INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2012

Public sitting

held on Thursday, 11 October 2012, at 3 p.m.,

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

President Shunji Yanai presiding

THE M/V "LOUISA" CASE

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

Verbatim Record

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

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and

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as Counsel and Advocates;

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and

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Mr Mariano J. Aznar Gómez, Professor, International Law Department, University “Jaume I”, Castellón, Spain,
Mr Carlos Jiménez Piernas, Professor, International Law Department, Universidad de Alcalá de Henares, Spain,

as Counsel and Advocates;

Ms María del Rosario Ojinaga Ruiz, Associate Professor, International Law Department, Universidad de Cantabria, Spain,
Mr José Lorenzo Outón, Legal Adviser, Ministry of Foreign Affairs and Cooperation,

as Counsel;

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

as Adviser.

THE PRESIDENT: Good afternoon. We will continue the hearing in the *M/V Louisa* case. Today we will hear the second round of oral arguments of the Applicant. Therefore I give the floor to the Co-Agent of Saint Vincent and the Grenadines, Mr S Cass Weiland. You have the floor.

MR WEILAND: Thank you, Mr President. May it please the Tribunal, just a brief word of thanks and an opportunity to express the appreciation of all of the persons associated with our delegation, and that would certainly include Ms Rochelle Forde, Mr William Weiland, Mr Nordquist, Mr Robert Hawkins, Mr Whittingon and Ms Bandara. We much appreciate your consideration and the hospitality, so to speak, of the wonderful staff here at the Tribunal. They have been terrific to us, both in December 2010 and again now we are here this time.

I would like to say a particular word of thanks to Ms Forde, and express our appreciation for her ability to appear here despite her family obligations and her practice obligations. You would think that this is the type of appearance that all lawyers would relish, and she certainly did, but she comes from a very small country and the demands were really great, but we are very appreciative of Ms Forde's ability to be with us for the first week and I know that her strong presence was felt by the Tribunal.

In talking about Ms Forde and Saint Vincent and the Grenadines' role in this case, it is important, I think, to point out the fact that the crew was treated so badly, the fact that Ms Avella was treated so incredibly badly, not being a member of the crew, does not and should not overshadow the effect of what the Respondent has done in this case to Saint Vincent and the Grenadines. It is a country whose standing in the community of nations is affected by these kinds of things. It is a country whose economic interests are threatened when members of its fleet are hauled into the kind of conditions that this ship was subjected to, and the fact that Saint Vincent and the Grenadines has been sadly and strongly affected by the case really cannot be over-emphasized.

I would like to give you a little insight into my argument, and I want to assure you that, although we have been allocated the entire afternoon to talk, we do not intend to do that. Judges have told me for years that closing arguments from lawyers are largely unnecessary when there is no jury, and my position would be that you are the jury and you are the Judges, and you do not need to hear lawyers for two or three hours tell you what you have just heard. We have been here for a few days and I know you remember the evidence, and I know you know the law better than I, so I am going to try to spare you having to listen to me for the entire afternoon. The President and I and the representatives of the Respondent spoke briefly yesterday afternoon about the possibility of taking a break after an hour in the event I still have a few more things to say. It is possible that we will be finished before that.

What I would like to address first is the jurisdictional question that you are all faced with. I am going to talk a little bit about the jurisdiction and repeat a little bit about what Mr Myron Nordquist had to say on the subject. Then I am going to address the essence of the merits decision that you are faced with, including some discussion of the damage issue. Finally I am going to talk about some policy issues I think should be addressed.

Before I get to any of that though, I would like to respond to your questions. We have two sets of questions, one of which I saw just a few minutes before coming into the courthouse, so I will address those briefly, but the questions received very early on, possibly before we re-started our first session, are things I am going to respond to first, before we get into any further discussion about the case.

The Tribunal has asked us:

> What is the legal justification for Saint Vincent and the Grenadines requesting the release of the Gemini III, which does not fly the flag of Saint Vincent?

The answer – and we have actually prepared a written response to this, which perhaps I can expand on a little bit – the technical answer is that the *Gemini III* served as a tender for the *Louisa* and is inextricably linked to it. *Gemini III* is a small boat and was never flagged, as the owner believed it was a vessel that did not require flagging. The vessel was transferred to Spain by truck from the Netherlands, where it was purchased. To our belief and knowledge, it was never registered in any jurisdiction after it arrived in Spain but it is considered the property of Sage, the owner of the *Louisa*, and for that reason we believe that the Applicant is entitled to restitution based on the loss of value of the ship, much as we have claimed hundreds of thousands of dollars' worth of property that was stripped off the *Louisa* and carried away by the Guardia Civil.

