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

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTINGS
HELD ON 1, 6, 7 AND 18 DECEMBER 2004

The "Juno Trader" Case
(Saint Vincent and the Grenadines v. *Guinea-Bissau), Prompt Release*

PROCES-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
DES 1ER, 6, 7 ET 18 DECEMBRE 2004

Affaire du « Juno Trader »
(Saint-Vincent-et-les Grenadines c. Guinée-Bissau), prompte mainlevée

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the uncorrected verbatim records.

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En vue de faciliter l’utilisation de l’ouvrage, le présent volume comporte, outre une pagination continue, l’indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux non corrigés.

Minutes of the Public Sittings
held on 1, 6, 7 and 18 December 2004

Procès-verbal des audiences publiques
des 1er, 6, 7 et 18 décembre 2004

PUBLIC SITTING HELD ON 1 DECEMBER 2004, 4.00 P.M.

Tribunal

Present: *President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Registrar* GAUTIER.

AUDIENCE PUBLIQUE DU 1ER DECEMBRE 2004, 16 H 00

Tribunal

Présents : M. NELSON, *Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; M. GAUTIER, *Greffier*.

Opening of the Oral Proceedings
[PV.04/01, E, p. 3–5]

Le Greffier :
Le 18 novembre 2004, le Tribunal international du droit de la mer a été saisi d'une demande de prompte mainlevée de l'immobilisation du navire *Juno Trader* et de prompte libération de son équipage, introduite au nom de Saint-Vincent-et-les Grenadines contre la Guinée-Bissau.

La demande a été faite au titre de l'article 292 de la Convention des Nations Unies sur le droit de la mer.

L'affaire a été inscrite au Rôle des affaires en tant qu'affaire No. 13 sous le nom d'*Affaire du « Juno Trader » (Saint-Vincent-et-les Grenadines c. Guinée-Bissau), prompte mainlevée*.

The President:
The Tribunal meets today in open session in the case concerning the prompt release of the vessel *Juno Trader* and its crew.

By Order dated 19 November 2004, the dates for the hearing with respect to the Application were fixed at 1 and 2 December 2004. Notice of the Order was communicated forthwith to the parties.

By letter dated 26 November 2004, the Agent of Guinea-Bissau requested the postponement of the hearing and a corresponding postponement of the time-limit for the filing of the statement in response.

The Tribunal, having considered the request by the Agent of Guinea-Bissau, has adopted the following Order:

> "*President* NELSON; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM,

TREVES, MARSIT, NDIAYE, JESUS, XU, COT, LUCKY; *Registrar* GAUTIER.

The International Tribunal for the Law of the Sea,

composed as above,

after deliberation,

Having regard to article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"),

Having regard to article 69, paragraph 1, of the Rules of the Tribunal,

Having regard to the Application under article 292 of the Convention submitted on behalf of Saint Vincent and the Grenadines to the Tribunal on 18 November 2004, concerning the prompt release of the vessel *Juno Trader* and its crew,

Makes the following Order:

Whereas the Registrar, in accordance with article 52, paragraph 2(a), and article 111, paragraph 4, of the Rules of the Tribunal, transmitted a certified copy of the Application to the Government of Guinea-Bissau by a letter dated 18 November 2004,

Whereas the President of the Tribunal, pursuant to article 112, paragraph 3, of the Rules of the Tribunal, fixed 1 and 2 December 2004 as the dates for the hearing,

Whereas, by a letter of 26 November 2004, the Agent of Guinea-Bissau requested the postponement of the hearing and a corresponding postponement of the time-limit for the filing of the statement in response, and whereas, the Registrar transmitted forthwith a copy of that letter to the Agent of Saint Vincent and the Grenadines,

Whereas the Agent of Saint Vincent and Grenadines by a letter dated 29 November 2004 made observations in respect of the request by the Agent of Guinea-Bissau,

THE TRIBUNAL

Having regard to the particular circumstances of the case and having ascertained the views of the parties;

Decides to postpone the continuation of the hearing to 6 December 2004;

Extends to 2 December 2004, 10:00 hours, the time-limit for the filing of a statement by Guinea-Bissau;

Extends to 6 December 2004, 10:00 hours, the time-limit for the filing of any additional documents;

Reserves the subsequent procedure for further decision.

Done in English and in French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this first day of December, two thousand and four, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Saint Vincent and the Grenadines and to the Government of Guinea-Bissau, respectively."

Signed by the President and Registrar of the Tribunal.

That is the end of the Order.

The hearing is now adjourned.

PUBLIC SITTING HELD ON 6 DECEMBER 2004, 10.00 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Registrar* GAUTIER.

Saint Vincent and the Grenadines is represented by:

Mr Werner Gerdts,
Döhle Assekuranzkontor GmbH & Co KG, Hamburg, Germany,

as Agent;

and

Mr Syméon Karagiannis,
Professor, Faculty of Law, Université Robert Schuman, Strasbourg, France,

Mr Vincent Huens de Brouwer,
Lawyer, Eltvedt & O'Sullivan, Marseilles, France,

as Counsel;

Mr Lance Fleischer,
Manager, Juno Management Services, Monaco,

Mr Fernando Domingos Tavares,
Director, TCI Bissau/Transmar Services Limited, Bissau, Guinea-Bissau,

as Advisers.

Guinea-Bissau is represented by:

Mr Christopher Staker,
Barrister, Bar of England and Wales, London, United Kingdom,

as Agent, Counsel and Advocate;

Mr Octávio Lopes,
Chef de Cabinet, Ministry of Fisheries,

as Co-Agent;

and

Mr Ricardo Alves Silva,
Miranda, Correira, Amendoeira & Associados, Lisbon, Portugal,

Mr Ramón García-Gallardo,
Partner, S.J. Berwin, Brussels, Belgium,

as Counsel and Advocates;

Ms Dolores Dominguez Perez,
Assistant, S.J. Berwin, Brussels, Belgium,

as Counsel;

Mr Malal Sané,
Coordinator, National Service of Surveillance and Control of Fishing Activities,

as Adviser.

AUDIENCE PUBLIQUE DU 6 DECEMBRE 2004, 10 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; MM. HOSSAIN et OXMAN, *juges* ad hoc; M. GAUTIER, *Greffier*.

Saint-Vincent-et-les Grenadines est représentée par :

M. Werner Gerdts,
Döhle Assekuranzkontor GmbH & Co KG, Hambourg, Allemagne,

comme agent;

et

M. Syméon Karagiannis,
Professeur, faculté de droit, Université Robert Schuman, Strasbourg, France,

M. Vincent Huens de Brouwer,
Juriste, Eltvedt & O'Sullivan, Marseille, France,

comme conseils;

M. Lance Fleischer,
Manager, Juno Management Services, Monaco,

M. Fernando Domingos Tavares,
Directeur, TCI Bissau/Transmar Services Limited, Bissau, Guinée-Bissau,

comme conseillers.

La Guinée-Bissau est représentée par :

M. Christopher Staker,
avocat, membre du barreau d'Angleterre et du Pays de Galles, Londres, Royaume-Uni,

comme agent, conseil et advocat;

M. Octávio Lopes,
Chef de Cabinet, Ministère des Pêches,

comme co-agent;

et

M. Ricardo Alves Silva,
Miranda, Correira, Amendoeira & Associados, Lisbonne, Portugal,

M. Ramón García-Gallardo,
Partenaire, S.J. Berwin, Bruxelles, Belgique,

comme conseils et avocats;

Madame Dolores Dominguez Perez,
Assistante, S.J. Berwin, Bruxelles, Belgique,

comme conseil;

M. Malal Sané,
Coordonnateur, Service national d'inspection et de contrôle des activités de pêche,

comme conseiller.

Introduction
[PV.04/02, E, p. 4–5; F, p. 8–10]

Le Greffier :
Les débats du Tribunal vont à présent se poursuivre dans l'*Affaire du « Juno Trader », (Saint-Vincent-et-les Grenadines c. Guinée-Bissau), prompte mainlevée*, inscrite sous le numéro 13 dans la liste des affaires.

Le 18 novembre 2004, une demande en vue de la prompte mainlevée du navire *Juno Trader* et de la prompte libération de son équipage a été soumise contre la Guinée-Bissau au nom de Saint-Vincent-et-les Grenadines. Par une ordonnance du 19 novembre 2004 les dates de l'audience ont été fixées au 1et et 2 décembre 2004.

La procédure orale dans l'affaire a été ouverte le 1er décembre 2004 lors d'une audience publique au cours de laquelle le Président du Tribunal a lu le texte de l'ordonnance rendue le même jour par le Tribunal.

Dans son ordonnance, le Tribunal a décidé le renvoi de la suite de la procédure orale au 6 décembre 2004 et a reporté au 2 décembre 2004 le délai pour le dépôt d'un exposé par la Guinée-Bissau.

Les agents et conseils du demandeur, Saint-Vincent-et-les Grenadines, et du défendeur, Guinée-Bissau, sont présents.

The President:
This is a public sitting pursuant to article 26 of the Statute of the Tribunal to hear the parties present their arguments and evidence in the *"Juno Trader" Case*. I call on the Registrar to read out the submissions of Saint Vincent and the Grenadines as contained in its application.

Le Greffier :
Le demandeur a formulé les demandes suivantes :

> « Saint-Vincent-et-les Grenadines prie le Tribunal de rendre les ordonnances et de faire les déclarations ci-après :
>
> a) une déclaration selon laquelle le Tribunal international du droit de la mer est compétent, en vertu de l'article 292 de la Convention des Nations Unies sur le droit de la mer de 1982 (ci-après la « Convention ») pour connaître de la demande
>
> b) une déclaration selon laquelle la demande est recevable
>
> c) une déclaration selon laquelle le défendeur a violé l'article 73, paragraphe 2, de la Convention en ce que les conditions fixées par le défendeur pour la mainlevée de l'immobilisation du « Juno Trader » et la libération de dix-neuf des membres de son équipage ne sont pas autorisées en vertu de l'article 73, paragraphe 2 et ne sont pas raisonnables aux termes de l'article 73, paragraphe 2
>
> d) une ordonnance demandant au défendeur de procéder à la mainlevée de l'immobilisation du « Juno Trader » et à la libération de ses officiers et de son équipage sans dépôt de caution ou autre garantie financière et, dans ce cas, demandant au défendeur de restituer la caution ou garantie déposée

e) à titre subsidiaire, une ordonnance, demandant au défendeur de procéder à la mainlevée de l'immobilisation du « Juno Trader » et à la libération de ses officiers et de son équipage dès le dépôt, par le propriétaire du navire, d'une caution ou autre garantie d'un montant que le Tribunal jugera raisonnable eu égard aux circonstances particulières de cette affaire

f) une ordonnance, dans ce dernier cas, prescrivant la forme de la caution ou autre garantie visée ci-dessus

g) une ordonnance demandant au défendeur d'annuler la mesure de confiscation de la cargaison de poissons trouvée à bord du « Juno Trader »

h) une ordonnance demandant au défendeur de supporter les frais de procédure du demandeur. »

The President:
By letter dated 18 November 2004, a copy of the application was transmitted to the Government of Guinea-Bissau. The Respondent did not avail itself of its right under article 111, paragraph 4, of the Rules of the Tribunal to submit a statement in response. In accordance with the Rules of the Tribunal, copies of the application are being made accessible to the public as of today.

The Tribunal notes the presence in court of Mr Werner Gerdts, Agent of Saint Vincent and the Grenadines, and Mr Christopher Staker, Agent of Guinea-Bissau. I now call on the Agent of the Applicant to note the representation of Saint Vincent and the Grenadines.

Mr Gerdts:
I should like to introduce the delegation of the Applicant to the court. Mr President, your honours, we have our counsel, Professor Syméon Karagiannis, from the Université Robert Schuman in Strasbourg, Professor for public law; co-agent and counsel Mr Vincent Huens de Brouwer, working as lawyer for the firm Eltvedt & O'Sullivan. We have two advisers with us, Mr Lance Fleischer, representing the owner of the *Juno Trader*, a Portuguese national, and Mr Fernando Tavares, as adviser. He is the correspondent of the Applicant in Guinea-Bissau and a national of that country.

Thank you.

The President:
Thank you.

I now call on the Agent of the Respondent to note the representation of Guinea-Bissau, Mr Christopher Staker.

Mr Staker:
Mr President, distinguished members of the court, it is an honour for me to have been entrusted by the Republic of Guinea-Bissau with the task of representing it as Agent in this case. I also have the privilege to appear in these proceedings as counsel and advocate. To my immediate left is the co-agent of the Republic of Guinea-Bissau, Mr Octávio Lopes, *Chef de Cabinet*, Ministry of Fisheries. As counsel and advocates with us we have to his immediate left Mr Ricardo Alves Silva, of Miranda, Correira, Amendoeira & Associados, Lisbon, and to his left Mr Ramón García-Gallardo, a partner at S.J. Berwin, Brussels. In the row behind we are further assisted to my left by Mr Malal Sané, Coordinator, National Service of

Surveillance and Control of Fishing Activities, and to his right by Ms Dolores Dominguez Perez, also of S.J. Berwin in Brussels as our advisers.

Mr President, that concludes the introduction of our delegation.

The President:

Thank you. Following consultations with the Agents of the parties, it has been decided that the Applicant, Saint Vincent and the Grenadines, will be the first to present his arguments and evidence. Accordingly, the Tribunal will hear Saint Vincent and the Grenadines first this morning. In the afternoon the Tribunal will hear Guinea-Bissau.

I now call on Professor Karagiannis to begin his statement.

Plaidoirie de Saint-Vincent-et-les Grenadines

EXPOSE DE M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/02, F, p. 10–18]

M. Karagiannis :
Votre Excellence, Monsieur le Président, Messieurs les Juges, Membres du Tribunal international du droit de la mer, j'ai l'immense honneur de plaider devant vous la cause de l'Etat de Saint-Vincent-et-les Grenadines en cette affaire de prompte mainlevée de l'immobilisation du navire *Juno Trader* ainsi que de prompte libération de membres de son équipage, le navire et l'équipage se trouvant actuellement à Bissau, la capitale de la République de Guinée-Bissau. C'est naturellement cet Etat qui détient en ce moment même et le navire *Juno Trader* et certains membres de son équipage.

J'avoue qu'il m'est un peu pénible de devoir plaider contre la République de Guinée-Bissau parce que, au moins pour deux sérieuses raisons, cet Etat d'Afrique de l'Ouest m'est particulièrement sympathique. Tout d'abord, les hommes de ma génération ne peuvent pas oublier la lutte du peuple de Guinée-Bissau en vue de la libération du joug colonial qui sévissait jusqu'en 1973, date à laquelle le territoire a été libéré grâce à la bravoure, la vaillance, l'esprit de sacrifice d'hommes et de femmes sous la conduite de l'inoubliable Amilcar Cabral, grand révolutionnaire et grand humaniste.

Seconde raison sérieuse : permettez-moi, Monsieur le Président, de dire que le professeur de droit international que je suis dans la vie civile est particulièrement content du comportement international de la République de Guinée-Bissau. En effet, au moins à trois reprises cette République a démontré en pratique son attachement au droit international et au règlement pacifique des différends internationaux.

En effet, la Guinée-Bissau a soumis deux différends internationaux de délimitation maritime avec la République de Guinée et un autre avec la République du Sénégal à des tribunaux arbitraux, et troisièmement, lorsqu'elle a contesté la valeur, pour ainsi dire de l'une de ces sentences arbitrales, encore une fois, elle s'est adressée à la justice internationale, plus particulièrement à la Cour internationale de Justice.

Je conclus donc naturellement que la Guinée-Bissau est un Etat qui fait tout pour se conformer au droit international. J'ai d'autant plus quelques regrets en la présente affaire. Bien sûr, il s'agit d'une affaire de prompte mainlevée, en tout cas, formellement. Je reviendrai sur les détails tout au long de mon discours de ce matin.

Néanmoins, il y a un regret. Nous avons, en tant que Saint-Vincent-et-les Grenadines, déposé notre demande en prompte mainlevée et en prompte libération de l'équipage le 18 novembre 2004 ainsi que M. le Greffier l'a rappelé tout à l'heure. Monsieur le Président du Tribunal a fixé par ordonnance les deux audiences aux 1er et 2 décembre. Et l'on constate, à notre très grande surprise, que c'est le tout dernier jour avant de venir à Hambourg, alors même que l'on était prêt à venir tous, que l'agent de Guinée-Bissau a été nommé et que, dans la foulée, celui-ci demande une extension du délai pour le dépôt de son mémoire en réponse.

Disons-le clairement. Ce n'est point la faute de mon estimable collègue M. Staker s'il a été nommé au tout dernier moment. En revanche, honnêtement, la République de Guinée-Bissau aurait dû se montrer un peu plus diligente sur ce point. La conséquence de tout cela est que l'audience a été déplacée au jour d'aujourd'hui et au jour de demain, mais, autre grande surprise, on constate que la République de Guinée-Bissau n'a toujours pas déposé un mémoire en réponse à notre demande.

Il me semble, sauf erreur de ma part, que c'est la première fois que votre Tribunal se trouve dans cette situation : connaître les arguments de l'Etat demandeur et ne point connaître

les arguments de l'Etat défendeur. Avouez, Monsieur le Président, qu'il est également un peu difficile pour nous, et pour moi personnellement, de devoir plaider une cause, sans connaître le moins du monde ce que la Guinée-Bissau en pense.

D'ailleurs, Monsieur le Président, j'avoue que je n'ai toujours pas compris pourquoi j'ai finalement l'immense honneur de plaider cette cause devant vous et devant votre Tribunal. Cette affaire aurait du être réglée il y a longtemps de la manière la plus simple qu'il soit, entre les représentants de l'armateur propriétaire du navire *Juno Trader* et les autorités locales de Guinée-Bissau. Je ne comprends donc pas pourquoi, de fil en aiguille, on est venu devant votre Tribunal.

Permettez-moi de rappeler brièvement les faits de cette affaire. Il ne s'agit pas naturellement de reprendre mon texte écrit. Le navire qui s'appelle *Juno Warrior*, qui, incidemment, lui aussi a la nationalité de Saint-Vincent-et-les Grenadines, pêche tranquillement une certaine quantité de poissons dans la zone économique exclusive de Mauritanie. Il est doté d'une licence de pêche en bonne et due forme émise par les autorités mauritaniennes, à la fin du mois d'août et durant la première moitié du mois de septembre 2004. A la fin de la saison de pêche, notamment lorsque cette licence arrive à expiration, sur ordre de l'armateur propriétaire du *Juno Warrior*, la cargaison pêchée est transbordée à bord d'un navire qui s'appelle *Juno Trader*, le navire évidemment qui va nous intéresser dans cette affaire.

Ce transbordement a lieu à l'intérieur de la zone économique exclusive de Mauritanie et il est explicitement autorisé par les autorités mauritaniennes. Le transbordement commence le 19 septembre et s'achève le 23 septembre 2004. Après cela, le *Juno Trader* quitte les eaux mauritaniennes, traverse les eaux sénégalaises et aussi gambiennes. Il se destine au Ghana.

Une société ghanéenne qui s'appelle « Unique Concerns Limited » a acheté sur la base d'un certain nombre de connaissements, dont d'ailleurs vous avez les originaux, la cargaison pêchée par le *Juno Warrior* qui se trouve maintenant à bord du *Juno Trader*. Tout va très bien. Le *Juno Trader* va atteindre le port de Tema au Ghana pour décharger la cargaison, pour la livrer à son propriétaire légal, la société ghanéenne Unique Concerns Limited.

Un incident totalement imprévu a lieu à l'intérieur de la zone économique exclusive de la République de Guinée-Bissau. Le navire est arraisonné – on verra dans quelles conditions – et dérouté vers le port de Bissau. Il est arraisonné le 26 septembre et le *Juno Trader* se trouve dans le port de Bissau depuis le 27 septembre. Avouez que le temps commence à devenir un peu long pour le propriétaire du navire, pour l'équipage, surtout à l'approche de Noël, et aussi pour le propriétaire de la cargaison, la société ghanéenne Unique Concerns Limited, déjà mentionnée.

Je voudrais avoir sur ce point quelques brefs développements concernant la compétence de votre Tribunal. Je constate tout d'abord que la Convention des Nations Unies sur le droit de la mer a été ratifiée par les deux Etats concernés : l'Etat côtier, la République de Guinée-Bissau, et l'Etat du pavillon, Saint-Vincent-et-les Grenadines. La Convention est réellement entrée en vigueur vis-à-vis de ces deux Etats le 16 novembre 1994, c'est-à-dire le jour même où, en général, cette Convention est entrée en vigueur.

Je constate également qu'il y a une immobilisation du navire *Juno Trader* dans le port de Bissau ainsi qu'une arrestation des membres de son équipage, à l'exception d'un seul qui, blessé lors d'une fusillade, a dû être rapatrié dans son pays d'origine, la Russie, grâce à l'assistance d'un navire-hôpital espagnol, *Esperanza del Mar*. Que ce navire et le médecin à bord soient remerciés.

La compétence en matière de prompte mainlevée du Tribunal est, d'une certaine manière, automatique aux termes de l'article 292 de la Convention, lorsqu'aucun autre Tribunal dans un délai de dix jours n'est déclaré compétent d'un commun accord par les deux

Etats. Cela fait longtemps que ce délai de dix jours a expiré. On conclut que la compétence du Tribunal sur ce point est vraiment acquise.

Toujours en matière de compétences, j'ajouterais que l'Etat de Saint-Vincent-et-les Grenadines allègue, le plus officiellement du monde, que la République de Guinée-Bissau n'a pas procédé à ce jour à la prompte mainlevée de l'immobilisation du navire *Juno Trader*. Par ailleurs, plusieurs membres de l'équipage sont toujours en état d'arrestation, en tout cas privés de leur liberté totale d'aller et venir.

La mainlevée de l'immobilisation ou la libération des derniers membres de l'équipage encore arrêtés, au sens large du terme, se maintient en dépit du dépôt d'une lettre de garantie bancaire, P&I, auprès des autorités de Guinée-Bissau par les représentants locaux de l'armateur du *Juno Trader*.

En ce qui concerne la recevabilité de cette affaire, bien sûr il peut y avoir parfois un flottement, on ne sait pas toujours si on se trouve dans le domaine de la compétence ou dans le domaine de la recevabilité. Donc je préfère, encore une fois, dire ici que la mainlevée de l'immobilisation n'est toujours pas obtenue. Il y a pire. Par un document très récent daté du 3 décembre 2004, alors même qu'on pouvait raisonnablement espérer encore au dernier moment la mainlevée de l'immobilisation, la libération de l'équipage, qu'apprend-on ? Que les autorités de Guinée-Bissau ont procédé à la confiscation en bonne et due forme du navire *Juno Trader*.

Peut-être quelqu'un pourrait nous dire que la lettre de garantie a été déposée un peu tardivement auprès des autorités de Guinée-Bissau. Je ne pense pas que cet argument puisse tout de même être sérieusement avancé, pour l'excellente raison qu'il [ne s'est] pas passé énormément de temps entre l'immobilisation du navire, l'arrestation de l'équipage et le moment de dépôt de la lettre de garantie bancaire.

De toute façon, je dois tout de suite dire que le représentant de l'armateur propriétaire du navire *Juno Trader* a été tenu pendant très longtemps dans l'ignorance la plus complète, non pas évidemment du sort de son navire, mais disons du sort juridique de son navire. On ne savait pas ce que les autorités locales de Bissau reprochaient au capitaine, au navire, à l'armateur.

Impossible de le savoir, en dépit de multiples démarches de notre part, dont éventuellement nous aurons aussi l'occasion de parler plus loin et qui sont explicitement décrites dans le texte de notre demande.

Permettez-moi de dire aussi que l'Etat du pavillon, Saint-Vincent-et-les Grenadines, n'a jamais été averti par les autorités de Guinée-Bissau de l'immobilisation du navire et de l'arrestation, à l'origine, des dix-neuf de les membres de son équipage (sauf le marin blessé). Alors même que très explicitement, un article 73 de la Convention de Montego Bay explicitement oblige l'Etat côtier à avertir *sans délai*, dit cet article, l'Etat du pavillon.

Je ne voudrais pas m'éterniser sur cet argument de l'éventuel caractère tardif du dépôt de la lettre de garantie. Il est vrai que votre Tribunal, dans son arrêt dans l'*Affaire du « Camouco »*, nous dit explicitement que l'article 292 de la Convention sur le droit de la mer ne requiert pas de l'Etat du pavillon de soumettre une demande de prompte mainlevée de l'immobilisation du navire et de prompte libération de l'équipage, à un moment particulier après l'immobilisation du navire. Il s'agit du paragraphe 54 de l'arrêt *« Camouco »*.

Après avoir donc brièvement développé la compétence de votre Tribunal et la recevabilité de notre demande, je vous énonce sans ambages, en toute sincérité, Monsieur le Président, que notre objectif, en tant qu'Etat du pavillon, est d'obtenir de la part de votre Tribunal la prompte mainlevée de l'immobilisation du navire et la prompte libération des membres de l'équipage encore arrêtés, au sens large du terme, sans aucune caution.

Vous me direz : l'article 292, l'article 73 de la Convention, explicitement parlent d'une caution raisonnable ou d'une autre garantie bancaire ou financière raisonnable. Les

mathématiciens arabes déjà au VIIIe siècle de notre ère, nous ont tout de même appris pour la première fois que zéro est également un chiffre.

De toute façon, si, à notre grand regret, votre Tribunal ne peut pas nous suivre dans notre demande de zéro caution, zéro garantie bancaire, alternativement nous le prions de bien vouloir ordonner cette prompte mainlevée d'immobilisation et cette prompte libération des membres de l'équipage, moyennant une caution ou autre garantie financière très peu élevée, symbolique, si aux yeux du Tribunal la courtoisie internationale impose tout de même un chiffre autre que le chiffre zéro.

Evidemment, une telle thèse, qui peut vous paraître audacieuse au vu de votre jurisprudence jusqu'à maintenant, doit être justifiée. Je vais vous apporter les éléments de cette justification.

D'une certaine manière, Monsieur le Président, la justification se trouve dans ce texte même, notamment dans l'article 73 de notre Convention. Le paragraphe 2 de l'article 73 nous parle de la prompte mainlevée, de la prompte libération de l'équipage, mais pour quoi faire ? Prompte mainlevée, prompte libération, dans le cas où le navire a été immobilisé et l'équipage a été arrêté, pour que l'Etat côtier puisse correctement procéder à « l'exercice de ses droits souverains d'exploration, d'exploitation, de conservation et de gestion des ressources biologiques de la zone économique exclusive ».

Il est vrai que nombre d'Etats, et pas seulement africains (vous connaissez très bien les difficultés de la France ou encore de l'Australie) éprouvent des difficultés pour préserver leurs ressources biologiques dans leurs zones économiques exclusives contre un pillage systématique de la part de chalutiers et de capitaines, ma foi peu scrupuleux.

L'Etat de Saint-Vincent-et-les Grenadines, Etat côtier lui-même, est, bien entendu, du côté de tous les Etats côtiers qui luttent contre le pillage de leurs ressources biologiques. Personnellement, je rends hommage tout de même aux administrateurs de Guinée-Bissau, et surtout aux hommes sur le terrain qui, souvent au péril de leur vie, cherchent à préserver et à protéger les ressources biologiques de la République de Guinée-Bissau, ressources biologiques qui sont une ressource financière extrêmement importante pour cet Etat africain, qui ne compte pas parmi les Etats les plus riches du monde, c'est le moins que l'on puisse dire.

Je rends donc hommage, encore une fois, aux autorités de Guinée-Bissau, mais j'ai un petit problème : l'article 73 impose des mesures d'immobilisation d'un navire, d'arrestation d'un équipage lorsqu'il s'agit, pour faire bref, d'une pêche illicite. Dans le cas présent, justement, il n'y a pas eu de pêche illicite. Il n'y a pas eu de pêche du tout. Et il ne pouvait pas y avoir de pêche. Pour une excellente raison, Monsieur le Président : le *Juno Trader* n'est pas un chalutier. Il n'a pas de filets, il n'a pas d'appareils, pas d'engins de pêche. Le *Juno Trader* est un cargo frigorifique spécialisé dans le transport, notamment de poissons congelés.

Il me paraît un peu difficile de confondre, même de loin, un chalutier avec un grand cargo frigorifique. Il paraît que la structure de ces deux types de navire est quand même assez différente.

Mais allons un peu plus dans le détail. La garde côtière de Guinée-Bissau trouve à bord du *Juno Trader* quantité de poissons, naturellement congelés. J'ai bien dit qu'il s'agissait d'un bateau frigorifique. D'où vient cette cargaison ? Je vous l'ai dit tout à l'heure, cette cargaison vient du navire *Juno Warrior* qui l'a pêchée dans la zone économique exclusive mauritanienne.

Il y a un grand nombre de documents qui attestent cette thèse. Ces documents, pour l'essentiel, ont été déposés et les membres du Tribunal et nos honorables contradicteurs de la délégation guinéenne en ont pris connaissance.

De quoi s'agit-il ? Ces documents sont de nature différente, cela va de soi. D'abord, je voudrais citer les *delivery acceptance reports* qui ont été cosignés chaque fois et datés par le

capitaine du navire *Juno Warrior*, c'est-à-dire le chalutier, et par le capitaine du navire *Juno Trader*, où cette cargaison a été transbordée dans les eaux mauritaniennes. Ces *delivery acceptance reports* sont particulièrement détaillés par espèce de poissons transbordés, par quantité, le jour même, voire l'heure du transbordement est signalée, et ces documents sont datés du 19 au 23 septembre 2004. J'estime qu'il est quand même assez inutile de lire ces documents qui sont à votre disposition.

Sinon, d'autres documents attestant de la provenance de la cargaison – du poisson congelé pour l'essentiel – trouvée à bord du *Juno Trader*, sont établis par la société qui gère d'une certaine manière le navire *Juno Warrior*, la société Atlantic Pelagic. Ici encore, vous avez à votre disposition un certain nombre de documents, notamment en langue française bien sûr, par le biais desquels cette société Atlantic Pelagic charge son représentant local en Mauritanie de surveiller et de vérifier le bon transbordement de la cargaison à bord du *Juno Trader*.

Puis, comme j'ai pu le dire tout à l'heure, la cargaison congelée ainsi que quelques sacs de farine de poisson d'ailleurs, ont été vendus par le propriétaire du *Juno Trader* à une société ghanéenne, la Unique Concerns Limited. Il y a un certain nombre de connaissements, si je ne me trompe pas, trois connaissements, vous en avez les originaux, ces trois connaissements sont en langue anglaise, particulièrement explicites, par quantité, par espèce de poissons, etc., et ces trois connaissements ont été signés en Grande-Bretagne le 23 septembre. Il me semble superflu de lire des chiffres de documents purement technico-administratifs.

Puis, lorsque la situation commence tout de même à Bissau à prendre du temps, à s'envenimer, on ne comprend plus très bien ce que les autorités de Guinée-Bissau cherchent. Et bien, tout simplement, on demande aux autorités officielles de la République islamique de Mauritanie d'attester à leur tour, mais de manière officielle, bien entendu, la provenance de la cargaison. Nous avons deux attestations – vous avez le texte – et comme ces attestations sont un peu plus courtes, je me propose d'en lire quelques très brefs extraits.

La première attestation est signée et datée du 7 novembre 2004 en Mauritanie. Cette attestation provient du Ministère de pêche et de l'économie maritime, Délégation à la surveillance de pêche et du contrôle en mer. Attestation sur demande de la société Atlantic Pelagic, suivant lettre en date du 4 novembre 2004 :

> « Nous soussignés, délégués à la surveillance de pêche et au contrôle en mer, attestons par la présente que le navire pélagique Juno Warrior, a transbordé le 19 septembre 2004 : 1 183,830 tonnes de poissons pélagiques et 112 tonnes de farine de poisson sur le cargo Juno Trader, conformément à l'autorisation de transbordement formulée le 18 septembre 2004 à la Délégation à la surveillance de pêche et au contrôle en mer par ladite société, et que le poisson objet de ce transbordement est bien mauritanien. La présente attestation est délivrée pour servir et valoir ce que de droit. »

On a demandé aussi d'autres documents des autorités mauritaniennes et, de bonne grâce, celles-ci nous ont délivré le 9 novembre 2004, c'est-à-dire deux jours après, une autre attestation. Encore une fois, c'est la Direction de pêche, Ministère de pêche et de l'économie maritime.

> « Attestation : Je soussigné, Chérif Ould Toueleb, Directeur de la Pêche industrielle, atteste que le navire Juno Warrior a travaillé sous la licence numéro 04/1083 du 19 août 2004, valable pour la période allant du 20 août

> 2004 au 18 septembre 2004, dans le cadre de la convention signée le 15 février 2004 entre le Ministère de pêche et de l'économie maritime et la société Frozen Foods International Limited.
>
> Au vu de l'attestation de la Délégation à la surveillance de pêche et au contrôle en mer numéro etc. du 7 novembre 2004, le navire Juno Warrior a transbordé 1 183,830 tonnes de poissons pélagiques et 112 tonnes de farine de poisson le 19 septembre 2004 sur le cargo transbordeur Juno Trader. En foi de quoi la présente attestation est établie pour servir et valoir ce que de droit. »

Ces attestations, qui émanent quand même du ministère compétent de la République islamique de Mauritanie, sont officielles. Je ne sais pas comment la Guinée-Bissau aurait pu jamais se poser des questions sur l'authenticité de ces documents.

Au fur et à mesure que le *Juno Trader* reste immobilisé dans le port de Bissau, le propriétaire de la cargaison, cette fois-ci, la société ghanéenne Unique Concerns Limited, commence à vivement s'inquiéter du sort de la marchandise qu'elle a achetée et qu'elle attend désespérément dans le port de Tema au Ghana.

Les partenaires ghanéens comprennent les difficultés de l'armateur du *Juno Trader*, mais après tout, ce n'est pas tout à fait leur problème si le *Juno Trader* a tel ou tel problème juridique ou administratif avec les autorités de Bissau. A mon tour, je comprends tout à fait les inquiétudes que se fait la société Unique Concerns Limited.

Finalement, cette société prend les devants et dans une lettre adressée au représentant local à Guinée-Bissau de la société Lloyds à Bissau, M. Rosa, le 28 octobre 2004 … je vais la lire en anglais, car elle est uniquement en anglais, la société ghanéenne nous dit :

« *As owners of the cargo, the consignment of* »

– the figures are not easy to read –

> « *frozen fish and 112 tonnes of fish meal belongs to us and must be delivered to us in Tema. Any quantity from the said bills of lading discharged in Guinea-Bissau will be a breach of international law and will be viewed as theft. We reserve our right to protect our interest legally in the unlikely event our cargo is not delivered to us in Tema, Ghana.* »

Signé : Unique Concerns Limited.

Dans ces divers documents, deux chiffres sont devenus pour moi magiques, c'est 1 183,830 tonnes de poissons pélagiques congelés et 112 tonnes de farine de poisson.

Ces mêmes quantités sont également mentionnées dans le rapport officiel d'un comité scientifique, le CIPA, chargé par les autorités du Ministère de pêche de Guinée-Bissau d'établir, dans la mesure du possible, la provenance de la cargaison du *Juno Trader*.

Je ne voudrais pas contester en ce moment la méthode établie par le CIPA en vue de la vérification de la provenance de la cargaison du *Juno Trader*. Si j'ai bien compris, les scientifiques guinéens ont comparé des spécimens qui se trouvent habituellement dans la zone économique exclusive de Guinée-Bissau avec des spécimens se trouvant à bord du *Juno Trader*.

Je ne sais pas quelle est la scientificité de cette méthode, mais peu importe à la limite. Ce qui est intéressant, c'est que le rapport des scientifiques de Guinée-Bissau dit bel et bien que les poissons se trouvant à bord du *Juno Trader* sont similaires aux poissons se trouvant habituellement dans la zone économique exclusive de Guinée-Bissau.

Mais ici, il y a un problème : la similitude, ce n'est pas du tout l'identité. D'ailleurs, très honnêtes, les scientifiques locaux nous disent qu'il y a certains cartons à bord du *Juno Trader* contenant des spécimens qui ne se trouvent pas dans les eaux de Guinée-Bissau. Soit dit en passant, Monsieur le Président, cela n'empêchera nullement les autorités administratives de Bissau de tout confisquer, même les cartons de poissons congelés qui ne se rencontrent, de l'avis des scientifiques locaux, absolument pas dans les eaux de Guinée-Bissau.

Au-delà, je dois également dire que la zone économique exclusive de Guinée-Bissau n'est pas tout de même une zone totalement isolée. Les poissons circulent librement, passent d'une zone à l'autre, d'une zone à la haute mer, etc., et il y a bien sûr une similitude de plusieurs espèces de poissons dans plusieurs zones économiques exclusives ouest-africaines.

Imaginez tout de même, Monsieur le Président, qu'il n'y a que les eaux sénégalaises ou gambiennes, mais enfin, la zone gambienne est trop étroite, il n'y a donc que les eaux sénégalaises qui séparent les eaux mauritaniennes des eaux de Guinée-Bissau.

Enfin, le rapport des scientifiques locaux de Bissau nous fournit un argument qui finalement nous est favorable. Ils disent, eux aussi, qu'ils ont trouvé à bord du *Juno Trader* la même quantité, le même chiffre, que je qualifiais tout à l'heure de magique de 1 183 et 112 etc.

