

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2012

Public sitting

held on Tuesday, 9 October 2012, at 3 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Shunji Yanai presiding

THE M/V “LOUISA” CASE

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

Verbatim Record

Present:

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

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and

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Mr William H. Weiland, Esq., Houston, Texas, USA,

as Counsel and Advocates;

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and

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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.

1 **THE PRESIDENT:** Good afternoon, Mr Weiland. You may now continue with the
2 examination of the expert but before I give you the floor, I wish to remind you,
3 Mr Delgado, that you continue to be covered by the declaration you made this
4 morning. I also ask you to speak slowly. Thank you. Mr Weiland, you have the floor.
5

6 **MR WEILAND:** Thank you, Mr President. Mr Delgado, before we broke we were
7 talking about the situation relating to Odyssey, which is a US company, privately
8 trading. Do you recall that testimony in general?
9

10 **MR DELGADO:** Yes, I do.
11

12 **MR WEILAND:** I just have a few questions based on your knowledge of that case,
13 which sounds quite extensive. After the personnel on the *Odyssey* raised the
14 artefacts, quite valuable – whatever amount we wish to ascribe to them, we agree
15 that they are quite valuable – correct?
16

17 **MR DELGADO:** I believe they are very archaeologically valuable.
18

19 **MR WEILAND:** I think you have testified that the ship put into Gibraltar, and the
20 artefacts were unloaded and flown to the United States. What happened to the ship
21 when it left Gibraltar?
22

23 **MR DELGADO:** I believe the vessel returned to Spanish waters, where it
24 encountered difficulties with Spanish authorities.
25

26 **MR WEILAND:** Yes, it did, did it not? In fact, the Spanish authorities forced the ship
27 into the port of Algeciras, which is right next to Gibraltar, did they not?
28

29 **MR DELGADO:** I believe so but I only would be relying on media reports.
30

31 **MR WEILAND:** Have you heard then that the Spanish authorities boarded the ship,
32 which had just made off with, say, 500 million in artefacts? You have heard that,
33 have you not?
34

35 **MR DELGADO:** I read that in the newspaper.
36

37 **MR WEILAND:** The captain of the ship declined the Spanish invitation to allow them
38 to board the ship. Do you remember reading that?
39

40 **MR DELGADO:** No, I do not.
41

42 **MR WEILAND:** We have admitted into the record of this case Exhibit 10, which the
43 President advised me shortly before the start of the trial would be allowed. It is a
44 public document. This is a document from the court in Spain relating to what
45 happened after the ship was boarded. I am not going to ask you to read it, Mr
46 Delgado, but I would appreciate it if you are in a position to confirm these facts
47 based on your knowledge of the case. The captain declined to allow the Spanish on
48 board, so he was charged with a criminal offence of grave disobedience, but the
49 Spanish had neglected to either obtain his consent or to notify the flag State. Does
50 that refresh your recollection of things you had read?

1
2 **MR DELGADO:** No, it does not. I focused on the archaeology in this case and not
3 the other aspects. That is the area of my expertise. So I am sorry, I cannot help you.
4
5 **MR WEILAND:** You are not aware then that the Spanish judge ruled on 24 May
6 2010 that the captain could not be convicted because Spain had failed to notify the
7 flag State, which was the Bahamas, and had failed to secure the captain's
8 agreement that the police board the ship? You are not aware of that?
9
10 **MR DELGADO:** That was a question?
11
12 **MR WEILAND:** Yes.
13
14 **MR DELGADO:** You are beyond my area of knowledge.
15
16 **MR WEILAND:** Let us go back into your area. I apologise. Meanwhile, back in the
17 United States, Spain filed a suit against Odyssey – correct?
18
19 **MR DELGADO:** Yes, I believe so.
20
21 **MR WEILAND:** That was in the Federal Court in Florida – correct?
22
23 **MR DELGADO:** I believe so.
24
25 **MR WEILAND:** Was that when you started some consulting work for Spain?
26
27 **MR DELGADO:** That depends upon your definition of “consulting”. I was asked for
28 my opinion on the nature of the recovered materials that were provided to Spain's
29 counsel through that legal process. As to where that was in those proceedings I
30 cannot say. My involvement was very narrowly focused on looking at what Odyssey
31 had provided to the court, in regard to the photos, video, inventory of artefacts,
32 things of that nature, and I was solely asked to comment on the nature of the site
33 and what those materials might represent.
34
35 **MR WEILAND:** OK, and if I mischaracterized the nature of your work I apologize but
36 now we know what you were doing. You mentioned inventory of the artefacts. I am
37 going to come back to that. Just tell the Tribunal then what happened in the litigation
38 in the United States, just briefly. We do not need it blow by blow. What was the
39 outcome?
40
41 **MR DELGADO:** Odyssey lost the case and on every appeal lost the case up to the
42 United States Supreme Court, which did not wish to hear the case. The artefacts
43 were subsequently returned to Spain.
44
45 **MR WEILAND:** So there was an action held in the Federal Court in Florida, Spain
46 prevailed in that case, it went on to appeal in an appellate court in Atlanta, Georgia,
47 Spain again prevailed, and the Supreme Court declined to hear the case.
48
49 **MR DELGADO:** I believe so, but I am not an attorney.
50

1 **MR WEILAND:** Then the Spanish Air Force flew over to Florida and picked up 500
2 million or so worth of artefacts and flew back to Spain – correct?
3
4 **MR DELGADO:** I saw in the press that Spain had recovered the materials, which I
5 think was more than simply coins. It was every bit of archaeological evidence that
6 had been collected, with the exception, I believe, of some materials which *Odyssey*
7 had left in Gibraltar.
8
9 **MR WEILAND:** Would it surprise you to hear that all of the things we have just talked
10 about – the captain’s criminal problem, the *Odyssey* being forced into Algeciras, the
11 litigation in the United States – all of that happened after the *Louisa* was arrested in
12 Puerto de Santa Maria near Cádiz?
13
14 **MR DELGADO:** I am afraid I do not understand your question.
15
16 **MR WEILAND:** Perhaps the Tribunal will, because the *Odyssey* is still docked, we
17 think. It has not sunk yet at the dock. It is still there, and these other court systems
18 have managed to resolve rather considerable issues. You know that no one on
19 *Odyssey* was ever charged with theft of the Spanish heritage, were they?
20
21 **MR DELGADO:** You are beyond my knowledge.
22
23 **MR WEILAND:** Let us move to another issue. You were asked several questions
24 about the property aboard the *Louisa* and the *Gemini III*. Do you remember those
25 questions? I think you were shown some pictures. Let me ask you a little bit about
26 that. Did the Spanish delegation show you an inventory of what was taken off the
27 *Louisa*?
28
29 **MR DELGADO:** No.
30
31 **MR WEILAND:** They showed you a museum report. I think you mentioned that.
32
33 **MR DELGADO:** That was a document, I believe, provided by you.
34
35 **MR WEILAND:** Yes, when we were here two years ago.
36
37 **MR DELGADO:** No, this is a document that I believe was provided by Saint Vincent
38 and the Grenadines which says it is an assessment done by the Museum of
39 Underwater Archaeology.
40
41 **MR WEILAND:** We will get to that in a minute but let us talk about some of the less
42 important things first, if you will. Metal detectors – you found that they had several
43 metal detectors on the *Louisa*. Correct? That is what you were told.
44
45 **MR DELGADO:** That is what I saw in the photographs.
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47 **MR WEILAND:** Yes, and they told you those came from the ship.
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49 **MR DELGADO:** Yes, in court, which I presume means, as it would elsewhere, that it
50 is the truth.

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MR 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.

MR WEILAND: So it helps distinguish between what is metal and what is not?

MR DELGADO: It does indeed.

MR 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 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 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 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

1 scan sonar to multi-beam sonar, to the most recent application of high-definition
2 imaging and mapping sonar.

3
4 **MR WEILAND:** Let me explain my problem. Yesterday we had testimony, quite
5 surprising really, that indicated that Sage, which is the company that owned the ship
6 that our country had issued the registration to, had gone into one of the hottest oil
7 and gas areas of Spain, but then we hear later that, despite being in the hot area for
8 oil and gas, maybe some of this is the wrong equipment. So I am just trying to see if
9 you can help us with real knowledge of what kind of equipment someone who is
10 doing a survey for oil and gas purposes would use. Do you feel qualified in that
11 area?

