INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD FROM 23 TO 24 FEBRUARY 1998

The M/V "SAIGA" (No. 2) Case
(Saint Vincent and the Grenadines v. *Guinea), Provisional Measures*

PROCES-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DU 23 AU 24 FEVRIER 1998

Affaire du navire « SAIGA » (No. 2)
(Saint-Vincent-et-les-Grenadines c. Guinée), mesures conservatoires

Minutes of the Public Sittings held from 23 to 23 February 1998

Procès-verbal des audiences publiques du 23 au 24 février 1998

PUBLIC SITTINGS HELD ON 23 AND 24 FEBRUARY 1998
AT THE CITY HALL OF THE FREE AND HANSEATIC CITY OF HAMBURG

23 February 1998, 10.00 a.m. and 3.00 p.m.
24 February 1998, 2.00 p.m.

Present:

President	Thomas A. Mensah
Vice-President	Rüdiger Wolfrum
Judges	Lihai Zhao
	Hugo Caminos
	Vicente Marotta Rangel
	Alexander Yankov
	Soji Yamamoto
	Anatoly Lazarevich Kolodkin
	Choon-Ho Park
	Paul Bamela Engo
	L. Dolliver M. Nelson
	P. Chandrasekhara Rao
	Joseph Akl
	David Anderson
	Budislav Vukas
	Joseph Sinde Warioba
	Edward Arthur Laing
	Tullio Treves
	Mohamed Mouldi Marsit
	Gudmundur Eiriksson
	Tafsir Malick Ndiaye
Registrar	Gritakumar E. Chitty

Saint Vincent and the Grenadines is represented by:

Mr. Bozo A. Dabinovic,
Commissioner for Maritime Affairs of Saint Vincent and the Grenadines,

as Agent;

Mr. Carl Joseph,
Attorney General and Minister of Justice of Saint Vincent and
the Grenadines,

Mr. Nicholas Howe,
Solicitor, Partner, Stephenson Harwood,
London, United Kingdom,

Mr. Philippe Sands,
Reader in International Law, University of London,
United Kingdom,

Mr. Yérim Thiam,
Barrister, President of the Senegalese Bar,
Dakar, Senegal,

as Counsel.

Guinea is represented by:

Mr. Hartmut von Brevern,

Barrister, Röhreke, Boye, Remé & von Werder,

Hamburg, Germany,

as Agent.

AUDIENCES PUBLIQUES DES 23 ET 24 FEVRIER 1998
A L'HOTEL DE VILLE DE LA VILLE LIBRE ET HANSEATIQUE DE HAMBOURG

23 février 1998, 10 h 00 et 15 h 00
24 février 1998, 14 h 00

Présents :

Président	M.	Thomas A. Mensah
Vice-Président		Rüdiger Wolfrum
Juges	MM.	Lihai Zhao
		Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoly Lazarevich Kolodkin
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		Mohamed Mouldi Marsit
		Gudmundur Eiriksson
		Tafsir Malick Ndiaye
Greffier	M.	Gritakumar E. Chitty

Saint-Vincent-et-les-Grenadines est représentée par :

M. Bozo A. Dabinovic,
commissaire aux affaires maritimes de Saint-Vincent-et-les-Grenadines,

comme agent;

M. Carl Joseph,
procureur général et Ministre de la justice de Saint-Vincent-et-les-Grenadines,

M. Nicholas Howe,
avocat, associé du cabinet Stephenson Harwood,
Londres, Royaume Uni,

M. Philippe Sands,
maître de conférence en droit international, Université de Londres,
Royaume Uni,

M. Yérim Thiam,
avocat, batônnier de l'Ordre des avocats du Sénégal,
Dakar, Sénégal,

comme conseils.

La Guinée est représentée par :

M. Hartmut von Brevern,
avocat, cabinet Röhreke, Boye, Remé et von Werder,
Hambourg, Allemagne,

comme agent.

Public sitting held on 23 February 1998
Audience publique du 23 février 1998

Introduction

The Registrar:
The Tribunal will today hear argument in the Request for provisional measures in respect of the M/V Saiga. The case has been named the M/V "SAIGA" (No. 2) case and it has been entered in the Tribunal's List of cases as Case No. 2.

The Registrar was informed by letter dated 12 February 1998 that the Agent of Saint Vincent and the Grenadines will not be able to be present today. By the same letter the Registrar was informed that his Excellency, Mr. Carl Joseph, Attorney General and Minister of Justice of Saint Vincent and the Grenadines, will head the delegation of Saint Vincent and the Grenadines today.

The President:
This public sitting is being held, pursuant to article 26 of the Statute of the Tribunal, for the oral proceedings in the Request for the prescription of provisional measures submitted by Saint Vincent and the Grenadines in the M/V "SAIGA" (No. 2) case.

On 22 December 1997, Saint Vincent and the Grenadines sent to Guinea a notification instituting arbitral proceedings under Annex 7 to the United Nations Convention of the Law of the Sea.

On 13 January 1998, Saint Vincent and the Grenadines filed with the Registrar of the Tribunal a Request for the prescription of provisional measures in respect of a dispute between the Government of Saint Vincent and the Grenadines and the Government of Guinea which was to be submitted to an arbitral tribunal to be constituted pursuant to Annex VII of the United Nations Convention on the Law of the Sea. The Request for the prescription of provisional measures was filed under article 290, paragraph 5, of the Convention, pending the constitution of the arbitral tribunal.

By Order of 20 January 1998 the Tribunal fixed 23 February 1998 as the date for the opening of the oral proceedings.

On 30 January 1998, Guinea filed with the Registrar of the Tribunal its Response to the Request, pursuant to article 90, paragraph 3, of the Rules of the Tribunal. In the Response, Guinea asked the Tribunal to reject the Request for the prescription of provisional measures.

A Reply was filed by Saint Vincent and the Grenadines on 13 February 1998. In the Reply, Saint Vincent and the Grenadines modified the initial Request of 13 January 1998 and introduced an additional provisional measure to be prescribed by the Tribunal.

On 20 February 1998, Guinea filed with the Registrar of the Tribunal a Statement in addition to its Response of 30 January 1998 in reply to the Request of Saint Vincent and the Grenadines of 13 January 1998 and in reply to the Statement of Saint Vincent and the Grenadines of 13 February 1998.

On 20 February 1998, the President of the Tribunal was informed by a communication from Guinea that the Government of Guinea and the Government of Saint Vincent and the Grenadines had, by an Exchange of Letters, agreed to "transfer to the International Tribunal for the Law of the Sea ... the arbitration proceedings instituted by St. Vincent and the Grenadines by Notification of 22 December 1997." The President was also informed that the two Governments had agreed that the submission of the dispute to the International Tribunal for the Law of the Sea shall be on the following conditions:

(1) The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines [instituting the proceedings];

(2) The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998;

(3) The written and oral proceedings shall follow the timetable set out in the Annex [to the exchange of letters between the two governments, subject to the agreement of the Tribunal];

(4) The International Tribunal for the Law of the Sea shall address all claims for damages and costs referred to in paragraph 24 of the Notification of 22 December 1997 and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal;

(5) The Request for the Prescription of Provisional Measures submitted to the International Tribunal for the Law of the Sea by St Vincent and the Grenadines on 13 January 1998, the Statement of Response of the Government of Guinea dated 30 January 1998, and all subsequent documentation submitted by the parties in connection with the Request shall be considered by the Tribunal as having been submitted under article 290, paragraph 1, of the Convention on the Law of the Sea and article 89, paragraph 1, of the Rules of the Tribunal.

The Agreement between the Government of Guinea and the Government of Saint Vincent and the Grenadines provides that "upon confirmation by the President (of the International Tribunal for the Law of the Sea) that … the [International] Tribunal is prepared to hear the dispute the arbitration proceedings instituted by the Notification dated 22 December 1997 shall be considered to have been transferred to the jurisdiction of the International Tribunal for the Law of the Sea."

By Order of 20 February 1998, the Tribunal decided that it is prepared to hear the dispute instituted by Saint Vincent and the Grenadines against Guinea by the Notification dated 22 December 1997, pursuant to the Agreement of the two governments and on the terms and conditions specified in the Agreement. In particular, the Tribunal ordered:

(1) that the dispute shall be deemed to be submitted to it on 22 December 1997.

(2) The Tribunal further ordered that the Request for provisional measures submitted by Saint Vincent and the Grenadines on 13 January 1998 and the response thereto submitted by Guinea on 30 January 1998 and all other documentation submitted by the parties, the Order made by the President on 20 February 1998 and all communications relating to the Request for the prescription of provisional measures shall be considered as having been duly submitted under article 290, paragraph 1, of the United Nations Convention on the Law of the Sea, and article 89, paragraph 1, of the Rules of the Tribunal.

(3) The Tribunal further ordered that the case be recorded in the Tribunal's List of cases as case number 2, the M/V "SAIGA" (No. 2) case.

(4) The Tribunal has ordered that the written and oral proceedings will, subject to the Rules of the Tribunal and any decisions of the Tribunal, follow the timetable set out in the annex to the Agreement by which the two governments transferred the dispute to the jurisdiction of the Tribunal.

Pursuant to the decisions of the Tribunal, the Request for the prescription of provisional measures by Saint Vincent and the Grenadines is to be dealt with as incidental proceedings in the M/V "SAIGA" (No. 2) case (case number two in the list of the Tribunal's cases). These proceedings are governed by article 290, paragraphs 1, 2, 3, 4 and 6, of the Convention on the Law of the Sea; article 25 of the Statute of the Tribunal and article 89, paragraphs 1, 3 and 5, and the other relevant provisions of Part III, Section C, subsection 1, of the Rules of the Tribunal.

The provisional measures requested by Saint Vincent and the Grenadines in the Request dated 13 January 1998, as subsequently revised in its Reply dated 13 February 1998, are as follows:

(1) that Guinea forthwith brings into effect the measures necessary to comply with the Judgment of the International Tribunal for the Law of the Sea of 4 December 1997, in particular that Guinea shall immediately:

(a) release the M/V Saiga and her crew;

(b) suspend the application and effect of the judgment of 17 December 1997 of the Tribunal de Première Instance of Conakry and/or the judgment of the Cour d'Appel of Conakry;

(c) cease and desist from enforcing, directly or indirectly, the judgment of 17 December 1997 and/or the judgment of 3 February 1998 against any person or governmental authority;

(d) subject to the limited exception as to enforcement set forth in article 33(1)(a) of the 1982 Convention on the Law of the Sea, cease and desist from applying, enforcing or otherwise giving effect to its laws on or related to customs and contraband within the exclusive economic zone of Guinea or at any place beyond that zone (including in particular articles 1 and 8 of law 94/007/CTRN of 15 March 1994, articles 316 and 317 of the Code des Douanes, and articles 361 and 363 of the Penal Code) against vessels registered in St. Vincent and the Grenadines and engaged in bunkering activities in the waters around Guinea outside its 12-mile territorial waters;

(2) that Guinea and its governmental authorities shall cease and desist from interfering with the rights of vessels registered in Saint Vincent and the Grenadines, including those engaged in bunkering activities, to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to freedom of navigation as set forth inter alia in articles 56(2) and 58 and related provisions of the 1982 Convention;

(3) that Guinea and its governmental authorities shall cease and desist from undertaking hot pursuit of vessels registered in Saint Vincent and the Grenadines, including those engaged in bunkering activities, except in accordance with the conditions set forth in article 111 of the 1982 Convention, including in particular the

> requirement that "such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted".

In a Statement in reply dated 20 February 1998, Guinea reiterated its request that the Tribunal should reject all the provisional measures requested by Saint Vincent and the Grenadines.

In conformity with article 67, paragraph 2, of the Rules of the Tribunal, copies of the pleadings and documents annexed thereto are being made accessible to the public as of today. Copies of the Request of Saint Vincent and the Grenadines have already been made accessible.

I note the presence in court this morning of The Right Honourable Mr. Carl Joseph, the Attorney General and Minister of Justice of Saint Vincent and the Grenadines, who is appearing on behalf of the Applicant. I also note the presence in court of Mr. Hartmut von Brevern, Agent of Guinea. I now call upon The Right Honourable Mr. Carl Joseph to note the representation of Saint Vincent and the Grenadines.

Mr. Joseph:
May it please you, Mr. President, Members of the Tribunal. Mr. President, Members of the Tribunal, it is a great privilege for me to be with you today as head of the delegation representing Saint Vincent and the Grenadines. I appear with Mr. Nicholas Howe, Solicitor of the Supreme Court, Maître Thiam, President of the Senegalese Bar and Mr. Philippe Sands, Barrister and Reader of International Law at the University of London, representing Saint Vincent and the Grenadines.

As Attorney General for Saint Vincent and the Grenadines, my presence here today indicates the very great and continuing importance my government attaches to its request that this Tribunal prescribe the provisional measures of protection. It is with great regret that my government has had to institute these proceedings for the prescription of provisional measures of protection pending the final disposal of the substantive matter on its merits.

The President:
Your Honour, if you could just give me a few minutes, I would like the Agent for Guinea to introduce the representation of Guinea before you make your formal submission. Thank you very much.

I now call on Mr. von Brevern, the Agent of Guinea, to note the representation of Guinea. Mr. von Brevern.

Mr. von Brevern:
President, Honourable Judges, first of all I thank you for your instruction that you have prepared and accepted the transfer of the case on the merits, the transfer from the arbitral tribunal to the International Tribunal. Thank you very much.

The representation today will be done by myself. I am sitting there with one assistant, Mr. Hugenberg.

The President:
Thank you very much Mr. von Brevern. The Tribunal will hear the submissions of the Applicant, Saint Vincent and the Grenadines, at this sitting, which will end at 13.00 hours. There will be a short break of fifteen minutes at 11.30.

The submissions of Guinea will be heard at a sitting from 3 o'clock to 6 o'clock this afternoon. At another sitting tomorrow afternoon, both parties will have the opportunity to make replies to the presentations given today.

I now invite The Right Honourable Mr. Carl Joseph to make the submissions on behalf of Saint Vincent and the Grenadines. Your Honour, please.

Argument of Saint Vincent and the Grenadines

STATEMENT OF MR. JOSEPH
COUNSEL OF SAINT VINCENT AND THE GRENADINES

Mr. Joseph:
May it please you, Mr. President, Members of the Tribunal. Mr. President, Members of the Tribunal, it is a great privilege to be with you today as head of the delegation representing Saint Vincent and the Grenadines. I appear with Mr. Nicholas Howe, Solicitor of the Supreme Court, Maître Thiam, President of the Senegalese Bar, and Mr. Philippe Sands, Barrister and Reader of International Law at the University of London representing the State of Saint Vincent and the Grenadines. As Attorney General for Saint Vincent and the Grenadines, my presence here today indicates the very great and continuing importance my government attaches to its request that this Tribunal prescribe provisional measures of protection.

It is with great regret that my government has had to institute these proceedings for the prescription of provisional measures of protection pending the final disposal of the substantive matter on its merits. It was clear after the bond has been posted as ordered by this Tribunal that the Guinean authorities were not responding to efforts to put into effect your decision. Saint Vincent and the Grenadines, therefore, had to move quickly to further secure the interests of vessels flying our flag and to take steps to preserve our rights under the 1982 Convention.

This application was initially submitted under article 290, paragraph 5, of the 1982 Convention on the Law of the Sea on the basis that the merits of the matter were being submitted to arbitration. The arbitral tribunal was to be constituted pursuant to our notification of 22 December 1997. However, recent events have superseded this. The position now is that the parties have agreed that the merits, together with the request for provisional measures, are transferred to this Tribunal. Accordingly, these proceedings are now based on article 290, paragraph 1, of the Convention.

On behalf of the Government of Saint Vincent and the Grenadines I would like to express our sincere appreciation and gratitude to you, Mr. President, and to the Registrar, for the efforts you have made to assist the parties to bring this case fully before this Tribunal. My government is equally appreciative of the expeditious steps which the Court has already taken to order the prompt release of the M/V Saiga and of the fact that the Tribunal has ensured, in accordance with article 90 of its Rules, to give the request priority and to treat it as a matter of urgency.

My government is making this request before the Tribunal has considered the merits of the case, and when the respondent party appears to be challenging the jurisdiction of the Tribunal to preside on the merits, and hence the Tribunal's right to prescribe provisional measures. It is fully conscious of the gravity of this request.

There are a number of reasons why we have been forced to institute these proceedings and return to this Tribunal for a second time. Guinea has failed to give effect to the Judgment of this Tribunal of 4 December 1997. Since that Judgment, Guinea has filed and prosecuted criminal charges before its domestic courts, and obtained judgments which threaten freedom of navigation under the 1982 Convention. And Guinea has in effect confirmed its unilateral extension to the outer limits of its exclusive economic zone - and indeed beyond - the right to apply and enforce customs duties in relation to oil bunkering activities between vessels which do not fly the Guinean flag. These acts have grave repercussions for the State of Saint Vincent and the Grenadines as well as vessels flying its flag. Each of these acts, in our submission, is without any justification in international law, in particular the 1982 Convention.

Moreover, Mr. President and Members of the Tribunal, notwithstanding the pendency of proceedings before this Tribunal on the merits and the application for provisional measures, Guinea has persisted in its determination to apply and enforce its laws in total disregard of the Judgment of this Tribunal and the relevant rules of international law. On 3 February 1998, less than three weeks ago, the Court of Appeal in Conakry upheld the right of the Guinean authorities to arrest the M/V Saiga, an oil tanker flying the flag of Saint Vincent and the Grenadines, for customs and contraband violations. The Court of Appeal condemned the Master of the M/V Saiga to a fine of approximately US$ 15 million, imposed a six month prison sentence, and ordered the confiscation of the vessel as well as its cargo. The Court of Appeal did not vary the citation against the State of Saint Vincent and the Grenadines. I am advised that this means that our State is, in principle, subject to payment of that fine and that vessels flying our flag are liable to arrest in Guinean waters.

In a further regrettable development last week, Saint Vincent and the Grenadines was informed through Guinea's Agent that the Minister of Justice of Guinea had decreed that the M/V Saiga would be released only after payment of the bond had been made. This was a condition for the release of the vessel. The only condition required by the 1982 Convention and this Tribunal was that a reasonable bond be posted. It is our firm belief and opinion that such a bond was in place from 10 December 1997. By its own admission, Guinea accepted the bond posted on 29 January 1998 as being in their opinion "reasonable". There has, therefore, been no justification for Guinea's continued prevarication and their demand for payment of the bond as a condition for the release of the vessel constitutes a further and flagrant violation of the terms of the 1982 Convention and the Judgment of this Tribunal.

The Guinean actions have had grave consequences for the M/V Saiga, for its Master and crew, for its owners and charterers, for the cargo owners, and for Saint Vincent and the Grenadines. Further consequences are threatened. For these reasons my government has decided to make this request as a matter of urgency. The measures requested are set out in paragraph 9 of our Request, which was filed on 13 January 1998. As you are aware, there have been some developments since then, and accordingly we filed a revised Request on 13 February 1998.

Saint Vincent and the Grenadines is a small developing country with a population of 109,000. The country consists of a group of small islands located in the Caribbean and is inevitably and by definition a maritime State. Indeed, the entire economy of Saint Vincent and the Grenadines is greatly dependent upon the country's relationship with the sea. Our national economy has three principal sources of revenue: tourism, agriculture (including fisheries) and shipping. Each is intimately connected with the sea. For this reason Saint Vincent and the Grenadines is especially strongly committed to the maintenance of orderly relations between States in matters relating to the oceans and seas, and to the promotion of the rule of law. Saint Vincent and the Grenadines is an active member of the International Maritime Organisation, and of course a party to the 1982 United Nations Convention on the Law of the Sea. Our commitment to the 1982 Convention is reflected by the enshrinement of its obligations into our domestic law, and, to be absolutely clear on the point, Saint Vincent and the Grenadines does not seek to apply or enforce duties in relation to bunkering activities in its exclusive economic zone, whether in relation to foreign vessels or indeed any vessels. In my government's view an interpretation of the 1982 Convention which supports that approach is wholly unjustified by its provisions.

Saint Vincent and the Grenadines is not only a coastal State. It also has an active merchant shipping fleet registered under its flag, engaged in fisheries, bunkering and other lawful activities on the high seas and in the exclusive economic zone of other States. When Saint Vincent and the Grenadines achieved its independence in 1979, its registered fleet was

small. For the most part the fleet comprised small fishing vessels and ferry boats which were mainly active in Caribbean waters. On achieving independence, the Government took a decision to diversify the country's economic base which had, until that time, been rather narrow. It was considered to be inappropriate to remain too dependent on a single source of income, whether from banana production (our traditional activity) or tourism. The newly independent government took as one of its first steps the decision to establish a maritime register, and to do it under conditions in which its reliability and effectiveness could not be questioned. To this end, the Merchant Shipping Act of Saint Vincent and the Grenadines was passed in 1982. Saint Vincent and the Grenadines wished to be, and wished to be seen as, a flag State which would comply with its international obligations and actively promote and protect the interests of vessels flying its flag, including their rights under the 1982 Convention. Starting from a small base, by the end of 1997 our total registered tonnage reached just over 10 million. That made Saint Vincent and the Grenadines, one of the smallest countries in the world, the seventeenth largest shipping nation.

For these reasons the actions by the Guinean authorities in October 1997 in detaining the M/V Saiga and subsequently arresting her have inspired the gravest concern for my government. This is the third vessel flying the flag of Saint Vincent and the Grenadines to have been attacked by the Guinean customs authorities. The failure by Guinea to comply with your Judgment and the subsequent decision on the part of its customs and criminal authorities to bring proceedings under its domestic, customs and criminal laws against the Master inspired even greater concern. By 10 December 1997 it was clear that the Guinean actions had nothing to do with fisheries. These acts have profound implications for the developing shipping activities of Saint Vincent and the Grenadines, and equally serious is the decision by the authorities of Guinea to name Saint Vincent and the Grenadines, a sovereign State, as the party which is civilly liable for the fine imposed upon the Master of the vessel by the Court of Conakry on 17 December 1997 and upheld by the Court of Appeal on 3 February 1998. The citing of Saint Vincent and the Grenadines in such a fashion constitutes a direct attack on our sovereignty. I am not aware of any precedent. It is a wholly unjustifiable piercing of the corporate veil.

The criminal conviction of the Master and the imposition of the civil liability of Saint Vincent and the Grenadines are acts which remain legally effective and capable of enforcement under Guinean law. I am advised that the citing of Saint Vincent and the Grenadines as civilly liable for a fine in the equivalent of $ 15 million means that any vessel flying the flag of Saint Vincent and the Grenadines is on notice that if it enters the waters of Guinea it is liable to be seized in execution of the Guinean judgment. That fact alone has a potentially chilling effect on the ability of Saint Vincent and the Grenadines to promote its shipping industry. Further, I am advised that there exists the possibility that Guinea could seek to enforce that judgment against the assets of Saint Vincent and the Grenadines itself.

Accordingly, this request for provisional measures is of the gravest importance and utmost urgency to my government. We request these provisional measures to preserve our rights under the 1982 Convention and to restore the situation to that which existed before 29 October 1997, pending the final decision of this Tribunal on the matter. The object of the provisional measures is to suspend the effect of the judgments of 17 December 1997 and 3 February 1998 and to prevent the application and enforcement by Guinea of rights it does not possess under the 1982 Convention. We believe that there exist continuing threats to freedom of navigation posed by the judgments of the Guinean courts and by the action of the Guinean authorities in its exclusive economic zone and beyond.

In bringing these proceedings we seek to protect the sovereign rights of our State and to exercise the necessary protective power for vessels which are registered under our flag, in

particular rights relating to the enjoyment of freedom of navigation and other internationally lawful uses of the sea, as set out in articles 56 and 58 of the 1982 Convention. Saint Vincent and the Grenadines simply could not afford to fail to act in these circumstances. Not to have acted would have significant economic detriment. Mr. President, Members of the Tribunal, not to prescribe these provisional measures would have a chilling effect on our ability to attract further registrations.

Mr. President, Members of the Tribunal, let me turn now to the structure and overview of Saint Vincent and the Grenadines' case. Our oral presentation this morning will consist of three parts.

In the first part, Mr. Nicholas Howe will place the dispute in its factual context, setting out for you the relevant circumstances relating to the seizure and arrest of the M/V Saiga and focusing in particular on developments occurring after your Judgment of 4 December 1997. He will set out the circumstances in which Guinea unjustifiably refused to accept until 3 February 1998 the reasonable bond which Saint Vincent and the Grenadines had posted on 10 December 1997, together with Guinea's recent and unjustifiable attempt to obtain payment of the bond as a condition for the release of the vessel. Finally, he will indicate the factors which lead us to conclude that Guinea is likely to take similar steps against other flagged vessels of Saint Vincent and the Grenadines before this Tribunal gives its judgment on the merits.

In the second part, Maître Thiam will examine the legal and factual situation in Guinea and examine in particular the criminal proceedings and the judgments of 17 December 1997 and 3 February 1998, together with their implications for future Guinean conduct in its exclusive economy zone and in relation both to vessels flying the flag of Saint Vincent and the Grenadines and to Saint Vincent and the Grenadines itself. He will show that events after 4 December 1997 point overwhelmingly to the conclusion that Guinea was in no way motivated by fisheries conservation considerations. He will draw your attention to the fact that the Master was charged with and convicted before the Guinean courts for violations of customs regulations. Maître Thiam will conclude that this Tribunal has *prima facie* jurisdiction over the merits and that accordingly this Tribunal has jurisdiction under article 290, paragraph 1, of the 1982 Convention.

In the third and final part, Mr. Sands will make the legal submissions supporting our request for provisional measures. He will show that Saint Vincent and the Grenadines has a *prima facie* case; that the request is urgent; that a failure to accede to the request would have serious adverse consequences for Saint Vincent and the Grenadines and for vessels flying her flag; and that in all the circumstances the measures requested are reasonable and would preserve the rights of the parties pending a final decision on the merits.

