

**APPLICATION on behalf of SAINT VINCENT AND THE GRENADINES**

**Application under Article 292  
of the United Nations Convention on the Law of the Sea 1982**

**“JUNO TRADER”**

**Memorial submitted on behalf of SAINT VINCENT AND THE GRENADINES**, represented by Mr Werner GERDTS, assisted by Mr Syméon KARAGIANNIS, Professor of the Faculty of Law at the Robert Schuman University in Strasbourg and by Mr Vincent HUENS DE BROUWER, lawyer of the firm Messrs ELTVEDT & O’SULLIVAN, as counsel.

**Against the State of GUINEA-BISSAU**

**Authorizations:**

The Attorney-General of Saint Vincent and the Grenadines, being the authority competent to authorize persons to make an application on its behalf under Article 292 of the United Nations Convention on the Law of the Sea 1982, acting through the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, appointed and authorized its agent, Mr Werner GERDTS, to make this application on its behalf before the International Tribunal for the Law of the Sea. (annex 1).

Personal details of the agent Mr Werner GERDTS are as follows:

Am Kornberg 18a, 21266 Jesteburg, Germany

Tel.: + 49 (4183) 777 530

Fax: + 49 (4183) 777 531

Email: [gerdts@doehle.de](mailto:gerdts@doehle.de)

Communications necessary for the present case are to be forwarded to his professional addresses, as follows:

Döhle Assekuranzkontor GmbH & Co. KG

Palmaille 33, 22767 Hamburg, Germany

In his capacity as Managing Director

Tel.: + 49 (40) 38 10 82 05

Fax: + 49 (40) 38 10 81 49

E-mail: [assekuranz@doehle.de](mailto:assekuranz@doehle.de)

**A. MEMORIAL**

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**A: MEMORIAL**

**1. BRIEF FACTUAL BACKGROUND OF THE PRESENT CASE**

2. The "Juno Trader" is a vessel flying the flag of Saint Vincent and the Grenadines. It was registered in the official registry of that State under the number 3073 on 14 February 1994. Its Certificate of Registry is permanent. Its home port is Kingstown, Saint Vincent and the Grenadines. Its gross tonnage is 2,780.42 tonnes and its net tonnage 1,207.22 tonnes. Its deadweight carrying capacity is 1,600 tonnes of frozen products and 200 tonnes of bulk cargo (see annexes 2, for other data useful for determining its value). It was built in Nikolaev in the former Soviet Union in 1968.
3. The "Juno Trader" is designed as a reefer vessel.
4. Since 9 September 1993 it has been the property of the company Juno Reefers Limited whose registered office is in the British Virgin Islands (Road Town, Tortola).
5. At the time it was arrested its crew consisted of 20 members, all of Russian nationality, with the exception of Mr Oleksandr ROMANOV, its radio operator, who is Ukrainian. Its Master is Mr Nikolay POTARYKIN, also of Russian nationality (see crew list in annex 3).
6. On the orders of its owner/operator (also called "shipowner" below), on 18 September 2004 at 2200 the "Juno Trader" was off Nouadhibou, Mauritania, in order to load a cargo of fish caught within the Mauritanian exclusive economic zone by the fishing vessel "Juno Warrior". The latter

vessel was in possession of a fishing licence issued in good and due form by the Mauritanian authorities.

7. The process of transhipping the cargo from the “Juno Warrior” to the “Juno Trader” began on 19 September 2004 at 2240. The first operation was to tranship 1,183.830 tonnes of several species of frozen fresh fish. The fish was in 39,461 cartons each weighing 30 kg. This operation was completed on 22 September 2004 at 1800. It was followed by a second transshipment operation, this time concerning sacks of fish meal (2,800 sacks each weighing 40 kg). This operation, which began on 22 September 2004 at 1900, was completed the following day, 23 September 2004, at 0330 (for the details, see the Delivery Acceptance Reports co-signed by the masters of the “Juno Warrior” and the “Juno Trader” and reproduced in annex 4). It will be noted that, before the start of transshipment, “Atlantic Pelagic”, the agent of the “Juno Warrior”, had notified the Mauritanian Delegate for the Supervision of Fisheries and Marine Control, in Nouadhibou, of the said transshipment to the “Juno Trader”, in a letter dated 19 September 2004 (reproduced in annex 5) and that the local representative in Nouadhibou of the company SGS, Mr KHALED, had carried out a detailed inspection of the cargo on board the “Juno Trader” on 24 September 2004 (inspection report and letter from the office of SGS in Dakar relating thereto reproduced in annex 6).
8. Thus, loaded with frozen fish and fish meal, and after being refuelled by the bunkering vessel “Amursk” (operation completed on 24 September 2004 at around 2000), the “Juno Trader” left Mauritanian waters bound for Ghana, where it was to discharge its cargo for the Ghanaian consignee, the company “Unique Concerns Limited”, which, in the meantime, had become the owner of the cargo on the basis of several bills of lading drawn up on 23 September 2004 (see copies of the originals in annex 7). It was while the “Juno Trader” was crossing the exclusive economic zone of the Republic of Guinea-Bissau, a crossing which it had to make to reach its destination, that the events leading to the present case occurred. Boarded on 26 September 2004 at around 1700 by what turned out to be members of the Guinea-Bissau navy, the “Juno Trader” was conducted to the port of Bissau the following day, 27 September 2004, at around 1600, and placed under the control of six armed military personnel. As we shall see below, the first document from the authorities relating to the reasons for the detention of the vessel and its crew was not received until 20 October 2004.
9. The vessel is currently still in Bissau (see photos of the “JUNO TRADER” in annex 8). The members of the crew, apart from one, are still being held on board under the surveillance of armed men. Their passports have been seized by the local authorities.

**10. ON THE TRIBUNAL'S JURISDICTION (point a of the application)**

11. Saint Vincent and the Grenadines, whose flag is flown by the vessel "Juno Trader", ratified the United Nations Convention on the Law of the Sea on 1 October 1993 and Guinea-Bissau ratified it on 25 August 1986. The Convention entered into force for both States on 16 November 1994. Neither State made any declaration concerning the procedure for prompt release from detention of a ship or its crew, except, implicitly, Guinea-Bissau which, in its instrument of ratification of the Convention, rejects the jurisdiction of the International Court of Justice in its entirety, and hence also in terms of prompt release proceedings.
12. It is essentially Article 292 of the Convention which deals with proceedings for the prompt release of vessels and crews. The first paragraph of Article 292 provides that:
13. "Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under Article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree".
14. Besides the fact that Saint Vincent and the Grenadines alleges that, de facto, the Respondent State "has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security" (a question to which we shall return), it is noted that no agreement has been reached between the two States concerning the designation of a tribunal or court with jurisdiction to rule on the application for prompt release of the vessel and its crew. In this case, wisely, the drafters of the Convention designated the International Tribunal for the Law of the Sea to have jurisdiction to deal with the release of the vessel and its crew.
15. Furthermore, the jurisdiction *ratione temporis* of the Tribunal begins after a certain period: 10 days "from the time of detention". In the present case, the vessel "Juno Trader" was detained and all its crew members arrested with the sole exception of one who was wounded when the members of the Guinea-Bissau armed forces opened fire, and had to be evacuated with the assistance of a Spanish hospital ship, the "Esperanza del Mar", which by good fortune was present where the drama unfolded.
16. One view (see Jean-Pierre Quéneudec, "A propos de la procédure de prompt mainlevée devant le Tribunal international du droit de la mer", *Annuaire du droit de la mer*, 2002, pp. 79–92) has criticized the vagueness of the *dies a quo* criterion in Article 292, paragraph 1, considering that the detention of a vessel is an operation which, often, can be broken down into several successive phases. The same view has also criticized the International Tribunal for the Law of the Sea for not attempting to define better the expression in question which, it is stressed, plays a crucial role in establishing the jurisdiction of the Tribunal. And it considers, lastly, that "from a strictly legal point of view, a vessel should effectively not be deemed as detained until the time when it is provisionally seized by decision of the judge who upholds the seizure previously decreed by an administrative authority" (*op. cit.*, p. 83).
17. This concept is certainly attractive in its intellectual rigour. Nevertheless, it sets the standard very (too?) high. So, for example, there may be doubt concerning the possibilities for appeal, or even the possibility of appeal on a point of law, possibilities which, if they are taken into account, would fatally postpone the start of the 10-day period to a very distant future. Moreover, the

understanding of the eminent French expert in the law of the sea would seem to refer to State systems in which the judiciary is effectively independent of the executive and the administrative authorities are hierarchically subordinate to it. Far be it from us, of course, to question, in any way whatsoever, the independence of the judiciary in the Republic of Guinea-Bissau or, moreover, democratic principles locally, despite, it is true, the recurrent problems relating to the interference of the armed forces in the political life of that country (see, most recently, a military coup d'état in September 2003 and a mutiny leading to the assassination of the Chief of Staff in early November 2004; *Le Quotidien* newspaper, Dakar, of 3 November 2004 – annex 9).

18. However, the example of Guinea-Bissau provides raw material for a fresh consideration of the determination of the *dies a quo*. Thus, article 46, paragraph 3, of decree-law No. 6-A/2000 of 22 August 2000 concerning the fisheries resources and fishing rights in the maritime waters of Guinea-Bissau (*Boletim Oficial*, No. 34, of 22 August 2000, annex 10) indicates that “in all circumstances, the Ministry (“departamento do Governo”) responsible for fisheries must submit the report (“auto de noticia”) within 24 hours to the Attorney-General or to the representative of the public prosecutor’s office attached to the court having territorial jurisdiction or, if appropriate, decide to impose the fine set forth in article 53 of the present decree-law”.
19. This provision clearly shows that the referral to the Attorney-General or the representative of the public prosecutor’s office attached to the court having territorial jurisdiction is not an obligation since a convenient alternative exists: the fisheries authority may itself impose a fine. In any event, even if this interpretation of the law of Guinea-Bissau were to turn out to be wrong, it is nevertheless true that, to date, more than one and a half months since the “Juno Trader” was boarded and was then diverted to the port of Bissau, the vessel’s owners, the flag State, or even the members of the crew have not been made aware of any legal proceedings of any kind. By that logic, it would be easy to argue that the period of 10 days would never begin, the International Tribunal for the Law of the Sea would therefore never have jurisdiction and the vessel and the crew would remain, if necessary, for years in the hands of the coastal State without the “detention” or the “arrest” of some or all members of the crew ever being legally effected. If one assumes, however, that the coastal State’s seizure of the vessel and its crew is in some way advantageous to it, simple inertia, negligence or, more prosaically, the State’s administrative and judicial disorganization would increase that advantage. If one assumes, on the other hand, that there is no advantage in the case in point, the negative characteristics which we have just mentioned become even more unacceptable since everyone is the loser. The Tribunal cannot reasonably support too strict a concept of the detention of a vessel or the arrest of its crew unless it wants at best to leave the door open to abuse of rights (which is categorically prohibited by Article 300 of the Convention), and at worst to situations which are humanly shocking, particularly when they involve depriving human beings of their freedom.
20. To conclude on this point, we suggest that the terms “detention” and “arrest” must be understood in a less strictly legal and more down-to-earth way, or “ordinary”, if that is preferred, as is, moreover, required, *prima facie*, by article 31 of the Vienna Convention on the Law of Treaties of 1969. Thus, “detention” would be the practical inability of the shipowner and the Master to use their vessel freely because of acts attributable to the coastal State, whereas “arrest” of the member(s) of the crew would simply be the fact of the coastal State’s authorities depriving them of their freedom and, in particular, of their freedom of movement. If the Tribunal accepts (even in part!) this interpretation of the terms of Article 292, paragraph 1, it will have no difficulty in observing that the “detention” of the “Juno Trader” and the concomitant “arrest” of almost all the members of its crew took place on 26 September 2004, or 27 September 2004 at the latest. The period of 10 days imposed by Article 292, paragraph 1, of the Convention having expired long ago, the Tribunal will be in a position to consider itself to have jurisdiction in this case.

