

# INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2012

Public sitting

held on Friday, 5 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)*

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**Verbatim Record**

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<i>Present:</i>	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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*as Co-Agents, Counsel and Advocates;*

*and*

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

*as Counsel and Advocates;*

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

*as Advocate;*

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*as Counsel.*

*The Kingdom of Spain is represented by:*

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Department, Universidad Nacional de Educación a Distancia (UNED), Spain,

*as Agent, Counsel and Advocate;*

*and*

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Law Division, Ministry of Foreign Affairs and Cooperation, International Law  
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University “Jaume I”, Castellón, Spain,

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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.*

1 **THE PRESIDENT:** Good afternoon. We will now continue the examination of the  
2 witness, Mr Avella. Mr Avella, you continue to be covered by the declaration you  
3 made yesterday.

4  
5 **MR AVELLA:** I understand.

6  
7 **THE PRESIDENT:** I give the floor to the Co-Agent of Saint Vincent and the  
8 Grenadines to re-examine the witness. I wish to repeat that no new issue should be  
9 raised during the re-examination. Mr Weiland, you have the floor.

10  
11 ***Re-examined by MR WEILAND***

12  
13 **MR WEILAND:** Thank you, Mr President. I have just a very few questions for  
14 Mr Avella. The first thing I would like to discuss briefly, Mr Avella, is the testimony  
15 you gave in response to some questions about your decision to enter and attempt to  
16 exit the country via Lisbon. Do you remember those questions from the  
17 representatives of the Respondent?

18  
19 **MR AVELLA:** I do.

20  
21 **MR WEILAND:** You mentioned that there were some scheduling and other issues.  
22 You are not suggesting to the Tribunal that you were by then not interested in  
23 avoiding arrest, are you?

24  
25 **MR AVELLA:** No. On the contrary, I was concerned about that.

26  
27 **MR WEILAND:** What did you mean when you said you recalled that perhaps there  
28 were some scheduling issues?

29  
30 **MR AVELLA:** The fact is I was flying in from Paris, not from America, for one, and  
31 that had a lot to do with the flights available and what I could get at the timing that  
32 was necessary, and also I believe that it is almost as close if not closer to Puerto de  
33 Santa Maria than Madrid is.

34  
35 **MR WEILAND:** So you were going to rent a car and drive, and Lisbon is actually  
36 closer, is it not?

37  
38 **MR AVELLA:** Yes.

39  
40 **MR WEILAND:** Just so the record here is clear, you were interested in avoiding  
41 arrest?

42  
43 **MR AVELLA:** Yes.

44  
45 **MR WEILAND:** Because you knew that if you were arrested, you could not help your  
46 daughter.

47  
48 **MR AVELLA:** That is correct.

49  
50 **MR WEILAND:** In the meantime, you had been in Paris, working the phones.

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**MR AVELLA:** That is correct.

**MR WEILAND:** There was some testimony requested of you regarding the state of repair of the *Louisa* and whether it had the requisite certificates and was in compliance with regulations. Do you recall those questions?

**MR AVELLA:** I do.

**MR WEILAND:** I believe that Saint Vincent and the Grenadines had submitted some old certificates at the time of the Provisional Measures, ones that we were able to acquire from the ship owner or something. Are you sure that the *Louisa* was in compliance when it left Jacksonville?

**MR AVELLA:** Absolutely sure.

**MR WEILAND:** Why do you recall that with such certitude?

**MR AVELLA:** There is no way for a ship to sail like that, because it has to clear what is called port state control prior to it leaving the United States, which regulates and audits all those certificates and makes sure that they are current.

**MR WEILAND:** I think Mr Aznar Gómez actually referred to Spain Annex 17. I would ask that we take a look at that to perhaps just elaborate on this point. This was referred to as an email that was sent from someone to someone else. This is not an email that you received, is it?

**MR AVELLA:** No.

**MR WEILAND:** You see on the first page of Annex 17 that there is a series of items mentioned. I believe Mr Aznar Gómez asked you if you were aware in 2005 if all of these specific items were expiring. I guess you would call them certificates of some kind. I think your response was no, you did not know all these items were expiring. Do you recall that?

**MR AVELLA:** I do.

**MR WEILAND:** You did testify that the *Louisa* in 2005, after the contract with Tupet had expired and the permit of Tupet had expired, was supposed to leave but was not ready. Do you recall that?

**MR AVELLA:** That is correct.

**MR WEILAND:** Let me see page 2, please. I believe this might be blown up a little bit if possible. This is, I guess, the English translation of at least the first part of the email. Do you see the third paragraph of one sentence there? Would you read that to me?

**MR AVELLA:** Yes. It states:

1 "To renew these certificates the ship must remain in port."  
2

3 **MR WEILAND:** Just so it is clear, one of the principal reasons the *Louisa* had not  
4 returned to the United States in the spring of 2005 was because all of these various  
5 issues had to be addressed?  
6

7 **MR AVELLA:** That is correct.  
8

9 **MR WEILAND:** Finally, I am going to ask you this question, Mr Avella. Do you recall  
10 being asked about Mr Valero, who, I guess, was the owner of Tupet?  
11

12 **MR AVELLA:** Yes.  
13

14 **MR WEILAND:** With his colleague, Mr Bonifacio?  
15

16 **MR AVELLA:** Yes.  
17

18 **MR WEILAND:** I think they were introduced to you during questioning as "known  
19 treasure hunters"?  
20

21 **MR AVELLA:** That was what was said, yes.  
22

23 **MR WEILAND:** If Mr Valero was a "known treasure hunter" to the Spanish, do you  
24 have any idea how his company could have acquired the permit that you showed to  
25 the Guardia Civil repeatedly when the ships were stopped out in the bay?  
26

27 **MR AVELLA:** I do not know. I have no idea.  
28

29 **MR WEILAND:** That is all I have, Mr President.  
30

31 **THE PRESIDENT:** Thank you very much. Mr Avella, thank you for your testimony.  
32 Your examination is now finished. You may withdraw.  
33

34 **MR AVELLA:** Thank you.  
35

36 **THE PRESIDENT:** Mr Weiland, you have the floor.  
37

38 **MR WEILAND:** As we continue our case, Mr President, the next order of business is  
39 for us to present some excerpts from the direct testimony of Javier Moscoso, who  
40 testified during the proceeding on 10 and 11 December 2010, and I wish to make it  
41 clear that under our rules this is not being presented as new evidence, but it is  
42 evidence that is part of the case, since it was introduced in the Provisional Measures  
43 phase and Mr Moscoso took a solemn oath. We believe that it is relatively short, and  
44 it is important for the Tribunal to be reminded of Mr Moscoso's testimony.  
45 Mr William Weiland will present that, if the Court please.  
46

47 **THE PRESIDENT:** Mr William Weiland, you have the floor.  
48

49 **MR W WEILAND:** Mr President, Members of the Tribunal, thank you for allowing me  
50 to appear today. It is an honour and a pleasure. I am going to read from the

1 transcription of the testimony of Don Javier Moscoso. I am going to leave out, for the  
2 sake of brevity, the early parts in which the witness made a solemn declaration, and  
3 the greeting that the witness offered the Tribunal and the Spanish delegation. There  
4 was also a brief resolution of some technical problems. I think, for the sake of clarity  
5 and to shorten this a little bit, I will ask you to consider when I refer to the word  
6 “Question” that the question is a question posed by Mr Weiland to the witness and  
7 when I refer to the word “Answer” the word is a reference to the answer to  
8 Mr Weiland’s question made by Don Javier Moscoso.

9  
10 The first question that Mr Weiland posed to Mr Moscoso was:

11  
12 Q You are Javier Moscoso?

13 A (*Interpretation from Spanish*) Yes.

14  
15 Q Would you tell the Tribunal briefly your educational and  
16 professional background?

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

22  
23 Q So you have served as a law professor and you have served in  
24 the executive branch of the Spanish Government?

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

28  
29 Q At one time you served as the Attorney General. Is that correct?

30 A (*Interpretation from Spanish*) Yes, that is correct. For four years I was  
31 Attorney General.

32  
33 Q Are you generally familiar with the facts of this case?

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

42  
43 Q Were you asked by the Spanish lawyers for Sage to give that legal  
44 opinion?

45 A (*Interpretation from Spanish*) Yes, the Spanish lawyers.

46  
47 Q As part of your review of the facts of the case, have you had  
48 occasion to read and understand the details of what happened on  
49 February 1, 2006, when the *Louisa* and the *Gemini* were boarded and  
50 searched?

51 A (*Interpretation from Spanish*) If my memory does not fail me, I think that  
52 is indeed the date when the ships were boarded and searched.

53



1 Q In your opinion as an expert in Spanish law and procedure, was  
2 the boarding of the *Louisa* legal?

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

9  
10 Q I will show you annex 27...

11  
12 Mr Whittington, could you put that up for us, please? This was put up at the time of  
13 the hearing.

