, would go on for a long time – correct?

*Mr Pallín (Interpretation from Spanish):*

Not exactly. I am not quite sure whether the translation has been correct but obviously there is damage for the parties if the procedure goes on, drags on, and our constitution establishes quite clearly that everybody is entitled to a procedure without undue delay, and also the European Convention confirms this. If you forgive the information, at the Supreme Court we have considered that an undue delay in a case where somebody is found guilty does confer on the person found guilty a special treatment, i.e. that the penalty can be reduced because the procedure has been delayed unduly.

*Mr S. Cass Weiland:*

One last question really: prejudice to the parties by this late notification can be dealt with in certain ways. I think I understand that, but I represent to you that when we were last here in December 2010 the lawyer from Madrid for Sage was present in the courtroom. He was astounded ---

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*Mr Pallin (Interpretation from Spanish):*

I am sorry. I was not here in 2010. The interpreter said that I was here in 2010 and I was not here in 2010. Is that correct?

*Mr S. Cass Weiland:*

The lawyer for Sage was present. Some of the judges [of the Tribunal] were not even present however. He was astounded that the lawyer for Spain would produce two orders that had not been notified to the parties. You have said that was not particularly prejudicial. Do you think it was prejudicial to Saint Vincent and the Grenadines to have non-public orders brought into court that had been supposedly issued by this judge weeks, if not months before?

*Mr Pallin (Interpretation from Spanish):*

I do not quite understand the scope of the question. The facts are the facts, and this decree of 27 October 2010 is still valid on 27 October 2011 or 27 October 2012. It is a decree which, by virtue of a principle which we have in all democratic systems, which is called cooperation between the arms of government, and the fact that a decree which already has been adopted in the procedure and that is not prejudicial to any party unless, I repeat again, it is gravely prejudicial to the right to defence, but I must say our present procedural system, some very recent decisions, of the last 24 hours or 48 hours, available to any Spanish citizen on the Internet, say this.

*Mr S. Cass Weiland:*

Did you know that that order you referred to in October 2010 is dated one day after the diplomats from Saint Vincent and the Grenadines sent a formal notice to Spain of its dissatisfaction with the state of the Louisa and its intention to file this case? Did you know that? That is my question. I am not asking you to read the order.

*Mr Pallin (Interpretation from Spanish):*

If you are hinting that a Spanish judge took an unfair decision, that is a very strong accusation and, again, you are saying that on 6 October 2010 the authorities of Saint Vincent and the Grenadines addressed the Spanish authorities. I think to say these things before an international court of law is very risky, and I strongly reject the possibility of a Spanish judge, as you are hinting, may have altered the proceedings or may have altered a resolution in view of this.

*Mr S. Cass Weiland:*

One last question. The Spanish judge we have heard so much about, the author of that document from October, has he been removed in Cádiz or has he been promoted?

*Mr Pallin (Interpretation from Spanish):*

I understand it is very difficult for somebody from a North American legal system to understand our system of promotion of judges but, Mr President, if I am allowed a minute, I could explain it, because the question asks for this. Spanish judges join the service by a public examination at judicial school. They then request a post in any part of Spain which is available, and after that they are promoted according to a system, and they can move from one court to the other, and can be promoted not just because of seniority but also for family reasons, for example, because their boyfriend or girlfriend happens to live otherwise, and they may want to go and live where his or her boyfriend or girlfriend lives. This mobility of judges is reflected in the statutes of judges and they are entitled to move from one court to another.

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*Mr S. Cass Weiland:*

Thank you.

*The President:*

Thank you very much, Mr Weiland, for having kept to the time.

*(Poursuit en français)* Les experts qui ont été contre-interrogés par la partie adverse peuvent être à nouveau interrogés par la partie qui les a appelés. C'est pourquoi je demande à l'agent de l'Espagne si elle souhaite procéder à un nouvel interrogatoire, peut-être cet après-midi.

*Mme Escobar Hernández :*

Oui, Monsieur le Président. Si vous en êtes d'accord, je ferai encore un nouvel interrogatoire tout à fait court, juste au début de la séance de l'après-midi.

*The President:*

Thank you very much.

So we have arrived at almost one o'clock, so we will resume our hearing at three o'clock. The sitting is closed now.

*(Luncheon adjournment)*

10 October 2012, p.m.

**PUBLIC SITTING HELD ON 10 OCTOBER 2012, 3.00 P.M.**

**Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 8 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 10 OCTOBRE 2012, 15 HEURES**

**Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 8 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

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

*(Poursuit en français)* Maintenant, nous allons continuer l'audition de l'expert, M. Martín Pallín. Monsieur, je vous rappelle que vous continuez d'être lié par la déclaration que vous avez faite hier.

Je donne maintenant la parole à Mme Escobar Hernández. Je rappelle aussi que le nouvel examen ne doit pas servir à soulever de nouveaux points, c'est-à-dire des points qui n'ont pas été soulevés lors de la première audition ou de l'audition contradictoire. Madame Escobar Hernández, vous avez la parole.

*Mme Escobar Hernández :*

Merci Monsieur le Président. Je tiendrai compte de ce que vous venez de dire et je vous assure que je terminerai rapidement cette partie de la séance.

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**Examination of Experts (continued)**

MR MARTÍN PALLÍN, RE-EXAMINED BY MS ESCOBAR HERNÁNDEZ  
AGENT OF SPAIN  
[ITLOS/PV.12/C18/11/Rev.1, p. 1–3; TIDM/PV.12/A18/11/Rev.1, p. 1–3]

*Ms Escobar Hernández (Interpretation from Spanish):*

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

*Mr Pallín (Interpretation from Spanish):*

Yes, that is correct.

*Ms Escobar Hernández (Interpretation from Spanish):*

In any case, I would like, if you will allow me, Mr President ...

*(Poursuit en français)* Monsieur le Président, j'aimerais demander des éclaircissements.

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

*Mr Pallín (Interpretation from Spanish):*

Yes, that is true. The court clerk has no authority to order someone to be arrested. What he or she can do is to attest to the date and time at which a person is brought before the judge and attest to the fact that they are present. Court clerks also have the authority to authenticate, to attest to the literal transcriptions of telephone conversations. The court clerk listens to these recordings and says that the transcriptions are in fact true. They attest to that like – pardon my saying so – a notary, and in the last few years the Spanish procedural system requires all public hearings to be recorded on audio and video, so the court clerk watches these videos and attests to the fact that this audio and video does in fact correspond to the hearing with which it is labelled.

*Ms Escobar Hernández (Interpretation from Spanish):*

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

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*Mr Pallín (Interpretation from Spanish):*

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

*Ms Escobar Hernández (Interpretation from Spanish):*

But can the judge rule that under certain circumstances he needs to have the accused physically present in order to guarantee the immediacy of the interrogation? Is that reasonable?

*Mr Pallín (Interpretation from Spanish):*

What would be reasonable is that the judge would need to justify and give a reasoned motivation for why this person needs to be physically present and why a video conference is not sufficient. There needs to be a judicial decision on this, giving very good reasons to justify this.

*Ms Escobar Hernández (Interpretation from Spanish):*

Thank you very much, Mr Martín Pallín.

*(Poursuit en français)* Merci, Monsieur le Président, je n'ai pas d'autres questions et, comme vous le savez, l'Espagne n'a pas d'autres experts ou témoins à appeler dans le cadre de l'audience. Je vous remercie.

*The President:*

Thank you, Ms Escobar Hernández.

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

*(Poursuit en français)* Maintenant, je redonne la parole à Mme Escobar Hernández.

*Mme Escobar Hernández :*

Merci Monsieur le Président.

Comme je vous l'avais annoncé lundi, mon collègue, le P<sup>r</sup> Jiménez Piernas va présenter devant vous la position de l'Espagne à l'égard du droit applicable du point de vue matériel.

Je vous prie, Monsieur le Président, de bien vouloir appeler mon collègue.

*Le Président :*

Merci Madame.

Maintenant, Monsieur Jiménez Piernas a la parole.

NAVIRE « LOUISA »

**Plaidoirie de l'Espagne (suite)**

EXPOSÉ DE M. JIMÉNEZ PIERNAS  
 CONSEIL DE L'ESPAGNE  
 [TIDM/PV.12/A18/11/Rev.1, p. 3–12]

*M. Jiménez Piernas :*

Monsieur le Président, Madame et Messieurs les Juges, veuillez me permettre de commencer mon exposé en exprimant l'honneur que je ressens de m'adresser pour la première fois au Tribunal international du droit de la mer, et ce, pour défendre les intérêts légitimes du Royaume d'Espagne.

Mes collègues, les P<sup>F</sup> Escobar Hernández et Aznar Gómez, ont examiné les faits pertinents de cette affaire, les questions de juridiction et la protection diplomatique. Madame Escobar, agent du Royaume d'Espagne, m'a confié la tâche de me référer aux règles du droit de la mer applicables aux faits exposés, suivant le Statut et le Règlement du Tribunal.

Il convient de rappeler que cette affaire a été portée devant le Tribunal en vertu de la Convention du droit de la mer de 1982 (ci-après « la Convention »). Selon l'article 293, paragraphe 1, de ladite Convention et l'article 23 du Statut du Tribunal, le droit applicable correspond donc aux « dispositions de la Convention et [aux] autres règles du droit international qui ne sont pas incompatibles avec celle-ci ».

Ce Tribunal a déjà pris connaissance de la position de l'Espagne durant la procédure écrite : aucune des dispositions conventionnelles invoquées par le demandeur ne saurait s'appliquer aux faits de la cause, de sorte que le Tribunal n'a pas compétence *ratione materiae*. L'immobilisation du « Louisa » fut la conséquence d'une procédure pénale engagée en Espagne à raison d'infractions présumées commises sur notre territoire, dans nos eaux intérieures et dans notre mer territoriale. Cette procédure pénale interne et tout ce qu'elle entraîne répondent au simple exercice de la souveraineté du Royaume d'Espagne, dans le respect des normes internes et du droit international. En aucun cas, l'Espagne n'a manqué de respecter scrupuleusement la Convention.

Cela dit, l'Espagne considère que le Tribunal n'a pas compétence *ratione materiae* pour connaître de cette affaire. Ensuite, nous désirons attirer votre attention sur les allégations infondées et confuses du demandeur.

Pour ce faire, nous devons établir une distinction claire entre la phase écrite et la phase orale de cette affaire.

Pourquoi ? Parce que le demandeur emploie une vieille argutie procédurale, que nous pouvons qualifier de « tactique/stratégie de la "nouvelle affaire" ». Cela consiste à modifier substantiellement les arguments apportés pendant la phase écrite pour les remplacer par de nouveaux raisonnements absolument étrangers à ceux utilisés auparavant. Le demandeur reformule ainsi l'affaire en d'autres termes dans l'intention d'obtenir un avantage lors du règlement de l'affaire. Cette stratégie prouve que l'autre Partie considérait la phase écrite perdue du point de vue des mémoires et des annexes documentaires. C'est une option pitoyable et généralement sans résultats mais qui, cependant, est très problématique pour l'autre Partie et, surtout, ennuyeuse pour le Tribunal. Cette première argutie s'accompagne d'un deuxième piège que le demandeur pose au Tribunal et dont nous nous occuperons plus tard.

Monsieur le Président, cette introduction exprime uniquement notre perplexité à la vue de cette phase orale, où nous avons écouté une tout autre histoire des faits et un exercice de transformation radicale de la demande de Saint-Vincent-et-les Grenadines, qui dévoile ainsi son véritable objectif. Une fois acceptée de façon opportuniste la compétence du Tribunal, le demandeur utilise le « Louisa », qui bat son pavillon, pour accuser l'Espagne d'avoir violé la

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Convention. Une fois les deux Parties face à face devant le Tribunal, on s'aperçoit tout d'un coup que l'aspect du litige écrit n'a rien à voir avec sa présentation orale.

Pourtant, Monsieur le Président, Madame et Messieurs les juges, le Royaume d'Espagne était prêt à débattre devant le Tribunal de l'application du droit de la mer dans cette affaire. Et c'est, en effet, ce que nous désirons. La procédure écrite, le mémoire et la réplique du demandeur arguaient essentiellement de la violation par l'Espagne des articles 73, 87, 226, 227 et 245 de la Convention, articles dont l'application à cette affaire s'est avérée illogique et incohérente, ce dont nous allons traiter brièvement par la suite. Nous réfuterons également la « nouvelle affaire » de cette phase orale pour nous opposer à tous les nouveaux arguments en ce qui concerne le droit de la mer.

Il faut préciser objectivement le différend en question, première condition pour que tout tribunal exerce sa fonction juridictionnelle. Il ne suffit donc pas qu'une partie allègue l'existence d'un différend avec l'autre partie. Il ne suffit pas que le demandeur allègue que l'Espagne a violé certains articles de la Convention pour que cela engage la responsabilité internationale de l'Espagne. C'est pour cette raison que l'Espagne affirme que, en l'espèce, il n'y a aucun différend qui puisse ou doive être réglé par le Tribunal international du droit de la mer.

Dans ce sens, les articles de la Convention cités par le demandeur sont manifestement inapplicables à cette affaire, s'ils sont interprétés de bonne foi, conformément au sens ordinaire à attribuer aux termes de la Convention dans leur contexte et à la lumière de son objet et de son but. On observe, bien sûr, un manque total de logique et persuasion juridique parmi les arguments exposés par le demandeur durant la phase écrite. Afin de résumer notre position développée ci-après, l'Espagne considère évident que le « Louisa » ne pêchait pas dans la zone économique exclusive espagnole ; qu'il était volontairement amarré dans un port espagnol depuis plusieurs mois ; que la cause des enquêtes et de l'immobilisation par les autorités espagnoles n'était pas la pollution des eaux sous sa souveraineté ou juridiction ; que le « Louisa » ne se consacrait en fait pas à des travaux de recherche scientifique au sens de la Convention ; et que, évidemment, les actions juridiques à l'encontre du navire et de ses propriétaires n'avaient aucun rapport avec ces raisons-là.

Le fait est que le contenu normatif des articles 73, 226, 227 et 245 de la Convention, invoqués par le demandeur pendant la phase écrite, n'offre aucune base légale à leurs prétentions ; bien au contraire, il établit une base solide pour que le droit espagnol et la législation des pêches s'appliquent dans la zone économique exclusive (article 73), notre droit de prévenir la pollution du milieu marin relevant de notre souveraineté ou juridiction (articles 226 et 227), de même que notre droit exclusif de réglementer la recherche scientifique marine à l'intérieur de notre mer territoriale (article 245) et bien sûr dans nos eaux intérieures.

Ce nonobstant, nous désirons faire remarquer que l'Espagne n'a jamais contrevenu à la Convention dans cette affaire. Le demandeur a soutenu que l'Espagne, en arrêtant le « Louisa », aurait violé les articles 73, 87, 226, 227 et 245 de la Convention, outre l'article 303, même si cette dernière violation n'a pas été expliquée dans le mémoire du demandeur et a ensuite disparu de la réplique.

En ce qui concerne l'article 73, qui s'occupe de l'application des lois et règlements d'un Etat dans sa zone économique exclusive, l'autre Partie a assuré que l'Espagne n'avait pas respecté son obligation de procéder rapidement à la mainlevée de l'immobilisation du « Louisa », en fixant une caution ou autre garantie raisonnable ; ni son obligation de notifier immédiatement l'Etat du pavillon des mesures adoptées contre le « Louisa ». Mais il est évident que l'article 73 concerne la saisie des navires de pêche dans la zone économique exclusive et n'a aucun rapport avec le cas d'espèce. Aucune autre interprétation de cet article n'est possible, en vertu de l'article 31, paragraphe 1, de la Convention de Vienne de 1969.

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Le « Louisa » n'a jamais été un navire d'exploration ou d'exploitation des pêcheries dans les eaux de la zone économique exclusive espagnole. Il n'a jamais pêché dans la zone économique exclusive espagnole. Le « Louisa » n'est pas un navire de pêche. Le « Louisa » a été arraisonné et perquisitionné, et ensuite immobilisé, sur ordre d'un juge, dans les eaux espagnoles, alors qu'il était amarré à Puerto Santa María (région de Cadix), accusé d'atteintes au patrimoine culturel sous-marin dans les eaux intérieures et territoriales de l'Espagne, comme nous l'avons suffisamment prouvé au moment de la procédure écrite et maintenant durant la phase orale. A l'intérieur de ces espaces marins, l'Espagne exerce sa souveraineté, toujours conformément à la Convention et autres normes du droit international (comme le droit de passage inoffensif dans la mer territoriale), ce qui ne concernerait pas cette affaire, bien sûr. Il n'y a donc aucune base juridique pour justifier l'application de l'article 73 de la Convention.

Il en va de même de l'article 87 de la Convention, qui s'occupe des libertés en haute mer, plus concrètement de la liberté de navigation (87.1.a.). Le demandeur a allégué que, du fait de son immobilisation dans un port espagnol, le « Louisa » aurait vu restreint ce droit particulier, ce qui aurait causé un préjudice. Ce raisonnement revient à pervertir le sens authentique de cet article, qui codifie une coutume établie en droit international général. Il n'existe aucune façon logique de comparer l'immobilisation du « Louisa » dans un port espagnol avec une prétendue infraction au droit de naviguer librement en haute mer, et moins encore si les faits reprochés par l'Espagne au navire portaient sur des infractions à des lois et règlements espagnols dans les eaux intérieures et territoriales.

D'autre part, le « Louisa » ne pouvait déjà plus naviguer légalement avant son immobilisation. L'Etat du pavillon (Saint-Vincent-et-les Grenadines) et l'Etat du port (l'Espagne) doivent s'assurer que le navire respecte les normes internationales de navigation. Et le « Louisa » n'avait pas renouvelé les certificats nécessaires en vertu des Conventions SOLAS et MARPOL, qui étaient parvenus à expiration en mars 2005, soit une année avant l'immobilisation du navire, pour reprendre la navigation dans des conditions de sécurité. Le « Louisa » ne pouvait plus naviguer parce qu'il avait été immobilisé dans un port espagnol à la suite d'une action judiciaire ; mais il ne pouvait pas naviguer en général parce qu'il ne satisfaisait plus aux conditions requises. Parmi les devoirs des Etats du pavillon prévus à l'article 94 de la Convention figure celui d'adopter les mesures nécessaires pour garantir la sécurité maritime et pour que chaque navire fasse l'objet d'un examen périodique conformément aux normes internationales en la matière (articles 94.3, 4 et 5). La responsabilité en la matière incombe spécialement à l'Etat du pavillon, obligation que le demandeur semble ne pas avoir remplie.

Le demandeur dénonçait également la violation par l'Espagne des articles 226 et 227 de la Convention. Rappelons que ces articles portent sur les enquêtes dont peuvent faire l'objet les navires étrangers aux fins prévues aux articles 216, 218 et 220 et sur la non-discrimination à l'encontre des navires étrangers (article 227), dans la partie XII de la Convention, qui est consacrée à la protection et à la préservation du milieu marin. Ces deux articles figurent à la section 7, relative aux garanties juridiques des navires quand ils sont soumis à des actes d'autorité ou à des mesures d'exécution en la matière de la part d'autres Etats, selon les articles 216, 218 et 220 de la Convention déjà cités. Mais ces articles précisent que ces mesures, et leurs limites, concernent l'enquête menée par l'Etat côtier sur des navires étrangers impliqués dans des activités présumées de pollution du milieu marin. Ce n'est donc pas le cas du « Louisa », qui n'a pas été immobilisé du fait d'activités polluantes dans les eaux relevant de la souveraineté ou de la juridiction espagnole, mais accusé de délits d'une tout autre nature, contre le patrimoine culturel sous-marin.

En ce qui concerne l'article 227 de la Convention, qui figure aussi (ne l'oublions pas) dans la partie XII de la Convention, le demandeur s'est plaint de discrimination contre le

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« Louisa » en violation de cet article, établissant une comparaison avec l'entreprise espagnole Repsol qui exploite quelques gisements de gaz dans le Golfe de Cadix depuis 1995. Cette allégation est absurde si l'on tient compte des faits : nous avons prouvé, tant pendant la phase écrite que durant la phase orale, que le « Louisa » n'était pas autorisé à mener des activités d'exploration d'hydrocarbures et ne pouvait donc absolument pas entrer en concurrence avec Repsol. En plus, l'invocation de l'article 227 n'a aucun rapport avec les permis et autorisations d'exploration et d'exploitation d'hydrocarbures qu'un Etat peut délivrer dans ses eaux intérieures et sa mer territoriale conformément à son droit interne et, au cas où ce serait pertinent, au droit international. Ces autorisations ou permis sont discrétionnaires et dépendent des autorités administratives internes compétentes. En fait, les autorités espagnoles, en pleine application de leur compétence en la matière, ont accordé une autorisation à l'entreprise Sage pour réaliser certains travaux sur l'environnement dans le golfe de Cadix, autorisation qui, en fin de compte, a été utilisée par l'entreprise de façon illégale. Les autorités espagnoles ont annulé les permis pertinents une fois la fraude avérée.

*Le Président :*

Excusez-moi, Monsieur Jiménez Piernas, voulez-vous parler un peu plus lentement ? Il paraît que les interprètes ont quelques difficultés. Merci.

*M. Jiménez Piernas :*

Merci. Je m'excuse.

Le demandeur invoquait également la violation de l'article 245 de la Convention, que je m'abstiendrai de citer devant le Tribunal et qui porte sur la réglementation de la recherche scientifique marine dans la mer territoriale. Cet article, conformément au droit international général, dispose que la recherche scientifique marine dans la mer territoriale n'est menée qu'avec le consentement de l'Etat côtier et dans les conditions fixées par lui. Nous savons que la principale limitation de la souveraineté de l'Etat côtier dans sa mer territoriale est l'obligation de respecter le droit de passage inoffensif de navires d'Etats tiers (article 17 de la Convention). Or, le passage inoffensif ne s'applique pas et est considéré comme « portant atteinte à la paix, au bon ordre ou à la sécurité de l'Etat côtier » si le navire concerné mène des activités de « recherches ou levés » (article 19.2.j de la Convention). *A fortiori*, ce régime vaut pour les eaux intérieures ; mais il diffère – comme on pouvait le prévoir – de ce que la Convention établit en cette matière pour la zone économique exclusive et le plateau continental.

Il est vrai que l'entreprise Sage a utilisé une autorisation du Ministère de l'environnement pour effectuer certaines recherches dans le golfe de Cadix, permis émanant des autorités espagnoles dans l'exercice de leur souveraineté, qui plus concrètement provenait de la Direction générale des Côtes. En Espagne, comme l'a déjà expliqué à ce Tribunal un expert hautement qualifié, il existe différents types d'autorisations et de permis en la matière. En aucun cas, on ne peut affirmer que le droit de la mer donne à lui seul naissance à un droit général d'obtenir ces autorisations ou permis de la part d'un Etat côtier, moins encore quand il s'agit de ses eaux intérieures. Cela dit, nous avons bien prouvé que le permis obtenu par l'entreprise Sage n'a pas été utilisé de bonne foi. Or, le « Louisa » n'a pas été immobilisé à cause d'une prétendue violation des conditions de l'autorisation administrative obtenue des autorités espagnoles, mais uniquement parce qu'il avait été utilisé afin de cacher des activités portant atteinte au patrimoine culturel sous-marin et, détenait par ailleurs illégalement des armes de guerre dans nos eaux intérieures et notre mer territoriale, ce qui n'a rien à voir avec l'autorisation que le « Louisa » avait reçue et indûment utilisée. Pour le dire autrement, c'est uniquement à cause d'activités illicites, criminelles, réprimées par le Code pénal espagnol,

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que le navire a été immobilisé, activités d'une tout autre nature que celles prévues dans l'autorisation citée. Il n'y a pas lieu, donc, d'invoquer l'article 245 de la Convention.

Le demandeur a dénoncé également la violation de l'article 303 de la Convention, qui vise le traitement à réserver aux objets archéologiques et historiques trouvés en mer. Or, il convient de rappeler l'objet et le but de cet article de la Convention. L'objectif principal dudit article est d'établir une collaboration entre les Etats Parties pour protéger le patrimoine marin (voir paragraphe un). Nous savons que le demandeur a voté pour l'adoption (le 2 novembre 2001) et a ratifié (le 8 novembre 2010) la Convention de l'Unesco sur la protection du patrimoine culturel subaquatique, acceptant ainsi toutes les conséquences de l'article 18 de la Convention de Vienne de 1969 sur l'obligation de ne pas priver de son objet et de son but un traité avant son entrée en vigueur lorsque l'Etat a signé le traité ou a échangé les instruments constituant le traité. Saint-Vincent-et-les Grenadines est donc tenu, depuis la signature de cette convention, de faire preuve d'une particulière diligence s'agissant de prévenir les atteintes au patrimoine, et de collaborer avec les autres Etats Parties (comme l'Espagne) pour lutter contre de telles atteintes imputables à des navires quel que soit leur pavillon, et à plus forte raison à des navires battant son pavillon.

