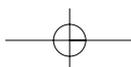
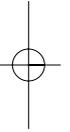
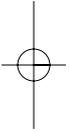
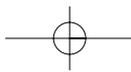
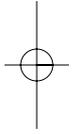
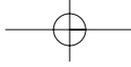
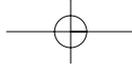


COUNTER-MEMORIAL SUBMITTED BY GUINEA







COUNTER-MEMORIAL – GUINEA

127

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ST. VINCENT AND THE GRENADINES

v.

REPUBLIC OF GUINEA

The M/V “SAIGA” (No. 2) Case

COUNTER-MEMORIAL**Submitted by the Republic of Guinea****16. October 1998****I. Introduction****The 1998 Agreement**

1. In the Memorial of 19 June 1998 St. Vincent and the Grenadines referred to the 1998 Agreement of the parties merely by quoting its wording. St. Vincent and the Grenadines contended that only the objection as to Article 297 para. 3 of the 1982 United Nations Convention on the Law of the Sea (herein-after referred to as “the Convention”) could be invoked by the Republic of Guinea, whereas for example, the local remedies rule would be without relevance. This, however, is an interpretation of the Exchange of Letters dated 20 February 1998 (herein-after referred to as “the 1998 Agreement”) which is unacceptable and contrary to what the parties have agreed to. In order fully to understand the 1998 Agreement and to give it a correct interpretation, it is necessary to mention and quote the exchange of letters that finally resulted in the 1998 Agreement.

As stated in the letter of the Commissioner of Maritime Affairs and the Agent for St. Vincent and the Grenadines of 19 June 1998 to the International Tribunal for the Law of the Sea (herein-after referred to as the “International Tribunal”), the 1998 Agreement was reached “through the good offices of the President of the International Tribunal for the Law of the Sea.” As may be confirmed by the President and the Registrar of the International Tribunal, the 1998 Agreement has indeed been concluded in close co-operation with the International Tribunal.

After the Republic of Guinea has expressed its wish to have the case transferred from the Arbitral Tribunal to the International Tribunal, the President of the International Tribunal was kind enough to contact the Counsel for

St. Vincent and the Grenadines, Mr. Sands. On 27 January 1998 the President thereafter confirmed to the Agent of the Republic of Guinea the conditions, under which St. Vincent and the Grenadines would be prepared to agree to the transfer of the case to the International Tribunal. One of the conditions was that the case should be heard in a single phase covering questions of jurisdiction as well as the merits of the case.

This was confirmed in the letter of the Agent of St. Vincent and the Grenadines to the Agent of Guinea of 29 January 1998, a copy of which was sent to the International Tribunal,

Annex I

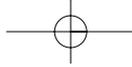
(Annexes in Roman numbers are those of the Counter-Memorial, whereas Annexes in Arabic numbers are those of the Memorial.)

It is expressly said in this letter:

"I write further to my fax of 26 January following on from your faxes of 22 and 23 January and related discussions involving the President and the Registrar of the International Tribunal for the Law of the Sea ("the Tribunal"). As I expect will have already been conveyed to you, St. Vincent and the Grenadines is prepared in principle to submit the application of 22 December to the jurisdiction of the Tribunal provided that the Agreement to do so includes provisions covering the following:

1. a comprehensive time table for all phases of the further proceedings, including the written and oral phases, that is satisfactory to the Tribunal;
2. the Tribunal be empowered to award costs in respect of the preparation and conduct of all proceedings subject to this disputes; and
3. the proceedings be limited to a single phase dealing with all aspects, including the merits and any jurisdictional issues that may arise.

Agreement along these lines should be recorded in a written exchange of letters between the Agents. I suggest that the first step would be for you to prepare a draft of such an agreement that is acceptable to Guinea upon which I may seek instructions. However you will appreciate that we must continue to insist that the timetables for appointment of arbitrators be complied with in the meantime absent such Agreement."



In a further telephone conversation, the President of the International Tribunal instructed the Agent of Guinea that Mr. Sands would prepare a draft agreement for the transfer of the case to the International Tribunal.

On 12 February 1998 Mr. Sands called the Agent of the Republic of Guinea and asked to be furnished with an official authorisation of the Government of the Republic of Guinea for the Agent to conclude an agreement to transfer the case to the International Tribunal.

In a letter of 13 February 1998, Mr. Sands wrote to the Agent of the Republic of Guinea:

“Further to our conversation I have the honour to send you herewith the draft letter which the Government of St. Vincent and the Grenadines will be ready to receive. In the event that an agreement along these lines is not concluded by 21 February we will proceed with the arbitration proceedings.”

The letter of Mr. Sands and the draft agreement is enclosed as

Annex II

Following an initiative of the International Tribunal, the draft letter after having been sent from the Agent of Guinea to the Agent of St. Vincent and the Grenadines, was amended by including new numbers 1 and 5, the result of which was the letter of the Agent of the Republic of Guinea of 20 February 1998.

Annex III

On the same day, the International Tribunal delivered the respective Order.

It follows these facts that the Republic of Guinea is not precluded from raising all legally possible objections against the admissibility of the claims in the present proceedings. This will be further explained below in Section 3.1.

2. Basis for the present dispute are the following facts:

- National laws of the Republic of Guinea prohibiting the off-shore supply of fishing vessels with gasoil;
- MV “SAIGA” supplied gasoil to fishing vessels having sailed under flags of third countries in the Contiguous Zone of the Republic of Guinea;

- patrol boats of the Republic of Guinea arrested the MV "SAIGA" enforcing Guinean laws.
3. St. Vincent and the Grenadines alleges that the Republic of Guinea violated the right of freedom of navigation and of other internationally lawful uses of the sea of St. Vincent and the Grenadines and of vessels flying its flag.
 4. The pre-eminent question to be decided by the International Tribunal is therefore, whether bunkering fishing vessels in the contiguous zone respectively in the exclusive economic zone of the Republic of Guinea
 - is navigation or another internationally lawful use of the sea pursuant to Article 58(1) of the Convention, or
 - is inherent to the sovereign rights of the Republic of Guinea pursuant to Article 56(1) (a) of the Convention, or
 - gives an inherent right of self-protection to the Republic of Guinea according to the rules and principles of general international law, or
 - constitutes a conflict that should be resolved on the basis of equity in accordance with Article 59 of the Convention.

Bunkering

5. St. Vincent and the Grenadines tries to give the impression that off-shore bunkering is a global multi-million US\$ industry. This is neither correct, nor reflected in the magazine "Bunker News" (Annex 4).

The Memorial of 19 June 1998 does not mention those States that have express laws obliging States that wish to undertake bunkering activities in the exclusive economic zone, to enter into agreement with the coastal State. This applies for example to Guinea-Bissau, a neighbour State of the Republic of Guinea, or to Cameroon. Other States like Sierra-Leone and Mauritania have reached the same result by requiring fishing vessels to obtain licences for bunkering. Finally, in the provisional measures proceedings, a legal opinion with respect to the Italian law as regards bunkering was produced which expressly stated:

"The Italian authorities might seek to exercise customs surveillance and enforcement powers with respect to deliveries of liable oil products, taking systematically place in the Contiguous Zone."

No genuine link

6. Contrary to the statement of St. Vincent and the Grenadines in the Memorial of 19 June 1998, it is to be questioned whether the Maritime Register of

St. Vincent and the Grenadines is reliable and effective. The Government of Guinea has no proof but rather doubts if there is a genuine link between St. Vincent and the Grenadines and vessels flying its flag. Without this link, the MV “SAIGA” would not have the nationality of St. Vincent and the Grenadines on the day it was arrested. It would have been a ship without nationality, as mentioned in Article 110(1) (d) of the Convention. This will be dealt with in more detail in Section 1 (number 11) and in Section 3.2 below.

The national laws of the Republic of Guinea

7. St. Vincent and the Grenadines cited some Guinean laws in paras. 14–20 in the Memorial. However, this quotation does not reflect the real legal situation and does not explain why off-shore supply as undertaken by the MV “SAIGA” constitutes a violation of Guinean laws. In essence, the Guinean regulations violated by the MV “SAIGA”, are as follows:
 8. Law 94/007/CTRN of 15 March 1994 concerning the fight against fraud covering the import, purchase and sale of fuel in the Republic of Guinea (Annex 22)

the import, transport storage and distribution of fuel are prohibited in the Republic of Guinea by any natural person or corporate body not legally authorised (Art. 1).

Any person who sells fuel other than from approved service stations or selling agents will be punished by 3 months to one year’s imprisonment and a fine . . . (Art. 2).

Any owner of a fishing boat, the holder of a fishing licence issued by the Guinean competent authority who refuels or attempts to be refuelled by means other than those legally authorised, will be punished . . . (Art. 4).

Whoever illegally imports fuel into the national territory will be subject to 6 months to two years imprisonment, the confiscation of the means of transport, the confiscation of the items used to conceal the illegal importation and a joint and several fine equal to double the value of the subject of the illegal importation where this offence is committed by less than 3 individuals (Art. 6).

Where the misdemeanour referred to in article 6 of this law has been committed by a group of more than 6 individuals, . . . the offenders will be subject to a sentence of imprisonment . . . , a fine equal to four times the value of the confiscated items . . . (Art. 8).
 9. Customs code no. 094/PRG/SEG of 28 November 1990 (Annex 23)

A special area of surveillance, known as a customs radius, is organised along the land and sea borders (Art. 33 para. 2).

The customs radius includes a marine area. . . . The marine area lies between the coastline and an outer limit located at sea 250 km from the coast (Art. 34).

Customs Officials have the right to bear arms in the performance of their duties (Art. 40 para. 1).

Apart from cases of self-protection, they may use these: Where they cannot otherwise stop vehicles, vessels and other means of transport the drivers of which fail to obey the order to stop (Art. 41 para. 2 lit. b).

In pursuance of the provisions of this code and for the detection of smuggling, customs officials may search goods, means of transport and individuals (Art. 44).

The driver of any means of transport must comply with the instructions of customs officials. Where the driver fails to comply, customs officials may make use of any appropriate devices in order to immobilise the means of transport (Art. 45).

The master of a ship arriving in the marine area of the customs radius is required upon first demand: to subject the original of the manifest to the customs officials to come on board (Art. 54).

Those who establish a customs offence have the right to seize all items subject to confiscation (Art. 232 para. 2).

The customs authorities shall be authorised to negotiate settlements with persons proceeded against for customs offences (Art. 251 para. 1).

The Customs Department is held liable in respect of its employees only in the exercise and in respect of their duties, unless there is an appeal against them (Art. 300).

When a seizure that is carried out in accordance with Art. 223–2 above is not justified, the owner of the goods has the right to compensation at the rate of 1% per month of the value of the seized objects, from the time of their seizure to the time of their return (Art. 301).

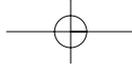
Contraband is taken to mean importation . . . outside the customs houses . . . (Art. 317).

SECTION 1: FACTUAL BACKGROUND

The facts as described in the Memorial of St. Vincent and the Grenadines of 19 June 1998 in paras. 26–76 have to be amended as follows:

No effective registration of MV "SAIGA"

10. The MV "SAIGA" was built in 1975. On the day of its arrest by Guinean authorities on 28 October 1997, it was not registered under the flag of St. Vincent and the Grenadines. As can be seen in Annex 13 of the Memorial, the MV "SAIGA" had been granted a Provisional Certificate of



Registry by St. Vincent and the Grenadines on 14 April 1997. This Provisional Certificate, however, had already expired on 12 September 1997. The MV “SAIGA” was arrested more than a month later.

The Permanent Certificate of Registry has only been issued by the responsible authority of St. Vincent and the Grenadines on 28 November 1997. It is thus very clear that the MV “SAIGA was not validly registered” in the time period between 12 September 1997 and 28 November 1997. For this reason, the MV “SAIGA” may qualified to be *a ship without nationality* at the time of its attack.

Owner of the MV “SAIGA”

11. At the relevant date, Tabona Shipping Company Ltd., situated in Nikosia, Cyprus, was owner of the MV “SAIGA”. Interestingly enough, its nationality had never been mentioned by St. Vincent and the Grenadines. The vessel was managed by Seascot Shipmanagement Ltd., based in Scotland.

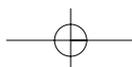
Charterer of the MV “SAIGA”

12. It is neither clear to St. Vincent and the Grenadines, nor to the Agent of the Republic of Guinea who at the relevant time was the charterer of MV “SAIGA”. Whereas Addax Bunkering Services is mentioned as charterer in para. 7 of the Memorial, another company named Lemania Shipping Group Ltd. is held to be charterer in para. 26 of the same Memorial. There is no doubt that both the International Tribunal and the Republic of Guinea have the right to have full knowledge of the relevant charterer.

Crew of the MV “SAIGA”

13. Whereas the Memorial in the present proceedings states in para. 26 that the MV “SAIGA” had 24 crew members, the Application in the prompt release proceedings refer to 25 crew members (as can be seen from Annex 14 page 218).

However, the accurate number of crew members was 22 (twenty-two). During its previous voyage no. 11, 21 crew members served on the MV “SAIGA”, as it is mentioned in Annex 15 after page 230. In Annex 16, page 234, St. Vincent and the Grenadines produced a telex from ITOC Shipping to the charterer A.B.S. Geneva of 24.10.97 according to which a crew change was performed with three onsigners and two offsigners. The cadets mentioned in the list under nos. 20 and 21 have offsigned, whereas the crew members have been onsigned (listed on page 218 under nos. 19, 21 and 22). In addition, the three Senegalese painters were hired to work on board (nos. 23 until 25).



The three Senegalese were no crew members. The purpose of their engagement was not to conduct or navigate the MV "SAIGA" but to work as painters. Therefore, even if there was a genuine link between the MV "SAIGA" and St. Vincent and the Grenadines, the State of St. Vincent and the Grenadines would not have any right to claim damages for the three Senegalese painters.

Moreover, it is by no means clear which company employed the members of the crew. The same question arises with respect to the three Senegalese painters, as can be seen from the telex of the captain of the MV "SAIGA" to the management of 29 October 1997 (page 262 of the Annexes).

Cargo-owner

14. In para. 28 of the Memorial it is stated that the oil was owned by Addax B.V. Geneva Branch. There is no justification for St. Vincent and the Grenadines to seek any damages for a Geneva company against the Government of Guinea before the International [Tribunal]. This aspect will be explained in more detail below.

Arrest of MV "SAIGA"

15. The facts concerning the arrest of the MV "SAIGA" are not correct as outlined in paras. 34–37 of the Memorial. The correct facts are as follows:

The MV "SAIGA" left Dakar, Senegal, on 24 October 1997.

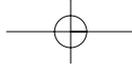
On 25 October 1997 the master of the MV "SAIGA" telexed to the charterers A.B.S. Geneva that three fishing vessels were in a position about 20 miles off Guinea-Conakry (page 240 of the Annexes of the Memorial). On 26 October, the MV "SAIGA" supplied gasoil to fishing vessels in the exclusive economic zone of Guinea – Bissau (page 242 of the Annexes of the Memorial).

The captain of MV "SAIGA" noted in the bridge order book on the same day, *inter alia*:

"Please have in contact with f/v "GIUSEPPE 1" at 04.00 by VHF 68/70 or F = 8320".

3. Please keep sharp look-out and observe by radar all time. If you notice any fast moving target towards our vessel call me at once" (page 228 of the Annexes of the Memorial).

It is also mentioned:



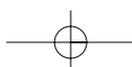
“2. Check the radar all the time. Pay attention for fast moving targets. Call me at once” (page 230 of the Annexes of the Memorial).

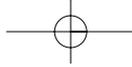
The position of the MV “SAIGA” in the morning of 27 October 1997 was 10° 25,3 N and 15° 42,6 W, both of which lie in the contiguous zone of the Republic of Guinea. The ship then supplied three fishing vessels, i.e. the GIUSEPPE PRIMO, the KRITTI and the ELENI G., beginning at 4 o’clock in the morning of the same day (page 247 of the Annexes of the Memorial). The supply of the three fishing vessels in the Guinean contiguous zone was terminated on 27 October 1997 at about 14.00 h. The fisherboats sailing under Italian and Greek flags exercised fishing rights on the basis of the Agreement between the European Economic Community and the Government of the Republic of Guinea on fishing off the Guinean coast. According to Art. 4 of the Guinean Law 94/007/CTRN of 15 March 1994, the licence holders were obliged to bunker only from approved service stations.

On 27 October 1997 A.B.S. Geneva sent a telex to the captain (page 251 of the Annexes of the Memorial) and advised MV “SAIGA” that her position would not be safe and that Guinean Port Authorities from Conakry would be sending out patrol boats. The MV “SAIGA” should immediately proceed into the waters of Sierra-Leone. Without showing a flag, the MV “SAIGA” proceeded into the southern direction. The captain of the MV “SAIGA” and the charterer were well aware of arrests of two other vessels “NAPETCO” and “AFRICA” by the Guinean authorities in 1996 and 1997, enforcing Guinean laws relating to the supply of gasoil.

16. On 26 and 27 October 1997 the Guinean authorities had heard radio conversations between the captain of the MV “SAIGA” and fishing trawlers on frequency 8320. These conversations made clear that the MV “SAIGA” was to supply the fishing trawlers with gasoil. Already on 25 October 1997, the MV “SAIGA” advised three other fishing vessels, which were at that time in a position about 20 miles off Guinea-Conakry, that the supply should be done in position 9° 15 N and 16° 15 W, this position being well within the Guinean exclusive economic zone. After the three fishing vessels had been supplied in the Guinean contiguous zone on 27 October 1997, the Guinean patrol boats F-328 and P-35 received the order to inspect the MV “SAIGA” with regard to the violation of Guinean laws.

The task of the Guinean patrol boats was to search and stop the MV “SAIGA”. However, it was clear that the MV “SAIGA” was aware of being pursued. Therefore, the MV “SAIGA” received shortly thereafter





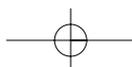
instructions to proceed immediately to position 09° 00 N 15° 00 W, lying slightly south of the Guinean border. Having heard such new instructions, the Guinean patrol boats headed to the southern border and detected the MV "SAIGA" on the radar at 4 o'clock in the morning of 28 October 1997, when she was still in the exclusive economic zone of Guinea.

The patrol boats tried to stop the MV "SAIGA". They communicated with the MV "SAIGA" on an international channel. The patrol boats identified themselves and asked the MV "SAIGA" to stop. However, the MV "SAIGA" did not halt. The patrol boats then transmitted acoustic signals and were even ringing the bell on board of the launch, but the MV "SAIGA" still did not stop. The patrol boats also gave visual warnings which were ignored by the MV "SAIGA". Instead, it crossed the border to Sierra-Leone. On all of its way from the position where it supplied the three fishing vessels to this position, the MV "SAIGA" had never entered the territorial sea of Sierra-Leone or of another State.

Since the MV "SAIGA" did not stop, the patrol boats came alongside the vessel. The MV "SAIGA" then attempted to sink the patrol boats twice, the success of which the crews of the patrol boats barely managed to avoid. They realised that the MV "SAIGA" did not fly any flag. No crew member was on the wheelhouse. The vessel was sailing on automatic pilot heading for the High Seas. At last, the Guinean boats were successful to stop the vessel. That was at 8° 58 N and 15° 00 W, a position that is within the exclusive economic zone of Sierra-Leone.

It took the Guinean authorities about 30 minutes to search the crew on board. After about three hours, the investigation was completed and MV "SAIGA" now took course for Conakry.

17. The captain of the MV "SAIGA" could in no way assume that he would be attacked by a pirate vessel. The reason for this being that the patrol boats were faster than pirate boats and that the captain of the MV "SAIGA" must have noticed this on his radar. Moreover, the patrol boats had identified themselves and were easily to be recognised by their numbers P328 and P35. Furthermore, they had requested by sound and light signals the MV "SAIGA" to stop. Finally, the patrol boats could be identified because of their flag and military colour and the characteristic symbol on their hull. The fact that the captain of the MV "SAIGA" tried to escape by switching on the autopilot and that he asked the crew to secure themselves in the machinery, also indicates so.



