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

1999

Public hearing

held on Saturday, 20 March 1999, at 10.00 a.m.,

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

President Thomas A. Mensah presiding

in the M/V "SAIGA" (No.2)

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

Uncorrected
Non-corrigé

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

Saint Vincent and the Grenadines
represented by

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

as Agent;

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

as Deputy Agent and Counsel;

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

and

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

as Counsel and Advocates.

Guinea
represented by

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

as Agent and Counsel;

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

and

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

as Counsel.

THE PRESIDENT: Mr Von Brevern, as agreed, your side will present their submissions this morning, and I invite you to commence the presentation.

MR VON BREVERN: Yes Mr President. The presentation will be started by the Minister of Justice of the Republic of Guinea, Mr Togba.

MR TOGBA (Interpretation from French): Mr President, Members of the Tribunal. As in November 1997, I have the honour to head the Guinean delegation at the hearing on the merits of the case of the *M/V SAIGA*. Before referring to several aspects of the proceedings, allow me, Mr. President, to express the sincere thanks of the government of the Republic of Guinea for the wise and prompt way in which you dealt with the slanderous remarks made in this courtroom against my country in particular, and Africa in general.

Let me comment first of all that there are no corrupted without corrupters, and the corrupters have dropped their mask in this hearing, which brings us together by producing to support their actions a draft decision which has neither been signed by the competent ministers, nor registered with the Secretary General, and on which the Applicant in these proceedings is mistaken on two counts. He is mistaken on the validity of the legislation, which is only a draft. He is also mistaken on the subject of this draft, which intends not only to bridge a legal void, but to install a system of taxation which is more favourable for bunkering fuel intended for fishing vessels and other vessels in transit to Conakry in relation to ordinary taxation for fuel, for transport vehicles, whether private or collective.

The project offers, if it is adopted, to current companies, Elf, Mobil, Shell, Total, Bankina, Sodegui, practising bunkering, and also to new companies requesting to do so, to apply lower prices than those on the domestic market. Therefore they will be competitive. Indeed, whereas non-tax free gasoil consumed on our land market bears a specific tax of 245 Guinean Francs per litre, the draft provides for a tax of only 15 francs per litre. This preferential system would not only benefit legal trade, but smuggling would continue to be suppressed in conformity with the legislation in force. Beyond the interest of the draft, the question arises as to how those responsible for *The Saiga* who are not officials of the Guinean state have been able to procure this text.

Mr President, Members of the Tribunal, it emerges clearly from what has gone before, that the phenomenon of oil trafficking at sea is based on shadowy relations on a network which implies complicity on land, and this makes the struggle which our country is engaging in more difficult.

Oil trafficking constitutes a serious obstacle in implementing our targets of development. Suffice it to say that the Customs accounts for 53% of domestic revenue of our national budget, and in this customs revenue nearly 30% stems from the taxation on oil products; petrol, gasoil and oil.

Guinea is not an oil producing country, neither does it have a refinery. That is to say, the more oil trafficking goes on, the more the revenue for our budget is compromised. The statistics produced to the Tribunal in the proceedings on prompt relief in November 1997 have shown the progression of oil taxation following the arrest of *The Saiga* and the intensification of coastal surveillance. The following table is also a further illustration of this.

The total of levies and taxes from fuel for last year, 1997, the entire year, provided 81,705,308,207 Guinean Francs. For the first six months of 1998, the revenue has been 50,172,815,249 Guinean Francs. These figures are enough to speak for themselves.

Guinea has been engaged in a difficult struggle against petrol trafficking since 1980, with the support on the one hand of the United States of America, who have made a gift of four launches, the P328 and the P35 operating in *The Saiga* case, the P300 and the P30 and a floating dock. On the other hand, oil companies Elf, Total and Shell, victims of oil smuggling at sea.

The diversity of the support to the action of the Government of the Republic of Guinea shows to a sufficient degree the dangers for the economies of developing countries from this modern form of piracy at sea, which is represented by oil trafficking. However, following the example of the oil companies quoted above, and the company Mobil Oil which started its activities in 1997, the owner of *The Saiga* could have asked to constitute an oil distribution company in Guinea, which is a country resolutely in favour of liberal economy since 1984. Thus, by levies and taxes which it would pay the State, by the jobs which it would create, and the income which it would distribute, the owner of *The Saiga* would make its modest contribution to the development of Guinea.

