

**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 10.00 a.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 Sindi 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 CLERK OF THE TRIBUNAL: The International Tribunal for the Law
2 of the Sea is now in session.

3

4 THE REGISTRAR: “The Tribunal will today hear argument in the request
5 for provisional measures in respect of the M/V SAIGA. The case has been
6 named M/V SAIGA [II] and it has been entered in the Tribunal’s list of cases
7 as case number two.

8

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

14

15 THE PRESIDENT: This public sitting is being held, pursuant to Article 26 of
16 the Statute of the Tribunal, for the oral proceedings in the Request for the
17 prescription of provisional measures submitted by St Vincent and the
18 Grenadines in the M/V “SAIGA” [II] case.

19

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

23

24 On 13 January 1998 St Vincent and the Grenadines filed with the Registrar of
25 the Tribunal a Request for the prescription of provisional measures in respect
26 of a dispute between the Government of St Vincent and the Grenadines and

1 the Government of Guinea which was to be submitted to an arbitral tribunal to
2 be constituted pursuant to Annex VII of the United Nations Convention on
3 the Law of the Sea. The request for the prescription of provisional measures
4 was filed under Article 290, paragraph 5, of the Convention, pending the
5 constitution of the arbitral tribunal.

6
7 By Order of 20 January 1998 the Tribunal fixed 23 February 1998 as the date
8 for the opening of the oral proceedings.

9
10 On 30 January 1998 Guinea filed with the Registrar of the Tribunal its
11 Response to the Request, pursuant to Article 90, paragraph 3, of the Rules of
12 the Tribunal. In the Response, Guinea asked the Tribunal to reject the
13 request for the prescription of provisional measures.

14
15 A reply was filed by St Vincent and the Grenadines on 13 February 1998. In
16 the reply St Vincent and the Grenadines modified the initial request of
17 13 January 1998 and introduced an additional provisional measure to be
18 prescribed by the Tribunal.

19
20 On 20 February 1998 Guinea filed with the Registrar of the Tribunal a
21 Statement in addition to its Response of 30 January 1998 in reply to the
22 request of St Vincent and the Grenadines of 13 January 1998 and in reply to
23 the Statement of St Vincent and the Grenadines of 13th February 1998.

24
25 On 20 February 1998, the President of the Tribunal was informed by
26 a communication from Guinea that the Government of Guinea and the

1 Government of St Vincent and the Grenadines had, by an Exchange of
2 Letters, agreed to “transfer to the International Tribunal for the Law of the
3 Sea ... the arbitration proceedings instituted by St Vincent and the
4 Grenadines by Notification of 22 December 1997.” The President was also
5 informed that the two Governments had agreed that the submission of the
6 dispute to the International Tribunal for the Law of the Sea shall be on the
7 following conditions:

8

9 “[One] The dispute shall be deemed to have been submitted to the
10 International Tribunal for the Law of the Sea on 22 December 1997,
11 the date of the Notification by St Vincent and the Grenadines
12 [instituting the proceedings]’

13

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

19

20 [Three] The written and oral proceedings shall follow the timetable set
21 out in the Annex to the exchange of letters between the two
22 governments, subject to the agreement of the Tribunal.

23

24 [Four] The International Tribunal for the Law of the Sea shall address
25 all claims for damages and costs referred to in paragraph 24 of the
26 Notification of 22 December 1997 and shall be entitled to make an

1 award on the legal and other costs incurred by the successful party in
2 the proceedings before the International Tribunal..

3
4 [Five] The Request for the Prescription of Provisional Measures
5 submitted to the International Tribunal for the Law of the Sea by
6 St Vincent and the Grenadines on 13 January 1998, the Statement of
7 Response of the Government of Guinea dated 30 January 1998, and all
8 subsequent documentation submitted by the parties in connection with
9 the Request shall be considered by the Tribunal as having been
10 submitted under Article 290, paragraph 1, of the Convention on the
11 Law of the Sea and Article 89, paragraph 1, of the Rules of the
12 Tribunal.”

13
14 The Agreement between the Government of Guinea and the Government of
15 St Vincent and the Grenadines provides that “upon confirmation by the
16 President (of the International Tribunal for the Law of the Sea) that the
17 Tribunal is prepared to hear the dispute, the arbitral proceedings instituted by
18 the Notification dated 22 December 1997 shall be considered to have been
19 transferred to the jurisdiction of the International Tribunal for the Law of the
20 Sea.”

21
22 By Order of 20 February 1998 the Tribunal decided that it is prepared to hear
23 the dispute instituted by St Vincent and the Grenadines against Guinea by the
24 Notification dated 22 December 1997, pursuant to the Agreement of the two
25 Governments and on the terms and conditions specified in the Agreement. In
26 particular, the Tribunal ordered:

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

(2) The Tribunal further ordered that a request for provisional measures submitted by St Vincent and the Grenadines on 30 January 1998 and their response thereto submitted by Guinea on 30th January 1998 and all other documentation submitted by the parties, the Order made by the President on 20th February 1998 and all communications relating to the requests for the Prescription of Provisional Measures shall be considered as having been duly submitted under Article 290, paragraph 1, of the United Nations Convention on the Law of the Sea; and Article 89, paragraph 1 of the Rules of the Tribunal.

(3) The Tribunal further ordered that the case be recorded in the Tribunal's List of cases as case number 2, M/V SAIGA [II] case.

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

Pursuant to the decisions of the Tribunal, the Request for the prescription of provisional measures by St Vincent and the Grenadines is to be dealt with as Incidental proceedings in the M/V SAIGA [II] (case number two in the List

1 of the Tribunal's cases). These proceedings are governed by Article 290,
2 paragraphs 1, 2, 3, 4 and 6 of the Convention on the Law of the Sea; Article
3 25 of the Statute of the Tribunal and Article 89 paragraphs 1, 3 and 5 and the
4 other relevant provisions of Part III, Section C, subsection 1, of the Rules of
5 the Tribunal.

6

7 The provisional measures requested by St Vincent and the Grenadines in the
8 Request dated 13 January 1998, as subsequently revised in its reply dated 13
9 February 1998, are as follows:

10

11 “[One] that Guinea forthwith brings into effect the measures necessary
12 to comply with the Judgment of the International Tribunal for the Law
13 of the Sea of 4 December 1997, in particular that Guinea shall
14 immediately:

15

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

17

18 (b) suspend the application and effect of the judgment of 17 December
19 1997 of the Tribunal de Premiere Instance of Conakry and/or the
20 judgment of the Cour d'Appel of Conakry;

21

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

25

1 (d) subject to the limited exception as to enforcement set forth in
2 Article 33 [paragraph 1, sub-paragraph a] of the 1982 Convention on
3 the Law of the Sea, cease and desist from applying, enforcing or
4 otherwise giving effect to its laws on or related to customs and
5 contraband within the exclusive economic zone of Guinea or at any
6 place beyond that zone (including in particular Articles 1 and 8 of Law
7 94/007/CTRN of 15 March 1994, Article 316 and 317 of the Code des
8 Douanes, and Articles 361 and 363 of the Penal Code) against vessels
9 registered in St Vincent and the Grenadines and engaged in bunkering
10 activities in the waters around Guinea outside its 12-mile territorial
11 waters;

12
13 [Two] that Guinea and its governmental authorities shall cease and desist
14 from interfering with the right of St Vincent and the Grenadines and vessels
15 registered in St Vincent and the Grenadines, including those engaged in
16 bunkering activities, to enjoy freedom of navigation and/or other
17 internationally lawful uses of the sea related to freedom of navigation as set
18 forth inter alia in Articles 56 [paragraph 2] and Article 58 and related
19 provisions of the 1982 Convention;

20
21 [Three] that Guinea and its governmental authorities shall cease and desist
22 from undertaking hot pursuit of vessels registered in St Vincent and the
23 Grenadines, including those engaged in bunkering activities, except in
24 accordance with the conditions set forth in Article 111 of the 1982
25 Convention, including in particular the requirement that ‘such pursuit’ must
26 be commenced when the foreign ship or one of its boats is within the internal

1 waters, the archipelagic water, the territorial sea or the contiguous zone of the
2 pursuing State, and may only be continued outside the territorial sea or the
3 contiguous zone if the pursuit has not been interrupted’.

4
5 In a statement in reply dated 20th February 1998, Guinea reiterated its request
6 that the Tribunal should reject all the provisional measures requested by St
7 Vincent and the Grenadines.

8
9 In conformity with Article 67, paragraph 2, of the Rules of the Tribunal,
10 copies of the pleadings and documents annexed thereto are being made
11 accessible to the public as of today. Copies of the Request of St Vincent and
12 the Grenadines have already been made accessible.

13
14 I note the presence in court this morning of The Right Honourable Mr Carl
15 Joseph, the Attorney General and Minister of Justice of St Vincent and the
16 Grenadines who is appearing on behalf of the Applicant. I also note the
17 presence in court of Mr Harmut von Brevern, Agent of Guinea. I now call
18 upon The Right Honourable Mr Carl Joseph to note the representation of St
19 Vincent and the Grenadines.

20
21 MR JOSEPH: May it please you Mr President, Members of the Tribunal.
22 Mr President, Members of the Tribunal, it is a great privilege for me to be
23 with you today as Head of the Delegation representing St Vincent and the
24 Grenadines. I appear with Mr Nicholas Howe, solicitor of the Supreme
25 Court, Maitre Thiam, Solicitor of the Senegalese Bar and Mr Philippe Sands,

1 Barrister and Reader of International Law at the University of the West Indies
2 representing St Vincent and the Grenadines.

3

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

10

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

14

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

17

18 MR von BREVERN: President, Honourable Judges, first of all I thank you
19 for your instruction that you have prepared and accepted the transfer of the
20 case on the merits, the transfer from the arbitral Tribunal to the International
21 Tribunal. Thank you very much.

22

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

25

1 THE PRESIDENT: Thank you very much Mr von Brevem. The Tribunal
2 will hear the submissions of the Applicant, St Vincent and the Grenadines, at
3 this sitting, which will end at 13.00 hours. There will be a short break of
4 fifteen minutes at 11.30.

5

6 The submissions of Guinea will be heard at a sitting from 3 o'clock to
7 6 o'clock this afternoon. At another sitting tomorrow afternoon, both parties
8 will have the opportunity to make replies to the presentations given today.

