

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER



1999

Public hearing

held on Thursday, 18 March 1999, at 2.00 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

Uncorrected
Non-corrigé

Present:

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

Saint Vincent and the Grenadines
represented by

Mr. Carlyle D. Dougan Q.C., High Commissioner to London for Saint Vincent and the Grenadines,

as Agent;

Mr. Richard Plender Q.C., Barrister, London, United Kingdom,

as Deputy Agent and Counsel;

Mr. Carl Joseph, Attorney General and Minister of Justice of Saint Vincent and the Grenadines,

and

Mr. Yérím Thiam, Barrister, President of the Senegalese Bar, Dakar, Senegal,
Mr. Nicholas Howe, Solicitor, Howe & Co., London, United Kingdom,

as Counsel and Advocates.

Guinea
represented by

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

as Agent and Counsel;

Mr. Maurice Zogbélemou Togba, Minister of Justice and Attorney General of Guinea,

and

Mr. Namankoumba Kouyate, Chargé d'Affaires, Embassy of Guinea, Bonn, Germany,
Mr. Rainer Lagoni, Professor at the University of Hamburg and Director of the Institute for Maritime Law and Law of the Sea, Hamburg, Germany,
Mr. Mamadi Askia Camara, Director of the Division of Customs Legislation and Regulation, Conakry, Guinea,
Mr. André Saféla Leno, Judge of the Court of Appeal, Conakry, Guinea,

as Counsel.

1 **THE PRESIDENT:** As agreed, at this session we are going to hear the commencement of
2 the submissions of Saint Vincent and the Grenadines. I take it, Mr Howe, that you are going
3 to start for Saint Vincent and the Grenadines.

4
5 **MR HOWE:** I am, Mr President.

6
7 **THE PRESIDENT:** You may proceed.

8
9 **MR HOWE:** Mr President, Members of the Tribunal, today it is my pleasure to address you
10 on two matters: the applicants' further submissions as to why it is not open to Guinea to
11 challenge admissibility, and the delay in releasing the *M/V SAIGA*. I shall also comply with the
12 request made by the Tribunal and Mr von Brevern to supply more information about the
13 relevant insurance arrangements.

14
15 I start with the challenge to admissibility. In my speech on the first day of these
16 hearings, I reminded the Tribunal that your jurisdiction in this case is based on the exchange of
17 letters dated 20 February 1998, which I shall refer to as "the February 1998 Agreement".
18 I explained how, objectively, it could be seen that Guinea had waived their rights to raise
19 objections to the admissibility of the case. I pointed out that if Guinea relied on a special
20 meaning to have been attributed to the word "merits" by the parties, the burden would be on
21 Guinea to show that it was the common intention of the parties to give them that special
22 meaning.

23
24 In his response on Thursday 11 March, Mr von Brevern stated that there was indeed
25 such a common intention between the parties in February 1998. It followed from this that
26 Guinea found my objective interpretation of the February 1998 Agreement to be "rather sly
27 and unfair conduct consciously misinterpreting and ignoring what has been agreed upon in
28 February last year." It is true that, unfortunately, I was not myself directly party to each and
29 every one of the oral discussions which took place leading up to the conclusion of the
30 February 1998 Agreement. Another counsel also acting for Saint Vincent and the Grenadines
31 at that time also conducted a number of these discussions. However, I was more closely
32 involved in those discussions than anybody else on the Vincentian side of this dispute at that
33 time. For this reason, I am the person best qualified to comment on the common intention of
34 the parties when concluding the February 1998 Agreement.

35
36 As Mr von Brevern has pointed out, earlier discussions concerning a proposal to
37 transfer jurisdiction to this Tribunal were substantially recorded in writing for the first time in
38 my fax of 29 January 1998. That fax makes it clear that for such an agreement to be
39 acceptable to Saint Vincent and the Grenadines, it would have to include a number of
40 provisions. The third such provision was that "the proceedings be limited to a single phase
41 dealing with all aspects, including the merits and any jurisdictional issues that may arise." The
42 reference to "any jurisdictional issues that may arise" was included because Guinea had raised
43 a jurisdictional defence in their Statement of Response dated 30 January 1998. However, that
44 jurisdictional defence had been raised in response to the fact that:

45
46 "The Tribunal in its judgment in case number 1 of 4th December 1997 has qualified the
47 dispute in question as one which concerns the interpretation or application of the
48 provisions of the Convention with regard to fisheries."
49

1 Guinea had submitted at the application for the prompt release of the vessel that *The*
2 *Saiga* had been guilty of Customs offences. Clearly if Guinea believed that *The Saiga* was
3 guilty of Customs offences, we should not be too surprised that she should want to question
4 the jurisdiction of this Tribunal in the event that you were to continue to categorize this matter
5 in terms of a fisheries offence. That jurisdictional defence was clearly to be expected at that
6 time.

7
8 Of course, it was also open to Guinea to raise other jurisdictional objections at that
9 time. Had they done so, these would have been discussed. Depending on the outcome of
10 such discussions, it may well have been that the February Agreement would have incorporated
11 references to those objections as well. The reason that no such objections were included was
12 because no such objections were ever raised.

13
14 The agent for Guinea says "the accuracy of the Guinean position is clearly illustrated
15 by the fact that she put forward the objection concerning the non-exhaustion of local remedies
16 during the hearings in the provisional measures proceedings on 24th February 1998. He points
17 out, quite correctly, that "this was only four days after the conclusion of the 1998 Agreement
18 – we concluded on 20th February and this was on the 24th – which is now claimed to exclude
19 the raising of the objections." Why would Guinea seek to raise objections to admissibility on
20 24 February if indeed she had consciously intended to waive them only four days earlier?

21
22 Of course, it often happens that two parties conclude an agreement believing that they
23 have a common intention only to find out at a later date that they did not in fact see eye to eye
24 on all aspects. Courts in every jurisdiction are frequently asked to review such agreements in
25 those circumstances to determine the respective rights and obligations of the parties
26 notwithstanding their misunderstandings. But I do not believe that this is such a case. Indeed,
27 I shall submit that in this case Guinea did consciously waive her right to raise objections of
28 admissibility or, at best, was completely uninterested in preserving any such rights that she
29 might have had at the time of concluding the February 1998 Agreement. To do this, it is
30 necessary for us to seek to "go back in time" to the circumstances leading up to 20 February
31 Agreement. I propose to do this in some detail and shall deal with the delays in the release of
32 the vessel and the insurance position in the process.

33
34 With regard to the background, I do not propose to spend more than a brief moment
35 discussing the earlier attack on the *ALPHA I* in May 1996 because I know that this is not a
36 matter before the Tribunal today. The position of Guinea with regard to that attack has
37 always been and remains today unclear. Marc Vervaet has explained in paragraph 7 of his
38 statement the ambiguous position adopted by Guinea in response to the investigations made
39 after that attack. In paragraph 13 of their Rejoinder, Guinea – the first time that they
40 addressed this issue in these proceedings – denied any involvement in the attack on the
41 *ALPHA I*. However, as recently as this Tuesday, 16 March, Professor Lagoni cited the attack
42 on the *ALPHA I* in support of the proposition that "there is sufficient documentary evidence
43 that the master of *The Saiga* knew that offshore bunkering in the exclusive economic zone of
44 Guinea was prohibited and that the Guinean authorities enforced this prohibition against
45 foreign ships."

46
47 I attended the *ALPHA I* in Dakar a few days after that attack and met with the master
48 and crew members who had been shot at and left on board the burning vessel. As set out in
49 the statement of Marc Vervaet, the investigations conducted at that time included visiting

1 Conakry and speaking with Guinean lawyers. The Guinean officials who were spoken to
2 denied being involved in that attack. The Guinean lawyers who were spoken to could not
3 identify any provisions of Guinean law that the *ALPHA I* had been infringing. Most
4 importantly for me, I advised my clients that they were not doing anything unlawful in
5 accordance with the United Nations Convention on the Law of the Sea which Guinea had
6 ratified. The Addax and Oryx Group's determination to continue with their bunkering
7 operations off Guinea, albeit exercising additional caution in doing so, was made taking into
8 account this advice.

9
10 Against that background, I turn to discuss the insurance position. The earlier attack on
11 the *ALPHA I* is material to the insurance position regarding *The Saiga* upon which the
12 Tribunal has sought additional information and to which Mr von Brevern alluded in his closing
13 speech on Tuesday. He said, "Guinea also submits that any payment by insurance companies
14 should be taken into account, be it hull insurers or P&I clubs"; I repeat, "be it hull insurers or
15 P&I clubs."

16
17 The fact is that we live and operate in the real world. In the real world, insurance
18 companies charge their clients premiums calculated on the basis that if a claim is to be paid in
19 due course, the underwriter will be able to step into the shoes of the assured to seek to
20 recover that claim from any party truly at fault. In England, the country in which most of the
21 relevant insurance policies were taken out, the underwriter may proceed as if he were the
22 assured, pursuant to his rights of subrogation. Any proceedings will continue to be taken in
23 the name of the assured, and the underwriter may call upon the assured to give all reasonable
24 assistance in the pursuit of such proceedings, for example, in the production of documents and
25 the making available of witnesses of fact. It is for this reason that the insurance position of a
26 party is not regarded as relevant to a claim for damages before the English Courts.
27 I understand that the rules of legal procedure can be different in other jurisdictions. For
28 example, in some jurisdictions a claim may be brought in the name of the underwriter after he
29 has paid the claim. However, I would imagine that the general position is broadly similar, in
30 that an underwriter may expect to be able to recover at least some of the sums paid to it from
31 the other party in the same way that its assured would have been able to recover had that
32 payment not been made.

33
34 Certainly that an assured should not do anything to prejudice the ability of the
35 underwriter to recover all losses in due course. I remind the Tribunal that the premium earned
36 by the underwriter has been calculated on this basis. I respectfully submit that it would be
37 quite wrong for an underwriter to have to pay the claim of an assured and then be told that he
38 could not recover sums pursuant to his rights of subrogation because the assured had not truly
39 suffered a loss by virtue of the underwriters' own payment. I venture to suggest that, if this
40 were the case, no underwriter would ever pay a claim again until after all conceivable litigation
41 had been concluded.