18. After arriving in Conakry, the crew members, with the exception of the master, were free to leave the MV “SAIGA” and the Republic of Guinea. This has already been stated in the Mémoire en Défense de la République de Guinée on page 6 under no. 2.

Cargo confiscated

19. The cargo on board of the MV “SAIGA” was 4.906.212 metric tons, as can be seen from Annex 16, page 231. It is not accurate to state, as has been done in para. 44 of the Memorial, that approximately 5.000 metric tons of gasoil were discharged into shore tanks on 10 and 11 November 1997.

Posting of a reasonable bond

20. In its Application for the prompt release of the MV “SAIGA” and its crew of 13 November 1997, St. Vincent and the Grenadines presented the following submission:

“The Applicant submits that the Tribunal should determine that the vessel, her cargo and crew be released immediately without requiring that any bond be provided. The Applicant is prepared to provide any security reasonably imposed by the Tribunal to the Tribunal itself, but in view of the foregoing seeks that the Tribunal do not determine that any security be provided directly to Guinea.”

The International Tribunal delivered its judgement on 4 December 1997. Contrary to the submission of St. Vincent and the Grenadines, the International Tribunal ordered and decided that the MV “SAIGA” and its crew should only be released upon the posting of a reasonable bond or security which shall consist of (1) the amount of gasoil discharged from the MV “SAIGA” and (2) the amount of 400.000,- US\$, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form. It is therefore requested that St. Vincent and the Grenadines should bear the costs of the prompt release proceedings.

21. Article 113(3) of the Rules of the Tribunal (herein-after referred to as “the Rules”) stipulates that “the bond or other financial security for the release of the vessel or the crew shall be posted with the detaining State unless the parties agree otherwise.” Contrary to this Article, the Agent of St. Vincent and the Grenadines posted a guarantee by Crédit Suisse dated 10 December 1997 with the Agent of the Government of Guinea instead of the Government of Guinea directly (see Annex 38, page 538, of the Memorial).

22. The Agent of St. Vincent and the Grenadines expressed his expectation that vessel and crew would be promptly released during 11 December 1997. In accordance with his instructions by St. Vincent and the Grenadines, he would otherwise make a further application to the Tribunal on the following day.
23. The letter of the Agent of St. Vincent and the Grenadines of 10 December 1997 which enclosed the text of the guarantee was received by the Agent of the Republic of Guinea on 11 December 1997. On the same day, the latter informed the Agent of St. Vincent and the Grenadines that he would have to "go into the process of checking whether the draft of the bank guarantee is sufficient and reasonable", involving consultation with the Minister of Justice in Conakry (Annex 38, page 541, of the Memorial). Furthermore, he requested that Crédit Suisse be asked to provide the guarantee in the French wording. Finally, he asked for prolongation of the time-limit for the release of vessel and crew at least until the "receipt of the French worded bank guarantee with some time for approval in addition."
24. Also on 11 December 1997, the Agent of the Republic of Guinea received a telephone call of the Agent of St. Vincent and the Grenadines in which the latter rejected the demand to receive a bank guarantee in French wording. Stephenson Harwood only offered to provide a translation of the original into the French language.

The Agent of St. Vincent and the Grenadines asked for potential other complaints with respect to the wording of the bank guarantee. The Agent of the Republic of Guinea advised that he personally could not finally decide whether the bank guarantee is to be considered "reasonable" in the sense of the judgement of the International Tribunal. It would be up to the Government of Guinea to decide. In this connection the Agent of St. Vincent and the Grenadines was advised that the Agent of the Republic of Guinea had not been able to get instructions from Conakry up to that date.

With such reservation, the Agent of the Republic of Guinea addressed in the same telephone discussion some further concerns he had observed after a first examination of the English draft of the bank guarantee. He referred to the word "claims" used in line 8 of page 2 of the guarantee and made in that connection clear that the meaning of "claims" would also have to include penalties resulting from criminal proceedings. He again demanded the bank guarantee to be issued in French and asked for confirmation by Crédit Suisse of the authorisation of the persons who signed or would sign the bank guarantee. The Agent of the Republic of Guinea has made it very



clear that these concerns would not necessarily be the only ones, in particular since he did not have the chance to examine the bank guarantee in depth and detail and because he had not yet received any instructions or commentaries of the Republic of Guinea with respect to the bank guarantee.

25. Therefore, it is not correct to state, as has been done in para. 145 of the Memorial, that the conversation of the two Agents of 11 December 1997 would have superseded the letter of the Guinean Agent of the same day in which the latter expressed that he would have to consult the Minister of Justice in Conakry before agreeing to a wording of a bank guarantee.
26. In the course of 11 December 1997, the Guinean Agent had the possibility to examine the guarantee in detail. After this examination of the wording, he discovered further problems which he deemed to have to be solved by amendment of the draft bank guarantee. The Guinean Agent tried to call the Agent of St. Vincent and the Grenadines immediately in the evening of the same day, however, without success. He therefore put down all of his concerns in his letter of 12 December 1997 (Annex 38, pages 550–554, of the Memorial). As far as the most important points are concerned, the Guinean Agent stated as follows:

“In essence Crédit Suisse guarantees to pay

- such sum
- as maybe due to the Government of Guinea
- by a final judgement
- on behalf of the MV “SAIGA”
- in respect of the claims pursuant to which the MV “SAIGA” was detained.

Now, the problem I see is that it is not clearly said who has to pay to the Government of Guinea by the final judgement. The only reference in that connection in my understanding are the words “on behalf of the MV ‘SAIGA’”. This however is not clear enough or at least may cause uncertainty, because in my understanding without having received specific instructions from my client a judgement could be given against the owner, the charterer, the crew, the captain of the vessel. Therefore, the wording of the guarantee had to be clarified accordingly . . .

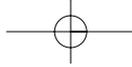
Further it must be clear that “due to you” does not only refer to the Government of Guinea, but also to the customs, tax administration and/or other agencies of Guinea. Finally the words “in respect of the

claims pursuant to which the MV "SAIGA" was detained" in my opinion are not clear enough. MV "SAIGA" in my opinion was detained because she violated laws of Guinea. It is doubtful whether the detention of MV "SAIGA" was effected in respect of "claims". Even with the clarification Crédit Suisse gave with its letter of 11 December 1997 under no. 2 "we think that a clarification of the wording of the guarantee also in this respect is necessary."

Finally the Guinean Agent requested the inclusion of an arbitration clause into the bank guarantee (Annex 38, page 555, of the Memorial).

27. With letter of 12 December 1997, which had been sent by fax on Friday at 6.27 p.m., i.e. after office hours, and which was received by the Guinean Agent only on 15 December 1997, the Agent of St. Vincent and the Grenadines rejected the requests for amendments of the guarantee and announced to submit an application pursuant to Article 126 of the Rules on Monday, 15 December 1997, if vessel and crew were not released by then (pages 556–557).
28. On 15 December 1997, the Ambassador of the Republic of Guinea in Germany faxed to the Guinean Agent that the Minister for Justice of the Republic of Guinea would be on a mission in Ethiopia and that he would be expected to be back in Conakry the same week. The Agent of St. Vincent and the Grenadines was immediately informed of these news by letter of 15 December 1997 (pages 560–561).
29. That the Agent of St. Vincent and the Grenadines had posted the financial security, contrary to Article 113(3) of the Rules, with the Guinean Agent instead of the Government directly, resulted in the need that instructions of the Republic of Guinea had to be received by its Agent. For technical reasons, the communication between Hamburg and Guinea was delayed enormously. In fact, no contact could be established between the Agent and the Republic of Guinea for weeks.

After the Guinean Agent received the letter of Stephenson Harwood of 11 December 1997 with the English wording of the guarantee, the letter and guarantee were sent both to the Minister of Justice in Guinea and to the Ambassador of the Republic of Guinea in Bonn. On 11 December 1997, the Agent succeeded in faxing the letter to the Minister at 11.04 a.m. and to the Ambassador at 11.17 a.m. This letter is annexed as

**Annex IV**

and the fax journal of the Guinean Agent for 11 December 1997 as

Annex V

On the same day, at 1.19 p.m., a second letter could be faxed to the Minister of Justice

Annex VI

in which the Government of Guinea was informed about the telephone discussion between the two Agents in which the production of a guarantee in the French language had been requested.

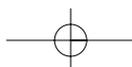
30. Thereafter numerous letters were to be sent to the Government of Guinea, the faxing of which was, however, impossible as can be seen from the various fax journals of the Guinean Agent of 11, 12, 13 and 15 December (Annex V). Consequently, the Guinean Agent sent by DHL courier the French translation of the guarantee and asked for immediate instructions with letter of 15 December 1997,

Annex VII

The Ambassador of the Republic of Guinea in Germany informed the Guinean Agent on 15 December 1997 that the Minister of Justice of the Government of Guinea would be on a mission in Ethiopia,

Annex VIII

31. Meanwhile, on 17 December 1997, the first instance tribunal of Conakry gave judgement against the captain of the MV “SAIGA”. He was found guilty to have committed contraband by having supplied fishing vessels off-shore in the contiguous zone of Guinea and was sentenced to the payment of more than 400.000, – US\$ (Annex 29 of the Memorial).
32. It is wrong that St. Vincent and the Grenadines has ever been advised that the fine adjudged against the captain of the MV “SAIGA” could be enforced directly against the State of St. Vincent and the Grenadines itself and/or vessels flying its flag.



142

M/V "SAIGA" (No. 2)

33. St. Vincent and the Grenadines instituted arbitration proceedings against the Republic of Guinea on 22 December 1997 (Annex 1 of the Memorial), which are now to be decided by the International Tribunal. St. Vincent and the Grenadines requests the International Tribunal to adjudge and declare that the Republic of Guinea has violated Articles 292(4) and 296 of the Convention by not releasing the MV "SAIGA" and her crew immediately upon the posting of the guarantee of US\$ 400.000, – on 10 December 1997 or upon the subsequent clarification from Crédit Suisse on 11 December.
34. Only on 5 January 1998, the Guinean Agent received a fax from the Guinean Avocat à la Cour Barry Alpha Oumar,

Annex IX

in which Maître BAO stated under no. 1 that meanwhile, the Guinean Agent should have received the observations of the Minister of Justice dated 24 December 1997 with respect to the bank guarantee. This was, however, not the case. The Guinean Agent answered to Maître BAO with letter of 5 January 1998

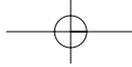
Annex X

that neither he, nor the Ambassador of the Republic of Guinea had received the statement of the Minister of Justice of 24 December 1997. All efforts to fax the letter to Maître BAO were been unsuccessful until 8 January, as can be seen from the fax journal of 5 January 1998 under nos. 18, 19, 20, 23, 24 and 27, of 6 January 1998 under nos. 28, 36, 38, 51, 52 and 53 and of 7 January 1998 under nos. 56 and 7, 13, 14, 15, 17 and 27.

Annex XI

On 6 January 1998, via the Guinean Ambassador in Germany, the Guinean Agent received a copy of the letter of the Minister of Justice of the Republic of Guinea dated 24 December 1997. Still on the same day, the Guinean Agent transmitted the observations and objections of the Guinean Government to the bank guarantee to the Agent of St. Vincent and the Grenadines (pages 562–563).

35. Meanwhile, on 13 January 1998, St. Vincent and the Grenadines submitted a Request for the Prescription of Provisional Measures to the



International Tribunal. The submissions of St. Vincent and the Grenadines were as follows:

“St. Vincent and the Grenadines requests the Tribunal to prescribe the following provisional measures:

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

- a) release the MV “SAIGA” and her crew;
- b) suspend the application and effect of the judgement of 17 December 1997 of the Court of Conakry, Guinea;
- c) cease and desist from enforcing, directly or indirectly, the judgement of 17 December 1997 of the Court of Conakry against any person or governmental authority; and
- d) subject to the limited exception as to enforcement set forth in Article 33(1)(a) of the 1982 Convention on the Law of the Sea, cease and desist from applying, enforcing or otherwise giving effect to its laws on or related to customs and contraband within the exclusive Economic Zone of Guinea or at any place beyond that zone, in particular Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, in particular as against vessels flying the flag of St. Vincent and the Grenadines.

(2) that Guinea and its governmental authorities shall cease and desist from interfering with the right of St. Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation as set forth inter alia in Articles 56(2) and 58 and related provisions of the 1982 Convention.”

36. In the Order of the International Tribunal of 11 March 1998, the International Tribunal did in not accept the submissions of St. Vincent and the Grenadines and prescribed and recommended as follows:

“Prescribes the following provisional measure under article 290, paragraph 1, of the Convention:

Guinea shall refrain from taking or enforcing any judicial or administrative measure against the MV "SAIGA", its Master and the other members of the crew, its owners or operators, in connection with the incidents leading to the arrest and detention of the vessel on 28 October 1997 and to the subsequent prosecution and conviction of the Master;

Recommends that St. Vincent and the Grenadines and Guinea endeavour to find an arrangement to be applied pending the final decision, and to this end the two States should ensure that no action is taken by their respective authorities or vessels flying their flag which might aggravate or extend the dispute submitted to the Tribunal."

Consequently, the costs of the proceedings should be borne by St. Vincent and the Grenadines.

37. With letter of 19 January 1998, the Minister of Justice of the Republic of Guinea reminded the Guinean Agent that the MV "SAIGA" would be released if and when an acceptable bank guarantee was provided. He also stated that the Guinean Government did not understand the new applications of St. Vincent and the Grenadines of 22 December 1997 and of 5 January 1998 because it was only due to the unacceptable wording of the guarantee that the Judgement of the International Tribunal of 4 December 1997 had not yet been followed by the Government of Guinea.
38. On 20th January 1998, the Guinean Agent received a letter from the Agent of St. Vincent and the Grenadines dated 19 January 1998 (pages 564–565). In this letter he was informed that the delay in responding to the Guinean demands for changes in the wording of the guarantee, as put forward to St. Vincent and the Grenadines by letter of 6 January 1997, was due to the absence of responsible persons on the side of St. Vincent and the Grenadines. The Agent of St. Vincent and the Grenadines indicated that all demands for a change of the wording would be accepted by St. Vincent and the Grenadines. With respect to the requested proof concerning the authorisation of the signatories of the bank guarantee, it was asked how the Guinean concerns could be overcome.
39. The Guinean Agent informed the Agent of St. Vincent and the Grenadines by letter dated 22 January 1998 of the instructions received from the Guinean Government dated 21 January 1998 (pages 570–571). The Government of Guinea requested to receive the original of the bank guarantee in the French language, made some concrete proposals as to the wording, and asked to have the signatures of the bank representatives to be notari-ally attested.



40. With letter of 30 January 1997, the Agent of St. Vincent and the Grenadines informed that the new bank guarantee had been issued and, in line with Article 113(3) of the Rules, had been posted directly to the Minister of Justice of Guinea as representative of the detaining state (page 572).
41. The National Customs Director informed the Guinean Agent on 16 February 1998,

Annex XII

that the wording of the new bank guarantee was now acceptable. The Director underlined that up to that date the MV “SAIGA” had not been promptly released because of the unacceptable original wording. Furthermore, he asked the Guinean Agent to invite Crédit Suisse to fulfill its obligation to pay 400.000,- US\$ into the bank account of the Guinean Government in order to achieve the release of the MV “SAIGA”. The Director referred to the judgement of the Appeal Court of Conakry of 3 February 1998 according to which the MV “SAIGA” was confiscated. Annexed to this letter was a copy of the longform of the judgement of the Appeal Court of Conakry of 3 February 1998.

On the same day, the Director also sent a fax directly to Crédit Suisse (page 588) asking for a payment of 400.000,- US\$ in order to be able to release the MV “SAIGA”.

42. The Guinean Agent informed both the Agent of St. Vincent and the Grenadines and the Registrar of the International Tribunal on 17 February 1998 (page 582) as regards the bank account into which the 400.000,- US\$ should be transferred.

After having called, the Guinean Agent sent to Crédit Suisse on 18 February 1998 (page 586) a copy of the judgement of the Supreme Court of Guinea of 3 February 1998. He also asked for immediate confirmation that Crédit Suisse would be prepared to pay 400.000,- US\$ under the guarantee or, alternatively, what Crédit Suisse would require to effect such payment.

43. One day later, the Agent of St. Vincent and the Grenadines informed the Agent of Guinea by phone call that he would not advise Crédit Suisse to make payment under the guarantee as long as the International Tribunal had not decided on the merits of the case.
44. As has already been stated in the Memorial in para. 145, Crédit Suisse refused to pay and asked to receive at its counters in Geneva “a hard copy

of the required statement accompanied with the relating documents duly issued and signed as specified in the bank guarantee" (page 587).

Release of MV "SAIGA"

45. The deed of release had been already drafted by the Government of Guinea on 13 February 1998. The captain of the MV "SAIGA" refused, however, to sign the document despite the presence of his three lawyers Maîtres Richard Bangoura, Ahmadou Tidiane Kaba and Alpha Bacar Barry. Subsequently, negotiations were held between parties representing the various interests in the MV "SAIGA" and the authorities of the Republic of Guinea. Only on 27 February 1998, an agreement was reached and the captain of the MV "SAIGA" signed the deed of release on 28 February 1998. The MV "SAIGA" could consequently leave Conakry the same day.

As stated in the letter of the Minister of Justice of the Guinean Government to the Guinean Agent of 9 March 1998

Annex XIII

no agreement was entered between the Government of Guinea and the owner or the master of the MV "SAIGA" before the protocol in form of the deed of release had been signed. The reason for the release was that Crédit Suisse obliged itself to pay 400.000,- US\$, if the Republic of Guinea produced two documents, namely a request of the Republic of Guinea signed by a minister and indicating the amount to pay and a certified copy of the full and final judgement of the Court of Appeal.

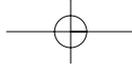
SECTION 2: JURISDICTION

46. The dispute on the merits of the M/V "Saiga" case is submitted to the Tribunal on behalf of Saint Vincent and the Grenadines as Applicant and Guinea as Respondent. The Agents of both parties agreed in the 1998 Agreement

"to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the M/V 'SAIGA'."

Point no. 2 of their 1998 Agreement stipulates that

"the written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects



of the merits (including damages and costs) *and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998*" (emphasis added).

47. Guinea had alleged in point no. 4 of its Statement of 30 January 1998 that the Tribunal had no jurisdiction in the proceedings for provisional measures because:

"The request of the Applicant concerns a dispute which is regulated in Article 297 para. 3 lit. a) of the Convention concerning the interpretation or application of the provisions of the convention with regard to fisheries."

The reason why Guinea maintained its right to submit the mentioned objection to the jurisdiction of the Tribunal is also made clear in the cited Statement (id. no. 4): The Tribunal had decided in its Judgement of December 4, 1997, (*inter alia* in paragraph 71) that for the purpose of the prompt release proceedings the action of Guinea could be seen "within the framework of article 73 of the Convention." As this statement of the Tribunal was contrary to the contentions of the Republic of Guinea, which at all stages of the dispute has consistently alleged (and is still alleging) that its actions against the M/V "Saiga" were not based directly on its fisheries laws and jurisdiction, Guinea was bound to expressly reserve this very objection to the Tribunal's jurisdiction in order not to be estopped from raising it in the proceedings on the provisional measures.

48. Notwithstanding its Judgement of 4 December 1997, however, the Tribunal stated in paragraph 30 of its Order of 11 March 1998 on Provisional Measures:

"[. . .] that in the present case article 297, paragraph 1, of the Convention, invoked by the Applicant, appears *prima facie* to afford a basis for the jurisdiction of the Tribunal."

