

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE
SEA**

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER



1998

Public hearing

held on Monday, 23 February 1998, at 3.00 p.m.,
at the City Hall of the Free and Hanseatic City of Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Request for the Prescription of Provisional Measures under Article
290, Paragraph 1, of the UN Convention on the Law of the Sea, 1982)
(*Saint Vincent and the Grenadines v. Guinea*)

Verbatim Record

<i>Present:</i>	President	Thomas A. Mensah
	Vice-President	Rüdiger Wolfrum
	Judges	Lihai Zhao
		Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli 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.

1 THE PRESIDENT: I now invite Mr Hartmut von Brevern, the Agent of
2 Guinea, to address the Tribunal.

3

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

9

10 I will present the submissions of the Government of Guinea. This morning
11 we heard the submissions of St Vincent and the Grenadines. We first heard
12 Mr Joseph, the Attorney General of St Vincent and the Grenadines. I am
13 happy to have made his acquaintance. I am active in giving German
14 shipowners advice and they like to flag their vessels to St Vincent and the
15 Grenadines. I personally have never had the chance to do the exercise of
16 flagging out to St Vincent and the Grenadines but I hope to be able in future
17 to do this exercise. I clearly understand what Mr Joseph said about the
18 109,000 inhabitants and the importance of the business of the flag of
19 convenience.

20

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

25

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

14

15 As to the facts, I have sent to you in our letter of 20 February a submission in
16 which I dealt with the facts. I would only remind you that I have presented
17 you with a sea chart as Annex 5, on which is marked where M/V SAIGA
18 supplied gas oil to the three fishing vessels. This was, as you can see from
19 the chart, within the contiguous zone of Guinea. I would like to answer Mr
20 Howe. Guinea has created a contiguous zone. This was mentioned in your
21 first case. Judgment is created through the National Maritime Code in Article
22 13.

23

24 The next point as to the facts: I merely quote what has already been
25 presented to you in the first case, namely that M/V SAIGA when it was
26 pursued by government boats of Guinea was in the proximity of the first buoy

1 of the Cité Munier de Campsa and that was within the limits of the contiguous
2 zone of Guinea. I am only quoting and reporting what the member of the
3 delegation of Guinea in the first case presented to you.

4

5 I would remind you of something which Mr Howe did not mention but what
6 we mentioned in the first case, namely the decision of the Security Council of
7 the United Nations of 8 October 1997. It has been presented to you and you
8 are all aware of it as Annex 8. In this decision the Security Council expressly
9 decided that all states shall prevent the sale or supply to Sierra Leone by their
10 nationals or from their territory or using their vessels or aircraft of petroleum
11 and petroleum products, whether or not originating in the territory.

12

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

19

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

23

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

25

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

4

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

14

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

25

1 Four days after the first instance judgment, St Vincent and the Grenadines
2 instituted arbitral proceedings which now have been transferred to you, the
3 International Tribunal. St Vincent has asked in this submission of
4 22 December to get some declarations, inter alia: the Guinean judgment
5 would violate the right of St Vincent and the Grenadines to enjoy freedom of
6 navigation; the judgment would violate the right of vessels under St Vincent
7 and the Grenadine's flag to enjoy freedom of navigation; the Guinean customs
8 law not to be applied in the EEZ of Guinea; Guinea to release ship and crew
9 immediately, hence Guinea to be liable for damages for all violations.

10

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

17

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

26

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

13

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

21

22 Request No 3 is that Guinea shall cease and desist from undertaking an
23 unlawful hot pursuit of all vessels registered in St Vincent and the Grenadines
24 and also of those engaged in bunkering. Here again there is no
25 corresponding request in the application of 22 December on the merits. So
26 I have indicated that the provisional merits requested do not fulfil the

1 necessary conditions. But what are the conditions for provisional measures
2 under the Law of the Sea Convention?

3

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

10

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

15

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

23

24 In number 19 of its application of 5 January St Vincent and the Grenadines
25 state that provisional measures would assist in rendering settlement of the
26 existing dispute more likely. Finally, they say otherwise than of the

1 provisional measures, vessels would be discouraged to enter the EEZ of
2 Guinea.

3

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

9

10 The following further conditions which have not been dealt with by St
11 Vincent and the Grenadines, also apply to the prescription of provisional
12 measures in our view. Provisional measures must be strictly related to the
13 requests of the main submission. Further, they must not go beyond what is
14 required for the preservation of the requests of the main submission, and
15 lastly, provisional measures must not prejudice the decision of the merits.
16 Provisional merits may not constitute a performance of what the applicant
17 seeks in his request of the merits.