12
13 **MR DELGADO:** I feel strongly qualified to talk about equipment used in
14 archaeological survey. Every piece of equipment I have been shown is used in
15 archaeological survey, and effectively so, particularly when operating in shallow
16 water environments. I would also say that the use of the prop wash deflectors I have
17 never seen used in any application other than in the excavation of the bottom for
18 underwater heritage, and not by people who seem to care about that heritage. It
19 seems to me, based on my experience, which is decades long, to be – it is a
20 treasure hunting tool, very specifically.

21
22 **MR WEILAND:** I do not think that is what I asked you.

23
24 **MR DELGADO:** I believe it is.

25
26 **MR WEILAND:** I am asking you if you feel qualified to talk about what sort of
27 instruments are used in oil and gas surveying, not archaeological. You must have
28 misunderstood my question. Oil and gas surveying, sir.

29
30 **MR DELGADO:** No, I understand your question. I am just curious as to why you are
31 asking me that question since I am not an oil and gas person, or, as you phrased it,
32 “guy”.

33
34 **MR WEILAND:** Every time we go down the road here you express some kind of a
35 minor, perhaps, opinion about oil and gas matters, so I am just trying to get you to
36 say once and for all if you are an oil and gas expert or not, because we are trying to
37 determine how far we can rely on your testimony in the oil and gas area. I think I am
38 hearing properly: you do not consider yourself an oil and gas expert, especially in the
39 area that we are dealing with here in this case.

40
41 **MR DELGADO:** I think you can rely on my testimony 100 per cent when it comes to
42 the archaeological area.

43
44 **MR WEILAND:** That is good. Thank you. So now let us talk about the deflectors.
45 You mentioned the deflectors that were put on the boat. Did the Spanish delegation
46 advise you about any of the details of the picture that you saw with the deflectors?
47 Did they give you any details about that? They just showed you a picture of a boat
48 with some big aluminium things on the back?

49
50 **MR DELGADO:** I was shown a photograph as a court document, I believe.

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2 **MR WEILAND:** There is one on screen. Did they give you any details about that?
3
4 **MR DELGADO:** Other than that it was an exhibit in this case, no.
5
6 **MR WEILAND:** So you are not aware that these deflectors were placed on this boat,
7 which is called the *Gemini III*, after it was leased to another company?
8
9 **MR DELGADO:** I was asked specifically what these were and what they were used
10 for. That other matter is beyond my knowledge or my ability to testify.
11
12 **MR WEILAND:** You are not aware that the company that leased the boat, called
13 Plangas, sent a letter to the Ministry of the Environment saying, "I am going to put
14 these deflectors on the back of my boat"?
15
16 **MR DELGADO:** No.
17
18 **MR WEILAND:** We had an interesting picture of a scuba tank. You have scuba-
19 dived. That is one of your specialties, is it not?
20
21 **MR DELGADO:** Yes.
22
23 **MR WEILAND:** When you have tanks, are those tanks made out of aluminium
24 usually?
25
26 **MR DELGADO:** Tanks are made of aluminium, and they are made of steel.
27
28 **MR WEILAND:** Both?
29
30 **MR DELGADO:** Yes.
31
32 **MR WEILAND:** Is it common to put these rubber shock absorbers on the bottom of
33 tanks so that they do not get damaged, say if the ship shifts or something?
34
35 **MR DELGADO:** It is a preferred technique. Not everybody does it.
36
37 **MR WEILAND:** So the presence of a rubber disc that goes on the bottom of a scuba
38 tank just in itself would not lead you to believe that there is anything nefarious about
39 that?
40
41 **MR DELGADO:** The presence of a rubber boot would not in any way indicate
42 anything to me other than prudence in scuba diving. If it conceals a cut made in the
43 bottom of the tank, that would lead anyone, I would imagine, to assume otherwise.
44
45 **MR WEILAND:** Have you, or people who work for you, ever had occasion, when a
46 scuba tank has outlived its useful life, perhaps the regulator or valve on top is not
47 working, do you ever cut them in two with a table saw on the boat? Have you ever
48 seen that?
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50 **MR DELGADO:** No. Why would you do that?

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MR 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 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 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 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?

MR DELGADO: I do not understand that.

MR 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 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

1 were taken, as we understand it, and the report itself indicates the total value of all of
2 these things – and the report had pictures. Did you see the pictures? I do not have
3 the pictures on my exhibit here but the total value of all of these things was €2,950.
4 Do you recall that, sir?

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6 **MR DELGADO:** First, for the record ---

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8 **MR WEILAND:** First, do you recall that?

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10 **MR DELGADO:** First, for the record ---

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12 **MR WEILAND:** Would you put the last page of the report up?

13
14 **MR DELGADO:** As I was saying, first, for the record, I am familiar with this
15 document, and said so earlier in my testimony. I am also, by the way, familiar with
16 the museum and the laboratory in which this analysis was done, because it was
17 done in Cartagena, and that is the museum and the laboratory that we used in the
18 Bajo de la Campana ---

19
20 **MR WEILAND:** A first-rate museum.

21
22 **MR DELGADO:** A very good museum that I think speaks powerfully to Spain's care
23 and its ability to not only use words but effectively use resources to deal with their
24 underwater cultural heritage for the good, not only of their citizens, but of all of the
25 world, who learn from the results of their excavations. In this case I did see this
26 economic valuation and did say earlier that I do not agree with the economic
27 valuation, because, as I indicated, it is difficult – to my professional opinion, it is
28 impossible – to place a dollar value on an artefact when those values can be
29 speculative, they can be used merely to drive up market price or interest, and in
30 many cases when a dollar value has been assessed, those valuations have been not
31 only disputed but proven wrong, and, more to the point, in a case like this the value
32 is not one of the price one might make in selling that artefact but rather its more
33 priceless nature.

34
35 They were not asked to make a valuation of this material in regards to something
36 other than money. As archaeologists and conservators, and knowing many of them
37 personally, as colleagues, I know that the valuation they would have placed would
38 have been different, and they would have noted that these materials, recovered
39 without context other than the Bay of Cádiz, recovered improperly, recovered without
40 due diligence or care for their conservation and treatment, which must begin the
41 moment they leave the water, that they had been rendered practically valueless. So
42 how do you quantify that then? Is it this dollar or euro amount, or is it what happened
43 with the recovery of those materials, the destruction of the scientific information, the
44 loss of their cultural context, and indeed, actions if they were left out on a boat
45 without treatment that was counter to their long-term preservation?

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47 I do not agree with this dollar value.

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49 **MR WEILAND:** So actually things may be worth less if they have not been
50 maintained properly and treated in the manner that they should be?

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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 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 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.

MR 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 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 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 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 WEILAND: That was for the Cartagena project?

MR DELGADO: Yes, the Phoenician shipwreck.

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2 **MR WEILAND:** You know that the Guardia Civil is out in these areas where all these
3 shipwrecks are, checking people's permits and enforcing the law regularly, or it
4 would not surprise you if they did, would it?

5
6 **MR DELGADO:** It depends on the circumstances in a given day of police resources
7 and where people are; and I say that not specifically with reference to Spain, though
8 with the time on the Bajo de la Campana project, because the project was fully
9 transparent, open and shared with all levels of the Spanish Government, the visits
10 were few, and only once, I believe, did the Guardia Civil come out, as a formality, to
11 observe. In the case of where we work, particularly in my experience in the National
12 Parks Service, it is a question of how many available rangers or law enforcement
13 people you have on any given day, how many vessels are in an area, what you may
14 be able to do, what the coastguard in the United States would be able to do, and so
15 it is difficult to characterize, in my opinion, how any activity or lack of activity
16 represents a pattern of care or diligence.

17
18 **MR WEILAND:** But you are saying that even for an expedition such as you might
19 mount, a really famous archaeologist, the Guardia Civil came and checked your
20 papers? They have a Historical Patrimony Group of the Central Operations Unit. Are
21 you familiar with that group?

22
23 **MR DELGADO:** I have heard of that group, yes.

24
25 **MR WEILAND:** In this case there is testimony that the Guardia Civil stopped the
26 *Louisa* and the *Gemini* several times and looked at their papers.

27
28 **MR DELGADO:** Were those vessels ---

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30 **MR WEILAND:** There was no arrest. There was no apparent concern about metal
31 detectors and scuba tanks and things like that. Would that surprise you? That is my
32 question. Would that surprise you?

33
34 **MR DELGADO:** It would not surprise me if the equipment was not visible, if the
35 metal detectors were perhaps concealed, if it was a mere courtesy stop. It could also
36 be that your vessels were operating outside of a normal zone. There might be any
37 number of reasons. On occasion, boardings or visits, particularly in the United
38 States, can be a simple question of, "Do you have enough personal flotation
39 devices?" So it is hard, having not been on the water on all these occasions on either
40 vessel, to really say much of anything about that, and I really cannot characterize it.