There is a question No.4 addressed to both parties, and I will respond to that as follows. The Applicant believes this question was partially addressed by Mr Nordquist during his presentation, but we take this opportunity to consider the question in greater detail. Respondent has never produced an inventory of items taken from the ship, nor any proof of their origin, and thus this is a complicated question that you have put to us, which is dependent on the facts of the particular case. The direct reply is that the Spanish criminal legislation that is apropos to the present case may conform in principle to UNCLOS, including article 303 or other principles of international law, including in particular the UNESCO Convention of 2 November 2001 on the Protection of the Underwater Cultural Heritage, the UCH Convention, but even if it does conform, as repeatedly pointed out before the Tribunal, it was unlawfully applied to the Applicant and those for whom the Applicant is responsible. Because a far smaller number of States have become Parties to the UCH Convention than are Parties to UNCLOS, it can be argued that the UCH Convention is not customary international law, as almost all of UNCLOS is. Additionally, the UCH Convention creates new jurisdictional competences not provided in UNCLOS.

Question No. 5 relates to the Spanish criminal law, and I will respond to that question as follows. Article 561 of the Spanish Law of Criminal Procedure has been discussed at length. We reject the contention of the Respondent that article 561 has been modified. Article 561 is consistent with international law in that the consent of the captain or the flag State is required before boarding and searching a vessel.

Finally, on question No. 6 we would say as follows. Javier Moscoso testified during the request for Provisional Measures hearing that the judge, in accordance with articles 127 and 128 of the Spanish Criminal Code, shortly after the arrest of the vessels should have given the owner the alternatives he proposed to give it in his order of 29 July 2010, that is, Moscoso testified, as you will recall, that the alternatives suggested by the judge in Cádiz were appropriate; they were just about four years too late.

That order of July 2010 was never notified to the accused persons before Spain introduced the order in this courtroom in December of 2010. We will talk more about that. In fact, it was not notified as required by Spanish law, and you will recall that Judge Pallín yesterday confirmed that Spanish law requires it to be notified to the parties within three days. The July 2010 order was notified on 31 January 2011, so by the time the judge issued the order, which the lawyers for the ship owner had not seen, the *Louisa* had already been arrested without maintenance for over four years. The owner did refuse to elect any of those options, and he later explained the liability involved, the costs involved, the refusal of that very judge to allow sailors to live on the ship from the very beginning, all contributed to that decision. So in essence that is our response to the early questions from the Tribunal.

I think before I address some more substantive things relating to jurisdiction and the facts of the case, we might also talk about the second group of questions, which I really just saw a few minutes ago. Obviously, with the questions from the Tribunal, it would be useful no doubt to provide what I can at this stage.

The first question and the second question are really the same, and they ask:

> Under what permit was the *Louisa* (in question 1) and the *Gemini III* (in question 2) authorized to conduct activities in internal waters and the territorial sea of Spain? Was the permit contained in Annex 6 to the Memorial of the Applicant preceded or followed by other permits and what were the expiration dates of each permit? If there are other permits, can we have copies?

Here is the answer to the questions. First of all, there was only one permit. We supplied that as Annex 6 early on in the Provisional Measures stage. The permit did not require the Tupet company to use any particular vessel in conducting its scientific activity, so the Tupet permit was used for both vessels, the *Louisa*, and then when the tender went out to, for example, tow the sonar, it would carry the permit. So when the Guardia Civil checked, the permit was available on any boat and there was not, to our knowledge, ever a problem with the fact that Tupet was allowed to use different vessels. It expired, I believe, 1 May 2005. I cannot give you the exact date. That was one of the reasons that the *Louisa* was ordered back to the United States and set off the whole series of activities that Avella was going to undertake to get the *Louisa* prepared to go. By that time the record shows that the *Gemini III* had been leased out, and you have questions about that so let me try to address those.

Question 3, incidentally, asked if any report was filed with the Spanish authorities and, if so, whether there is a copy. We were not aware of any reports that Tupet may have filed with the Ministry. To my knowledge, we have not been provided with copies of any reports that Tupet may have filed.

The terms of the contract between Sage and Tupet are most interesting, and I must apologize to the Tribunal because when I saw the question, it made me go and check through our annexes because I was confident we had supplied the contract. It was certainly our intention to supply the Tupet-Sage contract. I can summarize the important terms and I will provide the Tribunal with a copy, I hope by tomorrow. I was not able to locate one in the last minutes before we began our session today.

Essentially, the Sage contract with Tupet was a joint venture agreement where Sage agreed to use the Tupet permit, and the contract has language about "If by happenstance some shipwreck is discovered then Tupet will take the necessary measures to acquire whatever permits are required by Spanish law." So, as you will hear in further argument this afternoon, we have never tried to conceal the dual interest here of Sage. They had a thing with Tupet. John Foster, as a beneficial owner of Sage, is in the oil business. He sees that Tupet has a permit that is going to, he thought, allow him to drag some sonar and magnetometer devices around an area that seemed to be one of the hottest oil and gas areas in the world, so they entered into a venture, and if anything was found, Tupet would go and acquire whatever additional permits were necessary. I will obtain the agreement and provide it to the Tribunal.