9

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

12

13 MR JOSEPH: May it please you Mr President, Members of the Tribunal.

14

15 Mr President, Members of the Tribunal, it is a great privilege to be with you
16 today as head of the delegation representing St Vincent and the Grenadines. I
17 appear with Mr Nicholas Howe, Solicitor of the Supreme Court,
18 Maitre Thiam, President of the Senegalese Bar and Mr Philippe Sands,
19 Barrister and Reader of International Law at the University of London
20 representing the State of St Vincent and the Grenadines. As Attorney
21 General for St Vincent and the Grenadines, my presence here today indicates
22 the very great and continuing importance my government attaches to its
23 Request that this Tribunal prescribe provisional measures of protection.

24

25 It is with great regret that my Government has had to institute these
26 proceedings for the Prescription of provisional measures of protection

1 pending the final disposal of the substantive matter on its merits. It was clear
2 after the bond has been posted as ordered by this Tribunal, that the Guinean
3 authorities were not responding to efforts to put into effect your decision. St
4 Vincent and the Grenadines, therefore, had to move quickly to further secure
5 the interests of vessels flying our flag and to take steps to preserve our rights
6 under the 1982 Convention.

7
8 This application was initially submitted under Article 290 paragraph 5 of the
9 1982 Convention on the Law of the Sea on the basis that the merits of the
10 matter were being submitted to Arbitration. The Arbitral Tribunal was to be
11 constituted pursuant to our notification of 22nd December 1997. However,
12 recent events have superseded this. The position now is that the parties have
13 agreed that the merits, together with the request for provisional measures, are
14 transferred to this Tribunal. Accordingly, these proceedings are now based
15 on Article 290 paragraph 1 of the Convention.

16
17 On behalf of the Government of St Vincent and the Grenadines I would like
18 to express our sincere appreciation and gratitude to you, Mr President, and to
19 the Registrar, for the efforts you have made to assist the parties to bring this
20 case fully before this Tribunal. My Government is equally appreciative of
21 the expeditious steps which the Court has already taken to order the 'prompt
22 release' of the M/V SAIGA and of the fact that the Tribunal has ensured, in
23 accordance with Article 90 of its Rules, to give the Request priority and to
24 treat it as a matter of urgency.

1 My Government is making this Request before the Tribunal has considered
2 the merits of the case, and when the respondent Party appears to be
3 challenging the jurisdiction of the Tribunal to preside on the merits, and hence
4 the Tribunal's right to prescribe provisional measures. It is fully conscious of
5 the gravity of this Request.

6

7 There are a number of reasons why we have been forced to institute these
8 proceedings and return to this Tribunal for a second time. Guinea has failed
9 to give effect to the Judgment of this Tribunal of 4 December 1997. Since
10 that judgment Guinea has filed and prosecuted criminal charges before its
11 domestic courts, and obtained judgments which threaten freedom of
12 navigation under the 1982 Convention. And Guinea has in effect confirmed
13 its unilateral extension to the outer limits of its exclusive economic zone - and
14 indeed beyond - the right to apply and enforce customs duties in relation to oil
15 'bunkering' activities between vessels which do not fly the Guinean flag.

16 These acts have grave repercussions for the State of St Vincent and the
17 Grenadines as well as vessels flying its flag. Each of these acts, in our
18 submission, is without any justification in international law, in particular the
19 1982 Convention.

20

21 Moreover, Mr President and Members of the Tribunal, notwithstanding the
22 pendency of proceedings before this Tribunal on the merits and the
23 application for Provisional Measures, Guinea has persisted in its
24 determination to apply and enforce its laws in total disregard of the judgment
25 of this Tribunal and the relevant rules of international law. On 3 February
26 1998, less than three weeks ago, the Court of Appeal in Conakry upheld the

1 right of the Guinean authorities to arrest the M/V SAIGA, an oil tanker flying
2 the flag of St Vincent and the Grenadines, for customs and contraband
3 violations. The Court of Appeal condemned the Master of the M/V SAIGA
4 to a fine of approximately US\$ 15 million, imposed a six month prison
5 sentence, and ordered the confiscation of the vessel as well as its cargo. The
6 Court of Appeal did not vary the citation against the State of St Vincent and
7 the Grenadines. I am advised that this means that our State is, in principle,
8 subject to payment of that fine and that vessels flying our flag are liable to
9 arrest in Guinean waters.

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

24
25 The Guinean actions have had grave consequences for the M/V SAIGA, for
26 its Master and crew, for its owners and charterers, for the cargo owners, and

1 for St Vincent and the Grenadines. Further consequences are threatened. For
2 these reasons my Government has decided to make this Request as a matter
3 of urgency. The measures requested are set out in paragraph 9 of our
4 Request, which was filed on 13 January 1998. As you are aware, there have
5 been some developments since then, and accordingly we filed a revised
6 Request on 13 February 1998.

7

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

1

2 St Vincent and the Grenadines is not only a coastal state. It also has an active
3 merchant shipping fleet registered under its flag, engaged in fisheries,
4 bunkering and other lawful activities on the high seas and in the exclusive
5 economic zone of other states. When St Vincent and the Grenadines
6 achieved its independence in 1979 its registered fleet was small. For the most
7 part the fleet comprised small fishing vessels and ferry boats which were
8 mainly active in Caribbean waters. On achieving independence, the
9 Government took a decision to diversify the country's economic base which
10 had, until that time, been rather narrow. It was considered to be inappropriate
11 to remain too dependent on a single source of income, whether from banana
12 production (our traditional activity) or tourism. The newly independent
13 government took as one of its first steps the decision to establish a maritime
14 register, and to do it under conditions in which its reliability and effectiveness
15 could not be questioned. To this end, the Merchant Shipping Act of St
16 Vincent and the Grenadines was passed in 1982. St Vincent and the
17 Grenadines wished to be, and wished to be seen as, a flag state which would
18 comply with its international obligations and actively promote and protect the
19 interests of vessels flying its flag, including their rights under the 1982
20 Convention. Starting from a small base, by the end of 1997 our total
21 registered tonnage reached just over 10 million. That made St Vincent and
22 the Grenadines, one of the smallest countries in the world, the seventeenth
23 largest shipping nation.

24

25 For these reasons the actions by the Guinean authorities in October 1997 in
26 detaining the M/V SAIGA and subsequently arresting her have inspired the

1 gravest concern for my Government. This is the third vessel flying the flag of
2 St Vincent and the Grenadines to have been attacked by the Guinean Customs
3 Authorities. The failure by Guinea to comply with your judgment and the
4 subsequent decision on the part of its customs and criminal authorities to
5 bring proceedings under its domestic, customs and criminal laws against the
6 Master inspired even greater concern. By 10 December 1997 it was clear
7 that the Guinean actions had nothing to do with fisheries. These acts have
8 profound implications for the developing shipping activities of St Vincent and
9 the Grenadines, and equally serious is the decision by the authorities of
10 Guinea to name St Vincent and the Grenadines, a sovereign state, as the party
11 which is civilly liable for the fine imposed upon the Master of the vessel by
12 the Court of Conakry on 17 December 1997 and upheld by the Court of
13 Appeal on 3 February 1998. The citing of St Vincent and the Grenadines in
14 such a fashion constitutes a direct attack on our sovereignty. I am not aware
15 of any precedent. It is a wholly unjustifiable piercing of the corporate veil.

16

17 The criminal conviction of the Master and the imposition of the civilly
18 liability of St Vincent and the Grenadines are acts which remain legally
19 effective and capable of enforcement under Guinean law. I am advised that
20 the citing of St Vincent and the Grenadines as civilly liable for a fine in the
21 equivalent of \$15 million means that any vessel flying the flag of St Vincent
22 and the Grenadines is on notice that if it enters the waters of Guinea it is
23 liable to be sized in execution of the Guinean judgment. That fact alone has
24 potentially chilling effect on the ability of St Vincent and the Grenadines to
25 promote its shipping industry. Further, I am advised that there exists the

1 possibility that Guinea could seek to enforce that judgment against the assets
2 of St Vincent and the Grenadines itself.

3
4 Accordingly, this Request for provisional measures is of the gravest
5 importance and utmost urgency to my Government. We request these
6 provisional measures to preserve our rights under the 1982 Convention and to
7 restore the situation to that which existed before 29 October 1997, pending
8 the final decision of this Tribunal on the matter. The object of the provisional
9 measures is to suspend the effect of the judgments of 17 December 1997 and
10 3 February 1998 and to prevent the application and enforcement by Guinea of
11 rights it does not possess under the 1982 Convention. We believe that there
12 exist continuing threats to freedom of navigation posed by the judgments of
13 the Guinean courts and by the action of the Guinean authorities in its
14 exclusive economic zone and beyond.

15
16 In bringing these proceedings we seek to protect the sovereign rights of our
17 State and to exercise the necessary protective power for vessels which are
18 registered under our flag, in particular rights relating to the enjoyment of
19 freedom of navigation and other internationally lawful uses of the sea, as set
20 out in Articles 56 and 58 of the 1982 Convention. St Vincent and the
21 Grenadines simply could not afford to fail to act in these circumstances. Not
22 to have acted would have significant economic detriment. Mr President,
23 Members of the Tribunal, not to prescribe these provisional measures would
24 have a chilling effect on our ability to attract further registrations.

25

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

4
5 In the first part Mr Nicholas Howe will place the dispute in its factual context,
6 setting out for you the relevant circumstances relating to the seizure and arrive
7 of the M/V SAIGA and focusing in particular on developments occurring
8 after your Judgment of 4 December 1997. He will set out the circumstances
9 in which Guinea unjustifiably refused to accept until 3 February 1998 the
10 reasonable bond which St Vincent and the Grenadines had posted on 10
11 December 1997, together with Guinea's recent and unjustifiable attempt to
12 obtain payment of the bond as a condition for the release of the vessel.

13 Finally, he will indicate the factors which lead us to conclude that Guinea is
14 likely to take similar steps against other flagged vessels of St Vincent and the
15 Grenadines before this Tribunal gives its judgment on the merits.

16
17 In the second part Maitre Thiam will examine the legal and factual situation in
18 Guinea and examine in particular the criminal proceedings and the judgments
19 of 17 December 1997 and 3 February 1998, together with their implications
20 for future Guinean conduct in its exclusive economy zone and in relation both
21 to vessels flying the flag of St Vincent and the Grenadines and to St Vincent
22 and the Grenadines itself. He will show that events after 4 December 1997
23 point overwhelmingly to the conclusion that Guinea was in no way motivated
24 by fisheries conservation considerations. He will draw your attention to the
25 fact the Master was charged with and convicted before the Guinean courts for
26 violations of customs regulations. Maitre Thiam will conclude that this

1 Tribunal has *prima facie* jurisdiction over the merits and that accordingly this
2 Tribunal has jurisdiction under Article 290(1) of the 1982 Convention.