42
43 But I digress. The fact is, as I have said above, that we live in the real world. In the
44 real world underwriters do not pay claims until they have been properly investigated and the
45 situation has been clarified. The Master of the *ALFA I* Captain Dimitros Exarchos, came to
46 Hamburg to offer his assistance to the Tribunal at the hearing of the application for the prompt
47 release of the vessel in November 1997. He came willingly, together with a representative of
48 the Owners, to explain precisely what had been done to him and his crew and his vessel. My
49 understanding is that at that time – and I simply do not know what has happened since – their

1 underwriters had still not made any payment in respect of the damage to that vessel some 18
2 months earlier, or the loss of hire that they had suffered while the repairs had had to be
3 effected. Their underwriters could not understand the reasons for the attack and so delayed
4 making any payment.
5

6 Under vigorous cross-examination from Mr Von Brevern, Mr Stewart, on behalf of the
7 owners of *The Saiga*, explained the position with regard to the dispute between the Owners
8 and the Charterers. Mr Stewart confirmed that it is not yet finally decided whether the
9 Owners will accept the behaviour of the Charterers in not paying hire for the period of the
10 detention. Earlier today we lodged with the Court a small bundle of additional documents
11 evidencing this dispute between the Owners and the Charterers and how this impacts on their
12 respective insurance arrangements. I should explain that the bundle has been prepared
13 chronologically. This has been done for ease of reference to demonstrate the nature of the
14 ongoing discussions. These may be broadly summarized as follows.
15

16 Representative examples of the correspondence passing between representatives of the
17 Owners and the Charterers appear at pages 1-2, 4-5, 19-25 and 30-38. This line of
18 correspondence ended with the message from Seascot on 23 February 1998 which, amongst
19 other things, commented on the situation in which the Master had been obliged to discharge
20 the cargo. In that fax they also chose to comment on my previous message as follows,
21 quoting from the fax: "In the words of England's most celebrated writer 'methinks he doth
22 protest too much'". Frankly, I do not think that anybody who chooses to misquote
23 Shakespeare in writing deserves a response. Suffice to say that, as Mr Stewart has confirmed
24 this dispute may yet have to be resolved in arbitration.
25

26 As can be seen from pages 4-5, 20, 30-31 and 36-38 of this correspondence, Owners'
27 P&I Club maintain that Charterers should pay the bulk of the losses. I understand that they
28 have not made any payment to the Owners for this reason. Owners are also seeking to effect
29 some sort of recovery in respect of the physical damage to the vessel from their war-risk
30 underwriters. However, I also understand that, as of today, these underwriters have still not
31 accepted that the loss falls within the policy terms. This was confirmed by Mr Stewart.
32 Further proceedings are doubtless being contemplated in this regard.
33

34 Perhaps not surprisingly, the view of the Owners' P&I Club is not shared by the
35 underwriters of charterers or the cargo owners. As could be anticipated in the light of the fax
36 from brokers Henrijean appearing at pages 26-28 charterers' liability underwriters have taken
37 the view that this matter does not come within their area of responsibility. Charterers can have
38 no objection with this position until any liability to Owners has been established.
39

40 **THE PRESIDENT:** Mr von Brevern, please.
41

42 **MR VON BREVERN:** Mr President, I wonder whether the document Mr Howe is referring
43 to in the bundle of documents could perhaps also be made available to this side of the
44 proceedings. I see that you Honourable Judges have something before you. We have not
45 received anything, or is the idea that we should not get anything?
46

47 **THE PRESIDENT:** Thank you Mr Von Brevern. No, the bundle will be made available to
48 you. It is not yet available to the Judges.
49

1 **MR HOWE:** I have a spare copy Mr President, which I will be happy to give
2 Mr von Brevern now.

3
4 **THE PRESIDENT:** Mr von Brevern, are you speaking about the text of Mr Howe's
5 statement, or the bundle which he is referring to?

6
7 **MR VON BREVERN:** No, I meant the bundle Mr Howe is referring to. He has been
8 referring to page 1, 20 etc., and I could not follow, because I have not got it before me.

9
10 **THE PRESIDENT:** That bundle, I understand, has just been made available to the Tribunal.
11 It is not available to the Judges, and in accordance with normal practice copies will be made
12 available to you as soon as possible.

13
14 **MR VON BREVERN:** Just a remark. It is of course difficult for us to understand when the
15 speaker refers to page 2, 3 or 4, which we do not have before us. Of course we would be in
16 a better position to understand what is said if what is quoted or described in those pages.
17 Thank you Mr President.

18
19 **THE PRESIDENT:** Thank you very much. I think perhaps a compromise could be, as
20 Mr Howe has suggested, that he gives you a copy of the text he is reading, so that you can at
21 least have the references correctly, so when you get the bundle you will be able to check them.
22 That is, I take it, a copy of the statement. The bundle will be made available to you in due
23 course. Thank you very much. Mr Howe, you may proceed.

24
25 **MR HOWE:** Thank you Mr President. I believe I had just finished discussing the position of
26 the charterers' liability underwriters. I intend to discuss, which is perhaps of more interest, the
27 position adopted by the cargo insurers at Lloyds with whom the assured deals through the
28 brokers Lloyd Thompson . The cargo insurers' comment of 29 December 1997 was:

29
30 "On their initial analysis of the information including the fact that the Guinean Tribunal
31 have now ruled that the Assured were in breach of local customs regulation,
32 Underwriters are not convinced that they would be liable in the event of a loss in these
33 circumstances. Although underwriters do not wish in any way to pre-judge any issues
34 in this very complex case, you will appreciate that they must, and hereby do, reserve all
35 of their rights, and in particular with regard to any breach of any warranties in the
36 policy."

37
38 I also invite the Tribunal in due course, when the bundle is to hand, to read these
39 underwriters' further comments of 2 June 1998 appearing at pages 42-43. They say that they
40 are not clear on the consequences of the findings of this Tribunal. Additionally they question
41 whether or not the cargo has been lost as a result of the seizure. The implication from this is
42 that further litigation may be necessary between the cargo owners and these underwriters
43 whatever the Tribunal decides in the present case. If this Tribunal were to find that Guinea did
44 act unlawfully, it is still possible that an English Court may subsequently hold that these
45 underwriters are right that the cargo has not yet been lost as a result of the seizure. In this
46 event the cargo owners will additionally have to commence further litigation to exhaust their
47 tracing rights against the oil companies in Conakry, as was anticipated near the outset of this
48 matter in a fax appearing at pages 6-17 of the bundle. This course of action they would have

1 to undertake before they would be able to recover any sums under the policy on the basis
2 postulated by those underwriters.
3

4 In conclusion, as at today's date, we are not aware of any "hull insurers or P&I clubs"
5 that have yet paid so much as a cent in respect of the physical losses or detention time suffered
6 by the interests in *The Saiga* under the terms of any relevant policies of insurance. Indeed, the
7 only insurance claim that has been accepted to date is in respect of the injuries to the crew
8 which was covered by Owners' medical insurance. However, the payment made by those
9 underwriters only represents a very small proportion of the expenses actually paid by the
10 Owners due to the extent of the deductible. As I have outlined, it seems quite likely that there
11 will have to be a good deal more litigation in domestic Courts before the position between the
12 various interests in the vessel and their respective underwriters can be resolved.
13

14 I turn to discuss the detention of *The Saiga* and the delay in releasing the crew.
15

16 Over the last two weeks we have had the benefit of seeing *The Saiga* matter from a full
17 perspective for the first time. On Tuesday, Mr Camara explained to the Tribunal how
18 Customs revenue represents one of the principal sources of income for the budget of Guinea,
19 and how fraudulent activity with petrol, diesel and oil, puts a large part of this income for the
20 Customs in danger. Under cover of a letter dated 12 March 1999 we were provided with
21 a copy of the *Ordre de Mission* stating, as its object, and I give a loose translation, "locating
22 and prevention of fraud at sea and on land". We have heard from Mr Bangoura and
23 Lieutenant Sow how they undertook their actions against *The Saiga* in accordance with this
24 mission. We have heard Mr Niasse, a very impressive witness, report how one of the first
25 things that the detaining officers said to him was that "you Senegalese are crooks".
26

27 As we know, the vessel was detained on the morning of 28 October and brought into
28 Conakry that evening. Unfortunately, upon its arrival at Conakry and only a few days later Mr
29 Vervaeet was initially only able to communicate with the Master by making hand signals to the
30 vessel from the shore. As he told you when giving evidence at the *Prompt Release* hearing,
31 the Guinean officials that they were able to speak to, and I quote from his evidence, "quite
32 simply said that we were smugglers engaged in contraband activities and that they had all the
33 evidence but they did not want to give us any of it". Representatives of the Governments of
34 Saint Vincent and the Grenadines and the Ukraine, as well as representatives of the owners,
35 charterers, cargo owners and crew, had similar difficulties in making contact with the vessel
36 and her crew or the Guinean officials responsible for the arrest.
37

38 It was in these circumstances that Saint Vincent and the Grenadines determined to
39 make an application for the *Prompt Release* of the vessel by an application filed on
40 13 November 1997. That application appeared entirely appropriate at that time in view of the
41 urgency of the situation and the very limited information being received about the reasons for
42 the detention. That same day, but after the filing of that application, the Customs
43 *procès-verbal* was made available. The *procès-verbal* talked of Customs offences but, by
44 reference to provisions of Guinean law did not, at least to representatives of Saint Vincent and
45 the Grenadines, appear even on their face to be applicable to the detention of *The Saiga*. The
46 application for *Prompt Release* was accordingly maintained.
47

48 As you know, the hearing took place over 27 and 28 November 1997. Guinea
49 throughout maintained their position that *M/V SAIGA* was guilty of Customs offences. I have

1 counted from the verbatim records that the representatives of Guinea used the expression
2 "smugglers" in relation to the bunkering activities on no less than 16 occasions over the course
3 of that hearing.

4
5 I need hardly remind the Tribunal that, by your judgment of 4 December 1997, you
6 unanimously found that the Tribunal had jurisdiction under article 192 of the Convention.
7 You further found that the application was admissible and ordered that Guinea shall promptly
8 release the *M/V SAIGA* and its crew from detention and that the release shall be upon the
9 posting of a reasonable bond or security. You further decided that the security shall consist
10 of: (1) the amount of gasoil discharged from the *M/V SAIGA*; and (2) the amount of
11 US\$400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by
12 the parties, in any other form. The guidance that we were given as to the form of the bond
13 comes from article 113 (91) of the Rules of the Tribunal. This provision talks of the "posting
14 of a reasonable bond".

15
16 The subsequent correspondence concerning the bond appears at tab 38 of the Annex to
17 the Memorial. As you know, a bond was initially issued on 19 December 1997 and a copy
18 faxed to the Agent of Guinea that same day. The contemporaneous notes of my telephone
19 conversations with the Agent of Guinea on the following day and the day after appear at
20 tab 14 of the Annexes to the Reply. I spoke with the Agent of Guinea on the morning of
21 11 December before seeing a fax that he had sent to me that morning. We agreed that I could
22 overcome a number of concerns that they had by procuring a further fax to be sent directly to
23 him by Crédit Suisse in agreed terms, including attaching a translation of the bond. That was
24 done in accordance with our agreement. I do not suggest that in doing this the Agent of
25 Guinea agreed that Guinea would be irrevocably bound to accept the bond and would
26 immediately release the vessel. It was made clear that he would need to speak to somebody in
27 Guinea before this could happen. However, I do suggest that, in the light of our agreement, it
28 was clear that the Agent of Guinea himself considered that the bond was "reasonable" in the
29 form in which it had been provided with his ambiguities clarified by the subsequent fax from
30 Crédit Suisse. In these circumstances, and absent a clear mistake on the part of the Agent of
31 Guinea, which is not evidence in this case, it is difficult to see how it can be open to Guinea to
32 suggest that the bond was not "reasonable" in this form on 11 December 1997. Such a
33 suggestion would be contrary to the advice of the professional advisers that they have retained
34 to advise on precisely such issues.