Today, Guinea accuses *The Saiga* of contravention of Article 1 and following the law 007/CTRN of 15 March 1994, having to do with suppression of fraud on the import, the transport, the storing and sale of fuel in the Republic of Guinea by any physical or legal person who is not legally authorised. The penalties awarded by the Guinean courts in conformity with Article 8 of the law I have just cited are no more severe than those provided for by Articles 316 of the Code des Douanes of Guinea and 309 of the Code des Douanes of Senegal. These two Codes provide in their respective articles, as I quote above, for the confiscation of the object of the fraud, the confiscation of the means of transport, the confiscation of the objects used to conceal the fraud, and a fine equal to four times the value of the objects confiscated.

In the spirit and the letter of the law of 15 March 1994, the activities of import, transport, storage, sale or distribution of fuel may be exercised cumulatively, or independently. In the case in point *The Saiga* is accused of illegal sale of fuel in the Republic of Guinea in consideration furthermore of the fact that Conakry was not even its destination. These issues of the case are founded in the space with regard to units of measure, of distance at sea which are permitted in Guinea, which are nautical miles and cables. One nautical mile is ten cables, which is 1852 metres; that is, one cable equals 185.2 metres, and this is in conformity with the edge of the chart no. 31056-G drawn up in 1980.

Mr President, Members of the Tribunal, to return to another more technical aspect of the file, and in conformity with the Convention of 1982 and the rules of procedure of your Tribunal, the Republic of Guinea is opposed to the Flag State, the State of Saint Vincent and the Grenadines. But the reality is indeed something else. The adversary of Guinea in this case is the community of owners whose tankers sail the seas of the globe. To witness, the campaign of defamation organised in the American press against our country. Only the diligent and appropriate reaction of our diplomatic representation in Washington and New York, on the basis of information it received enabled us to put an end to this campaign of denigration and disinformation.

In respect to the quality of the parties, let me recall the pertinent observations of Guinea on the nature and nationality of *The Saiga*. It was shown to this effect. Firstly, the provisional certificate of registration had expired on 12 September 1997, that is more than one month before the arrest of the vessel. Secondly, the final certificate of registration had been issued on 28 November 1997, that is one month after the facts.

The final certificate of registration was only issued after the production of certain documents during the period of validity of the provisional certificate. The non-issuance of the final certificate during this period of the validity of the provisional certificate incurs the loss of the right to the benefits of the registration of the provisional registration. These benefits cannot persist beyond 12 September 1997.

By issuing the final certificate of 28 November 1997, the State of Saint Vincent and the Grenadines wished to repair what was irreparable. With regard to the references of the provisional certificate reproducing the references of the registration list, the benefits of the latter could not contradict those of the provisional certificate.

In summary, the nationality of *The Saiga* was not established at the time of the facts. It is still less effective since the owner is a Cypriot, and the managers are Scottish, and therefore it is obvious that the Applicant is inadmissible in his action in default of competence to act.

In his intervention before the Tribunal, my learned friend Mr Carl Joseph of Saint Vincent and the Grenadines dwelt at length on the alleged damage for which he is seeking compensation. Allow me to indicate that to have a right to compensation, the damage must be established against a person. In this respect, it is sufficient to observe that, firstly, the moral damage resulting from damage to a national has not been proved. The link of nationality was in default at the time of the facts.

Secondly, with regard to the damage caused to the ship, the demonstration in the hearings leaves a lot to be answered. To arrive at this conclusion, the Guinean advocates of *The Saiga* vessel would have had to organise a statement of facts by a bailiff chosen by them or assigned by a judge in the presence of the master of the vessel of the Customs and the Guinean Navy. For want of such a statement, the activities organised in Dakar and the absence of Guinean authorities cannot persist. The photographs shown in this courtroom are null and void.

Thirdly, the above observations are applicable to injured witnesses who have given statements to the bar of the Tribunal. With a lack of hospital evidence, the responsible people of *The Saiga* have submitted evidence from private doctors in Conakry.

Mr President, Members of the Tribunal, Guinea is a coastal State and earns a great deal of its income from maritime trade. Therefore, we are very aware of our international commitments, and this is why we have come before you to plead for your jurisdiction. This is why, as soon as the conditions of 4 December 1997 were fulfilled, the vessel *M/V SAIGA* was duly released after the bank bond had been drafted in an acceptable form to all the parties.

