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INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

1998

Public hearing

held on Tuesday, 24 February 1998, at 3.00 p.m.,

at the City Hall of the Free and Hanseatic City of Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Request for the Prescription of Provisional Measures under Article

290, Paragraph 1, of the UN Convention on the Law of the Sea, 1982)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

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

Saint Vincent and the Grenadines is represented by:

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

as Agent;

Mr. Carl Joseph, Attorney General and Minister of Justice of Saint Vincent and the Grenadines,
Mr. Nicholas Howe, Solicitor, Partner, Stephenson Harwood, London, United Kingdom,
Mr. Philippe Sands, Reader in International Law, University of London, United Kingdom,
Mr. Yérim Thiam, Barrister, President of the Senegalese Bar, Dakar, Senegal,

as Counsel.

Guinea is represented by:

Mr. Hartmut von Brevern, Barrister, Röhreke, Boye, Remé & von Werder, Hamburg, Germany,

as Agent.

THE PRESIDENT: Please be seated.

THE CLERK OF THE TRIBUNAL: The International Tribunal for the Law of the Sea is now in session.

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

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

MAITRE THIAM (Interpretation): Mr President, Honourable Judges of the Tribunal. Relating to questions of interpretation, today I would just like to read out a text. First of all, I shall make some general comments on the facts of the matter before looking at *prima facie* jurisdiction very briefly.

On the facts now the Respondent contends that the captain of the SAIGA was represented by a lawyer during the judicial proceedings in Guinea. However, this is absolutely false. As Maitre Bangoura mentioned in his statement in the course of the proceedings, a lawyer in the course of criminal proceedings may not represent his client in Guinea. The legal system in Guinea is based on the French system, and advocates or lawyers can only ever assist their clients. I would like to note however that the lawyers of the captain were never in a position to communicate with their client before the first hearing. This shows that Guinea wanted to have a judgment quickly on this matter, violating the most basic rights of defence. To contest this point, the judges of the Conakry Court simply confirmed by an extraordinarily short note that if, the Guinean lawyers had put forward written evidence this meant they would be able to communicate with their client. However, this element could not be taken into consideration since the declaration of the captain was corroborated by those of all his lawyers.

Guinea also contends that the captain of the SAIGA was sentenced in accordance with Guinean law. However, from the provisions of the decree of the Conakry Cour d'Appel, this decision was textually based on something which is not only within Guinean law because this also invokes the provisions

of the Convention , namely its Article 111. This is the UNCLOS, and therefore it has substituted itself to your legal international organisation, which has not applied any penal sanctions. Moreover, concerning the following facts, it will be more exact to say that the captain had been sentenced by application of the Guinean custom code by application of the Convention Article 111.

The application of these texts to apply a sentence on the SAIGA captain or master is erroneous, because the provisions of Article 111 of the Convention do not lay down any criminal offence liable to justify any sentence. Moreover, Maitre Bangoura in his statement says there is nothing in current Guinean legislation which would allow the application of the Guinean customs code to bunkering activities beyond their territorial waters. Moreover, if Guinea has adopted such texts this would have been against the provisions of the Convention on the freedom of navigation in the exclusive economic zone, which includes the contiguous zone. The Agent of Guinea has no qualification to give an opinion on Guinean laws, and Guinea has not produced any declaration from a Guinean lawyer.

Guinea says that the master has in fact been freed, but I would like to refer to the final telex of the master saying that his passport has been confiscated and this is not in line with any provision of his sentence. Moreover, he is not allowed to leave the territory of Guinea, and he has also added the following "please mention this in Hamburg as well."

