REPLY SUBMITTED BY SAINT VINCENT AND THE GRENADINES

ST VINCENT AND THE GRENADINES
v
REPUBLIC OF GUINEA

REQUEST FOR PROVISIONAL MEASURES BY ST VINCENT AND THE GRENADINES

REPLY OF ST VINCENT AND THE GRENADINES

13 February 1998

1. This Reply responds to the points raised by Guinea in its Statement of Response dated 30 January 1998 ("Guinean Response") and provides additional factual and legal material in support of the Request for Provisional Measures ("Request") submitted to the International Tribunal for the Law of the Sea ("the Tribunal") on 13 January 1998.

2. Since the submission of the Request, new developments have occurred which bear on these proceedings. *First*, the written text of the Judgement of 17 December 1997 of the Tribunal de Premiere Instance ("TPI") of Conakry was finally made available to St Vincent and the Grenadines on 6 February 1998 (see **Attachment 1**; "Judgement of 17 December"). This text confirms the fine of 15,354,024,040 GNF imposed on the master of the m/v Saiga and the confiscation of the vessel and its cargo in application of Article 111 and 242 of the 1982 Convention and the criminal and customs laws identified in the Request. The judgement makes no reference to any laws relating to fisheries or other resources of the exclusive economic zone. *Second*, on 3 February 1998 the Court of Appeal of Conakry gave judgement on the Master's appeal from the judgement of the TPI (see **Attachment 2**; "Judgement of 3 February"). This judgement:

   – rejects the appeal,
   – declares the master of m/v Saiga guilty of smuggling offences under Article 196 of the Code of Criminal Procedure; Article 111 of the 1982 Convention; Articles 361 and 363 of the Penal Code; Article 40 of the National Maritime Code; Articles 33, 34, 316 and 317 of Law 94/007/CTRN of 15/3/94; and Articles 1, 8 and 162 of the Code of Civil Procedure;
   – sentences the master to six months imprisonment (suspended);
   – imposed a fine of 15,354,040 Guinean francs;
   – confiscates the cargo;
   – seizes the ship as surety; and
   – imposes fees and expenses against the master.

   The judgement of 3 February makes no mention of any fisheries violations.

3. The two judgements show clearly that the Guinean actions were premised solely on the prosecution of customs laws without any reference to fisheries conservation or management in the exclusive economic zone. The judgements also show that Guinea persists in claiming the right to enforce and apply its customs laws as such within its exclusive economic zone, and to exercise "hot pursuit" under conditions other than those strictly regulated by the 1982 Convention.

4. It is in the context of these developments that Guinea's Response falls to be considered. The Response narrows the issues for the Tribunal to address at this stage of the proceedings. Guinea essentially makes two arguments:

   – the Arbitral Tribunal to be constituted pursuant to the institution of arbitration proceedings on 22 December 1997 does not have *prima facie* jurisdiction, and accordingly the Tribunal has no *prima facie* jurisdiction under Article 290(5) of the 1982 Convention; and
   – the urgency of the situation does not require the prescription of provisional measures and that accordingly some of the conditions required by Article 290(5) have not been satisfied.

5. St Vincent and the Grenadines submits that both arguments are without merit and should be rejected by the Tribunal. In summary, the position of St Vincent and the Grenadines is:

   (1) the Arbitral Tribunal to be constituted pursuant to the Notification of 22 December 1997 has *prima facie* jurisdiction, therefore this Tribunal has jurisdiction under Article 290(5) to prescribe provisional measures;
   (2) vessels flying the flag of St Vincent and the Grenadine have a *prima facie* right under the 1982 Convention to bunker in the exclusive economic zone of Guinea without being subject to customs duties under the law of Guinea;
   (3) St Vincent and the Grenadines and vessels flying its flag have the right not to be subject to hot pursuit except where the conditions provided by Article 111 of the 1982 Convention have been satisfied;
   (4) the Request is urgent, since a failure to accede to the request would have serious adverse consequences for St Vincent and the Grenadines and for vessels flying her flag, namely there would continue to exist a serious possibility of further steps being taken by the Guinean authorities against vessels flying the flag of St Vincent and the Grenadines in enforcement of customs laws and/or the judgements of 17 December/3 February and/or in the wrongful application of the exercise of hot pursuit under Article 111 of UNCLOS, as well as the possibility of enforcement measures directly against the state of St Vincent and the Grenadines; and
   (5) in all the circumstance the measures requested are reasonable and would preserve the rights of the Parties pending a final decision on the merits.

6. Each of these aspects will be addressed in turn. In light of the new developments outlined above, and in particular the right claimed by Guinea to undertake "hot pursuit" in a manner incompatible with the 1982 Convention, St Vincent and the Grenadines respectfully requests [the] Tribunal's permission to revise its Request *inter alia* with the addition of a further request to the effect that Guinea should not undertake hot pursuit except where the conditions of Article 111 of the 1982 Convention apply. The revised request is set out in full at the end of this Reply.

7. It cannot be excluded that further developments may occur between the submission of this Reply on 13 February 1998 and the opening of oral hearings on 23 February 1998. St Vincent and the Grenadines therefore reserves its right to make further request for revision, including in respect of payments which Guinea might seek under the bond posted on 10 December 1997.