41
42 **MR WEILAND:** You have testified that the Bay and Gulf of Cádiz have, if I am not
43 mischaracterizing it, at least 400 shipwrecks out there. Do you think that if the
44 Guardia Civil stopped a suspicious ship called the *Louisa* from Saint Vincent and the
45 Grenadines, it would be worried about life preservers?

46
47 **MR DELGADO:** You are beyond where I could even go in an answer, but I will say
48 that, having been a park ranger, having worn a badge in a uniformed service, having
49 worked on the water, you need due cause particularly to search a vessel, so even in
50 an archaeologically sensitive area, if I were there as a law enforcement official, I

1 would not always be in a position other than a visit to do more, unless something
2 roused my suspicions, which seems to have been the case ultimately.

3
4 **MR WEILAND:** We are not really sure, are we, because we do not know what was
5 ever taken off the ship, what the value of the stuff was. The testimony in the case
6 was that in those pictures of the *Louisa*, there are big doors on the side of the ship,
7 that the Guardia Civil pulled up, went into the hold, looked around at all the metal
8 detectors and diving equipment, and they even had a decompression chamber on
9 the ship, and it was all there for the Guardia Civil to look at. Does it surprise you that
10 the ship was allowed to just sail off, and that it did not just happen once but it
11 happened over and over?

12
13 **MR DELGADO:** You are beyond my ability to comment. However, it strikes me as
14 interesting that you have a scuba tank that is modified, which can be used to
15 conceal, so unless there was a very diligent inspection of that or entering a
16 decompression chamber, going into the bilges or other sealed areas – and I believe
17 that the vessel had a safe – there is a variety of ways in which people can cleverly
18 make sure that things are not seen.

19
20 **MR WEILAND:** They very cleverly put the rifles in the safe behind two locked doors,
21 but we do not really need to talk about that. Have you ever known the federal police
22 in any of these many jurisdictions that you have worked in to become involved in
23 shipwreck hunting themselves?

24
25 **MR DELGADO:** No.

26
27 **MR WEILAND:** Would it surprise you that all this alleged important shipwreck
28 searching equipment that the Guardia Civil confiscated on 1 February 2006 sat
29 around in a warehouse for two years and that the Guardia Civil then came in and
30 asked the court if they could use Sage's equipment? Does that surprise you?

31
32 **MR DELGADO:** In cases in the United States where we have had seizure of assets
33 for offences, there are occasions on which that material is used. I cannot fathom why
34 the request may have been made in this case, but in a seizure all assets can be
35 used to the benefit of the public or the government.

36
37 **MR WEILAND:** I am going to interrupt you there, because now you are digging into
38 an area that I know something about. I used to be a federal prosecutor. In the United
39 States you have to forfeit stuff, you have to forfeit the equipment to the government
40 before the FBI can just start using it?

41
42 **MR DELGADO:** Have you ever prosecuted an ARPA case, sir?

43
44 **MR WEILAND:** No, but I have prosecuted a lot of different types. We have property
45 rights in the United States and due process, and we do not just seize something and
46 then give it to the police without a judicial action, some kind of a trial, some kind of
47 an opportunity for the person whose goods were taken to defend himself. Let me just
48 ask you to look at what is on your screen. The Guardia Civil wanted all these
49 items ... Can we have it in English? Do you speak Spanish?

1 **MR DELGADO:** Poorly.
2
3 **MR WEILAND:** Me too, so let us look at the English, if we can have it. If we do not, it
4 is my fault.
5
6 **MR DELGADO:** While we are doing that, sir, just going back to that point, because
7 you have not prosecuted an Archaeological Resources Protection Act case, there
8 are circumstances in which people are caught and they do forfeit.
9
10 **MR WEILAND:** Let me give you an analogy. I defended a migrant bird case one time
11 and those birds that the police seized had to be handled in a judicially appropriate
12 manner, so I do not think that in the United States, or really anywhere else that I
13 have ever heard of, you can take this equipment and then just give it to the police
14 forces to use?
15
16 **MR DELGADO:** No.
17
18 **MR WEILAND:** By the way, that was the last that Sage heard of it. This equipment is
19 worth hundreds of thousands of dollars and it has not been seen again.
20
21 **MR DELGADO:** In this case we are now moving well beyond what I could comment
22 on as an archaeologist.
23
24 **MR WEILAND:** I apologize for that. I am just about finished. I am looking at my notes
25 to see whether there is anything else that I need to ask you. You are not familiar with
26 international law and the appropriate circumstances for boarding vessels, are you?
27
28 **MR DELGADO:** I am an archaeologist, not a lawyer.
29
30 **MR WEILAND:** I think this is the last question that I want to ask you. In all your
31 various activities in this business ... Actually I have two questions. First, is there
32 something called the Speakers Bureau in the United States, where people can pay
33 money to get personalities, or talent as they say, to come and give a speech to their
34 group?
35
36 **MR DELGADO:** There are such institutions.
37
38 **MR WEILAND:** Are you in the Speakers Group?
39
40 **MR DELGADO:** Of the United States?
41
42 **MR WEILAND:** Yes.
43
44 **MR DELGADO:** No. I do, however, sit in the Speakers Bureau for Canada, talking
45 on aspects of Canadian maritime history, occasionally more international subjects. It
46 is not a lucrative trade by any means. It largely is to corporate clients, doctors,
47 lawyers and others who want to be entertained with history or archaeology as
48 opposed to having someone talk about their latest surgical technique or some clever
49 application of the law. I have given, on average, two such presentations each year

1 over the past several years, and I began this when I was a museum director in
2 Canada.

3

4 **MR WEILAND:** Let me say that you are very good at it, sir.

5

6 **MR DELGADO:** Thank you.

7

8 **MR WEILAND:** I am sure that you might get some more business through the
9 Speakers Bureau. It just occurred to me as I listened to your testimony that the
10 Spanish delegation has brought you from Washington DC to Hamburg to lecture us
11 on archaeological issues. Do the Spanish have experts of their own who might be
12 able to speak to these things, that you are aware of?

13

14 **MR DELGADO:** I cannot speak for the Spanish.

15

16 **MR WEILAND:** I think you just have, but I wondered about that one issue, that one
17 question.

18

19 **MR DELGADO:** I believe I was asked because I have worked extensively around the
20 world and could speak perhaps more authoritatively than one who has worked in one
21 country. I have experience in this area in and around Spain, and I think I was asked
22 not to give a lecture but actually to answer questions and to characterize things to
23 the best of my knowledge, which I hope I have done, sir.

24

25 **MR WEILAND:** Thank you very much. No further questions, Mr President.

26

27 **THE PRESIDENT:** Thank you, Mr Weiland. An expert who is cross-examined by the
28 other Party may be re-examined by the Party who had called the expert. Therefore, I
29 ask the Agent of Spain whether the Respondent wishes to re-examine the expert.
30 Ms Escobar Hernández, you have the floor.

31

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

33

34 ***Re-examined by MS ESCOBAR HERNÁNDEZ***

35

36 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): Mr Delgado, do you
37 remember that during Mr Weiland's cross-examination, that is to say the cross-
38 examination by the Co-Agent for Saint Vincent and the Grenadines, he mentioned a
39 company called Plangas, which apparently had sent a letter to the Spanish
40 authorities saying that they were going to use a deflector?

41

42 **MR DELGADO:** Yes, I do recall that.

43

44 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): Thank you, Mr Delgado.
45 Mr President, in that case I must make a formal objection to the Tribunal because
46 the letter to which Mr Weiland, the Co-Agent of Saint Vincent and the Grenadines,
47 referred is document No. 8, which was submitted after the written proceedings had
48 ended, and it was not admitted by the Tribunal. I therefore ask you, Mr President, to
49 take note. I am speaking subject to your authority and that of the Registrar, but I
50 think that this is the second time that this has been done. Thank you, Mr President.

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THE PRESIDENT: 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?

MS ESCOBAR HERNÁNDEZ: No.

THE PRESIDENT: 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?

MS ESCOBAR HERNÁNDEZ (*Interpretation from French*): Thank you, President. May I ask you, please, to call Mr Martín Pallín? He is the last expert Spain wishes to bring before you.

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.

THE REGISTRAR (*Interpretation from French*): Thank you, Mr President.

Good afternoon, Mr Pallín. Mr Martín Pallín, before giving any statement an expert has to make a solemn declaration required under article 79 of the Rules of the Tribunal. You have the declaration in front of you. May I invite you to make the solemn declaration?