18

19 I will now deal with the first condition, which is to be fulfilled before a
20 provisional measure can be described. The International Tribunal has to
21 consider that *prima facie* it has jurisdiction. So first of all the consideration
22 of the Tribunal is *prima facie*. In my view this means that the International
23 Tribunal does not have to examine the question of jurisdiction in detail as
24 St Vincent and the Grenadines tried to do in their reply of 13 February, and as
25 they did this morning. The Guinean Government respectfully in this
26 connection refers the International Tribunal to its own view expressed and

1 decided in the Number 1 case. Here the Tribunal, you the judges, have
2 qualified the relevant laws of Guinea as sovereign rights to explore, exploit,
3 conserve and manage the living resources in the EEZ.

4

5 In this connection I would like to refer to the written statement of St Vincent
6 and the Grenadines under number 17 where it has been said that the violation
7 of fishery legislation my M/V SAIGA has only been indicated in our
8 statement in response of 30 January. No, this has already been expressed and
9 stated in the judgment of the International Tribunal, Case Number 1 on page
10 19. As these laws were known to the court, copies of the laws must not be
11 provided.

12

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

17

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

22

23 The specific wording in the relevant Article 297(3) of the Convention gives
24 an additional argument for the view of the Government of Guinea. The
25 relevant part reads:

26

1 “Any dispute relating to its sovereign rights with respect to the living
2 resources in the EEZ, including the terms and conditions established in
3 its conservation and management laws and regulations”

4

5 That is exactly what the basis of the measures against M/V SAIGA was,
6 Guinean regulations and laws relating to the management of the living
7 resources. Fishery activities are excepted by the Guinean Government under
8 the condition that the fishery vessels are not supplied with gasoil offshore. If
9 one would not accept the view that the laws and regulations of Guinea,
10 forbidding the offshore supply of fishery vessel constitute terms and
11 conditions established in its conservation and management laws and
12 regulations as per Article 297(3) of the Convention, then one has to accept at
13 least that the fishery vessels by individual contract with the Government of
14 Guinea have taken over such obligation.

15

16 I refer to the protocol establishing the fishing rights in the agreement between
17 the European Economic Community and the Government of the Republic of
18 Guinea on fishing off the Guinean coast, and in particular to the annex to this
19 protocol which you will find as attachment 6 of the reply of St Vincent of 13
20 February.

21

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

25

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

5

6 The reference of St Vincent and St Grenadines to the reasoning of the
7 judgment of the first instance Tribunal at Conakry and of the Supreme Court
8 of Guinea is in our view of no relevance as to this question of 297 paragraph
9 3. These courts did not have to decide whether the violations done by M/V
10 SAIGA were to be qualified as violations against fishery laws or against laws
11 regulating the management of the living resources. From such qualification is
12 the task of this international Tribunal, but only on a *prima facie* basis.

13 Perhaps this aspect has not become clear. The fishery vessels that have been
14 supplied by M/V SAIGA were not under the Guinean flag, they were under
15 the flag of a country of the European Community, so they have been granted
16 the right to fish in the fisheries zone of Guinea, and our submission is that
17 they have got the licence under the condition to conform to the laws of
18 Guinea, and one of these laws is that the offshore supply of gasoil to fishery
19 vessels is not allowed. This is everything I have said to 297 paragraph 3.

20

21 I now come to the next condition, namely that provisional measures requested
22 in our view are not urgently required. In our statement in response we have
23 already outlined why all the reasons given by St Vincent and the Grenadines
24 for the alleged urgency of the situation are not convincing or in our view are
25 not correct. In the St Vincent statement of 13 February on page 12 it is in no
26 way explained or substantiated that or why the owners of M/V SAIGA are

1 continuing to incur great financial cost. The reference to attachment 7 does
2 not give any clarification. Who bears at the moment the financial burden of
3 M/V SAIGA? An insurance company? The P&I Club? The owner or
4 charterer? Is there a danger for them to go bankrupt? Obviously not. Is it St
5 Vincent and the Grenadines, the state which suffers? We have heard a very
6 impressive figure of 10 million tonnes registered under this flag. Is it really
7 such an enormous damage, irreparable harm? What could be cost if we wait
8 until the final decision, which is in the not too far future? Do we really need
9 provisional measure? And the charterer Addax? We have just heard that it
10 has been mentioned in the same line as BP, as Exxon Shell. We have also
11 heard that there is increasing market for bunkering offshore on the West
12 African coast, and the small part which is the Guinean bunkering part of it. I
13 think this is really not an impressive figure. And why is it urgent to avoid
14 further damages? St Vincent and the Grenadines in its application of 22
15 December has asked the Tribunal to decide also on damages, and the
16 potential further damages which might occur until the final decision could just
17 be added to the damages which St Vincent and the Grenadines will in any
18 case ask from the International Tribunal.