Maitre Bangoura also mentioned in his statement that his client is illegally held in a type of administrative detention, which is not envisaged by the law of Guinea, and in any case, this could not go beyond the provisions laid down by Guinean criminal code. By the way I would like to note that the Guinean customs agents have the quality of a police officer, and this results from the decree of the Cour d'Appel. Moreover, the constant declarations of the master were not verified by the court in Conakry. Maitre Bangoura also said that I declare in line with my various oral and written submissions, that the law, the rights of defence, the procedure and basic Guinean laws have been circumvented and infringed, which means that a just and fair trial is impossible. Guinea says that the three vessels bunkered with gasoil by SAIGA are not Guinean. This is quite correct, given that Guinea contends that these held Guinean fisheries licences. They do not, however, give any evidence on this, and it is particularly important to note that they never tried to take legal actions against the masters or the owners of these vessels. So if we are going to exclude acts of banditry, why then did they not see fit to pursue these vessels, and why did they only attack a foreign vessel full of gasoil, a foreign tanker. Given that Guinea says that they were in negotiation with the shipping line of SAIGA and there were negotiations under way, this is in fact not correct at all, and we do not see why merely referring this to a Tribunal should mean that negotiators acting in good faith should not continue to try and reach a settlement. Guinea says that the state of St Vincent and the Grenadines in fact was sheltered by criminal pursuit because it was not mentioned in the Conakry Court of Appeal. However, given that Guinea never wanted to formally declare that it was abandoning criminal procedures against this state, it is very important for this to be manifested by clear acts.

If it is true that the state was not formally sentenced, it is also correct to say it was not exonerated either by the Court of Appeal or by the Court of First Instance of Conakry.

The state of St Vincent and the Grenadines having cited to appear as civilly liable is concerned by this relationship, and the Guinean courts therefore had to (settle) on the insulation of this state in the witness box as it were, and this is in line with what was laid down, and they could have been either exonerated, and this was not done, or they could have been asked to support the fines against the master. Neither of these solutions was adopted. Therefore we are still very uncertain as to what the fate of the state of St Vincent and the Grenadines will be. It is particularly serious especially because of what Mr Bangoura said, and this is backed up by what you see in Le Sphinx newspaper, this shows serious judicial risks with respect to justice in Guinea. Moreover it is also corroborated by the fact that this is the first time that one state is pursued by another state as civilly liable for an act of smuggling and we also have a state which is pursued by another state for smuggling. Therefore it cannot be surprised to hear of how its acts are being qualified under law. There is no reason to believe the representative of Guinea when he says that the judgment is clear and does not justify the fear that the state of St Vincent and the Grenadines is pursued. It is equally clear that Article 111 of the Convention has not prevented Guinea from laying down an exception of verity with respect to the illegality of the hot pursuit of the SAIGA on the basis of the Judgment of your Tribunal on 4 December 1997 on the basis of Article 111 of the Convention. Moreover, to invoke the provision of this text to justify a criminal sentence, as I have just mentioned is

quite inappropriate. Guinea contends that it was not in a position to stop the execution of the Conakry Court of Appeal but it is up to the prosecutor of that country to execute or enforce correctional judgment. It is directly accountable to the Ministry of Justice who can give all the necessary instructions.

Moreover, anyone under a law or even the customs can, in fact, renounce to the benefit of a judgment which is in its interests or defer the validity of this. The customs are accountable to the Ministry of Finance which could renounce the fines or defer them. So it is wrong to say that the Guinean Government is not in a position to suspend or cease the execution of their Conakry Cour d'Appel's judgment. Moreover, if this had been the case, we do not understand then why the representative of the defendant state said that the vessel had been liberated, had been freed, or would have been liberated if the bond had been considered reasonable.

> " I would like to refer to a law of 1995 and an order of 1985 according to fisheries."

This is what the Guineans say. And on the basis of this, however, they could not provide us a copy of the appropriate text. They say that they are not obliged even to produce a copy of their text. But you will notice that at Annex 6 of their file, to justify the rights that they reserve themselves in the contiguous zone, the Guinean side has produced a French and English copy of law L9523 CTRN dated 12th June 1995 relating to the Merchant Navy.

We do not see why, since they spontaneously produce the copy of other legislation, they suddenly refuse to produce copies of the 1995 law relating to fisheries and the 1985 order relating to fisheries. Once again, such a refusal must be considered as being extremely suspicious. In any case it is not up to your Tribunal to seek the elements on which they base their arguments for them. Therefore, in my submission, one should reject all the statements of Guinea based on texts not produced within the course of these proceedings. Guinea still contends that the decision of your Tribunal of 4 December 1997 confirms the hypothesis that M/V SAIGA was stopped on the basis of a violation of laws based on Article 73 of the Convention. But this only confirms the justice of the position of the state of St Vincent and the Grenadines which now asks that a stronger signal be sent out to the defendant who does not seem to have understood all the delicacy and all the signs of the first signal sent out by your Tribunal.