Mais que se passe-t-il maintenant ? Est-il jamais possible que le *Juno Trader* finisse l'opération de transbordement le 23 septembre, par magie, il se débarrasse de la cargaison, on ne sait pas où ni au profit de qui, et qu'entre le 26, je crois, où il entre dans la zone économique exclusive et les quelques heures où il est arraisonné par la garde côtière, il repêche, il remplit à nouveau ses cales de poisson, soi-disant guinéen, tout en faisant quand même extrêmement attention, Monsieur le Président, à ce que la quantité qu'il avait transbordée et la quantité qu'il avait maintenant pêchée, soit exactement de 1183,830 tonnes de poisson et de 112 tonnes de farine de poisson ? Tout cela alors même que personne, même pas nos chères autorités de Guinée-Bissau, n'ont pu trouver à bord du *Juno Trader* des appareils élémentaires de l'industrie de pêche ou encore des appareils de transformation du poisson pêché en farine de poisson. Tout cela est tout de même particulièrement préoccupant du point de vue de la logique, Monsieur le Président !

Peut-être les autorités de Guinée-Bissau n'étaient pas au courant de la provenance de la cargaison trouvée dans la zone économique exclusive de Guinée-Bissau à bord du *Juno Trader*. Dès que les représentants du propriétaire/armateur ont su que le *Juno Trader* avait des difficultés administratives avec le Ministère de pêche de Bissau, ils ont entrepris d'éclairer la religion des autorités guinéennes, c'est-à-dire à leur faire comprendre la réelle provenance de cette cargaison. Mon collègue représentant local de l'armateur, M. Fernando Tavares, a entrepris la quasi totalité de ces démarches. Je vous prierai, Monsieur le Président, de bien vouloir lui permettre de nous exposer pendant quelques minutes les démarches réelles qu'il a entreprises, mais avant de nous donner, si possible, cette permission, je voudrais ajouter également une chose.

Il n'y a pas que M. Tavares ou d'autres personnes qui ont cherché à établir auprès des autorités administratives de Bissau la provenance de cette cargaison. Comme on l'a vu tout à l'heure, le propriétaire légal de la cargaison depuis le 23 septembre, sur la base de trois connaissements, bref la société ghanéenne Unique Concerns Limited, commence à s'inquiéter et elle-même entreprend des démarches – on l'a vu d'ailleurs – particulièrement par le biais de l'agent de Lloyds qui la représente localement, M. Rosa. M. Rosa, à son tour, adressera une lettre aux autorités compétentes administratives de Bissau, plus particulièrement au docteur Malal, directeur général de la FIS[CAP], l'autorité administrative compétente.

Cette lettre signée par l'agent de Lloyds, M. Rosa, est datée de Bissau, du 1er novembre 2004. Je m'abstiens de lire le texte original portugais, je vous lirai quelques extraits de la traduction de cette lettre en langue anglaise :

> « *Dear Sir,*
> *Ref.: Juno Trader arrested in Bissau, 26 September 2004*
> *We represent Lloyd's of London in Guinea-Bissau. As representatives of the insurers of the cargos carried by the ship Juno Trader, we have been asked by the owners of those cargos to intervene to clarify the situation and, if possible, as is desired, to resolve it. We will not reiterate the matter or the background, which must be well known to you, but simply wish to draw your attention to the documents which we take the liberty of enclosing for your consideration. The enclosed documents certify that the cargo was loaded in Mauritanian territory. This being so, and knowing the excellent relations and co-operation which Guinea-Bissau maintains with Mauritania, it would be helpful in our view if you would use official channels to confirm or otherwise the truth of that fact. This approach, we are sure, would prevent any negative outcome to this incident, which we regard as serious for any of the parties who might be found guilty. We are grateful for your collaboration on which we rely and of course remain at your disposal. Yours faithfully* ».

C'est tamponné « H.P. Rosa, Agencies, Lloyd's Agent ».

Il est peut-être possible que le nom H. P. Rosa, agent local de la Lloyd's à Bissau, ne vous dise rien. Je vous informe, Monsieur le Président, que M. Rosa est non seulement l'agent de la Lloyd's localement, il est aussi depuis 2003 le Président de la République de Guinée-Bissau. Si le Président lui-même, certes en sa qualité professionnelle, cherche quand même à donner des conseils de ne pas faire trop de zèle, des conseils de tempérament, aux administrateurs un peu bouillants et peut-être aussi brouillons, du Ministère de la pêche, alors qui pourrait encore leur dire vraiment la provenance de cette cargaison ? Il y a quand même une personne qui pourrait la leur dire, et effectivement il l'a dit, c'est M. Fernando Tavares. Je demande la permission du Président pour que M. Tavares puisse faire un exposé sur ce point.

The President:
Thank you, Mr Karagiannis, your request is granted.

I now give the floor to Mr Fernando Tavares.

EXPOSÉ DE M. TAVARES
CONSEILLER DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/02, F, p. 18]

M. Tavares :
Monsieur le Président, au sujet de la marchandise qui se trouve à bord du navire *Juno Trader* et en tant que représentant local des armateurs du navire *Juno Trader* à Bissau, après la saisie du navire, moi en tant que représentant local j'ai fait pas mal de démarches auprès des autorités guinéennes de Bissau – d'abord, je suis un Guinéen de Bissau – dans le sens professionnel pour informer les autorités sur l'origine de la marchandise. Je ne veux pas parler de la véracité des documents des autorités de la Mauritanie mais de ce que l'on a sur les papiers arrivés en nos mains des documents officiels du Ministère de la pêche de Mauritanie.

Ils déclarent que la marchandise a été chargée dans la zone économique exclusive de la Mauritanie. On a passé cette information en temps utile au Ministère de la pêche, à travers le FISCMAR, c'est l'Institut gouvernemental chargé de la fiscalisation maritime. On a informé parallèlement le Ministère de pêche sur l'origine de la marchandise. On a envoyé un « attachement » avec le « manifeste cargo », la copie du connaissement d'embarquement, le certificat SGS, tout ce que l'on a reçu comme preuve du chargement de la marchandise qui a fait le transbordement entre le *Juno Warrior* et le *Juno Trader* dans les eaux de la Mauritanie mais, malgré tous nos efforts, malgré toute la documentation envoyée en copie à M. Rosa, qui dans ce dossier est le représentant des assureurs qui ont acheté la marchandise au Ghana, on n'a jamais reçu une contestation ni une réponse, négative ou positive, au sujet de l'origine de la marchandise.

On a en mains toutes les lettres que l'on a écrites à FISCMAR, au Ministère de pêche, les documents joints en annexe pour prouver l'origine de la marchandise mais on doit se rendre à l'évidence des faits que l'on n'a jamais reçu une réaction de la part des autorités locales concernant les informations écrites données aux autorités guinéennes de Bissau. Donc, j'ai à votre disposition quelques documents avec la traduction en anglais que je peux vous présenter ou vous lire. Sur l'origine de la marchandise on a apporté beaucoup d'attention pour transmettre toute la documentation, toutes les preuves formelles que l'on a reçues, aux autorités de Bissau, sur la cargaison.

C'est tout ce que j'ai à dire.

The President:
Thank you.

Mr Karagiannis.

EXPOSE DE M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/02, F, p. 18–21]

M. Karagiannis :
Merci encore, Monsieur le Président.

Il me semble donc que la provenance de la cargaison « litigieuse » se trouvant à bord du navire *Juno Trader* est maintenant assez bien établie. Il y a tout de même une avalanche de documents plus officiels les uns que les autres qui attestent de cette provenance.

Malgré tout, les autorités locales ne veulent rien entendre. Il est impossible de leur faire comprendre que cette fois-ci elles n'ont pas arrêté un navire peu scrupuleux comme il y en a tant hélas dans les zones africaines et ailleurs, cette fois-ci elles se sont trompées. On peut se tromper, Monsieur le Président, tout le monde se trompe mais il est quand même particulièrement honnête à un certain moment de reconnaître que l'on a pu se tromper. Si tout cela avait pu être la qualité de certains administrateurs de Bissau, il est vrai que l'on ne serait pas maintenant ici devant votre Tribunal.

Les autorités prennent le 18 octobre un acte connu comme l'Acte no. 12 qui explique le comportement illégal du *Juno Trader*. Cet Acte no. 12, le lendemain, sauf erreur de ma part, le 19 octobre 2004, sera avalisé par un Acte no. 14 émanant de la Commission interministérielle des pêches de la République de Guinée-Bissau.

Dans ces documents no. 12 et no. 14, il y a bien entendu certaines justifications des mesures prises par les autorités locales. Pour résumer, ces mesures sont essentiellement trois : une amende infligée à l'armateur, une amende infligée à titre personnel au capitaine pour tentative de fuite – on reviendra là-dessus dans un instant – puis la confiscation de la cargaison se trouvant à bord du *Juno Trader* parce que cette cargaison aurait été pêchée ou transbordée illégalement dans la zone économique exclusive de Guinée-Bissau.

On ne nous dit pas franchement si cette cargaison a été pêchée illégalement, à leur avis toujours, ou transbordée illégalement. Pêchée illégalement, enfin légalement ou illégalement, on l'a dit tout à l'heure, c'est impossible. Le *Juno Trader* n'est pas équipé à cet effet.

Même le Parlement britannique n'arrive pas à transformer un homme en une femme. Pourquoi les autorités de Guinée-Bissau voudraient absolument transformer un cargo frigorifique en chalutier ?

Quoiqu'il en soit, à supposer que ce ne soit pas finalement la pêche illégale qui est implicitement retenue par l'Acte no. 12, l'Acte no. 14, on passe à un autre acte connexe à une pêche illégale, bref le transbordement. Comme je l'ai dit déjà, de manière un peu humoristique, dans notre Demande de prompte mainlevée, le transbordement ressemble au mariage : il faut être deux pour que l'acte puisse être accompli.

Cherchons donc l'autre navire qui aurait pêché légalement ou illégalement ou qui, de toute façon, contiendrait une cargaison très précisément de 1 183 tonnes, etc., vous connaissez les chiffres, Monsieur le Président. Quel est ce navire ? L'Acte no. 12 nous parle d'un navire *Flipper 1* qui serait à proximité du *Juno Trader* lorsque le *Juno Trader* sera arraisonné par la Garde côtière.

Ecoutez, vérifications faites, les autorités locales de Guinée-Bissau innocentent totalement le *Flipper 1* en considérant que ce chalutier pêchait tranquillement, muni d'une licence de pêche en bonne et due forme dans les eaux de Guinée-Bissau.

Il n'y a pas d'autres navires mentionnés. De toute façon, j'avoue que je ne possède pas le P.V. établi par la Garde côtière de Guinée-Bissau. J'espère quand même qu'un tel P.V. circule quelque part dans la nature parce que le Décret-loi de 2000 qui règlemente la pêche

dans les eaux de Guinée-Bissau impose à la Garde côtière d'établir scrupuleusement un tel P.V. J'en ignore l'existence.

Sinon, l'Acte no. 14 qui avalise donc l'Acte no. 12 impose aussi une lourde amende au propriétaire du *Juno Trader*. Je suppose, encore une fois, pour pêche illégale et/ou transbordement illégal. Je ne reviendrai pas sur ces accusations, d'ailleurs accusations qui ne sont pas formulées de manière nette mais par le biais d'allusions. C'est pour cela que je ne sais toujours pas ce que l'on reproche précisément au *Juno Trader* : une pêche, un transbordement illégal, autre chose ?

Enfin si, Monsieur le Président, on lui reproche une autre chose et c'est cette autre chose qui est la clef du mystère dans le comportement, l'attitude des autorités de Guinée-Bissau. Vous voyez que je me transforme un peu en psychologue pour chercher à trouver difficilement quelques motifs à peu près raisonnables qui auraient pu motiver les autorités de Guinée-Bissau.

Alors, dans l'Acte no. 12 et dans l'Acte no. 14, on mentionne une tentative de fuite, « *tentativa de fuga* » en portugais. Tentative de fuite donc, dont est responsable bien entendu le capitaine qui est responsable de son navire. En effet, le capitaine n'aurait pas obtempéré aux ordres du représentant, je suppose, de la Garde côtière ou de la Marine nationale guinéenne. Ces ordres effectivement visaient à faire arrêter le navire *Juno Trader* et ces ordres venaient d'un zodiac, c'est-à-dire une petite embarcation apparemment assez rapide, qui a cherché à faire comprendre au capitaine du *Juno Trader* qu'il lui fallait arrêter les machines du navire en question. Il est vrai que le capitaine ne s'est pas arrêté, il a continué sa route. L'Acte no. 12 nous dit donc : tentative de fuite.

La tentative de fuite, comme je le disais, est un élément clé dans le raisonnement des autorités administratives de Bissau. Quelqu'un qui prend la fuite a nécessairement quelque chose à cacher. Quelqu'un qui prend la fuite a forcément accompli un acte illégal. Le raisonnement vaut ce qu'il vaut, c'est à votre Tribunal d'apprécier le caractère de ces raisonnements. Mais la question est : comment ne pas prendre la fuite lorsqu'on rencontre, dans les circonstances rocambolesques que l'on va voir, des hommes qui tentent de vous dire quelque chose, des hommes que vous ne comprenez pas, vous n'entendez pas, des hommes qui sont incapables de communiquer avec vous sauf avec des gestes désordonnés et lorsque parmi ces gestes on distingue quand même clairement des armes, qui assez rapidement, dans 5 ou 10 minutes suivant les versions, commencent tout de même à être réellement utilisées ? Lors de la fusillade, un des marins a été blessé et c'est lui qui a été rapatrié grâce à l'assistance du navire *Esperanza del Mar* plus tard à Moscou. Comment ne pas prendre la fuite lorsqu'on commence à craindre pour le navire et pour sa vie et pour la vie aussi des membres de l'équipage dont on est responsable ? Comment en plus ne pas craindre lorsque l'on sait que malheureusement il y a, année après année, une recrudescence des actes de piraterie dans certaines parties du monde ? Entre autres, au large de plusieurs côtes ouest-africaines. La Llyod's ou d'autres organismes régulièrement nous informent de cette recrudescence, entre autres en Afrique et plus particulièrement en Afrique de l'Ouest.

L'agent de Saint-Vincent-et-les Grenadines et conseil en la présente affaire, M. Vincent Huens de Brouwer, a eu l'occasion de s'entretenir avec certains membres de l'équipage alors tous détenus, privés de liberté, à Bissau.

Dans des témoignages écrits et signés par les membres de l'équipage interviewés, ces derniers nous parlent, entre autres, et surtout d'ailleurs, de l'impression globale que le zodiac a fait sur le moment, au moment crucial, au capitaine et évidemment aux autres membres de l'équipage. Voici par exemple ce que nous dit – tout cela est versé dans vos archives et tout cela est également mentionné par extraits dans la demande que nous avons déposée – mais pour faire bref, voilà par exemple ce que nous dit l'officier radio M. Oleksandr Romanov, de

nationalité ukrainienne. C'est dans un anglais très approximatif, un anglais mondialisé comme je dirais, mais enfin que l'on comprend tout de même. Je cite l'officier radio :

> « *At 16 hour 55, I saw speedboat on starboard – beige, with five men on board ... During attack I did not notice any sign on board vessel. Afterward, I read "Marine nationale Guinea-Bissau", but during attack I did not read this signature.* »

L'officier en second, M. Karedin, de nationalité russe, dans son témoignage écrit pris par M. Huens de Brouwer et déposé dans vos archives nous dit :

> « Vers 17 heures, j'ai entendu des coups de feu. Je me suis rendu immédiatement sur le pont pour rencontrer le capitaine, le principal officier, l'officier de radio. Les tirs ont duré à peu près 5 à 7 minutes et le zodiac a changé de bord. L'officier de radio a diffusé des appels de détresse. J'ai également transmis un message d'attaque pirate S.O.S. sur le canal VHF 16 : « attaque de pirate, je vous prie de me contacter ». J'ai immédiatement reçu une réponse de la part de l'Esperanza del Mar qui avec le radar était à peu près à 10/12 milles nautiques à distance du Juno Trader. »

Un autre membre de l'équipage, l'ingénieur en chef, Maksimkin, nous donne des témoignages analogues et l'officier radio Romanov dans le témoignage déjà mentionné ajoute :

> « et alors il était indiqué qu'on nous attaquait en tirant dessus. L'attaque a duré quelque 10/15 minutes. J'ai remarqué que l'équipage de la vedette ou un homme sur la vedette gesticulait du côté bâbord et le capitaine m'a commandé d'envoyer des signaux de détresse. J'ai envoyé deux signaux, l'un au port de Dakar, l'autre au port de Conakry, mais je n'ai pas reçu de réponse.
>
> A 17 h 28 minutes environ, j'ai confirmé ce message de détresse 'l'attaque de pirate est terminée' ».

Le marin, le capitaine apparemment aussi, ont cru à une véritable attaque de pirates. Sinon on n'alerte pas tout le monde, vraiment tout l'univers, jusqu'à la France, à proximité de Calais où ils ont reçu des signaux de détresse « attaque de pirates ». Est venu effectivement un navire espagnol se trouvant plus proche que d'autres, et le navire-hôpital espagnol *Esperanza del Mar,* dans le procès-verbal que nous avons versé dans vos archives, nous dit qu'effectivement il y a eu un blessé à bord du *Juno Trader.* D'ailleurs, il y a aussi des photos dans vos archives qui montrent quelques impacts de balle. Il est vrai que *Esperanza del Mar* a eu de bons rapports avec une vedette de la Marine nationale à côté de laquelle se trouvait maintenant le zodiac fauteur de troubles et de craintes à bord du *Juno Trader,* mais cette fois-ci les signes distinctifs sur la vedette étaient quand même bien distinctifs. Ce n'était pas le cas du petit zodiac qui a posé tous ces problèmes. Il n'y a qu'un seul marin, l'officier radio Romanov qui nous dit – j'ai lu tout à l'heure son témoignage signé – que, lui, il a pu voir un tout petit peu un signe « Marine nationale Guinée-Bissau » mais pourquoi ? Parce que lui, Romanov, a été le seul a être forcé à prendre place à bord de la vedette ou du zodiac pour être amené au port de Bissau séparément du reste de l'équipage du *Juno Trader*.

Mais peut-être, Monsieur le Président, offrons-nous cette occasion, écoutons un peu le capitaine du navire *Juno Trader*, le capitaine Potarykin lui-même, qui, si vous le souhaitez, en tout cas nous nous le souhaitons, pourra témoigner ici même.

The President:
Thank you.

We ought to have a recess at 11.45, but the Tribunal will now hear Mr Potarykin, who is being called by the Applicant as a witness pursuant to article 78 of the Rules of the Tribunal.

Before calling the witness, I first request that the interpreter appear before the Tribunal who will interpret the witness's statement from Russian into one of the official languages of the Tribunal.

The interpreter is sworn in (in English).

The President:
Thank you.

I now call on the witness to make the declaration.

Mr Nikolay Potarykin is sworn in (in Russian).

Audition des témoins

M. NIKOLAY POTARYKIN, INTERROGÉ PAR M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/02, E, p. 21–23; F, p. 21–23]

M. Karagiannis :
Monsieur Potarykin, une première question, s'il vous plaît, concernant l'incident à bord du *Juno Trader* dans la zone économique exclusive de Guinée-Bissau.

The President:
I am sorry, but the interpreter is not yet upstairs.

(Pause)

M. Karagiannis :
Je disais tout à l'heure que je voudrais vous poser quelques questions au sujet de l'incident, tout de même assez grave, survenu avec le navire que vous commandez, le *Juno Trader*, à l'intérieur de la zone économique exclusive de Guinée-Bissau, plus particulièrement le 26 septembre 2004.

Plusieurs membres de votre équipage, et vous-mêmes d'ailleurs dans des témoignages écrits et signés, parlez d'un zodiac qui vous a approché le 26 septembre 2004. Je voudrai que vous répondiez à cette question : quelle a été pour vous personnellement l'apparence extérieure des occupants du zodiac ? Comment étaient-ils habillés par exemple ?

Mr Potarykin:
(Technical difficulties)

The President:
As there is a slight technical problem, we will take our 15-minute break. The sitting is adjourned, we will continue at noon after the break. Thank you.

(L'audience est suspendue à 11 h 42)

The President:
We will continue to hear the witness. I give the floor to Professor Karagiannis.

M. Karagiannis :
Merci, Monsieur le Président. Je poserai donc, comme entendu, si notre technologie le veut bien, quelques questions au capitaine du *Juno Trader*, M. Nikolay Potarykin.

Capitaine, le 26 septembre vous commandiez le navire *Juno Trader* et, à l'intérieur de la zone économique exclusive de Guinée-Bissau, vous avez été abordé par un zodiac. Je voudrais, si vous le voulez bien, que vous puissiez me décrire rapidement, non pas le zodiac en lui-même, un zodiac est un zodiac, mais l'apparence extérieure des occupants de ce zodiac.

Mr Potarykin:
(Interpretation from Russian) A speedboat of the zodiac type approached us from the starboard. With hand signs, they demanded that we stop. They did not fly any flag, no signs, and five people were in that speedboat. They were wearing civil togs and they had sub-machine guns and only one had semi-camouflage and a hat. The speedboat caught up to us

and ahead of us and then reached us from the port side and also with hand signs demanded our stop. There was no connection by radio, and so during the three to five minutes I could not even explain what to do and they started shooting at us. Therefore, I decided that those were pirates. I could not make any comparisons. Before, I had never encountered such cases. I do not know exactly how pirates look but to my understanding that was a pirate case. The speedboat had a speed of 20 to 25 knots and my ship with the speed of only 10 knots could not go away. There was no reason to start shooting at us from the speedboat. We could not run away anyway. That is all I can say on this point.

M. Karagiannis :
Merci, Monsieur le capitaine. Peut-être pourriez-vous nous donner quelques autres détails sur votre réaction personnelle. Qu'avez-vous fait et quelle était la situation à bord du *Juno Trader* ? Comment avez-vous vécu ces moments ?

Mr Potarykin:
(No interpretation due to technical problems)
(Interpretation from Russian)… and one member of the crew was wounded in the leg. Our ship gave the signal of distress and it was accepted by the hospital ship from Spain. Our calls on the 16th channel, nobody answered before that, and after the distress call, *Esperanza del Mar*, the hospital ship, answered and they were approximately 10 miles away to the south-west.

M. Karagiannis :
Merci, Monsieur le capitaine.

Je ne désire pas poser d'autres questions j'ai eu suffisamment de réponses de la part du capitaine.

The President:
Thank you.

Mr Staker, would you like to cross-examine the witness? If so, please do so now.

MR NIKOLAY POTARYKIN, CROSS-EXAMINED BY MR STAKER
AGENT OF GUINEA-BISSAU
[PV.04/02, E, p. 23–24]

Mr Staker:
Mr President, I have just a few very specific questions and then my colleague Mr Ramón García-Gallardo would also like to pose an additional question or two.

Captain, I would like to ask you: did you inform the authorities of Guinea-Bissau when your ship crossed into the waters of Guinea-Bissau?

Mr Potarykin:
(Interpretation from Russian) No, such information was not given because of the International Convention ruling. I had a free pass as of right, a free passage right.

Mr Staker:
Do you usually travel through the waters of Guinea-Bissau in the course of your voyages?

Mr Potarykin:
(Interpretation from Russian) I have not had any contacts since the time of working with the tanker *Amour* and on 26 September we had had no contacts with any other ships.

Mr Staker:
When the inspectors of Guinea-Bissau came on board your ship, at first they asked you for your logbook and engine book, did they not?

Mr Potarykin:
(Interpretation from Russian) No. At first they hit in the face, and, as long as the crew members of the Spanish ship were on board, I stood under this threat of being shot from their machinegun, and, only after the wounded sailor was taken away and the Spanish ship left, about 15 people went on board. They were in camouflage togs and also with machine guns. Then I myself offered them to see my logbook and also cargo documents and also to take into account the way from the tanker up to the point and to calculate the time for this, but nobody wanted to talk to me on this point. Only one Bissau afterwards – finish.

Mr Staker:
When you were first asked to go to Bissau, you refused to do so, did you not?

Mr Potarykin:
(Interpretation from Russian) The first moment when three people from the zodiac went aboard our ship, one was in civil clothes and the other two were in camouflage togs. The military men threatened me with their firearms and shouted where were the shrimps, where were the fins of the sharks. I stood and I could not understand why they asked such questions and, further on, after the *Esperanza del mar* sailed away and then on the ship flying the flag of Guinea-Bissau and –

Mr Staker:
I am sorry. I do not wish to interrupt the explanation but I just wanted a very brief answer to a very specific question. When you were asked to take the ship to Bissau, at first you refused, did you not?

Mr Potarykin:
(Interpretation from Russian) Yes. At first I declined and asked about the explanation and causes of such an action. I did not have any chart. There were no water charts and therefore I refused, but when the crew was surrounded and one man was taken from us, I found myself in a very difficult situation – impasse.

Mr Staker:
Thank you. I just have one other question. Your ship is presently in Bissau and you need members of your crew to look after and maintain the ship. Certain members of the original crew have since left Bissau and have been replaced by other people who have come to Bissau in order to replace them and to form part of the crew to look after the ship.

Mr Potarykin:
(Interpretation from Russian) The ship is at Bissau port and the crew takes care of its technical condition and security, and also the cargo is on board and it is necessary to take care of the cargo. I was forced to send away a few crew members because of their psychological condition, but so far nobody came in replacement. Perhaps there are some technical problems and I would like to say that it was not so easy to send the people away. The passports were taken from us and without any explanation; they are at the disposal of somebody under a lock, no matter how long and how much I talked about that, and, one more point, for a whole month the crew members were under military arrest. You understand how the psychological situation of the crew was. Only recently this situation changed for the better, but additional members of the crew have not yet arrived.

Mr Staker:
Thank you. My colleague will have a few further questions.

The President:
Thank you, Mr Staker.
I now give the floor to Mr García-Gallardo.

MR NIKOLAY POTARYKIN, CROSS-EXAMINED BY MR GARCIA-GALLARDO COUNSEL OF GUINEA-BISSAU
[PV.04/02, E, p. 24–26]

Mr García-Gallardo:
Mr President, distinguished Members of the Tribunal. The legal arguments of the Respondent will occupy the whole afternoon, but due to the allocation of time, we need to come now to the facts. I have a very few questions for the witness, Mr Potarykin.

Mr García-Gallardo:
Mr Potarykin, you are an experienced master?

Mr Potarykin:
(Interpretation from Russian) Already 26 years on the bridge as ship's master.

Mr García-Gallardo:
Did you operate reefer vessels for a certain number of years?

Mr Potarykin:
(Interpretation from Russian) I have already answered that for 26 years I have been captain, master.

Mr García-Gallardo:
This is not the first time you have operated in West Africa with a reefer vessel?

Mr Potarykin:
(Interpretation from Russian) No, on board this ship for 12 years I worked in the vicinity of African coasts.

Mr García-Gallardo:
And it is not the first time that you passed through the exclusive economic [zone] of Guinea-Bissau?

Mr Potarykin:
(Interpretation from Russian) That was for the second time. The first time I crossed the zone in 1992. The second time, this year, from south across the Mauritanian waters, I was heading to Ghana.

Mr García-Gallardo:
You are an experienced professional. You know that some documents need to stay on board the vessel, certainly a copy of a bill of lading?

Mr Potarykin:
(Interpretation from Russian) Once again, please.

Mr García-Gallardo:
You know that some documents need to stay on board the vessel?
(Technical problem with the translation) I shall try again. I was just telling Mr Potarykin – he's an experienced professional, he really knows that some documents need to stay on board.

Mr Potarykin:
(Interpretation from Russian) This is true.

Mr García-Gallardo:
Do you know that these documents in this case were provided extremely late, not precisely by you but by your representatives in Bissau?

Mr Potarykin:
(Interpretation from Russian) I did not understand the question.

Mr García-Gallardo:
Can you confirm that the documents were not found on board?

Mr Potarykin:
(Interpretation from Russian) What documents are you talking about?

Mr García-Gallardo:
Two documents: a copy of the bill of lading and the certificate of origin of the fishing boat.

Mr Potarykin:
(Interpretation from Russian) You have wrong information. All the loading documents needed were on board and they were, at the first request, passed over to the authorities.

Mr García-Gallardo:
If that was the case, why did the Mauritanian authorities issue a certificate on 7 November to confirm something that was already, as you mentioned, on board?

Mr Potarykin:
(Interpretation from Russian) All loading documents which are compiled according to the rules at time of loading – all the documents were on board. The bill of lading was absent on board. Usually, the bill of lading is compiled by the sender of the cargo and is sent over to the recipient of the cargo and this bill I did not have on board, but all the other documents on the basis of which the bill of lading is compiled were on board.

Mr García-Gallardo:
You mentioned that the bill of lading was on board and now you say that the bill of lading was not on board. So, there is something that does not work.

Mr Potarykin:
(Interpretation from Russian) No, you misunderstood me. All the documents, except for the bill of lading – these documents are the basis for the compilation of the bill of lading and they were present and they still are. A lot of copies were given to the authorities of Guinea-Bissau.

Mr García-Gallardo:
Among these documents there is not any certificate of origin. Do you agree that to sell the boat you need the certificate of origin?

Mr Potarykin:
(Interpretation from Russian) Certainly, I do not understand this. The following documents were all present on board. All these documents are on board or were given to the authorities at their request.

Mr García-Gallardo:
I am not talking about private documents between the sellers, the vendors and the owner. I am just talking about official documents issued by any competent authority where the fish has been caught.

Mr Potarykin:
(Interpretation from Russian) I asked you what documents you needed concerning the load or other ship's documents on board.

Mr García-Gallardo:
I have one last question. You can see a photograph of the cartons on board the vessel. Is it normal for you that there is no reference to the fishing area? It is normal practice at this level to reflect in any carton the fishing area or the origin of the goods. Do you think that this is normal?

Mr Potarykin:
(Interpretation from Russian) I think that it is your own opinion. Where the fishing takes place and the State itself provides a licence and a certain number, it is enough. What else would you like to see? I do not have any idea.

Mr García-Gallardo:
This number, according to the application made by Saint Vincent and the Grenadines, is the IMO number, the International Maritime Organization number, of the vessel. There is no link to say that these goods come from Mauritania and there is no certificate of origin, nothing else.

Mr Potarykin:
(Interpretation from Russian) I am sorry; this question should be asked of the Government of Mauritania, which allows the making of such markings.

Mr García-Gallardo:
Thank you.

The President:
Thank you, Mr García-Gallardo.
Professor Karagiannis, do you wish to re-examine the witness?

M. Karagiannis :
Merci, Monsieur le Président. Je crois que nous avons fini tous avec le témoignage du capitaine Potarykin. Si vous le permettez, il peut s'éloigner de cette estrade et je reprends mon argumentation.

The President:
Yes, you can resume your argument.
The witness may leave, thank you very much.

Plaidoirie de Saint-Vincent-et-les Grenadines (suite)

EXPOSE DE M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/02, F, p. 27–29]

M. Karagiannis :
Il va de soi, Monsieur le Président, que maintenant on a quand même un retard avec le contre-interrogatoire effectué sur le témoin Potarykin par les avocats de l'Etat défendeur. Cela doit être dûment comptabilisé.

Permettez-moi, Monsieur le Président, de mentionner maintenant la procédure qui a commencé déjà devant le tribunal régional de Bissau, qui est le tribunal territorialement compétent de cette République.

Comme on l'a vu précédemment, deux Actes, no. 12 et no. 14, ont infligé des amendes, ont confisqué même la cargaison se trouvant à bord du *Juno Trader*. Il s'agit là d'un acte administratif et les représentants locaux de l'armateur ont demandé au tribunal régional de Bissau, dans un premier temps tout au moins, de suspendre les effets de cet acte administratif.

Le tribunal régional de Bissau a, en effet, pris une décision de suspension de toutes les amendes et de toutes les autres mesures figurant sur les Actes no. 12 et no. 14. Donc, pas d'amende pour le capitaine. Pas d'amende pour le propriétaire du navire. Annulation de la mesure de confiscation de la cargaison. Et, de surcroît, restitution de la garantie bancaire qui avait été au préalable déposée auprès du Gouvernement de Guinée-Bissau par l'armateur et l'Etat du pavillon.

Quiconque a étudié le droit sur les bancs de l'université sait qu'une administration est sensée agir en légalité. Ce n'est qu'*a posteriori* que le citoyen, le particulier, peut contester la légalité d'un acte administratif. Bien entendu, cette contestation peut aboutir des mois ou des années après l'adoption de l'acte, alors même que dans l'intervalle l'acte continue de produire des effets juridiques et matériels.

Heureusement néanmoins pour le particulier, pour l'administré, il lui est offert la possibilité de demander au juge compétent la suspension des effets de l'acte, ce que l'on appelle également le sursis à exécution.

Dans le système des droits romano-germaniques, dont celui du Portugal, dont, par ricochet, celui de Guinée-Bissau, le sursis à exécuter ne peut être donné que lorsqu'il y a des conséquences difficilement réparables ou carrément irréparables et lorsque, également, de prime abord, à l'oeil nu, le juge compétent constate qu'il y a de réels problèmes de légalité de l'acte. Un juge qui désire naturellement que l'Etat continue à fonctionner, n'ordonne jamais le sursis à exécution le coeur léger. C'est un acte grave. Il est naturellement provisoire.

Et bien, le tribunal régional de Bissau, sur la demande de représentant de l'armateur, a ordonné la suspension de tous les effets des Actes no. 12 et no. 14, ainsi que, je le disais tout à l'heure, la restitution de la garantie bancaire déjà déposée.

Cela, me direz-vous, ne prouve rien au fond. Le juge guinéen pourra revenir sur la question et avoir une autre opinion. Il n'empêche qu'il est tellement manifeste à l'oeil nu, comme je le disais, au juge local que l'acte est illégal de prime abord, qu'il a ordonné ce sursis à exécution.

Bien entendu, on vous a fourni le texte manuscrit en portugais, ainsi qu'une traduction, je l'avoue volontiers, un peu bizarre, puisqu'elle est d'abord en langue française, puis en anglais. C'est l'urgence de l'article 292 qui nous a obligés à faire ce tour de force. Mais vous verrez bien, Monsieur le Président, dans cet acte, que le juge de Guinée-Bissau

épouse totalement notre argumentation sur la provenance de la cargaison et sur l'inégalité des mesures.

J'ai oublié de vous dire que cet acte est relativement récent, il date du 24 novembre, si ma mémoire est bonne.

Et pourtant, que constatons-nous sur le terrain ? Rien ne bouge.

Pourtant, le juge local avait ordonné la restitution de tous les passeports. Certains passeports ont été restitués, mais pas tous. Naturellement, l'administration guinéenne persiste et signe. Elle n'accepte pas l'annulation de l'amende, de la mesure de confiscation, etc. Du même coup, on se transpose dans l'univers kafkaïen : les autorités administratives compétentes, avec ou sans guillemets, peuvent se permettre de faire tout ce qu'elles veulent, sans aucunement tenir compte de la jurisprudence de leur propre pays. A ce jour, et à notre connaissance, il y a une inexécution totale et très surprenante de cette décision du tribunal régional de Bissau.

Monsieur le Président, vous le savez, l'article 292, en combinaison avec l'article 73, et on ne parle pas ici des articles 220 ou 226 de la Convention, en tout cas la combinaison des articles 292 et de 73 nous dit qu'effectivement le Tribunal international du droit de la mer ordonne la prompte mainlevée de l'immobilisation, la libération de membres de l'équipage moyennant une caution ou autre garantie bancaire.

Quel est le rôle de cette caution ? Son rôle est naturellement bien clair : elle doit donner une sorte de provision à une future condamnation par la juridiction locale de l'armateur, notamment de l'armateur du navire. Donc, la future décision sur le fond ne doit pas rester lettre morte. Prosaïquement, on dit que la justice doit avoir quelque chose à se mettre sous la dent.

A partir de là, bien entendu, il y a de très bonnes considérations dans la jurisprudence, notamment dans votre jurisprudence, qui nous parlent de la possibilité à l'avenir, pour la justice nationale, de se satisfaire sur le montant de la caution ou autre garantie financière.

Et pourtant, que constatons-nous ici ? On constate que la justice guinéenne, de la Guinée-Bissau, ne serait-ce que bien entendu à titre provisoire, trouve qu'il n'y a strictement aucune illégalité.

Je crois bien savoir, sauf erreur de ma part, qu'une telle situation ne s'est jamais présentée devant votre Tribunal. D'une certaine manière, ce n'est pas l'Etat côtier qui nous pose problème en tant qu'Etat du pavillon et en tant qu'armateur. Extérieurement, la Guinée-Bissau joue tout à fait son rôle, un rôle honorable, comme j'ai pu le dire dans mon hommage initial à cette République. Mais on constate que les différents organes de cet Etat n'arrivent plus à communiquer entre eux. Bien sûr, on a déjà vu qu'il y a quelques problèmes de communication de l'administration de la garde côtière avec des navires qui traversent la zone économique exclusive, mais je ne savais pas qu'il y a aussi un manque de communication entre la justice nationale et l'administration nationale.

Il est difficile de croire que votre Tribunal va se montrer plus royaliste que le roi, plus sévère, plus exigeant que la justice guinéenne elle-même. Après tout, dans un Etat normal, et la République de Guinée-Bissau est un Etat normal, c'est le juge qui a le dernier mot et non pas tel ou tel administrateur dans tel ou tel Ministère.