The witness, MR MARTÍN PALLÍN, made a solemn declaration

THE REGISTRAR (*Interpretation from French*): Thank you, Mr Martín Pallín. Please have a seat.

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.

1 **Examined by MS ESCOBAR HERNÁNDEZ**

2

3 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): Thank you, Mr President.
4 As yesterday, I would ask you to allow me to speak to Mr Martín Pallín in Spanish,
5 and I will carefully note your remarks regarding the need to speak slowly. Thank you,
6 Mr President.

7

8 (*Interpretation from Spanish*) Good afternoon, Mr Martín Pallín. Thank you very
9 much for coming to Hamburg to speak as an expert in this case. Could you please
10 tell us your full name?

11

12 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): My name is José Antonio Martín
13 Pallín.

14

15 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): What is your
16 nationality?

17

18 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): I am a Spaniard.

19

20 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Could you please
21 indicate your professional experience?

22

23 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): My professional experience is
24 focused in the world of legal services. First of all, I served in the Public Prosecutor's
25 Office for more than 20 years and then I was in the Supreme Court, in the criminal
26 Chamber, for 22 years until I retired one year ago. I have also combined this activity
27 with teaching at different Spanish universities.

28

29 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): During the period of
30 time that you have had your professional activity as a public prosecutor and as a
31 judge, have you always dealt with criminal cases?

32

33 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Mainly. Especially when I was at
34 the Public Prosecutor's Office I also dealt with administrative issues.

35

36 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): How many years have
37 you been a judge in the Spanish Supreme Court, in the criminal court?

38

39 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Twenty-two years, if I am not
40 mistaken.

41

42 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): You just referred to
43 your teaching activities, your academic activities, in different Spanish universities.
44 Could you please tell us at which universities you have given classes and on what
45 subjects?

46

47 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): I have done civil law at the
48 Complutense University in Madrid and at the Autonomous University of Madrid.
49 I have been a professor of criminal law at the University of La Laguna in the Canary

1 Islands, Spain, and I have been a professor of criminal law at the Autonomous
2 University in Madrid.

3
4 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Within that academic
5 activity you have taken part in seminars, courses for specialists, programmes for
6 educating the general public on criminal law?
7

8 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): In Spain, the General Council of
9 the Judiciary frequently organizes training courses for judges, and I have directed
10 courses like that several times. I have also been a director for courses at Menéndez
11 Pelayo International University, and I have taken part in Spain and in Latin America
12 mainly in many courses involving procedural and criminal law.
13

14 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Can you please tell us
15 about articles or collaborations in books, any publications that you may have related
16 to procedural law, criminal law or due process law?
17

18 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Given my advanced age, I have
19 had many opportunities to write articles. I have written quite a few articles, some
20 commentaries on procedural texts in collaboration with other colleagues. There are
21 so many that I could not tell you all of them by heart, but mainly I have had a special
22 focus on these two aspects of criminal law regarding phone tapping as a method of
23 investigation and of entry and search in closed places generally. These papers are
24 published. They are all on the internet. You could look up the publications that I am
25 talking about on the internet.
26

27 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): If I am not mistaken you
28 have also had a great deal of important international activity related to the defence of
29 the rule of law and guarantees. Could you please indicate whether right now you
30 belong to any international institution of this kind?
31

32 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Right now I am a member of the
33 International Commission of Jurists, which has its headquarters in Geneva. There
34 are sixty members from all around the world from all kinds of judicial systems and
35 legal systems. Perhaps due to the fact that unfortunately I do not know English it has
36 been centred more on Latin America. I basically participated in observation of
37 transition processes, for example the trial involving the Argentine dictatorship. I was
38 called as an expert in front of the court that tried Fujimori in Peru and I have had
39 many other activities relating to human rights, mainly in Latin America, and at this
40 time in the Maghreb in what is called the Arab Spring, because the Commission is
41 very closely following the process of the drafting of the constitutions of Tunisia and
42 Egypt.
43

44 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): You referred to the
45 International Commission of Jurists. Amongst the main objectives of the International
46 Commission of Jurists which, you are perfectly aware, is a private institution – it
47 is not an international organization but it has enormous prestige world-wide – it
48 collaborates actively on a large number of UN programmes and programmes of
49 other international organizations – is to promote due process.
50

1 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Of course. We could say that
2 the two main points of reference are basically the two international covenants on civil
3 and political rights and on economic, social and cultural rights. At this time we are
4 carrying out a study on the possibilities of introducing the economic, social and
5 cultural rights in international proceedings, but mainly the right to due process, in
6 Anglo-Saxon terms – the right to a fair trial in our terminology. Those are the main
7 objectives and concerns of the Commission.
8

9 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Could you lastly tell us
10 about your general activities in your promotion and protection of human rights?
11

12 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): I have been the President of the
13 Pro-Human Rights Association of Spain, and I would like to say that the Commission
14 has a consultative status at the UN and specifically the rules for the independence of
15 judges and lawyers were drafted in collaboration with that Commission. With regard
16 to human rights we have carried out a number of missions on the ground in
17 situations of dictatorships, in the Southern Cone, specifically in Latin America in
18 general.
19

20 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Mr Martín Pallín, I see
21 that you are very modest and that you have not said that you received Spain's
22 national human rights prize.
23

24 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Yes, I have had the pleasure to
25 have that honour.
26

27 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Thank you. After this
28 brief introduction of your *résumé*, which is very long – and we do not have time to
29 devote more space to that here – for the court's benefit I am going to begin my
30 examination. Could you please tell us if there is a provision of Spanish criminal law
31 which makes damaging Spanish cultural heritage a punishable offence?
32

33 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Spain's legal system protects
34 cultural heritage with criminal laws. It is included in the Criminal Code. There is a
35 specific offence included in the Criminal Code of offences against cultural heritage.
36 There are more generic offences; there is protection, administrative protection in the
37 law known as the Spanish Historical Heritage Act, and there is a third form of
38 protection in the Smuggling Act, which considers it an offence to smuggle or illicitly
39 traffic goods taken from archaeological sites.
40

41 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): What is this offence in
42 the Spanish Criminal Code to which you have just referred? You said that the
43 criminal Code has an article that gives offences against historical heritage criminal
44 status. What is that?
45

46 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Article 323 of the Criminal Code
47 has a sentence of one to three years and a fine of 12 to 24 months for anyone who
48 damages an archaeological site. Moreover, there is a different and more generic
49 definition for theft of such items: a theft is considered to have a longer sentence if the
50 article stolen has archaeological value.

1
2 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): The provisions that you
3 have just mentioned are of a general nature. Are they also applicable to the
4 underwater or sub-aquatic cultural heritage located in Spanish waters?
5

6 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Without a doubt. I am sorry,
7 I have to ask the Tribunal to forgive me for being so hasty in my answers. Yes, of
8 course, it is perfectly defined in article 323 and I didn't say before that, moreover, the
9 Smuggling Act has three to five-year sentences for unlawful exporting of goods that
10 are classified as Spanish cultural heritage.
11

12 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Given that the alleged
13 offences investigated in Cádiz that we have been talking about throughout this case
14 were committed in internal waters, in territorial sea, albeit with unequivocal support
15 from the land, since there was a support network there – so in the event that the
16 property was sold, do you think that Spanish judges have the authority to investigate
17 these events?
18

19 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Spanish judges unquestionably
20 have jurisdiction over these criminal acts when the investigation could begin on land
21 and later be extended to the vessel *Louisa* that was the subject of the entry and
22 search warrant. As far as territorial jurisdiction is concerned, that corresponds to the
23 court of the place in question, which I believe is Criminal Court No. 4 of Cádiz.
24

25 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): You refer to the specific
26 jurisdiction of the Magistrate Judge of Criminal Court No. 4 in Cádiz, so could you
27 therefore say that this judge is the judge "predetermined by law" for the investigation
28 of these acts?
29

30 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Undoubtedly. The general rule,
31 the absolute rule of our procedural system is that the jurisdiction of the judge of the
32 place where the criminal act was committed prevails, and no one has questioned
33 that the place where this act was committed was not the Bay or the territory of Cádiz.
34 This has not been questioned.
35

36 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): So when we are talking
37 about the judge being predetermined by law, what does that mean? Who is the judge
38 predetermined by law? What relationship does this have with due process?
39

40 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): The Spanish Constitution, which
41 is from 1978, includes the phrase from the European Convention and other
42 conventions, the internationally accepted expression of "judge established by law",
43 and our Constitution calls this the judge predetermined or established, if you wish – it
44 means the same thing – by law. So it is perfectly constitutional and it is totally in
45 keeping with international conventions.
46

47 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): The judge
48 predetermined by law – is this a guarantee in the criminal process? Is it a guarantee
49 of protecting human rights in a criminal proceeding?
50

1 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): All procedural systems, all
2 international conventions, establish the idea of the judge predetermined by law or the
3 judge established by law as a guarantee in order to eliminate the possibility of
4 suspicion that either a legislator or someone in power might hand-pick a judge *ad*
5 *hoc*. So it is to ensure the guarantee of impartiality and objectivity; and this is
6 guaranteed by the figure of the judge predetermined by law.