Guinea also adds that the fishing licences of the vessels which were bunkered by the SAIGA said that they could not provide gasoil in the high seas and as a consequence the SAIGA had violated this obligation. But other than the fact that the licences have not been produced as I have already mentioned, and apart from the fact that the obligations of fishing vessels in the high seas have nothing to do with this present case, we do not see why one can contend that the SAIGA had violated a contractual obligation which does not concern it on the basis of the relative effect of the contracts.

I would also like to point out, moreover, that the argument has never been put forward and it is neither in the proceedings of the criminal proceedings nor in the response of Guinea to your Registrar.

Finally I would like to mention the extraordinary declaration of Guinea, according to which, according to the French translation yesterday, and I would like to quote:

> "The references to Guinean courts have no relevance because it is not up to them, these courts, to judge the question as to whether SAIGA violated the fisheries legislation in Guinea."

The Tribunal, I am sure, has noted that Guinea has not been able to make such a declaration without any contradiction, having said that the Captain was pursued by his courts and tribunals for a violation of fisheries legislation. This is an important contradiction which makes more suspicious the refusal of Guinea to produce to the Tribunal the contended legislation which was, allegedly that is, violated by the SAIGA.

Mr President, Members of the Tribunal, your court has no other choice but to follow resolutely the course of history and we know what the ups and downs have been. We have had to wait such a long time before finally the slavery and the transport of slaves was considered as an act of piracy. You are the hope of the entire world community and in particular of the peoples of the third world whose court systems do not always work as it perhaps would be desirable to do so. Please help us, and send us in the path of justice.

(Resumed in English)

MR PRESIDENT: Mr Sands, would you like to continue?

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

Going on to deal with these points I would like to say something about the proper standard to be applied. We are in the provisional measures phase. There can be no question but that you are not required to take a definitive decision on the merits. That is for the next phase. The parties are in agreement on this. What they disagree on is what *prima facie* means in practice. I have to confess that we are a little confused about Guinea's

approach in this respect. In the last proceedings, the prompt release proceedings, which were entirely separate from these, the majority of this Tribunal found it plausible or sufficiently arguable that on the basis of the information then available, on 4 December 1997, Guinea's actions might be classified as relating to fisheries matters. Guinea seems not to understand that the Tribunal did not decide that its actions were definitively related to fisheries rather than customs. What did Mr von Brevern say yesterday? I quote:

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

That would be a perfectly reasonable view, and I think that I would probably share it if no material events had occurred between 4 December 1997 and today. But there is the little matter of the Cédule de Citation, the judgment of the Tribunal de Premier Instance of 17 December 1997, the judgment of 3 February 1998 of the Cour d'Appel, and of course the actions of Guinea's authorities throughout this entire period, which in the past two and a half months have shown not the remotest connection whatsoever with fisheries legislation. Mr von Brevern conveniently chose to overlook these matters.

We say that what was plausible or sufficiently arguable then is certainly not *prima facie* today.

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

Let me turn now to the bond that was posted on 19 December 1997. Was it a reasonable one? For the purposes of these proceedings we are concerned only with the question of whether the bond which is today in the possession of Guinea is *prima facie* reasonable. In our view the bond is reasonable -- period -- and not just *prima facie* reasonable, but that is a matter for you to decide in the next phase of these proceedings at the merits stage. At this stage all you have to decide is whether the bond is *prima facie* reasonable or *prima facie* unreasonable. If it is *prima facie* reasonable, then you must prescribe provisional measures for the release of the vessel and crew. If it is *prima facie* unreasonable, then you should decline to prescribe these provisional measures that we request.

Whether the bond is reasonable or unreasonable now boils down to a single issue: is the event triggering payment under the bond reasonable? Guinea says that a reasonable bond would provide for payment upon presentation of a final judgment from a Guinean court. We say that the bond is reasonable

because the dispute has been internationalised, in the sense that the final determination on the merits will be the decision of this Tribunal, and that it is therefore *prima facie* reasonable for the final decision of this Tribunal to be the act which triggers payment.