14  
15 ...which is a reproduction of the Spanish Article 561 that you have just  
16 referred to, in both Spanish and English. I know you are familiar with it  
17 yourself, and I would ask you to explain to the Tribunal what it was about  
18 the search and boarding of the vessels that makes the actions of the  
19 Spanish police illegal.

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

30  
31 Q One of the things that the judge said in his order was that there  
32 was no need to notify the flag country because there was a proliferation of  
33 flags of convenience now. Is that not correct?

34 A (*Interpretation from Spanish*) That is the opinion of the judge. I do not  
35 share that opinion.

36  
37 Q But that was the judge's statement – correct?

38 A (*Interpretation from Spanish*) In the resolution that orders the boarding  
39 and search, yes, the judge does make that declaration.

40  
41 Q I think it is uncontroversial in this case that there was no notice to  
42 any authority in Saint Vincent prior to the boarding, and there was no  
43 permission from the captain, because the captain, who was employed by  
44 Seascot, had returned to Hungary. Is it your position that the boarding of  
45 the ships was improper or the judge's order in the boarding of the ships is  
46 improper absent one of those two things?

47 A (*Interpretation from Spanish*) In my opinion, it was procedurally  
48 incorrect.

49  
50 Q I ask you to consider some recent litigation in Spain over a  
51 treasure-hunter whose ship was called the *Odyssey Explorer*: has there  
52 been an opinion from a Spanish court relating to Article 561 in the  
53 *Odyssey* situation?

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

12  
13 Then Mr Weiland makes a statement:

14  
15 I would represent to the court that the opinion, the excerpts of which are  
16 reproduced at exhibit 29 in our papers...

17  
18 Mr Whittington will just put that up.

19  
20 ...essentially are from a ruling that the captain of the *Odyssey Explorer*  
21 could not be prosecuted for denying entry on his ship, because the  
22 Spanish authorities had failed to give notice to the Bahamas, which is the  
23 flag country for that ship. It was a very highly publicised situation in Spain.

24  
25 (*To the witness*): Now, I would ask the expert if he is aware of any effort  
26 by the judge in Cadiz in this case to notify Saint Vincent and the  
27 Grenadines of his intention to allow the boarding of the ship.

28 A (*Interpretation from Spanish*) This is a question for me?

29  
30 Q Yes.

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

40  
41 Q Can I ask you about the notification of Saint Vincent? I would ask  
42 my assistant to put Spain exhibit 5 up if he could. I will show you a better  
43 copy.

44  
45 I am not putting that up. That exhibit was put up at the time.

46  
47 A (*Interpretation from Spanish*) It is in English. Embassy of Spain; 2006;  
48 15 March 2006 ...

49  
50 Q This is the document submitted by Spain allegedly relating to  
51 notification of the flag country, is it not?

52 A (*Interpretation from Spanish*) It is the first time I see this document. I  
53 have no opinion on it.

54

1 Q Are you aware of any other document that Spain claims was used  
2 to notify the Saint Vincent authorities of the boarding of the ship?

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

11  
12 Q I come to the issue of quarantine or detention of the two ships.  
13 Have you seen an order from the Court specifically having the *Louisa*  
14 quarantined?

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

21  
22 Q In your opinion, was the quarantine appropriate under Spanish  
23 law?

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

33  
34 Q Was it possible for the Court in Cadiz to order some kind of less  
35 offensive relief other than to hold the ship for such a long time?

36 A (*Interpretation from Spanish*) I think so, yes, because you see the  
37 problem is that if the judge in Cadiz understands that the ships are  
38 instruments of a crime – I do not share that opinion; I do not think they are  
39 instruments of a crime – but if the judge considers they are instruments of  
40 a crime, then he should apply Article 127 of our Penal Code. However, in  
41 Articles 127 and 128 of our Penal Code, it is said that if it is a matter of  
42 goods that have a legal use, they must be put in the hands of the owner  
43 or of a third person, imposing obligations on the person who is to be in  
44 charge of those goods. They both could be taken by the State only after a  
45 sentence, so what I think is appropriate is to have the goods deposited  
46 under guarantee. There is specific regulation on the conservation of  
47 elements of evidence, and the law understands that when the value of  
48 this instrument of the crime is much superior to the object of the crime,  
49 which in this case, if my memory does not fail me, was less than €3000 -  
50 that was the value estimated for the underwater objects that were found –  
51 if there is that imbalance between the value of the proof and the value of  
52 the crime, there is an obligation for the judge to place those goods in the  
53 hands of the owners. Therefore I think that that quarantine should have  
54 been ended very briefly with a motivated judicial decision that those ships

1 would have been placed in the hands of their owners with the guarantees  
2 that civil legislation establishes.

3  
4 There is a statement by the President indicating that the expert at that point was  
5 speaking too fast. Then there is a statement by Mr Weiland.

6  
7 Sir, let me ask you this question before we end – I just have a couple  
8 more questions. Spain, in its papers that it recently filed, refers to the ship  
9 *Louisa* as if it was a knife in a murder case. That is the language of the  
10 Spanish argument. I take it from your opinion that you do not agree with  
11 it, but why is the ship not like a knife in a murder case?

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

26  
27 Q The Spanish delegation has provided us with an order,  
28 supposedly issued by the Court in Cadiz on 29 July this year, which we  
29 have not seen before; it was never served on Saint Vincent and on the  
30 owner. This is exhibit 9. I have a couple of questions about this for you.  
31 Have you seen this order yesterday?

32 A (*Interpretation from Spanish*) Yes, because you gave it to me last night.

33  
34 Q For your convenience I am going to give you a copy of that so you  
35 can read it. (*Same handed*) The order relates to three separate issues,  
36 does it not?

37 A (*Interpretation from Spanish*) Yes.

38  
39 Q This order was not translated for us but the third issue relates to  
40 the ships that are at issue in this case. Is that correct?

41 A (*Interpretation from Spanish*) Yes, this is the case.

42  
43 Q Would you tell the Tribunal: what is the judge suggesting there in  
44 the last sentence or two of his order?

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

1 Q Is the judge suggesting that there are alternatives as to how to  
2 handle the *Louisa* in that order?

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

11  
12 **THE PRESIDENT:** Mr Weiland, you had asked the expert to read out the  
13 note and I think that was a good thing to do. You have been posing  
14 questions about the note but Judges are not privy to the content. Could I  
15 ask you to see to it that the note is read out so that we can have the  
16 benefit of its content.

17  
18 **MR WEILAND:** I am sorry, Mr President, but I did not understand the  
19 question.

20  
21 **THE PRESIDENT:** The exhibit you have just commented upon was not  
22 read out by the expert, so that we could be fully aware of the content and,  
23 therefore, understand very well the questions that you are posing to him.  
24 My question would be whether you would be in a position to have him  
25 reading out the exhibit.

26  
27 **MR WEILAND:** It was an unfortunate situation because the order has not  
28 been translated, but I did want to elicit his opinion about one thing.  
29 Perhaps I could ask one final question about this document.

30  
31 (*To the witness*) Mr Moscoso, the document uses the word “*subasta*”.  
32 What does that mean, please?

33 A (*Interpretation from Spanish*) It is a public auction. It is a sale in a public  
34 auction.

35  
36 **MR WEILAND:** I have no further questions.

37  
38 **MR W WEILAND:** That is the end of the transcription of the direct examination of  
39 Don Javier Moscoso.

40  
41 **THE PRESIDENT:** Thank you, Mr William Weiland. Ms Forde, you have the floor.

42  
43 **MS FORDE:** Mr President, Members of the Tribunal, next for the Applicant is  
44 Professor Myron Nordquist. He serves as Advocate for the Applicant and his  
45 qualifications have already been made known to the Tribunal.

46  
47 **THE PRESIDENT:** Professor Nordquist, you have the floor.

48  
49 **MR NORDQUIST:** Mr President and honourable Judges, it is a great privilege to  
50 appear today before the International Tribunal for the Law of the Sea as an Advocate  
51 for the Applicant in this hearing on the *Louisa* case. This appearance is the fulfillment  
52 of a lifetime dream not only to see a vibrant court functioning pursuant to a virtually  
53 universal Convention – the number of parties is now up to 163, as last week Ecuador

1 came into the party category – but also an exciting opportunity for me personally to  
2 make a small contribution to the progressive development of international law. We  
3 can believe that supporters of the peaceful settlement of disputes section in the  
4 Convention are smiling with satisfaction at the great success of the Tribunal. The  
5 *Louisa* presents a challenging case, perhaps even a landmark case, in the  
6 progressive development of international law. The Tribunal has yet to decide its  
7 jurisdiction on the merits and questions relating to admissibility as well as to the  
8 merits themselves. The Applicant and the Respondent are submitting arguments in  
9 respect of these questions, and the Tribunal has yet to make a final decision on the  
10 submissions of both parties with respect to the cost allocations in the proceedings.  
11 This is, so to speak, a full plate of work, and we ought to promptly turn now to the  
12 tasks at hand.