35
36 But Guinea did not release the vessel. Instead, the very next day on 12 December they
37 issued the *citation*. The *cedule* to that *citation* cited the Master as the person charged and
38 Saint Vincent and the Grenadines as a party to be civilly liable. The judgment of the Court of
39 First Instance was given in Conakry only five days later on 12 December. This found the
40 Master guilty of Customs offences. As you know, Mr President, at this time Saint Vincent
41 and the Grenadines were contemplating making an application for interpretation of your
42 judgment of 4 December 1997 under article 126 of the Regulations when it transpired that an
43 application for Provisional Measures might be more expeditious

44
45 In these circumstances, and to protect the Master from imprisonment, an appeal was
46 lodged with the Court of Appeal in Conakry. Judgment was again fast and the judgment of
47 the Court of Appeal in Conakry was handed down on 3 February 1998, confirming that the
48 Master was guilty of Customs offence.

1 Moreover, over this period Guinea continued to take steps against the other vessels for
2 breaches of its Customs laws. You have seen in the statement of Marc Vervaet, appearing at
3 Annex 10 to the Memorial, that at least two fishing trawlers were attacked in the months after
4 *The Saiga* had been detained but before 12 February: the *POSEIDON* and the *XIFIAS*.

5
6 The Agent of Guinea now tries to suggest that the delay in releasing the vessel over
7 this period was largely due to communication difficulties he experienced in sending faxes to
8 Guinea, but there is a wealth of evidence that Guinea knew precisely what had happened at
9 this stage with regard to the bond. Captain Merenyi was clear in his evidence that the
10 authorities in Guinea with whom he was talking "wanted to make us understand that
11 everything was legal". He also said: "They considered the \$400,000 as not a bond but a cash
12 payment".

13
14 At the hearing of the application for Provisional Measures the Agent of Guinea advised
15 the Tribunal that the Minister of Economy and Finance of Guinea had "advised the release of
16 the vessel immediately if US\$400,000 under the guarantee were paid by Crédit Suisse. So far
17 as Guinea was concerned, *M/V SAIGA* had been found guilty of Customs offences and was
18 now obliged to pay the appropriate fine of US\$400,000 in accordance with your ruling.

19
20 At The hearing of the application for Provisional Measures, Counsel for Saint Vincent
21 and the Grenadines suggested that by categorizing this matter as one relating to fisheries in the
22 Prompt Release judgment, this Tribunal had "offered Guinea a perch on which to develop an
23 argument". However, "rather than seize that perch, it chose too ignore the views of the
24 majority and persist with its claims to be entitled to enforce Customs and criminal laws". Why
25 was that? Mr President, Members of the Tribunal, I have tried, with the benefit Of the more
26 complete information that we now have, to demonstrate why it was so clear at the beginning
27 of the hearing on the application for Provisional Measures on 23 February 1998 that Guinea
28 genuinely considered that they had acted lawfully in detaining *The Saiga*. This is what they
29 had maintained steadfastly since the vessel had first been detained back in October 1997. At
30 no stage up until that time in February did Guinea seek to change their position one iota from
31 that which they had maintained from the outset. Their conviction in the position that they had
32 undertaken stood as firm, if I may say so, as the rock of Alcatraz.

33
34 That explains why the desire to preserve arguments questioning the admissibility of the
35 claims of Saint Vincent and the Grenadines was not important to Guinea at any time prior to
36 20 February when they concluded the February Agreement. Mr President, Members of the
37 Tribunal, this Tribunal is an extremely public forum. Our proceedings have been monitored on
38 video tapes; our words are published every evening to the world at large on the Internet.
39 Guinea did not agree to transfer jurisdiction to this Tribunal under the watch of the whole
40 world in the knowledge that she had done wrong and with the hope that she might be able to
41 get away with this because of some legal technicality – of course not. She, like Saint Vincent
42 and the Grenadines, was absolutely convinced at that stage of the correctness of her acts.
43 Here was an opportunity to prove this to the world, to collect the US\$400,000 due to her, but
44 perhaps even importantly to show what happens to smugglers operating off Guinea to help
45 stamp out fraud offshore and inland.

46
47 I indicated before that I would seek to explain why it was that Guinea sought to raise
48 objections to admissibility on 24 February when she had intended to waive them only four
49 days earlier. As you know, this was not *any* four days. The hearing of the application for

1 Provisional Measures commenced on Monday 23 February and concluded the following day.
2 A lot of work was done in respect of that application by both sides. Captain Orlov indicated
3 to this Tribunal how the Saint Vincent and the Grenadines team was up until at least four
4 o'clock in the morning of Monday 8 March preparing this application before you. I know that
5 the Guinean side have been working equally as hard, and so it was on the application for
6 Provisional Measures. I well remember burning the midnight oil on that occasion to make our
7 case, and so, I have no doubt, did Guinea.
8

9 What is remarkable is that in the whole of their answering submissions – in two rounds
10 of written pleadings and in the first round of oral pleadings taking place on the afternoon of
11 Monday 23 February – there was not one single mention of any of the three technical
12 objections to admissibility Guinea now seeks to raise. It is true that they developed their
13 arguments that this Tribunal lacked jurisdiction in view of your earlier categorization of this
14 matter as a fisheries matter, but that was made by way of a defence to the immediate
15 application being made for Provisional Measures. There is no doubt that they wished the
16 subsequent substantive hearing to concentrate on the Customs offences alleged to have been
17 committed by *The Saiga* as, indeed, was to be expected. That was their case.
18

19 What changed? I venture to suggest that during the course of those four days it
20 became apparent to the Guinean side, as it did to the Tribunal, that *The Saiga* had not been
21 engaged in any form of smuggling or other illegal activity. On the contrary, it was clear that
22 she had done nothing contrary to Guinean law. Four further days after the hearing, on
23 28 February 1998, Guinea released *The Saiga* without having received payment under the
24 bond following nearly four months of detention. Only a few days later, on 11 March 1998,
25 this Tribunal prescribed the most important of the Provisional Measures sought, and did so
26 unanimously. Moreover, the National Director of Customs in Guinea has since acknowledged
27 that there is, "a current loophole in the area of the refuelling of boats" in the Customs
28 legislation of Guinea.
29

30 Maître Thiam will shortly address you on whether or not the proposed draft decree
31 overcomes the problems identified, but it is sufficient for my purposes to note that Guinea
32 accepted the fact that there is a loophole.
33

34 It is against the background described above that the agent of Guinea first raised the
35 failure of Saint Vincent and the Grenadines to exhaust legal remedies in Guinea as a further
36 defence to the application for Provisional Measures. He did that in his closing submissions on
37 the afternoon of 24 February. It was correctly pointed out that he could not then raise this
38 matter for the first time after not having mentioned it at all in two rounds of written
39 proceedings and the first round of oral arguments. That was an end to the point. It could
40 equally have been said that this was contrary to the February Agreement, but this would have
41 involved a more detailed examination of the February Agreement which would have been
42 neither appropriate nor necessary at that stage.
43

44 Mr President, Members of the Tribunal, there was no "special agreement" between the
45 parties at the time of concluding the February Agreement, whether to preserve Guinea's rights
46 to raise objections of admissibility or otherwise. Indeed, I can state quite categorically that the
47 intention of Saint Vincent and the Grenadines at least was quite the contrary: we did not wish
48 to be burdened with the additional work and costs of arguing questions of admissibility. The

1 interpretation of the agreement that I have put forward is neither sly nor unfair conduct. It is
2 exactly how it happened between the parties.

3
4 Finally in this regard I would remind you of the submissions I have already made
5 concerning the fact that Guinea is out of time to make this application. I do not propose to
6 repeat those submissions here.

7
8 Mr President, Members of the Tribunal, that completes my submissions before you
9 today and, in all likelihood, for ever in *The Saiga* saga. It has been my great pleasure to
10 appear before you in all three hearings in this matter together with my colleague, and now
11 good friend, Maître Thiam, and Mr von Brevern, for whom I have developed the utmost
12 respect. I have also greatly enjoyed working with Dr Plender and Professor Lagoni and learnt
13 a great deal from both of them. Who knows whether or not I shall ever have the honour to
14 appear before this esteemed body again? In some ways I hope so, but in others I hope not.
15 Certainly, I hope that with your judgment in this matter, you can help to prevent further
16 attacks being made along the lines of the one made upon *The Saiga*, so that such an incident
17 never arises again. I thank you once again for your indulgence throughout these hearings.

18
19 **THE PRESIDENT:** Thank you, Mr Howe. Thank you also for your kind words.
20 Dr Plender?

21
22 **DR PLENDER:** Mr President, Members of the Tribunal, in case the Tribunal should judge it
23 appropriate to consider Guinea's objections to admissibility, despite the agreement reached on
24 20 February and notwithstanding the late stage at which those objections were raised, Saint
25 Vincent and the Grenadines will submit that those objections have no substance; they should
26 be dismissed.

27
28 The first objection to admissibility is based on the certificate of registration. Guinea
29 contends that *The Saiga* was not validly registered on 28 October 1998 because the
30 provisional certificate had expired during the preceding month.

31
32 The agent for Guinea does not conceal his enthusiasm for the point. On the afternoon
33 of Thursday 11 March he told the Tribunal that once he had drawn attention to the so-called
34 "problem", the Claimant State, "seemed to realize that there might be a really serious issue"
35 and "took the problem seriously" (p.10, lines 1-6 and p.12, lines 25-30 of the transcript).

36
37 Since the agent for Guinea has told the Tribunal that we appear very much impressed
38 by his point, I hope that I shall be acquitted of discourtesy if I respond. It is incorrect. The
39 submissions made by the Respondent State on the basis of Vincentian law would be dismissed
40 without hesitation by the Vincentian Court.

41
42 Just as a person does not become stateless when his passport expires, so a vessel does
43 not cease to remain on the Vincentian register when the provisional certificate expires.
44 A provisional certificate, like a passport, is evidence of a national status. It is not the source
45 of that status.

46
47 The position under Vincentian law is very simple. It is governed by Section 36(2) of
48 the Merchant Shipping Act 1982 (tab 6 of the Annexes to our Reply) which reads as follows:
49

1 "The provisional certificate of registration issued under subsection (1) shall have the
2 same effect as an ordinary certificate of registration until the expiry of one year from
3 the date of its issue".