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

Mr Cissoka knew then, or at least he should have been advised by Mr von Brevern, that the judgment of the Court of Conakry of 3 February 1998 was being otherwise challenged, and he must have known -- or at least he should have been advised -- that it was most probably going to be otherwise challenged before this Tribunal, because it is Guinea itself that

requested that the international proceedings on the merits be transferred to this Tribunal. On the basis of that language Guinea accepted the bond as reasonable. That is irrefutable.

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

What happened? Well, Guinea tried to cash in the bond and quite reasonably payment was refused. The conditions of the bank guarantee, as accepted by Guinea, simply had not been met. Lest it be said that the unreasonableness is ours alone, you will recall that Mr von Brevern said yesterday that Credit Suisse, a large international banking institution, had refused to pay on the bond. The truth is that Guinea's representatives have had weeks and weeks and weeks to challenge this language and they have not done so and they cannot now do so. They are stopped by their conduct and by their earlier acceptance.

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

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

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

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

Yesterday Mr von Brevern said: "the correct application our view would have been a demand of St Vincent to the International Tribunal for an interpretation of the Judgment t with respect to the notion 'reasonable'." We wonder if this is the same Mr von Brevern who on 12 December 1997 -- you

will find the letter at attachment 12 of our bundle, page 23 -- said this: "You have advised to be in the process of preparing an application to the Tribunal pursuant to Article 126 of the Rules of the Tribunal. Of course that is up to the decision of St Vincent and the Grenadines, however we have the feeling that such an application would be a misuse of the Tribunal."

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

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

We heard a great deal from Mr von Brevern about why there exists no situation of urgency. He said that the release of the vessel and crew after something approaching four months in captivity was not really an urgent matter. I feel almost bound to ask him: I wonder if he would feel the same way if he or members of his family were similarly incarcerated with no prospects of release? He asked of the commercial consequences: is the damage really so bad? Again, one wonders how he would feel if members of his own law firm were similarly incarcerated thousands and thousands of

miles from Hamburg and similarly deprived of the means of carrying out their basic commercial activities? He questioned whether the interests of vessels registered in St Vincent and the Grenadines was such as to justify the prescription of provisional measures, given that these were, I think he said, small in financial amount and, in any case, the exclusive zone of Guinea is far away and rather small?

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

Let us apply it to the facts of this case. Is action prejudicial to the rights of St Vincent likely to be taken before your final decision? Well, Mr von Brevern yesterday confirmed again that the vessel and crew would not be released without payment of the $400,000 bond. Since, in our view, that constitutes a continuing violation of Guinea's obligations to St Vincent and the Grenadines, with the passing of each day, its prejudicial action continues. There is no question that that is likely to happen. It will happen.
Mr von Brevern has said so. Then he confirmed that Guinea maintained its

right to apply in its exclusive economic zone the very same customs laws which we are challenging. Presumably then, if the SAIGA were to be released tomorrow and bunker another St Vincent vessel in the exclusive economic zone, Guinea would once again take enforcement action against that vessel. In these circumstances it is very difficult to see how you cannot conclude that prejudicial action is likely to occur. And Mr von Brevern did not deny that Guinea maintained its right to exercise hot pursuit with interruption. What he said was that we had given no indication that such hot pursuit would take place, as though we would be required to provide a detailed timetable as to when this was going to happen. Likelihood is established in our submission if a practice has occurred in the past with sufficient frequency to suggest that there are reasonable prospects for it happening again. This is amply established in this case, as the very detailed statements of Mr Vervaet and Mr Kano and the evidence they provide attest. So we say that the urgency of the request is established, but if we are wrong, and if Mr von Brevern is right, then the Orders of the International Court of Justice in, amongst others, the *Anglo-Iranian Oil Company* case, the *Fisheries Jurisdiction Cases*, the *Nuclear Test Cases* and the *US Diplomatic Hostages* cases were all wrongly decided.

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

he indicated that in the meantime our business would not be lost since there are no Guinean vessels to take it over that business. Very reassuring!