13  
14 The first major point offered by the Applicant is to urge that the Tribunal has  
15 jurisdiction on the merits in this case based on article 300 of the Convention. The  
16 legal rationale to support this point is in the text of article 288(1), which I now ask be  
17 displayed on your screen. The Tribunal knows this provision by heart, but a few brief  
18 comments are necessary since it is crucial in relation to the facts in the *Louisa* case.

19  
20 As a preliminary comment, we are pleased that both the Applicant and the  
21 Respondent chose ITLOS in this case as the means for settlement of disputes  
22 concerning the interpretation or application of the Convention. We recall that in  
23 paragraph 9 of the ITLOS Order of 23 December 2010 Spain requested that the  
24 Tribunal hear and determine this case pursuant to article 13, paragraph 3 of the  
25 UNCLOS Statute. Also, in paragraph 37 of its Order, the Court notes that the  
26 Applicant instituted proceedings in accordance with article 287 of the Convention.  
27 With respect to the written text of article 288, all can recall that the word “shall” is not  
28 “may”. This means that if the rules in article 288 are satisfied, the Tribunal is duty  
29 bound to accept jurisdiction over this dispute on the merits. Another word to note in  
30 the article 288 text is “any”, which modifies the word “dispute”. “Any” is an inclusive,  
31 comprehensive word that in ordinary usage here means that the Tribunal is  
32 conferred with wide latitude under the Convention to accept and decide disputes.  
33 Article 288 further provides in its text for any dispute concerning – another word  
34 connoting judicial latitude – “the interpretation or application of the Convention”. The  
35 word “or” is carefully not written as “and”, as it is sometimes read. This thoughtful  
36 drafting is deliberate and consistent throughout the Convention. Its importance is that  
37 the Tribunal may find separately or in combination either interpretation or application  
38 of the law on the Convention. To drive the point home, this means that satisfaction of  
39 either interpretation or application provides a sufficient basis to confer jurisdiction for  
40 this Tribunal to hear and decide a case. All the words in the text thus expressly  
41 confer wide, not narrow, discretionary powers to this Tribunal with respect to  
42 jurisdiction. Lastly, article 288(1) requires that the dispute or disputes must be  
43 submitted in accordance with Part XV of the Convention, titled “Settlement of  
44 Disputes”.

45  
46 Mr President and honourable Judges, the Applicant will identify several specific  
47 articles in the Convention that require ITLOS to assume jurisdiction on the merits in  
48 this case. As mentioned, the first to be identified and therefore discussed is article  
49 300, the text of which is now displayed on the screen. Perhaps the Tribunal recalls  
50 that the Respondent expressly cites article 300 in paragraph 75 of the Response to

1 the Applicant's request for provisional measures dated 8 December 2010, and again  
2 specifically cites article 300 in the context of the doctrine of abuse of process in  
3 paragraphs 186, 187, 188, 189 and 190 of its Counter-Memorial dated 12 December  
4 2011. Indeed, the Respondent bases virtually its entire argument for cost  
5 reimbursements in this case, now before this Tribunal, on article 300. It is  
6 respectfully submitted that the Respondent is therefore estopped from asserting with  
7 any credibility that article 300 is not relevant to this case. The Applicant indeed  
8 agrees that article 300 is highly relevant but at the same time fundamentally disputes  
9 the Respondent's interpretation and/or application of article 300 in relation to the  
10 facts in this case.

11  
12 The immediate impression from examining the text in article 300 is that this article  
13 embodies a general principle of international law which is packed with meaning. The  
14 text of article 300 is concisely formulated, but it is apparent that the sovereign States  
15 that agreed to this provision, including the Applicant and the Respondent, could only  
16 have intended that this Tribunal interpret or apply article 300 on the basis of the facts  
17 of a particular case. Some might argue that article 300 opens the door to a form of  
18 judicial legislation. Truthfully, there is a degree of merit to that argument as, while  
19 unmistakably incorporating the abuse of rights doctrine into the law that this Tribunal  
20 must consider, little further guidance is given in the Convention. The Applicant  
21 respectfully submits that this does not mean that article 300 is devoid of meaning  
22 and can be discarded. The article was deliberately placed in the Convention near the  
23 end of the negotiations at the Third UN Conference on the Law of the Sea to remind  
24 this Tribunal of a specific body of public international law that the Tribunal must  
25 consider in every case; by that I mean that international law is inherent in all your  
26 decisions, not that article 300 is relevant in every case. The article can be accurately  
27 characterized as inviting a broad interpretation and a liberal application. While the  
28 determinations are up to this Tribunal, the Applicant urges the Tribunal to accept the  
29 responsibilities entailed in article 300, since they are plainly delegated by the State  
30 Parties to the Convention. We believe that the Tribunal can and ought to rise to the  
31 challenge of the progressive development of international law delegated to it in  
32 article 300 and apply the abuse of rights doctrine, which is well rooted in international  
33 law, to the particular facts in the *Louisa* case. We reiterate that the Tribunal has the  
34 authority, and indeed in the Applicant's view the obligation expressly provided in  
35 article 300 of the Convention, to interpret as well as apply the international law  
36 doctrine on abuse of rights to the particular facts in the *Louisa* case.

37  
38 What are some of those most noteworthy facts? There are voluminous records and  
39 documents in this case. We have already pointed out that the record shows that the  
40 Applicant completely and totally disputes the Respondent's interpretation or/and  
41 application of article 300 in this case. However, if any doubt could remain, the  
42 Applicant herewith again states that it fundamentally and totally rejects the  
43 interpretation and/or application of article 300 as advanced by the Respondent in the  
44 pleadings. The Respondent might argue that technically its express reliance on  
45 article 300 earlier was limited to the terms in article 294(1) pertaining to prompt  
46 release matters. This might ring true as a convenient argument to ward off  
47 jurisdiction on the merits, but what rationale could the Respondent provide for why  
48 article 300 ought to allow Spain relief pursuant to article 294(1) but not pursuant to  
49 article 288? Could it convince the Tribunal that Spain ought to be able to argue how  
50 article 300 helps its argument but that the Applicant may not refer to it? This would

1 hardly be due process – a cardinal principle for ITLOS and a key element in many of  
2 its decisions, including this one. Hopefully the Respondent will not again try to dictate  
3 what law the Tribunal may consider, as the conclusion is self-evident to all in this  
4 room that the Respondent and the Applicant fundamentally disagree on the  
5 interpretation of article 300, given the facts in this case. The Applicant asserts that  
6 on the merits the abuses inflicted by local Spanish officials warrant remedies in its  
7 favour. The Respondent will of course speak for itself, but it is fully predictable that  
8 Spain categorically disputes the position of Saint Vincent and the Grenadines with  
9 respect to the interpretation or application of article 300.

10  
11 The Respondent prepared diligently for this hearing. Therefore, the Respondent  
12 must be held to have been aware of the abuses inflicted by local authorities on Alba  
13 Avella, as we heard in her testimony yesterday. Those familiar with international law  
14 know that a sovereign State is responsible for the acts of officials or official bodies,  
15 national or local, even if the acts were not authorized by or even known to the  
16 responsible national authorities; indeed, even if expressly forbidden by domestic law.  
17 A related principle is that a State is responsible for human rights violations by an  
18 official where condoned by the responsible governmental authorities of that State.  
19 These principles and rules apply in this case. The Applicant submits that Spain has  
20 consistently and firmly denied its responsibilities under certain rules of international  
21 law as well as under article 300 of the Convention. It is as if the Respondent had no  
22 legal obligation to abide, at all levels of its government and judicial system, by the  
23 Universal Declaration of Human Rights and its subsequent treaties. This subject will  
24 be developed later in this presentation.

25  
26 Briefly stated, the doctrine of abuse of rights cited in article 300 is founded on the  
27 obligation of States under international law to act in good faith in fulfilling their treaty  
28 commitments. Oppenheim explains that the doctrine arises when a State avails itself  
29 of its right in an arbitrary manner in such a way as to inflict upon another State an  
30 injury which cannot be justified by legitimate considerations of its own advantage.  
31 Thus, even if technically acting within the law, a State may incur liability by abusing  
32 its rights. The Applicant maintains that the record shows that Spain has violated its  
33 obligations with respect to the Applicant under the Convention. Part of the violation is  
34 that the arrests and subsequent treatment of certain persons and the detention of the  
35 vessel *Louisa* were illegal. In the latter case, the local authorities did not have prior  
36 consent to board and search the *Louisa* from either the master or the Applicant, as  
37 required by both Spanish and international law. We are reminded that a sovereign  
38 State does not lose its rights and responsibilities under international law for its flag  
39 vessels, owners or crew simply because they dock in a foreign port. We are also  
40 reminded that the Tribunal and the Respondent are deemed to be aware that the  
41 obligations of the customary law of human rights are obligations on all States.  
42 Therefore, any State may pursue remedies for their violation, even if the individual  
43 victim is not a national of the complaining State and the violation does not affect any  
44 other particular interest of that State. This basic right of human beings was cited in  
45 the *Barcelona Traction* case on page 176.