The Arbitral Tribunal has *prima facie* jurisdiction

8. Guinea denies that the arbitral tribunal to be constituted pursuant to the institution of arbitration proceedings on 22 December 1997 has jurisdiction. It claims that the dispute between the two states concerns "the interpretation or application of the provisions of the [1982] Convention *with regard to fisheries*" (Response, para. 4) and that compulsory jurisdiction is excluded by application of Article 297(3)(a) of the 1982 Convention. The characterisation of this dispute as one about fisheries is without foundation.

9. At this stage of the proceedings the Tribunal must be satisfied that the arbitral tribunal to be constituted would have *prima facie* jurisdiction: see Article 290(5) of the 1982 Convention. St Vincent and the Grenadine[s] submits that Guinea has acted *prima facie* to apply and enforce its customs laws, that the arbitral tribunal has *prima facie* jurisdiction, and that this Tribunal has jurisdiction to prescribe provisional measures. St Vincent and the Grenadines recognises, however, that a finding by this Tribunal that the arbitral tribunal to be constituted has *prima facie* jurisdiction would not bind the arbitral tribunal on the question of jurisdiction at the merits stage. Nor would it bind this Tribunal if the dispute were to be transferred from arbitration to the Hamburg Tribunal, as Guinea has now requested.

10. In determining whether this dispute is *prima facie* about customs or fisheries matters it is to be noted that Guinea has not disputed the basic facts as set out in paragraphs 2 to 6 of the Arbitration Notification. It does not deny that the m/v Saiga never entered the territorial waters or any other part of the territory of Guinea. It does not deny that all material events – the alleged bunkering activity of the m/v Saiga, the detention and arrest – occurred either in the exclusive economic zone of Guinea or in waters beyond. For these

purposes it is entirely irrelevant whether the bunkering took place within or beyond any Guinean contiguous zone which might exist (on which point St Vincent and the Grenadines makes no admissions). Article 33 of the 1982 Convention does not permit Guinea to *apply* its customs laws within any contiguous zone, but only to "exercise [within that zone] the control necessary to … prevent infringement of [such] laws … *within its territory or territorial sea* … [and t*o*] punish infringement of [such] laws … *within its territory or territorial sea*" (Article 33(l)(a) and (b), emphasis added). The distinction between prescriptive and enforcement jurisdiction is one which Guinea seems unable to grasp. Nevertheless, there is no material dispute as to where the events occurred, as the finding of the Cour d'Appel in the judgement of 3 February 1998 confirms (see **Attachment 2**). Guinea cannot – and does not – challenge the underlying character of the dispute as one relating to the extent of the right of Guinea as a coastal state to prescribe and enforce its laws in and even beyond its exclusive economic zone.

11. The parties are therefore in agreement that this dispute is about the extent of the coastal state's right to prescribe and enforce its laws in relation to activities occurring in the exclusive economic zone. St Vincent and the Grenadines submits that the question for the Tribunal is this: in purporting to exercise its rights under the 1982 Convention were the Guinean authorities acting in relation to fisheries matters – in which case it might be *prima facie* arguable that the Article 297(3)(a) exception could be invoked – or was Guinea applying and enforcing its customs law in a manner entirely unrelated to its fisheries rights under the Convention, in which case the Article 297(3)(a) exception clearly does not assist Guinea? This is essentially a question of fact.

12. It is appropriate to recall that Article 297(3)(a) is an exception to a general rule on compulsory jurisdiction:

> "Disputes concerning the interpretation or application of the provision of this Convention shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."

13. As an exception it should be narrowly construed, and it is for Guinea to satisfy the Tribunal that its actions fall within the exception. Guinea must show that the dispute relates to "sovereign rights with respect to living resources within the exclusive economic zone". To do that it must introduce evidence that its

actions were exercised in respect of fisheries resources as Guinea claims. To that end it might, for example, show that the m/v Saiga was apprehended by or with the support of the Guinean fisheries authorities, or that the Guinean Ministry of Fisheries instituted or joined the criminal proceedings brought against the master of the m/v Saiga on 10 December 1997, or that the legislation on the basis of which the measures and criminal charges were brought was intended to conserve fisheries or other living resources. However, Guinea has put no such evidence before the Tribunal, and none exists.

14. All the evidence – the instrument instituting criminal proceedings against the Master on 10 December 1997 (the "Cedule de Citation"), the judgements of 17 December 1997 and 4 February 1998, the legal arguments put to the Guinean courts by the national authorities (its "Conclusions") – indicate no connection with fisheries or other living resources in the exclusive economic zone. The criminal charges, for example, were brought by the Agent Judiciaire de l'Etat and the Administration des Douanes – the Ministry of Fisheries was not involved (see Cedule de Citation, **Attachment 3**). The detailed legal arguments – set out in the "Conclusions Presents au Nom de l'Administration des Douanes par Le Chef de la Brigade Mobile Nationale des Douanes" ("the Conclusions", see **Attachment 4**) similarly make no reference to the involvement of fisheries authorities. Those Conclusions are dated 14 November 1997, but were only made available to St Vincent and the Grenadines on 16 December 1997. They were not available during the previous proceedings before this Tribunal. St Vincent and the Grenadines recognises that if they had been available the Tribunal may have found it more difficult to conclude that the matter was "arguably" or "sufficiently plausibly" related to rights under Article 73 of the 1982 Convention. The Conclusions unambiguously set out the basis of the charges thus: "une infraction qui consiste en une importation en contrebande de produits petroliers" (which might be translated as "a violation occasioned by the importation by contraband of petroleum products"). In none of these documents is there any reference to fisheries legislation or other legislation purporting to relate to the sovereign rights of Guinea "with respect to the living resources in the exclusive economic zone or their exercise".