3

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

12

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

1

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

4

5 THE PRESIDENT: Thank you very much, Mr Joseph. As you have
6 suggested, I will now call on Mr Nicholas Howe to continue with the
7 presentation of the case for St Vincent and the Grenadines.

8

9 MR HOWE: Mr President, Members of the Tribunal, it is an honour to
10 appear before you again as part of the delegation representing St Vincent and
11 the Grenadines. The unfortunate events surrounding the M/V SAIGA have of
12 course already come before the Tribunal in the Article 292 'Prompt Release'
13 proceedings last year. Accordingly, I shall not rehearse the events
14 surrounding the detention of the vessel in great detail but shall instead seek to
15 confine what I say first, to a summary of material facts previously before the
16 Tribunal in so far as they relate to this application for Provisional Measures;
17 and secondly, to supplement those facts with details of the developments that
18 have occurred since the Tribunal gave its Judgment on 4 December. As you
19 will appreciate, these are different proceedings from those of last year, all the
20 more so given the developments that have taken place since that time.

21

22 My submissions before you this morning can be divided into three parts: (1)
23 an overview of the facts and circumstances leading up to the judgment of this
24 Tribunal on 4 December 1997 in the 'Prompt Release' proceedings; (2) the
25 events surrounding the posting of the bond pursuant to that judgment; and
26 (3) the reasons why we fear that such actions on the part of Guinea may occur

1 again at any time. I would emphasise from the outset that it is important to
2 view developments in this matter in the context in which they arose, and not
3 place too much emphasis on how they may appear with the benefit of
4 hindsight. Our final submissions nevertheless, of course conclude by asking
5 the Tribunal to take into account all matters of which we are presently aware.

6

7 Before embarking upon these submissions I will take a few moments to
8 explain the activity at the centre of this dispute, that is “bunkering”. This
9 involves the supply of fuel (gasoil) and other provisions necessary for the
10 operation of vessels. As the Members of the Tribunal are probably aware,
11 bunkering is a well established global industry worth millions of US dollars a
12 year to the oil companies involved, both in-shore and off-shore. Those
13 companies include most of the majors such as BP, Mobil, Shell and Caltex, as
14 well as numerous independent companies amongst which Addax is a
15 prominent player. This is borne out by the two recent editions of “Bunker
16 News”. There is a particularly large market for off-shore bunkering. This is
17 widely recognised by, and practised in, the international community, as
18 Maitre Thiam will indicate in due course. However, for the moment I would
19 simply like to draw the Tribunal’s attention in particular to an article
20 appearing at page four of the December issue of “Bunker News” in the
21 attachments to the reply. This highlights the West African bunkering market
22 as an emerging market with what it describes as “enormous potential”. It is
23 this industry in this region that has been placed in jeopardy by the recent
24 actions of the Guinean authorities.

25

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

3

4 The vessel at the centre of the controversy is the M/V SAIGA, an oil tanker
5 registered under the flag of St Vincent and the Grenadines. The owner of the
6 M/V SAIGA is Tabona Shipping Co Ltd and she is managed by
7 Messrs Seascott Shipping Ltd who are based in Glasgow in Scotland. At all
8 relevant times her charterer was Lemanía Shipping Group Ltd. The vessel
9 has a Ukrainian aster and crew totalling 24 of Ukrainian and Senegalese
10 nationality. The vessel is insured for a value of approximately
11 US\$ 1.5 million and at the material time was carrying gasoil of a value of
12 approximately US\$1 million belonging to Addax Bunkering Services,
13 a division of Addax BV Geneva Branch. To clarify the point raised at item
14 11 by the Tribunal in their Annex dated 19 February, the arrangements under
15 which a bunkering vessel such as the SAIGA or the ALFA supplies bunkers
16 to clients are touched upon in paragraph 3 of the Statement of Marc Albert
17 Vervaeet in the attachments to the reply. These arrangements may be briefly
18 summarised as follows: a loaded supply vessel will travel from her port of
19 loading through a convenient and safe path so as to ideally return nearly
20 empty to the same, or another convenient port in which to reload and
21 recommence her operations. During the course of her journey she will supply
22 the fishing vessels and other customers on that route following the customers'
23 request at a point subsequently arranged by radio or other communication
24 between the Master of the bunkering vessel and the Masters of the fishing
25 vessels at a point which is convenient to both parties bearing in mind the
26 constraints imposed by the charterers of the vessels to ensure the vessels'

1 safety, and usually utilising established meeting points. The purchased order
2 by the customer could be made pursuant to an ongoing contract of supply or
3 on an ad hoc basis, but the meeting point will almost always be arranged on
4 an ad hoc basis for that particular supply.

5

6

7 The following facts have been accepted, or at least not denied by Guinea. At
8 the material times the M/V SAIGA served as a bunkering vessel. She
9 supplied gasoil to fishing vessels and other vessels operating off the west
10 coast of Africa including the west coast of Guinea. In the early morning of 27
11 October 1997 the M/V SAIGA crossed the maritime boundary between
12 Guinea and Guinea Bissau and entered the exclusive economic zone of
13 Guinea where she supplied three fishing vessels with gasoil between
14 approximately four o'clock in the morning and 1400 hours. Having bunkered
15 those three vessels the /V SAIGA then proceeded southwards and at
16 approximately 0400 hours on 28th October she was located off the coast of
17 Sierra Leone (beyond its territorial waters) waiting to bunker further vessels.
18 At approximately 0911 hours on 28th October 1997, the M/V SAIGA was
19 attacked by two customs patrol boats out of Guinea at a point south of and
20 clearly beyond the maritime boundary of Guinea's exclusive economic zone.
21 To effect the arrest, the Guinean authorities used armed force seriously
22 injuring two crew members of the M/V SAIGA in the process. On the same
23 day the vessel was brought into the port of Conakry, the capital of Guinea,
24 where she has been detained ever since. Upon the orders of the local
25 authorities, the Master was forced to discharge the cargo in Conakry over 10
26 - 12 November 1997.

1

2 I should like to draw the Tribunal's attention in particular to the following
3 points: at no time did the M/V SAIGA enter the internal waters, territorial
4 waters or the contiguous zone of Guinea. Indeed, it is our submission that for
5 these purposes it is immaterial whether or not the M/V SAIGA engaged in
6 bunkering activities in any area beyond Guinea's territorial sea. Guinea
7 maintains that the bunkering took place within its contiguous zone because
8 they say the point of bunkering was within 24 miles of Alcatraz Island.

9 However, there is no evidence that Guinea has ever declared a contiguous
10 zone or that its territorial waters commence from Alcatraz Island. The point
11 of difference is, in any event, immaterial. The Tribunal will be familiar with
12 the provisions of Article 33 of the 1982 Convention concerning the
13 contiguous zone. The effect of those provisions is clear: a State may not
14 apply its customs laws within the outer 12 miles of the zone (the area
15 contiguous with the outer limits of the territorial sea). Within the outer part of
16 the contiguous zone, under Article 33(1)(a) and (b), a State may only act to
17 'prevent' or 'punish' violations of its customs laws that are anticipated to
18 occur or have occurred within the State's territory as delimited by the
19 seaward extent of the territorial sea. It is undisputed that the M/V SAIGA
20 never entered Guinea's territory, such that no rights concerning enforcement
21 in the contiguous zone could ever have arisen.

22

23 It is also incontrovertible that the vessel was arrested outside of Guinea's
24 exclusive economic zone many hours after the bunkering activities at the
25 centre of Guinea's allegations had ceased. It was also agreed between the
26 parties during the last proceedings that the three fishing vessels bunkered

1 within Guinea's exclusive economic zone were not flying the flag of Guinea.
2 The Guinean representative confirmed this and stated that those vessels, while
3 flying foreign flags, were permitted to fish within Guinea's exclusive
4 economic zone by virtue of bi-lateral agreements between Guinea and the
5 relevant flag state. This had been Guinea's position until the Court of
6 Appeal's decision of February 3rd 1998, which held, amongst other things,
7 that the three fishing vessels in question, the "GUISEPPE PRIMO", the
8 "KRITTI" and the "ELENI G" were 'flying the flag of Guinea'. In fact, as
9 accepted during the Prompt Release proceedings, none of these vessels fly the
10 flag of Guinea.

11

12 Guinea failed to respond to attempts to procure the release of the "SAIGA" at
13 the end of October and the beginning of November last year and even refused
14 to provide details of the reasons for the action at that time. Given the
15 unacceptable nature of the situation it was concluded then that the best way
16 forward was for the Government of St Vincent and the Grenadines to seek
17 recourse to this Tribunal under the 'Prompt Release' procedures provided for
18 by Article 292 of the 1982 Convention to secure the release of the vessel and
19 her crew. This Tribunal, by its judgment dated December 4 1997 ordered
20 that Guinea shall promptly release the M/V SAIGA and her crew upon the
21 posting of a reasonable bond or security in the amount of US\$ 400,000 having
22 expressly commented that the discharged gasoil shall be considered as a
23 security to be held and, as the case may be, returned by Guinea, in kind or in
24 its equivalent United States dollars at the time of judgment. There was
25 certainly no question at that time that the release should be conditional upon
26 payment of the bond.

1

2 I now turn to the events surrounding the posting of the bond pursuant to that
3 judgment. The events surrounding the posting of the bond are detailed in the
4 reply of St Vincent and the Grenadines submitted to this Tribunal dated
5 February 13 1998. I would like to summarise the salient events and
6 supplement them with developments since that time.