The contract regarding the *Gemini* that was made with Plangas is a contract that I have seen. I am not sure that I have access to it in the next 24 hours, but I will endeavour to supply it to the Tribunal. My recollection is that the contract with Plangas for the *Gemini* in 2005 was a simple lease, like a bare boat charter. Plangas has its own permit and it is going to lease the boat from Sage for a period of – I do not know – six months or a year. It is a simple bare boat charter, as I recall.

Finally, your question No. 6 is:

> Under Spanish law, what would be the further legal proceedings which would have to be pursued or instituted, if any, in the present case in order to exhaust the local remedies in accordance with international law?

As we have said, that is a loaded question because we do not think that anything has to be exhausted in accordance with international law any more. My understanding, which is somewhat limited to say the least, is that the Spanish criminal proceedings, as arcane as they are and difficult to understand, seem to require that the investigatory judge – you have heard so much about Court No. 4 in Cádiz – has to enter an order referring the case to the trial court. I am sure that counsel for Spain can correct me, but I believe that it is called an *auto de procesamiento*. It refers the case up for trial. At that point the prosecutor has the option to decide that there is really nothing to the case and that he or she is not actually going to prosecute the case – again my understanding. The accused also has the right, firmly established under Spanish law as I understand it, to appeal this referral to the next level court; and, of course, after conviction, if there is one, there are other appeals. The view from afar is that the process is interminable, and it would be a further abuse to subject Mr Avella and Mr Foster and others to run that gauntlet. It has already taken six and a half years, and frankly there is no end in sight, but that is my understanding of the criminal procedures in Spain.

Let me talk first, if I may, about jurisdiction in this case. We have asked you basically to cross over the bridge to the area of human rights, denial of justice, application of international legal principles, which you have done previously on occasion, but possibly not in such an explicit manner as one could argue we are asking you to do. We think that we have an ample legal basis for asking you to take this case. It was explained in rather greater detail by Mr Nordquist, a true authority in the field, who talked a great deal about article 300 and the fact that it can be independently deployed, unlike what we heard from the Spanish representative yesterday. We would consider article 300 to be a basis for jurisdiction in a proper case, and this is a case in which you can undertake that responsibility.

We have heard the complaints from the Respondent that they had not heard about article 300 before coming to Hamburg and that they do not think it is fair – lots of complaints. Our response to that is that they cited it first, we studied it, we conferred with people more expert than the Agent and the two Co-Agents for Saint Vincent and the Grenadines and realized that the facts as we were able to develop them, to a large extent after December 2010, fit this model; and I would remind you that in 2010 and ever since we have cited article 293(1), which incorporates international law, which we think should have eliminated any surprise on the part of Spain that that was what they should be prepared for.

Of course, article 288 is important in the context of this case. If the other rules are satisfied, the Tribunal must take jurisdiction over any dispute, as Mr Nordquist pointed out, concerning the interpretation or application of an international agreement related to the purposes of the Convention. We think that the notion that there is no dispute here lacks any factual and legal basis. There is a dispute, there has been a dispute, and if you do not settle it for us there will continue to be one.

I kind of alluded to the way that this case has developed in terms of our jurisdictional approach, and certainly the people at the Centre for Sea Law at the University of Virginia had a role to play in terms of assisting us to analyse the facts that we were developing since we were last here in December 2010. All the lawyers associated with Saint Vincent and the Grenadines were humbled by our last appearance and certain of the opinions that came thereafter. Now that you have seen the facts in much greater detail, hopefully the background to the application for provisional measures is more understandable, because Saint Vincent and the Grenadines, after learning that its ship had been arrested for a very long time with no notice to Saint Vincent and the Grenadines except this *note verbale* that you have seen, which we will talk about later, rallied and wanted prompt action in any way that we could get into court. The Attorney General and the Prime Minister were consulted.

We put together, with a very limited budget, the kind of case that we did, and I am sure that the criticism that we received was to a large extent justified and earned on our part, but the case that we have been able to bring to you now is a totally different situation because of the depth of the facts. No one has brought you any facts other than the Applicant, and we made that decision in preparing to come here. Having studied your previous cases and the few trials that have been conducted, we realized that what we were endeavouring to do would be somewhat unorthodox, but there was no other way to effectively show you what the Respondent has done here.