De toute façon, je signale également que l'armateur a déjà déposé une lettre de garantie P&I d'un montant de 50 000 euros. La réaction de l'administration locale de Guinée-Bissau a été identique, jusqu'à maintenant, nulle et non avenue. On ne sait pas ce que l'administration en pense, on ne sait pas si elle considère que ce montant est élevé, peu élevé, nul et non avenu ou si la forme de la garantie bancaire ne leur convient pas, etc. On n'a aucune réponse. Et pourtant, Monsieur le Président, on a fait tout ce que l'on a pu pour, encore une fois, mettre au clair les choses avec l'administration compétente du Ministère de la pêche.

Si vous le permettez, Monsieur le Président, le représentant local de l'armateur, M. Fernando Tavares, pourra également donner quelques éclaircissements sur ce point un peu plus technique et terre à terre concernant la forme et la qualité de la garantie bancaire, ainsi que son montant, ainsi que les réactions ou non-réactions des autorités locales.

The President:
I now give the floor to Mr Tavares.

EXPOSE DE M. TAVARES
CONSEILLER DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/02, F, p. 29]

M. Tavares :
Monsieur le Président, vu l'arrestation du navire *Juno Trader* à Bissau, c'est normal que soit mise en place une garantie, en principe une garantie P&I. Sur cette base, nous avons proposé à notre bureau central l'admission d'une garantie P&I à délivrer aux autorités locales pour permettre la sortie immédiate du navire. Mais bien avant, on a écrit une lettre aux autorités de pêche pour leur communiquer l'intention afin de savoir exactement s'ils peuvent accepter ou non une garantie P&I. La seule réponse verbale que nous ayons reçue, c'est que seule une garantie acceptable par la banque locale, la BCEAO [banque centrale des Etats de l'Afrique de l'ouest], sera considérée. Donc, on a reçu une garantie P&I dont le montant de 50 000 euros, qu'on a placé au tribunal régional de Bissau, avec le support d'un avocat local, on a déposé la garantie locale, on a fait copie de cette garantie au Ministère de la pêche, au Ministre de la Justice en tant que membre du Comité Interministériel pour la pêche, l'organisme qui prend la décision.

Donc, veuillez me croire, jusqu'à ce jour nous n'avons reçu aucune réaction sur la mise en place de la garantie, ni lui, ni moi. Donc, c'est une situation vraiment difficile. Moi-même, en tant que représentant local, j'ai d'énormes problèmes à m'expliquer face à la société que je représente là-bas, mais les faits sont là. Nous avons tout fait. Nous avons livré, informé, les parties concernées de la mise en place de la garantie et nous attendons une réaction. Mais jusqu'à présent, on n'a rien. En ce qui concerne cette matière, ce sont les informations qui me sont disponibles.

Merci.

The President:
Thank you, Mr Tavares.

I give the floor to Mr Karagiannis.

EXPOSE DE M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/02, F, p. 29–32]

M. Karagiannis :
Merci encore, Monsieur le Président. Ainsi, nous avons vu la réaction de la justice locale. On peut quand même s'en vanter un peu, elle nous est tout à fait favorable et nous attendons une réaction, comme je le disais tout à l'heure, positive, ne serait-ce que partielle de la part de l'administration guinéenne.

En fait de réaction, nous apprenons, le 3 décembre 2004, il y a à peine quelques jours, que l'administration guinéenne a décidé la confiscation de tout le navire. Jusqu'à maintenant, il y avait confiscation de la cargaison. Maintenant, on confisque également le navire. C'est une manière extraordinairement surprenante de se conformer à la décision du tribunal régional de Bissau.

Quant à votre Tribunal, Monsieur le Président, je ne pense pas que cette mesure nationale, enfin, à demi nationale, puisque la justice ne suit pas l'administration, puisse avoir une quelconque signification juridique dans le présent procès.

Cette mesure, en effet, est un pur fait, comme toutes les mesures unilatérales nationales, comme maints arrêts des tribunaux où des cours permanentes internationales ont eu l'occasion de nous le dire.

C'est un pur fait, mais je vous demande quand même de vous attarder un peu là-dessus. Cette mesure de confiscation du navire du 3 décembre 2004 dénote, au moins, une sorte de mépris total de l'administration guinéenne vis-à-vis, premièrement, de la justice locale nationale, deuxièmement, vis-à-vis de la procédure qui se déroule en ce moment à Hambourg et, troisièmement, vis-à-vis de votre Tribunal lui-même.

Dès le début de cette affaire, l'armateur et l'Etat du pavillon ont été mis devant une série de faits accomplis. Monsieur le Président, apparemment, l'administration guinéenne a voulu vous mettre, à votre tour, devant un fait accompli. Ainsi, nous sommes un peu plus solidaires.

Naturellement, je comprends également que votre Tribunal désire se montrer solidaire vis-à-vis de la justice de Guinée-Bissau tant malmenée par l'administration de Guinée-Bissau.

Sinon, il y a naturellement deux procès qui se déroulent en même temps avec des fortunes diverses : le procès à Hambourg et celui à Bissau.

Cette litispendance n'a aucune signification juridique concernant la procédure de prompte mainlevée et de libération de quelques membres de l'équipage qui restent encore plus ou moins en état d'arrestation.

En effet, ne serait-ce qu'une lecture attentive de l'article 292 note assez clairement que la procédure de prompte mainlevée est indépendante de toutes autres procédures nationales ou internationales. C'est une procédure qui n'a rien à voir avec un quelconque épuisement notamment des voies de recours internes.

Votre arrêt *« Camouco »*, j'y reviens, nous le dit très clairement et nous explique cette position. On ne pouvait jamais attendre des mois et probablement des années avant que les recours internes dans tel ou tel Etat côtier puissent être épuisés, avant que votre Tribunal n'ordonne la prompte mainlevée. Je dis bien la prompte mainlevée et non pas la mainlevée. La litispendance ne peut donc aucunement être avancée, à mon avis, comme argument pour mettre un obstacle à votre futur arrêt.

Il convient également de parler un peu du sort de la cargaison. Que vise la procédure de la prompte mainlevée ? A lever justement l'immobilisation du navire, à permettre encore au navire d'appareiller, d'être exploité normalement par son propriétaire et autres armateurs.

La prompte mainlevée, encore moins la prompte libération de l'équipage, ne peut pas a priori concerner la cargaison qui, sur la base des Actes no. 12 et no. 14 locaux, a été confisquée, mais une confiscation dont la justice locale, je le rappelle toujours, a ordonné la suspension. Pourtant, votre Tribunal, à mon avis, devrait se pencher sur le sort juridique de cette cargaison.

Un mot tout de même concernant le sort matériel de cette cargaison. Cette dernière, à notre connaissance, est toujours à bord du *Juno Trader* et est toujours congelée. Elle na jamais été décongelée, en dépit de l'ordre de confiscation de l'administration locale. Normalement l'administration locale aurait dû décharger au plus vite cette cargaison, afin de l'entreposer en lieu sûr dans les installations du port de Bissau. Cela n'a jamais été accompli et sans que nous ayons, me semble-t-il, aucune obligation concrète, le capitaine Potarykin et ses hommes ont continué à soigner cette cargaison, car elle a effectivement une certaine valeur et elle risque de poser, cette fois-ci, de grands problèmes juridiques à l'armateur.

Sans doute, c'est la procédure normale, votre Tribunal ordonnera la prompte mainlevée de l'immobilisation du *Juno Trader* et vous pourrez dire que, là, votre tâche, en vertu de l'article 292, s'arrête. Le *Juno Trader* pourra donc enfin quitter son lieu de détention provisoire, le port de Bissau, mais pour aller où ? Peu importe, il sera sans sa cargaison, puisqu'elle a été confisquée, en dépit de la jurisprudence locale du tribunal régional de Bissau.

Néanmoins, je vous rappelle que cette marchandise, cette cargaison de poissons congelés et de sacs de farine de poisson appartient, depuis déjà le 24 septembre 2004, à quelqu'un. Elle n'appartient plus au propriétaire armateur du *Juno Trader*, mais à un tiers : la société ghanéenne, déjà mentionnée à plusieurs reprises, Unique Concerns Ltd. Cette société a déjà écrit quelques lettres, de plus en plus menaçantes, à l'armateur du *Juno Trader*.

Imaginons que le *Juno Trader*, grâce à votre arrêt, quitte le port de Bissau. A sa prochaine escale, le navire risque fort de faire la mesure d'une saisie demandée par le propriétaire de la marchandise que l'armateur du *Juno Trader* ne sera évidemment plus en état de lui livrer.

La prompte mainlevée que vous aurez donc ordonnée par votre arrêt sera, pour nous, une mesure illusoire, une mesure au mieux provisoire. Le *Juno Trader* retrouvera la liberté pour quelques jours ou quelques heures suivant la diligence des avocats de Unique Concerns Ltd.

Il faut donc que, dans le cadre de la procédure de l'article 292, vous ordonniez également la libération, si je peux utiliser ce terme, de la marchandise confisquée, pas confisquée, tout dépend de votre allié, Monsieur le Président. Votre allié sera l'administration ou le juge local. C'est évidemment à vous de choisir.

Je voudrais également dire, de manière un peu plus générale, que cette affaire du *Juno Trader* intéresse et intéressera un grand nombre d'Etats et d'armateurs, car, au fond, il s'agit d'une pure question de liberté de navigation dans la zone économique exclusive. Bien entendu, la zone économique exclusive, ce n'est pas de la haute mer, mais ce n'est pas non plus une mer territoriale. La question de la nature juridique de la zone économique exclusive a, à juste titre, longtemps occupé la Troisième Conférence des Nations Unies sur le droit de la mer. L'article 59 de la Convention de Montego Bay cherche également, avec un succès modeste, à cerner la nature juridique de la zone.

The President:
Mr Karagiannis, I am sorry to interrupt you. How much time do you need to end your pleadings this morning?

M. Karagiannis :
Cinq minutes, cela irait-il ?

The President:
Thank you.

M. Karagiannis :
Au fond, il s'agit donc d'une question de liberté de navigation. Il faut assurer la liberté de navigation dans la zone économique exclusive, ne serait-ce que pour se conformer au grand compromis atteint pendant la Troisième Conférence des Nations Unies sur le droit de la mer, ne serait-ce que pour donner pleinement valeur à l'article 58 de la Convention. La liberté de navigation vaut non seulement pour les plaisanciers, pour les navires de guerre, pour des navires scientifiques, pour des cargos classiques. Permettez-moi tout de même de dire que la liberté de navigation vaut également pour les cargos qui pour leur plus grand malheur sont conçus pour transporter du poisson congelé.

Enfin, le tout dernier point vise les frais de procédure dans le présent procès exposés par le demandeur. Il me semble que le dossier est particulièrement accablant pour la République de Guinée-Bissau. Encore une fois, je commence à avoir quelques remords à dire que c'est la faute de la République de Guinée-Bissau. Le juge bissau-guinéen a fait son travail. C'est une partie de l'administration qui ne le fait pas.

En tout cas, pour le besoin de la cause, je dirais que le dossier est accablant pour l'administration du Ministère local des pêches et, à mon avis, il faudrait aussi que votre Tribunal mette les points sur tous les i en la matière en condamnant également le défendeur au paiement des frais de procédure exposés par le demandeur qui ne voulait que traverser paisiblement, tranquillement, une zone économique exclusive. Faut-il à l'avenir éviter toute zone économique exclusive alors que les zones économiques exclusives sont tout de même souvent un passage quasi obligé ?

Merci infiniment, Monsieur le Président.

The President:
Thank you very much, Mr Karagiannis.

We have heard the Applicant this morning. The sitting is now closed, we will resume at 3 o’clock this afternoon.

(L'audience est suspendue à 13 h 16.)

PUBLIC SITTING HELD ON 6 DECEMBER 2004, 3.00 P.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines: [See sitting of 6 December 2004, 10.00 a.m.]

For Guinea-Bissau: [See sitting of 6 December 2004, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 6 DECEMBRE 2004, 15 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines : [Voir l'audience du 6 décembre 2004, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 6 décembre 2004, 10 h 00]

The President:
We will resume the oral proceedings. I give the floor to Mr Staker, Agent for the Government of Guinea-Bissau.

Argument of Guinea-Bissau

STATEMENT OF MR STAKER
AGENT OF GUINEA-BISSAU
[PV.04/03, E, p. 4–12]

Mr Staker:
Mr President, distinguished Members of the Tribunal, this is the first case in which Guinea-Bissau has been a party in a case before this honourable Tribunal, which has now been in existence for some eight years. It was only some three weeks ago that we saw the passing of the tenth anniversary of the entry into force of the United Nations Convention on the Law of the Sea. Guinea-Bissau had already ratified the Convention nearly eight years prior to that, and was one of its original States Parties on its entry into force.

The Convention represented, and continues to represent, a milestone in the development of the international law of the sea, and indeed, in international law in general.

In this context I must at the outset emphasize that no disrespect to this Tribunal is in any way intended when Guinea-Bissau appears before you today to argue that the Tribunal is without jurisdiction in this particular case, and that the Application of Saint Vincent and the Grenadines is inadmissible.

However, before beginning to present our arguments in relation to this particular case, I must say something first about the scope and limits of prompt release proceedings in general. The Applicant's case here involves, and indeed in our submission is based upon, many allegations that go beyond the ambit of proceedings under article 292.

A very substantial part of the Applicant's Memorial, and of Professor Karagiannis' argument this morning, concerned the merits of the proceedings against the *Juno Trader* in the legal system of Guinea-Bissau. The Applicant's entire case is based on an argument that there was no justification for the arrest of the *Juno Trader* and an argument that the *Juno Trader* has done nothing illegal under the national law of Guinea-Bissau. The Applicant's Memorial suggests that this is a case where the detention of a vessel may appear to be unjustified to the naked eye because all the circumstances clearly show that the vessel has in no way infringed the regulations of the coastal State. I refer in that respect to the Applicant's Memorial, paragraphs 36-37. There are other paragraphs to the same effect, and there are so many of them. I refer to paragraphs 6, 7, 18–19, 24, 35–38, 42, 43, 45, 47, 49–51, 53–54, 55–68, 70, 73–96, 100.

In addition, the Applicant's Memorial deals at length with the circumstances of the interception of the *Juno Trader*, and of the legality of the conduct of Guinea-Bissau under international law. For instance, paragraphs 98 and 127–128 of the Applicant's Memorial suggest that Guinea-Bissau has interfered with the freedom of navigation under "futile" pretexts. Professor Karagiannis concluded this morning by saying that this was an important case for the freedom of navigation in exclusive economic zones.

The Applicant's Memorial then goes on to make a curious statement. With particular reference to the poorer countries of the South who are coastal States, it says that we do not "want coastal States to have their debts paid for by the first cargo vessel which is unlucky enough to be in the wrong place at the wrong time" (at paragraph 104 of the Memorial).

Now, Mr President, it is for the Agent and counsel of the Applicant to explain what is meant by this comment. But one would be forgiven for taking this as suggesting that Guinea-Bissau has effectively engaged in something equivalent to piracy, by simply seizing the first cargo vessel that passes by without any justification, and either confiscating it or holding it to ransom by demanding a bond for its release. If I have misunderstood what the learned counsel for the Applicant is suggesting I would invite earliest clarification, and I do note that

Professor Karagiannis modified this position somewhat this morning by suggesting that Guinea-Bissau had simply made a mistake. But these types of allegations are very serious, and should, if they are ever made, be made on a proper basis and in a proper forum.

Mr President, Guinea-Bissau's response to these allegations made against it is twofold. The first response of Guinea-Bissau is to challenge the factual picture as portrayed by the Applicant. As part of its case, Guinea-Bissau will be presenting evidence to place the facts of this case in a somewhat different light. The second response of Guinea-Bissau is to point out that many of the Applicant's factual allegations are irrelevant to these proceedings.

This is a prompt release case under article 292 of the Convention. Article 292 is a very special jurisdiction. It is an exceptionally speedy procedure. Under the Rules, hearings are completed within two weeks or so of an application being filed, and judgment must be given within two weeks after the close of the hearings.

Normally, it would not be even remotely possible for a dispute between two sovereign States to be dealt with to finality by an international court in this kind of timeframe. For instance, in Case No. 2 before this Tribunal, the merits proceedings in relation to the *Saiga*, judgment was given nearly a year and a half after the proceedings were commenced. In the International Court of Justice (the "ICJ"), the time between the filing of an application instituting proceedings and the final judgment can take some years.

Prompt release cases can only be dealt with by this Tribunal so exceptionally quickly because the jurisdiction under article 292 is so narrowly circumscribed. As Vice-President Wolfrum and Judge Yamamoto said in paragraph 16 of their Dissenting Opinion in the *"SAIGA"* prompt release case, "the prompt release procedure is a self-contained one, with very precise limits and specific rules". I refer also to paragraph 50 of the Tribunal's Judgment in that case.

In a prompt release case brought to enforce article 73, paragraph 2, of the Convention, the issues for decision are whether the Tribunal has jurisdiction, whether the application is admissible, and whether the application is well founded. If the application is determined to be well founded, the only matter for the Tribunal to decide is whether to order the release of the vessel, and, if so, what should be the amount and form of the bond or other financial guarantee.

The text of article 292, and the Tribunal's case law, make clear the limits of prompt release proceedings.

First, paragraph 3 of article 292 makes it clear that the Tribunal cannot consider the merits of any case against the vessel under the municipal law of the detaining State. As Judge Anderson said in paragraph 8 of his Dissenting Opinion in the *"SAIGA"* prompt release case, "It will, of course, be for the national courts in Guinea to decide upon the merits of the charges". I would also refer the Tribunal to the comments made by Judge Jesus in paragraphs 29–30 of his Dissenting Opinion in the *"Monte Confurco" Case*.

Secondly, in prompt release proceedings, the Tribunal can only determine whether the detaining State is in breach of a provision of the Convention for the prompt release of a vessel, for instance, such as article 73, paragraph 2. The Tribunal has no jurisdiction in prompt release proceedings to determine whether the detaining State – or for that matter any other State – has violated any other rule of international law. Thus, in the *"Camouco"* Judgment, at paragraphs 59–60, the Tribunal held that it could not consider alleged violations of article 73, paragraphs 3 or 4, nor could it consider a general allegation of the kind made by the Applicant in this case of violations of the provisions of the Convention on freedom of navigation. Further authority for the proposition that other breaches of international law cannot be considered in prompt release cases can be found elsewhere in the case law of the Tribunal.

This does not mean that the flag State is without remedy if it considers that the detaining State has violated other rules of international law. It is merely to say that article 292 proceedings are not the appropriate mechanism for dealing with that kind of matter. Any alleged breaches of other rules of international law may form the subject matter of separate proceedings before the Tribunal, or before another international court, or may be submitted to some other international dispute settlement mechanism. This is exactly what happened in relation to the *M/V Saiga*, for instance. Case No. 1 before this Tribunal was a prompt release case. Case No. 2 before this Tribunal, which was a completely separate case, dealt with other international law issues on the merits in relation to that vessel. The merits of the case under national law, and the merits of this case in respect of broader issues of international law, are thus simply outside the scope of this present case.

Thirdly, in prompt release proceedings, the Tribunal cannot determine whether the arrest of a ship was legitimate. Authority for that proposition is again found in paragraph 62 of the *"SAIGA"* prompt release Judgment. Again, if it is suggested that the arrest of the ship violated a rule of international law, that may be the subject matter of different proceedings but it is not a matter that can be dealt with in prompt release proceedings.

Fourthly, in exercising its article 292 jurisdiction, the Tribunal cannot act in a way that would interfere with, or impede, the ability of the authorities of the detaining State to deal with the case in accordance with its national law. If it did so, it would not be dealing with the case without prejudice to the merits of the case before the domestic forum, as is required by article 292, paragraph 3. I refer in this respect to the Dissenting Opinion of Judge Wolfrum in the *"Camouco" Case*, at paragraph 8, who said that "no decision of the Tribunal shall be taken under article 292, paragraph 1, of the Convention which renders the right of the coastal State to prosecute violations of its laws an empty shell", and that this should be taken into account when setting the level of the bond.

Fifthly, the matters referred to previously necessarily impose significant limitations on the Tribunal's ability to decide questions of fact in prompt release proceedings. The Tribunal confirmed, in the *"SAIGA"* prompt release Judgment, at para. 51, and in the *"Monte Confurco"* Judgment, at para. 74, that in article 292 proceedings it may be required to evaluate factual allegations made by the parties but there must be qualifications to this.

First, in prompt release proceedings, the Tribunal should only evaluate those facts that are relevant to the matters it must decide. Thus, it may consider facts relevant to determining the flag State of the detained vessel, or the facts relevant to the value of the ship. But as the Tribunal cannot determine the merits of the proceedings at the national level, it cannot make findings of fact in that respect. I refer, on that point, to the final paragraph of the Declaration of Judge Mensah in the *"Monte Confurco"* Judgment, who observed also in this context the need for the Tribunal to "exercise utmost restraint in making statements that might plausibly imply criticism of the procedures and decisions of the domestic courts".

Secondly, as was observed in paragraph 51 of the *"SAIGA"* prompt release Judgment, because of the accelerated nature of prompt release proceedings, findings of relevant facts by the Tribunal are for the purposes of prompt release proceedings only. If a subsequent case is presented to the Tribunal requiring a full examination of the merits of the same facts, it would be open to the Tribunal to reach a different conclusion on the same facts after full consideration.

Thirdly, as was held in paragraph 49 of the *"SAIGA"* prompt release Judgment, findings of fact made by the Tribunal in prompt release proceedings are not binding on the domestic courts of the detaining State in their consideration of the merits of the case.

Fourthly, I should add that it now seems well established as a rule of evidence in the practice of this Tribunal that the applicant in article 292 proceedings has the burden of proof in establishing the facts that it alleges in support of its application. As authorities to this

effect, I refer the Tribunal to the *"Grand Prince" Case*, to the Judgment, at paragraph 67; to the Joint Dissenting Opinion of nine Members of the Tribunal, at paragraph 7; to the Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, at paragraph 4; and to the Dissenting Opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, at paragraph 9.

As I noted earlier, much of the Applicant's Memorial in this case is devoted to the alleged lack of justification for the arrest of the *Juno Trader*, and to criticizing the proceedings in Guinea-Bissau. For the reasons I have given, these are matters that are simply irrelevant to article 292 proceedings.

The Applicant tries, somewhat inventively, to argue that these matters are relevant on the ground that they are material to the reasonableness of the bond. According to the Applicant, since Guinea-Bissau arrested the ship without justification, and since the proceedings in Guinea-Bissau have no merit, therefore a reasonable bond should be either no bond at all or a symbolic bond. I submit that this argument must be rejected as a transparent device to seek to have matters determined in prompt release proceedings that simply go beyond the Tribunal's jurisdiction under article 292.

First, in the Judgment in the *"Volga" Case*, at paragraph 83, the Tribunal held that matters relating to the circumstances of the seizure of the ship are not relevant to article 292 proceedings, and that they therefore would not be taken into account in determining the reasonableness of the bond.

Secondly, in Judgment in the *"SAIGA"* prompt release case, at paragraph 81, the Tribunal rejected a request by the Applicant that no bond, or only a symbolic bond should be posted. The Tribunal stated that "The posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings". Saint Vincent and the Grenadines should of course be well aware of this ruling, since it was also the Applicant in the *M/V "SAIGA" Case*.

Accordingly, the Applicant's allegations concerning the merits of the arrest of the *Juno Trader* are irrelevant and should be disregarded.

I note that in paragraph 127 of its Memorial, the Applicant makes a dramatic statement that the freedom of navigation in the world is at stake in this case, and that "all states, coastal or landlocked, for which shipping and the freedom of navigation are synonymous with business, trade, prosperity and growth, have invited themselves, in a way, to be part of the *Juno Trader* case". It is a dramatic statement indeed, but certainly far from the truth. Prompt release cases are not proceedings in which to seek landmark judgments on issues of international law of general importance. They are quick and simple proceedings aimed at determining whether a particular ship on a particular occasion is being detained contrary to a particular provision of the Convention containing a prompt release obligation, and if so, at determining the level and form of an appropriate bond. If any State does have a dispute with another State concerning any related issue of international law, as I previously indicated, there other ways of setting that dispute but prompt release proceedings are not the forum.

Having addressed the parts of the Applicant's case that are *not* relevant to this case, the delegation of Guinea-Bissau now proposes to address those issues that *are* relevant. We propose to proceed as follows.

First, the Co-Agent for Guinea-Bissau, Mr Octávio Lopes, will address the Tribunal on general background matters relating to the enforcement of fisheries regulations by Guinea-Bissau. Subsequently, Mr Ricardo Alves Silva will address the facts of the case. In this respect, Mr President, I have a particular request.

Mr Tavares, who is a member of the delegation of Saint Vincent and the Grenadines, made certain interventions this morning. I note that he is not here as a witness but he did give

evidence on certain questions of fact and, as part of his presentation, Mr Silva would, if you would permit it, Mr President, like to pose certain questions to him.

The President:
Could you repeat your request?

Mr Staker:
Mr Tavares, who is a member of the delegation of Saint Vincent and the Grenadines, is not here as a witness – we understand that – but he did make certain interventions today in which he gave evidence on certain matters of fact. In respect of those matters, Mr Silva would like to pose a small number of questions to him.

The President:
But Mr Tavares was not here as a witness.

Mr Staker:
No, I understand that, Mr President. Perhaps a convenient solution might be if the delegation of Guinea-Bissau could pose these questions in writing and seek a written response from the delegation of Saint Vincent and the Grenadines to these matters.

The President:
That is acceptable.

Mr Staker:
Thank you, Mr President. Following Mr Silva's presentation, I will again address the Tribunal on questions of jurisdiction, admissibility and on whether the application in this case is well founded. Our submission, as I have said, is that the Tribunal lacks jurisdiction and that the case is inadmissible. If that primary submission is upheld, the issue of the reasonableness of a bond does not arise, but in the event that the Tribunal is not with us on our main submission, the reasonableness of the bond will subsequently be dealt with by my colleague, Mr Ramón García-Gallardo. I will then follow to address the Tribunal with some concluding remarks.

Mr President, I would then invite you to now call upon the Co-Agent for Guinea-Bissau, Mr Octávio Lopes, *Chef de Cabinet*, the Ministry of Fisheries.

The President:
Thank you very much, Mr Staker.

I now give the floor to Mr Octávio Lopes, Co-Agent for the Government of Guinea-Bissau.

STATEMENT OF MR LOPES
CO-AGENT OF GUINEA-BISSAU
[PV.04/03, E, p. 12–14]

Mr Lopes:
Mr President, distinguished Members of the Tribunal, it is an honour to appear before you today, to represent my Government in the capacity as Co-Agent.

On behalf of the Republic of Guinea-Bissau, I present our kindest regards to you, Mr President Nelson, to the Members of the Tribunal, as well to my distinguished colleagues representing the State of Saint Vincent and the Grenadines, and all present in the room.

Before addressing the facts directly related to the challenges faced by my Government to combat and eliminate illegal, unregulated and undeclared fishing, it is important to establish a brief factual background on the Republic of Guinea-Bissau. The first and perhaps most relevant detail is that the Republic of Guinea-Bissau is amongst the ten poorest countries in the world, with a crippled economy resulting from its 11-month civil war. In fact, the International Monetary Fund estimates that Guinea-Bissau's gross national product in 2004 will be a mere 220.8 million euro, and approximately 50 per cent of the population will be living below the poverty line. For more facts on Guinea-Bissau, please see *The World Fact Book* at www.cia.gov/publications/factbook.

Given that Guinea-Bissau's industrial infrastructures were severely destroyed over the past decades, the country has become highly dependant on the agriculture and fisheries sector, which contributes approximately 55 per cent of the annual gross national product. If we consider that solely 8.82 per cent of Guinea-Bissau's land is permanently occupied with crops, it is simple for us all to understand why fisheries are considered one of the country's main resources, being also one of its main exports. In fact, during 1999, the statistical services registered that 7.2 thousand tonnes of captured fish, and fishing and connected activities are responsible for generating between 43 and 45 per cent of the country's treasury revenue.

Like most African countries, Guinea-Bissau is a developing nation, highly dependant on the few resources it possesses. Like the majority of those countries, it has been subject to constant exploitation of those natural resources by developed nations without being duly compensated for such exploitation. One economical sector that has been hard hit by the illegal exploitation carried out by foreign companies has been the fisheries sector. As happens along most of the West African coast, numerous foreign fishing and support vessels have been exploiting Guinea-Bissau's fisheries resources, without paying the required permits, duties and taxes. When we consider that fisheries – as we have already referred – are responsible for generating between 43 and 45 per cent of the country's treasury revenue, it is not difficult to imagine the loss caused every year to the Guinean economy by illegal fishing and activities related to illegal fishing.

The study presented for the Sub-Regional Fisheries Commission (CRSP) that covers countries like Mauritania, Senegal, Cape Verde, Gambia, Guinea-Bissau, Guinea and Sierra Leone, prepared in 2001 by the Irish specialist Kheller, estimates that the negative impact of the pillage on the economy essentially of the last three countries – Guinea-Bissau, Guinea and Sierra Leone – represents approximately US$ 200 million per year.

These foreign companies proceed with their illegal fishing activities, benefiting from the country's economic and technical difficulties in enforcing national law. Amongst these foreign vessels there are ships flying the flags of developed nations, as well as ships flying flags of convenience of States such as Saint Vincent and the Grenadines. Most of the vessels flying flags of convenience are owned by companies in developed countries that try to escape liability by registering their vessels in foreign tax havens and countries with poor judicial

structures. This fact can be easily proven by comparing the names of some of the ships arrested during 2004 and their respective flags. For example, the *Barracuda* and the *Maria Assaro* are owned by Italian companies but curiously registered in Senegal. The *Josephine* is owned by a Korean company but is curiously registered in Guinea, Conakry. The *Juno Trader* is owned by a company with a registered office in Monaco, but flies the flag of Saint Vincent and the Grenadines.

It is those ships flying flags of convenience that are in violation of the general principle of sustainable fisheries, by taking an active part in the illegal capture of fish of the poor countries such as Guinea-Bissau, or serving as a logistic support to an entire wandering fleet that insists on engaging in this abominable practice in this part of the world.

The basis of the laws that govern Guinea-Bissau's fishing sector are unequivocally consistent with the principles established in the regional and international legal instruments to which Guinea-Bissau is a party.

The principle of confiscating vessels used in illegal fishing activities and of sanctioning the agents of the illegal fishing is recognized in the "Plan of Action for the combat and elimination of illegal, unregulated and undeclared fishing", approved by the Committee of FAO at its 24th Session, and approved for its implementation at the 120th Session of the Council on 23 June 2001.

The confiscation of vessels engaged in such activities, as provided for in our fishing laws, finds its legal foundations in the principle of elimination of the means used for illegal fishing activities, as embodied in the plan of action to which I have referred.

Mr President, I thank the Tribunal for its attention, and would now invite you to call on Mr Ricardo Silva, who will deal with the facts and evidence specific to this case.

Mr President, thank you for having given me the floor; distinguished Members of the Tribunal, thank you for hearing me.

The President:

Thank you very much, Mr Octávio Lopes.

I now give the floor to Mr Ricardo Alves Silva.

STATEMENT OF MR ALVES SILVA
COUNSEL OF GUINEA-BISSAU
[PV.04/03, E, p. 14–42]

Mr Alves Silva:
Mr President, distinguished Members of the Tribunal, it is with great honour that I address you in representation of the Republic of Guinea-Bissau. At this present time, and having heard the oral presentations of Saint Vincent and the Grenadines, I feel that a heavy burden has been set upon my shoulders. On the one hand, I will be forced to intervene in defence of the honour of the Republic of Guinea-Bissau. In this case, as in most cases before any jurisdiction, each side has its own view of the facts, its own story to tell.

In this particular case, we truly believe that the vision of what happened and what has been happening that was transmitted by Saint Vincent and the Grenadines results not from any conscious omission of the facts but, on the other hand, from the fact that what they do know has been transmitted by the shipping agent directly to the State, since the State has had no knowledge of what has been happening. As such, it is our responsibility to clarify the relevant facts in this case. Although, as Mr Staker so kindly stated before, most of the facts that are actually called upon by the Applicant are irrelevant in a prompt release case, it is also true that due to the Rules that govern the functioning of this Tribunal, if the Respondent does not clarify what has truly happened in the case, then it may be considered that it confesses that such facts are exactly how they were stated by the opposing party.

On the other hand, I am a Portuguese lawyer. I work for a law firm with offices and representation in all Portuguese-speaking African countries. We have offices in Angola, Mozambique, Cape Verde, Sao Tome and Principe and, obviously, Guinea-Bissau. As such, I bear a heavy burden before you here today to explain exactly how the legal system of Guinea-Bissau functions, how its statues and its case law has addressed the different issues at hand, and to clarify to the Tribunal what has been done on the ground and the implications of what has happened.

I believe that many of the grounds on which the Applicant's statements are based are wrong. I believe that the Applicant does not have a thorough knowledge of Guinea-Bissau's legal system. I believe that it was not possible for them to obtain that knowledge on short notice. This is mainly due to one fact, that is, that Guinea-Bissau, as many of the Portuguese-speaking African countries, is heavily dependent on Portuguese laws passed before the independence of their territories. They have been substituting their laws and amending them on a regular basis, but some aspects have not yet been touched, due in some cases to a lack of resources, in other cases to a lack of qualified legal professions and, in other cases still, due to some political and social instability that has only recently ended.

I also state that, unlike Mr Karagiannis, I did not have the opportunity to accompany the fight for the independence of African countries and African-speaking Portuguese countries, but my generation in Portugal is also a generation that has great respect and admiration for the African people. In my particular case, my professional activity and the interest with which the Portuguese society has accompanied all signs coming out of Bissau are the reasons for the said respects. Having said that, I will now begin my presentation of the facts in this case.

As Mr Octávio Lopes stated so well in his previous intervention, one of the major problems that Guinea-Bissau faced at the beginning of this new century was the rapid depletion of its fisheries resources due to unlawful fishing by foreign countries. Pursuant to this unashamed, unlawful exploitation of one of the country's few natural treasures, the authorities of Bissau have always tried to enforce the nation's fishing regulations. Routine inspections are not a novel introduction of the Fisheries Resources Law enacted by Decree-

Law No. 6-A/2000. In fact, in the year prior to the enactment of this statute, the Guinea-Bissau authorities actually carried out various inspection services and operations and arrested 16 vessels for illegal fishing, all of them, curiously, belonging to foreign companies.

However, with the enactment of this law, restructuring of the inspection services was made possible, with a subsequent increase in the quality and number of inspection operations. Under the Fisheries Resources Law, the Guinean authorities arrested 21 vessels in the year 2000; 37 vessels in the year 2001; 10 vessels in 2002; 27 vessels in 2003. However, contrary to the message that the Applicant tries to pass on to this Tribunal, the majority of these vessels were released upon payment of either the respective fine or of a bond considered sufficient and adequate to cover the liabilities that the ship and the crew might incur.

There is no registered case of the maritime authorities of the Republic of Guinea-Bissau ever having arrested a simple "merchant vessel", contrary to the image that the Applicant is trying to pass. There is also no known case of unlawful arrest of ships or of breach of international maritime law. The aim of Decree-Law No.6-A/2000 is not to permit the Guinea-Bissau authorities to arrest any ship, but is solely to put an end to illegal activities in the fisheries sector. The preamble of this statute clearly states the reasons for its approval. I will now proceed with a free translation of two paragraphs, which I believe clarify the intention behind the passing of this statute.

> "Whereas rationalizing the exploitation of our fishing resources, which must be performed by creating the conditions for a rigorous and marked control and inspection of our coast, is an urgent necessity.
>
> Whereas it is also necessary to modernize and adjust the country's legal framework on fisheries, including the substantial increase of the value of fines levied on fishing vessels which breach the law and regulations, namely, on non-authorized fishing vessels."

These were the two main aims of the statute that was passed on 22 August 2000.

Therefore, I believe that it is now clear that Guinea-Bissau does not have, and never has had, the intention of "hunting down" foreign vessels in an arbitrary form, nor in confiscating them. In fact, if we analyze the statistics respecting this year's activities of the Fisheries Inspection Services, we can conclude that, of the 13 vessels apprehended up to this date, only the *Juno Trader* and the *Josephine* reverted to the State, and even then in completely different circumstances, which we will outline later.

The comparison of these different cases that came before the Fisheries Inspection Services in the year 2004 is as follows. Mr President, distinguished Members of the Tribunal, if you wish, you may consult annex 1 to the affidavit that is part of the bundle of documents that Guinea-Bissau presented today, which contains a copy of the table that I will now read.

The first vessel detained this year was the *Orkhevi*. The *Orkhevi* was a Ukrainian vessel accused of unauthorized fishing. The sanction imposed on the *Orkhevi* was a $400,000 fine. The situation of the *Orkhevi* was simple. Once the fine was paid, the ship and its crew were released.