**21. ON THE ADMISSIBILITY OF THE APPLICATION (point b of the application)**

22. Ordinarily, the question of admissibility in proceedings for prompt release of a vessel and its crew concerns either the allegation that the prompt release of the vessel and its crew has not been obtained despite the posting of a bond, or the allegation that the bond set by the Respondent was excessive (combination of Articles 292 and 73 of the Convention).
23. In the present case, the security whose characteristics are specified in annex 11, in the amount of 50,000 euros, was posted, in the name of the shipowner, with the competent authorities of Guinea-Bissau (annex 11). To date, neither the release of the detained vessel nor of its crew have been obtained. N.B.: because of serious difficulties in communicating with Guinea-Bissau, the documents for the posting of the bond cannot be annexed to the present application but will be forwarded to the Tribunal as soon as possible.
24. It is true that the posting of this security took place about one and a half months after the detention of the vessel and the holding of its crew on board, without, moreover, to the applicant's knowledge, any referral of the fate of the vessel, its cargo or its crew to the judiciary of Guinea-Bissau. This time lapse, which was no doubt a very unpleasant experience for the crew, can be explained essentially by the fact that the administrative authorities of the coastal State was extraordinarily slow to provide any information.
25. It was only in a letter dated 20 October 2004, in other words, more than three weeks after the arrest, that the first "formal communication" of a decision concerning the vessel "Juno Trader" was sent (annex 12). This was a letter from Dr MALAL, writing in his capacity as coordinator of the department of inspection and control of fishing activities, to Mr TAVARES, representing the shipowner's interests locally, and sending him minute No. 14/CIFM/04 of 19 October 2004 from the Interministerial Maritime Control Commission of Guinea-Bissau (annex 13).
26. Minute No. 14/CIFM/04 referred explicitly to minute No. 12/CTFM/04 (annex 14) which had been adopted on 18 October 2004. The local representative immediately requested a copy thereof, which was communicated to him on the morning of 26 October 2004 (annex 15).
27. On 27 October 2004, the coordinator of inspection and control of fisheries notified the shipowner's local representative of the decision to discharge the entire cargo of frozen fish on board the "Juno Trader" the same day (the fish meal was not affected by the decision) (annex 16).
28. On 28 October 2004, a letter was circulated concerning the discharge of 200 metric tonnes of fish from the "Juno Trader" out of a total of 1,180 tonnes on board the vessel (annex 17). On the same day, the sale at public auction of the entire cargo on board the "Juno Trader" was announced, to be held on the morning of 29 October, for a total of approximately 500,000 euros (annex 18).
29. The shipowner has thus continually been faced with *fait accompli*. He has not been given the opportunity to negotiate seriously with the authorities of the coastal State.
30. In any event, there is no need to argue further on this point. As ruled by the Tribunal in its order of 7 February 2000 delivered in the case of the vessel "CAMOUCO".

**31. ON THE BREACH OF ARTICLE 73, PARAGRAPH 2, OF THE CONVENTION BY GUINEA-BISSAU (points c to f of the application)**

32. Under Article 73, paragraph 2, of the Convention on the Law of the Sea, “arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security”. This provision cannot be read separately from that of the first paragraph of the same article, which stipulates that “the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.”
33. The result, indeed the necessary result, of combining the first two paragraphs of Article 73 is anything but uninteresting. In effect, the coastal State *may not* take the measures indicated (boarding, inspection, arrest and judicial proceedings, etc.) if this is not “in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone”.
34. Furthermore, the posting of a bond or a financial security is intended, essentially if not exclusively, to ensure that any sentence by national courts will not remain a dead letter, but may be satisfied by the amount of bond or security posted. Article 292 of the Convention considers the said bonds and financial securities as a sort of provision which may be used for the payment of penalties which may, if applicable, be imposed by the competent courts of the coastal State. In that respect, the phrase in paragraph 3 of Article 292 which refers to “any case before the appropriate domestic forum against the vessel, its owner or its crew” is rather eloquent. Thus, for example, according to one opinion, the bond (“garantie” in the French text of the Convention) “facilitates the administration of justice and the effectiveness of the decisions of courts and complements the power to arrest and to institute judicial proceedings” (Anne-Katrin Escher, “Release of Vessels and Crews before the International Tribunal for the Law of the Sea”, *The Law and Practice of International Tribunals and Courts*, 2004, pp. 205–374, p. 316 in particular).
35. To detain a vessel and demand, for its “release”, the posting of a bond or security is particularly arbitrary if the vessel cannot be accused of anything. Of course, it is up to the competent national *courts* (we wish to stress this point again) to say whether the vessel is accused of anything. Otherwise, one would be highly likely to invert the situation and place the examination of the merits of the case before the acts needed for it to be brought (including, *largo sensu*, the posting of a bond or security in order to cover any future sentence).
36. However, there are exceptions to every rule. It cannot be ruled out that, quite exceptionally, a detention of a vessel may appear to be unjustified to the naked eye, without need for any specific additional measures to investigate the case further, if all the circumstances clearly show that the vessel has in no way infringed the regulations of the coastal State relating to the conservation of fisheries resources in its exclusive economic zone.
37. This is exactly the case of the crossing, on 26 September 2004, of the exclusive economic zone of Guinea-Bissau by the vessel “Juno Trader”. As we have seen, it had left Mauritania and was travelling towards Ghana where it was to discharge its cargo (which was the property of a Ghanaian company), which it had loaded, by transshipment, off Nouadhibou. Minute No. 14/CIFM/04 of 19 October 2004 issued by the Interministerial Maritime Control Commission of the Ministry of Fisheries of Guinea-Bissau accuses the “Juno Trader” of violating national fisheries legislation in the “maritime waters” of Guinea-Bissau, which very probably coincide with the exclusive economic zone of that State (on 26 September 2004 the “Juno Trader” crossed

the maritime boundary of Guinea-Bissau at a distance of approximately 40 nautical miles from the coast). The “violations” (“infractions”) mentioned in minute No. 14 are not specified, which is extremely surprising given that the fine imposed for them is as much as 175,398 euros.

38. On the other hand, we find an attempt to specify the said “violations” in another document, minute No. 12/CTFM/04, adopted on 18 October 2004 by the Interministerial Inspection Committee for Fishing Activities (FISCAP) and which served as the basis for the adoption of the aforementioned minute No. 14. Unfortunately, this attempt at specification does not fulfil its praiseworthy intentions since the operative part of minute No. 12 states only that the “Juno Trader”, allegedly, violated provisions of the fisheries legislation of Guinea-Bissau concerning “related fishing operations”, without saying which.
39. Under article 3, paragraph 3, of decree-law No. 6-A/2000 of 22 August 2000 on fisheries resources and fishing rights in the maritime waters of Guinea-Bissau,
40. “related fishing operation, in the meaning of the preceding paragraph, is understood to be:
  - (a) the transshipment of fish or fish products in the maritime waters of Guinea-Bissau;
  - (b) the transport of fish or other aquatic organisms caught in the maritime waters of Guinea-Bissau until the first unloading;
  - (c) logistic support activities for fishing vessels at sea;
  - (d) the collecting of fish from artisanal fishermen”.
41. In particular, the aforementioned minute No. 12 refers, in its statement of grounds, to the fact that on 26 September 2004 officers of the Fisheries Inspection Service, on board the vessel “Cacine”, found the vessel “Juno Trader” “anchored” (“ancorado”) in the exclusive economic zone of Guinea-Bissau at position “11°42’ and 017°09’” parallel to the vessel “Flipper 1” (“em paralelo com o Navio FLIPPER 1”; underlined in the original Portuguese text). According to the same statement of grounds, it was when it caught sight of the inspectors’ vessel that the “Juno Trader” attempted to flee (we shall of course return to this point later).
42. When he was first allowed to go on shore at Bissau on 27 October 2004, the master of the “Juno Trader”, Mr Nikolay POTARYKIN, interviewed by Mr HUENS DE BROUWER, agent of the company Eltvedt & O’Sullivan, which is representing the shipowner’s interests, described as follows, in English that is certainly not very accurate but nonetheless understandable, his first encounter (a memorable one) with an officer of the Fisheries Inspection Service of Guinea-Bissau at around 1800 on 26 September 2004: “5 minutes later speed boat again – Georges and 2 camouflage men – Georges punched my face – Georges speaked Russian to me and first said ‘you anchored’ – then looked at fire pipes I believe thinking that this was made for bunkering! (without authorisation), then asked where are shrimps/sharks – I proposed to G to check the anchor to show that same was no wet nor muddy to prove that vessel did not stop – G refused – and said ‘go to Bissau’” (text of interview signed by the master currently held on board the “Juno Trader” and reproduced in annex 19).
43. In an interview which took place on 12 November 2004 with Mr Lance FLEISCHER (annex 14) (document not available from Guinea-Bissau because of a long-lasting and widespread power cut but will be made available to the Tribunal as soon as possible), Master POTARYKIN states, first of all, that, without marine charts (which were confiscated when the vessel was boarded by the authorities of the coastal State), he is not in a position to say exactly what the depth of the waters is at the point where, according to minute No. 12, he was “accused” of casting anchor. He



nevertheless estimates the depth at 45 to 60 metres, which could have permitted him to perform such an operation, his vessel being able to anchor up to a depth of 100 metres. However, he estimates, at the same time, that he would have needed 15 to 20 minutes to perform this operation (including the time needed for the vessel to slow down). Around 20 more minutes would have been needed for the vessel to weigh anchor, thus totalling around 40 minutes, if everything went very well and quickly, but most likely, according to him, around 60 minutes would have actually been needed. That said, even supposing that casting anchor at this point had been possible both technically and *ratione temporis* (see, on this point, some useful statements by the Master in the above interview) and that, contrary to the Master's statements, this could have taken place, one may question, from a legal point of view, what the authorities of Guinea-Bissau could object to in such an action. Here we would point out (because we are likely to have to return to this issue) that Article 58 of the United Nations Convention on the Law of the Sea strongly protects the right of all vessels to freedom of navigation within the exclusive economic zones of coastal States. To cast anchor, when it is technically possible, is a right for third-state vessels, inasmuch as the freedom of navigation, covered by Article 58, is not fundamentally different – far from it – from the freedom of navigation on the high seas, covered by Article 87 (to which, moreover, Article 58 explicitly refers).