I end, if I may, Mr. President and Members of the Tribunal, by emphasizing once again that this request arises out of an issue which is a matter of the utmost gravity for Saint Vincent and the Grenadines. My government appreciates that this is the first time that this Tribunal has been asked to prescribe provisional measures under article 290 of the 1982 Convention and that accordingly it will wish to consider the request most carefully. In my submission there could be few stronger cases to fall within article 290 of the Convention and article 25 of the Tribunal's Statute. I repeat, Mr. President, this is a matter of the gravest urgency to Saint Vincent and the Grenadines and I respectfully but earnestly request the Tribunal to prescribe the provisional measures in the form presented in paragraph 9 of our Request, as amended to incorporate developments subsequent to its filing. Whatever measures this Tribunal may prescribe, I can assure you that my government will certainly co-operate in their implementation.

Mr. President, may I ask you to call on Mr. Nicholas Howe to introduce the first part of our presentation.

The President:
Thank you very much, Mr. Joseph. As you have suggested, I will now call on Mr. Nicholas Howe to continue with the presentation of the case for Saint Vincent and the Grenadines.

STATEMENT OF MR. HOWE
COUNSEL OF SAINT VINCENT AND THE GRENADINES

Mr. Howe:
Mr. President, Members of the Tribunal, it is an honour to appear before you again as part of the delegation representing Saint Vincent and the Grenadines. The unfortunate events surrounding the M/V Saiga have of course already come before the Tribunal in the article 292 prompt release proceedings last year. Accordingly, I shall not rehearse the events surrounding the detention of the vessel in great detail but shall instead seek to confine what I say first, to a summary of material facts previously before the Tribunal in so far as they relate to this application for provisional measures; and secondly, to supplement those facts with details of the developments that have occurred since the Tribunal gave its Judgment on 4 December. As you will appreciate, these are different proceedings from those of last year, all the more so given the developments that have taken place since that time.

My submissions before you this morning can be divided into three parts: (1) an overview of the facts and circumstances leading up to the Jof this Tribunal of 4 December 1997 in the prompt release proceedings; (2) the events surrounding the posting of the bond pursuant to that Judgment; and (3) the reasons why we fear that such actions on the part of Guinea may occur again at any time. I would emphasize from the outset that it is important to view developments in this matter in the context in which they arose, and not place too much emphasis on how they may appear with the benefit of hindsight. Our final submissions, nevertheless, of course conclude by asking the Tribunal to take into account all matters of which we are presently aware.

Before embarking upon these submissions I will take a few moments to explain the activity at the centre of this dispute, that is "bunkering". This involves the supply of fuel (gas oil) and other provisions necessary for the operation of vessels. As the Members of the Tribunal are probably aware, bunkering is a well established global industry worth millions of US dollars a year to the oil companies involved, both inshore and offshore. Those companies include most of the majors such as BP, Mobil, Shell and Caltex, as well as numerous independent companies amongst which Addax is a prominent player. This is borne out by the two recent editions of *Bunker News*. There is a particularly large market for offshore bunkering. This is widely recognized by, and practised in, the international community, as Maître Thiam will indicate in due course. However, for the moment I would simply like to draw the Tribunal's attention in particular to an article appearing at page four of the December issue of *Bunker News* in the attachments to the Reply. This highlights the West African bunkering market as an emerging market with what it describes as "enormous potential". It is this industry in this region that has been placed in jeopardy by the recent actions of the Guinean authorities.

I start with an overview of the facts and circumstances leading up to the Judgment of 4 December.

The vessel at the centre of the controversy is the M/V Saiga, an oil tanker registered under the flag of Saint Vincent and the Grenadines. The owner of the M/V Saiga is Tabona Shipping Co. Ltd. and she is managed by Messrs Seascott Shipping Ltd. who are based in Glasgow in Scotland. At all relevant times her charterer was Lemania Shipping Group Ltd. The vessel has a Ukrainian Master and crew totalling 24 of Ukrainian and Senegalese nationality. The vessel is insured for a value of approximately US$ 1.5 million and at the material time was carrying gas oil of a value of approximately US$ 1 million belonging to Addax Bunkering Services, a division of Addax BV Geneva Branch. To clarify the point raised at item 11 by the Tribunal in their Annex dated 19 February, the arrangements under

which a bunkering vessel such as the M/V Saiga or the *Alfa* supplies bunkers to clients are touched upon in paragraph 3 of the Statement of Marc Albert Vervaet in the attachments to the Reply. These arrangements may be briefly summarized as follows: a loaded supply vessel will travel from her port of loading through a convenient and safe path so as to ideally return nearly empty to the same or another convenient port in which to reload and recommence her operations. During the course of her journey she will supply the fishing vessels and other customers on that route following the customers' request at a point subsequently arranged by radio or other communication between the Master of the bunkering vessel and the Masters of the fishing vessels at a point which is convenient to both parties bearing in mind the constraints imposed by the charterers of the vessels to ensure the vessels' safety, and usually utilizing established meeting points. The purchase order by the customer could be made pursuant to an ongoing contract of supply or on an *ad hoc* basis, but the meeting point will almost always be arranged on an *ad hoc* basis for that particular supply.

The following facts have been accepted, or at least not denied, by Guinea. At the material times the M/V Saiga served as a bunkering vessel. She supplied gas oil to fishing vessels and other vessels operating off the west coast of Africa including the west coast of Guinea. In the early morning of 27 October 1997 the M/V Saiga crossed the maritime boundary between Guinea and Guinea Bissau and entered the exclusive economic zone of Guinea where she supplied three fishing vessels with gas oil between approximately four o'clock in the morning and 1400 hours. Having bunkered those three vessels the M/V Saiga then proceeded southwards and at approximately 0400 hours on 28 October she was located off the coast of Sierra Leone (beyond its territorial waters) waiting to bunker further vessels. At approximately 0911 hours on 28 October 1997, the M/V Saiga was attacked by two customs patrol boats out of Guinea at a point south of and clearly beyond the maritime boundary of Guinea's exclusive economic zone. To effect the arrest, the Guinean authorities used armed force seriously injuring two crew members of the M/V Saiga in the process. On the same day the vessel was brought into the port of Conakry, the capital of Guinea, where she has been detained ever since. Upon the orders of the local authorities, the Master was forced to discharge the cargo in Conakry over 10-12 November 1997.

I should like to draw the Tribunal's attention in particular to the following points: at no time did the M/V Saiga enter the internal waters, territorial waters or the contiguous zone of Guinea. Indeed, it is our submission that for these purposes it is immaterial whether or not the M/V Saiga engaged in bunkering activities in any area beyond Guinea's territorial sea. Guinea maintains that the bunkering took place within its contiguous zone because they say the point of bunkering was within 24 miles of Alcatraz Island. However, there is no evidence that Guinea has ever declared a contiguous zone or that its territorial waters commence from Alcatraz Island. The point of difference is, in any event, immaterial. The Tribunal will be familiar with the provisions of article 33 of the 1982 Convention concerning the contiguous zone. The effect of those provisions is clear: a State may not apply its customs laws within the outer 12 miles of the zone (the area contiguous with the outer limits of the territorial sea). Within the outer part of the contiguous zone, under article 33, paragraphs 1(a) and (b), a State may only act to "prevent" or "punish" violations of its customs laws that are anticipated to occur or have occurred within the State's territory as delimited by the seaward extent of the territorial sea. It is undisputed that the M/V Saiga never entered Guinea's territory, such that no rights concerning enforcement in the contiguous zone could ever have arisen.

It is also incontrovertible that the vessel was arrested outside of Guinea's exclusive economic zone many hours after the bunkering activities at the centre of Guinea's allegations had ceased. It was also agreed between the parties during the last proceedings that the three fishing vessels bunkered within Guinea's exclusive economic zone were not flying the flag of

Guinea. The Guinean representative confirmed this and stated that those vessels, while flying foreign flags, were permitted to fish within Guinea's exclusive economic zone by virtue of bilateral agreements between Guinea and the relevant flag State. This had been Guinea's position until the Court of Appeal's decision of 3 February 1998, which held, amongst other things, that the three fishing vessels in question, the *Giuseppe Primo*, the *Kritti* and the *Eleni G* were "flying the flag of Guinea". In fact, as accepted during the prompt release proceedings, none of these vessels fly the flag of Guinea.

Guinea failed to respond to attempts to procure the release of the M/V Saiga at the end of October and the beginning of November last year and even refused to provide details of the reasons for the action at that time. Given the unacceptable nature of the situation it was concluded then that the best way forward was for the Government of Saint Vincent and the Grenadines to seek recourse to this Tribunal under the prompt release procedures provided for by article 292 of the 1982 Convention to secure the release of the vessel and her crew. This Tribunal, by its Judgment dated 4 December 1997, ordered that Guinea shall promptly release the M/V Saiga and her crew upon the posting of a reasonable bond or security in the amount of US$ 400,000, having expressly commented that the discharged gas oil shall be considered as a security to be held and, as the case may be, returned by Guinea, in kind or in its equivalent United States dollars at the time of judgment. There was certainly no question at that time that the release should be conditional upon payment of the bond.

I now turn to the events surrounding the posting of the bond pursuant to that Judgment. The events surrounding the posting of the bond are detailed in the Reply of Saint Vincent and the Grenadines submitted to this Tribunal dated 13 February 1998. I would like to summarize the salient events and supplement them with developments since that time.

In its Judgment of 4 December 1997 this Tribunal ruled that the bond for the sum of US$ 400,000 posted by Saint Vincent and the Grenadines be "reasonable". No further elaboration was given or deemed necessary by this Tribunal, and the 1982 Convention offers no guidance on this issue. On 10 December 1997 the bond was posted on behalf of Saint Vincent and the Grenadines in the form of a bank guarantee provided by Crédit Suisse. The guarantee was drafted to accord with international banking practice in a form with which many practitioners of international trade law would be very familiar. The wording of such guarantee reflects the fact that it is not possible to anticipate the precise course of future developments at the time the bond was posted. Because of this it is quite usual for such guarantees to be payable against judgments or awards of a number of possible jurisdictions, for example in England an arbitration or a High Court jurisdiction, given that the parties will not know at the outset precisely which jurisdiction will give the final ruling. In this matter it was unclear at the time that the bond was posted whether the bond should be payable against a final judgment of the court in Conakry, as would probably have been the case if Guinea had proceeded to lawfully prosecute the M/V Saiga for a violation of applicable fisheries legislation in accordance with its fisheries laws as we believe was anticipated by the Judgment of 4 December, or whether the matter might have to return to an appropriate international forum because Guinea proceeded to prosecute the M/V Saiga in an unlawful manner. The relevant provisions of the bond that reflect this are the following, and I quote from the bond:

> Crédit Suisse … hereby GUARANTEE to pay you forthwith on your first written demand in immediately disposa[ble] US$ funds such sum or sums as may be due to you by a final judgment, or if such judgment be appealed or otherwise challenged, by final decision of a final appeal court or tribunal or arbitral tribunal or the Tribunal [which is defined in the bond as "The International Tribunal for the Law of the Sea"] to be due to you ... .

It is our submission that Guinea should have released the M/V Saiga immediately upon receipt of this bond. However, the Agent of Guinea raised a number of concerns he had in a telephone conversation with me on the morning of 11 December. These concerns had been summarized in a fax of that date, but I had not seen the fax at the time of our conversation. We discussed his concerns in some detail and agreed that they could be overcome by my procuring that a further fax be sent directly from Crédit Suisse to his firm clarifying three points, including attaching a translation of the bond in the French language. A fax was duly sent in the agreed terms later that same day. It is our submission that Guinea should have released the M/V Saiga immediately thereafter.

Unfortunately, however, it became clear that Guinea were not responding to our efforts. Initially by his letter in response of 12 December 1997, the Agent of Guinea set out a number of new problems which he maintained constituted reasons why he now considered personally that the bond was unreasonable within the meaning of the Tribunal's Judgment of 4 December, notwithstanding that we had already overcome all of the concerns he had raised the previous day in the manner we had agreed.

It is clear that those reasons constituted the Agent's personal views and were not intended to be ascribed to the Republic of Guinea. Our response to this letter of the same day emphasized our disappointment at the position being taken and concluded that we were preparing an application pursuant to article 126 of the Rules of the Tribunal if the vessel was not to be released the following morning.

Mr. Sands will deal with the precise reasons why this application was not, in the event, pursued. The position of Guinea was subsequently clarified by their Agent and summarized in the faxes of 15 December. These included, and I quote:

> I again would like to make it very clear to you that since December 11 I have not had any reaction or instruction from the Government of Guinea so I am not sure at this very moment that they have seen the French text of the guarantee. Repeatedly I have asked the Government of Guinea to instruct me. As long as this has not been done I am in no way in a position to agree to any wording of the bank guarantee.

My colleague, Maître Thiam, will deal with the further developments in Guinea in more detail. Suffice to say for the moment that it became clear around this time that Guinea was actively taking steps to progress an action before the court in Conakry as quickly as possible and we suspected that it was for this reason that they were not instructing their Agent to address the issue of the bond. Indeed, the oral judgment given at the Court of First Instance in Guinea was given on 17 December, only two days after receipt of the above letter from their Agent. In those circumstances the need to make a further application before the relevant international court gained an increasing urgency, such that it was not considered appropriate to jeopardize the position of Saint Vincent and the Grenadines by possibly making those proceedings subject to a response to an invitation to agree on a court or tribunal to which to submit the provisional measures.

The following developments took place in Guinea over the following weeks: Guinea proceeded to advance the action before the Court in Conakry and the customs authorities of Guinea subsequently attacked two more vessels, the *Poseideon* and the *Xifias*, as detailed in the statement of Mr. Vervaet. Meanwhile Saint Vincent and the Grenadines instituted arbitral proceedings on 22 December and submitted their Request for provisional measures at the earliest opportunity on 5 January 1998.

Doubtless in response to this step we received notification the following day, 6 January 1998, that Guinea were finally addressing the issue of the bond. By this time the vessel and her crew had been in the port of Conakry for more than six weeks. Incidentally, in response to clarification 6 sought by the Tribunal in their Annex of 19 February, it is understood that all members of the crew except for the Master were technically free to leave the vessel over this time. However, for them to have done so would have meant effectively abandoning the vessel in practical terms. This is because of the absence of adequate security arrangements or measures taken by the authorities to ensure the safety of the vessel and her crew at Conakry. In order to protect the vessel, her owners have therefore continued to employ a skeleton crew over this period and subsequently to date.

By their response of 6 January, the Agent of Guinea quotes the reasons why the Minister of Justice could not accept the bond as being reasonable. Those reasons were entirely different from the personal views expressed by the Guinean Agent in his letter of 11 December.

Saint Vincent and the Grenadines responded that it did not accept that any of the objections raised by the Minister of Justice were valid and that they did not justify failure to release the M/V Saiga upon receipt of the bond on 10 December. However, given that the daily running costs of having the vessel idle in Conakry are in the order of US$ 4,000 per day, Saint Vincent and the Grenadines expressed a willingness by letter of 19 January 1998 to accommodate the views of the Minister of Justice in Guinea but without prejudice to its position that the Guinean demands were invalid. In this regard I should also mention that it is unhealthy for an oil tanker to remain idle for long periods of time: numerous problems can arise, including those caused by foreign bodies collecting under her hull and the kind of problems that one could ordinarily expect if a large engine is not run for a long period of time.

The letter of 19 January also requested that Guinea also provide acceptable substitute language in relation to its objections. Such language was provided by Guinea's Agent on 22 January and a revised version of the guarantee was duly forwarded to the Minister of Justice on 29 January as advised to the Agent of Guinea the following day. That same day M/V Saiga was attacked again, this time while in the custody of the authorities of Guinea. We understand that the guarantee was accepted by the Minister of Justice around the time of the hearing of the judgment of the Court of Appeal in Conakry on 3 February. His acceptance of the guarantee is formally confirmed by a letter dated 16 February 1998 from the Director of Customs in Guinea to the Agent in Guinea, a copy of which was first seen by Saint Vincent and the Grenadines only earlier this morning. Notwithstanding this, the vessel has still not been released. As you have seen, Guinea are now demanding payment under the bond before they will allow her to be released.

It is submitted that the bank guarantee forwarded on 10 December fully conformed to the express terms of this Tribunal's Judgment of 4 December 1997. It was a bank guarantee and it was in the amount of US$ 400,000. It also conformed to the implicit terms of the Judgment. It was payable to the Government of Guinea and it was payable upon final judgment or decision if such judgment be otherwise challenged with respect to the claims made by the Guinean authorities in relation to the M/V Saiga. The bank guarantee was issued in a form with which Crédit Suisse and other international banking institutions for instruments of this type would be very familiar and was reasonable within the meaning of this Tribunal's Judgment. Thus it is the contention of Saint Vincent and the Grenadines that all of the conditions of this Tribunal's Judgment, both explicit and implicit, were fully satisfied by the bond posted on 10 December 1997.

The guarantee eventually accepted by the Minister of Justice does not differ in any material respect from the original guarantee and is identical in all areas relevant to the

Judgment of 4 December. We submit that there is nothing that can justify the unacceptable delay on the part of Guinea to release the vessel. Ten weeks have now passed since the original bond was posted and more than three weeks have passed since the posting of the revised bond. Through Guinea's acceptance of the revised bond there was no excuse for failing to release the vessel immediately. It is therefore submitted that Guinea's conduct concerning the bank guarantee and failure to promptly release the vessel constitutes a flagrant violation of this Tribunal's Judgment of 4 December 1997 and a further violation of the 1982 Convention.

Furthermore, by their letter of 17 February 1997, the Minister of Justice for Guinea stated through his Agent that the release of the vessel would be consequent upon the payment of the bond in the sum of $ 400,000. This again is wholly unacceptable and a gross violation of the 1982 Convention and the Judgment of 4 December. Payment of the bond is not a condition of, and has no bearing upon, the release of the vessel. The only factor relevant to the release of the vessel under the Judgment and the 1982 Convention is that a reasonable bond be posted. This condition was fulfilled on 10 December 1997. Further detention beyond that point is totally unjustified.

My colleague Maître Thiam will discuss the proceedings that have been instituted against the Master of the M/V Saiga in the local courts of Conakry in more detail and will address the content of those judgments and their legal consequences. It will become more apparent during that discussion that, while Guinea has put off any developments concerning the bond or the release of the vessel, it has sought to progress those proceedings in Conakry as quickly as possible. However I would like to end this section by mentioning the current position of the Master. Maître Thiam will detail how the Court of Appeal sentenced him to a suspended sentence of imprisonment for six months as a result of which he was technically free to leave Conakry. Nevertheless the authorities in Guinea have refused to return his passport to him and, seemingly in desperation, he has expressly requested that this conduct be brought to the attention of this Tribunal. Indeed, it is believed that he is being effectively held hostage until payment has been made under the bond.

I turn now to discuss the reasons why we fear that such actions on part of Guinea may occur again.

I should like to close by explaining why the conduct of the Guinean authorities throughout this matter has led Saint Vincent and the Grenadines to fear that, in the absence of provisional measures being granted pending a final decision on the merits, Saint Vincent and the Grenadines itself and those vessels sailing under its flag are at risk from similar actions by the Guinean authorities in the future.

Some of these factors have already been alluded to, such as the failure to notify the flag State of the arrest, the unjustifiable delay by the authorities in responding to the concerns surrounding the bond and of course, the apparently endless detention of the M/V Saiga for which there can be no justification. The conditions under which the crew were arrested and detained have also been unacceptable. The crew of the M/V Saiga were not armed and carried no weapons of any kind. The force used by the Guinean authorities in the apprehension of the vessel can therefore in no way be described as being reasonable. Indeed, I understand that the Senegalese crew member injured during the attack in October of last year is still in hospital. Moreover, the M/V Saiga and her remaining crew were attacked by men armed with knives and axes in the port of Conakry again on 30 January, having been left unprotected by the Guinean authorities.

But perhaps even more disturbingly, thorough research conducted since the M/V Saiga was detained reveals that the experience of the M/V Saiga is not an isolated or even very rare experience off Guinea; all that is different is that this is the first time the authorities in Guinea

have directed their actions against such a large vessel. The evidence now available strongly suggests that there is a severe problem with the manner in which the authorities of Guinea are purporting to exercise their customs legislation. Indeed Saint Vincent and the Grenadines has become aware that in recent times no fewer than eight tankers engaged in offshore bunkering activities beyond the territory of Guinea have been attacked by the Guinean authorities. None of these instances have been denied by Guinea. The flags of the other vessels known to have been attacked are set out in an extract from *Lloyd's Register* and reveal that two of those vessels also fly the flag of Saint Vincent and the Grenadines. Incidentally, while this point will hopefully deal with part of the question raised at point 13 of the Annex dated 19 February from the Tribunal, I hope that the Tribunal will appreciate from the above description of how bunkering activities are conducted generally why we have not been able to provide details of the fishing vessels to which these vessels supplied gas oil within the short times available.

Most importantly, the difference between the first experience of the *Napetco 1* in 1993 and the second attack on that vessel in October 1996 detailed in the statement of Mr. Kanu, both attacks being outside the exclusive economic zone of Guinea and within the exclusive economic zone of Sierra Leone, together with the experience of the *Alfa 1* in May 1996 and the experiences of the other vessels detailed in the statement of Mr. Vervaet leading up to the detention of the M/V Saiga, all lead to only one conclusion: that this problem is escalating very rapidly. Having trodden quite softly to begin with, the authorities of Guinea are pursuing increasingly larger and larger vessels for their more valuable cargoes and to extort higher sums to secure their release. The situation for merchant shipping in this area is therefore a grave one and especially so for tankers engaged in bunkering activities as they represent a relatively easy and lucrative target. The Tribunal will note from the statements referred to above that vessels have been instructed to steer clear of Guinea as far as possible. However, bunkering more than two hundred miles from the coast beyond the exclusive economic zone is not practicable. It is apparent that Guinean law purports to be able to prescribe and has no qualms about enforcing its customs laws in this fashion within its exclusive economic zone and beyond and to initiate "hot pursuits" that do not conform to the clear requirements of article 11 of the 1982 Convention. Therefore not only are vessels at risk in general from such attacks, but for the reasons to be explained by Maître Thiam in further detail, there exists a particular danger for vessels flying the flag of Saint Vincent and the Grenadines.

The Tribunal will, I trust, appreciate that this situation may have the effect of curtailing a rapidly expanding and wholly legitimate industry within this region. In addition, by way of an added precaution, owners of vulnerable vessels may wish to register their vessels with another flag administration if they consider Saint Vincent and the Grenadine registered flag vessels to be at particular risk. The obvious implications of this can be drawn from the introduction by the Right Honourable Mr. Carl Joseph, Attorney General for Saint Vincent and the Grenadines, in that the maritime registry business constitutes one of the pillars of the Saint Vincent and the Grenadines economy. This is a matter of the utmost gravity for both Saint Vincent and the Grenadines and the operators of vessels within the vicinity of Guinea that the provisional measures requested and any others the Tribunal may consider relevant, be granted.

Mr. President, that concludes my submissions. May I ask you to call on Maître Thiam to introduce the second part of our presentation.

The President:

Thank you very much, Mr. Howe. It is now almost 11.30. It is convenient for us to break now for 15 minutes. Maître Thiam can then continue his submissions. The sitting will be suspended for 15 minutes, and we will come back at 25 to 12 o'clock sharp.

Short adjournment

The President:
I now call on Maître Thiam as indicated before to continue with the presentation for Guinea.

EXPOSÉ DE M. THIAM
CONSEIL DE SAINT-VINCENT-ET-LES-GRENADINES

M. Thiam :
Monsieur le Président, Messieurs les membres du Tribunal, c'est déjà la seconde fois que je plaide devant votre juridiction. C'est un très grand honneur et je suis toujours ému. Cette émotion est due au respect que m'inspirent vos Excellences, d'abord, et, ensuite, à la gravité de cette affaire et spécialement pour l'Afrique.

Or donc, la République de Guinée soutient que nos demandes en indication de mesures provisoires seraient irrecevables au double motif que d'abord il n'y aurait pas d'urgence et qu'ensuite le cas relèverait de l'article 293, paragraphe 3, de la Convention. Sur l'urgence, nous avons déjà déposé un document qui est explicite et tout à l'heure mon collègue M. Sands fera des observations complémentaires. Je me contenterai donc d'examiner simplement les motifs qui sont invoqués par la République de Guinée pour soutenir l'irrecevabilité des demandes en prescription de mesures conservatoires. Deux motifs sont invoqués : le premier est tiré d'un paragraphe : il s'agit du paragraphe numéro 73 de l'arrêt rendu le 4 décembre 1997 par votre juridiction. On prétend à la lecture de cet arrêt que votre juridiction aurait déjà décidé que cette affaire relève des institutions guinéennes relatives à la pêche et que c'est pour ce motif que le capitaine du navire Saiga aurait été arrêté. Je considère, pour ma part, qu'il s'agit d'un argument qui ne mérite même pas que l'on s'y arrête. Car comment voulez-vous que lorsque votre juridiction, dans ce paragraphe précisément, envoie à la République de Guinée un signal extrêmement fort en lui expliquant, au contraire, qu'il n'est pas possible de considérer que cette affaire relève - en tout cas dans le comportement qui était connu de la Guinée à l'époque - des institutions guinéennes de la pêche; ce n'était pas possible, et maintenant voilà que la Guinée inverse l'interprétation de cet article, de ce paragraphe 73. Je crois qu'il y a là quelque chose sur lequel il n'est pas utile de s'arrêter.