L'article 303, paragraphe 2, étend en outre les compétences de l'Etat côtier à la zone contiguë à la mer territoriale, de telle sorte qu'il peut considérer que l'enlèvement d'objets archéologiques ou historiques du fond de la mer dans cette zone, sans son approbation, constitue une infraction sur son territoire ou dans sa mer territoriale aux lois et règlements de l'Etat côtier visés à l'article 33 (sur la zone contiguë). Il s'agit sans doute d'une autre preuve de la *vis expansiva* des compétences des Etats côtiers sur les eaux adjacentes à leurs côtes dans le nouveau droit de la mer, ce qui souligne de plus la congruence des compétences exercées par l'Espagne dans ses eaux en matière de protection du patrimoine culturel. Nous voulons attirer l'attention du Tribunal sur cet aspect délicat pour les nombreux Etats qui ont souvent subi la spoliation de leur patrimoine culturel sous-marin.

En conclusion, selon une interprétation de bonne foi de l'ensemble de ces articles, et conformément au sens ordinaire qui doit être attribué aux termes du traité (voir la Convention), dans son contexte et à la lumière de son objet et de son but, l'immobilisation du « Louisa », alors qu'il se trouvait à quai depuis plusieurs mois dans un port espagnol, constitue un acte parfaitement conforme aux lois et règlements espagnols relatifs à la protection du patrimoine culturel et à la répression de la détention illicite d'armes, et plus encore d'armes de guerre ; cela ne peut en aucun cas être interprété comme une atteinte à la liberté de navigation en haute mer. Ni d'ailleurs comme une discrimination à l'égard du « Louisa », dès lors que l'inapplicabilité de l'article 227 dans cette affaire a été établie. De plus, les droits auxquels fait référence l'article 245 sont attribuables au défendeur et non pas au demandeur, ce qui rend cet article également inapplicable. Enfin, nous nous devons d'ajouter que l'Espagne a exercé les compétences prévues par la Convention, notamment par l'article 303, paragraphe 1, qui fait obligation au demandeur de collaborer de bonne foi, en l'occurrence avec l'Espagne, en vue de prévenir et de réprimer l'enlèvement d'objets archéologiques dans les eaux relevant de sa souveraineté.

A ce stade, permettez-moi, Monsieur le Président, quelques observations sur la compétence des Etats côtiers dans leurs eaux intérieures et leurs ports. Rassurez-vous, Monsieur le Président, je n'aurai pas l'outrecuidance de donner une leçon sur le droit de la mer. Mais nous considérons nécessaire de rappeler quelques éléments clés du régime juridique des eaux intérieures en rapport avec cette affaire.

La Convention ne traite guère des eaux intérieures. Les articles 8 et 11 visent uniquement à distinguer ces eaux de la mer territoriale. Ils définissent les eaux intérieures comme celles qui se trouvent entre la terre et la mer territoriale, les eaux des ports incluses. La seule indication, brève mais importante, sur la nature juridique des eaux intérieures nous est offerte

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à l'article 2, paragraphe 1, de la Convention, qui précise que : « La souveraineté de l'Etat côtier s'étend, au-delà de son territoire et de ses eaux intérieures... à une zone de mer adjacente désignée sous le nom de mer territoriale ». On peut en déduire que la Convention assimile le régime juridique des eaux intérieures à celui du territoire de l'Etat, ce qui explique qu'elle ne s'occupe pratiquement pas de ces eaux.

Par conséquent, il n'existe aucun droit d'utilisation de ces eaux par des Etats tiers. L'exploitation des ressources naturelles et la navigation de cabotage sont du domaine exclusif des citoyens de l'Etat côtier. Il faut, en fait, se référer à la législation interne des Etats côtiers et au droit comparé pour se faire une idée approximative des grandes lignes du régime juridique actuel. Parce que, en somme, cela relève du droit interne.

La pratique internationale en la matière fait apparaître des tendances restrictives de la liberté d'accès aux ports par des navires de commerce étrangers, dérivées du principe coutumier de la liberté de commerce et de navigation. La cause de cette tendance est que, soucieux d'assurer la sécurité de la navigation et de lutter contre la pollution, les Etats du port ont accru leurs pouvoirs. Enfin, l'article 25, paragraphe 2, de la Convention reconnaît le droit de l'Etat côtier de réglementer, voire d'empêcher, l'accès à ses ports, droit confirmé par la jurisprudence internationale. Dans le même sens, l'article 211, paragraphe 3, de la Convention (partie XII consacrée à la protection et à la préservation du milieu marin) reconnaît aux Etats du port compétence pour fixer « des conditions particulières pour l'entrée dans leurs ports ou leurs eaux intérieures ».

En somme, le régime juridique des eaux intérieures, y compris l'accès au port et l'amarrage des navires, est en principe fixé par la législation et la juridiction de l'Etat côtier, qui exerce sa compétence sur lesdites eaux sans aucune restriction prévue en droit international, sauf le principe coutumier de liberté de commerce et de navigation, et à moins qu'il n'y ait un régime particulier issu, par exemple, d'un traité.

Le droit interne espagnol n'offre aucune nouveauté digne de mention à ce propos. Le régime juridique applicable se fonde sur la garantie du libre accès aux ports espagnols des navires de commerce étrangers, sauf dans des cas exceptionnels, voire pour des raisons sanitaires ou d'ordre public. Tout cela pour autant, bien sûr, que les navires respectent pendant leur amarrage les lois et règlements espagnols.

Compte tenu de ce qui précède, Monsieur le Président, nous considérons que rien n'autorise à critiquer devant le Tribunal le fait qu'un juge espagnol ait ordonné l'arraisonnement et la perquisition du « Louisa » alors qu'il se trouvait amarré dans un port espagnol depuis bien des mois, dans le cadre d'une enquête policière préalable portant sur des atteintes présumées à l'encontre du patrimoine historique espagnol, qualifiées qui plus est dans notre Code pénal. Cette affaire est celle d'un navire dont le capitaine, de nationalité hongroise, a disparu ; de plus, Saint-Vincent-et-les Grenadines n'a pas de représentation consulaire en Espagne.

Comment peut-on affirmer, dans ces circonstances, que le juge espagnol aurait enfreint l'ordre interne lorsqu'il a exercé sa compétence pénale à l'égard de ce navire en décidant d'accélérer les formalités procédurales en raison de la nécessité urgente de préserver des preuves éventuelles et en veillant toujours à ce que les droits de la défense soient préservés ?

Je ne m'attarderai pas plus longtemps sur le déroulement de la procédure pénale, dont mes estimés collègues se sont déjà occupés et s'occuperont encore.

Enfin, j'aimerais vous présenter, Monsieur le Président, certaines observations vis-à-vis de la stratégie du demandeur, qui a modifié radicalement sa position pendant cette phase orale, en faisant disparaître tous les articles de la Convention invoqués dans la phase écrite et en oubliant tous les arguments qu'il avait défendus. Avec quelle excuse ? L'article 300 de la Convention (bonne foi et abus de droit) que je vous cite :

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Les Etats Parties doivent remplir de bonne foi les obligations qu'ils ont assumées aux termes de la Convention et exercer les droits, les compétences et les libertés reconnus dans la Convention d'une manière qui ne constitue pas un abus de droit.

Le demandeur argue – et c'est vrai – que le défendeur a cité à plusieurs reprises l'article 300 au cours de la procédure écrite. Pourquoi, alors, le demandeur ne pourrait-il pas le faire ? L'objectif poursuivi par le demandeur est double. D'abord, convaincre qu'il y aurait une véritable affaire, qu'il y aurait un litige, puisque le demandeur soutient qu'il existe au moins une divergence importante avec l'Espagne quant à l'interprétation de l'article 300 de la Convention. En effet, selon l'article 288, paragraphe 1, le Tribunal a compétence pour connaître de tout différend relatif à l'interprétation ou à l'application de la Convention. Le demandeur essaye ainsi de s'assurer une base légale suffisante, aussi minime et artificielle soit-elle, pour influencer le Tribunal, en l'amenant à se déclarer compétent et à traiter le fond de l'affaire.

Au contraire de l'Espagne, le demandeur ne veut pas appliquer le principe de bonne foi à une ou plusieurs normes spécifiques de la Convention pour aider à son interprétation concrète. L'Espagne considère la bonne foi comme un principe cardinal qui inspire l'ensemble de la Convention. Mais Saint-Vincent-et-les Grenadines prétend aller plus loin encore. Il propose la bonne foi comme un principe juridique général de valeur substantielle et autonome, qui permettrait au Tribunal de trancher cette affaire, laissant de côté toute autre norme particulière de la Convention, c'est-à-dire au-delà du droit de la mer et presque conformément à l'équité. Le demandeur critique une interprétation prétendument restrictive de la Convention et propose une lecture plutôt libre et créative, option présentée comme une magnifique occasion de développement progressif du droit international, à travers une sorte de « droit jurisprudentiel ». Voilà, sans doute, la véritable ruse que le demandeur utilise devant ce Tribunal.

Le demandeur affirme que la doctrine de l'abus de droit confère à l'article 300 un contenu suffisant et indépendant du reste des articles de la Convention. Du point de vue du demandeur, l'article 300 serait donc la fenêtre ouverte par laquelle toute violation du droit international pourrait être rattachée à la Convention, ce qui donnerait dans tous les cas compétence au Tribunal. C'est ce qui intéresse le demandeur dans cette affaire. C'est pour cette raison que la prétendue violation de droits fondamentaux de citoyens américains est à présent invoquée.

Telle est l'interprétation de l'article 300 que donne le demandeur. Une telle interprétation est-elle soutenable ? Reportons-nous aux travaux préparatoires de la Convention pour le vérifier.

Selon les travaux de codification de la troisième Conférence des Nations Unies sur le droit de la mer, une telle interprétation extensive de l'article 300 de la Convention est impossible. Le demandeur n'a pas cité une seule fois les comptes rendus officiels de la troisième Conférence à l'appui d'une thèse si audacieuse. Il n'y a pas de meilleure interprétation que celle qui est habituellement donnée à l'article 300, c'est-à-dire le sens commun juridique. L'article 300 accompagne et inspire l'interprétation du reste des articles de la Convention, ce qui était bien l'objectif commun. C'est une disposition réitérative, en ce sens que la bonne foi figure parmi les principes fondateurs de l'ordre international contemporain, dont le contenu normatif est fixé dans la résolution 2625 (XXV) de l'Assemblée générale de 1970.

L'origine de l'article 300 se trouve dans une proposition du Mexique, qui a été ensuite envoyée au Groupe de travail compétent pour examen et négociation, à la suite de quoi elle a été remaniée et simplifiée. La délégation mexicaine s'est à l'époque félicitée du succès de son

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initiative, en déclarant qu'elle visait – je cite en anglais – « *to balance the rights, powers and freedom accorded to the various parties concerned under the convention* ». Une fois atteint le consensus sur trois articles de la Convention, parmi lesquels se trouvaient aussi les articles 301 (Utilisation des mers à des fins pacifiques) et 302 (Divulgarion de renseignements), le Président de la Conférence a précisé – je cite en anglais – : « *The article on good faith and abuse of rights was to be interpreted as meaning that the abuse of rights was in relation to those of other States* ».

En somme, on prétendait que les droits et obligations des Etats ayant des intérêts différents devaient s'interpréter de bonne foi (par exemple, les relations entre un Etat côtier et un Etat voisin sans littoral). Les compétences et libertés dégagées de la Convention doivent s'exercer sans aucun type d'abus de droit qui serait contraire à la lettre et l'esprit de ladite convention. Dans notre affaire, en vertu de l'article 300, aucun type d'abus de droit n'est acceptable dans l'application de la Convention, ni de la part de l'Etat du port (l'Espagne) ni de la part de l'Etat du pavillon (Saint-Vincent-et-les Grenadines). L'article 300 n'a donc pas d'existence autonome. C'est la signification que l'Espagne a donnée à cet article pendant la procédure. La suggestion du demandeur est donc contraire à la Convention parce que, si on l'appliquait, la compétence du Tribunal s'en trouverait élargie dans une mesure qui n'est nullement prévue par la Convention.

Il convient d'ajouter qu'une telle interprétation de l'article 300 constituerait une très mauvaise nouvelle pour l'évolution de la juridiction internationale et un sain développement *ratione materiae* de l'ordre international. Comme nous le savons, l'ordre international contemporain a vu se multiplier un ensemble de systèmes normatifs spécialisés, tel le droit international de la mer ou le droit international des droits de l'homme. Cette diversité normative est caractéristique du droit international contemporain et s'est accompagnée de la création de nouveaux tribunaux chargés du contrôle juridictionnel de l'application des normes correspondantes dans le cadre de chaque régime spécialisé. Ce Tribunal, ainsi que d'autres tribunaux dans le domaine des droits de l'homme, en est un très bon exemple. Il s'agissait d'un développement positif de l'ordre international soumis de cette manière à un meilleur contrôle juridictionnel.

Enfin, cela dit, je dois, Monsieur le Président, conclure en remarquant, encore une fois, que l'Espagne ne s'oppose aucunement à l'application de l'article 300 de la Convention en tant que principe fondateur du droit international contemporain qui joue un rôle significatif dans l'interprétation des normes de cet ordre juridique.

Monsieur le Président, Madame et Messieurs les juges, je vous suis très reconnaissant de votre attention et je vous remercie.

*Le Président :*

Je vous remercie, Monsieur Jiménez Piernas.

Je donne maintenant la parole à Madame Escobar Hernández.

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AGENT DE L'ESPAGNE  
[TIDM/PV.12/A18/11/Rev.1, p. 12–19]

*Mme Escobar Hernández :*

Je vous remercie, Monsieur le Président.

Comme je vous l'avais annoncé lundi, durant la présentation de la structure des exposés de la délégation de l'Espagne, j'aimerais, Monsieur le Président, aborder certaines questions relatives à l'article 300.

Monsieur le Président, Madame et Messieurs les juges, comme mon collègue le P<sup>f</sup> Jiménez Piernas l'a souligné à très juste titre, l'article 300 de la Convention du droit de la mer est une nette expression du principe de bonne foi. Un principe fondamental présent dans tout ordre juridique et qui trouve aussi sa place dans le droit international. Il n'est pas nécessaire, devant un si honorable collègue de juges, d'expliquer un principe qui est déjà consacré dans la Charte des Nations Unies et la résolution 2625 (XXV) relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats, à laquelle a fait référence mon collègue.

Mais, malgré l'importance du principe, permettez-moi de rappeler combien il est difficile de trouver des règles spécifiques sur la bonne foi dans les traités et conventions internationales. En effet, la bonne foi est restée, dans la plupart des cas, de l'ordre des principes fondamentaux du droit international, sans avoir de manifestation écrite et particulière dans la plupart des textes conventionnels, même dans les plus grandes conventions dites « de codification », sauf peut-être dans la Convention de Vienne sur le droit des traités.

Ce nonobstant, la Convention sur le droit de la mer est une des rares exceptions à la pratique générale. Sans aucun doute, pour les très bonnes raisons déjà exposées par le P<sup>r</sup> Jiménez Piernas, les Etats ont décidé d'inclure dans la Convention une clause spécifique sur la bonne foi, dont la portée est déjà annoncée par l'intitulé même de l'article : « Bonne foi et abus de droit ». C'est-à-dire, les deux faces d'une même médaille.

Mais quelle est la signification de l'article 300 ? Est-ce que l'on peut identifier une quelconque spécificité du principe de bonne foi contenu dans cet article si on le compare, bien sûr, avec le principe de bonne foi dans le cadre du droit international général ?

La réponse doit être « non » du point de vue substantiel : nous sommes face à une catégorie bien établie en droit international qui ne présente pas de caractéristiques propres. Mais, si on se place sur le plan de la portée normative de l'article 300, on trouve une spécificité qui n'est pas du tout négligeable, quoiqu'évidente : ledit article a été rédigé expressément pour la Convention sur le droit de la mer.

Les affirmations que je viens de faire ne sont pas sans conséquences.

La première, c'est que l'article 300 ne peut pas s'appliquer en dehors de la Convention sur le droit de la mer.

La deuxième, c'est qu'il est nécessaire d'appliquer le principe de la bonne foi et de l'interdiction de l'abus du droit dans le cadre qui est défini à l'article 300 lui-même, à savoir : celui-ci des « droits, (...) compétences et (...) libertés reconnus dans la Convention ».

Et troisièmement, s'agissant d'une disposition conventionnelle, elle doit être interprétée en conformité avec la Convention de Vienne sur le droit des traités, à savoir les articles 31 et suivants ; j'aimerais en particulier citer l'article 31.1, qui est particulièrement pertinent, et aux termes duquel « Un traité doit être interprété de bonne foi – encore de bonne foi – suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but ».

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En tout état de cause, la rédaction de l'article 300 ne nous offre pas d'éléments interprétatifs quant à son objet et à son but, si ce n'est, peut-être, qu'il est inclus dans la partie XVI de la Convention qui a pour titre : « *Dispositions générales* », ce qui nous permet d'arriver à une première conclusion : la portée du principe de bonne foi et de prohibition d'abus du droit n'est pas limitée à une quelconque partie de la Convention. Tout au contraire, le principe de bonne foi est applicable à chacune des dispositions contenues dans la Convention, mais toujours dans le cadre et dans les limites de la Convention.

Ce nonobstant, malgré sa portée générale, le principe de bonne foi (article 300) n'a pas fait l'objet d'un traitement continu et notable dans la jurisprudence de votre Tribunal. Comme vous le savez fort bien, l'article 300 a été invoqué devant le Tribunal dans le cadre de deux affaires contentieuses : l'*Affaire du thon à nageoire bleue* et l'*Affaire relative aux travaux de poldérisation par Singapour à l'intérieur et à proximité du détroit de Johor*. De plus, l'article 300 a été pris en compte dans l'avis consultatif sur les *Responsabilités et obligations des Etats qui patronnent des personnes et des entités dans le cadre d'activités menées dans la Zone*.

Dans les deux affaires contentieuses que je viens de citer, l'article 300 a été invoqué par les parties toujours « conjointement » avec d'autres dispositions de la Convention. Le Tribunal, quant à lui, n'a pas considéré nécessaire de statuer spécifiquement sur l'article 300.

Ce nonobstant, dans la seconde des affaires citées, il faut remarquer que les juges Nelson et Anderson ont émis des déclarations où ils se sont prononcés sur le principe de bonne foi, sans pour autant faire mention expresse de l'article 300.

Dans l'affaire consultative, le Tribunal s'est prononcé sur l'article 300, mais toujours pour le mettre en relation avec l'article 4, paragraphe 24, de l'Annexe III à la Convention, c'est-à-dire pour le mettre en relation avec une disposition de la Convention. Dans ce contexte, le Tribunal a eu recours au principe de bonne foi et à l'article 300 expressément, comme critère d'interprétation de la marge d'appréciation de l'Etat dans le processus de « l'adoption des lois et règlements et la prise de mesures administratives ».

Par conséquent, on peut conclure que l'article 300 a été pris en considération dans lesdites affaires, toujours en connexion avec une ou plusieurs dispositions de la Convention et non comme une disposition autonome capable de produire des effets juridiques en elle-même et d'une manière isolée de cette disposition de la Convention.

Comme je l'ai déjà dit dans ma première déclaration devant le Tribunal lundi dernier, l'Espagne convient de l'applicabilité de l'article 300 dans le cadre de la Convention. Et elle considère – nous considérons – que l'obligation de bonne foi et l'interdiction de l'abus de droit s'appliquent à l'égard de n'importe quelle disposition de la Convention. Par contre, le demandeur a expressément invoqué l'article 300 en tant que nouveau titre de compétence.

Le demandeur a aussi construit son argumentation sur l'établissement d'un lien direct entre l'article 300 et la violation des droits de particuliers, tels que les droits de l'homme en général ou le droit de propriété, sans établir aucune connexion avec une ou plusieurs dispositions de la Convention. Ainsi, le co-agent de Saint-Vincent-et-les Grenadines a dit : « Les personnes ont des droits de propriété, lesquels sont protégés par l'article 300 ».

Permettez-moi de poser ici une question : sur quelles bases juridiques dans la Convention ?

Mon collègue, le P<sup>f</sup> Jiménez Piernas, a traité de la dimension juridictionnelle des déclarations faites pendant les audiences par la distinguée délégation de Saint-Vincent-et-les Grenadines et, pour l'instant, je ne considère pas nécessaire de revenir sur ce sujet. En revanche, j'aimerais faire quelques commentaires sur la relation entre l'article 300 et les droits de l'homme.

Bien que la Convention ne soit pas un instrument des droits de l'homme, il faut reconnaître que les droits de l'homme sont pris en considération dans le processus

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d'application de la Convention. Cela s'est produit à certaines occasions, mais comme cela a été dit par vos anciens collègues les juges Treves et Vukas, le traitement des droits de l'homme par le Tribunal s'est toujours inscrit dans le cadre de la prompte mainlevée de l'immobilisation du navire ; sans aucun doute du fait de la spécificité de cette procédure et parce que, dans les cas de prompte mainlevée, il s'agit de l'immobilisation du navire, ainsi que de la détention de l'équipage consécutive à l'immobilisation du navire. C'est-à-dire qu'il s'agit d'une atteinte aux droits des membres de l'équipage directement liée à un fait (l'immobilisation du navire) expressément prévu dans la Convention comme fondant la compétence spécifique du Tribunal dans ce type de procédure d'urgence.

Chaque fois qu'un tel lien a été soulevé (je citerai ici l'affaire du « *Juno Trader* » et l'affaire « *Tomimaru* »), on peut donc trouver une connexion entre les droits de l'homme et les dispositions applicables de la Convention, en l'espèce, les règles spécifiques à la procédure de prompte mainlevée.

Cette relation étroite entre la procédure de prompte mainlevée et les violations des droits des membres de l'équipage, pour étayer la violation alléguée de la Convention, a été notamment bien établie dans l'opinion individuelle du juge Treves dans l'affaire du « *Juno Trader* » (2004) :

Je me permets de la citer, Monsieur le Président, même si vous connaissez très bien ce texte :

Dans une affaire de prompte mainlevée, le recours abusif à la force et les violations de la régularité de la procédure et des droits de l'homme en général peuvent être pertinents de diverses façons. En particulier, le défaut de régularité de la procédure – retard mis à faire connaître les chefs d'inculpation, lenteur et insécurité de la procédure suivie par les autorités, inertie des autorités elles-mêmes – peut justifier que l'on plaide la violation de l'obligation de prompte mainlevée et de prompte libération alors même que le temps écoulé n'aurait pas semblé excessif s'il avait été employé à assurer une procédure réglementaire dans le respect de la légalité.

Il en va de même quand le défaut de régularité de la procédure sert à faire aboutir rapidement une procédure interne sans offrir véritablement la possibilité d'examiner la moindre thèse en faveur du navire saisi et de son équipage. Dans les deux cas de figure, l'usage abusif de la force – l'usage abusif de la force – et les violations des droits de l'homme et des droits de la défense sont des éléments qu'il faut également prendre en considération au moment de fixer le montant d'une caution ou d'une garantie qui puisse être considérée comme raisonnable. L'idée d'abus de droit est très proche de l'idée d'absence de caractère raisonnable et l'examen de l'article 300 de la Convention ne doit pas se situer en dehors du processus complexe par lequel le Tribunal fixe le montant d'une garantie qu'il estime raisonnable.

Dans le même ordre d'idées M. le juge Nelson – c'est M. Treves qui fait la citation – qui était alors Vice-président du Tribunal, dans l'opinion individuelle qu'il a jointe à l'arrêt rendu dans l'*Affaire du « Monte Confurco »*, a fait observer qu'à l'article 292, « [l']utilisation de la notion de raisonnable vise [...] à limiter l'exercice arbitraire du pouvoir discrétionnaire conféré aux Etats côtiers ».