Guinea has today had to appeal to your jurisdiction. Maître Admadou Tidiane Kaba, the advocate from Guinea, Maître Richard Bangoura, Maître Alpha Bacar Barry, all

advocates of the Bar of Conakry, and Maître Yèrim Thiam, present here, came to the hearings of Conakry, but the latter was not able to plead because the Convention between Guinea and Senegal does not provide for reciprocity in terms of the pleadings of advocates.

Having defended its case in front of the tribunal at first instance in Conakry, the master of *The Saiga* has not appealed to the Supreme Court to consider the legality of the decision of the Court of Appeal of Conakry. Indeed, in conformity with article 87 of the organic law L/91/008 of 23 December 1991, in respect of the Supreme Court of Guinea there was a time of six days after the announcement of the decision to appeal. By this means of appeal, the master of *The Saiga* had the right to appeal the decision if his request was well founded, but also before the decision of the Supreme Court he could ask for a stay of implementation of the decision by fulfilling the conditions of article 78 of the law of the Supreme Court.

Concerning the owner, he was also absent from this trial of the master, and consequently with regard to the confiscation of the vessel, the notification of the decision opens up the right to appeal on points of law in conformity with article 87, and this has not yet been done and the owner still has the right to appeal on points of law. The owner of the cargo, being in the same legal situation as the owner, would also benefit today from the same means of appeal.

Contrary to the allegations made by Maître Thiam, article 300 of the *Code des Douanes* does not institute a system of administrative irresponsibility, but rather a system of responsibility of the administration on the actions of its agents, that is, Customs officials and sailors, that is, members of the crew who have a claim to damages have the right to do so in front of Guinean tribunals and the responsibility of the State will cover its agents.

In summary, Guinea has a legal system for compensation which all the parties to the dispute may use. The development of the proceedings shows clearly that there was a non-exhaustion of local remedies in the case of *The Saiga*. In fact, it was not the intention of the people responsible for *The Saiga*. The objective was to use the media to damage the image of Guinea. However, after the decision of the Court of Appeal of Conakry, the compromise settlement which can be applied in conformity with article 251 of the *Code des Douanes* of the Republic of Guinea, was not applied.

Mr President, Members of the Tribunal, I recall the hardly hidden threat that we heard in Conakry, "If we do not win our case, we will go elsewhere." Therefore, we are here today in front of the International Tribunal of the Law of the Sea and we have been brought to Court under the eyes of the American press.

In summary, the State of Saint Vincent and the Grenadines is asking the Tribunal to give rights to the owners of vessels, a decision which will have a dire effect on our populations, and if there is a victim in this case, it is certainly not the State of Saint Vincent and the Grenadines but the Republic of Guinea, which, contrary to what Maître Thiam has said, has not the time to consider its fate because we are losing income due to smuggling. Guinea is today mourning the loss of two of its officials involved in a smuggling case.

Mr President, Members of the Tribunal, the Republic of Guinea is calm and has confidence in the Tribunal that justice will be done.

Mr President, Members of the Tribunal, I would now ask you to allow me to hand over to my colleagues to continue their pleadings. Thank you very much.

THE PRESIDENT: Mr von Brevern, please.

MR VON BREVERN: Mr President, Honourable Judges, may I present my paper on the right to contest the admissibility and on one aspect of the admissibility, namely the question of provisional registration.

The present dispute concerning the arrest and detention of the *M/V SAIGA* was instituted by the Applicant State on 22 December 1997. Having undergone the prompt release proceeding pursuant to article 292 of the Convention, Saint Vincent and the Grenadines instituted arbitration proceedings on 22 December 1997. These proceedings were based on article 287(3) of the Convention and commenced with the provisional measures proceedings before this Tribunal, pursuant to article 290(5) of the Convention. At the same time, the first steps to constitute an arbitral tribunal were being undertaken.

Shortly before the opening of the provisional measures hearings, the parties transferred the dispute on the merits from the arbitral tribunal, yet to be constituted, to this Tribunal. The underlying exchange of letters that we have referred to as the 1998 Agreement is now interpreted by the Applicant State to have excluded the possibility for Guinea to raise objections to the admissibility of the claims.