4
5 I emphasize the mandatory words that it shall have the same effect for one year.
6

7 The effect of a provisional certificate of registration can be shortened in one case only.
8 By Section 37, registration ceases at the end of 60 days if the Applicant fails to provide,
9 during that time, sufficient evidence that the vessel has been removed from its former register
10 and has been duly marked. In the case of *The Saiga*, that evidence was supplied within the
11 60 day period so the vessel did not cease to be registered. The effect of a provisional
12 certificate was the same as that of an ordinary certificate until the expiry of one year; that is,
13 until 11 March of the following year.
14

15 Within the first year of a vessel's registration, an applicant must supply to the
16 Vincentian authorities evidence of several matters. They are all set out in section 36(3) of the
17 1982 Act. The evidence covers not only such matters as the seaworthiness of the vessel, but
18 also proof of payment of the "*annual fee for one year in respect of the ship.*" I repeat:
19 "annual fee for one year". Obviously, the time taken to satisfy the Vincentian authorities of
20 these matters varies from case to case. That is why provision is made for the issuance of two
21 successive certificates, each of six months. If the applicant satisfies the Vincentian authorities
22 of all the statutory matters within the first six months, the provisional certificate is replaced by
23 an ordinary one. If the paperwork has not been completed within the first six months, another
24 provisional certificate can be issued. It is replaced by an ordinary certificate once the
25 Vincentian authorities have been satisfied of all the matters set out in section 36(3).
26

27 To a common lawyer, at least, this is obvious from the text of the statute. To a native
28 speaker of the English language, at least, it appears with equal clarity from the brochure
29 appended at Annex 5 to the Memorial. This provides that registration is governed by the Act
30 of 1982; that the issuance of a provisional registration certificate is contingent on payment of
31 "*registration and annual fees*"; and that a provisional certificate is issued for six months and
32 can be extended for a further six months.
33

34 Not only is this clear from the statute and from the brochure; it is also consistent with
35 the practice of many other States. There were appended to my speech, and will no doubt be
36 copied and supplied to each of your Lordships in due course, extracts from the third edition of
37 *Ship Registration* by NP Ready. This describes the procedures for registration in a variety of
38 jurisdictions. You will find extracts from the sections dealing with The Bahamas, Barbados,
39 Cyprus, Malta and Panama, as well as Saint Vincent and the Grenadines. In all these cases,
40 initial registration is provisional; the period is commonly six months; the period can be
41 extended; during the period of provisional registration period, the applicant is required to
42 satisfy the authorities of the flag State of certain statutory matters; and once this is done, the
43 provisional certificate becomes definitive or is replaced by a definitive certificate. One
44 searches the book in vain to find a single case of any jurisdiction in which a vessel becomes
45 stateless in the interval between the expiry of the provisional certificate and the issuance of a
46 new certificate.
47

48 Moreover, the Tribunal has heard evidence that the Vincentian law on the subject is
49 well understood and known by those whose business it is to register vessels on the Vincentian

1 registry. Allan Stewart gave evidence that he had experience of registering numerous vessels
2 on the Vincentian registry, not only *The Saiga*. On the afternoon of Wednesday 10 March he
3 stated (p 23 of the transcript, beginning at line 43):

4
5 "Usually the initial, provisional registry document is issued for six months. You can
6 get another extension for six months if the ship happens to be in a place and you
7 cannot finally get all the bits and pieces together within the six months for permanent
8 registration, or issuance of a permanent registration document, as they call it, because
9 obviously, once you fill in the application form and the ship is accepted for registry, it
10 remains on the register until or unless it is deleted for some reason or other..."

11
12 His understanding of the procedure, which is correct and consistent with that of other
13 jurisdictions, is also consistent with the letter dated 1 March 1999 from the Deputy
14 Commissioner for Maritime Affairs. She states:

15
16 "In my experience it is very common for owners to allow the validity period of the
17 provisional certificate to lapse for a short period before obtaining either a further
18 provisional certificate or a permanent certificate (as was the case here)".

19
20 At paragraph 17 of the Rejoinder, the Republic of Guinea observed that "an inspection
21 of the ship registry of Saint Vincent and the Grenadines would eliminate any doubt that the
22 *M/V SAIGA* was not registered on 28 October 1997." It was presumably in the light of that
23 comment that the President invited us to produce, at a meeting on 2 March this year, the
24 appropriate extract from the register. That was done. In complying with the Guinean
25 comment and the President's suggestion, we failed to satisfy the Guinean agent. In his speech
26 of 11 March (at page 12) he complained that the extract had been produced "only very
27 shortly" and declared that the production of this material was evidence that "Saint Vincent and
28 the Grenadines [realised] that they might still be in a grave problem."

29
30 For convenience, I have asked that a further copy of the extract from the register
31 should be appended to the copy of my speech delivered to your Lordships. As you have seen
32 and will conveniently see again, the Vincentian register is not an old-fashioned handwritten log
33 but a computerized database. On 15 April 1997, a copy of the relevant extract was printed
34 from the registry book. You will see the date in the top left-hand corner. This shows that on
35 that date the vessel had been granted provisional registration, valid until 12 September 1997.
36 That is exactly what one would expect. On 15 April 1997, it was impossible to predict
37 whether the necessary formalities would have been completed before 12 September. If the
38 formalities had been completed within that period, registration would have become permanent
39 within the first six months. Section 36(2) of the 1982 Act would not have come into play. In
40 the event, the formalities were not completed within the six month period, so section 36(2) did
41 come into play. In accordance with that sub-section, the provisional certificate continued to
42 have the same effect as an ordinary certificate for one year, measured from 12 March 1997.

43
44 The agent for Guinea invites you to conclude that on 13 September 1997 the
45 registration had expired and the vessel had become stateless. That submission, as I have
46 explained, ignores the effect of section 36(2) of the 1982 Act. It also ignores the extract from
47 the register dated 24 February 1999, a copy of which was also supplied to the registry and
48 should be distributed to each of your Lordships. This shows that *The Saiga* held a permanent
49 certificate of registration *beginning on 12 March 1997*. This certificate, I suggest, is

1 conclusive even if all the rest is not conclusive. If the provisional registration had expired on
2 13 September, it would obviously have been necessary to register the vessel again and a
3 different date of registration would have appeared on the registration certificate. The
4 permanent certificate confirms that the registration was effective from 12 March 1997 and
5 continuously thereafter.
6

7 In the same context, the agent for Guinea declared himself to be " a little astonished
8 that the Maltese deletion certificate was not exhibited" and "not happy" with the statement
9 declaring that the owners had produced alternative evidence to show that the Maltese
10 registration had been closed. Indeed, as we entered the Tribunal building today we received a
11 letter asking us to elaborate on just this point. There is no cause for astonishment nor for
12 unhappiness. Section 37(a) of the Merchant Shipping Act provides for the registration of
13 a vessel where the applicant has produced *either* a certificate issued by the government of the
14 last country of registration *or* "other acceptable evidence" to show that the registration had
15 been closed. In the case of *M/V SAIGA*, it met the second of those conditions. Since there
16 has never been any suggestion that *The Saiga* remains on the Maltese register, we have judged
17 it unnecessary to trouble the Tribunal with details of her history under a different name and a
18 different flag years before the events which have given rise to this litigation. The Tribunal may
19 judge that it has enough questions to answer in this case without enquiring into the history of a
20 different named vessel under a different flag which was never the subject of any arrest.
21

22 I shall not labour further the question of the certificate of registration, for, although the
23 agent of Guinea declares that he cannot understand our submission (page 10, line 46), we
24 submit that Vincentian law is simple, clear, consistent with other States' practice and widely
25 understood in the industry. Before leaving the subject, however, I should say something about
26 the letter from the Commissioner for Maritime Affairs, Mr Dabinovic, dated 27 October 1997.
27 This will be found at Annex 7 to our Reply. So far as relevant, it reads as follows:
28

29 "I hereby confirm that the *M/V SAIGA* was registered under the Saint Vincent and the
30 Grenadines flag on 12 March 1997 and is still validly registered".
31

32 Mr von Brevern commented on that letter on 11 March, at page 12 of the transcript.
33 He suggested that the letter was silent about a gap in registration from 12 September 1997 to
34 28 November 1997. If that had been the case, the letter would certainly have been both
35 misleading and improper. In the language used by Mr von Brevern elsewhere in his speech
36 (page 5, lines 15-16) it would have been "sly and unfair conduct, consciously misinterpreting
37 and ignoring" the relevant facts. We owe it to Mr Dabinovic to repudiate any such
38 construction of his letter.
39

40 By irresistible implication, the letter states that *The Saiga* was registered on
41 28 October 1997. It is consistent with the words of the Merchant Shipping Act and with
42 extracts from the register. It is confirmed in the letter written by his Deputy and daughter. It
43 is consistent with the practice described by Mr Stewart, and it is correct.
44

45 The Respondent State's second objection to admissibility is based on Article 9(1) of the
46 United Nations Convention . This provides that "There must exist a genuine link between the
47 State and the ship". In my opening address, I proposed that if the Tribunal thought it right to
48 deal with this objection at all, it should dispose of it on the basis of the evidence.
49

1 As is well known, the words "genuine link" owe their origin to the judgment of the
2 International Court of Justice in the *Nottebohm Case (Second Phase)*. For convenience,
3 I have had a copy supplied to the Court, though I have to add that this had to be from the
4 International Law Reports rather than the International Court of Justice Reports.
5

6 The Court there held that it was not open to Liechtenstein to espouse the claim of
7 Mr Nottebohm against Guatemala, in the absence of a genuine link between that man and the
8 principality. The Court pointed out that his actual connections with Liechtenstein were
9 extremely tenuous. He had paid no more than a short visit to the principality, and in the
10 Court's words:

11
12 "the application confirms the transient character of this visit by its request that the
13 naturalisation proceedings should be initiated and concluded without delay."
14

15 The Court added:

16
17 "There is no allegation of any economic interests or of any activities exercised or to be
18 exercised in Liechtenstein and no manifestation of any intention whatsoever to transfer
19 all or some of his interests and business activities to Liechtenstein."
20

21 In the case of *The Saiga*, by contrast, the links between the State and the vessel are far
22 from transient; and there *is* evidence of economic activities exercised in the flag State. The
23 ship is now, and at all material times has been, represented in St Vincent by a Vincentian
24 company formed, managed and present on St Vincent. She is subject to the supervision of the
25 Vincentian authorities to secure compliance with various Conventions to which Saint Vincent
26 and the Grenadines are a party. Effective supervision of her seaworthiness is secured by
27 regular inspections conducted by classification societies nominated by Saint Vincent and the
28 Grenadines. Preference is given to Vincentian nationals in respect of her manning.
29 Saint Vincent and the Grenadines has been vigorous in attempting to secure her protection at
30 the international level both before and through this litigation.
31

32 There is also supplied to the Tribunal with a copy of my speech an extract from the
33 latest edition of *Oppenheim's International Law*, Volume I, p.732. At that point the eminent
34 editors, Sir Robert Jennings and Sir Arthur Watts, give some indication of the meaning of the
35 "genuine link" for the purposes of the United Nations Convention. After acknowledging that
36 the point is not without difficulty, they use the following words, and I quote.
37

38 "The 1982 Convention sets out the duties of the flag state such as maintaining a
39 register, assuming jurisdiction under its internal law over its flag ships, master, officers
40 and crew in respect of administrative, technical and social matters relating to the ship,
41 measures concerning construction and seaworthiness, manning, training and labour
42 conditions, signals and communications, regular survey, appropriate qualifications,
43 conversance with international regulations, reports and enquiries."
44

45 Each one of these links, without exception, is established between the Applicant State
46 and *The Saiga*.
47

48 It is therefore unnecessary to enquire what the effects would be if these links were
49 absent. Professor Lagoni invites the Tribunal to consider that question, nevertheless. There

1 is, I believe, a German word, apt to describe this sort of legal speculation. It is
2 *Professorenrecht*. I am content to consider what the law would be, on the hypothesis that
3 a genuine link were absent in the present case; but I do so in the same spirit as that in which
4 Meister Eckhart asked whether angels could fly if they did not have wings.