I could get up here and show you some documents and talk about what happened to Ms Avella and Mario Avella, but without bringing people into the courtroom and letting you hear the actual facts, the strength of the case would have been lost, so we made a decision, although we considered it perhaps somewhat unorthodox, to bring real witnesses to facts and in a sense let you feel the pain.

You may recall that when I first addressed you on the morning of the first day of the trial I made a statement to the effect that I was pretty confident that at least some of you would be surprised to see us back again trying to litigate the fate and the details of the seizure of this little ship, the *Louisa.* Having been here in December 2010, surely this case would have gone away in two more years and would have been settled or disposed of in some way by the Parties or even unilaterally, but amazingly we come back in two years and the ship is still tied up in the dock at Puerto de Santa Maria. I am sure that that fact struck most of you as really odd.

As we heard the Respondent's case, something else certainly struck me as incredibly odd – that there is no apology; there is nothing approximating an apology from the Respondent for what has happened based on these judges and bureaucrats and out-of-control police officers in Spain. In fact, the attitude, if you will forgive me for characterizing it, is one of arrogance: "We have your ship, your tender and your people. So what? Our law provides that we can abuse people." They are not going to apologize for anything. They say: "This poor woman Ms Avella should not even have been there studying Spanish". That is the attitude that comes through to me. There is not even a simple apology, a simple, "Hey, we need to make this right, we need to get this ship taken care of, we need to do something for Mario Avella, detained for 27 months and for what?"

Would you put up the Spanish annex 16 with photograph 7? You may remember this photograph. The Spanish have this in their documents. We showed it to Ms Avella. We asked, "Alba, do you remember these police taking anything off the ship?" She said, "I remember some cannonballs and a rock with a hole in it". Is this really what this complex international investigation is about? We do not know. We still do not know what the investigation is about, because the people with the best opportunity to tell us have taken a pass. There is no inventory of what was taken off the ship. There is certainly no appraisal of anything taken off the ship other than the diving gear, the decompression chamber and the expensive material that the Spanish police confiscated and then decided to use.

However, in terms of all this patrimony that we have heard so much about for years – since 1 February 2006 we have heard about patrimony – what is the damage to the Spanish heritage for which these people have been thrown in jail? Do not tell me that they are thrown in jail for rifles that are locked in a closet that is welded to the bulkhead of the ship, which is behind two locks that none of the people who were arrested even had access to. That is not what the case is about. *This* (referring to Spain's Annex 16) is what the case seems to be about, but there is no proof that this was even on the ship or where it was taken from. We have to dig deeper, and we have been very disappointed with the Spanish approach to the case, because they have not brought evidence. They have brought people like Señora Martinez, who does not even know what the penalty is for having the wrong permit in the Bay of

Cádiz, and that was because she was being asked questions that were not on her script; but that is another story.

I would like to talk about the facts some more but, before we get there, there is another really important legal concept that needs to be addressed, namely what I call the standard of proof, the appreciation of evidence. What is it? What does the Applicant have to prove to prevail in the case? We have read some opinions. There have been very few trials here, so it is not as though there is a great deal of precedent to tell us what we are looking for, but we know that article 28 of the Statute, although it seems to relate to cases where one of the parties is absent, refers to a position being well founded in fact and law. It has been said that that standard is akin to beyond reasonable doubt, which I know you are familiar with; it is certainly the standard in criminal cases in many jurisdictions. Is that the standard that we are faced with? I would say that "well founded in fact and law" is more akin to a preponderance of the evidence. Nevertheless, our position is that we have proved our case under any standard, even beyond a reasonable doubt, but certainly by any lesser standard.

The corollary issue is whether, assuming we make more of a *prima facie* showing of violations of various provisions of the Tribunal's articles, the burden passes to the Respondent at any point to produce evidence. I can find no particular commentary on that, though I apologize if it is out there. We would say that it ought to pass at some point when the Applicant makes some sort of showing, and here the Respondent has failed totally to bring anything except legal argument. There have been no witnesses of fact. People have commented on what is the use of a metal detector, as though you did not know that. As I have said, the issue needs to be considered, and we want to assure you, not surprisingly, that we think we have met whatever standard you wish to apply to the proof in this case.

I say that because there are certain issues that have recurred and they need to be mentioned as facts that we do not have to prove. The Applicant does not have to prove some of these things that keep percolating up during the course of the trial. We do not have to prove that the Sage company was solely interested in oil and gas in order to avoid some problems with the Spanish courts: that is just not part of our burden; in fact just the opposite. We have been very open that Sage entered into this joint venture agreement with a guy, Mr Valero, which, as Mr Nordquist later said, was a bad decision. It turns out he is apparently some notorious fellow in the annals of the Spanish heritage police. He does not seem to have been in jail or anything but they have criticized us heavily for having done business with him. Is that detrimental? Certainly we do not think it is in terms of the outcome of the case.