The next ship apprehended was the *Maria Assaro*, about which we have already had an opportunity of hearing today. The *Maria Assaro* was in Guinean waters, fishing unauthorized species. The fine imposed was one of $150,000. However, the *Maria Assaro* case has a relevant edge to it, which must be taken into account by this Tribunal. The *Maria Assaro* was arrested by the Guinea-Bissau authorities. After the arrest, the shipping agent granted a bond and the ship was freed. Later on, the company operating the *Maria Assaro* contacted the authorities of Guinea-Bissau and informed them that the authorities could execute the bond to pay the fine that was levied. However, they also stated and claimed

before the Guinea-Bissau authorities that they had an outstanding debt from the Government in the value of $100,000 and, as such, the fine was reduced in that amount and the execution of the bond was actually over a mere $50,000, which was the difference between the credit that the State had over the operator of the *Maria Assaro* and that which was owed for the illegal fishing activities.

The *Barracuda* was also a vessel that was arrested for fishing unauthorized species. It was also fined $150,000. It also paid its fine and was promptly released by the Guinea-Bissau authorities.

The *Josephine* is one of the cases of confiscated ships, but a very peculiar case, which shows the good faith in which the authorities of Guinea-Bissau have always acted under the fisheries law. The *Josephine* was also arrested for unauthorized fishing. The sanction levied on the *Josephine* was a $750,000 fine. Initially, this ship was confiscated due to the activities that it was performing as a result of the law on fisheries resources. By request of the agent of the *Josephine*, the Guinean authorities analyzed the case and the confiscation was converted into a fine. By further request of the agent, this fine was then reduced to $600,000. It so happens that subsequently the agent never paid the fine. The 15-day term established for payment came to an end, no fine was paid and the vessel reverted to the State as a direct result of the legal statute.

Next, we have two ships operated by the same company, the *Tindo 1* and the *Tindo 2*. Both ships were caught fishing in the territorial sea without the specific authorization requested by Guinea-Bissau's Fisheries Resources Law. Both ships were fined $200,000. Both ships paid the fine and were immediately released.

Soley and *Kadi* were two ships that were caught in exactly the same situation as the *Tindo 1* and *Tindo 2*. They were both fined $200,000, they both paid the fine, they were both released.

Here we come to the case of the *Juno Trader*. The *Juno Trader* was accused of various offences. It was accused of unauthorized performance of connected activities, of violation of communication and co-operation duties under the Fisheries Resources Law. The *Juno Trader* was fined a total of 184,168 euro, this value including the fine levied on the captain. The *Juno Trader* paid the fine respecting the captain, but the *Juno Trader* did not pay the fine respecting the vessel within the established legal deadline. As a result, the law of Guinea-Bissau, as we will see further on, is clear. A vessel that does not pay the fine within the legal term established automatically reverts to the State. The *Juno Trader* reverted to the State of Guinea-Bissau.

The *Capo Transmontano*, another Italian ship, is one of the most significant examples that Guinea-Bissau is not a pirate nation, is not a rogue nation, and is not trying to produce riches by arresting foreign vessels. The *Capo Transmontano* is not a novelty in Guinea-Bissau's waters. The *Capo Transmontano* was arrested for illegal fishing in 2001. It paid its fine and was released. In 2003 the *Capo Transmontano* was arrested again in Guinean waters, fishing illegally. It paid its fine and was released. In 2004, the *Capo Transmontano*, for the third time in three years, was arrested in Guinea-Bissau's waters, suspected of having performed illegal fishing activities. The *Capo Transmontano* was conveyed to the Port of Bissau. The administrative procedure to impose the fine was initiated. The case was investigated and, curiously, if we think that the *Capo Transmontano* had already been arrested and fined twice, the case was dismissed. Why was it dismissed, Mr President? It was dismissed due to lack of evidence. The vessel was automatically released and was free to continue.

Last, but not least, we have three small fishing vessels – *piroges* in local language – which were also arrested for unauthorized fishing.

What we can see from this comparative table is that the *Juno Trader* was not an isolated case of the inspection services arresting a vessel. It was, however, one of the only two cases in which the company did not seek to solve its legal problems before Guinea-Bissau's authorities. As such, the consequence that was imposed on the *Juno Trader* was the legally established consequence.

On another note, the Guinea-Bissau authorities, whenever duly contacted, have never refused to co-operate with foreign shipping agents and their local representatives in solving the cases of arrested vessels. As an example of this co-operation, we refer to the above-mentioned cases of the *Maria Assaro*, the *Capo Transmontano* and the *Josephine*, as well as the recent case of a vessel belonging to the Italian Shipping Agents Federation, the Federpesca. This vessel was actually arrested and fined. Further on, the agent posted a bond and appealed the fine. Contrary to the case of the *Juno Trader*, Federpesca presented the Guinea-Bissau authorities with a real bank guarantee on first demand, issued by the banque centrale des Etats de l'Afrique de l'ouest, the only recognized private commercial bank operating in Guinea-Bissau. This guarantee was deemed to be in accordance with Guinean law, but a problem arose relating to the text of the actual guarantee on first demand. As such, it was necessary to carry out further negotiations as to the text of the bond. Curiously enough, the parties came to an agreement, the text was changed, the bond was posted and the ship was free to leave the Port of Bissau.

In most cases, the Guinean authorities have also approved the request of shipping agents that their fines be reduced or that payment of the fines be made in instalments. We all know that we are going through a difficult economic time and that shipping agents are also suffering with the world's problems. The authorities in Guinea-Bissau have been sensible, have attended to these problems and have tried to solve them whenever so contacted.

As you can see, Mr President, Guinea-Bissau is not a rogue State, to which I have already had an opportunity to refer. Guinea-Bissau is simply an African country struggling with real problems and trying to solve them in the best possible manner without harming the fishing trade on which it is so highly dependent. The authorities of Guinea-Bissau do not wish to scare away the foreign fishing vessels, which actually pay the taxes and duties that are due in respect of carrying out their activities. It so happens that the agent of the *Juno Trader*, unlike the agents of other confiscated or arrested vessels, did not show any real interest in negotiating with the fisheries authorities, as can be confirmed by all the documentary evidence that has been filed by both parties.

It so happens that until 11 November the confusion reigning in the camp of the *Juno Trader* was so great and so widespread that numerous agents from different companies presented documents to the authorities requesting different things. The confusion is so great that when this prompt release proceeding was filed before the International Tribunal, other proceedings had already been filed before the authorities in Guinea-Bissau. The confusion is so great that when this procedure was actually filed before the International Tribunal for the Law of the Sea, the passports of some crew members had already been returned to their respective owners and such crew members had already been replaced in order to maintain the crew of the ship.

Unfortunately, Guinea-Bissau's delegation has received today a document, prior to the beginning of the afternoon's proceedings, that actually is a letter filed by Mr Tavares, as representative of the *Juno Trader*, with Guinea-Bissau's authorities, a document which was received in the FISCAP delegation in Bissau on 17 November. This letter is actually a curious element in this case.

The letter sent to FISCAP states the following. I will make a rough translation of the letter from memory. The letter says: From this date on, from 17 November onwards, Mr Tavares is considered the legal representative of the *Juno Trader* in Guinea-Bissau.

Attached to this letter is a letter by the English company operating the *Juno Trader* in which it so refers that due to the confusion and to the bad steps taken in all the procedures that were ongoing in Bissau by its previous agent, Agemar, which actually has various documents attached to these proceedings as well; it substitutes from that day onwards Agemar as its agent in Guinea-Bissau by Mr Tavares. The truth is that the authorities in Guinea-Bissau had no-one to contact up to that date and were continuously receiving different documents from different companies, from companies in Ghana, in Marseilles, in England and various companies within Guinea-Bissau, claiming to be the representatives of *Juno Trader* in Bissau.

It is also true that Guinea-Bissau's authorities informed Mr Tavares on more than one occasion that, due to the fact that he had no formal power of attorney or no formal document attesting to his representative powers over the *Juno Trader*, they could not establish any contact with Mr Tavares. It is true that on 17 November that document was finally filed with the Guinea-Bissau authorities.

It is simple to add up the facts. On 16 November, an injunction was filed with the Guinea-Bissau District Court requesting that an administrative act have its enforcement suspended. On the following day, the agent of *Juno Trader* in Bissau actually changed his representative because he was unhappy with the representation that was going on in Bissau.

At this time, and having said all the above, I would like to call your attention, on a more particular note, to the *"Juno Trader" Case* and to the facts that have to be contested.

On 26 September 2004, Guinea-Bissau's navy vessel *Cacine,* duly identified, was performing routine control and surveillance operations in the country's exclusive economic zone. During this routine operation, the *Cacine*, between 6.15 a.m. and 7.15 p.m.— and we are talking about a 13 hour timespan – sighted eight vessels, having identified one and boarded seven vessels. The seven vessels boarded were boarded to perform routine inspection operations. These seven vessels are mentioned in Annex 2 of the documents presented by Guinea-Bissau.

Whilst boarding the vessel *Flipper 1*, the inspection team aboard *Cacine* noticed that the *Juno Trader*, which was anchored in the Guinea-Bissau fishing zone at the position of 11^{o} 42' and 17^{o} 9' at approximately 40 nautical miles from the coast, parallel to the vessel *Flipper I,* weighed its anchor and attempted to flee. This fact has been referred to by the Applicant as eventually a mere suspicion and an innocent right of laying anchor and weighing anchor whenever a ship wishes. However, the Tribunal must note that the use of this type of vessel, of reefer vessels, as fishing supply and support ships is widespread throughout the West African coast, and Guinea-Bissau's authorities have arrested numerous such vessels performing illegal fishing and support activities off the country's coast. These vessels normally lay anchor alongside other fishing vessels, authorized and unauthorized, in order to perform transhipping and refuelling operations. They are also known to carry aboard food stocks in order to supply other fishing vessels. The authorities from Bissau have also noticed that normally Russian-manned fishing vessels, fishing trawlers, unload their catch onto other Russian-manned vessels, receiving from the latter all the necessary provisions. What we have we can perhaps classify as a trade relationship in which the trawlers deposit their catch aboard the reefers; the reefers supply them with refuelling, with food and with all the necessary provisions.

It so happens that the crew of the *Flipper 1* is mainly Russian, just like the crew of *Juno Trader*. For all these reasons, the reaction of the *Juno Trader* does not cease to be in the least curious, especially when we take into account that visibility on 26 September, as results from the numerous reports of the incident that are attached to our bundle of documents, was "good" and that the sea was "quite calm". Actually, in the statements of various crew members, and these crew members, unfortunately, were not able to be present today to

provide oral testimony, it is mentioned that they were able to detect ships as far away as 10 miles and identify them as small fishing ships. It does not cease to be curious that a ship at sea in good conditions can spot a small fishing vessel 10 miles away but however cannot spot a large patrol vessel of the Guinea-Bissau navy before it shows up with its zodiac rapid intervention dinghies.

Given the *Juno Trader's* unusual reaction to the presence of a navy patrol vessel, the *Cacine* sent out a zodiac dinghy – and a zodiac is basically a dinghy, a small rubber boat with an engine, with not enough capacity to be out in the EEZ by itself performing piracy operations. Let us be clear about that.

As I was saying, the zodiac's speedboat was sent to intercept the *Juno Trader*, hoping to clarify the situation which had just been witnessed by the officials. Although this is not deemed relevant by Guinea-Bissau, we must clarify that if, as Mr Karagiannis said, it takes two to get married, it is also true that it only takes one unfaithful party to cause a divorce! What we mean by that is simply this: is it not possible that the *Flipper 1* was authorized to tranship its cargo to other vessels, and that the *Juno Trader* was not authorized to receive it? It seems so to me; the fact that the *Juno Trader* might be breaching Guinea-Bissau law does not automatically imply that its "spouse", the *Flipper 1* in this case, also breached the law.

Another point which has led to some confusion before this Tribunal is the fact that Bissau's authorities frequently refer to the *Juno Trader* as *barco de pesca*, a fishing vessel. That is the direct translation of the term. We must analyze the Fisheries Resources Law in order to have a clear picture of what is meant by *barco de pesca* in Guinea-Bissau's laws.

The scope of the activities covered by the Fisheries Resources Law is defined in its Article 3, which clarifies that the provisions of the law are applicable not only to what can be referred to as "traditional fishing activities", the activities of trawlers, but also to what the law designates as "activities related to fishing". These activities include the transhipment of fish and fish products in the waters of Guinea-Bissau, and I stress that because illegal transhipment, unlawful transhipment, does not require that the fish be caught in Guinea-Bissau waters.

Transportation of fish or any other aquatic organisms in the country's waters up to the first time it is unshipped to landing is also considered an activity related to fishing. Logistical support activities to fishing vessels at sea and the collection of fish from traditional fishermen are also considered fishing activities.

Pursuant to the wide scope of these fishing activities that the law aims to regulate, Article 6, which we have taken the opportunity to translate and include in our bundle of documents as it was not translated in the documents filed by the Applicant, provides a definition of "fishing vessels" which includes "any vessel capable or equipped to perform said fishing activities", whether fishing in the strict sense or activities connected to fishing. Therefore, all the vessels that are equipped for fishing or for activities connected to fishing, as described in Article 3, are considered fishing vessels for application of the statutory regime. Mr President, this implies that all vessels that possess the equipment or characteristics which allow for the transhipment of fish or fish products, as well as those that are equipped to provide logistical support, are fishing vessels and are subject to the provisions of the Fisheries Resources Law.

All vessels that are equipped to transport fresh or frozen fish are classified by Guinea-Bissau's laws as fishing vessels. As such, I do not think we have to clarify any further that under Guinea-Bissau's Fisheries Resources Law the *Juno Trader* is a fishing vessel although it is not a trawler. There is no point continuing to refer to Guinea-Bissau's inspection authorities perhaps being intellectually limited because they do not understand what a *barco de pesca* is. Bissau's authorities understand exactly what a *barco de pesca* is and the

understanding they have of this concept is equivalent to the concept in internal law of what a *barco de pesca* is.

Guinea-Bissau's Fisheries Resources Law considers the storage and transportation of fish as activities related to fishing and requires that the performance of these operations be expressly authorized. The said law also sets forth that any vessel performing fishing activities or activities related to fishing, such as the transport of frozen fish, must obtain a permit from the authorities and must pay the corresponding respective amount to the government, to the State.

When we start putting the pieces of the puzzle together, we start to get a clearer view of what actually happened on 26 September 2004. On that afternoon, the inspectors aboard the *Cacine* observed a reefer vessel, whose presence in Guinea-Bissau's waters was unknown and undeclared, anchored in a position normally used by bunkering and transhipment vessels; it weighed anchor and fled from a navy patrol vessel. We believe that in view of the above, no doubt can remain as to the justifiable nature of the suspicions of the inspection teams.

We are all qualified legal professionals. We all know that criminal law, the laws on sanctions, are dependent on suspicion. Suspicion leads to investigation. Investigation leads to dismissal or to the offence being considered proved and the levying of a fine.

We believe that in view of the above no doubt can remain as to the justifiable nature of the suspicions. However, that was not all that happened that afternoon. It is also true that the reefer vessel fled from the speedboat that had left the patrol vessel in order to investigate the sudden weighing of anchor. It is also true that it repeatedly disobeyed the speedboat's signals to cut its engines and permit the boarding of the inspection team.

Mr President, we have all read and heard what the Applicant has to say as to this matter. We have all heard the Applicant refer to what it describes as a piracy attack, as "unidentified speedboats" with someone in military uniform and numerous other people in civilian clothes. However, what we do have to ask is: in the first place, was the vessel really unidentified, as claimed? Secondly, is it so abnormal for an inspection team to be dressed in civil clothes? We also have to take into account that, as we heard this morning from the Master of the *Juno Trader*, he had never encountered a piracy attack, and he had never seen a pirate.

With respect to the first question, the answer is necessarily "no". As expressly admitted by the *Juno Trader*'s radio operator in the written statements provided, the zodiac speedboat was duly identified as belonging to the navy of Guinea-Bissau. Is it normal for the crew of the *Juno Trader* not to have noticed these markings? I believe it is not normal, and for one simple reason. The crew members aboard the *Juno Trader* in their panic due to being subject to a purported pirate attack seem to have noticed what type of clothes the persons on board the speedboat were wearing, and the colour of their pants. They noticed that those persons had a relaxed look about them with hats hanging on their backs, but no-one managed to notice the markings on the zodiac. I ask: if the markings are painted on the side of a zodiac and admitting for the moment that it is possible to actually fly a flag on a zodiac – all of those who have been faced with these rubber dinghies know their size – we are talking of a flag that, if flown, is of *this* size, more or less. We are talking of the side of a vessel with painted markings of 3 or 4 metres length. Is it easier to notice the painted markings on the side saying *Marinha Nacional da Guinea-Bissau* or is it easier to see a small flag flying on a rubber dinghy?

Curiously, none of the other seven vessels boarded on that day confused the rubber dinghies for pirates. There was no other registered piracy attack on that day, nor did anyone else claim to have confused the authorities for pirates. It has also been proved that international law does not provide for the marking of rubber dinghies like the zodiacs, but only for the marking of the main navy vessels.

On another note, and passing on to the second question I asked previously, we must explain to the Tribunal that the FISCAP (National Fisheries Inspection and Control Service) is not a branch of the military but a government entity, as is the case with most inspection services throughout the world. Given this fact, it is obvious that, as happens with the inspection services of other countries, FISCAP officials do not wear military uniforms.

Another fact that we must consider, and it is very interesting, is that the *Juno Trader's* Chief Radio Officer, who it was said would provide oral statement today but unfortunately that was not available, stated in his written testimony that, even when he saw the zodiac was with the navy patrol vessel, he still sent out a distress signal. I believe this is very important.

At this point, we believe it is time to consider what actually took place and what happened on this afternoon. The first conclusion we must draw is that the *Juno Trader* had already committed two offences against Guinea-Bissau's Fisheries Resources Law by the time it was boarded by the inspection team. Offence number 1: it did not communicate its entry into Guinean waters as required by law. Number 2: it fled from an inspection team. Furthermore, Guinea-Bissau considers it reasonable that once the crew of the *Juno Trader* were aware that in fact what they had purportedly mistaken for pirates was in fact an inspection team, they would have wished to co-operate with the authorities in order to continue their route. However, that is not what happened. In fact, upon the boarding of the vessel, the inspection team was repeatedly confronted with the *Juno Trader'*s Master's refusal to comply with the instructions of the officials. The vessel's Master also refused to hand over the vessel's documents. He did not hand over the ship's logbook; he did not hand over the engine room log. These documents were necessary to establish exactly where the vessel was going, where it was coming from, and what it had been doing. The vessel's Master also refused to go to the Port of Bissau when so ordered by the inspection team. He is actually reported by one of his own crew members as having said, "Kill me, I no go to Bissau". This can be read in Annex 22 of Saint Vincent and the Grenadine's Application.

Last but not least important, and we will return to this point later, the vessel's Master refused to sign the *auto de notícia*, which we have freely translated as the "report of the incident", which explained exactly what had happened on that day and the offence of which the vessel was accused.

The *auto de notícia* in Portugal, as in Guinea-Bissau, is an official document made by the inspection services, whether naval or traffic inspection services, in which they state the facts that they witnessed on that day, the possible offence, and it is signed by the inspection crew and the purported offender.

Given the above-mentioned, by the time that the ship was bound for Bissau, the *Juno Trader's* Captain had already committed one offence under the Fisheries Resources Law and had managed to deepen the suspicions of Guinea-Bissau's authorities. We must stress once more that the flight does not mean that the vessel was fishing illegally. However, it causes legitimate suspicion to arise allowing for the pursuit, and it is also a punishable infraction. It is curious to note that the inspector identified as George spoke Russian but no one on board the *Juno Trader* understood him.

Lastly, and referring to the testimony of the Master of the *Juno Trader*, we believe that most of it cannot be deemed credible by the Tribunal. In the first case, when the Master of the *Juno Trader* was questioned by Mr Staker he claimed that he had never been in Guinea-Bissau's waters. Afterwards, when he was questioned by Mr García-Gallardo, he claimed that, after all, yes, he had been in Guinea-Bissau but only once before. We must ask one question; that is, the Master of the *Juno Trader* has 26 years of experience as master of reefing vessels. The Master of the *Juno Trader* has been performing his activity for 12 years on the West African coast. The Master of the *Juno Trader*, over 12 years of performing such activities, only crossed into Guinea-Bissau's waters twice. We must ask why the Master of

the *Juno Trader* on this occasion was a mere 40 miles off the coast of Guinea-Bissau if he has passed only once or twice through Guinea-Bissau's waters. We must conclude, I believe, that normally the *Juno Trader* does not enter the exclusive economic zone of Guinea-Bissau. On that date, however, the decision was different.

That having been said, we come to a point at which we must begin to analyse the provisions of the Fisheries Resources Law more deeply. For this purpose I call your attention to an affidavit signed by Mr Malal Sané and its respective translation, which is included in the bundle of documents that we presented today. The first point we would like to address is the conveyance of the *Juno Trader* to the Port of Bissau. Why did Guinea-Bissau's authorities decide to carry out such operation? It so happens that Article 42 of the Fisheries Law determines that vessels be provisionally arrested in the event that an inspection team is faced with circumstances which raise a reasonable suspicion that a breach of the Fisheries Law has taken place. We believe that no doubt can remain that reasonable suspicion existed in this case.

Pursuant to said Article 42, the inspection team may lead such vessel and its crew to the port and arrest the ship until the conclusion of any legal proceedings and procedures, in case said arrest is required to ensure the payment of any fine or the enforcement of any conviction. This provision was the basis for the arrest of the *Juno Trader* and the conveyance of the vessel to the Port of Bissau. All of the conditions that are required by said Article 42 were met. In the first place, the inspection team encountered one situation that may configure a breach of Guinea-Bissau's law and numerous direct offences that they witnessed and that the crew of the *Juno Trader* have admitted as being true.

Secondly, the offences that were committed are punishable by fine and by other sanctions. Thirdly, the arrest of the vessel was the only manner of ensuring the enforcement of the future conviction, given that the vessel was flying a flag of convenience and given that the vessel was not registered in Guinea-Bissau, given that the company that operates the vessel is not a Guinea-Bissau company.

As we have said, if some of these infractions were witnessed by all that were present and have been expressly admitted by the crew members, the truth is that the suspicion that the vessel was performing activities connected to fishing without the necessary authorization still needed to be confirmed. To confirm if the said offences took place or not the authorities of Guinea-Bissau had only one means at their disposal. They ordered that inspections be carried out by the Centre for Applied Research on Fisheries (CIPA) aboard the *Juno Trader* at the Port of Bissau.

These inspections confirmed one thing; that is, that the fish found on board the *Juno Trader* includes species which are usually found in Guinea-Bissau's waters. The Applicant pretends to undermine this inspection by claiming that it did not conclude that the fish found on board the *Juno Trader* were caught in the waters of Guinea-Bissau. The question at this point of time is: could any scientific examination come to such conclusion? The answer is obviously "no".

Therefore, faced with the facts known at the time, the authorities in Bissau took what they considered to be the right decision. Faced with a case in which a vessel was found transporting fish that are found in its waters, seeing that such a vessel had no documents proving that said fish were captured in another country, considering that the vessel had no permit to tranship in waters under the jurisdiction of Guinea-Bissau, and not having such vessel communicated its entrance into national waters, the authorities decided that the *Juno Trader* had been performing unlawful transhipment and levied the respective fine.

Only on 1 November 2004 – it is important that the Tribunal apprehend this – did the representatives of the vessel's agent send to the authorities in Bissau documents purportedly proving that the cargo had been transhipped elsewhere. The Master of the *Juno Trader* said

that there were documents and that there were not documents. We are not sure whether he understood what kind of documents we were talking about. The truth is that there is no proof attached by the Applicant that those documents were on board. It is strange that those documents were not handed over with the logbook. It is strange that the representatives of the shipping agent waited for one and a half months before filing these documents with Guinea-Bissau's authorities. It so happened that at the time at which those documents were filed, the resolution of the Interministerial Commission of Maritime Surveillance could no longer be challenged, save in the Court of Bissau. At the time these documents reached the hands of the Guinea-Bissau authorities, the authorities, due to Guinea-Bissau's laws, could no longer amend their decision. The decision was final and binding. We had a decision on the merits of the case of application of the fine. It is true that this decision may be challenged before the courts but the administrative authorities could no longer revoke or amend their decisions.

Articles 62.3 and 62.4 of the Fisheries Resources Law are clear when they determine that the decision of the Commission confiscating the cargo, equipment and vessel is final and binding. Given that, if the *Juno Trader*'s representatives wished to reverse such a decision, they should have filed an application with the courts in Bissau within the legal term. The Interministerial Commission could not have changed its decision, not because it did not want to; not because it was performing activities which have been classified as theft but because the law does not allow them to. Whatever is said throughout the world, whatever is said by the Applicant, in Guinea-Bissau the law is respected. In the past few years in Guinea-Bissau there has been an enormous effort to make sure that the State works.

At this moment in time, it is important to clarify why that decision cannot be changed. It happens that contrary to what happens in common law countries, most States with a civil law legal regime do not rely on courts to impose administrative fines. We are not talking of criminal fines but fines for minor offences which are not classified as criminal. In fact, fines and sanctions that are not derived from such criminal activity are imposed by the administrative authorities and the decisions issued are considered a final judgment. The only way to overturn such decisions is to appeal directly to the courts which may either confirm the decision or overturn it. Such is the case in Portugal, Cap Verde, Angola, Mozambique and Guinea-Bissau.

A different legal system from the one that we have in our country does not allow us to judge our neighbour. Nor does it allow us to make unfair insinuations at an international level. Contrary to what the Applicant pretends to pass on to this Tribunal, the justice system in Guinea-Bissau is working. How else does the Applicant explain that the court in Bissau has passed a judgment on the *Juno Trader* case in a mere seven days from the filing of the application ? If in fact Guinea-Bissau is not one of those – here I should like to refer to an expression used in the Application – "state systems in which the judiciary is effectively independent of the executive and the administrative authorities are hierarchically subordinated to it" as indirectly stated at page 5.19 of the Application, how does the Applicant justify that the Court in Bissau has judged an injunction on the *Juno Trader*?

Another sign that the basic rule of separation of powers works in Guinea-Bissau is the fact that contrary to what the Applicant states, in page 13.62 of its Application, it was not the Interim President of Guinea-Bissau, Mr Rosa, that signed the letter attached as Annex 34 but the current director, the current representative, of HP Rosa as a company. In fact, Guinea-Bissau is a country with a constitutional system very similar to the Portuguese system which in turn is influenced by the European constitutions. Guinea-Bissau's constitution establishes what most States establish nowadays, which is normally identified as the principle of separation of powers. Separation of powers in Bissau has been working over the last years.

Mr Rosa was constitutionally bound to step down from all private practice when he was sworn in as Interim President and did so. Mr Rosa has proven that the democratic regime

is now working in Bissau, although this is not pleasant news for the Applicant to hear since it was counting on the President's pressure and the President's private commercial interests to pressure the administrative and judicial authorities in Bissau to solve his problem. That would be a direct offence of the basic democratic principle of separation of powers.

Returning to the *"Juno Trader" Case*, it is also alleged that up to this date, no one from the shipowner to the crew knows why the vessel was arrested. That is blatantly not true.

The President:
Mr Silva, have you a long way to go?

Mr Alves Silva:
We can speed up, if you wish.

The President:
No, I am thinking of having a 15-minutes' break. Would that be a convenient moment?

Mr Alves Silva:
I believe that this would be a good opportunity to have a break.

The President:
Thank you very much. We will now have a 15-minutes' break. The meeting is adjourned.

Short adjournment

The President:
We continue with Mr Ricardo Alves Silva. Mr Silva, you have the floor.

Mr Alves Silva:
Returning to the *Juno Trader*, in its claim, the Applicant also states that up to this date no one from the shipowner to the crew knows why the vessel was arrested. This is blatantly not true. As we have already had the opportunity to refer to it, the vessel's Master refused to sign the report, the *auto de notícia*, which explained what had happened on 26 September and the offence that the vessel was accused of. The *auto de notícia*, or report, as we have been referring to it in English, is not a simple document with little or no interest in a procedure. It is a document of great importance in the administrative procedure of levying fines. It is through the *auto de notícia* that the authorities officially serve notice to an offender in respect of the facts that he is accused of having committed and the article that he is alleged to have breached.

However, to avoid obstruction of justice, the law sets forth that if the offender refuses to sign the *auto de notícia* after it has been read to him, the offender is considered to have been duly notified of its contents and accusation. It is simply a case of the offender not agreeing with what he is accused of. Therefore, from the moment the *auto* has been read by the offender, he is considered to be in a position of appealing or contesting the facts that he is accused of, and there are internal procedures, judicial and administrative, that can be adopted to contest such accusations. Therefore, it is not true that to this date, more than one and a half months since the *Juno Trader* was boarded and was then diverted to the Port of Bissau, the vessel's owner, the flag State or even the members of the crew have not been made aware of any legal proceedings of any kind, as has been stated on page 5, paragraph 19, of the Application. The proof of what we have just said is that prior to the filing of the *"Juno Trader" Case* before the International Tribunal for the Law of the Sea, the vessel's owner, its

representatives and the crew were fully aware of the proceedings, having been notified of the fine levied on the vessel and the Captain, and having appealed to Guinea-Bissau's courts.

It is also not true that the vessel's crew have been detained in Bissau. In fact, the Applicant expressly acknowledges that the vessel's Captain was "allowed to go ashore" to be interviewed. It is also a fact, as you may confirm by analyzing Annexes 4, 5 and 6 of the bundle of documents presented by the Republic of Guinea-Bissau, that between 4 November and 16 November the authorities received a request for the return of the passports of various crew members, and said passports were effectively returned, with the consequent repatriation of said crew members. Given the above, the Republic of Guinea-Bissau does not understand the reasons that led Saint Vincent and the Grenadines to claim before this Tribunal that no passports had been returned and that the crew members were being held aboard the *Juno Trader*.

During the vessel's stay in the Port of Bissau, the crew members were free to move around the city. They were never confined to the vessel. When so requested by the representatives of the ship's agents in Bissau, the customs authorities returned the passports of the crew members and they went back to their countries of origin. At no time did the authorities in Bissau deny the right of the crew to have their passports returned to them. In fact, the same has recently happened with the ship's Master, whose passport was returned to him on 2 December, at the request of the representative of the ship's agent. The same happened with the two crew members who were also handed their passports on the same date.

The crew has been changing over the past month. If no one has come back to occupy the ship, as was said here by the Master of the *Juno Trader*, that is not the problem of the Guinea-Bissau authorities. They have allowed the crew members to return to their home countries. It is normal for those crew members to be replaced by other, fresh crew members from their States of origin who are responsible, as the Master so stated, for maintaining the security on board, for maintaining the conditions on the ship, for maintaining the frozen fish. The Applicant says that there are actually members of the crew who are still in Bissau. I therefore ask, would it be possible for those crew members to abandon their ship? Would the company that operates the *Juno Trader* permit such crew members to abandon their ship and leave it lying in the Port of Bissau with no one maintaining the cold storage facilities and no one maintaining security on board? I believe not.

On 19 October 2004, we come to another important stage of this process. The Interministerial Commission of Maritime Surveillance on that date resolved to levy a fine of 175,398 euro on the *Juno Trader* for breach of the fisheries law, and a fine of 8,770 euro on the vessel's captain for refusing to cooperate with the inspection team, namely, in view of the attempted flight from the navy vessel and the refusal to hand over the ship's documents. Subsequently, there was also the refusal to sail to Bissau.

The question at the present time is, were these fines disproportionate? The Applicant seems to think so. However, these fines were not levied due to a simple idea of some administrative authorities in Bissau, as we have heard stated today. These fines were actually levied pursuant to Article 58 of the Fisheries Law. Article 58 of the Fisheries Law classifies the actions of the Captain of the *Juno Trader* during the inspection as an offence punishable with a fine of up to 10 per cent of the annual fees that should be paid for the permit to operate the *Juno Trader*. As such, the fine levied on the Captain of the *Juno Trader* was not disproportionate.

On another note, the failure to communicate the *Juno Trader*'s entry into Guinea-Bissau's waters is considered; and, please note, it is considered to be a serious offence. The non-communication of the entry of a fishing vessel, a *barco de pesca*, into Guinea-Bissau's waters is considered to be a serious offence under Article 54.1,h of the Fisheries Law. Mr President, serious offences are punishable with a minimum fine of $150,000 and a

maximum fine of US$ 1 million. However, the authorities of Guinea-Bissau did not decide to levy a fine on the *Juno Trader* for a serious offence, contrary to what was actually suggested in the *auto de notícia*.

We must come to one conclusion here, which is that the *auto de notícia*, which was the official report of the facts, suggested that, faced with these facts, the administrative authorities should apply a fine of between $150,000 and $1 million. The authorities in Bissau, which have been accused of not attending to the law and of deciding this case in an arbitrary manner, actually did not accept the opinion of the person who assisted the facts and reviewed the *auto de notícia*.

The performance of non-authorized activities connected to fishing and fleeing from inspection vessels are considered to be "other offences" under Article 56, punishable with a fine of an amount up to double the amount of the fees to be paid for the annual permit required to perform the activities that the vessel was believed to be carrying out. In this case, the authorities decided to spare the vessel from the application of a fine under the "serious offence" article, having resolved to apply a lighter fine under the "other offence" rules. As a result, the *Juno Trader* was fined the equivalent of the annual fees that should be paid for the permit, in the value of 175,398 euro, and not the double thereof.

There was a possibility of applying a fine somewhere within the range of 350,000 euro, and that fine was not applied, so the fine that was levied on the *Juno Trader* was the minimum fine permitted by law for this case. That means that, in spite of the various offences and in spite of the attitude of the Captain, the authorities in Bissau still levied the lowest fine that they possibly could. The Master was fined 8,770 euro, exactly 5 per cent of the annual fees, when he could have been fined an amount of 10 per cent of such value. This means that in both cases the authorities in Bissau did not levy the maximum fines that they were entitled to levy, having taken into account all the possible favourable circumstances that might exist in this case.

The fine was not the only sanction that was applied. Under Article 52.1 of the Fisheries Law, it was also resolved that the cargo be deemed lost to the State of Guinea-Bissau, given that it was transshipped in its waters. The payment of the fines was to be made within 15 days of the decision, as provided for expressly in Article 60 of the Fisheries Law. Conscious of this fact, someone – we believe perhaps the Master – paid his fine on 3 November 2004. On the other hand, no one paid the *Juno Trader'*s fine, and the representatives of the shipowner in Bissau, pursuant to Article 60 of the Fisheries Law, requested a15-day extension. However, please note that this extension was never granted.

The Fisheries Law is clear in setting out that if the fines are not paid within the 15-day deadline, the vessel, its equipment and its cargo revert automatically to the State. This is expressly set forth by Article 60.3 of the Fisheries Law. Therefore, on 5 November 2004, the *Juno Trader*, its equipment and its cargo automatically reverted to the State of Guinea-Bissau and, due to statutory law, due to the direct operation of the law, are no longer the property of their original owners. This is not a new situation, nor was it invented just for the *Juno Trader*. It actually results directly from valid, statutory law applicable in Guinea-Bissau.

Under Article 60.3, Guinea-Bissau's Government has recently sold two similar reefer ships – also confiscated – belonging to a Korean company but flying the flag of Guinea Conakry – the *Hedera 1* and the *Hedera 10*. This confiscation does not require an administrative resolution. It is a different confiscation from the one that was made initially. This confiscation does not require that it be ordered by a court of law. It is enforced by the law, it results from the law, and it operates automatically – what we usually refer to as *ope legis* – and, as such, this reversion of the property to the State of Guinea-Bissau cannot be suspended, it cannot be changed, it cannot be revoked in any way, save by the approval of another law from the parliament stating that in this case, or in the case of the vessels that

reverted to the property of the State under said article, shall return to the property of their original owners.

Mr President, given what I have just described, I believe that we can all conclude that, contrary to what has been said here today, the fact that the bond was a little too late in being granted, the fact that Guinea-Bissau's authorities only received the documents purportedly proving that the cargo came from a different place or was transshipped in a different place, is not too important. I believe that we can say that this is not true. What has happened in Guinea-Bissau, Mr President, is not contempt of Guinea-Bissau's court. This reversion not only operates by force of the law and cannot be changed or suspended by a judge, but it actually operated before Guinea-Bissau's judge was faced with the injunction that was filed on 16 November. Contrary to what has been said today, this situation is not contempt of the International Tribunal Law of the Sea. It is not contempt of the proceedings pending in this Tribunal. It is a direct and necessary consequence of a statute that is in force in Guinea-Bissau and will remain in force until it is either revoked, amended or stricken down by the constitutional court.

This having been said, we come to another important aspect that has led to some confusion of the Applicant. On 17 November 2004, the authorities in Bissau were advised that the Shipowners Protection Limited had issued a guarantee covering a maximum amount of 50,000 euro and was requesting the prompt release of the vessel and crew under article 72.2 of the Law of the Sea Convention and Article 65 of the Fisheries Resources Law. Pursuant to the rules of the United Nations Convention on the Law of the Sea, Article 65 of the Fisheries Resources Law sets forth what we may classify as a prompt release mechanism similar to the one provided for in article 292. Article 65 sets forth that the master, agent or captain of an arrested vessel can request that the national courts order prompt release of such a vessel if a sufficient and suitable bond is paid. In order to make this mechanism effective, said Article 65 sets forth that the court must decide on the prompt release within 48 hours.