5
6 In his speech on 11 March at p.15 of the transcript, Professor Lagoni argued that if
7 there had been no genuine link between the Applicant State and *The Saiga*, Guinea would not
8 have been bound to recognize claims relating to the vessel, advanced by Saint Vincent and the
9 Grenadines. I beg to differ.

10
11 The United Nations Convention does *not* deprive a flag State of competence to
12 advance a claim in respect of a vessel, in the absence of a genuine link. On the contrary, in
13 1958 there was a proposal to insert such wording into the High Seas Convention. It was
14 expressly rejected. In an earlier incarnation, Article 29 of the 1958 Convention provided that
15 there must be a genuine link between the State and the ship, and continued with the following
16 words:

17
18 "for the purpose of recognition of the national character of the ship by other States"

19
20 As Professor Brown points out in *The International Law of the Sea*, Vol. I, 1994 at
21 288, copy also supplied to the Tribunal

22
23 "The formulation would have provided a basis for challenging the exclusive discretion
24 of the State to grant its nationality and for refusing to recognize the nationality of a
25 ship considered to lack a genuine link with the flag State. This proved too much for
26 UNCLOS I and, in the end, the clause...was omitted."

27
28 This was, of course, well known to the International Law Commission and to the
29 negotiators when the 1982 Convention came to be drafted. Neither the Commission nor the
30 parties sought to reinstate the language omitted from the corresponding provision in 1958.

31
32 Some might perhaps regret that what had been proposed in 1958 did not mature into
33 international law. Others, no doubt, would vigorously take the opposing view. This Tribunal
34 can only interpret the Convention consistently with its object and purpose, taking account of
35 the intentions of the parties. Such an interpretation will lead to the conclusion that the
36 function of the "genuine link" is not to limit the opposability of international claims. It is to
37 secure the effective discharge of the supervisory functions entrusted to flag States under the
38 Convention, by ensuring that they do not place on their register vessels which they are unable
39 to administer. So even if *The Saiga* had not been genuinely linked to Saint Vincent and the
40 Grenadines, Guinea's objection to admissibility would not be further advanced.

41
42 Guinea's third objection to admissibility concerns alien seamen. Guinea has now
43 abandoned her argument that the flag State cannot advance claims in respect of the ship owner
44 and the cargo owner (transcript, p.17 line 11), and she has abandoned the argument advanced
45 in the Counter-Memorial (paragraphs 73-8) that a flag State is in principle unable to advance a
46 claim in respect of alien crew. Instead, Guinea advances a narrower argument (p.16 line 12).
47 Professor Lagoni submits that the rule whereby a flag State can advance claims in respect of
48 alien crew does not apply in the case of "open register". I note in passing that no workable
49 definition is given to distinguish between those registers which do not permit flag States to

1 espouse claims of alien seamen, and those which do enable the flag States to do so. The
2 proposition advanced by Professor Lagoni is not supported by any judicial authority or any
3 academic writer, or any evidence of State practice. In the authorities that we have cited, there
4 is much support for the proposition that a flag State may protect alien crew; but no suggestion
5 that the rule is subject to an exception in the case of certain types of register.
6

7 Professor Lagoni builds his case on a question. He asks (p.16 line 45) "Why should
8 foreign seamen be in a better position than foreign workers who live in the country?" The
9 answer to that question has been given by international courts and tribunals many times. It is
10 the same in the case of open registers (however these may be defined) as in the case of other
11 registers. Indeed, it is the same as in the case of alien seamen and alien members of a State's
12 armed forces. Foreign seamen, like foreign members of a State's armed forces, are subject to
13 the discipline of the State under whose flag they serve. They are commonly subject to the flag
14 State's criminal jurisdiction. This is the case, for example, under the law of Saint Vincent and
15 the Grenadines as it is in the United Kingdom. They owe the State a duty of loyalty and can
16 expect its protection in return. This is the *duplex ligamen* or double bond to which some
17 writers refer.
18

19 There are also practical considerations. Diplomatic intercourse would be hugely
20 complicated if a seaman had to look for protection to his own State of nationality when
21 questions arose about the treatment of a vessel. The same would be true of litigation before
22 this Tribunal. On Professor Lagoni's thesis, the number of parties in proceedings before this
23 Tribunal could be at least as great as the number of nationalities represented on board the
24 vessel. That cannot be right.
25

26 Guinea's final objection to admissibility is the claim that the master failed to exhaust
27 local remedies. He did not pursue his appeal to the Supreme Court. Instead, Saint Vincent
28 and the Grenadines seized this Tribunal in prompt release proceedings. I anticipated that
29 argument in my speech on 8 March. I then submitted that the rule requiring exhaustion of
30 local remedies applies only when the alien has created a voluntary, conscious and deliberate
31 connection between himself and the flag State whose actions are impugned. That was not the
32 case with *The Saiga*.
33

34 As to the effectiveness of local remedies, we heard from Professor Lagoni that another
35 member of the Guinean delegation will deal with that in due course. We shall, of course, listen
36 to him with interest. At this stage I can only question whether a person who complains that a
37 State has exercised within its exclusive economic zone powers which it does not enjoy under
38 the United Nations Convention truly has an effective remedy where the effect of exercising it,
39 is to submit to the law of the State to which he maintains he is not subject, particularly where
40 that law provides for the detention of the vessel and the payment of a bond, this detention to
41 continue throughout the exhaustion of the proceedings.
42

43 On that aspect of the case, since it has yet, I understand, to be developed, I have
44 simply attached to the text of my speech an extract from the book by A.A. Cancado Trindade,
45 *The Application of the Rule of Exhaustion of Local Remedies in International Law*.
46

47 It is, however, unnecessary for this Tribunal to decide this issue on the effectiveness of
48 the remedy. Before any question of effectiveness of a remedy can arise, the Tribunal must first
49 determine whether the Master was under an obligation to exercise any remedy, effective or

1 otherwise. On that question, Professor Lagoni makes submissions that take the Tribunal to
2 the heart of this case. He maintains that the necessary jurisdictional connection is established
3 "in any case where the coastal State's sovereign rights in the exclusive economic zone are
4 affected" (p 17-18). From this I infer that Professor Lagoni and I are *ad idem*, we are agreed.
5 If the United Nations Convention conferred on coastal States the sovereign right to prohibit
6 the bunkering of vessels within their exclusive economic zone for the purpose of raising
7 revenue and if the coastal State made and proclaimed such a prohibition, a jurisdictional
8 connection would be established between that State and the vessel where the vessel enters for
9 the purpose of bunkering. Conversely, if the United Nations Convention did not confer such a
10 right upon coastal States, and if the coastal States did not make and proclaim such a
11 prohibition, no jurisdictional connection would be established.
12

13 It is our case that the Republic of Guinea has not made and proclaimed such
14 a prohibition and that, even if she had done so, such a law could not be invoked in relation to
15 the other States, since it would exceed the competence accorded to States by the United
16 Nations Convention.
17

18 My learned friend Maître Thiam will now develop the first of those contentions, and
19 I will then address the second.
20

21 **THE PRESIDENT:** Thank you, Dr Plender. In view of the arrangements that this session
22 will last for three hours, I propose we break for 15 minutes and return at 3.50, at which point
23 Maître Thiam will then continue the submission.
24

25 **(The session was suspended from 1530 until 1550 hours)**
26

27 **MAITRE THIAM (Interpretation from French):** Mr President, Members of the Tribunal,
28 allow me, first of all, to address my remarks to Professor Lagoni.
29

30 Professor, I am going to quote you several times in my comments but, before doing so,
31 I would like to impose somewhat on your sense of modesty.
32

33 Circumstances have led us to maintain opposite theories but I have had great pleasure
34 in listening to you, and I have been able to appreciate, as has the Tribunal, your talents and
35 qualities which command respect. Your students will be proud to be under your direction.
36 No matter what decision the Tribunal takes, the Guinean State will be proud to have been
37 defended by you. As for myself, I am gratified that this case has given me the opportunity to
38 make your acquaintance. However, I must contradict you on several points of your
39 submissions.
40

41 I am going now to address the Tribunal and to talk about the scope of the application
42 of Guinean law in terms of national law.
43

44 Mr President, in talking of the law of hot pursuit, Professor Lagoni said: "As regards
45 the violation of the relevant Guinean laws, may I invite your attention to the fact that
46 *The Saiga* supplied the foreign fishing vessels *GUILLERMO PRIMO*, *KRITTI* and *ELENI G*
47 on the morning of 27 October 1997 at 10°25.3N 15°42.6W with fuel. This position is about
48 22.5 and 22.9 nautical miles off the Guinean Island of Alcatraz. Accordingly, it is within the
49 Guinean contiguous zone, the Guinean exclusive economic zone and the Customs radius as

1 well. It violated the prohibition of offshore bunkering within the Customs radius contained in
2 the Guinean Customs laws. (P/V in French, p.14, lines 8-16 Verbatim Record PV.99/15, page
3 10, lines 8-14).

4
5 In this declaration there are two assertions that deserve a response. The first is relative
6 to the contiguous zone of the Island of Alcatraz. The second is relevant to Guinean Customs
7 law.

8
9 I assure you that I do not see the need to dwell at length on the first affirmation
10 relative to the contiguous zone of the Island of Alcatraz because in fact the Claimant State has
11 already explained without being seriously contradicted that there could not be a contiguous
12 zone for this island unless Guinea had filed the necessary instruments with the Secretary
13 General of the United Nations. Moreover, it has also been noted that Guinea has already
14 declared that the law of hot pursuit exercised against *The Saiga* was not based on the
15 existence of a contiguous zone for the island in question (Counter-Memorial para. 37).
16 Consequently, I will conclude on this question simply by remarking to the Tribunal that the
17 hearings which have just taken place before the Tribunal have not permitted Guinea to bring in
18 new evidence in relation to the claimed contiguous zone of the island in question.

19
20 Concerning the Guinean law applicable to *The Saiga* in the exclusive economic zone,
21 Professor Lagoni said, and I quote him: "Domestic rules and regulations are facts which of
22 course have to be presented by the parties." (PV.99/15, page 9, lines 4-5). I would agree
23 with this affirmation of his. This is why, as in the case of the Tribunal, I expected Guinea to
24 present the relevant laws passed by the Guinean legislator to be applied to the exclusive
25 economic zone of Guinea. Knowing the weakness on this point of Guinean law presented to
26 the Tribunal as fact, Professor Lagoni hastened to add: "measures of national authorities or
27 decisions of domestic courts applying the domestic laws and regulations are not subject to
28 legal scrutiny under the national law of one party before this Tribunal." In other words, the
29 International Tribunal is not a Court of Appeal which reviews decisions of domestic courts in
30 accordance with national law (Verbatim PV.99/15 page 9, lines 7-10).