We do not have to prove that we had the proper permit. I answered some questions as we started. Our burden does not include proving that we had the proper permit. Sage was out there in the bay with a permit that it thought was adequate. If it was not, that is no basis for the kind of abuses and the denial of justice that were heaped on Sage personnel thereafter.

We certainly do not have to prove that there was a complete absence of artefacts on the ship. If in fact they had proof that some Sage diver had put some cannon balls on the ship, that is not fatal to the case. The Spanish have had six and a half years to

prove that somebody associated with the *Louisa* did something wrong, and they have not got there yet.

Finally, as to the other aspect of the charges or the informal charges in Spain relating to the weapons, it is not our burden to prove the weapons were properly declared. Apparently the captain did not declare them. In fact that is the offence that the Spanish judge cited at one point, that the weapons were undeclared. There is no telling what the penalty is for a ship's captain failing to declare weapons when it comes into the harbour, but it is not part of our burden.

The converse of that would involve what we think Spain should have been able to prove to you in order to prevail in this case. They made a big mistake in not bringing any evidence, but we would say that to avoid a finding on your part that the investigation was fatally flawed and that these people had their rights abused, despite whatever Spanish criminal procedure might have allowed them to do, they needed to show you why an investigation that lasted six and a half years with no resolution was reasonable under any version of the law – Spanish law or international law. They have not shown you that at all. They brought a witness yesterday. You will recall his testimony – a very impressive former judge. He said: "I read the police report, and I think that investigation was reasonable." Somebody else has testified that there are voluminous documents involved, and we do not think that was enough.

I would say that in order to prevail they have to show you some evidence that the people whose rights were so abused had committed a crime. They have not brought you any evidence of that. They have not brought you an inventory of what was taken off the ship or evidence that the arms were destined to be sold once the ship arrived in Spain or anything like that. In fact the evidence seems to be uncontroverted that the weapons were in the closet from the time since the ship entered Spanish waters and were never even taken out all that time.

I think you have to consider that there is some obligation on the part of the Respondent to produce some evidence if it intends to prevail in the case.

There is a sensitive issue that we have talked a lot about in letters to the Court and in our Pleadings, and I need to talk to you about it because it affects the Court in a major way, and that has to do with what we consider to be certain mistakes, to put it mildly that the Spanish have made in the case. They have brought you some evidence that we consider tainted in a way, and we do not consider the explanations that have come to you up to now to be adequate. I am talking of course about the two orders that they produced in December 2010. We have asked the Tribunal to use its powers and undertake a separate investigation of the matter.

You will recall that one of the issues in December 2010 was whether the *Louisa* posed any kind of environmental threat, and we used the possibility as a basis for receiving some remedy from the Tribunal. The answer that came from Spain was: "Don't worry about it; we are monitoring the vessel. The port captain is monitoring the vessel." That language appeared in the majority opinion of the Tribunal when our Provisional Measures were rejected.

It turns out that the Respondent had produced a report dated July 2010 as annex 14.1. This document came from the judge in Cádiz and it mentioned in the body of the order that there should be entered into the record the official letter filed by the Civil Guard on the status of the ship; and then that letter was not attached. Remember that this order was brought into the courtroom in December 2010. We had never seen it. This is one of the orders that was never notified to the Parties. This one was not officially released to the Parties until January of the following year.

If you look at our annex 33, page 2, paragraph (d), admittedly the port captain is not reporting a colossal failure on the part of the ship the *Louisa*, but it is clearly not in good shape at the time that the port captain was reporting on it. That was a major mistake, I think, putting it charitably, on the part of the Respondent in presenting its case.

Even more important was the October 2010 indictment. Spain's Counter-Memorial, annex 2, contains this document. Yesterday I made a point of the fact that the document was dated a day after Saint Vincent and the Grenadines sent a formal notice to Spain's diplomatic authorities. We never heard any explanation about this.

I will tell you that in December of 2010 the ship owner's lawyer from Madrid was sitting in the audience. He was shocked – shocked. He is a thirty-year lawyer and had never seen anything like this in his life, that this document would be brought into court in the way that it was that affected his people.

So we complained and wrote letters saying, "Let us investigate this." Is this even a legitimate document? Was it concocted by the judge when he realized, "I am presiding over an investigation that has been going on for years and finally Saint Vincent and the Grenadines is calling me on it". Maybe it was just a coincidence, but we heard yesterday – at least I think I did from the Agent of Spain trying to explain this for the first time. She called the judge. She called the Court and she said it was because President Jesus had asked her, "Get the indictment". That is what I wrote down in my notes. I looked at the transcript and I could not find the President asking her for anything except an English translation of what she had produced.