Curiously enough, the Applicant decided, having applied for prompt release, to file the current Application with the International Tribunal. The truth is that the letter to which the Applicant metaphorically refers as a bond does not meet the requirements of the internal law of Guinea-Bissau, nor of the Law of the Sea Convention. Articles 65.3 and 65.4 of the Fisheries Resources Law set forth that the bond must cover the costs of arrest, detention, repatriation of the crew, as well as the amount of the potential fine and of the ship, its respective material and cargo.

In the *Juno Trader* case, a private company, The Ship Owners Club, issued a letter on 10 November claiming that it may cover any amount levied on the vessel up to a maximum of 50,000 euro. At the time that the letter was issued, the vessel's agent already had knowledge of the value of the fine, but still decided to present a purported guarantee for one-third of the amount of such fine. Mr President, it is also clear that this letter is not deemed to be a suitable bond under the internal law of Guinea-Bissau nor of any other country that we know of, and its value does not meet the requirements set forth by Articles 65.3 and 65.4.

It is also true that Mr Tavares's testimony cannot be considered relevant to this matter. On the one hand, we believe that Mr Tavares is not a qualified legal practitioner. As such, we deem it important to correct his statement pursuant to Guinea-Bissau law. Under said law, the bond must be sufficient, and "sufficient" means that it must cover the amount of the liability. Under Guinea-Bissau law, the bond must be adequate. Guinea-Bissau's legal regime, as is the case of the legal regime in Portugal, usually accepts bank bonds as adequate bonds, guarantees on first demand and bank deposits. These are the kind of bonds that have been rendered by other companies, which have led to the prompt release of vessels.

Furthermore, as we have already explained, on the date on which said letter was issued, the vessel, as well as all its equipment and cargo, had already reverted to the State of

Guinea-Bissau. Given this fact, even if we were to consider that the letter may be deemed to be a bond, that it was sufficient to cover the liabilities of the shipping agent and that it was issued in a suitable form, it does not serve the purposes of Articles 65.3 and 65.4 of the Fisheries Law, since it is impossible for any court at the present date to order the prompt release of a vessel that now belongs to the State of Guinea-Bissau. Accordingly, the prompt release of the vessel could not be ordered by Guinea-Bissau's courts.

Furthermore, on 16 November 2004, the Agent of the *Juno Trader* filed an injunction with the courts of Bissau requesting the suspension of the resolution of the Interministerial Commission [of Maritime Surveillance], as well as the "prompt release" of the vessel. In view of the urgency of the case, the court in Bissau decided not to hear Guinea-Bissau's authorities prior to ruling on the injunction. It decided solely on what was stated by the Applicant. Guinea-Bissau's court's decision ordered (1) the immediate cancellation or annulment of any procedure aimed at selling the fish and fish flour aboard the *Juno Trader*; (2) the immediate release of the crew and return of their passports, and (3) the immediate suspension of the fine imposed on the Master and the non-enforcement of the bank guarantee to ensure payment of that fine.

It is curious to note at this point in time that what occurred with the Master was not the posting of a bond but the payment of the actual fine. However, we must in this case analyze local law before we can reach any conclusion as to the effects of this judgment. The jurisprudence, the case law of Guinea-Bissau, has frequently decided that any appeals to the courts including injunctions of this nature respecting the administrative resolutions that levy fines under the Fisheries Resources Law may only be filed within the 15-day term established for payment. There is a simple and logical reason for these decisions. The courts have judged, in our view correctly, that after said 15-day term has expired, the shipowner's right to appeal is forfeited and he can no longer file any case respecting the decision. This derives from the fact that the property of the vessel, its equipment and cargo reverts to the State when the 15-day term or extension thereof elapses without payment of the fine. This case law forces us to conclude that the injunction could no longer produce any effects at the time it was filed with the court in Bissau given that at such time the vessel's agent was no longer the owner of the vessel.

Furthermore, as we have already had the opportunity to explain, the court's decision is irrelevant in the present case since forfeiture did not result from the court. It operated *ope legis* as a direct result of Guinea-Bissau's fishery law, irrespective of any administrative decision, any legal decision or any judicial decision and irrespective of any court order. Furthermore, any court decision in an administrative law system like that of Guinea-Bissau could never do more than confirm or annul the decisions. The decisions of the administrative bodies in such administrative law systems cannot as a matter of fact hand back the property of the vessel to the original owner nor modify the amount of the fine. They can basically only annul the administrative act or maintain it.

Furthermore – this is the last point on the suspension of the enforcement of the administrative act – we have attached with our bundle of documents a translation of the judgment of the Bissau court relating to the suspension. It may clarify some imprecisions stated here today and that we believe resulted exactly from the translation from Portuguese into French into English; namely, it may clarify one point that was stated here which indicated that in the decision, the Bissau court decided that there was evidence that the act was illegal.

Mr President, I ask permission to say three phrases in Portuguese and then translate them into English. The Bissau Court judgment says what the law says. And the law says that the suspension of enforcement of an administrative act may be ordered when three requirements are met: (1) *Prejuízos de difícil reparação;* which are exactly those – damages

which are difficult to repair; (2) *Não houver [grave] prejuízo para o Interesse Público*. That means that the court may only judge the injunction and may only confer the suspension if and when the decision to suspend the administrative authority's decision does not cause any serious damage or possibility of serious damage to the public interest. (3) *Não haja indícios de ilegalidade do recurso*. We believe that this was the paragraph that was not properly translated and was stated here today. This last requirement does not mean that the court decides in favour of the applicant when it is convinced that there is serious proof or sufficient proof that maybe the decision, the act of the administrative authorities, is illegal. What this means, *não haja indícios de ilegalidade do recurso*, is that: it can only suspend the act when, faced with what is actually stated in the injunction, it concludes that the filing of the main case before the court will not be illegal. It means that it can only suspend the act if it confirms that the applicant is an interested party, for example. If the applicant is not an interested party, the suspension cannot be granted.

Mr President, It may be that the eyes of the world are on this case; it may be that they are not. The truth is that the eyes of the people of Guinea-Bissau are clearly looking towards Hamburg at present. The new Fisheries Resources Law of Guinea-Bissau was enacted pursuant to the rules and principles of the Law of the Sea Convention. The authorities in Bissau have struggled to implement a new inspection service which is finally operational and has been effective in fighting against unlawful exploitation of the country's resources. The rules that have been applied to the *Juno Trader* are set forth by statutory law. They have been respected and have been applied in many other cases. They were not invented to harm the *Juno Trader*, its crew or its respective owner.

The civil law system of Guinea-Bissau is not an invention of the local authorities. It was imported from Portugal, which in turn was inspired by the French and German models. These countries have never been accused of being undemocratic. They are not developing countries and no one challenges the rules on application of administrative fines when they are enforced in Europe.

Mr President, distinguished Members of the Tribunal, Guinea-Bissau spends vast amounts of its limited resources in enforcing the nation's fisheries regulations. In the course of this year FISCAP has budged the performance of three special control and inspection operations per month not included in routine operations. Each month the value of these operations considering only the payments made to the inspection staff reaches a total of 23,750,000 XOF Francs. The monthly costs with administrative staff are of 13 million XOF Francs. That means that the monthly operating budget of FISCAP, not including vessel and equipment maintenance and repair costs, is of approximately 36,750,000 XOF Francs. This is an astounding amount of money for one of the ten poorest countries in the world to support monthly to try and put an end to the immoral and illegal exploitation of its limited resources by other States.

Guinea-Bissau's courts and authorities have shown respect for international law and capability to solve the problems arising from arrest cases resorting to domestic rules and procedures. The Applicant states to be also pleading the Respondent's case, showing simultaneously that the consequences of the posting of the significant may possibly bring future financial problems to be solved. At the same time, curiously, the Applicant requests that the Tribunal orders the Republic of Guinea-Bissau to pay the costs of these proceedings.

The reversion to the State of Guinea-Bissau of the property of the ship operated due solely to legal statute. Mr President, what the Applicant is attempting to do is to pressure Guinea-Bissau's courts and authorities to decide the domestic case in favour of the shipping agent under pain of filing legal action aimed at obtaining an amount of compensation that it knows that Guinea-Bissau will not easily be able to support. In my personal opinion, this is blackmail of a sovereign State and it is inadmissible.

Mr President, I thank you for listening to my oral arguments. I thank the Tribunal. I would like to invite you to call Mr Christopher Staker to the stand to present oral arguments on admissibility of the Application, jurisdiction and whether or not this Application is well founded. Thank you very much.

The President:
Thank you, Mr Alves Silva.

I now give the floor to Mr Staker.

STATEMENT OF MR STAKER
AGENT OF GUINEA-BISSAU
[PV.04/03, E, p. 43–53]

Mr Staker:
Mr President, distinguished Members of the Tribunal, Mr Silva has dealt in quite some detail with the facts and circumstances surrounding the *Juno Trader* affair. This detail has been felt necessary to be explained to the court simply in order to provide an answer to the very many allegations that have been made against Guinea-Bissau by the Applicant in this case. But, as I said at the outset, article 292 proceedings are a very limited and circumscribed jurisdiction. Most of the allegations that were made are not relevant to the jurisdiction the court is exercising today. I regret to say that the long exposition that Mr Silva gave should have been unnecessary to give because it was answering irrelevant allegations but nonetheless giving an answer that in the circumstances Guinea-Bissau was put in a position of feeling forced to answer.

I turn now to the few discrete questions that really are relevant to a prompt release application under article 292: jurisdiction, admissibility and whether the claim is well founded. Before coming to jurisdiction there is one point that needs to be emphasized, one very relevant fact that emerges from the explanation of the facts that was given by Mr Silva; that is the fact that since 5 November 2004 the *Juno Trader* has been the property of the State of Guinea-Bissau and no longer the property of the former owners.

It is my submission that this Tribunal must, in accordance with general principles of international law, recognize this change of ownership that occurred in the *Juno Trader* since the change of ownership was effected by the law of Guinea-Bissau at a time when the ship was physically situated within the territory of that State and when the law of Guinea-Bissau was therefore the *lex situs*.

I wish to refer the Tribunal to two authorities for that proposition, which are contained in a small bundle of authorities that I provided to the Registry and I hope that the Members of the Tribunal will have before them. I have to begin by saying that it is with some diffidence that I refer to the first of these authorities because it is an article that I was the author of many years ago. It appeared in the 1987 edition of the *British Year Book of International Law*. I do not put forward this authority on the basis that it is the work of an author of any particular eminence; I refer to it merely because it conveniently identifies the authorities on a rather specialized question of international law.

To put that question of international law in context, there are various rules of public international law that operate upon property rights of individuals as they exist under municipal law. For instance, it is a basic rule of international law that a State may not expropriate the property of an alien without paying proper compensation. But, because property rights are created by municipal law and not international law, it is necessary to have some rule of international law to decide which system of municipal law you look at to decide which individual has which right in which property for the purposes of the international law rule.

The article that I have referred to and put before the Tribunal seeks to demonstrate, and I adopt my submission today, that for international law purposes, property rights in tangible property are determined in accordance with the *lex situs* principle. A convenient and clear articulation of that rule can be found on page 163 of the article in question. It should appear on page 2 of the bundle of authorities that I put before the Tribunal. It is the second paragraph on the right-hand side of that page and it is a quote from the author Rabel, who states:

> "It is at present the universal principle, manifested in abundant decisions and recognized by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated".

The article in question then goes on to expand on the application of this rule and at page 187 of the article, which should appear on page 7 of the bundle before the Tribunal, the fourth line of the first full paragraph on the right-hand side page states "Ships and aircraft are treated like any other chattel in so far as a sale or expropriation of a ship in the territorial waters of a particular State will be governed by the *lex situs*". Various authorities are then given.

The second authority that I would cite for the same proposition is Iain Goldrein's *Ship Sale and Purchase,* which gives an example of the same principle from the point of view of English law. That is found on page 9 of the bundle, page 101 of the work in question. At the bottom of the page it is stated with reference to contracts for the sale of ships that:

> "Where the sale contract is governed by English law but delivery of the ship will take place in the internal or territorial waters of another country, the parties should be aware that under English rules of private international law the validity of the transfer of title in the ship will be governed by the law of the place where the ship is situated at the time of transfer".

Thus, in my submission, to the extent that it is necessary for international law purposes to determine who is the owner of the *Juno Trader*, the answer must be that since 5 November 2004 the *Juno Trader* has been the property of the State of Guinea-Bissau, that title having been transferred to the State by operation of a municipal law of Guinea-Bissau at a time while the vessel was physically situated within the territory of that State.

It is my submission that in prompt release proceedings the Tribunal does not have the power to order a transfer of property from one person to another. It has no power to annul a transfer of property. It has no power to undo the effect of some municipal law that has taken effect at some time in the past. For the purposes of these prompt release proceedings, it is my submission that one must proceed simply on the basis that the *Juno Trader* is the property of the State of Guinea-Bissau and to ask on that basis: does this Tribunal have jurisdiction over this application, is it admissible and is it well founded?

I turn to the first question, which is jurisdiction. On the subject of jurisdiction, a number of criteria must be looked at. I can say quite clearly that there are a number which are not in dispute. It is common ground that at all material times both parties to these proceedings were parties to the Convention. Secondly, Guinea-Bissau agrees that no relevant court or tribunal has been accepted by Guinea-Bissau under article 287 of the Convention. Thirdly, Guinea-Bissau does not dispute that within a period of 10 days following the detention of the *Juno Trader*, no agreement was reached between the parties to submit the question of release from detention to a particular court or tribunal. So that much is not in dispute.

However, in relation to jurisdiction, Guinea-Bissau's principal concern relates to the status of Saint Vincent and the Grenadines as the flag State of the vessel. Paragraph 2 of article 292 makes clear that a prompt release application may be made only by or on behalf of the flag State of the vessel. What this means is that the Tribunal has jurisdiction only if the applicant State is the flag State of the detained vessel at the time of the filing of the Application. It is not sufficient that the Applicant was the flag State at the time of the initial arrest or detention. That much is clear from the *"Grand Prince" Case*. I believe that I do not

need to go into the facts of the *"Grand Prince" Case* to explain how that principle was arrived at in that case.

I know that some Members of the Tribunal did express reservations on this point in a joint dissenting [opinion] but I submit that it is now the established case law of this Tribunal that the applicant State in prompt release proceedings must be the flag State at the time the Application is made.

In my submission it is also established in the case law of the Tribunal that it is the Applicant who has the initial burden of proving its status as the flag State of the vessel at the time that the Application was filed. On that I refer to paragraph 67 of the *"Grand Prince"* Judgment. In other words, it is therefore for Saint Vincent and the Grenadines to show that it was the flag State of the *Juno Trader* on 18 November 2004, which was the date on which the Application was filed in this case and which was some two weeks after title to the vessel passed to the State of Guinea-Bissau.

I acknowledge that the Memorial of Saint Vincent and the Grenadines contains certain documents seeking to show that it was the flag State of the *Juno Trader* at the time of its arrest. That does not address the question of its status as the flag State at the time the Application was filed apart, for instance, from Annex 1 to the Applicant's Memorial, which is a letter of the Attorney-General of Saint Vincent and the Grenadines dated 17 November 2004, which states that the *Juno Trader* is a vessel flying the flag of Saint Vincent and the Grenadines. This is a letter issued merely for the purposes of granting an authorization to commence proceedings before the Tribunal and there is no evidence that the Attorney-General was aware at the time that the *Juno Trader* had become the property of the State of Guinea-Bissau.

In my submission it would seem a rather odd result that one sovereign State could be the flag State of a vessel that is the property of another sovereign State. As Judge Wolfrum said in paragraph 3 of his Declaration in the *"Grand Prince" Case*:

> "It is one of the established principles of the international law of the sea that, except under particular circumstances, on the high seas ships are under the jurisdiction and control only of their flag States, i.e. the States whose flag they are entitled to fly".

The obvious question is whether a ship that is owned by one sovereign State can ever be under the sole jurisdiction and control of a different sovereign State.

I confess that I do not have an answer to the question of what normally happens in respect of the flag of a vessel when the vessel is confiscated by another State for violations of its fisheries regulations or other laws. Certainly, it is a situation that occurs often enough in practice. My understanding is that it may be the case that when a ship is confiscated in those circumstances it is thereupon regarded as ceasing to fly any flag at all and to have become an ordinary chattel until such time as the State that has confiscated it has sold the ship and it is reflagged by a new owner. I cannot say that I know that for a fact, but in any event although I cannot provide the Tribunal with a clear answer, it is my submission that the burden is on the Applicant to establish its case. My submission is that the Applicant has not discharged its initial burden of establishing that it was the flag State of the *Juno Trader* at the time of the filing of the Application in these proceedings.

It is my further submission that if the Tribunal is without jurisdiction over the vessel, it is also without jurisdiction over its cargo and its crew because it is evident from the wording of article 292, paragraph 1, that a State cannot have *locus standi* to bring prompt release proceedings in respect of a cargo or crew if it has no *locus standi* to bring proceedings

in respect of the vessel. Jurisdiction with respect to the cargo and crew is only ever ancillary to jurisdiction over the vessel.

Finally, before leaving the question of jurisdiction I would also for completeness recall the general overriding principle that has been recognized in the case law of the Tribunal that the Tribunal must satisfy itself as to its own jurisdiction and that it must examine issues of jurisdiction *proprio motu* if necessary, whether or not they have been expressly raised by the parties. On that I refer to the *Grand Prince* Judgment, paragraphs 77 to 79. Accordingly, I respectfully submit that the Tribunal should find itself without jurisdiction in this case.

I then subsequently turn to the question of admissibility which of course arises only in the event that the Tribunal finds that it does have jurisdiction. Guinea-Bissau submits that these prompt release proceedings are inadmissible on three grounds. The first ground of inadmissibility relies on the same arguments that I have raised in relation to jurisdiction. The *Juno Trader*, its equipment and cargo, are presently the property of the State of Guinea-Bissau. Therefore, the Government of Guinea-Bissau is not detaining the vessel but rather is in possession of the vessel as the lawful owner. The Applicant could only establish that the *Juno Trader* is being detained – detention is a requirement of admissibility for a claim under article 292 – by challenging the lawfulness under either national law or international law of the confiscation of the vessel. But as I submitted in my opening arguments, in prompt release proceedings, which is a very narrow jurisdiction, the Tribunal is unable to determine the lawfulness of a State's conduct under national or international law and any such issues, if they are to be raised, must be raised in other proceedings. On that basis the claim is inadmissible.

The second ground of inadmissibility is that the central allegation in this application does not in fact fall within the terms of article 292. In accordance with the plain wording of paragraph 1 of article 292, a prompt release application must allege that the detaining State has not complied with the provisions of the Convention for the prompt release of the vessel or its crew. The only relevant provision of this nature in the Convention that has been invoked by the Applicant in this case is article 73, paragraph 2. That provision imposes a prompt release obligation in cases where a vessel has been arrested under article 73, paragraph 1. However, it is clear from the Applicant's Memorial that the Applicant is not in reality alleging that the *Juno Trader* was arrested in accordance with article 73, paragraph 1. In paragraph 108 of the Applicant's Memorial it is stated that Guinea-Bissau acted within the framework of the exercise of its sovereign rights under article 73, paragraph 1, "in form only", and that it therefore could not take measures to ensure compliance with the laws and regulations referred to in article 73, paragraph 1. What the Applicant essentially alleges is that the *Juno Trader* was not genuinely arrested pursuant to the enforcement of the kind of laws referred to in article 73, paragraph 1. What the Applicant really alleges is that Guinea-Bissau simply seized the first cargo vessel unlucky enough to be in the wrong place at the wrong time and on a totally futile pretext (paragraphs 104 and 127 of the Memorial).

If there is no serious allegation that the arrest was pursuant to article 73, paragraph 1, there can therefore be no violation of article 73, paragraph 2. Therefore, this is not an application in respect of one of the types of provisions with which the jurisdiction under article 292 can be exercised. On that basis I also submit that this application is inadmissible.

The third ground of inadmissibility, which is related to the others, is that this application has now become moot. It has become moot because the possibility of proceedings under article 292 has now been superseded by, and made unnecessary by, developments at the national level in Guinea-Bissau.

The purpose of article 292 proceedings is clear enough. Paragraph 3 of that article, as I have already emphasized several times, says that prompt release proceedings are without

prejudice to the merits of any case before the appropriate domestic forum against the vessel, the owner or its crew. Therefore, prompt release proceedings are not designed to interfere with whatever action may be taken in accordance with the national legal system of the detaining State in respect of the vessel. It is not the role of article 292 proceedings to determine whether or not a vessel has committed any crime. It is not the purpose to determine whether or not the vessel should be forfeited to the detaining State. It is not the purpose of article 292 proceedings to determine whether any fine should be imposed on the ship. All of these are matters for the national legal system.

All that the prompt release procedure is intended to achieve is to avoid a situation in which a vessel is tied up for a lengthy period, possibly indefinitely, in detention in the detaining State awaiting the outcome of the national legal process. Article 292 proceedings involve, to adopt the words of Judge Anderson in his Dissenting Opinion in *The "Volga" Case* at paragraph 13,

> "the release of the vessel, pending the resolution of legal proceedings, in exchange for the provision of financial security and the observance of appropriate conditions designed to ensure that those proceedings are not prejudiced or frustrated".

I emphasize the words "pending the resolution of legal proceedings" and the words "designed to ensure that those proceedings are not prejudiced or frustrated".

In cases where proceedings at the national level have not yet been commenced against an arrested ship, or where such proceedings are still pending, the release of the vessel on the posting of a reasonable bond balances the interests of both the coastal State and the flag State; namely, the interest of the coastal State to take appropriate measures to ensure compliance with its laws and regulations and the interests of the flag State and the shipowner in ensuring that the vessel remains available to engage in productive activity.

However, once the national legal processes have been completed, the prompt release procedure no longer serves any purpose. If a national court orders the confiscation of a detained ship as a penalty for the violation of its laws, the judgment can simply be executed. For the Tribunal to interfere at that stage and to order the release of the vessel would not at that stage be a measure to preserve the interests of both parties pending the resolution of the matter. On the contrary, it would be an interference in the merits of the matter subsequent to its final resolution. It would, in effect, amount to entertaining an appeal against the decision of the national court resulting, for instance, in a decision of the Tribunal to substitute a monetary penalty in place of the confiscation of the vessel.

Furthermore, for the Tribunal to take any action under article 292 after the national legal process has been completed would be inconsistent with the principle, articulated in the *M/V "SAIGA" Case* (at paragraph 49), that although parties to prompt release proceedings are bound by the Tribunal's decision on prompt release, "their domestic courts, in considering the merits of the case, are not bound by any findings of fact or law that the Tribunal may have made in order to reach its conclusions". Article 292, paragraph 3, which affirms that prompt release proceedings shall not prejudice the merits of the proceedings at the national level, would be meaningless if a final judgment of a national court could subsequently be disturbed by the Tribunal acting under article 292. The flag State cannot apply to the Tribunal to seek a remedy against the order for confiscation, as the Tribunal has no jurisdiction with respect to the merits of the case. As the Tribunal has affirmed, article 292 proceedings are "not an appeal against a decision of a national court". I refer to the *"Camouco"* Judgment at paragraph 58.

In short, now that the *Juno Trader* and its cargo have been forfeited to the State of Guinea-Bissau in accordance with the national legal process, there is no longer any basis for the Tribunal to intervene in the exercise of its article 292 jurisdiction.

I would add that paragraph 35 of the Applicant's Memorial appears to suggest that the reference in article 292, paragraph 3, to the "appropriate domestic forum" is a reference that is confined to national courts as opposed, for instance, to administrative authorities. I may misunderstand, but I simply raise this point. On this view, while the merits of proceedings before national courts may not be prejudiced by prompt release proceedings it might be argued that there is nothing to prevent prompt release decisions from affecting the merits of decisions taken by national administrative authorities, for instance. I simply raise that argument in order to reject it.

There are many different States in the world with many different legal systems. Mr Silva has explained the legal system in Guinea-Bissau, which is modelled on that of Portugal and has been influenced by that of various other European legal systems. In some legal systems fines and forfeitures of vessels can only be ordered by a court. In other legal systems they can be ordered by an administrative act which may be legally effective without more ado, although it may be possible to bring proceedings before a national court to have them annulled. Other types of proceedings may exist in other systems. Clearly, article 292 is not intended to discriminate between States according to the structure of their domestic legal system.

The general principle to which article 292 gives effect is that prompt release proceedings are to be without prejudice to the merits of the national legal process of the detaining State for enforcing laws and regulations of the kind referred to in article 73, paragraph 1, whatever the nature of that process.

For these reasons, Guinea-Bissau requests the Tribunal to declare the application in this case to be inadmissible.

I turn to the next submission, which relates to whether the application is well founded, which again arises only if the Tribunal first rejects my submissions on jurisdictions and admissibility. Again, it is our submission that the burden is on the Applicant as the moving party to establish the requirement that the application be well founded. This aspect of the case can be dealt with very briefly.

In relation to the *Juno Trader*, its equipment and cargo, the application is not well founded because the owner is now the State of Guinea-Bissau. The State of Guinea-Bissau cannot be said for the purposes of article 292 proceedings to be detaining the property. Accordingly, the *Juno Trader* is not a detained vessel for the purposes of article 292.

In relation to the crew the application is similarly not well founded as the Applicant has not, in my submission, discharged the burden of proving that the crew are being detained. Mr Silva has presented our evidence that crew members of the *Juno Trader* have been free to move around Bissau, that passports have been returned to members of the crew when so requested, that various members of the crew have returned to their country of origin and in our submission it cannot be said that an allegation that the crew are being detained is an allegation that is well founded.

Accordingly, the application should, in my submission, be rejected on the merits even if jurisdiction and admissibility were found to exist.

Mr President, I am conscious of the time. There were two further brief interventions that we proposed to make.

The first relates to the question of what would be a reasonable bond. This is our alternative, alternative, alternative submission, in the event that the Tribunal was to rule against us on jurisdiction, admissibility and well-foundedness. The final intervention relates to the question of the application for costs in these proceedings.

I am happy to invite you to call on my colleague to address the question of the reasonableness of the bond. However, if it is more convenient, perhaps it might be possible to deal with those questions in a brief amount of time tomorrow morning.

The President:
Yes. I was also concerned about the allocation of time. I think that we should follow your suggestion that we should adjourn the meeting now and continue for a short period tomorrow with your two points.

Mr Staker:
I am very much obliged, Mr President.

The President:
Thank you.

We have heard at least part of the Respondent's pleading this afternoon. We shall resume the oral pleadings at 10 o'clock tomorrow morning. The sitting is now closed.

(*The sitting was adjourned at 6 p.m.*)

PUBLIC SITTING HELD ON 7 DECEMBER 2004, 10.00 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines: [See sitting of 6 December 2004, 10.00 a.m.]

For Guinea-Bissau: [See sitting of 6 December 2004, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 7 DECEMBRE 2004, 10 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines : [Voir l'audience du 6 décembre 2004, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 6 décembre 2004, 10 h 00]

The President:
Good morning. This morning we will continue hearing the Respondent. I give the floor to Mr Ramón García-Gallardo.

Argument of Guinea-Bissau (continued)

STATEMENT OF MR GARCIA-GALLARDO
COUNSEL OF GUINEA-BISSAU
[PV.04/04, E, p. 5–13]

Mr García-Gallardo:
Mr President, distinguished Members of the Tribunal, it is an honour for me to come back before your Tribunal today after four years, when, on 7 December 2000, I had the pleasure to inaugurate the floor in this main courtroom as Agent of the Applicant in *The* "*Monte Confurco" Case*.

This Tribunal has had the opportunity in each case to state new principles of the interpretation of article 292. We consider that this time the Tribunal is confronted with a situation similar to the *"Grand Prince" Case* (*Belize* v. *France*, Case no. 8), although at that time you did not enter into that debate, since you found that you did not have jurisdiction for other reasons.

The object of my oral explanation today is the reasonability of the bond and its form and nature – a bond limited to the vessel and the cargo, since the fine imposed on the Master has already been paid, and, as shown, he is not detained and was free to leave Guinea-Bissau.

In this case, which is different from my personal experience, the Applicant is not challenging a decision to fix a bond to release the vessel of an exorbitant value. In this case, in contrast, the coastal State did not fix a bond, but the reasons for that are completely different. In the present case, the speed with which the local proceedings were conducted was within the spirit of article 292. A formal decision on the merits of the case was taken in a period of less than four weeks. As Mr Cot pointed out in his Declaration in *The "Grand Prince" Case*, the purpose of article 292 and this proceeding is to avoid the undue detention of a vessel. It is not intended to preclude the application of national law to violations committed in the exclusive economic area. I would just like to quote Mr Cot's ideas at paragraph 7 of his Declaration:

> "It would be a peculiar reading of this provision to see in it a kind of impunity afforded to offenders by the payment of a bond. The 'reasonable bond' would thus replace the penalties provided for by the law of the coastal State. It would no longer serve to ensure the appearance of the offender, but to give him the option of an alternative penalty to that defined by the national law. This would prejudge further proceedings before the appropriate domestic forum".

Paragraph 3 of article 292.

In the cases of the *"Camouco", "Monte Confurco" and "Volga"* (cases numbers 5, 6 and 11), your Tribunal was called upon to take a decision on requests for prompt release which had been presented at a time when the proceedings at national level were still under way. Those proceedings had not led to a decision on the merits.

A request for a reasonable bond made sense, since a decision on the merits had not been adopted. Let us remember that in one of the cases involving the Republic of France, after almost a year the case was not judged on the merits, there was a high, exorbitant, unreasonable bond, and there were reasons to come to this Tribunal. However, in the present case the posting of a bond is not possible, for the reasons that my colleague, the Agent of the Applicant and the Adviser, explained to you yesterday. These reasons are similarly reflected

in the criteria retained in order to fix the bond. For these reasons, we will inevitably have to stress questions on inadmissibility, since they are extremely linked.

In this context, a prompt release is no longer possible and not even conceivable. Subsequent to the confiscation, after a failure to pay within the legally requested period of 14 days, without losing the opportunity to lodge an appeal on the administrative decision, but after failure to pay within the deadline, in all respective countries in relation to questions of money, finance, to make an appeal, normally you are bound to pay and later you claim, and sometimes in the end when the legal proceedings have been heard, it is normal that if they revoke what was decided in the earlier administrative proceedings, there will be consequences also on the part of the assets that were confiscated for failure to pay at the time within the deadline set to provide the payment.

Subsequent to this confiscation, in our opinion, the title of ownership is now within the hands of the State of Guinea-Bissau. By ordering prompt release upon the posting of a reasonable bond, the Tribunal would then be led to order the authorities in Guinea-Bissau to return the vessel to its owner. If the Tribunal ordered Guinea-Bissau to promptly release the vessel in favour of the former owner of the vessel, then the Tribunal would be confronted with the problems of the consequences that could result from the judgment of this Tribunal.

Mr President, no matter how you address this issue, you would always come to a dead end, and the reason for that is easy to understand. The Application is moot and the Tribunal should not accept it.

However, coming back to the purpose of my presentation, in the alternative, in case your Tribunal considered that it has jurisdiction and the application submitted by Saint Vincent and the Grenadines was declared admissible, a reasonable bond or security has to be fixed.

First of all, one principle underlying article 292 is that a bond or financial security must be posted. In this regard, the request made by Saint Vincent and the Grenadines at paragraph 131 of their Application that no bond or financial security – or even a symbolic bond or security – should be posted, cannot be accepted.

As your Tribunal has already stated in the *M/V "SAIGA" Case* (Case No. 1), at paragraph 81, the posting of a bond or security seems necessary in view of the nature of the prompt release proceedings.

The Applicant has spent much time yesterday trying to explain its views on the circumstances of the arrest of the *Juno Trader*. However, your Tribunal has also had the opportunity to make clear that its exclusive and sole task under article 292 proceedings is just to deal with the question of prompt release, not the arrest – paragraphs 81 to 83 of the *"Volga" Case* (Case No. 11). The principle of non-prejudice to the merits of any case applies equally to any other wider issues outstanding between the parties (paragraph 4 of the Dissenting Opinion of Judge Anderson).

Once it is clear that a bond or a financial security must be posted and that the circumstances surrounding the arrest of the *Juno Trader* are absolutely irrelevant to these proceedings, we will go through the factors identified by your Tribunal in an assessment of the reasonability of the bond, which are: the gravity of the alleged offences; the penalties imposable under the laws of the detaining State; the value of the detained vessel and of the cargo seized. That is related in paragraph 67 of the *"Camouco" Case*. Furthermore, in the *"Monte Confurco" Case*, at paragraph 76, your Tribunal noted that this list was by no means a complete list of factors, and that you did not intend to lay down rigid rules as to the exact weight to be attached to each of them.

Turning to the gravity of offences, yesterday the Agents of Guinea-Bissau and the Counsel of Guinea-Bissau presented their submissions on very important issues affecting this case. The first was the lack of jurisdiction and exceptions of inadmissibility, but, also very

important, a well founded description of the facts of the case and the legal framework of the Guinea-Bissau law. I again remember Mr Cot's words in the *"Grand Prince" Case*. He mentioned that there was a necessity for the legal team of a State coming before this Tribunal to be in close contact with the authorities of the flag State. The credibility and the reliability of the information that they provide to the legal position of the flag is extremely important.

The affidavit made by the Guinean lawyer of our delegation, a member of the legal team seated in this room, on Guinea-Bissau law and related areas, both administrative and procedural, together with the oral explanations made by my colleague, a Portuguese lawyer belonging to one of the only foreign law firms established in Bissau, are fundamental to understand the difficulties of the famous administrative decision and the issues of confiscation. I must say again that the burden of proof in any event does not relate to the Respondent but just simply to the Applicant.

Let us come back to the issue of the rationality of the bond. We were looking at the gravity of the offences. In respect of the gravity of the offences, first of all, there is an important factor to take into account. Yesterday a description was given of how the gravity of the offence was conceded.

Let us move on to the penalties. The Tribunal looks at possible penalties that might be decided, such as the possible amount of the fines and the possible confiscation of a vessel and its cargo. The amount of the fines described yesterday by my colleague was 50 per cent of the maximum fines that a shipowner and a master could receive for failure to comply with the provisions of the Guinean Fisheries Act. It is by far not the application of a higher or a big amount.

When the Tribunal keeps in mind the possible fines, it considers that the bond is aimed at giving the coastal State a guarantee that will enable it, if necessary, to ensure the effective implementation of fines, if these are decided. Therefore, how could one conceive of requesting proceedings before the Tribunal to fix a bond providing such a warranty when the penalties have already been announced and, above all, when the confiscation of the vessel and the cargo has operated *ex lege* for failure to pay those penalties?

As explained, a decision on the merits was adopted one month prior to the submission of the application, and the following fines were imposed: a fine of the vessel of 175,398 euro; confiscation of the cargo (frozen fish and fish flour); and a fine of the Master of about 7,000 euro. Furthermore, the fine imposed on the Master has already been paid. Guinean law, as explained previously, provides explicitly for the fact that fines can be imposed by the administrative authorities, since, in contrast with previous cases, the law applied is not of a criminal nature. There were no criminal offences, as used to happen in Australia or France. It is of an administrative nature.

I turn now to the value of the vessel, the third parameter used by theTribunal. It is astonishing that although the Applicant must know the clear case law from this Tribunal, it has not provided a single piece of data on the value of the vessel. In the past, either applicants or respondents have discussed this before this Tribunal, showing written evidence and witnesses, when possible, were examined. Not only has the Applicant in this case not provided any value, but it has even asked this Tribunal at paragraph 123 of its Application, to make the assessment itself based on the characteristics of the vessel. The Applicant considers that the Tribunal may become an expert itself in the valuation of vessels. This may be true because there have been so many cases of arrest. I do not think we need to go into this.

Once again, we have to stress that the title of property of the vessel was transferred to Guinea-Bissau on 5 November 2004. How can a bond be fixed for the prompt release of a vessel that is no longer owned by the Applicant?

The vessel, now the property of Guinea-Bissau, is around 35 years old; it is less than 100 metres long and is a reefer vessel. A reefer vessel is a refrigerated vessel with one part

for the keeping of frozen fish and to stock other materials and also to provide bunkering and oil to fishing fleets. That is the usual description of a reefer. It is not just a refrigerated vessel with bananas coming from Central America to Europe; it is a real activity to provide full services to fishing fleets. That is why Guinean fishing law, like that of so many other countries – remember the *M/V "SAIGA" Case* – includes in the definition of fishing operations the activities of fishing fleets.

No matter how old the vessel is, it is extremely important that the vessel is still classified by the prestigious international company, based in Hamburg, Germanischer Lloyd, one of the top five or six internationally well recognized classification societies for vessels (page 2 of Annex 2 of the Application for the particulars of the vessel).

The Respondent has presented, lacking any other evidence presented by the Applicant, as Annex 14 of our set of documents, a purchase contract for a reefer vessel recently made (31 August 2004) of an age of 25 years, but smaller in gross tonnage and length, for a purchase price of US$ 1,600,000, which at the time was approximately 1,300,000 euro. (1 euro was equal at the time to US$ 1.2) With a minimum depreciation for the difference in age, a vessel with the characteristics of *Juno Trader* should have a market value of not less than, very conservatively, half the price, US$ 800,000. In this regard, the contract of sale of that vessel was submitted yesterday. Only the details of the identification of purchaser and seller have been deleted for confidential reasons. This is just one bit of evidence that the Respondent should meet so that this Tribunal can evaluate the value of this vessel.