Accordingly, for the purpose of its proceedings on provisional measures, the Tribunal considered the dispute as one concerning the exercise by Guinea of its "sovereign rights or jurisdiction" (article 297(1)) other than those relating to fisheries (article 297(3) of the Convention).

49. Guinea is not bound in the pending proceedings on the merits of the M/V "Saiga" case by the Tribunal's statement that article 297(1) of the Convention may appear *prima facie* an appropriate basis for its jurisdiction

in that particular dispute on provisional measures. Guinea is alleging in the present proceedings, as will later be explained in detail,¹ that it took enforcement actions against the M/V "Saiga" on the basis of its rights and jurisdiction which are not expressly attributed to it by the Convention as "sovereign", as it is required in article 297(1) of the Convention.

Therefore the basis for the International Tribunal's jurisdiction on the merits of the dispute is the 1998 Agreement of the parties.

SECTION 3: ADMISSIBILITY

Section 3.1 Guinea's right to contest the admissibility

50. In case the International Tribunal has jurisdiction, it does not necessarily follow, however, that the claims advanced by Saint Vincent and the Grenadines are automatically admissible for the purpose of the present proceedings. The distinction between the admissibility of State claims before an international tribunal from the jurisdiction on the one hand and the merits on the other hand is generally recognised in international law. Professor *Brownlie*, for instance, rightly observed in his treaties on international law:²

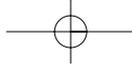
"An objection to the substantive admissibility of a claim invites the tribunal to reject the claim on a ground distinct from the merits – for example, undue delay in presenting the claim. In normal cases the question of admissibility can only be approached when jurisdiction has been assumed, and issues as to admissibility, especially those concerning the nationality of the claimant and the exhaustion of local remedies, may be closely connected with the merits of the claim."

The mentioned distinction is also adopted in article 97(1) of the Rules.

51. Guinea submits that it is not precluded by article 97(1) of the Rules from raising all legally possible objections against the admissibility of the claims in the present proceedings. As stated by Order of the Tribunal of 20 February 1998, the pending dispute is submitted to the Tribunal pursuant to article 287(4) of the Convention on the basis of the 1998 Agreement of the parties. In accordance with article 97(7) of the Rules, the

¹ See paras. 109–117 of this Counter-Memorial.

² Ian Brownlie, *Principles of Public International Law*, 4th Edition, Oxford 1990, p. 477.



1998 Agreement implies that an objection as to the admissibility of the case shall be heard and determined within the framework of the merits.

52. Guinea advances the following arguments for the afore-mentioned submission:

First, concluded by exchange of letters between the Agents of the parties, the 1998 Agreement is based upon a proposal made by the Agent of the Respondent in his letter of 20 February 1998. Guinea did not waive any objection as to the admissibility of claims, neither was there any reason for any such waiver.

Second, the purpose of the 1998 Agreement, namely choosing the proceedings before the Tribunal instead of “arbitration in accordance with Annex VII” for the settlement of the dispute, excluded any such waiver. The 1998 Agreement establishes that the Government of the Republic of Guinea “agrees to *transfer*” (emphasis added) the arbitration proceedings instituted by Saint Vincent and the Grenadines through its Notification of 22 December 1997 to the Tribunal. Hence the dispute as a whole has been transferred to the Tribunal while no waiver as to any objection to the admissibility was agreed.

Third, the reference in point no. 2 of the 1998 Agreement relating to “the objection as to jurisdiction raised in the Government of Guinea’s Statement of Response dated 30 January 1998” constitutes an isolated reservation concerning the *jurisdiction* of the Tribunal, which indicates that other objections relating to the jurisdiction should not be raised. In a letter of 29 January 1997 from Mr. *Howe*, Counsel for the Applicant, (Annex I) the respective clause still reads

“3. the proceedings be limited to a single phase dealing with all aspects, including the merits and any jurisdictional issues that may arise.”

It does not permit any conclusion *e contrario* that objections as to the admissibility have been waived by Guinea.

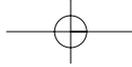
Fourth, the quotation and point no. 2 of the 1998 Agreement clearly reveal the intention of the parties that the Tribunal should deal with *all aspects* of the dispute in *a single phase* of the proceedings. As provided in article 97(7) of the Rules, this single phase shall include all aspects of the dispute, such as the reserved objection to the jurisdiction and aspects of the admissibility, in the framework of the merits.

53. As a subsidiary argument Guinea submits that she is not precluded from raising objections to the admissibility of the claims at the present stage, because it is for her to decide whether or not such objections should be

raised as formal preliminary objections the decision upon which is requested before any further proceedings on the merits.³ Besides, Guinea contends that the period of 90 days "from the institution of the merits" provided in article 97(1) of the Rules would not expire before 16 October 1998. Point no. 1 of the 1998 Agreement stipulates that the dispute shall be deemed to have been submitted to the Tribunal on 22 December 1997. This *ex post* determination of the date, at which the proceedings were deemed to be instituted, had no effect on the time-limits for the pleadings fixed by the Tribunal in its Order of 23 February 1998. Neither did it affect the rights of the parties to raise objections as to the admissibility.

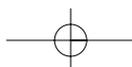
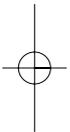
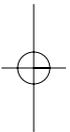
54. The proceedings were actually instituted in accordance with the initial time-limits through the submission of the Memorial filed by the Applicant on 19 June 1998. Before that date the Respondent had no possibility to pronounce himself on the dispute. The 90 days period provided for an objection to the admissibility under article 97(1) of the Rules originally would have expired on 18 September 1998, the date fixed for the filing of the Counter-Memorial. When, upon an agreement of the parties, the Tribunal ordered an extension of the time limit for the Counter-Memorial until 16 October 1998, also the time limit for submitting objections as to the admissibility deemed to be implicitly extended because otherwise the Respondent would have been deprived of essential rights of procedure.
55. In accordance with the aforementioned, certain procedural issues relating to the admissibility of the claims advanced by Saint Vincent and the Grenadines have to be addressed before dealing with the substance of these claims. As it will be elaborated in the following, Guinea contests in particular: First, the nationality of the M/V "Saiga"; second, the right of diplomatic protection concerning foreigners; third, the lacking exhaustion of local remedies. Because not every reason to object to the admissibility relates to all claims submitted by the Applicant, these reasons have to be elaborated in the mentioned order.

³ See for example Thirlway, *Preliminary Objections*, Encyclopaedia of Public International Law, Vol. 1, 1987, p. 180.



Section 3.2 Objection to the admissibility of the claim relating to the flag State’s freedom of navigation and/or other internationally lawful uses of the sea because of the missing “genuine link” (article 91(1) of the Convention)

56. According to submission no. (1) in its Memorial (p. 81), the Applicant claims that Guinea’s enforcement actions against the M/V “Saiga” violated the right, both of Saint Vincent and the Grenadines *and of ships flying its flag*, to enjoy the freedom of navigation and other internationally lawful uses of the sea related to these freedoms set forth in articles 56(2) and 58 and related provisions of the Convention. For the reasons elaborated in the following, Guinea alleges that the mentioned claims are not admissible. It should be noted that observations on the freedom of navigation made in this section apply, *mutatis mutandis*, also to other internationally lawful uses of the sea relating to navigation.
57. To begin with, the freedom and right of navigation and related uses of the sea provided in the Convention are freedoms, rights and uses of *States* (in contradistinction to *ships*). This is made clear in the relevant provisions of the Convention: Pursuant to article 58(1) “States” enjoy the freedom of navigation in the exclusive economic zone; article 58(3) stipulates that “States” have to take due regard of the rights and duties of the coastal State; according to article 87(2) the freedoms of the high seas shall be exercised by all “States” with due regard for the interests of other “States”; and every “State” has the right of navigation pursuant to article 90.
58. Consequently *ships* on the high seas or in the exclusive economic zone of another State enjoy the right and freedom of navigation and related uses of the sea only on the basis of the domestic law of their flag State. A claim based on an alleged violation of their right to navigate and related uses, as it is also submitted by the Applicant, is according to article 295 subject to the exhaustion of local remedies (see below section 3.5). Therefore the observations and allegations following in this section (3.2) are confined to the Applicant’s submission that *its own* freedom of navigation and related uses are violated.
59. Pursuant to article 58(1) of the Convention the flag State enjoys the freedom of navigation referred to in article 87 in the exclusive economic zone. Article 58(2) refers additionally to articles 88 to 115 and other pertinent rules of the Convention. Article 90 provides in particular the right of every State “to sail ships flying its flag” and, concomitantly with this, according to article 92(1), 1st sentence, the ship shall be subject to the “exclusive jurisdiction” of the flag State in that zone. The right of navigation (article 90)



and the status of the ship (article 92(1)) relate only to ships having the nationality of the flag State. Pursuant to article 91(1), 2nd sentence, ships have the nationality of the State whose flag they are entitled to fly. The provision proceeds in its 3rd sentence:

“There must exist a genuine link between the State and the ship.”

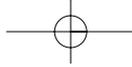
60. Although the requirement of such link set forth in article 91(1), 3rd sentence, of the Convention is not new to the law of the sea, both the concept of “genuine link” and the legal consequences of its absence are still under discussion in international law of today. The said requirement was already provided in the 1958 Convention on the High Seas,⁴ article 5(1), 3rd sentence, of which reads:

“There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag” (emphasis added).

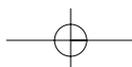
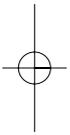
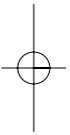
The second part of the article 5(1) of the 1958 Convention quoted in italics here is not maintained in article 91(1) of the 1982 Convention. Instead article 94 regulates the duties of the flag State concerning its jurisdiction and control in administrative, technical and social matters separately.

61. From this separation of the half-sentences of article 5(1) of the 1958 Convention in the 1982 Convention follow two consequences for an interpretation of the concept of “genuine link”: First, the very fact that the requirement of a genuine link is maintained in article 91(1), 3rd sentence, of the Convention reveals that the concept has maintained a specific function for the registration of ships, because one cannot presume that the 3rd sentence of article 91(1) is redundant. The requirement of a genuine link between the flag State and the ship qualifies the right of every State provided in article 91(1), 1st sentence, of the Convention to “fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag”. In this respect, the function of the genuine link is to establish an international minimum standard for the registration of ships, certainly an important function in a time of increasing numbers of open registers.

⁴ UNTS Vol. 450, p. 82.



62. Second, despite their systematic separation from the genuine link in the text of Convention, the duties of the flag State nevertheless determine the concept of genuine link. This concept gains its contents and legal meaning only in connection with the said duties: The necessary link between the flag State and the ship is only then a “genuine” one, when it enables the State to comply with its international obligations relating to the ship. These obligations have been considerably specified and extended in article 94 and other provisions of the 1982 Convention as against the 1958 Convention.
63. From the conception of the “genuine link” follows that a flag State can only then effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as required under article 94(1) of the Convention, when it can exercise appropriate jurisdiction and control also over the *owners* of the ships. In the case of a bareboat charter, *mutatis mutandis*, control is necessary over the charterer or operator. This results from several provisions of the Convention: For instance, article 94(4)(a) obliges the flag State to survey the ships flying its flag. Surveying the ships by a qualified surveyor in the flag State and abroad is a necessary but not a sufficient condition for an effective exercise of the flag State’s jurisdiction and control. In order to take action necessary to remedy the situation if, for example, a ship flying its flag would not conform with its rules and regulations on manning of ships, labour conditions and training of crews as provided in article 94(3), the flag States must have jurisdiction over the owner or operator of the ship as well. Otherwise its administrative and/or criminal sanctions, if necessary, would be practically ineffective.
64. Moreover, the duties of the flag State set forth in article 94 are not the only ones of interest in this context. The Convention provides in article 217 additional obligations in environmental matters, to which the flag State can only live up if it is exercising effective jurisdiction and control over the shipowner or operator as well: The flag State shall provide for the effective enforcement of rules, standards, laws and regulations concerning the protection of the marine environment, “irrespective of where a violation occurs” (article 217(1), 2nd sentence). In case of a violation it shall, where appropriate, institute proceedings (article 217(4)) including penalties (article 217(8)), or enable such proceedings upon request of another State (article 217(6)). Again jurisdiction over the Master and crew of the ship, especially if they are foreigners like in the case of the M/V “Saiga”, appears by no means sufficient for the exercise of these obligations.
65. The foregoing does not mean, however, that the requirement of a genuine link necessarily would exclude all kinds of so-called “open registers”



entertained by States. But it means that every shipping register has to conform with certain basic conditions of the genuine link. According to what has been mentioned before with respect to the legal obligations of the flag State under articles 94 and 217 of the Convention, a basic condition for the registration of a ship is that also the owner or operator of the ship is under the jurisdiction of the flag State. Nevertheless international law, no doubt, leaves it to the flag State to determine the basis of this jurisdiction which can be, for example, nationality or residence or domicile of the owner or operator of the ship.

66. In a line with this, Judge *Jessup* observed in his Separate Opinion to the *Barcelona Traction Case*:⁵

“If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognise the asserted nationality of the ship.”

Although the diplomatic protection for corporations was at issue in this case, the quoted observation can be considered as a valid statement of what international law is still requiring as a minimum standard concerning the genuine link of ships. In the same vein the 1986 United Nations Convention on Conditions for Registration of Ships⁶ provides the ownership principle as one option for registration in its article 8(2). The provision reads:

“Subject to the provision of article 7, in such laws and regulations the flag State shall include appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. The laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag.”

Adopted under the auspices of UNCTAD in order to ensure or strengthen the genuine link and in order to exercise effective jurisdiction over ships the 1986 Convention has not entered into force as yet. But this does not impair its worth as an example for the general view that the flag State must

⁵ I.C.J. Reports 1970, p. 188 para. 46.

⁶ UN Doc. TD/RS/CONF/23 (13 March 1986); also in: International Legal Materials, Vol. 26 (1986), p. 1229.

exercise effective jurisdiction and control not only over the ship, but also over its owner or operator.

67. Another question is that of the legal consequences following from the lack of a genuine link between the flag State and the ship. As observed by Judge *Jessup* in his Separate Opinion to the *Barcelona Traction* Case quoted above, another State is not bound to recognise the asserted nationality of the ship. Accordingly the coastal State is equally not bound to recognise the asserted right of navigation of such ship in its exclusive economic zone. As a procedural consequence it may hence contest an asserted violation of this right as inadmissible in a dispute submitted to the Tribunal, because only such claims are admissible in the pending proceedings before the Tribunal which have a valid basis in international law.
68. As regards the pending dispute, this means: Without a genuine link between Saint Vincent and the Grenadines and the M/V “Saiga”, the Applicant’s claim concerning a violation of its right of navigation and the status of the ship is not admissible before the Tribunal *vis-à-vis* Guinea, because Guinea is not bound to recognise the Vincentian nationality of the M/V “Saiga”, which forms a prerequisite for the mentioned claim in international law.
69. Guinea alleges that the registration of the M/V “Saiga” under the flag of Saint Vincent and the Grenadines does not meet the condition of an effective jurisdiction of the flag State over the shipowner forming an essential condition of the genuine link under article 91(1) of the Convention. The M/V “Saiga” was owned at the relevant time by the *Tabona Shipping Co. Ltd.* of Nicosia, Cyprus, and was chartered by a company which is domiciled in Geneva, Switzerland. This is in conformity with the “Ownership Requirements” for the registration of ships issued by the Maritime Administration of Saint Vincent and the Grenadines according to which

“A ship may be registered if it is owned by:

- Any body corporate, partnership or other association of individuals registered according to law in any foreign country, provided that, where the main office is situated outside St. Vincent, a registered agent in St. Vincent is appointed” (Information issued by the Maritime Administration, page 1).⁷

⁷ See Annex 5 of the Memorial.

It is submitted that a flag State cannot effectively fulfil its obligations under articles 94 and 217 of the Convention if it has jurisdiction only over a "registered agent", who could not bear any administrative or criminal responsibility for the ship, instead of jurisdiction over the shipowner.

70. This deficiency concerning an effective jurisdiction of the flag State is further illustrated by the following information from the Saint Vincent and the Grenadines Maritime Administration:

"There are no nationality requirements for officers and crew serving on St. Vincent vessels although a priority is expected to be given to Vincentian nationals" (*id.*, page 4, Manning and Certification).

According to the "standard crew agreement" issued by the Saint Vincent authorities the employment contract is "between the master and the seafarer and not between the employer and the crew" (*id.*, page 4, Employment Conditions).

"When deficiencies are found, Owners are requested to put their vessel into a safe operating condition as soon as possible" (*id.*, page 7, General Information).

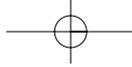
71. Guinea further alleges that it is not estopped to contest the admissibility of the claims in the dispute on the merits on the grounds that the genuine link is missing between the M/V "Saiga" and Saint Vincent and the Grenadines. Because of their accelerated nature, the foregoing proceedings on the prompt release of the vessel and on provisional measures were not appropriate to raise the issue of the missing genuine link at an earlier stage of the dispute before the Tribunal.

Section 3.3 Objection to the admissibility of the M/V "Saiga's" claim relating to the right of navigation because of the missing genuine link (article 91(1) of the Convention)

72. The Republic of Guinea contests the admissibility of the claim that its enforcement actions violated the right of the M/V "Saiga" "to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation"⁸ in connection with the claim that "Guinea is liable for damages as a result of the aforesaid violation".⁹ It

⁸ Memorial, page 81, Submission no. (1).

⁹ Memorial, page 82, Submission no. (8).



should be noted in this context that the “right of a ship”, as in this case the alleged right of the M/V “Saiga”, is an ancillary term which indicates the respective rights of the shipowner, because ships are no subjects of law. The reason for this objection is again the missing genuine link between the M/V “Saiga” and Saint Vincent and the Grenadines as expounded in the paragraphs 22–25 above, to which it is referred here.

Section 3.4 Objection to certain claims because of the nationality of the aggrieved persons

73. The Republic of Guinea submits that certain claims advanced by Saint Vincent and the Grenadines could not be entertained by the Tribunal because the rights the violation of which is alleged are held by foreigners. To begin with, these are claims relating to personal injury and damage suffered by the Master and crew members of the M/V “Saiga” through direct actions of the Guinean authorities during the detention of the ship or later through alleged omissions of the authorities while the ship was in the port of Conakry.
74. No State may claim protection of persons in international law who are not its own nationals. In the case pending on the merits before the Tribunal, the Applicant asserts protection before the Tribunal for all crew members and for the owners of ship and cargo. It is not in dispute here that none of these persons are nationals of Saint Vincent and the Grenadines.
75. There are, however, certain exceptions to the mentioned rule one of which is allegedly the right of the flag State to protect foreigners serving on merchant vessels flying its flag. But a careful scrutiny of international decisions and State practice undertaken in legal writing revealed that the predominantly American endeavours to protect aliens on vessels flying the American flag related in several cases to the special situation that the foreign seafarers had declared their intention to become American citizens.¹⁰ While most of these decisions and the State practice are of an elder date, the US Government took another position in the 1930s. It contended in the *I’m Alone* Case that a claim submitted by Canada on behalf of three French citizens belonging to the crew of the British schooner under Canadian registry *I’m Alone*, who suffered damage through the sinking of the ship,

¹⁰ See A. D. Watts, *The Protection of Alien Seamen*, International and Comparative Law Quarterly, Vol. 7 (1958), pp. 691–697.

should not be recognised or given effect in the proceedings of that case.¹¹ Thus the mentioned writer concluded:

“Fifth, the right can be taken to mean that a State may protect alien seamen as such, with full knowledge of their status as aliens. On the basis of the material which has been considered (but which is not necessarily exhaustive) no firm conclusion that such right exists is possible and the matter must remain one of doubt.”¹²

76. Of greater relevance for the pending dispute appears to be the reply of the Canadian Government in the *I'm Alone* Case: It contended

“as regards the individuals of French nationality, that the claim was not on behalf of any individual as such; it arose out of damage to a vessel of Canadian registry, and the damages in question were simply part of the damages resulting from her illegal sinking. There was also a plea that when a claim was on behalf of a vessel, members of the crew were to be deemed, for the purpose of the claim, to be of the same nationality as the vessel.”¹³

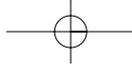
Yet, unlike in the *I'm Alone* Case, the claims asserted by the flag State relating to personal injury and damage suffered by crew members of the M/V “Saiga” could not be considered as damage of the ship and hence could not be made on behalf of the ship but of the individuals themselves. Although this damage was caused by actions undertaken in the course of the detention of the ship, it did not result from the detention itself but from other actions taken by Guinean authorities on the occasion of the detention. Moreover, in contradistinction to the illegal sinking of the *I'm Alone*, the detention of the M/V “Saiga” was a legally permissible action (as it will be shown below). Apart from this, damage allegedly suffered later in the Port of Conakry obviously did not ensue from the detention.