I will not now re-state why we say that damage is occurring, is significant and will continue to occur. In response to the Guinean view the Members of the Tribunal may wish to re-read the statements of Messrs Vervaet and Kanu, which appear respectively at our Attachments 7 and 11. Unlike Guinea's entirely unsubstantiated comments, the statements constitute formal evidence before this Tribunal; evidence, I might add, which has not been challenged by Guinea at all. The statements confirm the impracticality of Mr von Brevern's proposals. For example, vessels loading at Dakar and wanting to avoid Guinea's exclusive economic zone would effectively mean taking a significant chunk out of the potential southerly route from Dakar, thereby making a bunkering route further south --that is to say, off the coast of Sierra Leone or Liberia -- effectively uneconomical. This would be all the more so if the bunkering vessel had to sail 200 miles off the coast to go entirely around Guinea's EEZ, as Mr von Brevern suggested might be appropriate yesterday. Moreover, as we have amply demonstrated, the authorities of Guinea do not restrict their activities to vessels located in Guinea's waters. Mr Kano's statement make that very clear. We have provided detailed evidence of three recent occasions on which Guinea has detained vessels and confiscated cargoes beyond its own exclusive economic zone. Again, these have not been denied.

Finally, there is evidence that this threat to freedom of navigation is escalating and that it will continue to do so unless steps are taken to confirm freedom of

navigation rights. This request for provisional measures is a first step in that direction and we fear that a failure to prescribe the measures requested would send out the wrong signal.

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

We say that there will inevitably be a great deal of similarity between requests for provisional measures and those relating to the claim on the merits. We explained that in some detail yesterday, particularly by reference to the standard applied by the international Court of Justice in the *US Diplomatic Hostages* case. We heard no response from Mr von Brevern again on whether that standard was appropriate or not. We therefore assume that it is. But, to remind you of what the Court said then in The Hague, it was that a request for provisional measures must by its very nature relate to the

substance of the case since their object is to preserve the respective rights of either party. We indicated, we hoped rather fully, yesterday why it was that these provisional measures were sufficiently related to the request on the merits.

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

We say something about each element of our request in response to what Mr Von Brevern said yesterday. The first request related to the release of the vessel and the crew. It is said by Guinea to be request for a decision on the merits. Well that cannot be right. When the International Court of Justice indicated as a provisional measure the release of US diplomatic and consular staff in Teheran pending its final decision, it was not handing down a definitive judgment on the merit. It was simply indicating that at that time the US had a *prima facie* argument and that the continued captivity of the hostages would be financially irreparable. This case is very similar. It is a question of balancing the convenience to the two parties of ordering by way of provisional measures the release of the vessel and the crew or not so

ordering. If no provisional measures for their release is prescribed, could compensation subsequently repair the harm? We think the answer to that question is clearly no. Deprivation of personal liberties and the loss of commercial activities would be almost impossible to value easily. If release on the other hand is prescribed, can the harm occasioned to Guinea be compensated if it later turns out that Guinea was in fact entitled to retain them all along? The answer to that has got to be yes. Guinea has said quite simply that it wants $400,000 for their release. The amount is fixed and defined. If it wins on the merits it will receive its money, it is as simple as that. The bond will be paid. The only difference is that Guinea will have to wait for a year to get its money.

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

obligation to comply with that order. Limitations in its domestic law will not provide a defence, that is well established in international law.

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

As to the fourth request "that Guinea desist from applying or enforcing its customs laws in its exclusive economic zone against St Vincent and the Grenadines vessels" Guinea makes two points. One, that St Vincent and the Grenadines has shown no specific business interest in this activity, and two that the request is beside the point since Guinea only applies its fisheries laws in the EEZ. I feel almost bound to ask, has Mr von Brevern actually read the text of the judgment of 3 February 1998 of the Cour d'Appel? It finds that

the master of a vessel registered in St Vincent and the Grenadines is criminally liable for violating customs laws in the exclusive economic zone of Guinea. Do we need to say any more? If that is the full extent of Guinea's argument on this point then it is difficult to see how this Tribunal can avoid prescribing the provisional measures which we have respectfully requested.

The fifth request asks Guinea to cease and desist from interfering with vessels of St Vincent and the Grenadines to enjoy freedom of navigation. In effect Guinea says that we have no right to raise the request since it goes to the merits, and in any event there is no *prima facie* right to bunker in the exclusive economic zone In my presentation yesterday I tried to explain why a request for provisional measures and the claim on the merits will necessarily be closely linked. As I have already mentioned, that drew no response from the Agent of Guinea. We therefore assume that the approach set out by the Court is one which is acceptable to Guinea. That explains the overlap, and it explains why the prescription of provisional measures would not have any effect whatsoever for your decision on the merits.