A second element relates to Annex 48 of the Applicant when describing the cost of keeping the vessel in Guinea-Bissau. It makes reference to the daily depreciation of the vessel. That means that the vessel to them is not just a vessel for scrap due to its age. On the contrary, it is a well-conserved vessel that must still hold a price in the market. The depreciation is 377 euro per day (Annex 48 of the documents presented by the Applicant). Based on this, as a second conclusion, to secure the value of this reefer vessel, the value of the vessel will never be below approximately 615,000 euro ($800,000 equivalent) if we take into consideration today's exchange rates of about 1 euro equal to US$ 1.3.

The value of the vessel is the price presented by myself from the experience obtained by the Guinea-Bissau Government which this year sold several vessels that had previously been confiscated. Information about this is to be found in the set of documents presented yesterday by the Respondent.

I turn now to the fourth element, the value of the cargo. The cargo consists of around 1,183 tonnes of frozen fish and 112 tonnes of fish flour. As your Tribunal knows, the cargo was confiscated not only by the decision on the merits by the appropriate authority, but *ex lege* by failure to pay the fine on the vessel. Therefore, once again, we cannot see how a bond could be posted for the release of something which is no longer the property of the Applicant. In this case, in contrast to cases such as *"Camouco"," Monte Confurco"* and *"Volga"*, the cargo has not yet been sold in public auction. Therefore, in order to release the vessel, a bond should also cover eventually the value of the cargo. The cargo has a specific estimated value of around half a million euro, as the Applicant himself recognizes at paragraph 28 of this Application (Annex 18).

The Applicant has, on several occasions, discussed the fact that the cargo is owned by a company based in Ghana, Unique Concerns Limited. Your Tribunal knows very well that the question of property is, for the purposes of these proceedings, absolutely irrelevant to this forum and principles of public order prevail.

Finally, we cannot forget the value of the fuel and lubricants (bunkering and oil); these are also the property of the Guinea-Bissau State. The bunkers have not been unloaded, in contrast with the *M/V "Saiga" Case*. In this regard, paragraph 8 of the Application

recognized that the *Juno Trader* had just been refuelled by the bunkering vessel *Amursk* before entering the exclusive economic zone of Guinea-Bissau. The Respondent does not have data on the value of the bunkers. It is for the Applicant to provide that value since the burden of proof is on their side. We can make an estimate of not less than 60,000 euro, a conservative figure. According to Annex 48 of the Application, the consumption is 683 euro daily, and so we consider it reasonable that the bunkers on board do not have less than fuel for 100 days, irrespective of possible services that this vessel was supplying to other vessels.

In addition, what must be taken into account for the calculation of the bond is the high cost of unloading operations and the minimum period of time requested for cold storage of the cargo until its sale. This will represent a conservative figure of around 30,000 euro.

Therefore, and for the above-mentioned reasons, there should be a reasonable bond to release the vessel with the cargo on board as it is now. There are two possibilities. One, if you take the amount included in the unpaid administrative decisions – fines and the value of the cargo – and you do not include the value of the vessel and bunkers, in this case a bond of 705,398 euro should be reasonable, calculated as follows: unpaid fines, 175,398 euro; the value of the cargo, 500,000 euro; and the unloading and cold storage before auction, 30,000 euro. On the contrary, if there is an issue over confiscation and the Tribunal takes into account the value of the vessel, cargo and bunkers that have already been confiscated, that must be excluded in the calculation of the bond. In this case, a higher bond of 880,398 euro should be considered reasonable, related again to the fine on the shipowner, the value of the vessel – and as I mentioned, 615,000 euro would be a reasonable amount –, the bunkering and oil, 60,000 euro, and the unloading operations and cold storage until auction of the cargo, 30,000 euro.

The Applicant will argue that they offered a reasonable bond to release the vessel. First of all, we have already repeatedly noted that this alleged bond was offered when the vessel had already been confiscated. However, if we come to discuss the amount of the bond offered, it is not very difficult to conclude that this so-called bond is clearly insufficient. The bond offered is limited to 50,000 euro, which by far does not cover the amount of the fine already imposed and the cargo already confiscated.

May I say one word in relation to the nature and form of the bond? As stated, Guinea-Bissau would be satisfied with a bond of the characteristics that your Tribunal has the opportunity to describe in its case law. In this regard, the bond should be in the form of a bank guarantee from a bank present in Guinea-Bissau or having corresponding arrangements with a Guinea-Bissau bank. The bank guarantee should state that it is issued in consideration of Guinea-Bissau releasing the *Juno Trader* in relation to the incidents dealt with in Minutes No. 14 of 19 October, and that the issuer undertakes to pay to Guinea-Bissau such sums up to the amounts that this Tribunal may consider, in its judgment, as may be determined by a final judgment or by agreement of the parties. Payment under the guarantee would be promptly after receipt by the issuer of a written demand by the competent authority of Guinea-Bissau, accompanied by a certified copy of the final judgment or agreement. That is simply the *"Camouco"* case law.

It is clear that Guinea-Bissau is not satisfied with the kind of bond allegedly offered by the Applicant. It is just a simple letter by which the insurance company commits to pay up to 50,000 euro. The Applicant has repeatedly stressed that it is a bank guarantee but it is not. Maybe the Applicant has a different notion of what constitutes a bank guarantee. The alleged bond cannot be seen as a bank guarantee but a simple letter. In particular, it is just a letter from an insurance company which is not an entity registered with the regulatory financial authority in the United Kingdom, the FSA.

Mr President, I shall terminate my representation by concluding that for the various reasons explained this morning and yesterday, the application of Saint Vincent and the

Grenadines should be set aside for lack of jurisdiction and/or inadmissibility and, as a subsidiary, for the lack of a deposit of a reasonable bond. Thank you.

The President:
Thank you very much.

We shall now have a 40–minutes' break. The proceedings will resume at 11.15 a.m. The meeting is adjourned.

(*Short adjournment*)

The President:
We shall now hear from the Applicant. I give the floor to Professor Karagiannis.

Réplique de Saint-Vincent-et-les Grenadines

EXPOSE DE M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/04, F, p. 12–24]

M. Karagiannis :
Merci beaucoup, Monsieur le Président, de me redonner la parole au nom de l'Etat de Saint-Vincent-et-les Grenadines.

Monsieur le Président, ma qualité de professeur dans une faculté de droit est une horrible déformation professionnelle que je porte lourdement et qui m'engage parfois à faire des réflexions peut-être indues, ou alors dues. C'est au Tribunal, naturellement, de décider.

En effet, je constate une chose depuis hier, à laquelle, à vrai dire, je ne m'attendais point. Bien sûr, vous le savez, l'Etat défendeur, la République de Guinée-Bissau, n'a pas déposé de contre-mémoire sur notre demande en prompte mainlevée. C'est tout à fait son droit, suivant le Statut du Tribunal, et surtout d'ailleurs le Règlement de votre Tribunal. Néanmoins, je constate ceci de particulier, la République de Guinée-Bissau a eu pour étudier nos arguments, je l'espère de manière approfondie, un délai allant du 18 novembre, date de dépôt de notre demande, au 6 décembre, c'est-à-dire hier. Nous, nous avons eu pour étudier leurs arguments la nuit d'hier, bien blanche. Cela a naturellement pour conséquence fâcheuse d'enlever à la personne qui parle en ce moment un peu de sa fraîcheur habituelle. Veuillez l'en excuser, et peut-être le Tribunal saisira cette occasion pour revoir un peu le règlement interne, de manière à ce qu'une plus grande équité, voire carrément une équité, puisse être établie entre les deux parties.

Plusieurs membres de la délégation de Guinée-Bissau ont pris la parole hier et encore ce matin. J'ai beaucoup apprécié tout d'abord l'intervention de M. Lopes, représentant du Gouvernement de Guinée-Bissau. Son discours m'a impressionné. Il nous a dit naturellement des choses qu'hélas nous connaissions déjà : par exemple, la Guinée-Bissau compte parmi les dix pays les plus pauvres au monde.

J'ajouterai quand même incidemment que l'Etat au nom duquel je parle, Saint-Vincent-et-les Grenadines, hélas pour lui, ne compte pas parmi les dix Etats les plus riches au monde. Pour employer un vocabulaire un peu suranné, cet Etat fait également partie du Tiers-monde.

Sinon, nous avons eu confirmation de ce que l'on savait pertinemment, que la République de Guinée-Bissau dépend, dans une très grande mesure, de l'exploitation des ressources halieutiques de sa zone économique exclusive. A juste titre, cette République ouest-africaine lusophone cherche à contrer le pillage de ses ressources par des capitaines ou des armateurs étrangers trop peu scrupuleux. Naturellement, ce n'est pas du tout le cas du navire *Juno Trader*, ainsi que nous l'avons dit à plusieurs reprises et le redirons ce matin.

Le représentant du Gouvernement [de Guinée-Bissau], M. Lopes, a dit que Saint-Vincent-et-les Grenadines est un pavillon de complaisance. Qu'est-ce que cela veut dire « pavillon de complaisance » ? Que quelqu'un m'apporte ici une définition du pavillon de complaisance. A partir déjà du célèbre avis consultatif de 1960 de la Cour internationale de Justice jusqu'aux plus récents arrêts de votre Tribunal, en passant par les travaux de la Troisième Conférence et de la Convention spéciale des Nations Unies, la cause est entendue, il n'y a plus rien à ajouter, sauf qu'on ne peut pas tout de même considérer qu'un pavillon de complaisance est égal à une violation ou à une probable violation du droit national d'un Etat côtier. Quiconque donc porterait le pavillon de Saint-Vincent-et-les Grenadines serait suspect ?

Le *Juno Trader*, le navire qui donne, à son corps défendant, son nom à la présente affaire devant votre Tribunal, appartient à une très importante holding, Irvin & Johnson Limited, qui a son siège dans la ville du Cap en Afrique du Sud. C'est une holding très importante. Entre autres, par plusieurs biais juridiques et sociétaux, elle contrôle le navire *Juno Trader*, le navire *Juno Warrior* qui a pêché la cargaison, ou encore la société Frozen Foods International Limited, etc. Cette holding, avec un grand nombre de navires – navires de pêche, cargos frigorifiques et autres – travaille avec un grand nombre d'Etats africains, entre autres le Mozambique, la Namibie, le Congo, le Ghana ou encore la Mauritanie ainsi que nous le voyons dans cette affaire.

Les navires qui, d'une manière ou d'une autre, dépendent de la holding Irvin & Johnson Limited sont tous munis de licences de pêche en bonne et due forme. Jamais, jusqu'à maintenant, au grand jamais, la holding ou un de ses navires ou une des sociétés qu'elle contrôle, n'a eu le moindre problème avec quelque autorité africaine que ce soit. Le *Juno Trader* lui-même a passé tout de même 10 ans à charger du poisson pélagique en Namibie, essentiellement, pour le livrer au Congo, au Ghana, au Cameroun, sans le moindre problème. Le premier problème, c'est l'affaire présente.

L'amalgame avec la pêche illicite qui est proposé par le conseil de Guinée-Bissau est potentiellement désastreux pour la bonne réputation de la holding Irvin & Johnson Limited, sans parler évidemment de la réputation du pavillon Saint-Vincent-et-les Grenadines.

Certains des conseils, hier, ont cherché sans doute par inadvertance, tout au moins dans un premier temps, à déformer légèrement mes propos. Monsieur le Président, je n'ai jamais qualifié la Guinée-Bissau d'Etat pirate. Et un autre conseil de Guinée-Bissau, plus véhément, peut-être plus véhément parce que plus jeune dans l'âge, a même franchi un pas supplémentaire en nous accusant d'avoir qualifié la Guinée-Bissau « d'Etat voyou ». Souvenez-vous, Monsieur le Président, j'ai commencé hier mon discours en rendant un vibrant hommage aux hommes et aux femmes de Guinée-Bissau qui ont tant lutté pour la libération de l'Afrique du joug colonial et j'ai, également, rendu, à plusieurs reprises, un hommage aux hommes et aux femmes qui, au péril de leur vie, cherchent tout de même à protéger les ressources biologiques de la zone économique exclusive de Guinée-Bissau.

Je devrais prendre position sur certains arguments de mon estimable collègue, M. Ricardo Silva. Il nous dit qu'il y a eu une confusion dans le camp du navire *Juno Trader*. Le navire, ou plutôt son propriétaire armateur, ne savait pas très bien qui était son représentant local, etc. Donc, c'est à juste titre, nous a-t-il dit hier, que le Ministère des pêches de Guinée-Bissau a hésité à prendre des contacts avec qui que ce soit. Soit dit en passant, le Ministère de Guinée-Bissau n'a jamais douté du fait que le *Juno Trader* portait, et porte toujours, on reviendra sur ce point, le pavillon de Saint-Vincent-et-les Grenadines. Il aurait pu quand même au moins appliquer l'article 73 et notifier cette immobilisation à l'Etat du pavillon. A supposer même que la République de Guinée-Bissau ait oublié la Convention – un oubli parfois habituel, disons normal dans certaines pratiques – au moins les gens du Ministère de Guinée-Bissau avaient devant eux le Décret-loi de 2000 de leur propre pays qui texto oblige la notification de toute immobilisation ou arrestation à l'Etat du pavillon.

De toute façon, sur la question de la représentation du navire *Juno Trader*, le 20 octobre 2004, la FISCAP, c'est-à-dire l'autorité compétente au sein du Ministère des pêches, s'adresse à la société Transmar dont le dirigeant est M. Tavares que vous avez entendu brièvement hier. Elle s'adresse à M. Tavares en sa qualité du représentant du navire *Juno Trader*, en lui notifiant l'Acte no. 14 qui nous pose d'ailleurs tous les problèmes. C'est l'annexe 12 attachée à notre Demande. Le 3 décembre 2004, c'est-à-dire il y a 4 jours, la FISCAP s'adresse encore au même représentant de Transmar, M. Tavares, toujours en sa qualité de représentant du navire *Juno Trader*, pour lui notifier cette fois-ci le changement de propriétaire, etc. (annexe 51 de notre Demande). La qualité de Transmar, et personnellement

de M. Tavares en tant que représentant du navire *Juno Trader*, n'est pas contestée par la Guinée-Bissau, jamais, sauf hier devant votre prétoire. Vous apprécierez.

Une autre argumentation de M. Silva porte sur la qualité du *Juno Trader* en tant que bateau de pêche. Il est bien entendu qu'un article 3, paragraphe 3, du Décret-loi guinéen de 2000, la législation pertinente, nous dit que des navires qui se livrent à des opérations de pêche connexes sont qualifiés eux-mêmes de navires de pêche. Disons tout de même que cette qualification nationale n'a pas forcément une valeur au niveau international, et notamment devant votre Tribunal.

Je voudrais signaler à cet effet, encore une fois, que le *Juno Trader* est un cargo frigorifique, un *reefer* comme on dit en langue anglaise. Il charge du poisson congelé mais il peut également charger d'autres choses en état de congélation : de la viande, du poulet, des bananes, etc., tout ce que l'on peut congeler. Ainsi donc, selon l'argumentation de M. Silva, le *Juno Trader* changerait de qualité suivant sa cargaison du moment. Si la cargaison est du poisson, c'est un chalutier, un navire de pêche. S'il n'a pas chargé du poisson, c'est autre chose. Je me demande naturellement quelle serait la qualification de l'administration compétente guinéenne si, par exemple, un porte-conteneurs parmi 100 conteneurs transportait également 5 ou 10 conteneurs de poisson. Peut-être il y aurait une solution formidable : que ce porte-conteneurs serait navire de pêche pour 5 pour cent, donc pour 5 pour cent la législation nationale lui serait applicable, etc.

Imaginons également que le navire ne soit pas constamment dans la zone économique exclusive de Guinée-Bissau, ce qui peut arriver à un navire tout de même de changer de temps à autres d'eaux maritimes, alors il serait considéré comme navire de pêche en Guinée-Bissau, comme cargo au Sénégal, comme autre chose dans un Etat voisin, etc. Cela n'est pas très sérieux !

Par ailleurs, on nous dit qu'il y a eu éventuellement transbordement illégal de poissons à bord du *Juno Trader*, à l'intérieur de la zone économique exclusive de la Guinée-Bissau. Cela, nous dit-on également sur la base de l'article 3, paragraphe 3, du Décret-loi de 2000, quel que soit le lieu où le poisson a été pêché. Nous protestons quand même de manière véhémente contre une telle extension. De toute façon, l'article 58, paragraphe premier, de la Convention de Montego Bay est particulièrement clair. Il mérite éventuellement d'être lu et entendu :

> « Dans la zone économique exclusive, tous les Etats, qu'ils soient côtiers ou sans littoral, jouissent, dans les conditions prévues par les dispositions pertinentes de la Convention, des libertés de navigation ... visée à l'article 87 »

– je rappelle que l'article 87, c'est la haute mer, visée donc à l'article 87 –

> « ainsi que de la liberté d'utiliser la mer à d'autres fins internationalement licites liées à l'exercice de ces libertés et compatibles avec les autres dispositions de la Convention, notamment dans le cadre de l'exploitation des navires ».

Monsieur le Président, l'exploitation du navire *Juno Trader*, seule et unique, est effectivement [pour ce navire] d'être chargé et déchargé de produits en principe congelés.

A un autre moment de l'argumentation de M. Silva, nous apprenons que le *Juno Trader* a été vu parallèlement à un navire appelé *Flipper*, toujours à l'intérieur de la ZEE guinéenne. Donc, suspicion, quelque chose de mal se trame entre le *Flipper* et le *Juno Trader*.

Sur ce premier point, je voudrais mentionner l'*auto de notícia*, le procès-verbal dressé par les agents de la Guinée-Bissau. Je peux lire : (*Continuing in English*) « *The vessel [*Juno Trader*] was discovered anchored parallel to Flipper, which was fishing* ». C'était le *Flipper* qui « *was fishing* ». Or il faut savoir que, si un chalutier pêche, comme c'est le cas du *Flipper*, il bouge forcément et a les agréments de pêche, notamment les filets, derrière lui. Il est impossible qu'un autre navire soit à l'ancre à côté d'un chalutier en train de pêcher pour plus de deux minutes, tout simplement parce que le chalutier qui pêche continue à progresser à une vitesse habituelle d'environ 5 noeuds. On se demande comment donc le transbordement peut être effectué et comment même on peut voir en parallèle et à l'ancrage les deux navires.

Surtout, le capitaine du *Juno Trader* et d'autres membres de l'équipage ont dit dans leurs dépositions écrites qu'ils ont vu plusieurs chalutiers, qu'ils ont cherché à éviter en manoeuvrant. Il est plus facile dans ces conditions au cargo de manoeuvrer pour éviter les chalutiers qui, eux, ont une route un peu immuable. Et dans la partie de la zone économique exclusive de Guinée-Bissau, proche de la zone économique exclusive sénégalaise, il y a effectivement deux champs extrêmement riches en poissons pélagiques.

Surtout, on ne nous dit pas qu'un navire a transbordé son poisson vers le *Juno Trader*. Le *Flipper* est totalement innocenté par les agents de Guinée-Bissau. Les contrôles n'ont rien donné. Tout de même, on ne peut pas infliger une amende, confisquer une cargaison et finir, pour faire bien, par confisquer le navire tout entier sur la base d'une suspicion que l'on cherche par ailleurs trop peu à fonder.

Je constate par ailleurs, avec un relatif plaisir, que la Guinée-Bissau ne conteste pas l'authenticité des *delivery acceptance reports*, de plusieurs documents d'inspection privés, des documents officiels de la Mauritanie, des connaissements, etc. C'est tout de même, Monsieur le Président, un sacré progrès. Sauf que M. Silva prétend que les rapports du CIPA – il s'agit du Comité scientifique des biologistes locaux – confirment que les espèces se trouvant à bord du *Juno Trader* ne se trouvent que dans les eaux de la zone économique exclusive de Guinée-Bissau. Je renvoie aux minutes d'hier, c'est la traduction française, page 22[*].

Pourtant, si on a la curiosité de lire les conclusions du CIPA, on voit – en traduction anglaise : « *The species identified aboard the* Juno Trader *are species that are found in our waters* ». Il n'y a aucun exclusivisme ici. Il y a une similitude de poissons et comme je le disais hier les poissons, comme les navires, bougent sans cesse. Le même rapport du CIPA, puisqu'on y est, nous dit également : *« are found in our waters, except for the species Brama brama, of the Bramidae family, which is occasionally found* ». Le brama brama, allez hop, lui aussi confisqué ! Il s'agit bien entendu d'une inadvertance de M. Silva. J'exclus naturellement tout propos malveillant sur ce point.

De même, hier, dans la matinée, si ma mémoire est bonne, le conseil de Guinée-Bissau en contre-interrogeant le capitaine du *Juno Trader*, M. Potarykin, a signalé certaines bizarreries qui auraient eu lieu à bord du *Juno Trader*. Ainsi donc, les cartons qui se trouvent toujours à bord de ce navire à Bissau, estampillés « *Juno Warrior* », avec tous les chiffres appropriés dont nous parlons dans notre demande, ces cartons donc ne mentionnent pas le lieu de pêche. Je peux dire au représentant de Guinée-Bissau que cela n'est pas nécessaire et souvent même n'est pas habituel. Ce qui nous intéresse c'est le nom du navire qui a pêché ici : *Juno Warrior*, son numéro d'identification et d'autres éléments évidemment que vous trouvez dans les annexes à notre Demande.

De même je peux apprendre au représentant de Guinée-Bissau qu'il n'est pas nécessaire que les originaux des connaissements se trouvent à bord du navire. Par ailleurs, cette société qui s'appelle SGS – pour ceux qui ne la connaissent pas, Société Générale de Surveillance – dont proviennent plusieurs documents annexés à notre Demande, est une

[*] Note du Greffe: Ce nombre de page se réfère à la version non-corrigée du compte-rendu.

société de droit suisse, indépendante, très bien cotée dans le milieu maritime et notamment dans le milieu de la pêche maritime et qui est chargée notamment par les éventuels acheteurs, mais pas uniquement, de la surveillance de la quantité et de la qualité. Hier matin également, le conseil de Guinée-Bissau a pu parler des certificats d'origine qui seraient introuvables. Ils ne sont pas introuvables, ils sont dans nos cartons à nous. On n'a pas cru nécessaire de les déposer auprès de votre Tribunal pour l'excellente raison que ces certificats d'origine sont établis par le chalutier qui pêche le poisson, ici le *Juno Warrior*. Il s'agit d'une spécification contractuelle. Naturellement, si le Tribunal souhaite avoir ces documents – nous ne proposons rien, mais s'il souhaite les avoir – nous nous conformerons à son souhait.

M. Silva, dans son brillant discours d'hier après-midi, s'est posé une question innocente. Est-ce anormal – excusez-moi, je lis de mes propres notes, je n'ai pas vérifié les minutes mais je ne crois pas m'être trompé – est-ce anormal pour un inspecteur d'être en civil ? Devant une telle innocence de question, on aurait tendance à dire bien sûr que non, pourquoi tout le monde devrait porter un uniforme plus ou moins militaire ?

Dans la même veine, M. Ricardo Silva s'emploie avec beaucoup de talent à nous dire que personne d'autre que l'équipage du *Juno Trader* n'a confondu les inspecteurs avec des pirates. Très bien. Sauf que notre estimable collègue Silva, apparemment, n'a pas lu au préalable le rapport de la FISCAP, c'est-à-dire l'autorité compétente en matière de pêche de Guinée-Bissau. Il s'agit d'un document intitulé « *Report on Maritime Inspection Mission* ». Ce rapport, nous ne l'avions pas, il nous a été remis hier, d'ailleurs comme je peux préciser le temps, après notre plaidoirie matinale. Mais grâce soit rendue à M. Silva d'avoir remis au Tribunal et à nous ce document. Ce document est daté du 28 septembre 2004, c'est-à-dire deux jours après l'arraisonnement du *Juno Trader* par les agents de la FISCAP. La phrase est la suivante, c'est la dernière phrase dans ce document – je le lis en traduction anglaise, fournis par M. Silva : « *We suggest that inspectors wear uniforms on missions since some captains say that they took them for pirates* ». Sans commentaire, Monsieur le Président, du moins la mésaventure du *Juno Trader* et de son équipage aura servi à quelque chose.

Si le rapport de la FISCAP, avec ses suggestions de bons sens, ma foi, n'est pas suffisant pour convaincre votre Tribunal qu'un homme en armes, habillé en civil ou en tenue totalement dépareillée, puisse être pris pour un pirate, il y a encore tout de même un extrait très beau, que je lirai en traduction anglaise, de la décision du tribunal régional de Bissau :

> « *In addition, it was proved that the launch belonging to the Maritime Control Commission does not possess any maritime identification. Moreover, neither does it have a radio or any means of communication, a fact which obliged the Applicant to continue his normal course, despite having been hailed by the former because he did not know if it was a pirate ship or an official vessel. Thus, there was no attempt at flight, as suggested in the decision of the Defendant.* »

C'est à peine au bout de quelques minutes, 5 ou 6 minutes selon les témoignages, que les hommes du zodiac ont commencé à tirer, avec un indéniable niveau de violence qui naturellement vous rappelle une autre affaire dont vous avez eu à connaître d'ailleurs dans ces parages également.

Ce qui nous attriste, c'est que le procès-verbal de Guinée-Bissau met en doute le fait qu'il y a eu un membre de l'équipage blessé pendant la fusillade. A cet égard, je vous renvoie au texte en langue originale espagnole, mais aussi en traduction, du navire-hôpital espagnol *Esperanza del Mar* qui a dû hospitaliser d'urgence le membre de l'équipage blessé.

M. Silva nous reproche encore une autre chose dans sa plaidoirie d'hier. J'attire votre attention, Messieurs les Juges, ce reproche est tout nouveau, tout neuf. On ne le trouve pas jusqu'à maintenant, et notamment on ne le trouve ni dans l'Acte no. 12, ni dans l'Acte no. 14, c'est-à-dire les deux actes des autorités compétentes locales qui procèdent à l'infliction de l'amende, à la confiscation de la cargaison etc.

Quel est cet argument ? Et bien, le *Juno Trader* n'aurait pas notifié son entrée dans la zone économique exclusive de Guinée-Bissau. Dans ma bonne faculté de l'Université Robert Schumann de Strasbourg, certes loin de la mer, je m'évertue quand même à apprendre à mes étudiants que les bateaux, dans le cadre de leur passage dans la mer territoriale, n'ont ni à notifier leur passage ni, a fortiori, à demander l'autorisation en vue de ce passage de l'Etat côtier. Si M. Silva exige la notification préalable pour la traversée de la zone économique exclusive, vous imaginez bien, Monsieur le Président, les noirs desseins de M. Silva pour la traversée dans la mer territoriale.

Dans un texte remis par la Guinée-Bissau hier vers 10 heures, je l'ai déjà dit, qui nous a été finalement communiqué l'après-midi après notre plaidoirie, signé Dr Malal Sané, l'auteur de ce texte qui est par ailleurs le coordinateur de la FISCAP, c'est-à-dire l'autorité compétente en matière de pêche et d'inspection de pêche, affirme que – en traduction anglaise : « *The Guinean authorities did not receive any information regarding the entrance of the Juno Trader into Guinean waters*. » Un peu plus loin, le même auteur, dans le même texte, affirme aussi qu'en vertu de l'article 31 du Décret-loi guinéen de 2000, traduction anglaise : « *The foreign fishing vessels must advise the Guinean authorities of their entry into the country's EEZ and subsequent exit* ». Dans la traduction anglaise on a le verbe « *advise* ». Dans l'original du texte de M. Malal, c'est « *informar* » en portugais.

A supposer même que le Décret-loi de 2000 de Guinée-Bissau dise tout cela, cette réglementation nationale ne peut être prise que pour ce qu'elle est : une réglementation nationale qui devra impérativement être comparée par tout juriste, et, au sommet, par votre Tribunal, avec le droit international de la mer et, bien entendu, avec la Convention de Montego Bay, qui, je crois comprendre, est un peu plus libérale concernant la navigation dans la zone économique exclusive que M. Silva et M. Malal ne le prétendent.

Mais, je l'ai dit à plusieurs reprises depuis hier, il m'est désagréable de devoir ici plaider contre la République de Guinée-Bissau. A vrai dire, je ne plaide pas contre la République, l'Etat, le peuple, la nation de Guinée-Bissau, je plaide contre certains administrateurs du Ministère de la pêche de ce pays. En effet, Monsieur le Président, le législateur de Guinée-Bissau est beaucoup mieux informé du droit international de la mer que M. Malal ou que le conseil de Guinée-Bissau.

Dans le texte de l'Article 31 du Décret-loi de 2000, l'original portugais est le suivant. C'est un moment désagréable et pour moi et pour vous. Je chercherai à prononcer très lentement, mais je dois lire juste quelques mots en portugais, avec votre permission, Monsieur le Président, car c'est d'une extrême importance pour nous.

Article 31 : « *As embarcações de pesca industrial estrangeiras autorizadas a operar na zona economica exclusiva da Guiné-Bissau …* », doivent notifier leur entrée et leur sortie de cette zone. Je répète : « *as embarcações autorizadas a operar na zona económica* ».

Je constate que dans l'ensemble des documents qui nous a été remis hier, je le répète, après notre plaidoirie, et qui vous a été sans doute remis également, l'original portugais n'y figure point, alors que presque tous les textes sont en original portugais et en traduction anglaise. On ne trouve ici que la traduction anglaise du début de l'Article 31 que vous m'avez permis de lire en portugais. Quelle est la traduction anglaise ? « *Foreign industrial fishing vessels operating in the exclusive economic zone of Guinea-Bissau*». Il y a tout de même une énorme différence entre des bateaux étrangers qui opèrent dans la ZEE et, comme le dit le texte portugais, des bateaux *autorisés à opérer*.

Le *Juno Trader* n'a pas été autorisé à pêcher dans la zone économique exclusive de Guinée-Bissau. Le *Juno Trader* n'est absolument pas concerné par cette disposition. Je comprends tout à fait que la Guinée-Bissau impose cette règle de notification aux navires de pêche, aux chalutiers munis dûment d'une licence de pêche. Je crois même que c'est indispensable par ce biais pour que l'Etat côtier sache à chaque moment ce qui est prélevé finalement de ses ressources halieutiques dans sa ZEE.

Je vous conseille donc ardemment de ne point tenir compte de la traduction anglaise de cet article. Je pense que le texte portugais, qu'il est vrai nous n'avons pas traduit ni en anglais ni en français, est suffisamment clair même pour un non lusophone, pourvu qu'il comprenne un peu le français, même un anglophone, pour le comprendre..

J'attire également votre attention sur la troisième page de cet ensemble de documents que la Guinée-Bissau nous a remis hier. Signée Ricardo Alves Silva, Counsel for the Republic of Guinea-Bissau : « *I hereby certify that the translation hereunder are exact and that they correspond to the documents attached in this bundle*. » Je ne suis pas tout à fait d'accord avec cette confirmation de M. Silva.

Dans la suite, il est allégué que le capitaine du *Juno Trader*, Nikolay Potarykin, a refusé de remettre les documents aux autorités, aux agents de Guinée-Bissau. Là, je dois le dire franchement, je suis désolé, c'est un mensonge. En dépit de la panique et des menaces et des mauvais traitements, le capitaine a coopéré. Le procès-verbal lui-même établi par les agents de Guinée-Bissau nous dit en traduction anglaise : « *The captain declared that he had on board a total of 1,183 tonnes and 112 tonnes of fish for flour and 334 tonnes of diesel* ». Il s'agit quand même d'un début de coopération.

Selon M. Silva, Georges, le fameux militaire qui voulait intimider tout le monde et qui a battu, tout de même, une personne aussi vénérable que le capitaine Potarykin, que vous avez entendu hier, le fameux Georges, selon M. Silva, parlait russe, ce qui est vrai, et M. Silva s'étonne que personne ne l'ait compris à bord du *Juno Trader*. Disons que Georges n'avait d'ailleurs pas trop besoin de parler russe pour se faire comprendre. Sa kalachnikov, plus russe que nature, menaçante, était elle-même bien parlante. Georges s'est totalement désintéressé des documents qui lui ont été présentés par le capitaine. Le capitaine est affirmatif dans ses témoignages écrits : tout ce qui intéressait le brave militaire était que le *Juno Trader* aille à Bissau.

Là, il est vrai que le capitaine Nicolay Potarykin a refusé de se dérouter vers Bissau. Pour quelle raison ? Une bonne raison. Il n'avait pas de carte marine des eaux proches de la côte de Guinée-Bissau. Il était suicidaire de faire les 90 à 100 milles marins qui le séparaient du point d'arraisonnement jusqu'au port de Bissau. En effet, il suffit de voir une carte générale de géographie de ce pays pour comprendre que la navigation y est extrêmement difficile. Il y a beaucoup d'îlots, de rochers, de hauts fonds découvrants, et, plus loin, de canaux et de rivières extrêmement difficiles à emprunter.

Qu'à cela ne tienne ! Les officiers du navire *Cacine*, qui ont fini par venir sur l'endroit, ont remis au capitaine Potarykin les cartes marines qu'il réclamait. Après quoi, le capitaine a tout simplement, avec l'aide évidemment des locaux, conduit son navire au port de Bissau. Son refus n'était donc pas un vrai refus.

Il y a un autre reproche par ailleurs fait par M. Silva : le représentant du *Juno Trader* aurait attendu un mois et demi pour transmettre les documents sur le transbordement. Il faut bien encore une fois rappeler, parce qu'on l'a écrit dans notre demande écrite, que le représentant du *Juno Trader* ne savait pas quoi faire. Aucun reproche, aucun acte d'accusation ne leur parvenait, ni à eux, ni au capitaine.

Plusieurs lettres ont été adressées par M. Tavares à la FISCAP. La première communication est carrément la communication de l'Acte no. 14 et 12 qui condamne. D'abord, on condamne, après, on négocie. D'abord on tire, après on somme de se rendre, en

quelque sorte. Signalons que nous n'avons jamais reçu le procès-verbal établi le 26 septembre. Si, nous l'avons reçu, Monsieur le Président, vers midi, après notre plaidoirie matinale. Mieux vaut tard que jamais, bien entendu.

Le capitaine a refusé de signer le PV établi par le militaire Georges et ses hommes. Premièrement, parce que ce PV était uniquement en portugais, langue inconnue du capitaine. Certes, le militaire Georges lui a traduit sommairement en russe ce PV. Peut-on faire confiance à 100 pour cent à un interprète qui vous menace avec une kalachnikov, qui vient de vous taper dans le visage ? Il y a peut-être un petit doute ici. Mais, de toute façon, mettons que la traduction aurait comblé les exigences du capitaine, il y a une inexactitude contre laquelle le capitaine s'est révolté, une inexactitude qui figure dans le PV. En effet, c'est que le *Juno Trader* serait à l'ancre au point précis où on l'a vu pour la première fois et où la fusillade a commencé.

Sur ce point, nous n'insisterons pas. Je dis, du point de vue du juriste, qu'il est permis de jeter l'ancre dans la zone économique exclusive. La zone économique exclusive n'est pas la mer territoriale. De toute façon, techniquement, il est impossible pour le *Juno Trader* d'avoir jeté l'ancre vu le timing facile à calculer. Si le Tribunal international du droit de la mer le désire, même tardivement, il peut nommer des experts en navigation, s'il le souhaite, il peut consulter tous les spécialistes qu'il veut, il peut aussi nous demander, nous allons nous conformer sans problème, de lui remettre le cas échéant le livre de bord, le livre des machines, les cartes marines du capitaine, tout ce qu'il veut. Nous n'avons rien à cacher. Nous n'avons pas pris l'initiative de remettre tous ces documents car, honnêtement, cela me paraît totalement inutile, déjà d'un point vu matériel, mais aussi du point de vue du droit international.

On peut, si l'on veut, s'arrêter dans la zone économique exclusive. C'est dans la mer territoriale que le passage doit être « prompt » et « continu », je crois que ce sont les termes, pas dans la ZEE.

Je ne voudrais pas revenir sur ce que M. Silva nous disait hier : les lettres ont été ou n'ont pas été signées par M. Rosa, qui incidemment est le Président actuel de la République de Guinée-Bissau. J'avoue que je n'ai pas le plaisir de reconnaître la signature de M. Rosa, mais les papiers qui vous ont été remis sont marqués « Rosa ». La société ghanéenne, propriétaire de la cargaison, s'adresse à M. Rosa, *Government of Guinea-Bissau*. Tout cela, c'est un peu flou. Vous apprécierez librement.

M. Silva nous dit également qu'il n'est pas vrai que l'équipage avait été détenu. Tout dépend de ce que mon honorable collègue entend par détention. Pour nous, dans le cadre des articles 292 et 73, c'est : « empêcher une personne de pleinement jouir de la liberté d'aller et de venir. » Or, sans passeport, on ne peut pas faire grand-chose, surtout si l'on est Russe ou Ukrainien dans un pays africain. Il est vrai que certains marins ont été munis de *shore passes*, c'est-à-dire de documents qui leur permettent d'aller à terre ferme entre autre pour se distraire un peu, *last but not least* pour acheter de quoi manger et boire.

Il est faux également de prétendre que les passeports ont été rendus. Certains ont été rendus, d'autres, non. Hier soir encore, on a appris que 6 membres de l'équipage du *Juno Trader* étaient privés de passeport. M. Silva a fermement annoncé que même le capitaine Potarykin s'est vu restituer son passeport. Il s'est vu restituer son passeport le 2 décembre pour qu'il puisse venir témoigner devant votre Tribunal. Etrange idée parfois de la liberté, de la non-détention.