77. This is even more readily apparent with respect to the Applicant’s claim for returning the equivalent in US Dollars of the discharged oil (Memorandum, page 82, Submission (8)). The gas oil cargo belonged to a company either situated in Switzerland or in Senegal, in any case a foreign legal

¹¹ See the contentions quoted by Watts, *ibid.*, at page 697–698.

¹² Watts (note 10 above), page 711. On the other hand, Schwarzenberger referring to cases involving the United States held: “Admittedly, these cases are not conclusive evidence that the right asserted by the United States does not exist”; Georg Schwarzenberger, *International Law*, 3rd Edition, (1957), page 594.

¹³ Claim of the British Ship “I'm Alone” (1935), Document V, page 12; here quoted after Watts (note 10), page 698.



entity that is neither established nor domiciled in Saint Vincent and the Grenadines. The discharging order and subsequent confiscation of the cargo neither coincided temporarily with the detention of the M/V “Saiga”, nor were their economic effect, considering the value of the gas oil, marginal to it. Legally these actions did not serve the purpose of the detention, nor were they cogent legal consequences of it. Instead the discharging order of the Guinean customs authorities and the confiscation order contained in the decision of the Cour d’Appel of Conakry of 3 February 1998 were separate legal actions which are independent from the detention order concerning the ship.

78. For the reasons set forth in the foregoing paragraphs, Guinea submits that claims alleged by the Applicant with respect to personal injury and damages suffered by foreign crew members and to the confiscation of the gas oil cargo of the M/V “Saiga” are not admissible in the dispute on the merits pending before the Tribunal.

Section 3.5 Further objection to the admissibility of claims relating to personal injury, losses or damages of private persons because of the local remedies rule (article 295 of the Convention)

79. The Republic of Guinea further contests the admissibility of certain claims espoused by Saint Vincent and the Grenadines in the interest of individuals or private entities, because these individuals or private entities have not exhausted the local remedies available to them in Guinea. The requirement of the so-called “local remedies rule” is provided in article 295 of the Convention which reads:

Article 295

Exhaustion of local remedies

“Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.”

In contrast to proceedings on the prompt release of vessels and crews under article 292 of the Convention and on provisional measures under article 290(1) relating to the Applicant’s own rights, article 295 of the Convention has to be taken into account in the proceedings on the merits of a dispute. The parties to this dispute have not agreed to exclude the local remedies rule in their 1998 Agreement, as it already has been stated (see above section 3.1 of this Counter-Memorial). That a plea concerning the

exhaustion of local remedies must be regarded as directed against the admissibility of the Application has been expressly observed by the International Court of Justice in the *Interhandel* Case.¹⁴

80. Saint Vincent and the Grenadines has alleged the following claims in the interest of individuals or private entities contending the violation of these rights and ensuing liability for damages or compensation for loss:

1. The right of the M/V "Saiga" "to enjoy freedom of navigation and/or internationally lawful uses of the sea related to the freedom of navigation" (Memorial, page 81, Submission (1)).
2. Damages sustained by the ship and personal injury suffered by its Master and crew resulting from Guineas enforcement actions against the M/V "Saiga" (*id.*, page 82, Submission (8)).
3. Return of the equivalent in US Dollars for the discharged gas oil cargo (*id.*, page 82, Submission (7)).

These claims are based on alleged violations of a right of the shipowner to freedom of navigation (no. 1) and of damage to private property and to the health of individual crew members (no. 2) as well as on compensation for confiscation of the gas oil which belonged to the charterer (no. 3).

81. The local remedies rule, however, does not apply to claims which are primarily based on a direct breach of international law. The claims enumerated in the preceding paragraph may well have different foundations in domestic law, but they nevertheless have in common that all of them are based on rights of individuals and private legal entities, whereas none of them relates to or is based upon a right of the flag State itself. Neither do these private rights constitute an integral part of the right of the flag State. Although they are asserted in connection with actions taken by the Guinean authorities against the M/V "Saiga", they are nevertheless legally separate and independent from any violation of international law.

82. However, a violation of the freedom of the *ship* to navigate appears to be necessarily incidental to a violation of the flag State's freedom of navigation alleged by the Applicant. But, apart from the different nature of domestic law as against international law, these rights are of completely different contents and purposes: The flag States has a right to sail ships under its flag and subject to its exclusive jurisdiction,¹⁵ whereas the ship itself (*i.e.* the shipowner or operator) enjoys the freedom to navigate.

¹⁴ I.C.J. Reports 1959, p. 26.

¹⁵ See above para. 59 of this Counter-Memorial.

Besides that, stopping, searching and detaining a ship would not necessarily cause damage and injuries to the vessel and crew so that, as made clear before, the asserted violations of private rights depend upon separate actions.

83. As to the *cargo*: Its owner is not identical with the shipowner of the M/V “Saiga”. It had been under the flag State’s jurisdiction as long as it remained on board the ship. But this link had been severed before a claim to compensation could arise, when the gas oil was discharged in the Port of Conakry on 12 November 1997. The administrative order to discharge the gas oil in Conakry and the subsequent Court order confiscating the cargo were issued under the territorial jurisdiction of Guinea. Although the M/V “Saiga” was not voluntarily in the Port of Conakry, Guinea could exercise its territorial jurisdiction over the ship, its crew and the cargo while it was in port because, as it is alleged and will be stated below (see para. 115), the detention of the ship was in conformity with international law. Besides that, taking the value of the gas oil into account, the alleged violation of the flag State’s right to navigation is by no means preponderant to the claim concerning the cargo. Therefore the claim to compensation concerning the gas oil cargo is separate and independent from the Applicant’s claims relating to its right of navigation and its jurisdiction over the ship. In contradistinction to the latter, it is not primarily based on a direct breach of international law.
84. Apart from the genuine link between the flag State and the ship required under article 91(1) of the Convention, which has already been referred to (see section 3.2 of this Counter-Memorial), international law requires also a link between the ship (or, *mutatis mutandis*, an aircraft), its crew members and cargo, on the one hand, and the coastal State, on the other hand, as a condition for an application of the local remedies rule. In the same vein, the Government of Israel stated before the International Court of Justice in the case concerning the *Aerial Incident of July 27, 1955* (Israel v. Bulgaria):¹⁶

“I submit that all the precedents show that the [exhaustion of local remedies] rule is only applied when the alien, the injured individual, has created or is deemed to have created, a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of

¹⁶ Pleadings, Oral Arguments, Documents, pages 531–532; I.C.J. 1959.

this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there – I believe that covers the majority of the cases – or by virtue of his having made some contract with the government of that State, such as cases involving foreign bondholders; and there may be other instances.”

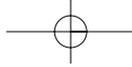
85. It is alleged here that such link has been established by the M/V “Saiga”, when the ship came voluntarily into the exclusive economic zone and the contiguous zone of Guinea for the purpose of bunkering foreign fishing vessels. The M/V “Saiga” was chartered especially for bunkering activities off the coast of West Africa, including bunkering in the mentioned zones of Guinea, and its gas oil cargo should serve, and actually did serve, this purpose. The ship did not merely sail in transit through these zones but entered them in order to conduct certain activities of an economic nature within the zones of Guinea. In short: the ship had established a voluntary, conscious and deliberate connection with the coastal State. In the light of the coastal State’s jurisdiction over its exclusive economic zone, a presence of the ship in its territorial sea or internal waters deems to be no longer necessary in today’s international law – as, for instance, a foreign fishing boat in the exclusive economic zone would readily make clear. It has to be considered a sufficient link, when the ship voluntarily and intentionally comes into this zone for economic purposes. As Guinea was exercising its jurisdiction over the said zones together with its right of hot pursuit (article 111 of the Convention), when it stopped and detained the M/V “Saiga”, there existed a sufficient connection between the ship and the coastal State concerned.

86. Guinea submits that the Mr. *Mikhailo Orlov*, Master of the M/V “Saiga”, did not exhaust the local remedies available against the Judgement of 3 February 1998 of the Chambre Correctionnelle of the Cour d’Appel de Conakry¹⁷ issued on his appeal against the Judgement of the Tribunal de Première Instance du Conakry of 17 December 1997.¹⁸ As correctly stated in paragraph 64 of the Memorial, the Cour d’Appel

- ruled that the Master of the ship was guilty and convicted of the events of which he was accused (*i.e.* smuggling offences);
- sentenced him to pay the sum of 15,354,024,040 GF as a fine to the benefit of the Guinean State; and
- ordered the confiscation of the vessel “Saiga” and its cargo as a guarantee of the payment of the amount of the penalty.

¹⁷ Annex 30 of the Memorial.

¹⁸ Annex 29 of the Memorial.



The ruling of the Cour d'Appel was in application of article 111 and 242 of the 1982 Convention, articles 361 and 363 of the Code Pénal Guinéen, 40 of the Code de la Marine Nationale Guinéenne, 34, 316 and 317 of the Code des Douanes and the Law No. 94/007/CTRN of 15 March 1994, articles 1 and 8.

87. The convicted Master of the M/V “Saiga” had the right of appeal within 6 days after the passing of the Judgement of 3 February 1998 of the Cour d'Appel to the Cour Suprême of Guinea. In accordance with article 266 of the Code des Douanes matters of customs are subject to review by the Cour Suprême. The Cour Suprême decides pursuant to article 4 of the Loi organique L/91/008 of 23 December 1991

Annex XIV

(hereinafter: Loi organique) which reads:

“Article 4: La Cour Suprême est juge de l'excès de pouvoir des autorités exécutives.

Elle se prononce sur les pourvois en cassation pour incompétence ou violation de la loi, dirigés contre:

- les arrêts et jugements rendus en dernier ressort par toutes les juridictions;
- les décisions rendues en dernier ressort par les organismes administratifs à caractère juridictionnel; . . .”

However, pursuant to article 79 of the Loi organique the Cour Suprême cannot review the facts of a case. But in accordance with article 80 of the Loi organique, it can set aside any judgement of the Cour d'Appel in criminal law cases because of a violation of law, including the fundamental rights guaranteed in the Guinean Constitution of 1958 (Loi Fondamental)

Annex XV

Indicating the violated laws it remits the case for new decision to the same court with another composition or to another court of the same order.

88. Being an effective right in criminal matters, the mentioned right of appeal to the Cour Suprême was readily available to Mr. *Orlov*. Failing to appeal to the Cour Suprême, the Master of the M/V “Saiga” has forfeited any right to diplomatic protection. Accordingly Guinea alleges that, because of the non-exhaustion of local remedies available in Guinea, claims relating to damages of the Master are not admissible before the Tribunal.

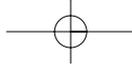
89. The shipowners of the M/V "Saiga" and the owners of the confiscated gas oil cargo are natural and juridical persons responsible in private law in accordance with article 302 and 303 of the Code des Douanes. They have the same right of appeal to the Cour Suprême against the Cour d'Appel's Judgement of 3 February 1998 as the convicted Master of the ship. However, in accordance with general principles of law one could assume that the period of appeal would not commence, before the mentioned Judgement has been served to them. According to article 301 of the Code des Douanes, owners of goods that were unlawfully seized have a right to an indemnity of 1% of the value per month from the time of the seizure until the release of the goods. Guinea submits that also for to claims relating to loss of damages with respect to the M/V "Saiga" and/or the cargo, the local remedies available in the Guinea have to be exhausted, before these claims are admissible in this dispute.

Section 3.6 Conclusions concerning the admissibility

90. In conclusion Guinea submits that, for the reasons stated, the following claims are not admissible in the dispute pending before the Tribunal:
- The claim relating to the flag State's freedom of navigation and/or other internationally lawful uses of the sea, because of the missing genuine link (article 91(1) of the Convention) (paras. 56–71 of this Counter-Memorial);
 - the claim relating to the M/V "Saiga's link (para. 72 of this Counter-Memorial);" right of navigation, also because of the missing genuine [link]
 - claims as to personal injury, damages and losses including the cargo of private persons, because of general international law (paras. 73–78 of this Counter-Memorial), the local remedies rule pursuant to Article 295 of the Convention (paras. 79–89 of this Counter-Memorial), and the missing genuine link.

SECTION 4: LEGAL ARGUMENTS

91. Saint Vincent and the Grenadines alleges in its Memorial that Guinea violated international law through its enforcement actions against the M/V "Saiga" and through a failure to release the vessel between 10 December 1997 and 28 February 1998 pursuant to the Tribunal's Judgement of 4 December 1997. The following legal arguments intend to show that these allegations are not founded. For this purpose, this section will in the first elaborate on the submission that Guinea, as coastal State, has prescriptive and enforcement jurisdiction over certain bunkering activ-



ities conducted in its exclusive economic zone (section 4.1) and in its contiguous zone (section 4.2). Thereafter it will deal with Guinea's enforcement actions purportedly undertaken outside its exclusive economic zone (section 4.3). Finally it will turn to the alleged delay in the release of the ship (section 4.4).

Section 4.1 Guinea's jurisdiction to regulate and control certain bunkering activities in its exclusive economic zone

92. The Applicant alleges in the Memorial¹⁹ that Guinea has violated the freedom of navigation and related rights under article 58 and related provisions of the Convention. In support of this view two different lines of reasoning are maintained by the Applicant²⁰ contending, first, that the Guinean customs and contraband laws do not apply in Guinea's exclusive economic zone and, second, that their application and enforcement beyond Guinea's territorial waters would be incompatible with the Convention, which is supposed to limit jurisdiction only to those matters expressly permitted by article 56(1) of the Convention. To begin with the second allegation, because this is of a more general nature, Guinea nevertheless contests both lines of argument for the reasons set forth below.

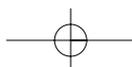
Section 4.1.1 Bunkering fishing vessels in the exclusive economic zone is not navigation (article 58(1), 1st alt., of the Convention)

93. Guinea has established its exclusive economic zone in conformity with Part V of the Convention. It is adjacent to its territorial sea of 12 nautical miles and has a breadth of 200 nautical miles extending from the Guinean baselines. In accordance with article 55 of the Convention, Guinea's exclusive economic zone is subject to a specific legal régime established in Part V of the Convention, under which the Respondent's rights and jurisdiction and the Applicant's rights and freedoms are governed by the relevant provisions of the Convention. This is not contested between the parties.²¹
94. What is contested, however, is the Applicant's view of the consequences following from this régime submitted in paragraph 104 of its Memorial, reading:

¹⁹ Memorial, section 3.2, para. 101; section 3.2.3, para. 138.

²⁰ Memorial, section 3.2, para. 105.

²¹ Memorial, para. 103.



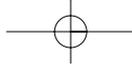
"104 With the establishment of the exclusive economic zone as a 'specific legal regime' under the Convention, maritime areas of what were previously high seas became subject to this new regime. St. Vincent and the Grenadines submits that *the pre-existing rights of states to exercise high seas freedoms* (as to which further below), *including bunkering, within an exclusive economic zone are unaltered, except where subject to express limits under the Convention*" (emphasis added).

Guinea alleges contrary to this submission, first, that refuelling ships at sea (*i.e.* "bunkering"), as it had been conducted by the M/V "Saiga", is not included in the high seas freedoms. And second, that the quoted submission reveals a fundamental misconception of the exclusive economic zone. As a zone with its own legal status (a zone *sui generis*), the exclusive economic zone is neither a part of the high seas nor the territorial sea. Uses of the sea with regard to which the Convention has not expressly attributed rights or jurisdiction in the exclusive economic zone to the coastal State do not automatically fall under the freedom of the high seas, otherwise article 59 would be redundant. Unlike an exclusive fisheries zone, the exclusive economic zone is not a special part of the high seas *minus* exclusive rights of the coastal State, as it has been alluded in the quotation.

95. Keeping this factual and legal situation in mind, one can determine the first issue as follows: Contrary to the Applicant's opinion that "bunkering is a freedom of navigation right",²² Guinea contends that the M/V "Saiga's" bunkering of fishing vessels *in the Guinean exclusive economic zone* is neither comprised by the freedom of navigation referred to in article 87 of the Convention, nor does it form any other internationally lawful use of the sea related to these freedoms, such as those associated with the operation of ships. It is not navigation of the M/V "Saiga" that is at issue in this case, but its commercial activity of off-shore bunkering in the Guinean exclusive economic zone. Article 58(1) of the Convention does not apply to the mentioned bunkering activities which caused Guinea to take measures against the M/V "Saiga", as it will be elaborated in the following.

96. The M/V "Saiga" supplied foreign fishing vessels in the exclusive economic zone on a contractual basis with gas oil as bunkers. The sale and delivery of fuel with a view to make profit is, without doubt, a commercial activity in particular if it is, like in the given situation, designed to continue for some time. Despite of its being conducted by means of a ship, bunker-

²² Memorandum, section 3.2.2 A, paras. 101, 115–120.



ing deems to be trade, not navigation. In other words: the M/V “Saiga” served as a movable gas oil bunkering station for the purpose of the gas oil trading business. The principal purpose of the tanker were the commercial bunkering activities whereby transportation of the gas oil was only a secondary aspect. Likewise, fishing vessels are determined for fishing and research vessels serve the purposes of marine scientific research, to mention but two other examples, where the law considers transportation and navigation as subsidiary.

97. When the Applicant is submitting in paragraph 117 of its Memorial that

“an activity or right ancillary or related to this freedom [*viz.* the freedom to navigate] is the freedom of a vessel flagged by one State to provide fuel to other vessels, including those flagged by other States”,

it fails to distinguish between the situation of the buyer and the seller of the fuel. Obtaining fuel, which is necessary to sail a ship, could reasonably be considered as ancillary or related to navigation, whereas providing fuel could not. The freedom to navigate, no doubt, can be exercised without providing fuel to other vessels. International law does not contain a “freedom of a vessel . . . to provide fuel to other vessels”.

98. The “right of navigation”, on the other hand, is generally defined in article 90 of the Convention as the right “to sail ships”, which clearly relates to the *movement* of ships. The “freedom of navigation” referred to in articles 87 and 58(1) means, subject to certain limitations, an unimpeded navigation (in the mentioned sense of a freedom of movement) and an exclusive jurisdiction of the flag State provided in article 92(1), 1st sentence, of the Convention. Notwithstanding the fact that the concept of a merchant ship²³ usually relates to its commercial purpose as well, which is transportation of passengers or cargo from one place to another, international law has at all times distinguished between navigation and the commercial activities of the shipping business.

99. There have been examples abound for the mentioned distinction since the earliest days of the law of the sea: Already *Hugo Grotius* dedicated different chapters of his ground-breaking dissertation *Mare liberum*²⁴ of 1609 to

²³ See in contrast the definition of warships in article 29 and the reference to “other government ships operated for non-commercial purposes” in article 31 of the Convention.