7
8 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): I am going to go back
9 to the issue of offences against historical heritage that were the reason behind the
10 seizure of the *Louisa*. Do you think it was reasonable for the judge to order at that
11 time the entry and search of the *Louisa* and also of the *Gemini III*?

12
13 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): According to the information
14 that I have, the judge, before ordering the entry into the ship, had been conducting
15 an investigation which, according to the reports of the Guardia Civil, which has in
16 Spain the consideration of, shall we say, judicial police – the Guardia Civil had
17 provided the judge with information regarding the possible existence of a network
18 that included a network on land to the point that a member of the Guardia Civil was
19 detained on suspicion of disloyalty in the performance of his duties. The investigation
20 reached the conclusion that objects that were part of the underwater cultural heritage
21 of Spain could be on board, inside the ship the *Louisa*. It is certainly logical and
22 normal for any judge, any investigating judge, to follow this line of investigation; and
23 in my opinion it was totally reasonable. Spanish procedural law authorizes this
24 measure and the judge, in the exercise of the authority granted to him under the law,
25 used it, because he believed that it was reasonable, and I share his opinion.

26
27 **MR WEILAND**: Excuse me, this seems to be an important opinion. I would like to
28 bring something to your attention. It is not clear to us what he is basing his opinion
29 on. There are 15 volumes of the court documents, and I would like to know if he has
30 read the court documents or just what the opinion is based on.

31
32 **THE PRESIDENT**: May I ask Mr Martín Pallín to repeat your statement to clarify if it
33 is a statement of fact or opinion?

34
35 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Sorry, Mr President,
36 I understood that the cross-examination will come later but I have no inconvenience
37 in replying to this question. I have no problem. I have not seen it personally, but from
38 what I have seen, the judicial investigation is very voluminous. It covers more than a
39 thousand or more pages of paper, and I have not read the thousand pages or so.
40 I have read the report from the Guardia Civil. As I have said, they are the judicial
41 police of Spain, and the report from the Guardia Civil informs the judge that there
42 may be the remains of sub-aquatic cultural heritage within the ship. In these
43 circumstances I think, and the judge – I think that any judge in fact, as a
44 consequence of this information, this report, may, if he deems it necessary, in his
45 criterion, order the entry and search of the ship. The investigating officials who carry
46 out the investigation so inform the judge, and the judge is the only person who could
47 take that decision. If my experience is of any worth, had I been the judge of Cádiz
48 I would have taken the same position.

49
50 **THE PRESIDENT**: Does it satisfy your question, Mr Weiland?

1
2 **MR WEILAND:** Yes, thank you very much, Mr President. I understand to a greater
3 extent now.
4

5 **THE PRESIDENT:** Thank you very much. Ms Escobar Hernández, please proceed.
6

7 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): I wanted to point out
8 that this is quite unusual and that the cross-examination should come later and not
9 now. Obviously the Party who has called the witness can examine the witness, so I
10 would ask the Agent from Saint Vincent and the Grenadines to ask questions at the
11 right moment. (*Interpretation from French*): The only thing that I wanted to say – it
12 was something that I forgot before – is that Mr Martín Pallín has already made
13 reference to the system of examination and cross-examination before the Tribunal,
14 and you have said clearly from the very beginning of the proceedings that Spain has
15 always respected the speaking order. It is of course not my task to do so but I would
16 be grateful to the Agent of Saint Vincent and the Grenadines to wait for his turn to
17 ask questions. He will have time and the right to do so, but in turn. I think that is the
18 procedure laid down in the Rules of the Tribunal, and that is why I say that.
19 Secondly, Mr President, I am also going to say something further, namely the
20 reference to information from the Guardia Civil and the fact that the Guardia Civil
21 sent communications to the judge to inform him as to what was happening, in its
22 view, with the *Louisa* as part of this operation. What is more, this is a very well-
23 known operation in Spain. It is well known to Mr Weiland; it is the “Bahia” operation
24 mentioned in the indictment, the *auto de procesamiento*, which is in the Tribunal’s
25 case file; so this is not a new fact at all – if you allow me.
26

27 **THE PRESIDENT:** As to the first point of procedure I would like to ask Mr Weiland to
28 wait a little bit until you have the chance to cross-examine the expert. I ask Ms
29 Escobar Hernández to continue your examination.
30

31 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Mr Pallín, you said that,
32 in your judgement, taking into account your professional experience, so bearing in
33 mind what we usually call *l’expertise* – experience is well recognized in any legal
34 system – on the basis of your experience and your expertise you have said that you
35 would also have ordered the entry and search of the *Louisa*. I am not going to ask
36 you this again, but I would like to ask you about another matter. Do you think that the
37 Cádiz judge could have adopted measures other than those of searching and
38 entering the ship, to follow this criminal investigation? Do you think other measures
39 could have been taken by the judge?
40

41 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): There are investigation
42 measures that a judge has to take, depending on the case, to continue the
43 investigation, which restrict fundamental rights and the right to privacy, like tapping a
44 phone or entering and searching premises. The case law, both of the Inter-American
45 Court of Human Rights and the Strasbourg Court, has established that these
46 measures have to be adopted as a last measure, a last resort; i.e., if there are less
47 invasive measures that can be adopted which do not restrict human rights to such an
48 extent, they have to be adopted instead. In this case I think what we were talking
49 about is searching for sub-aquatic cultural heritage artefacts that were presumably

1 on the boat, so there was little other alternative, frankly. If this had not been done the
2 risk would have been of losing the evidence or having the evidence destroyed in fact.

3
4 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): The entry and search of
5 the ship took place on 1 February 2006. In order to do this the Magistrate Judge of
6 Criminal Court No. 4 of Cádiz gave a ruling and issued a warrant to enter and search
7 the ship – i.e., a judicial decision whereby the entry and the search of the ship were
8 ordered. Is this in line with Spanish law and with the right to due process in law?

9
10 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Yes. As I already said, the
11 Spanish judicial system is, in certain ways, the heir of the French system, and
12 requires the judge to hand down a decision, an order – using Spanish terminology –
13 and this judicial ruling not only orders the entry and search but what is more
14 important in my opinion is that it explains and gives the reasons and grounds behind
15 such a decision. This is very much what we find in this order that was handed down
16 by this investigating judge. I have this order in front of me and I have read it and it
17 seems to me, if I am allowed to do so – if the President allows me to do so I can read
18 a paragraph of this, which says the judge states that he adopts the decision in order
19 to avoid the plunder of the Spanish sub-aquatic archaeological heritage, and
20 because a risk exists that this evidence may be removed from the ship and the court
21 may be deprived of the possibility of taking action. So these are the reasons the
22 judge gives in his order or decision of 1 February 2006.

23
24 **THE PRESIDENT** (*Interpretation from French*): Ms Escobar Hernández, I do
25 apologize for interrupting you, but it is half past four and I do believe you have quite
26 a few more questions on your list; and thus the Tribunal will now break for thirty
27 minutes and we will resume at five o'clock.

28
29 (*Break from 4.30 p.m.-5.00 p.m.*)

30
31 **THE PRESIDENT**: Ms Escobar Hernández, you may continue the examination of the
32 expert, but before giving you the floor, I would like to mention one thing. Before the
33 break there was a question raised concerning the document that was referred to by
34 the Applicant. I would like to confirm that the letter referred to by the Co-Agent of
35 Saint Vincent and the Grenadines as a document filed after the closure of the written
36 procedure, which is, I understand Exhibit 8, was transmitted by a letter dated
37 25 September this year, but, as stated by the Agent of Spain, the Tribunal did not
38 authorize the production of this document. That being said, the information referred
39 to by the Co-Agent of Saint Vincent and the Grenadines may be found in paragraph
40 37, page 14, of the Memorial of Saint Vincent and the Grenadines as well as in
41 paragraph 15, page 14, of the Counter-Memorial of Spain. So the fact concerning the
42 deflector on *Gemini III* is known but the document was not a filed document, so
43 perhaps we can refer to the fact in the record but without referring to the document.
44 I hope that will solve the problem. Thank you.