44. It is greatly to be feared that the officers of the Fisheries Inspection Service of Guinea-Bissau blithely confused the freedom of navigation in the exclusive economic zone with the right of innocent passage in the territorial sea. It is only the latter which, under the terms of Article 18, paragraph 2, of the Convention, must be “continuous and expeditious”, epithets which appear to exclude any right to stop and cast anchor (except in the event of *force majeure* or distress). As noted in a treatise in French on the law of the sea which generally has authority amongst law-of-the-sea specialists, navigation in the exclusive economic zone “means not only the movement of vessels, but stopping and anchoring” (Laurent Lucchini and Michel Vœlckel, *Droit de la mer*, Paris, Pedone, Book 2, Vol. 2, 1996, p. 191, No. 853). If people in the field are ignorant of international law, this is regrettable; if the Government of a State party to the Convention on the Law of the Sea excuses, endorses or approves that ignorance, this gives cause for concern.
45. The other charge against the “Juno Trader” brought by the aforementioned minute No. 12 concerns the fact that it was “parallel” to another vessel, the “Flipper 1”. The “parallelism” in question ought without a doubt to have been rather better specified in that official document. Master PORTARYKIN, in his written statement, does not deny that in the exclusive economic zone of Guinea-Bissau he encountered, at 1500, “a group of 4/6 trawlers approx ... obliging my vessel to do a small change of route to avoid them”. When, later, he took his turn on watch, at 1600 until 1655, when he first became “aware” of what would prove to be inspection vessels of Guinea-Bissau, he wrote: “no ship before my vessel but some small ships far astern”. Similarly, in his written and signed statement (annex 20), the second officer of the “Juno Trader”, Mr Anatoly KAREDIN, wrote that “during my bridge watch at approx 14H30 I saw a group of fish boat with wings – small trawlers – on port and starboard side at about 7/10 miles – the closest from JUNO TRADER was may be at 2/3 miles – I decided a slight manoeuvre to avoid the group knowing that fishing vessel always slalom/change directions. Fish boats did no contact JUNO TRADER – I was keeping watch with international channel 16 – at 15H15/30 fish boats behind us”. In his interview with Mr FLEISCHER, Master PORTARYKIN reiterated that he had seen a group of trawlers between the moment (1550) when he passed the point 11°42’ and 017°09’ (the point at which, according to minute No. 12, he anchored), and the moment (1655) when he was boarded/attacked. He asserts that during that time he saw neither any vessel of the Guinea-Bissau navy nor any trawler named “Flipper 1”.
46. Even assuming that the version of the Master and the officer is not the correct one, it is still not necessary to digress on the right of a vessel to be parallel to another vessel in the exclusive

economic zone of a coastal State. That being the case, we shall say so straight away. The allegations of “anchoring” and “parallelism” in fact have only one purpose. To imply that the “Juno Trader” was transshipping fish from the vessel “Flipper 1”. It would have been preferable for an official document imposing the fine, which we know, to state explicitly what the penalized vessel was accused of, rather than just making allusions. All minute No. 12 does is confiscate the “Juno Trader’s” cargo of fish, evidently on the basis of a simple *suspicion* (“seja declarado perdido a favor do Estado da Guiné-Bissau todo o producto a bordo do navio, ... por se *suspeitar* ter sido transbordado nas aguas da Guiné-Bissau, sem a devida autorização”; italics ours).

47. But there are even more surprises to come. The vessel “Flipper 1”, holder of a valid fishing licence, was reportedly inspected at the very time of the incident and found to be in compliance with local legislation. Yet if it had violated article 3, paragraph 3, of the decree-law of 22 August 2000 on related fishing violations (including transshipment), it would have had some problems. Transshipment is like marriage: it takes two to do it. If one of the two is unwilling, it is difficult to see what the other could do. Perhaps there was an “intention” to tranship, as Dr MALAL, coordinator of FISCAP of Guinea-Bissau, appears to have stated orally during a meeting, on 26 October 2004, to the shipowner’s representatives. Here too (and supposing one could understand the word “intention”), we would reply that two parties are required. It is also noted that minute No. 12 mentions no “suspect” trawler other than the “Flipper 1”).
48. A reading of the official documents and the texts of the witness statements raises another question. What, in fact, is the “Juno Trader”? The question is not a metaphysical one. Rather, it is quite amusing.
49. As we have been able to see, the authorities of the coastal State appear to consider that the cargo of the “Juno Trader” came from a transshipment. However, in documents other than minutes Nos. 12 and 14, they appear to be not far from thinking that it was actually the “Juno Trader” itself which had caught the disputed fish and, while it was doing so, that it was in the maritime waters of Guinea-Bissau. Thus, in a letter dated 27 October 2004, which notifies the local representative of the owner of the “Juno Trader” of the discharge of the cargo in the port of Bissau in implementation of minute No. 14, Dr MALAL explicitly describes the “Juno Trader” as a “fishing vessel” (“navio de pesca”). It is true that many people in Guinea-Bissau appeared not to understand that the “Juno Trader” was not a trawler. Here is how the Chief Engineer of the “Juno Trader”, Mr Gennadiy MAKGIMKIN, describes this confusion in his interview with Mr HUENS DE BROUWER, agent of Eltvedt & O’Sullivan, which took place in Bissau on 27 October 2004 (written text of this statement signed by the interviewee and reproduced in annex 21): “On 28/09 at 12H00 big commission with 20/25 people looking at accommodations/rooms/all departments – constant question from these people ‘where is fish fabric – where is fish meal fabric?’ – the answer was ‘it is not trawler, this is carrier vessel, we have no fish and fish meal fabrics, only trawlers have same’ – inspectors were surprised – militarians were very aggressive on board”. In another interview with the same agent in the same place and on the same date (without the presence of the interviewee previously mentioned), the Master of the “Juno Trader”, Mr Nikolay POTARYKIN, mentioned the question asked of him, at the time of the boarding, by the Guinea-Bissau officer known as “Georges”: “where are shrimps/sharks”. In another interview conducted under the same conditions, the radio officer of the “Juno Trader”, Mr Oleksandr ROMANOV (see signed statement in annex 22), refers to “Georges”, on the day of the boarding, “looking for anchorage matters then shrimps and sharks fins”.
50. These statements, written and duly signed by members of the crew, also mention suspicions on the part of the local authorities whereby the “Juno Trader” was allegedly carrying out bunkering operations.

51. All this is a matter for dismay. The “Juno Trader” (once and for all!) is a cargo vessel specially fitted out for freezing cargoes of fish. It has neither equipment for bunkering other vessels nor equipment enabling it to carry out fishing operations or for processing caught fish. It is difficult to understand how the officers of the Fisheries Inspection Service could not differentiate between a fishing vessel, a cargo vessel and a bunkering vessel, and it is just as difficult to understand how the administrative authorities continue, at times (letter from Dr MALAL dated 27 October 2004, cited, but also the covering letter for minute No. 14 dated 20 October 2004), to consider the “Juno Trader”, one month after it was boarded, as a “navio de pesca”.
52. Behind the – evident – amusement which these improbable and repeated confusions may provide, matters may however be rather more serious. It is the desire of the coastal State authorities to indicate, apparently at all costs, that something is not right as concerns the “Juno Trader”. Their main accusation is that it fled. In their reasoning, anyone who runs away must have committed a crime and, in a sea full of fish, the ideal crime is of course illegal fishing. We shall discuss the reasons for the “flight” later.
53. What must be stressed for the moment is the origin of the cargo found on board the “Juno Trader” on 26 September 2004. We have already referred at length to the transshipment of the said cargo from the “Juno Warrior” to the “Juno Trader” in Mauritanian waters between 19 and 23 September 2004. The official documents certifying the veracity of this operation are numerous. To those already mentioned in paragraph 7 above should also be added the certificate, issued at the request of the company “Atlantic Pelagic” and dated 7 November 2004, by the Ministry of Fisheries and Maritime Economy, Delegation of Supervision of Fisheries and Marine Control (DSPCM), of the Islamic Republic of Mauritania (annex 23). This document certifies “that the pelagic vessel “Juno Warrior” transhipped on 19/09/2004 1,183.830 tonnes of pelagic fish and 112 tonnes of fish meal to the cargo vessel “Juno Trader”, in accordance with the transshipment authorization issued on 18/09/2004 to DSPCM by the said company (“Atlantic Pelagic”), and that the fish transhipped during this operation was indeed Mauritanian”. Another certificate (annex 24) sent on 9 November 2004 by fax by Mr Chérif Ould TOUEILEB, Director of Industrial Fishing at the Ministry of Fisheries and Maritime Economy of Mauritania, again specifies that, after the appropriate authorizations, “the vessel Juno WARRIOR transhipped 1,183.830 tonnes of pelagic fish and 112 tonnes of fish meal on 19/09/2004 to the cargo carrier JUNO TRADER” and that the “vessel Juno Warrior worked under licence No. 04/1083 of 19/08/2004 which was valid for the period 20/08/2004 to 18/09/2004 under the agreement signed on 15/02/2004 between the Ministry of Fisheries and Maritime Economy and the company Frozen Foods International LTD” (documents annexed and systematically brought to the knowledge of the authorities of Guinea-Bissau).
54. It is interesting to note that minute No. 12, on which minute No. 14 of the Interministerial Commission of Guinea-Bissau recording its decision to confiscate the cargo is based, refers to “approximately” 1,183.8 tonnes (“cerca de 1.183,8 toneladas”). This is close to the “1,183.830 tonnes of pelagic fish” which, according to the official Mauritanian documents, were transhipped to the “Juno Trader” starting on 19 September 2004. And it is very difficult to believe that, between the date of completion of transshipment in Mauritania (23 September 2004 at 0330) and the date when it was boarded in the waters of Guinea-Bissau (26 September 2004 at around 1400), the “Juno Trader” could have discharged the Mauritanian fish, loaded other fish or, as sometimes suspected in Bissau, itself caught the fish and, above all, made sure that the newly loaded (or caught) fish was to within a decimal point the same quantity as that loaded in Mauritania.
55. Another point which has escaped the wisdom of the Guinea-Bissau officials is the fact that the fish allegedly loaded (or fished!) in the waters of that State was stored in cartons that were all marked “Juno Warrior”. Specimens of the cartons normally used by the “Juno Warrior” will be

made available to the Tribunal (annex 25); they may be compared with the photos taken by the agent of Eltvedt & O'Sullivan, Mr HUENS DE BROUWER, in the three holds of the "Juno Trader" on 30 October 2004 at around 2200 (annex 26). In compliance with international regulations, the marking of the cartons, which are still on board the "Juno Trader", shows not only the name of the vessel which caught the fish ("JW" for "Juno Warrior"), but also the number 8607268, which, according to the Safe Manning Certificate of the "Juno Warrior", corresponds to the official number allocated to this vessel by the International Maritime Organization (annex 27). It is difficult to challenge such proof of the origin of the cargo, but of course, if it wishes, the Tribunal can proceed to the site or delegate officers of its choice to verify the facts here set forth (Article 81 of the Tribunal's Rules).

