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

2004

Public sitting

held on Monday, 6 December 2004, at 3 p.m.,

at the International Tribunal for the Law of the Sea, Hamburg,

President L. Dolliver M. Nelson presiding

The “Juno Trader” Case

(Application for prompt release)

(Saint Vincent and the Grenadines v. *Guinea-Bissau)*

Verbatim Record

Uncorrected
Non-corrigé

Present:	President	L. Dolliver M. Nelson
	Vice-President	Budislav Vukas
	Judges	Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		Thomas A. Mensah
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Rüdiger Wolfrum
		Tullio Treves
		Mohamed Mouldi Marsit
		Tafsir Malick Ndiaye
		José Luis Jesus
		Guangjian Xu
		Jean-Pierre Cot
		Anthony Amos Lucky
	Registrar	Philippe 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, Director, 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.

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

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 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 emphasise that no disrespect to the 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 St 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 Article 292.

A very substantial part of the Applicant's Memorial, and of Professor Karagiannis's 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 it 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 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 para. 104).

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 factual allegations made against it is twofold.

The first response of Guinea-Bissau is to challenge the factual picture 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 also 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 paras. 59-60, the Tribunal held that it could not consider alleged violations of Article 73, paragraphs 3 and 4, nor could it consider a general allegation of the kind made by the Applicant in this case of violations the provisions of the Convention on freedom of navigation. Further authority for the proposition of other breaches of international law cannot be considered in prompt release case 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 the 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 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 proceeding 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 required by Article 292, paragraph 3. I refer in this respect to the Dissenting Opinion of Judge Wolfrum in the *Camouco* case, at para 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 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 the facts relevant to determining the flag state of the detained vessel, or the facts relevant to the value of the ship. 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 para. 67; to the Joint Dissenting Opinion of nine members of the Court; to the Dissenting Opinion of Vice-President Wolfrum and Judge Yamamoto, at paragraph 4; and the Dissenting Opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, at para. 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 criticising 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 para. 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 take into account in determining the reasonableness of the bond.

Secondly, in the *Saiga Prompt Release* case, at para. 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". St Vincent and the Grenadines should be well aware of this ruling, since it was also the Applicant in the *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 the limits of the rules 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 St 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 SILVA: Mr Tavares, who is a member of the delegation of St 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. 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 St Vincent and the Grenadines to these matters.

THE PRESIDENT: That is acceptable.

MR STAKER: 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. Their 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.

I now invite the Tribunal to call upon the co-agent for Guinea-Bissau, Mr Octávio Lopes, *Chef de Cabinet*, the Ministry of Fisheries.

MR LOPEZ: 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 St 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 10 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 1997, 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 West 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 of the economy essentially of the last three countries (Guinea-Bissau, Guinea and Sierra Leone), represents approximately US$ 200 million per year 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 flag of developed nations, as well as ships flying flags of convenience of States such as St 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 just 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 registered office in Monaco, but flies the flag of St 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 global and regional 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 in the 120th Session of Council on June 23, 2001.

The confiscation of vessels engaged in such activities, as provided for in our fishing law, 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, 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.

MR 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 St 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 St 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, S Tomé e 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 through 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 science 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 the 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 statue clearly states the reasons for its approval. I will now proceed with a free translation of two paragraphs, which I believe clarifies 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 the 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 has 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 to be 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 one of $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 *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 €184,169, 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 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 -- *piroga* 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 Italian Shipping Agents Federation, Federpesca. This vessel was actually arrested and fined. Further on, the agent posted a bond an 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 del'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 test 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 *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 refers to due to the confusion and to the bad steps taken in all the procedures that were ongoing in Bissau by the pervious agent, Ajamal, which actually has various documents attached to these proceedings as well; it substitutes from that day onwards Ajamal 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, and 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 *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* was duly identified and 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° 42' and 017° 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 weighing anchor and weighing anchor when ever 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 vessel, 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 *Flipper 1* is mainly Russian, just like the crew of *Juno Trader*. For all these reasons, the reaction of *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 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 *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 that 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 fishery resources law in order to have a clear picture of what meant by *barco de pesca* in Guinea-Bissau's laws.

The scope of the activities covered by the fisheries resources law is defined in 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 shipping 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 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 laws.