La conclusion, d'après l'argumentation que je viens de présenter, est claire : les prétendues violations des droits de l'homme, citées dans l'opinion du juge Treves, sont en relation directe avec l'objet et le but poursuivis par les dispositions de la Convention relatives

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à la procédure de prompt mainlevée : c'est-à-dire faciliter la libre navigation du navire arraisonné dans un délai *raisonnable* et par la seule condition de l'établissement d'une caution également *raisonnable* accordée par une autorité nationale dans le cadre d'une procédure interne *raisonnable* et qui se déroule en plein respect du droit du procès.

Mais, bien sûr, sans que ces conditions et garanties puissent empiéter sur le résultat final de la procédure interne relative au bien-fondé de l'immobilisation du navire qui n'est pas de la compétence du Tribunal. Et tout cela obéit à une raison claire : les violations présumées des droits de l'homme citées dans l'opinion individuelle sont exclusivement le résultat de l'immobilisation du navire qui est, en elle-même, le seul fondement des actes internes relatifs à l'équipage.

Par contre, le Tribunal ne s'est jamais prononcé dans l'abstrait sur des violations présumées des droits de l'homme ni sur la violation présumée de la procédure régulière comme seul motif pour conclure à une violation de la Convention des Nations Unies sur le droit de la mer. Ce n'est, en outre, que la conséquence de la propre compétence du Tribunal : étant un tribunal spécialisé dans le droit de la mer, il peut sans aucun doute se prononcer sur les règles du droit international qui ne sont pas incompatibles avec la Convention, mais il ne peut pas passer sous silence la Convention – voire ne pas en tenir compte – et choisir d'autres règles qui ne sont pas incluses dans la Convention pour conclure à la violation de cette Convention. Et, pourtant, c'est cela que le demandeur vous suggère.

En effet, que s'est-il passé à Cadix ? Les autorités judiciaires espagnoles ont mené une enquête sur certains faits constitutifs d'une infraction. Dans le cadre de cette enquête, les autorités judiciaires ont pris plusieurs mesures, parmi lesquelles l'immobilisation du « Louisa », l'arrestation de certaines personnes et l'adoption de mesures conservatoires pour assurer le bon déroulement de l'enquête (confiscation du passeport, obligation de comparaître tous les quinze jours devant le juge). Mais chacun de ces actes (l'immobilisation du navire et la détention des personnes) est indépendant, comme le montre très bien le fait qu'ont été accusés certains individus qui n'étaient pas sur le navire mais qui, selon le juge, ont participé aux faits incriminés. Il y a, bien sûr, une connexion entre l'immobilisation du « Louisa » et les mesures judiciaires prises à l'égard de certaines personnes. Mais une telle connexion n'est pas l'immobilisation du « Louisa » (contrairement à ce qui se passe dans les cas de procédure et prompt mainlevée). La connexion se trouve dans la commission d'atteintes au patrimoine culturel sous-marin espagnol : le « Louisa » est immobilisé parce qu'il est l'instrument ayant servi à commettre l'infraction ; les personnes sont détenues et mises en accusation du fait de leur participation aux actes incriminés. En l'espèce, permettez-moi de le dire, Monsieur le Président, nous n'arrivons pas à identifier les dispositions de la Convention sur le droit de la mer qui auraient été violées par l'Espagne en ouvrant une procédure pénale telle que celle en cours à Cadix.

Et nous n'arrivons pas non plus à saisir comment l'exercice de la juridiction pénale dans le cas d'espèce pourrait être constitutif d'un abus de droit : la procédure vise à protéger le patrimoine culturel subaquatique (une obligation de l'Espagne d'après l'article 303 de la Convention et d'après la Convention de l'Unesco citée à plusieurs reprises ici) ; la procédure se déroule conformément au droit espagnol, tant du point de vue substantiel que procédural ; et, troisièmement, la procédure, quoiqu'elle dure depuis 6 ans, n'a violé aucun droit de la défense, elle n'a pas nui aux intérêts de la défense et elle a été respectueuse des droits de l'homme.

Le demandeur a tenté, non pas pendant la procédure écrite mais pendant les audiences, en particulier par le biais des témoignages de Mme Avella et de M. Avella, de montrer comment les autorités espagnoles ont bafoué les droits de l'homme de ces deux personnes. Les représentants du demandeur ont même employé des expressions telles que violation systématique des droits de l'homme, traitement inhumain et dégradant, affirmations sans

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aucun doute d'une extrême gravité qui, si elles avaient eu réellement lieu, auraient mérité de mettre en jeu le système espagnol (et même européen) de protection des droits de l'homme. Mais, comme toujours, les représentants de Saint-Vincent-et-les Grenadines ont lancé ces graves accusations sans aucun raisonnement juridique pour les étayer. En outre, pour ce qui est des faits, il suffit d'appeler votre attention, à ce stade, sur les failles qu'ont fait apparaître les témoignages de Mme Avella et de M. Avella.

Monsieur le Président, l'Espagne est tout à fait disposée à ce que l'article 300 de la Convention soit appliqué. Comment est-ce que nous pourrions nous opposer à l'application d'une disposition qui contient un principe fondamental du droit international contemporain ? Mais où est la connexion entre une disposition de la Convention et la violation alléguée des droits de l'homme, connexion qui devrait être à la base de toute analyse de la bonne foi de l'Espagne et d'un prétendu abus de droit. Car ce n'est que si l'abus de droit a une connexion avec la Convention qu'il sera possible d'accepter que l'article 300 s'applique.

Or, Monsieur le Président, Madame et Messieurs les juges, on ne trouve nulle trace d'une telle connexion. Sauf, peut-être, dans la volonté, dans l'esprit ou le désir intéressé du demandeur de présenter devant vous de très graves affirmations (Atteinte aux droits de l'homme, violation de la procédure régulière, déni de justice) pour essayer à travers des mots ronflants d'attirer votre attention sur une prétendue affaire qu'il ne parvient pas à étayer par une quelconque disposition de la Convention dont vous assurez la correcte application et interprétation.

Et pour finir, Monsieur le Président, quelques mots sur la portée générale de l'article 300. Je pense que j'en ai encore le temps.

Comme je l'ai dit auparavant, l'article 300 est une disposition générale qui doit s'appliquer de manière horizontale à toute la Convention. De par sa nature, il s'agit d'une disposition qui doit inspirer l'interprétation et l'application de toutes et chacune des dispositions de la Convention. Et j'aimerais le répéter encore une fois : de toutes et chacune des dispositions de la Convention. Y compris, c'est évident, les dispositions relatives au système de règlement des différends.

Si le respect de la bonne foi et l'interdiction de l'abus de droit sont des principes auxquels on ne peut pas renoncer quelles que soient les circonstances, ces règles et principes revêtent une importance spéciale quand on parle du système de règlement des différends. Un système de règlement des différends, en particulier s'il s'agit d'un système de règlement judiciaire, ne peut pas se développer sans la bonne foi. Plus encore : un tel système perd toute son efficacité et sa crédibilité si la bonne foi n'est pas toujours présente. Je suis absolument certaine que vous le savez très bien, car c'est votre fonction chaque jour.

Et ce que je viens de dire me conduit au dernier sujet que je voudrais aborder à ce stade des audiences. Le demandeur semble croire que la bonne foi est quelque chose, une notion, qui doit s'appliquer en Espagne (et il a raison de le croire), qui doit s'appliquer quand on parle des droits des particuliers (et, de nouveau, il a raison de le croire) et, pour finir, que Saint-Vincent-et-les Grenadines a le droit de réclamer le respect de ces principes devant vous (et, de nouveau, il a raison de le croire).

Mais, Monsieur le Président, le demandeur ignore de manière absolue que le principe de la bonne foi et l'interdiction de l'abus de droit protègent aussi l'Espagne, d'une part, et que la bonne foi et l'interdiction de l'abus de droit doivent aussi être respectés dans l'exercice des droits procéduraux reconnus aux parties à la Convention, d'autre part. Bref ! Que la bonne foi et l'interdiction de l'abus de droit font partie des règles procédurales qui s'appliquent dans la présente affaire.

Ce n'est pas mon intention, à ce stade des audiences, de faire une longue liste des griefs que l'Espagne pourrait avoir à l'égard du demandeur. Ce n'est pas mon intention, je vous l'assure. Mais permettez-moi de rappeler, au moins, que la façon dont le demandeur a

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reconnu votre compétence (même si c'est son droit) n'est pas compatible avec la bonne foi et l'interdiction de l'abus de droit.

En outre, la confusion constante entre la procédure de prompt mainlevée et la procédure ordinaire, d'un côté, et entre la procédure interne et la procédure internationale, de l'autre, ne l'est pas non plus.

Et, pour finir, ne sont pas du tout compatibles avec la bonne foi et l'interdiction de l'abus de droit certaines « stratégies » mises en place par le demandeur, dont le fait d'avoir changé de façon tout à fait inattendue et à la dernière minute, et seulement aux plaidoiries orales, les arguments sur lesquels il prétend fonder sa requête, ce qui ne reflète pas non plus le respect que toute partie à une procédure judiciaire doit au principe de la bonne foi et à l'interdiction de l'abus de droit.

Avec cette observation, je conclus ma dernière intervention dans ce premier tour des plaidoiries.

Monsieur le Président, Madame et Messieurs les juges, je vous remercie de votre patience et de votre aimable attention. Merci Monsieur le Président.

*Le Président :*

Je vous remercie, Madame Escobar Hernández.

Il est 16 heures 30 déjà. Nous allons à présent avoir une interruption de 30 minutes. Vous pourrez poursuivre votre exposé lorsque la session reprendra à 17 heures.

*Mme Escobar Hernández :*

J'ai fini mon exposé mais j'aimerais que vous rappeliez mon collègue après la pause.

*Le Président :*

Je comprends bien. Donc à 17 heures.

*(L'audience est suspendue)*

*Le Président :*

Madame Escobar Hernández, je crois savoir que M. Jiménez Piernas souhaite prendre la parole.

Monsieur Jiménez Piernas, vous avez la parole.

## NAVIRE « LOUISA »

EXPOSÉ DE M. JIMÉNEZ PIERNAS  
 CONSEIL DE L'ESPAGNE  
 [TIDM/PV.12/A18/11/Rev.1, p. 19–23]

*M. Jiménez Piernas :*

Monsieur le Président, Madame et Messieurs les juges, j'ai l'honneur de m'adresser de nouveau au Tribunal pour traiter des aspects généraux du droit de la responsabilité internationale de l'Etat en rapport avec cette affaire. Je ne souhaite pas du tout faire un cours sur ce sujet. Toutefois, certaines observations et précisions générales quant aux interventions du demandeur s'imposent.

Il faut d'abord souligner que l'article 304 de la Convention établit clairement que tout ce qui relève de la responsabilité de l'Etat est régi par les dispositions du droit international général en vigueur en la matière. La Convention n'établit aucun régime particulier de responsabilité internationale.

Le principe sur lequel repose le régime de la responsabilité internationale veut que toute conduite internationalement illicite entraîne une responsabilité internationale de l'Etat qui l'a commise et donne lieu par conséquent à une nouvelle relation juridique internationale. Ce principe est énoncé dans l'article premier du « Projet d'articles sur la responsabilité de l'Etat pour faits internationalement illicites » (ci-après dénommé le « projet ») que la Commission du droit international a adopté à sa cinquante-troisième session, en 2001, qui a ensuite été soumis à l'Assemblée générale des Nations Unies. Nous allons ici examiner en détail le contenu de ce projet.

Son article 2 précise les conditions requises pour établir l'existence d'un fait internationalement illicite de l'Etat, c'est-à-dire les éléments constitutifs d'un tel fait. Deux éléments s'en dégagent : premièrement, le comportement en question doit être attribuable à l'Etat en vertu du droit international; deuxièmement, pour qu'une responsabilité naisse du fait de l'Etat, ce comportement doit constituer une violation d'une obligation juridique internationale de l'Etat en question.

L'expression « violation d'une obligation internationale de l'Etat » est établie de longue date et s'applique aux obligations tant conventionnelles que non conventionnelles. Il n'y a pas d'exception au principe énoncé à l'article 2.

Dans le cas d'espèce, l'Espagne n'a violé aucune de ses obligations internationales à l'égard du demandeur. Par conséquent, l'Espagne n'a pas commis un fait illicite international et sa responsabilité internationale n'est donc aucunement engagée. Il n'existe donc pas d'obligation de réparer. Cela dit, nous présenterons certaines observations générales sur l'affaire, pour répondre aux arguments du demandeur, toujours à titre subsidiaire.

Commençons par préciser qu'une action d'un Etat est considérée comme « internationalement illicite » uniquement en vertu du droit international, et non pas du droit interne, même pas celui des Etats-Unis. Conformément aux articles 3 et 32 du projet, la conduite d'un Etat peut être qualifiée d'illicite si elle constitue une violation d'une obligation internationale. Peu importe si celle-ci est considérée licite ou illicite dans le cadre de son ordre interne. Il est pertinent de le rappeler, Monsieur le Président, dans la mesure où les avocats américains du demandeur ont osé alléguer, devant le Tribunal, la dernière édition du *Restatement*, comme si elle constituait un argument d'autorité pour qualifier la conduite des autorités espagnoles dans cette affaire et dicter votre décision. Permettez-moi de rappeler à l'autre Partie que le droit international général en la matière est énoncé clairement dans le projet de la Commission, lequel a été le résultat de beaucoup d'années de travail et d'un consensus suffisant au sein de la communauté internationale, qui va bien au-delà des seuls Etats-Unis et qui englobe tous les Etats membres de l'Organisation des Nations Unies.

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Selon l'article 12 du projet de la Commission, il y a violation d'une obligation internationale par un Etat lorsqu'un fait dudit Etat n'est pas conforme à ce qui est requis de lui en vertu de cette obligation. Il doit donc s'agir d'une obligation internationale, quoiqu'en pensent les avocats américains du demandeur. Dans l'affaire qui nous occupe, les normes européennes en la matière – la procédure pénale – sont exigeantes, comme il ressort de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (du 4 novembre 1950), en vigueur aussi pour l'Espagne et de la riche jurisprudence de la Cour européenne des droits de l'homme, et comme l'a déjà expliqué aujourd'hui un expert hautement qualifié.

Dans le même ordre d'idées, les avocats américains du demandeur ont également tenté de minimiser et même de jeter le ridicule sur l'importance de la découverte d'armes de guerre (fusils d'assaut) lors de la perquisition du « Louisa ». Nous comprenons certainement que l'histoire de leur pays leur donne une sensibilité différente de celle des européens en la matière. Mais nous attendons d'eux qu'ils respectent de la même façon des sensibilités culturelles différentes en ce qui concerne la détention d'armes à feu. Le droit international existe, en effet, pour fixer des règles du jeu partagées par tous les Etats, par-delà les coutumes ou sensibilités particulières, qui sont toutes dignes de respect.

Il conviendrait aussi de rappeler aux avocats du demandeur que la pratique tend désormais à ne pas exercer la protection diplomatique à l'égard d'un particulier quand l'Etat de nationalité nourrit des doutes raisonnables quant à la conduite de son ressortissant, la considérant irresponsable, irrégulière ou simplement incorrecte, à savoir contraire au droit interne ou international. Il s'agit de sauvegarder la fluidité et la cordialité des relations bilatérales pour éviter des affaires dans lesquelles le comportement de particuliers prétendument lésés susciterait des doutes raisonnables. Mais n'oublions pas, par ailleurs, que dans cette affaire, ce n'est pas l'Etat de nationalité qui prétend exercer cette protection diplomatique, mais un autre Etat qui ne satisfait pas aux conditions requises pour ce faire.

Dans le même sens, l'article 39 du projet de la Commission dispose que :

[P]our déterminer la réparation, il est tenu compte de la contribution au préjudice due à l'action ou à l'omission, intentionnelle ou par négligence, de l'Etat lésé ou de toute personne ou entité au titre de laquelle réparation est demandée.

Parfois, l'Etat lésé ou la personne victime de la violation a pu contribuer matériellement aux dommages par sa négligence ou par une action ou omission délibérée ; ces situations sont désignées, dans les systèmes juridiques nationaux, par les expressions « négligence contributive », « faute concurrente », « faute de la victime » et autres formules.

Selon l'article 39, avant que soient déterminées la forme et l'étendue d'une réparation, il faut tenir compte du comportement de l'Etat lésé ou de toute personne ou entité au titre de laquelle cette réparation est demandée. La question de la contribution au préjudice se pose le plus souvent dans le contexte de l'indemnisation, mais le principe peut également être pertinent pour d'autres formes de réparation. La Commission du droit international signale en effet, dans son commentaire de l'article, que :

si un navire appartenant à un Etat est illégalement saisi par un autre Etat et que, pendant la durée de la saisie, il subit des avaries imputables à la négligence du capitaine, il pourra être simplement requis de l'Etat auteur qu'il rende le navire dans l'état endommagé dans lequel il se trouve.

## NAVIRE « LOUISA »

Et il faut noter que toute action ou omission, intentionnelle ou par négligence, qui contribue au dommage peut être le fait de l'Etat lésé ou de toute personne ou entité au titre de laquelle cette réparation est demandée.

Nous allons aborder, finalement, la question du navire « Louisa » comme l'objet réel et principal de la réclamation de dommages de la part de Saint-Vincent et les Grenadines contre l'Espagne. Nous laisserons de côté le reste des réclamations à raison de préjudices personnels, manifestement infondées, comme les éléments de preuve et les arguments juridiques présentés par l'Espagne l'ont montré tout au long des phases écrite et orale.

Quand un Etat commet une action internationalement illicite, celle-ci donne lieu à la naissance de nouvelles obligations, en particulier celle de réparer les préjudices causés. Cela implique la réparation intégrale du préjudice causé par le fait internationalement illicite, ce qui comprend tout dommage, tant matériel que moral.

Parmi les différentes formes de réparation existantes, l'option choisie par le demandeur est de réclamer exclusivement une indemnisation, c'est-à-dire le paiement d'une certaine somme d'argent, calculée d'ailleurs d'une façon très peu rigoureuse, comme l'Espagne l'a bien démontré en s'appuyant sur les témoignages et documents présentés par le demandeur.

Mais l'Etat responsable d'un fait internationalement illicite est tenu d'indemniser le dommage causé par cette action, dans la mesure où la restitution n'est pas possible. Le droit de la responsabilité internationale permettrait d'envisager la possibilité d'une restitution matérielle, habituelle s'agissant de navires, à condition qu'il n'y ait pas d'obstacles infranchissables rendant la restitution impossible ou disproportionnée. Or, le demandeur a rejeté cette option de restitution très rapidement, comme on pouvait s'y attendre : la valeur du « Louisa » était, avant et maintenant, presque insignifiante. En outre, le « Louisa » a déjà accompli sa tâche principale : servir au demandeur de point de contact et de piège pour invoquer le droit de la mer devant le Tribunal.

Par conséquent, les avocats du demandeur ne demandent plus la restitution du « Louisa ». Ils ont choisi de privilégier l'indemnisation. Or, quels dommages seraient susceptibles d'être indemnisés d'après le droit international ?

Le droit international établit que l'indemnisation doit couvrir tout dommage susceptible d'évaluation économique.

Les principes d'évaluation à appliquer pour le chiffrer varient selon le contenu des obligations primaires en cause, selon l'appréciation des comportements respectifs des parties et, plus généralement, selon le souci de parvenir à une solution équitable et acceptable. L'estimation de l'indemnisation est basée sur la perte par le demandeur des droits patrimoniaux dont il a été privé. Cette perte est normalement évaluée par rapport à des catégories précises de dommages, parmi lesquelles essentiellement l'indemnisation au titre de la valeur en capital et l'indemnisation pour manque à gagner (*lucrum cessans*).

L'indemnisation au titre de la valeur en capital du bien exproprié, détruit ou simplement endommagé à cause d'un fait internationalement illicite, est normalement calculée en fonction de la valeur loyale et marchande du bien perdu. Vu la nature du bien en question, le « Louisa », il ne semble pas difficile de calculer sa possible valeur commerciale, qui serait minime si l'on rappelle l'état du navire – physique, technique et juridique – et son abandon par ses propriétaires, bien que les autorités espagnoles les aient invités à plusieurs reprises à veiller à son entretien.

Dans certains cas, une indemnisation pour manque à gagner peut être indiquée. Des tribunaux internationaux ont tenu compte du manque à gagner pour évaluer le montant de l'indemnité. Néanmoins, les indemnités accordées pour manque à gagner ont été, dans la pratique, moins courantes que celles accordées pour les pertes comptabilisées. Dans cette affaire, le demandeur semble invoquer la perte de profits découlant de biens générateurs de

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revenus, perte subie entre la date de l'immobilisation du bien (le « Louisa ») et la date de règlement du litige.

Mais dans ce cas, le manque à gagner invoqué – le *lost opportunities damages*, selon l'expression en anglais – porte la prétendue perte de possibilité d'utiliser des données supposément stockées sur des disques durs. Il a été démontré par l'Espagne que ces données étaient à la disposition du demandeur dès l'immobilisation (mais les avocats de Sage n'ont pas demandé au juge leur restitution avant 2011), ce qui montre bien qu'il ne s'agissait pas de données « sensibles », dans la mesure où elles étaient déjà connues du demandeur avant l'immobilisation du « Louisa » ou relevaient du domaine public et étaient accessibles gratuitement à ceux qui s'intéressent vraiment à la prospection pétrolière.

Voilà mes observations générales concernant la responsabilité internationale dans cette affaire. L'Espagne se réserve cependant le droit de revenir sur les prétendus dommages allégués par le demandeur.

Je vous remercie de votre attention, Monsieur le Président, Madame et Messieurs les juges.

*Le Président :*

Merci, Monsieur Jiménez Piernas.

Dois-je comprendre que c'est le dernier exposé de l'Espagne ? Je donne la parole à Madame Escobar Hernández.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. En effet, c'est la dernière intervention de l'Espagne dans le premier tour de plaidoiries.

Alors que se terminent les plaidoiries de l'Espagne, permettez-moi, Monsieur le Président, même si les audiences vont se poursuivre, de vous faire part de la reconnaissance toute particulière de la délégation espagnole, non seulement pour votre aimable attention, mais surtout pour la patience et la coopération dont vous avez fait preuve, acceptant que deux de nos témoins experts et experts s'expriment en espagnol. L'interprétation s'en est trouvée compliquée, ce qui a rendu votre tâche plus ardue. Merci beaucoup, encore une fois, Monsieur le Président. Nous en avons terminé.

*Le Président :*

Madame Escobar Hernández, c'est moi qui vous remercie de votre aimable coopération.

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

The sitting is closed.

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

M/V "LOUISA"

**PUBLIC SITTING HELD ON 11 OCTOBER 2012, 3.00 P.M.****Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 8 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 11 OCTOBRE 2012, 15 HEURES****Tribunal**

*Présents :* M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 8 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*The President:*

Good afternoon. We will continue the hearing in the M/V "Louisa" Case. Today we will hear the second round of oral arguments of the Applicant. Therefore I give the floor to the Co-Agent of Saint Vincent and the Grenadines, Mr S. Cass Weiland.

You have the floor.

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### **Reply of Saint Vincent and the Grenadines**

STATEMENT OF MR S. CASS WEILAND  
CO-AGENT OF SAINT VINCENT AND THE GRENADINES  
[ITLOS/PV.12/C18/12/Rev.1, p. 1–15]

*Mr S. Cass Weiland:*

Thank you, Mr President. May it please the Tribunal, just a brief word of thanks and an opportunity to express the appreciation of all of the persons associated with our delegation, and that would certainly include Ms Rochelle Forde, Mr William Weiland, Mr Nordquist, Mr Robert Hawkins, Mr Whittington and Ms Bandara. We much appreciate your consideration and the hospitality, so to speak, of the wonderful staff here at the Tribunal. They have been terrific to us, both in December 2010 and again now we are here this time.

I would like to say a particular word of thanks to Ms Forde, and express our appreciation for her ability to appear here despite her family obligations and her practice obligations. You would think that this is the type of appearance that all lawyers would relish, and she certainly did, but she comes from a very small country and the demands were really great, but we are very appreciative of Ms Forde's ability to be with us for the first week and I know that her strong presence was felt by the Tribunal.

In talking about Ms Forde and Saint Vincent and the Grenadines' role in this case, it is important, I think, to point out the fact that the crew was treated so badly, the fact that Ms Avella was treated so incredibly badly, not being a member of the crew, does not and should not overshadow the effect of what the Respondent has done in this case to Saint Vincent and the Grenadines. It is a country whose standing in the community of nations is affected by these kinds of things. It is a country whose economic interests are threatened when members of its fleet are hauled into the kind of conditions that this ship was subjected to, and the fact that Saint Vincent and the Grenadines has been sadly and strongly affected by the case really cannot be over-emphasized.