7

8 In its judgment of December 4 1997 this Tribunal ruled that the bond for the
9 sum of US\$ 400,000 posted by St Vincent and the Grenadines be
10 'reasonable'. No further elaboration was given or deemed necessary by this
11 Tribunal and the 1982 Convention offers no guidance on this issue. On 10th
12 December 1997 the bond was posted on behalf of St Vincent and the
13 Grenadines in the form of a bank guarantee provided by Credit Suisse. The
14 guarantee was drafted to accord with international banking practice in a form
15 with which many practitioners of international trade law would be very
16 familiar. The wording of such guarantee reflects the fact that it is not possible
17 to anticipate the precise course of future developments at the time the bond
18 was posted. Because of this it is quite usual for such guarantees to be
19 payable against judgments or awards of a number of possible jurisdictions, for
20 example in England an arbitration or a High Court jurisdiction, given that the
21 parties will not know at the outset precisely which jurisdiction will give the
22 final ruling. In this matter it was unclear at the time that the bond was posted
23 whether the bond should be payable against a final judgment of the court in
24 Conakry, as would probably have been the case if Guinea had proceeded to
25 lawfully prosecute the SAIGA for a violation of applicable fisheries
26 legislation in accordance with its fisheries laws as we believe was anticipated

1 by the Judgment of 4 December, or whether the matter might have to return to
2 an appropriate international forum because Guinea proceeded to prosecute the
3 SAIGA in an unlawful manner. The relevant provisions of the bond that
4 reflect this are the following, and I quote from the Bond:

5 “Credit Suisse hereby guarantee to pay to you forthwith on your first
6 written demand in immediately disposable US\$ funds such sum or
7 sums as may be due to you by a final judgment, or if such judgment be
8 appealed or otherwise challenged by final decision of a final appeal
9 court or tribunal or arbitral tribunal or the Tribunal”

10 which is defined in the bond as “The International Tribunal for the Law of the
11 Sea”

12 “to be due to you ...”
13

14 It is our submission that Guinea should have released the M/V SAIGA
15 immediately upon receipt of this bond. However, the Agent of Guinea raised
16 a number of concerns he had in a telephone conversation with me on the
17 morning of December 11. These concerns had been summarised in a fax of
18 that date, but I had not seen the fax at the time of our conversation. We
19 discussed his concerns in some detail and agreed that they could be overcome
20 by my procuring that a further fax be sent directly from Credit Suisse to his
21 firm clarifying three points, including attaching a translation of the bond in the
22 French language. A fax was duly sent in the agreed terms later that same day.
23 It is our submission that Guinea should have released the M/V SAIGA
24 immediately thereafter.
25

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

8

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

15

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

20

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

1

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

15

16 The following developments took place in Guinea over the following weeks:
17 Guinea proceeded to advance the action before the Court in Conakry and the
18 customs authorities of Guinea subsequently attacked two more vessels, the
19 POSEIDON and the XIFIAS, as detailed in the statement of Mr Vervaet.
20 Meanwhile St Vincent and the Grenadines instituted arbitral proceedings on
21 22 December and submitted their request for provisional measures at the
22 earliest opportunity on 5 January 1998.

23

24 Doubtless in response to this step we received notification the following day,
25 6th January 1998, that Guinea were finally addressing the issue of the bond.
26 By this time the vessel and her crew had been in the port of Conakry for more

1 than six weeks. Incidentally, in response to clarification 6 sought by the
2 Tribunal in their annex of 19 February, it is understood that all members of
3 the crew except for the Master were technically free to leave the vessel over
4 this time. However, for them to have done so would have meant effectively
5 abandoning the vessel in practical terms. This is because of the absence of
6 adequate security arrangements or measures taken by the authorities to ensure
7 the safety of the vessel and her crew at Conakry. In order to protect the
8 vessel her owners have therefore continued to employ a skeleton crew over
9 this period and subsequently to date.

10

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

15

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

1 that one could ordinarily expect if a large engine is not run for a long period
2 of time.

3

4 The letter of January 19 also requested that Guinea also provide acceptable
5 substitute language in relation to its objections. Such language was provided
6 by Guinea's Agent on 22 January and a revised version of the guarantee was
7 duly forwarded to the Minister of Justice on January 29 as advised to the
8 Agent of Guinea the following day. That same day SAIGA was attacked
9 again, this time while in the custody of the authorities of Guinea. We
10 understand that the guarantee was accepted by the Minister of Justice around
11 the time of the hearing of the judgment of the Court of Appeal in Conakry on
12 3 February. His acceptance of the guarantee is formally confirmed by a letter
13 dated 16 February 1998 from the Director of Customs in Guinea to the Agent
14 in Guinea, a copy of which was first seen by St Vincent and the Grenadines
15 only earlier this morning. Notwithstanding this, the vessel has still not been
16 released. As you have seen, Guinea are now demanding payment under the
17 bond before they will allow her to be released.

18

19 It is submitted that the bank guarantee forwarded on 10th December fully
20 conformed to the express terms of this Tribunal's judgment of
21 December 4 1997. It was a bank guarantee and it was in the amount of US\$
22 400,000. It also conformed to the implicit terms of the judgment. It was
23 payable to the Government of Guinea and it was payable upon final judgment
24 or decision if such judgment be otherwise challenged with respect to the
25 claims made by the Guinean authorities in relation to the M/V SAIGA. The
26 bank guarantee was issued in a form with which Credit Suisse and other

1 international banking institutions for instruments of this type would be very
2 familiar and was reasonable within the meaning of this Tribunal's judgment.
3 Thus it is the contention of St Vincent and the Grenadines that all of the
4 conditions of this Tribunal's judgment, both explicit and implicit, were fully
5 satisfied by the bond posted on December 10 1997.

6

7 The guarantee eventually accepted by the Minister of Justice does not differ
8 in any material respect from the original guarantee and is identical in all areas
9 relevant to the judgment of December 4. We submit that there is nothing that
10 can justify the unacceptable delay on the part of Guinea to release the vessel.
11 Ten weeks have now passed since the original bond was posted and more
12 than three weeks have passed since the posting of the revised bond. Through
13 Guinea's acceptance of the revised bond there was no excuse for failing to
14 release the vessel immediately. It is therefore submitted that Guinea's
15 conduct concerning the bank guarantee and failure to promptly release the
16 vessel constitutes a flagrant violation of this Tribunal's judgment of December
17 4 1997 and a further violation of the 1982 Convention.

18

19 Furthermore, by their letter of 17 February 1997 the Minister of Justice for
20 Guinea stated through his Agent that the release of the vessel would be
21 consequent upon the payment of the bond in the sum of \$400,000. This again
22 is wholly unacceptable and a gross violation of the 1982 Convention and the
23 judgment of December 4. Payment of the bond is not a condition of, and has
24 no bearing upon, the release of the vessel. The only factor relevant to the
25 release of the vessel under the Judgment and the 1982 Convention is that a

1 reasonable bond be posted. This condition was fulfilled on the 10 December
2 1997. Further detention beyond that point is totally unjustified.

3

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

19

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

22

23 I should like to close by explaining why the conduct of the Guinean
24 authorities throughout this matter has led St Vincent and the Grenadines to
25 fear that, in the absence of provisional measures being granted pending a final
26 decision on the merits, St Vincent and the Grenadines itself and those vessels

1 sailing under its flag are at risk from similar actions by the Guinean
2 authorities in the future.

3

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

17

18 But perhaps even more disturbingly, thorough research conducted since the
19 SAIGA was detained reveals that the experience of the SAIGA is not an
20 isolated or even very rare experience off Guinea, all that is different is that
21 this is the first time the authorities in Guinea have directed their actions
22 against such a large vessel. The evidence now available strongly suggests
23 that there is a severe problem with the manner in which the authorities of
24 Guinea are purporting to exercise their customs legislation. Indeed
25 St Vincent and the Grenadines has become aware that in recent times no
26 fewer than eight tankers engaged in off-shore bunkering activities beyond the

1 territory of Guinea have been attacked by the Guinean authorities. None of
2 these instances have been denied by Guinea. The flags of the other vessels
3 known to have been attacked are set out in an extract from Lloyd's Register
4 and reveal that two of those vessels also fly the flag of St Vincent and the
5 Grenadines. Incidentally, while this point will hopefully deal with part of
6 the question raised at point 13 of the Annex dated 19 February from the
7 Tribunal, I hope that the Tribunal will appreciate from the above description
8 of how bunkering activities are conducted generally why we have not been
9 able to provide details of the fishing vessels to which these vessels supplied
10 gasoil within the short times available.

11

12 Most importantly, the difference between the first experience of the
13 NAPETCO 1 in 1993 and the second attack on that vessel in October 1996
14 detailed in the statement of Mr Kanu, both attacks being outside the
15 exclusive economic zone of Guinea and within the exclusive economic zone
16 of Sierra Leone, together with the experience of the ALFA 1 in May 1996 and
17 the experiences of the other vessels detailed in the statement of Mr Vervaet
18 leading up to the detention of the SAIGA , all lead to only one conclusion;
19 that this problem is escalating very rapidly. Having trodden quite softly to
20 begin with, the authorities of Guinea are pursuing increasingly larger and
21 larger vessels for their more valuable cargoes and to extort higher sums to
22 secure their release. The situation for merchant shipping in this area is
23 therefore a grave one and especially so for tankers engaged in bunkering
24 activities as they represent a relatively easy and lucrative target. The Tribunal
25 will note from the statements referred to above that vessels have been
26 instructed to steer clear of Guinea as far as possible. However, bunkering

1 more than two hundred miles from the coast beyond the exclusive economic
2 zone is not practicable. It is apparent that Guinean law purports to be able to
3 prescribed and has no qualms about enforcing its customs laws in this fashion
4 within its exclusive economic zone and beyond and to initiate “hot pursuits”
5 that do not conform to the clear requirements of Article 11 of the 1982
6 Convention. Therefore not only are vessels at risk in general form such
7 attacks, but for the reasons to be explained by Maitre Thiam in further detail
8 there exists a particular danger for vessels flying the flag of St Vincent and
9 the Grenadines.

10

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

23

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

26

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

5

6 **(Short adjournment)**

7

8

9 THE PRESIDENT: I now call on Maitre Thiam as indicated before to
10 continue with the presentation for Guinea.

11

12 MAITRE THIAM (Interpretation): May it please the Court, this is the
13 second time that I submit to your jurisdiction. It is a great honour, and I am
14 very touched by this opportunity to address the Tribunal. This is due to the
15 fact that I am in the presence of your Excellencies first of all, and also in view
16 of the seriousness of this case, in particular for Africa and the Caribbean.

17

18 The Republic of Guinea has replied to our application for provisional
19 measures saying that this is not admissible because it is not urgent, and
20 because the case is based on Article 297 (3) (a) of the Tribunal. We have
21 submitted a document which is very explicit, and Mr Sands my colleague, is
22 going to add his comments to this. So I wish to examine only the reasons
23 which have been brought about by the Republic of Guinea to argue against
24 the admissibility of this application for provisional measures. There are two
25 motives, two reasons. The first is resting on paragraph 73 of the Judgment
26 issued on 4 November 1997 by the Tribunal, and looking at this, they say that

1 your Judgment has already been decided. This also has to do with the fishing
2 matter in Guinea, and I consider for my part that it is an argument which is
3 not really worth spending a great time on. When your jurisdiction in this
4 paragraph in particular gives a very strong signal to the Republic of Guinea
5 explaining on the contrary that it is not possible to consider that this case,
6 especially in view of the behaviour of Guinea at the time, this behaviour has
7 more relation to do with the fishing authorities in Guinea, and that it is not
8 practical or not useful to dwell on this point at this stage. I simply want to
9 recall that Mr Pierre Pescatore, the Judge of the Court of Justice of the
10 European Community has said that we must consider that this is a way
11 forward to solve this dispute. The parties must be given a signal to bring their
12 case to a satisfactory conclusion. The Judge may give indications to the
13 parties to gear the argumentation in the interest of finding a solution. I do
14 not think that Guinea has adhered to the Judgment which has been issued by
15 the Tribunal, and I think it is now time to issue a stronger signal.