19
20 Another aspect that speaks against the urgency of the provisional measures
21 because of the financial situation of the owner is stated in the letter of the
22 Minister of Justice of the Republic of Guinea addressed to Guinea's Agent of
23 19 January 1998 in which also the authorisation of us is contained, and we
24 have handed this letter over to you.

25

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

9

10 The next argument of St Vincent and the Grenadines why the situation
11 urgently requires provisional measures is that the Bank guarantee *prima facie*
12 was reasonable. As has been explained, Crédit Suisse was not prepared to
13 pay under the guarantee. Notwithstanding the fact that there is no further
14 appeal possible against the Supreme Court decision in Guinea. This justifies
15 the conclusion that the Bank guarantee *prima facie* is not reasonable. The
16 question of the reasonableness of the Bank guarantee will be dealt with later
17 in more detail.

18

19 The next argument of St Vincent and the Grenadines why the suspension of
20 the effect of the judgment of the Guinean court is urgent is mentioned on page
21 12 of the 13 February at the bottom, namely, it is intended *inter alia* to allow
22 vessels flying the flag of St Vincent and the Grenadines to continue to engage
23 in their commercial activities without fear of hindrance or other interference
24 by the Guinean authorities. The following questions are unanswered. First,
25 who has the intention to allow? Obviously St Vincent and the Grenadines.
26 But is an intention to allow something such an urgent situation that requires to

1 suspend a judgment of the highest court of a sovereign state If someone has
2 an intention this does not necessarily mean that the intention would be
3 realised. I cannot see that it is the duty or task of a flag state to allow or see
4 to it that it is allowed to all vessels flying its flag to engage in commercial
5 activities. Article 94 of the Law of the Sea Convention describes the duties
6 of the flag states. Even paragraph 3 does not state an obligation of a flag
7 state in relation to vessels under its flag. No, the obligation of the flag state
8 is versus the other member states of the Convention.

9

10 The next argument of St Vincent and the Grenadines is the result of its inquiry
11 world-wide. The answers received are next in attachment 9. I really wonder
12 whether St Vincent and the Grenadines in the end of this case expect that
13 Guinea has to bear all costs, including those fees of lawyers world-wide
14 which St Vincent and the Grenadines have employed. This International
15 Tribunal comprises of 21 judges from all over the world, and therefore has
16 huge knowledge of laws world-wide. I wonder what purpose the opinions of
17 lawyers in some countries can serve. Nevertheless, I think it is not correct
18 what this morning has been said, that all answers have as a result the response
19 expected by St Vincent and the Grenadines. The answer for the Cameroon is
20 interesting. Authorisation for this bunkering is needed. At least, I understood
21 the letter like that. An Italian lawyer spoke for Italy, and stated “However,
22 the issue of how far from the mainland outside the territory waters and how
23 regularly any such sales and deliveries occur, could be relevant. The Italian
24 authorities might seek to exercise customs surveillance and enforcement
25 powers with respect to deliveries of liable oil products, taking systematically
26 place in the contiguous zone.” I am not quite sure whether this word was

1 correct in connection with the Italian. But at least from the Italian answer, it
2 is said that there might be the necessity of an authorisation. The last quote I
3 would like in this connection, this is the answer of Marine Claims Service
4 Tunisia. The service quoted the Tunisian customs and stated that the
5 intervention of customs authorities is only limited to continental shelf. That is
6 very interesting.

7

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

20

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

25

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

12

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

17

18 Finally, St Vincent for the last provisional measure under number 3 on page
19 24 to give reasons for the urgency of the situation says: “There is accordingly
20 every reason to expect that hot pursuit might again be undertaken in similar
21 conditions.” It is not clear what is meant by “similar conditions”. Why
22 should such similar conditions occur? Is there any indication? No. Why is
23 there every reason for such an expectation? Is there any indication? No. Is
24 expectation identical to the hot pursuit itself? No. So all this shows that
25 there is no urgency of the situation that the provisional measures require.