I would like to give you a little insight into my argument, and I want to assure you that, although we have been allocated the entire afternoon to talk, we do not intend to do that. Judges have told me for years that closing arguments from lawyers are largely unnecessary when there is no jury, and my position would be that you are the jury and you are the Judges, and you do not need to hear lawyers for two or three hours tell you what you have just heard. We have been here for a few days and I know you remember the evidence, and I know you know the law better than I, so I am going to try to spare you having to listen to me for the entire afternoon. The President and I and the representatives of the Respondent spoke briefly yesterday afternoon about the possibility of taking a break after an hour in the event I still have a few more things to say. It is possible that we will be finished before that.

What I would like to address first is the jurisdictional question that you are all faced with. I am going to talk a little bit about the jurisdiction and repeat a little bit about what Mr Myron Nordquist had to say on the subject. Then I am going to address the essence of the merits decision that you are faced with, including some discussion of the damage issue. Finally I am going to talk about some policy issues I think should be addressed.

Before I get to any of that though, I would like to respond to your questions. We have two sets of questions, one of which I saw just a few minutes before coming into the courthouse, so I will address those briefly, but the questions received very early on, possibly before we re-started our first session, are things I am going to respond to first, before we get into any further discussion about the case.

The Tribunal has asked us:

M/V "LOUISA"

What is the legal justification for Saint Vincent and the Grenadines requesting the release of the *Gemini III*, which does not fly the flag of Saint Vincent?

The answer – and we have actually prepared a written response to this, which perhaps I can expand on a little bit – the technical answer is that the *Gemini III* served as a tender for the *Louisa* and is inextricably linked to it. *Gemini III* is a small boat and was never flagged, as the owner believed it was a vessel that did not require flagging. The vessel was transferred to Spain by truck from the Netherlands, where it was purchased. To our belief and knowledge, it was never registered in any jurisdiction after it arrived in Spain but it is considered the property of Sage, the owner of the *Louisa*, and for that reason we believe that the Applicant is entitled to restitution based on the loss of value of the ship, much as we have claimed hundreds of thousands of dollars' worth of property that was stripped off the *Louisa* and carried away by the Guardia Civil.

There is a question No.4 addressed to both parties, and I will respond to that as follows. The Applicant believes this question was partially addressed by Mr Nordquist during his presentation, but we take this opportunity to consider the question in greater detail. Respondent has never produced an inventory of items taken from the ship, nor any proof of their origin, and thus this is a complicated question that you have put to us, which is dependent on the facts of the particular case. The direct reply is that the Spanish criminal legislation that is apropos to the present case may conform in principle to UNCLOS, including article 303 or other principles of international law, including in particular the UNESCO Convention of 2 November 2001 on the Protection of the Underwater Cultural Heritage, the UCH Convention, but even if it does conform, as repeatedly pointed out before the Tribunal, it was unlawfully applied to the Applicant and those for whom the Applicant is responsible. Because a far smaller number of States have become Parties to the UCH Convention than are Parties to UNCLOS, it can be argued that the UCH Convention is not customary international law, as almost all of UNCLOS is. Additionally, the UCH Convention creates new jurisdictional competences not provided in UNCLOS.

Question No. 5 relates to the Spanish criminal law, and I will respond to that question as follows. Article 561 of the Spanish Law of Criminal Procedure has been discussed at length. We reject the contention of the Respondent that article 561 has been modified. Article 561 is consistent with international law in that the consent of the captain or the flag State is required before boarding and searching a vessel.

Finally, on question No. 6 we would say as follows. Javier Moscoso testified during the request for Provisional Measures hearing that the judge, in accordance with articles 127 and 128 of the Spanish Criminal Code, shortly after the arrest of the vessels should have given the owner the alternatives he proposed to give it in his order of 29 July 2010, that is, Moscoso testified, as you will recall, that the alternatives suggested by the judge in Cádiz were appropriate; they were just about four years too late.

That order of July 2010 was never notified to the accused persons before Spain introduced the order in this courtroom in December of 2010. We will talk more about that. In fact, it was not notified as required by Spanish law, and you will recall that Judge Pallín yesterday confirmed that Spanish law requires it to be notified to the parties within three days. The July 2010 order was notified on 31 January 2011, so by the time the judge issued the order, which the lawyers for the ship owner had not seen, the *Louisa* had already been arrested without maintenance for over four years. The owner did refuse to elect any of those options, and he later explained the liability involved, the costs involved, the refusal of that very judge to allow sailors to live on the ship from the very beginning, all contributed to that decision. So in essence that is our response to the early questions from the Tribunal.

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I think before I address some more substantive things relating to jurisdiction and the facts of the case, we might also talk about the second group of questions, which I really just saw a few minutes ago. Obviously, with the questions from the Tribunal, it would be useful no doubt to provide what I can at this stage.

The first question and the second question are really the same, and they ask:

Under what permit was the *Louisa* (in question 1) and the *Gemini III* (in question 2) authorized to conduct activities in internal waters and the territorial sea of Spain? Was the permit contained in Annex 6 to the Memorial of the Applicant preceded or followed by other permits and what were the expiration dates of each permit? If there are other permits, can we have copies?

Here is the answer to the questions. First of all, there was only one permit. We supplied that as Annex 6 early on in the Provisional Measures stage. The permit did not require the Tupet company to use any particular vessel in conducting its scientific activity, so the Tupet permit was used for both vessels, the *Louisa*, and then when the tender went out to, for example, tow the sonar, it would carry the permit. So when the Guardia Civil checked, the permit was available on any boat and there was not, to our knowledge, ever a problem with the fact that Tupet was allowed to use different vessels. It expired, I believe, 1 May 2005. I cannot give you the exact date. That was one of the reasons that the *Louisa* was ordered back to the United States and set off the whole series of activities that Avella was going to undertake to get the *Louisa* prepared to go. By that time the record shows that the *Gemini III* had been leased out, and you have questions about that so let me try to address those.

Question 3, incidentally, asked if any report was filed with the Spanish authorities and, if so, whether there is a copy. We were not aware of any reports that Tupet may have filed with the Ministry. To my knowledge, we have not been provided with copies of any reports that Tupet may have filed.

The terms of the contract between Sage and Tupet are most interesting, and I must apologize to the Tribunal because when I saw the question, it made me go and check through our annexes because I was confident we had supplied the contract. It was certainly our intention to supply the Tupet-Sage contract. I can summarize the important terms and I will provide the Tribunal with a copy, I hope by tomorrow. I was not able to locate one in the last minutes before we began our session today.

Essentially, the Sage contract with Tupet was a joint venture agreement where Sage agreed to use the Tupet permit, and the contract has language about “If by happenstance some shipwreck is discovered then Tupet will take the necessary measures to acquire whatever permits are required by Spanish law.” So, as you will hear in further argument this afternoon, we have never tried to conceal the dual interest here of Sage. They had a thing with Tupet. John Foster, as a beneficial owner of Sage, is in the oil business. He sees that Tupet has a permit that is going to, he thought, allow him to drag some sonar and magnetometer devices around an area that seemed to be one of the hottest oil and gas areas in the world, so they entered into a venture, and if anything was found, Tupet would go and acquire whatever additional permits were necessary. I will obtain the agreement and provide it to the Tribunal.

The contract regarding the *Gemini* that was made with Plangas is a contract that I have seen. I am not sure that I have access to it in the next 24 hours, but I will endeavour to supply it to the Tribunal. My recollection is that the contract with Plangas for the *Gemini* in 2005 was a simple lease, like a bare boat charter. Plangas has its own permit and it is going to lease the boat from Sage for a period of – I do not know – six months or a year. It is a simple bare boat charter, as I recall.

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Finally, your question No. 6 is:

Under Spanish law, what would be the further legal proceedings which would have to be pursued or instituted, if any, in the present case in order to exhaust the local remedies in accordance with international law?

As we have said, that is a loaded question because we do not think that anything has to be exhausted in accordance with international law any more. My understanding, which is somewhat limited to say the least, is that the Spanish criminal proceedings, as arcane as they are and difficult to understand, seem to require that the investigatory judge – you have heard so much about Court No. 4 in Cádiz – has to enter an order referring the case to the trial court. I am sure that counsel for Spain can correct me, but I believe that it is called an *auto de procesamiento*. It refers the case up for trial. At that point the prosecutor has the option to decide that there is really nothing to the case and that he or she is not actually going to prosecute the case – again my understanding. The accused also has the right, firmly established under Spanish law as I understand it, to appeal this referral to the next level court; and, of course, after conviction, if there is one, there are other appeals. The view from afar is that the process is interminable, and it would be a further abuse to subject Mr Avella and Mr Foster and others to run that gauntlet. It has already taken six and a half years, and frankly there is no end in sight, but that is my understanding of the criminal procedures in Spain.

Let me talk first, if I may, about jurisdiction in this case. We have asked you basically to cross over the bridge to the area of human rights, denial of justice, application of international legal principles, which you have done previously on occasion, but possibly not in such an explicit manner as one could argue we are asking you to do. We think that we have an ample legal basis for asking you to take this case. It was explained in rather greater detail by Mr Nordquist, a true authority in the field, who talked a great deal about article 300 and the fact that it can be independently deployed, unlike what we heard from the Spanish representative yesterday. We would consider article 300 to be a basis for jurisdiction in a proper case, and this is a case in which you can undertake that responsibility.

We have heard the complaints from the Respondent that they had not heard about article 300 before coming to Hamburg and that they do not think it is fair – lots of complaints. Our response to that is that they cited it first, we studied it, we conferred with people more expert than the Agent and the two Co-Agents for Saint Vincent and the Grenadines and realized that the facts as we were able to develop them, to a large extent after December 2010, fit this model; and I would remind you that in 2010 and ever since we have cited article 293(1), which incorporates international law, which we think should have eliminated any surprise on the part of Spain that that was what they should be prepared for.

Of course, article 288 is important in the context of this case. If the other rules are satisfied, the Tribunal must take jurisdiction over any dispute, as Mr Nordquist pointed out, concerning the interpretation or application of an international agreement related to the purposes of the Convention. We think that the notion that there is no dispute here lacks any factual and legal basis. There is a dispute, there has been a dispute, and if you do not settle it for us there will continue to be one.

I kind of alluded to the way that this case has developed in terms of our jurisdictional approach, and certainly the people at the Centre for Sea Law at the University of Virginia had a role to play in terms of assisting us to analyse the facts that we were developing since we were last here in December 2010. All the lawyers associated with Saint Vincent and the Grenadines were humbled by our last appearance and certain of the opinions that came thereafter. Now that you have seen the facts in much greater detail, hopefully the background to the application for provisional measures is more understandable, because Saint Vincent

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and the Grenadines, after learning that its ship had been arrested for a very long time with no notice to Saint Vincent and the Grenadines except this *note verbale* that you have seen, which we will talk about later, rallied and wanted prompt action in any way that we could get into court. The Attorney General and the Prime Minister were consulted.

We put together, with a very limited budget, the kind of case that we did, and I am sure that the criticism that we received was to a large extent justified and earned on our part, but the case that we have been able to bring to you now is a totally different situation because of the depth of the facts. No one has brought you any facts other than the Applicant, and we made that decision in preparing to come here. Having studied your previous cases and the few trials that have been conducted, we realized that what we were endeavouring to do would be somewhat unorthodox, but there was no other way to effectively show you what the Respondent has done here. I could get up here and show you some documents and talk about what happened to Ms Avella and Mario Avella, but without bringing people into the courtroom and letting you hear the actual facts, the strength of the case would have been lost, so we made a decision, although we considered it perhaps somewhat unorthodox, to bring real witnesses to facts and in a sense let you feel the pain.

You may recall that when I first addressed you on the morning of the first day of the trial I made a statement to the effect that I was pretty confident that at least some of you would be surprised to see us back again trying to litigate the fate and the details of the seizure of this little ship, the *Louisa*. Having been here in December 2010, surely this case would have gone away in two more years and would have been settled or disposed of in some way by the Parties or even unilaterally, but amazingly we come back in two years and the ship is still tied up in the dock at Puerto de Santa Maria. I am sure that that fact struck most of you as really odd.

As we heard the Respondent's case, something else certainly struck me as incredibly odd – that there is no apology; there is nothing approximating an apology from the Respondent for what has happened based on these judges and bureaucrats and out-of-control police officers in Spain. In fact, the attitude, if you will forgive me for characterizing it, is one of arrogance: “We have your ship, your tender and your people. So what? Our law provides that we can abuse people.” They are not going to apologize for anything. They say: “This poor woman Ms Avella should not even have been there studying Spanish”. That is the attitude that comes through to me. There is not even a simple apology, a simple, “Hey, we need to make this right, we need to get this ship taken care of, we need to do something for Mario Avella, detained for 27 months and for what?”

Would you put up the Spanish annex 16 with photograph 7? You may remember this photograph. The Spanish have this in their documents. We showed it to Ms Avella. We asked, “Alba, do you remember these police taking anything off the ship?” She said, “I remember some cannonballs and a rock with a hole in it”. Is this really what this complex international investigation is about? We do not know. We still do not know what the investigation is about, because the people with the best opportunity to tell us have taken a pass. There is no inventory of what was taken off the ship. There is certainly no appraisal of anything taken off the ship other than the diving gear, the decompression chamber and the expensive material that the Spanish police confiscated and then decided to use.

However, in terms of all this patrimony that we have heard so much about for years – since 1 February 2006 we have heard about patrimony – what is the damage to the Spanish heritage for which these people have been thrown in jail? Do not tell me that they are thrown in jail for rifles that are locked in a closet that is welded to the bulkhead of the ship, which is behind two locks that none of the people who were arrested even had access to. That is not what the case is about. *This* (referring to Spain's Annex 16) is what the case seems to be about, but there is no proof that this was even on the ship or where it was taken from. We

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have to dig deeper, and we have been very disappointed with the Spanish approach to the case, because they have not brought evidence. They have brought people like Señora Martínez, who does not even know what the penalty is for having the wrong permit in the Bay of Cádiz, and that was because she was being asked questions that were not on her script; but that is another story.

I would like to talk about the facts some more but, before we get there, there is another really important legal concept that needs to be addressed, namely what I call the standard of proof, the appreciation of evidence. What is it? What does the Applicant have to prove to prevail in the case? We have read some opinions. There have been very few trials here, so it is not as though there is a great deal of precedent to tell us what we are looking for, but we know that article 28 of the Statute, although it seems to relate to cases where one of the parties is absent, refers to a position being well founded in fact and law. It has been said that that standard is akin to beyond reasonable doubt, which I know you are familiar with; it is certainly the standard in criminal cases in many jurisdictions. Is that the standard that we are faced with? I would say that "well founded in fact and law" is more akin to a preponderance of the evidence. Nevertheless, our position is that we have proved our case under any standard, even beyond a reasonable doubt, but certainly by any lesser standard.

The corollary issue is whether, assuming we make more of a *prima facie* showing of violations of various provisions of the Tribunal's articles, the burden passes to the Respondent at any point to produce evidence. I can find no particular commentary on that, though I apologize if it is out there. We would say that it ought to pass at some point when the Applicant makes some sort of showing, and here the Respondent has failed totally to bring anything except legal argument. There have been no witnesses of fact. People have commented on what is the use of a metal detector, as though you did not know that. As I have said, the issue needs to be considered, and we want to assure you, not surprisingly, that we think we have met whatever standard you wish to apply to the proof in this case.

I say that because there are certain issues that have recurred and they need to be mentioned as facts that we do not have to prove. The Applicant does not have to prove some of these things that keep percolating up during the course of the trial. We do not have to prove that the Sage company was solely interested in oil and gas in order to avoid some problems with the Spanish courts: that is just not part of our burden; in fact just the opposite. We have been very open that Sage entered into this joint venture agreement with a guy, Mr Valero, which, as Mr Nordquist later said, was a bad decision. It turns out he is apparently some notorious fellow in the annals of the Spanish heritage police. He does not seem to have been in jail or anything but they have criticized us heavily for having done business with him. Is that detrimental? Certainly we do not think it is in terms of the outcome of the case.

We do not have to prove that we had the proper permit. I answered some questions as we started. Our burden does not include proving that we had the proper permit. Sage was out there in the bay with a permit that it thought was adequate. If it was not, that is no basis for the kind of abuses and the denial of justice that were heaped on Sage personnel thereafter.

We certainly do not have to prove that there was a complete absence of artefacts on the ship. If in fact they had proof that some Sage diver had put some cannon balls on the ship, that is not fatal to the case. The Spanish have had six and a half years to prove that somebody associated with the *Louisa* did something wrong, and they have not got there yet.

Finally, as to the other aspect of the charges or the informal charges in Spain relating to the weapons, it is not our burden to prove the weapons were properly declared. Apparently the captain did not declare them. In fact that is the offence that the Spanish judge cited at one point, that the weapons were undeclared. There is no telling what the penalty is for a ship's captain failing to declare weapons when it comes into the harbour, but it is not part of our burden.

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The converse of that would involve what we think Spain should have been able to prove to you in order to prevail in this case. They made a big mistake in not bringing any evidence, but we would say that to avoid a finding on your part that the investigation was fatally flawed and that these people had their rights abused, despite whatever Spanish criminal procedure might have allowed them to do, they needed to show you why an investigation that lasted six and a half years with no resolution was reasonable under any version of the law – Spanish law or international law. They have not shown you that at all. They brought a witness yesterday. You will recall his testimony – a very impressive former judge. He said: “I read the police report, and I think that investigation was reasonable.” Somebody else has testified that there are voluminous documents involved, and we do not think that was enough.

I would say that in order to prevail they have to show you some evidence that the people whose rights were so abused had committed a crime. They have not brought you any evidence of that. They have not brought you an inventory of what was taken off the ship or evidence that the arms were destined to be sold once the ship arrived in Spain or anything like that. In fact the evidence seems to be uncontroverted that the weapons were in the closet from the time since the ship entered Spanish waters and were never even taken out all that time.

I think you have to consider that there is some obligation on the part of the Respondent to produce some evidence if it intends to prevail in the case.

There is a sensitive issue that we have talked a lot about in letters to the Court and in our Pleadings, and I need to talk to you about it because it affects the Court in a major way, and that has to do with what we consider to be certain mistakes, to put it mildly that the Spanish have made in the case. They have brought you some evidence that we consider tainted in a way, and we do not consider the explanations that have come to you up to now to be adequate. I am talking of course about the two orders that they produced in December 2010. We have asked the Tribunal to use its powers and undertake a separate investigation of the matter.

You will recall that one of the issues in December 2010 was whether the *Louisa* posed any kind of environmental threat, and we used the possibility as a basis for receiving some remedy from the Tribunal. The answer that came from Spain was: “Don’t worry about it; we are monitoring the vessel. The port captain is monitoring the vessel.” That language appeared in the majority opinion of the Tribunal when our Provisional Measures were rejected.

It turns out that the Respondent had produced a report dated July 2010 as annex 14.1. This document came from the judge in Cádiz and it mentioned in the body of the order that there should be entered into the record the official letter filed by the Civil Guard on the status of the ship; and then that letter was not attached. Remember that this order was brought into the courtroom in December 2010. We had never seen it. This is one of the orders that was never notified to the Parties. This one was not officially released to the Parties until January of the following year.

If you look at our annex 33, page 2, paragraph (d), admittedly the port captain is not reporting a colossal failure on the part of the ship the *Louisa*, but it is clearly not in good shape at the time that the port captain was reporting on it. That was a major mistake, I think, putting it charitably, on the part of the Respondent in presenting its case.

Even more important was the October 2010 indictment. Spain’s Counter-Memorial, annex 2, contains this document. Yesterday I made a point of the fact that the document was dated a day after Saint Vincent and the Grenadines sent a formal notice to Spain’s diplomatic authorities. We never heard any explanation about this.

I will tell you that in December of 2010 the ship owner’s lawyer from Madrid was sitting in the audience. He was shocked – shocked. He is a thirty-year lawyer and had never seen

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anything like this in his life, that this document would be brought into court in the way that it was that affected his people.

So we complained and wrote letters saying, "Let us investigate this." Is this even a legitimate document? Was it concocted by the judge when he realized, "I am presiding over an investigation that has been going on for years and finally Saint Vincent and the Grenadines is calling me on it". Maybe it was just a coincidence, but we heard yesterday – at least I think I did from the Agent of Spain trying to explain this for the first time. She called the judge. She called the Court and she said it was because President Jesus had asked her, "Get the indictment". That is what I wrote down in my notes. I looked at the transcript and I could not find the President asking her for anything except an English translation of what she had produced.

When you saw that indictment in December 2010, no doubt it caused you to think: "These people associated with Sage must be really bad people", and we are helpless to respond because it was in effect a secret document that was released when she called the Court. Did anybody apologise for that or explain it beyond that? No, no.

We have heard other things. Yesterday or the day before, I heard that Sage's representatives had made an unauthorized entry on the *Louisa* – an unauthorized entry! It never happened. I do not know why such a statement would be made in open court. There was a visit, you heard from Mario Avella. Lawyers for Sage and Mario did go on the ship in 2009 with a full court order, and it was so important to the Spanish they sent the Guardia Civil all the way from Madrid to look at the ship.

There has been lots of talk about the ship being quarantined by order of the judge. This ship has never been quarantined by the judge; there is no order to that effect in the file. That is the way the judge does business in Cádiz: he has the police put a tape up on the ship, gets everybody off; the ship sits there. It is not properly quarantined at all.

Let me shift to talking a little bit about the witnesses in the case. The Respondent produced four witnesses. I will tell you that I have been in a few trials in my career and a few courtrooms here and there and I am really hard-pressed to have seen a witness like Señora Martinez before, and to the extent that I disappointed you by not being able to get some questions answered that you were interested in, I apologize. I got nothing that I was interested in except I learned that she has a lifetime job and that she was a civil servant, and I should not be asking any questions that were not part of the script that she was prepared for.

Now we learn that Sage had the wrong permit and there was some issue, I guess, about what area they were in; but beyond that I have no idea why the Respondent would think it was appropriate to bring that lady as an expert.

They also brought Mr Stow, all the way I guess from England or Scotland, at who knows what cost. I am used to being able to ask the witness how much he is paid for bias reasons. We did not hear that but we did hear that he gets £1,500 a day for riding around to consult on ships for people; so no doubt the Respondent paid some significant money to Mr Stow to come in and be an absolutist: "I can tell you that I have been in the oil business for years and years and all this equipment that Sage had on the ship was not for oil prospecting." He some time grudgingly admitted, "Well, maybe for survey purposes you might use some of these things", which is exactly what Sage was trying to do. Mr Stow, however, was keeping on the plan and he was not going to allow himself to make any kind of concession in terms of what Sage might have been doing, despite the testimony of Mr McAfee about their long history of oil prospecting.

Finally, Mr Delgado was a very interesting guy. I confess – and I am sure this shows my lack of culture – I do not know why millions and millions of dollars are still being spent to dive on the Titanic, which is his specialty. I think there are some better social uses for some of that money, but he is a very well-educated and experienced fellow. I was kind of surprised

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they had to bring him from the United States to talk about the cultural history of Spain. Maybe it is because other nationals are doing all the shipwreck work in Spain and Spain really does not have experts in the area; but they did bring him. He was knowledgeable. I do not think he said anything that was contrary to the essence of the Applicant's case.

When we come back, Mr President, I would like to talk about our witnesses a little bit and some concluding remarks, if that would be permissible.

*The President:*

May I understand that we can take a break now?

*Mr S. Cass Weiland:*

If that would be all right, President. We have been going for about an hour. I have perhaps 15 or 20 minutes at the most, but if we could take a short break, perhaps 15 if 30 is too long, that would be much appreciated.

*The President:*

Thank you.

The Tribunal will withdraw for a break of 15 minutes.

*(Break)*

*The President:*

We will continue the hearing.

Mr Cass Weiland, you have the floor.

*Mr S. Cass Weiland:*

Thank you, Mr President. Thank you for the extraordinary consideration of an out-of-sequence break like that. I do appreciate it and I will move on through my final remarks and then present our final submission.

I had just begun talking about the witnesses, and I had said a few words about the Respondent's experts. I would like to just compare those with the witnesses that you heard from the Applicant. I am not going to tell Ms Avella's story again. You have heard the story, you have heard it commented on by Judge Pallín yesterday, so I consider that really unnecessary. You are quite familiar now with what happened to Alba Avella.