Je voudrais simplement rappeler les commentaires de M. Pierre Pescatore, juge à la Cour de justice des communautés européennes, à propos des signaux que les juridictions comme les vôtres doivent envoyer aux parties. Il s'exprimait ainsi :

> Toutefois, on ne peut pas empêcher le juge d'avoir aussi en cette matière son quant à soi et de considérer le référé en même temps comme une étape dans l'acheminement vers la solution d'un contentieux. S'il est vrai qu'il ne peut pas dépasser le cadre d'une appréciation toute préliminaire dans la limite strictement nécessaire à la justification des mesures provisoires qu'il accorde éventuellement, on constate qu'il profite parfois de cette première approche au fond du litige pour donner aux parties un signal de manière à acheminer l'affaire vers son dénouement final. Ainsi, lorsque l'argumentation présente des faiblesses manifestes, le juge pourra donner des indications qui permettront à une partie attentive de mieux orienter son argumentation ou même de réapprécier les chances de son affaire.

Je ne pense pas que la Guinée ait tiré partie de l'arrêt que vous aviez rendu et je crois donc qu'il est nécessaire qu'un autre signal encore plus fort soit envoyé par votre juridiction à la Guinée.

Mais l'argument principal de la Guinée est fondé sur une affirmation selon laquelle le capitaine du navire Saiga aurait été poursuivi pour avoir violé une loi de 1995 sur la pêche - une loi guinéenne. Je voudrais, avant d'examiner ce motif, voir rapidement avec vous les critères que vous devez retenir pour apprécier *prima facie* de la compétence de la juridiction qui sera appelée à statuer sur le fond du litige, c'est-à-dire votre juridiction. Ce critère réside

dans les dispositions mêmes de l'article 297, paragraphe 1 de la Convention. Lorsque vous lisez cette disposition et lorsqu'on en fait simplement une interprétation purement littérale, on constate qu'il est dit que le Tribunal peut être saisi lorsqu'il est allégué qu'une partie ou un Etat côtier a violé les dispositions de la Convention relatives à la liberté de navigation. Lorsqu'il est donc allégué, simplement lorsqu'il est allégué. Qui allègue ? Sinon le demandeur ? Personne d'autre. C'est à nous d'alléguer. Un tel critère ne vous permet pas de rechercher autre chose, de rechercher la compétence *prima facie* du Tribunal autrement que dans les allégations de l'Etat demandeur. Cela implique qu'il faut de toute façon écarter les déclarations de la Guinée.

Mais il est vrai que, même si l'on doit voir les allégations, et uniquement les allégations de l'Etat demandeur, on peut quand même se poser une question : faut-il simplement constater que dans les allégations il y a une adéquation entre les affirmations et le texte qui sert de base à la compétence ? Ou est-ce qu'il faut aller au-delà pour voir s'il y a des éléments de rattachement entre les allégations et le texte qui est invoqué à la base des poursuites ? Je parle des poursuites judiciaires. Si on prend la deuxième solution et que l'on estime que vous devez vérifier à ce stade de la procédure des éléments de rattachement entre les allégations de l'Etat de Saint-Vincent-et-les-Grenadines et l'article 297, paragraphe 1, de la Convention, cela voudrait dire que votre juridiction va prendre, alors qu'elle statue sur des mesures provisoires, des critères beaucoup plus élevés que les critères qui seront adoptés lorsqu'elle va examiner l'affaire au fond. Car enfin, si vous examinez l'affaire au fond, lorsque vous examinerez l'affaire au fond, qu'est-ce que vous pourrez faire ? Vous direz : l'Etat de Saint-Vincent-et-les-Grenadines allègue que l'Etat de Guinée a violé la Convention des Nations Unies. Nous allons vérifier ce point. Nous sommes compétents, nous allons le vérifier. Et puis, lorsque vous allez le vérifier vous direz : eh bien, c'est vrai, ou c'est faux. Si vous dites que c'est faux, vous n'allez pas vous déclarer incompétents, vous allez simplement décider de débouter l'Etat de Saint-Vincent-et-les-Grenadines.

Donc, au jour d'aujourd'hui, si vous décidiez déjà de vérifier les éléments de rattachement, c'est-à-dire de vérifier les faits, pour statuer simplement sur la compétence *prima facie*, vous adopteriez des critères supérieurs à ceux que vous seriez amenés à adopter au moment de l'examen de cette affaire au fond.

Ensuite, la jurisprudence que j'ai pu voir montre d'une manière constante que l'examen du sérieux des moyens n'a pu être effectué. Excusez moi. L'examen du sérieux des moyens de l'Etat demandeur n'a jamais été effectué à propos de l'examen des critères de compétence, mais uniquement quelquefois dans certaines jurisprudences, et ce n'est pas la jurisprudence de la Cour internationale de Justice, mais celle peut-être de la Cour des communautés européennes, pour examiner le fond des demandes. Je parle évidemment des demandes en prescription de mesures conservatoires. Donc, je pense qu'il suffit, pour que votre juridiction constate une compétence *prima facie*, qu'elle se fonde sur nos allégations et sur le texte que nous avons invoqué et il est évident que le texte de l'article 297, paragraphe 1 que nous avons invoqué justifie pleinement la compétence.

Mais subsidiairement, si vous décidiez d'examiner néanmoins les éléments de rattachement entre les faits et la base textuelle qui est invoquée pour la compétence, j'aurais quelques observations à faire.

La République de Guinée soutient que le capitaine du navire Saiga a été poursuivi pour avoir violé une loi sur la pêche. De quels faits fait-elle une telle déduction ? Aucun, strictement aucun. Et l'examen que vous pourriez faire de cette affaire vous amènera obligatoirement à la conclusion inverse. D'abord, parce que le navire Saiga a été poursuivi, arraisonné et conduit jusqu'au port de Conakry par une brigade mobile des douanes guinéennes. C'est la douane. Les faits ont été constatés uniquement par un procès-verbal des

autorités douanières. Les autorités douanières chargées de la pêche, les autorités guinéennes chargées de la pêche ne sont jamais intervenues et n'ont jamais fait le moindre grief au navire Saiga et à son capitaine. Aucunes autres autorités guinéennes ne sont intervenues dans cette affaire que les autorités douanières. Le capitaine du navire Saiga a été poursuivi et condamné simplement pour une prétendue fraude douanière. Les citations ont été délivrées pour une fraude douanière. Et malgré l'abondance de textes qui ont été cités, on ne trouve aucun texte relatif à la pêche dans ces citations, ni dans les jugements du tribunal de première instance de Conakry ni dans l'arrêt de la cour d'appel de Conakry. Même dans la citation, la seule qualification qui a été faite en dehors de la citation de multiples textes, la seule qualification qui ait été donnée aux faits c'est « contrebande », contrebande sur des produits prohibés.

La confiscation du navire Saiga a été ordonnée par application des seules dispositions du code des douanes. Sa cargaison a été confisquée elle aussi, saisie d'abord et ensuite confisquée, uniquement sur la base du code des douanes. Elle avait été vendue avant le jugement définitif du tribunal de Conakry et avant l'arrêt de la cour d'appel de Conakry sur la base des dispositions de l'article 170, paragraphe 2, du code des douanes qui dit que l'on peut vendre avant jugement les denrées périssables - ce qui n'était d'ailleurs pas le cas ici, mais il semblerait que pour la Guinée ce n'était pas important.

La loi de 1995 qui a été invoquée de l'autre côté de la barre, l'ordonnance du 23 février 1985 qui est évoquée également de l'autre côté de la barre, n'ont jamais été produites et n'ont été invoquées nulle part au cours de la procédure.

Le texte fondamental qui a été invoqué, qui est une loi du 16 mars 1994, est une loi qui est intégrée dans le code des douanes. Ce n'est pas une loi à part du code des douanes, mais c'est une loi qui est intégrée dans le code des douanes, puisque son article 10 dit ceci : la présente loi modifie et complète les dispositions des articles 365, alinéa 2, du code pénal et 53, 60, 62 et 314 du code des douanes. C'est donc bien une loi douanière. En plus cette loi prévoit des peines de prison. Or les dispositions de l'article 73, paragraphe 3, de la Convention excluent que l'on puisse prévoir des peines de prison justement quand on agit dans le cadre de l'article 73 comme le prétend la Guinée. Et la Guinée a condamné expressément le capitaine du navire Saiga à six mois de prison, même si c'est avec sursis. Il a été condamné à six mois de prison, ce qui est manifestement contraire aux dispositions de cet article 73 de la Convention. Alors on ne voit pas sur la base de quels faits la Guinée pourrait prétendre que le capitaine du navire Saiga a été poursuivi et condamné pour des activités de pêche.

Mais, même en droit, ce n'est pas possible. Et c'est bien parce que c'est impossible que la Guinée n'a pas pu le faire. Ce n'est pas possible parce que la Convention l'interdit. C'est ce que nous affirmons. Ce n'est pas possible non plus parce que la Guinée n'a pris aucune disposition législative actuellement applicable allant dans le sens de ses prétentions. Elle a pris, il est vrai, des dispositions dans le code de la marine marchande; notamment dans ses articles 4 et suivants, 13, 16 relatifs à la zone contiguë - j'insiste sur ce point, les articles 16 et suivants relatifs à la zone contiguë - et les articles 40 et suivants relatifs à la zone économique exclusive. Mais ces textes restent des textes très généraux qui ne prévoient aucune infraction pénale. Ils n'étendent pas la législation douanière de la Guinée au-delà de la mer territoriale et ils n'interdisent pas les activités de soutage. Ils ne les lient pas aux activités de pêche.

Dans ces conditions, je ne vois vraiment pas comment la Guinée, qui n'a pas produit - je le souligne encore - la loi de 1995 et l'ordonnance de 1985 qu'elle invoque, pourrait prétendre en droit que ses affirmations seraient fondées. La réalité, je vais vous la dire. C'est que la Guinée a commis un acte que l'on peut qualifier, que l'on doit même qualifier d'acte de pseudo piraterie. Nous savons que ces actes, à plusieurs reprises on attendait de les

appréhender. Je voudrais citer à cet égard la déclaration du Congrès de Paris du 16 avril 1956, la Conférence navale de Washington de novembre à février 1921, l'article 3 du Traité dit Résolution de route, l'Arrangement de Lyon du 14 septembre 1937 et son Accord additionnel du 17 septembre 1937. Ce sont tous des textes relatifs à la guerre et relatifs à la piraterie d'Etat. Le président Roosevelt lui-même, en septembre 1940, avait déclaré qu'il fallait détruire les sous-marins ennemis comme - je cite - « moyen de défense contre les attaques de piraterie perpétrées contre les navires de commerce en violation du droit international ».

Donc, c'est vrai qu'au jour d'aujourd'hui la Convention qui nous préoccupe a repris des définitions assez vieillissantes sur la piraterie qui excluent que l'on puisse considérer qu'un Etat se comporte comme un pirate. Mais, elle a, précisément dans l'article 297, paragraphe 1, de la Convention, prévu que ces actes sans être qualifiés de piraterie puissent relever des dispositions que nous nous invoquons. Je reste donc absolument persuadé que votre juridiction se déclarera compétente.

Ceci étant, je voudrais dire deux mots sur les condamnations que nous avons subies en Guinée, pas nous mais le capitaine du navire Saiga. Dans une note assez détaillée, l'avocat du capitaine du navire Saiga a expliqué toutes les violations qu'il a pu relever des lois guinéennes, notamment sur les droits de la défense et en ce qui concerne les lois de fond.

Sur les droits de la défense, l'arrêt de la cour d'appel qui est produit au dossier que nous avons fourni est assez extraordinaire. Il dit par exemple, alors que le capitaine du navire Saiga se plaignait de n'avoir pas pu communiquer avec ses avocats jusqu'au jour de l'audience, cela semble quand même évident à nous tous que quelqu'un qui comparait pour un délit aussi grave qu'une fraude douanière doit pouvoir communiquer avec son avocat. Les avocats se plaignent à l'audience, le prévenu se plaint à l'audience et que répond la cour d'appel ? Ah mais vous savez, puisque les avocats ont pu déposer des notes et des conclusions, c'est donc qu'ils ont communiqué avec le capitaine du navire Saiga. C'est assez extraordinaire.

Sur le fond, je ne veux pas relever tout ce que vous savez déjà puisque c'est dans le dossier, mais sur le fond, on note un seul argument de la Cour d'appel de Conakry pour prétendre que nous aurions commis une fraude douanière dans la zone économique exclusive et cet argument, curieusement, vous l'avez noté, il est tiré non pas de la loi guinéenne, mais d'un article de la Convention des Nations Unies sur le droit de la mer, et cet article, ce n'est pas n'importe lequel c'est l'article 111 de la Convention sur le droit de poursuite. La cour d'appel dit : « Attention. Puisque l'article 111 de la Convention des Nations Unies donne compétence aux Etats de poursuivre des navires et que la poursuite doit commencer dans la mer territoriale cela veut dire que nous avons compétence pour appliquer le code des douanes au-delà de la mer territoriale. » C'est un raccourci que personnellement je n'arrive pas à comprendre. Je vous souhaite bonne chance si vous essayez de le comprendre. Moi, personnellement, je ne vois pas comment. Mais c'est un raccourci extraordinaire et il est d'autant plus extraordinaire que votre juridiction dans son arrêt du 4 décembre 1997 avait déjà expliqué à la Guinée que l'article 111 ne pouvait pas être appliqué. Et j'ai pu lire les opinions divergentes, je n'ai rien vu qui concernait un avis divergent sur ce point en particulier. La Guinée n'avait pas le droit d'exercer le droit de poursuite de l'article 111 dans les conditions qui ont été les conditions de cette affaire; elle n'avait pas le droit de le faire. Votre juridiction le dit. N'empêche que la cour d'appel de Conakry, elle, décide que, oui, l'article 111 permet de faire une extension de l'application du code des douanes guinéennes au-delà de la mer territoriale.

Je crois que cela est assez extraordinaire et je ne peux que trouver la réponse dans un article de presse qui est paru en Guinée qui est intitulé « La justice en panne ». Cet article cite - et c'est important de le noter - les propos du procureur de la République de Conakry et cet

article n'a jamais été démenti. C'est un article récent - il est de ce mois-ci - il est du 9 février 1998. Cet article n'a jamais été démenti et le journaliste n'a pas été poursuivi. Que dit-il : « Les excès et carences de la police. Les policiers sont insuffisants », etc. Et ensuite en parlant de la justice : « Les décisions de justice sont caractérisées - c'est moi qui l'ajoute - corruption généralisée, incompétence, ignorance. » Voilà ce que dit un Guinéen journaliste sur sa justice en citant les propos du procureur de la République de Conakry.

Alors, en vous quittant, la dernière fois, je vous avais parlé d'insécurité judiciaire. Je sais que je soupçonne que peut-être certains d'entre vous n'avaient pas compris ce que j'avais voulu dire, mais ce que j'avais voulu dire c'est cela. Alors que votre juridiction avait envoyé un signal très fort disant à la Guinée : « Attention ! On ne peut pas se trouver dans le cadre d'une police douanière, d'une répression d'un délit douanier; ce n'est pas possible », vous l'avez dit. Je crois que c'est clair dans l'article 73 qui est invoqué et pourtant, aussitôt sortis de cette salle ils se sont dépêchés de nous envoyer une citation non seulement au capitaine du navire Saiga et à notre Etat. Ils se sont dépêchés de nous citer à comparaître pour des délits douaniers. C'est extrêmement grave. Alors, je voudrais terminer rapidement puisque le temps m'est compté et M. Sands doit s'impatienter, en apportant quelques éclaircissements ou quelques réponses aux éclaircissements demandés par le Tribunal, notamment sur l'effet de la citation qui a été délivrée à l'Etat de Saint-Vincent-et-les-Grenadines.

Vous pouvez le constater vous-mêmes, l'arrêt de la cour d'appel de Conakry ne met pas hors de cause un Etat qui a été appelé à l'audience, qui est donc lié par le lien d'instance. Nous n'avons pas été mis hors de cause. Et cette justice décriée là, par les Guinéens eux-mêmes, peut à tous moments nous dire comme nous l'avons affirmé : « Mais écoutez, vous êtes responsables pour les 15 millions de dollars » et cette justice qui refuse une caution parfaitement valable, qui a finalement accepté cette caution et qui malgré le fait qu'elle a accepté la caution nous dit : « Il faut payer d'abord avant qu'on libère le navire », qui jusqu'à présent refuse que le capitaine du navire Saiga quitte le territoire de la Guinée, cette justice-là peut à tout moment saisir un autre navire battant le pavillon de l'Etat que je représente aujourd'hui. Il y a là effectivement quelque chose d'extrêmement grave.

Et puis, sur les autorités chargées de la pêche en Guinée, il est évident que cela ne peut pas être les autorités douanières. Il appartiendra à la Guinée de vous apporter les éclaircissements. Je crois pour ma part pouvoir vous dire qu'il s'agit du Ministre chargé des pêches. Mais il ne s'agit sûrement pas du Ministre des finances ni des autorités douanières.

En m'excusant peut-être d'avoir été trop long, je m'en tiens là pour l'instant et je vous dépose un petit résumé des propos que je viens de tenir devant vous.

The President:
Thank you. That will be taken from you by the Registrar. Thank you very much, Maître Thiam.

May I now invite Mr. Philippe Sands to conclude the presentation for Guinea.

STATEMENT OF MR. SANDS
COUNSEL OF SAINT VINCENT AND THE GRENADINES

Mr. Sands:
President, Members of the Tribunal, it is a very great pleasure and privilege to appear before this Tribunal for the first time, particularly since this is the first occasion upon which the Tribunal has been asked to prescribe provisional measures pursuant to the powers granted to it under article 290 of the 1982 Convention.

This Tribunal, in the context of this request, joins the significant and growing number of international jurisdictions which have been given authority by the international community to recommend, to indicate or, in your case and that of the European Court of Justice, to prescribe legally binding provisional measures.

In this presentation I will set out the submissions of Saint Vincent and the Grenadines as to why it considers that the present circumstances justify fully the prescription of provisional measures. First and foremost, they are necessary to preserve the rights of the parties. They are necessary as a matter of urgency. They are needed to prevent further irreparable harm and they are needed to prevent the further aggravation of this unfortunate dispute. I will deal with each of these points in turn briefly but, before doing so, it may be appropriate to recall the more general legal context within which this request is being made.

As many of you will know far better than I, provisional measures have a well-established and widely recognized place in the practice of international courts and tribunals. As far back as 1907, the Convention for the Establishment of the Central American Court of Justice gave that body the power to "fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in status quo pending a final decision". The Statute of the Permanent Court of International Justice allowed it to indicate provisional measures, and it did so on numerous occasions between 1927 and 1939. The 1928 General Act for the Pacific Settlement of Disputes provided that any court or tribunal having jurisdiction under that Act "Shall lay down within the shortest possible time the provisional measures to be adopted" and that the "parties shall be bound to accept any such measures". Of course, as is well known, the Statute of the International Court of Justice provides in article 41 that the Court has "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

The list does not end there. The European Commission of Human Rights, established under the 1950 European Convention, may "indicate to the parties any interim measures the adoption of which seems desirable in the interest of the parties ..." and by article 186, the European Court of Justice "may in any case before it prescribe any necessary interim measures". Similar powers are provided for in respect of the Inter-American Commission of Human Rights, and the African Commission for Human and Peoples' Rights.

And in the commercial world also, the need for international adjudicatory bodies to maintain the status quo and to preserve prospective rights is reflected, for example, in the 1965 Convention for the Settlement of Investment Disputes, ICSID, between States and Nationals of Other States, which provides that any ICSID arbitral tribunal may, if it considers that the circumstances require it, recommend any provisional measures which should be taken to preserve respective rights of either party. Indeed, that should be a provision which is familiar to my learned friend, the Agent of Guinea, since Guinea itself has invoked it in an ICSID arbitration which, unlike this dispute, did involve the Ministry of Fisheries. There are numerous other examples of international bodies authorized to order interim measures of relief and each and every one of these bodies has done so.

I begin with this background to illustrate that there is nothing exceptional about the power to order or indicate provisional measures. It is in this context of an established practice that you face your task. Even if provisional measures are not an everyday occurrence they are certainly not extraordinary. As the *cour d'appel* of Rennes, in France, put it in endorsing Guinea's views in a related application to that ICSID arbitration before the French courts:

> It is accepted under international law that parties must refrain from taking any steps which might prejudice the enforcement of any future decision [of an international tribunal] and, in general, not take any action of whatever nature which could aggravate or enlarge the dispute.

That is, as you will see from the authorities which I have cited, an endorsement of the Guinean position in that application. As Mr. Laurence Collins put it in his Hague lectures, which has exhaustively analyzed international practice on provisional measures in a most comprehensive manner:

> The interim protection of rights is no doubt one of those general principles of law common to all legal systems.

It is in the context of this established practice and of this general principle that the Tribunal for the Law of the Sea will join a distinguished company, determining in this case initially the path which it is to take in defining in which circumstances it will be prepared to prescribe provisional measures. Of course it does so in relation to the substantive rights of the parties which it, the Tribunal, is called upon to protect, namely those arising under the 1982 Convention. The conditions under which provisional measures may be prescribed are set forth in article 290 of the 1982 Convention, its Annex 7, and the Rules which you have adopted last year, in particular articles 90 to 95. It is these provisions which you are called upon to apply to the facts of this case.

When we first requested the prescription of provisional measures in our Arbitration Notification of 22 December 1997, it was envisaged that the merits would be adjudged by an arbitral tribunal. Accordingly, the request first submitted on 5 January 1998 was based on paragraph 5 of article 290. With the assistance of the President and the Registrar the parties have agreed to transfer the proceedings on the merits to this Tribunal. I would like to join the Attorney General in thanking them personally for their willingness to assist in rather difficult circumstances over the past few weeks.

As the two parties have now been able to conclude an agreement allowing the merits to be heard by this Tribunal, this request is now based upon article 290, paragraph 1, of the Convention. It is true that there may be certain differences between these two paragraphs textually but to our mind these differences are essentially academic. For all practical purposes the standards and the tests they apply are the same but the material difference is one of context and it is an important one: this Tribunal can take its decision on provisional measures safe in the knowledge that it and it alone will address the merits of this dispute and that the appreciation of fact which falls upon you to apply will not go to another body.

The background to the negotiation of article 290 demonstrates that the principle that this Tribunal should be empowered to prescribe provisional measures did not meet with any significant resistance in the negotiation of the 1982 Convention. In 1975 an informal Working Group was charged with preparing appropriate language to establish the conditions governing the grant of provisional measures. The Working Group decided to depart from the wording of the Statute of the International Court of Justice by recommending that, unlike that Court, this

Tribunal would have the power to take legally binding measures of a provisional nature. The Working Group apparently considered the term "indicate", as used in the Statute of the International Court of Justice, to be insufficient: it did not sufficiently clearly convey the binding character of provisional measures; it had led, considered the Working Group, to further differences about the obligation to comply with those measures; and also according to the Working Group in its Report, it had resulted in non-compliance by States with the measures indicated. The Working Group therefore agreed that the word "prescribe" should be used and that it should be explicitly stated that the prescribed measures would be binding upon the parties to the dispute. Apparently this idea originated in an earlier proposal of 1973. The text of the Convention, as adopted, states clearly that this Tribunal will "prescribe" rather than merely "indicate" provisional measures, and that the parties to the dispute shall comply promptly with any provisional measures prescribed under this article. There is therefore no doubt that the provisional measures we have asked you to prescribe will be legally binding and, like those, for example, of the European Court of Justice, capable of producing enforceable legal effects. This means necessarily that the prospects for compliance with any provisional measures which you may prescribe are markedly improved. This is an aspect which was not lost upon us in deciding to embark upon this route following the posting of the bond on 10 November 1997 which did not, unfortunately, lead to the release of the M/V Saiga.

Let me turn now to the measures which we have requested. Here I feel I must begin with an apology and then an explanation. The apology relates to what might appear to be the somewhat dynamic nature of our request. Perhaps it is inevitable that with cases such as this, where the facts change fast and unexpectedly, the precise terms of the request sought may move somewhat. The explanation for that is this.

The Notification of Arbitration, in which the request first saw the light of day, was prepared on 22 December 1997. In fact, we had originally envisaged returning to this Tribunal with an application for interpretation of your Judgment of 4 December 1997 under article 126 of the Regulations. Indeed I was instructed to prepare a draft, and a draft was prepared and was ready for submission on 15 December, very shortly after your Judgment when it became clear that Guinea was raising an issue about whether the bond was reasonable.

During my informal discussions the following day with the President it became apparent that such an application might not necessarily benefit from the expedited procedure available for prompt release proceedings. The day after that, on 17 December, the *tribunal de première instance* of Conakry gave its rather surprising judgment which confirmed our growing fear that the dispute went beyond a matter of mere interpretation of the reasonableness of the bond and extended more broadly.

In those circumstances we felt bound to take a decision to initiate proceedings on the merits, which would inevitably also raise issues about whether the bond was in conformity with the Judgment of 4 December. This explains why, as at 22 December 1997, the focus of Saint Vincent and the Grenadines was very much on the question of Guinea's obvious non-compliance with your Judgment of 4 December. The Request for provisional measures was initially submitted to you, as Mr. Howe explained, on 5 January and formally submitted on 13 January. After 22 December, certainly after 13 January, there had been a number of significant new developments, as described to you by Mr. Howe and Maître Thiam. These have necessitated minor amendments including the addition of a request relating to the exercise of hot pursuit, which is textually minor but substantively terribly important to us.

I must confess that over the last few weeks we were rather expecting and even hoping to have to make a further amendment. It is a matter of very great regret to us that we are not able to inform you today that the M/V Saiga has been released and that the request relating to

that part of the provisional measures is moot. That, unfortunately, is not the case, and we therefore continue to make the request in the terms in which it has been set out, asking that as a provisional measure, and I will come back to this, the release of the vessel and the crew be prescribed.