15. Moreover, the Cedule de Citation and the Conclusions – issued or made public only *after* the Tribunal's Judgement of 4 December 1997 – refer to four acts of legislation: Article 40 of the Code de la Marine Marchande, 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 (see paras. 5, 16 and 17 of the Arbitration Notification and **Attachment 5**). At no time from the seizure of the m/v Saiga until the criminal charges were filed on 10 December 1997 and prosecuted on 12 December 1997, or at any time thereafter in the proceedings in Guinea, was any allegation made by the Guinean authorities as to violations of fisheries laws.

16. And, as described above (see para. 2) the judgements of 17 December and 4 February make no mention of legislation pertaining to "living resources in the exclusive economic zone", or their violation.

17. Guinea first indicated that the m/v Saiga had or may have violated fisheries legislation on 30 January 1998 – in its Response to the Request for provisional measures made by St Vincent and the Grenadines. Guinea says – at page 2 of its Response – that the captain of the m/v Saiga has violated the Code of Maritime Fishing (Guinean Law 95/13/CTRM of 15 May 1995) and the General Regulation for the Implementation of the Maritime Fisheries Code of Guinea (order number 039 PRG/85 of 23 February 1985). It is to be noted that no reference to these acts is made in the Judgements of 17 December and 3 February. Moreover, Guinea has not provided the Tribunal with copies of either act. There is no evidence to show that these acts require foreign oil tankers bunkering foreign fishing vessels to pay customs duties, or that they were violated by the m/v Saiga. If indeed the m/v Saiga did violate these laws then why did the judgements of 17 December 1997 and 3 February 1998 not so declare.

18. All the evidence points decisively to the conclusion that there exists no Guinean law relating to the living resources of the EEZ which purports to or which could justify the imposition of customs duties on the m/v Saiga. And there is no evidence that the Guinean authorities have brought charges against the three fisheries vessels bunkered by the m/v Saiga, (which, it is to be noted were not Guinean registered as the Guinean court states). One was Italian and therefore subject to the 1996 Fisheries Agreement between the European Community and the Government of the Republic of Guinea on fishing off the Guinea coast (Official Journal of the European Communities, No. L 157, 29.6.1996, p. 3; **Attachment 6**). The EC-Guinea Agreement establishes the conditions under which EC fisheries vessels may fish in Guinean waters, including "waters beyond 10 nautical miles" (*ibid*., *Annex*, point H). It provides *inter alia* for Community financing of "fisheries surveillance programmes" and "institutional aid for the Ministry of Fisheries" (Article 6). It makes no mention of such surveillance being carried out by the customs authorities. The Annex to the Agreement is entitled "Conditions for the Exercise of Fishing Activities by Community Vessels in Guinea's Fishing Zone". It does not impose any conditions in relation to bunkering or the payment of customs duties in the exclusive economic zone.

19. This dispute is about – and has been treated by the Guinean authorities as being about – a customs matter entirely unrelated to the living resources of the EEZ. There is no evidence, not even *prima facie* evidence, before the Tribunal to indicate that the Article 297(3)(a) exception may be invoked. The dispute has nothing to do with "sovereign rights with respect to the living resource[s] in the exclusive economic zone or their exercise".

20. One further point must be made. Guinea invokes the Tribunal's judgement of 4 December 1997 in support of its view that the dispute relates to fisheries. In so doing it misunderstands or possibly mis-states the Tribunal. The Tribunal said that it was not necessary for it to come to a conclusion as to whether "bunkering" was an activity falling within fisheries jurisdiction or alternatively, within freedom of navigation (Judgement of 4 December 1997, para. 59). The Tribunal simply concluded that

> "for the purposes of the admissibility of the application for prompt release … it is sufficient to note that non-compliance with Article 73, paragraph 2, of the Convention has been "alleged" and to conclude that the allegation is arguable or sufficiently plausible" (Judgement of 4 December 1997, para. 59).

21. It is one thing to characterise the Guinean actions as "sufficiently plausibl[e]" or "arguably" having been taken on the grounds of fisheries conservation. It is quite another to say that those definitively were the grounds on which the actions were taken. In any event these distinctions are entirely immaterial now. Developments subsequent to the Tribunal's judgement of 4 December 1997 make it abundantly clear that Guinea's actions were not motivated directly or indirectly, plausibly or arguably, or otherwise by considerations relating to "sovereign rights with respect to the living resources of the exclusive economic zone or their exercise". Moreover, the prompt release proceedings were entirely separate from these, and not incidental. They proceeded on the basis of the evidence then available to the Tribunal and to St. Vincent and the Grenadines. The Tribunal itself recognised that an approach and decision on the prompt release proceedings "does not foreclose that if a case were presented to it requiring full examination of the merits it would reach a different conclusion" (Judgement, para. 51). There is no inconsistency between the Tribunal's conclusions of 4 December, on the basis of the evidence then available, and a finding in these proceedings that the Guinean actions were *prima facie* about matters other than fisheries, on the basis of the evidence now available.

22. For these reasons St. Vincent and the Grenadines submits that this dispute is *prima facie* about the enforcement of customs laws and not fisheries laws. The dispute *prima facie* falls within Article 297(1)(a) of the 1982 Convention and Guinea may not avail itself of any exceptions.