26

1 And a final point: St Vincent and the Grenadines on page 16 of 13 February
2 submits the following. Provisional measures will be legally binding to
3 according to Article 290 paragraph 6 where it is said:

4

5 "The parties to the dispute shall comply promptly with any provisional
6 measures prescribed under this Article."

7

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

17

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

23

24 The first demand is that Guinea shall immediately release M/V SAIGA and
25 her crew. Such an order would not be a provisional measure. It would
26 already constitute the performance of St Vincent on the merits. Furthermore,

1 such an order would be against the first judgment of the International Tribunal
2 in the prompt release case, according to which a reasonable financial security
3 has to be provided by St Vincent and the Grenadines. The question of
4 reasonableness has to be taken into consideration by the International
5 Tribunal. As long as the conditions under the guarantee had not been
6 fulfilled, that was as long as there was not a final judgment in Guinea, the
7 reasonableness could be checked and estimated only with respect to the
8 wording of the guarantee.

9

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

15

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

21

22 The first point is that I was uncertain about the fact that the bank guarantee
23 had been sent to us as Agents instead of directly to the Guinean Government,
24 as was done at our express wish with the second bank guarantee with the new
25 wording. The consequence of the sending to us of this guarantee was that the

1 guarantee had to be sent to Guinea and thereby necessarily a delay was
2 caused.

3

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

13

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

23

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

1
2 Having gone through the text of the guarantee in detail, the next day, with our
3 letter of 12 December 1997, I advised Stephenson Harwood about all the
4 uncertainties I had at that time seen in the guarantee.

5
6 The President has asked us to deliberate more on the problem of
7 reasonableness of the guarantee. The explanation as to why the guarantee
8 and the old wording was unreasonable is as follows. The wording of the
9 guarantee which I considered not to be reasonable was the following: “Credit
10 Suisse guarantees to pay such sum as may be due to the Government of
11 Guinea by a final judgment of a court on behalf of M/V SAIGA in respect of
12 the claims pursuant to which M/V SAIGA was detained.” I saw the
13 following deficiencies. First, the person who would have to pay the money
14 due to Guinea has not been mentioned. Second, it was not clear that the
15 courts mentioned were those of Guinea. Three, claims might not include
16 penalties and M/V SAIGA was not detained in respect of claims. Four, in the
17 remark under “whereas”, the second remark, it was stated that with respect to
18 the discharged gas oil that this, as the case may be, shall be returned by
19 Guinea, and that is not a usual content of a guarantee.

20
21 Finally, there was no jurisdiction clause, so I suggested a new wording to
22 make sense of the disputed part as follows: “Credit Suisse guarantees to pay
23 such sum as may be due to the Government of Guinea by a final judgment of
24 a court ‘of Guinea’” I added, ”to be owing to you”, and I added “or to your
25 customs or to your fiscal administration or other agency of Guinea by M/V
26 SAIGA”, and I added “or owners, charterers, crew or Captain of M/V

1 SAIGA in respect to the claims” and I added “or allegations pursuant to
2 which M/V SAIGA was detained”. There was no positive reaction from St
3 Vincent and the Grenadines to this proposal.

4

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

9

10 Second, also the “whereas” remark under B iii) should be deleted as a whole
11 as not being in conformity with the operative provision of the judgment of the
12 International Tribunal. Third, the date of expiration in the French version had
13 to be amended. Finally, the authorisation of the two persons having signed
14 the guarantee should be proved.

15

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

18

19 The Minister of Economy and Finance of Guinea, by a letter of
20 16 February 1998, confirmed receipt and acceptance of the new wording of
21 the guarantee. He has not, as Mr Sands submitted, said in his letter that the
22 vessel and crew would only be released if US\$ 400,000 were paid. The
23 Minister advised the release of the vessel immediately if US\$ 400,000 under
24 the guarantee were paid by Credit Suisse.

25

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

18

19 To conclude my remarks as to the first demand of the application of
20 St Vincent and the Grenadines for provisional measures, namely for a release
21 of the vessel and crew, the crew is already free. We have been given
22 evidence from St Vincent and the Grenadines themselves of that. With
23 respect to the vessel, it has to be said that this International Tribunal has
24 ordered the release of the vessel against posting of a bond because the court
25 did not want to interfere in national proceedings. Now we have the result of
26 the national proceedings, namely the judgment of the Supreme Court of

1 Guinea which has sentenced the Captain and which therefore has not
2 amended the situation of St Vincent and the Grenadines with respect to this
3 aspect.