45
46 (*Interpretation from French*) Ms Escobar Hernández, you have the floor.

47
48 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): Thank you, Mr President,
49 and thank you for the information that you have just conveyed to us. Indeed, when I
50 made my objection I was not objecting to the fact but to the express reference here

1 to a document that had been presented by the Co-Agent of Saint Vincent and the
2 Grenadines and to which Spain had objected as a document which does not concern
3 the deflector. Consequently, as a document, reference could not be made to that.
4 Thank you in any case for the explanations you have just given, Mr President.

5
6 **THE PRESIDENT** (*Interpretation from French*): Thank you for your clarifications.
7 That was also how I understood it. You may continue.

8
9 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Sir, before finishing the
10 first part of the examination, I asked whether you consider that there was another
11 option instead of ordering the entry and search of the ship. You have already
12 answered this question but can you answer the same question again, please?

13
14 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): The general rule, as I was
15 saying before, was that the judicial investigation, by encroaching on, by a judicial
16 decision, obviously, fundamental rights such as the right to privacy, is exceptional
17 and can only be permissible when other measures are not available, i.e. confirming
18 what I said before, and I think that in this case there were not any alternative
19 measures available to the judge in fact.

20
21 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): During the actual entry
22 and search, the court clerk was present, who actually recorded in writing what
23 happened there. Can you please explain what is a court clerk's role in Spain and
24 what functions he or she has?

25
26 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): In the Spanish procedural
27 system, in order for entry and search to be carried out, in the first place what we
28 need, as we said before, is a court decision, and the judge orders the search, orders
29 what is called in Spain a judicial commission. The judge's presence is not required
30 because in the Spanish judicial system the court clerk, apart from having the
31 functions of, for example, the *greffier* in a French court, also has functions we call – I
32 do not know if the expression is correct or common – is acting effectively as a public
33 notary in a judicial process. A court clerk's written record documents have the same
34 value and authenticity as a public notary's intervention in a last will and testament,
35 for example, or in a private contract. This is a specific category of court clerks in
36 Spain, this power to act as public notaries, so much so that our case law has set
37 down without question that if a court clerk is not present in a search and entry, the
38 actual procedure of entering and searching is absolutely null and void. What makes
39 this entry and search valid is the actual presence of the court clerk and this is an
40 absolute guarantee because a court clerk under his or her responsibility attests that
41 the actual entry and search has been carried out exactly as he or she attests in the
42 actual written record of the entry and search.

43
44 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): The Applicant has
45 pointed out that the entry and search of the *Louisa* was carried out illegally because
46 the judicial commission which carried out the entry and search was not authorized by
47 the ship's captain, who was actually not on the ship at the time, and possibly was not
48 even in Spain at the time, and indeed, has apparently never been in Spain, or by the
49 consul of Saint Vincent and the Grenadines, and that this authorization by either the
50 consul of Saint Vincent and the Grenadines or of the ship's captain was an absolute

1 requirement under article 561 of the Criminal Procedure Act. Could you kindly
2 explain what the wording of article 561 is and the actual meaning and content of that
3 article?
4

5 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Article 561 of the Criminal
6 Procedure Act is within a bloc of articles, 30-something articles in fact, in which the
7 Spanish legislature regulates entry and search of private homes, entry and searches
8 in closed areas which are not deemed to be private homes, and entry and searches
9 even, for example, in the royal palace. I include the words “the royal palace” because
10 this Act is actually from 1882. So article 561 also dates back to 1882. So the 19th
11 century is a long way back in time. After this, for example, the Constitution of 1978
12 came into force and the Spanish courts have been in a position to interpret pre-
13 constitutional rules from the 19th century in the light of the constitutional text which is
14 now in force and, what is more important, in the light of the international treaties in
15 the area of human rights which Spain has ratified or signed, more specifically, in the
16 light of the International Covenant on Civil and Political Rights and the European
17 Convention on Human Rights, and also in line with the case law the Strasbourg
18 Court has handed down. It is true that article 561 is still in force and that article 561
19 does require the authorization of either the captain or, if the captain is not present, of
20 the consul of the flag State of the ship, but as far as I know, the captain was not
21 present and he was not actually traceable, and had been so for a long time, and the
22 consul was also untraceable. This situation ---
23

24 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): I am sorry. If I could
25 interrupt you to ask two questions to clarify your replies.
26

27 (*Interpretation from French*) Do I have your permission to do so, Mr President?
28

29 (*Interpretation from Spanish*) Firstly, you said that you need either the authorization
30 of the ship’s captain or the authorization of the consul if the ship’s captain is
31 unavailable. What happens if the ship’s captain is actually on board the ship but
32 refuses to give the authorization? Is the authorization of the consul then necessary if
33 the captain does not give it?
34

35 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): In this case I think we ought to
36 distinguish. We are talking here of course of investigating criminal offences, for it is
37 not entering a ship for business purposes or to seize goods in a civil procedure. We
38 are talking here of investigating criminal offences, which could be *in flagrante delicto*,
39 i.e. an offence which is being committed at that very moment. In the case of crimes
40 detected in the act, case law in Spain has clearly set out that the authorization of
41 either the captain or of the consul is not required. In this case, as I said before, a risk
42 did exist of evidence and exhibits disappearing, and therefore the judge had to
43 assess this risk at the time of taking the decision, and thus, in my opinion, I think that
44 the decision to enter the ship was correct, in so far as a judge considered that there
45 was a risk of evidence disappearing, or even possibly the risk of possible suspects
46 having committed this offence actually disappearing.
47

48 I must say that article 561 has caused a great debate in Spain and also in
49 Strasbourg, especially in the light of searches of ships in the case of drug trafficking
50 offences. This is not the case, obviously, we are studying now, but precisely in

1 various occasions – I do not recall how many now, frankly – Spain has been taken to
2 the Strasbourg Court for alleged violations of the rules regulating the entry and
3 search of premises. This can be looked up in any legal database of case law: in the
4 *Prado Bugallo* case, a very well known case, because he is a well known drug
5 trafficker, who was a focus of attention and of media coverage in Spain, the
6 Strasbourg Court rejected the claim by *Prado Bugallo* that his rights had been
7 violated in so far as Spanish legislation had been infringed because it is considered
8 that there were irregularities but that such irregularities did not cause the search and
9 entry proceedings to be null and void. They only caused the search and entry
10 proceedings to be irregular.

11
12 According to our constitutional system, only proceedings that violate the essential
13 requirements and produce a situation of defencelessness for the party being abused
14 are null and void. In this case, for example, the maximum guarantee for any person
15 who was actually on board the ship was the presence of the court clerk, who was
16 there, and therefore I consider, and also the Strasbourg Court would consider, that
17 no defencelessness is caused. It is an irregularity, if you want, and if this can be of
18 any use, Spain is now amending, indeed, actually the whole legislation in criminal
19 procedures, and it is all being updated, but what was in force at the time of the case
20 when the entry and search was actually carried out was article 561, as interpreted as
21 I have just outlined.

22
23 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Could you please
24 indicate what decision of the Strasbourg Court you are referring to?

25
26 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): It is a decision. It is not a
27 judgment. It is a non-admission to consideration.

28
29 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Can you refer to the
30 case and date, please?

31
32 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): It is No. 21218/09. The date is
33 18 October 2011 and it is case 21218/09 and as I say, there are many other
34 decisions – this is not the only one – which actually concur with this one.

35
36 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Thank you very much.
37 Before continuing, I would like to point out ...

38
39 (*Interpretation from French*) Mr President, I would like to make a remark prior to that
40 referring to something Mr Martín Pallín said when he was talking about the consul of
41 Saint Vincent and the Grenadines.

42
43 (*Interpretation from Spanish*) As far as you are aware, is there a consulate in Spain
44 for Saint Vincent and the Grenadines?

45
46 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Frankly, I do not know, but I
47 imagine, but the judge could have verified this very easily.

48
49 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Thank you, Mr Pallín.
50

1 (*Interpretation from French*) Thank you, Mr President. I wish to inform you that there
2 is no consulate of Saint Vincent and the Grenadines in Spain, not even an honorary
3 consulate, which is a fairly common practice, but that is not the only thing which I
4 wanted to inform the Tribunal because, although between Spain and Saint Vincent
5 and the Grenadines there are diplomatic relations, Saint Vincent and the Grenadines
6 has never appointed a consul anywhere in the world deemed to be responsible for
7 what is usually considered as normal consular activity *vis-à-vis* Spain.