The situation urgently requires provisional measures to be prescribed

21.* Guinea raises a second general argument as to why the International Tribunal should not prescribe provisional measures. It says "there is no

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* As in original.

urgent need for provisional measures". In support of this contention Guinea makes the following more specific arguments:

- the International Tribunal should not prescribe the provisional measures requested in relation to oil bunkering by vessels of St. Vincent and the Grenadines in the exclusive economic zone of Guinea since this is a matter which can only be dealt with at the merits stage and not by way of provisional measures (a);
- vessels flying the flag of St. Vincent and the Grenadines are not "subject to potential seizure in the waters including the EEZ Guinea" as a result of the citing of St. Vincent and the Grenadines in the Cedule de Citation (b);
- no reason has been given for the view expressed by St. Vincent and the Grenadines that the proceedings are "unlikely to lead to a final and binding Judgement in the near future" (c);
- Guinea cannot be expected to give a "carte blanche" against taking actions against vessels flying the flag of St. Vincent and the Grenadines within its exclusive economic zone or beyond (d); and
- the Guinean government cannot be expected to "otherwise" seek to enforce its first instance judgement (e).

22.* St. Vincent and the Grenadines will deal with each of these arguments in turn. Before doing so it is to be noted that Guinea has not challenged the following facts:

- the Cedule de Citation was only published on 10 December 1997 (*Request*, para. 11);
- although the Conclusions indicating the relief sought by the Guinean authorities were apparently prepared on 14 November 1997 they were only made available to St. Vincent and the Grenadines on 16 December 1997 (*Arbitration Notification*, para. 17);
- St. Vincent and the Grenadines was never notified that it had been joined civilly to the criminal proceedings (*Request*, para. 11);
- criminal proceedings opened on 12 December 1997 without the master being given a chance to meet with his lawyers (*Request*, para. 11);
- judgement in Conakry was given on 17 December 1997 in oral form only, and no written judgement had been published by the time of the submission of the Request on 13 January 1998 (*Request*, para. 11);
- the judgements accept the request for relief sought by the Guinean authorities and imposed *inter alia* a criminal fine of approximately US $15 million equivalent and ordered the confiscation of the vessel (*Request*, para. 11).

* As in original.

(a) The measures requested by St. Vincent and the Grenadines are properly those of a kind to be prescribed at this stage of the proceedings

23. The provisional measures which St. Vincent and the Grenadines has requested seek to preserve its rights under the 1982 Convention. Specifically, they are intended to give effect to this Tribunal's judgement of 4 December 1997 (in particular to obtain the release of the vessel and crew); to suspend the effect of the Judgements of the Guinean courts of 17 December 1997 and 4 February 1998 (in particular to prevent their enforcement against St. Vincent and the Grenadines or any vessels flying its flag or any other person); to ensure that vessels flying the flag of St. Vincent and the Grenadines are able to exercise their rights of freedom of navigation in the exclusive economic zone of Guinea and beyond, *inter alia* under Article 58 of the 1982 Convention (and in particular to allow such vessels to engage in bunkering without threat or fear of attack); and to ensure that such vessels are able to exercise these rights without fear of being subject to hot pursuit by Guinean authorities except under the conditions provided by Article 111 of the 1982 Convention.

24. These objectives are properly to be achieved by measures prescribed provisionally. At this stage the Tribunal is not called upon to consider the merits, and any provisional measures it prescribes are without consequence for what the arbitration tribunal might decide at the merits phase. Nevertheless, and in common with the practice of the many domestic and international tribunals which are called upon grant interim or provisional measures of protection, the underlying merits cannot be entirely ignored. Certainly St. Vincent and the Grenadines could not reasonably expect the measures it requests to be prescribed if its case on the merits appeared to be entirely without foundation or not *prima facie* meritorious. But this is clearly not the situation here. St. Vincent and the Grenadines submits that it has a strong case on the merits and that the threshold of a *prima facie* case is easily crossed to justify the prescription of these measures.

25. First, as regards the objective of obtaining the immediate release of the vessel pursuant to the judgement of 4 December 1997, the Tribunal will have to consider the relative strengths of Guinea's arguments that the bond posted by St. Vincent and the Grenadines was not "reasonable" and then weigh up, on balance of convenience, which party stands to lose more if the Tribunal does or does not prescribe the provisional measures. St. Vincent and the Grenadines submits that the Guinean arguments as to the "unreasonableness" of the bond, as reflected in the views of the Guinean Minister of Justice on 6 January 1997 (see below at para. 48) are entirely without substance. The failure to release the vessel after St. Vincent and the Grenadines had, without prejudice to its view that the bond posted was "reasonable", accommodated certain changes to the bond, is no more justifiable. The bond posted by

St. Vincent and the Grenadines on 10 December 1997, in the form of a bank guarantee, was "reasonable" within the meaning of the Tribunal's judgement of 4 December 1997. The owners of the m/v Saiga are continuing to incur great financial costs as a result of Guinea's failure to release the vessel (see statement of Mr. Mark Vervaet, **Attachment 7**). Those members of the crew remaining in detention have suffered the deprivation of their liberty and great personal hardship for more than three months. They have faced additional attacks whilst in captivity (see **Attachment 8**). Even if the Guinean concerns about the "reasonableness" of the bond could be justified, which St. Vincent and the Grenadines submits they cannot be, the delay in the response of the Minster of Justice (nearly four weeks from the posting of the bond on 10 December 1997 to receipt of his views on 6 January 1998) was totally without justification. Similarly, the subsequent delays, including that between the posting of a revised bond on a "without prejudice" basis on 29 January 1997 and the submission of this Reply, are without justification. The bond posted by St. Vincent and the Grenadines was *prima facie* reasonable and the balance of convenience is firmly against Guinea.