²⁴ Hugonis Grotii, “*Mare Liberum Dissertatio sive De jure quod Batavis competit ad Indicana commercia*”, quoted after the edition Amsterdam 1689.

the freedom to navigate,²⁵ on the one hand, and the freedom to trade²⁶ on the other. Thereby he adopted an earlier distinction put forward by *Vitoria*²⁷ between a right to communicate in the sense of movement (*ius communicationis*) and a right to conduct commerce (*ius commercii*). This distinction has been maintained since then in times of peace and war while the concept of the freedom of the seas has gradually been developed. For instance, the right of cabotage relates to coastal trade and trade with overseas territories, not to navigation itself. On the other hand, all kinds of passage rights, customary and modern, such as innocent passage through the territorial sea, archipelagic sea lanes passage, transit passage through straits used for international navigation, or the passage through international channels, are rights of navigation which do not include a right to trade while exercising the passage, unless the coastal State would allow otherwise. An embargo prohibits trading whereas a blockade prevents navigation.

100. In international litigation the mentioned distinction was at issue in a case concerning river navigation on the basis of the Convention of Saint Germain. Nevertheless the *Oscar Chinn* Case decided by the Permanent Court of International Justice in 1934²⁸ illustrates this distinction very well. The Belgian Government maintained before the Court:²⁹

“that a distinction must be drawn between the sphere of navigation and that of the management of national shipping. Whereas, in the former sphere, the riparian State is forbidden to encroach on freedom of navigation, its freedom of action in the latter sphere is not subject to restriction.”

And also the British Government, while distinguishing between the principles of “freedom of trade and freedom of navigation”, had “never contended that the impugned measures constituted an obstacle to the movement of vessels.”³⁰

The Court held:³¹

²⁵ Caput I: *Jure gentium quibusvis ad quovis liberam esse navigationem.*

²⁶ Caput VIII: *Jure gentium inter quovis liberam esse mercaturam.*

²⁷ Francisco de Vitoria, *De Indis noviter inventis*, Section III, Titul 1 No. 3 (1538/39).

²⁸ Permanent Court of International Justice, Judgement of December 12th, 1934, Series A/B, No. 63.

²⁹ *Ibid.* p. 82.

³⁰ *Ibid.* p. 83.

³¹ *Ibid.* p. 83.

“According to the conception universally accepted, the freedom of navigation referred to by the Convention [of Saint Germain] comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers.

From this point of view, freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also. *But it does not follow that in all other respects freedom of navigation entails and presupposes freedom of commerce.*

...

For this reason the Court – *whilst recognising that freedom of navigation and freedom of commerce are, in principle, separate conceptions* – considers that it is not necessary, for the purpose of the present case, to examine them separately.”

(Emphases added).

Judge *Anzilotti* proceeded in his Individual Opinion to the Judgement also from the distinction between “freedom of carrying goods” and the “freedom of movement of shipping” or “navigation in the strict sense of the word”.³²

101. In the line of the aforementioned practice and litigation, Guinea alleges that the mentioned distinction between the freedom to navigate and the freedom to trade should also be applied to the case pending before the Tribunal. There are several reasons for this:

First, the Guinean actions against the M/V “Saiga” were not taken because the ship was navigating in that zone, but because of its unwarranted commercial activities in the Guinean exclusive economic zone. Guinean authorities have at no time impeded the freedom of movement of foreign ships navigating in the exclusive economic zone of Guinea. Second, Guinean authorities strictly distinguish between supplying bunkers to fishing vessels in the Guinean exclusive economic zone and to other vessels navigating in transit through that zone. This distinction determines the draft Joint Decree No. A/98/. . ./MEF/MCIPSP/98 Relating to the activity of refuelling ships in the Republic of Guinea drafted by the Minister of the Economy and Finance and the Minister of Commerce, Industry and Promotion of the Private Sector.

³² *Indiv. Op. Anzilotti, ibid.* p. 111.

Annex XVI

Article 1 of the draft Joint Decree reads:

“The exercise of the activity of refuelling fishing boats and other vessels in transit to Conakry is subject to obtaining the approval to that effect from the Minister of Commerce, Industry and the Promotion of the Private Sector.”

Referring to “fishing boats and other vessels in transit to Conakry” in article 5 as well, the draft Joint Decree mirrors the Guinean practice not to submit other vessels in transit through Guinean waters to its laws and jurisdiction.

Third, as the actions of the Guinean authorities were only caused through bunkering of fishing vessels, at no time the international movement of vessels could have been curtailed, as it is wrongly alleged in paragraph 120 of the Memorial.

Fourth, it is of no relevance for this dispute, whether or not the freedom of navigation *on the high seas* included bunkering at all. The bunkering activities of the M/V “Saiga” took place in the *exclusive economic zone* and in the *contiguous zone* of Guinea, where the coastal State has certain sovereign rights and jurisdiction.

Fifth, the bunkering activities in the aforementioned zone affected the public order of Guinea, which will be elaborated below, whereas navigation *per se* would hardly affect the coastal State at all.

Therefore Guinea contends that the said bunkering activities of the M/V “Saiga”, which caused the Guinean actions, have to be distinguished in law and fact from navigation. Hence they are not covered by the freedom of navigation referred to in article 58(1) of the Convention.

Section 4.1.2 Neither is bunkering fishing vessels in the exclusive economic zone another internationally lawful use of the sea related to navigation (article 58(1), 2nd alt., of the Convention)

102. A further question is, whether or not the said bunkering activities of the M/V “Saiga” in the Guinean exclusive economic zone are deemed to be “other internationally lawful uses of the sea related to these freedoms [viz. navigation], such as those associated with the operation of ships” in the sense of article 58(1), second alternative, of the Convention. In general, off-shore bunkering being associated with the operation of ships could well be considered as another internationally lawful activity conducted by ships at sea whereby the gas oil bunkers serve as fuel for ships. Therefore,

although being not literally a use *of* the sea, refuelling, for instance, of ships in transit to another State through the exclusive economic zone would probably constitute a lawful use in the sense of the second alternative of article 58(1) of the Convention.

103. Notwithstanding that, the factual and legal situation is essentially a different one in the case of the M/V “Saiga”: The tanker was determined to service, *inter alia*, fishing vessels operating in the exclusive economic zone as well as the contiguous zone of Guinea. Shortly before the Guinean authorities took action, the M/V “Saiga” had actually discharged bunkers to the fishing vessels “Guiseppe Primo”, “Kriti” and “Eleni G.”, which is uncontested between the parties. For the purpose of this dispute on the merits, such bunkering operations in the exclusive economic zone, however, cannot be considered a lawful use of the sea related to *navigation*.
104. There are at least two important reasons for the aforementioned submission: First, off-shore bunkering is preponderately associated with the operation of fishing vessels and thus related to *fishing*, although it does not constitute fishing in itself. It is an ancillary activity for fishing vessels enabling them to proceed with fishing without calling at a port when being in need of fuel. Through obtaining fuel at sea, a fishing vessel can spend a longer time fishing on the fishing grounds and hence can catch a greater amount of fish, before it is bound to call at a port. Accordingly the coastal State has an interest to regulate offshore bunkering in its exclusive economic zone as an aspect of its fisheries policies. Therefore the Statement of purpose of the proposed Joint Decree on refuelling ships reads:³³

- safeguarding the customs or tax interests of the Public Treasury on oil products;
- reducing the cost of fuelling boats enabling them to make economics of scale. (Loss of time in coming to quay to fuel, difference in price);
- promoting fishing with a view to supplying the population with fish at reasonable prices.” (Annex XVI)

Second, the coastal State has also a considerable fiscal interest in regulating off-shore bunkering in its exclusive economic zone, as it is indicated in the first reason mentioned. Whereas customs revenues on oil

³³ Annex ## of this Counter-Memorial, p. 12. [Note by the Registry: As in original.]

products represent at least 33% of the total customs revenue destined for the Guinean Public Treasury,³⁴ and whereas only 10% of the fishing fleet operating in the Guinean exclusive economic zone is flying the Guinean flag,³⁵ customs revenues from fishing vessels flying foreign flags are an important fiscal resource for Guinea. Fishing vessels from the European Communities may land 80% of their catch per year in ports outside Guinea as laid down in Condition C on "Landing of catch" of the Annex to the Guinea-EEC Fisheries Protocol.³⁶ These vessels are saving customs duties and/or taxes through off-shore bunkering as well as bunkers because they need not call at a port in Guinea before their journey back to their home port or port of landing.

105. In conclusion, Guinea submits that bunkering fishing vessels in the Guinean exclusive economic zone is neither navigation nor another internationally lawful use of the sea related to navigation, such as those associated with the operation of ships. Therefore article 58(1) of the Convention does not apply to the M/V "Saiga's" off-shore bunkering activities concerning the said fishing vessels.

Section 4.1.3 Bunkering fishing vessels in the exclusive economic zone is not inherent to the sovereign rights of the coastal State (article 56(1)(a) of the Convention)

106. Guinea has consistently contended at all stages of the dispute concerning the M/V "Saiga" that it does not consider bunkering of fishing vessels in its exclusive economic zone *per se* as an exercise of its sovereign rights attributed to it for the purpose of exploring and exploiting, conserving and managing its living resources in the said zone pursuant to article 56(1)(a) of the Convention. Although the bunkering activities are ancillary measures of a considerable importance for the fishing vessels concerned, they constitute neither fishing nor conservation or management activities with respect to the living resources themselves.
107. As a consequence, articles of the Convention relating to fisheries laws and jurisdiction do not apply to the pending merits of the M/V "Saiga" Case. Guinea did not exercise its enforcement laws and jurisdiction pursuant to

³⁴ See Statement of purpose of the proposed Joint Decree (**Annex ##** of this Counter Memorial), p. 11. [*Note by the Registry: As in original.*]

³⁵ See Statement of Purpose of the proposed Joint Decree (**Annex ##** to this Counter-Memorial), p. 12. [*Note by the Registry: As in original.*]

³⁶ **Annex 9** to the Memorial, p. 162.

article 73(1) over the M/V “Saiga.” The ship was not “fishing in the exclusive economic zone” of Guinea, as required in article 62(4) of the Convention, and therefore the laws and regulations of the coastal State listed in the mentioned provision would be of no relevance for it. Neither would be the provision that the coastal State shall give due notice of its conservation and management laws (article 62(5) of the Convention).³⁷ In the same strand, the conclusions of the Arbitral Tribunal in the *La Bretagne* Case concerning the concept of “management” in article 56 of the Convention is of no relevance for this case pending before the Tribunal.³⁸ Dealing with the mutual fishing relations between Canada and France that dispute was concerned with the processing of catches aboard foreign fishing vessels.³⁹

108. Neither does Guinea contend that the economic activities employed by the M/V “Saiga” in its exclusive economic zone are “other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds” in the sense of article 56(1)(a) of the Convention. The activities envisaged in the mentioned provision are those constituting an exploitation and exploration of the zone itself and its natural resources, as the example of energy production indicates, whereas bunkering activities are of a different nature. They are business activities, as it has been elaborated above, for which the fishing vessels in the exclusive economic zone offer a particular market for selling the gas oil as bunkers. Although these activities are conducted with a view to fisheries and although they represent ancillary measures for the fishing vessels in the exclusive economic zone, they do not form an economic exploitation of the zone itself. In conclusion Guinea does not contend that bunkering the fishing vessels would constitute a part of its sovereign rights in its exclusive economic zone.

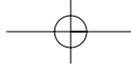
Section 4.1.4 Guinea is justified to exercise jurisdiction in order to protect its public interest in its exclusive economic zone

109. The alleged inapplicability of articles 58(1) and 56(1)(a) of the Convention to the M/V “Saiga’s” bunkering of the said fishing vessels in the Guinean exclusive economic zone gives rise to the question, whether the pending dispute should be resolved either in accordance with other rules of international law or pursuant to article 59 of the Convention. This

³⁷ Memorial, para. 134.

³⁸ Memorial, para. 133.

³⁹ International Law Reports, Vol. 82 (1990), p. 590, at pp. 592, 630.

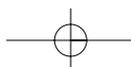


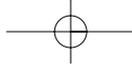
article provides certain legal standards for the resolution of a conflict between the interests of the coastal State and any other State on the basis of equity. The mentioned question, however, appears to be primarily of a theoretical nature because any solution should be an equitable one balancing the respective interests of the coastal State and other States and taking all relevant circumstance into account.

110. Although, in an obiter dictum to its Judgement of 4 December 1997, the Tribunal considered article 59 of the Convention as a possible way of solving the conflict,⁴⁰ Guinea alleges that this article is a provision of last resort. Accordingly it is applicable when other rules of international law, including customary law, do not apply to the pending dispute. Article 58(3) of the Convention, which precedes article 59, indicates that the coastal State has (prescriptive and enforcement) jurisdiction in its exclusive economic zone not only with regard to provisions adopted in accordance with the Convention but also to "other rules of international law in so far as they are not incompatible with this Part." In addition, the last operative sentence of the Preamble to the Convention affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."
111. Endorsing its aforementioned legal view, Guinea nevertheless reserves its right to submit, as a subsidiary argument, a solution on the basis of article 59 of the Convention. For the case that the Tribunal would not endorse Guinea's view, the Respondent already alleges now that a solution based on article 59 would reach essentially the same result as the one submitted hereafter.
112. Guinea alleges that it has an inherent right to protect itself against unwarranted economic activities in its exclusive economic zone that considerably affect its public interest. International law does not oblige any State to sustain detriment caused to it by foreign individuals or merchant ships under its very eyes. This principle played a role in the Corfu Channel Case,⁴¹ when the Agent of Great Britain was contending that a British minesweeping operation in the Albanian territorial waters was justifiable as an act of self-protection or self-help. However, the International Court of Justice did not endorse this argument because of the violation of the Albanian territory, but the Court did not refuse the principle itself. Rendering an action lawful that otherwise would be contrary to international

⁴⁰ Judgement of 4 December 1997, para. 58.

⁴¹ I.C.J. Reports 1949, p. 4, at p. 35; similar Judge *Alvarez* in his Individual Opinion, p. 47.





law, the same principle has been recognised as the doctrine of necessity in general international law. In this sense it has been suggested, for instance, by the former Special Rapporteur Mr. Roberto Ago in his eight report on State responsibility to the International Law Commission.⁴²

113. Especially in the realm of the law of the sea, the principle of self-help has been codified in the case of unauthorised broadcasting from the exclusive economic zone: Any State, where the transmission can be received or where authorised radio communication is suffering interference, can arrest the ship engaged in such broadcasting in accordance with articles 109(4) and 58(2) of the Convention in its exclusive economic zone. Furthermore the Convention recognises that, in the case of maritime casualties, the coastal State has the right to take and enforce measures beyond its territorial sea proportionate to the actual or threatened damage to protect its coastline or related interests, including fishing, from pollution or threat of pollution following upon the casualty as provided in article 221 of the Convention and customary and conventional international law.⁴³
114. Accordingly Guinea submits that it has an implied jurisdiction to take necessary and reasonable actions compatible with international law against activities of the kind the M/V “Saiga” had conducted in its exclusive economic zone. Under the domain of the mentioned principle, Guinea was not required to extend its laws upon its exclusive economic zone. These laws present only a domestic legal basis for its respective customs measures. Therefore, the allegations of the Applicant in paras. 106 to 113 of the Memorial that the Guinean customs and contraband laws did not apply in its exclusive economic zone miss the point.
115. Therefore Guinea submits that its actions against the M/V “Saiga” were lawful coastal State measures intended to protect its public interests consisting of its fisheries interests as well as its interests in customs matters against an infringement in its exclusive economic zone. These measures were in conformity with all requirements of self-help: Searching and detaining the ship was necessary because there were no other means to prevent it from further bunkering activities in the Guinean exclusive economic zone. In particular the Guinean authorities had to arrest the M/V “Saiga” on spot in order to obtain evidence for its unwarranted

⁴² Circumstances precluding wrongfulness, 5. State of necessity, Article 33 (UN Doc. A/CN.4/318/Add. 5–7), Yearbook of the International Law Commission 1980, Volume II, Part One, pp. 14, 51.

⁴³ 1969 Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

bunkering activities. A preceding exchange of views with the flag State would have been useless without clear evidence of the bunkering activities.

116. Moreover the measures were also reasonable. The important requirement of reasonableness, which already has been recognised in the North Atlantic Fisheries Case of 1910⁴⁴ and other international decisions,⁴⁵ needs some elaboration here. In this context Guinea is giving weight to the following circumstances and interests involved:

First, the effects of the M/V "Saiga's" bunkering activities upon the Guinean fiscal interests in its exclusive economic zone were by no means marginal as it has been mentioned above.⁴⁶ Second, the search and detention of the vessel were aiming at the commercial activities of the M/V "Saiga". They were not determined to interfere with the freedom of navigation in the Guinean exclusive economic zone. Guinea makes, as has been demonstrated, a subtle distinction between the supply of gas oil to ships in transit through the zone and to fishing vessels operating in the zone.⁴⁷

Third, the M/V "Saiga" knew that Guinea considered off-shore bunkering in its exclusive economic zone illegal and had already taken measures against foreign tankers at earlier occasions. This has been made clear by the declarations of Mr. Marc Albert Vervaet, Manager of the ADDAX and ORYX Group, relating to the tanker "Alpha-1",⁴⁸ notwithstanding the fact that Guinea does not share the legal views expressed in that declaration of 12 February 1998.

Fourth, the measures taken in order to stop the M/V "Saiga" and to search it were not excessive. They were necessary police measures of the Guinean customs authority, as it will be elaborated below.⁴⁹

117. In conclusion, Guinea could lawfully take measures against the off-shore bunkering activities of the M/V "Saiga" in its exclusive economic zone.

Section 4.2 Guinea's right to apply its customs laws in its contiguous zone

118. In the following subsection it is being contended that the M/V "Saiga" violated customs laws in the Guinean contiguous zone. For this purpose

⁴⁴ UNRIAA Vol. XI, p. 189.

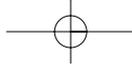
⁴⁵ *Barcelona Traction* Case, I.C.J. Reports, 1970, p. 48, para. 93; *La Bretagne* Arbitration (Canada/France), International Law Reports, Vol. 82 (1990), p. 590, at p. 631.

⁴⁶ See para. 101 of this Counter-Memorial.

⁴⁷ See para. 101 of this Counter-Memorial.

⁴⁸ See Annex 10 of the Memorial.

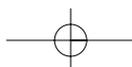
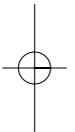
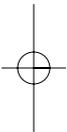
⁴⁹ See paras. 122–131 of this Counter-Memorial.



it will be shown that the bunkering of the fishing vessels “Guiseppe Primo”, “Kriti” and “Eleni G.” took place in the mentioned zone. Thereafter it will be elaborated that Guinea has a right to apply its customs laws in its contiguous zone, and finally reference will be made to the applicable Guinean laws.