56. The material indications which could have shown the officials and government of Guinea-Bissau that the cargo of the "Juno Trader" could not have been transhipped (or, *a fortiori*, caught by it) in the waters of that State are impressive in their number and quality. If that were not enough, the shipowner's representatives both locally and in the Marseilles head office took every opportunity to indicate the origin of the cargo of the "Juno Trader" and to show that that cargo had, on the basis of appropriate bills of lading, become the property of a third party, the Ghanaian company "Unique Concerns Limited".
57. Thus, a letter posted in Marseilles on 18 October 2004 by the company Eltvedt & O'Sullivan to Dr MALAL at the Ministry of Fisheries of Guinea-Bissau (annex 28) stresses that "m. v. "Juno Trader" is carrying a cargo of frozen fish from Mauritania to Ghana ("we have forwarded copies of the SGS Inspection Report concerning this loading"). A letter dated the same day (annex 29) and sent to the same Government representative by Mr TAVARES of the company "Transmar", the local representative of Eltvedt & O'Sullivan, explicitly mentions the letter sent from Marseilles to the Ministry. Another letter, sent on 20 October 2004 by Mr TAVARES to the FISCAP (Serviço Nacional de Fiscalização e Controlo das Actividades de Pesca) of Bissau, again very explicitly clarifies the origin of the cargo of the "Juno Trader". The letter concludes as follows: "As we understand it, the purpose of these documents (the SGS certificate) is to ask the Interministerial Commission to reconsider its position with respect to the vessel "Juno Trader", which we leave to the consideration of the Committee". The local representative also requests an "urgent reply" to his letter.
58. The "urgent" reply arrived one week later, on 27 October 2004, but ... announcing the mandatory discharge in the port of Bissau of the confiscated cargo of fish with a view, apparently, to its sale at public auction planned for 29 October 2004. On the same day, 27 October, a letter from Mr TAVARES to FISCMAR, the competent committee of the Ministry of Fisheries, in reply to this notification, insists on the fact that the fish on board the "Juno Trader" was not the property of the vessel, but that it was purchased "em tempo oportuno" by a third party in a normal and lawful commercial transaction.
59. Mr TAVARES, who was certainly not idle, wrote again on 29 October 2004 to FISCMAR, asking it to reconsider its position given the lawful origin of the cargo and asking it to allow the ship to weigh anchor, with the cargo in question on board (annex 30). He added that the lawful owners of the cargo had also protested, demanding the return of their property. A further letter from Mr TAVARES to FISCMAR (annex 31), dated 1 November 2004, reiterates the protests of the shipowner and the Ghanaian party.
60. Indeed, on 28 October 2004, two letters were sent to Mr H. P. ROSA, in his capacity as agent of Lloyd's of London in Guinea-Bissau, from "Vassajam Company Limited" and "Unique Concerns Limited" respectively (annexes 32). The former company is acting for the latter and the latter, on the basis of the aforementioned three bills of lading of 23 September 2004, is the owner of the

frozen fish and the fish meal on board the “Juno Trader”. The two letters establish the truth about the cargo in question, which ought to be delivered to Tema, Ghana. They conclude as follows: “Any quantity from the said Bills of Lading discharged in Guinea-Bissau will be breach of international law and will be viewed as theft. We reserve our right to protect our interest legally in the unlikely event our cargo is not delivered to us in Tema, Ghana”.

61. Exasperated by the attitude of the fisheries authorities of Guinea-Bissau, the Ghanaian company “Unique Concerns Limited”, the lawful owner of the cargo of the “Juno Trader”, even contacted the Government of Ghana with a view to an action by Ghana against Guinea-Bissau before the courts of the Economic Community of West African States. The same company, in a letter sent on 29 October 2004 to Mr ROSA, states that the secretariat of the Economic Community of West African States, to whom the matter had been referred, was seeking an amicable settlement to the dispute (annex 33).
62. The Lloyd’s representative in Bissau, Mr ROSA, wrote to Dr MALAL on 1 November 2004, with a copy sent directly to the Minister of Fisheries (annex 34), describing the status of the disputed cargo. In that letter Mr ROSA, who, incidentally, has been Interim President of the Republic of Guinea-Bissau since 2003, states among other things: “The annexed documents attest to the fact that the cargo was loaded on Mauritanian territory. In that case, knowing the excellent cooperative relations between Guinea-Bissau and Mauritania, we believe that it would be easy to use the official channels to confirm or disprove the veracity of the facts”.
63. The least that can be said is that, even if the officials of Guinea-Bissau were incapable of establishing, by their own means, the origin of the cargo, third parties, including the serving President of the Republic giving excellent counsel, were there to indicate that the officials had perhaps been a little hasty. That there was never any doubt in the minds of the Ministry of Fisheries of Guinea-Bissau is absolutely incomprehensible. That, in the words of minute No. 12, “the absence of evidence, particularly documentary, relating to the destination of the vessel and the fish products on board was verified” leaves us frankly perplexed. According to the written and signed statement of Master POTARYKIN, of which we have already spoken, after the Guinea-Bissau servicemen took control of the “Juno Trader”, “on that day (26 September 2004) were confiscated 1 chart, log book, oil record book (engine book remains on board)”. Here is how he describes, in the same statement, the day of 28 September 2004: “1st local commission on board, approx 30 men, opened hatches, looked cargo, cargo documents & checked all ship, then requested 100 cartons then 50 but I refused”. It is difficult to believe that the examination of the “log book” and the “cargo documents”, first by the servicemen and then by the members of the committee in question, did not reveal the origin of the cargo. It is true that an initial explanation can be given: that of language. The “log book” at least appears to be kept, in whole or in part, in Russian. Although the serviceman “Georges” appears to speak Russian, at least according to the Master’s statement, we cannot prejudge either his level of mastery of the language of Pushkin nor his desire or, more prosaically, his ability, under fire (both figuratively and literally; we shall return to this point), to study the contents of the “log book”. According to Master POTARYKIN’s statement, the log book was confiscated. If the Tribunal wishes, it could perhaps demand that it be produced.
64. However, from the inability of “Georges” to understand the log book to the ability of the Interministerial Commission to claim that there is no evidence of the origin of the cargo is a step which on the face of it one may hesitate to take. It is true that minute No. 12 of the said Committee mentions a report of the inspection of the fish on board, requested by FISCAP and prepared by the technicians of CIPA (Centro de Investigação Pesqueira Aplicada). According to that report, “the species identified are similar to those found in our waters” (“as espécies identificadas são semelhantes as exigentes nas nossas águas”). With the Master’s permission, on

5 and 8 October 2004 CIPA took random samples of fish from the cartons on board the “Juno Trader”. It compared the specimens it had taken with specimens which, on the basis of size and species, are supposed, according to FAO and local data, to be found – also – in the waters of Guinea-Bissau.

65. At this stage of the proceedings, we cannot say anything about the scientific basis of this method, but *prima facie* and without prejudice, we can admit that the conclusion of an investigation *presumed* to be scientific could have tipped the scales, within the Interministerial Commission, against the “Juno Trader”. However, if we look a little more closely, we find that the conclusion of the CIPA inquiry concerns the similarity of the size and species of the specimens examined and key specimens available to it. The observed *similarity*, which the report itself states does not apply for all the specimens compared (which would not prevent the seizure even of species not found in the waters of Guinea-Bissau), is not *identity*. The report prudently refrains from crossing the line between similarity and identity.
66. That line would be crossed by the authorities of the Respondent State. We would note that minute No. 12 from the authorities does not rely excessively on the relative importance, as has been said, of the CIPA report (annex 35). For that minute, the report is only one element among others, mentioned last of all, and probably considered to be much less important than other elements, which are more “meaningful” in the eyes of the authorities, such as the “attempted flight” of the “Juno Trader”, to which we shall return *in extenso*.
67. We may also point out that the exclusive economic zone of Guinea-Bissau is only a relatively small part of the exclusive economic zones established off the African coasts and that, while the free movement of persons is always a problem in Africa, like elsewhere in the world, the free movement of fish has been an undeniable reality from time immemorial. It is actually their stubborn failure to comply with the maritime boundaries of States which causes most of the problems in international fisheries law. Nothing indicates *a priori* that the similarity of the specimens found in several West African fishing areas could lead to the conclusion that the fish were caught in one area rather than another. Only the Senegalese coast (and the extremely narrow coast of Gambia) separates the Mauritanian fishing area from that of Guinea-Bissau.
68. Nonetheless, even supposing that we are ready to admit that the observed similarity (if it is based on irrefutable scientific methods) may be taken into consideration, we remain dismayed by the fact that a whole other series of *indisputable* elements have not been taken into consideration in any way. These are of course the multiple certificates of the origin of the cargo of the “Juno Trader”. Possibly, the scientific report could have (and should have) been requested, at the very least, if serious doubts had existed as to the said origin. Unfortunately, those doubts could only ever have existed in the minds of a relatively small number of local officials and we may recall, in that respect, the surprise of the committee which visited the vessel in the port of Bissau on 28 September 2004 and did not find any fishing equipment and/or fish processing equipment on board the “Juno Trader” (para. 49 above).
69. We sometimes have the impression in this case that certain officials in the Ministry of Fisheries felt that they were the victims of a vast plot woven by a large number of companies, international and African, each more serious than the other, by foreign States, such as Mauritania and Ghana, by the crew of a cargo vessel which has never caused the slightest problem before, and even by the Interim President of the Republic of Guinea-Bissau who, in his professional capacity as representative of Lloyd’s, requested the fisheries authorities, in an official letter, to adopt a more relaxed attitude, if not to just let the vessel and its cargo go.