16

17 The Master of the SAIGA was pursued and he was accused of violating the
18 law of 1995 on Fisheries in Guinea. Before going into this ground I would
19 like to look at the criteria that you should bear in mind to appreciate
20 *prima facie* the jurisdiction, that is your jurisdiction in this case. This criteria
21 has to do with the provisions of Article 297, paragraph 1, of the Convention.
22 If you read this provision and if you translate this purely literally you will see
23 that it says that the Tribunal may be called upon to deal with a case when it is
24 alleged that a party or its coastal state has violated the conditions of the
25 Convention with regard to the freedom of navigation when it is alleged. So
26 who is doing the alleging other than the Applicant, and no-one else? It is up

1 to us to make this allegation. Such a criterion does not call upon you to
2 examine *prima facie* the jurisdiction of the Tribunal other than in the
3 allegations of the applicant states. So this is why we have to dismiss the
4 petitions of Guinea.

5

6 If we have the allegations of the Applicant state the question does arise
7 nonetheless, is it simply a question of looking at the allegations and seeing
8 whether there is a relationship between the affirmations and the text admitting
9 the jurisdiction or does it go beyond that? Are there any other relationships
10 between the allegations and the jurisdiction? If you look at the second
11 solution and you consider that you must verify at this stage of the proceedings
12 the relations between the application of St Vincent and the Grenadines and
13 Article 297 paragraph 1 of the Convention, this means that when you are
14 judging on the provisional measures is going to apply a higher criteria
15 because this will involve you in examining the case on its merits. If you
16 examine the case on its merits, what can you do? You could say that the
17 State of St Vincent is alleging that the State of Guinea has infringed rights
18 under the 1982 Convention. We are going to examine this point, we are
19 competent to do so. When you examine it you will see either that it is true or
20 it is false. If you say that it is false, then you will simply decide to judge
21 against the State of St Vincent and the Grenadines. If you decide to examine
22 the substance of the case, to consider *prima facie* the jurisdiction, then you
23 adopt a higher criteria than those which you would have adopted when
24 looking at the case on its merits.

25

1 The jurisprudence which I have been able to consult shows that the evidence
2 provided by the applicant state would not be looked at in conjunction with an
3 examination of the jurisdiction of the court. This is not the jurisdiction of the
4 International Court of Justice but of the Court of the European Communities;
5 that is, considering an application for provisional measures.

6

7 I think that it is sufficient for your jurisdiction to maintain that you have *prima*
8 *facie* jurisdiction. Based on the allegations and from the text that we have
9 submitted and Article 297 (paragraph 1) this is entirely within the jurisdiction
10 of the court.

11

12 If you decide to examine the other submissions and the relationship between
13 the facts and the textual basis which has been cited in favour of competence, I
14 would like to make some comments.

15

16 The Republic of Guinea maintains that the Master of the SAIGA was pursued
17 and accused of violating a law on fisheries. The examination that you could
18 engage in in this case would lead you necessarily to the opposite conclusion
19 because the SAIGA was pursued and taken to the port of Conakry by a
20 mobile unit of the Guinean authorities, that is the customs authorities. No
21 other Guinean authority entered into this case other than the customs
22 authorities. The Captain was pursued and condemned for an infringement of
23 the customs code. In spite of all the texts cited, there is no text concerning
24 fisheries, either in the submissions or in the Court of First Instance of
25 Conakry or in the judgment of the Court of Appeal. Even in the summons the

1 only qualification made was about contraband; that is contraband on
2 prohibited products.

3

4 The confiscation of the SAIGA was ordered on the basis of the customs code.
5 This was the only justification. Before the final judgment of the Court of First
6 Instance and the Court of Appeal this was on the basis of paragraph 170 of
7 the customs code.

8

9 The law of 1995 which was quoted was not mentioned in the proceedings.
10 The basic text which was cited, which is a law of 16 March 1991, is
11 integrated into the customs code. It is not part of the customs code but it is
12 integrated into it because Article 10 states the following: the current law
13 modifies the provisions of Article 365 (paragraph 2) of the Customs Code and
14 Articles 53, 62 and 74. According to this, they may impose imprisonment.
15 This would be in keeping with Article 73 of the Convention.

16

17 The Master of the ship has been sentenced to a six month suspended prison
18 sentence. We do not see the basis of any fact for Guinea claiming that the
19 Master of the SAIGA has been sentenced for violation of any fisheries law; it
20 is not possible. Because it is not possible, Guinea has not been able to
21 justify this. As Guinea has taken no legislative measures in the direction of
22 substantiating this claim, it is not possible to do so. They have taken certain
23 measures to do with the merchant code, Articles relating to the contiguous
24 zone (Article 16 and following and Article 40 and following) relating to the
25 exclusive economic zone, but these are very general texts which have no
26 detail. They talk about the legislation of Guinea beyond the territorial waters,

1 but that does not prohibit bunkering and it is also not relative to fishing
2 activities. I do not really see how under these circumstances Guinea, which
3 has not produced -- and I underline this -- the provisions of the law of 1995
4 and the order of 1995 can justify their claims on this basis.

5

6 Guinea has committed an act which must be termed as pseudo-piracy. We
7 know that these acts have been committed several times before. I would like
8 to repeat the declaration of the Congress of Paris of 16 April 1956, the Naval
9 Conference of Washington of February 1971 and the agreements of
10 7 September 1937. These are texts concerning war and acts of piracy on
11 behalf of states. You know that in September 1940 it was declared that
12 enemy submarines had to be destroyed if they were used against commercial
13 vessels. Terms to do with piracy have been anchored in these agreements and
14 conventions, so we know exactly what a pirate is. Article 197 (paragraph 1)
15 of the Convention also defines this case.

16

17 There are two things I would like to say on the penalties that we have
18 suffered -- not us but the Master of the SAIGA. In a very detailed note the
19 attorney of the Master looked at all the alleged infringements which were
20 brought under Guinean law. In defence before the Court of Appeal this was
21 rather extraordinary. It was stated that the Captain of the SAIGA complained
22 that he was not able to consult his attorney until the day of the hearing. We
23 find it difficult to understand that because someone who has committed such a
24 serious act must have the right to consult his attorney. The Court of Appeal
25 on hearing these complaints said that because the attorneys were allowed to

1 submit notes and conclusions they must have been able to communicate with
2 the Master of the SAIGA. This is a rather extraordinary thesis.

3

4 I do not want to return to everything that has already been submitted on file.
5 There is only one argument of the Court of Appeal of Conakry which says
6 that we have violated the exclusive economic zone, and this has nothing to do
7 with the Guinean customs code. Article 111 of the Convention on the right of
8 hot pursuit gives competence to states to pursue vessels, and this pursuit can
9 start in territorial waters, so that we have jurisdiction to apply the customs
10 code beyond our territorial waters. This is something which I do not
11 understand. I wish you luck if you understand that better than I do. This is a
12 rather extraordinary theory. It is even more extraordinary because in your
13 Judgment of 4 December 1997 you have explained to Guinea that Article 111
14 does not appear to be applicable. I can read different opinions on this but
15 I have seen nothing on this particular point. Guinea did not have the right of
16 hot pursuit according to Article 111 and the prevailing conditions in this case.

17

18 In spite of your indication the Court of Appeal of Conakry said that Article
19 111 enables them to extend the application of the Guinean customs code to
20 beyond territorial waters. I think this is rather extraordinary. I found a press
21 article which appeared in Guinea entitled “Justice Fails”. It is important to
22 note that this recent article of 9 February of this year quotes the statements of
23 the Procurator General of Conakry. It identifies the failures of the police and
24 general corruption, incompetence and ignorance. A Guinean journalist is
25 talking about justice in his country and quoting the Procurator of the Republic
26 of Guinea.

1

2 I talked about legal security earlier. I think perhaps some of you might not
3 have understood what I wanted to say on this, but this is precisely what I am
4 getting at. Your signal was very strong in saying to Guinea: be careful, you
5 must not be acting as customs police in this matter and you must apply Article
6 293. We have been asked to appear before the courts in Conakry. Not only
7 the Master of the ship but also St Vincent and the Grenadines has been held
8 civilly liable for this. This is not tenable.

9

10 I would like to end by giving you some replies to the information requests of
11 the Tribunal, in particular the summons issued to St Vincent and the
12 Grenadines. You can see for yourself the judgment of the Court of Appeal of
13 Conakry does not have the right to condemn a state which it calls to appear in
14 front of it in Guinea. We have heard that we are responsible for \$15 million.
15 In spite of the fact that this bond has been accepted, they are saying that we
16 have to come up with the \$15 million before they release the vessel and
17 before the Master of the SAIGA leaves Guinean territory. There is also the
18 danger of other ships flying the flag. There are some very serious issues at
19 stake here.

20

21 The fishing authorities in Guinea cannot, of course, be the same as the
22 customs authorities. I think Guinea has to clarify this issue. For my part I can
23 only state that it is the minister responsible for fisheries, not the minister
24 responsible for finance and not the customs authorities that should be dealing
25 with this case if it was truly a fisheries case.

26

1 I am sorry to have spoken at such length. I rest my case here and submit in
2 writing a summary of what I have submitted to the Tribunal. Would you like
3 to receive this now?

4

5 THE PRESIDENT: Thank you. That will be taken from you by the
6 Registrar. Thank you very much, Maitre Thiam.

7

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

9

10 MR SANDS: President, Members of the Tribunal, it is a very great pleasure
11 and privilege to appear before this Tribunal for the first time, particularly
12 since this is the first occasion upon which the Tribunal has been asked to
13 prescribe provisional measures pursuant to the powers granted to it under
14 Article 290 of the 1982 Convention.

15

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

21

22 In this presentation I will set out the submissions of St Vincent and the
23 Grenadines as to why it considers that the present circumstances justify fully
24 the prescription of provisional measures. First and foremost they are
25 necessary to preserve the rights of the parties. They are necessary as a matter
26 of urgency. They are needed to prevent further irreparable harm and they are

1 needed to prevent the further aggravation of this unfortunate dispute. I will
2 deal with each of these points in turn briefly but, before doing so, it may be
3 appropriate to recall the more general legal context within which this request
4 is being made.