The request we make is, therefore, that which you will find at the end of the Reply we submitted on 13 February 1998 and it asks you to prescribe provisionally, pending your Judgment on the merits, that Guinea takes steps to preserve our rights pending final judgment, namely by immediately releasing the vessel and crew as there exists no justifiable basis for not doing so; secondly, not taking any steps to enforce the judgments of 17 December or 3 February; thirdly, respecting the rights of Saint Vincent and the Grenadines to freedom of navigation in the exclusive economic zone; and fourthly, undertaking hot pursuit only in accordance with the strict conditions set out in article 111 of the Convention.

In this context I must say that we were most grateful for the request for clarification set out at point 8 of the Annex which was given to us by the Registrar on Friday, the Request for Clarification. This does allow us to clarify an understandable misconception. The measures requested are provisional measures. They are intended to preserve the rights of the parties pending final judgment on the merits by this Tribunal. None of the measures is intended to implement the Judgment of the Tribunal of 4 December or seek to force compliance with that Judgment. There is an important distinction between the two and I appreciate that the chapeau in paragraph 1 of our original Request might have given a different sense. So for the avoidance of doubt, when the Attorney General reads our final submissions tomorrow afternoon, he will introduce an appropriate change to that chapeau to make it absolutely clear what we seek is the preservation of rights, not the implementation of the Judgment as such.

In its response of 30 January, Guinea claims that the measures we have requested are not properly of a kind to be granted by way of provisional measures. In our Reply of 13 February we set out numerous examples illustrating that other international courts and tribunals are quite prepared to indicate or prescribe provisional measures requiring the addressee to, for example, refrain from adopting new legislative, administrative or judicial measures, or enforcing existing ones as well as protecting private commercial interests. In this respect the request has not differed materially from previous requests. It does not really, in that sense, break new ground but merely inscribes itself within a well-established international practice. This applies equally to the request concerning the release of the vessel as a provisional measure which I also noted was subject to a request for clarification at point 8. We see no material difference of principle between this request and that made, for example, by the United States for the release of all hostages of US nationality and the facilitation of their prompt release and safe departure in the case concerning US Diplomatic and Consular staff in Tehran, a request which was fully acceded to by the International Court of Justice in 1979. If that analogy was powerful when we originally made the request on 22 December, it is all the more so today, since Guinea announced last Friday that it would only release the vessel and its crew upon payment of the $ 400,000 bond. The vessel and the crew are, in effect, now hostages and it is entirely in order for you to prescribe their release as provisional measure to preserve the rights of Saint Vincent and the Grenadines, especially since Guinea now clearly considers the terms of the bond to be reasonable.

The measures we request provisionally are entirely different from the claim we make in respect of the merits, which you will find at paragraph 24 of the Arbitration Notification and which is expressly referred to in our Agreement of last Friday referring the merits to this Tribunal. We are not seeking, for example, “to obtain an interim judgment in favour of a part of the claim”, as occurred, for example, in the Chorzów Factory case. In that case the

applicant State sought to obtain from the court a final judgment on part of a claim for a sum of money to recover. That was quite rightly rejected by the Permanent Court. We are seeking today not damages or any determination on the merits other than that we have a good *prima facie* case on which to achieve the provisional measures that we seek. What we are seeking are provisional measures to preserve the substance of the rights which we claim *pendente lite*, which by their nature relate to the substance of the case. They are quite appropriate, contrary to what Guinea says, and there is a long and similar practice of measures of this type.

Let me turn then to the first requirement justifying provisional measures, namely that the measures must be "appropriate under the circumstances to preserve the respective rights of the parties … pending the final decision [on the merits]", the test of article 290, paragraph 1. The formulation is similar to those applied by other international courts and tribunals, whether in their statute or in their regulations or as developed in their practice. There is practice elsewhere which I have referred you to, and will refer you to. We appreciate, of course, that such practice does not in any way constrain you on the path which you are to take in this case. Nevertheless, practice may be of some assistance in indicating how other international bodies have dealt with similar issues. It is, of course, with this understanding that I proceed in referring occasionally to prior practice from other places.

The very first request for the indication of interim measures to be made to the Permanent Court of International Justice was some 70 years ago in the Sino-Belgian Treaty Case. That case concerned a difference of view between Belgium and China as to whether the treaty of friendship, commerce and navigation concluded on 2 November 1865 between Belgium and China was still in effect. In his order of 8 January 1927 the President of the Court, Max Huber, stated:

> [T]he object of the measures of interim protection to be indicated in the present case must be to prevent any rights [under the 1865 treaty] from being prejudiced.

Applying that test, President Huber initially declined to make an order but he later changed his mind as further documentary evidence was made available to him as to what the consequences of the unilateral denunciation of the Treaty might mean for, amongst others, Belgian shipping interests which had benefited from rights under the Treaty.

Mr. President, I hope you will understand now why we presented you with 2 kilograms of evidence, and we hope that you will not need any more evidence in the next few days!

President Huber's Order is of interest for a number of reasons. It is very specific, and it included an express requirement that Belgian property and shipping interests should have "protection against any sequestration or seizure". It is also notable that the Order of 1927 seeks to protect private interests under the 1865 Treaty, making it clear that rights so established may be protected by provisional measures, again contrary to the view put by my learned friend, the Agent of Guinea, in his response of 30 January.

In this case the rights to be preserved are those established by the 1982 Convention. The rights in respect of which we seek protection can be divided into three groups. First, we seek the preservation of our rights under article 292, paragraph 4, of the 1982 Convention which requires the Guinean authorities to comply promptly with the Judgment of 4 December 1997. We were, frankly, very surprised to receive the Guinean Agent's letter of 16 February 1998 informing us that the vessel and the crew would only be released upon payment of the bond. Quite apart from the fact that the conditions for payment of the bank guarantee have not yet been satisfied, as Mr. Howe explained, the terms of your Judgment of 4 December are, in our submission, crystal clear in establishing that the vessel was to be released upon the

posting of the bond, not the payment of the bond, as Guinea now asserts. The bond was posted on 10 November last. The vessel should have been released immediately thereafter. It has still not been released notwithstanding the acceptance by Guinea of the bond as reasonable and as evidenced by the documents that were made available to us this morning by Guinea. The failure to release the vessel and crew constitute ongoing violations of our rights under the Convention. Provisional measures confirming the reasonableness of our bond, including the terms included in it and our interpretation thereof and prescribing immediate release would go a long way towards preserving our rights under the 1982 Convention.

The second right which we seek to have protected by these provisional measures is that vessels registered in Saint Vincent and the Grenadines should be able to enjoy freedom of navigation in the exclusive economic zone of Guinea in accordance with the rights that Saint Vincent and the Grenadines has under articles 56, paragraph 2, and 58 of the 1982 Convention. In our submission this includes the right of the M/V Saiga and other vessels registered in Saint Vincent and the Grenadines to bunker fishing vessels in the exclusive economic zone of Guinea without being subjected to the Guinean customs and criminal laws which have been relied upon by Guinea in this case.

Until the morning of 29 October 1997 the M/V Saiga and the State of Saint Vincent and the Grenadines were blissfully unaware that Guinea required the payment of customs duties for bunkering oil in its exclusive economic zone. There were no legislative or administrative requirements to that effect, as Maître Bangoura makes very clear in his Declaration. That legislation which we have seen appears to be on its face in conformity with the 1982 Convention. Guinea had never, to the best of our knowledge, claimed any right whatsoever to impose customs duties in the exclusive economic zone. If there had been such legislation it would have been vigorously protested as being clearly incompatible on its face with the 1982 Convention. The right to bunker is one that has been exercised by Saint Vincent vessels in these waters without previous interference, as well as by many other vessels. It is a right which is exercised without interference in exclusive economic zones around the whole world, including in those zones which overlap with any contiguous zone which might have been lawfully established. For the reasons explained by Mr. Howe and Maître Thiam, Guinea is not assisted in any way by the argument that some of the events might have occurred in any contiguous zone which it might have established. The parties in any event agree that none of the alleged activities occurred in Guinea's territorial waters which establish the outer limits of its jurisdiction to prescribe or apply customs duties, and Guinea seems to have confused prescriptive jurisdiction with enforcement jurisdiction. We see no reason why the exclusive economic zone of Guinea, even that part of it which may overlap with a contiguous zone, should remain out of bounds pending the final decision in this case, and that is why we seek provisional measures to that effect.

The third right that we seek to have preserved is that our vessels should not be subject to hot pursuit except in accordance with the strict requirements of article 111 of the 1982 Convention. This means, in particular, hot pursuit undertaken by the Guinean authorities must be uninterrupted. In the prompt release proceedings this Tribunal found that "the arguments put forward in order to support the existence of the requirements for hot pursuit and, consequently, for justifying the arrest, are not tenable, even *prima facie*" since Guinea itself had recognized that pursuit was commenced one day after the alleged violation at a time when the M/V Saiga was certainly not within any contiguous zone of Guinea. Guinea's claimed justification of hot pursuit did not meet the requirement of arguability. Nevertheless, the judgment of 3 February of Conakry claims that the conditions of article 111 were satisfied and in those circumstances there is every reason to expect that article 111 may again be invoked

unlawfully by Guinea. And it is for that reason that we seek to preserve our right not to be subject to hot pursuit other than as envisaged by article 111.

These rights cannot be preserved pending any decision on the merits so long as the judgment of the *cour d'appel* of Conakry of 3 February 1998 remains in effect and capable of being further enforced. For that reason we are asking that the judgment be suspended. The judgment includes an order against the Master for some US$ 15 million, and there therefore exists a real risk that the Guinean authorities might seek to recover some of those sums from other vessels including other vessels registered in Saint Vincent and the Grenadines. What is more, as Maître Thiam has explained, the *cédule de citation* of 10 December 1997 posted the same day as our bond names the state of Saint Vincent and the Grenadines as the "party liable" for that fine. We do not know what exactly are the legal consequences of that Citation but at the very least the possibility cannot be excluded that the judgment could be enforced against the State itself.

Even beyond this we also consider that the approach taken by the *cour d'appel* in upholding the arguments of the Guinean authorities indicates that Guinea remains committed strongly to the application and enforcement in its exclusive economic zone of the various customs and criminal laws which were invoked against the M/V Saiga and its Master. Nothing we have heard in these proceedings indicates that Guinea is remotely reconsidering its approach. This is also clear from the Statement of Maître Bangoura, set out at Attachment 13 to our Reply. So there is a real possibility that those laws can be invoked again against the rights of Saint Vincent and the Grenadines and that its vessels cannot therefore be protected pending final judgment on the merits. If I can put it another way, so long as those laws remain capable of being applied in the exclusive economic zones, then our vessels cannot enter those waters and we are precluded from exercising our rights in those waters. Without those rights our vessels risk losing market share, a market described by Bunkering News as offering "rich opportunities" and "enormous potential". And that failure to preserve rights is not one that can be subsequently remedied. They are irreversible, as I will show later. For this reason we have requested that provisional measures be prescribed requiring Guinea not to invoke these laws before a judgment on the merits now before this Tribunal be so invoked. There is ample precedent for the proposition that provisional measures be indicated or prescribed to suspend the enforcement or application of domestic laws where such enforcement would have prejudicial effects on rights under international law. For example, the *Fisheries Jurisdiction* cases between the United Kingdom and Iceland and Germany and Iceland - litigated at the International Court of Justice from 1972 - arose upon Iceland's claim, in the form of Regulations which it had adopted in July 1972, to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland. Iceland was prescient perhaps in identifying the changes in law which were coming, unlike Guinea, and I think that distinguishes the background. The United Kingdom and Germany nevertheless requested the Court to indicate interim measures of protection which would, *inter alia,* require Iceland to "refrain from taking any measure purporting to enforce the Regulations" or from "applying or threatening to apply administrative, judicial or other sanctions or any other measures against ships registered in [the United Kingdom and the Federal Republic of Germany], their crews or other related persons". By 14 votes to 1 the Court indicated provisional measures to that effect. The Court said this to justify its order:

> the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by [the United Kingdom and the Federal Republic of Germany] and affect the possibility of their full restoration in the event of a judgment in [their] favour … .

In our submission exactly the same language can be applied to this case, even if Guinea's unique and unilateral actions do not attract the degree of support which did those of Iceland at the time and subsequently, as was reflected in the judgment on the merits in 1974.

In the *Fisheries Jurisdiction* case the Vice-President of the International Court, Judge Ammoun, and Judges Forster and Jiménez de Aréchaga felt compelled to set out in a joint declaration that the Order "cannot have the slightest implication as to the validity or otherwise of the rights protected by [the] Order or of the rights claimed by a coastal State". That position is of course absolutely correct. To be absolutely clear, if this Tribunal finds against us on the merits, then Guinea will be able to seek to enforce its judgment of 3 February, and to apply and enforce its customs laws against vessels such as the M/V Saiga, assuming of course that they are otherwise consistent with international obligations.

But the fact that you are not called upon at this stage to judge on the merits cannot mean that you must ignore altogether the underlying merits of the case, particularly those of the party seeking interim relief or provisional measures of protection. For as the International Court put it in the Case Concerning US Diplomatic and Consular Staff, "a request for provisional measures must by its very nature relate to the substance of the case since ... their object is to preserve the respective rights of either party". The practice of the European Court of Justice and indeed other international courts and tribunals similarly indicates that in considering whether or not to grant interim relief the chances of success of the action on the merits simply cannot be ignored.

The situation which this Tribunal faces is, we submit, directly analogous to that of the *Fisheries Jurisdiction* case. Guinea is in effect seeking to apply and enforce in its exclusive economic zone customs and criminal laws which are clearly unrelated to the matters in respect of which it is entitled by the 1982 Convention to exercise such jurisdiction, namely the conservation and management of resources. Maître Bangoura's statement makes it abundantly clear that the laws justifying the prosecution of the Master are not to be applied in the EEZ, and that there are no laws, fisheries or otherwise, which could be prayed in aid of Guinea's prosecution. There is no evidence before this Tribunal that the Treasury of Guinea raises a single penny from these customs laws being applied in its exclusive economic zone or that it would lose any money whatsoever from such provisional measures as we are requesting. But even if there was such evidence, Guinea would not be assisted. For there is nothing in the 1982 Convention which could remotely support Guinea's actions. This is clear from the text of the 1982 Convention, and by the practice of States under the Convention. In this regard we can do no more than confirm that we wholeheartedly endorse the view of Vice-President Wolfrum and Judge Yamamoto in their Dissenting Opinion to the Judgment of 4 December 1997 to the effect that although the list set out in article 62, paragraph 4, of the 1982 Convention (which lists the issues which coastal states may deal with under their fishing laws)

> is not meant to be fully comprehensive, it gives no indication that the competence of the coastal State concerning fishing might encompass activities of merchant ships, associated with the freedom of navigation, for the sole reason that they service fishing vessels.

Moreover, as Mr. Howe and Maître Thiam have made clear in their presentations, Guinea has not made the slightest pretence in its actions after your Judgment of 4 December 1997 to pursue the argument that the criminal proceedings which were taken against the Master of the M/V Saiga were based on fisheries legislation. What appeared to President Mensah to be the situation on 4 December 1997 - namely that "no action taken by any official or authority in

Guinea, before and after the arrest of the *Saiga,* has had the faintest link with fisheries" - is all the more clearly so today. As we indicated in our written pleadings, what was sufficiently plausible or arguable in our view and that of the majority of this Tribunal on 4 December 1997 is simply not tenable today. This Tribunal offered Guinea a perch on which to develop an argument. Rather than seize that perch, it chose to ignore the views of the majority and persist with its claims to be entitled to enforce customs and criminal laws notwithstanding that they are *entirely* unconnected to fisheries matters or rights under the Convention. In these circumstances there is every possibility that Guinea will continue to act in violation of the 1982 Convention. The rights of Saint Vincent and the Grenadines are seriously at risk of being prejudiced.

Practice under the Convention merely serves to confirm our conclusion that Guinea has acted in *prima facie* violation of the 1982 Convention. We have had some difficulty in identifying practice but when we sought to obtain information from the United Nations we found out that there was no information on practice available in relation to bunkering, or the application of customs duties in the exclusive economic zone. We thought that at very short notice to do what one might sensibly do in those circumstances, namely write to independent law firms in 21 countries reflecting the principal legal systems of the world. At Attachment 9 of our document you will find responses from 19 of the 21 countries which we wrote to. We appreciate that these are not conclusive, not definitive statements. They were prepared in some haste. They are intended simply to be illustrative of the general proposition that we are making. They are not intended to go any further than that. But we think it is remarkable that of the 19 replies that we received, every single one, without exception, without a single exception, confirms that bunkering in the exclusive economic zone by a foreign fishing vessel will not attract customs duty. We expect that the opinions which we will receive this week and which we will of course share with you, from Argentina and from Grenada, will also confirm the universality of that practice.

Mr. President, Members of the Tribunal, I have mentioned this by way of background, not because we expect you to deal with the merits - we do not ask that you do so - and not because we expect you to be bound by these necessarily hastily prepared legal opinions. Rather, they serve to illustrate that the evidence is overwhelmingly in favour of our submission that we have the *prima facie* rights under the Convention which we claim, and that these will be prejudiced if you do not prescribe the provisional measures we request. We are aware of no academic authority to the contrary. We say that we have a *prima facie* case on the merits and that it cannot reasonably be asserted that our action is without foundation or that it is manifestly unfounded as Advocate General Mayras of the European Court of Justice put the standard in a 1977 judgment of that Tribunal. Or, as might be said in parts of the Caribbean, "*fumus boni iuris"*, and no doubt that there cannot be smoke without fire. Putting it the other way, on the basis of the evidence that is now available to us and to the Tribunal it cannot reasonably or *prima facie* be said that Guinea's actions are well founded.

And what of Guinea's rights under the Convention, for its rights too must be preserved? We submit that these would not be prejudiced by the provisional measures we seek. Guinea would be free in accordance with the Convention to exercise rights in relation to the resources of its exclusive economic zone, including fisheries. There would be no implications, for example, of the Agreement between European Communities and Guinea concerning fisheries, which makes no mention whatsoever concerning the licensing of fishing vessels in relation to bunkering in the exclusive economic zone. It would be able to apply and enforce customs duties up to the limit of its territorial waters like any other international community. It would be entitled to exercise its right of hot pursuit in accordance with article 11 of the Convention, like any other member of the international community

uninterruptedly. Indeed, if Maître Bangoura is correct, it would be free to apply and enforce the customs laws which exist on the statute books exactly as they appear in those books, up to the limit of Guinea's territorial waters. This, we are told by Maître Bangoura, is what Guinean law provides for. Guinea has not shown that its Treasury derives a single cent of revenue from the application of these customs laws in its exclusive zone, so it cannot even be said that it would suffer any financial detriment whatsoever.

In short, the provisional measures we seek would simply confirm the status quo as it was up to the night of 28/29 October 1997, until your final judgment on the merits. Moreover, the measures would have the great additional benefit of preventing a further aggravation or enlargement of this dispute.

For these reasons, Mr. President, Members of the Tribunal, we submit that the provisional measures we have requested would preserve both the parties' rights pending final judgment.

I turn now to a second element which it is clearly incumbent upon us to demonstrate. The failure to prescribe these provisional measures would lead to serious and possibly irreversible consequences.

Let us assume that you are not inclined to prescribe these provisional measures. What would happen then? Well, last Friday in your office, Mr. President, Guinea stated clearly and categorically that the vessel and crew will not be released until the bond of $ 400,000 is paid. That is clear. Since that payment will not occur- at the very earliest if ever - until your judgment on the merits, for the reasons which Mr. Howe explained in terms of the conditions set forth in the bank guarantee, it appears that provisional measures are the only way now to obtain the early release of the M/V Saiga and its unfortunate crew before final judgment. If you were not to prescribe these provisional measures, Guinea would no doubt treat your decision as a green light entitling it to pursue the application and enforcement of the customs laws in its exclusive economic zone. The effect of this, of course, would be to deter yet more vessels such as the M/V Saiga from entering the exclusive economic zone of Guinea. Mr. Kanu from Sierra Leone has indicated in his statement that it is already the case that many vessels from Sierra Leone will not enter into those waters. We therefore have a situation of a sort of "no-go zone" which is entirely at variance with the intent of the 1982 Convention. The failure to prescribe would also have the effect of potentially subjecting other seamen and vessels to the wholly unacceptable conditions to which the Master and crew of the M/V Saiga have been subjected now for nearly four months, and for which no amount of compensation could conceivably provide adequate reparation. Moreover, the judgment of the *cour d'appel* of 3 February 1998 would remain on the books and capable of full enforcement. Pending judgment our vessels would not be able to bunker in the Guinean EEZ. The possibility cannot be excluded that Guinea will seek to recover the full amount of the US$ 15 million fine against the Master, or against the vessel, or against affiliates of the vessel or even against other vessels of Saint Vincent and the Grenadines registered in that country, or indeed even against the state of Saint Vincent and the Grenadines itself. Within days of the detention of the M/V Saiga, before criminal charges had been lodged, Guinea had sold the oil on the M/V Saiga. It justified its actions on the grounds that these were "perishable goods". And it has tried to recover $ 400,000 under a bond other than in accordance with the terms of that bond. It is idle to speculate as to what might happen. But Guinea's behaviour thus far indicates that nothing, absolutely nothing, can be excluded. This fact alone may have a chilling effect on Saint Vincent and the Grenadines' ability to protect the interests of its vessels, as the Attorney General made clear.

In our submission, each of these occurrences is serious and each does and would continue to entail irreversible consequences, that is to say they could not adequately be

repaired by monetary damages, even if such damages could ever be objectively assessed. These occurrences are as serious and as irreversible as those which led the President of the Permanent Court of International Justice to make the Order in its first case on interim measures, or which led the International Court of Justice in its first case on interim measures - the *Anglo-Iranian Oil Co.* case - to make an Order of very great specificity to protect private commercial interests of the United Kingdom in Iran. We, too, hope that our commercial interests, as a small and developing nation, will also be safeguarded by this first request for provisional measures before this Tribunal.

There is a further point. We are all aware that this request for provisional measures has generated considerable interest. Because it is the first to come before this Tribunal. Because it raises important issues concerning the law of the sea. Because of the importance of the underlying issues. And because - most regrettably - it follows and is related to a first Judgment which a State Party to the 1982 Convention has declined to give effect to. There must now be a risk that if this Tribunal does not prescribe the provisional measures the actions of Guinea may be seen as legitimate. The prescription of the provisional measures we request would underscore the importance of the rights and obligations set forth in the Convention. And all the more so because, unlike those which may be "indicated" by the International Court in The Hague, your provisional measures are clearly and unequivocally binding as a matter of law, with all the consequences that entails for the prospects of compliance and further legal measures here and elsewhere if they are not respected.

Mr. President, Members of the Tribunal, I cannot tell you with absolute precision what will happen if you do not prescribe these measures. But I can tell you that without them there will be further consequences and that many of them, for example those relating to the fundamental human rights of the crew, those relating to the commercial interests of the vessel, will have irreversible consequences.

I turn now to the question of urgency. In our original request we explained why these measures were urgently needed. Since then nothing has changed to make them any less urgent - quite the contrary. The crew and vessel have been deprived of their liberty and suffered gross violations of their fundamental human rights for something approaching three months since the bond was posted, and far longer since the original detention. Vessels from Saint Vincent and the Grenadines are hesitant, understandably, about entering the waters of Guinea. The exclusive economic zone of Guinea continues to be an area of waters in which care has to be exercised, with additional costs incurred by re-routing or by bringing on board armed guards. These additional costs are significant, without even taking into account the financial losses which continue to accrue in excess of $ 4,000 a day. As Mr. Kanu's statement from Sierra Leone indicates, some vessels will not even enter the waters concerned by this application because of the perceived threat to them. The judgment of 3 February continues to produce the chilling effects of its predecessor, and all the more so since it imposes a suspended sentence of imprisonment upon the Master. These factors combine to create a wholly unacceptable state of affairs which provisional measures would go some way towards remedying, at least *ad interim*. In the circumstances it is very difficult to imagine many cases in which a greater situation of urgency could exist.

International courts and tribunals have provided little by way of dicta or guidance as to what precisely is meant by a situation of urgency. This is an aspect which appears to be dealt with principally as a matter of first impression. In the *Case Concerning Passage through the Great Belt,* which I appreciate is very well known to some of you on the bench, Finland requested the International Court to indicate interim measures requiring Denmark to refrain from constructing a planned bridge project which, Finland claimed, would impede the passage of ships to and from Finnish ports and shipyards. The Court stated that it understood the term

"urgency" to mean that "action prejudicial to the rights of either party is likely to be taken before [the] final decision [on the merits] is given".

On the facts of that case the Court found that according to that test there was no urgency. In fact, Denmark had stated that there would be no physical hindrance to passage before 1994, by which time the case on the merits would have been completed, and Finland had not challenged that statement.

Guinea has not made an equivalent undertaking and does not seem inclined to do so. We wonder what it would be worth if it did. Nevertheless, the standard adopted by the Court is a useful one and, applied to the facts of this case, I think it points decisively towards the conclusion that a situation of urgency does exist: the actions against the Master and vessel, under the judgment of 3 February and in respect of the customs legislation being applied in the exclusive economic zone, are all "actions ... likely to be taken before [your] final decision [on the merits] is given". In our submission there exists a situation of urgency.

Mr. President, Members of the Tribunal, in this your first case concerning provisional measures it is right that you should proceeded cautiously. Regrettably, this is a case in which all the requisite conditions are satisfied, and we say very easily so. The Tribunal has *prima facie* jurisdiction. The rights of Saint Vincent and the Grenadines will be further prejudiced if these measures are not prescribed, and those of Guinea will not be if they are. Some of the consequences of the failure to prescribe provisional measures will be irreversible and there exists a situation of urgency.