70. And yet we can understand (of course without justifying it) the attitude of certain officials of the Ministry of Fisheries. In the various steps they have taken, they have never backed out of the corner into which they painted themselves right from the start. It would have been so easy for them to contact the shipowner, his underwriter, their local representatives and, *last but not least*, the flag State of the “Juno Trader” itself. Moreover, those contacts, and especially the contact with the flag State, cannot be seen as a facility or a convenience which may or may not be made. Pursuant both to Article 72, paragraph 4, of the United Nations Convention on the Law of the Sea and to article 46, paragraph 2, subparagraph b, of the decree-law No. 6-A/2000 of 22 August 2000, the flag State *must* be informed in the event of detention of a vessel flying its flag. According to the Convention, that obligation must even be met “without delay”. This can be seen clearly in the present case. The purpose of the obligation is not only to follow a longstanding rule of the law of the sea. It also has a prosaic purpose. To prevent misunderstandings or mistakes that are very unpleasant and extremely costly.
71. To return to the CIPA report, we note, moreover, that during the inspection on board the “Juno Trader” by the scientists, the famous quantities of 1,183.830 tonnes of frozen fish and 112 tonnes of fish meal were again confirmed. It would have been so easy to compare this quantity with the one mentioned in the certificate of transshipment in Mauritania, the bills of lading establishing the Ghanaian ownership of the cargo, and the letters of protest sent to the Ministry of Fisheries from many places! But the officials in charge would have had to be curious enough to read those documents and, of course, before taking any action, should have made contact with the flag State and the persons concerned, who had to come forward *proprio motu* after being kept in total ignorance for several weeks. Furthermore, at no point does the CIPA report define the “Juno Trader” as a “fishing vessel” although it does give a rather detailed description of it. Curiously, the covering letter for minute No. 14 of the Ministry, which is supposed to take this report into consideration, continues to tell us that the “Juno Trader” is a “fishing vessel”. A “detail”, whose importance will soon be seen.
72. One factor which had great weight in the assessment by the authorities of the Respondent State was what they call the “attempted flight” (“tentativa de fuga”) of the “Juno Trader”. Pursuant to article 58 of the decree-law of 22 August 2000, that attempt led to the Master of the vessel being sentenced to a fine of 8,770 euros for failing to cooperate with the Inspection officers (“por falta de cooperação com os agentes de fiscalização evidenciada pela tentativa de fuga do navio”). This fine was paid by the shipowner on 3 November 2004 (see annex 36), but without any admission of liability on the part of the Master.
73. We wish to stress the following point. The “attempted flight” of which the Master is accused is not only an independent offence, punished by the fine which we have just mentioned. It is one of the basic elements which implied that the cargo on board the “Juno Trader” was suspect, either that it was illegally transhipped inside the exclusive economic zone of Guinea-Bissau (but from which vessel, since the “Flipper 1” has been cleared? – a mystery!), or that it was caught by the “Juno Trader” itself (but how and with what? – another mystery). The cargo became illegal because the behaviour of the “Juno Trader” allegedly became illegal (the crime of flight). This implicit reasoning is worth whatever it is worth. It makes it no less necessary to explain this “flight”.
74. Not having any report of the boarding, arrest and inspection of the “Juno Trader”, despite the fact that all the documents relating to this unfortunate case were requested by the shipowner and despite the fact that the drafting of such a report is, in any case, required by article 45 of the decree-law of 22 August 2000, the shipowner and the flag State can rely only on the scanty information provided in minute No. 12 by FISCAP and on the statements written and signed by

the crew members of the “Juno Trader”. The context of sailing off the coasts of West Africa should also clarify certain aspects of the case.

75. The key sentence in the statement of grounds in minute No. 12 is this: “When it saw the inspection vessel approaching, it (the “Juno Trader”) weighed anchor and fled, being boarded at position “11°29’ and 017°134”, after a chase of two hours and thirty minutes (02h30)” (“Ao perceber-se da aproximação do navio da fiscalização, desancorou e pôs-se em fuga, tendo sido apresado, na posição “11°29’ et 017°134”, apos uma perseguição de duas horas e trinta minutos (02h30)”). We have already discussed the question of “anchoring” in this zone and the refusal of “Georges”, at least according to the Master’s statement above, to check whether the anchor was muddy or even simply damp.
76. The version of the chase between the “Juno Trader” and “Georges” men is quite different when we study the statement by Master PORTARYKIN, which reads as follows:
77. “At 16H00 (on 26 September 2004) speed boat came from starboard with no sign no VHF, passed fore of my ship and went portside. Waiving at my ship I do not know what to do? – then started approx 5/10 minutes shooting port and starboard side.
78. During shooting I ordered to send distress signals for piracy – one crew member injured
79. At approx 17H30 I noticed speed boat sailing away.
80. 2 minutes after distress call, received VHF contact from ESPERANZA DEL MAR sailing to 235° at approx 7 miles of my ship – Second Mate gave explanations by VHF and changed course to meet DEL MAR.
81. We met – I ordered to stop engine – DEL MAR sent launch with 3 men 1 woman arrived at approx 1800.
82. 5 minutes later speed boat again – Georges and 2 camouflage men – Georges punched my face – Georges speaked Russian to me and first said “you anchored” – then looked at fire pipes I believe thinking that this was made for bunkering! (without authorization), then asked where are shrimps/sharks – I proposed to G to check the anchor to show that same was no wet nor muddy to prove that vessel did not stop – G refused – and said “go to Bissau”.
83. Launch from DEL MAR left vessel and at the same time on portside noticed navy vedette (LF01) moored at JUNO TRADER – Plenty of people – we went to bridge with G to look at charts and repeated “go to Bissau”. I refused – G if you do not go to Bissau I shoot (gesture) – Radio Officer was taken on board Navy vedette”.
84. Second Officer KAREDIN wrote in his written statement: “At approx 1700 (of 26 September 2004) heard shooting – I immediately went to navigation bridge meet Master/chief mate/radio Officer – shooting lasted approx 5/7 minutes with speed boat changing side – radio officer sent distress signal by GMDSS – I sent a “pirate attack SOS” by VHF channel 16 ‘I have attack pirate please call me’ – I received immediately reply from ESPERANZA DEL MAR, looked at radar same was about 10/12 miles from JUNO TRADER”.
85. The statement by Chief Engineer MAKGIMKIN is similar, whereas Radio Officer ROMANOV wrote in his written statement: “Boatswain (1st sailer) came on bridge saying that they were shooting at us – may be attack lasted 10/15 minutes – I noticed that men from speed boat was doing stop gestures when on starboard side – Master ordered me to send distress signals: I sent 2 distress calls, one to Dakar port, one to Conakry port but no answer



86. At 1700, I sent on digital channel 70 – then 1706 sent distress signal short wave – then at 1711 I sent a successful satellite msg to France telecom station, received by MRCC CROSS Griz Nez in France asking to confirm distress and message.
87. At 1728 I confirmed ‘my distress msg – now finished attack piracy’.
88. At 1806 I received msg from MRCC Madrid ‘Please be informed that we have been advised you have suffered a piracy attack and you have on board an injury crewmember. In order of a secure assistance by the Hospital vessel “ESPERANZA DEL MAR” Please confirm your safety vessel condition’
89. At 1812 I received msg from MRCC Cross Griz Nez ‘call immediately the ship “NJAMBUUR” on VHF channel 16 – vessel close to your position to give you assistance’.
90. At 1816, I replied MRCC Cross Griz Nez ‘This is attack patrol boat: I have assistance MV ESPERANZA DEL MAR’
91. I remember at 17H20, that Second Officer talked with assistance vessel – At 1740, I saw DEL MAR at 1/2 miles on the right hand side then I looked back and saw navy vedette and speed boat, I though that vedette was arresting speed boat – When vedette and speed boat approached together I sent the satellite distress message at 1816”.
92. Master POTARYKIN, in addition to his written statement cited above, also sent an e-mail to Mr O. OLEINIKOV, on-shore agent and intermediary between Russian crews and shipowners, based in Walvis Bay, Namibia (annex 37). In this text, which was sent on 12 October 2004, the Master reaffirms his impressions of what he had taken to be a pirate attack. In the translation (clearly from Russian) provided by Mr OLEINIKOV, he reiterates his version of the facts. He did the same in a “note of sea protest” (annex 38), a document which is generally authoritative, which he sent to the Harbourmaster of the Port of Bissau. In a document issued by the Spanish hospital ship “Esperanza del Mar” and dated 26 September, there is confirmation that the “Juno Trader” sent a distress message mentioning a pirate attack (annex 39). In any event, the hospital ship was good enough to take on board and provide first aid to one of the members of the crew who had been shot. Again, let the Spanish hospital ship be deeply thanked for this.
93. It is very unlikely that the vessel “Juno Trader” would have sent distress messages (annex 40) to report a pirate attack if its Master had not really thought that that was the real situation at that time. Of course, *a posteriori*, the “pirates” turned out to be fisheries agents and inspectors of the Republic of Guinea-Bissau, a State that unfortunately, like many other coastal States nowadays, is waging a difficult and often unequal struggle against the plundering of its fisheries resources by unscrupulous trawlers. It is true that the report of the hospital-ship “Esperanza del Mar” mentions that “next to the JUNO TRADER, we see an inflatable dinghy with armed people on board is going towards the vessel (“se abarloa al buque”), this dinghy comes from a patrol boat of the navy of Guinea-Bissau, LFO1, which is coming towards us full steam ahead”. Then, the “Esperanza del Mar” immediately established the non-“pirate” nature of the vessels which would board the “Juno Trader”. Nevertheless, we would note that the Spanish vessel could also see, next to the inflatable dinghy, the patrol boat LFO1 (see photos, Republic of Guinea-Bissau’s fleet of monitoring and inspection vessels for fishing activities – annexes 41), an opportunity which was not given to the Master of the “Juno Trader” for a long time. It was over an hour after the first encounter with the Zodiac, according to the statement of the Master POTARYKIN, that the encounter between the “Juno Trader”, the patrol boat LFO1 and the “Esperanza del Mar” occurred. Thus, to assess any possible inexcusable conduct by the Master we must therefore place ourselves not at 1800 but rather at 1655.