On nous dit également que l'amende infligée par les Actes no. 12 et 14 est une amende non disproportionnelle. Est-ce qu'on oublierait quelque part la confiscation de la cargaison du *Juno Trader* ? La cargaison avait été vendue le 23 septembre par connaissement à la société ghanéenne, que vous connaissez, Unique Concerns Limited, pour une valeur

approximative de 460 000 dollars des Etat-Unis d'Amerique. M. Silva considère que la garantie bancaire de 50 000 euros n'est pas une somme appropriée.

Pourquoi a-t-on attendu hier pour nous le dire ? Ne s'agirait-il pas quelque part ici d'une espèce *d'estoppel* aux frais de la République de Guinée-Bissau ? De toute manière, c'est au Tribunal de dire si cette somme est adéquate ou non.

M. Silva nous dit également que la décision du tribunal régional de Bissau ne pouvait avoir un quelconque effet. Sa décision n'est pas pertinente. C'est un peu ce que nous voulions entendre, Monsieur le Président. On savait que l'administration de Guinée-Bissau se fichait éperdument des décisions de la justice de son propre pays. On apprend maintenant que même le juriste employé par l'administration des pêches de Guinée-Bissau ne fait pas grand cas des décisions de justice. On croit rêver quelque part !

On passe parfois le plus clair de son temps, M. Silva et encore ce matin M. García-Gallardo, a nous expliqué que la décision du juge du tribunal régional de Bissau est nulle et non avenue, que le juge local franchement ne connaît rien au droit bissau-guinéen. Le droit pour certains en Guinée-Bissau n'est pas ce que disent les tribunaux qu'il est, mais ce qu'ils disent eux-mêmes qu'il est. Pour finir par dire que le tribunal n'a rien compris au droit guinéen. Cela me désole, cela m'inquiète et cela me consterne.

M. Silva, à la fin de sa plaidoirie, nous dit que vouloir condamner la Guinée-Bissau à payer les frais de procédure, c'est un chantage. C'est le mot de la traduction française que j'ai entendu. C'est un peu larmoyant, tout cela. Ce n'est pas un chantage, c'est l'article 34 du Statut du Tribunal international du droit de la mer, si naturellement le Tribunal nous suit dans nos conclusions.

Et puis, M. Staker prétend que nous prenons position uniquement sur le fond de cette affaire. Nous évitons tout de même de confondre l'article 292, la procédure de prompte mainlevée, avec le fond de cette affaire. Nous savons très bien que votre Tribunal, dans le cadre de cet article, n'est pas compétent pour dire une fois pour toutes qui a raison, qui a tort. Mais le Tribunal de Hambourg doit calculer la caution ou autre garantie financière sur la base, tout de même, de quelque chose, ainsi que les arrêts *« Camouco », « Volga »* et autres le disent.

Un des critères, le critère principal, ainsi que M. García-Gallardo s'est évertué à nous le dire ce matin, est la gravité des infractions. Nous nous sommes attelés à démontrer, et dans notre demande, et dans nos deux plaidoiries, qu'il n'y a pas gravité d'infraction. Et pour cause : il n'y a même pas d'infraction. Il n'y a pas de pêche illégale, on ne pouvait pas pêcher. La cargaison a une origine attestée par tant de documents.

Puis le tribunal régional de Bissau, que M. Silva a déclaré, ni plus, ni moins, ignorant de la loi guinéenne, sinon carrément illégal, si j'ai bien compris, sinon, je le prie de m'excuser, le Tribunal dit explicitement que le requérant, qui demande le sursis à exécution, doit être – je l'ai en traduction anglaise – : « *the possessor of a right* ». Si on n'était pas possesseur, alors, évidemment, le tribunal n'aurait pas établi une décision en notre faveur. Il est vrai que tout cela, je le disais hier est *prima facie*, de prime abord. Nous ne contestons nullement la possibilité pour un juge de fond de Bissau de prendre une décision qui, éventuellement, serait contraire. Je constate seulement que l'administration des pêches de Guinée-Bissau écarte totalement cet aspect qu'est la décision de suspension. Si elle était tellement convaincue de son bon droit, peut-être aurait-elle pu avoir tout de même à sa disposition quelques recours, par exemple un appel, etc.

Dans cette même décision, qui tout de même nous intéresse, on peut également lire – toujours en traduction anglaise, Monsieur le Président :

> « *In the present case, based on the stated facts, this court is in no doubt that failure to suspend the decision of the Defendant, the Interministerial*

Maritime Control Commission at the time caused serious or not easily repairable injury to the Appellant. As shown in paragraph 1, the vessel Juno Trader, *belonging to the Appellant, loaded all the fish that was on board in Nouadhibou, Mauritania. All the relevant formalities required by that country were satisfied in respect of its voyage to Ghana, where the respective cargos would be delivered to their respective consignees, clients. It was thus obvious that the fish on board the ship was not caught in Guinea and, moreover, nor was the ship itself a fishing vessel as the Defendant tried to claim in its reports.* »

Monsieur le Président, un autre argument avancé par M. Staker concerne la compétence du Tribunal et la recevabilité de notre demande. A vrai dire, avec des variantes, l'argument de mon excellent collègue Staker est le même dans les deux cas. Le *Juno Trader* aurait changé de propriétaire et le Saint-Vincent-et-les Grenadines ne serait plus l'Etat du pavillon du *Juno Trader*, parce que confisqué, et automatiquement confisqué par l'administration, si dans un certain délai l'amende infligée n'est pas payée.

M. Tavares, le représentant local du *Juno Trader*, a bien demandé une prorogation du délai de paiement, mais entre-temps Saint-Vincent-et-les Grenadines a eu la malheureuse idée de s'adresser au Tribunal international du droit de la mer. La lettre qui annonce la confiscation est datée du 3 décembre. Le tampon, c'est bien Bissau. L'origine serait-elle peut-être Hambourg ? A voir.

La prorogation demandée par M. Tavares était nécessaire, pas tellement pour avoir la somme, car cette somme, qui n'est tout de même pas légère à supporter, pouvait être trouvée, mais afin de pouvoir clarifier, dans les jours qui suivraient, la situation matérielle et juridique de la cargaison qui, elle, avait été confisquée.

Dans un document signé Malal Sané, le coordinateur de la FISCAP, mais non daté, l'auteur reconnaît que le représentant de l'armateur a sollicité une prorogation du délai de paiement de l'amende de 15 jours, en ajoutant que cette prorogation n'a pas été concédée. C'est ma traduction du portugais, mais vous avez la traduction en anglais aussi. Libre à l'administration de Guinée-Bissau, au terme du décret-loi, si je comprends bien, de concéder ou de ne pas concéder cette prorogation. Des raisons plus qu'élémentaires d'équité et de probité imposent que l'administration se donne la peine de répondre à l'armateur, qui attend cette réponse à sa demande de prorogation, surtout si à la clef la sanction qui menace l'armateur n'est autre que la confiscation du navire. Aucune démarche n'a été entreprise pour informer qui que ce soit de la part de l'administration de pêche guinéenne.

La confiscation et le changement de propriétaire sont censés avoir eu lieu le 5 novembre. Que se passe-t-il après ? Voyons un peu, car c'est intéressant.

Le 18 novembre, l'armateur dépose une lettre de garantie P&I d'une valeur de 50 000 euros auprès du Ministre de la justice, du Ministre des pêches, avec copie au FISCMAR. L'original a été déposé au tribunal compétent. Tout ce beau monde accepte sans rechigner l'acte de dépôt de cette lettre de garantie. Personne, même pas les autorités compétentes du Ministère des pêches, ne se serait aperçu que celui qui dépose la lettre de garantie en vue de la prompte libération de son navire, n'est plus du tout propriétaire de son navire.

Puis, saisi d'une demande de suspension des effets juridiques de l'Acte no. 14, le tribunal régional de Bissau, après avoir étudié le dossier, ordonne, comme on le sait, la suspension de ces effets avec le résultat concret d'ailleurs que l'on connaît. Le juge du tribunal régional de Bissau ne se serait-il pas aperçu lui non plus de ce changement de propriétaire du *Juno Trader* alors même qu'il a à sa disposition tous les documents et qu'il connaît, je présume naturellement, même si certains ont exprimé des doutes, le Décret-loi de 2000 ? *Jura novit curia*. Tout cela est bizarre.

Après avoir vu ce qui était bizarre, passons maintenant au granguignolesque. La lettre datée du 3 décembre annonçant que le *Juno Trader* a changé de propriétaire par le biais de sa confiscation s'adresse à Transmar Services, c'est-à-dire à M. Tavares que vous connaissez très bien. M. Tavares et sa société y sont qualifiés, *expressis verbis*, de « *local representative of the ship* Juno Trader ».

C'est à croire que le Ministère des pêches, à l'origine, nous dit-on, de cette mesure, n'est pas lui non plus conscient que le *Juno Trader* aurait changé de propriétaire. Le moins que l'on puisse dire est que M. Tavares est demeuré représentant local du *Juno Trader* alors que ce dernier appartient, nous dit-on, depuis déjà un mois au gouvernement local.

Au moins, Monsieur Tavares, vous saurez désormais à qui envoyer vos factures. Vous avez changé d'employeur. De même, le capitaine Potarykin et les membres de son équipage devront enfin cesser de réclamer leurs salaires à la Juno Reefers Limited. Il est grand temps que ces pauvres marins apprennent qu'ils ont changé, eux aussi, d'employeur.

De même, on se demande pourquoi le pavillon de Saint-Vincent-et-les Grenadines continue à flotter à bord du *Juno Trader*. Pourquoi les documents de l'enregistrement et d'autres n'ont pas été modifiés ? Il y a mille autres questions amusantes du même genre à poser.

J'ajoute que la lettre annonçant la confiscation du *Juno Trader* n'est pas signée par les représentants de la Commission interministérielle de pêche et qu'elle a été remise à M. Tavares, je ne sais plus si elle a été remise personnellement à M. Tavares ou à son bureau local, le 3 décembre. A quelle heure ? A 17 h 30, alors que les fonctionnaires de la République de Guinée-Bissau, comme ceux de beaucoup d'autres pays chauds, ont un horaire continu jusqu'à environ 14 h 30. Naturellement, je conçois qu'un fonctionnaire puisse rester dans le bâtiment d'un ministère, mais, Monsieur le Président, quelle précipitation pour mettre le Tribunal devant un nouveau fait accompli ! On a même « violé » les horaires de travail normaux des fonctionnaires locaux.

Pour parler un peu plus terre à terre, Monsieur le Président, comme l'on dit en français, « la ficelle est un peu grosse ». Contre toute attente, on nous annonce, un bon mois après le changement de propriétaire, par rapport à la date de l'événement, que le propriétaire du *Juno Trader* n'est plus son propriétaire, alors que les autorités locales, y compris judiciaires, nous considèrent toujours comme propriétaires et même deux jours après la date du début des audiences prévues à l'origine par vous-mêmes au 1er décembre 2004.

De là à dire que si l'Etat de Saint-Vincent-et-les Grenadines n'avait pas saisi le Tribunal international du droit de la mer, la Juno Reefers Limited serait toujours le propriétaire du *Juno Trader*, il n'y a qu'un pas. Ce n'est pas précisément nous qui franchissons ce pas. C'est une personne anonyme qui a assisté, hier après-midi, à la brillante plaidoirie de mon collègue Staker et qui, s'adressant à une autre personne, a dit – en anglais, je traduis, parce-que j'ai entendu : « Si le Tribunal international du droit de la mer accepte cet argument – confiscation et changement de propriétaire – il n'a qu'à fermer boutique en matière de prompte mainlevée ». Ce ne sont pas mes propos. Je traduis maintenant en termes plus polis et plus juridiques ce que l'assistance a murmuré. La procédure de l'article 292 n'aurait plus aucun sens si tout Etat côtier pouvait couper court à cette procédure en ordonnant la confiscation du navire immobilisé, qui plus est dans un court délai, pour plaider par la suite l'incompétence du Tribunal de Hambourg étant donné que la demande de prompte mainlevée aurait été introduite par un non-Etat du pavillon, volant au secours d'un non-propriétaire ou d'un non-armateur.

De toute manière, l'article 73, paragraphe 1, qui nous intéresse au premier rang, prévoit une liste de mesures que pourrait prendre l'Etat côtier, sans que ces mesures naturellement empêchent d'actionner la demande de prompte mainlevée. Parmi ces mesures, on trouve la saisie qui, le cas échéant, je ne voudrais pas être tout à fait affirmatif, mais, le cas

échéant, serait proche de la confiscation. Toujours est-il que cette liste de mesures est non exhaustive. Il est clairement marqué l'expression « y compris ».

De même, autre expression qui m'intéresse, il est marqué : « toutes mesures ». Je m'excuse, je n'utilise que la version française officielle de la Convention.

Evidemment, une question se pose au Tribunal et à nous-mêmes : n'y aurait-il pas de mesures nationales qui pourraient vider de son sens la demande et la procédure de prompte mainlevée devant votre Tribunal ? Eh bien, Monsieur le Président, il me semble qu'il y en a. Il s'agirait de brûler le navire ou de le couler, si possible dans une grande profondeur, afin qu'il soit irrécupérable. Mais je m'arrêterai là, Monsieur le Président. Je ne voudrais pas donner de mauvaises idées supplémentaires aux agents de Guinée-Bissau. Je vous remercie.

The President:

Thank you very much, Professor Karagiannis.

We shall resume at 3 o'clock this afternoon when we will hear further from Professor Karagiannis.

(La séance est levée à 12 h 40.)

PUBLIC SITTING HELD ON 7 DECEMBER 2004, 3.00 P.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT and LUCKY; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines: [See sitting of 6 December 2004, 10.00 a.m.]

For Guinea-Bissau: [See sitting of 6 December 2004, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 7 DECEMBRE 2004, 15 H 00

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, TREVES, MARSIT, NDIAYE, JESUS, XU, COT et LUCKY, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines : [Voir l'audience du 6 décembre 2004, 10 h 00]

Pour la Guinée-Bissau : [Voir l'audience du 6 décembre 2004, 10 h 00]

The President:
This afternoon we will continue hearing the Applicant. I give the floor to Mr Lance Fleischer.

Reply of Saint Vincent and the Grenadines (continued)

STATEMENT OF MR FLEISCHER
ADVISER OF SAINT VINCENT AND THE GRENADINES
[PV.04/05, E, p. 4–7]

Mr Fleischer:
Good afternoon, Mr President, distinguished Members of this Tribunal. Thank you for the opportunity you have given me to address this Tribunal. My name is Lance Fleischer and I work at Juno Management Services SAM, a company registered in Monaco. This company is a wholly-owned subsidiary of the South African seafoods company Irvin and Johnson Ltd., based in Cape Town.

Given that I am not a legal practitioner in the same way as Mr Tavares, but rather a manager of more straightforward activities, such as operating reefer vessels and pelagic factory freezer trawlers, please allow for my lack of legal terminology. I have been involved in the pelagic fishing business for the past 10 years but this is the first time I find myself in a hearing of this nature.

I will address three issues: the value of the cargo; the value of the vessel; the value of the whole package, and thus, should this distinguished Tribunal so decide, the value of the bond.

Your Honours, I would like to speak from the heart. The *Juno Trader* is a lovingly maintained lady of 35 years old, and she is stuck. Will she ever be freed, and in what condition? Alone I was not able to resolve this conundrum during my visit to the wonderful country of Guinea-Bissau last month, but perhaps the Tribunal can do that. I met fantastic people. Guinea-Bissau is a wonderful and interesting place but I could not resolve this problem.

The value of the cargo: the cargo on *Juno Trader* was sold for a value of US$ 459,938.65 cents on terms C&F basis in Tema, Ghana. A copy of the invoice is available if the Tribunal wishes to see it. This includes fishmeal valued at US$ 63,280.

The Guinea-Bissau Technical Fish Inspection Commission, CIPA, found the cargo in good condition when they inspected it in early October, with temperatures at –20°C. We were informed that the fish authorities, FISCAP, had placed the frozen fish cargo on auction around 26 or 27 October, and our agents were subsequently informed on several occasions that the cargo would be discharged at any moment. However, we were surprisingly informed yesterday that the cargo has not yet been sold in public auction, and it is now more than a month later. Let me remind you that the frozen fish cargo is still inside the *Juno Trader* with the compressors and the freezing equipment still running.

I would like to suggest that, given the frozen fish cargo remains unsold at this late stage, there is a good chance that its market value has been considerably reduced, perhaps even to zero. In addition, we understood initially that the fishmeal was not confiscated and for sale, as it appears that the fishmeal did not interest the CIPA and its origin, Mauritanian or Guinean, was not an issue, but during my stay in Guinea-Bissau I can assure you that nobody had the slightest interest in the fishmeal. We would respectfully suggest that the value of the fishmeal be deducted from any agreed valuation of the cargo.

The value of the vessel: the net book value of *Juno Trader* on our account is US$ 460,000. As you have heard from the Guinea-Bissau delegation, and I would like to thank them for this, the vessel is in good condition for a ship of this age. As with all the ships that we manage, they are all maintained in top-class condition with all class and statutory documents up to date. How else could we trade legally in all the ports at which we call, such as Tema, Matadi, Maputo, Nouadhibou and Walvis Bay? These are all African ports where

this business is conducted. The *Juno Trader* as a reefer is able to store and hold frozen cargo at the required temperature of -18^{o}C, which is the requirement on most charter parties and also required to be mentioned on bills of lading in the reefer trade.

As for the market value of the vessel, I would suggest that the market value of the vessel "as is, where is" could be the subject of considerable debate, and indeed affected by the potential doubts over flagging and ownership as suggested by Mr Staker in his speech yesterday. Let us say that the vessel at anchorage off Port of Bissau is very difficult to value and I would probably have to look at other vessels in similar places. Again, I speak from the heart: I can assure you that the value of the vessel would be zero if, unhappily, it ended up in the same way as the *Josephine*, which I saw at anchor off the Port of Bissau and which is currently listing seriously and will probably sink soon. I gather this was reported on Guinea-Bissau radio last week. This is something which I report because I have seen those vessels.

The value of bunkers: we have left on board about 210 tons of gasoil. The price of gasoil in Guinea-Bissau is 350 CFA francs per litre. However, the bunkers are needed to keep the engines running, so perhaps the value of the bunkers is also very difficult to ascertain as, if the compressors stop running, then the cargo will be spoiled and the bankers will have a negative value if you take them out of the vessel.

The value of the discharge costs: I do not know how to value a discharge cost there as normally we would not be involved in discharge. These costs are not for the vessel owner in a C&F delivery; they are for the charterer or the receiver.

I would like to suggest also that we consider the value of goodwill. Notwithstanding questions of ownership of the vessel, cargo and crew, the undisputed fact is that the *Juno Trader* has acted as a floating cold storage off Guinea-Bissau since 27 September. The running costs out of pocket have been about $3,600 per day, as per the submission. But, more importantly, the vessel has been preserved, the cargo has been preserved, and the crew and military guards on board have been well looked after. I would request that this element of valuation is extremely valuable to the owners, whoever they may be, and this fact probably outweighs all the rest.

I would respectfully request your Honours that it is very difficult to consider the value of any of the above items separately: the cargo, vessel, bunkers and crew form one indivisible whole with intrinsic value off port of Guinea-Bissau only if they are kept operating.

If this Tribunal should decide it has jurisdiction in this case, that the case is admissible and well grounded, and that an order for prompt release can be issued, then I respectfully submit that the value of the bond should take all the above factors into consideration.

Thank you again, Mr President, for the opportunity to address the Tribunal.

The President:
Thank you very much, Mr Fleischer.

I now give the floor to Mr Vincent Huens de Brouwer.

EXPOSE DE M. HUENS DE BROUWER
AGENT ADJOINT DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/05, F, p. 8–11]

M. Huens de Brouwer :
Monsieur le Président, Messieurs les Membres du Tribunal, je voudrais d'abord faire mention d'un document qui vient de nous être transmis par le conseil adverse. Il s'agit, me semble-t-il, d'une déclaration selon laquelle tous les membres d'équipage seraient libres. Nous maintenons sur ce point notre déclaration de ce matin selon laquelle il demeure 6 passeports retenus par les autorités de Guinée-Bissau. Nous n'acceptons pas ce document et nous demandons humblement au Tribunal d'en faire autant.

L'occasion m'est donnée d'intervenir sur la forme de la caution telle que prévue par l'article 292 de la Convention des Nations Unies sur le droit de la mer.

L'exploitation commerciale des navires, y compris ceux de pêche, nécessite pour l'armateur une couverture d'assurance responsabilité civile. Dans le milieu maritime, la très grande majorité des armateurs sont couverts en ce sens par leur P&I Club *(Protection and Indemnity Club)*. Les P&I Clubs sont en réalité des mutuelles d'armateurs disposant d'une capacité financière très importante alimentée par les primes versées par leurs membres, c'est-à-dire les armateurs.

La moyenne des réserves de fonds disponibles, appelées les *free reserves*, dans les caisses des P&I Clubs dépasse les 100 millions de livres sterling. C'est le cas des membres de l'International Group of P&I Clubs, qui regroupe une dizaine des clubs les plus réputés dans le monde des activités maritimes, et dont fait partie *The Shipowners*, c'est-à-dire le P&I Club du *Juno Trader*, qui a déposé le 18 novembre 2004 sa lettre de garantie pour un montant maximum de 50 000 euros au tribunal compétent de Bissau.

L'importance des réserves financières des P&I Clubs les range incontestablement parmi la catégorie des institutions financières reconnues et appréciées pour leur sérieux aux quatre coins de la planète. D'ailleurs, sur ce point, nous souhaitons rappeler l'article de Madame Anne-Katrin Escher, déjà mentionné au paragraphe 34 de notre Demande.

La société maritime internationale, dont font bien entendu partie les sociétés de pêche et les administrations spécialisées dans la pêche, ne saurait donc ignorer les capacités et le sérieux d'institutions comme les P&I Clubs et, en particulier, la portée de leur engagement contenu dans leur lettre de garantie.

Cette apparente ignorance dont fait preuve le conseil de la Guinée-Bissau s'agissant des P&I Clubs est d'autant plus étonnante dans le cas du P&I Club du *Juno Trader*, c'est-à-dire *The Shipowners*, car il est de notoriété publique que *The Shipowners* est un P&I Club spécialisé dans la couverture de la responsabilité civile des chalutiers. Peut-être les chalutiers de Guinée-Bissau ne sont pas couverts par ce P&I Club ni par aucun autre mais la FISCAP, lors de ses inspections de routine, a forcément rencontré un chalutier étranger étant couvert par un P&I Club.

Le conseil de Guinée-Bissau minimise de façon opportune cet acteur incontournable et essentiel des activités maritimes que représente l'institution du P&I Club, en la qualifiant sans plus de détail de « compagnie privée » ayant émis une lettre (page 23 des minutes en français du défendeur, alinéa 16[*]).

Ma propre expérience de correspondant P&I Club à Marseille, au sein de la société Eltvedt & O'Sullivan, qui représente en Europe, depuis de nombreuses années, le réseau TCI Africa, qui sont eux-mêmes des correspondants P&I basés dans la majorité des grands ports africains, m'amène à indiquer que les lettres de garantie P&I Club sont acceptées et même

[*] [1] Note du Greffe: Ce nombre de page se réfère à la version non-corrigée du compte-rendu.

exigées par la quasi-totalité des acteurs maritimes africains, qu'il s'agisse d'entreprises privées ou d'administrations et, en particulier, les autorités portuaires de ces Etats d'Afrique, parce qu'ils savent pertinemment que la lettre de garantie P&I Club sécurise leurs réclamations ultérieures.

En effet, les termes d'une lettre de garantie P&I Club sont en tout point semblables à ceux d'une garantie bancaire, puisqu'il s'agit d'un engagement de la part d'une institution disposant d'un fort capital financier, en contrepartie de la mainlevée du navire détenu, de payer à une personne dénommée – le créancier potentiel – une somme d'argent limitée à un montant maximal, soit sur la base d'un accord amiable entre les parties, soit sur une décision du tribunal compétent.

Nous proposons ici d'opérer une simple comparaison entre le contenu de la garantie bancaire émise dans l'*Affaire du « Monte Confurco »* (annexe 15 des défendeurs) et le contenu de la lettre de garantie émise le 10 novembre 2004 par *The Shipowners* P&I Club et déposée le 18 novembre 2004 devant le tribunal compétent de Bissau, pour réaliser que les termes sont en tous points semblables.

Si le Tribunal décide tout de même d'une prompte mainlevée du navire *Juno Trader* et de la libération de son équipage contre une caution, celle-ci pourra, plaise au Tribunal, prendre la forme d'une lettre de garantie semblable à celle émise par *The Shipowners* P&I Club du navire *Juno Trader*, à hauteur d'un montant que nous souhaitons le plus bas possible, comme l'ont rappelé le professeur Karagiannis et M. Fleischer à l'instant.

Merci, Monsieur le Président, de m'avoir donné l'occasion de faire comprendre au conseil de Guinée-Bissau la réalité du monde des affaires maritimes dans le domaine particulier des garanties financières.

Je termine mon intervention par l'énoncé précis des points de notre demande.

Saint-Vincent-et-les Grenadines demande à ce que plaise au Tribunal rendre les ordonnances et faire les déclarations ci-après :

a) une déclaration selon laquelle le Tribunal international du droit de la mer est compétent, en vertu de l'article 292 de la Convention des Nations Unies sur le droit de la mer de 1982 (ci-après la « Convention »), pour connaître de la demande;
b) une déclaration selon laquelle la demande est recevable;
c) une déclaration selon laquelle le défendeur a violé l'article 73, paragraphe 2, de la Convention en ce que les conditions fixées par le défendeur pour la mainlevée de l'immobilisation du navire « Juno Trader » et la libération de tous les membres de l'équipage ne sont pas autorisées en vertu de l'article 73, paragraphe 2, et ne sont pas raisonnables aux termes de l'article 73, paragraphe 2;
d) une ordonnance demandant au défendeur de procéder à la mainlevée de l'immobilisation du « Juno Trader » et à la libération de tous les membres de son équipage sans dépôt de caution ou autre garantie financière et, dans ce cas, demandant au défendeur de restituer la garantie déjà déposée;
e) à titre subsidiaire, une ordonnance demandant au défendeur de procéder à la mainlevée de l'immobilisation du « Juno Trader » et à la libération de tous les membres de son équipage dès le dépôt, par le propriétaire du navire, d'une caution ou autre garantie d'un montant que le Tribunal jugera raisonnable eu égard aux circonstances particulières de cette affaire;
f) une ordonnance, dans ce dernier cas, prescrivant la forme de la caution ou autre garantie visée ci-dessus;
g) une ordonnance demandant au défendeur d'annuler la mesure de confiscation de la cargaison de poisson se trouvant à bord du « Juno Trader »;

h) une ordonnance demandant au défendeur de supporter les frais de procédure du demandeur.

Je vous remercie, Monsieur le Président et Messieurs les Membres du Tribunal.

The President:
Thank you, Mr Huens de Brouwer.

I thank the Agent of Saint Vincent and the Grenadines.

We now have a 35-minutes' break. The oral proceedings will resume at five past four.
Thank you.

(*The sitting is adjourned at 3.25 p.m.*)

Questions from the Tribunal
[PV.04/05, E, p. 9–10]

The President:
Before beginning the hearing, I shall give the floor to the Registrar to repeat certain questions which have been posed to the parties by the Tribunal.

The Registrar:
Thank you, Mr President. Further to your request, the questions which were transmitted yesterday to the parties are as follows:

1. Under the Guinea-Bissau legal system can a decision of the Interministerial Commission be subject to judicial review by the domestic court system?
2. In case the fisheries administration does not agree with a decision rendered by a competent domestic judicial court suspending the effects of a decision taken by the Interministerial Commission, what legal remedy, under the legal system of Guinea-Bissau, can the fisheries administration resort to in order to challenge the court's decision?
3. What remedies are available to the shipowner whose ship has been forfeited to the State as a result of an administrative decision?
4. Are all members of the crew free to leave Bissau?

Thank you, Mr President.

The President:
Thank you very much, Mr Registrar.

Would any of the parties like to respond as to how they propose to deal with these questions? I give the floor to Mr Staker.

STATEMENT OF MR STAKER
AGENT OF GUINEA-BISSAU
[PV.04/05, E, p. 10–11]

Mr Staker:
Mr President, it would be the wish of our delegation to answer each of these four questions as best as we can during the course of the oral hearings today. Should it prove necessary to submit anything further in writing, we are of course available to do that. There is one matter I should raise at this stage. My delegation has provided to the Registry a document that comes from the Government of Guinea-Bissau, which is not intended to be our answer to question 4, but is submitted in support of our answer to question 4. It is intended that my co-agent, Mr Octávio Lopes, will provide an oral answer to question 4 and that this document will then be used in support.

I understand that there are rules in the Rules of the Tribunal relating to the late submission of documents. However, in our submission this is not a new document which our delegation of its own motion has decided it now wishes to bring before the court. Rather, the court has asked the parties a very factual question to which a very factual answer has to be given. Normally, when a party makes a statement of fact it submits evidence in support. In our submission, providing this document is in reality no different to the court expressly asking for the logbook of the ship and that document being provided at the court's request. I leave it to my colleagues appearing for Saint Vincent and the Grenadines to indicate whether they have any opposition to that position. If they do, I submit that there is a question of interpretation of the Rules, which is a question of procedural law of general importance and that therefore the Tribunal as a whole may wish to render a legal opinion on that question of procedure.

The President:
Thank you very much.

I now give the floor to the Agent of the Applicant.

EXPOSE DE M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/05, F, p. 12–13]

M. Karagiannis :
Merci, Monsieur le Président. Par rapport aux quatre questions qui nous ont été remises, je crois, hier soir, comme convenu ce matin lors d'une réunion, nous vous remettrons dans les meilleurs délais, peut-être même ce soir, des réponses écrites à ces quatre questions. Mais je ne sais pas si je peux juste pendant quelques secondes fournir une réponse purement orale à la quatrième question ?

The President:
Yes, you can do so.

M. Karagiannis :
Merci, Monsieur le Président. On vient de contacter à 16 heures 05, c'est-à-dire il y a quelques minutes, aussi bien les membres de l'équipage qui sont à bord du bateau *Juno Trader*, que l'agent maritime de ce bateau, son représentant local. Personne ne peut nous dire si les six passeports restants ont été restitués aux membres de l'équipage. Donc, ici, il y a une question de fait à notre meilleure connaissance. En ce moment même, ces passeports n'ont pas été restitués. Que peut-on dire de plus ?

Merci, Monsieur le Président.

The President:
Professor Karagiannis, there is a question raised by the Respondent vis-á-vis a document called, in the English translation, a declaration. What are your views on the production of this document?

M. Karagiannis :
Je vous demande juste une seconde pour relire ce document. (*Pause*) Je prends position immédiatement sur ce document, au vu surtout de sa traduction en langue anglaise. Il est donc noté :

> *I declare on my honour for any effect considered convenient, that on the members of the crew of the Juno Trader, there is no prohibition or restriction to their freedom of movement; as a matter of fact, there has never been an obstacle to the freedom of movement of these people.*

J'ai expliqué tout à l'heure, Monsieur le Président, qu'il y a apparemment une différence d'interprétation entre les deux parties sur les termes « *freedom of movement*, liberté de mouvement, liberté d'aller et venir ». Pour nous cette liberté n'existe toujours pas pour les six derniers marins auxquels, à notre meilleure connaissance, les passeports n'ont toujours pas été restitués. Mais, je lis un peu plus dans la déclaration : « *Furthermore, it is declared that upon request the passports have been delivered to their respective addressees.* »

Je ne sais pas que dire sur cette affirmation. Evidemment, la personne de la plus haute qualité, M. Ildefonso Barros, nous dit « *I declare on my honour* ». Bien entendu je respecte ce personnage que je ne connais pas personnellement mais nos marins eux-mêmes et l'agent maritime nous ont certifié il y a 25 minutes que les six derniers passeports n'ont pas été restitués. C'est pour cela que nous avons insisté tout à l'heure que le Tribunal ordonne, encore

une fois, dans nos conclusions finales, la totale libération des derniers membres de l'équipage. Pour nous, libération, cela veut dire : Messieurs les marins, voici vos passeports.

Nous insistons donc pour que le Tribunal prenne position sur ce point. Naturellement, je ne peux pas exclure que les passeports soient restitués dans le délai des 14 jours que le Règlement vous accorde pour rendre votre arrêt. C'est une pure question de fait, mais en ce moment, désolé, les passeports ne sont pas restitués, Monsieur le Président.

Merci beaucoup et mon co-agent de Saint-Vincent-et-les Grenadines demande la parole pour quelques minutes, si vous l'accordez, Monsieur le Président.

The President:
On this issue.

EXPOSE DE M. HUENS DE BROUWER
AGENT ADJOINT DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/05, F, p. 13–14]

M. Huens de Brouwer :
Monsieur le Président, Messieurs les Membres du Tribunal, tout à l'heure, nous avons déclaré au nom de Saint-Vincent-et-les Grenadines que nous n'acceptions pas ces documents mais, par la force des choses, nous sommes contraints de nous y pencher. A la lecture de ces documents et notamment de la pièce jointe à cette déclaration, en anticipant les dires du conseil adverse, cela semblerait vouloir dire que nous n'aurions pas réclamé le retour de l'intégralité des passeports puisque le document qui n'est pas traduit, lui, document annexé, semble indiquer qu'effectivement pour six personnes, membres de l'équipage, leurs passeports seraient toujours entre les mains de la FISCAP : *« tripulantes cujos passaportes retidos na FISCAP »*.

Permettez-moi de rappeler brièvement oralement dans un premier temps que, dans une lettre du 12 novembre 2004 qui constitue l'annexe 52 de notre demande, M. Tavares, Transmar, représentant du navire dit : je vais lire en français la traduction de ce document émis en portugais qui s'adresse à la FISCAP :

> « Messieurs, nous faisons suite au contact que nous avons eu avec vous à propos du navire Juno Trader et nous venons par la présente vous demander la restitution des dix passeports que vous détenez toujours de membres de l'équipage du navire cité ».

Deuxième document que je souhaiterais mentionner devant vous. Toujours une annexe présentée à l'appui de notre demande, l'annexe 50, un document toujours émis par M. Tavares de Transmar à l'attention du Ministère des pêches, du 25 novembre 2004, soit deux jours après le jugement et la décision du tribunal régional de Bissau qui, comme vous l'avez lu, ordonne le retour immédiat de tous les passeports. Suite à cette décision, M. Tavares s'adresse de nouveau au Ministère des pêches. Je lis, en anglais cette fois-ci, ce qu'il mentionne dans sa lettre :

> « *Yesterday we were informed by the attorney responsible for the case of the above-mentioned ship that the Regional Court of Bissau, among other dispositions, ordered the return of the passports of the crew of that vessel being held by FISCAP. We would be grateful your returning the passports today because several of the crew members, including the ship's captain, will leave Guinea-Bissau this weekend*.»

Pour l'instant, c'est tout ce que nous avons à dire oralement.

The President:
I would like to narrow the issue. Are you objecting to the production of this document?

M. Huens de Brouwer :
Si le Tribunal souhaite accepter ce document, comme le demande M. Staker, à l'appui de la réponse numéro 4, nous produirons de même, à l'appui de notre réponse au point numéro 4, des documents qui, par ailleurs, vous ont déjà été communiqués par le biais de nos annexes. Notre position est effectivement de rejeter ce document, mais si le Tribunal a été

requis de décider si oui ou non ce document fera l'appui de la question numéro 4, nous demandons aussi de pouvoir produire des documents ou de rappeler certains documents.

The President:
There is no conflict here. Therefore, as President, I accept your answer with the conditions. Thank you.

I return to our hearing and I now give the floor to Mr Staker.

Reply of Guinea-Bissau

STATEMENT OF MR STAKER
AGENT OF GUINEA-BISSAU
[PV.04/05, E, p. 14–18]

Mr Staker:
Mr President, Members of the Tribunal, I must apologize if I begin on a note of raising a slightly difficult point. We had a simple question of procedure that was raised earlier namely whether a document should be admitted or not. I think it got sidetracked a little bit into an argument on the merits of question 4. The document wasn't their answer to question 4. I hope that won't count against their time, and I hope it won't count against me that I've just raised that point.

I begin by expressing my understanding for the fact that my colleague, Professor Karagiannis, was required to burn the midnight oil to prepare his response to our first round of oral submissions, but it is true to say that our delegation has also spent many hours late into the night over the last days in the preparation of this case. Professor Karagiannis suggests that this problem of having to work unsociable hours might be avoided in the future by an amendment to the Rules. With the utmost respect to Professor Karagiannis, I would also propose that this problem might be avoided in the future by the parties adhering to the terms of the Convention, the Statute and the Rules that we already have.

As I submitted yesterday, [prompt] release proceedings under article 292 are a special type of proceedings in which the Tribunal is required to look at certain very narrow and very circumscribed issues only. I made the point yesterday that, quite apart from anything else, it would be impossible for an international tribunal to deal with an interstate dispute in the very short time frame provided under the Statute and Rules for prompt release proceedings, and that if issues other than those relevant to prompt release proceedings were introduced, it would simply make this time frame impossible. I suspect that the fact that the delegation members have been working such long hours is as a result of that fact.