For small, especially developing countries, the international rule of law is vital. The great Latin American jurist, Eduardo Jiménez de Aréchaga, in the Aegean Sea case, identified

> the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence and on the merits is that the action of one party "*pendente lite*" causes or threatens a damage to the rights of the other, of such a nature that it would not be possible fully to restore those rights, or remedy the infringement thereof, simply by a judgment in its favour.

In our submission, this case falls squarely within that test and we would ask that you prescribe the provisional measures we request.

Mr. President and Members of the Tribunal, this concludes the presentation of Saint Vincent and the Grenadines. On behalf of our delegation, may I thank you very much for your attention.

The President:
Thank you very much indeed, Mr. Sands.

This concludes the sitting this morning. The Tribunal will sit again this afternoon at 3 o'clock.

The Tribunal adjourned at 1.00 p.m.

The President:
I now invite Mr. Hartmut von Brevern, the Agent of Guinea, to address the Tribunal.

Argument of Guinea

STATEMENT OF MR. VON BREVERN
AGENT OF SAINT VINCENT AND THE GRENADINES

Mr. von Brevern:
Mr. President, Honourable Judges, first let me express my pride at being able to appear before you and to have the chance to plead to 21 judges. This does not very often happen in the life of a lawyer but in my life it is already the second time it has happened. Hopefully, it will not be the last.

I will present the submissions of the Government of Guinea. This morning we heard the submissions of Saint Vincent and the Grenadines. We first heard Mr. Joseph, the Attorney General of Saint Vincent and the Grenadines. I am happy to have made his acquaintance. I am active in giving German shipowners advice and they like to flag their vessels to Saint Vincent and the Grenadines. I personally have never had the chance to do the exercise of flagging out to Saint Vincent and the Grenadines but I hope to be able in future to do this exercise. I clearly understand what Mr. Joseph said about the 109,000 inhabitants and the importance of the business of the flag of convenience.

We then heard Maître Thiam with respect to the legal situation in Guinea. I am impressed at his knowledge of the situation in Guinea. He might have some advantage over me on that. Finally, I was, as you may have been, impressed in particular at the energy and temperament of Mr. Sands.

First, I would like to speak very shortly to the facts, or at least to those facts which might differ from those Mr. Howe has presented to you. I would like to refer to the applications of Saint Vincent and the Grenadines in the institution of arbitral procedure and now to the International Tribunal on the merits of the case and compare that to the applications in the Request for the prescription of provisional measures of 5 January 1998. Then I would like to say something about the conditions to be fulfilled before provisional measures can be prescribed. I will deal shortly with the question of whether the International Tribunal has jurisdiction, the point on article 297, paragraph 3. I will deal with the question of whether provisional measures really are urgently required. I will deal with the reasons given by Saint Vincent and the Grenadines and give our comments on that. Finally, I would like to turn to Guinea's view on every single provisional measure requested.

As to the facts, I have sent to you in our letter of 20 February a submission in which I dealt with the facts. I would only remind you that I have presented you with a sea chart as Annex 5, on which is marked where M/V Saiga supplied gas oil to the three fishing vessels. This was, as you can see from the chart, within the contiguous zone of Guinea. I would like to answer Mr. Howe. Guinea has created a contiguous zone. This was mentioned in your first case. Judgment is created through the National Maritime Code in article 13.

The next point as to the facts: I merely quote what has already been presented to you in the first case, namely that M/V Saiga, when it was pursued by government boats of Guinea, was in the proximity of the first buoy of the Cité Minière de Kamsar and that was within the limits of the contiguous zone of Guinea. I am only quoting and reporting what the member of the delegation of Guinea in the first case presented to you.

I would remind you of something which Mr. Howe did not mention but that we mentioned in the first case, namely the decision of the Security Council of the United Nations of 8 October 1997. It has been presented to you and you are all aware of it as Annex 8. In this decision the Security Council expressly decided that all States shall prevent the sale or supply

to Sierra Leone by their nationals or from their territory or using their vessels or aircraft of petroleum and petroleum products, whether or not originating in the territory.

There is another resolution of ECOWAS, an organisation of West African countries of which Guinea is a member. It is also mentioned in the Security Council decision under number 8 that this organization is authorized to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products by halting inward maritime shipping in order to inspect and verify their cargoes and destinations.

It is clear to all of you why I mention this. The Government of Guinea thinks that it had not only the right but the obligation to bring M/V Saiga back from the waters of Sierra Leone into those of Guinea.

As to the bank guarantee, I will deal with that later in depth.

Finally, as to the facts, today we have been presented with a paper which shows that the crew is free. This is undisputed. I have been informed that the Captain is free as well.

This is sufficient as to the facts. May I then introduce you to the overall situation. There is a sovereign State, the Republic of Guinea. In that State there has been a prosecution against the captain of a vessel who has violated Guinean law. Proceedings have been held before the First Instance Criminal Court of Conakry in Guinea. The Captain has been represented by a lawyer. The court has delivered a judgment and the Captain has been sentenced to a fine, and the vessel and cargo have been confiscated as security for the payment of the penalty in application of the laws of the sovereign State of Guinea.

The Captain, through two lawyers, lodged an appeal. The appeal hearing was on 22 January 1998 and the judgment was delivered on 3 February, thereby sentencing the Captain to six months' imprisonment which, however, was suspended, and a fine of the same amount as in the first instance. Further, the cargo has been confiscated at 3.8 million Guinean Francs, thereby reducing the fine for the Captain. Finally the ship was seized, but only as surety for the payment of the fine. To me, there is no sign that we have to deal with a piracy act. Do the representatives of Saint Vincent and the Grenadines really think that all Guinean authorities, including the tribunals, are pirates? I do not think so.

Four days after the first instance judgment, Saint Vincent and the Grenadines instituted arbitral proceedings which now have been transferred to you, the International Tribunal. Saint Vincent has asked in this submission of 22 December to get some declarations, *inter alia*: the Guinean judgment would violate the right of Saint Vincent and the Grenadines to enjoy freedom of navigation; the judgment would violate the right of vessels under Saint Vincent and the Grenadine's flag to enjoy freedom of navigation; the Guinean customs law not to be applied in the EEZ of Guinea; Guinea to release ship and crew immediately, hence Guinea to be liable for damages for all violations.

This is what Saint Vincent and the Grenadines seek and this will be dealt with only in some months by you but will not be decided here and now. Here and now we have another independent application of Saint Vincent and the Grenadines, namely one for provisional measures. I fully agree with Mr. Sands that provisional measures are well-established in international law and are also expressly foreseen in the Law of the Sea Convention.

The Request No. 1 under this application for provisional measures is to bring into effect the measures necessary to comply with the first case Judgment of the International Tribunal of 4 December 1997. The Judgment, as you all know, has ordered Guinea to promptly release vessel and crew against the posting of a reasonable financial security. So the request for provisional measures, as specified under 1(b), (c), (d) and (e) on page 23 of Saint Vincent's Reply of 13 February has no connection to the Judgment of the International Tribunal.

The International Tribunal did not order the suspension of a Guinean judgment, nor did it order not to apply its customs laws within the EEZ of Guinea. The demand for a provisional measure under paragraph 1(a) may be to release M/V Saiga and her crew, leave out the condition to which you as the International Tribunal has connected your order, namely the posting of a reasonable bond. But the request of Saint Vincent for a provisional measure under number 1(a) to release M/V Saiga and her crew exactly conforms to the request of Saint Vincent under the case on the merits, namely in the application of 22 December, so Saint Vincent and the Grenadines requests as a provisional measure something that would make this application on the merits already performed. Whether this is legally in order I will discuss a little later, but I can say here that I do not think this is legally in order.

Request No. 2 is that Guinea shall cease and desist from interfering with the rights of all vessels registered in Saint Vincent and the Grenadines, including also those engaged in bunkering activities to enjoy freedom of navigation. This request does go even further than Request No. 1 of the case on the merits of 22 December where merely the declaration is asked for that the acts of Guinea have violated the rights of Saint Vincent and the Grenadines and its vessels to enjoy freedom of navigation.

Request No. 3 is that Guinea shall cease and desist from undertaking an unlawful hot pursuit of all vessels registered in Saint Vincent and the Grenadines and also of those engaged in bunkering. Here again there is no corresponding request in the application of 22 December on the merits. So I have indicated that the provisional measures requested do not fulfil the necessary conditions. But what are the conditions for provisional measures under the Law of the Sea Convention?

In article 290, paragraph 5, two conditions are expressly mentioned, and these two conditions, and I agree with Mr. Sands about this, have also been fulfilled in application of article 290, paragraph 1, which is now applicable after the transfer to you. Article 297, paragraph 3, must not be applicable. That is one condition and the other is that the urgency of the situation requires the prescription of provisional measures demand it.

I will deal with these two conditions later at length, but are there more conditions to be fulfilled? The prescription of provisional measures is up to the discretion of the Tribunal. However, there are some principles that international law requires for the prescription of provisional measures.

Saint Vincent and the Grenadines in their Reply of 13 February under numbers 34 and 52, and also in the writ of 5 January, speak of irreparable harm by acts that might be instituted by Guinea if the provisional measures would not be prescribed. Then they submit that the further implementation by Guinea of its customs laws in the economic exclusive zone would affect the possibility of the full restoration of the rights of Saint Vincent in the event of a judgment in its favour.

In number 19 of its application of 5 January, Saint Vincent and the Grenadines state that provisional measures would assist in rendering settlement of the existing dispute more likely. Finally, they say otherwise than of the provisional measures, vessels would be discouraged to enter the EEZ of Guinea.

Finally, and more important, another condition is that the Tribunal has to take a preliminary view as to the underlying merits. Are the merits *prima facie* on the side of applicants? I would like to remark here that this morning I have heard a lot of arguments which in my opinion were arguments on the merits and did not speak to the *prima facie* consideration of the situation here.

The following further conditions which have not been dealt with by Saint Vincent and the Grenadines also apply to the prescription of provisional measures in our view. Provisional measures must be strictly related to the requests of the main submission. Further, they must

not go beyond what is required for the preservation of the requests of the main submission, and lastly, provisional measures must not prejudice the decision of the merits. Provisional measures may not constitute a performance of what the Applicant seeks in his request of the merits.

I will now deal with the first condition, which is to be fulfilled before a provisional measure can be prescribed. The International Tribunal has to consider that *prima facie* it has jurisdiction. So first of all the consideration of the Tribunal is *prima facie.* In my view this means that the International Tribunal does not have to examine the question of jurisdiction in detail as Saint Vincent and the Grenadines tried to do in their Reply of 13 February, and as they did this morning. The Guinean Government respectfully in this connection refers the International Tribunal to its own view expressed and decided in the Number 1 case. Here the Tribunal, you, the Judges, have qualified the relevant laws of Guinea as sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ.

In this connection I would like to refer to the written statement of Saint Vincent and the Grenadines under number 17 where it has been said that the violation of fishery legislation by M/V Saiga has only been indicated in our Statement in response of 30 January. No, this has already been expressed and stated in the Judgment of the International Tribunal, Case Number 1, on page 19. As these laws were known to the court, copies of the laws must not be provided.

With such a decision taken by you, only two and a half months ago, the Guinean Government cannot see why today the dispute over M/V Saiga should not be considered *prima facie* by the International Tribunal to relate to Guinea's sovereign rights with respect to the living resources in the EEZ.

I will not deal with the laws of Guinea any further. I am of the opinion that the International Tribunal has analyzed these laws in great detail in the first case, and it is not my task to dispute in any way what twelve judges of the International Tribunal have decided.

The specific wording in the relevant article 297, paragraph 3, of the Convention gives an additional argument for the view of the Government of Guinea. The relevant part reads:

> [A]ny dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone …, including … the terms and conditions established in its conservation and management laws and regulations.

That is exactly what the basis of the measures against M/V Saiga was, Guinean regulations and laws relating to the management of the living resources. Fishery activities are accepted by the Guinean Government under the condition that the fishery vessels are not supplied with gas oil offshore. If one would not accept the view that the laws and regulations of Guinea forbidding the offshore supply of fishery vessels constitute terms and conditions established in its conservation and management laws and regulations as per article 297, paragraph 3, of the Convention, then one has to accept at least that the fishery vessels by individual contract with the Government of Guinea have taken on such obligation.

I refer to the protocol establishing the fishing rights in the Agreement between the European Economic Community and the Government of the Republic of Guinea on fishing off the Guinean coast, and in particular to the annex to this protocol which you will find as Attachment 6 of the Reply of Saint Vincent of 13 February.

It follows from the protocol and annex that licences for fishing rights in the EEZ of Guinea are granted only under the conditions for the exercise of fishing activities by community vessels in Guinea's fishing zone.

Here again, the *prima facie* consideration has the result that these individual obligations of the fishery vessels are part of the terms and conditions established in the conservation and management regulations of the Government of Guinea.

The reference of Saint Vincent and the Grenadines to the reasoning of the judgment of the court of first instance at Conakry and of the Supreme Court of Guinea is in our view of no relevance as to this question of article 297, paragraph 3. These courts did not have to decide whether the violations done by M/V Saiga were to be qualified as violations against fishery laws or against laws regulating the management of the living resources. Such qualification is the task of this International Tribunal, but only on a *prima facie* basis. Perhaps this aspect has not become clear. The fishery vessels that have been supplied by M/V Saiga were not under the Guinean flag, they were under the flag of a country of the European Community, so they have been granted the right to fish in the fisheries zone of Guinea, and our submission is that they have got the licence under the condition to conform to the laws of Guinea, and one of these laws is that the offshore supply of gas oil to fishery vessels is not allowed. This is everything I have said to article 297, paragraph 3.

I now come to the next condition, namely that provisional measures requested in our view are not urgently required. In our Statement in response we have already outlined why all the reasons given by Saint Vincent and the Grenadines for the alleged urgency of the situation are not convincing or in our view are not correct. In the Saint Vincent statement of 13 February, on page 12, it is in no way explained or substantiated that, or why, the owners of M/V Saiga are continuing to incur great financial cost. The reference to Attachment 7 does not give any clarification. Who bears at the moment the financial burden of M/V Saiga? An insurance company? The P&I Club? The owner or charterer? Is there a danger for them to go bankrupt? Obviously not. Is it Saint Vincent and the Grenadines, the State which suffers? We have heard a very impressive figure of 10 million tonnes registered under this flag. Is it really such an enormous damage, irreparable harm? What could be the cost if we wait until the final decision, which is in the not too distant future? Do we really need provisional measures? And the charterer Addax? We have just heard that it has been mentioned in the same line as BP, as Exxon Shell. We have also heard that there is increasing market for bunkering offshore on the West African coast, and the small part which is the Guinean bunkering part of it. I think this is really not an impressive figure. And why is it urgent to avoid further damages? Saint Vincent and the Grenadines in its Application of 22 December has asked the Tribunal to decide also on damages, and the potential further damages which might occur until the final decision could just be added to the damages which Saint Vincent and the Grenadines will in any case ask from the International Tribunal.

Another aspect that speaks against the urgency of the provisional measures because of the financial situation of the owner is stated in the letter of the Minister of Justice of the Republic of Guinea addressed to Guinea's Agent of 19 January 1998 in which also the authorization of us is contained, and we have handed this letter over to you.

On page 2, second paragraph, it is stated that the owner represented by Seascott Management Limited, Glasgow, represented by the Superintendent Captain Merenyi, has engaged in discussions with the National Guinean Customs Direction with a view to achieve a global amicable solution. These negotiations obviously have not yet been terminated. I leave it to you to decide whether the gravity of the alleged violation of Guinea, which we have so eloquently by Mr. Sands, whether this does conform to such friendly negotiations.

The next argument of Saint Vincent and the Grenadines why the situation urgently requires provisional measures is that the bank guarantee *prima facie* was reasonable. As has been explained, Crédit Suisse was not prepared to pay under the guarantee. Notwithstanding the fact that there is no further appeal possible against the Supreme Court decision in Guinea.

This justifies the conclusion that the bank guarantee *prima facie* is not reasonable. The question of the reasonableness of the bank guarantee will be dealt with later in more detail.

The next argument of Saint Vincent and the Grenadines why the suspension of the effect of the judgment of the Guinean court is urgent is mentioned on page 12 of the statement of 13 February at the bottom, namely, it is intended *inter alia* to allow vessels flying the flag of Saint Vincent and the Grenadines to continue to engage in their commercial activities without fear of hindrance or other interference by the Guinean authorities. The following questions are unanswered. First, who has the intention to allow? Obviously Saint Vincent and the Grenadines. But is an intention to allow something such an urgent situation that it requires to suspend a judgment of the highest court of a sovereign State? If someone has an intention this does not necessarily mean that the intention would be realized. I cannot see that it is the duty or task of a flag State to allow or see to it that it is allowed to all vessels flying its flag to engage in commercial activities. Article 94 of the Law of the Sea Convention describes the duties of the flag States. Even paragraph 3 does not state an obligation of a flag State in relation to vessels under its flag. No, the obligation of the flag State is versus the other Member States of the Convention.

The next argument of Saint Vincent and the Grenadines is the result of its inquiry world-wide. The answers received are next in Attachment 9. I really wonder whether Saint Vincent and the Grenadines in the end of this case expect that Guinea has to bear all costs, including those fees of lawyers world-wide which Saint Vincent and the Grenadines have employed. This International Tribunal comprises of 21 judges from all over the world, and therefore has huge knowledge of laws world-wide. I wonder what purpose the opinions of lawyers in some countries can serve. Nevertheless, I think it is not correct what has been said this morning, that all answers have as a result the response expected by Saint Vincent and the Grenadines. The answer for the Cameroon is interesting. Authorization for this bunkering is needed. At least, I understood the letter like that. An Italian lawyer spoke for Italy and stated:

> However, the issue of how far from the mainland outside the territorial waters, and how regularly, any such sales and deliveries occur could be relevant. … [T]he Italian authorities might seek to exercise customs surveillance and enforcement powers with respect to deliveries of liable oil products, taking systematically place in the contiguous zone.

I am not quite sure whether this word was correct in connection with the Italian. But at least from the Italian answer, it is said that there might be the necessity of an authorization. The last quote I would like in this connection, this is the answer of Marine Claims Service Tunisia. The service quoted the Tunisian customs and stated that the intervention of customs authorities is only limited to continental shelf. That is very interesting.

But such inquiry is in no way proof to Saint Vincent's conclusion that the Convention *prima facie* prohibits the application of customs duties in the EEZ. Firstly, the question drafted in the inquiry was not whether customs laws could be part of the terms and conditions of the regulations for the management of living resources in the EEZ. Secondly and more important, the facts to which an opinion was asked were not identical to the situation of M/V Saiga. In the inquiry, it has been referred to the supply situation of two vessels, both under foreign flag. In our situation the fishing vessels also were under foreign flag. However, they were under a fishing licence of Guinea and thereby subject to all Guinean laws, even those that might have not been in conformity to the Law of the Sea Convention. So again there is no urgency to suspend the effect of the two judgments of the Guinean Courts.

Furthermore, Saint Vincent seeks for vessels flying its flag that they should be able to exercise freedom of navigation rights in the EEZ of Guinea. There is no indication whatsoever that vessels under Saint Vincent's flag entering the EEZ could not exercise the freedom of navigation rights.

Saint Vincent then mentions expressly the right of bunkering in the EEZ of Guinea as part of the freedom of navigation. Now apart from the fact that such a right cannot be accepted for the bunkering of vessels that have obliged themselves to the coastal State not to get bunkers offshore, I wonder whether the freedom of navigation comprises the bunkering. Article 58, paragraph 3, of the Convention very clearly restricts the freedom of navigation by the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and other rules of international law and so far as they are not incompatible with Part V on the EEZ. I have great doubts whether a national law forbidding the supply of gas oil offshore in the EEZ would be contrary to article 58, paragraph 3, of the Convention.

However, this question must not and cannot be answered here and now. But I think there is no urgency to prejudice the answer to that question by today prescribing provisional measures demanded as under number 1(d) and number 2 of the Application of Saint Vincent of 13 February.

Finally, Saint Vincent, for the last provisional measure under number 3 on page 24, to give reasons for the urgency of the situation, says: "There is accordingly every reason to expect that hot pursuit might again be undertaken in similar conditions". It is not clear what is meant by "similar conditions". Why should such similar conditions occur? Is there any indication? No. Why is there every reason for such an expectation? Is there any indication? No. Is expectation identical to the hot pursuit itself? No. So all this shows that there is no urgency of the situation that the provisional measures require.

And a final point: Saint Vincent and the Grenadines on page 16 of the statement of 13 February submits the following. Provisional measures will be legally binding according to article 290, paragraph 6, where it is said:

> The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

Saint Vincent states that the violation of the provisional measures ordered may allow appropriate measure of response before other courts. Which measures are meant? Which other courts does Saint Vincent and the Grenadines have in mind? I have no idea, and there is no indication. However, also the prompt release decision is legally binding according to article 292, paragraph 4, where it is said that upon the posting of the bond the authorities of the detaining State shall comply promptly with the decision of the Court concerning the release of the vessel or its crew. Why does Saint Vincent and the Grenadines not take appropriate measure of response before other courts now?

Now after having dealt with the submissions of Saint Vincent I would now like to refer to any single provisional measure requested and summarize or recapitulate the reasons why in the view of Guinea these provisional measures demanded should not be prescribed. In doing so I will not repeat the arguments around article 297, paragraph 3, which stands above all.

The first demand is that Guinea shall immediately release M/V Saiga and her crew. Such an order would not be a provisional measure. It would already constitute the performance of Saint Vincent on the merits. Furthermore, such an order would be against the first Judgment of the International Tribunal in the prompt release case, according to which a *reasonable* financial security has to be provided by Saint Vincent and the Grenadines. The question of reasonableness has to be taken into consideration by the International Tribunal. As

long as the conditions under the guarantee had not been fulfilled, that was as long as there was not a final judgment in Guinea, the reasonableness could be checked and estimated only with respect to the wording of the guarantee.

Today, however, now that the judgment of the Supreme Court is final and the Captain of M/V Saiga has been sentenced to a fine of more than the amount of US$ 400,000 for which the bank guarantee is given, the response of Crédit Suisse as guarantor must be considered as to whether the guarantee is reasonable or not.

Now the question is why the guarantee, as presented on 11 December, in our view was not reasonable. I think I have to deal with this but by saying that Crédit Suisse has not paid is enough to show unreasonableness. In case some of you do not follow this, I have to explain why I think that the wording of the guarantee as provided on 10 December was not reasonable.

The first point is that I was uncertain about the fact that the bank guarantee had been sent to us as Agents instead of directly to the Guinean Government, as was done at our express wish with the second bank guarantee with the new wording. The consequence of the sending to us of this guarantee was that the guarantee had to be sent to Guinea and thereby necessarily a delay was caused.

Messieurs Stephenson Harwood, in their accompanying letter of 10 December, which we received on 11 December, expected the vessel and crew to be promptly released during the course of 11 December, but still on 11 December we faxed the guarantee to the Minister of Justice of Guinea and asked for instructions. I also sent the draft guarantee to the lawyer of Guinea, Mr. Bao, whom we met in the first case here. Further, I wrote to Stephenson Harwood still on 11 December and, to quote, "we go into the process of checking whether the draft of the … guarantee is … 'reasonable'. This … cannot be done within hours, because we have to consult the [Guinean Government]".

I can tell you that I have been provided, as you have been, with a lot of bank guarantees, none of which I have accepted without checking the contents. A bank guarantee is a contract to which two parties have to agree. Therefore, I, on behalf of Guinea, have not accepted the bank guarantee. I do not recall quite whether Mr. Howe said I would have accepted. I really would not know whether I would have been authorized or whether my authorization would cover such an acceptance but, of course, I insisted on express instructions and, as I said, on the same day I received the guarantee I immediately faxed Stephenson Harwood and said we would check that and seek instructions.

On 11 December I had a telephone conversation with Mr. Howe in which I asked him to request Crédit Suisse to provide the guarantee in French for the Guineans. I also asked for clarification as to some parts of the guarantee.

Having gone through the text of the guarantee in detail, the next day, with our letter of 12 December 1997, I advised Stephenson Harwood about all the uncertainties I had at that time seen in the guarantee.

The President has asked us to deliberate more on the problem of reasonableness of the guarantee. The explanation as to why the guarantee and the old wording was unreasonable is as follows. The wording of the guarantee which I considered not to be reasonable was the following: Crédit Suisse guarantees to pay such sum as may be due to the Government of Guinea by a final judgment of a court on behalf of M/V Saiga in respect of the claims pursuant to which M/V Saiga was detained.

I saw the following deficiencies. First, the person who would have to pay the money due to Guinea has not been mentioned. Second, it was not clear that the courts mentioned were those of Guinea. Three, claims might not include penalties and M/V Saiga was not detained in respect of claims. Four, in the remark under "whereas", the second remark, it was

stated that with respect to the discharged gas oil that this, as the case may be, shall be returned by Guinea, and that is not a usual content of a guarantee.

Finally, there was no jurisdiction clause, so I suggested a new wording to make sense of the disputed part as follows: Crédit Suisse guarantee to pay such sum as may be due to the Government of Guinea by a final judgment of a court of Guinea, I added, to be owing to you, and I added, or to your customs or to your fiscal administration or other agency of Guinea by M/V "Saiga", and I added, or owners, charterers, crew or captain of M/V "Saiga" in respect of the claims, and I added, or allegations pursuant to which the M/V "Saiga" was detained. There was no positive reaction from Saint Vincent and the Grenadines to this proposal.

On 6 January finally we received instructions from the Government of Guinea with their letter of 24 December with four proposals for alterations. The first referred to the "whereas" remark under A in the guarantee: "no reference should be contained to Guinean laws".