As to the *prima facie* right to bunker in the exclusive economic zone Guinea made some effort to challenge the evidence we introduced concerning practice in other states. We want to say quite clearly the evidence we introduced does not in any way bind you and it is not in any way conclusive. We simply wanted to find some evidence that was illustrative of state practice. If we had come to this Tribunal with no evidence of state practice it would have been said that we had failed to carry out our task properly in establishing the *prima facie* rights that we sought to preserve. We had a very

short amount of time. We explained yesterday that it was not possible, because apparently it did not exist, for such evidence to be obtained from far more authoritative sources, including in particular the United Nations. The evidence however that we have introduced, we recognise its limitations, does confirm what we thought might be the case, namely that 19 reasonably representative states do not apparently do what Guinea does in its exclusive economic zone . It supports our contention that we have a *prima facie* right to bunker in Guinea's exclusive economic zone We noted yesterday that in its presentation Guinea did not challenge our readings of Article 62 paragraph 4 or Article 33 paragraph 1 of the 1982 Convention, both of which in our submission point to the conclusion that Guinea's acts are *prima facie* incompatible with the Convention .

We think we need to be very clear about what we are saying, which is *prima facie* the extent of our right. We do not dispute the right of Guinea or indeed of any other state to impose as a condition of a grant of a fisheries licence certain obligations in respect of bunkering. For example, under the EC-Guinea Agreement which has been mentioned frequently, Guinea would be entirely free to require EC vessels fishing in its exclusive economic zone to bunker only from certain sources. That may raise an issue under the World Trade Organisation's General Agreement on Trade in Services, of which Guinea is a party, and which provides for non-discrimination. But it would not in our submission necessarily be problematic from the perspective of the 1982 Convention. But Guinea has not done that. The EC-Guinea Protocol 1996 is entirely silent about conditions as to bunkering. And so is Guinean law. There is not a shred of evidence to support the view that the Italian

vessel bunkered by the SAIGA violated Guinean law. It has not produced the fisheries licence which that vessel must have operated under. If it were to produce it we cannot help but feel that it too would show that there were no obligations imposed on that fisheries vessel in relation to bunkering. But even if the licences were produced, and even if the licences did indicate that the Italian vessel had to comply with certain bunkering conditions, Guinea would not be helped, because the proper addressee, the proper target of any claim for a violation of that licence would be the fishing vessel, not the SAIGA registered in a third state and without any connection with Guinea. Guinea simply cannot enforce obligations owed to it by a fishing vessel subject to its jurisdiction against a third party. Guinea further has produced no evidence that any steps have been taken against any of the three fishing vessels.

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

In conclusion Mr President, Members of the Tribunal, it is the submission of St Vincent and the Grenadines that all of the requisite conditions which must be satisfied are satisfied for the prescription of provisional measures. They are all in place. The Tribunal has *prima facie* jurisdiction on the merits. The

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

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

free to leave the vessel. If he was, he would be in this courtroom, and he would be a witness, we assure you.

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

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

THE PRESIDENT: I would like to note the presence in court of Mr Bozo Dabinovic, the Agent of Guinea, who is also the Commissioner for Maritime Affairs for St Vincent and the Grenadines. As requested, I now call on the Rt Hon Carl Joseph, Attorney General of St Vincent and the Grenadines to conclude the presentation of St Vincent and the Grenadines

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

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

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

We are a small archipelagic state of limited natural resources with a narrow economic case. Our maritime register represents a vital source of income for St Vincent and the Grenadines That source has been threatened by the actions of Guinea. It has become apparent that the Guinean authorities are persistently applying and enforcing their customs laws within and beyond their exclusive economic zone. We say that this is in contravention of our rights under international law. I have heard nothing to allay the fears of my government that as civilly responsible in the Conakry proceedings, St Vincent

and the Grenadines will not be liable to the enforcement of the 3 February as against vessels flying our flag or against our state, the state itself.