94. Indeed, at 1655, we can see from the “Juno Trader” a Zodiac (“speed boat”) coming towards the vessel. It does not seem to bear any distinctive marks of any kind, no VHF contact is possible, and on board, there are persons who seem to be gesturing with their arms and hands. In his statement, Mr MAKGIMKIN talks about a “small zodiac, coffee with milk color”. He does not see any distinctive mark. In his statement, Mr ROMANOV wrote: “At 1655, I saw speed boat on starboard – beige color with 5 men on board”. He continues: “During attack I did not notice any sign on board vessel – afterward I read “marine national Guinea Bissau” but during attack I did not read this signature”.
95. We can understand the panic on board all the more since the external aspect of the people on board the Zodiac had nothing reassuring about it, according to the statements. In his “note of sea protest”, Master PORTARYKIN wrote to the Master of the Port of Bissau that “in a fast-track boat, there were five persons, one in camouflage uniform and four in civil clothes”. The statements from the other crew members hardly differ. The only man in military clothing was dressed in rather a relaxed fashion (“camouflage hat hanging on his back”, writes Mr ROMANOV). And the Master wrote in his e-mail to M. OLEINIKOV, “all of them looked as pirates”.
96. The behaviour of the occupants of the Zodiac was in keeping with this. According to the Master, 5 to 10 minutes after their appearance and seeing that the “Juno Trader” was not stopping, they opened fire with automatic weapons, a volley (photos of bullet impacts – annex 42) during which a crew member was shot in the leg. We may not perhaps contest that about 10 minutes are normally needed for the police at sea to obtain what they want before turning to coercive means since in any event, the law must have force. On the other hand, however, we will contest whether the police may open fire, with all the risks that it includes for life and physical integrity of human beings, when their order was not only not understood but, objectively, was also difficult or even impossible to understand.
97. It is true that the international law of the sea does not openly envisage such eventualities, which, although they may be thought too technical, have no less practical significance for all that, as the present case so easily demonstrates. The United Nations Convention on the Law of the Sea, which on that point recalls similar provisions of the Geneva Convention on the High Seas, recognizes the institution of the right of visit (Article 110). This right may be exercised on the high seas by a warship against another vessel when the latter is suspected by the warship of carrying out certain unlawful activities, which are exhaustively listed in Article 110. The right of visit may be exercised only when the warship has *serious* reasons for suspecting such unlawful activities.
98. It is true that the exclusive economic zone is not part of the high seas, as Article 86 of the Convention on the Law of the Sea explicitly states. It is nevertheless true that Article 58 explicitly protects the freedom of navigation in the economic zone, and that the economic zone does not form part of the coastal State’s territorial sea. It is normal for coastal States to be able to exercise the right to board vessels suspected of illegally exploiting, by whatever means, the natural resources – and particularly the biological resources – of its economic zone, but to some extent, that right has similarities to the right of visit. Of course, the crimes or offences which it is trying to punish or prevent are not the same, but in both cases, the imperative of the freedom of navigation is likely to invoke some common rules, or rules that are at the very least analogous, for the exercise of the two rights. The decree-law of Guinea-Bissau dated 22 August 2000 confirms this in its article 43, where it posits the principle of minimal interference in and disruption of fishing activities within the context of necessary inspection operations. If fishing activities must be disrupted to the minimum extent possible, navigation must be disrupted even less. Another useful piece of information which we can draw from the comparison between the right of visit on the high seas and the right to board in the exclusive economic zone concerns the fact that the

inspection must be carried out by vessels, even if they are not warships per se, bearing all external distinctive markings of the State on whose behalf they are acting.

99. Even under the hypothesis whereby we may not transpose, in the case of the exclusive economic zone, all the rigour of the right of visit of Article 110 and the concomitant rigour of Article 29 of the Convention, which concerns the definition of warship, pure logic (or equity or concern for the freedom of navigation ...) would require the Tribunal to recognize formally that vessels may not be boarded in the exclusive economic zone in just any way, by just anybody and using any means whatever.
100. Of course, in a particular case, there can be differences in the way the facts are presented by the parties and it will be up to the Tribunal, possibly ruling on the merits (we shall return to this issue), to weigh the versions which will be presented to it. However, over and above the material nature of the facts of the case, the perception of those facts by the boarded vessel cannot leave the Tribunal totally unmoved. Of course, in principle, the Master of a vessel is an experienced person who, normally, ought to be able to understand the messages that a national navy, a coastguard or a fisheries inspection service transmits to him. Nevertheless, there is a limit to everything. A group of persons wearing non-matching clothing, waving guns and shouting without anyone being able to understand what they are saying, on board a Zodiac whose markings (“distinctive”, says the Convention on the Law of the Sea...) are not really visible, which has no flag (all the statements agree on this point), with apparently no pennants, no radio, no VHF and not even a simple loudhailer can evoke to an experienced sailor such as Master POTARYKIN a danger rather than police at sea. It is typical that only the radio officer, Mr ROMANOV, says in his written statement that he finally managed to see the “distinctive” marking of the Guinea-Bissau navy. But then the radio officer was the only crew member that the inspectors and servicemen of the Respondent State chose to take on board their launch to go to the port of Bissau. From up close, one can see markings which from further away are not distinctive.
101. We must also not neglect both the historical and the geographical context in which the boarding, which was conducted in the manner which we have seen, was carried out. For many years now, alas, large parts of the West African coast are not safe for shipping because of the increasing number of acts of piracy. Just between 1 January and 30 September 2004, the web site of the International Chamber of Commerce Commercial Crime Service (<http://www.iccwbo.org> – annex 43) lists 42 acts of piracy or armed robbery at sea off the West African coast (true, 18 of those were off the Nigerian coast, but there were nine over the period in question between the coasts of Senegal and Guinea).
102. It is indeed true that so far the Tribunal has dealt most often with boardings that were “beyond any suspicion”. For example, in the most recent prompt release case on which it was called upon to rule, the vessel “Volga” was boarded by Australian soldiers operating from an Australian military helicopter from an Australian Royal Navy frigate. Or again, in the case of the vessel “Camouco”, the latter had been boarded by a French surveillance frigate and by a helicopter.
103. It is true that in the “Volga”, case the Applicant State claimed that the vessel “Volga” did not receive any order to stop before it was boarded. But a military helicopter which overflies a fishing vessel in an area which pirates, for climatic reasons among others, do not find to their taste, is difficult to mistake.
104. The question, however, needs to be asked: Is it only the great Powers who are to protect their fisheries resources with the powerful means at their disposal? Will the means and methods of interception constitute a new North-South divide? One hopes not. Nevertheless, neither do we

- want coastal States to have their debts paid for by the first cargo vessel which is unlucky enough to be in the wrong place at the wrong time.
105. To bring this long development to a conclusion, from the Applicant's point of view, taking into account the circumstances relating to this case, what the coastal State's authorities consider to be a "crime of flight" and a lack of cooperation from the Master probably represented the only way for the Master to save his vessel, its cargo and above all the lives of its crew who were under his orders.
  106. We would also point out that, to a large extent, the cargo was eventually considered to be illegal because the "flight" had been considered illegal. The Tribunal will no doubt appreciate the tangled nature of this reasoning implicit in FISCAP minute No. 12.
  107. We would also add a remark about the perception of "phenomena" in the marine environment. The perception of Master POTARYKIN has been discussed. It is time to look at the perception of those pursuing him. Articles 41 and 42 of the decree-law dated 22 August 2000 explicitly authorize fisheries inspectors, as is logical, to exercise certain powers over and on board suspect vessels. However, they continually point out that those powers cover fishing vessels only ("embarcações de pesca"). We may wonder how and why fisheries inspectors could mistake a cargo vessel for a fishing vessel when such a mistake would be inexcusable even for a non-specialist. This little remark, which it is true throws a rather unfavourable light on the competence of certain officers, will proceed to explain the insistence of the Respondent State's administration (up to and including in the letters dated 20 and 27 October 2004) on describing the "Juno Trader", against all probability, as a fishing vessel.
  108. Overall, in the present case, the coastal State acted within the framework of the "exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone" in form only. Therefore it could not "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention" (article 73, paragraph 1). Consequently, there is scant justification for the posting of a "reasonable bond or other security" under article 73, paragraph 2.
  109. The objection that can be raised to this way of seeing things can easily be guessed. It would concern the merits of the case, not the autonomous procedure for prompt release. However, in this latter procedure, the Tribunal, once the matter has been competently referred to it by the Applicant, must rule on the amount, or the form "of a reasonable bond or other financial security" (Article 292, paragraph 1), with the specific objective of prompt release of the vessel and its crew. The amount can be purely symbolic, and can also be zero. Nothing in the Convention on the Law of the Sea or in the Rules of the Tribunal rules out such a possibility. Rather, the jurisprudence of the Tribunal would seem to authorize it.
  110. It is true that the French terminology which is used by Article 292, paragraph 1, and by Article 73, paragraph 2, can lead to confusion. Whereas in the former we find the terms "une caution raisonnable ou une autre garantie financière" (a reasonable bond or other financial security), in the latter we find the term "une caution ou autre [une] garantie suffisante" (sufficient bond or security). It might of course be thought that the terms in Article 73 should take precedence since article 73 would be a *lex specialis* unlike the *lex generalis* of Article 292. Indeed, the former specifically concerns detention of vessels in the event of illegal fishing, whereas the latter has a broader scope, therefore concerning any case of detention of a vessel, or at the very least, any case where detention is explicitly provided for by the Convention (in addition to Article 73, Articles 220 and 226). However, this approach is incorrect once we see that Article 292 is not

intended to be juxtaposed to Article 73 (or to Articles 220 and 226), rather, it is intended to supplement them. Article 292 is the procedure, Article 73 is the substance. On that basis, it is difficult to understand the difference in terminology between Articles 292 and 73. Indeed, we have to conclude that here there has been a lack of terminological coordination, the more so since, during the Third United Nations Conference on the Sea Law, negotiation of the articles in question was not assigned to the same committees.