Second, also the "whereas" remark under (B) iii should be deleted as a whole as not being in conformity with the operative provision of the Judgment of the International Tribunal. Third, the date of expiration in the French version had to be amended. Finally, the authorization of the two persons having signed the guarantee should be proved.

The same day we advised Stephenson Harwood accordingly and asked them to send the new draft guarantee directly to the Guinean Government.

The Minister of Economy and Finance of Guinea, by a letter of 16 February 1998, confirmed receipt and acceptance of the new wording of the guarantee. He has not, as Mr. Sands submitted, said in his letter that the vessel and crew would only be released if US$ 400,000 were paid. The Minister advised the release of the vessel immediately if US$ 400,000 under the guarantee were paid by Crédit Suisse.

This news was immediately sent to Stephenson Harwood and Crédit Suisse. The answer, however, is that the bank will not pay. The conditions of the bank guarantee in their view would not have been fulfilled because there would be no final judgment as long as the final judgment of Guinea were appealed before the International Tribunal. The idea of Saint Vincent and the Grenadines and of Crédit Suisse, however, is not correct. Crédit Suisse is obliged to pay on first demand such sums as may be due to Guinea by a final decision of a final appeal court. This very clearly refers to the Appeal Court in Guinea; namely if that decision could not be appealed in Guinea, as is the case, the Application of Saint Vincent and the Grenadines to the arbitral tribunal or the International Tribunal of 22 December 1997 is not such an appeal in the sense of the guarantee. Therefore, the Government of Guinea is of the opinion that the bank guarantee, as provided by Saint Vincent and the Grenadines from Crédit Suisse, is not reasonable in the sense of your Judgment of 4 December 1997. The International Tribunal never had in mind that a final decision of an appeal court would only exist if a possible recourse to the International Tribunal had been finalised.

To conclude my remarks as to the first demand of the application of Saint Vincent and the Grenadines for provisional measures, namely for a release of the vessel and crew, the crew is already free. We have been given evidence from Saint Vincent and the Grenadines themselves of that. With respect to the vessel, it has to be said that this International Tribunal has ordered the release of the vessel against posting of a bond because the court did not want to interfere in national proceedings. Now we have the result of the national proceedings, namely the judgment of the Supreme Court of Guinea which has sentenced the Captain and which therefore has not amended the situation of Saint Vincent and the Grenadines with respect to this aspect.

Why should the International Tribunal now order the release of M/V Saiga without the condition of providing financial security by Saint Vincent and the Grenadines? Saint Vincent

and the Grenadines might say that a security has already been posted. However, the reasonableness of the bank guarantee of Crédit Suisse is disputed by the Government of Guinea. Therefore, the correct application in our view would have been a demand of Saint Vincent and the Grenadines to the International Tribunal for an interpretation of your first Judgment with respect to the notion of "reasonable". There are possibilities under your rules to ask for interpretation. Saint Vincent and the Grenadines should have asked for a definition of reasonableness and a declaration that the bank guarantee of Crédit Suisse is reasonable.

If Saint Vincent and the Grenadines were successful in such an application to the International Tribunal, Guinea would have to comply with such a judgment in accordance with article 292, paragraph 4, of the Convention.

I turn to the second application of Saint Vincent, or the application for another provisional measure, namely: Guinea shall immediately suspend the application and effect of the two judgments in Guinea.

If the purpose of this provisional measure requested were to bring into effect the measures necessary to comply with the Judgment of the International Tribunal, as put in the introductory sentence, the request would be unjustified, as has already been stated. There is no connection between your Judgment in the first case and this application.

An application to suspend a judgment of the Supreme Court of Guinea, of a sovereign country, could in no way be ordered by an International Tribunal, and in any case not by a provisional measure.

The Guinean Government does not have a legal possibility to suspend any judgment of the Guinean Tribunal or even of the Supreme Court. How should this be done? I have no idea.

If we look at the judgment of the Supreme Court, it becomes clear that this demand is not reasonable. The sentence of the Master to imprisonment has already been suspended by the Supreme Court itself.

There is no real danger of the Captain paying the imposed fine because he has no means. Therefore, the suspension of the application and the effect of the judgment would, in this connection, not change the situation at all.

The confiscation of the cargo cannot be suspended because the cargo has already been sold to a third party buyer.

With respect to the seizure of the vessel, the suspension of the judgment is not reasonable because, as has already been explained at length, the seizure of the vessel could be terminated at once if the payment under the guarantee were to be effected.

Finally, the imposition of fees and expenses against the Master must urgently be suspended as the Master in any case does not have the means to pay. If the judgment of the Supreme Court of Guinea were not suspended, no irreparable harm or damage would be caused to the Captain of M/V Saiga or to anyone else.

Finally, this demand of Saint Vincent and the Grenadines for a provisional measure is not reasonable because it is not strictly related to the requests of Saint Vincent and the Grenadines under the main submission. They have requested a declaration in the submission on the merits of the International Tribunal that *inter alia* the judgment violated the right of Saint Vincent and the Grenadines and vessels flying its flag.

I do not want to discuss the merits of this application here and now but it is clear that a suspension of the judgment of the Supreme Court goes beyond what is required for the preservation of the requests of the main submission.

The third application is that Guinea shall immediately cease and desist from enforcing directly or indirectly the judgment against any person or governmental authority. It is not quite clear to whom this claim is addressed. It is implied that the object of this claim is any

person or governmental authority in the world. It is no doubt in the Plaintiff's interests that there is not such a request.

As an inherent condition of any legal action, the Plaintiff has to determine his personal interest in a specific judgment. As a consequence, such an interest of Saint Vincent and the Grenadines cannot be assumed with respect to such a demand of an indefinite character. But the Applicant might have thought that the Government of Saint Vincent and the Grenadines on the one hand and/or vessels flying their flag on the other could be made jointly liable with the Captain of M/V Saiga to pay his penalty.

However, this is absolutely unfounded. Also from the cédule de citation, or the schedule of summons, where Saint Vincent and Grenadines has been mentioned as the person responsible, such a responsibility does not derive. It is very clearly said in the judgment of the first instance and in the judgment of the Supreme Court that only the Captain of M/V Saiga is sentenced with no one being jointly liable.

Saint Vincent and the Grenadines, in their presentation of this morning, think they only presumed the possibility of a joint liability without giving evidence. The judgment, I think, is evidence enough that such a fear is unjustified.

Implied that object to this request that Guinea shall immediately cease from enforcing the two judgments would be any person or governmental authority affected by the judgment. It is to state that the submission dealt with before, namely to suspend the judgments, are identical to application under number 3.

Summing up with respect to the question of whether Guinea shall immediately cease and desist from enforcement: there is no danger of the judgment of 3 February being enforced against any person in any governmental authority. The sentence for the Master of imprisonment is suspended. The fine might only be executed against the Master who is not in a position to pay. The cargo is not only confiscated but is already sold. The ship can be released against US$ 400,000. Fees and expenses will not be executed against the Master who will not be able to pay.

The next one, number four: Guinea shall immediately cease and desist from implying, enforcing or otherwise giving effect to its laws related to customs and contraband within the EEZ of Guinea against vessels registered in Saint Vincent. Here again, the interest of Saint Vincent in an action for a declaratory judgment is missing. Saint Vincent and the Grenadines has not submitted any specific business interests in bunkering activities by vessels registered in Saint Vincent and the Grenadines. Guinea is not aware of any such vessel. Saint Vincent and the Grenadines did not refer to any specific vessel having such intention, so there is no danger that Guinean laws on or related to customs or contraband might be applied or enforced against vessels registered in Saint Vincent and engaged in bunkering activities.

Furthermore, the request is beside the point. Saint Vincent desires Guinea to cease and desist from applying laws on or related to customs or contraband. Instead, Guinea has only so far adopted its laws related to fishing activities within the EEZ.

The next application, or submission, is: Guinea shall cease and desist from interfering with the right of vessels registered in Saint Vincent to enjoy freedom of navigation.

In the main submission a declaration is asked for from the International Tribunal that the action of Guinea in relation to M/V Saiga violates the right of Saint Vincent and vessels flying its flag to enjoy freedom of navigation. So a legal assessment is asked for and is related to the specific actions that have already happened in the past.

In the application for a provisional measure, in the form of "to cease and to desist from interfering with rights of vessels to enjoy freedom of navigation", an order is asked to prevent similar actions in the future. This, however, cannot be the purpose of a provisional measure, the purpose of which is just the conservation of rights in dispute. So as the question

is in dispute whether the actions of Guinea have violated the right of Saint Vincent and the Grenadines and vessels flying its flag, Guinea cannot be ordered by a provisional measure not to interfere in future.

Such a provisional measure is not strictly related to the request of Saint Vincent of the same submission and therefore goes beyond what is required for the preservation of the request of the main submission. The provisional measure, therefore, is not reasonable.

Furthermore, the interest of Saint Vincent, and this relates to some of the submissions, to speak for and on behalf of all vessels registered in Saint Vincent and the Grenadines, including those engaged in bunkering activities, is not given, as has already been submitted to you. Under articles 56 and 58 of the Law of the Sea Convention, Saint Vincent and the Grenadines has no right to apply the right of freedom of navigation for all vessels under its flag.

Furthermore, Guinea has never acted in interfering with the rights of vessels registered in Saint Vincent and not engaged in bunkering activities.

The very last point: Guinea shall cease and desist from undertaking hot pursuit of vessels registered in Saint Vincent.

Again, there is connection between this request for a provisional measure and the application in the main submission. Here Saint Vincent speaks for and on behalf of all vessels under its register whereas in the main submission of 22 December it is referred only to M/V Saiga. There is no reason whatsoever why Guinea should undertake a hot pursuit against vessels under the flag of Saint Vincent and the Grenadines which is not in conformity with article 111 of the Convention.

To conclude: first, in our view, there is no jurisdiction of the International Tribunal to prescribe the requested provisional measures as the result of a *prima facie* consideration is to deny jurisdiction of the International Tribunal for the main submission.

Secondly, if the question of jurisdiction is answered in the affirmative, the urgency of the situation does not justify the prescription of the demanded provisional measures.

Thirdly, without prescription of the provisional measures, there would be no irreparable damage to Saint Vincent and the Grenadines because Saint Vincent and the Grenadines could claim damages and has claimed damages in the main submissions. The possibility of a full restoration of the right of Saint Vincent and the Grenadines would not be affected. The amounts at stake are relatively small and can in no way be compared to the Iceland fishery conflict as has been stated this morning. Bunkering could also be outside Guinean waters. The business will not be lost because there are no Guinean vessels that could take over that business and it should be not so difficult and not so expensive to get gas oil supplied offshore in the neighbouring EEZ. It is not necessary to go 200 miles outside. One could just go starboard or port some miles. The waters of Guinea are not that great, so in my view it is not a very great trip. So the money at stake is not very considerable.

Fourthly, the requested provisional measures are not strictly related to the requests in the main submission. They would rather go beyond what is required in order just to safeguard the position of Saint Vincent and the Grenadines for the proceedings on the merits.

Fifthly, the provisional measures requested would prejudice the decision on the merits and constitute already a performance of what Saint Vincent seeks in their request on the merits.

Sixthly, it cannot be seen that the prescription of the provisional measures demanded would assist in rendering settlement of the assisting dispute more likely.

This, Mr. President, Honourable Judges, concludes the presentation for the Government of Guinea. Thank you very much.

The President:

Thank you very much indeed, Mr. von Brevern. That brings us to the end of this sitting. As I indicated this morning, the Tribunal will sit again in public tomorrow afternoon at two o'clock. At that sitting the representatives of the parties will have the opportunity to address the Tribunal in response to the representations made today. The Tribunal's sitting is now closed.

The Tribunal rose at 4.30 p.m.

PUBLIC SITTING HELD ON 24 FEBRUARY 1998
AUDIENCE PUBLIQUE DU 24 FÉVRIER 1998

Introduction

The Registrar:
The Tribunal will continue its hearings on the request of Saint Vincent and the Grenadines for the prescription of provisional measures in the M/V "SAIGA" (No. 2) case, which is Case No. 2 in the List of cases. Saint Vincent and the Grenadines, Applicant, the Republic of Guinea, Respondent. Yesterday the Tribunal heard the first round of oral arguments by Saint Vincent and the Grenadines and the Republic of Guinea. Today both parties will present their second round of oral arguments in which they will have the opportunity to makes replies to the presentations given yesterday.

The President:
At this sitting the Tribunal will hear the final submissions of the parties. I wish to note that in accordance with the procedure agreed with the parties previously, the parties will only address issues already raised in the written pleadings or in the submissions of yesterday's sittings. This means that new material or evidence on which the other party has not had previous notice may not be introduced by the other party. I also wish to remind Agents that as provided in article 75, paragraph 2, of the Rules of the Tribunal, each party is required by the conclusion of his last statement to read out his final submissions. A typewritten text of the final submissions should be given to the Tribunal. A copy of the text will be transmitted to the other party. I wish now to invite the Agent for Saint Vincent and the Grenadines to make the submissions on behalf of Saint Vincent and the Grenadines.

Réplique de Saint-Vincent-et-les-Grenadines

EXPOSÉ DE M. THIAM
CONSEIL DE SAINT-VINCENT-ET-LES-GRENADINES

M. Thiam :
Monsieur le Président, Honorables juges du Tribunal international du droit de la mer, pour des questions je crois d'interprétation, je vais me contenter aujourd'hui de lire un texte.

Je ferai d'abord des considérations générales sur les faits avant de conclure très rapidement sur la compétence *prima facie*.

Sur les faits, l'Etat défendeur a soutenu que le capitaine du navire Saiga a été représenté par un avocat pendant les instances judiciaires en Guinée, mais cela est totalement inexact. Comme l'a rappelé Maître Bangoura dans sa déclaration produite aux débats, un avocat au cours d'une procédure pénale ne peut pas en Guinée représenter son client. Le système judiciaire guinéen étant d'inspiration française, les avocats ne peuvent qu'assister leur client en matière pénale.

A cet égard, il est important de noter que les avocats du capitaine n'ont jamais été en mesure de communiquer avec leur client avant la première audience, ce qui montre la volonté de la Guinée de faire juger cette affaire rapidement, sur son territoire, en violation des droits les plus élémentaires de la défense.

Pour contester ce point, les juges de la cour d'appel de Conakry se sont contentés d'affirmer par un raccourci extraordinaire que si les avocats guinéens du capitaine ont pu déposer des conclusions écrites, c'est qu'ils avaient pu communiquer avec leur client alors que cet élément ne pouvait pas être retenu, d'autant que la déclaration du capitaine était corroborée sur ce point par celles de tous ses avocats.

La Guinée fait encore plaider que le capitaine du navire Saiga a été condamné en conformité avec la loi guinéenne.

Mais il résulte des dispositions de l'arrêt de la cour d'appel de Conakry que les fondements textuels de cette décision ne sont pas seulement tirés des lois guinéennes, puisque cette juridiction a également cru devoir invoquer les dispositions de l'article 111 de la Convention des Nations Unies sur le droit de la mer, se substituant ainsi sans même une hésitation à la juridiction internationale qui est la vôtre et qui d'ailleurs n'aurait pas appliqué de sanctions pénales.

Par ailleurs, il n'est pas exact de dire que le capitaine a été condamné en conformité avec les lois guinéennes. Il est plus exact de dire qu'il a été condamné en application du code des douanes guinéen et en application de la Convention, plus précisément de son article 111.

L'application de ce texte pour infliger une sanction pénale au capitaine du navire Saiga est parfaitement erronée puisqu'aussi bien les dispositions de l'article 111 de la Convention ne créent aucune infraction pénale susceptible de justifier une quelconque condamnation et que Maître Bangoura, dans sa déclaration produite aux débats, explique que rien dans le dispositif législatif guinéen actuel ne permet d'appliquer les dispositions du code des douanes guinéen aux activités de soutage au-delà de la mer territoriale.

D'ailleurs, si la Guinée avait adopté de tels textes, cela aurait été parfaitement contraire aux dispositions de la Convention sur la liberté de navigation dans la zone économique exclusive qui comprend la zone contiguë.

Le représentant de la Guinée n'a aucune qualité pour donner un avis sur les lois guinéennes. La Guinée qui n'a produit aucune déclaration d'un juriste guinéen est particulièrement mal venue de contester la seule déclaration produite aux débats et signée par un juriste qualifié pour s'exprimer sur les lois guinéennes, celle de Maître Bangoura.

La Guinée fait plaider que le capitaine du navire serait actuellement en liberté; mais il a déjà été produit aux débats le dernier télex du capitaine qui explique que son passeport a été confisqué, sans que cela ne soit d'ailleurs conforme à une disposition du jugement de condamnation, et qu'il lui est fait interdiction de quitter le territoire de la Guinée. Il a ajouté la mention suivante : « S'il vous plaît, faites en mention également à Hambourg. »

Maître Bangoura mentionne également dans sa déclaration que son client est maintenu illégalement dans une sorte de détention administrative, qui n'est pas prévue par les lois guinéennes et qui, de toute façon, ne pouvait pas dépasser les délais de garde à vue accordés aux officiers de police judiciaire dans le code de procédure pénale guinéen.

On mentionnera, pour mémoire, que les agents des douanes guinéens ont bien la qualité d'officier judiciaire ainsi que cela résulte implicitement des dispositions de l'arrêt de la cour d'appel de Conakry.

Maître Bangoura ajoute que la cour d'appel de Conakry a manqué à son devoir de vérifier les déclarations constantes du capitaine du navire. Enfin, il a dû conclure, et je suppose à regret, en disant ceci :

> Je déclare, conformément à mes différentes plaidoiries orales et écrites dans cette affaire, que la loi, les droits de la défense, la procédure et les lois de fond guinéenne[s] ont été contournés et violés ce qui a rendu impossible un procès juste et équitable.

La Guinée explique que les trois navires avitaillés en pétrole par le navire Saiga ne sont pas guinéens. Sur ce point elle a parfaitement raison. La Guinée fait soutenir que ces trois navires étaient détenteurs de licences de pêche guinéennes, mais elle n'en apporte pas la moindre preuve et il est particulièrement important de noter qu'elle n'a jamais tenté de poursuivre en justice les capitaines et les armateurs de ces trois navires.

L'on devra se demander, si l'on veut exclure les actes de brigandage et si l'on veut croire à la thèse selon laquelle la Guinée entendait réellement faire respecter sa loi, pourquoi elle n'a pas cru alors devoir poursuivre ces navires et pourquoi elle s'est attaquée seulement à un pétrolier étranger plein de pétrole.

La Guinée fait plaider qu'elle était en négociation avec l'armateur du navire Saiga et que les pourparlers ont été interrompus à cause de la requête en indication de mesures conservatoires adressée à votre Tribunal, mais cela est parfaitement inexact. On ne voit pas pourquoi, d'ailleurs, la simple saisine du Tribunal devrait empêcher des négociateurs de bonne foi de poursuivre leurs initiatives de rapprochement.

La Guinée fait plaider que l'Etat de Saint-Vincent-et-les-Grenadines serait à l'abri des poursuites judiciaires parce qu'il n'a pas été mentionné dans l'arrêt de la cour d'appel de Conakry. Mais la Guinée n'a jamais voulu déclarer formellement qu'elle abandonnait les poursuites judiciaires contre l'Etat de Saint-Vincent-et-les-Grenadines, alors que lorsque les intentions sont sincères, il est très facile de les concrétiser par des actes clairs.

S'il est vrai que l'Etat demandeur n'a pas été formellement condamné, il est tout aussi vrai qu'il n'a pas été mis hors de cause par la cour d'appel, ni avant par le tribunal de première instance de Conakry.

L'Etat de Saint-Vincent-et-les-Grenadines ayant été cité à comparaître comme civilement responsable est concerné par le lien d'instance. Les juridictions guinéennes étaient tenues de statuer sur l'installation de cet Etat dans la cause et dans les procédures. Elles ne pouvaient le faire en droit autrement que, soit en déclarant l'Etat demandeur civilement responsable et tenu, en conséquence, de supporter les condamnations pécuniaires prononcées contre le capitaine, conformément à ce que demandait le parquet de la République, soit en le mettant totalement hors de cause, ce qui n'a pas été fait.

Aucune de ces deux solutions n'ayant été adoptée, la plus grande incertitude continue à peser sur le sort qui sera finalement réservé à l'Etat de Saint-Vincent-et-les-Grenadines. Cette incertitude est d'autant plus grave que la déclaration de Maître Bangoura, entièrement corroborée par l'article du journal « le Sphinx », montre les graves risques judiciaires qu'encourent les justiciables en Guinée. Elle est encore corroborée par le fait que c'est la première fois, dans les annales judiciaires internationales, que l'on voit un Etat poursuivi par un autre Etat comme civilement responsable d'un acte de contrebande. Un Etat qui poursuit un autre Etat pour des faits de contrebande ne peut pas s'étonner d'entendre, à son tour, la qualification qu'il conviendrait en droit de donner à ses propres actes.

Il n'y a aucune raison de croire le représentant de la Guinée lorsqu'il affirme que le jugement est clair et ne permet pas de justifier la crainte que l'Etat de Saint-Vincent-et-les-Grenadines soit poursuivi. Alors que la parfaite clarté des dispositions de l'article 111 de la Convention n'a pas empêché la Guinée non seulement d'écarter une exception de nullité fondée sur l'illégalité de la poursuite en mer du navire Saiga au mépris des motifs adoptés par votre Tribunal dans son jugement du 4 décembre 1997, sur la base précisément de cet article 111 de la Convention. Mais en plus, d'invoquer au fond les dispositions de ce texte pour justifier une condamnation pénale, comme je l'ai expliqué tout à l'heure.

La Guinée fait plaider qu'elle n'est pas en mesure d'arrêter l'exécution de l'arrêt de la cour d'appel de Conakry, mais il appartient au parquet de la République de Guinée de procéder à l'exécution des jugements correctionnels. Le parquet dépend directement du Ministère de la justice qui est habilité à donner toute l'instruction nécessaire. Qu'en plus, tout justiciable, et même la douane, peut volontairement renoncer au bénéfice d'un jugement rendu à son profit ou retarder l'exécution d'un jugement. La douane dépend du Ministère des finances qui peut à tout moment renoncer aux amendes prononcées à son profit ou retarder l'exécution de ces amendes.

Il est donc inexact de dire que le Gouvernement guinéen n'est pas en mesure d'arrêter ou de suspendre l'exécution du jugement de Conakry, de la cour d'appel de Conakry.

D'ailleurs, si tel avait été le cas, on ne comprendrait pas pourquoi, alors, le représentant de l'Etat défendeur aurait déclaré que le navire aurait été libéré, si la caution avait été considérée par eux comme raisonnable.

Sur la compétence *prima facie*, après avoir expressément invoqué une loi de 1995 et une ordonnance de 1985, toutes deux relatives à la pêche selon les affirmations de la partie guinéenne, celle-ci a fait plaider qu'elle n'est pas tenue de produire la copie des textes invoqués. Mais vous aurez remarqué qu'à l'annexe 6 de son dossier, pour justifier des droits qu'elle se réserve dans la zone contiguë, la partie guinéenne a produit une copie en versions française et anglaise de sa loi numéro 95 23 C.T.R.N du 12 juin 1995 portant code de la marine marchande.

L'on ne voit pas pourquoi, alors qu'elle produit spontanément la copie d'autres lois, elle refuserait subitement de produire la copie de sa loi de 1995 relative à la pêche et de son ordonnance de 1985 relative à la pêche. Un tel refus doit être considéré comme étant extrêmement suspect. En tout cas, il n'appartient pas à votre Tribunal de rechercher à la place des parties les éléments sur lesquels elles fondent leurs prétentions. Il conviendra donc de rejeter toutes les affirmations de la partie guinéenne fondées sur des textes non produits aux débats pour y être discutés contradictoirement. La Guinée persiste à soutenir que l'arrêt de votre Tribunal du 4 décembre 1997 confirmerait la thèse selon laquelle le navire Saiga aurait été arraisonné pour une violation des lois prises sur le fondement de l'article 73 de la Convention des Nations Unies.

Mais cette persistance ne fait que confirmer la justesse de la position de l'Etat de Saint-Vincent-et-les-Grenadines qui demande qu'un signal encore plus fort soit envoyé à la

partie défenderesse, qui ne semble pas avoir perçu toute la délicatesse et tout le sens du premier signal envoyé par votre Tribunal.

La Guinée fait ajouter que les licences de pêche des navires avitaillés par le navire Saiga leur interdisaient de se faire fournir du pétrole en haute mer. Elle en déduit la conséquence que, selon elle, le navire Saiga aurait violé cette obligation. Mais, outre que les licences dont il s'agit n'ont pas été produites, comme cela à déjà été relevé plus haut, et, outre que les obligations des navires de pêche en haute mer n'ont rien à voir avec la présente affaire, on ne voit pas comment on peut prétendre que le navire Saiga aurait violé une obligation contractuelle qui ne le concerne pas, en raison de l'effet relatif des contrats.

Il n'est pas inutile de relever, au demeurant, que l'argument n'a jamais été soulevé et qu'il ne figure ni dans les actes de la procédure judiciaire, ni dans les mémoires en réponse de la République de Guinée déposés au Greffe de votre juridiction.

Enfin, il faut relever l'extraordinaire déclaration de la Guinée selon laquelle, d'après la traduction française qui en a été faite hier à l'audience, je cite :

> Les références aux tribunaux guinéens n'ont aucune pertinence car ils n'avaient pas à juger - ces tribunaux - la question de savoir si le navire Saiga a violé la loi sur la pêche en Guinée.

Le Tribunal n'aura certainement pas manqué de relever que la Guinée n'a pas pu, sans se contredire gravement, faire une telle déclaration après avoir affirmé que le capitaine avait été poursuivi par ses cours et tribunaux pour une violation de sa législation relative à la pêche.