5

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

23

24 The list does not end there. The European Commission of Human Rights,
25 established under the 1950 European Convention, may “indicate to the parties
26 any interim measures the adoption of which seems desirable in the interest of

1 the parties ...” and by Article 186, the European Court of Justice “may in any
2 case before it prescribe any necessary interim measures”. Similar powers are
3 provided for in respect of the Inter-American Commission of Human Rights,
4 and the African Commission for Human and Peoples’ Rights.

5
6 And in the commercial world also, the need for international adjudicatory
7 bodies to maintain the status quo and to preserve prospective rights is
8 reflected, for example, in the 1965 Convention for the Settlement of
9 Investment Disputes, ICSID, between States and Nationals of Other States,
10 which provides that any ICSID arbitral tribunal may, if it considers that the
11 circumstances are required, recommend any provisional measures which
12 should be taken to preserve respective rights of either party. Indeed, that
13 should be a provision which is familiar to my learned friend, the Agent of
14 Guinea, since Guinea itself has invoked it in an ICSID arbitration which,
15 unlike this dispute, did involve the Ministry of Fisheries. There are numerous
16 other examples of international bodies authorised to order interim measures of
17 relief and each and every one of these bodies has done so.

18
19 I begin with this background to illustrate that there is nothing exceptional
20 about the power to order or indicate provisional measures. It is in this context
21 of an established practice that you face your task. Even if provisional
22 measures are not an every day occurrence they are certainly not
23 extraordinary. As the Cour d’Appel of Rennes, in France, put it in endorsing
24 Guinea’s views in a related application to that ICSID arbitration before the
25 French courts:

26

1 “It is accepted under international law that parties must refrain from
2 taking any steps which might prejudice the enforcement of any future
3 decision [of an international tribunal] and, in general, not take any
4 action of whatever nature which could aggravate or enlarge the dispute.
5 “

6

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

12

13 “The interim protection of rights is no doubt one of those general
14 principles of law common to all legal systems.”

15

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

1

2 When we first requested the prescription of provisional measures in our
3 Arbitration Notification of 22 December 1997, it was envisaged that the
4 merits would be adjudged by an arbitral tribunal. Accordingly, the request
5 first submitted on 5 January 1998 was based on paragraph 5 of Article 290.

6 With the assistance of the President and the Registrar the parties have agreed
7 to transfer the proceedings on the merits to this Tribunal. I would like to join
8 the Attorney General in thanking them personally for their willingness to
9 assist in rather difficult circumstances over the past few weeks.

10

11 As the two parties have now been able to conclude an agreement allowing the
12 merits to be heard by this Tribunal, this Request is now based upon Article
13 290(1) of the Convention. It is true that there may be certain differences
14 between these two paragraphs textually but to our mind these differences are
15 essentially academic. For all practical purposes the standards and the tests
16 they apply are the same but the material difference is one of context and it is
17 an important one: this Tribunal can take its decision on provisional measures
18 safe in the knowledge that it and it alone will address the merits of this
19 dispute and that the appreciation of fact which falls upon you to apply will not
20 go to another body.

21

22 The background to the negotiation of Article 290 demonstrates that the
23 principle that this Tribunal should be empowered to prescribe provisional
24 measures did not meet with any significant resistance in the negotiation of the
25 1982 Convention. In 1975 an informal Working Group was charged with
26 preparing appropriate language to establish the conditions governing the grant

1 of provisional measures. The Working Group decided to depart from the
2 wording of the Statute of the International Court of Justice by recommending
3 that, unlike that Court, this Tribunal would have the power to take legally
4 binding measures of a provisional nature. The Working Group apparently
5 considered the term “indicate”, as used in the Statute of the International
6 Court of Justice, to be insufficient: it did not sufficiently clearly convey the
7 binding character of provisional measures; it had led, considered the Working
8 Group, to further differences about the obligation to comply with those
9 measures; and also according to the Working Group in its Report, it had
10 resulted in non-compliance by states with the measures indicated. The
11 Working Group therefore agreed that the word “prescribe” should be used
12 and that it should be explicitly stated that the prescribed measures would be
13 binding upon the parties to the dispute. Apparently this idea originated in an
14 earlier proposal of 1973. The text of the Convention, as adopted, states
15 clearly that this Tribunal will “prescribe” rather than merely “indicate”
16 provisional measures, and that the parties to the dispute shall comply
17 promptly with any provisional measures prescribed under this Article. There
18 is therefore no doubt that the provisional measures we have asked you to
19 prescribe will be legally binding and, like those, for example, of the European
20 Court of the Justice, capable of producing enforceable legal effects. This
21 means necessarily that the prospects for compliance with any provisional
22 measures which you may prescribe are markedly improved. This is an aspect
23 which was not lost upon us in deciding to embark upon this route following
24 the posting of the bond on 10 November 1997 which did not, unfortunately,
25 lead to the release of the M/V SAIGA.

26

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

7

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

16

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

24

25 In those circumstances we felt bound to take a decision to initiate proceedings
26 on the merits, which would inevitably also raise issues about whether the

1 bond was in conformity with the Judgment of 4 December. This explains
2 why, as at 22 December 1997, the focus of St Vincent and the Grenadines
3 was very much on the question of Guinea's obvious non-compliance with
4 your Judgment of 4 December. The Request for provisional measures was
5 initially submitted to you, as Mr Howe explained, on 5 January and formally
6 submitted on 13 January. After 22 December, certainly after 13 January,
7 there had been a number of significant new developments, as described to you
8 by Mr Howe and Maitre Thiam. These have necessitated minor amendments
9 including the addition of a request relating to the exercise of hot pursuit,
10 which is textually minor but substantively terrible important to us.

11

12 I must confess that over the last few weeks we were rather expecting and
13 even hoping to have to make a further amendment. It is a matter of very great
14 regret to us that we are not able to inform you today that the M/V SAIGA has
15 been released and that the request relating to that part of the provisional
16 measures is moot. That unfortunately, is not the case, and we therefore
17 continue to make the Request in the terms in which it has been set out, asking
18 that as a provisional measure, and I will come back to this, the release of the
19 vessel and the crew be prescribed.

20

21 The Request we make is, therefore, that which you will find at the end of the
22 reply we submitted on 13 February 1998 and it asks you to prescribe
23 provisionally, pending your judgment on the merits, that Guinea takes steps to
24 preserve our rights pending final judgment, namely by immediately releasing
25 the vessel and crew as there exists no justifiable basis for not doing so;
26 secondly, not taking any steps to enforce the judgments of 17 December or 3

1 February; thirdly, respecting the rights of St Vincent and the Grenadines to
2 freedom of navigation in the exclusive economic zone; and fourthly,
3 undertaking hot pursuit only in accordance with the strict conditions set out in
4 Article 111 of the Convention.

5

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

20

21 In its response of 30 January Guinea claims that the measures we have
22 requested are not properly of a kind to be granted by way of provisional
23 measures. In our Reply of 13 February we set out numerous examples
24 illustrating that other international courts and tribunals are quite prepared to
25 indicate or prescribe provisional measures requiring the addressee to, for
26 example, refrain from adopting new legislative, administrative or judicial

1 measures, or enforcing existing ones as well as protecting private commercial
2 interests. In this respect the Request has not differed materially from
3 previous Requests. It does not really, in that sense, break new ground but
4 merely inscribes itself within a well-established international practice. This
5 applies equally to the request concerning the release of the vessel as
6 a provisional measure which I also noted was subject to a request for
7 clarification at point 8. We see no material difference of principle between
8 this request and that made, for example, by the United States for the release
9 of all hostages of US nationality and the facilitation of their prompt release
10 and safe departure in the case concerning US Diplomatic and Consular staff
11 in Tehran, a request which was fully acceded to by the International Court of
12 Justice in 1979. If that analogy was powerful when we originally made the
13 request on 22 December, it is all the more so today, since Guinea announced
14 last Friday that it would only release the vessel and its crew upon payment of
15 the \$400,000 bond. The vessel and the crew are, in effect, now hostages and
16 it is entirely in order for you to prescribe their release as provisional measure
17 to preserve the rights of St Vincent and the Grenadines, especially since
18 Guinea now clearly considers the terms of the bond to be reasonable.

19

20 The measures we request provisionally are entirely different from the claim
21 we make in respect of the merits, which you will find at paragraph 24 of the
22 Arbitration Notification and which is expressly referred to in our agreement of
23 last Friday referring the merits to this Tribunal. We are not seeking, for
24 example, “to obtain an interim judgment in favour of a part of the claim”, as
25 occurred, for example in the Chorzow Factory case. In that case the applicant
26 state sought to obtain from the court a final judgment on part of a claim for a

1 sum of money to recover. That was quite rightly rejected by the Permanent
2 Court. We are seeking today not damages or any determination on the merits
3 other than that we have a good prima facie case on which to achieve the
4 provisional measures that we seek. What we are seeking are provisional
5 measures to preserve the substance of the rights which we claim pendente
6 lite, which by their nature relate to the substance of the case. They are quite
7 appropriate, contrary to what Guinea says, and there is a long and similar
8 practice of measures of this type.

9

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

22

23 The very first request for the indication of interim measures to be made to the
24 Permanent Court of International Justice was some 70 years ago in the Sino-
25 Belgian Treaty Case. That case concerned a difference of view between
26 Belgium and China as to whether the treaty of friendship, commerce and

1 navigation concluded on 2 November 1865 between Belgium and China, was
2 still in effect. In his order of 8 January 1927 the President of the Court, Max
3 Huber, stated:

4

5 “The object of the measures of interim protection to be indicated in the
6 present case must be to prevent any rights [under the 1865 treaty] from
7 being prejudiced.”

8

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

14

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

17

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

25

1 In this case the rights to be preserved are those established by the 1982
2 Convention. The rights in respect of which we seek protection can be divided
3 into three groups. First, we seek the preservation of our rights under Article
4 292(4) of the 1982 Convention which requires the Guinean authorities to
5 comply promptly with the Judgment of 4 December 1997. We were, frankly,
6 very surprised to receive the Guinean Agent's letter of 16 February 1998
7 informing us that the vessel and the crew would only be released upon
8 payment of the bond. Quite apart from the fact that the conditions for
9 payment of the bank guarantee have not yet been satisfied, as Mr Howe
10 explained, the terms of your Judgment of 4 December are, in our submission,
11 crystal clear in establishing that the vessel was to be released upon the
12 posting of the bond, not the payment of the bond, as Guinea now asserts. The
13 bond was posted on 10 November last. The vessel should have been released
14 immediately thereafter. It has still not been released notwithstanding the
15 acceptance by Guinea of the bond as reasonable and as evidenced by the
16 documents that were made available to us this morning by Guinea. The
17 failure to release the vessel and crew constitute ongoing violations of our
18 rights under the Convention. Provisional measures confirming the
19 reasonableness of our bond, including the terms included in it and our
20 interpretation thereof and prescribing immediate release would go a long way
21 towards preserving our rights under the 1982 Convention.