Section 4.2.1 The bunkering took place in the Guinean contiguous zone

119. On 27 October 1997 between 04.00 and 14.00 hours, the M/V “Saiga” supplied gas oil as bunkers at point 10°25’03”N and 15°42’06”W to the “Guiseppe Primo” and the “Kriti” both flying the Italian flag and the “Eleni G.” flying the Greek flag. The mentioned point, which is indicated as point no. 5 in the map filed by the Applicant (Annex A1) is between 22.6 and 22.9 nautical miles in south-westerly direction from the uninhabited island of Alcatraz. These facts, which are also mentioned in paragraph 31 of the Memorial, are uncontested between the parties.
120. Before the background of these facts it is alleged that the bunkering of the fishing vessels at the mentioned point took place in the Guinean contiguous zone. Pursuant to article 5 of its Code de la Marine Marchande of 30 November 1995 (Annex 8) and in accordance with article 3 of the Convention, Guinea has established a territorial sea of 12 nautical miles. Through article 13(1) of its Code de la Marine Marchande it has also established a contiguous zone adjacent to its territorial sea. Following closely article 33 of the Convention, article 13(2) of the Code de la Marine Marchande provides that the contiguous zone extends up to 24 nautical miles from the baselines, from which the breadth of the territorial sea is measured. It goes without saying that both the territorial sea and the contiguous zone extend also around the islands belonging to the Guinean territory. Pursuant to article 121(2) of the Convention, islands have their own territorial sea and adjacent contiguous zone, which are determined in accordance with the provisions of the Convention applicable to other land territory.
121. The small uninhabited island of Alcatraz is under Guinean sovereignty, as it was correctly stated by the Court of Arbitration in its Award of 14 February 1985 in the *Guinea – Guinea-Bissau Maritime Delimitation Case* (para. 106) (Annex 7). Determining the course of the boundary between Guinea and Guinea-Bissau, the Court of Arbitration drew the delimitation line north of the island of Alcatraz 12 miles to the west, so that the island could have a territorial sea of 12 nautical miles extending to the west and to the south (*id.*, para. 111). Contrary to the allegation in



paragraph 93 of the Memorial that the island of Alcatraz has no contiguous zone, the Guinean territorial sea and contiguous zone extends in a westerly and southerly direction around the island of Alcatraz as well. Accordingly the tentative limits in the map filed by the Applicant (Annex A 1) as indicated for the Guinean territorial sea through a red line and for the contiguous zone through a broken red line are not correct. Measured from the normal baseline, which according to article 5(2) of the Code de la Marine Marchande is the low-water mark along the coast, the bunkering point mentioned above is definitely within the Guinean contiguous zone.

Section 4.2.2 Guinea has a right to apply its customs laws in its contiguous zone

122. The text of article 33(1) of the Convention provides that the coastal State may exercise the control necessary to (a) prevent infringement of its customs laws and regulations "within its territory or territorial sea", or (b) punish infringement of the mentioned laws and regulations "committed within its territory or territorial sea." Article 13(1) of the Guinean Code de la Marine Marchande has adopted these requirements nearly verbatim. The text of the mentioned articles is apparently limiting the coastal State's enforcement jurisdiction to necessary measures of control to prevent infringement of its customs laws applying within its customs territory or to punish infringement of these laws committed within its customs territory.
123. The coastal State's jurisdiction to control in its contiguous zone, no doubt, relates to ingoing and to outgoing ships. Control means stopping, boarding and inspecting any ship except for ships enjoying immunity. If there is good reason to believe that the ship has violated the laws and regulations of the coastal State, also directing (*i.e.* "arresting" in an untechnical sense) and escorting it for further investigation and for judicial proceedings to port is lawful. Measures taken by the customs authority against the ship have to be reasonable in the given circumstances.
124. Beyond that, however, there is a long-standing dispute in international law as to the scope of the coastal State's jurisdiction in its contiguous zone. The issue is whether or not the coastal State may also apply its laws and regulations provided in article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone⁵⁰ and subsequently in article 33 of the 1982 Convention against foreign ships in its contiguous zone and

⁵⁰ UNTS Vol. 516, p. 205.

accordingly may punish their infringement. A narrow interpretation of these articles rests upon the plain meaning of its text that exclusively relates to *infringements committed within its territory or territorial sea*. It can further point to the fact that the mentioned limitation contained in article 24 has been adopted after some discussion by the majority of States at the first UN Conference on the Law of the Sea 1958⁵¹ on the basis of a draft prepared by the International Law Commission.⁵² At the Third UN Conference on the Law of the Sea⁵³ the said limitation has been taken over verbatim in article 33 of the Convention without further discussion of the scope of the coastal State's jurisdiction in its contiguous zone. Adherents to the narrow interpretation⁵⁴ consider the contiguous zone merely as a zone of an extended enforcement jurisdiction of the coastal State established for the protection of its legal order within areas under its sovereignty.

125. Maintaining against this view a broad conception of the coastal State's jurisdiction in its contiguous zone, Guinea submits for the reasons elaborated in the following that it has jurisdiction to prevent and punish infringement of its customs laws committed in its contiguous zone:

First, article 33 of the Convention does not prohibit the coastal State making laws for the contiguous zone at all. The exercise of control normally requires, because of constitutional reasons, that the coastal State has extended at least parts of its respective laws and regulations *ratione loci* to its contiguous zone. It can apply its customs laws *vis-à-vis* foreign ships with a view to prevent and punish infringement, whereas it cannot submit them to customs duties in that zone. Measures to prevent and punish are intrinsically measures of police and criminal law. Therefore making the transshipment of dutiable cargo (as in this case the gas oil) an offence in the contiguous zone, can be considered as consistent with the coastal State's jurisdiction in its contiguous zone, as Professor *O'Connell* observed in his treaties on the Law of the Sea.⁵⁵

⁵¹ A Polish amendment (UNCLOS I, Official Records, Vol. III, p. 232) which deleted the reference to the territory or territorial sea in order to make provision for action to deal with possible infringement within the contiguous zone was adopted by the First Committee of the Conference, but rejected in plenary session and replaced by the original text of the ILC draft. Similar a Polish and Yugoslav amendment aiming at the same goal; *id.*, Vol. IV, p. 121.

⁵² See article 66 of the ILC draft, YBILC 1956 Volume II, p. 294; see also Commentary 2(a) to draft article 47 on hot pursuit, *id.*, p. 285.

⁵³ See Satya N. Nandan, Shabtai Rosenne and Neal Grandy (Editors), *United Nations Convention on the Law of the Sea 1982, A Commentary*, Volume II (1993), Commentary 33.2–33.7, pp. 268–275.

⁵⁴ In the first line: Sir Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, ICLQ Vol. 8 (1959), p. 73, at pp. 112 *seq.*

⁵⁵ D. P. O'Connell, *The International Law of the Sea*, Volume II, edited by I. A. Shearer, Oxford 1984, p. 1060.

126. Second, moreover there are also good reasons against an exclusively literal interpretation of article 33 of the Convention: Because article 24 of the 1958 Convention formed only a minimum consensus between conflicting views on that Conference, the explicit limitation to infringements within the territory or territorial sea would not allow a conclusion *e contrario* that such laws may not be applied against foreign ships in the contiguous zone.
127. Third, a narrow interpretation of article 24 (and article 33 of the Convention respectively) does not sufficiently take into account that the provisions have to be interpreted in the context of general international law including customary law. There have always been and there are still States going beyond the limits of the provisions *ratione materiae* within their contiguous zone.⁵⁶ For instance, the Chief Counsel of the U.S. Coast Guard, Department of Transportation, stated in 1976:⁵⁷

“(c) That hot pursuit may be undertaken *for a violation occurring within the contiguous zone* only when such violation concerns the rights for the protection of which the zone was established, namely, these laws and regulations appertaining to customs, fiscal, immigration, or sanitary matters.” (Emphasis added).

128. Fourth, in the same vein, the right of coastal States to apply their customs laws in the contiguous zone has been asserted in particular in connection with the right of hot pursuit in several cases. These are, for instance, the *Vince Case*,⁵⁸ the *Newton-Bay Case*⁵⁹ and the *Tayo Maru No. 28 Case*⁶⁰ of American courts and especially the Italian case of the British vessel *Sleek* (the *Martinez Case*),⁶¹ in which the Court of Cassation⁶²

“Held: that the appeal must be dismissed. (i) Article 24 of the Convention was not declaratory of existing customary international law, and there was no rule of international law which precluded a coastal State from exercising jurisdiction over offences by foreign nationals

⁵⁶ R. R. Churchill and A. V. Lowe, *The law of the sea*, 1983, p. 105, mention Saudi Arabia, Syria and Spain as examples.

⁵⁷ Legal opinion of Admiral R. A. Ratti dated 26 January 1976; quoted in Eleanor C. McDowell, *Digest of United States Practice in International Law 1976*, p. 380.

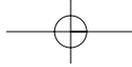
⁵⁸ 27 F. 2d 296, 299 (4th Cir. 1928); on revision the case was denominated *Giliam v. Dennis*, AJIL Vol. 23 (1929), p. 356 note 17.

⁵⁹ *The Newton Bay* (1928), 30 F. (2nd), p. 445; and 36 F. (2nd Cir. 1929), p. 731.

⁶⁰ 395 Fed. Supp. (S.D.Mc. 1975), p. 337; see also AJIL Vol. 70 (1976), p. 136.

⁶¹ *Re Martinez and Others*, International Law Reports, Vol. 28 (1963), p. 172.

⁶² *Id.*, p. 171.



which were committed in the contiguous zone of between six and twelve miles from the coast.” (Emphasis added).

129. Fifth, considered in a broader context a contiguous zone without prescriptive jurisdiction is a limping legal institution and a jurisdictional fossil in our time. Because it does not fit the needs of modern State practice, legal fictions are necessary to fill the jurisdictional gap of the narrow interpretation of article 33 of the Convention: For instance, the doctrine of extended constructive presence codified in article 111(4) of the Convention considers a “mothership” as being present in the territorial sea if one of its boats *or other craft working as a team* is in the territorial sea. Another example is the presumption in article 303 of the Convention, according to which archaeological or historical objects removed from the contiguous zone would result in an infringement within its territory or territorial sea of laws and regulations referred to in article 33 of the Convention.
130. Sixth, any interpretation of article 33 of the Convention has to take the development of the modern law of the sea into consideration. Embedded in the exclusive economic zone, the contiguous zone is no longer a part of the high seas. The reference to the high seas in article 24 of the 1958 Convention significantly has been deleted in article 33 of the Convention. Notwithstanding its different legal nature, the coastal State’s jurisdiction in its contiguous zone has to be considered in a real connection with its prescriptive and enforcement jurisdiction concerning its sovereign rights. The opinion that a coastal State may punish infringement of its fisheries laws committed nearly 200 nautical miles off its coast, whereas it should not punish infringement of its customs laws being an important aspect of its public order only 13 miles off its coast, is neglecting the factual side of the development since the last two decades.
131. After all it is fair to allege that Guinea has a right to apply its customs laws in its contiguous zone in order to prevent and punish infringement of these laws in the zone. This allegation is in conformity with the prevailing view of eminent writers of international law.⁶³

Section 4.2.3 Domestic laws and regulations applied by Guinea

132. As stated in the facts and held in the Judgement of 3 February 1998 of the Cour d’Appel, (Annex 30) the M/V “Saiga” has been detained and its

⁶³ See, instead of all, Professor *Tullio Treves* sharing this view in: René-Jean Dupuy/Daniel Vignes (Editors), *A Handbook on the New Law of the Sea*, volume 2, p. 859, and the writers mentioned there in note 95.

Master has been punished because of the violation of Guinean customs laws. The laws and regulations applied by the Guinean judicature on the M/V "Saiga" are already stated above in paras. 8 and 9 of this Counter-Memorial. Reference is made to this statement.

133. The publication of its customs laws and regulations applying in its contiguous zone is left to the coastal State. There is no obligation as to the contiguous zone corresponding to article 19(3) concerning laws and regulations relating to innocent passage in the territorial sea, or to article 62(5) concerning conservation and management laws and regulations in the exclusive economic zone. As mentioned before in para. 17 of this Counter-Memorial, the M/V "Saiga" knew that Guinea considered off-shore bunkering in its exclusive economic zone overlapping with its contiguous zone illegal.
134. The holding of the Cour d'Appel that the Master of the M/V "Saiga" has violated Guinean customs laws and regulations is an uncontested fact before the Tribunal. Against the allegation in paragraph 91 of the Memorial that "the customs laws and regulations upon which Guinea's actions were based are nowhere in its own legislation said to apply beyond its territorial sea", the Respondent pleads that it is not an issue for this Tribunal, with all respect, to consider whether or not the *domestic law of the Republic of Guinea* has been correctly applied by Guinean authorities in taking the measures against the M/V "Saiga" or by Guinean courts in the ensuing judicial proceedings against its Master. Unlike the supreme court of the country, the Tribunal could not review decisions of Guinean Courts applying domestic law of Guinea. Unless it is otherwise agreed, an international court or tribunal could only be seized in order to consider whether or not the coastal State violated *international law* when detaining the ship and punishing the Master. It is alleged that these measures are in conformity with international law.

Section 4.2.4 Conclusion

135. In conclusion Guinea submits that it had enforcement jurisdiction in international law on the basis of article 33 of the Convention to prevent and punish infringement of its customs laws and regulations by the M/V "Saiga" within its contiguous zone. The infringement of the Guinean customs laws and regulations is a fact stated by the Guinean judicature. This fact is not subject to legal review before the Tribunal.

Section 4.3 Guinea's right of hot pursuit (article 111 of the Convention)

136. Contrary to the views put forward by the Applicant in paragraphs 85–94 of the Memorial, Guinea contends that its right of hot pursuit justified stopping, searching and subsequent escorting the M/V “Saiga” to Conakry on 28 October 1998. The actions of the Guinean authorities are consistent with the conditions laid down in article 111 of the Convention for the exercise of hot pursuit.
137. The following elaboration on this issue also intends to query, with due respect, the *obiter dictum* of the Tribunal in paragraph 62 of its Judgement of 3 December 1997 according to which “the arguments put forward in order to support the existence of the requirements for hot pursuit and, consequently, for justifying the arrest, are not tenable, even *prima facie*.” This observation, however, rests upon the assumption that Guinea exercised hot pursuit because of a violation of its laws and regulations *in the contiguous zone*, whereas the Respondent alleges that the public order and essential public interest of Guinea *in its exclusive economic zone* form the basis for Guinea’s exercising hot pursuit.
138. Knowing that foreign tankers were bunkering fishing vessels in the Guinean exclusive economic zone, the Guinean customs authorities had good reason to believe that the ship was violating Guinean customs laws and regulations, when it had been detected by radar that the ship was meeting fishing vessels in the Guinean contiguous zone on 27 October 1997. As has already been elaborated,⁶⁴ Guinea regards such bunkering activities within its contiguous zone a violation of its customs laws and regulations justifying preventive measures against the tanker. Concomitantly this is a violation of essential public interests of the coastal State in its exclusive economic zone, as also has been elaborated.⁶⁵
139. Guinea alleges that the pending violation of its essential public interests within its exclusive economic zone is a sufficient condition for hot pursuit under article 111(2) of the Convention. According to its legal purpose, the right of hot pursuit provides the coastal State beyond its exclusive economic zone with enforcement jurisdiction against any violation of its laws and regulations in relation to which it has enforcement jurisdiction within that zone. Or putting it otherwise, *ratione materiae* the

⁶⁴ See paras. 122–131 of this Counter-Memorial.

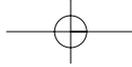
⁶⁵ See paras. 109–117 of this Counter-Memorial.

right of hot pursuit adds nothing to the coastal State's enforcement jurisdiction but, subject to the conditions set forth in article 111, it extends its application *ratione loci* to areas beyond the exclusive economic zone.

140. Taking the mentioned purpose into consideration, Guinea is of the opinion that it may exercise hot pursuit from its exclusive economic zone not only if its "laws and regulations" are violated, as maintained in article 111(2) of the Convention, but also in the case of a violation of its public order and essential public interest against which it has a customary right of self-help. Otherwise the coastal State could take necessary and reasonable actions against the respective ship within its exclusive economic zone, but had to stop any pursuit where the zone ends. This would be squarely against the object and purpose of article 111 stated above. Moreover it would neglect the customary principle of hot pursuit which is much older than article 111 of the Convention or the preceding article 23 of the 1958 Convention on the High Seas.⁶⁶
141. It is also alleged that, in the pursuit of the M/V "Saiga" on 28 October 1997, the further conditions of article 111 of the Convention are met as well. The Guinean authorities had good reason to assume that the M/V "Saiga" had already violated Guinean customs laws and regulations in its contiguous zone the day before, and future violations of its customs laws and regulations in that zone could not be excluded. At the same time, the bunkering had violated Guinea's essential public interest in its exclusive economic zone. Moreover and even more important, as long as the M/V "Saiga" remained in the Guinean exclusive economic zone, there was good reason to believe that it was further on infringing upon Guinea's essential public interest and would violate its public order again.
142. Under article 111(1) of the Convention, an offence *being about to be committed* qualifies also for the right of hot pursuit.⁶⁷ The authorities of the coastal State, no doubt, need not accompany a ship suspected of being about to violate the coastal States rights waiting until the violation has been committed. It follows from article 111(4), 1st sentence, of the Convention that the pursuit need not commence while the ship is committing the violation; *hot pursuit* is not necessarily pursuit *upon the act committed*

⁶⁶ UNTS Vol. 450, p. 11.

⁶⁷ A recommendation of Brazil to include this expressly into the draft of the ILC was regarded unnecessary by the Commission; Yearbook of the International Law Commission, 1956 Vol. II, p. 40; Vol. I, p. 49.



but pursuit *commencing while the suspected ship is still within the jurisdictional zone* of the coastal State. According to article 111(1), 3rd sentence, of the Convention the pursuing ship need not be in the respective zone when taking up the pursuit.

143. The M/V “Saiga” was kept under surveillance by radar and radio observation of the Guinean authorities since it had entered Guinean waters. This is confirmed, *inter alia*, in the Master’s Accident Damage Report of 29 October 1997 to SEASCOT SHIPMANAGEMENT LYD:

“They [*viz.* the Guinean authorities] were watching m.t. “Saiga” and knew exactly my meeting point (09.00N/015.00W) and waiting for me during 2 days.”
(Annex 18)

144. According to the Procès Verbal 29 (English translation; herein-after: PV29) (Annex 19, p. 278), on 27 October 1997 between 5.05 p.m. and 7.20 p.m. at sea the Guinean launches F-328 of the National Navy and P-35 with customs officials on board received information “regarding the illicit presence of a Tanker in the exclusive economic zone of our waters” and “headed for the southern border.” The tanker referred to was the M/V “Saiga” the presence of which in the area was also confirmed by radio conversation. After stating: “We turned on our radar with the aim of detecting the target,” PV29 proceeds for the following day (28 October 1997):

“The following day, at about 4 a.m. (standard local time), we detected on the radar the presence of a target which, according to the parameters given, appeared to be the one we were seeking.”
Since its detection on radar by the pursuing launches, the M/V “Saiga” had remained permanently under their control.

145. Article 111(4), 1st sentence, of the Convention requires that the pursuing ship *has satisfied itself by such practicable means as may be available* that the pursued ship was at the begin[ning] of the pursuit still in the exclusive economic zone of Guinea. Radar is generally considered as practical means for this purpose⁶⁸ and, unlike in the days of *The Red*

⁶⁸ See Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law*, Leyden 1969, p. 202; Craig H. Allen, *Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices*, *Ocean Development and International Law*, Vol. 20 (1989), p. 309, at p. 318.

*Crusader*⁶⁹ nearly 40 years ago, the modern ship-bound radar is sufficient precise to measure distances with great accuracy. Concurrently the shore-based radar could confirm the pursuing launches that the M/V "Saiga" was still in the exclusive economic zone of Guinea. Therefore the pursuit of the M/V "Saiga" deemed to have begun since the launches had detected the ship on their radar and were pursuing it.