4

5 Why should the International Tribunal now order the release of M/V SAIGA
6 without the condition of providing financial security by St Vincent and the
7 Grenadines? St Vincent and the Grenadines might say that a security has
8 already been posted. However, the reasonableness of the bank guarantee of
9 Credit Suisse is disputed by the Government of Guinea. Therefore, the
10 correct application in our view would have been a demand of St Vincent and
11 the Grenadines to the International Tribunal for an interpretation of your first
12 judgment with respect to the notion of “reasonable”. There are possibilities
13 under your rules to ask for interpretation. St Vincent and the Grenadines
14 should have asked for a definition of reasonableness and a declaration that the
15 bank guarantee of Credit Suisse is reasonable.

16

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

20

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

24

25 If the purpose of this provisional measure requested were to bring into effect
26 the measures necessary to comply with the judgment of the International

1 Tribunal, as put in the introductory sentence, the request would be unjustified,
2 as has already been stated. There is no connection between your judgment in
3 the first case and this application.

4

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

8

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

12

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

16

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

20

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

23

24 With respect the seizure of the vessel, the suspension of the judgment is not
25 reasonable because, as has already been explained at length, the seizure of the

1 vessel could be terminated at once if the payment under the guarantee were to
2 be effected.

3

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

9

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

16

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

20

21 The third application is that Guinea shall immediately cease and desist from
22 enforcing directly or indirectly the judgment against any person or
23 governmental authority. It is not quite clear to whom this claim is addressed.
24 It is implied that the object of this claim is any person or governmental
25 authority in the world. It is no doubt in the Plaintiff's interests that there is
26 not such a request.

1
2 As an inherent condition of any legal action the Plaintiff has to determine his
3 personal interest in a specific judgment. As a consequence such an interest of
4 St Vincent and the Grenadines cannot be assumed with respect to such a
5 demand of an indefinite character. But the Applicants might have thought that
6 the Government of St Vincent and the Grenadines on the one hand and/or
7 vessels flying their flag on the other could be made jointly liable with the
8 Captain of M/V SAIGA to pay his penalty.

9
10 However, this is absolutely unfounded. Also from the cédule de citation, or
11 the schedule of summons, where St Vincent and Grenadines has been
12 mentioned as the person responsible, such a responsibility does not derive. It
13 is very clearly said in the judgment of the first instance and in the judgment of
14 the Supreme Court that only the Captain of M/V SAIGA is sentenced with no
15 one being jointly liable.

16
17 St Vincent and the Grenadines, in their presentation of this morning, think
18 they only presumed the possibility of a joint liability without giving evidence.
19 The judgment, I think, is evidence enough that such a fear is unjustified.

20
21 Implied that object to this request that Guinea shall immediately cease from
22 enforcing the two judgments would be any person or governmental authority
23 affected by the judgment. It is to state that the submission dealt with before,
24 namely to suspend the judgments, are identical to application under number 3.

25

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

9

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

21

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

26

1 The next application, or submission, is:

2

3 “Guinea shall cease and desist from interfering with the right of
4 vessels registered in St Vincent to enjoy freedom of navigation.”

5

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

11

12 In the application for a provisional measure, in the form of “to cease and to
13 desist from interfering with rights of vessels to enjoy freedom of navigation”
14 an order is asked to prevent similar actions in the future. This, however,
15 cannot be the purpose of a provisional measure, the purpose of which is just
16 the conservation of rights in dispute. So as the question is in dispute whether
17 the actions of Guinea have violated the right of St Vincent and the Grenadines
18 and vessels flying its flag, Guinea cannot be ordered by a provisional measure
19 not to interfere in future.

20

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

25

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

7

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

10

11 The very last point:

12

13 “Guinea shall cease and desist from undertaking hot pursuit of vessels
14 registered in St Vincent.”

15

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

23

24 To conclude: first, in our view, there is no jurisdiction of the International
25 Tribunal to prescribe the requested provisional measures as the result of

1 a *prima facie* consideration is to deny jurisdiction of the International
2 Tribunal for the main submission.

3

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

7

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

21

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

26

1 Fifthly, the provisional measures requested would prejudice the decision on
2 the merits and constitutes already a performance what St Vincent seeks in
3 their request on the merits.

4

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

8

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

11

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

18

19 **(The Tribunal adjourned at 1630 hours)**