Cette importante contradiction rend d'autant plus suspect le refus de la Guinée de produire devant le Tribunal les prétendus textes législatifs qui auraient été violés par le navire Saiga.

Monsieur le Président, Messieurs les juges du Tribunal, votre juridiction n'a pas d'autre choix que celui de s'inscrire résolument dans le sens de l'histoire dont les péripéties que nous connaissons ont fait qu'il a fallu attendre si longtemps avant que, enfin, l'esclavage, le transport d'esclaves, puissent être considérés comme un acte de piraterie.

Vous êtes l'espoir de toute la communauté mondiale et singulièrement de nos peuples du tiers monde dont les institutions judiciaires ne fonctionnent pas toujours comme il serait souhaitable. Aidez-nous - de grâce ! - à nous indiquer le chemin de la justice.

The President:
Mr. Sands, would you like to continue?

STATEMENT OF MR. SANDS
COUNSEL OF SAINT VINCENT AND THE GRENADINES

Mr. Sands:
Mr. President, Members of the Tribunal, it falls to me to address the substantive legal arguments put to you yesterday by the distinguished Agent of Guinea. There are basically three remaining questions which you must decide. First, is the bond originally posted on 10 December 1997 and subsequently modified *prima facie* reasonable so as to justify the prescription by this Tribunal of provisional measures requiring release of the vessel and its crew? Second, have the conditions of article 290, paragraph 1 - in particular that of urgency - been satisfied so as to justify the prescription by this Tribunal of the provisional measures requested? And third, are the provisional measures requested properly of a kind to be prescribed by this Tribunal? I will try to deal with each of these points in turn as time is, of course, short and we cannot deal with all of the points raised yesterday. We feel bound to say that any silence in our presentation today should not be treated as an admission.

Going on to deal with these points I would like to say something about the proper standard to be applied. We are in the provisional measures phase. There can be no question but that you are not required to take a definitive decision on the merits. That is for the next phase. The parties are in agreement on this. What they disagree on is what *prima facie* means in practice. I have to confess that we are a little confused about Guinea's approach in this respect. In the last proceedings, the prompt release proceedings, which were entirely separate from these, the majority of this Tribunal found it plausible or sufficiently arguable that on the basis of the information then available, on 4 December 1997, Guinea's actions might be classified as relating to fisheries matters. Guinea seems not to understand that the Tribunal did not decide that its actions were definitively related to fisheries rather than customs. What did Mr. von Brevern say yesterday? I quote:

> [In the prompt release proceedings] the Tribunal, you, the Judges, have qualified the relevant laws of Guinea as sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ … . [Now] with such a decision taken … only two and a half months ago, the Guinean Government cannot see why today the dispute over M/V Saiga should not be considered *prima facie* by the International Tribunal to relate to Guinea's sovereign rights with respect to the living resources in the EEZ.

That would be a perfectly reasonable view, and I think that I would probably share it if no material events had occurred between 4 December 1997 and today. But there is the little matter of the *cédule de citation*, the judgment of the *tribunal de première instance* of 17 December 1997, the judgment of 3 February 1998 of the *cour d'appel*, and of course the actions of Guinea's authorities throughout this entire period, which in the past two and a half months have shown not the remotest connection whatsoever with fisheries legislation. Mr. von Brevern conveniently chose to overlook these matters. We say that what was plausible or sufficiently arguable then is certainly not *prima facie* today.

As we understand it the term *"prima facie"* means "at first impression, on first sight". That is the standard that has to be applied, both for the purposes of jurisdiction and in determining the reasonableness of the measures which we request. We say that on that standard it is plainly clear that this Tribunal has jurisdiction and that the measures we request are reasonable and ought to be prescribed.

Let me turn now to the bond that was posted on 19 December 1997. Was it a reasonable one? For the purposes of these proceedings we are concerned only with the

question of whether the bond which is today in the possession of Guinea is *prima facie* reasonable. In our view the bond is reasonable - period - and not just *prima facie* reasonable, but that is a matter for you to decide in the next phase of these proceedings at the merits stage. At this stage all you have to decide is whether the bond is *prima facie* reasonable or *prima facie* unreasonable. If it is *prima facie* reasonable, then you must prescribe provisional measures for the release of the vessel and crew. If it is *prima facie* unreasonable, then you should decline to prescribe these provisional measures that we request.

Whether the bond is reasonable or unreasonable now boils down to a single issue: is the event triggering payment under the bond reasonable? Guinea says that a reasonable bond would provide for payment upon presentation of a final judgment from a Guinean court. We say that the bond is reasonable because the dispute has been internationalized, in the sense that the final determination on the merits will be the decision of this Tribunal, and that it is therefore *prima facie* reasonable for the final decision of this Tribunal to be the act which triggers payment.

We say that this approach is entirely consistent with international practice, including in commercial relations, as my friend and colleague Mr. Howe explained yesterday. But we also say that the bond is *prima facie* reasonable for other reasons. To begin with, and perhaps most compellingly, Guinea itself has said that the bond is reasonable. For evidence of that you should look to Annex 11 of the bundle provided to us yesterday morning by Guinea. It is a letter from the *Directeur National des Douanes* in Guinea, Mr. Bocar Cissoka, to Mr. von Brevern. It is dated 16 February 1998: that is Monday of last week. It says this: "*la nouvelle rédaction de ladite lettre de garantie nous est acceptable*". (The wording of the so-called bond is acceptable to us). The version Mr. Cissoka was referring to included the very words that indicated that payment under the guarantee would be made after "final judgment, or if judgment be ... otherwise challenged, by final decision of a tribunal or arbitral tribunal or (the International Tribunal for the Law of the Sea)". That was last Monday.

Mr. Cissoka knew then, or at least he should have been advised by Mr. von Brevern, that the judgment of the Court of Conakry of 3 February 1998 was being otherwise challenged, and he must have known - or at least he should have been advised - that it was most probably going to be otherwise challenged before this Tribunal, because it is Guinea itself that requested that the international proceedings on the merits be transferred to this Tribunal. On the basis of that language Guinea accepted the bond as reasonable. That is irrefutable.

What is also irrefutable is that these very words in the bond have never been challenged by Guinea as being unreasonable. Exactly the same words can be found in the bond we posted on 10 December 1997. So Mr. Cissoka and Mr. von Brevern have had this language for nearly three months. If they had a problem with this language, if it was, as Mr. von Brevern says, *prima facie* unreasonable, then why did he not say anything about it? He did not. Guinea said nothing. We submit that unchallenged terms simply cannot be *prima facie* unreasonable. The Tribunal may ultimately rule that the language is unreasonable but it cannot today say that it is *prima facie* unreasonable, given that Guinea has itself approved it. In fact, the language only became unreasonable last Friday. Magically, what was reasonable at midnight on Thursday became unreasonable at 9 o'clock on Friday morning.

What happened? Well, Guinea tried to cash in the bond and quite reasonably payment was refused. The conditions of the bank guarantee, as accepted by Guinea, simply had not been met. Lest it be said that the unreasonableness is ours alone, you will recall that Mr. von Brevern said yesterday that Crédit Suisse, a large international banking institution, had refused to pay on the bond. The truth is that Guinea's representatives have had weeks and

weeks and weeks to challenge this language and they have not done so and they cannot now do so. They are estopped by their conduct and by their earlier acceptance.

There is another point. This Tribunal ordered the bond to be posted on the assumption that Guinea would prosecute the M/V Saiga for violation of fishing laws. Guinea prosecuted on the basis of customs laws. Can Guinea reasonably expect this Tribunal to determine that the bond is *prima facie* unreasonable when Guinea proceeded to act after the Judgment of 4 December 1997 on the very basis that the Tribunal said would be *prima facie* unlawful; namely, in exercise of customs laws?

Mr. President, English law provides a most suitable expression: he who comes to equity must come with clean hands.

The bond posted on 10 December was reasonable, and it is certainly *prima facie* reasonable. It continues to be *prima facie* reasonable today, including that part of it which provides for payment upon your final decision. On that basis the vessel and crew can and should be released by way of provisional measure and we hope very much that you will so prescribe.

Let me say something also briefly about the appropriate procedure for determining the reasonableness of the bond, the matter which is before this Tribunal.

Yesterday Mr. von Brevern said: "the correct application in our view would have been a demand of Saint Vincent … to the International Tribunal for an interpretation of [the] Judgment with respect to the notion of 'reasonable'". We wonder if this is the same Mr. von Brevern who on [15] December 1997 - you will find the letter at attachment 12 of our bundle, page 23 - said this:

> You have advised to be in the process of preparing an application to the Tribunal pursuant to article 126 of the Rules of the Tribunal. Of course this is up to the decision of St. Vincent and [the] Grenadines, however we have the feeling that such an application would be a misuse of the Tribunal.

No doubt the article 126 procedure would have been appropriate on that narrow issue but the matter of the *prima facie* reasonableness of the bond can just as easily be addressed by way of provisional measures and we see no reason of principle or practice why it cannot be so addressed.

Let me turn now to the second issue: conditions concerning the application of article 290. We are in agreement, I think, as to what these conditions are but we disagree as to whether they have been satisfied. Specifically, Guinea says that there is no urgency, and it wraps around that argument a number of subsidiary points alleging, essentially, that any harm which might occur to Saint Vincent's interests is minor and in any event is not irreparable.

We heard a great deal from Mr. von Brevern about why there exists no situation of urgency. He said that the release of the vessel and crew after something approaching four months in captivity was not really an urgent matter. I feel almost bound to ask him: I wonder if he would feel the same way if he or members of his family were similarly incarcerated with no prospects of release? He asked of the commercial consequences: is the damage really so bad? Again, one wonders how he would feel if members of his own law firm were similarly incarcerated thousands and thousands of miles from Hamburg and similarly deprived of the means of carrying out their basic commercial activities? He questioned whether the interests of vessels registered in Saint Vincent and the Grenadines was such as to justify the prescription of provisional measures, given that these were, I think he said, small in financial amount and, in any case, the exclusive zone of Guinea is far away and rather small?

I do not think we need to address that argument any further. What he did not address was the legal standard to be applied. We indicated our attraction yesterday to the standard which was put by the International Court of Justice in the Great Belts case. We do not say that it binds you but you may find some assistance in that language. The standard, you will recall, was that action prejudicial to our rights is likely to be taken before this Tribunal's final decision on the merits is taken. That is the standard for urgency. I did not hear the distinguished Agent yesterday challenge that standard. In fact, I did not hear him suggest an alternative. It is the only standard that is on the table and we take it therefore that it is an acceptable one to Guinea.

Let us apply it to the facts of this case. Is action prejudicial to the rights of Saint Vincent likely to be taken before your final decision? Well, Mr. von Brevern yesterday confirmed again that the vessel and crew would not be released without payment of the $ 400,000 bond. Since, in our view, that constitutes a continuing violation of Guinea's obligations to Saint Vincent and the Grenadines, with the passing of each day, its prejudicial action continues. There is no question that that is likely to happen. It will happen. Mr. von Brevern has said so. Then he confirmed that Guinea maintained its right to apply in its exclusive economic zone the very same customs laws which we are challenging. Presumably then, if the M/V Saiga were to be released tomorrow and bunker another Saint Vincent vessel in the exclusive economic zone, Guinea would once again take enforcement action against that vessel. In these circumstances it is very difficult to see how you cannot conclude that prejudicial action is likely to occur. And Mr. von Brevern did not deny that Guinea maintained its right to exercise hot pursuit with interruption. What he said was that we had given no indication that such hot pursuit would take place, as though we would be required to provide a detailed timetable as to when this was going to happen. Likelihood is established in our submission if a practice has occurred in the past with sufficient frequency to suggest that there are reasonable prospects for it happening again. This is amply established in this case, as the very detailed statements of Mr. Vervaet and Mr. Kanu and the evidence they provide attest. So we say that the urgency of the request is established, but if we are wrong, and if Mr. von Brevern is right, then the Orders of the International Court of Justice in, amongst others, the *Anglo-Iranian Oil Co.* case, the *Fisheries Jurisdiction* cases, the *Nuclear Tests* cases and the US Diplomatic Hostages case were all wrongly decided.

Mr. von Brevern also said that there was no urgency because no significant damage would be suffered by our vessels or our interests if you decided not to prescribe the measures requested. He confirmed, incidentally, that our fears as to entering the EEZ of Guinea are not unfounded. He suggested that we could always go and bunker "outside Guineas waters". By way of assurance, he indicated that in the meantime our business would not be lost since there are no Guinean vessels to take over that business. Very reassuring!

I will not now re-state why we say that damage is occurring, is significant and will continue to occur. In response to the Guinean view the Members of the Tribunal may wish to re-read the statements of Messieurs Vervaet and Kanu, which appear respectively at our Attachments 7 and 11. Unlike Guinea's entirely unsubstantiated comments, the statements constitute formal evidence before this Tribunal; evidence, I might add, which has not been challenged by Guinea at all. The statements confirm the impracticality of Mr. von Brevern's proposals. For example, vessels loading at Dakar and wanting to avoid Guinea's exclusive economic zone would effectively mean taking a significant chunk out of the potential southerly route from Dakar, thereby making a bunkering route further south - that is to say, off the coast of Sierra Leone or Liberia - effectively uneconomical. This would be all the more so if the bunkering vessel had to sail 200 miles off the coast to go entirely around Guinea's EEZ, as Mr. von Brevern suggested might be appropriate yesterday. Moreover, as we have

amply demonstrated, the authorities of Guinea do not restrict their activities to vessels located in Guinea's waters. Mr. Kanu's statement makes that very clear. We have provided detailed evidence of three recent occasions on which Guinea has detained vessels and confiscated cargoes beyond its own exclusive economic zone. Again, these have not been denied.

Finally, there is evidence that this threat to freedom of navigation is escalating and that it will continue to do so unless steps are taken to confirm freedom of navigation rights. This request for provisional measures is a first step in that direction and we fear that a failure to prescribe the measures requested would send out the wrong signal.

I turn now to the third and final point: the relationship between the provisional measures we have requested and our claim on the merits. Mr. von Brevern made great play about this, and we think confusingly so. He says that one of our requests for a provisional measure - the release of the M/V Saiga - is identical to our request on the merits and that therefore it should be rejected. Another of our requests for provisional measures should be rejected because "it goes even further than a request on the merits". Yet another of our requests should be rejected because it is "not strictly related to the request of the main submission". We are therefore in some confusion as to the standard which Guinea would apply as concerns the relationship between the request for provisional measures and the request on the merits. Are provisional measures to be granted that are different from or the same as claims on the merits?

We say that there will inevitably be a great deal of similarity between requests for provisional measures and those relating to the claim on the merits. We explained that in some detail yesterday, particularly by reference to the standard applied by the International Court of Justice in the US Diplomatic Hostages case. We heard no response from Mr. von Brevern again on whether that standard was appropriate or not. We therefore assume that it is. But, to remind you of what the Court said then in The Hague, it was that a request for provisional measures must by its very nature relate to the substance of the case since their object is to preserve the respective rights of either party. We indicated, we hoped rather fully, yesterday why it was that these provisional measures were sufficiently related to the request on the merits.

I turn to the provisional measures that we have specifically requested. Guinea considers that they are inappropriate. We believe that we have provided ample precedent to show that the measures requested fall within the range of those normally indicated or prescribed in other fora. In fact, I believe we have found an example to support each of our requests. Guinea has not challenged any of the authorities I mentioned yesterday, with the exception perhaps of the Fisheries Jurisdiction Order, a case which we say is directly analogous to this and provides an excellent basis upon which this Tribunal may at least draw inspiration.

We say something about each element of our request in response to what Mr. von Brevern said yesterday. The first request related to the release of the vessel and the crew. It is said by Guinea to be a request for a decision on the merits. Well, that cannot be right. When the International Court of Justice indicated as a provisional measure the release of US diplomatic and consular staff in Teheran pending its final decision, it was not handing down a definitive judgment on the merit. It was simply indicating that at that time the US had a *prima facie* argument and that the continued captivity of the hostages would be financially irreparable. This case is very similar. It is a question of balancing the convenience to the two parties of ordering by way of provisional measures the release of the vessel and the crew or not so ordering. If no provisional measures for their release are prescribed, could compensation subsequently repair the harm? We think the answer to that question is clearly no. Deprivation of personal liberties and the loss of commercial activities would be almost

impossible to value easily. If release on the other hand is prescribed, can the harm occasioned to Guinea be compensated if it later turns out that Guinea was in fact entitled to retain them all along? The answer to that has got to be yes. Guinea has said quite simply that it wants $ 400,000 for their release. The amount is fixed and defined. If it wins on the merits it will receive its money, it is as simple as that. The bond will be paid. The only difference is that Guinea will have to wait for a year to get its money.

The second and third requests concern the suspension of the judgements of 17 December and 3 February. Guinea says that international courts cannot order the suspension of the judgments of national courts, and that in any case the Government of Guinea has no means to suspend their application. On the first point we say why not? We provided a number of examples of cases before the International Court of Justice and the European Court of Justice in which provisional measures were indicated in relation to judicial proceedings in the national courts. We know that the European Court of Justice is regularly called upon to suspend the effects of national administrative and judicial decisions, and also now legislative decisions. I cannot say anything about the rules of criminal procedure in Guinea. But if this Tribunal prescribes provisional measures suspending the application or enforcement of the judgment of 3 February 1998, then Guinea is under an international legal obligation to comply with that order. Limitations in its domestic law will not provide a defence, that is well established in international law.

Guinea then goes on to say that suspension is not needed anyway. We say it is. As Maître Thiam has most eloquently explained, the greatest uncertainty exists as to whether the judgment of 3 February 1998 can be enforced against other persons. The only evidence before us, which is that of Maître Bangoura, the Guinean lawyer, has not been challenged by Guinea, which has not seen fit to introduce any evidence at all on the point. All Mr. von Brevern said is "There is no danger for the judgment of 3 February 1998 to be enforced against any person and any governmental authority". Where is his evidence to support that proposition? Or is it maybe an undertaking on behalf of the Government of Guinea? And if it is an undertaking, where is the evidence as to the authority of the Guinean Agent to make it? This is a court of law. Matters of evidence must be proved. The Tribunal can only proceed on the basis of that evidence which is before it. The evidence points exclusively in our view to the possibility that enforcement against Saint Vincent and the Grenadines itself and its vessels simply cannot be excluded.

As to the fourth request "that Guinea desist from applying or enforcing its customs laws in its exclusive economic zone against Saint Vincent and the Grenadines vessels" Guinea makes two points. One, that Saint Vincent and the Grenadines has shown no specific business interest in this activity, and two that the request is beside the point since Guinea only applies its fisheries laws in the EEZ. I feel almost bound to ask, has Mr. von Brevern actually read the text of the judgment of 3 February 1998 of the *cour d'appel*? It finds that the master of a vessel registered in Saint Vincent and the Grenadines is criminally liable for violating customs laws in the exclusive economic zone of Guinea. Do we need to say any more? If that is the full extent of Guinea's argument on this point then it is difficult to see how this Tribunal can avoid prescribing the provisional measures which we have respectfully requested.

The fifth request asks Guinea to cease and desist from interfering with vessels of Saint Vincent and the Grenadines to enjoy freedom of navigation. In effect Guinea says that we have no right to raise the request since it goes to the merits, and in any event there is no *prima facie* right to bunker in the exclusive economic zone. In my presentation yesterday I tried to explain why a request for provisional measures and the claim on the merits will necessarily be closely linked. As I have already mentioned, that drew no response from the Agent of Guinea. We therefore assume that the approach set out by the Court is one which is acceptable to

Guinea. That explains the overlap, and it explains why the prescription of provisional measures would not have any effect whatsoever for your decision on the merits.

As to the *prima facie* right to bunker in the exclusive economic zone, Guinea made some effort to challenge the evidence we introduced concerning practice in other States. We want to say quite clearly the evidence we introduced does not in any way bind you and it is not in any way conclusive. We simply wanted to find some evidence that was illustrative of State practice. If we had come to this Tribunal with no evidence of State practice it would have been said that we had failed to carry out our task properly in establishing the *prima facie* rights that we sought to preserve. We had a very short amount of time. We explained yesterday that it was not possible, because apparently it did not exist, for such evidence to be obtained from far more authoritative sources, including in particular the United Nations. The evidence however that we have introduced, we recognize its limitations, does confirm what we thought might be the case, namely that 19 reasonably representative States do not apparently do what Guinea does in its exclusive economic zone. It supports our contention that we have a *prima facie* right to bunker in Guinea's exclusive economic zone. We noted yesterday that in its presentation Guinea did not challenge our readings of article 62, paragraph 4, or article 33, paragraph 1, of the 1982 Convention, both of which in our submission point to the conclusion that Guinea's acts are *prima facie* incompatible with the Convention.

We think we need to be very clear about what we are saying, which is *prima facie* the extent of our right. We do not dispute the right of Guinea or indeed of any other State to impose as a condition of a grant of a fisheries licence certain obligations in respect of bunkering. For example, under the EC-Guinea Agreement which has been mentioned frequently, Guinea would be entirely free to require EC vessels fishing in its exclusive economic zone to bunker only from certain sources. That may raise an issue under the World Trade Organisation's General Agreement on Trade in Services, of which Guinea is a party, and which provides for non-discrimination. But it would not in our submission necessarily be problematic from the perspective of the 1982 Convention. But Guinea has not done that. The EC-Guinea Protocol 1996 is entirely silent about conditions as to bunkering. And so is Guinean law. There is not a shred of evidence to support the view that the Italian vessel bunkered by the M/V Saiga violated Guinean law. It has not produced the fisheries licence which that vessel must have operated under. If it were to produce it we cannot help but feel that it too would show that there were no obligations imposed on that fisheries vessel in relation to bunkering. But even if the licences were produced, and even if the licences did indicate that the Italian vessel had to comply with certain bunkering conditions, Guinea would not be helped, because the proper addressee, the proper target of any claim for a violation of that licence would be the fishing vessel, not the M/V Saiga registered in a third State and without any connection with Guinea. Guinea simply cannot enforce obligations owed to it by a fishing vessel subject to its jurisdiction against a third party. Guinea further has produced no evidence that any steps have been taken against any of the three fishing vessels.

Finally, as to the request concerning hot pursuit, this, too, arises in our claim on the merits, and we will certainly be addressing it at the next stage. We appreciate that this was introduced late into these proceedings, but if you read closely our Application on the merits you will see that it too is there addressed. The fact does not preclude the grant of provisional measures in this phase of the proceedings, since we explained yesterday the matter of hot pursuit had been previously addressed in our Application for notification of arbitration of 22 December.

In conclusion, Mr. President, Members of the Tribunal, it is the submission of Saint Vincent and the Grenadines that all of the requisite conditions which must be satisfied are

satisfied for the prescription of provisional measures. They are all in place. The Tribunal has *prima facie* jurisdiction on the merits. The measures requested are intended to and would preserve the rights of the parties under the 1982 Convention. We note that Guinea did not challenge that its Treasury obtains not a single cent from the application and enforcement of these customs laws in its exclusive economic zone, so it cannot show that its rights would be prejudiced in any way. The measures are urgent in the sense that Guinea is likely to take further actions prejudicial to the rights of Saint Vincent and the Grenadines. We heard nothing yesterday from Mr. von Brevern suggesting otherwise. And without the measures requested there is every prospect that the damage which would ensue would be serious and irreversible.

In our submission this Tribunal should not lose sight of the fact that we are not faced in this case only with the question of financial losses. Certainly Saint Vincent and the Grenadines is entitled to obtain provisional measures to protect its commercial interests, just as Belgium did in 1927 in the first equivalent request before the Permanent Court; just as the United Kingdom did in 1951 in the first equivalent case before the International Court of Justice. Saint Vincent and the Grenadines is a small State, is entitled to take steps to protect its assets, its interests and its rights as well as those of vessels flying under its flag for exactly the same reasons. The fact that Saint Vincent and the Grenadines is a small country, that its interests are necessarily less extensive, or that they are in relation to matters taking place far away, should make no difference to our application, contrary to what Mr. von Brevern said. But beyond these financial interests, these economic interests, the captain of the vessel continues to be incarcerated, as Maître Thiam explained. He is not free to leave the vessel. If he was, he would be in this courtroom, and he would be a witness, we assure you.

We received a telex from him last Wednesday and submitted it to the Tribunal in the bundle on Monday morning, and as Maître Thiam indicated, he indicated expressly that his plight be brought to your attention. At least one crew member remains hospitalized in a very grave condition. These are extremely serious matters. It is wholly unacceptable for Guinea to now require payment under the bond as a condition for the release of the vessel and the remaining crew. It is also legally unjustifiable, and it is in our respectful submission plainly contrary to your Judgment of 4 December last.

Mr. President, Members of the Tribunal, that concludes my presentation. I would like to thank you for your kind attention, and ask that you now call to the Bar The Right Honourable Carl Joseph, Attorney General of Saint Vincent and the Grenadines, who will present our closing submissions.

The President:

I would like to note the presence in court of Mr. Bozo Dabinovic, the Agent of Guinea, who is also the Commissioner for Maritime Affairs for Saint Vincent and the Grenadines. As requested, I now call on The Right Honourable Carl Joseph, Attorney General of Saint Vincent and the Grenadines, to conclude the presentation of Saint Vincent and the Grenadines

STATEMENT OF MR. JOSEPH
COUNSEL OF SAINT VINCENT AND THE GRENADINES

Mr. Joseph:
Mr. President, Members of the Tribunal. It is now my turn to address you finally, and to conclude the reply of Saint Vincent and the Grenadines in this matter.

May I begin by expressing the gratitude of the Government of Saint Vincent and the Grenadines for the way in which you have accommodated us in giving priority and a hearing in this very important matter in the shortest possible time. I wish to thank you further for your patience in listening to the arguments put forward by my delegation during the course of this hearing.