When you saw that indictment in December 2010, no doubt it caused you to think: "These people associated with Sage must be really bad people", and we are helpless to respond because it was in effect a secret document that was released when she called the Court. Did anybody apologise for that or explain it beyond that? No, no.

We have heard other things. Yesterday or the day before, I heard that Sage's representatives had made an unauthorized entry on the *Louisa* – an unauthorized entry! It never happened. I do not know why such a statement would be made in open court. There was a visit, you heard from Mario Avella. Lawyers for Sage and Mario did go on the ship in 2009 with a full court order, and it was so important to the Spanish they sent the Guardia Civil all the way from Madrid to look at the ship.

There has been lots of talk about the ship being quarantined by order of the judge. This ship has never been quarantined by the judge; there is no order to that effect in the file. That is the way the judge does business in Cádiz: he has the police put a

tape up on the ship, gets everybody off; the ship sits there. It is not properly quarantined at all.

Let me shift to talking a little bit about the witnesses in the case. The Respondent produced four witnesses. I will tell you that I have been in a few trials in my career and a few courtrooms here and there and I am really hard-pressed to have seen a witness like Señora Martinez before, and to the extent that I disappointed you by not being able to get some questions answered that you were interested in, I apologize. I got nothing that I was interested in except I learned that she has a lifetime job and that she was a civil servant, and I should not be asking any questions that were not part of the script that she was prepared for.

Now we learn that Sage had the wrong permit and there was some issue, I guess, about what area they were in; but beyond that I have no idea why the Respondent would think it was appropriate to bring that lady as an expert.

They also brought Mr Stow, all the way I guess from England or Scotland, at who knows what cost. I am used to being able to ask the witness how much he is paid for bias reasons. We did not hear that but we did hear that he gets £1,500 a day for riding around to consult on ships for people; so no doubt the Respondent paid some significant money to Mr Stow to come in and be an absolutist: "I can tell you that I have been in the oil business for years and years and all this equipment that Sage had on the ship was not for oil prospecting." He some time grudgingly admitted, "Well, maybe for survey purposes you might use some of these things", which is exactly what Sage was trying to do. Mr Stow, however, was keeping on the plan and he was not going to allow himself to make any kind of concession in terms of what Sage might have been doing, despite the testimony of Mr McAfee about their long history of oil prospecting.

Finally, Mr Delgado was a very interesting guy. I confess – and I am sure this shows my lack of culture – I do not know why millions and millions of dollars are still being spent to dive on the Titanic, which is his specialty. I think there are some better social uses for some of that money, but he is a very well-educated and experienced fellow. I was kind of surprised they had to bring him from the United States to talk about the cultural history of Spain. Maybe it is because other nationals are doing all the shipwreck work in Spain and Spain really does not have experts in the area; but they did bring him. He was knowledgeable. I do not think he said anything that was contrary to the essence of the Applicant's case.

When we come back, Mr President, I would like to talk about our witnesses a little bit and some concluding remarks, if that would be permissible.

THE PRESIDENT: May I understand that we can take a break now?

MR WEILAND: If that would be all right, President. We have been going for about an hour. I have perhaps 15 or 20 minutes at the most, but if we could take a short break, perhaps 15 if 30 is too long, that would be much appreciated.

THE PRESIDENT: Thank you. The Tribunal will withdraw for a break of 15 minutes.

(Break from 4 p.m. to 4.15 p.m.))

THE PRESIDENT: We will continue the hearing. Mr Cass Weiland, you have the floor.

MR WEILAND: Thank you, Mr President. Thank you for the extraordinary consideration of an out-of-sequence break like that. I do appreciate it and I will move on through my final remarks and then present our final submission.

I had just begun talking about the witnesses, and I had said a few words about the Respondent's experts. I would like to just compare those with the witnesses that you heard from the Applicant. I am not going to tell Ms Avella's story again. You have heard the story, you have heard it commented on by Judge Pallín yesterday, so I consider that really unnecessary. You are quite familiar now with what happened to Alba Avella.

I would like to say a few words about Mario Avella. Other than necessarily the abuses and the denial of justice which he has faced, he said some factual things that I think are important in terms of the Tribunal's analysis of the reasonableness of the investigation, in so far as you may think that is an appropriate undertaking. Avella said that the *Gemini* had been leased in 2005 and there is a document in the case that bears some attention. This is Spain Annex 11 and the title page to this particular exhibit says it is the order opening the criminal procedure and transforming it into abbreviated proceedings, *procedimiento sumario*. It is issued in Cádiz by the famous Court No.4, 1 March 2010, and I show you the English version of the order. It includes some very interesting language that I think you should be aware of. This is, as I said, in March 2010. They are converting this investigation which has been going on for four years, now they are going to the second stage, and the judge writes about the *Louisa* and the *Gemini*, and he has lots of names they are apparently looking at at the time. Some of these people, I represent to you, you may have heard of during the testimony. Whittakker was one of the Sage people who went out there in the early summer of 2004 and started to do some data-gathering – you may remember that testimony – before *Louisa* even arrived.