26. Second, as regards the objective of suspending the effect of the judgements of the Guinean courts of 17 December 1997 and 3 February 1998, it is equally appropriate for St. Vincent and the Grenadines to request this as a provisional measure. It is intended *inter alia* to allow vessels flying the flag of St. Vincent and the Grenadines to continue to engage in their commercial activities without fear of hindrance or other interference by the Guinean authorities. This objective is fully consistent with international precedent and practice: see for example the provisional measures indicated by the International Court of Justice in the *Anglo-Iranian Oil Co. Case* (the first time the Court was asked to indicate provisional measures), calling on the Iranian Government to "ensure that no measure of any kind should be taken designed to hinder the carrying on of the industrial and commercial operations of the Anglo-Iranian Oil Company, Limited, as they were carried on prior to May 1st, 1951" (*I.C.J. Reports 1951*, p. 89, at 93). Similarly, the state of St. Vincent and the Grenadines is entitled to request and obtain provisional measures preventing Guinea from taking steps against it directly: see for example the provisional measures indicated by the International Court in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* calling on the Government of the Islamic Republic of Iran to "afford to all the diplomatic and consular personnel of the United States the full protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law" (*I.C.J. Reports 1979*, p.7 at 21). In both these case[s] the International Court necessarily had to take a preliminary view as to the underlying merits. It did so, apparently without hesitation. In this case the merits are *prima facie* on the side of St. Vincent and the Grenadines, as the Tribunal itself recognised

in its judgement of 4 December 1997 "the classification as 'customs' of the bunkering of fishing vessels makes it very arguable that … the Guinean authorities acted from the beginning in violation of international law" (Judgement, para. 72). As a coastal state, Guinea's rights under the 1982 Convention in its exclusive economic zone are narrowly circumscribed by Articles 56(l), 61 and 62 of the Convention. The Convention *prima facie* prohibits the application and enforcement of customs duties in the exclusive economic zone, except possibly where they relate to the exploration, exploitation, conservation and management of living resources. The imposition of customs duties on an oil tanker for bunkering activities carried out in the exclusive economic zone is *prima facie* prohibited by the 1982 Convention. This is confirmed by overwhelming practice of Parties to the Convention, as evidenced by the illustrative practice which St Vincent and the Grenadines has been able to obtain in the short time available (see **Attachment 9**). There can be no question but that bunkering is a respectable and lawful activity which is carried out by vessels in all parts of the world registered with many nations (see the issues of *Bunker News* for December 1997 and January 1998, set out at **Attachment 10**). These show the extent to which this is a global activity, the reputation of the commercial entities involved and the commercial importance of the West African bunkering market (*Bunker News*, December 1997, Vol. 5, No. 12, pp. 4–5; *ibid*).

27. Third, as to the objective of ensuring that vessels flying the flag of St Vincent and the Grenadines are able to exercise freedom of navigation rights in the exclusive economic zone of Guinea, this too is appropriately addressed by provisional measures: see for example, the *Anglo-Icelandic Fisheries Jurisdiction* case where the International Court of Justice called on Iceland *inter alia* to "refrain from taking any measures to enforce the Regulations of 14 July 1972 against vessels registered in the United Kingdom and engaged in fishing activities in the waters around Iceland outside the 12-mile fishing zone", and "refrain from applying administrative, judicial or other measures against ships registered in the United Kingdom, their crews or other related persons, because of their having engaged in fishing activities in the waters around Iceland outside the 12-mile fishing zone" (*I.C.J. Reports 1972*, p. 12 at 17). This objective is closely related to the previous one. If this Tribunal does not prescribe the provisional measures requested, vessels flying the flag of St Vincent and the Grenadines will in effect be precluded from entering the exclusive economic zone of Guinea in order to exercise rights of navigation, including bunkering, in the exclusive economic zone of Guinea.

28. Finally, the objective of ensuring that Guinea exercises the right of hot pursuit solely in accordance with the conditions laid down in Article 111 of the 1982 is self evidently a matter appropriately addressed by provisional measures. In its judgement of 4 December 1997 the Tribunal clearly stated that Guinea's claim to lawfully exercise the right of hot pursuit did not meet

the requirement of "arguability" (Judgement, para. 61). In particular, Guinea had recognised "that the pursuit was commenced one day after the alleged violation, at a time when the m/v Saiga was certainly not within the contiguous zone of Guinea, as shown in the vessel's log book" (*ibid*.). The judgement of 3 February 1998 nevertheless confirms the legality of Guinea's exercise of hot pursuit against the m/v Saiga (see **Attachment 2**). There is accordingly every reason to expect that hot pursuit might again be undertaken in similar conditions. Provisional measures would assist in preserving the rights under the Convention not to be subject to hot pursuit except in accordance with the conditions imposed by Article 111.