46  
47 What then are salient laws and facts in the *Louisa* case for the Tribunal to consider  
48 in its analysis of abuse of rights and human rights doctrine? Before this Tribunal the  
49 Applicant is seeking justice for injuries suffered both by itself as a sovereign State as  
50 well as by natural and juridical persons for whom it is responsible as a flag State or



1 for whom international law gives it remedies for breaches by the Respondent in this  
2 case. We assert that the violations of treaty obligations and customary international  
3 law and other injuries arise in this case as a direct result of actions by the  
4 Respondent's local officials. To emphasize the point, the Applicant states that the  
5 Respondent's disregard of treaty and customary international law obligations arose  
6 directly from Spain's illegal arrests and detention of the Applicant's flag vessel the  
7 *Louisa*. The Applicant seeks remedies here for these violations as provided by  
8 UNCLOS and international law. We sincerely regret that up to this stage in the  
9 proceedings that Respondent steadfastly and firmly denies any responsibility or  
10 liability for any abusive actions or other international law infractions whether by its  
11 officials in Cádiz or elsewhere in Spain. This case ought to have been settled  
12 already.

13  
14 The attention of the President and honourable Judges is now directed to the  
15 testimony heard yesterday from Alba Avella, whose mistreatment was first indicated  
16 in the Applicant's Memorial of 10 June 2011. She is not a national of Saint Vincent  
17 and the Grenadines. That is not legally required, however, for the human rights  
18 abuses inflicted upon her were obligations that may be taken up by all States.  
19 Moreover, they are inextricably woven into the facts in the *Louisa* case. Without  
20 doubt, she would not have been abused in the manner as described but for the  
21 illegal seizure and detention of the *Louisa* by the Respondent in February 2006. Her  
22 injuries are part and parcel of this dispute. An additional fact for the Tribunal to  
23 consider is that she is a citizen of the United States. Since the United States is  
24 unfortunately not a Party to the Convention, United States citizens have no recourse  
25 to this Tribunal. Fortunately for Alba Avella, given the facts in this case, the Applicant  
26 is willing and able to bring her abuses to the attention of this Tribunal. In brief, ITLOS  
27 is her only recourse to justice.

28  
29 The Applicant urges that this Tribunal assumes its fulsome powers and lawful  
30 jurisdiction as expressly contemplated in the Convention. We ask ITLOS specifically  
31 to consider that article 300 mandates that justice in a given case such as that of Alba  
32 Avella be found by the Tribunal to consist of more than technical rules mechanically  
33 interpreted or applied, especially when the inherent rights of human beings are  
34 abused. The framers of the Convention deliberately made article 300 an overarching  
35 part of the Convention precisely because they wisely concluded that all factual and  
36 legal circumstances could not be predicted and covered by explicit rules. Article 300  
37 fills a gap by authorizing this Tribunal to find justice in cases of abuse. The State  
38 Parties in article 300 empowered the ITLOS with residual authority to hear about  
39 instances of injustice and to provide remedies where merited. Today, the Tribunal  
40 has a rare opportunity to discharge that sacred duty in this case that is now squarely  
41 before it.

42  
43 What are the most relevant factors pertaining to Alba Avella found in the records?  
44 The Applicant respectfully refers the Judges to recollections taken from her formal  
45 statement and sworn testimony given in full just yesterday.

46  
47 As a 21-year-old student Alba Avella flew over to Spain in 2006 for a brief visit with  
48 her father. Her father, as we know, was a member of the small crew left on the  
49 *Louisa* to help maintain the vessel and bring it up to international standards for future  
50 sailing, while moored in a Spanish port. Alba planned to take and did take Spanish

1 lessons during her short visit to Spain and, to save her family money on  
2 accommodations, she was allowed to use the vessel essentially as a dormitory.  
3 Within four days of her arrival, while waiting on the street outside her Spanish  
4 language classroom, two uniformed policemen approached Alba. They falsely told  
5 her that they had been sent by one of the *Louisa's* maintenance crew to provide her  
6 with a ride back to the ship. She naïvely believed them and voluntarily allowed the  
7 two officials to escort her back to the vessel. Once there, while frightened and  
8 intimidated, she was severely interrogated by several men about treasure-hunting  
9 and gun-locker matters of which she had no knowledge whatsoever. She was  
10 nevertheless arrested and jailed for five days by local authorities under the appalling  
11 conditions that she explained yesterday.

12  
13 Alba Avella at this stage was taken into custody while just an innocent bystander  
14 near a suspected crime scene, but the actual facts for her arrest and subsequent  
15 abuse were even worse than she fully realized at first. She was deliberately held as  
16 a hostage by local officials solely because she was the daughter of Mario Avella.  
17 This fact was expressed by the local magistrate in his order pertaining to her in early  
18 February 2006. Simply being an innocent bystander and a daughter of a suspected  
19 offender under investigation is not an acceptable reason to arrest and jail any human  
20 being under any recognizable system of justice. This was a fundamental violation of  
21 her human rights, due process and more.

22  
23 Honourable Judges, the abuses of Alba in this case provide a textbook example of  
24 an abuse of rights violation under any definition of fairness or justice contemplated in  
25 article 300. Even a minimal exercise of good faith and, yes, competence in standard  
26 interrogation techniques by the local officials would have readily established beyond  
27 doubt that Alba was not a crew member. The young woman was simply a tourist  
28 visiting her father, who was a working member of the *Louisa* crew. A glance at her  
29 passport (as the officials certainly did) would have easily proved that she had been in  
30 Spain for only a few days. During this entire period she was there, the *Louisa* was  
31 tied up in port; it was not conducting any of the offshore surveys which the officials  
32 were supposedly investigating. Any Spanish official acting in good faith could not  
33 conclude anything other than that Alba Avella was an innocent bystander to  
34 whatever alleged wrongdoing they were investigating. This Tribunal, and surely even  
35 the Respondent, can understand why Alba Avella was arrested without being  
36 informed of any charges: there were no charges of any merit whatsoever to cite. She  
37 was arrested and taken hostage only to entice her father back to Spain. This abusive  
38 action is an inexcusable violation of the Convention, which is expressly proscribed by  
39 article 300. The Applicant urges this abuse of Alba Avella to be admitted by the  
40 Respondent and certainly not to be condoned by this Tribunal.

41  
42 Five days after her detention in the degrading and unsanitary confinement she  
43 described under oath, the young woman was allowed to appear before a local  
44 magistrate. With full understanding that Alba Avella was to be used as "bait" to  
45 attract her father, the magistrate not only ordered confiscation of her passport but  
46 also the taking of her personal possessions, including her computer and new  
47 camera.

48  
49 She testified yesterday that her passport was taken and kept by magistrate order  
50 depriving her of official identification for eight months starting in early February 2006.

1 We hope that the Respondent does not take satisfaction in the fact that the heavy-  
2 handed hostage-taking scheme worked. Alba's father, Mario Avella, did return to  
3 help his young daughter in distress and he was arrested in early May, 2006. We may  
4 now perhaps focus on the factual circumstances surrounding Mario Avella in this  
5 case.

6  
7 Mario Avella, also a national of the United States, had to leave Spain, to his great  
8 distress, shortly after his daughter had arrived to visit him. His departure was an  
9 emergency as Mario's aged mother was seriously ill and he was summoned home  
10 by his family to tend to her needs. Mario had gathered from the unusual questions  
11 and Alba's phone call on a police telephone that there were troubles in Spain  
12 concerning the *Louisa*. Alba did her best in intimidating circumstances to follow the  
13 script dictated by local investigators who already were taking advantage of the  
14 frightened young female under their highly effective control.

15  
16 Alba continued to be held hostage as a practical matter after her and even her  
17 father's release from jail as a result of the abusive confiscation of her passport by the  
18 local authorities. This abuse was much more severe than the imposition of a fine or  
19 the posting of a bond, the common juridical practice, had the actual motivation for  
20 the official actions against her been to assure that she appear at a trial. We note  
21 here that there has still been no trial after six and a half years. The Tribunal can only  
22 imagine the magnitude of abuse if she and other victims were still confined in Spain  
23 six and a half years later waiting for trial. Unreasonable delay in due process is an  
24 independent injustice not only for the humans involved but for the vessel, *Louisa*,  
25 which also has not after six and a half years been charged with any offences (so far  
26 as the Applicant's beneficial owners or their counsel know). None have had a trial in  
27 court. This is an abuse of human and property rights especially in the case of John  
28 Foster, which will be discussed later.

29  
30 Unjustly denied a passport for some eight months, Alba could not leave Spain nor  
31 exercise her fundamental right to return to her home. Eight months is an excessive  
32 period for official abuse and a denial of justice on its face for an innocent bystander  
33 in a non-violent case. Without a passport, Alba was unable to seek gainful  
34 employment because without a passport she could not get a permit to work in Spain.  
35 She testified in front of this Tribunal that no charges were ever filed against her, but  
36 she was nevertheless treated as a criminal for over eight months, including being  
37 followed around by local authorities and having her personal telephone calls  
38 intercepted. Can there be any doubt left in the Tribunal's mind that such treatment  
39 was abusive in the sense proscribed by article 300?