In any event, this paragraph says that the *Louisa* and *Gemini* in principle under the flag of the USA – whatever that means – but under flags of convenience – and as you have heard, the judge does not think highly of flags of convenience, he does not think he has to give notice to countries who sponsor flags of convenience. He goes on to say that they are involved in the extraction in the year 2005 – in the year 2005 – of diverse pieces of vessels belonging to Spain's heritage, and that, by the way, they are worth more than 400 euros, which apparently is a jurisdictional amount. I think the question came up in December 2010 why I kept asking how much the artefacts were worth. It is because if they are worth, I guess, less than 400 euros, it is a misdemeanour, some kind of petty offence, but the judge is saying they are worth more. There is nothing in the record to indicate the judge had had anything appraised from the *Louisa* but what we do know is, apparently, he is worried about things that were extracted in 2005.

Now let us look at Spain's annex 16, photograph 1, which they have been very eager to show you on every occasion. This is the *Gemini* with this contraption on the back,

about which the testimony is uncontroverted: that was put on the *Gemini* in 2005, after the vessel was leased by Sage to Plangas. That is a feature of Mario Avella's testimony that may not have been particularly clear earlier in the trial.

Another feature relating to Mario that is worth noting is that no Spaniard, to our knowledge, ever spent any time in jail. No Spaniard spent any time in jail. We think that is discriminatory. We think the international law prohibits that kind of treatment, especially in cases like this. The foreign crewmen had their passports taken away, the two Hungarians, and Mario, and, just incidentally, Miss Avella. The Spaniards just continued their normal lifestyle, with no interruption.

Moving on, the Respondent has tried to defend the unreasonableness of the investigation with the assertion that the persons associated with the ship caused the delay. It is not that the Spanish criminal justice system is completely dysfunctional; it is because these Americans and these Hungarians, and even the Spaniards who were under investigation apparently, were just delaying matters so much that that is why we are here today, six and a half years later. I am sure that you will hear that tomorrow, so I would ask you to look at our Reply brief, where, at pages 17-21, I believe, we chronicle the delays that occurred in the case, delays occasioned, for example, by the repeated demands by the investigating judge in Cádiz that John Foster, beneficial owner of the *Louisa*, travel to Spain to be interviewed. We saw what happened to Mario Avella with the international arrest warrant. I would think that Foster would probably not be too eager to come over and talk to the Spanish judge, but what he was willing to do, and the record reflects this, was to give an interview pursuant to the mutual assistance treaty between the United States and Spain, and to do it at the convenience of the Court in Cádiz, which finally happened, the record shows, in July of 2011, I think – the years run together – without the need of a formal application and the involvement of the Justice Department of the United States and of the Justice Department of Spain. The lawyers for the ship owner and the judge were able to just set up a video conference and Foster was interviewed completely.

I spent a fair amount of time with some witnesses, particularly witnesses that the Respondent produced, talking about the *Odyssey* case. If there is a sense of proportionality, if there is a sense of anti-discrimination, then I would recommend that you take a look at what happened to the *Odyssey*. The *Odyssey* people were never arrested, they were never incarcerated, only one was ever charged, and that was the captain, and it turns out they charged him in violation of Spanish law so he was acquitted. That case only involved $500 million, and our case involves some rocks with holes in and some cannon balls. So I think the *Odyssey* case is instructive. The incident was started in October of 2007. By May of 2010 there was a decision, and the Spanish Air Force flew over and returned all of that cultural heritage to Spain. Unfortunately for the Americans caught up in the Cádiz case, the good will that you might think was generated by the *Odyssey* case did not flow down to Cádiz.

I really have just a couple of other things to say. One of them is that I am sorry that more of our delegation could not still be present. I know that they would like to be here. We tried to get the Division of Ocean Affairs to dedicate some funds to Saint Vincent and the Grenadines for this purpose but we have been unsuccessful so far. We just cannot maintain a tremendous team here in Hamburg.

I also want to comment on some legal issues just before I finish today. I am particularly struck recently by this article from Judge Treves which I have cited to you as one of our references, one authority that we rely on and we recommend that the Tribunal look at this. He has written an article in the *Berkeley Law Review* in 2010 called *Human Rights and the Law of the Sea*, coincidentally. Perhaps most of you have seen this. He says in this article that: "The [Law of the Sea Convention] is not a 'human rights instrument' *per se*."

We certainly agree with that but we also agree with some of his other conclusions here because he goes on to say:

> Its main objectives, like those of the Law of the Sea in general, are different. Yet, concerns for human beings, which lie at the core of human rights concerns, are present in the texture of its provisions.