I submitted yesterday that many issues that are not relevant to prompt release proceedings have been argued at length by the delegation for Saint Vincent and the Grenadines. Yesterday I submitted that the only relevant issues in prompt release cases are whether there is jurisdiction, whether the application is admissible, whether the application is well founded and, if so, whether to order prompt release, and the level of the bond.

In prompt release proceedings, the Tribunal is not concerned with whether or not the detained ship has broken any law or whether or not any national authorities have broken any law, whether it is their own national law or international law, other than provisions of the Convention dealing with prompt release. I made the submission yesterday that the majority of Professor Karagiannis's arguments were directed to showing that the *Juno Trader* had broken no law and that the proceedings against it at the national level in Guinea-Bissau are unfounded and unreasonable, and that Guinea-Bissau is violating international law rules on freedom of navigation, all of these being matters that the Tribunal cannot determine in prompt release proceedings.

Although these are all matters that are irrelevant to prompt release proceedings, Guinea-Bissau has found itself in a position where serious allegations have been made against it, and where it has felt that although these allegations are irrelevant, it has been obliged to provide an answer to them – hence, in part, the long hours that have been worked by our delegation. It came to me as something of a surprise to discover that Professor Karagiannis's arguments this morning were once again directed principally to the question of whether or not the *Juno Trader* had done anything wrong and whether there was any merit to

the actions taken by the authorities of Guinea-Bissau; these same matters that are irrelevant simply because they are beyond the scope of the jurisdiction of the Tribunal in prompt release proceedings.

Again in oral argument this morning, Professor Karagiannis suggested that Guinea-Bissau had violated provisions of the Convention on freedom of navigation in the exclusive economic zone and had breached provisions of article 73, paragraph 3 or 4, by not notifying the flag State of the detention – again matters which, in my submission, are not relevant to these proceedings.

In this intervention, I do not wish to go over again all the same ground that I went over yesterday. I am sure that it is still very fresh in the minds of the Members of the Tribunal, and I will confine myself to dealing with a few points arising out of what counsel for the Applicant have said today. I will not deal with every single point. If any of their arguments have already been answered by our arguments yesterday, there is no more that needs to be said. In particular, I will not address all the arguments made with respect to the merits of the underlying affair in relation to the *Juno Trader*. For instance, Professor Karagiannis spoke of the effect that this case might have on the reputation of certain companies connected with the *Juno Trader*. In my submission, the reputation of the companies could only be affected by a decision relating to the merits of the case, not by a prompt release proceeding, but again that is a matter that is irrelevant to article 292.

The other members of the delegation of Guinea-Bissau will proceed in the same order as they did in our first round or oral arguments, and they will proceed on the same basis as me, namely, that they will address a few specific points arising out of matters that were stated in oral argument this morning, which may require further comment, but will not go over the entire ground again.

My few points are these. First, I do not want to engage in any unpleasant exchange with Counsel for the Applicant, but he appeared this morning to complain that Guinea-Bissau has accused the Applicant of classifying Guinea-Bissau as a pirate State. I do not recall saying that. I merely referred to a passage in the Applicant's Memorial. I indicated how that passage might be understood by somebody reading it and invited his explanation. I note that he did qualify his comment today in his oral argument. He said that in his view the problem was not Guinea-Bissau as a State, or the people of Guinea-Bissau or even the legislature of Guinea-Bissau, but with certain Government officials. That was what he alleged in his argument.

Nonetheless, in his arguments this morning he confirmed that his basic argument is still the same. He argues that the Tribunal should decide that the *Juno Trader* has done nothing wrong. In other words, he is asking the Tribunal to decide the merits of this case, which in my submission is contrary to paragraph 3 of article 292. He is asking the Tribunal to deal with the merits of the case presently before a national forum. On the basis of a finding that the proceedings at national level have no merit, he says that, in determining the bond, the Tribunal should determine that the gravity of the offence is zero, because there was no offence, and that therefore it should be released without any bond being paid. I referred yesterday to case law of the Tribunal to the effect that a bond cannot be zero. I made lengthy submissions on the fact that the underlying dispute cannot be looked at. In my submission, that argument must be rejected.

So far as the gravity of the offence is concerned as a factor relevant to setting the bond, in my submission, this does not mean the gravity of the conduct of the particular ship in the particular case, because to look at that would be to decide the merits of the dispute, which the Tribunal cannot do. What it means is the gravity of the offence as it is classified under national law and the maximum penalty that could be imposed under national law in respect of that offence.

We say that the Tribunal has no jurisdiction, that the case is not admissible, that it is not well founded, and we base those submissions primarily on a change in title to the vessel that occurred by operation of law on 5 November 2004. Professor Karagiannis spoke of certain events after 5 November 2004 and sought to draw certain conclusions from that. To the extent that events on subsequent dates need to be addressed, these will be addressed by my colleague, Mr Silva, but a basic response is that if ownership changes by the mere operation of law, then ownership has changed as a matter of law, regardless of the conduct of the parties subsequently, and our arguments on jurisdiction, admissibility and the lack of well foundedness of the application remain.

Professor Karagiannis suggests that if Guinea-Bissau's argument were accepted, the Tribunal could simply close shop in prompt release cases because any State by a quick confiscation of a ship could avoid the prompt release procedure. In my submission, it is not the case that the Tribunal would simply close shop in those circumstances.

The purpose of prompt release proceedings, I would argue, is to avoid a situation where a ship is kept for a lengthy period in a legal limbo, where no judicial decision is taken on whether crimes are being committed – or no administrative decision – where no action is being taken under national law to determine whether any offence is being committed or whether any fines should be imposed, whether any confiscation should occur, when the matter is simply not being dealt with at all under national law and the ship is just sitting there indefinitely in detention waiting for something to happen. That is the situation that prompt release proceedings are intended to deal with.

Once there has been a final disposition of the matter under the national law of the detaining State, then of course the vessel is no longer in legal limbo. Whatever the result is in the national proceedings, that result can be given effect to and that then becomes the future status of the ship. If the flag State or if the shipowner considers that there has been any violation of national or international law that arose out of the way that the ship was confiscated, or whatever occurred, then that is a matter that may be pursued in the appropriate forum, perhaps a national forum, perhaps an international forum. My submission is that at that point prompt release proceedings under article 292 are simply no longer the appropriate mechanism.

The same is true of the scenario that Professor Karagiannis raised at the end of his argument this morning. He said, "What would happen if a detaining State simply burnt or sank the ship? I would submit that if a ship was sunk or burnt, of course article 292 would no longer be the appropriate mechanism to do anything about the matter, but that is not to say that if there has been a violation of national or international law there is no remedy in respect of an illegal burning or sinking of a ship. It is only to say that the appropriate legal mechanism for seeking some remedy in respect of that situation would not be proceedings under article 292 of the Convention.

Quite simply, every law has its appropriate forum for resolution. Article 292 makes this Tribunal a forum for the resolution of certain types of matters; it is not the forum for resolving the particular matters that the Applicant is seeking to raise in this case.

Mr President, that concludes my comments in response on the aspects of the case with which I dealt. I would now invite you to call upon my Co-Agent, Mr Octávio Lopes, speaking as Co-Agent of Guinea-Bissau, to make some additional comments.

The President:
Thank you very much, Mr Staker.

I now give the floor to Mr Octávio Lopes.

STATEMENT OF MR LOPES
CO-AGENT OF GUINEA-BISSAU
[PV.04/05, E, p. 19]

Mr Lopes:
Mr President, distinguished Members of the Tribunal, we have to say that in fact we do not realize what Saint Vincent pretends on this particular issue of the crew member. As we all remember, the Master of the *Juno Trader* told us in this Tribunal that the crew needed to stay on board to maintain the ship and the frozen cargo.

As we said, on the declaration that our colleague read in French, the State of Guinea-Bissau, mainly the Fisheries Ministry, did not detain any crew member of the *Juno Trader* and gave passports on request. That letter was signed by Mr Ildefonso Barros, the General Director of Fisheries in Guinea-Bissau. I can do the same: we deliver passports on request.

Mr President, before asking you to hear Mr Ricardo Silva, I would like to read a document in French. It comes from Saint Vincent and the Grenadines, the Marine Administration, dated 7 December 2004.

> "*Le Commissaire aux affaires maritimes de Saint-Vincent-et-les Grenadines présente ses compliments au Ministère des affaires étrangères et de la coopération internationale et des communautés de la République de Guinée-Bissau et accuse réception du communiqué l'informant que le navire Juno Trader, official n° 3073, est dorénavant devenu propriété de l'Etat de Guinée-Bissau par faute de paiement de l'amende appliquée à l'armateur.*
>
> *Le Commissaire aux affaires maritimes de Saint-Vincent-et-les Grenadines saisit cette occasion pour renouveler au Ministère des affaires étrangères et de la coopération internationale et des communautés de la République de Guinée-Bissau, l'expression de sa haute considération.*
>
> *Le Commissaire aux affaires maritimes de Saint-Vincent-et-les Grenadines a signé pour Najla Dabinovic.*"

Thank you.

The President:
Thank you, Mr Lopes.

I now give the floor to Mr Ricardo Alves Silva.

STATEMENT OF MR ALVES SILVA
COUNSEL OF GUINEA-BISSAU
[PV.04/05, E, p. 19–23]

Mr Alves Silva:
Mr President, distinguished Members of the International Tribunal for the Law of the Sea, I would like to begin today by saying that this morning I was accused of saying certain things up here on this stand that in fact I did not say yesterday. I believe that the transcript of my statement in the English language, which was the language that I used to address this Tribunal, underlies this fact.

I would also like to say, before answering the questions that have been placed by the Tribunal, that never did I refer to the regional court of Bissau with any contempt and never did I before this Tribunal or anywhere else state that I did not agree with the court's decision and that I believed that the court in Bissau does not understand Guinea-Bissau law.

The first question we must address, and it is related to the allegations made against my person this morning, is related to the text of the judgment of the regional court of Bissau. It was said this morning that the text of such judgment stated that, and had decided I believe in a final way, the act of the Interministerial Commission was illegal. We must clarify here before the Tribunal that the decisions set forth in the injunction, *suspensão de eficácia* proceedings, are only provisional measures, which do not constitute *res iudicata* in respect of the merits of the case. Due to the urgency of the matter with which the regional court of Bissau was faced, the court had to decide in 48 hours; it did so. Given this fact, the court of Bissau did not hear the opposing party, the Ministry of Fisheries; it did not hear the opinion of the Public Prosecutor's office, which must be heard in all these cases as the government entity responsible for maintaining law in Guinea-Bissau. This court's decision decided solely on the facts that were presented to it by the Applicant, the exact same facts that were presented to this Tribunal by the Saint Vincent and the Grenadines Government. So there was no counter-proof. The only arguments that the court could base its judgment on were the arguments, the facts, that were provided by the Applicant.

This is why the judgment includes exactly those facts that were stated here. This judgment is not final, nor is it binding on other courts and – it is very important that we state this here – it is not binding on the courts that will judge the merits of the case respecting the minutes that established the fine.

More proof that judicial proceedings are working in Bissau is that we were informed this morning that the regional court of Bissau, upon request of the shipping agent, is going to carry out an inspection of the vessel in order to acquire the necessary proof to rule a judgment on the merits of the case. In Bissau things are moving. The case is not stopped. The courts will decide accordingly.

Mr President, Guinea-Bissau, as I said yesterday, is a State governed by its law and its constitution. The first law passed by Guinea-Bissau's parliament after independence was Law No. 1 of 73. It was passed on 24 September 1973, the exact date of the official proclamation of the independence of Guinea-Bissau and on the day that the movement that was seeking independence declared its independence from Portugal this law was passed. This law has one article only. I will proceed as I did yesterday and read in Portuguese and then the English translation:

> "*A legislação portuguesa em vigor à data da Proclamação do Estado soberano da Guiné-Bissau mantém a sua vigência em tudo o que não for contrario à soberania nacional, à Constituição da Republica, à suas leis ordinárias"*.

This article states that all Portuguese legislation in force as of the date of proclamation of the sovereign State of Guinea-Bissau remains in force insofar as it is not contrary to the national sovereignty, the Constitution of the Republic and its statutory law.

Thus, when answering the three questions that remain, I shall refer to the law that was in force as of 24 September 1973 and I will present case law regarding these aspects. Some of this case law is subsequent to independence but it was passed under the same statute. Some is prior to independence and as such has been accepted by the courts in Bissau as valid case law in order to interpret the articles of such laws.

Question 1: Under the Guinea-Bissau legal system, can a decision of the Interministerial Commission be subject to judicial review by the domestic court system? The answer is "Yes". The law of Guinea-Bissau sets forth that any final and enforceable administrative decision – in the original, *acto definitivio e executório* – may be subject to review as long as the appeal is filed in the legal term and the other legal requirements are met; namely, if the party has standing. Article 62.1 of the Fisheries Law sets forth that the Interministerial Commission is the competent authority for determining and applying the fines for offences to said law. Given this, the decision of the Commission can be subject to review and is currently being subject to review.

Question 2: In case the fisheries administration does not agree with a decision rendered by a competent domestic judicial court suspending the effects of a decision taken by the Interministerial Commission, what legal remedy under the legal system of Guinea-Bissau can the fisheries administration resort to in order to challenge the court's decision? The answer is that if the administration does not agree with said decision, it may appeal to the Supreme Court of Justice, which at the present time occupies the position of the Administrative Supreme Court that existed before independence.

I believe that the Tribunal will also be interested to know that this appeal under Guinea-Bissau's law does not suspend the execution of the decision rendered by the first instance court. So, there is no suspension of the suspension. The suspension of the decision is valid until we reach a final decision respecting the injunction.

I may on this matter refer to a decision by the Administrative Supreme Court of Portugal rendered on 3 July 1996 under a legal regime with exactly the same rules as the one in Bissau which stated: "*Tem efeito meramente devolutivo o recurso de decisão que suspendeu a eficácia de acto contenciosamente impugnado".* A rough translation is that in case the authorities or any other party appeal a decision which ordered the suspension of enforcement of an act which is being appealed in a main case, that appeal does not suspend the enforcement of that judgment.

Question 3: What remedies are available to the shipowner whose ship has been forfeited to the State as a result of an administrative decision? I would like to give two answers to this question, one based on a confiscation by an administrative act which is what I believe the Tribunal had in view, and one based on a situation of the forfeit or the reversion to the state of a vessel by direct effect of the law.

In the first case a shipowner whose ship has been confiscated or forfeited as a result of an administrative act, as a direct result of a resolution by an administrative body, may resort to exactly the same remedies that we explained in the answer to question 1. It can resort to the courts and obtain a judgment on the question of confiscation. In relation to the second possibility of forfeiture or reversion to the State by means of operation of a statute, the answer must be different. In this situation it is our opinion that the forfeiture cannot be challenged directly before the courts. However, this does not leave the shipowner without protection because, if in the original law suit that had the scope or the aim of annulling or declaring null and void the application of the fine, the act by which the fine was levied is annulled or considered null and void, then it will be possible to claim compensation for the

immobilization of the vessel as set forth in Article 67 of the Fisheries Law. This article specifies clearly that in case it is judged by a court ruling that the Government did not have reason when it arrested the vessel, then there is compensation. Even if the fisheries law did not exist that compensation would always be claimable pursuant to the legal regime set forth in Decree-Law 48,051 of 21 November 1967.

On another note, if the act that levies the fine is declared null and void, all successive acts are considered null and void. Among theses acts we must include the operation of reversion to the State automatically due to a legal statute. What I have just said is in no way contrary to what I stated yesterday. I have given you my honest, legal opinion as to the law in Guinea-Bissau in general terms, which is what I believed the court needed to hear today. What I referred to yesterday were the implications of this case and what I believe to be the law applicable to the case of the *Juno Trader*, especially when we take into account that the term for resorting to the courts, the term for filing an appeal, was not met by the owner of the *Juno Trader*.

Thank you very much, Mr President, thank you very much, distinguished Members of the Tribunal.

The President:
Thank you very much, Mr Ricardo Alves Silva.

I now give the floor to Mr Ramón García-Gallardo.

STATEMENT OF MR GARCIA-GALLARDO
COUNSEL OF GUINEA-BISSAU
[PV.04/05, E, p. 23–27]

Mr García-Gallardo:
Thank you Mr President, distinguished Members of the Tribunal, I should like to make just a few points. On the basis of the statements made by the Agent of Saint Vincent and the Grenadines, we consider that some points need to be clarified.

First, as regards the characterisation of the *Juno Trader*, nobody in this room has discussed whether the *Juno Trader* is a reefer vessel. Contrary to the statements of the Agent of Saint Vincent and the Grenadines, the vessel is considered under Guinean law, Article 3 of the Fisheries Act, as a fishing vessel. That is not because of its cargo but because of the activities it carries out. The activities related to fishing activities are, for example, transhipment of cargo or bunkering regardless of the cargo it carries. As to logistics, activities and classes of fish, there are sufficient clear definitions in the provision of Article 3.

Secondly, as regards the certificate of origin –

The President:
Mr García-Gallardo, could you speak more slowly?

Mr García-Gallardo:
Secondly, as regards the certificate of origin, this morning we heard that Saint Vincent and the Grenadines understand that these documents are private, issued by the vessels that have caught the fish and even that they are kept on board the vessel that has caught the fish. However, this statement is not accurate, since certificates of origin are exclusively issued by authorities of the waters where the fish is caught. In this case we have not seen the certificates of origin issued by the competent Mauritanian authority, if it is Mauritania where the fish were caught. Again, there is a lack of evidence.

Thirdly, as regards the entry into the exclusive economic zone of Guinea-Bissau, this morning we heard that the requirement to notify to the coastal State the entry into and exit from the EEZ does not make any sense and that this principle would apply only to the territorial waters. If Saint Vincent and the Grenadines wish to challenge the legislation of Guinea-Bissau for breach of the Montego Bay Convention, they can do it, but unfortunately not in the framework of the prompt release proceeding.

Secondly, this obligation to notify is not rare. Professor Karagiannis will know that it is the case in the Republic of France. In proceedings such as *"Camouco"* or *"Monte Confurco"*, this point was raised and this Tribunal did not enter into the question. Under Guinean law there is an obligation to notify when entering the exclusive economic zone for industrial fishing vessels authorized to operate. We have seen the broad definition of industrial fishing vessels and activities based on Article 3.

The *Juno Trader* has been expressly fined, among others, for carrying out activities for which an authorization should have been sought. Therefore, the *Juno Trader* was obliged to notify to the Guinea-Bissau authorities. The Master of the *Juno Trader* recognized yesterday that when the vessel entered the exclusive economic zone to carry out unauthorized operations, it did not notify the coastal authorities. As the Tribunal will know, transhipment of fishing cargo causes real problems to coastal States since they are used for laundering of catches. In this regard, in the last session of ICCAT, the international regional association for tuna in the Atlantic, held in New Orleans last month, that association agreed to forbid transhipment of fishing cargo since this practice is related to illegal, unreported and

unauthorized fishing. That was explained yesterday by Mr Octávio Lopes, based on the FAO document.

Let us be clear. It is very unusual for a Master with 26 years' experience, who recognizes that he has had at least 12 years' experience steering reefers in West Africa, to traverse only twice the exclusive economic zone of Guinea-Bissau. If we look at Annex 16, the maritime chart, it appears that if on previous occasions the Master was familiar with the exclusive economic zone and has steered his vessels from the north to the south of Africa, that is exclusively in international waters.

Finally, in respect of the reasonableness of the amount of the bond, we consider that a bank guarantee in the form and nature described this morning should be as follows based on the arguments raised by the Applicant this afternoon.

The cargo has been evaluated on the basis of what was expressly stated by the Applicant at paragraph 28 of his own Application. This is the value of the sale which the Guinean authorities considered should be obtained from the sale as a starting price. I would like to clarify that both the frozen fish and the fish flour were confiscated by the administrative decision. Furthermore, due to the failure of payment of the fine, the property of all the cargo reverted – that is a legal word; we were referring to confiscation but reverted should be the appropriate word – to the Guinea-Bissau State as part of the vessel.

The Applicant bases the evaluation of the vessel on net book value of US$ 460,000. We agree that it is one of the parameters to evaluate vessels. However, there are other elements to take into consideration and, as the Applicant recognizes, the vessel is in good condition and in good classification, made by an appropriate classification certificate. In our opinion, the comparison of recent sales of similar vessels in the market as the one we presented as Annex 14 of the documents submitted yesterday is also an important element, bearing in mind that we have already deducted 50 per cent, given the difference in age between the two vessels. For this reason, we consider that our evaluation of 615,000 euro is accurate and proportional, representing a fair market value as it is and where it is. No more evidence has been provided by the Applicant.

With respect to the bunkering, we have also said that we do not have information. Our estimates given this morning were too conservative. We gave an evaluation of 60,000 euro. On the basis of the data provided by the Applicant this afternoon, there are 210 tonnes on board, and on the indicated price per unit, 350 CFA – and I must say that one euro is equal to a fixed rate of 655,957 CFA – this represents a minimum price of the bunkering of 112,214 euro.

Since the property over the vessel, the cargo and the fuel have reverted to the State of Guinea-Bissau as from 5 November 2004, due again exclusively to a failure to pay the fine within the legal period, the bank guarantee should cover the value of these three items, which would be up to 1,227,214 euro. That corresponds to the following: 500,000 euro for the cargo; 112,214 euro for the oil and bunkering; and 615,000 euro for the vessel. That is very important. This amount takes into account the fact that Saint Vincent and the Grenadines have already stated that they wish that the vessel is released together with the cargo. In my estimations this morning, I did not take into consideration the value of the cargo. However, if Saint Vincent and the Grenadines wishes that the vessel is released without the cargo, the bond would be of 757,214 euro, which relates to the valuation of the vessel at 615,000 euro, 112,214 euro for the oil and bunkering, and 30,000 euro for the cost of unloading operations.

The fines – we talked this morning about 175,000 euro – to be consistent, are not included because of a failure to pay of the shipowner. The vessel was confiscated, so if the confiscation has taken place, it was because the payment of the fine was not made. We are not referring twice to this element.

Finally, the form and the nature of the bond. We insist that this bond should be in the form that the Tribunal has accepted in the four cases where prompt release was ordered – bank warranty. The Applicant has discussed that the letter offered by the P&I has the value of a bank warranty. We respectfully submit that we do not agree that this letter has all the elements, for example, of the bank guarantee issued as a result of the *"Monte Confurco" Case*, attached as Annex 14 of our documents. That included all the requirements mentioned by this Tribunal, in particular the place of execution.

P&I letters, as the one mentioned by the Applicant, are letters normally accepted between private operators. There is no discussion on that. They usually cover civil responsibilities, credits, under the Brussels Convention of 1961 of arrest of ships, but not usually by States. It must be possible to execute the bond that is offered in Guinea-Bissau. We understand that the P&I are normally subject to English law, in particular the letter of the P&I Club of Mutual Luxembourg is based in London. Therefore, the letter should need, in case of difficulties, to be executed in the United Kingdom. As you can imagine, the costs of executing such a letter are absolutely prohibitive for a State such as Guinea-Bissau, and in practice it would never be executed. For this reason, the bank warranty should be issued by a bank in Guinea-Bissau.

One word in relation to the letter that we received by fax from the Ministry of Fisheries of Guinea-Bissau one hour ago. It is a letter that was read by Mr Octávio Lopes, Agent of Guinea-Bissau. It is clear that they have been informed about the confiscation, about the notice sent by the Guinea-Bissau authorities to the Saint Vincent and the Grenadines competent authorities, and they did not raise any comment, bearing in mind the issue of the power of attorney to come to this Tribunal, bearing in mind the critical issues of confiscation that have been discussed during previous days, so it is absolutely clear that they take note and they accused receipt [*sic*] that the confiscation for them did not raise any particular problem.

Thank you very much.

The President:

Thank you, Mr García-Gallardo.

I now give the floor to Mr Staker.

STATEMENT OF MR STAKER
AGENT OF GUINEA-BISSAU
[PV.04/05, E, p. 28–32]

Mr Staker:
Mr President, distinguished Members of the Tribunal, before concluding this second round of oral argument, there is one final issue that needs to be addressed, which is the application made by Saint Vincent and the Grenadines that Guinea-Bissau pay the costs incurred by it in connection with these proceedings. In making that request, the Applicant invokes article 34 of the Tribunal's Statute, which states that unless otherwise decided by the Tribunal, each party shall bear its own costs. As the Applicant freely acknowledges in its Memorial, that provision of the Tribunal's Statute lays down what is a general rule, namely, that in proceedings before the Tribunal each party does pay its own costs. The Applicant further concedes, in paragraph 141 of its Memorial, that this general rule that each party pays its own costs is in fact based on "a laudable notion" of allowing each party to have access to international justice without the Damocles sword of additional costs hanging over them.

In this connection, I would also point out that article 34 of the Tribunal's Statute is in terms that are materially identical to Article 64 of the Statute of the International Court of Justice, the ICJ. I would refer here to the bundle of authorities that was placed before the Members of the Tribunal yesterday. I do not know whether it is still to hand. On page 17 of that bundle of authorities for the French version and page 26 for the English version, there is a quotation from the case *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime* Boundary between Cameroon and Nigeria, Preliminary Objections, of 25 March 1999, decision of the International Court of Justice at paragraph 18, which states that this provision in the Statute of the International Court of Justice confirms the basic principle regarding the question of costs in contentious proceedings before international tribunals to the effect that each party shall bear its own costs. I note simply that the International Court of Justice in this passage does not say that this is a general principle in proceedings before the International Court of Justice. It says that this is a general principle in contentious proceedings before international tribunals.

I therefore submit that the general rule contained in article 34 of this Tribunal's Statute is not a general rule that has been created by that provision of the Statute. Rather, it is a general principle of international law that is merely reflected in article 34 of the Tribunal's Statute, just in the same way that it is reflected in Article 64 of the Statute of the International Court of Justice, and it is my submission that the principle should, in principle, be applied consistently by both this Tribunal, the International Court of Justice and other courts of a similar nature.

The Applicant cites no case before this Tribunal or the ICJ in which an exception has ever been made to this general rule, and Guinea-Bissau is certainly not aware of any such case. Furthermore, the Applicant concedes in paragraph 142 of its Memorial that if any exception were made to this rule, it could not be arbitrary. There would have to be sound reasons why a particular case was different and why there is a reason for departing from the general rule.

The only justification given by the Applicant in this case is given in paragraph 142 of its Memorial. Essentially, in my submission, the argument is that this case is different because the *Juno Trader* has done nothing wrong and therefore the conduct of Guinea-Bissau – I quote their Memorial – "is not far from evidencing an abuse of rights". Of course, that submission is based on the very thing that we have submitted the Tribunal has no jurisdiction to decide in this case, so it is simply not a factor that the Tribunal could have regard to in determining whether a departure from the general costs rule should be made.

I would even go further and add that even if the allegations made by the Applicant in this case were relevant to proceedings before the Tribunal, and even if every single one of those allegations could be proved, the Applicant has not shown why the circumstances of this case are still so unique and different from any other conduct that has ever been adjudicated on before the International Court of Justice, where the International Court of Justice has never made an exception to the general rule. On that basis, we submit that there can be no possibility of an order for costs being made against Guinea-Bissau.

Indeed, I would go a little bit further. I would say that if there were ever circumstances in which the Tribunal would make an exception to the general rule, it may be in this case to the extent that the Tribunal should make an order that Saint Vincent and the Grenadines be ordered to pay the costs of Guinea-Bissau in these proceedings. As has been said, Guinea-Bissau is one of the poorest countries in the world. The costs of defending proceedings before this Tribunal are considerable. Where there is a genuine dispute between States, it must, of course, be accepted that there are litigation costs involved if the dispute is to be settled by an international court.

However, this is a case in which Guinea-Bissau has had to incur expenses to defend these proceedings in a case where the Tribunal, in our submission, has no jurisdiction and the case is not admissible; but, more than that, it is a case that has been brought where a large part of the case has been brought in direct contradiction of paragraph 3 of article 292, in that a large part of the Applicant's case has been based on its allegation that the *Juno Trader* has done nothing wrong and, contrary to article 292 paragraph 3, the proceedings have been brought to seek to litigate the merits of the case at national level – a matter that is clearly outside the scope of article 292 proceedings. The question is why should a country that is very poor be required to incur the expenses of coming to this international tribunal to defend allegations that are wholly irrelevant?

Article 292, as I have said, provides a mechanism that serves a very important purpose for dealing very promptly with very specific matters, and States that bring proceedings under article 292 must be expected to focus solely on those very specific matters. Article 292, in our submission, is not intended to be used as a vehicle for a State to find a very quick and convenient way of bringing other types of disputes before an international tribunal.

Guinea-Bissau wishes to inform the Tribunal that it has made an application to the International Tribunal for the Law of the Sea Trust Fund for financial assistance for expenses that it is incurring in connection with this case. No decision has yet been taken on that application, and Guinea-Bissau does not yet know whether any of its expenses will be met from that Trust Fund. Guinea-Bissau submits that in the circumstances the appropriate order should be that the Applicant is to pay the costs incurred by Guinea-Bissau in connection with these proceedings, less any amount of financial assistance that may be provided to Guinea-Bissau by the Law of the Sea Trust Fund in connection with the case. As an alternative submission, I would submit that at least a substantial part of Guinea-Bissau's costs should be paid by the Applicant, reflecting that part of this case that involved irrelevant allegations and that part of the costs that were incurred by Guinea-Bissau in responding to them.

Mr President, that concludes my arguments and the arguments of my delegation in connection with this case before the Tribunal. Now, in accordance with the Statute and the Rules, I propose to read the final submissions of Guinea-Bissau:

Guinea-Bissau requests the Tribunal:

1. To declare:

(a) that the Tribunal lacks jurisdiction under Article 292 of the United Nations Convention on the Law of the Sea to entertain the Application of St Vincent and the Grenadines in this case;

in the alternative,

(b) that the Application of St Vincent and the Grenadines in this case is inadmissible;

in the further alternative,

(c) that the Application of St Vincent and the Grenadines in this case is not well founded.

2. As a subsidiary submission, if the Tribunal decides that the *Juno Trader* and its cargo are to be released upon the deposit of a bond or other financial guarantee, to order:

(d) that the bond shall be no less than EUR 1,227,214.00;
(e) that the bond shall be in the form of a bank guarantee from a bank present in Guinea-Bissau or having corresponding arrangements with bank in Guinea-Bissau;
(f) that the bank guarantee shall state that it is issued in consideration of Guinea-Bissau releasing the *Juno Trader* in relation to the incidents dealt with in Minute No. 14/CIFM/04 dated 19 October 2004, and that the issuer undertakes to pay on first demand to the State of Guinea-Bissau such sums as may be determined by a final judgment, award or decision of the competent authority of Guinea-Bissau.

3. To decide that St Vincent and the Grenadines shall pay the costs of Guinea-Bissau incurred in connection with these proceeding, less any amount of financial assistance that may be provided to Guinea-Bissau by the Law of the Sea Trust Fund in connection with this case.

Mr President, that is the case for Guinea-Bissau.

The President:
I thank the Agent of Guinea-Bissau.

I give the floor to Professor Karagiannis, the Agent for the Applicant.

INTERVENTION PAR M. KARAGIANNIS
CONSEIL DE SAINT-VINCENT-ET-LES GRENADINES
[PV.04/05, F, p. 25–26]

M. Karagiannis :
Merci beaucoup, Monsieur le Président.

J'ai juste un petit problème tout à l'heure. Le représentant du Gouvernement guinéen, M. Lopes, a lu devant vous l'intégralité, me semble-t-il, d'un document tout à fait nouveau dont nous ne connaissons absolument pas l'existence. M. Lopes n'étant pas un juriste, je peux comprendre qu'il ne sait pas que tous les documents devaient être remis à votre Tribunal avant le 6 décembre à 10 heures du matin.

Un nouveau document est donc porté à votre attention. Nous ne l'avons jamais vu et nous aimerions au moins pouvoir en prendre connaissance, une simple photocopie suffirait peut-être, et éventuellement le contester par écrit pour ne pas importuner le Tribunal.

Closure of the Oral Proceedings
[PV.04/05, E, p. 32-33]

The President:
Thank you very much. That should be done in writing.
This brings us to the end of the oral proceedings in the *"Juno Trader" Case*. On behalf of this Tribunal, I would like to take this opportunity to thank the Agents and Counsel of both parties for their excellent presentations made before the Tribunal over the past two days. I would also like to take this opportunity to note with appreciation the professional competence and personal courtesies exhibited so consistently by the Agents and Counsel on both sides.

The Registrar will now address questions in relation to documentation.

The Registrar:
Mr President, in conformity with article 86, paragraph 4, of the Rules of the Tribunal, the parties have the right to correct the transcripts in the original language of their presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible but in any case not later than noon, Hamburg time, on 10 December 2004.

A list of questions which members of the Tribunal would like to address to parties was transmitted yesterday to both parties, and the Agents are requested to submit any written response by tomorrow noon.

In addition, the parties are requested to certify that all the documents that have been submitted and which are not originals are true and accurate copies of the originals of those documents. For that purpose, they will be provided by the Registry with a list of the documents concerned.

Thank you, Mr President.

The President:
The Tribunal will now withdraw to deliberate on the case. The judgment will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of judgment. That date is 18 December 2004. The Agents will be informed reasonably in advance if there is any change to this schedule.

In accordance with the usual practice, I request the Agents kindly to remain at the disposal of the Tribunal to provide any further assistance or information that it may need in its deliberations prior to the delivery of the judgment.

The hearing is now closed.

(*The hearing was closed at 5.40 p.m.*)

PUBLIC SITTING HELD ON 18 DECEMBER 2004, 10.30 A.M.

Tribunal

Present: *President* NELSON; *Vice-President* VUKAS; *Judges* CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, MARSIT, NDIAYE, JESUS, COT and LUCKY; *Registrar* GAUTIER.

For Saint Vincent and the Grenadines:

Mr Werner Gerdts,
Döhle Assekuranzkontor GmbH & Co KG, Hamburg, Germany,

as Agent.

For Guinea-Bissau:

Mr Abaf Seidi,
Chairman of the Guinea-Bissau Association, Hamburg, Germany.

AUDIENCE PUBLIQUE DU 18 DECEMBRE 2004, 10 H 30

Tribunal

Présents : M. NELSON, *Président*; M. VUKAS, *Vice-Président*; MM. CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, MENSAH, CHANDRASEKHARA RAO, AKL, ANDERSON, WOLFRUM, MARSIT, NDIAYE, JESUS, COT et LUCKY, *juges*; M. GAUTIER, *Greffier*.

Pour Saint-Vincent-et-les Grenadines :

M. Werner Gerdts,
Döhle Assekuranzkontor GmbH & Co KG, Hambourg, Allemagne,

comme agent.

Pour la Guinée-Bissau :

M. Abaf Seidi,
Président, Association de la Guinée-Bissau, Hambourg, Allemagne.

Reading of the Judgment
[PV.04/06, E, p. 4–5]

The Registrar:
The Tribunal will today deliver its Judgment in the *"Juno Trader" Case*, Application for prompt release, Case No. 13 on the List of cases, Saint Vincent and the Grenadines, Applicant, and Guinea-Bissau, Respondent. The Tribunal heard oral arguments from the parties at four public sittings held on 6 and 7 December 2004.

Mr President.

The President:
Judge Tullio Treves is not able to attend today's reading of the Judgment, but asked that he be allowed to record his final vote from Egypt. I will ask the Registrar to read the decision of the Tribunal on this matter.

The Registrar:
The decision of the Tribunal adopted on 16 December 2004 reads as follows:

> Judge Julio Treves has informed the Tribunal that he would be absent from Hamburg from the afternoon of 16 December 2004 as he was required to be in Cairo in order to attend a meeting of an arbitration body, of which he is chairman.
>
> Judge Treves has sought the permission of the Tribunal to record his vote by telephone in the "*Juno Trader*" *Case* although he will be absent when the formal vote is taken.
>
> Judge Treves was present at the public sittings held in this case on 6 and 7 December 2004. He has taken a sufficient part in the deliberations to be able to reach a judicial determination of all issues of fact and law material to the decision to be given in the case.
>
> The Tribunal decides that, in the special circumstances mentioned by Judge Treves, he should be allowed to record his final vote by telephone.

Judge Treves recorded his final vote in accordance with the decision of the Tribunal.

Mr President.

The President:
I now call on Mr Werner Gerdts, Agent of Saint Vincent and the Grenadines, to note the representation of Saint Vincent and the Grenadines.

Mr Gerdts:
[notes his appearance]

The President:
Thank you.

We have been informed that Guinea-Bissau will be represented by Mr Abaf Seidi, Chairman of the Guinea-Bissau Association in Hamburg. I now call on Mr Abaf Seidi to note the representation of Guinea-Bissau.

Mr Seidi:
[notes his appearance]

The President:
Thank you.

I will now read relevant extracts from the Judgment in the *"Juno Trader" Case*.

[*The President reads the extracts.*]

The sitting is now closed.

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in the *"Juno Trader" Case (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques de l'*Affaire du « Juno Trader » (Saint-Vincent-et-les Grenadines c. Guinée-Bissau), prompte mainlevée.*

Le 23 novembre 2009
23 November 2009

Signé/Signed
_____
Le Président
José Luís Jesus
President

Signé/Signed
_____
Le Greffier
Philippe Gautier
Registrar