Mr. President, Members of the Tribunal, this is the very first time that you have been asked to prescribe provisional measures for the protection of rights under the 1982 Convention for the Law of the Sea. This Tribunal is the ultimate guardian of the Parties' sovereign rights under the Convention. Your response to this request will set the precedent for the further implementation of its provisions. Your decision will therefore be the best possible decision that can be made for the future guidance of this Tribunal and all States Parties to the 1982 Convention. In that context, I must again stress the level of concern and importance that my country attaches to the outcome of these proceedings.

We are a small archipelagic State of limited natural resources with a narrow economic base. Our maritime register represents a vital source of income for Saint Vincent and the Grenadines. That source has been threatened by the actions of Guinea. It has become apparent that the Guinean authorities are persistently applying and enforcing their customs laws within and beyond their exclusive economic zone. We say that this is in contravention of our rights under international law. I have heard nothing to allay the fears of my government that as civilly responsible in the Conakry proceedings, Saint Vincent and the Grenadines will not be liable to the enforcement of the judgment of 3 February as against vessels flying our flag or against our State, the State itself.

The Agent for Guinea has repeatedly stated that the Master quite obviously does not have the means to settle by himself the fines imposed upon him. He has also provided no formal statement by the prosecuting authorities or by the Ministry of Justice or by customs authorities by way of undertaking to show us that we are not at risk. Accordingly, we feel that we must maintain our request in all its aspects.

The operation of a shipping registry entails a significant responsibility and it is one that my government takes very seriously. It is for this reason that my government has been compelled to bring this matter before you on two occasions already and why we will return for the merits phase. For the purposes of these proceedings it is the potential effect Guinea's action may have upon our shipping register, and therefore our economy, that it is of such grave concern to my government and is the reason why we have undertaken these steps to protect our vessels flying our flags and to preserve our sovereign rights.

Guinea's actions have resulted in vessels, in particular those flying the Saint Vincent flag, that operate within the vicinity of Guinea, being at unnecessary risk. Many are having to incur the additional cost of rewriting in an effort to minimize the peril.

Vessels flying our flag are entitled to enjoy the rights, obligations and freedoms afforded them under international law. This includes the practice of offshore bunkering. The M/V Saiga is already the third tanker flying our flag to have been attacked by Guinean authorities and it is my government's grave concern that if we, as a flag State, are seen to be unable to protect the inherent rights of vessels under our flag, this may result in the loss of confidence in Saint Vincent and the Grenadines' commitment and effectiveness as a flag State

by owners world-wide. This would have a profound effect upon our shipping register with potentially grave consequences for the economy of Saint Vincent and the Grenadines and the welfare of our people.

It is for this reason, Mr. President and Members of the Tribunal, that I, on behalf of the Government of Saint Vincent and the Grenadines, respectfully but most earnestly ask that you prescribe the provisional measures requested to preserve our rights and those of vessels flying our flag pending your final decision on the merits of this case.

I will now read out for you our final submissions as amended by our Reply of 13 February 1998 and incorporating the minor textual changes to the introductory chapeau that Mr. Sands mentioned yesterday.

The provisional measures of protection requested by Saint Vincent and the Grenadines are as follows:

> [T]hat Guinea shall forthwith bring into effect measures necessary to preserve the rights of Saint Vincent and the Grenadines under the 1982 Convention, namely:
>
> 1. Release the M/V Saiga and her crew;
>
> 2. Suspend the application and effect of the judgment of 17 December 1997 of the *tribunal de première instance* of Conakry and/or the judgment of 3 February 1998 of the *cour d'appel* of Conakry;
>
> 3. Cease and desist from enforcing, directly or indirectly, the judgment of 3 February 1998 against any person or governmental authority;
>
> 4. Subject to the limited exception as to enforcement set forth in article 33, paragraph 1(a), of the 1982 Convention on the Law of the Sea, cease and desist from applying, enforcing or otherwise giving effect to its laws on or related to customs and contraband within the exclusive economic zone (including in particular articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, articles 316 and 317 of the *code des douanes*, and articles 361 and 363 of the Penal Code), in particular as against vessels registered in Saint Vincent and the Grenadines and engaged in bunkering activities in the waters around Guinea outside its 12-mile territorial waters;
>
> 5. That Guinea and its governmental authorities shall cease and desist from interfering with the rights of vessels registered in Saint Vincent and the Grenadines, including those engaged in bunkering activities, to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to freedom of navigation as set forth, *inter alia* in articles 56, paragraph 2, and 58 and related provisions of the 1982 Convention;
>
> 6. That Guinea and its governmental authorities shall cease and desist from undertaking hot pursuit of vessels registered in Saint Vincent and the Grenadines including those engaged in bunkering activities except in accordance with the conditions set forth in article 111 of the 1982 Convention, including, in particular, the requirement that such hot pursuit must be commenced when a foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.

Accordingly, my government formally asks that the Tribunal prescribe the provisional measures requested for the reasons put before you by my delegation during the course of these proceedings. Mr. President, Members of the Tribunal, thank you very much.

The President:
Thank you very much indeed, Mr. Carl Joseph. I take it that that concludes the submissions of Saint Vincent and the Grenadines. It will be the turn of Guinea to make its submissions but before that I would suggest that the Tribunal suspends this sitting for fifteen minutes. The sitting is now suspended for fifteen minutes.

Short adjournment

The President:
I now invite Mr. von Brevern, the Agent of Guinea, to make his submissions.

Reply of Guinea

STATEMENT OF MR. VON BREVERN
AGENT OF GUINEA

Mr. von Brevern:
Mr. President, Honourable Judges, I will present the submission of the Government of Guinea. Let me remark at the beginning that I will try to speak in English and I have some submissions to read in French.

The second remark, at the beginning, is that I have the feeling that my opponents would like the procedural rules of the English system to be applied. I have several times heard that I did not refer to references given from Saint Vincent and the Grenadines, for example the important cases of the Iceland Fishery or the US Embassy. In my opinion, I thought it was not necessary to refer to these cases because they are in no way comparable to what we have to judge here.

Then I have the feeling that the rules of evidence are also judged differently by Mr. Sands on the one side and by myself on the other side. Mr. Sands referred to the judgment of the Supreme Court of Guinea of 3 February in which the Captain of the M/V Saiga was sentenced, and now Mr. Sands says I would not have given any evidence that the judgment could not be enforced against any other person. I really do not understand why I have to give evidence. The judgment is very clear. The Captain is sentenced and why should anybody else be enforced by such a judgment? It is up to Mr. Sands to give evidence.

By the way, in a paper addressed to the Tribunal in which the Agent had been asked to point out the issues which are still in dispute, I have made very clear that in my opinion all issues are still in dispute. Therefore, I would not be able to understand that, insofar as I did not refer to any submission of the representatives of Saint Vincent and Guinea, I would accept these submissions. That is not the case.

Another point in this connection was that I think Mr. Sands said, or was it Maître Thiam, that I would not have produced the fishery laws of Guinea, two laws which have been mentioned in my Statement in response. I have explained that I thought it is not necessary to do this because you, in your first case Judgment, have referred to these laws. Therefore these laws are known to the court and need not any longer be produced.

But now I come myself to a procedural point. This refers to the conclusion, or the submission, the last wording of the requests of Saint Vincent and the Grenadines in these proceedings. We have heard Mr. Joseph, the Attorney General, that this exact wording was different from the wording we had in the submission of 13 February. Well, I have only heard it now, but the difference is the following. In the 13 February submission, which during the last two days was the basis of these proceedings, it was said that the court is asked to order that Guinea forthwith bring into effect the measures necessary to comply with your Judgment of 4 December, and in particular then follow litera (a), (b), (c) and (d). But they clearly referred to bring into effect your Judgment of 4 December.

Now the new draft, which I only heard ten minutes ago and now have the chance and the obligation to respond to, is quite a different draft. Here, Saint Vincent and the Grenadines now ask for an order by you that Guinea forthwith brings into effect the measures necessary to preserve the rights of Saint Vincent and the Grenadines under the Convention, if I remember correctly.

On the one side the demand that provisional measures should enforce or should only be such as to enforce your Judgment and on the other side now the demand to preserve the rights under the Convention. If this is not a different thing - okay, I leave it to your judgment

and I do not know exactly my rights with respect to that but I have heard, during the last minutes or hours, some objections. So, I, too, have the right to object. So I officially herewith object to the amendment of this submission.

A last word, only in case you would not follow me with my before-mentioned objection and if the new draft is the one according to which you will decide - then I would comment that to preserve the "rights under the Convention", for me that is the enforcement of what Saint Vincent and the Grenadines are seeking under the merits case. And that is not possible by way of provisional measures.

So far to the procedural points. Now some direct replies to what Maître Thiam has said. Maître Thiam, if I recall correctly, has said we would have submitted that Guinea would never allow supplying offshore on the high seas. This is really not what Guinea ever has said. We speak here about the contiguous zone and the EEZ, but we do not speak about the high seas. Guinea would have no objection at all if the supply were to be on the high seas. But I would here remark that M/V Saiga, when supplying the fishery vessels, was in the contiguous zone. This is important. I will come back to that later.

Then Maître Thiam in his words said - I will not judge these, but he referred to the time of slavery and said, "We, Saint Vincent and the Grenadines, have great hope in you that you bring an end to slavery." Really, again, this that we have here is not comparable at all to what Maître Thiam has explained. We have a law of the sovereign state of Guinea. This law says that the offshore supply of gas oil to fishery vessels is not allowed. We have one case, the case of M/V Saiga, and this motor vessel has violated this Guinean law and has therefore been the issue of a Tribunal case and has been sentenced. Whether this was correct or not is the judgment of the Supreme Court. It is up to you to decide the case on the merits. If you say, "This was not correct, for that and that reason" then Guinea will follow that, but I really think it is too much, to speak of slavery in this connection here.

Now to what Mr. Sands has said. When he spoke about the *prima facie* consideration of your jurisdiction, article 297, paragraph 3, he quoted what I said yesterday and said that I had said that I would not expect you, after two and a half months, when you decided on 4 December now to have a different view. He said, "Oh, but since then we have so many new events". What are these events? It was first the *cédule de citation* - correct. You all know what I mean. I only say this, at this moment: this was not reflected at all in the judgment, the *cédule de citation*. I will give you a definition later of that. But important is that in the judgment there was no joint liability of anybody other than the captain. So why is that a new event? I do not know. Then we have the two judgments of 17 December and 3 February. We all know these judgments. We can forget about the first instance judgment, and we speak about the last one. We have a request for the arbitral tribunal now transferred to you to look at whether such a judgment was correct. But I cannot see that your *prima facie* consideration of article 297, paragraph 3, would now be changed considering the judgment of the Supreme Court, and why? The Supreme Court of Guinea, these judges over there, they are not experts in the Law of the Sea Convention. What they have seen is that there is a violation against the Guinean law to supply fishing vessels offshore and they have drawn the consequence. I cannot see why you should be influenced in your *prima facie* consideration by such judgment.

I have been asked by my government to refer you to your own Order (or was it an Order of the President) in the first case. It was the Ordinance of 21 November 1997 on the basis of article 292 in which the President, you, the Tribunal, said the following, and I will quote the President in the French language:

> Conformément à l'article 292 de la Convention, le Tribunal n'a à connaître que de la question de mainlevée ou de la mise en liberté, sans préjudice de la suite qui sera

donnée à toute action dont le navire, son propriétaire ou son équipage peuvent être l'objet devant la juridiction nationale appropriée.

(A poursuivi en français) Alors, comme l'a constaté le Tribunal dans son ordonnance du 21 novembre, l'arrêt de la Cour d'appel a été rendu par la juridiction nationale compétente, en parfaite harmonie avec le droit international de la mer.

(Resumed in English) The next point that Mr. Sands referred to at length was the question of whether the bond was reasonable. I am not quite happy with the quotations he has made of what I have said, and I am a little angry, if I may say so. He said that I would have said, or Guinea would have said, that the guarantee is reasonable. "They would have admitted that." And he quoted a letter. It has never been admitted by Guinea that the guarantee was reasonable. Guinea has admitted that the wording of the guarantee was reasonable. But this is a great difference: be it the wording or the guarantee. As we have seen, Crédit Suisse did not follow its obligation under the guarantee. And therefore in our view, in the view of the Government of Guinea, it is not a reasonable guarantee. The wording might be correct but as the conditions are fulfilled and the payment has not been done, we think that the guarantee is not reasonable.

Mr. Sands then referred to my recommendation to him, what he should have done, namely to apply to you and ask for an interpretation of the word "reasonable". This he could have done. He has explained to us that sometimes they were thinking about that.

Then he referred to my letter of 12 December and said - I did not like that very much - "Is it the same Mr. von Brevern who made this submission here and wrote this letter?" Of course I wrote this letter but this was on 12 December 1997. Only one day before, I have received the guarantee with the original, the first wording. That was on 11 December that I received from Mr. Howe, from Stephenson Harwood, the bank guarantee of Crédit Suisse. On 12 December I wrote the letter you all have in your files. And because already at that day Mr. Howe has told me, if the vessel would not be promptly released - on 11 December or latest 12 December - then he would apply to you again. And there, because at that time I did not have time to check the guarantee in detail, because I did not get the instructions from the Government of Guinea, because it was absolutely impossible to send the original guarantee, which has been sent to me, to Guinea and then to the Crédit Suisse within one day, I wrote the letter of 12 December 1997. Therefore, I told Mr. Howe in this letter of 12 December - I do not remember exactly what I said there - "I think this is a misuse of the International Tribunal because twenty-one judges should not be applied before Guinea has at least the possibility to judge and check the guarantee and give me instructions." That was the reason for this letter of 12 December. So hopefully Mr. Sands accepts that it is the same Mr. von Brevern who said that.

Now, the crew is free. I do not know why Mr. Sands spoke for so long about the very sad effects that detention may have had on the crew. Of course, this is not so; the crew is free. I therefore think that the first application for your order to release vessel and crew is not valid any longer. The imprisonment of the Captain, as you know, is a suspended sentence.

The last point on which I would reply to Mr. Sands is in connection with article 297, paragraph 3, that Guinea never made any tax incomes from the offshore supplies. I think that might be correct. I do not know exactly whether it is correct but that is not the point we make. Guinean law is that if someone wants to supply offshore, they have to obtain an authorization, which might perhaps cost something. This is not the point. The point is that the law of Guinea to forbid supplying offshore is very important for the income of Guinea.

Please allow me, Mr. President, to quote what we heard in the first case from Mr. Camara, a member of the Guinean delegation, in this connection. I will quote this in French because the English translation was not quite correct.

> … que dans la structure des recettes douanières de la Guinée, 37% des recettes proviennent des perceptions douanières effectuées sur les produits pétroliers. C'est dire l'importance des produits pétroliers dans la structure de nos recettes douanières dans notre budget national, les recettes douanières représentent 53%. C'est la raison pour laquelle le Gouvernement et le Parlement ont pris des décisions, pour réglementer rigoureusement l'importation et la distribution de ce produit dans notre pays. … C'est pourquoi … nos brigades de surveillance vont en mer et même sur les frontières terrestres pour appréhender les contrebandiers. Chaque fois que nous le faisons, nous constatons que les recettes douanières augmentent. Car la consommation des carburants par les circuits légaux augmente.

Et pour conclure :

> [L]es bateaux de pêche avaient consommé [1 083 000] litres contre [1 234 000] litres pour les 22 premiers jours du mois de novembre. Donc, vous voyez que dès que nous commençons à sévir, à appréhender les bateaux de contrebande, les fraudeurs non-arraisonnés s'éloignent. Automatiquement nos recettes douanières augmentent.

(Resumed in English) This was my direct reply to the points made by my colleagues. I now come to my own points. The first point is that we have heard about the Supreme Court decision of 3 February. There would have been the possibility of the Captain to appeal against that decision. He would have had the chance to do that within six days; those six days were over on 10 February 1998. So I would like you to refer in this connection to article 295 of the Law of the Sea Convention. I do not think it is necessary that I read the wording out exactly. You all know it by heart. It states that you can request something from the International Tribunal only after the domestic remedies have been exhausted. I have not put that very well but I think you understand what I mean.

The Captain's case was heard in the first instance. He appealed in the second instance and he could have appealed in a third instance, which he did not do. The judgment of the Supreme Court was legally binding only on 11 February. The request of Saint Vincent and the Grenadines to the arbitral tribunal, transferred now to you, was made on 22 December, and this was well before the national remedies had been exhausted. This also applies, of course, to the proceedings about which we are speaking here, about the application for provisional measures. This was done before everything had been exhausted in Guinea.

I think this is an important point and I would like to read something about that in your Judgment. I think the measures taken by Saint Vincent and the Grenadines were too early.

The President:
Mr. Sands?

INTERVENTION BY MR. SANDS
COUNSEL OF SAINT VINCENT AND THE GRENADINES

Mr. Sands:
I apologize for interrupting, Mr. President. This is the first time that we have heard this argument in these proceedings. In two rounds of written proceedings and the first round of oral arguments we have heard nothing about this argument. Our understanding was that at this reply stage the parties are limited to matters which have been previously raised in the proceedings yesterday or in the written proceedings. This is the first time that this point has been raised.

The President:
Thank you very much.

Mr. von Brevern?

Mr. von Brevern:
Mr. President, I thought that article 295 - and I think I should read it out -

The President:
Mr. von Brevern, Mr. Sands's objection is that this argument, which of course is a very important argument, has not been raised at all up to this stage. As I said at the beginning, it is not permitted for new matters, matters which have not been brought to the attention of either the Tribunal or the other parties, to be introduced. That was the objection. I thought you were going to respond that they there has been a previous reference to this.

Mr. von Brevern:
Mr. President, again that is something that divides English lawyers from other lawyers. In my opinion these are facts. The facts are known to you. Why do I have to introduce these obvious facts? If you look into your files, you know them precisely.

The Tribunal of the First Instance was on - whatever. The Supreme Court judgment was on 3 February, and that is known to all of you. It is also known to all of you that the request was previously and you also know article 295. The consequence is what I say now. But, even if I had not worked on it, I think it would have been up to you to decide according to article 295.

The President:
Very well, then. Now that you have made a point in response to the objection, I suggest that you proceed with your next point.

STATEMENT OF MR. VON BREVERN (CONTINUED)
AGENT OF GUINEA

Mr. von Brevern:
I now come to another very important point. In this connection I would like to address the gentlemen from Saint Vincent and the Grenadines. I have fully understood their fears as presented here because obviously they have been advised that there is a danger to Saint Vincent and the Grenadines as a State, and that therefore there is also a danger to all vessels under the flag of Saint Vincent and the Grenadines that the sentence of US$ 15 million will be enforced against Saint Vincent and the Grenadines or vessels under its flag. If this is so, indeed I fully understand your concern and that you would do everything to fight against. But I have also said that there is no danger whatsoever. I have already mentioned the *cédule de citation*, to which Mr. Sands often referred.

Let me give you a definition of the *cédule de citation*. I have heard Mr. Sands say that I do not know the law of Guinea. It is correct that I do not know very many of the laws of Guinea. He always referred to a Mr. Bangoura. Let me add at this moment that I did not understand the paper to which he referred. There is a paper of a Mr. Bangoura addressed to no-one and therefore I do not think that his paper is of any importance when you come to your final judgment. The definition of "*cédule de citation*" is the following:

> La cédule de citation est un acte administratif du Parquet qui permet à un huissier d'inviter une partie à comparaître devant une juridiction répressive et n'a pas la valeur juridique d'un jugement mais constitue une simple convocation devant le Juge.

(Resumed in English) I think that this clarifies, hopefully once and for ever, that the fear of Saint Vincent and the Grenadines of this quotation, which is not repeated in the judgment, is not justified. They must not fear that the State of Saint Vincent and any vessel under their flag will be made liable for this judgment.

The next point I would like to make is the following. I am a little better in French now on this point. L'application de toute loi, de règles douanières ou de contrebande de Guinée, à l'intérieur de la zone économique excluvise guinéenne, ou de tout autre lieu en dehors de ladite zone. La Guinée n'a sur la zone économique exclusive que des droits économiques. Elle n'a jamais prétendu exercer des pouvoirs de police. Toute intervention de police dans la zone économique exclusive ne peut résulter que de l'exercice du droit de poursuite initiée hors de cette zone. Alors, je vous dis que la Guinée respecte le libre passage dans la zone économique exclusive de tous les navires inoffensifs.

(Resumed in English) I should explain that there might be, I admit, a misunderstanding of the Supreme Court's decision with respect to a differentiation between contiguous zone and economic zone. Obviously the Supreme Court was of the opinion that these zones are two different zones. They were not aware that the contiguous zone is already part of the economic zone, but the contiguous zone has its own rights. They obviously were under the impression that if fishery vessels offshore are supplied in the contiguous zone, as has happened with M/V Saiga - the supply, as we have shown to you, has not been done outside the contiguous zone - they thought that then they had a right of hot pursuit against M/V Saiga which had the result which is known to you.

To me this shows that the fear of Saint Vincent and the Grenadines could only be referring to the contiguous zone. If what the Supreme Court said is also the opinion of the Government of Guinea, then there is only a danger for vessels supplying in the contiguous zone. They can do so outside the contiguous zone. This, I think, gives quite a different picture

to the fear of Saint Vincent. It gives quite a different picture to the possible damages which might occur because the fear is restricted only to the small part of an additional 12 miles contiguous zone. Also, the provisional measures demanded, which all refer to the economic zone, are not justified, or at least have to be restricted to the contiguous zone.

I have heard in the submissions of Mr. Sands and Maître Thiam that only M/V Saiga has been sentenced but that is not correct. There are also proceedings under way against the fishery vessels that have been supplied.

There is another point which refers to article 297, paragraph 3, that the vessels and persons which did the seizure of M/V Saiga were composed of people from various departments, and they are assembled in a national commission which is under the authority of the Ministry for Fisheries, so there is a connection with fisheries.

Then I read in one of the submissions of the other side that they said if the provisional measures demanded would not be ordered by you, this would seem as to legitimate the actions of Guinea. I think this is not fair. Such an agreement would really be a new illegal basis for provisional measures?

To conclude, in my opinion it cannot be that you order by way of a provisional measure let me say the right to bunker offshore in the contiguous zone of Guinea. This is really something which is only to be decided in the case of the merits. You cannot do this here. With respect to another point, why I think that the provisional measures are not reasonable, as the urgency is not given, I refer to damages. We have been speaking about damages. What happened to owner, charterers, Addax, the oil companies, if your provisional measures would not be ordered now? I think it is no problem. I think, Saint Vincent and the oil companies could, if they really would have a potential contract which they think they could not execute because of this uncertainty of the situation, notify to the Government of Guinea all these potential contracts, and at the time when your Judgment is delivered they could just add up these amounts and add it to the damages they claim in any case. So the damage aspect is also one which speaks absolutely against the urgency of the provisional measures.

Mr. President, Honourable Judges, this brings me to the end of my submission. All objections I have made against the provisional measures and which we have dealt with at length yesterday are still valid. My conclusion, or application, is as follows. I would on behalf of the Government of the Republic of Guinea in accordance with article 75, paragraph 2, of the Rules of the Tribunal, present the final submission as follows:

First, the request of Saint Vincent and the Grenadines for the prescription of provisional measures as per no. 52 of the Reply of Saint Vincent and the Grenadines of 13 February 1998, or in the revised draft as of today, should be rejected in total.

Second, furthermore, the International Tribunal is asked to adjudge and declare that Saint Vincent and the Grenadines should pay the costs of the proceedings which have been held consequently at the request of Saint Vincent and the Grenadines for the prescription of provisional measures. Thank you very much.

Closure of the Oral Proceedings

The President:
Thank you, Mr. von Brevern. That brings us to the end of the oral proceedings. I would like to commend the Agents, Counsel and Advocates of both parties for the high quality of their written pleadings as well as on the brevity and clarity of their oral submissions, both yesterday and today. I also wish to thank them for the courtesy shown by them to the Tribunal and to each other during the hearings.

In accordance with the general practice, I request the Agents kindly to remain at the disposal of the Tribunal to provide the Tribunal with any further assistance that may be needed. Subject to that, the oral proceedings in the case will be closed as of the end of this sitting.

In conformity with article 86, paragraph 4, of the Rules of the Tribunal, the parties may correct the transcript of the speeches and statements made on their behalf during the oral proceedings. Such corrections should not affect the meaning and scope of the speeches and statements as submitted to the Tribunal. Any corrections should be indicated to the Registrar as soon as possible, and in any case not later than Friday, 27 February 1998 at 1800 hours.

In addition, the parties are requested to certify that the documents they have submitted to the Tribunal are true and accurate copies of the originals. For that purpose, the Registrar will provide them with a tentative list of the documents concerned for their signature.

The Tribunal will now withdraw to deliberate. Agents of the parties will be notified of the exact time when the Tribunal will give its Order in respect of the request for the prescription of provisional measures.

The Tribunal has tentatively set 12 March 1998 as the date for giving this Order. The Agents will be duly notified if for any reason this schedule has to be altered. The sitting is now closed.

The Tribunal rose at 4.40 p.m.

The preceding texts are the corrected transcript of the public sittings and constitute, pursuant to article 86 of the Rules of the Tribunal, the authentic minutes of the hearing in the *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Provisional Measures*.

Le texte qui précède est le compte rendu corrigé des audiences publiques et constitue, en vertu de l'article 86 du Règlement du Tribunal, le procès-verbal authentique de l'audience en l'*Affaire du navire « SAIGA » (No. 2) (Saint-Vincent-et-les-Grenadines c. Guinée), mesures conservatoires.*

Le 24 novembre 2004
24 November 2004

Signé/Signed	*Signé/Signed*
Le Président L. Dolliver M. Nelson President	Le Greffier Philippe Gautier Registrar