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

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

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

Vessels flying our flags are entitled to enjoy the rights, obligations and freedoms afforded them under international law. This includes the practice of offshore bunkering. The M/V SAIGA is already the third tanker flying our flag to have been attacked by Guinean authorities and it is my government's grave concern that if we, as a flag state, are seen to be unable to protect the inherent rights of vessels under our flag, this may result in the loss of confidence in St Vincent and the Grenadines' commitment and effectiveness as a flag state by owners world wide. This would have a profound effect upon our shipping register with potentially grave consequences for the economy of St Vincent and the Grenadines and the welfare of our people.

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

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

The provisional measures of protection requested by St Vincent and the Grenadines are as follows: "that Guinea shall forthwith bring into effect measures necessary to preserve the rights of St Vincent and the Grenadines under the 1982 Convention, namely:

1. Release the M/V SAIGA and her crew;

2. Suspend the application and effect of the judgment of 17 December 1997 of the Tribunal de Premiere Instance of Conakry and/or the judgment of 3 February 1998 of the Cour d'Appel of Conakry;

3. Cease and desist from enforcing, directly or indirectly, the judgment of 3 February 1998 against any person or governmental authority;

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

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

6. That Guinea and its governmental authorities shall cease and desist from undertaking hot pursuit of vessels registered in St Vincent and the Grenadines including those engaged in bunkering activities except in accordance with the conditions set forth in Article 111 of the 1982 Convention, including, in particular, the requirement that such hot pursuit must be commenced when a foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing state and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.

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

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

(Short adjournment)

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

MR VON BREVERN: Mr President, honourable judges, I will present the submission of the Government of Guinea. Let me remark at the beginning that I will try to speak in English and I have some submissions to read in French.

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

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

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

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

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

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

On the one side the demand that provisional measures should enforce or should only be such as to enforce your judgment and on the other side now the demand to preserve the rights under the Convention. If this is not a different thing - okay, I leave it to your judgment and I do not know exactly my rights with respect to that but I have heard, during the last minutes or hours, some objections. So, I too have the right to object. So I officially herewith object to the amendment of this submission.

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

So far to the procedural points. Now some direct replies to what Maitre Thiam has said. Maitre Thiam, if I recall correctly, has said we would have submitted that Guinea would never allow supplying offshore on the high seas. This is really not what Guinea ever has said. We speak here about the contiguous zone and the EEZ, but we do not speak about the high seas.

Guinea would have no objection at all if the supply were to be on the high seas. But I would here remark that M/V SAIGA, when supplying the fishery vessels, was in the contiguous zone. This is important. I will come back to that later.

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

Now to what Mr Sands has said. When he spoke about the *prima facie* consideration of your jurisdiction, 297(3), he quoted what I said yesterday and said that I had said that I would not expect you, after two and a half months, when you decided on 4 December now to have a different view. He said, "Oh, but since then we have so many new events". What are these events? It was first the Cédule de Citation - correct. You all know what I mean. I only say this, at this moment: this was not reflected at all in the judgment, the Cédule de Citation. I will give you a definition later of that.

But important is that in the judgment there was no joint liability of anybody other than the captain. So why is that a new event? I do not know. Then we have the two judgments of 17 December and 3 February. We all know these judgments. We can forget about the first instance judgment, and we speak about the last one. We have a request for the arbitral tribunal now transferred to you to look at whether such a judgment was correct. But I cannot see that your *prima facie* consideration of Article 297(3) would now be changed considering the judgment of the Supreme Court, and why? The Supreme Court of Guinea, these judges over there, they are not experts in the Law of the Sea Convention. What they have seen is that there is a violation against the Guinean law to supply fishing vessels offshore and they have drawn the consequence. I cannot see why you should be influenced in your *prima facie* consideration by such judgment.

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

(Interpretation)

> "Whereas in conformity with Article 292 of the Convention the Tribunal has only to refer to the question of the release without prejudice to the follow-up to be given to any action in the vessel, its

owner or its crew which may be subject to the appropriate national court."

So, as the Tribunal has indicated, and stated, in its order of 21 November, the decree of the Court of Appeal was rendered by that competent national court in perfect harmony with international law of the sea.