I would like to say a few words about Mario Avella. Other than necessarily the abuses and the denial of justice which he has faced, he said some factual things that I think are important in terms of the Tribunal's analysis of the reasonableness of the investigation, in so far as you may think that is an appropriate undertaking. Avella said that the *Gemini* had been leased in 2005 and there is a document in the case that bears some attention. This is Spain Annex 11 and the title page to this particular exhibit says it is the order opening the criminal procedure and transforming it into abbreviated proceedings, *procedimiento sumario*. It is issued in Cádiz by the famous Court No.4, 1 March 2010, and I show you the English version of the order. It includes some very interesting language that I think you should be aware of. This is, as I said, in March 2010. They are converting this investigation which has been going on for four years, now they are going to the second stage, and the judge writes about the *Louisa* and the *Gemini*, and he has lots of names they are apparently looking at at the time. Some of these people, I represent to you, you may have heard of during the testimony. Whittaker was one of the Sage people who went out there in the early summer of 2004 and started to do some data-gathering – you may remember that testimony – before *Louisa* even arrived.

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In any event, this paragraph says that the *Louisa* and *Gemini* in principle under the flag of the USA – whatever that means – but under flags of convenience – and as you have heard, the judge does not think highly of flags of convenience, he does not think he has to give notice to countries who sponsor flags of convenience. He goes on to say that they are involved in the extraction in the year 2005 – in the year 2005 – of diverse pieces of vessels belonging to Spain's heritage, and that, by the way, they are worth more than 400 euros, which apparently is a jurisdictional amount. I think the question came up in December 2010 why I kept asking how much the artefacts were worth. It is because if they are worth, I guess, less than 400 euros, it is a misdemeanour, some kind of petty offence, but the judge is saying they are worth more. There is nothing in the record to indicate the judge had had anything appraised from the *Louisa* but what we do know is, apparently, he is worried about things that were extracted in 2005.

Now let us look at Spain's annex 16, photograph 1, which they have been very eager to show you on every occasion. This is the *Gemini* with this contraption on the back, about which the testimony is uncontroverted: that was put on the *Gemini* in 2005, after the vessel was leased by Sage to Plangas. That is a feature of Mario Avella's testimony that may not have been particularly clear earlier in the trial.

Another feature relating to Mario that is worth noting is that no Spaniard, to our knowledge, ever spent any time in jail. No Spaniard spent any time in jail. We think that is discriminatory. We think the international law prohibits that kind of treatment, especially in cases like this. The foreign crewmen had their passports taken away, the two Hungarians, and Mario, and, just incidentally, Miss Avella. The Spaniards just continued their normal lifestyle, with no interruption.

Moving on, the Respondent has tried to defend the unreasonableness of the investigation with the assertion that the persons associated with the ship caused the delay. It is not that the Spanish criminal justice system is completely dysfunctional; it is because these Americans and these Hungarians, and even the Spaniards who were under investigation apparently, were just delaying matters so much that that is why we are here today, six and a half years later. I am sure that you will hear that tomorrow, so I would ask you to look at our Reply brief, where, at pages 17-21, I believe, we chronicle the delays that occurred in the case, delays occasioned, for example, by the repeated demands by the investigating judge in Cádiz that John Foster, beneficial owner of the *Louisa*, travel to Spain to be interviewed. We saw what happened to Mario Avella with the international arrest warrant. I would think that Foster would probably not be too eager to come over and talk to the Spanish judge, but what he was willing to do, and the record reflects this, was to give an interview pursuant to the mutual assistance treaty between the United States and Spain, and to do it at the convenience of the Court in Cádiz, which finally happened, the record shows, in July of 2011, I think – the years run together – without the need of a formal application and the involvement of the Justice Department of the United States and of the Justice Department of Spain. The lawyers for the ship owner and the judge were able to just set up a video conference and Foster was interviewed completely.

I spent a fair amount of time with some witnesses, particularly witnesses that the Respondent produced, talking about the *Odyssey* case. If there is a sense of proportionality, if there is a sense of anti-discrimination, then I would recommend that you take a look at what happened to the *Odyssey*. The *Odyssey* people were never arrested, they were never incarcerated, only one was ever charged, and that was the captain, and it turns out they charged him in violation of Spanish law so he was acquitted. That case only involved \$500 million, and our case involves some rocks with holes in and some cannon balls. So I think the *Odyssey* case is instructive. The incident was started in October of 2007. By May of 2010 there was a decision, and the Spanish Air Force flew over and returned all of that cultural

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heritage to Spain. Unfortunately for the Americans caught up in the Cádiz case, the good will that you might think was generated by the *Odyssey* case did not flow down to Cádiz.

I really have just a couple of other things to say. One of them is that I am sorry that more of our delegation could not still be present. I know that they would like to be here. We tried to get the Division of Ocean Affairs to dedicate some funds to Saint Vincent and the Grenadines for this purpose but we have been unsuccessful so far. We just cannot maintain a tremendous team here in Hamburg.

I also want to comment on some legal issues just before I finish today. I am particularly struck recently by this article from Judge Treves which I have cited to you as one of our references, one authority that we rely on and we recommend that the Tribunal look at this. He has written an article in the *Berkeley Law Review* in 2010 called *Human Rights and the Law of the Sea*, coincidentally. Perhaps most of you have seen this. He says in this article that: “The [Law of the Sea Convention] is not a ‘human rights instrument’ *per se*.”

We certainly agree with that but we also agree with some of his other conclusions here because he goes on to say:

Its main objectives, like those of the Law of the Sea in general, are different. Yet, concerns for human beings, which lie at the core of human rights concerns, are present in the texture of its provisions.

They are present in the texture of its provisions. I know that this is an unusual case. We are asking you to decide a case involving a ship sitting at the dock of the Respondent, an area normally reserved for exclusive jurisdiction, but exclusive jurisdiction is not arbitrary jurisdiction, as one of you recently said. We maintain that the normal precept of exclusive jurisdiction of a ship docked right at the port of the Respondent needs to be looked at in the context of the facts that we have brought you. This is the time to adopt a view that this Court is not going to defer to Strasbourg. This Court is going to embrace human rights issues that flow directly from Law of the Sea core issues. This is the case that we think you can do it, and we would urge you not to wait for a better case. Do not wait for a better case. We are 20 or so cases in, and we are not sure when you will see another one that has facts like this. There are facts that we recognize will be somewhat difficult to deal with, and you are worried about precedent, but this case cries out for some kind of remedy for the Applicant.

I am not used to arguing for an Applicant, a Plaintiff, and then having the other side have the last word in the case, but that is your procedure, so we are stuck with it. You are going to hear tomorrow for most of the afternoon about all the reasons that I am wrong and the Respondent should prevail. I do not get an opportunity to rebut those arguments, but I would urge you to consider the landmark nature of this and the opportunity that the case presents.

Thank you, Mr President.

*The President:*

Thank you, Mr Cass Weiland. Do I understand that Mr William Weiland will speak after you?

*Mr S. Cass Weiland:*

No, sir, he will not have any remarks beyond what I have already said, so I am prepared to deliver the final submission.

*The President:*

Thank you.

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I understand this was the last statement made by Saint Vincent and the Grenadines during this hearing. As you know, article 75, paragraph 2, of the Rules of the Tribunal provides that 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 submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

I now invite the Co-Agent of Saint Vincent and the Grenadines, Mr Cass Weiland, to present the final submissions of the Applicant.

*Mr S. Cass Weiland:*

Thank you, Mr President. I have copies for the Respondent and Mr Gautier.

In accordance with article 75(2) of the Rules of the International Tribunal for the Law of the Sea, the Applicant, Saint Vincent and the Grenadines, makes the following final submission:

The Applicant requests the Tribunal to prescribe the following measures:

- (a) declare that the Tribunal has jurisdiction over the Request;
- (b) declare that the Request is admissible;
- (c) declare that the Respondent has violated articles 73(2) and (4), 87, 226, 227, 300 and 303 of the Convention;
- (d) order the Respondent to release the *Gemini III* and return property seized;
- (e) declare that the boarding and detention of the *MV Louisa* and *Gemini III* was unlawful;
- (f) declare that the detention of Mario Avella, Alba Avella, Geller Sandor and Szuszy Zsolt was unlawful and abused their human rights in violation of the Convention;
- (g) declare that the Respondent denied justice to Mario Avella, Alba Avella, Geller Sandor, Szuszy Zsolt and John B. Foster and abused the property rights of John B Foster;
- (h) order that the Respondent is prohibited from retaliating against the interests of Mario Avella, Alba Avella, Geller Sandor, Szuszy Zsolt, John B. Foster and Sage Maritime Scientific Research, Inc., including the initiation of any procedure requesting the arrest, detention or prosecution of these individuals or the seizure or forfeiture of their property in domestic Spanish courts;
- (i) order that the Respondent is prohibited from undertaking any action against the interests of Mario Avella and John B. Foster, including the continued prosecution of these individuals in domestic Spanish courts;
- (j) order reparations to individuals in the following amounts, plus interest at the lawful rate:
  - (1) Mario Avella: €810,000;

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- (2) Alba Avella: €275,000;
  - (3) Geller Sandor: €275,000;
  - (4) Szuszký Zsolt: €275,000;
  - (5) John B. Foster: €1,000.
- (k) order reparations to Sage Maritime Scientific Research, Inc. in the amount of \$4,755,144 (USD) for damages and an additional amount in the range of \$3,500,000 – \$40,000,000 (USD) for lost business opportunities;
- (l) order reparations to Saint Vincent and the Grenadines in the amount of €500,000 for costs and damages to its dignity, integrity, and vessel registration business; and
- (m) award reasonable attorneys' fees and costs associated with this request, as established before the Tribunal, of not less than €500,000.

Thank you, Mr President.

*The President:*

Thank you, Mr Weiland.

That completes the second round of oral arguments of Saint Vincent and the Grenadines. The hearing will be resumed tomorrow, Friday 12 October 2012, at 3 pm to hear the second round of oral arguments of Spain.

The sitting is now closed.

*(The sitting closes at 4.40 p.m.)*

NAVIRE « LOUISA »

**PUBLIC SITTING HELD ON 12 OCTOBER 2012, 3.00 P.M.****Tribunal**

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

**For Saint Vincent and the Grenadines:** [See sitting of 8 October 2012, 10.00 a.m.]

**For the Kingdom of Spain:** [See sitting of 4 October 2012, 10.00 a.m.]

**AUDIENCE PUBLIQUE TENUE LE 12 OCTOBRE 2012, 15 HEURES****Tribunal**

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

**Pour Saint-Vincent-et-les Grenadines :** [Voir l'audience du 8 octobre 2012, 10 heures]

**Pour le Royaume d'Espagne :** [Voir l'audience du 4 octobre 2012, 10 heures]

*Le Président :*

Bonjour Mesdames et Messieurs. Nous entendrons aujourd'hui le deuxième tour de plaidoiries de l'Espagne dans l'affaire concernant le navire « Louisa ». C'est aujourd'hui jour de fête nationale en Espagne. Je saisis cette occasion pour adresser mes félicitations à la délégation espagnole.

Avant de poursuivre, je souhaite vous informer que Monsieur le juge Wolfrum sera absent aujourd'hui pour des raisons qu'il m'a dûment expliquées.

J'invite maintenant l'agent de l'Espagne, Madame Escobar Hernández, à prendre la parole.

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ – 12 octobre 2012, après-midi

### Réplique de l'Espagne

EXPOSÉ DE MME ESCOBAR HERNÁNDEZ  
AGENT DE L'ESPAGNE  
[TIDM/PV.12/A18/13/Rev.1, p. 1–14]

*Mme Escobar Hernández :*

Merci Monsieur le Président. Madame et Messieurs les juges, c'est effectivement la fête nationale de mon pays et je vous remercie très sincèrement de vos félicitations. Nous sommes heureux d'être ici, en ce jour de fête nationale, pour vous présenter les dernières plaidoiries de l'Espagne.

Monsieur le Président, Madame et Messieurs les juges, nous sommes arrivés à la dernière séance des audiences, où l'Espagne doit vous présenter ses arguments finals dans la présente affaire, ainsi que ses conclusions et les *petita* adressées au Tribunal.

Aux fins de notre dernier exposé oral, nous avons pris en compte tant les pièces écrites qui vous ont été soumises que les audiences qui ont lieu dans cette salle depuis le 4 octobre. Cela dit, nous ne pensons pas qu'il soit nécessaire, ni utile, de revenir sur tous les arguments qui ont été présentés devant vous. Au contraire, compte tenu de la nature de ce deuxième tour de plaidoiries, nous avons choisi certains éléments particuliers qui reflètent la position de l'Espagne dans la présente procédure. Nous n'aborderons donc pas toutes les questions, mais il faut bien choisir.

Nous allons vous présenter lesdits éléments en connexion avec les dépositions des experts et des témoins qui ont été faites pendant les audiences et dans le contexte de la déclaration et des conclusions qui vous ont été présentées hier par le co-agent de Saint-Vincent-et-les Grenadines.

Dans le même temps, et dans ce cadre, nous allons vous soumettre les réponses de l'Espagne aux questions qui nous ont été posées par le Tribunal le 2 octobre.

Mais si vous me le permettez, Monsieur le Président, nous n'y répondrons que dans la deuxième partie de notre intervention, une fois que nous aurons présenté notre argumentation d'une façon complète. Si cela vous convient, c'est ainsi que nous procéderons.

Monsieur le Président, permettez-moi de commencer mon exposé par une référence aux éléments les plus pertinents et remarquables que nous avons l'intention de soumettre à l'examen de votre Tribunal à ce stade.

Premièrement, le Tribunal international du droit de la mer n'a pas compétence pour statuer sur la requête introduite par le demandeur, ni du point de vue de la recevabilité de la requête ni dans la perspective *ratione materiae*. Le demandeur a essayé de vous orienter vers un autre titre juridictionnel hier – cela a été dit par le co-agent de Saint-Vincent-et-les Grenadines, avec des arguments, à notre avis fallacieux et dénués de tout fondement juridique. Je crois qu'il n'est pas nécessaire, Monsieur le Président, de m'attarder sur ce point, je reviendrai sur certains éléments tout au long de mon exposé.

Deuxièmement, l'existence du « Louisa » constitue le seul élément qui aurait permis, le cas échéant, d'établir une connexion entre la présente affaire et la Convention des Nations Unies sur le droit de la mer. Le demandeur n'a établi aucune autre base pour lier d'une part sa plainte et la Convention et d'autre part sa plainte et le droit de la mer au sens large. Et malgré cela, le demandeur essaie de vous brosser un « tableau » de grandes dimensions, riche en couleurs, mais sans aucun dessin de base : un tableau basé sur des faits – ses faits – qui ne peuvent avoir un lien avec la Convention que si l'on admet une interprétation très large, brute et trompeuse de ce qui s'est passé à Cadix. Si vous me le permettez, je reviendrai plus tard sur ce sujet.

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Troisièmement, le fait que le navire « Louisa » batte le pavillon de Saint-Vincent-et-les-Grenadines est le seul lien permettant que l'affaire vous soit soumise. Et ce lien vous a été présenté par le demandeur d'une manière trompeuse, puisque les conséquences en droit international qu'il attribue au fait pour un navire de battre tel ou tel pavillon sont tout à fait inattendues et inadmissibles. Je me permets de vous citer deux de ces conséquences :

- d'après le demandeur, la présence d'un navire permet d'exclure toutes règles bien établies sur la protection diplomatique et d'ignorer les compétences souveraines d'un Etat tiers exercées conformément à la Convention sur le droit de la mer, conformément à d'autres conventions et traités et au droit international général ;
- de plus, la présence d'un navire transforme en droit de la mer, d'après le demandeur toujours, n'importe quel sujet : de l'exercice de la juridiction pénale par un Etat dans l'exercice de sa souveraineté, aux droits de l'homme et aux droits de la défense.

Mais je ne reviendrai pas sur des arguments que je vous ai déjà présentés. Permettez-moi de dire que, pour le demandeur, du seul fait de la présence du « Louisa », tout devient droit de la mer et tout doit être analysé exclusivement dans cette perspective. L'Espagne ne croit pas que le droit international devrait être considéré comme un domaine clos sans aucune connexion avec le reste.

Bien au contraire, comme nous l'avons dit pendant nos plaidoiries, le droit de la mer fait partie du droit international. En outre, votre Tribunal est habilité à considérer comme droit applicable tant la Convention que d'autres normes du droit international qui ne sont pas incompatibles avec la Convention. Cela dit, il faut aussi rappeler au demandeur que si le droit de la mer fait bel et bien partie du droit international, toute norme de droit international n'est pas automatiquement norme de droit de la mer ou ne lui est pas indissociablement liée.

En outre, et toujours en relation avec le pavillon, j'aimerais appeler votre attention sur le fait que le demandeur semble ne pas avoir une bonne compréhension de ce qu'implique le fait d'accorder son pavillon à un navire. A cet égard, nous nous contenterons de rappeler ici que la nature d'une telle institution, qui est fortement liée à une des libertés de la mer – la liberté de navigation – et qui est un droit souverain de l'Etat, ne correspond pas du tout au sens que le demandeur a donné à la reconnaissance du pavillon dans ses conclusions, plus concrètement dans le *petitum* figurant à l'alinéa l) : « Ordonner le versement à Saint-Vincent-et-les Grenadines de réparations d'un montant de 500 000 euros au titre des dépens et de l'atteinte à sa dignité et à son intégrité ainsi que du préjudice porté à son activité commerciale d'immatriculation de navires ».

Monsieur le Président, est-ce que l'exercice d'un droit souverain peut être traité comme une « activité commerciale » ?

Je crois, que le demandeur est allé dans la présente affaire bien au-delà du « développement progressif du droit international ». Il semblerait qu'il ne comprenne pas certaines catégories essentielles du droit international et – encore pire ! – que s'il les comprend, il préfère n'en tenir aucun compte.

En quatrième lieu, j'aimerais dire que le différend, si différend il y a, entre Saint-Vincent-et-les Grenadines et l'Espagne ne porte et ne peut porter que sur l'immobilisation du « Louisa » et sur la conformité de ladite immobilisation avec le droit international applicable, notamment la Convention des Nations Unies sur le droit de la mer.

Comme je l'ai déjà relevé, l'immobilisation du « Louisa » et la détention de certaines personnes, ainsi que l'adoption d'autres mesures conservatoires, ne constituent pas un « bloc » indissociable de mesures qui concernent la Convention des Nations Unies et le droit de la mer. Tout au contraire, permettez-moi de vous rappeler que le seul lien entre

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l'immobilisation du « Louisa » et la détention de certaines personnes est la procédure pénale en cours à Cadix à la suite de la commission d'infractions pénales non négligeables.

Le demandeur a mentionné, hier, un article du P<sup>r</sup> Treves comme référence faisant autorité et il a bien fait – l'Espagne l'a utilisé aussi. Mais il est parvenu à une conclusion absolument étonnante : sans doute ne l'a-t-il pas lu complètement, car il a conclu, si je ne m'abuse et si j'en crois le procès-verbal, à une sorte de *vis attractiva* absolue sur les droits de l'homme de la Convention sur le droit de la mer, ce qui est étonnant et montre encore une fois combien les arguments du demandeur sont trompeurs. Je me garderai de faire des commentaires sur ledit article : vous le connaissez bien et c'est à vous de décider quelle interprétation lui donner.

Mais permettez-moi au moins de faire deux observations :

- premièrement, l'Espagne n'a jamais dit, comme semble le prétendre le demandeur, qu'il est impossible de tenir compte des droits de l'homme dans le cadre de la Convention et dans l'exercice de votre compétence. L'Espagne a dit que l'on doit certes se soucier des droits de l'homme, mais toujours dans le cadre de la Convention ;
- deuxièmement, il est tout à fait étonnant que le demandeur n'ait fait aucune référence à votre jurisprudence à cet égard, d'autant que, comme il le dit lui-même, il a fait appel à des spécialistes du droit de la mer – je n'ai aucune raison de mettre en doute cette affirmation. Ces experts lui auraient dit d'invoquer l'article 300 et une prétendue violation des droits de l'homme par les autorités espagnoles. L'Espagne n'arrive toutefois pas à comprendre quel est le lien direct entre ces deux éléments.

Cinquièmement, l'Espagne n'a violé aucune règle ni aucun principe du droit international du fait de l'immobilisation du « Louisa ». L'immobilisation du « Louisa » s'est faite en pleine conformité avec le droit international et avec le droit interne espagnol. Je reviendrai plus tard sur ce sujet au moment de répondre aux questions que le Tribunal nous a adressées. Mais, laissez-moi, à ce stade, faire un commentaire sur une affirmation qui a été faite hier par le co-agent du demandeur. Il a dit que l'Espagne essayait de justifier que l'article 561 du Code de procédure pénale espagnol (*Ley de Enjuiciamiento Criminal*) a été modifié, et cela à l'appui de la décision du juge espagnol pour ce qui est de l'ordonnance d'arraisonnement et de perquisition du « Louisa ».

Monsieur le Président, comme j'aurai l'occasion de l'expliquer plus en détail par la suite, le co-agent de Saint-Vincent-et-les Grenadines ne cesse de déformer les propos de l'Espagne. Il s'est référé à la déposition de M. Martin Pallín et – je pense ! – à mon intervention à ce moment-là sur l'article 561 du Code de procédure pénale.

L'Espagne n'a jamais dit que l'article en question n'était plus en vigueur. L'Espagne n'a jamais dit que l'article 561 avait été modifié ce qui, dans un pays démocratique, impliquerait une nouvelle décision du Parlement.

Ce que nous avons dit, c'est que l'article 561 a fait l'objet d'interprétations différentes de la part de juges et de tribunaux en Espagne. Qu'il y a plusieurs interprétations sur sa portée et que la Cour suprême a déclaré que le non-accomplissement des conditions prévues à cet article n'influe ni sur la validité des preuves recueillies pendant l'arraisonnement et la perquisition, ni sur la validité de la procédure même, car un tel fait ne porte pas préjudice aux droits de la défense et ne porte pas non plus atteinte à la régularité de la procédure (*due process*), pas plus qu'il ne constitue un déni de justice.

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Mais, Monsieur le Président, Madame et Messieurs les juges, la Cour suprême espagnole n'est pas la seule à l'avoir dit. La Cour européenne des droits de l'homme l'a confirmé par la décision que nous vous avons présentée il y a deux jours.

Je m'attendais à ce qu'un avocat qui travaille d'habitude dans le cadre du *common law* et qui à ce titre a fait référence à plusieurs reprises au mot « précédent », comprenne les arguments présentés par l'Espagne et ne les confonde pas avec une « modification » de la loi.

Sixièmement, l'immobilisation du « Louisa » s'est produite dans le cadre de l'exercice par l'Espagne de sa juridiction pénale, notamment à l'égard de certaines atteintes au patrimoine culturel sous-marin, dont la protection et la préservation ont été acceptées volontairement par l'Etat, en vertu de certains instruments juridiques internationaux. Je répondrai plus tard à une des questions du Tribunal, mais permettez-moi de dire à ce stade que la procédure pénale en cours à Cadix, et dans le cadre de laquelle le « Louisa » a été immobilisé, n'est ni déraisonnable ni exorbitante.

Elle n'est pas déraisonnable car, comme je vous le dirai plus tard, c'est un instrument pour la défense du patrimoine culturel sous-marin, conforme aux obligations acceptées par l'Espagne en vertu de la Convention du droit de la mer et en vertu de la Convention de l'Unesco de 2001.

En outre, s'agissant des armes trouvées à bord du « Louisa », il faut aussi rappeler que le maintien de la sécurité à l'intérieur du pays est un droit et aussi une obligation de tout Etat souverain ; et le contrôle des armes qui pourraient être détenues par des particuliers est considéré par l'Espagne comme une *conditio sine qua non* pour garantir la sécurité et l'ordre public.

L'exercice de la juridiction par l'Espagne n'est pas non plus exorbitant, car les infractions qui font l'objet de l'enquête judiciaire ont été commises en Espagne, dans son territoire, ses eaux intérieures et sa mer territoriale, par un réseau d'individus présents sur le territoire espagnol, et que leurs conséquences se font sentir en Espagne et sur l'Espagne.

Septièmement, les faits allégués par le demandeur ne correspondent aucunement à ce qui s'est passé en Espagne dans le cadre de cette procédure pénale, dans laquelle l'immobilisation du « Louisa » n'était qu'une des mesures adoptées par les organes judiciaires compétents. Tant dans son mémoire que dans sa réplique, le demandeur a toujours dit très clairement que le « Louisa » était arrivé en Espagne pour mener des activités de recherche sur les hydrocarbures. Mais il n'a pas pu démontrer qu'il détenait une autorisation délivrée par les autorités espagnoles (dans l'exercice des compétences qui leur sont reconnues expressément par la Convention des Nations Unies sur le droit de la mer).