146. According to entries of 28 October 1998 in the Log Book of the M/V "Saiga" (Annex 15), the ship was at 4 a.m. at a position 9°02'7"N and 15°02'6"W. This position is about 1 nautical mile south of the southern limit of the Guinean exclusive economic zone established at the parallel 9°03'18" north latitude through article 4 of the Decree No. 366 of 30 July 1980 of the Republic of Guinea (Annex 6). If these entries are correct, it is not possible that the MV "Saiga" with its speed of 10 knots (nautical miles per hour) (Memorial para. 95) has left the exclusive economic zone of Guinea on 28 October 1998 "at approximately 03.45 hours", as it is alleged in paragraph 32 of the Memorial. Notwithstanding this, the pursuing launches had discovered the M/V "Saiga" *before* 4 a.m. – the PV29 (Annex 19) mentions: "vers 4 heures du matin (heure légale)" meaning at about 4 a.m. (standard local time) – on their radar, when the ship was still in the exclusive economic zone of Guinea. Accordingly the hot pursuit had begun timely as required in article 111(4), 1st sentence of the Convention.
147. Further Guinea alleges that the pursuing launches have given sufficient and timely signals to stop the M/V "Saiga", as required under article 111(4), 2nd sentence, of the Convention. The details as to the signals have been set forth in the statement of facts.
148. From a legal point of view, however, it is being added that the signal is not required if the pursued vessel already has begun to flee from the exclusive economic zone. The signal shall inform the ship that it either stops and shows its flag for identification (which the M/V "Saiga" didn't do) or is being pursued from that moment on. A ship that is trying to escape is not in need of this information because it would not stop and is aware of the pursuit, as the example of *The Red Crusader*⁷⁰ demonstrates. This opinion has been expressed in particular in American decisions: For

⁶⁹ In 1961 the Commission of Enquiry still observed: "Up to now, ship-borne navigational radar cannot be considered as completely accurate." International Law Reports Vol. 35 (1967), p. 488.

⁷⁰ International Law Reports, Vol. 28 (1963), p. 498.

instance, in the *Vince Case*⁷¹ of 1927, the *Newton Bay Case*⁷² of 1929 or in the case of the Polish fishing vessel *Wlocnik* of 1989.⁷³ Moreover, already in its commentary on article 47 of the 1956 ILC Draft, the Office of the General Counsel of the US Coast Guard rightly observed that the development of radar and sonar offers a means of escape by the offending vessel not contemplated in earlier times.⁷⁴ This was exactly what the M/V “Saiga” tried, when it discovered the Guinean patrol boats on radar. Therefore it is alleged that the signals were obviously not necessary in the case of the M/V “Saiga”.

149. Finally, as a subsidiary argument, Guinea submits that the M/V “Saiga” had been working together with other craft as a mother ship within the exclusive economic zone of Guinea in the sense of article 111(4), 1st sentence, of the Convention. In this situation of extended constructive presence, the hot pursuit could commence as long as the fishing vessels remained in the Guinean exclusive economic zone even if the M/V “Saiga” was already outside this zone. Like in the cases of the *Ernestina*⁷⁵ and the *Poseidon*⁷⁶ which also worked together with other ships instead of own boats, the M/V “Saiga” was undertaking a common venture working as a team together with the fishing vessels when it supplied them with fuel in the exclusive economic zone of Guinea. The transshipment of the gas oil was prearranged and took place at a specific meeting point and at a determined time. As it has been mentioned, the bunkering was not allowed either for the fishing vessels in the Guinean exclusive economic zone under article 4 of the Loi 94/007/CTRM of 15 March 1994 (**Annex 22**), which still remained in the zone on 28 October 1998. That also in this situation the signals to stop were given needs no further elaboration.

⁷¹ 20 F. (2d) 164.

⁷² 36 F. (2d) 729, 731 (2d Cir. 1929).

⁷³ Allen, ODIL 20 (1990), p. 334 note 142, mentions this unpublished case.

⁷⁴ Whiteman, Digest of International Law, Vol. 4 (1965), p. 685.

⁷⁵ *Regina v. Sunila and Soleyman* (1986) 28 DLR (4th) p. 450. In May 1985, the “Ernestina” registered in Honduras transshipped drugs to the Canadian fishing vessel “Lady Sharell” in Canadian waters and was later stopped and arrested by a Canadian patrol boat on the high seas about 400 nautical miles off the Canadian coast. The Nova Scotia Supreme Court, Appeal Division, characterized the “Ernestina” as mothership of the “Lady Sharell” and stated that “the two vessels were engaged in a common venture and were ‘acting as a team’”. As to this case, see William C. Gilmore, *Hot pursuit and constructive presence in Canadian law enforcement*, Marine Policy Vol. 12 (1988), pp. 105, 107.

⁷⁶ *R. v. Mills and others*. In this unpublished criminal case of 1993, the ship “Poseidon” flying the flag of St. Vincent and the Grenadines transshipped 6.25 t cannabis to the British trawler “Delvan” on the high seas. 54 hours after the crew of the “Delvan” was arrested in a British port and 65 hours after the transshipment, the “Poseidon” was stopped by the British Navy on the high seas and escorted to Britain. As to this case, see William C. Gilmore, *The Case of R. v. Mills and others*, ICLQ Vol. 44 (1995), p. 949, at p. 952.

150. In conclusion, Guinea submits that the launches lawfully exercised the right of hot pursuit in accordance with article 111 of the Convention, when they stopped and searched the M/V "Saiga" on 28 October 1998 and escorted the ship to Conakry. Consequently there is no room for an application of article 111(8) of the Convention concerning compensation.

Section 4.4 The force used was necessary and reasonable

151. Saint Vincent and the Grenadines contends that the force used to stop the M/V "Saiga" was excessive (paras. 95–99 of the Memorial). As a reasoning, reference is made to the leading cases of the *I'm Alone* and the *Red Crusader*. Contesting this, the Respondent alleges that the measures taken by the Guinean authorities were necessary and reasonable to stop the ship.
152. To begin with, both cases cited present no precedents for the situation at issue here. In the first case, the Canadian schooner with the allusive name *I'm Alone* was sunk by the United States coastguard cutter *Dexter* on the high seas.⁷⁷ The M/V "Saiga" has not been sunk. In the second case, the force of the Danish fisheries inspection vessel *Niels Ebbesen* against the British trawler with the indicative name *Red Crusader* had been used *after* the trawler was already under arrest and had a Danish officer and rating of the *Niels Ebbesen* on board.⁷⁸ In this situation, which is not comparable with that before the M/V "Saiga" was stopped at all, the Commission of Enquiry rightly found that those circumstances did not justify such violent action.⁷⁹
153. The M/V "Saiga", which did not show its flag, refused to stop upon the internationally usual signals given by the Guinean launches. The Master reported in his statement of 4 November 1997 (**Annex 17**) "When the distance from targets [*viz.* the approaching Guinean launches] was about 1–2 miles I heard shooting." The ship did not obey upon the blank shots being the customary signal to stop and show the flag at sea. Instead, the Master and crew hid in the engine room and the ship was trying to escape under its automatic steering (*viz.* auto pilot). In this situation, small calibre gun fire was a necessary means of instruction indicating the order to stop and show the flag. The Master's statement according to which he regarded this as being a "piracy's attack" is an irrelevant plea of defence,

⁷⁷ Annual Digest and Reports of Public International Law Cases, Years 1933 and 1934 (1940), p. 204.

⁷⁸ International Law Reports, Vol. 35 (1967), p. 496.

⁷⁹ International Law Reports, Vol. 35 (1967), p. 499.



because an error about the nature of the approaching launches and the signals given would not dispense in international law from an obligation to stop. Besides that, upon all the Master knew about Guinean measures against off-shore bunkering, it is contested that he erroneously could have misconceived the nature of the approaching launches. Therefore the measures given were necessary in that situation because the Guinean launches had no other possibility to stop the M/V “Saiga”.

154. The mentioned measures were also reasonable. Small calibre solid gunshots without using explosive shells would not even then endanger the tanker, when they would hit the ship. On the other hand, to stop the M/V “Saiga”, as mentioned above, was not only a lawful goal of the Guinean authorities. It was also an important goal because the ship had grossly infringed upon essential public interests and the public order of Guinea, as also has been set forth. Therefore the measures taken in order to stop the M/V “Saiga” upon hot pursuit met the conditions of necessity and reasonableness.

Section 4.5 No violation of Articles 292 (4) and 296 of the 1982 Convention

4.5.1 The allegation of St. Vincent and the Grenadines

155. The Applicant alleges in the Memorial (para. 139) that the Republic of Guinea has violated its obligations under the Judgement of the International Tribunal of 4 December 1997 to promptly release MV “SAIGA” after the bank guarantee of Crédit Suisse of 10 December 1997 has been provided. Thereby the rights of St. Vincent and the Grenadines under Articles 292 para. 4 and 296 of the 1982 Convention have allegedly been violated.

The Republic of Guinea contests the allegation of St. Vincent and the Grenadines and contends that the posting of the guarantee of Crédit Suisse of 10 December 1997 and of the subsequent clarification of 11 December 1997 was not a reasonable bond under the Judgement of the International Tribunal of 4 December 1997.

156. The question whether a reasonable bond has been posted has to be determined by the International Tribunal not only according to the wording of the bank guarantee but also with due consideration to the question whether St. Vincent and the Grenadines in providing a financial security have done so in accordance with the Rules of the International Tribunal in particular with Article 113(3).

4.5.2 *Posting with the Agent contrary to section 113(3) of the Rules.*

157. By sending the bank guarantee to the Agent of the Republic of Guinea, the bank guarantee had not been posted with the detaining State as directed in Section 113(3) of the Rules of the International Tribunal. St. Vincent and the Grenadines in this connection cannot argue that the Agent is the representative of the State and therefore the sending of the bank guarantee to the Agent should have the same effect as if it would have been sent to the State directly. The International Tribunal expressly has ordered in section 113(3) that the bond has to be handed over to the State in whose favour the bank guarantee has been issued. Such regulation is justified because normally the conditions under which the bank has to pay under the guarantee can only be fulfilled a proven by the State.

Another similar aspect, why the bond must be sent directly to the State, is the fact that the Agent of a State can take a final decision with respect to the bond whether it is reasonable or not only after consultation or instructions by the State he is representing.

158. So St. Vincent and the Grenadines did not have the right to freely decide to post the bank guarantee with the Agent of the Republic of Guinea, the more so as the Republic of Guinea had never notified St. Vincent and the Grenadines that the bank guarantee should be posted with its Agent.

159. Furthermore, the Agent of the Republic of Guinea did never declare nor give the impression to St. Vincent and the Grenadines that he was authorised to the effect that the guarantee should be posted with him. On the contrary, the Agent of the Republic of Guinea immediately after having received the fax letter of the Agent of St. Vincent and the Grenadines with the enclosed wording of the bank guarantee explained with his letter of the same day 11 December 1997 (pages 541 and 542 of the Annexes of the Memorial) that he himself cannot decide finally whether the bank guarantee is reasonable without clear instructions from the Republic of Guinea.

4.5.3 *No agreement between the Agents*

160. It is not correct and therefore disputed that the Agents of both States have concluded any binding agreement in the telephone discussion of the same day, on 11 December 1997. In no way did the Agent of the Republic of Guinea declare that the clarification discussed would make the bond to a reasonable one. The Agent of the Republic of Guinea at the time of the

telephone discussion with the Agent of St. Vincent and the Grenadines did not have the chance to check the wording of the bank guarantee in extenso. So when he has been called and asked by the Agent of St. Vincent and the Grenadines about the wording of the bank guarantee the Agent of the Republic of Guinea mentioned those concerns which he had immediately found after a first reading of the bank guarantee.

161. Also after having received the clarifications of Crédit Suisse on the morning of 12 December 1997, the Agent of the Republic of Guinea immediately explained in a separate letter of the same day (pages 550 to 554 of the Annexes of the Memorial) to the Agent of St. Vincent and the Grenadines and made it absolutely clear that before taking a final decision with respect to the reasonableness of the bank guarantee, he would have to consult the Government of Guinea and that he has not yet been able to get instructions from Conakry.
162. Therefore it is more than surprising that the Agent of St. Vincent and the Grenadines contends that the telephone conversation of the two Agents of 11 December 1997 would supersede the written comments of the Agent of the Republic of Guinea. That is in no way correct and is rejected. Therefore the Agent of the Republic of Guinea immediately after having received on the morning of Monday, 15 December 1997, the letter of the Agent of St. Vincent and the Grenadines of 12 December 1997 replied that he has never agreed to any wording of the guarantee and that the Agent of St. Vincent and the Grenadines could not have any understanding of the discussion of the two Agents that the guarantee would be finally acceptable upon the clarification of the discussed points.

4.5.4 *Co-operation of the Agent of the Republic of Guinea*

163. The Agent of the Republic of Guinea having received the original of the bank guarantee did everything to co-operate with the Agent of St. Vincent and the Grenadines in coming to a joint solution soon in order to agree on a wording of the bank guarantee acceptable to by both sides as being reasonable.

Already on 12 December 1997 the Agent of the Republic of Guinea terminated his examination of the wording of the bank guarantee and expressed all his concerns in his letter of 12 December 1997 to the Agent of St. Vincent and the Grenadines (pages 550–554 of the Annexes). So he suggested a wording of the guarantee that would have responded to all concerns which the Agent of the Republic of Guinea saw and which did

192

M/V "SAIGA" (No. 2)

avoid any uncertainty connected to the wording of the bank guarantee of 10 December 1997.

4.5.5 *No connection to the Government of Guinea*

164. Again the allegation of St. Vincent and the Grenadines is not correct that the very purpose of the request for changes of the wording of the bank guarantee would only be to delay the release of MV "SAIGA". That this is not correct is clearly demonstrated by the fact that from having received the wording of the bank guarantee on 11 December 1997 on until 6 January 1998, the Agent of the Republic of Guinea could not get any connection to and any advice from the Government of the Republic of Guinea.

4.5.6 *No obligation to promptly release on 10/11 December 1997*

165. In conclusion it must be stated that the Republic of Guinea did not have any knowledge of the bank guarantee of Crédit Suisse of 10 December 1997 and the clarification of 11 December 1997 by Crédit Suisse. It must be stated that the Republic of Guinea up to the 21 December 1997 did not have any knowledge of the bank guarantee of Crédit Suisse and therefore was not obliged under the Judgement of the International Tribunal of 4 December 1997 to release MV "SAIGA" as the Republic of Guinea had not been posted with a reasonable bank guarantee.

St. Vincent and the Grenadines in the submissions under no. 4 asked the International Tribunal to adjudge and declare that Guinea has violated Articles of the Convention in not releasing MV "SAIGA" and crew immediately upon the posting of the guarantee of US\$400.000,- on 10 December 1997 or the subsequent clarification from Crédit Suisse on 11 December (emphasis added). This submission is to be understood that the International Tribunal should declare that the violation by Guinea has already been fulfilled on 10 December 1997 respectively 11 December 1997. As however the Government of Guinea at these days did not have any knowledge of the providing of the bank guarantee of Crédit Suisse, the Republic of Guinea was not obliged to promptly release vessel and crew and therefore could not have violated Articles of the 1982 Convention. The submission of St. Vincent and the Grenadines must be rejected.

4.5.7 *No obligation to promptly release before 28 February 1998*

166. The same applies even if the submission of St. Vincent and the Grenadines under no. 4 would have to be understood in that way that – if not on 10 December 1997 or 11 December 1997 – the Republic of Guinea should have been obliged to release vessel and crew at least immediately after having got knowledge of the posting of the bank guarantee. The Government of the Republic of Guinea received a copy of the bank guarantee only on 21 December 1997. The Government of the Republic of Guinea immediately with letter of 24 December 1997 instructed its Agent to ask for various amendments of the wording of the bank guarantee. This letter of the Minister of Justice of the Republic of Guinea however only has been received by the Agent on 6 January 1998 as has been stated in the letter of the same day to the Agent of St. Vincent and the Grenadines (pages 562–563 of the Annexes of the Memorial).

The delay from 6 January to 19 January 1997 has not been caused either on the side of the Republic of Guinea but was due to the fact that the persons concerned on the side of St. Vincent and the Grenadines were absent, as can be seen from the letter of Stephenson Harwood of 19 January 1997 (pages 565–565 of the Annexes of the Memorial). In this letter the Agent of St. Vincent and the Grenadines also discussed the requests of the Government of Guinea for amendments of the bank guarantee and asked for some more clarifications.

Already on 21 January 1998, the Agent of the Republic of Guinea received the final instructions from the Government of Guinea which have been transferred to the Agent of St. Vincent and the Grenadines with letter of 22 January 1998 (pages 570–571 of the Annexes).

It took again some days until the Agent of St. Vincent and the Grenadines answered with his letter of 30 January 1998 to which he annexed the new wording of the bank guarantee issued by Crédit Suisse on 28 January 1998 that conformed now fully to the request of the Government of Guinea (pages 572–577 of the Annexes of the Memorial). On 29 January 1998 the Crédit Suisse had directly sent the original of the bank guarantee to Guinea. After the governmental bodies involved of the Republic of Guinea had the chance to examine the new wording of the bank guarantee, the National Director of the Customs Services with his letter of 16 February 1998 (Annex XII) instructed the Agent of the Republic of Guinea that the new wording of the bank guarantee would now be acceptable.

Already three days ago there has been drafted by the Government of Guinea the deed of release of 13 February 1998 which however has not been signed by the captain of MV "SAIGA" as has already been explained under para 45 of the Counter-Memorial. But when the deed of release has been signed by the master on 27 February 1998 the vessel has been promptly released on 28 February 1998.

4.5.8 *Conclusion*

167. It follows from what has been said before that the Government of the Guinea immediately after having received the acceptable bank guarantee had the intention to immediately release MV "SAIGA" and the Captain whereas the crew, as has already been stated, could have left the vessel already since months. However, it was caused by the captain and his legal advisers that the deed of release has been signed only days later, which was not the fault of the Government of Guinea. So the Government of Guinea was not responsible for the delay as from 10 December 1997 until 28 February 1998, so that there was no violation of Articles 292(4) and 296 of the 1982 Convention by the Republic of Guinea.

4.5.9 *Wording not reasonable*

168. Apart from the more procedural arguments explained before the Republic of Guinea also contends that the wording itself of the bank guarantee was not reasonable.

As far as the requests of the Government of the Republic of Guinea are concerned, the necessary amendments were the following: The Republic of Guinea could not accept that in the guarantee of 10 December 1997 it was given the impression that the International Tribunal had inter alia ordered that the members of the crew of MV "SAIGA" would be "currently detained or otherwise deprived of their liberty." (no. (B) i of the bank guarantee of 10 December 1997)

The Republic of Guinea has stated that the crew immediately after MV "SAIGA" has been arrived in Conakry was free and could leave the country. Apart from the fact that such order was not given by the International Tribunal in his Judgement of 4 December 1997 St. Vincent and the Grenadines by such draft tried to prejudice the Republic of Guinea. From such draft it can also be seen that the wording of the bank guarantee of 10 December 1997 has not been produced within the office of Crédit Suisse but was drafted by St. Vincent and the Grenadines.

Furthermore no. (B) ii of the bank guarantee of 10 December 1997 was not acceptable to the Republic of Guinea according to which “the discharged gasoil shall be considered as a security to be held and, as the case may be, returned by Guinea, in kind or in its equivalent in United States Dollars at the time of Judgement.” This statement again was not part of the order of the International Tribunal. Again by such draft St. Vincent and the Grenadines tried to prejudice the Government of Guinea.

Finally under (A) also the words “for alleged violations of the laws of Guinea as set out in the Procès-Verbal no. 29 dated 13 November 1997” were not acceptable to the Government of Guinea and had to be deleted. Here again St. Vincent and the Grenadines tried to prejudice the Government of Guinea.

Finally the bank guarantee of 28 January 1998 has been signed by a member of management and another representative of the bank. The authentication of the signatures has been notarially attested.

All these amendments were necessary to qualify the bank guarantee of Crédit Suisse as reasonable.

4.5.10 *Refusal of the bank to pay*

169. Another reason why the wording of the bank guarantee both of 10 December 1997 and of 28 January 1998 was the understanding of that wording by the Agent of St. Vincent and the Grenadines as expressed to the Agent of Guinea in the telephone conversation of 19 February 1998 (see para 43 of the Counter-Memorial). Here it has been clearly expressed that the bank would not pay under the bank guarantee as long as the International Tribunal had not decided finally as to the merits. This however was contrary to the Order of the International Tribunal in its Judgement of 4 December 1997 and contrary to both drafts of the bank guarantees. From the exchange of letters between the Agents of the two States, as have been mentioned under Section 1 of the Counter-Memorial and as can be seen from Annex 38 of the Memorial, Crédit Suisse should be obliged to pay under the bank guarantee as soon as there was a final decision from a court in Guinea sentencing the captain to more than 400.000,- US\$.