31
32 It is indubitably true that your Tribunal is not an Appeal Tribunal for decisions of
33 Guinean courts but that is not the question. The question is the following. It is up to Guinea
34 to reinforce and to justify its theory before the Tribunal. It is up to Guinea to produce facts,
35 its laws being considered as such as evidence. It cannot take as a basis decisions of its own
36 courts to justify before the jurisdiction of the Tribunal the alleged relevance of these laws. In
37 other words, it cannot claim that your Tribunal should be bound by consideration and
38 interpretation of its laws by its own courts. It cannot impose on the international community a
39 line unilaterally drawn up by itself for its frontiers in violation of international law. Neither can
40 it impose upon you the decision of its courts taken in violation of international law.

41
42 In the interests of brevity, I will not return to case law practice of international
43 courts -- you are quite aware of that -- but allow me, minor provincial Counsel, to call humbly
44 upon the conscience of this young Tribunal and your jurisdiction.

45
46 Allow me to ask you whether, if Guinea had the possibility of imposing its laws on you
47 - and especially the interpretation, which is manifestly erroneous and partisan - and if we did
48 this, what would be the hopes of the international community which they have so justifiably
49 placed in international jurisdictions like yourselves? In truth, it is up to you to judge the facts -

1 in complete independence of the Guinean courts - whether the Guinean laws presented and
2 invoked by Guinea during these proceedings have or have not been taken in the spirit of the
3 Guinean legislator to be applied within the exclusive economic zone of Guinea.
4

5 During the hearings which have just been held in front of the Tribunal, Guinea has not
6 produced any new evidence. Of course, one of its witnesses, M. Bangoura, quoted an alleged
7 decision of the Ministry which, in Guinea, would have extended the Customs territory to the
8 limits of the Customs radius. (Verbatim Report, French version, p.10) But this alleged
9 decision from the Ministry has not been produced.
10

11 Of course, Guinea has also produced, during the hearings, a copy of its basic law; that
12 is, its constitution. But there is no new provision to be found in this law enabling one to
13 conclude that at the place where the vessel was at the time it was bunkering ships, *The Saiga*
14 was contravening a legal Guinean prohibition on bunkering within the exclusive economic
15 zone. On the contrary, one finds evidence which proves, all the more, even with regard to
16 national Guinean law, that Guinea could not apply this law outside the circumstances expressly
17 envisaged by the legislator for the application of this law. Articles 9 and 22 of this
18 Constitution are particularly clear here. Article 9 stipulates that no one may be arrested,
19 detained or convicted except for reasons and in a form provided for by the law. In Article 22,
20 the law guarantees to everyone the exercise of freedom and fundamental rights. It defines the
21 conditions under which these are exercised.
22

23 It is also clear that in Guinea, no matter what his rank, function and motivations, no
24 official can believe himself to be authorised to bridge, on his own behalf, a legislative gap by
25 applying a law outside of the cases especially foreseen by the legislator. Instead of bringing
26 new legislative or regulatory evidence, Guinea simply invoked, again, the same text. Professor
27 Lagoni said:
28

29 "...Guinea prohibits offshore bunkering on the basis of its Law No. 94/007/CTRN of
30 15 March 1994 in a Customs radius of 250 km, or about 135 nautical miles, off its
31 coast. The Customs radius was established by articles 33 and 34 of the Guinean
32 Customs Code, No. 094/PRG/SGG of 28 November 1990" (Verbatim Record
33 PV.99/15, PAGE 9, lines 26-30)
34

35 Professor Lagoni has also drawn our attention to the fact that none of the articles of
36 the law of 1994, which was cited, constitute an offence against the owners or Masters of
37 bunkering vessels, and that therefore this law has been applied outside the cases specifically
38 foreseen by the legislator for a bunkering vessel.
39

40 On the other hand, and to all appearances, the Customs surveillance radius must not be
41 confused with the Customs territory. Therefore, one has applied the law of 1994 as cited and
42 the Guinean Customs Code for importation into a Customs radius instead of applying, as the
43 Guinean legislator wished, for importation into the Guinean Customs territory.
44

45 It is not going too far to say that the responses expected should have been precise.
46 The Tribunal cannot be satisfied simply with litany instead of repetition. We have every right
47 to require that it must be clearly established that the law of 1994 creates an offence for owners
48 of bunkering vessels within the Guinean exclusive economic zone. It is our right, after having
49 been severely and unjustly convicted, to require that it is clearly established that Guinean law

1 extended the Customs territory of Guinea to the exclusive economic zone. In waiting to find
2 out whether this extension is or is not legal in terms of international law, is it too much to ask
3 Guinea to deign to at least explain clearly to the international community in which way its
4 national legislation has been violated. Professor Lagoni does not reply to this question for the
5 Claimant State.

6
7 As for M. Mamadi Askia Camara, he does not do any better. He quotes exactly the
8 same text without adding anything new. He says, according to this text:

9
10 "With regard to Customs legislation, goods which are inside the Customs radius must
11 be taken by legal procedures to the border Customs offices to be declared there."
12 (Verbatim Record, PV.99/15 p.16, lines 9-10)

13
14 But this affirmation is extraordinary. It is absolutely contrary to the very clear and
15 precise provisions of the Guinean Customs Code. M. Mamadi Askia Camara feigns not to
16 know that the transport of Customs goods is the subject of article 3 of the Customs Code.
17 Instead, within article 3 we find the first chapter which relates to the importation of goods.
18 This also contains Section 1 which relates to the import of goods by maritime means. Section
19 1 contains articles 53 – 58. Of these articles, only article 54 contains a specific obligation for
20 the Master of a vessel entering the Customs radius. It stipulates that the Master of a ship,
21 arriving in the maritime area of the Customs radius is required upon first demand (a) to subject
22 the original of the manifest to the "*ne varietur*" endorsement by the Customs officials who
23 come on board, and (b) to hand them a copy of the manifest.

24
25 Who, in this prestigious courtroom, could claim in good faith that this text enables the
26 justification of the purely gratuitous affirmation of M. Mamadi Askia Camara, according to
27 whom the goods, once within the Customs radius, must be taken by legal means to the
28 Customs border posts to be declared? No-one. The goods, which simply enter the Customs
29 radius without entering the Customs territory, are not submitted to declaration and they must
30 not even be subject to the summary declaration in article 57 of the Customs Code which
31 addresses vessels entering the port.

32
33 Is it permitted that the Customs, when interested in a cargo or vessel outside the
34 Customs territory but within the Customs radius, mobilises itself, boards the vessel and
35 submits requirements to the Master to submit the cargo manifest to the "*ne varietur*"
36 endorsement? It is all the more incumbent upon the Customs officers boarding the vessel to
37 do so without abuse of rights and with all the courtesy their uniforms impose upon them.

38
39 It has never been claimed in front of this Tribunal that *The Saiga* had been searched for
40 in order to have it submit its cargo manifest to any "*ne varietur*" endorsement. Who has
41 claimed, in front of this Court, that Captain Orlov of *The Saiga* was requested to submit his
42 manifest to such an endorsement? No one. Furthermore, in the declaration which he
43 presented to the Tribunal, the witness, M. Bangoura, submitted the list of documents which he
44 asked for from Captain Orlov. The cargo manifest is not part of this list. Of course,
45 M. Bangoura, the captain, did try to escape but not for reasons of refusal to present a manifest
46 of his cargo.

47
48 This is the correct time and place to reply briefly to an affirmation from
49 Professor Lagoni who, in order to reject the theory of abuse of right said, in substance, that

1 Captain Orlov could not be unaware of the existence of Guinean legislation because measures
2 had been taken against the *ALFA I* vessel. I refer to the comments of Professor Lagoni
3 (Verbatim Record PV.99/15 no.15, p.10, lines 36-37 and p.12, lines 8-10) But instead of
4 reinforcing the position of Guinea, this theory, on the contrary, reinforces that of the Claimant
5 State. In fact, one has to be reminded that the vessel *ALFA I* was attacked by launches which
6 were recognised by the Master of this vessel as being launches of the Guinean Navy.
7

8 The vessel *ALFA I* was abandoned at sea in a cowardly way, with all the men of its
9 crew, when it was burning and when the assailants thought it was going to sink. They did
10 nothing to offer assistance to the crew. When the owner questioned the Guinean authorities,
11 the latter denied the facts and affirmed that they had never sent any vessel out to sea on that
12 day. *ALFA I* had never been taken to the Port of Conakry. Its Master had never been taken
13 in front of Guinean Courts for an alleged violation of Guinean law. From then on, the owner
14 had reason to think that his vessel had been subject to attack perpetrated either by pirates
15 disguised as military or by Guinean military having escaped from the control of their superiors.
16 In any case, the owner had no reason to think that *ALFA I* had been attacked because it had
17 contravened Guinean law on bunkering. Consequently, this owner had no reason to think that
18 such a law existed.
19

20 To conclude my comments on the provisions of article 54 of the Customs Code,
21 I would say that the hearings have never been about an alleged violation of this text by Captain
22 Orlov. The case was brought about simply because it was the intention to extend the Customs
23 territory of Guinea beyond the wishes of the Guinean legislator.
24

25 If the Guinean legislator had never wished to extend the application of its Customs
26 Code for the maritime area beyond the Guinean territorial waters, it is because it never wanted
27 his country to "go it alone" and grant to itself rights within the exclusive economic zone which
28 the international community would not recognise and which no other State in the world would
29 claim to confer upon itself. It is also because this legislator knows that Guinea, by ratification
30 of the Convention of 1982, like all the other States of the international community, confirmed
31 that it could have no fiscal claim whatever on the exclusive economic zone, a claim which
32 would not be in conformity with the provisions of the Convention.
33

34 We also have said that, no matter how far our research has led us, we have never
35 found any example of a State which had prohibited the bunkering activity in the exclusive
36 economic zone. We said that Guinea, with its legislator, did not become an exception to this
37 rule, but we have been convinced to the contrary. We had been expecting evidence to the
38 contrary but this has not been forthcoming; we were expecting new texts but they were not
39 produced; we were expecting experts to be announced by Guinea but they shied off.
40

41 Since Dr Richard Plender and Professor Lagoni have both cited the author
42 Sir Arthur Conan Doyle, I am going to do so as well. In his novel entitled *The Hound of the*
43 *Baskervilles*, the author reports an imaginary dialogue between imaginary people. Sherlock
44 Holmes says to Dr Watson, "It is illuminating to take account of the curious incident with the
45 dog in the night." Dr Watson replies to the famous detective, "But the dog did nothing in the
46 night" and the detective replies, "That, my dear Watson, is the curious incident." I apologise
47 for my pronunciation.
48

1 What is curious in this case, Mr President, is precisely the silence of Guinea when it is
2 invited to produce a new, relevant text which would have been taken by its legislator to be
3 applied within the exclusive economic zone. What is also curious is that when it broke its
4 silence, Guinea did so simply to contradict evidence, as, for example, to affirm that the draft
5 text drawn up by itself to bridge the question relative to bunkering in Guinea was not done to
6 bridge a legislative gap. In reality, absolutely everything in this case leads us to believe that
7 Guinean officials extended *proprio motu* the field of application of two Guinean laws, whereas
8 this field of application had been clearly delimited by the Guinean legislator solely to national
9 territory. The motivations (whether real or supposed) of its officials, as certain witnesses have
10 said, matter little.