Par la suite, il nous a dit qu'il pensait que le permis obtenu par Tupet était valide pour faire les recherches qui intéressaient Sage. Monsieur le Président, Madame et Messieurs les juges, est-ce qu'il est vraisemblable qu'une société – parce que je parle de Sage, la société à l'égard de laquelle Saint-Vincent prétend exercer sa protection diplomatique – qui, d'après le demandeur, est une grande société spécialisée dans le domaine des hydrocarbures, accepte de participer à une opération telle que celle décrite le demandeur sans être sûre que son partenaire a les permis voulus ?

Est-il vraisemblable que Sage n'ait pas consulté ses services juridiques pour se renseigner sur la validité d'un document qui est le seul titre autorisant la présence de son navire en Espagne et l'autorisant à mener des activités à fort contenu et à fort risque financier ? Encore plus surprenant, le demandeur nous dit maintenant que, en tout cas, s'il était en train de faire quelque chose d'irrégulier, ce n'était pas sa faute ni sa responsabilité, mais celles de tiers : Tupet pour le permis, Plangas pour les déflecteurs, et peut-être les plongeurs pour avoir enlevé des pièces des fonds marins et les avoir apportées sur le « Louisa ».

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Monsieur le Président, je trouve cela surprenant en tant qu'argumentation juridique. Et je trouve encore plus surprenant qu'une telle plaidoirie soit faite par un Etat devant un tribunal international.

L'Espagne, pour sa part, a bel et bien démontré ce qu'elle a affirmé : que le « Louisa » n'avait aucune autorisation pour faire des recherches dans le domaine des hydrocarbures et que, par conséquent, l'affirmation faite par le demandeur en défense de la légalité de l'activité du « Louisa » en Espagne est tout à fait fautive. De plus, l'Espagne a démontré qu'il y a une base raisonnable pour considérer que le « Louisa » faisait partie du réseau nécessaire pour la commission des infractions faisant l'objet de poursuites en Espagne et qu'il était un instrument nécessaire pour la commission des infractions. Et c'est pour cette raison et pour cette raison seulement que le « Louisa » a été immobilisé à Puerto de Santa María.

Pourtant, le demandeur vient de nous dire hier que l'Espagne n'a prouvé aucune de ses affirmations, ni à l'égard des objets trouvés sur le « Louisa », ni même s'agissant de la participation du « Louisa » dans la commission des infractions.

L'Espagne considère quant à elle qu'elle a bien démontré le lien du « Louisa » avec le réseau criminel, de même que la présence à bord de ce navire d'objets appartenant à son patrimoine culturel sous-marin : Mme Avella l'a elle-même reconnu lors de son témoignage. Qu'elle ait qualifié ces objets de « pierres » tient simplement au fait qu'elle n'est pas une experte dans le domaine de l'archéologie sous-marine, pas plus que moi d'ailleurs.

Quelles autres preuves le demandeur veut-il que l'Espagne apporte ici ? Le jour et l'heure où les participants à la présumée organisation criminelle se sont rencontrés et ce qu'ils ont dit ? Qui a pris tel objet ou tel autre ? Comment est organisé le réseau criminel ? Quel était le rôle de telle ou telle personne ? Quel est le contenu de tel ou tel disque dur ? Il ne s'agit là de quelques exemples.

Monsieur le Président, je ne suis pas sûre que le Tribunal veuille se transformer en cour pénale. Et pourtant c'est bien ce que voudrait le demandeur. Toutes ces données font l'objet de la procédure pénale en cours à Cadix, et toutes ces preuves, qui ont déjà été recueillies, seront présentées par l'Espagne aux accusés ; ceux-ci ne seront pas obligés de rapporter une preuve négative et de démontrer que tout cela ne s'est pas passé, contrairement à ce que Saint-Vincent-et-les Grenadines prétend que l'Espagne fasse devant vous. C'est à l'Espagne d'établir devant les tribunaux espagnols que des infractions ont été commises, bien sûr, là où la procédure pénale est en cours. Ces règles de procédure sont là pour garantir la présomption d'innocence et l'Espagne est fière de les respecter scrupuleusement.

Malheureusement, il ne semble pas que la position du demandeur soit la même quand il s'agit de l'Espagne car, par exemple, il a exigé que l'Espagne prouve qu'elle n'a commis aucune violation du droit international, sans pour autant reconnaître que c'est à Saint-Vincent-et-les Grenadines qu'il incombe de prouver devant vous ce qu'il affirme. Et qu'affirme-t-il ? Que le « Louisa » était en Espagne en conformité avec la loi espagnole et le droit international, et que le « Louisa » se livrait à des activités licites.

L'Espagne a donné des preuves suffisantes de ses arguments. Le demandeur n'a apporté aucune preuve à l'appui des siens ; il se contente de répéter qu'il croyait que tout était en ordre. En tout cas, Monsieur le Président, si j'en ai le temps, je reviendrai plus tard sur la charge de la preuve dans d'autres contextes.

Huitièmement, toutes les mesures et décisions prises par l'Espagne à l'égard de l'immobilisation du « Louisa » sont conformes au principe de bonne foi et ne constituent nullement un abus de droit.

Monsieur le Président, je ne considère pas nécessaire de répéter nos arguments sur la nature et la signification de l'article 300, car j'estime qu'ils ont déjà été bien développés. Il est clair que l'article 300 doit s'appliquer pour évaluer si l'Espagne a respecté ou non l'obligation d'agir de bonne foi et de ne pas commettre un abus de droit. Mais permettez-moi

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de dire quelques mots sur cette importante question : l'Espagne a agi d'une manière tout à fait raisonnable en immobilisant le « Louisa ». C'était l'instrument du délit ; il y avait des pièces à conviction importantes – et, je vous le dis, c'est pour cela que le juge n'a pas autorisé les membres d'équipage hongrois à séjourner à bord du « Louisa », car il fallait préserver les preuves, ce n'était pas du tout la manifestation d'une discrimination à l'égard d'étrangers. De plus, l'immobilisation du « Louisa » ne portait aucunement préjudice aux droits du propriétaire puisque, comme nous l'avons démontré par la déposition de M. Martín Pallín, le navire est toujours propriété de Sage et de M. Foster. L'Espagne a en outre adopté les mesures nécessaires pour assurer la sécurité du navire ainsi que son entretien en attendant la décision finale du juge compétent.

Pour finir, le propriétaire a toujours été absent et a gardé le silence à propos du navire jusqu'à un stade très avancé de la procédure : il n'a jamais prié le juge de lui restituer le navire et n'a jamais manifesté le moindre intérêt pour son entretien, si ce n'est certaines visites au cours desquelles ses représentants – espagnols et américains – ont pu prendre des photos, ces mêmes photos qui ont été montrées au Tribunal pendant ces audiences.

Neuvièmement, les prétendues violations des droits des particuliers, à savoir des droits de l'homme et du droit de propriété, ne se sont pas produites. Toutes les mesures adoptées par les autorités espagnoles sont conformes au principe de bonne foi et ne constituent pas un abus de droit.

Je n'ai pas l'intention de revenir sur le rôle que jouent les droits de l'homme en l'espèce. Vous connaissez déjà parfaitement la position de l'Espagne à cet égard et je ne crois pas qu'il soit nécessaire de la répéter. Mais cela dit, l'Espagne, pays fermement engagé, tant juridiquement que politiquement, en faveur des droits de l'homme, ne s'opposerait jamais à ce que l'on défende les droits de l'homme où que ce soit.

Permettez-moi seulement quelques mots concernant les très graves accusations qui ont été lancées par le demandeur contre l'Espagne concernant Mme Avella, M. Avella et M. Foster, tous trois de nationalité américaine. Mme Avella et M. Avella ont déposé devant vous à ce sujet. C'est dommage que le demandeur n'ait pas jugé utile de nous présenter aussi le témoignage des deux membres d'équipage hongrois, car nous aurions eu ainsi un tableau plus complet des violations des droits de l'homme dont toutes les personnes détenues à l'occasion de l'immobilisation du « Louisa » auraient, selon le demandeur, été victimes. Quoi qu'il en soit, le demandeur a le droit de choisir les témoins qu'il considère utile de présenter devant vous à l'appui de sa thèse.

Mais revenons au fond : les prétendues violations des droits de l'homme, sous tous les angles sous lesquels elles ont été évoquées par le demandeur. Cette grave accusation est apparue seulement aux audiences, et seulement à l'occasion des témoignages de Mme Avella et de M. Avella que le demandeur prétend vous présenter comme des preuves irréfutables. Je n'ai pas l'intention de commenter ici le contenu de ces témoignages qui, comme j'ai déjà dit, est des plus faibles, comme il ressort clairement d'une simple lecture des procès-verbaux.

Je ne peux pas manquer de souligner ici que l'introduction de ces arguments au stade de la procédure orale a privé l'Espagne de la possibilité de préparer sa défense, comme l'exige le principe de l'égalité des armes. A ce propos, j'aimerais dire ce qui suit :

Premièrement, aucune preuve ne nous a été fournie quant aux mauvais traitements qu'auraient subis Mme Avella et M. Avella : pas de certificats médicaux, pas de plaintes pour pratiques policières abusives, pas de preuves que des recours aient été introduits sans que le juge n'y réponde, pas de preuve que des dommages aient été réclamés à raison du préjudice prétendument subi. Alors, quelles violations des droits de l'homme ont-elles été commises ? Une accusation aussi grave, lancée sans la moindre preuve, en se contentant d'affirmer que les intéressés se sont sentis victimes d'atteintes à leurs droits, équivaut-elle à une véritable violation des droits de l'homme ?

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Comme l'Espagne l'a démontré, les droits fondamentaux de Mme Avella, de M. Avella et des deux membres d'équipage hongrois n'ont pas été violés. Ces personnes ont été détenues en toute légalité, on les a informés de leurs droits, on les a déférés devant un juge qui les a entendus, ils ont pu présenter des écritures, des recours et des pourvois pour défendre leurs droits et leurs intérêts ; les mesures prises par le juge espagnol ont été les moins rigoureuses pour les intéressés, qui ont eu la possibilité de demander réparation à raison du préjudice qu'ils auraient subi. Ils l'ont encore et ils ont même le droit de saisir la Cour européenne des droits de l'homme s'ils le veulent.

Par conséquent, même si votre Tribunal s'estimait compétent sur ce sujet, ce qu'il est tout à fait en droit de faire, l'Espagne affirme respectueusement qu'il n'a pas été porté atteinte aux droits fondamentaux des personnes détenues.

En ce qui concerne M. Foster, nous sommes obligés de dire dans le même ordre d'idées que ses droits restent intacts devant les juges espagnols et que, par conséquent, il n'y a jamais eu violation de ses droits humains. En outre, à l'égard du droit de propriété, nous avons déjà dit à plusieurs occasions qu'un tel droit n'est pas en cause : M. Foster continue d'être le propriétaire du « Louisa », il aurait pu demander que le « Louisa » lui soit rendu, or il ne l'a pas fait en plus de 5 ans. Il aura le droit de récupérer le « Louisa » une fois la procédure pénale terminée, si le juge considère qu'il n'y a pas eu d'infraction. En tout état de cause, il a le droit de réclamer devant les autorités espagnoles une indemnité à raison des prétendus dommages causés au « Louisa » si jamais il advenait que l'administration de la justice espagnole ait eu des ratés. J'y reviendrai lorsque je répondrai à vos questions.

Dixièmement, l'Espagne n'a pas commis de déni de justice.

Bien que l'Espagne considère qu'il ressort clairement de ce que je viens de dire qu'il n'y a pas eu déni de justice, j'aimerais, Monsieur le Président, dire deux mots sur un élément qui me semble particulièrement important. Le demandeur a affirmé qu'il y a eu déni de justice du fait que le « Louisa » est immobilisé depuis six années sans qu'il y ait de décision judiciaire définitive.

Je veux bien reconnaître que, dans des circonstances ordinaires, six ans, c'est bien long pour une procédure pénale, mais à l'inverse une procédure qui ne durerait que quelques jours ne serait pas raisonnable. Mais je veux attirer votre attention sur le fait que la procédure en cours à Cadix n'est pas une procédure simple ni facile. Je me suis déjà prononcée à cet égard pendant les audiences. Je ne suis pas en mesure, et ce n'est pas le lieu, de présenter ici tous les actes procéduraux qui ont été émis à Cadix. Hier, le co-agent du demandeur faisait grief à l'Espagne d'avoir affirmé que la lenteur de la procédure tenait en grande partie aux écritures et aux recours constants des accusés. Et c'est vrai, je l'ai dit, mais ce n'était pas pour rejeter la faute de cette lenteur sur les accusés, mais simplement pour l'expliquer.

Mais permettez-moi de m'expliquer un peu mieux. Le demandeur vous a dit hier, en réponse à certaines questions qui viennent de nous être posées par le Tribunal, qu'à son avis, le recours pendant, qui doit être épuisé, est sans doute l'« *Auto de procesamiento* » qui doit être envoyé à une instance judiciaire supérieure. En réalité, il fait référence au renvoi de toute la procédure par le juge d'instruction au juge du fond (l'*Audiencia provincial* de Cadix). Ce renvoi ne s'est pas encore produit parce qu'il faut pouvoir communiquer avec les accusés, or certains d'entre eux ont changé de représentant judiciaire (ce qu'en Espagne on appelle le *procurador*) ou ont renvoyé leur avocat ou n'en ont pas désigné. Et malgré les demandes répétées du juge à Cadix, ils n'ont pas nommé de nouveau représentant judiciaire ni de nouvel avocat. Enfin, le juge a dû demander au collège (barreau) des « *procuradores* » et des avocats d'en désigner d'office pour pouvoir continuer la procédure.

Monsieur le Président, si hier le co-agent du demandeur parlait de coïncidence, d'événements qui se produisent sans raison aucune, c'est aussi une coïncidence que cela se

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soit produit juste avant la tenue de ces audiences. Vous comprendrez que, dans ces conditions, l'Espagne ne peut en aucun cas admettre qu'il y a eu déni de justice.

Onzièmement, l'Espagne n'est pas tenue à réparation (en versant des dommages-intérêts) envers le demandeur. De plus, l'indemnité réclamée par Saint-Vincent-et-les Grenadines est imprécise, déraisonnable et ne répond à aucun critère de proportionnalité.

Je n'ai pas l'intention de me prononcer sur ce point car mon collègue, le P<sup>f</sup> Aznar, s'en chargera après mon intervention.

Douzièmement, le demandeur n'a pas respecté son obligation d'agir de bonne foi dans la présente affaire.

Monsieur le Président, comme je l'ai dit déjà, l'article 300 s'applique à l'horizontale à toutes les dispositions de la Convention. Par conséquent, il s'applique aussi au système de règlement des différends. Je me suis déjà exprimée à ce sujet pendant les plaidoiries de l'Espagne. Je ne pensais pas revenir sur ce point aujourd'hui, mais, après la déclaration faite hier par le co-agent du demandeur, je suis obligée, malgré mon intention initiale, de le faire.

Hier, le co-agent de Saint-Vincent-et-les Grenadines est venu exposer ses conclusions finales. Ce n'est pas à l'Espagne de se prononcer sur leur contenu, mais à vous de l'évaluer, car c'est à vous qu'elles s'adressent. Je ne peux cependant passer sous silence certains événements déplorablement qui se sont produits hier devant vous.

En premier lieu, s'agissant des experts et témoins présentés par l'Espagne, l'intervention du co-agent de Saint-Vincent-et-les Grenadines a été, pour le moins, malheureuse. Nous avons été « scandalisés » – pour reprendre le mot employé par le co-agent du demandeur – par l'utilisation dans une salle d'audience d'un tribunal international de mots, d'expressions et de commentaires qui seraient plus adaptés, et encore, à une procédure pénale qui se déroulerait devant un jury sans aucune formation juridique, dans l'intention de recourir à une tactique bien connue des pénalistes, appelée « arguments d'ambiance ». Mais un tel comportement, Monsieur le Président, n'est pas de mise ici.

Il n'appartient pas à l'Espagne de se prononcer sur le choix des témoins et des experts du demandeur. Mais cette affirmation est aussi valable pour Saint-Vincent-et-les Grenadines. En outre, il faut rappeler qu'il n'appartient pas aux Parties de porter un jugement sur la compétence, la fiabilité et la crédibilité des experts et témoins, et encore moins de faire des affirmations qui pourraient porter atteinte à l'honneur des experts et témoins. C'est au Tribunal de se faire sa propre idée, et nous avons confiance en son jugement. Nous n'aurions jamais l'impudence de faire des commentaires sur un témoin qui n'est pas présent. Mais permettez-moi, Monsieur le Président, d'appeler votre attention sur les failles des témoignages et des dépositions des experts cités par le demandeur.

En deuxième lieu, toujours au sujet des arguments relatifs au non-respect de la bonne foi procédurale, le co-agent de Saint-Vincent-et-les Grenadines a fait hier des affirmations qui sont tout à fait fausses, ce qui apparaît à la seule lecture des procès-verbaux. Pour ne vous donner qu'un exemple, vous vous souviendriez qu'hier le co-agent de Saint-Vincent-et-les Grenadines a affirmé que c'est pendant les présentes audiences que l'agent de l'Espagne a expliqué pour la première fois comment l'ordonnance de renvoi (*Auto de procesamiento*) du 27 octobre 2010 a été soumise au Tribunal.

Il est allé jusqu'à nier que c'est le Tribunal qui a demandé une copie de ce document. Il a dit qu'il a lu attentivement les procès-verbaux des audiences relatives aux mesures conservatoires et qu'il n'a rien trouvé à ce sujet. Je n'ai pas l'intention de vous faire perdre votre précieux temps, mais je me permettrai d'appeler votre attention sur le procès-verbal du 10 décembre 2010, après-midi, page 29, ligne 49, où M. Weiland lui-même a lu la question posée par écrit par le Tribunal.

En outre, le co-agent de Saint-Vincent-et-les Grenadines aurait-il déjà oublié qu'à sa propre demande, le Greffier a renvoyé, au mois de septembre dernier, tous les documents

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produits pendant les audiences relatives aux mesures conservatoires et que le premier de ces documents était l'*Auto de procesamiento* avec une note de couverture de l'agent de l'Espagne expliquant la manière dont ledit document était présenté devant le Tribunal ?

Encore un autre exemple : la manière dont le demandeur a présenté l'affaire de l'*Odyssey* devant vous. Etant donné les énormes différences entre l'une et l'autre affaire, je trouve, Monsieur le Président, qu'elle n'est pas conforme au principe de la bonne foi dans la procédure.

Monsieur le Président, il ne s'agit là que de deux exemples parmi d'autres sur lesquels je n'ai ni le temps ni la volonté de m'attarder ; c'est en effet tout à fait déplaisant d'avoir à le faire. Mais ces exemples montrent la volonté du co-agent du demandeur de réécrire les faits, en n'hésitant pas à proférer devant vous des affirmations tout à fait fausses, pour autant qu'elles servent ses intérêts et sa stratégie !

En troisième lieu, j'aimerais dire que le co-agent du demandeur semble ne pas avoir compris la nature de la procédure à laquelle il participe en tant que représentant d'un Etat souverain.

D'abord, il essaie de transformer la procédure contradictoire en disant que c'est la première fois, dans sa vie professionnelle, qu'il intervient en premier lieu et qu'il n'a pas le dernier mot. Je suppose que c'est parce qu'il a toujours été du côté de la défense, car autrement, je ne connais aucun système judiciaire basé sur le contradictoire où le demandeur a le droit de parler toujours en dernier lieu.

Il essaie aussi de vous convaincre qu'il faut inverser la charge de la preuve et exiger de l'Espagne qu'elle prouve ce qui n'existe pas, c'est-à-dire exiger une preuve négative. Encore une situation étrange dans une procédure basée sur le principe du contradictoire et au sujet de laquelle tant la Cour européenne des droits de l'homme que la Cour interaméricaine des droits de l'homme ont rendu de nombreux arrêts.

Et, pour finir, et c'est peut-être le plus grave, il a essayé de transformer le Tribunal en un jury. Il l'a dit expressément. Il a dit : « Vous êtes en même temps un jury et un tribunal ».

J'aimerais dire encore quelques mots sur ce sujet. Le demandeur a essayé de transformer le Tribunal en un jury qui intervient dans une affaire pénale, dans une intention très facile à comprendre : être en mesure de se pencher tout simplement sur les faits en oubliant le droit pour produire une certaine « ambiance », ce qui est relativement commun dans certains pays et certains types de tribunaux pénaux.

Je dois vous exprimer ma ferme conviction qu'il n'est pas admissible d'utiliser ce type d'arguments d'ambiance face à un Tribunal international, même à titre purement dialectique.

Monsieur le Président, je regrette d'avoir été obligée de prononcer ces mots. Si je les ai prononcés, c'est tout simplement pour dire la grande importance que l'Espagne attribue au système judiciaire de règlement des différends et, en particulier, à ce Tribunal. Et je les ai prononcés avec tout le respect que je dois à un Tribunal composé d'éminents juristes, tous bien connus sur le plan international et tous experts dans le domaine du droit de la mer et du droit international.

Pour finir, j'aimerais me référer au point 13. A notre avis, le *petitum* du demandeur – les conclusions finales, pour utiliser le terme courant ici, est plein de contradictions et contient des éléments exorbitants.

Mon collègue le Pr Aznar traitera certaines affirmations contenues dans le *petitum* à l'égard, notamment, de la réclamation de dommages-intérêts. Mais permettez-moi de vous présenter d'autres observations d'une portée plus générale.

J'ai déjà fait référence à la demande concrète sur la qualification de la reconnaissance du navire comme une « activité commerciale ». Je n'y reviendrai pas.

Mais permettez-moi d'appeler votre attention sur le fait que le demandeur vous a présenté un *petitum* plein de contradictions car, pendant les audiences, il a abandonné les arguments

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relatifs à la violation des articles concrets de la Convention, sauf l'article 300. Il avait même exclu de ses pièces écrites la référence à l'article 303, en prétendant qu'il s'agissait d'une erreur typographique.

Jamais, pendant les audiences, on n'a entendu parler des articles 73, 87, 226 et 227. Mais si on lit le *petitum*, ces articles reviennent à nouveau, bien que le co-agent du demandeur nous ait dit hier, et auparavant, que le plus important de tout, c'était la violation des droits de l'homme et que la compétence du Tribunal naissait de la relation entre l'article 300 et les violations des droits de l'homme.

Est-ce que la réintroduction de l'article 303 dans les conclusions, dans le *petitum*, est à nouveau une erreur typographique ? Et la référence aux articles 73 2) et 4), 87, 226 et 227, est-ce aussi une erreur typographique ? Ou est-ce plutôt que le demandeur n'a pas une idée claire de l'objet du prétendu différend ?

Avec tout le respect qu'elle vous doit, Monsieur le Président, l'Espagne considère qu'un tel *petitum* est une claire manifestation de la confusion que le demandeur a voulu introduire dans la présente procédure pour en tirer profit.

Mais j'ai une autre remarque à faire sur les contradictions du *petitum*. Le demandeur prie le Tribunal de bien vouloir ordonner que l'Espagne rende le « Gemini III ». Et le le « Louisa » ? Le « Louisa » n'apparaît pas du tout ! On ne demande pas que le « Louisa » soit rendu au propriétaire et, en tout cas, à Saint-Vincent-et-les Grenadines. Est-ce qu'il n'y a pas d'intérêt pour le « Louisa », alors même qu'il s'agit du seul lien entre Saint-Vincent-et-les Grenadines et la présente affaire ? Ou est-ce que le demandeur ou ses avocats poursuivent ici un autre objectif à travers le « Louisa » ?

Et voilà ma dernière remarque : le *petitum* du demandeur est tout à fait exorbitant et contient des revendications concrètes qui laissent perplexes.