(b) By reason of the citing of St Vincent and the Grenadines in the Guinean criminal proceedings vessels flying its flag may be "subject to potential seizure in the waters including the EEZ Guinea"

29. The Cedule de Citation cited St Vincent and the Grenadines as the "partie civilement responsible" for any fine to be imposed by the Guinean courts. The judgement of 4 February 1998 has upheld the fine of approximately US$15 million against the Master. Although the judgement does not refer to St Vincent and the Grenadines, the Government remains concerned that as a "partie civilement responsible" – whether potentially or actually – vessels flying the flag of St Vincent and the Grenadines may be subject to seizure in Guinean waters or beyond to recover the fine, or that assets of St Vincent and the Grenadines itself be the subject of attachment proceedings. The purpose of this request is to remove that threat pending the outcome of the case on the merits.

30. By citing St Vincent and the Grenadines in the Cedule de Citation the Guinean authorities have demonstrated their willingness to pierce the corporate veil and seek to attach responsibility to a flag state in respect of an alleged wrongdoing by a vessel flying its flag. This action is apparently without international precedent and *prima facie* incompatible with the 1982 Convention. Having thus acted once there is every reason to expect that Guinea will so act again. The citing of St Vincent and the Grenadines as flag state is sufficient to put other such vessels on notice that they risk seizure, and has a chilling effect on the willingness of these vessels to enter Guinean waters (see Statement of Mr. Vervaet, **Attachment 7**).

31. The risks to St Vincent and the Grenadines' flagged vessels and to the state itself are wholly unacceptable. The request for provisional measures seeks to minimise these risks pending a final judgement on the merits by the arbitral tribunal and so preserve rights under the 1982 Convention.

(c) The arbitration proceedings are "unlikely to lead to a final and binding judgement in the near future"

32. The provisional measures requested have been sought because it is unlikely that a final judgement on the merits by the arbitral tribunal will be given in the near future. In the event that the arbitration proceedings follow the usual timetable of other international proceedings of this kind it is unlikely that judgement will be given within at least a year. During that period, if the judgements of 17 December or 4 February are allowed to stand and be enforced, the m/v Saiga will have been confiscated, vessels flying the flag of St Vincent and the Grenadines may be subject to seizure, assets of the state of St Vincent and the Grenadines may be subject to attachment, Guinea will be free to continue to apply and enforce its customs laws to bunkering activities within its exclusive economic zone in violation of the 1982 Convention, and vessels flying the flag of St Vincent and the Grenadines will be subject to hot pursuit otherwise than in accordance with the 1982 Convention. These acts would have irreversible consequences for the persons involved, which may not be able to be compensated, fully or at all. It is doubtful that compensation could ever adequately cover the deprivation of liberty to which the master and crew have now been subjected for over three months. The flouting by Guinea of the Tribunal's judgement of 4 December 1997 makes the prescription of the provisional measures requested all the more important. Since these measures will be legal[ly] binding (Article 290(6), 1982 Convention) their violation by Guinea may allow appropriate measures of response before other courts.

33. There is a real likelihood that Guinea will continue to violate rights under the 1982 Convention which this Request aims to preserve. There exists overwhelming evidence as to past practice which shows that Guinea has a history of applying and seeking to enforce customs laws within its exclusive economic zone and beyond, with significant adverse consequences for shipping. At **Attachment 11** there is set out the Statement of Mr. Kanu, together with annexes. It details examples of attacks on another foreign vessel, in and beyond the exclusive economic zone of Guinea in recent years. It confirms that Guinean waters are now considered to be out of bounds for many vessels from Sierra Leone and elsewhere, and that the Guinean authorities will attack the same vessel on more than on[e] occasion.

34. There therefore exists a real likelihood of these acts occurring again. These acts would cause irreparable harm. There exists a situation of urgency, and it fully justifies the provisional measures requested.

(d) Guinea is not being asked to give a "carte blanche" against taking actions against vessels flying the flag of St Vincent and the Grenadines within its exclusive economic zone or beyond

35. St Vincent and the Grenadines is not asking for a "carte blanche" prohibiting enforcement measures or other actions against vessels flying its flag within the exclusive economic zone of Guinea. It is requesting provisional measures which will preserve its rights under the 1982 Convention, namely by allowing vessels flying its flag to continue to enjoy freedom of navigation and other internationally lawful uses of the sea related to freedom of navigation which are guaranteed by *inter alia* Articles 56(2) and 58 and related provisions of the 1982 Convention, including Article 111 (see *Arbitration Notification*, para. 27(2)).

36. Those freedom of navigation and related rights include the right of foreign (i.e. non-Guinean) vessels not to be subject to the application of customs duties or contraband laws in the exclusive economic zone of Guinea in relation to bunkering, particularly with other non-Guinean vessels. Guinea has put forward no international legal justification whatsoever for its view that it is entitled to apply customs law unrelated to fisheries in its exclusive economic zone. No such justification exists in the 1982 Convention. The rights of the coastal state in its exclusive economic zone are exhaustively laid out in Article 56(l) of the Convention, and no interpretation permits the exercise by the coastal state of prescriptive or enforcement jurisdiction of customs laws which are unrelated to fisheries matters.

37. As indicated earlier, the submissions of St Vincent and [the] Grenadines are consistent with and fully supported by overwhelming State practice (see **Attachment 9**).

38. Since 4 December 1997 it has become clear that the Guinean authorities were acting solely on the basis of customs legislation. It is no longer "plausible" or "arguable" that Guinea's actions can be said to be justified by its fisheries legislation. In those circumstances St Vincent and the Grenadine[s] has no option but to request at this provisional stage that the Tribunal order that Guinea

> "subject to the limited exception as to enforcement set forth in Article 33(1)(a) of the 1982 Convention […] 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" (*Arbitration Notification*, para. 27(1)(d)).