11
12 No more than Professor Lagoni do I wish to return to a question which can only be
13 embarrassing for the Government of Guinea, and I am not trying to embarrass the government
14 of a sister republic of the Senegalese Republic, of which I am a subject. However, I must in
15 fact ask myself one particular question: if the Guinean officials have really drawn on Guinean
16 law for the motivation for their proceedings against *The Saiga*, why did they not also pursue
17 the vessels which *The Saiga* bunkered? Unfortunately, on this point it would seem that our
18 questions will also remain unanswered.

19
20 It is true that Guinea has always claimed that the vessels bunkered by *The Saiga* were
21 subject to prosecution, but the proof of the exactness of this affirmation has still not been
22 brought before the Tribunal. Guinea concluded by admitting that prosecution had not been
23 exercised. Again by quoting M. Mamadi Askia Camara in correspondence 839/PR/TPI/C of
24 21 November 1997, the public prosecutor addressed a letter to the commander to find and
25 arrest these vessels and their masters for infractions of which *The Saiga* was accused. They
26 can be prosecuted according to article 4 of Law 007/CTRN of 15 March 1994. This is in the
27 Verbatim Record PV.99/15, PAGE 17, Lines 46 TO p. 18, Line 2). I think that this law
28 should have been 94/007/CTRN of 15 March 1994.

29
30 However, we must affirm first of all that the public prosecutor's letter was not
31 produced during the hearings. Furthermore, and incidentally, we do not see how the public
32 prosecutor could have given orders for arrest which, even in Guinea, are within the sole
33 competence of an examining judge. Finally, and above all, we cannot see how and why since
34 1997 the alleged instructions of the public prosecutor have not been executed. Guinea offers
35 no explanation on this point either, and has not said to the Tribunal that there would be
36 difficulties in executing the instructions of the court.

37
38 I must say here that the lack of action of the Court of the Republic of Guinea is all the
39 more surprising since one of the vessels mentioned in the famous *bord* notes (tidied up by
40 Captain Sow), the vessel *COMBAT*, belongs to the Guinean Navy. As in many other
41 instances, it was during the hearings in the last few days that we heard for the first time of the
42 *COMBAT* vessel in this case, and therefore at the last minute I simply cannot bring you the
43 evidence of what I am putting forward, but we know very well that the owner of this ship lives
44 in Guinea and operates his vessel there. Nevertheless, it is up to Guinea to bring the evidence
45 either that it has exercised prosecution against the vessels bunkered by *The Saiga* or that it
46 was prevented from doing so for reasons independent of its wishes or due to the negligence of
47 its agents entrusted with pursuit. This evidence has not been introduced to the hearings.

1 In view of the major difficulties which Guinea has met in justifying its theory according
2 to which its agents were acting in conformity with the will of the legislator, the defendant
3 State is trying to reduce the scope of its affirmation by maintaining in substance that in fact the
4 extension of the application of its laws and rules in the EEZ would only concern the activity of
5 bunkering for fishing vessels with special fishing licences, and I think it is doing so especially
6 on the basis of its law 94/007/CTRN of 15 March 1994. However, the Tribunal will not have
7 failed to observe, first of all, that even the alleged Guinean fishing licences granted to the
8 vessels in question have not been produced during the hearings, and therefore the argument of
9 Guinea is in fact necessarily totally lacking.

10
11 The Tribunal will not fail to observe either that in law a text has never been produced
12 which establishes that the Customs territory in the first article of this law has been extended to
13 the Customs radius, and therefore the argument of Guinea is also totally lacking in law.

14
15 Mr President, Members of the Tribunal, this terminates my submissions on the alleged
16 extension of the Guinean law to the exclusive economic zone I would now like to hand over to
17 Dr Plender.

18
19 **DR PLENDER:** Mr President, Members of the Tribunal, although Maître Thiam has shown
20 that Guinean law does not prohibit bunkering in the exclusive economic zone and also
21 Maître Bangoura of the Conakry Bar advised at an earlier stage that this was so, although the
22 Guinean Government has been unable to produce any text of a law which purports to prohibit
23 that activity, and although the Guinean *projet de loi* confirms that there is no such current
24 prohibition, we do not ask the Tribunal to rely on these facts when determining whether the
25 Guinean authorities acted within the scope of their authority.

26
27 As Mr Mamadi Askia Camara rightly observed in the course of his short presentation,
28 the central issue for this Tribunal is whether it would have been open to Guinea to apply and
29 enforce against other States and their nationals a prohibition on bunkering in her exclusive
30 economic zone. In other words, the question is whether such a prohibition, had it existed,
31 would have been opposable against other States.

32
33 It is elementary that a State is entitled to apply its legislation to the person or property
34 of aliens only when it has jurisdiction under public international law to do so. As the
35 Permanent Court of International Justice put it in the *Lotus* case (at page 19) it is:

36
37 "required of a State ... that it should not overstep the limits which international law
38 places upon its jurisdiction."
39

40 I do not say that jurisdiction is co-extensive with sovereignty, but the connection
41 between them is close. To quote the words of the Permanent Court in the *Lotus* case once
42 more, "A State's title to exercise jurisdiction rests on its sovereignty."
43

44 The exercise of a State's jurisdiction beyond the area over which it is sovereign is apt
45 to entail an infringement of the rights of other States. That is particularly so when it involves
46 the application of force to foreign vessels over whom the flag State exercises sovereign
47 jurisdiction. So when a State claims to exercise extra-territorial jurisdiction in relation to a
48 foreign vessel, it must demonstrate that it has a firm basis for the claim.
49

1 Guinea's claim to exercise extra-territorial jurisdiction in the exclusive economic zone
2 was expressed with admirable clarity by Professor Lagoni on the afternoon of Monday
3 15 March (see p.26). The claim is that Guinea is entitled to prohibit the bunkering of one
4 foreign vessel by another, outside her territorial waters but within her exclusive economic zone
5 for fiscal purposes, so as to encourage fishing boats to buy their supplies of oil in Conakry.
6

7 In vain does one search the United Nations Convention, to find any support for that
8 assertion. The rights and jurisdiction of the coastal State in the exclusive economic zone are
9 regulated by Article 56 of that Convention. This sets out, in careful and measured terms, the
10 sovereign rights that coastal States enjoy, for the purpose of exploring and exploiting,
11 conserving and managing the natural resources of the zone. It also defines the jurisdiction that
12 coastal States may exercise in that area. The rights and duties of other States in the exclusive
13 economic zone are set out in Article 58. This provides that other States enjoy the right of
14 navigation and other related freedoms, associated with the operation of ships. Neither in
15 Article 56 nor in Article 58, nor in the *travaux preparatoires* does one find the faintest scintilla
16 of a hint of an inkling of an insinuation of a ghost of a suggestion that a coastal State has the
17 right claimed by Guinea in these proceedings.
18

19 At page 26 of the transcript for the afternoon of 15 March, Professor Lagoni offered
20 three explanations for the absence from the Convention of any provision authorising a coastal
21 State to prohibit commercial activities generally, or bunkering in particular, within the
22 exclusive economic zone.
23

24 First, he stated that "the jurisdiction on customs and fiscal matters in the EEZ is
25 already implied in the sovereign rights of coastal States". If I may respectfully say so, that
26 does not meet the objection. Since coastal States have sovereign rights for the purposes of
27 exploring and exploiting the natural resources of the waters in the exclusive economic zone,
28 they can of course impose customs duties or fiscal charges on the exploitation of those
29 resources. They may for instance charge for the issuance of fishing licences. That is not this
30 case. *The Saiga* was not exploiting the natural resources of the zone. The jurisdiction
31 asserted by the Guinean authorities was not jurisdiction with respect to fisheries. That is
32 a point to which I shall revert.
33

34 Secondly, Professor Lagoni stated that "there was no need to regulate
35 comprehensively the customs and fiscal jurisdiction with the EEZ, at least at that early stage of
36 development, before most EEZs had been established." On the contrary, one of the principal
37 purposes and achievements of the Convention was to regulate the rights and duties of coastal
38 States and others within the exclusive economic zone. There a number of specific rights are
39 conferred and defined, it is to be presumed that no others are conferred: *expressio unius*
40 *exclusio alterius*.
41

42 Thirdly, he asserted that when the regime for the exclusive economic zone was
43 emerging, as part of an overall compromise between coastal and shipping States, there was
44 little room for discussion about details; but, he said, West African States were well aware of
45 the problem of extending customs duties to the exclusive economic zone. In a conference, as
46 in a courtroom, details can be overlooked; but it would be misleading to suggest that delegates
47 had it in mind to confer on coastal States the right to impose taxes on any activity other than
48 the exploration, exploitation, conservation and management of the exclusive economic zone.
49 There was indeed a concern on the part of some West African States to ensure that they

1 would be in a position to levy licence fees for the exploitation of the zone. That is not at all
2 the same as the desire to extend customs duties to the exclusive economic zone generally. The
3 preoccupation of African States at the time is accurately and succinctly described by Dr
4 Akintoba in his book *African States and Contemporary International Law: a Case Study of*
5 *the Exclusive Economic Zone* ". An appropriate extract from the book has been circulated
6 with the text of my speech. At p.121 he writes as follows:

7
8 "African governments...proposed and actively campaigned for the establishment in
9 international law of an exclusive economic zone. This was a prudent move, designed
10 in the short term to protect their coastline from and overfishing and exploitation by
11 distant water fishing fleets. Over the long term, the intention was to catalyse diverse
12 efforts to establish national fishing industries. From an African perspective, the EEZ
13 concept was couched in terms of sovereignty over resources rather than complete
14 sovereignty over areas that potentially threatened marine movement and other
15 customary rights, such as the laying of pipelines and cables."

16
17 There ends the quotation. It is precisely that distinction that the Guinean argument
18 seems to overlook, or to elide. The Tribunal cannot have failed to notice how frequently the
19 Respondent State's witnesses spoke of the exclusive economic zone as though it were an area
20 of Guinean waters, subject to Guinean sovereignty.

21
22 For instance, on the afternoon of Saturday 13 March, Lieutenant Sow gave evidence
23 about his work which was (in his words, p.7 line 2) "to maintain order *in our waters*". He
24 referred consistently to "our waters" until Professor Lagoni (at p.12 line 19) asked whether the
25 Guinean radar bases monitor "the whole *exclusive economic zone* of Guinea." Lieutenant Sow
26 answered "I do not understand the question." He was again asked which area was monitored
27 and he replied: "These bases listen to the *entire zone of Guinea*." Thereafter Professor Lagoni
28 reminded the witness that the relevant area was termed "the *exclusive economic zone*". He did
29 so again at p.13 line 13, p.14 line 38, p.16 line 22, p.18 line 23, and p.18 line 27. Then at p.21
30 line 8 a question was put to the witness about a line on the chart. He was asked: "which
31 boundary is that?" He answered "It is the southern boundary between the Republic of Guinea
32 and the Republic of Sierra Leone". Professor Lagoni corrected him, saying "It is the boundary
33 between their *exclusive economic zone*, I guess". At that stage, as you will remember, I raised
34 an objection, and Professor Lagoni put questions to the witness about his knowledge of
35 maritime zones. Even in answer to those questions, the witness described the relevant line as
36 "the border line between Guinea and Sierra Leone".