40  
41 Adding insult to injury, Alba Avella was also ordered by the local magistrate to check  
42 in with local officials basically every fifteen days to confirm that she was still in Spain.  
43 These officials were well aware of the harsh consequences in punishing this  
44 innocent young woman. The local authorities who inflicted the abuse have not to this  
45 day offered a reasonable explanation for their actions and certainly no apology has  
46 been given to Alba. It is incomprehensible and unacceptable that decent officials  
47 could be proud of the bullying done to this young woman. Apparently, however, the  
48 Respondent, that is legally accountable to this Tribunal for these abuses, has  
49 adopted the legal posture for this case that fully embraces these abusive procedures

1 by its local authorities. In fact we all witnessed yesterday continuing badgering of  
2 Alba as a witness before this Tribunal.

3  
4 Senior officials should have wanted to stop such unjustifiable sanctions on others in  
5 the future. Without such assurances the interests of justice cry out for a firm  
6 condemnation by the Tribunal in this case, of the treaty and customary law human  
7 rights violations by Spain.

8  
9 In the interests of full disclosures of the facts in this case, the Applicant adds that  
10 local counsel retained by John Foster, one of the beneficial owners of the vessel  
11 (acting not from any sense of legal obligation but just out of plain human sympathy  
12 for Alba's treatment) was finally successful in recovering some of her confiscated  
13 personal possessions. The local officials, however, could not find her camera or  
14 computer, which had disappeared while in their official custody. This is a small but in  
15 some ways symbolic example of their incompetence and another abuse inflicted on  
16 Alba.

17  
18 Mario Avella also testified yesterday before this Tribunal that he did return to Spain  
19 in a vain effort to help his daughter who was in desperate circumstances without her  
20 passport. We know that the father was arrested *en route* from Portugal pursuant to  
21 an Interpol arrest warrant issued on the basis of information provided by judicial  
22 authorities in Cádiz. We can expect that a similar warrant from Interpol has been  
23 issued for John Foster, since he is charged in the same so-called indictment  
24 document with Mario. We shall return to this point later.

25  
26 Mario, like Alba, was jailed for the first time in his life by a local magistrate in Cádiz.  
27 Thereafter he was confined without trial for nearly nine months in degrading and  
28 unsanitary conditions. Following his release from what must have been a very long  
29 nine months indeed, local authorities still kept his passport for more than 18 months,  
30 denying him not only his human right to return home but also his ability to obtain a  
31 work permit in Spain to support himself. As a matter of basic human rights, how was  
32 Mario to pay for his room and board? Again, it was only through the strenuous (and  
33 in some ways bizarre as well as costly) efforts of attorneys hired by the beneficial  
34 owner of the *Louisa*, John Foster, that Mario was able to secure a new passport from  
35 United States' officials at the end of 2007.

36  
37 The background was that after the facts pertaining to his abuse and denial of justice  
38 were effectively made known by the US Co-Agent of the Applicant in this case, US  
39 officials simply cancelled Mario's confiscated passport and issued him a new one.  
40 Common sense and Mario's testimony yesterday revealed that after 27 months of  
41 official abuse in Spain by its so-called judicial system, he was financially destitute.

42  
43 Six years after his arrest the threat of conviction for what can be characterized as  
44 minor offences still hangs over him. Whatever a just penalty would be, even  
45 assuming the charges had validity, Mario has been punished enough. The abusive  
46 and unjust actions of local authorities in keeping him in prison without trial inflicted  
47 actual punishment far in excess of the needs of justice for any of the so-called  
48 "crimes" The facts strongly suggest that Mario's case was ignored by the central  
49 Government in Madrid until the Applicant filed proceedings with ITLOS.

1 Now the Respondent must defend the morally indefensible actions of the local  
2 officials in Cádiz who may not have known or simply did not care to know about  
3 Spain's treaty or customary law obligations such as are embodied in the Convention  
4 and international law.

5  
6 Part of the international law doctrine of abuse of rights this Tribunal is asked to  
7 consider is whether the offence charged is comparable to the victim's abuse. This  
8 comparison helps Judges to determine whether there is an abuse of rights or a  
9 denial of justice violation based on the facts of a given case. While Alba Avella was  
10 not charged with any offence, for the good reason that there was none to charge, it is  
11 necessary to inquire into the two offences alleged by the magistrate judge in Cádiz to  
12 determine whether there were abuses and/or denial of justice for Mario Avella and/or  
13 John Foster. Stated another way, this inquiry is necessary to evaluate whether the  
14 abuses and/or denial of justice violations the Applicant alleges for the daughter and  
15 father and one of the beneficial owners of the *Louisa*, John Foster, were  
16 disproportionate to the offences charged by the Respondent's local authorities.

17  
18 For the Tribunal to make this comparison it is necessary to examine the offences  
19 charged. Please note here that there are in the records only two so-called "crimes"  
20 alleged. These two so-called alleged "crimes" are charged against two victims, Mario  
21 Avella and John Foster. Please bear in mind that the seriousness of the charges  
22 must be measured over six and a half years of abuses and unjust actions by the  
23 Respondent's local officials. What comes out of this comparison?

24  
25 Paragraph 29 of the ITLOS Order dated 23 December 2010 is seen on the screen  
26 and can be seen as summarizing two charges as follows:

27  
28 *Whereas, on 11 December 2010, the Agent of Spain submitted to the*  
29 *Tribunal a copy of an indictment issued by the *Juzgado de Instrucción**  
30 *No. 4 of Cadiz dated 27 October 2010, according to which charges have*  
31 *been brought against several alleged perpetrators ('presuntos autores')*  
32 *concerning a continuing crime of damage to the Spanish historical*  
33 *patrimony ('delito continuado de daños en el patrimonio histórico*  
34 *español')* and a related crime of possession or storing of arms ('*delito*  
35 *conexo al anterior de tenencia o depósito de armas')* ...

36  
37 The first point of law and fact to ask based on the paragraph shown on the screen is  
38 what was the "continuing damage" to the Spanish "historical patrimony"? The  
39 Respondent twice submitted in the record six photographs alleged as being the  
40 treasure confiscated by local authorities – we think it was alleged to be from the  
41 *Louisa*. We are not sure why otherwise the Respondent would put it in. The  
42 Respondent has never substantiated these allegations. Further, even were the origin  
43 of the artefacts proved, the Respondent never has submitted any credible proof  
44 about the value of the objects depicted. From the naked eye, the Tribunal Judges,  
45 using a little common sense, can conclude that the objects are of nominal value –  
46 more on this later.

47  
48 Even if some artefacts had been found on the *Louisa*, Mario Avella and John Foster  
49 have submitted documents and uncontested testimony in which they deny any  
50 knowledge about the purported "evidence". There is also the fact that these men

1 have many years of professional work having nothing to do with looking for treasure.  
2 This certainly adds credibility to their declarations.

3  
4 Counsel for the Applicant has advanced a good-faith belief that local authorities  
5 backdated the so-called indictment document to facilitate dismissal of this case by  
6 this Tribunal. The Tribunal may or may not find that such an offensive and due-  
7 process violation occurred, but in any event the indictment charges are, on their  
8 face, legally defective. How could any individual defend against such vague  
9 allegations? Why after over six years of investigation is there not even an allegation  
10 in the indictment of a specific intent by either of the victims to steal or appropriate  
11 any artefacts? Almost all of the main judicial systems of the world require a specific  
12 intent for the crime of larceny, if that is what the allegations are supposed to imply.  
13 The undeniable fact is that there was no such specific intent in what appear to be the  
14 bases advanced by the Respondent. Neither Mario Avella nor John Foster were  
15 focused on “treasure”; they were searching for potential gas deposits with expensive  
16 side-scan sonar on the *Louisa* that also, coincidentally, can sometimes show  
17 anomalies on the sea floor of possible interest to treasure-hunters. Frankly, the  
18 managers of the *Louisa* made a mistake, in my view, in entering into a contract with  
19 treasure-seekers who represented that the same data Sage planned to gather about  
20 the sea floor near Cádiz might reveal possible treasure sites. The contractors  
21 represented that they had a general permit to survey indicating consent by the  
22 Government of Spain to conduct the research. There was no sneaking around; local  
23 officials saw their activities and boarded the *Louisa* and its small tender to examine  
24 the permit they had. Documents were checked by police several times, and no  
25 problems noted. No work was stopped. The survey work continued within easy sight  
26 of shore.