39. In the event that the Tribunal prescribes such provisional measures Guinea would still be able to apply, within its exclusive economic zone, its fisheries

laws consistent with the 1982 Convention. There would thus be no "carte blanche" protection granted to vessels flying the flag of St Vincent and the Grenadines, as Guinea claims. It is only the application and enforcement in the exclusive economic zone of customs laws unrelated to fisheries which are being addressed by the provisional measures requested.

(e) It is appropriate that Guinea be required provisionally not to seek to enforce the judgements of its courts in relation to this matter.

40. St Vincent and the Grenadines submits that the judgements of 17 December 1997 and 4 February 1998 are inconsistent with Guinea's obligations under the 1982 Convention. To seek to enforce those judgements, in particular the fine of approximately US$15 million would further aggravate the dispute between the two parties. Moreover, to the extent that enforcement of the judgements was sought against *inter alia* other vessels flying the flag of St Vincent and the Grenadines or against the State itself, or led to further measures being taken against the m/v Saiga and/or its cargo and crew, Guinea would be failing to preserve the rights of St Vincent and the Grenadines under the 1982 Convention.

41. St Vincent and the Grenadines submits that there is no reason in principle why provisional measures cannot be granted to suspend the effect of the judgement of a municipal court pending the outcome of the international case on the merits. A national court is an organ of the State, and as such its judicial acts are attributable to the State analogously to legislative acts. International courts and tribunals are able and willing to indicate interim measures suspending the effect of legislation or judicial measures (as happened for example in the […] *Fisheries Jurisdiction Case*, *I.C.J. Reports 1972*, p. 17) or allowing commercial operations to continue unhindered by measures adopted under domestic law (see e.g. the International Court of Justice calling on Iran to do nothing which would "hinder the carrying on of the industrial and commercial operations of the Anglo-Iranian Oil Company Limited, as they were carried on prior to May 1st, 1951": *Anglo-Iranian Oil Company Case, I.C.J. Reports 1951*, p. 89 at 94). There is no reason why this Tribunal should not similarly prescribe the suspension in effect of a judicial measure to permit the m/v Saiga to pursue its commercial activities unhindered.

The measures requested

42. Guinea makes only one point in relation to the provisional measures requested by St Vincent and the Grenadines. In relation to the request that the m/v Saiga and her crew be released immediately, Guinea submits that the bond offered by St Vincent and the Grenadines on 10 December 1997 was not "reasonable" within the meaning of the Tribunal's judgement of

4 December 1997. It implies that for this reason the Tribunal should not, as a provisional measure, order the release of the vessel.

43. St Vincent and the Grenadines submits that the bond posted on that date in the form of a bank guarantee was "reasonable". It will be recalled that in its judgement of 4 December 1997 the Tribunal decided that "the release shall be upon the posting of a reasonable bond or security" (Judgement, para. 86(4)). No further guidance was provided as to the meaning of the word "reasonable". The 1982 Convention itself provides no guidance.

44. The bond was submitted by St Vincent in the form of a bank guarantee in English language on 10 December 1997, signed on behalf of Credit Suisse by Mr. Laurent Stockhammer and Mr. Gerard Meyer (see *Arbitration Notification*, paras. 9 to 11; **Attachment 12**, p. 2). On the morning of 11 December Mr. Howe and the Guinean Agent discussed the bond. The Guinean Agent advised that he had a number of concerns that were being set out in a fax that Mr. Howe had not yet seen. Mr. Howe and the Guinean Agent discussed those concerns in further detail and agreed how they could be overcome by a fax to be sent directly from Credit Suisse to the Guinean Agent. That conversation therefore superseded the fax of the Guinean Agent of 11 December (**Attachment 11**, p. 5) which Mr. Howe received shortly afterwards. The fax from Credit Suisse was duly procured in the agreed terms as required by the Guinean Agent and sent to him later that day (see **Attachment 12**, pp. 9–13).

45. The Guinean Agent confirmed receipt of the letter from Credit Suisse in his letter of 12 December 1997 (**Attachment 12**, pp. 14–19). This is the letter now relied upon by Guinea to argue that the bank guarantee posted by St Vincent and the Grenadines was not "reasonable" within the meaning of the judgement of 4 December 1997 (see *Response*, Annex 1). That letter conveniently ignores the fact that the Agent had already agreed that his concerns had been addressed in the manner described above. The Agent then goes on to state:

> "I have advised you, that *I personally cannot decide whether the bank guarantee is to be considered "reasonable"* in the sense of the judgement of the International Tribunal for the Law of the Sea of December 4. *It is up to the Government of Guinea to decide. In this connection I have advised that I have not yet been able to get instructions from Conakry*." (*ibid*., para. 3, emphasis added)

46. The Agent goes on to set out a number of new reasons why he – personally – then maintained the guarantee to be unreasonable. But it is clear that those reasons are his own and not those of Guinea. The letter of 12 December 1997 is therefore of no relevance to this Request, save that it confirms that by that date Guinea had not expressed a view.

47. Nevertheless, in the interest of acting expeditiously to obtain the release of the vessel and crew, which by this time had been in captivity for more than six weeks, St Vincent and the Grenadines responded immediately to the letter from the Guinean Agent (**Attachment 12**, pp. 20–1). This letter called *inter alia* for the immediate release of the vessel. On 15 December 1997 the Agent of Guinea responded *inter alia* to the effect that he had no reaction or instructions from Guinea and he was not authorised to agree to the guarantee (**Attachment 12**, pp. 23–4).