Guinea submits that the interpretation by the applicant is wrong. She has given sufficient explanation concerning her interpretation of the phrase "in a single phase dealing with all aspects of the merits and the objection to the jurisdiction". It is now up to you, Honourable Judges, to decide upon this point. Yet I would like to make some remarks in support of the Guinean interpretation, in particular taking into account what Mr Howe said two days ago.

In accordance with article 31(1) of the Vienna Convention on the Law of Treaties, any interpretation of the 1998 Agreement should be done in good faith. This means that a reasonable person should be able to accept the result of the interpretation as fair and equitable.

No reasonable person could assume that Guinea waived any objection to the admissibility of the claims. Had the parties not concluded the 1998 Agreement, no dispute would have arisen with respect to the wording of its paragraph 2. Had the parties not concluded the 1998 Agreement, no dispute would have arisen with regard to any time limits for the filing of preliminary objections. Had the parties not concluded the 1998 Agreement, Guinea, as a State Party to the Convention without having made a declaration concerning the choice of judicial procedure, would have been deemed to have accepted arbitration pursuant to article 287(3) of the Convention.

Mr Howe tried to explain what the Guinean motivation to waive objections to the admissibility might have been. He drew the conclusion that Guinea necessarily wanted to reach a judgment of this esteemed Tribunal on the ultimate merits in order to prove to the world that she acted in conformity with international law to deter vessels from bunkering off the Guinean coast and to be able to collect the US$400,000 under the bank guarantee. Guinea invites this Tribunal not to follow this reasoning. Apart from the fact that it has

always been the Guinean position that the payment of the US$400,000 was dependent on a final decision by a Guinean Court, Mr Howe's interpretation fails to take into account the fact that Guinea did not voluntarily enter into judicial proceedings concerning the present dispute.

It is one of the novelties that the Convention introduces to public international law that it entails compulsory judicial proceedings with respect to disputes concerning the interpretation and application of the Convention. As has been indicated by, for example, Captain Lazlo Merenyi, Guinea would have preferred to settle the dispute concerning the *M/V SAIGA* on a non-judicial basis in accordance with article 251 of the Guinean Customs Code. It is primarily for the compulsory dispute settlement mechanism that Guinea appeared as the Respondent before this Tribunal.

Of course, this does not mean that Guinea would not like to show to the international community that she acted in conformity with international law, but this does not mean that Guinea waived any objections to the admissibility of the claims. As Mr Howe has rightly observed in his first statement on the question, the Guinean objections concern all of the claims advanced. In other words, they are an important and essential part of the Guinean argumentation. In that regard, it is contradictory that Mr Howe referred to them in his second statement as "some legal technicality", the raising of which would have been precluded.

Guinea submits that a reasonable person would not interpret paragraph 2 of 1998 Agreement as precluding the raising of objections to admissibility. It is reasonable to assume a waiver of any objections to the jurisdiction of this Tribunal that have not been expressly mentioned, but it is unreasonable to assume the waiver of the fundamental right of the Respondent to challenge the admissibility of material claims brought against it.

That Guinea had not already raised the objections in the prompt release proceedings or at an earlier stage of the provisional measure proceedings relates to the fact that these proceedings do not constitute the merits of the case, within the framework of which the objections to admissibility of the claims were to be treated. As is also indicated by the discussion concerning the non-exhaustive character of preliminary objections, Guinea has a procedural right to raise her objections in the proceedings on the merits. This is, of course, notwithstanding the general procedural requirement that such objections shall be raised as early as possible to avoid unnecessary work and to give the Applicant sufficient opportunity to respond.

I have argued in my opening statement that the Applicant Counsel's objection to my raising of the objection concerning the non-exhaustion of local remedies in the provisional measures hearings on 24 February 1998 proved that objections to admissibility had not been waived. Mr Howe stated in response that this was not so because the Applicant's Counsel objected only to the late stage that this objection was made because this was easier to explain than to refer to any complicated interpretation of the 1998 Agreement. I dare say that no complicated interpretations would have occurred only four days after the conclusion of the 1998 Agreement had the parties really precluded something so substantial as a waiver of objections to the admissibility of the claims.

I, as Agent of the Republic of Guinea, negotiated the 1998 Agreement primarily with Counsel of the Applicant State who is not present in these current hearings. Therefore, I am the person in this court who can report best on the intentions the parties had when concluding the 1998 Agreement. I repeat very clearly before you, Honourable Judges, that I did not

waive any objection to the admissibility of the claims, and – I do not have to emphasise this – I did not have the authority to do so.