22

23 The second right which we seek to have protected by these provisional
24 measures is that vessels registered in St Vincent and the Grenadines should
25 be able to enjoy freedom of navigation in the exclusive economic zone of
26 Guinea in accordance with the rights that St Vincent and the Grenadines has

1 under Articles 56(2) and 58 of the 1982 Convention. In our submission this
2 includes the right of the M/V SAIGA and other vessels registered in
3 St Vincent and the Grenadines to bunker fishing vessels in the exclusive
4 economic zone of Guinea without being subjected to the Guinean customs
5 and criminal laws which have been relied upon by Guinea in this case.

6

7 Until the morning of 29th October 1997 the M/V SAIGA and the state of
8 St Vincent and the Grenadines were blissfully unaware that Guinea required
9 the payment of customs duties for bunkering oil in its exclusive economic
10 zone. There were no legislative or administrative requirements to that effect
11 as Maitre Bangoura makes very clear in his Declaration. That legislation
12 which we have seen appears to be on its face in conformity with the 1982
13 Convention. Guinea had never, to the best of our knowledge, claimed any
14 right whatsoever to impose customs duties in the exclusive economic zone. If
15 there had been such legislation it would have been vigorously protested as
16 being clearly incompatible on its face with the 1982 Convention. The right to
17 bunker is one that has been exercised by St Vincent vessels in these waters
18 without previous interference, as well as by many other vessels. It is a right
19 which is exercised without interference in exclusive economic zones around
20 the whole world, including in those zones which overlap with any contiguous
21 zone which might have been lawfully established. For the reasons explained
22 by Mr Howe and Maitre Thiam, Guinea is not assisted in any way by the
23 argument that some of the events might have occurred in any contiguous zone
24 which it might have established. The parties in any event agree that none of
25 the alleged activities occurred in Guinea's territorial waters which establish
26 the outer limits of its jurisdiction to prescribe or apply customs duties, and

1 Guinea seems to have confused prescriptive jurisdiction with enforcement
2 jurisdiction. We see no reason why the exclusive economic zone of Guinea,
3 even that part of it which may overlap with a contiguous zone, should remain
4 out of bounds pending the final decision in this case, and that is why we seek
5 provisional measures to that effect.

6

7 The third right that we seek to have preserved is that our vessels should not
8 be subject to hot pursuit except in accordance with the strict requirements of
9 Article 111 of the 1982 Convention. This means, in particular, hot pursuit
10 undertaken by the Guinean authorities must be uninterrupted. In the prompt
11 release proceedings this Tribunal found that “the arguments put forward in
12 order to support the existence of the requirements of hot pursuit, and
13 consequently for justifying the arrest, are not tenable, even *prima facie*” since
14 Guinea itself had recognised that pursuit was commenced one day after the
15 alleged violation at a time when the M/V SAIGA was certainly not within any
16 contiguous zone of Guinea. Guinea’s claimed justification of hot pursuit did
17 not meet the requirement of arguability. Nevertheless, the judgment of 3
18 February of Conakry claims that the conditions of Article 111 were satisfied
19 and in those circumstances there is every reason to expect that Article 111
20 may again be invoked unlawfully by Guinea. And it is for that reason that we
21 seek to preserve our right not to be subject to hot pursuit other than as
22 envisaged by Article 111.

23

24 These rights cannot be preserved pending any decision on the merits so long
25 as the judgment of the Cour d’Appel of Conakry of 3 February 1998 remains
26 in effect and capable of being further enforced. For that reason we are

1 asking that the judgment be suspended. The judgment includes an Order
2 against the Master for some US\$ 15 million, and there therefore exists a real
3 risk that the Guinean authorities might seek to recover some of those sums
4 from other vessels including other vessels registered in St Vincent and the
5 Grenadines. What is more, as Maitre Thiam has explained, the Cédule de
6 Citation of 10 December 1997 posted the same day as our bond names the
7 state of St Vincent and the Grenadines as the “party liable” for that fine. We
8 do not know what exactly are the legal consequences of that Citation but at
9 the very least the possibility cannot be excluded that the judgment could be
10 enforced against the state itself.

11

12 Even beyond this we also consider that the approach taken by the Cour
13 d’Appel in upholding the arguments of the Guinean authorities indicates that
14 Guinea remains committed strongly to the application and enforcement in its
15 exclusive economic zone of the various customs and criminal laws which
16 were invoked against the M/V SAIGA and its Master. Nothing we have
17 heard in these proceedings indicates that Guinea is remotely reconsidering its
18 approach. This is also clear from the Statement of Maitre Bangoura, set out
19 at Attachment 13 to our Reply. So there is a real possibility that those laws
20 can be invoked again against the rights of St Vincent and the Grenadines and
21 that its vessels cannot therefore be protected pending final judgment on the
22 merits. If I can put it another way, so long as those laws remain capable of
23 being applied in the exclusive economic zones, then our vessels cannot enter
24 those waters and we are precluded from exercising our rights in those waters.
25 Without those rights our vessels risk losing market share, a market described
26 by Bunkering News as offering “rich opportunities” and “enormous

1 potential”. And that failure to preserve rights is not one that can be
2 subsequently remedied. They are irreversible, as I will show later. For this
3 reason we have requested that provisional measures be prescribed requiring
4 Guinea not to invoke these laws before a judgment on the merits now before
5 this Tribunal be so invoked. There is ample precedent for the proposition that
6 provisional measures be indicated or prescribed to suspend the enforcement
7 or application of domestic laws where such enforcement would have
8 prejudicial effects on rights under international law. For example, the
9 Fisheries Jurisdiction cases between the United Kingdom and Iceland and
10 Germany and Iceland - litigated at the International Court of Justice from
11 1972 - arose upon Iceland’s claim, in the form of Regulations which it had
12 adopted in July 1972, to extend its exclusive fisheries jurisdiction to a zone of
13 50 nautical miles around Iceland. Iceland was prescient perhaps in
14 identifying the changes in law which were coming, unlike Guinea, and I think
15 that distinguishes the background. The United Kingdom and Germany
16 nevertheless requested the Court to indicate interim measures of protection
17 which would, *inter alia* require Iceland “to refrain from taking any measures
18 purporting to enforce the Regulations” or from “applying or threatening to
19 apply administrative, judicial or other sanctions or any other measures
20 against ships registered in the United Kingdom and the Federal republic of
21 Germany, their crews or other related persons”. By 14 votes to 1 the Court
22 indicated provisional measures to that effect. The Court said this to justify its
23 order:

24

25 “the immediate implementation by Iceland of its regulations would, by
26 anticipating the Court’s judgment, prejudice the rights claimed by the

1 United Kingdom and the Federal Republic of Germany and affect the
2 possibility of their full restoration in the event of a judgment in their
3 favour;”
4
5

6 In our submission exactly the same language can be applied to this case, even
7 if Guinea’s unique and unilateral actions do not attract the degree of support
8 which did those of Iceland at the time and subsequently, as was reflected in
9 the judgment on the merits in 1974.
10

11 In the Fisheries Jurisdiction case the Vice-President of the International
12 Court, Judge Ammoun, and Judges Forster and Jiménez de Aréchaga felt
13 compelled to set out in a joint declaration that the Order “cannot have the
14 slightest implication as to the validity or otherwise of the rights protected by
15 the Order or of the rights claimed by a coastal State.” That position is of
16 course absolutely correct. To be absolutely clear, if this Tribunal finds
17 against us on the merits, then Guinea will be able to seek to enforce its
18 judgment of 3 February, and to apply and enforce its customs laws against
19 vessels such as the SAIGA, assuming of course that they are otherwise
20 consistent with international obligations.
21

22 But the fact that you are not called upon at this stage to judge on the merits
23 cannot mean that you must ignore altogether the underlying merits of the case,
24 particularly those of the party seeking interim relief or provisional measures
25 of protection. For as the International Court put it in the Case Concerning US
26 Diplomatic and Consular Staff, “a request for provisional measures must by

1 its very nature relate to the substance of the case since ... their object is to
2 preserve the respective rights of either party”. The practice of the European
3 Court of Justice and indeed other international courts and tribunals similarly
4 indicates that in considering whether or not to grant interim relief the chances
5 of success of the action on the merits simply cannot be ignored.

6

7 The situation which this Tribunal faces is, we submit, directly analogous to
8 that of the Fisheries Jurisdiction case. Guinea is in effect seeking to apply
9 and enforce in its exclusive economic zone customs and criminal laws which
10 are clearly unrelated to the matters in respect of which it is entitled by the
11 1982 Convention to exercise such jurisdiction, namely the conservation and
12 management of resources. Maitre Bangoura’s statement makes it abundantly
13 clear that the laws justifying the prosecution of the Master are not to be
14 applied in the EEZ, and that there are no laws, fisheries or otherwise, which
15 could be prayed in aid of Guinea’s prosecution. There is no evidence before
16 this Tribunal that the Treasury of Guinea raises a single penny from these
17 customs laws being applied in its exclusive economic zone or that it would
18 lose any money whatsoever from such provisional measures as we are
19 requesting. But even if there was such evidence, Guinea would not be
20 assisted. For there is nothing in the 1982 Convention which could remotely
21 support Guinea’s actions. This is clear from by the text of the 1982
22 Convention, and by the practice of states under the Convention. In this
23 regard we can do no more than confirm that we wholeheartedly endorse the
24 view of Vice-President Wolfrum and Judge Yamamoto in their Dissenting
25 Opinion to the Judgment of 4 December 1997 to the effect that although the

1 list set out in Article 62 paragraph 4 of the 1982 Convention (which lists the
2 issues which coastal states may deal with under their fishing laws)

3
4 “is not meant to be fully comprehensive , it gives no indication that the
5 competences of the coastal State concerning fishing might encompass
6 activities of merchant ships, associated with the freedom of navigation,
7 for the sole reason that they service fishing vessels”

8
9 Moreover, as Mr Howe and Maitre Thiam have made clear in their
10 presentations, Guinea has not made the slightest pretence in its actions after
11 your Judgment of 4 December 1997 to pursue the argument that the criminal
12 proceedings which were taken against the Master of the M/V SAIGA were
13 based on fisheries legislation. What appeared to President Mensah to be the
14 situation on 4 December 1997 - namely that “no action taken by any official
15 or authority in Guinea, before or after the arrest of the SAIGA has had the
16 faintest link with fisheries” - is all the more clearly so today. As we indicated
17 in our written pleadings, what was sufficiently plausible or arguable in our
18 view and that of the majority of this Tribunal on 4 December 1997 is simply
19 not tenable today. This Tribunal offered Guinea a perch on which to develop
20 an argument. Rather than seize that perch, it chose to ignore the views of the
21 majority and persist with its claims to be entitled to enforce customs and
22 criminal laws notwithstanding that they are entirely unconnected to fisheries
23 matters or rights under the Convention . In these circumstances there is every
24 possibility that Guinea will continue to act in violation of the 1982
25 Convention . The rights of St Vincent and the Grenadines are seriously at
26 risk of being prejudiced.