27  
28 The dark depths of the Bay of Cádiz require a physical check by divers on the  
29 bottom of the sea floor to check out whether anomalies have gas prospects. The  
30 divers look for gas bubbles and metal objects - it would not be good to put a drill bit  
31 through the center of a safe – and other scientific indications by a physical ground  
32 check. These procedures might have provided an incidental opportunity to look for  
33 treasure by the treasure-hunters but Mario testified he was not interested in treasure-  
34 hunting activities, and John Foster was certainly preoccupied with higher-level  
35 management matters in Texas. The point is that neither Mario Avella nor John Foster  
36 had any specific intent or corresponding actions to justify criminal charges as  
37 indicated in the so-called indictment. Good faith in carrying out treaty obligations long  
38 ago called for dismissal of the vague, minor charges against them. An order from this  
39 Tribunal would be just that condemns the misuse of passport confiscations for  
40 individuals who, under widely accepted human rights doctrine are to be presumed  
41 innocent, not guilty. In light of its treaty and international law obligations, the right  
42 thing for Spain to do would have been to settle this case long ago.

43  
44 Applicant is not asking this Tribunal to take any action with respect to others named  
45 in the so-called indictment that are not properly considered for fair consideration  
46 before this Tribunal. We do ask for consideration for the innocent bystander, the  
47 members of the crew, and for one of the beneficial owners of the *Louisa*,  
48 John Foster, as well as for the Applicant.

1 As noted, the alleged offence is substantively defective in that the elements of the  
2 alleged crime are too vague to be enforceable under the law of nations. For  
3 example, what is the meaning of “continuing damage to the Spanish patrimony”?  
4 The burden of proof is certainly on Spain to show continuing damage. After six and a  
5 half years of abuse, with no persuasive evidence of serious wrongdoing, the  
6 presumption of innocence for Mario Avella and John Foster ought to be persuasive  
7 before this Tribunal. Indeed, the interests of justice cry out for this Tribunal to bring  
8 unconscionable official harassment of Mario Avella and John Foster to an end.

9  
10 Our understanding is that under both the Constitution of Spain and certainly under  
11 general international law, these two persons are to be presumed innocent until  
12 proven guilty. This is part of accepted human rights doctrine as well. The facts in the  
13 records of this case do not contain even a hint of credible evidence to justify the  
14 continued harassment by local authorities of either Mario Avella or John Foster on  
15 the sham charges of “continuing damages to the Spanish patrimony”.

16  
17 **THE PRESIDENT:** Mr Nordquist, I am sorry to interrupt you but we have reached  
18 4.30 and a break is scheduled from 4.30 to 5 o'clock. Are you going to finish in a  
19 minute?

20  
21 **MR NORDQUIST:** It is probably better to take a break now.

22  
23 **THE PRESIDENT:** The Tribunal will withdraw at this stage and we will continue in  
24 30 minutes. Thank you very much.

25  
26 **(Break from 4.30 p.m. to 5 p.m.)**

27  
28 **THE PRESIDENT:** We will now continue the hearing. Mr Nordquist, you have the  
29 floor.

30  
31 **MR NORDQUIST:** Thank you, Mr President. As mentioned before the break, a  
32 relevant method for determining abuse of rights and denial of justice doctrines is to  
33 compare the proportionality of an alleged offence with the punishment meted out to  
34 victims. For this exercise, it is necessary to make a comparison, often done in  
35 relative monetary values, of what is in this case the value of the likely “treasure” in  
36 comparison to the harm to the victims. We cannot be sure about the value of the  
37 “treasure” reportedly substantiating the alleged offences. Assume, however – and  
38 perhaps we can have the slide up – that we take Respondent’s inventory list of  
39 10 large and 10 small cannon balls, a few rocks with centre holes drilled, and several  
40 pieces of broken pottery in the photograph as actually depicting the “treasure” taken  
41 from the *Louisa*. The value of this “treasure” based on other Respondent  
42 submissions of similar appearing artefacts is nominal. The alleged “treasure”,  
43 assuming it was taken from the *Louisa*, does not even begin to compare in value  
44 with the gold and silver booty Spain brought home from the New World as a colonial  
45 power in one of its typical treasure ships. Since Spain is a party to the Convention on  
46 Underwater Cultural Heritage, part of the response to a question asked by the  
47 Tribunal is that if the cannon balls were of British origin, could Spain count them as  
48 part of its historic patrimony? I think in the Battle of Trafalgar there were an equal  
49 number of British cannon balls fired. As I understand, under the proper interpretation  
50 of the Underwater Cultural Heritage Convention, the protocol would be to return the

1 cannon balls to England. We have no established facts, as I have indicated, about  
2 the origin of the cannon balls, and maybe it is not even possible to determine this. If  
3 we could, my understanding is that they should be returned to their rightful owners.  
4 Certainly, I think the policies of Spain are to never relinquish their rights to sunken  
5 treasure off their flag vessels, no matter how old.

6  
7 One factual clarification may be necessary to assist the Tribunal and to reduce  
8 confusion with respect to the cannon balls. They can be fairly characterized as  
9 “weapons” of war. It is hard to imagine what other use you would make of a cannon  
10 ball. The Tribunal will recall that the small arms found in the gun locker on the *Louisa*  
11 were also characterized by Respondent as “weapons of war”. In fact, the small arms  
12 shown in the photograph were found on the *Louisa* but they were small arms  
13 designed for civilian use, and properly sold and documented when the vessel  
14 originally sailed.

15  
16 Respondent and local authorities filed charges based on “continuing damages”. After  
17 a review of the “treasure”, we cannot answer the question of what are the continuing  
18 damages, and what legal connection is there between the two charges made by  
19 Spain, as best we can decipher, and Mario Avella or John Foster?

20  
21 To assess whether the doctrines of abuse of rights or denial of justice are applicable,  
22 consider again, for example, the relative relationship between the punishment  
23 inflicted on Mario Avella in comparison to the harm charged in the indictment drafted  
24 by the local authorities in Cádiz. Mario was imprisoned for nine months without trial.  
25 That fact is uncontroverted. The local magistrate in Cádiz then confiscated his  
26 passport for 18 more months, making the denial of his legal rights as a human being  
27 to travel home effective for 27 months, over two years. Today, even at this stage of  
28 hearings in this Tribunal, Mario Avella still has no clear idea of the alleged crimes  
29 with which he is charged.

30  
31 After confiscating the vessel *Louisa* under the flag of the Applicant, of which he is  
32 one of the beneficial owners, John Foster also stands charged, or apparently  
33 charged, with a “continuing crime against Spanish patrimony”. In his particular case,  
34 these abusive and unnecessary actions by local officials are harsh punishment. The  
35 reason is that John Foster has been in the business of collecting data on prospective  
36 oil and gas deposits around the world for over 30 years. He has no record of  
37 treasure hunting at all. John Foster also has only a vague idea of the alleged  
38 charges against him, which have not been clarified, although the local authorities  
39 have had over six years to do so.

40  
41 Applicant has not only pointed to his sworn denial of the charges in what is possibly  
42 a back-dated indictment, but detailed the abuse of rights and denials of justice  
43 violations by local authorities for both Mario Avella and John Foster. Consider that a  
44 vessel flying the flag of the Applicant is seen by John Foster and his counsel as  
45 having been unlawfully seized and is now under the threat of forfeiture according to  
46 recent documents. Thus the official abuses persist after six and a half years due to  
47 what can be fairly characterized as unprofessional police work and continuing abuse  
48 of judicial discretion, particularly by local authorities in Cádiz.



1 Respondent apparently argues that the two charges alluded to in the so-called  
2 indictment are supposed to justify six and a half years of abuses. Applicant contends  
3 that, in light of article 300 in the Convention, abuse of human rights, including their  
4 property rights, is a legitimate and necessary source of law for this Tribunal to  
5 examine. This is particularly so with Alba Avella, Mario Avella, the two Hungarian  
6 crewmen, John Foster and the Applicant itself. The vague offences alleged in the  
7 indictment do not fairly apply to them by any reasonable standard of due process or  
8 justice.

9  
10 The Tribunal is respectfully next asked to examine the second charge, about the  
11 storage of the five rifles, one shotgun, and one pistol that were actually discovered in  
12 a gun locker aboard the *Louisa*. A picture of what the Respondent in its pleadings  
13 repeatedly describes as “weapons of war” is on the screen. At the outset Applicant  
14 stresses that neither Mario Avella nor John Foster had any reasonable or legal  
15 connection to any gun locker offence that would remotely justify the charges in the  
16 so-called indictment. The record in this case is clear that neither possessed nor  
17 stored the arms in question in any criminal sense as charged. Rather, the rights of  
18 both victims have been abused, and both have been denied justice in this case. We  
19 stress that Applicant believes that the real wrong revealed before this Tribunal is the  
20 illegal and unreasonable conduct of local authorities in Cádiz. That is the conduct  
21 meriting correction by this Tribunal.