48. On 6 January 1998 – more than four weeks after the Tribunal had given its judgement, and with the m/v Saiga and crew still being held in Conakry – the Guinean Agent wrote to indicate that he had finally received instructions from the Minister of Justice of Guinea as to the bank guarantee (**Attachment 12**, pp. 27–8). The letter confirms that the Agent's "personal" letter of 12 December 1997 has been superseded and that the Minister of Justice has concerns as to the reasonableness of the bank guarantee which are entirely different from those expressed by the Agent in his letter of 11 December. The Minister of Justice considers that the bank guarantee cannot be accepted (and is presumably "unreasonable") for the following reasons:

- in paragraph A of the bank guarantee he asks for the deletion of all words after "28 October 1997";
- paragraphs B(i) and B(iii) of the bank guarantee are said to be not in conformity with the judgement of the International Tribunal because (a) the sum of US$400,000 is an integral part of the guarantee, and (b) all aspects of the payment of that sum have to be accepted by the Guinean government;
- the French language translation of the guarantee erroneously refers the instrument's expiration on 10 December 1996; and
- the status of the two signatories of the guarantee on behalf of Credit Suisse was not indicated and the guarantee was therefore not valid.

49. On 19 January 1998 St Vincent and the Grenadines responded (**Attachment 12**, pp. 29–30). The letter explained that St Vincent and the Grenadines did not accept that any of the objections raised by the Minister of Justice of Guinea [were] valid and that they did not justify the failure to release the m/v Saiga on receipt of the bond (on 10 December 1997) or upon clarification (the following day). Nevertheless, in the interest of expediting the release of the m/v Saiga and the crew – which by now had been in captivity for nearly two months, including in excess of six weeks after the Tribunal's judgement – St Vincent and the Grenadines expressed a willingness to accommodate the views of the Minister of Justice, "without prejudice" to its position that the Guinean demands were not valid. The letter also requested that Guinea provide acceptable substitute language in relation to paragraph B(i) and (iii).

By letter of 22 January 1998 the Agent of Guinea provided substitute language (**Attachment 12**, pp. 37–8). On 29 January 1998 St Vincent and the Grenadines sent to the Minister of Justice in Conakry, by registered courier, the revised bank guarantee incorporating the suggestions (**Attachment 12**, pp. 39–44). The revised bank guarantee was accepted by the Minister of Justice (**Attachment 12**, p. 45).

50. As at 13 February 1998 the m/v Saiga and crew had still not been released.

51. St Vincent and the Grenadines submits that the failure to release the m/v Saiga upon receipt of the bank guarantee on 10 December 1997 is not justifiable, and constitutes in itself a further violation of the 1982 Convention. The changes introduced into the guarantee on 30 January 1998 are of no material effect. In all relevant respects the revised guarantee is identical to the original one. Since the official languages of the Tribunal are English and French (Rules of the Tribunal, Article 43) the posting of a guarantee in English with a French translation cannot be said to be "unreasonable".

CONCLUSIONS

52. This Tribunal has jurisdiction to prescribe provisional measures in this matter. The measures sought are intended to preserve rights under the 1982 Convention. They are urgently required to prevent irreparable further harm. They are reasonable and, being binding, they are likely to be effective. St Vincent and the Grenadines therefore requests the Tribunal to prescribe the following provisional measures, revised to take account of developments which have occurred since the Request was initially submitted:

(1) that Guinea forthwith brings into effect the measures necessary to comply with the Judgement 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 judgement of 17 December 1997 of the Tribunal de Premiere Instance of Conakry and/or the judgement of 3 February 1998 of the Cour d'Appel of Conakry;
(c) cease and desist from enforcing, directly or indirectly, the judgement of 17 December 1997 and/or the judgement 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 St 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 St 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".

Accordingly, the government of St Vincent and the Grenadines asks the Tribunal to prescribe the provisional measures requested for the reasons set out above and in the original Request or any of them or for any other reason that the Tribunal deems relevant.

13 February 1998

Mr. Bozo Dabinovic
Agent for the Government of
St Vincent and the Grenadines

LIST OF ATTACHMENTS

Attachment 1 – Judgement of 17 December 1997 (French with English translation)

Attachment 2 – Judgement of 3 February 1998 (French with English translation)

Attachment 3 – Cedule de Citation of 10 December 1997 (French with English translation)

Attachment 4 – Conclusions of 14 November 1997 (French with English translation)

Attachment 5 – Texts of Article 40 of the Code de la Marine Marchande, 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 (with English translation)

Attachment 6 – Protocol establishing for the period 1.1.1996 to 31.12.1997, the fishing rights and financial compensation provided for [in] the Agreement between the EEC and the Government of Guinea on fishing off the Guinean coast, OJ NDL 157, 29.06.1996, P.3.

Attachment 7 – Statement by Mr. Mark Vervaet

Attachment 8 – Report on attack on m/v Saiga on 31 January 1998

Attachment 9 – Practice of states on the application of customs duties to bunkering in the EEZ

Attachment 10 – *Bunker News*, December 1997 and January 1998

Attachment 11 – Statement by Mr. Kanu

Attachment 12 – Correspondence between the parties concerning the bond posted on 10 December 1997