En premier lieu, il vous demande de vous prononcer sur certains actes relatifs à des particuliers, qui n'ont rien à voir avec l'immobilisation du « Louisa », mais avec une procédure pénale espagnole encore en cours – en particulier, je me réfère aux alinéas f) et g). Qui plus est, le demandeur vous a prié d'ordonner des mesures que je ne peux qualifier que de « mesures de protection », de mesures conservatoires à l'égard de certaines personnes et de leurs intérêts ; il s'agit là des alinéas h) et i) dont je vais donner lecture :

Alinéa h) : « Ordonner que le défendeur se voie interdire d'exercer des représailles à l'encontre des intérêts de Mario Avella, Alba Avella, Geller Sandor, Szuszy Zsolt, John B. Foster et Sage Maritime Scientific Research Inc., y compris l'ouverture devant des tribunaux espagnols de procédures demandant l'arrestation, la détention ou la poursuite de ces personnes, ou la saisie ou confiscation de leurs biens » ;

Alinéa i) : « Ordonner que le défendeur se voie interdire de prendre toute mesure à l'encontre des intérêts de Mario Avella et John B. Foster, y compris la poursuite des procédures engagées contre ces personnes devant les tribunaux espagnols ».

Monsieur le Président, dans un *petitum* qui est présenté devant un tribunal international par un Etat contre un autre Etat, il est demandé d'interdire « d'exercer des représailles », d'interdire « l'ouverture de procédures... ou la poursuite ». On demande, pour finir, d'interdire « de prendre toute mesure à l'encontre des 'intérêts » de certaines personnes, « y compris la poursuite des procédures engagées contre ces personnes devant les tribunaux espagnols ».

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Monsieur le Président, Madame et Messieurs les juges, je suis désolée mais il me faut faire certains commentaires. Ces demandes, en plus d'être exorbitantes, montrent très bien quel est le véritable intérêt du demandeur dans cette affaire. Et ledit intérêt n'est pas d'assurer le respect du droit de la mer ni d'assurer le respect du droit de Saint-Vincent-et-les Grenadines en ce qui concerne l'entretien d'un navire qui bat son pavillon.

Enfin, le co-agent du demandeur vous a dit hier que vous étiez placés face à une situation historique et que vous ne devriez pas perdre l'occasion d'exercer votre compétence et de vous livrer à un exercice de développement progressif du droit international.

L'Espagne ne peut que confirmer l'importance du développement progressif du droit international qui, avec la codification, est une garantie de l'existence du droit international et de l'état de droit sur le plan international. Mais une notion tellement importante doit être traitée avec le sérieux qu'elle mérite.

Quoi qu'il en soit, Monsieur le Président, je suis très heureuse car, au bout de deux ans, je suis enfin arrivée à trouver un point de concordance avec Saint-Vincent-et-les Grenadines.

L'Espagne considère en effet que la présente affaire est très importante et qu'à travers votre décision, vous pourriez rendre un grand service au droit international et à son développement progressif. Et cela, en prenant une décision qui rappelle à la communauté internationale tout entière qu'il importe de garantir la protection du patrimoine culturel subaquatique qui, je dois le dire, n'est pas simplement le patrimoine de l'Espagne dans le cas d'espèce, mais le patrimoine de toute l'humanité.

Monsieur le Président, juste en dessous de cette salle magnifique, il y a un atrium avec une vue magnifique sur les bâtiments anciens et nouveaux du Tribunal. Dans cet atrium, il y a un cadeau du Gouvernement de la République de Chypre. Il s'agit d'un petit cadeau, mais qui a une importance énorme ! C'est un modèle d'un navire marchand grec ancien, appelé le « Kyrenia II », qui a coulé au IV<sup>e</sup> siècle avant J.C., à l'époque d'Alexandre le Grand. C'est parce qu'il a été remis au jour dans les règles de l'art, et après de longues recherches menées par les historiens, archéologues, ingénieurs navals et constructeurs navals, qu'une réplique précise et détaillée de ce navire a pu être construite.

Le site archéologique du « Kyrenia II » nous donne et donnera aux générations futures de précieuses informations sur notre passé. Imaginons maintenant que ce qui s'est passé dans les sites archéologiques de la baie de Cadix pendant les « fouilles » effectuées par le « Louisa » et le « Gemini III » se soit passé pour le « Kyrenia ». Nous aurions perdu toutes ces précieuses informations. Nous n'aurions jamais pu raconter cette partie de notre histoire à nos enfants.

Monsieur le Président, Madame et Messieurs les juges, je vais m'arrêter ici mais, comme vous pouvez le constater, je n'ai pas abordé toutes les questions.

J'ai été obligée, vu les contraintes de temps, de faire un choix et de vous présenter plusieurs questions à l'égard desquelles, à mon avis, il y a encore des éléments très obscurs qui méritaient d'être au moins portés à votre attention.

Monsieur le Président, Madame et Messieurs les juges, merci de votre patience et de votre attention. Je sais que mon exposé était très long.

Je vous prie, Monsieur le Président, de bien vouloir appeler mon collègue, le P<sup>r</sup> Aznar, pour continuer la plaidoirie de l'Espagne.

*Le Président :*

Je remercie Mme Escobar Hernández.

Je donne la parole à M. Aznar Gómez.

## M/V “LOUISA”

## STATEMENT OF MR AZNAR GÓMEZ

## COUNSEL OF SPAIN

[TTLOS/PV.12/C18/13/Rev.1, p. 13–18; TIDM/PV.12/A18/13/Rev.1, p. 14–20]

*Mr Aznar Gómez:*

Mr President, in the next few minutes I am going to address some of the particular issues concerning international responsibility that this case presents. My colleague Professor Jiménez Piernas has already addressed some general questions in his pleading on Wednesday. In my case, I am going to focus on the particular claims regarding responsibility brought up by Saint Vincent and the Grenadines, some of them surprisingly added yesterday afternoon in its final submission.

However, it must be clarified at the very outset that these questions of responsibility are discussed by Spain only subsidiarily since, as clearly explicated in our Counter-Memorial and Rejoinder and during these hearings, Spain considers that none of the actions discussed in this case entail the international responsibility of Spain.

Mr President, the Applicant has argued, in a confusing and even contradictory manner, its claim on responsibility. As a whole, it seems to be asking for reparations for: alleged damages to the *Louisa*, although not clearly specified in its final submission; alleged damages to certain persons for the violation of their human rights; and alleged “lost opportunity damages” due to the impossibility of using certain information. These damages are, however, quantified in a disproportionate range, not specifying the particular origin and evidence supporting them, against what has been codified by the International Law Commission after a careful review of international practice and jurisprudence.

Regarding damages to the *Louisa* – and only to the *Louisa*, given that the *Gemini III* could never be addressed in this case – in the opinion of Spain, the following should be noted. First, that, as has already been said, a possible option for reparation would be simply *restitutio in integrum*, the first desirable option under international law. However, Saint Vincent and the Grenadines seems to have neglected this possibility; yesterday’s *petitum* confirmed this. Second, that in the case of compensation the condition of the ship must be taken into account, and to this end we must remind the Tribunal that when the *Louisa* came into port on 29 October 2004 it was not, by any measure, in the pristine state that the Applicant would have us believe. On the contrary, the *Louisa* – a vessel built in 1962 and used by different owners under different flags – was in a poor state upon its arrival in Spain, as may be seen in photograph 3 annexed to the Spanish Counter-Memorial. This is the unique, undisputed dated photograph of the vessel in November 2005, namely before its immobilization.

It must also be said that from the time of its voluntary docking the *Louisa* was not subjected by its owner to any maintenance work to improve the general state of the ship. Some issues must then be recalled. First, from March 2005 onwards the *Louisa* was unclassified, with the consequent impact on its economic value. In March 2005, that is before its immobilization, the *Louisa* could not, functionally speaking, be considered a ship legally permitted to navigate under international law; and this responsibility lay with Saint Vincent and the Grenadines, not upon Spain. In addition, from the time of its immobilization Saint Vincent and the Grenadines, the flag State, ignored the ship, just as its owners generally did, despite the constant requests from the Spanish judge to proceed to the maintenance of the *Louisa*. For this reason, it was Spain, through the *Capitanía Marítima de Cádiz*, and not Saint Vincent and the Grenadines, that took responsibility for certain costs involved in the maintenance of the vessel.

In summary, what we have here is an unclassified ship, without effective maintenance by its owners from the very moment it arrived in a Spanish port, which was abandoned by its flag

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State. The economic value of the said ship is, therefore, zero; and under no circumstance can that devaluation be attributable to Spain. The Applicant has submitted other claims of responsibility with regard to some equipment aboard the *Louisa*. Surprisingly, as with the vessel itself, the owners of that equipment never appropriately claimed its devolution. As soon as it had been done, the judge in Cádiz might have decided that devolution. The Guardia Civil, bearing the costs of its maintenance, has been taking care of that equipment.

Regarding the alleged damages to persons, Spain has already made it very clear that no reclamation of any kind can be submitted, because neither of the two basic requisites for diplomatic protection have been met – a diplomatic protection which is the legal procedure that Saint Vincent and the Grenadines is claiming to exercise before this honourable Tribunal.

Moreover, the alleged damages to these persons have no relationship whatsoever to the immobilization of the *Louisa*. Rather, these damages (if any) are related to a criminal proceeding legitimately initiated in Spain, the immobilization of the *Louisa* being only one of its components.

To this must be added the incomprehensible evaluation of these damages by the Applicant. This evaluation was done without any prior experience in the said evaluation on the part of the accountant who Saint Vincent and the Grenadines presented as an expert before this Tribunal. Moreover, the said expert evaluated these damages incorrectly, as if they were lost opportunity damages. That evaluation did not take into account at any time the well-established principles of the international law on human rights in the evaluation of these kinds of damages; and, finally, the evaluation quantified the damages to human rights using the arbitrary magic number of \$1,000 a day – a magic number that would serve equally for a 21-year-old student, a marine technician, two crewmen and one wealthy Texas businessman.

Finally, regarding the alleged lost opportunity damages, let me summarize the question by saying that nothing was lost, that there was no opportunity and that there were no damages whatsoever.

Sage, not Saint Vincent and the Grenadines, alleges economic losses due to the impossibility of using the data supposedly stored on the hard disks of the computers retained by Spanish authorities on 1 February 2006. However, the following points should be noted.

First, and prominently, Saint Vincent and the Grenadines has never supported this claim with clear and convincing evidence. No proof has ever been exhibited before this Tribunal that that data exists, or of its scientific or commercial value.

Secondly, as has been shown through these hearings, the data that Sage was allegedly using for its work were already well known and had been assessed by the company itself. As Sage's Director, Ms Linda Thomas, admits in her affidavit annexed to the Applicant's Rejoinder as Annex 41: "The survey was satisfied in May of 2005." Mr McAfee, the expert of Saint Vincent and the Grenadines, confirmed this. When talking about these alleged "lost opportunity damages", the question is: what was lost, then? The fact is, *nothing* was lost.

Thirdly, it was only on 11 April 2011, that is, more than five years and two months after the immobilization of the *Louisa*, that Sage's lawyers requested the return of these computers. As soon as they did so, the judge authorized the return of the computers on 12 July 2011, which was indeed carried out three weeks later – in other words, as promptly as the demand was made through the proper judicial channels. Therefore, it makes no sense to evaluate lost opportunity damages, because where is the opportunity here?

Fourthly, as has also been shown over the course of these hearings, the data to which Sage refers are, they allege, geological and geophysical data referring to the Bay of Cadiz. However, these data were and are available, free of charge, on free-access databases. They are, therefore, data without any commercial value whatsoever, so regarding these supposed lost opportunity damages, where is the damage?

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In the evaluation of these data, the expert from Saint Vincent and the Grenadines, Mr Mesch, also came up with a quantification that makes no sense. As has been previously said, he provided no evidence whatsoever regarding the possible content of these data, and he quantified these data according to standards which are, to put it kindly, incomprehensible.

The absence of any serious contention by the Applicant with regard to that data may be found in paragraph 84 of its Memorial. In that paragraph it is said: "[t]he consultants have reported to Sage that the anticlines (arches of sedimentary rock) within the geological anomalies that have been identified contain very substantial reserves."

Mr President, we believe that it has been demonstrated by Spanish experts during the hearings that it is plainly impossible to find anticlines or to discover geological anomalies with the instruments and methodology used by Sage aboard the vessels. Furthermore, the data to which the Applicant refers were acquired through the fraudulent use of permits. As has been proved, the permits obtained by Tupet, and then used by Sage, were for environmental research. Therefore, any data gathered regarding hydrocarbons would have required a different kind of permit, as was explained by the expert presented by Spain.

However, let me add another point. Along these hearings, Sage is trying to evade, escape, all and any responsibility regarding its conduct in Spain. They say that they were not responsible for the permits, that they were not responsible for the war weapons aboard the *Louisa*, that they were not responsible for the administrative situation of the *Gemini III*, that they were not responsible for the conduct of the divers aboard the vessels, and that the cultural objects that they admit were aboard the *Louisa* were a mermaid's gift to the master of the vessel.

This is not serious, Mr President. Sage was violating Spanish law; and its conduct, insofar as international responsibility is concerned, must be taken into account as it relates to the possible evaluation of damages, as codified in Article 39 of the ILC Articles on State Responsibility, to which Professor Jiménez Piernas referred last Wednesday.

In summary, Mr President, strictly speaking we should only be discussing the international responsibility relationship between Saint Vincent and the Grenadines and Spain. If it did indeed exist, this responsibility would refer solely to the immobilization of the *Louisa*.

Hence, it should be a relationship of international responsibility between States and governed by the customary rules and principles of the international responsibility of States for wrongful acts, codified by the ILC in 2001. These basic principles of the international responsibility of States need no further explanation in this courtroom, Mr President. You are not a jury; Spain is perfectly aware that you are the judges of the International Tribunal for the Law of the Sea.

But some comments made yesterday by the Co-Agent of Saint Vincent and the Grenadines, and some of the final submissions of the Applicant, deserve to be addressed.

It was only yesterday - and perhaps upon some comments of the Agent of Spain - that Saint Vincent and the Grenadines suddenly realized that it might claim for responsibility for any possible damage to its "dignity" and "integrity" that might have been caused by the immobilization of the *Louisa*. This damage was evaluated at €500,000. However, we do not know which part of this amount relates to that dignity and integrity - which Spain fully respects - because in the same package the Applicant also included damages to "vessel registration business".

With regard this "vessel registration business", this Tribunal, in the *Saiga No 2 Case* (paragraph 177), noted that: "no evidence [had] been produced by Saint Vincent and the Grenadines that the arrest of the *Saiga* caused a decrease in registration activity under its flag, with resulting loss of revenue". The Tribunal further considered that: "any expenses incurred by Saint Vincent and the Grenadines in respect of its officials must be borne by it as having

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been incurred in the normal functions of a flag State.” For these reasons, the Tribunal did not accede to these requests for compensation made by Saint Vincent and the Grenadines in the *M/V “SAIGA” Case*.

*Mutatis mutandi*, the same has occurred with regard to this tardy submission by the Applicant in this case.

Mr President, in the present case, Saint Vincent and the Grenadines have been used to seek, before this Tribunal, what should be sought before the Spanish courts and, if appropriate, other international legal bodies - but not before this honourable Tribunal.

The only responsibility that Spain could entail to the benefit of Saint Vincent and the Grenadines would stem from an immobilization of the vessel in violation of the UN Convention on the Law of the Sea; but Spain has already demonstrated with facts and law that in the immobilization of the *Louisa* none of the provisions of the Convention were violated, nor did this action breach any rule of general international law. On the contrary, Spain was exercising, in its internal waters and territorial sea, the sovereign rights that current international law, including UNCLOS, recognizes for coastal States. These sovereign rights are also reflected in Spanish domestic law, and have been correctly exercised in this case.

Consequently, if there is no international wrongful act, no international responsibility is entailed whatsoever. If no international responsibility is entailed, then there can be no obligation to repair and no apology to be given as a form of satisfaction.

In the opinion of Spain, Mr President, this is indeed the case now before the Tribunal.

Mr President, distinguished Judges, before asking you to give the floor again to the Agent of Spain, let me stress that it has been a privilege and a true honour to have had the opportunity to plead before you on behalf of the Kingdom of Spain.

*The President:*

Thank you, Mr Aznar Gómez.

Now I give the floor to Ms Escobar Hernández.

*Mme Escobar Hernández :*

Merci, Monsieur le Président. Mon intention, une fois que j’aurai fini ma plaidoirie, sera de vous présenter les réponses aux questions qui nous ont été posées et de lire les conclusions.

Voulez-vous que nous fassions une pause ? C’est comme vous voulez ...

*Le Président :*

Avez-vous besoin d’une pause de quinze minutes ?

*Mme Escobar Hernández :*

Si c’était possible, je vous en serais reconnaissante parce que je vais parler une heure. Merci, Monsieur le Président.

*Le Président :*

Merci, Madame.

Nous aurons donc une interruption d’un quart d’heure. L’audience reprendra à 16 heures 45.

*(L’audience est suspendue.)*

*Le Président :*

Madame Escobar Hernández, vous avez la parole.

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*Mme Escobar Hernández :*

Monsieur le Président, comme je vous l'avais dit, mon intention est de répondre maintenant de façon expresse aux questions qui nous ont été posées par le Tribunal dans la liste qui nous a été envoyée le 2 octobre. Bien que nous ayons fait référence à certaines de ces questions, il nous semble qu'il est mieux d'y répondre expressément ; ce sera plus utile pour le Tribunal. Est-ce que je peux commencer ?

*Le Président :*

Oui.

*Mme Escobar Hernández :*

J'entends, Monsieur le Président, qu'il ne faut pas que je fasse référence à la question. Tout simplement à la réponse avec le numéro.

Question n° 2

Ma première réponse se réfère à la question n° 2, qui a été adressée directement au défendeur.

La Constitution espagnole de 1978 prévoit le droit des individus, dans les termes établis par la loi, à une indemnité pour tout dommage subi, qu'il porte sur leurs biens ou leurs droits, sauf cas de force majeure, pourvu que le préjudice soit le résultat du fonctionnement des services publics. De manière plus spécifique, elle inclut aussi le droit des individus à une compensation par l'Etat, conformément à la loi, pour les dommages causés par une erreur judiciaire, ainsi que ceux découlant d'irrégularités dans le fonctionnement de l'administration de la justice (article 121).

En application de ces dispositions, le titre V de la Loi organique 6/1985 du 1<sup>er</sup> juillet sur le pouvoir judiciaire est consacré à la responsabilité de l'Etat dans le fonctionnement de l'administration de la justice (articles 292 à 297). Les situations dans lesquelles une compensation est prévue comprennent l'erreur judiciaire à la suite de jugements non conformes à la loi et le fonctionnement irrégulier des services judiciaires qui composent la structure de l'administration de la justice. Par exemple, en cas de retard excessif dans la procédure judiciaire, ou de perte ou de dommages aux biens qui sont sous la garde des organes judiciaires.

Selon la jurisprudence du tribunal suprême espagnol – la Cour suprême –, sont incluses dans la notion de fonctionnement anormal de l'administration de la justice toutes décisions que pourraient adopter les juges et les magistrats dans l'exercice de leurs fonctions judiciaires lors de l'établissement et de l'évaluation des faits, ainsi que dans l'interprétation et l'application de la loi (arrêt de la Cour suprême du 26 novembre 2004).

Selon la même jurisprudence, pour que les dommages résultant de décisions judiciaires visant des biens puissent être imputés à l'administration de la justice, par le biais d'un fonctionnement anormal, il est nécessaire qu'il y ait reconnaissance expresse d'une erreur judiciaire, voire de retards injustifiés, dans un arrêt judiciaire.

Quoiqu'il en soit, il n'y a pas de droit à indemnisation dans les cas où une erreur judiciaire ou un fonctionnement anormal du service public est une conséquence de l'action intentionnelle ou fautive de la partie lésée.

D'autre part, l'article 293.2 de la Loi organique sur le pouvoir judiciaire se réfère à la procédure administrative pour le dépôt d'une demande d'indemnisation aux articles 142 et 143 de la Loi 30/1992 et dans le décret de développement. Il s'agit de la loi qui régit l'activité

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des administrations publiques chez nous. Je vous en donnerai en tout cas, Monsieur le Président, une copie avec toutes les références précises.

L'intéressé doit soumettre la demande d'indemnisation directement auprès du Ministère de la justice. L'article 6.1 du décret stipule ce que doit contenir la réclamation administrative, dans laquelle doivent être indiqués les dommages produits et le lien de causalité entre ces dommages et le fonctionnement du service public.

L'article 12.2 prévoit aussi qu'il faut une procédure d'avis du Conseil d'Etat, organe consultatif qui se trouve au plus haut rang dans le système espagnol et qui est l'organe consultatif du Gouvernement. Le Conseil d'Etat doit statuer sur l'existence d'un lien de causalité entre le fonctionnement de l'administration de la justice et le préjudice subi et, le cas échéant, sur l'évaluation des dommages, le montant et la forme de rémunération.

En outre, la deuxième disposition du même décret stipule que dans les allégations relatives à la responsabilité de l'Etat dans le fonctionnement anormal de l'administration de la justice, un rapport du Conseil général du pouvoir judiciaire est obligatoire.

La décision rendue par le Ministère de la justice met fin à la procédure administrative. Face à cette décision, il est possible de former un recours administratif ou directement un recours judiciaire, voire d'introduire un recours devant le Tribunal constitutionnel en cas de déni de justice.

Sur le site Internet du Ministère de la justice se trouve toute information relative à ce type de recours, ainsi que le formulaire pour présenter la réclamation.

## Question n° 3

Question n° 3, laquelle se réfère à l'ordonnance du 29 juillet 2010.

L'ordonnance en question est datée du 29 juillet 2010. Dans la version française des questions, du fait d'une erreur typographique, on a indiqué 2009 au lieu de 2010, mais on considère que c'est bien à l'ordonnance de 2010 qu'il est fait référence.

Pour bien comprendre le choix de la date, nous devons revenir dans le temps jusqu'au 22 février 2006.

Ce jour-là, à peine vingt et un jours après l'arraisonnement et la perquisition du « Louisa », l'avocat de l'Etat, représentant l'Autorité du port de Cadix, c'est-à-dire le responsable du port Puerto de Santa María, lieu où était amarré le « Louisa », informe le juge, entre autres, de ce qui suit :

*(Continues in English)*

the vessel's security may be affected if it is not boarded for the purpose of checking the moorings, some of which may be loosened by the action of waves against the side of the vessel ... Accordingly authorization is requested to board the vessel and to examine elements that are relevant to the ship's safety.

(Annex 8.2 to Spain's Counter-Memorial.)

*(Poursuit en français)* A la suite de cette requête, le Juge n° 4 à Cadix autorise les agents de l'Autorité du port de Cadix à :

pénétrer dans le navire LOUISA, mis sous scellés et surveillé par la Garde civile, afin de retirer le tuyau d'alimentation en eau et de procéder à la vérification d'éléments pouvant nuire à la sécurité dudit navire et de son amarrage. Cette opération sera réalisée par les agents de l'Autorité portuaire, qui communiqueront les résultats de leur vérification au Tribunal.

(Annexe 8.1 du contre-mémoire de l'Espagne).

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L'opération en question a été réalisée par les agents de l'Autorité du port le 13 mars 2006, qui ont : « vérifié les amarres, contrôlé les réserves et cales et vidé le magasin d'alimentation et le réfrigérateur, qui contenaient des denrées périssables ». (Annexe 8.3 du contre-mémoire de l'Espagne)

C'est ce qui a été communiqué au juge, le 23 mars, par l'Autorité du port.

Cela étant, ce n'est que le 22 février 2008, deux ans plus tard, que la représentante de Sage dans le procès tenu à Cadix s'est adressée au Magistrat Juge n° 4 dans le but de demander que lui soient communiquées :

*(Continues in English)*

All possible information regarding the current situation of the ships *Louisa* and *Gemini III*, property of my clients, or alternatively, to agree to lift the seizure of the same; or alternatively, to agree to any other measure tending to facilitate their adequate maintenance and conservation, all for the purpose of avoiding the occurrence of irreparable damages. (Annex 9.3 of our Counter-Memorial)

*(Poursuit en français)* Le Magistrat Juge transmet cette demande au procureur qui, le 27 mai, recommande l'adoption des mesures nécessaires pour entretenir correctement le navire. En juin, le juge requiert de la Garde civile un avis motivé sur la requête – la demande qui avait été présentée par la représentante de Sage –, Garde civile qui répond en juillet en signalant que dans des occasions semblables, on désigne normalement un marin de l'équipage pour qu'il effectue les travaux d'entretien du navire (annexe 9.6.)