8
9 Mr President, Mr Martín Pallín referred to the *Prado Bugallo* case which was heard
10 before the European Court of Human Rights. He referred to the contents of the
11 judgment. It is my intention to return to this in my oral pleadings later but it is my view
12 that this is relevant. I defer to your opinion as to whether it is relevant or not, of
13 course, but above all it is a public decision that is published on the website of the
14 Council of Europe and in the database of the European Court of Human Rights. So I
15 would like to ask for your permission, Mr President, to put on the screen a number of
16 items pertaining to this decision. This is the decision of 18 October 2011 adopted in
17 response to Application No. 21218/09 presented by José Ramón Prado Bugallo
18 against Spain. I also have a copy for the Co-Agent of Saint Vincent and the
19 Grenadines, and I would like to hand out copies and put up on the screen some of
20 the paragraphs from the decision.

21
22 **THE PRESIDENT** (*Interpretation from French*): Thank you, Ms Escobar Hernández.
23 If this is public domain information, then you can always show it and refer to this
24 decision.

25
26 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): That is the case, Mr
27 President. I can even show you on the screen the database where this information is
28 to be found, so the distinguished delegation of Saint Vincent and the Grenadines and
29 the Judges, the Members of the Tribunal, can see that this is the database of the
30 European Court of Human Rights; this is a free, public database. It can be accessed
31 either directly or via the Council of Europe's website.

32
33 **MR WEILAND**: Mr President, we have no objection. We point out that the copy we
34 have is in French.

35
36 **THE PRESIDENT**: Thank you very much.

37
38 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): It is indeed in French,
39 Mr President. The copy that I have just given to Mr Weiland is in French. This is the
40 only language in which there was an official publication of information from the
41 European Court of Human Rights database. Of course, French is an official
42 language of the Tribunal, and I believe that the Parties are entitled to use either
43 language. I have given this copy to Mr Weiland to ensure that there is equality of
44 arms, as it were. Obviously we can certainly have it translated into English, if
45 necessary, by the Saint Vincent and the Grenadines translation department.

46
47 On the screen here we have the first of the items that I mentioned. In line 2 you will
48 see the reference to *Prado Bugallo v. Spain*, 21218/09. It is also indicated that it is
49 available only in French, and then there is the decision in the third section. The date

1 of adoption is 18 October 2011, and once again it is stated that it is available only in
2 French.

3
4 **THE PRESIDENT** (*Interpretation from French*): Thank you, Ms Escobar Hernández.
5 If it is one paragraph, you can quote it in French and it will be interpreted into
6 English.

7
8 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): I am now referring to the
9 section headed “The Facts”. This is paragraph 3: “Within the framework of a judicial
10 investigation concerning international drug trafficking, on 15 August 2001 ...”
11 This is, I think, the most important bit coming up, which is why it is highlighted in
12 blue: “...the Spanish police intercepted in international waters a fishing boat called
13 the *Tatiana*. It was registered in Togo.”

14
15 If you then move to paragraph 4, starting at the first two words in red, it reads:

16
17 The next day police officers in charge of the investigation informed the
18 Togolese Honorary Consulate in Madrid by telephone that the *Tatiana*
19 had been intercepted, leaving a message on the answering machine. On
20 21 August 2001 they informed the Consulate by fax that the boat had
21 been intercepted, naming the individuals who had been arrested on
22 board.

23
24 I would draw your attention to the fact that the communication with the Togolese
25 authorities took place after the boat had been boarded.

26
27 Then the arguments put forward by the applicants, that is to say what Mr Prado
28 Bugallo presented in his defence, in blue:

29
30 Regarding the boarding and search of the *Tatiana* in international waters,
31 the applicant and the other persons involved alleged that they were null
32 and void inasmuch as the police officers had not sought the prior
33 authorization from the Togolese Consulate and the vessel was flying the
34 Togolese flag.

35
36 I will now move on to the arguments put forward by the *Audiencia Nacional*, the
37 highest court in Spain, under the supervision of the Supreme Court, of which Mr
38 Martín Pallín was a member. These are the arguments it gives. The *Audiencia*
39 *Nacional* is the highest court dealing with crimes of an international nature, terrorism,
40 forgery and so forth. I am now reading:

41
42 “In addition, the *Audiencia Nacional* noted that the Supreme Court had
43 also ruled on this question in connection with an appeal on points of law
44 lodged by the Republic of Togo against a decision by Section 1 of the
45 Criminal Chamber of the *Audiencia Nacional*, which had dismissed its
46 objection as to jurisdiction based on the fact that the offences had been
47 committed in international waters. In its Judgment of 25 November 2003,
48 the Supreme Court held that the failure to seek authorization from the flag
49 State, as required in article 4.1 of the Vienna Convention against Illicit
50 Traffic in Narcotic Drugs and Psychotropic Substances and article 561 of
51 the Code of Criminal Procedure, did not have the consequences alleged
52 by Togo. In the Supreme Court’s opinion this failure was at all events an

1 irregularity, which neither invalidated the boarding of the boat nor entailed
2 consequences extending to the assessment of any evidence obtained
3 without authorization.
4

5 “The Supreme Court” – that is, the Supreme Court of Spain – “found that
6 the non-compliance with the rule requiring authorization to be sought did
7 not detract from the rights of the accused persons, did not constitute a
8 ground for nullifying the procedure and did not limit the jurisdiction of the
9 State as exercised by the latter in accordance with international law.”

10
11 Am I reading slowly enough for the interpreters?
12

13 **THE PRESIDENT:** Yes.
14

15 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): Finally, I am going to
16 refer to a decision made by the European Court of Human Rights. Responding to a
17 claim submitted by Mr Prado Bugallo, the European Court ruled as follows. By the
18 way, this paragraph refers to arguments regarding boarding and search.
19

20 In this respect, the Court points out again that it falls primarily to the
21 national authorities, and in particular the courts and tribunals, to interpret
22 the relevant internal and international law, and that the European Court of
23 Human Rights will not substitute its own interpretation of the law for theirs
24 in the absence of arbitrary conduct.
25

26 Furthermore, the European Court of Human Rights took the view that there was no
27 reason to accept the Applicant’s arguments and declared the decision inadmissible.
28 The relevant passage reads:
29

30 In this case, the Court notes that the *Audiencia Nacional* and the
31 Supreme Court [of Spain] have taken the view that the interception of the
32 *Tatiana* was authorized and was carried out in accordance with the
33 provisions of national law and the international conventions on this
34 subject. They took account of the fact that the flag flown by the *Tatiana*
35 was not known to the authorities and that once it had been identified, the
36 Honorary Consulate of the Republic of Togo had been informed by
37 telephone and by fax of the interception of the vessel. In addition, the
38 domestic courts took the view that Spain had jurisdiction over the facts in
39 dispute, irrespective of the flag flown by the *Tatiana*, inasmuch as the
40 final destination of the cocaine was Spain, where the purchasers of the
41 drug were Spanish and some of the criminal activities had taken place on
42 Spanish territory. This conclusion was strengthened by the fact that the
43 flag was a flag of convenience and that there was no substantive
44 connection between the ship and the flag State as required by the
45 relevant provisions of international law.
46