22  
23 The record shows that the small arms were secured in a steel gun locker on the  
24 *Louisa* at the time of its detention on 1 February 2006. Honourable Judges will recall  
25 that the local authorities bullied Alba while being interrogated on the *Louisa* into  
26 telephoning her father in the United States to ask about gaining access to the steel  
27 gun locker. They learned, because these officials were listening to her conversation  
28 without her father’s permission, as might be required under US law, that he did not  
29 know, but he thought that the Master of the vessel kept the key to the metal outer  
30 locker and held the safe combination. Every crewman on the *Louisa* was concerned  
31 about measures regarding self-defence against pirates. There is no contention that  
32 there are pirates in the bay in Spain but this vessel was a seagoing vessel and was  
33 awaiting its next assignment. Very competent and responsible management officials  
34 in Scotland routinely asked that the so-called “weapons of war” be placed securely in  
35 the gun locker on the *Louisa*. As a member of the crew, Mario was therefore  
36 generally aware of the existence of the gun locker. He did not know what was in it.  
37 He was not, however, responsible in any legal sense. He had no key and he did not  
38 know the combination to the safe where the guns were kept.

39  
40 The local authorities could not wait. In the light of the facts available clearly in the  
41 records, a reasonable speculation can be offered that they may have believed that  
42 the safe contained truly valuable “treasure”. The record is, of course, as mentioned,  
43 silent on what actually motivated the local authorities with such a sense of urgency.  
44 In any event, the investigators cut the padlock on the outer steel door and then  
45 blasted off the second combination lock on the steel gun safe inside. The contents  
46 were probably disappointing for the local officials, as there was no true treasure.  
47 Inside they found just the normal small arms, now routinely carried on cargo vessels  
48 that need self-defence means against pirates.

1 Would any reasonable person believe that the local officials actually thought they  
2 had discovered weapons of war when they saw what was inside the gun locker? Did  
3 they think these were the kind of weapons that would be peddled to an arms dealer?  
4 Highly unlikely. The five rifles were civilian small arms, without even a thumb lever to  
5 select automatic fire. Some weapons of war! Documents made available to this  
6 Tribunal persuasively indicate that the few small arms were there based on a  
7 responsible recommendation from a highly respected ship management company in  
8 Scotland that had been hired by the beneficial owners of the *Louisa* to outfit it  
9 properly for its purposes.

10  
11 The persons responsible for listing the small arms on the manifest or obtaining a  
12 routine administrative authorization from local officials may not have done what, in  
13 retrospect, they should have done; perhaps it was just as a result of an honest  
14 mistake by whomever was responsible for such administrative matters on the *Louisa*.  
15 Based on the handling of Alba's personal computer and new camera, it is not  
16 unreasonable to wonder if the authorization paperwork may have been misplaced by  
17 a local official, who might have been perhaps lax in his duties. In any event, the  
18 paperwork was either lost or not done properly, and at all events, the miscue was not  
19 attributable in any plausible legal sense to Mario Avella or John Foster, the parties  
20 named in connection with this crime.

21  
22 It strains belief beyond reasonable limits to suggest that either of them intended or  
23 acted to harbour "weapons of war". The accurate facts, not exaggerated ones, are  
24 that neither of them had any role in the alleged improper procedures constituting the  
25 second charge. William Shakespeare's adage comes to mind: this charge is "Much  
26 Ado About Nothing."

27  
28 Every relevant fact in the record points to the conclusion that the charges against  
29 Mario Avella and John Foster were unfounded as a matter of both fact and law. If  
30 these two men did somehow deserve official sanctions, that might be in the form of a  
31 small administrative fine as a penalty which could have been quickly paid and they  
32 could have moved on in their lives. Instead, these minor offences have been blown  
33 out of all proportion, and the rights of Mario Avella and John Foster under article 300  
34 of the Convention have been abused. Moreover, both have been denied justice  
35 under international law doctrine, in violation in both cases of Spain's solemn treaty  
36 obligations.

37  
38 Frankly speaking, honourable Judges, it is slightly embarrassing to discuss these  
39 flimsy charges before this august Tribunal during an international proceeding such  
40 as this. It challenges good faith to conceive that the minor infractions alleged against  
41 remotely connected persons, and the absence of the usual elements of a crime  
42 being alleged such as specific intent, could be the justification for the abuses and  
43 denial of justice in Respondent's case over a period of six and a half years. It would  
44 not be an appropriate remedy to send this case back to Spain, condoning perhaps  
45 six and a half more years without a trial. Frankly, one of the witnesses characterized  
46 the charges as being trumped up and cooked up at the last minute to cover  
47 bureaucratic ineptitude.

48  
49 In its Memorials, Respondent has done its best to make these alleged infractions  
50 seem really serious, but there was no realistic threat to the peace, good order or

1 security of Cádiz from the few small arms securely locked in a steel safe on the  
2 *Louisa*. By comparison, it is staggering how much grievous harm was inflicted on a  
3 working-level member of the crew on Applicant's vessel and the scorn heaped on its  
4 generous beneficial owner, or, at least, one of the beneficial owners.

5  
6 Vigorous advocacy by the Respondent to justify this abusive behaviour by local  
7 officials compounds the injustice in this case. Applicant suggests that this only  
8 serves to reinforce the validity of a finding by this Tribunal that abuses of rights and  
9 denial of justice are justified violations of the Convention and international law. It is  
10 respectfully suggested that the Tribunal needs to send a clear lesson out, not only to  
11 Spain but to the world at large. As mentioned, there has never been any sign of  
12 compromise or interest expressed in settlement from the Respondent. There is no  
13 prospect that the passage of more years of the curious form of judicial processing  
14 that Spain condones in this case will lead to a just result in Spain for either  
15 Mario Avella or John Foster.

16  
17 There is one final matter of importance that must be considered by the Tribunal in  
18 this case. It is fully predictable from the records already submitted that an  
19 irreconcilable dispute exists between Applicant and Respondent concerning the  
20 interpretation and/or application of article 295 in the Convention. Applicant contends  
21 that the doctrines of abuse of right and/or denial of justice are exceptions to the  
22 general rule of international law that normally require exhaustion of local remedies.  
23 Respondent has consistently argued that there is a requirement in this case to allow  
24 local authorities to finish the unduly delayed legal proceedings prior to the Tribunal  
25 having any jurisdiction on the merits. Applicant respectfully suggests that it is an  
26 undeniable conclusion that a genuine dispute exists between Applicant and  
27 Respondent over the interpretation and/or application of article 295 in the  
28 Convention based on the facts in this case.

29  
30 With respect to the legal doctrine of exhaustion of remedies, Applicant submits that  
31 there is nothing further to exhaust in the case of Alba Avella. No local remedies are  
32 pending and none are contemplated, to the best of Applicant's knowledge and belief.  
33 This is also true with respect to the two Hungarian crewmen who were unlawfully  
34 arrested, imprisoned without trial, and denied their passports for eight months, until  
35 they were returned through the efforts of John Foster's lawyers. All these individuals  
36 merit equitable remedies from this Tribunal for their abuses and denial of justice.

37  
38 With respect to Mario Avella, the two charges, as best we can understand,  
39 referenced in paragraph 29 of this Tribunal's Order above remain pending according  
40 to the so-called indictment conveniently introduced by the Respondent at the very  
41 end of the last hearing before this Tribunal without an opportunity for rebuttal. The  
42 Applicant contends that the so-called indictment was a complete surprise and a  
43 violation of due process in the sense that Mario Avella and John Foster and their  
44 legal advisers could hardly prepare to rebut charges before this Tribunal contained in  
45 a document they had never seen before 11 December 2010. If the Applicant's  
46 assertions are accepted as valid by this Tribunal, this would be a serious breach of  
47 due process as there was no fair opportunity to be heard. It would be helpful if the  
48 Respondent would disabuse this Tribunal of any role that Spanish officials played  
49 with respect to the timing and content of the so-called indictment. When was it  
50 drafted and by whom? The tender of the document was not a shock in one sense, in

1 that its revelation at the last minute was consistent with the continued abuse of due  
2 process that Mario Avella and John Foster have experienced at the hands of local  
3 authorities in Cádiz for the past six and a half years.

4  
5 We are mindful that in paragraph 65 of its Order dated 23 December 2010 the  
6 Tribunal noted that the obligation to exchange views was satisfied, but that in  
7 paragraph 68 held that the exhaustion of remedies issues would remain open.  
8 Paragraph 80 is also clear that the Order in “no way” prejudices jurisdiction on the  
9 merits or the admissibility of the Application or the issue of cost payments to either  
10 Party.

11  
12 A discussion of the topic of exhaustion of remedies is therefore necessary, in that the  
13 Applicant contends that in this case the Respondent violated article 300 in relation to  
14 both the Applicant itself as a sovereign nation and to private individuals and  
15 corporations for whom the Applicant is responsible under the Convention and  
16 international law. The Applicant further contends that the Respondent denied justice  
17 as that doctrine is understood in international law, and that appropriate remedies for  
18 these violations can only be determined if this Tribunal accepts jurisdiction on the  
19 merits in accordance with the Convention, the Tribunal Statute and the Rules of the  
20 Court.