I submit that the Guinean interpretation could be accepted by a reasonable person as being fair and equitable, whereas any interpretation to the contrary would be made against good faith.

Next, Mr President, I would like to respond to Dr Plender's intervention with respect to registration of the vessel in which he, on the afternoon of Thursday, 18 March, addressed the question of registration of *M/V SAIGA*. Dr Plender concluded that Vincentian law would be simple and clear on this issue. Nevertheless, he discussed the question of provisional registration for about 20 minutes. I have, since then, gone through his statement several times but I have failed to understand the legal approach of Dr Plender in respect to provisional certificates under Vincentian law.

It is not my view that the situation under Vincentian law is such that a provisional certificate of registration always and in any case remains valid for up to one year unless it is replaced during that time by a permanent certificate of registry or unless the exceptional provision of article 37 of the Merchant Shipping Act applies.

Dr Plender starts by referring to section 36, paragraph 2, stating that the provisional certificate would have the same effect as an ordinary certificate until the expiry of one year.

Dr Plender did not expressly mention the expiry date of the provisional certificate of *M/V SAIGA,* namely 12 September 1997, when he continued with section 7 of his declaration by stating that: "provision is made for the issuance of two successive certificates, each for six months". In the same section he became even clearer when he said: "If the paperwork has been completed within the first six months, another provisional certificate is issued".

Furthermore, the brochure issued by Saint Vincent and the Grenadines Maritime Administration states that a provisional certificate is issued for six months and **can** be extended for a further six months. The same applies to registration procedures in other maritime registries, for example all those cited by Dr Plender where initial registration is provisional, where the registration period commonly covers six months and where that period can be extended. Accordingly, the witness Alan Stewart expressly stated: "You can get another extension of six months".

What is clear from the statements cited by Dr Plender is that when the provisional registration certificate expires six months after its issuance the Commission for Maritime Affairs must step into action. It cannot be stressed strongly enough that this necessity results from the fact that there is no automatic extension by law.

Saint Vincent and the Grenadines obviously does not maintain the point of view that they had put forward in their reply under no. 24 according to which a vessel registered under the flag of Saint Vincent and the Grenadines remains registered until deleted from the registry. Dr Plender now deems any kind of activity by the Commissioner for Maritime Affairs as necessary, while remaining unclear on the characteristics of this activity. Whereas under no. 7 of his statement he said that in such a case "another provisional certificate is issued", in all other parts of his speech referring to provisional certificates he contends that the provisional certificate original issued for six months can be extended for a further six

months. In any case, he does not clarify whether a new paper would have to be issued or whether a statement by the Commissioner for Maritime Affairs in the registry would suffice for the extension over another six months.

Dr Plender avoids mentioning that the Commission for Maritime Affairs would have either issued a new provisional certificate or extended the original provisional certificate. One of these two acts, however, would have to be executed by the Commissioner, according not only to the rule in the brochure but also to regulations in other maritime registries as well as according to Alan Stewart's statements. Consequently, we must come to the conclusion that Dr Plender was explaining the situation in the light of the Merchant Shipping Act of Saint Vincent and the Grenadines, thereby declaring that a provisional certificate must either be replaced by another provisional one or have its expiry date extended. Furthermore, we must state that Dr Plender did not allege that such an act was executed by the Commissioner for Maritime Affairs. It has to be presumed that the Commissioner did not take any action. This is also confirmed by the cross-examination of Captain Orlov recorded in the proc*ès-verbal* no. 3, p.7, line 5. From his answer, it becomes evident that he did not receive any information from Seascot as to whether an extension of the provisional certificate after its expiry was granted or whether an extension had been applied for.

So, instead of producing a letter by the Commissioner for Maritime Affairs stating the extension of *M/V SAIGA's* provisional certificate on 12 September 1997 for another six months or producing a second provisional certificate issued for *M/V SAIGA* as documentary evidence, Dr Plender cited the letter by the Deputy Commissioner for Maritime Affairs of 1 March 1999, in which she stated that it was "common practice" that owners allowed the validity period of their provisional certificate to lapse for a short period. That is an interesting statement. The person responsible for the registration of vessels in the St Vincent registry describes in a letter that will be presented to the International Tribunal that in the St Vincent registry it is regular practice that owners do not care about the expiry date of a provisional certificate. Why did Dr Plender produce such a letter for the International Tribunal? In my opinion, this is counter-productive to his case. The citation of this statement is obviously intended to give the International Tribunal the impression that in the Vincentian registry the expiry date of a provisional certificate is not to be strictly respected. However, if this were to be the case, then I would say that, in all those cases where owners allowed the validity period of their provisional certificates to lapse, the respective vessels were indeed without valid registration after the expiry date. The same applies to *M/V SAIGA*.