37
38 I do not for a moment suggest that Professor Lagoni intended to coach his witness,
39 and it is no part of my case to raise the slightest suggestion of that character; nor is it
40 necessary to enquire whether the witness was familiar with the existence and extent of the
41 various maritime zones. My point is different. What I deduce from his answers is that he
42 regarded the whole exclusive economic zone as part of the "Guinean waters" within which he
43 had general authority "to maintain order", and that this was, in his words, an area where
44 Guinean law applied as part of the Republic of Guinea. Indeed, it appears from his answer at
45 p.23 line 14 that he either understood at the time, or that he now believes, that it was
46 important to locate *The Saiga* while she was in the exclusive economic zone in order that she
47 could be arrested for an offence committed within what is said to be the contiguous zone
48 much earlier.

1 He was not alone. Mr Bangoura took the view that Guinea's customs legislation
2 applied throughout the "customs zone". (See his answers when cross-examined by me on 12
3 March, morning session, pages 17 line 40 and 18 line 7). The view of both of these witnesses
4 about the extraterritorial effect of Guinean law are consistent with the submissions made on
5 the morning of 16 March by Mr Camara.

6
7 Whatever may be the position under Guinean law, it would be plainly incorrect to
8 assert that a State may extend its customs legislation to foreign vessels within the exclusive
9 economic zone. One need hardly say that a State's exclusive economic zone is *not* subject to
10 its sovereignty.

11
12 As the Tribunal will know, some writers take the view that the exclusive economic
13 zone is part of the high seas in which a coastal State has jurisdiction in respect of resources;
14 others, like Professor Lagoni, take the view that it is a region *sui generis* within which certain
15 rules relating to the high seas are to be applied. The controversy over that question explains
16 the extraordinary and tortured wording of Article 86 of the Convention. The Tribunal is not
17 asked to resolve that dispute in this case. All that matters is that the exclusive economic zone
18 is not subject to the coastal State's sovereignty.

19
20 The rules relating to the high seas are, however, of present relevance. That is so
21 because the second paragraph of Article 58 9 of the Convention provides that virtually the
22 whole of the rules relating to the high seas shall apply within the exclusive economic zone in
23 so far as they are not incompatible with Part V. The provisions thus applied to the exclusive
24 economic zone include not only Article 89 (which provides that no State may validly purport
25 to subject any part of the high seas to its sovereignty), but also Article 87, which defines
26 freedom of the high seas in the broadest of terms.

27
28 We cannot therefore accept Professor Lagoni's assertion (made on 15 March,
29 afternoon session, p.25 line 23) that it is confusing or irrelevant to refer to the rules relating to
30 the high seas. Since those rules have been largely incorporated into the Part of the Convention
31 dealing with the exclusive economic zone, they are highly relevant.

32
33 By Article 73 of the Convention, a coastal State may enforce its laws in the exclusive
34 economic zone only to the extent that they relate to the exploration, exploitation, conservation
35 and management of the natural resources. A customs law designed to augment the revenues
36 of the coastal State, by encouraging vessels to buy fuel there, does not relate to any of the
37 matters mentioned in Article 73.

38
39 It is true that by your Judgment dated 4 December 1997, a majority of your members
40 expressed the view that the rights conferred on coastal States might include the right to
41 prohibit the bunkering of fishing vessels. At paragraph 57 of your Judgment you said:

42
43 "Argument can be advanced to support the qualification of 'bunkering of fishing
44 vessels' as an activity, the regulation of which can be assimilated to the regulation of
45 the exercise of the coastal State of its sovereign rights to explore, exploit, conserve
46 and manage the living resources in the exclusive economic zone."
47

1 The majority that expressed that view was not, of course, announcing its conclusion.
2 The majority took the view that, for the purposes of the application for prompt release, it was
3 sufficient that there was an arguable allegation that the arrest was made in enforcement of the
4 coastal State's laws governing the exploitation of the natural resources of the exclusive
5 economic zone.

6
7 The difficulty in which the Republic of Guinea finds herself is that she steadfastly and
8 persistently refuses to adopt and advance the argument that the majority of this Tribunal
9 considered to be arguable or defensible. She insists that the arrest was not effected in
10 connection with the exploitation of fisheries but in the interests of maximizing receipts from
11 Customs. On this she is emphatic. M. Bangoura said, in response to one of my questions
12 (12 March, morning p. 21, line 28): "the object of the mission was to look for and combat
13 fraud. I am talking about smuggling fuel." Lieutenant Sow confirmed that this was a Customs
14 operation, not a fisheries operation (13 March, afternoon, p.7, lines 8-15). These witnesses
15 have confirmed by their evidence the position as it appeared previously to you, Mr President
16 and to Vice-President Wolfrum and Judge Yamamoto. At paragraph 27 of your Dissenting
17 Opinion dated 4 December 1997, Mr President, and at paragraph 11 of the Dissenting Opinion
18 of your two colleagues, you emphasized that the action taken by the Guinean authorities was
19 not based on the Code of Maritime Fishing but on the Customs Code. In the words of Judges
20 Wolfrum and Yamamoto:

21
22 "The arrest of *The Saiga* was executed by Customs authorities and there is no
23 indication of an involvement of the respective institutions concerning the management
24 of living resources."

25
26 That was the situation as it appeared. Now it is the situation as it has been confirmed
27 and reaffirmed by witnesses on behalf of the Republic of Guinea.

28
29 It is therefore the submission of Saint Vincent and the Grenadines that the application
30 and enforcement of Guinean Customs law within the exclusive economic zone entailed
31 a breach of the Convention. It was an excessive exercise of jurisdiction or, as we say in
32 English, an *exces de pouvoir*. For that reason, it was a breach of the Claimant State's freedom
33 of navigation and related freedoms. The propositions are two sides of one coin.

34
35 Professor Lagoni contends, however, that bunkering is not navigation, nor even a use
36 of the sea "related to those freedoms, such as those associated with the operation of ships"
37 (15 March, afternoon session, p.25). He asserts that the contrary proposition confuses
38 freedom of navigation with other matters not expressly mentioned in article 87 of the
39 Convention and emphasizes that commercial bunkering on the high seas is not expressly
40 mentioned in article 87.

41
42 It is very clear that the draftsmen of the Convention did not intend to imbue the word
43 "navigation" with a narrow and literal meaning. In the words of *Oppenheim's International*
44 *Law*, at p. 729:

45
46 "The list of freedoms contained in article 87 of the Convention on the Law, as the
47 wording clearly indicates, is not restrictive. Not only are there freedoms here other
48 than those specified, but they must change form time to time, for example, with the
49 development of new technologies."

1
2 The editor's words reflect those of the International Law Commission when
3 commenting on the draft for article 2 of the High Seas Convention of 1958. The Commission
4 said:

5
6 "The list of freedoms of the high seas contained in this article is not restrictive. The
7 Commission has merely specified four of the main freedoms, but is aware that there are
8 other freedoms."
9

10 It would utterly frustrate the intentions of the draftsmen if freedom of navigation were
11 read so restrictively as to exclude bunkering. That is so whether one relies upon the Latin
12 origins of the word "navigation", as Professor Lagoni did, or on the alternative argument
13 based upon the economic interest of the coastal State. A vessel is engaged in navigation when
14 bunkering another at sea. Generally the bunkering vessel and the vessel receiving the supply
15 are in motion, at slow speed, so that the fuel pipes remain taut. In any event, when a vessel is
16 drifting at sea (not at anchor or in port) it is engaged in navigation. I venture to suggest that
17 the same is true of the verb *navigare*. It adds nothing to the debate.
18

19 Professor Lagoni argues that bunkering is not navigation or a related activity because it
20 is commercial and may be inconsistent with the economic interests of the coastal State. It will
21 not escape the Tribunal's attention that this contention is inconsistent with the language in
22 which article 58 is expressed. That is so whether one fixes attention on the word "navigation"
23 or on the phrase "lawful uses of the sea related to navigation, such as those associated with the
24 operation of ships". Nor will it escape the Tribunal's attention that article 56 does not confer
25 on the coastal State a general right to prohibit within the exclusive economic zone commercial
26 activities which it considers injurious to its fiscal interests. It confers defined rights for defined
27 purposes. A coastal State cannot, for instance, prohibit the sale of duty-free goods on foreign
28 vessels within its exclusive economic zone on the premise that passengers might otherwise buy
29 similar goods within the coastal State and so contribute to its resources. Professor Lagoni
30 asserted that such commercial activities "do not affect the interests of the coastal State" (15
31 March afternoon, p.24 line 31). That, I respectfully suggest, is incorrect. A coastal State's
32 fiscal interests may be affected by the sale at sea of duty-free goods (or in the case of
33 Germany, by the offshore sale of butter) in just the same way as it may be affected by the sale
34 of dutiable fuel.
35

36 There is a further objection to Guinea's claim that she is entitled to prohibit bunkering
37 in her exclusive economic zone for the purpose of increasing her Customs revenue. There is
38 literally no State practice on which she can rely as evidence of such a right. We have
39 conducted extensive surveys of State practice, supplemented by further reports produced on
40 2 March. Not one single State maintains legislation of the kind that Guinea claims to be able
41 to enforce.
42

43 Indeed, as the hearing has proceeded, the press has reported a fresh development
44 suggesting that States cannot prohibit such bunkering. A major oil company has announced
45 its entry into the market in providing offshore bunkers in the Gulf of Guinea off the Nigerian
46 coast. According to press reports, the decision to enter the market has followed a legal
47 examination of the question, in view of these present proceedings, upon which the press
48 reports. So, even as we speak, others who consider their position very carefully, take the view
49 that bunkering within the exclusive economic zone is a lawful activity.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Mr President, Members of the Tribunal, the freedoms enjoyed by all States in the exclusive economic zone are expressed in the broadest of terms in article 58 of the Convention. They include the "freedoms referred to in article 87 of navigation and of over-flight and *other internationally lawful uses of the sea related to those freedoms*, such as those associated with the operation of ships". The breadth of that language is, if I may respectfully say so, inadequately expressed in Professor Lagoni's phrase when he characterized these as "communication freedoms". Gidel describes the principle of the freedom of the high seas as "*multiforme et fugace*". It would be regrettable indeed if this Tribunal were to support a reversion to the days of *mare clausum*, the very antithesis of the tract by Hugo Grotius, from which modern international law has developed.

In his address tomorrow morning, Maître Thiam will present our comments on the Respondent State's witnesses. I shall then close our case by reverting to questions of damages and costs.

THE PRESIDENT: Thank you very much, Dr Plender. That brings us almost to the minute to the time for closing. I adjourn the sitting and we will resume tomorrow morning at 10 o'clock.

(Adjourned at 1700 hrs until 1000 hrs on Friday, 19 March 1999)