21  
22 What then are the key rules and principles that pertain to abuse of rights and denial  
23 of justice doctrines with respect to facts about exhaustion of remedies in this case?  
24 The Applicant has already asserted that the Tribunal is mandated by the Convention  
25 to interpret and apply article 300 to the particular facts of this case. The Applicant  
26 has also noted that the doctrine of abuse of rights is closely related to the principles  
27 of good faith and due process. The Applicant contends that an abuse of rights  
28 occurred when local authorities in Spain exercised their legal rights or authority in a  
29 manner that benefits from this exercise were unjustly disproportionate, to the  
30 detriment of Alba Avella, two Hungarian crewmen, Mario Avella, and John Foster as  
31 well as to Saint Vincent and the Grenadines as a sovereign. Spain is deemed to  
32 have abused its rights and to have acted in bad faith in that the local authorities  
33 grossly exceeded their powers and legitimate interests as repeatedly described in  
34 this proceeding. The Applicant contends that the Respondent be estopped from  
35 further exercising its rights in this case and be held liable for damages to the  
36 Applicant, Mario Avella, the two Hungarian crewmen and John Foster. The  
37 Respondent has used its rights in violation of moral rules, good faith and  
38 straightforward elementary fairness in this case. The punishments inflicted upon the  
39 named injured parties were grossly disproportionate to the seriousness of the  
40 relatively minor offences alleged in the so-called indictment.

41  
42 As an innocent bystander, Alba Avella was subjected to degrading and inhuman  
43 treatment, to an investigation of offences alleged by others, and was intimidated for  
44 many months, suffering additional hardship without justification by confiscation of her  
45 passport by local officials in Cádiz. She was forced to spend many painful hours in  
46 the company of true criminals even while waiting to report, as ordered by the local  
47 magistrate, to the courthouse in Cádiz or Madrid. Her father, Mario Avella, was jailed  
48 without charges or trial for nine months. For an additional 18 months Mario Avella  
49 was denied the right to find work, to earn a living or to return home as his passport  
50 was confiscated by court order for a total of 27 months. John Foster’s personal and

1 property rights were abused by local authorities and to this day continue to be  
2 abused. Without any reasonable or legal connection to his person, sham charges  
3 have been alleged against him and he can reasonably expect that he would be  
4 arrested based on information provided to Interpol from local authorities in Cádiz  
5 were he to resume his normal way of conducting his international business of  
6 30 years' duration, that is to search for oil or gas data throughout the world.  
7 Moreover, as one of the beneficial owners of the *Louisa*, John Foster has been  
8 subject to six and a half years of agony, watching the deterioration of his and the  
9 other beneficial owners' vessel, the *Louisa*, and related equipment due to the  
10 unlawful arrest and irresponsible custody thereafter by local authorities in Cádiz.

11  
12 All these actions by the Respondent violate the article 300 treaty obligations to Saint  
13 Vincent and the Grenadines. The violations for which the Respondent is responsible  
14 under both the Convention and international law amount to a denial of justice to  
15 natural and juridical persons, which, as the flag State of the *Louisa*, the Applicant  
16 has the right and duty to protect. The victims were crewmen and a daughter of one  
17 of them, as well as a beneficial owner of the vessel, John Foster. The treatment of  
18 Alba Avella, Mario Avella, two Hungarians and John Foster reveals an undeniable  
19 fact of an excessively long period of over six years of abuse and a denial of  
20 procedural and substantive fairness. This excessive delay has imposed a  
21 disproportionate punishment that vitiates the normal rule of exhaustion of remedies  
22 under international law.

23  
24 Further, there is no requirement under international law to exhaust local remedies  
25 when the claims for injuries suffered in this case by the Applicant, Alba Avella, Mario  
26 Avella, two Hungarian crewmen and John Foster are firmly denied by the  
27 Respondent. The Respondent will speak for itself, just as the facts do, before this  
28 Tribunal on this issue. However, the Applicant respectfully submits that immediate,  
29 final and binding justice is long overdue and that further delays in resolution, for  
30 example by sending this case back to be further considered by Spain, would be futile  
31 and unjust.

32  
33 The Restatement (Third) of Foreign Relations Law, which is readily available to the  
34 Tribunal in its library, published in the United States, is a familiar source of authority  
35 for the Judges to rely on for this matter. The Re-statement discusses in great depth  
36 the doctrine of denial of justice with respect to a State's responsibility for injuries to  
37 nationals of other States. Reference is also made to the principal human rights  
38 instruments such as the Universal Declaration and the International Covenant on  
39 Civil and Political Rights. It would certainly be presumptuous of me to argue that I am  
40 a human rights expert, but Members of this Tribunal are recognized worldwide as  
41 human rights experts; still I know injustice when I see it. Injustices include, for  
42 example, the right to return to one's country and the customary law requirement that  
43 foreign nationals be accorded equal protection of the law with only reasonable  
44 distinctions being acceptable between nationals and aliens – that is, I guess, security  
45 concerns of nations. The host State is responsible for injury when the exercise of  
46 police powers exceed an international standard of reasonableness. A State such as  
47 Spain in this case is also responsible if it fails to provide an alien with remedies such  
48 as would be provided by the major legal systems of the world. Denials of justice can,  
49 in principle, reach to juridical persons, such as Sage in this case.

50

1 The Restatement (Third) cites examples of denials of due process in criminal  
2 proceedings as arbitrary arrest, unlawful or prolonged detention, prolonged arbitrary  
3 imprisonment, delayed trial, failure to render a decision, denial of an interpreter and  
4 inhuman treatment. Section 712(1) of the Restatement expressly provides that a  
5 sovereign State is responsible under international law for injury resulting from its  
6 taking of the property of a national of another State. Examples would be Alba's "lost"  
7 computer and camera, as would the valuable misplaced equipment taken from the  
8 *Louisa*, the confiscation of the *Gemini III*, and of course the execution of Spain's  
9 latest threat to sell the *Louisa* at auction. Confiscatory action is action that "prevents,  
10 unreasonably interferes with, or unduly delays, effective enjoyment of an alien's  
11 property ..." Despite lengthy submissions by the Respondent, there is no indication  
12 that Spain is prepared to pay damages or provide just compensation for any of the  
13 wrongdoings recited.

14  
15 The Applicant respectfully suggests that it is up to this Tribunal to order a suitable  
16 remedy to finally settle this case for all concerned. No legal qualification formula  
17 defining just compensation as a remedy can suit all facts and circumstances. That is  
18 why the Tribunal was delegated the authority, and indeed the duty, to apply article  
19 300. Fair market value has been the normal judicial standard – that is, the value of  
20 the property at the time of the taking. The Tribunal has the discretion to consider the  
21 pain and suffering of individuals as well as future earnings of natural and judicial  
22 persons in its analysis of a just settlement. The Tribunal is respectfully reminded that  
23 a temporary, lawful deprivation of property may ripen into a taking, particularly in a  
24 case such as this where there have been six and a half years of deprivation.

25  
26 The Applicant is aware that the claims for compensation on behalf of John Foster in  
27 particular are espoused by the Applicant not only in its capacity as a flag State but  
28 also in its capacity as a sovereign in the family of nations with human rights duties  
29 owed to every human being, including respect for property. In this case, the  
30 Applicant considers itself to have a special obligation also to espouse the cited  
31 violations of the doctrine of abuse of rights and denial of justice for Alba Avella,  
32 Mario Avella, two Hungarian crewmen (Gellert Sandor and Suzusky Zsolt), as well  
33 as for John Foster. The Applicant reminds the Tribunal that, as a small country with  
34 very limited resources, it is also entitled to equitable financial relief in this case. The  
35 Tribunal is reminded at the end that if the Applicant does not take up these causes  
36 for relief, no justice will ever be done.

37  
38 The Applicant accordingly respectfully submits that Saint Vincent and the  
39 Grenadines has a right to offer diplomatic protection in this case against violations by  
40 Spain of the Convention and international law as previously discussed. We recite the  
41 law in the Re-statement, in section 713, that there is no need to exhaust remedies  
42 that are "clearly sham or inadequate, or their application is unreasonably prolonged.  
43 There is no need to exhaust local remedies when the claim is for injury for which the  
44 respondent state firmly denies responsibility." Consequently, there is no need for  
45 further exhaustion of remedies, and the Tribunal is respectfully requested to find long  
46 delayed justice in a final and binding decision on the merits.

47  
48 Thank you, Mr President and honourable Judges.

49

1 **THE PRESIDENT:** Thank you, Mr Nordquist. It is now 5.47. I would like to know how  
2 Mr Cass Weiland would like to proceed. I understand that you wish to examine an  
3 expert, but we have very little time this evening, so are you prepared to do that  
4 tomorrow morning?

5  
6 **MR WEILAND:** Mr President, we are prepared to proceed for a while with our next  
7 witness or to adjourn according to whatever is your wish. I can tell you that we  
8 expect to end our case early tomorrow. We will not require the entire day. We have  
9 two witnesses, the second of whom is of somewhat inexact length, but I do not  
10 expect us to be here all day tomorrow on our case.

11  
12 **THE PRESIDENT:** Thank you very much. I understand that this brings us to the end  
13 of today's sitting. The pleading will be resumed tomorrow at 10 o'clock. The sitting is  
14 now closed.

15  
16

*(The sitting closed at 5.48 p.m.)*