111. In any event, in the English and Spanish versions of the Convention (respectively, “reasonable bond or other financial security” and “reasonable bond or other security”; “fianza razonable u otra garantía financiera” and “fianza razonable u otra garantía”), the terms in Articles 292 and 73 do attempt to resemble each other without, it is true, becoming identical, except, and this is the point of particular interest to us, with regard to the adjective used to qualify them (“reasonable” and “razonable” each time, instead of “raisonnable” and “suffisante” in the French text).
112. This brief linguistic comparison shows that “reason” triumphs over “sufficiency”, which would also seem to be in conformity with the rule for the interpretation of treaties to be found in article 33 of the Vienna Convention on the Law of Treaties. “Reason” is clearly a broader concept than “sufficiency”, which, though more precise, makes too much reference to a sum of money to be paid into the national system of justice which, if necessary, will apply a financial penalty against vessels for violating its fisheries legislation. It is true that “reason” does not in any way rule out such a prospect. Nevertheless, the triumph of “reason” allows the Tribunal to demonstrate greater flexibility.
113. The Tribunal sets out its philosophy in prompt release cases in its judgment delivered on 18 December 2002 in the “Monte Confurco” case. It contains the following wording:
114. “the object of article 292 of the Convention is to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties” (paragraph 71 of the judgment).
115. The same judgment continues with what appears to be a statement of principle:
116. “The balance of interests emerging from articles 73 and 292 of the Convention provides the guiding criterion for the Tribunal in its assessment of the reasonableness of the bond.” (paragraph 72 of the judgment).
117. Balance is an ideal to be achieved that was greatly prized by Greek philosophy, and has a close cousin: justice. Like justice, balance cannot prosper when it is abstract and detached from reality, or as lawyers put it, the relevant circumstances of the case. Such detachment will lead to both imbalance and injustice.
118. In the judgment which it delivered in the case of the “Camouco” on 7 February 2000, the Tribunal seems to have given a great deal of attention to the criteria for determining the reasonableness of the bond or security. In that judgment,
119. “The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form” (paragraph 67 of the judgment).
120. In its judgment in the “Monte Confurco” case, the Tribunal added that the above list of criteria was not exhaustive. Nevertheless, the list in the “Camouco” judgment, which is very useful to the

parties in prompt release proceedings, is a real starting point for discussion of the amount of bond or security which ought to be posted in the present case.

121. We shall not discuss the form of the security in particular. The one posted by the shipowner meets all the criteria for a security on which the Guinean justice system and the Tribunal might wish to rely.
122. In any event, the Applicant is willing to post the amount of bond or security in the form required by the Tribunal, should such posting be ordered.
123. In the event that such payment is ordered, the Tribunal may usefully base itself on the characteristics of the vessel provided in annex in order to assess its value. The same applies for the value of the cargo seized, except for certain developments in that regard, which are of great importance for the Applicant and will be discussed below.
124. There are two other criteria which must be discussed in greater detail immediately. These are the “gravity of the alleged offence” criterion and the “penalties imposed or imposable under the laws of the detaining State”. The Tribunal was right about the importance of those two criteria when of its own accord it put them at the top of the list in its “Camouco” judgment.
125. Concerning the first criterion (“gravity of the alleged offence”), at first sight this seems to be purely and simply determined by the coastal State. That said, the freedom [discretion], and what is more, the total freedom [discretion] of the coastal State on this point would be very likely to upset that balance which was so extolled in the “Monte Confurco” judgment. And not only would the balance in question become an imbalance, but the very role of the Tribunal itself would be reduced to practically nothing as it would have nothing more to do than keep an exact account of the allegations and other demands of the coastal State. In order to achieve the required balance, it is necessary to go beyond the notion of imputability, which is so subject to destructive abuses of the system set up by the Convention.
126. Moreover, there is no need to look far. One can halt at the notion of “gravity”, the other key word in the first criterion used by the “Camouco” judgment. Assuming that “allegation” [imputation] tends towards subjectivism, the “gravity” can have a counterbalancing effect and open the way for the Tribunal to intervene once more in the case, the Tribunal whose strict interpretation of the “allegation” had seemed, at one time, no more and no less, to bar it. Of course, the Tribunal would not have to weigh the “gravity” as if it were already, at this stage, determining the case on the merits. Nevertheless, a *prima facie* evaluation, in the style of national judges of urgent applications, would not be at all problematic. Rather, the elements made available to it in this case enable it to decide easily that in all probability the “Juno Trader” could not have transshipped or, *a fortiori*, actually caught the fish in the exclusive economic zone of Guinea-Bissau.
127. Moreover, and even if it is not mentioned in the “Monte Confurco” judgment, the Tribunal is not only faced with two States, the coastal State and the flag State between whose positions it will have to find a “balance”. It is no exaggeration to say that everybody is watching the Tribunal’s proceedings with a keen eye and an anxious heart. The flag States, and more generally, all States, coastal or landlocked, for which shipping and the freedom of navigation are synonymous with business, trade, prosperity and growth, have invited themselves, in a way, to be part of the “Juno Trader” case. Even if a State allows itself, under pretexts as futile as the ones in the present case, to interfere with the freedom of navigation, the Tribunal for its part cannot allow itself to adopt a low profile by refusing to get involved between the two States parties to the action. The necessary protection of the interests of the coastal State in the conservation of its fisheries resources cannot come into play at the level – at least – of the Tribunal unless there are such interests. One must not

forget that this case is only formally a fisheries case. In reality, it is a case of pure freedom of navigation. The fact that it occurred in part of the exclusive economic zone of a coastal State only makes it that much more serious. Not only would the economic zone tend to become “territorial”, something which the Third Conference wanted to avoid at all costs; the territorial sea itself would become unrecognizable as there would be very little left of the right of innocent passage, if the freedom of navigation were to prove to be as restricted as the Respondent State, on the evidence, views it, even in the exclusive economic zone.

128. Some may still counter that interpretation of what is at stake in the case of the “Juno Trader” by saying that there is a desire to have the merits judged by the Tribunal. It will be difficult to claim that the merits will in no way be affected by the Tribunal’s judgment in this prompt release case. However, it will be affected either way, whether the Tribunal’s judgment is in favour of the flag State or in favour of the coastal State. Indeed, who will be able to argue that the freedom of navigation has any meaning in the exclusive economic zone if the Tribunal compels the shipowner to pay a bond (or worse, a “substantial” bond) in order to retrieve his ship, his cargo and his crew once any coastal State with the same degree of scruple as the Respondent State would be able to act the same way? One can also say that, if all goes well, a future judgment on the merits may end up with the flag State winning. However, firstly, whatever the merits of Part XV of the Convention on the Law of the Sea, it is obvious that to have such a case tried on the merits will not always be possible or easy and, secondly, the shipowner is not interested in winning the case several years after the incident, after the disruption it caused in his business and after the damage it has done to his professional credibility in the difficult environment of maritime transport. Shipowners, who are pragmatic and prudent, will henceforth avoid exclusive economic zones whenever technically possible, even though “all major international shipping routes pass through exclusive economic zones” (Lucchini et Voelckel, *op.cit* p. 190, para. 853). They will thus abandon the zones to the coastal States. By so doing, they will adversely affect the balance which the Third Conference on Law of the Sea wanted between coastal States and flag States, which, after all, perhaps, would not seem much of a tragedy to laymen. At the same time, however, the shipowners will pass the excess costs of circumnavigating the zones on to their clients and to consumers, at the palpable risk of damaging world economic growth. And that would be a tragedy.
129. The second major criterion established by the “Camouco” judgement, concerns the “penalties imposed or imposable under the laws of the detaining State”. Here again, at first glance it would appear that coastal States are free to determine what those penalties should be. *Mutatis mutandis*, we would point out, however, the impasses into which absolute freedom is likely to lead here, as before, regarding the “gravity of the alleged offences”. Nevertheless, we would add that, in a normally/democratically constituted State, penalties are applied and laws interpreted by the judiciary. The legal characterization of facts is also within the jurisdiction of the courts. We shall not offend the national courts of Guinea-Bissau by believing them capable of applying fisheries regulations to a cargo vessel; of mistaking a cargo vessel for a trawler; of contesting the veracity of the cargo documents of the “Juno Trader”; or of refusing to put themselves in the place of a Master who fears (and at the time had reason to fear) for the lives of his crew.
130. Neither can the International Tribunal for the Law of the Sea commit such an offence against the professionalism of Guinean judges and grant the Coastal State a bond which will not correspond to anything because it has no real objective. Also, more generally, in its first “Saiga” judgement, of 4 December 1997, the Tribunal indicated that “given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter” (paragraph 72). Over and above the complex problem of the “Saiga” judgment— one which has nothing to do with this case – this short extract expresses the Tribunal’s fundamental

confidence in the States parties to the Convention, and most especially, in their courts, to treat international law with all respect.

131. Accordingly, given all the evidence which has been provided, which prove in no uncertain manner that the cargo of the “Juno Trader” was neither transshipped nor caught in waters under the sovereignty or jurisdiction of Guinea-Bissau, the Tribunal is requested to demand from the authorities of that State the prompt release of the “Juno Trader” and of its crew, either without posting bond or other financial security, or if, in its opinion, in the name of courtesy and *comitas gentium*, with a symbolic bond or security.

132. It is also true that in the event the Tribunal were to order the posting of a significant bond or other security, the shipowner and the coastal State, whatever the difficulties, would do everything in their power to ensure that the Tribunal or another international court judges the matter on the merits, in the very unlikely event, given their confidence in the wisdom of the Guinean courts, that the latter would nonetheless find the “Juno Trader” guilty. The situation of Guinea-Bissau would not be a very comfortable one in that event. Suffice it to recall that, in the “Saiga” case, which posed real legal problems, the damages awarded by the Tribunal, deciding on the merits, in its judgment dated 1 July 1999, amounted to over 2 million United States dollars, compared to the 400,000 dollars (in addition to the value of the Saiga’s cargo of gas oil), that it had considered “reasonable” in view of the prompt release of the vessel. A “significant” bond set by the Tribunal could then, in the short or long term, work against the interests of the coastal State. There are cases where the Applicant also pleads the Respondent’s case. The case of the “Juno Trader” is one.

133. If the Tribunal, as we hope, grants the present application and orders the prompt release from detention of the vessel and the release of the crew without the posting of any bond or other financial security, it is also to be hoped that it will order the return of the said bond or guarantee to the Applicant. Similarly, even if, alternatively, the Tribunal opts for the principle of bond or security, and the amount which it sets is less than the amount posted by the Applicant, it is hoped that the Tribunal will order the refund to the Applicant of the surplus that the Respondent would have had at its disposal. If the amount of the bond or security is greater than the amount of the security posted, it is hoped that the Tribunal will prescribe the form of the bond or other security to be posted.

**134. ON THE CONFISCATION OF THE CARGO OF THE M/V “JUNO TRADER” (point g of the application)**

135. Minute No. 14 of the Interministerial Commission dated 19 October 2004 confiscates the cargo found on board the “Juno Trader” when it was boarded on 26 September 2004. We have shown to a sufficient extent how singularly unjust this measure is in view of all the evidence that exists concerning the lawful origin of the said cargo. Of course, it is understood that the fate of the cargo and the confiscation to which it was subjected relates, in principle, to the merits of the case and that the court dealing with the prompt release – under Article 292 of the Convention, the Tribunal – might not be concerned with it.