The letter from the Deputy Commissioner for Maritime Affairs of 1 March 1999, however, is also of great interest with respect to the second part of the sentence cited by Dr Plender. In the second part of the sentence the Deputy Commissioner confirms that, after the expiry of the validity of the provisional certificate, the owner has to obtain either a further provisional certificate or a permanent certificate. The Deputy Commission makes it clear that in *The Saiga*'s case it was not a further provisional certificate but a permanent certificate that was obtained.

By way of documentary evidence, it has been proven that *M/V SAIGA*'s permanent certificate dates from 28 November 1997. This was exactly when the second day of the oral hearing in the prompt release case took place and when Saint Vincent and the Grenadines produced the permanent certificate for the International Tribunal and the parties.

In one of the submissions, Saint Vincent and the Grenadines stated that it was difficult to send the permanent certificate on board *M/V SAIGA* because she might have been at sea. If such a fact had indeed been relevant in the case of *M/V SAIGA*, the permanent certificate would have shown a date before the arrest of the vessel, namely before 28 October 1997, whereas the delivery of the certificate might have taken place only later. This, however, was not the case. The permanent certificate dates from only one month after the arrest of *M/V SAIGA* and was apparently only demanded by the registrar of Saint Vincent and the Grenadines at a time when the problem of validity of the registration of *M/V SAIGA* came up in the prompt release proceedings.

Saint Vincent and the Grenadines thereafter produced confirmations by the Commissioner for Maritime Affairs which were alleged to demonstrate that the original provisional registration of 12 March 1997 was still and continuously effective after the expiry date of validity. From amongst these letters, they produced, for example, an extract from the register dated 24 February 1999 in which the validity of registration was pronounced "permanent". Such effect, however, is limited to the date of the issue of the extract so that consequently, by such an extract, it is made clear that the vessel was registered on a permanent basis on and following the date that the register extract was issued. On 12 March 1997, however, the vessel's registration was not permanent, as can be seen from Annex A in the letter of the Deputy Commissioner of 1 March 1999 in which the registry extract of 15 April 1997 is produced and where it is clearly said that this registration was valid only until 12 September 1997. The same applies to the declaration by the Commissioner for Maritime Affairs of 27 October 1998 produced as Annex 7 in the Reply. He does not confirm in this document that the extension of the registration had been applied for.

In this context we must also take into consideration that confirmations and letters signed and issued by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines are not independent documentary evidence. The Commissioner for Maritime Affairs is party to these proceedings. Such confirmations are the only possibility for the Commissioner to support the various parties interested in this case, to overcome the problems raised by the defendant State. The only valid documentary evidence would have been the timely application of Seascot Management to the Saint Vincent and the Grenadines Maritime Administration for a prolongation of the validity of the provisional certificate or for the issue of another provisional certificate. However, such application was not and cannot be produced.

Finally, I should like to reject Dr Plender's comparison of a vessel's provisional registration certificate with a natural citizen passport. Such comparison is not acceptable. The nationality of a natural citizen is acquired by birth. A natural citizen retains the nationality of his State independent of the expiry of his passport. A vessel, however, acquires the nationality of a state only by express application for registration. Such registration in the life of a vessel can be and will often be changed. The registration is a constitutional act by which the nationality of the flag State is granted to the vessel. If this act of registration is limited in its validity, indeed the vessel becomes stateless, which is quite different from the case of a natural citizen. I refer to article 91, paragraph 1, sentence 2 of the Convention which states:

"Ships have the nationality of the state whose flag they are entitled to fly."

The entitlement to fly a flag is given by the registrar on condition that the vessel is registered. As in the case of *The Saiga*, the validity of registration was limited to 12 September 1997 and as the validity of that provisional registration has not been extended, *The Saiga* was a vessel without nationality.

As regards the requirements of article 37 of the Merchant Shipping Act, I cannot accept Dr Plender's statement that the letter of the Deputy Commissioner of 12 March provides the owners of *The Saiga* with:

> "other acceptable evidence that the ship's registration in the country of last registration had been closed".