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

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

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

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

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

Please allow me, Mr President, to quote what we heard in the first case from Mr Camara, a member of the Guinean delegation, in this connection. I will quote this in French because the English translation was not quite correct. (Interpretation) I would like to point out to you that in the structure of the customs income 37 per cent of customs income comes from customs dues raised on petroleum products. This indicates the importance of petroleum products in the structures of our customs income in our national budget. The income from customs dues represents 53 per cent and for this reason the government and the parliament have taken decisions to adjust the imports and the distribution of these products in our country and to regulate them. This is why our marine brigades go out to sea and act on the land to apprehend smugglers each time we can, and we have noticed that, as a result of this, the customs fees have increased because the consumption of fuel by legal means is on the increase as a result. To conclude, by way of example, since we started to apprehend smugglers of petroleum products, we have noted that the consumption of fishing vessels has also increased. They have been buying

more products at the quay, and in October 1997 the fishing vessels had consumed 1,083,000 litres as opposed to 1,234,000 for the first 22 days of November. So you can see that as soon as we started to apprehend smugglers vessels smuggling has decreased and our customs income has duly increased.

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

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

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

THE PRESIDENT: Mr Sands?

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

THE PRESIDENT: Thank you very much.

Mr von Brevern?

MR von BREVERN: Mr President, I thought that Article 295 -- and I think I should read it out ---

THE PRESIDENT: Mr von Brevern, Mr Sands's objection is that this argument, which of course is a very important argument, has not been raised at all up to this stage. As I said at the beginning, it is not permitted for new matters, matters which have not been brought to the attention of either the

Tribunal or the other parties, to be introduced. That was the objection. I thought you were going to respond that they there has been a previous reference to this.

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

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

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

MR von BREVERN: I now come to another very important point. In this connection I would like to address the gentlemen from St Vincent and the Grenadines. I have fully understood their fears as presented here because obviously they have been advised that there is a danger to St Vincent and the Grenadines as a state, and that therefore there is also a danger to all vessels under the flag of St Vincent and the Grenadines that the sentence of US$ 15 million will be enforced against St Vincent and the Grenadines or vessels under its flag. If this is so, indeed I fully understand your concern and that

you would do everything to fight against. But I have also said that there is no danger whatsoever. I have already mentioned the Cédule de Citation, to which Mr Sands often referred.

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

The definition of Cédule de Citation is the following: (Interpretation) The Cédule de Citation is an administrative document of the lawyers, which means that a party may be asked to come to appear before a criminal court. It does not have the legal value of a judgment but is merely a convocation to appear before the judge.

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

The next point I would like to make is the following. I am a little better in French now on this point. (Interpretation) As far as the suspension of the

cessation of the application of any law or rule concerning the customs code to do with smuggling in Guinea, within the exclusive economic zone or any other place beyond the said zone, Guinea declares the following. Only in the exclusive economic zone does it have jurisdiction. It does not have a claim to execute police powers. Any police intervention in the exclusive economic zone can only result from the exercise of pursuit initiated outside of this zone. So I would submit that Guinea respects the free passage within the exclusive economic zone of any vessels which are progressing in innocent passage.

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

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

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

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

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

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

To conclude, in my opinion it cannot be that you order by way of a provisional measure let me say the right to bunker offshore in the contiguous zone of Guinea. This is really something which is only to be decided in the case of the merits. You cannot do this here. With respect to another point, why I think that the provisional measures are not reasonable, as

the urgency is not given, I refer to damages. We have been speaking about damages. What happened to owner, charterers, Addax, the oil companies, if your provisional measures would not be ordered now? I think it is no problem. I think, St Vincent and the oil companies could, if they really would have a potential contract which they think they could not execute because of this uncertainty of the situation, notify to the government of Guinea all these potential contracts, and at the time when your judgment is delivered they could just add up these amounts and add it to the damages they claim in any case. So the damage aspect is also one which speaks absolutely against the urgency of the provisional measures.

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

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

Second, furthermore the International Tribunal is asked to adjudge and declare that St Vincent and the Grenadines should pay the costs of the proceedings which have been held consequently at the request of St Vincent

and the Grenadines for the prescription of provisional measures. Thank you very much.

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

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

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

In addition, the parties are requested to certify that the documents they have submitted to the Tribunal are true and accurate copies of the originals. For

that purpose, the Registrar will provide them with a tentative list of the documents concerned for their signature.

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

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

(The hearing concluded at 1640 hours)