1

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

21

22 Mr President, Members of the Tribunal, I have mentioned this by way of
23 background, not because we expect you to deal with the merits - we do not
24 ask that you do so - and not because we expect you to be bound by these
25 necessarily hastily prepared legal opinions. Rather, they serve to illustrate
26 that the evidence is overwhelmingly in favour of our submission that we have

1 the *prima facie* rights under the Convention which we claim, and that these
2 will be prejudiced if you do not prescribe the provisional measures we
3 request. We are aware of no academic authority to the contrary. We say that
4 we have a *prima facie* case on the merits and that it cannot reasonably be
5 asserted that our action is without foundation or that it is manifestly
6 unfounded as Advocate General Mayras of the European Court of Justice put
7 the standard in a 1977 judgment in that Tribunal. Or, as might be said in
8 parts of the Caribbean, '*fumus boni iuris*', and no doubt that there cannot be
9 smoke without fire. Putting it the other way, on the basis of the evidence that
10 is now available to us and to the Tribunal it cannot reasonably or *prima facie*
11 be said that Guinea's actions are well founded.

12
13 And what of Guinea's rights under the Convention, for its rights too must be
14 preserved? We submit that these would not be prejudiced by the provisional
15 measures we seek. Guinea would be free in accordance with the Convention
16 to exercise rights in relation to the resources of its exclusive economic zone,
17 including fisheries. There would be no implications, for example, of the
18 agreement between European Communities and Guinea concerning fisheries,
19 which makes no mention whatsoever concerning the licensing of fishing
20 vessels in relation to bunkering in the exclusive economic zone. It would be
21 able to apply and enforce customs duties up to the limit of its territorial waters
22 like any other international community. It would be entitled to exercise its
23 right of hot pursuit in accordance with Article 11 of the Convention, like any
24 other member of the international community uninterruptedly. Indeed, if
25 Maitre Bangoura is correct, it would be free to apply and enforce the customs
26 laws which exist on the statute books exactly as they appear in those books,

1 up to the limit of Guinea's territorial waters. This, we are told by Maitre
2 Bangoura, is what Guinean law provides for. Guinea has not shown that its
3 Treasury derives a single cent of revenue from the application of these
4 customs laws in its exclusive zone, so it cannot even be said that it would
5 suffer any financial detriment whatsoever.

6

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

11

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

15

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

19

20 Let us assume that you are not inclined to prescribe these provisional
21 measures. What would happen then? Well, last Friday in your office
22 Mr President, Guinea stated clearly and categorically that the vessel and crew
23 will not be released until the bond of \$400,000 is paid. That is clear. Since
24 that payment will not occur- at the very earliest if ever - until your judgment
25 on the merits, for the reasons which Mr Howe explained in terms of the
26 conditions set forth in the Bank Guarantee, it appears that provisional

1 measures are the only way now to obtain the early release of the M/V SAIGA
2 and its unfortunate crew before final judgment. If you were not to prescribe
3 these provisional measures, Guinea would no doubt treat your decision as a
4 green light entitling it to pursue the application and enforcement of the
5 customs laws in its exclusive economic zone. The effect of this, of course,
6 would be to deter yet more vessels such as the M/V SAIGA from entering the
7 exclusive economic zone of Guinea. Mr Kanu from Sierra Leone has
8 indicated in his statement that it is already the case that many vessels from
9 Sierra Leone will not enter into those waters. We therefore have a situation
10 of a sort of “no-go zone” which is entirely at variance with the intent of the
11 1982 Convention. The failure to prescribe would also have the effect of
12 potentially subjecting other seamen and vessels to the wholly unacceptable
13 conditions to which the Master and crew of the M/V SAIGA have been
14 subjected now for nearly four months, and for which no amount of
15 compensation could conceivably provide adequate reparation. Moreover, the
16 judgment of the Cour d’Appel of 3 February 1998 would remain on the books
17 and capable of full enforcement. Pending judgment our vessels would not be
18 able to bunker in the Guinean EEZ. The possibility cannot be excluded that
19 Guinea will seek to recover the full amount of the US\$15 million fine against
20 the Master, or against the vessel, or against affiliates of the vessel or even
21 against other vessels of St Vincent and the Grenadines registered in that
22 country, or indeed even against the state of St Vincent and the Grenadines
23 itself. Within days of the detention of the M/V SAIGA, before criminal
24 charges had been lodged, Guinea had sold the oil on the M/V SAIGA. It
25 justified its actions on the grounds that these were “perishable goods”. And it
26 has tried to recover \$400,000 under a bond other than in accordance with the

1 terms of that bond. It is idle to speculate as to what might happen. But
2 Guinea's behaviour thus far indicates that nothing, absolutely nothing, can be
3 excluded. This fact alone may have a chilling effect on St Vincent and the
4 Grenadines' ability to protect the interests of its vessels, as the Attorney
5 General made clear.

6

7 In our submission each of these occurrences is serious and each does and
8 would continue to entail irreversible consequences, that is to say they could
9 not adequately be repaired by monetary damages, even if such damages could
10 ever be objectively assessed. These occurrences are as serious and as
11 irreversible as those which led the President of the Permanent Court of
12 International Justice to make the Order in its first case on interim measures, or
13 which led the International Court of Justice in its first case on interim
14 measures - the *Anglo-Iranian Oil Company Case* - to make an Order of very
15 great specificity to protect private commercial interests of the United
16 Kingdom in Iran. We too hope that our commercial interests, as a small and
17 developing nation, will also be safeguarded by this first request for
18 provisional measures before this Tribunal.

19

20 There is a further point. We are all aware that this Request for provisional
21 measures has generated considerable interest. Because it is the first to come
22 before this Tribunal. Because it raises important issues concerning the law of
23 the sea. Because of the importance of the underlying issues. And because -
24 most regrettably - it follows and is related to a first judgment which a State
25 Party to the 1982 Convention has declined to give effect to. There must now
26 be a risk that if this Tribunal does not prescribe the provisional measures the

1 actions of Guinea may be seen as legitimate. The prescription of the
2 provisional measures we request would underscore the importance of the
3 rights and obligations set forth in the Convention. And all the more so
4 because, unlike those which may be “indicated” by the International Court in
5 the Hague, your provisional measures are clearly and unequivocally binding
6 as a matter of law, with all the consequences that entails for the prospects of
7 compliance and further legal measures here and elsewhere if they are not
8 respected.

9
10 Mr President, Members of the Tribunal, I cannot tell you with absolute
11 precision what will happen if you do not prescribe these measures. But I can
12 tell you that without them there will be further consequences and that many of
13 them, for example those relating to the fundamental human rights of the crew,
14 those relating to the commercial interests of the vessel, will have irreversible
15 consequences.

16
17 I turn now to the question of urgency. In our original request we explained
18 why these measures were urgently needed. Since then nothing has changed to
19 make them any less urgent -- quite the contrary. The crew and vessel have
20 been deprived of their liberty and suffered gross violations of their
21 fundamental human rights for something approaching three months since the
22 bond was posted, and far longer since the original detention. Vessels from St
23 Vincent and the Grenadines are hesitant, understandably, about entering the
24 waters of Guinea. The exclusive economic zone of Guinea continues to be an
25 area of waters in which care has to be exercised, with additional costs
26 incurred by re-routing or by bringing on board armed guards. These

1 additional costs are significant, without even taking into account the financial
2 losses which continue to accrue in excess of \$4000 a day. As Mr Kano's
3 statement from Sierra Leone indicates, some vessels will not even enter the
4 waters concerned by this application because of the perceived threat to them.
5 The judgment of 3 February continues to produce the chilling effects of its
6 predecessor, and all the more so since it imposes a suspended sentence of
7 imprisonment upon the Master. These factors combine to create a wholly
8 unacceptable state of affairs which provisional measures would go some way
9 towards remedying, at least *ad interim*. In the circumstances it is very
10 difficult to imagine many cases in which a greater situation of urgency could
11 exist.

12
13 International courts and tribunals have provided little by way of dicta or
14 guidance as to what precisely is meant by a situation of urgency. This is an
15 aspect which appears to be dealt with principally as a matter of first
16 impression. In the *Case Concerning Passage through the Great Belt*, which
17 I appreciate is very well known to some on you on the bench, Finland
18 requested the International Court to indicate interim measures requiring
19 Denmark to refrain from constructing a planned bridge project which, Finland
20 claimed, would impede the passage of ships to and from Finnish ports and
21 shipyards. The Court stated that it understood the term "urgency" to mean
22 that "action prejudicial to the rights of either party is likely to be taken before
23 [the] final decision [on the merits] is given".

24
25 On the facts of that case the Court found that according to that test there was
26 no urgency. In fact, Denmark had stated that there would be no physical

1 hindrance to passage before 1994, by which time the case on the merits
2 would have been completed, and Finland had not challenged that statement.

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

13
14 Mr President, Members of the Tribunal, in this your first case concerning
15 provisional measures it is right that you should proceed cautiously.

16 Regrettably, this is a case in which all the requisite conditions are satisfied,
17 and we say very easily so. The Tribunal has *prima facie* jurisdiction. The
18 rights of St Vincent and the Grenadines will be further prejudiced if these
19 measures are not prescribed, and those of Guinea will not be if they are.

20 Some of the consequences of the failure to prescribe provisional measures
21 will be irreversible and there exists a situation of urgency.

22
23 For small, especially developing, countries, the international rule of law is
24 vital. The great Latin American jurist, Eduardo Jiménez de Aréchaga, in the
25 *Aegean Sea* case, identified “the essential justification for the impatience of a
26 tribunal granting relief before it has reached a final decision on its

1 competence and on the merits as being that the action of one party *pendente*
2 *lite* causes or threatens a damage to the rights of others of such a nature that it
3 would not be possible fully to restore those right, or remedy the infringement
4 thereof simply by a judgment in its favour”. In our submission, this case falls
5 squarely within that test and we would ask that you prescribe the provisional
6 measures we request.

7

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

11

12 THE PRESIDENT: Thank you very much indeed, Mr Sands.

13

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

16

17 **(The hearing adjourned at 13.00)**

18

19