136. Nevertheless, this confiscation seriously complicates the situation of the “Juno Trader”, its owner and crew. Indeed, as we have already stated, the cargo has belonged to the Ghanaian company “Unique Concerns Limited” since 23 September 2004. In accordance with the well-turned phrase of professors René Rodière and Emmanuel du Pontavice (*Droit maritime*, Paris, Dalloz, 11th ed., 1991, p. 266, para. 348), in matters of bills of lading, “the Master who holds the goods has



physical possession of them on behalf of another”. Also, the carrier, as maritime law indicates, is under an obligation of performance”. If the “Juno Trader”, following a prompt release measure, resumes its voyage without the cargo in question, it is possible and even likely that the question of its liability as carrier of the said goods will be raised by the Ghanaian owner. Indeed, pursuant to the Brussels Convention of 25 August 1924, the non-delivery to their destination of the goods on the bill of lading creates a maritime claim to the benefit of the Ghanaian recipients giving them the right, if necessary, to arrest the vessel at its next port of call to [meet] the amount of their financial loss including the cargo and all related expenses. The fact that the same Convention mentions a limitation of liability in the event of “restraint of princes” will not prevent the owner from taking steps to arrest the vessel while waiting for the case to be resolved. Also, specifically, the representatives of the owner of the cargo, through a letter addressed to Mr FLEISCHER, the shipowner’s representative, dated 28 October 2004 (see annex 44), have clearly indicated their intention to take, at the first opportunity, the measures which they deem necessary.

137. When seen from that point of view, a prompt release of the “Juno Trader” ordered by the Tribunal will always be a half measure, since the vessel is still under the constant threat of future arrest. The form of its misfortune will be different but it will still be a misfortune. The sole root of its new misfortune would be the confiscation ordered by the authorities of Guinea-Bissau. The Tribunal cannot allow itself, under Article 292 of the Convention, to take steps which are both abstract and illusory. It will therefore have to rule, even within the context of the release proceedings, on the confiscation of the cargo. The only logical outcome would be for it to order this administrative measure to be rescinded (or for an equivalent action to be taken which it may judge appropriate) so that the prompt release will be meaningful to the “Juno Trader”.
138. Such a measure by the Tribunal is necessary also for another reason. If the “Juno Trader”, further to a prompt release measure, resumes its voyage with the cargo on board, it will now be the authorities of Guinea-Bissau who, if they have not rescinded the confiscation in the meantime, may arrest the “Juno Trader” at the next port of call for transporting stolen goods! The situation would be much the same if in the meantime the cargo at issue had been sold to a bona fide third party on the basis of the public auction of 29 October 2004 (whose outcome remains unknown to the shipowner). To add to this complexity, it is rumoured that the port authorities have not had the means to unload the vessel, as they had initially scheduled for 27 October 2004 and the days following, which implies that most of the cargo is still on board the “Juno Trader”. Once again, to order the prompt release without ordering at the same time that the confiscation be rescinded will prove to be an illusory measure reflecting little credit on proceedings instituted under Article 292 of the Convention.

**139. ON COSTS (point h of the application)**

140. Under Article 34 of the Statute of the International Tribunal for the Law of the Sea, “unless otherwise decided by the Tribunal, each party shall bear its own costs”.
141. This provision obviously does not mention “sentencing” one of the parties to pay the legal costs incurred by the other party, even if one of the parties loses. The philosophy behind this provision seems to be based on the laudable notion of allowing each party to have access to international justice, specifically, to the International Tribunal for the Law of the Sea, without having to fear, besides a possible “defeat”, additional legal costs. The parties must be entitled to defend their legal positions without the Damocles’ sword of those costs hanging over them.

142. However, Article 34 of the Statute itself mentions an exception to the rule. Truth to tell, that exception is not defined from a substantive point of view but only from a procedural one: it is the Tribunal which must, in effect, give concrete expression to this exception if necessary. The sense is nevertheless obvious: the Tribunal shall not be able – nor will it want – to commit an injustice. It may take the “heterodox” decision which is nevertheless provided for in Article 34 of its Statute, if it considers that, given the circumstances, the party whose submissions are rejected was not far from evidencing an abuse of rights in the sense of Article 300 of the Convention.
143. It is suggested that this is precisely the position of Guinea-Bissau in the present case. Ordering it to pay the costs incurred by the Applicant and shown, as provisionally indicated, in annex 45 of its application, would complete the Tribunal’s conclusion whereby, to sum up, the cargo on board the “Juno Trader” could in no way have been caught or transhipped within the exclusive economic zone of that State, whose behaviour is consequently particularly threatening to the future of the freedom of navigation. A decision ordering prompt release with no posting of security or with posting of a symbolic security would not be comprehensible unless accompanied by an order for Guinea-Bissau to pay the Applicant’s costs.

**144. SUBMISSIONS:**

145. Saint Vincent and the Grenadines requests the Tribunal to make the following orders and declarations:
- (a) a declaration that the International Tribunal for the Law of the Sea has jurisdiction, pursuant to Article 292 of the United Nations Convention on the Law of the Sea of 1982 (hereinafter the “Convention”) to hear the application;
  - (b) a declaration that the application is admissible;
  - (c) a declaration that the Respondent has violated Article 73, paragraph 2, of the Convention in that the conditions set by the Respondent for the release from detention of the vessel “Juno Trader” and the release of 19 members of its crew are not authorized pursuant to Article 73, paragraph 2, and are not reasonable in terms of Article 73, paragraph 2;
  - (d) an order requesting the Respondent to release the “Juno Trader” from detention and to release its officers and its crew without posting a bond or any other financial security and, in that event, requesting the Respondent to return the bond or security posted;
  - (e) alternatively, an order requesting the Respondent to release the “Juno Trader” from detention and to release its officers and its crew as soon as the owner of the vessel posts a bond or other financial security in an amount determined to be reasonable by the Tribunal in view of the particular circumstances of the present case;
  - (f) an order, in that last event, prescribing the form of the aforementioned bond or other security;
  - (g) an order requesting the Respondent to rescind the confiscation of the cargo of fish found on board the vessel “Juno Trader”;
  - (h) an order requesting the Respondent to pay the Applicant’s costs.

## LIST OF THE DOCUMENTS CITED AND ANNEXES:

1. Authorizations delivered by the State of Saint Vincent and the Grenadines
2. Registry Certificate of the “JUNO TRADER”
3. Crew list of the “JUNO TRADER”
4. Delivery acceptance reports
5. Letter dated 19/09/04 of the agent of the “JUNO WARRIOR”, ATLANTIC PELAGIC
6. Inspection report, SGS Mauritania of 24/09/04 and letter of 20/10/04 from SGS SENEGAL, to the Correspondent of the company Eltvedt & O’Sullivan in Dakar, TCI AFRICA DAKAR
7. Original bills of lading No. 01-TE, 02-TE, 03-TE issued at Hull on 23/09/04
8. Two photographs of the “JUNO TRADER”, detained at Bissau since 27/09/04, taken on 25/10/04 by Mr Huens de Brouwer
9. Article from the Senegalese newspaper “LE QUOTIDIEN”, issue of 03/11/04
10. Official Bulletin of the Republic of Guinea-Bissau of 22/08/2000
11. Letter of security issued on 10/11/04 by Messrs THE SHIPOWNERS issued on 10/11/04
12. Letter from Mr Malal dated 20/10/04
13. Minute No. 14/CIFM/04 dated 19/10/04
14. Minute No. 12/CTFM/04 of 18/10/04
15. Acknowledgement of receipt of Minute No. 12/CTFM/04 by Mr Tavares at 1000 on 26/10/04
16. Letter from Mr Malal to Mr Tavares of 27/10/04
17. Letter from the Ministry of Fisheries to the port authorities of Bissau of 27/10/04
18. Public notice of the auction of the cargo of the “JUNO TRADER” dated 28/10/04
19. Interview of the Master of the “JUNO TRADER” on 27/10/04
20. Interview of the Second Officer of the “JUNO TRADER” on 28/10/04
21. Interview of the Chief Engineer of the “JUNO TRADER” on 27/10/04
22. Interview of the Radio Officer of the “JUNO TRADER” on 28/10/04
23. Certificate dated 07/11/04 from the Ministry of Fisheries and Maritime Economy, Delegation of Supervision of Fisheries and Marine Control of the Islamic Republic of Mauritania
24. Certificate dated 09/11/04 of the Director of Industrial Fishing to the Ministry of Fisheries and Maritime Economy of the Islamic Republic of Mauritania
25. Sample of stamp usually used for marking cartons of frozen fish aboard the trawler “JUNO WARRIOR”
26. Photographs taken by Mr Huens de Brouwer on the evening of 30/10/04, respectively three in hold No. 1, two in hold No. 2 and two in hold No. 3 aboard the “JUNO TRADER”
27. Safe Manning Certificate of the “JUNO WARRIOR”
28. Letter from Eltvedt & O’Sullivan of 18/10/04
29. Letter from Mr Tavares of 18/10/04
30. Letter of Mr Tavares of 29/10/04
31. Letter from Mr Tavares of 01/11/04
32. Letter of 28/10/04 from Unique Concern Ltd. and letter of the same day from Vasajam Company Ltd to the Lloyd’s agent in Bissau, Mr Rosa
33. Letter of 29/10/04 from Unique Concerns Ltd to Mr Rosa
34. Letter of 01/11/04 from Mr Rosa
35. CIPA report of 08/10/04
36. Receipt dated 03/11/04 from the Treasury of Bissau concerning the payment of the Master’s fine
37. Fax from Mr Oleinikov of 13/10/04
38. “Note of Sea Protest” by the Master of the “JUNO TRADER”
39. Intervention report of 26/09/04 by the Master of the Spanish hospital vessel “ESPERANZA DEL MAR”
40. Distress messages sent by the “JUNO TRADER” and replies received by it

41. Two photographs of the Republic of Guinea-Bissau's fleet of monitoring and inspection vessels for fishing activities, taken on 26/10/04 by Mr Huens de Brouwer
42. One photograph of bullet impact taken by Mr Fleischer on 25/10/04 in the cabin of the Chief Engineer of the "JUNO TRADER" and one photograph of bullet impacts in the portside bridge, taken on the same day by Mr Huens de Brouwer
43. Extract from the web site of International Chamber of Commercial Crimes Services
44. Letter from J. Marr (Seafoods) Ltd. dated 28/10/04
45. Provisional statement of the Applicant's costs

WE certify that a copy of this application and all cited and annexed documents has been communicated to the flag State.

Werner GERDTS,

at Hamburg, 18 November 2004

[signed]

[dated]