Fact is that Crédit Suisse notwithstanding having received a copy of the full and final Judgement of the Supreme Court of Guinea of 3 February 1998 and having asked for immediate confirmation that they would be

prepared to pay 400,000, – US \$ under the guarantee Crédit Suisse up to now has refused to pay. This behaviour again shows very clearly that the wording of the bank guarantee obviously gives rise to uncertainties and therefore it was not and is not reasonable.

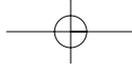
4.5.11 *Concerns expressed by the Agent of the Republic of Guinea*

170. The concerns having been expressed by the Agent of the Republic of Guinea in his letter of 12 December 1997 to the Agent of St. Vincent and the Grenadines (pages 550–554 of the Annexes of the Memorial) also show and demonstrate that the bank guarantee of Crédit Suisse of 10 December 1997 was not reasonable. The draft did not express clearly that the bank should be obliged and pay under the bank guarantee if a final Judgement of a criminal tribunal would be delivered. The clarification as per separate letter of Crédit Suisse of 11 December 1997 cannot be considered as the sufficient clarification as such letter is not part of the bank guarantee of 10 December 1997.

Further reasons why the wording of the bank guarantee of 10 December 1997 would not be reasonable have been explained in the letter mentioned before of 12.12.97.

Section 4.6 No violation of the 1982 Convention by citing the flag state in the criminal proceedings

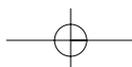
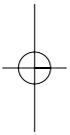
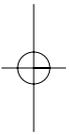
171. The submission of St. Vincent and the Grenadines under (5) is unfounded and should be rejected. As has already been stated in the proceedings relating to the application of St. Vincent and the Grenadines for provisional measures, the Cédule de Citation is an administrative document which has the only meaning that a party may be asked to come to appear before a criminal court. It does in no way have the legal value of a Judgement or other order making the person asked to appear before the court jointly liable. It is nothing else than merely a convocation to appear before the judge. Therefore it cannot be accepted that St. Vincent and the Grenadines contends that such Cédule de Citation which is not mentioned in the Judgement of the Supreme Court, would in no way violate the rights of St. Vincent and the Grenadines under the 1982 Convention.



SECTION 5: DAMAGES

Section 5.1 General remarks

172. Besides interest and legal costs, St. Vincent and the Grenadines claims compensation and damages under four heads:
- the claim on behalf of the loss or damage to the vessel arising from the detention and arrest and its subsequent treatment, with a total of \$1,091,930;
 - the claim for the benefit of the master and crew, including personal injury and deprivation of liberty, with a total of \$276,652;
 - the claim in respect of the removal of the cargo from the vessel, in the amount of \$3,000,000; and
 - the claim in respect of damages or loss suffered by the State of St. Vincent and the Grenadines, in the amount of \$1,000,000.
173. As has already been stated above, the Republic of Guinea puts forward objections to the admissibility of these claims: The objection of the missing genuine link between St. Vincent and the Grenadines and the M/V “Saiga” with respect to all of the above-mentioned claims; the objection concerning the nationality of the aggrieved private persons with respect to the first three claims; and the objection concerning the non-exhaustion of local remedies with respect to the first three claims (see para. 90 of this Counter-Memorial).
174. St. Vincent and the Grenadines cites as legal basis for these claims Article 111(8) of the Convention, as well as the general rules of State responsibility for wrongful acts. The Republic of Guinea requests the International Tribunal to dismiss the claims, since it has lawfully exercised its right of hot pursuit and has not violated any other rule of international law, as has already been laid before the Tribunal.
175. The following arguments are made on an auxiliary basis, in case the International Tribunal does not come to the same conclusions regarding the lawfulness of the Guinean acts and subsequently holds the Republic of Guinea generally responsible to pay damages to St. Vincent and the Grenadines.

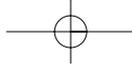


Section 5.2 Claim on behalf of the loss or damage to the vessel arising from the detention and arrest and its subsequent treatment

176. Annex 41 to the Memorial lists the sustained losses to the owners of the M/V "Saiga". The various items of this damage are, however, disputed: There is no actual proof as to the medical expenses, the repatriation and relief costs as well as to sickness payments as claimed for the Second Officer Kluyev and the painter Djibril (para. 180 of the Memorial). There is also no proof as to any damage to the vessel. The same applies to the claimed losses consequential to the detention of the vessel in Conakry. In particular, the time charter referred to has not been produced. Likewise, there is not a single original invoice covering the claimed amounts in relation to bunkering agency port costs and expenses for attendance of representatives of the owners of the M/V "Saiga". In this connection, it must be mentioned that pages 692 to [696] and pages 700 to 702 are not legible.
177. All figures in Annex 41 are contested. They are simply taken from internal lists and calculations of the owners of the M/V "Saiga" who would be direct beneficiaries from a favourable award under this head. Hardly any actual proof in terms of bills, receipts or statistics is given, although this would have been feasible, since only damages for alleged actual loss are claimed under this head. The Republic of Guinea requests to dismiss the claim made under this head.

Section 5.3 Claim for the benefit of the master and crew, including personal injury and deprivation of liberty

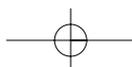
178. St. Vincent and the Grenadines claims as award for non-pecuniary damages suffered by the Master and the crew members the exorbitantly high sum of \$267,150. It is requested that the International Tribunal, if it is to grant an award for non-pecuniary damage at all, reduce the claimed amount to a reasonable level and take into account the following arguments.
179. Moral damage should only be granted to the Master of the M/V "Saiga", since he was the only properly detained person on board, as a course to the charge brought against him before the Guinean courts. All other crew members were allowed to leave the detained vessel in due course. Consequently, eleven crew members left the vessel and thirteen stayed voluntarily on board. Those are thus not entitled to any moral damages at all. Moreover, only the 22 crew members of the M/V "Saiga" could theoretically be entitled to moral damages to be paid for their benefit to the flag State. The other three persons on board were hired painters and



do not fall within the protection regime between the vessel and crew and the flag State.

180. It is also disputed that there is any justification for any moral damages arising from an excessive use of force. As has already been stated, the Guinean measures were necessary and appropriate to stop the unwarranted bunkering activities and to exercise its right to search and detain the vessel, in particular considering the fact that the M/V “Saiga” did not cooperate with the Guinean authorities at all. Further argument is that thirteen crew members stayed voluntarily on board although they had been allowed to leave. It is very unlikely that they would have done so, if the Guinean authorities had applied excessive use of force.
181. In this connection, Guinea also contests that the Second Officer Kluyev and the painter Djibril suffered serious injuries. As has been recorded in the Procès-Verbal of the Guinean customs authorities, the two crew members were only slightly injured. The claimed sum for damages with a total of \$100,000 is calculated unreasonably high, also taking into account that the costs for the medical treatment are claimed under another head for the benefit of the owners of the M/V “Saiga”.
182. Moreover, it is a well-established principle in assessing damages in international law that any contribution or negligence concerning the occurred loss reduces the amount of damage to be awarded.⁸⁰ In the present case, any claimed damage, if granted at all, ought to be reduced in amount, since the M/V “Saiga” knew or should have known that bunkering activities are considered illegal in the Guinean exclusive economic zone and that Guinea had already taken enforcement measures against foreign tankers for the same offence. That the M/V “Saiga” undertook bunkering activities in the Guinean exclusive economic zone despite this knowledge, must be regarded as a provocation of the subsequent Guinean enforcement actions. Insofar, it can be maintained that the vessel contributed to the alleged damage that arose out of the arrest and detention of the vessel.
183. Under the same head, St. Vincent and the Grenadines claims compensation for the alleged theft of personal possessions by the Guinean authorities. Guinea contests such theft and submits as a subsidiary argument that the claimed total of \$9,502 is excessive to the real value of the missing items which are alleged to consist mainly of clothes and shoes and small electric goods.

⁸⁰ See Verdross/Simma, *Universelles Völkerrecht*, (1984), p. 877.



Section 5.4 Claim in respect of damages or loss suffered by the State of St. Vincent and the Grenadines

184. St. Vincent and the Grenadines claims \$1,000,000 as a material amend in its own right for the alleged violation of Article 56(2), Article 58 and related provisions, and Article 111 of the Convention, as well as of the right of vessels flying its flag not to be subject to unnecessary and unreasonable force and of the right to prompt compliance with the International Tribunal's judgement of 4 December 1997. This claim is based both on material loss or expected loss of profit as well as on alleged non-material damage.
185. Compensation for material losses is requested with regard to the steps taken to ensure the protection of the M/V "Saiga" and its crew. Compensation is also requested for expected loss of profit regarding new registration or renewal of existing registration of vessels under the flag of St. Vincent and the Grenadines. Finally, St. Vincent and the Grenadines claims compensation for the reason that vessels flying its flag may have been precluded from exercising their freedom of navigation within the Guinean exclusive economic zone.
186. St. Vincent and the Grenadines specifies the steps it has taken to protect vessel and crew to consist in the commencing of proceedings before the International Tribunal. There is no specific mention or proof of any costs other than its legal costs which might have arisen in this respect. Under a different head of the Memorial, St. Vincent and the Grenadines quantifies its legal costs to be "in excess of \$660,000". This amount is disputed by Guinea. Moreover, it is contended that St. Vincent and the Grenadines can only claim its legal costs under one head. It would be highly inequitable if Guinea had to compensate the same claim twice.
187. With respect to the expected losses of new registration and renewals of existing registrations, Guinea submits that the claim be dismissed on the grounds that St. Vincent and the Grenadines has not suffered any material damage caused by the Guinean enforcement actions at all. Neither does the Memorial specify any damage to be compensated, nor does it explain, why ship-owners who are generally interested in registering in St. Vincent and the Grenadines, should be deterred from doing so because of Guinea's enforcement actions in its exclusive economic zone. Indeed, there is no connection between the registration of vessels in a Caribbean State and the enforcement of customs legislation of a West-African State.

The Republic of Guinea asserts, as it has done before, that its enforcement actions are not solely directed at vessels flying the flag of St. Vincent and the Grenadines but to all vessels that violate Guinean customs laws. It may serve as evidence that enforcement actions have already been undertaken against several vessels flying the flag of other States. Moreover, it is contested that St. Vincent and the Grenadines sustains a loss of registration, since it has taken all steps that a flag State could do to protect its vessels, in particular it has promptly instituted all legal proceedings before the International Tribunal. Consequently, no generally interested reasonable ship-owner would take the Guinean enforcement actions as a reason not to register in St. Vincent and the Grenadines.

188. But even if there was a loss of registration, the claim should be dismissed on the grounds that the alleged damage is too remote from the Guinean conduct. In this context, international arbitral practice often determines the liability of the wrongdoing State according to whether the damage is of a direct or indirect nature. If the damage is indirect, awards for damages are usually not granted.⁸¹ The question remains, however, as to what actually constitutes indirect damages. After surveying the existing decisions, *Whiteman* concluded that, although there was no uniform practice, “it may be stated that damages allowed on account of the commission or the omission of an act giving rise to responsibility generally are those which it is reasonable to allow”.⁸² As argued above, any damage or loss of profit with respect to the registration of vessels in St. Vincent and the Grenadines would not be based on reasonable conduct of interested ship-owners and could therefore not be attributed to Guinea’s enforcement actions.

189. The same conclusion can be drawn, if one applies the concept of an adequate causal link between the loss sustained or expected and the wrongful act. This concept was further elaborated by arbitral tribunals through the application of the criteria of normality and foreseeability. The case concerning the *Samoan Claims* might serve as an example for this point. The Commissioners agreed that

“The effect of these rules is that the damages for which a wrongdoer is liable are the damages which are both, in fact, caused by his action, and cannot be attributed to any other causes, and which a reasonable man

⁸¹ See Gray, *Judicial Remedies in International Law*, (1987), p. 22.

⁸² Whiteman, *Damages in International Law* (1937–1943), pp. 1766–1767.

in the position of the wrongdoer at the time would have foreseen as likely to ensue from his action."⁸³

It is held, that a loss of registration for St. Vincent and the Grenadines, is neither a normal nor a foreseeable consequence of Guinea's enforcement actions. This results from the fact that these actions are not directed specifically against vessels under the flag of St. Vincent and the Grenadines and that thus no reasonable ship-owner would attribute them particularly to St. Vincent and the Grenadines.

190. Furthermore, Guinea requests to reject the claim on the grounds that the damage or the loss of profit has not been specified at all. Even though there have been arbitral awards in which the amount of the loss of profit had not been exactly determined, it is still required that a claim is made concrete to a certain extent. There have thus been many arbitral tribunals that have rejected claims for loss of profit for uncertainty of the profits. *H. Lauterpacht* draws the conclusion that:

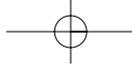
"The instances of rejection of claims [for loss of profit] are due . . . to the lack of adequate proof and a reasonably reliable basis of compensation, or to uncertainty, or their speculative character of their remoteness."⁸⁴

In the present case, St. Vincent and the Grenadines has left its claim completely vague and has not given any proof whatsoever as to the amount of the damage. The claim is entirely speculative and unsubstantiated and should be dismissed.

191. The same considerations are made with respect to the alleged damage that occurred to vessels flying the flag of St. Vincent and the Grenadines because they might have been precluded from navigating through the Guinean exclusive economic zone. Moreover, it is to be noted that this claim is no claim that St. Vincent and the Grenadines could request on its own behalf.
192. Apart from compensation for material loss, St. Vincent and the Grenadines claims satisfaction in its own right for alleged moral damage arising from the Guinean enforcement actions. It fails, however, to explain

⁸³ Cited in Gray, *Judicial Remedies in International Law* (1987), p. 23.

⁸⁴ Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 149–150.



what the actual moral damage is supposed to be. As precedents it mentions the *I'm Alone Case*, the *Re Letelier and Moffitt Case* and the *Rainbow Warrior Case*.

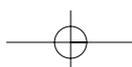
193. The latter two cases do not serve as precedents for the present case. In the *Re Letelier and Moffitt Case*, the Chile-United States Commission awarded moral damages to the relatives of the victims not to the United States itself. The *Rainbow Warrior Case* cannot be regarded as a precedent, since there existed prior agreement between the parties that France would pay compensation to New Zealand.

194. The only precedent that could apply is the *I'm Alone Case*. Its validity as an orderly judicial decision is, however, questioned. As has been pointed out by *Fitzmaurice*,⁸⁵ the Commissioners who determined the case were acting as counsellors appointed to advise the two governments mainly on the basis of equity, rather than as judges giving a judicial decision based on legal grounds. Consequently, the Commissioners submitted merely a report and gave recommendations as to what should be done by the parties. They did not render a judgement or a decision and did not give any reasons for their recommendations, thereby failing to fulfil basic requirements of a proper judicial decision. For these reasons, it is submitted that the International Tribunal shall not rely on the *I'm Alone Case* as a subsidiary source of international law, as listed in Article 38(1 d) of the Statute of the International Court of Justice. Although not explicitly bound by Article 38 of the Statute of the International Court of Justice, it seems reasonable to assume that the International Tribunal will base its findings, pursuant to Article 23 of the Statute of the Tribunal and Article 293 of the Convention, on the same sources of international law as its predecessor, the International Court of Justice.

195. In case the Tribunal does not follow this argument, it is requested that the International Tribunal should take into account the singular and controversial nature of the recommendations made in the *I'm Alone Case*. *Parry* wrote:

“But it is permissible to doubt the expressed ground of this award [of \$25,000 to Canada directly], if it can be considered an award, in view

⁸⁵ Fitzmaurice, *The Case of the I'm Alone*, British Yearbook of International Law, 1936 (XVII), pp. 94–95; a similar observation is made by Parry, *Some Considerations upon the Protection of Individuals in International Law*, in: Recueil des Cours, Académie de Droit International, 1956 (II), p. 678.



of the rejection of Canada's vicarious claim on behalf of the owners, . . . , ownership being found to be vested in American rather than Canadian nationals. . . . It is, however, impossible not to speculate whether the award on the first count would have been so substantial, or would have been made at all, had not the second count been rejected for a technical reason. It is not to be forgotten, moreover, that what is referred to as the "award" was couched in the form of a recommendation. And it is not wholly certain that the recommendation with respect to the payment to Canada on account of a wrong to herself was *intra vires* the commissioners who purported to make it."⁸⁶

196. This case is the only clear precedent in which pecuniary satisfaction was awarded as direct damages to a State on account of mere moral damage.⁸⁷ *Gray* concludes her thorough examination of decisions on damages as a remedy for direct injury to States by stating:

"Specifically it is clear that there is no compelling authority to support the claim that a mere breach of international law without injury to nationals or material damage to the state should be met by an award of damages by a tribunal."⁸⁸

197. It may be stated that satisfaction for direct injuries to a State of a immaterial nature usually takes non-pecuniary forms such as an apology for the damage done.⁸⁹ Another form of non-pecuniary satisfaction are declaratory judgements. An important example is the *Corfu Channel* Case, in which the International Court of Justice declared that the United Kingdom had violated the Albanian sovereignty and that "this declaration by the Court constitutes in itself appropriate satisfaction".⁹⁰ Other examples are the *Carthage* and the *Manuba* cases, in which France claimed from Italy one franc as moral reparation for an offence to the French flag and 100,000 francs as "sanction" and reparation for the political and moral injury resulting from the violation by Italy of certain Conventions. The Permanent Court of Arbitration, however, rejected these claims and observed that

⁸⁶ Parry, *ibid.*, see also p. 685.

⁸⁷ Parry, *Some Considerations upon the Protection of Individuals in International Law*, in: *Recueil des Cours, Académie de Droit International*, 1956 (II), pp. 685, 689, 693–694; Gray, *Judicial Remedies in International Law* (1987), pp. 43 and 86.

⁸⁸ Gray, *ibid.*, p. 91.

⁸⁹ Riedel, *Satisfaction*, *Encyclopaedia of Public International Law*, Vol. 10 (1987), p. 384.

⁹⁰ ICJ Reports, 1949, p. 36.

“in case a Power has failed to fulfil its obligations . . . the statement of this fact, especially in an arbitral award, constitutes already a severe penalty . . . made heavier, if there be occasion, by the payment of compensation for material losses.”⁹¹

198. As an auxiliary argument, Guinea submits that its enforcement actions were undertaken with a view on establishing a just economic balance between its national interests and the interest of the international trade community as regards bunkering. These actions were neither excessive, nor did they insult the dignity and honour of St. Vincent and the Grenadines in a way that could justify pecuniary satisfaction for immaterial damage suffered.

SECTION 6: LEGAL COSTS

199. According to the 1998 Agreement, the International Tribunal is “entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal.” It is requested that the Tribunal award the legal and other costs incurred by the Republic of Guinea in the proceedings before the Tribunal. These costs will be substantiated to the Tribunal in accordance with any orders as to costs which it may make.

SUBMISSIONS

For the above mentioned reasons or any reasons or any of them or for any other reason that the International Tribunal deems to be relevant, the Government of the Republic of Guinea asks the International Tribunal to dismiss the Submissions of St. Vincent and the Grenadines in total and to adjudge and declare that St. Vincent and the Grenadines shall pay all legal and other costs the Republic of Guinea has incurred in the M/V “SAIGA” cases nos. 1 and 2.

16 October 1998

[Signed]
Hartmut von Brevern
Agent of the Republic of Guinea

⁹¹ Cited in Whiteman, *Damages in International Law* (1937–1943), p. 264.