47 That is all, Mr President. Thank you.
48

49 All in all, the Court took the view that the proceedings in Spain were fair.
50

51 Thank you, Mr President.
52

1 **THE PRESIDENT:** Thank you very much. Do you have further questions?
2
3 **MS ESCOBAR HERNÁNDEZ:** Yes.
4
5 **THE PRESIDENT:** Please continue.
6
7 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Mr Martín Pallín, on the
8 occasion of the entry and search of the ship, the arrest of two persons took place,
9 two members of the crew who were actually on the ship, and the arrest of Ms Alba
10 Avella. The first were of Hungarian nationality and Ms Avella was of US nationality.
11 In these circumstances, bearing in mind the situation of entry and search, were these
12 arrests actually reasonable within our ongoing judicial investigation or not?
13
14 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): The entry and search takes
15 place at any place, a ship or any other premises, where there is evidence to be
16 found, where evidence relating to the crime can be found, and this evidence, as well
17 as individuals who may be related to the offence, could be within these premises, the
18 judge is very much authorized by the law, and the judge is the one who has to
19 decide, to assess the circumstances of the case, and if he considers that there is a
20 risk of abscondment of possible suspects or that the investigation could be
21 prejudiced in any way or that the evidence could be destroyed, he is very much
22 authorized, perfectly authorized, by the law to order the arrest of these persons
23 provisionally. The general rule is that an arrest cannot last more than what is
24 reasonable – the time that the judge considers necessary in order to ensure the
25 success of the investigation. In this case, he acted correctly ---
26
27 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Thank you, Mr Martín
28 Pallín. I want to ask you something else now, if you do not mind. You said before
29 that the judge is very much authorized to order the arrest of individuals who are
30 suspicious or are actually on the premises when the search is carried out and a
31 person who was suspected of actually being close on the premises searched. Do
32 you think that this practice or this power that judges have, a Spanish judge has, of
33 arresting provisionally these individuals in relation to a judicial investigation, which
34 includes the entry and search, as you have already told us before, is in line with
35 Spanish law? Is it only a Spanish practice, arresting these persons, or in other
36 countries, generally in judicial investigations, are people arrested in these
37 circumstances on a provisional basis?
38
39 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): As far as I know, this is
40 foreseen in other legislations under the continental law system – for example, in
41 France and in Italy, in most countries in Latin America, and of course in any other
42 procedural system in which the judge is the person responsible for taking these
43 decisions, in order to ensure, I repeat, the success of the investigation. It is his
44 responsibility and the Constitution itself entrusts only to the judge the adoption of
45 these decisions, which is obviously a decision which is solely limited to the personal
46 freedom of individuals. All continental legal systems, including the Spanish one, do
47 establish, of course, a maximum period of remand in custody. The judge is
48 responsible for assessing when this detention is no longer appropriate, but in any
49 case the law does set a maximum time limit, so a person can only be remanded in
50 custody up to a maximum of half of the penalty that could be imposed as a result of

1 the offence. For example, if the hypothetical offence penalty can be eight years, a
2 judge can never keep somebody remanded in custody for more than four years. It
3 might seem excessive, but this is the rule that is set out in our legislation. It is an
4 exception, and the Constitution does require the judge to order a person to be set
5 free when that deprivation of freedom is no longer necessary for the investigation.
6

7 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Ms Alba Avella, as you
8 know, was arrested on 1 February and was handed over to the judge on 3 February
9 at Puerto de Santa Maria and immediately afterwards was handed over to Magistrate
10 Judge of Criminal Court No. 4 of Cádiz on that same day. Can you tell us the actual
11 time limit in Spain for a person to be put at a judge's disposal once that person has
12 been arrested within the framework of a judicial investigation? Just explain to us – it
13 may be obvious to you but just generally, as there are so many legal systems we are
14 talking about here. From the moment the police actually arrest somebody to the time
15 that person must be handed over and be brought before a judge, what is the time
16 limit? There is a maximum time limit within those two moments. What I am saying
17 here is it is not that the person is not under judicial control; I am just saying simply
18 that that person has been arrested by the police but has not been brought to the
19 judge physically yet. What is the time limit? What is the maximum time allowed
20 between the arrest of a person and that person being put at the disposal of the judge
21 and being physically brought before the judge?
22

23 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): According to article 17 of the
24 Constitution, the maximum time limit is 72 hours. In this case we have a special
25 circumstance, that the arrest actually takes place before the court clerk, so in some
26 way there was already a judicial control or judicial knowledge of the arrest, because
27 the court clerk was present, but in general terms the time limit is 72 hours.
28

29 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): On 6 February of that
30 same year, logically, the Magistrate Judge of Criminal Court No. 4 of Cádiz heard Ms
31 Avella, questioned her, and he ordered her provisional release on that same day, but
32 when he ordered her to be set free he did withhold her passport, so in practice a
33 judicial retention of the passport took place. What sense is there behind retaining
34 judicially a passport? Can you kindly explain this to us, please?
35

36 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): The fact the person was
37 released immediately after being questioned confirms what I said before. The judge
38 listened to the person who had been arrested, considered that it was not necessary
39 for that person to be deprived of her freedom further, and ordered her to be set free.
40 As a precautionary measure he decided to withhold her passport with the purpose of
41 that person not being able to leave Spain. This measure is most common and is in
42 line with what I said before. It is a measure which is less restrictive, so to speak, of
43 human freedom. It does not deprive her of freedom, but it simply prevents a person
44 from leaving Spain. So a person can move absolutely freely within Spain but the fact
45 that she does not have a passport any more prevents her, as far as possible, from
46 leaving Spain and removing herself from the court's action.
47

48 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): If a person whose
49 passport has been withheld by a Spanish court were to need – were to have an
50 absolute need to leave Spain for some reason, or were to declare that she must

1 leave Spain for some reason, can she ask the judge for special leave to travel on this
2 occasion?

3
4 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Any person who is in that
5 situation, i.e. that his or her passport has been withheld, may obviously address the
6 judge at any moment in time and request the passport to be returned because, in his
7 or her judgement, the measure is no longer required, or may request special leave
8 from the judge to leave Spain to go abroad for some justified reason, for example,
9 family reasons or professional reasons. In my long experience I have known cases
10 of people, very important people in Spanish life, political life, economic life and
11 business life, artists, who have found themselves in this situation, and the judge has
12 authorized them in a specific case, for example, to give a lecture at an American
13 university. So the judge did grant this authorization to leave Spain and to come back,
14 and that is what he did; he went out, gave the lecture and came back.

15
16 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Withholding a passport
17 is a measure that only exists in Spain or it is something found in other legal systems
18 in other countries?

19
20 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): This measure is used in many
21 other countries. For example, if you allow me to comment as a personal comment, at
22 present within the Schengen territory, for example, which we have within the
23 European Union, this measure is no longer as important as it was at other times,
24 since one can move quite freely within this area, but this measure is still very much
25 in the law. It does exist and it is very much used.

26
27 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): Ms Avella was released
28 without any charges, and in fact was not charged subsequently. In your professional
29 life have you found yourself in a situation like this one, where a person has actually
30 been arrested in a criminal investigation, a judicial investigation, was later on not
31 formally charged, and in fact is released, and the proceedings regarding that person
32 are dismissed? Have you seen this happening in your professional life?

33
34 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): It is relatively common. A
35 person who is deprived of freedom and then is not charged with any offence, or in
36 other cases is actually formally acquitted after the trial, is indeed entitled to request
37 damages, damages to be indemnified, for example, material damages, having lost
38 their job, for example, or professional income or personal damages, for example,
39 having appeared in the media, having been detained and suspected of a crime. But
40 this general rule has to apply to every case. In this case one has to look at whether
41 the duration of the deprivation of liberty is sufficiently short in order to decide whether
42 or not the judge did act in line with the law. I cannot give a general rule here. I would
43 examine each case on its own merits and decide whether that person is entitled to
44 indemnity, but certainly both the Spanish Constitution and the law grant that person
45 the right to claim damages from the State for having been deprived of freedom.

46
47 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): In other words, it is not
48 something absolutely extraordinary, and it is not equivalent to a denial of justice for a
49 person who has actually been investigated not to be prosecuted afterwards.

50

1 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): Of course not, otherwise judges
2 would not be able to work. In all legal systems the law itself recognizes the possibility
3 of a judicial error. Of course, we judges, because of our work and because we have
4 to take decisions – sometimes the decisions are wrong. That is why, if a decision has
5 been wrong, a person who has suffered loss can claim compensation.

6
7 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from Spanish*): You said before that
8 there was a right to reparation. How would you claim? Before whom would you claim
9 damages, for the damages caused by this judicial decision?

10
11 **MR MARTÍN PALLÍN** (*Interpretation from Spanish*): The Spanish system, as I said
12 before, in the Constitution itself, establishes the right of citizens to claim damages,
13 what the Constitution defines as the normal functioning of the judicial system, and
14 more specifically, the claim is made before the General Council of the Judiciary,
15 which is a constitutional body which governs judges, and the actual money is paid by
16 the Ministry of Justice from its ordinary budget. This is the theory and the law. In
17 practice, at times the claim for damages is actually upheld, and in other cases the
18 claim for damages is rejected.

19
20 **THE PRESIDENT**: May I know if you still have many questions to ask?

21
22 **MS ESCOBAR HERNÁNDEZ** (*Interpretation from French*): Yes, President, I would
23 wish to continue my examination tomorrow.

24
25 **THE PRESIDENT**: The examination of the expert Mr Martín Pallín will have to be
26 continued tomorrow morning. The hearing will be resumed tomorrow, 10 October, at
27 10 a.m. The sitting is closed.

28
29 *(The sitting closed at 6.04 p.m.)*