Par conséquent, le 22 juillet 2008, le juge demande à Sage de nommer un membre de l'équipage pour l'entretien du navire (annexe 9.1). La requête a été notifiée à la représentante de Sage à peine quelques jours plus tard (annexe 9.2). Curieusement, il n'a jamais été répondu à la demande. Or, quelques mois plus tard, le 18 février 2009, le Magistrat Juge reçoit une demande de la représentante de Sage afin que M. Cass Weiland et M. William Weiland puissent visiter les navires, ce que le juge autorise en précisant que *(Continues in English)* "The visit is to be restricted to the evaluation of the condition of the vessels and the needs for repairs." *(Poursuit en français)* La visite a eu lieu le 5 mars 2009 en compagnie de M. Avella.

Malgré cette visite – le 5 mars 2009 et dans le seul but d'évaluer l'état des navires – la représentation de Sage en Espagne n'avait toujours pas répondu à l'ordonnance du juge lui demandant de désigner un membre de l'équipage pour l'entretien du navire.

Voilà donc pourquoi, en juillet 2010, après avoir demandé à l'Autorité du port de réaliser une nouvelle inspection de l'état du navire, le Magistrat Juge a proposé aux propriétaires de choisir entre l'entretien par le propriétaire, la remise en dépôt à un tiers ou la vente aux enchères.

De fait, la raison de ces trois choix réside dans l'ancien article 104.4 de la Loi sur les ports de l'Etat et la marine marchande. Cet article est devenu aujourd'hui l'article 304.4 dans la version actualisée de la loi, datée du 5 septembre 2011. La nouvelle loi conserve le libellé de l'ancien article 104.4, d'après lequel :

Lorsqu'à l'occasion d'une procédure judiciaire ou administrative, on a accordé l'immobilisation, la conservation ou le dépôt d'un navire dans la zone de service d'un port, l'autorité portuaire peut demander à l'autorité judiciaire que le navire soit coulé ou vendu aux enchères lorsque le séjour du navire au

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port pose un danger réel ou potentiel aux personnes ou aux biens ou cause des problèmes graves pour l'exploitation du port.

L'autorité judiciaire ordonnera que le navire soit coulé ou vendu selon la procédure établie par la loi dans chaque cas, à moins qu'elle considère essentielle sa conservation aux fins de l'instruction de la procédure et pour le temps strictement nécessaire.

De même, on devra procéder à la vente aux enchères dans les cas où, à cause de la durée prévue de la procédure judiciaire, il y a risque d'une dépréciation significative du navire, le produit de la vente étant mis en dépôt pour qu'il soit décidé de son utilisation en fonction du résultat de la procédure.

En somme, la loi espagnole autorise le juge à procéder à la vente aux enchères en mettant en réserve le produit de la vente pour décider de son utilisation en fonction de l'issue de la procédure.

Le juge a cependant tenté de donner aux propriétaires des options moins dommageables, à savoir l'entretien du navire ou la désignation d'un gardien. L'expert proposé par le demandeur dans la phase des mesures conservatoires, M. Moscoso, a souligné lui-même, le demandeur le rappelait hier, que c'était la décision correcte. Il a ajouté qu'elle aurait dû être prise auparavant. Ce qu'il ne savait pas néanmoins, c'est que déjà en mars 2006, l'Autorité du port avait pris les mesures nécessaires pour la sécurité du navire et qu'en juillet 2008, elle avait demandé à Sage de nommer un membre de l'équipage pour l'entretien du navire. Malheureusement, les avocats de Sage n'ont jamais daigné répondre à cette demande, même pas après la visite de M. Cass Weiland et de M. William Weiland en mars 2009. Cela ne nous surprend absolument pas. À l'époque, comme aujourd'hui, les navires ne les intéressaient point. Cela explique qu'ils n'aient pris jusqu'à présent aucune mesure de conservation malgré les demandes renouvelées de la part du Magistrat Juge. C'est le Magistrat Juge lui-même qui, placé face au manque d'action du propriétaire, a dû finalement désigner un gardien pour l'entretien correct des navires.

Enfin, il nous reste la question de la notification. Certes, d'après la documentation du procès, il paraît que cette ordonnance n'a pas été notifiée aux avocats de Sage avant janvier 2011. Mais, comme le juge Martín Pallín l'a affirmé, il y a des circonstances de la procédure qui peuvent causer des retards. Or, la notification tardive n'a pas causé un manquement aux droits des accusés ni des dommages à leurs intérêts (le navire) puisque déjà en juillet 2008, le juge avait demandé à Sage la nomination d'un membre de l'équipage pour l'entretien, requête à laquelle il ne fut jamais répondu.

Voilà les faits de la procédure à Cadix en ce qui concerne les mesures de conservation des navires. Tout autre récit ne correspond pas à la réalité.

#### Question n° 4

Avec l'article 149, l'article 303 est le seul article concernant le patrimoine culturel subaquatique dans la Convention de 1982.

Son paragraphe 1 dit simplement que : « *les Etats ont l'obligation de protéger les objets de caractère archéologique ou historique découverts en mer et coopèrent à cette fin* ».

Et son paragraphe 2 établit que :

[p]our contrôler le commerce de ces objets, l'Etat côtier peut, en faisant application de l'article 33, considérer que leur enlèvement du fond de la mer dans la zone visée à cet article, sans son approbation, serait cause d'une

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infraction sur son territoire ou dans sa mer territoriale, aux lois et règlements de l'Etat côtier visés à ce même article.

Rien dans la Convention n'est dit sur les droits individuels des Etats côtiers en ce qui concerne la protection et la réglementation du patrimoine culturel subaquatique situé dans les eaux intérieures et territoriales. Cependant, les droits de l'Etat côtier dans ces zones sont établis dans l'article 2 de la Convention, selon lequel la souveraineté de l'Etat côtier s'étend au-delà de son territoire et de ses eaux intérieures à la mer territoriale, ainsi qu'au fond de cette mer et à son sous-sol.

L'Espagne – comme Saint-Vincent-et-les Grenadines – a ratifié la Convention de 2001 de l'Unesco sur la protection du patrimoine culturel subaquatique. L'article 7, paragraphe 1, de cette Convention établit que – je cite :

[d]ans l'exercice de leur souveraineté, les Etats parties ont le droit exclusif de réglementer et autoriser les interventions sur le patrimoine culturel subaquatique présent dans leurs eaux intérieures, leurs eaux archipélagiques et leur mer territoriale.

Comme il a été expliqué dans le témoignage de M. Martin Pallin, la législation pénale espagnole, à la fois dans son Code pénal de 1995 et sa loi de 1995 sur le trafic illicite, prévoit la poursuite et la punition des conduites contraires à la protection du patrimoine culturel subaquatique. Cela inclut la poursuite et l'emprisonnement des coupables, l'imposition d'amendes et la confiscation des instruments utilisés pour la perpétration du délit.

Ce qui ne peut pas être caractérisé comme infraction pénale peut faire l'objet en Espagne de poursuites en tant qu'infraction administrative. Tant la loi de 1985 sur le patrimoine historique espagnol que les lois régionales complémentaires, en particulier la loi de 1991 de l'Andalousie, prévoient un contrôle spécial et rigoureux, ainsi que la poursuite et la sanction des activités contraires à ces lois administratives.

Par conséquent, même avant l'entrée en vigueur de la Convention de l'Unesco, le 2 janvier 2009, l'Espagne avait déjà inclus dans sa législation pénale et administrative en particulier les obligations de comportement imposées à l'article 14 de cette Convention (contrôle de l'entrée sur le territoire, du commerce et de la détention), à l'article 15 (non-utilisation des zones relevant de la juridiction des Etats Parties), à l'article 17 (sanctions) et à l'article 18 (saisie et disposition d'éléments du patrimoine culturel subaquatique).

La Convention, toutefois, n'introduit pas un système de sanctions. Cependant, elle apporte, en particulier dans son annexe qui fait partie intégrante de la Convention en vertu de son article 33, un catalogue de conditions et d'exigences pour la bonne exécution des interventions sur le patrimoine archéologique subaquatique, comme convenu par la communauté scientifique internationale. La plupart de ces conditions et exigences sont déjà prévues également dans la législation générale et régionale espagnole.

J'en arrive maintenant, Monsieur le Président, à la question n° 5, à laquelle il a été opportunément répondu tout au long de la phase orale.

## Question n° 5

Des réponses ont été apportées à cette question tout au long de la phase orale dans les exposés du défendeur.

L'article 561 du Code de procédure pénale espagnol régit la visite et la perquisition d'un navire étranger et prévoit l'autorisation préalable de son capitaine ou bien du consul de l'Etat du pavillon. Ce Code fut promulgué en 1882 et fondé sur une ancienne doctrine maintenant désuète, qui considérait le navire étranger comme formant partie du territoire de l'Etat du

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pavillon dans ces circonstances. De là se dégageait une protection spéciale : « La visite et la perquisition sur les navires étrangers marchands ne seront pas non plus admises sans l'autorisation du capitaine ou, si celui-ci la refuse, sans l'autorisation du consul de son pays ».

L'article 561 n'a pas été modifié ni abrogé, malgré le temps passé depuis la publication du Code. Mais, 130 années après sa publication, le contenu normatif de l'article doit être interprété et adapté – et non pas modifié – par les juges et tribunaux espagnols en fonction des circonstances particulières de chaque affaire concrète, et dans le cadre d'une communauté internationale bien différente de celle du XIX<sup>e</sup> siècle.

La pratique judiciaire espagnole, à ce propos, a été expliquée en détail par M. le juge Martín Pallín, présenté par l'Espagne comme expert. Nous nous référons donc aux comptes rendus des audiences publiques tenues les mardi 9 octobre et mercredi 10 octobre.

Nous pouvons les résumer de la façon suivante : les limites de l'adaptation interprétative – en aucun cas la modification – dudit article proviennent de la volonté d'éviter de donner lieu à un manquement aux droits de la défense et de sauvegarder la justice et l'impartialité du procès, c'est-à-dire le droit à un procès équitable (le *due process*). En tout cas, la jurisprudence considère que l'exception vis-à-vis de l'application de l'article 561 ne constitue pas, *a priori*, un vice qui provoque la nullité du procès. C'est une disposition qui n'est pas essentielle pour la procédure et qui doit être interprétée à la lumière de la Constitution de 1978 et de la Convention européenne des droits de l'homme. Pour cela, bien sûr, seraient nécessaires des circonstances spéciales qui justifieraient, en bonne foi, une exception concrète à l'application de la norme de l'article 561.

Des nombreuses exceptions ont été faites, par exemple, dans le but de poursuivre certaines activités criminelles, comme le trafic de drogues ou le terrorisme, aussi bien que lorsqu'il faut accéder au navire pour des raisons humanitaires ou en cas d'une infraction commise à bord.

En effet, le Tribunal suprême espagnol, la Cour suprême, a accepté dans des cas exceptionnels que le juge puisse ne pas avoir appliqué cet article, sans qu'il ait exercé pour autant son pouvoir de façon arbitraire. Vu les circonstances particulières de nature spatiale, temporelle et personnelle et compte tenu des raisons de nécessité, le juge devrait expliquer, dans chaque affaire, sa décision d'exclure l'application littérale de l'article 561, si cette décision était raisonnable et gardait la proportionnalité nécessaire. Cela peut conduire à des interprétations différentes par les juges. Rien de nouveau pour vous, Madame et Messieurs les juges, car vous connaissez bien le rôle primordial que joue la jurisprudence pour appliquer de la manière la plus appropriée le droit dans la culture juridique continentale et dans le système du *common law*.

Dans l'affaire du « Louisa », il s'agissait d'une procédure pénale où aurait pu se produire une perte d'éléments de preuve : le juge devait garantir le succès de la visite et de l'enquête ; une partie des activités délictuelles avait eu lieu sur le territoire espagnol, la possible destination finale des objets était l'Espagne et une partie du réseau criminel qui avait participé au délit était composée de nationaux espagnols qui habitaient en Espagne ; et le pavillon du « Louisa » était de complaisance.

D'autre part, le capitaine, de nationalité hongroise, ne pouvait pas être consulté, car il avait disparu et Saint-Vincent-et-les Grenadines manquait de représentation consulaire en Espagne, n'ayant jamais désigné le consulat responsable pour l'Espagne ni communiqué aux autorités diplomatiques espagnoles l'existence d'un tel consulat.

Telles sont les raisons qui se trouvent derrière la Note verbale de l'Ambassade de l'Espagne à Kingstown, accréditée aussi auprès du demandeur. Enfin, les délits contre le patrimoine historique suscitent en Espagne un grand émoi et sont particulièrement vilipendés par l'opinion publique. Toutes ces circonstances particulières justifient la nécessité et la

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proportionnalité, et donc la nature tout à fait raisonnable de la décision du magistrat juge dans le cas d'espèce.

On peut citer, à titre de précédent significatif, les arrêts du Tribunal suprême du 25 novembre 2003 et du 16 février 2006 dans l'affaire *Prado Bugallo*.

Ce citoyen espagnol alléguait que l'article 17 de la Convention de Vienne de 1988 avait été enfreint, dans la mesure où l'abordage d'un navire de pêche en haute mer avait été effectué sans l'autorisation préalable de l'Etat du pavillon (Togo), en se référant en même temps à la violation de l'article 561. Le Tribunal suprême note que l'infraction dénoncée par M. Prado Bugallo, ne portait pas atteinte aux droits fondamentaux de la personne et n'avait pas placé le demandeur dans l'impossibilité de se défendre au cours de la procédure. Le Tribunal suprême considère que le juge central d'instruction de l'*Audiencia Nacional*, dans une décision amplement motivée, a autorisé l'abordage en tant que mesure à caractère exceptionnel pour éviter l'arrivée des substances stupéfiantes à leur destination finale et garantir le succès de l'enquête.

La Cour suprême met aussi en garde contre une interprétation excessivement formaliste de la Convention de Vienne de 1988 contre le trafic illicite de stupéfiants et de substances psychotropes, comme le prétendait le requérant. Le requérant forma un recours d'*amparo*, un recours en défense des droits fondamentaux, devant le Tribunal constitutionnel espagnol qui déclara le recours irrecevable comme étant manifestement dépourvu de contenu justifiant de sa part un arrêt sur le fond.

Enfin, de l'avis du Tribunal suprême, cette omission de l'article 561 du Code de procédure pénale constitue, en tout état de cause, une irrégularité qui n'invalide pas nécessairement la procédure ni n'étend ses conséquences à l'appréciation de la preuve obtenue sans autorisation. Le Tribunal suprême considère que le non-respect de la norme exigeant la demande d'autorisation ne porte pas atteinte aux droits des personnes accusées, ne constitue pas un motif de nullité de la procédure et ne conditionne pas la juridiction de l'Etat exercée par celui-ci conformément au droit international. Il faudra, en tout cas, étudier les circonstances des cas en l'espèce pour résoudre cet aspect.

Enfin, la Cour européenne note dans cette même affaire que le requérant se borne à montrer son désaccord avec l'interprétation de la législation interne effectuée par les juridictions nationales de l'Espagne, à la lumière des conventions internationales auxquelles l'Espagne est partie en ce qui concerne la nécessité d'obtenir l'autorisation préalable de l'Etat du pavillon.

A cet égard, la Cour rappelle que :

C'est d'abord aux autorités nationales et, spécialement, aux cours et tribunaux qu'il incombe d'interpréter le droit interne et international pertinent et qu'elle ne substituera pas sa propre interprétation du droit à la leur en l'absence d'arbitraire.

La Cour estime que la destination finale de la cocaïne était l'Espagne, les acheteurs de la drogue étaient espagnols, une partie des activités délictueuses avait eu lieu sur le territoire espagnol et :

Le fait que le pavillon [du Togo] était de complaisance et qu'il n'existait donc pas un lien substantiel entre le navire et l'Etat du pavillon, comme l'exigeaient les conventions internationales en la matière

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doit être pris en compte. Par conséquent, « la Cour conclut que le procès en Espagne a revêtu un caractère équitable ». Pour finir, la Cour rappelle aussi, en d'autres passages de l'arrêt, de la décision :

que l'interprétation des dispositions de droit interne, en l'occurrence la question de la qualification pénale des faits reprochés, entre dans la compétence exclusive des juridictions internes.

Des raisons bien fondées existent pour ne pas qualifier la décision du Juge numéro 4 quant à l'arraisonnement et à la perquisition du « Louisa » de mal fondée ou d'arbitraire.

Pour répondre à la dernière partie de ces questions, j'aimerais vous dire tout simplement, Monsieur le Président, que, de l'avis de l'Espagne, il n'existe aucune règle de droit international général obligeant l'Espagne en la matière, c'est-à-dire obligeant l'Espagne à obtenir l'autorisation du capitaine du navire ou l'autorisation du consul pour pouvoir monter à bord d'un navire qui est volontairement amarré au port et le perquisitionner. Les références faites par le demandeur à cet égard se réfèrent à d'autres situations et surtout à des navires qui sont en train de naviguer et qui ne sont pas à quai.

Et pour en finir, Monsieur le Président, avec cette longue lecture des questions – je vous prie de m'en excuser –, je vais répondre à la question n° 6.

Comme l'Espagne l'a montré dans les pièces de la procédure écrite et au cours de ses plaidoiries (voir, par exemple, la réponse à la question n° 3), le propriétaire du navire immobilisé et ses représentants pouvaient à tout moment demander aux autorités judiciaires espagnole l'autorisation d'entrer dans le navire afin de prendre les mesures estimées nécessaires, que ce soit pour récupérer leurs effets personnels (visite qui a eu lieu le 9 juin 2006), ou, justement, pour vérifier l'état du navire (visite des frères Weiland citée ci-dessus, finalement effectuée le 5 mars, après le changement de la date demandé par la représentante de Sage et de M. Foster au dernier moment (annexes 10.1 et 10.2 du contre-mémoire de l'Espagne).

Ces exemples, ainsi que d'autres identiques constatés au cours de la procédure, nous montrent que le droit espagnol est très peu formaliste vis-à-vis de ce genre de demandes, qui sont acceptées par les juges pourvu que soient assurées, justement, la conservation et la sécurité des objets saisis, voire des navires.

En somme, les représentants de Sage auraient pu demander au Magistrat Juge une autorisation dans le but d'effectuer les visites techniques nécessaires afin d'assurer en temps opportun la reclassification du « Louisa ». Le fait qu'aucune demande n'ait été déposée à cet égard auprès du Tribunal n° 4 à Cadix nous montre, encore une fois, le peu d'intérêt du propriétaire pour ses navires.

En outre, et pour en finir quant à ces questions, Monsieur le Président, j'aimerais ajouter également que le demandeur, Saint-Vincent-et-les Grenadines, a été aussi averti, au moment voulu, de l'existence d'une situation d'immobilisation du navire et que l'Etat du pavillon n'a rien fait pour essayer de garantir que le « Louisa » ait tous les certificats et la classification nécessaires pour pouvoir naviguer.

Merci, Monsieur le Président. J'en ai ainsi terminé avec les réponses aux questions.

S'agissant des questions qui nous ont été posées hier, aujourd'hui, c'est la fête nationale espagnole. Nous n'avons pas eu la possibilité d'obtenir, sur tous les documents, les autorisations qui puissent intéresser le Président. Nous allons vous répondre la semaine prochaine.

Merci.

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*Le Président :*

Je vous remercie, Madame Escobar Hernández.

C'est donc le dernier exposé de l'Espagne au cours de cette audience. Comme je l'ai déjà indiqué hier, l'article 75, paragraphe 2, du Règlement du Tribunal prévoit que, à l'issue du dernier exposé présenté par une partie au cours de la procédure orale, l'agent de ladite partie donne lecture des conclusions finales de cette partie sans récapituler l'argumentation. Copie du texte écrit et signé par l'agent est communiquée au Tribunal et transmise à la partie adverse.

Je vous invite donc, Madame Escobar Hernández, à donner lecture des conclusions finales de l'Espagne.

*Mme Escobar Hernández :*

Merci beaucoup, Monsieur le Président.

En application du paragraphe 2 de l'article 75 du Règlement du Tribunal, le Royaume de l'Espagne présente ci-après ses conclusions finales.

Sur la base des motifs indiqués dans les pièces de procédure écrite et développés ensuite au cours de ses plaidoiries ou pour tout autre motif, le Royaume d'Espagne prie le Tribunal international du droit de la mer de dire et juger :

- 1) Que la demande présentée par Saint-Vincent-et-les Grenadines n'est pas recevable et doit être rejetée ;
- 2) Qu'il n'est pas compétent en l'espèce ;
- 3) A titre subsidiaire, que l'assertion du demandeur selon laquelle l'Espagne a enfreint les obligations qui lui incombent en vertu de la Convention est dénuée de tout fondement ;
- 4) Que, par conséquent, toutes et chacune des demandes formulées par le demandeur doivent être rejetées ;
- 5) Que le demandeur doit défrayer le défendeur de ses dépens dans la présente affaire tels qu'ils seront fixés par le Tribunal mais dont le montant ne saurait être inférieur à 500 000 dollars des Etats-Unis.

Ainsi, Monsieur le Président, se termine mon intervention. Je vous prie de bien vouloir recevoir les remerciements de toute ma délégation. Nous sommes une délégation composée de fonctionnaires de l'Etat, de fonctionnaires publics, de personnes qui ont des contacts avec l'Etat, soit du côté de l'Université, soit du côté de l'administration publique espagnole. Notre obligation est toujours de servir l'Etat.

Nous sommes ici pour vous démontrer tout simplement l'intérêt que l'Espagne porte à cette affaire. Vous pouvez comprendre que, même si nous sommes entre cinq et six, cela dépend des jours, cela constitue un effort vraiment remarquable pour l'Espagne dans la situation économique où elle se trouve actuellement.

Merci bien. Merci Madame et Messieurs les juges, de votre aimable attention. Merci pour l'aide que nous avons reçue de la part du Greffé du Tribunal dans le cadre de la défense des intérêts de l'Espagne.

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*Le Président :*

Je vous remercie, Madame Escobar Hernández.

Cela nous amène au terme de la procédure orale.

M/V "LOUISA"

**Closure of the Oral Proceedings**

[ITLOS/PV.12/C18/13/Rev.1, p. 27–28; TIDM/PV.12/A18/13/Rev.1, p. 31–32]

*The President:*

I would like to take this opportunity to express our appreciation of the high quality of the representations made by the representatives of both Saint Vincent and the Grenadines and Spain. I would also like to take this opportunity to thank both Co-Agents of Saint Vincent and the Grenadines and the Agent of Spain for their exemplary spirit of cooperation.

The Registrar will now address questions in relation to the documentation.

*Le Greffier :*

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 concernent la version vérifiée du compte rendu dans la langue officielle utilisée par la Partie concernée. Les corrections devront être transmises au Greffe dès que possible et au plus tard le mercredi 24 octobre à 17 heures, heure de Hambourg.

Merci, Monsieur le Président.

*Le Président :*

Merci, Monsieur le Greffier.

*(Continued in English)* The Tribunal will now withdraw to deliberate. The judgment will be read on a date to be notified to the Agents. The Tribunal currently plans to deliver the judgment in spring 2013. The Agents of the Parties will be informed reasonably in advance of the precise date of the reading of the judgment.

In accordance with the usual practice, I request the Agents to kindly 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 judgment.

The hearing is now closed.

*(The sitting closes at 5.33 p.m.)*

28 May 2013, a.m.

**PUBLIC SITTING HELD ON 28 MAY 2013, 11.00 A.M.**

**Tribunal**

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

**For Saint Vincent and the Grenadines:**

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Mr Christoph Hasche, Esq.,  
Fleet Hamburg LLP, Hamburg, Germany,

*as Counsel.*

**For the Kingdom of Spain:**

Ms Concepción Escobar Hernández,  
Professor, International Law Department, National Distance Education University, Spain,  
Member of the International Law Commission,

*as Agent, Counsel and Advocate;*

*and*

Mr José Martín y Pérez de Nanclares,  
Professor, Head of the International Law Division, Ministry of Foreign Affairs and  
Cooperation, International Law Department, University of Salamanca, Spain,

*as Counsel and Advocate.*

NAVIRE « LOUISA »

**AUDIENCE PUBLIQUE DU 28 MAI 2013, 11 H 00****Tribunal**

*Présents* : M. YANAI, *Président* ; M. HOFFMANN, *Vice-Président* ; MM. MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, *juges* ; Mme KELLY, *juge* ; MM. ATTARD, KULYK, *juges* ; M. GAUTIER, *Greffier*.

**Pour Saint-Vincent-et-les Grenadines :**

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M. Christoph Hasche,  
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*comme conseil.*

**Pour le Royaume d'Espagne :**

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*comme agent, conseil et avocat;*

et

M. José Martín y Pérez de Nanclares,  
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