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 in 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 at 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 through 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 <u>this</u> 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 (*Maria nationalel de 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 zone. 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 St Vincent and 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 noticia*, 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 noticia* 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 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 cost 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 were required of 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 disposals. 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 water, 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 truth attached by the Applicant that those documents were brought. It is strange that those documents were not handed over with a log book. 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* representative 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 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 of the *Juno Trader*?

Another sign that the basic rule of separation 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 at 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 in Bissau over the past 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 ship owner 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 SILVA: We can speed up, if you wish.

THE PRESIDENT: No, I am thinking of having a 15-minute break. Would that be a convenient moment?

MR SILVA: I believe that this would be a good opportunity to have a break.

THE PRESIDENT: We will now have a 15-minute break. The meeting is adjourned.

(Short adjournment)

THE PRESIDENT: We continue with Mr Ricardo Alves Silva. Mr Silva, you have the floor.

MR SILVA: Returning to the *Juno Trader*, in its claim, the Applicant also states that up to this date no one from the ship owner 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 (*auto de noticia*), which explained what had happened on 26 September and the offence that the vessel was accused of. The *auto de noticia*, 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 noticia* 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 an obstruction of justice, the law sets forth that if the offender refuses to sign the *auto de noticia* 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 the said passports were effectively returned, with the consequent repatriation of the said crew members. Given the above, the Republic of Guinea-Bissau does not understand the reasons that led St 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 changed 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 actual 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 on the *Juno Trader* for breach of the fisheries law, and a fine of €8,770 on the vessel's captain for refusing to co-operate 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 conceded; and, please note, it is conceded to be a serious offence. The non-communication of the entry of a fishing vessel, in *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 $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 noticia*.

We must come to one conclusion here, which is that the *auto de noticia*, 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 tending 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 noticia*.

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, not the double thereof.

There was a possibility of applying a fine somewhere within the range of €350,000, 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, 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 Resources 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 ship owner 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 6.3, 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 the 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 a 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 a contempt of the International Tribunal Law of the Sea. It is not a 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 Ship Owners Protection Limited had issued a guarantee covering a maximum amount of €50,000 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, the 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. 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 the 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 in 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 the 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 as 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, on16 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 authority prior to ruling on the injunction. It decided solely on what was stated by the Applicant. Guinea-Bissau 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 that what occurred with the Master was not the posting of a bond but the payment of the fine. However, we must in this case analyse local law before we can reach any conclusion as to the effect 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 respected the administrative resolutions that levy fines under the Fisheries Resources Law may only e 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 the said 15 day term has expired, the ship owner'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 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 to French to 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.

I ask permission to state three phrases in Portuguese and translate them into English. The Bissau Court judgment says what the law says. The law says that the

suspension of enforcement of an administrative act may be ordered when three requirements are met: (1) *prejuízos de difíil reparacao;* which are exactly those - damages which are difficult to repair; *(2) Nao houver grave prejuízo parao o interesse Público*. That means that the court may only judge the injunction and may only confer the suspension if and when the decisions to suspend the administrative authority's decision does not cause any serious damage or possibility of serious damage to the public interest. (3): *Nao haja indícios de ilegalidade na interposicao 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 prove that may be the decision, the act of the administrative authorities, is illegal. What this means, *Nao haja indicios de ilegalidade na interposicao 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.

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 in 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 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.

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 10 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 sole the problems arising from arrest cases resorting to domestic rules and procedures. The Applicant state 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 ordered 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. 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 the southern of a sovereign state and it is inadmissible.

I thank you for listening to my oral arguments. I thank the Tribunal. I should like to invite the Tribunal 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.

MR STAKER: Mr Silva has dealt in 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 exercised, one very relevant fact that emerges from the explanation of the facts that were 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 adopted 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 van 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 insofar as 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 state for the same proposition is Ian 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 the 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 of 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 *Junor 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 St 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 judgment 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 St 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 St 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 St Vincent and the Grenadines dated 17 November 2004, which states that the *Juno Trader* is a vessel flying the flag of St Vincent and the Grenadines. This is a letter issued merely for the purposes of granting an authorisation 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, ie the State 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 recognised 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 the 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 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 proceedings 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 emphasise 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 ship owner 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 *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 has 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 cannot 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 be ordered only 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 until 10 a.m. on Tuesday, 7 December 2004)