They are present in the texture of its provisions. I know that this is an unusual case. We are asking you to decide a case involving a ship sitting at the dock of the Respondent, an area normally reserved for exclusive jurisdiction, but exclusive jurisdiction is not arbitrary jurisdiction, as one of you recently said. We maintain that the normal precept of exclusive jurisdiction of a ship docked right at the port of the Respondent needs to be looked at in the context of the facts that we have brought you. This is the time to adopt a view that this Court is not going to defer to Strasburg. This Court is going to embrace human rights issues that flow directly from Law of the Sea core issues. This is the case that we think you can do it, and we would urge you not to wait for a better case. Do not wait for a better case. We are 20 or so cases in, and we are not sure when you will see another one that has facts like this. There are facts that we recognize will be somewhat difficult to deal with, and you are worried about precedent, but this case cries out for some kind of remedy for the Applicant.

I am not used to arguing for an Applicant, a Plaintiff, and then having the other side have the last word in the case, but that is your procedure, so we are stuck with it. You are going to hear tomorrow for most of the afternoon about all the reasons that I am wrong and the Respondent should prevail. I do not get an opportunity to rebut those arguments, but I would urge you to consider the landmark nature of this and the opportunity that the case presents.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Cass Weiland. Do I understand that Mr William Weiland will speak after you?

MR WEILAND: No, sir, he will not have any remarks beyond what I have already said, so I am prepared to deliver the final submission.

THE PRESIDENT: Thank you. I understand this was the last statement made by Saint Vincent and the Grenadines during this hearing. As you know, article 75, paragraph 2, of the rules of the Tribunal provides that at the conclusion of the last statement made by a Party at the hearing, its Agent, without recapitulation of the arguments, shall read that Party's final submissions. A copy of the written text of

these submissions, signed by the Agent, shall be communicated to the Tribunal and transmitted to the other Party.

I now invite the Co-Agent of Saint Vincent and the Grenadines, Mr Cass Weiland, to present the final submissions of the Applicant.

MR WEILAND: Thank you, Mr President. I have copies for the Respondent and Mr Gautier.

In accordance with article 75(2) of the Rules of the International Tribunal for the Law of the Sea, the Applicant, Saint Vincent and the Grenadines, makes the following final submission:

The Applicant requests the Tribunal to prescribe the following measures:

(a) declare that the Tribunal has jurisdiction over the Request;

(b) declare that the Request is admissible;

(c) declare that the Respondent has violated articles 73(2) and (4), 87, 226, 227, 300 and 303 of the Convention;

(d) order the Respondent to release the *Gemini III* and return property seized;

(e) declare that the boarding and detention of the *MV Louisa* and *Gemini III* was unlawful;

(f) declare that the detention of Mario Avella, Alba Avella, Geller Sandor and Szuszky Zsolt was unlawful and abused their human rights in violation of the Convention;

(g) declare that the Respondent denied justice to Mario Avella, Alba Avella, Geller Sandor, Szuszky Zsolt and John B. Foster and abused the property rights of John B Foster;

(h) order that the Respondent is prohibited from retaliating against the interests of Mario Avella, Alba Avella, Geller Sandor, Szuszky Zsolt, John B. Foster and Sage Maritime Scientific Research, Inc., including the initiation of any procedure requesting the arrest, detention or prosecution of these individuals or the seizure or forfeiture of their property in domestic Spanish courts;

(i) order that the Respondent is prohibited from undertaking any action against the interests of Mario Avella and John B. Foster, including the continued prosecution of these individuals in domestic Spanish courts;

(j) order reparations to individuals in the following amounts, plus interest at the lawful rate:

(1) Mario Avella: €810,000;

(2) Alba Avella: €275,000;

(3) Geller Sandor: €275,000;

(4) Szuszky Zsolt: €275,000;

(5) John B. Foster: €1,000.

(k) order reparations to Sage Maritime Scientific Research, Inc. in the amount of $4,755,144 (USD) for damages and an additional amount in the range of $3,500,000 – $40,000,000 (USD) for lost business opportunities;

(l) order reparations to Saint Vincent and the Grenadines in the amount of €500,000 for costs and damages to its dignity, integrity, and vessel registration business; and

(m) award reasonable attorneys' fees and costs associated with this request, as established before the Tribunal, of not less than €500,000.

Thank you, Mr President.

THE PRESIDENT: Thank you, Mr Weiland. That completes the second round of oral arguments of Saint Vincent and the Grenadines. The hearing will be resumed tomorrow, Friday 12 October 2012, at 3 pm to hear the second round of oral arguments of Spain.

The sitting is now closed.

(*The sitting closed at 4.40 p.m.*)