The Deputy Commissioner, as well as Dr Plender, failed to explain what was the other acceptable evidence that apparently proved that the registration in the former registry had been closed. There would be no other acceptable evidence besides a deletion certificate of the Maltese register. The fact that Saint Vincent and the Grenadines is not in a position to provide the International Tribunal with such a deletion certificate serves, in my view, as clear evidence that *M/V SAIGA* was not deleted from the Maltese Registry at the time of the arrest. I have no doubt that the International Tribunal will also come to this conclusion, particularly when considering Dr Plender's explanation for not having produced the deletion certificate when he said that it is unnecessary to trouble the Tribunal with details of her history under a different name and registry.

To conclude, when *M/V SAIGA* was arrested, it was not validly registered in the registry of Saint Vincent and the Grenadines and was, therefore, a vessel without nationality. As has been stated in front of the International Tribunal, on 28 November 1997 *M/V SAIGA* was validly registered in the Saint Vincent and the Grenadines registry on that very day. From thereon, the vessel had the right to fly the Saint Vincent flag and the State of Saint Vincent and the Grenadines from thereon may be entitled to pursue possible claims that may arise for *M/V SAIGA* after that date. Consequently, Saint Vincent and the Grenadines cannot pursue any claim for the cargo owner because the confiscation of the cargo had already been terminated before the vessel was permanently registered under the Saint Vincent and the Grenadines registry. Furthemore, Saint Vincent and the Grenadines cannot pursue a claim for the crew members that had already left *M/V SAIGA* on 28 November 1997 including those two crew members who were injured. Furthermore, Saint Vincent and the Grenadines cannot pursue the alleged damages to the vessel as at the relevant time the vessel was not registered in the Vincentian registry. So, under this particular aspect of valid registration, Saint Vincent and the Grenadines could only pursue claims for damages that occurred after 28 November 1997. However, here the other objections as to admissibility apply.

Mr President, I should like to ask Professor Lagoni to present his paper on further points of admissibility and legal issues.

DR PLENDER: Mr President, Members of the Tribunal, during the past two weeks we have heard several speeches and many submissions of both parties. A lot of documentary evidence has been presented and six witnesses were examined, cross-examined and re-examined. With Captain Orlov and Lieutenant Sow, this procedure continued over hours. In this speech, which will be my last appearance as Counsel for the Republic of Guinea in this case before the Tribunal, I will not and cannot address all facts and legal issues in detail. Instead, I will

focus on certain questions and issues which in our view are important, if not crucial, to decide the case of *M/V SAIGA* on the merits.

Thereby, I shall take into account the list of issues agreed between the parties with the help of your good offices, Mr President, on 5 February 1999. Some of the issues mentioned there have remained contested between the parties, whereas others lost their significance. Accordingly I will talk on the issue of the admissibility of certain objections against the St Vincentian claim; the applicability of its Customs laws by the Republic of Guinea in its Customs radius and finally on hot pursuit.

I begin with the admissibility of Guinean objections against certain damage claims brought by Saint Vincent and the Grenadines. The first point I want to make refers to the genuine link between Saint Vincent and the Grenadines and *The Saiga*,(article 91(1) 3rd sentence of the Convention).

We would like to make it very clear before this Tribunal that the Republic of Guinea recognises that open shipping registers are institutions of importance in the competition of modern shipping and that the revenues gained from such registers are of relevance for several developing countries. However, here I have to pause to tell my learned colleague, Dr Plender, what an open register is. It is exactly what it says; that is, a register open to ships, the beneficial ownership of which are not nationals of the registering country. Accordingly, the British, French, German, Italian, American registers and many others are not "open" registers. In these countries, registration in the national shipping register generally requires that the beneficial owner of the ship is a national of the country. I say "generally" because there are various exceptions for bare-boat charter registration or so-called second registers. Many open registers, however, require that the owner is a resident, or, as a juridical person, that he is domiciled in the country of registration whereas others, such as the Vincentian register, are satisfied with a registered agent domiciled in the country.

Guinea does not challenge the sovereign decision of any country to establish an open shipping register. Nevertheless, it submits that certain legal requirements, which the Law of the Sea Convention contains for open registers are not met in the case of a registered agent. I specified in my speech of Thursday 11 March, in particular, the ownership requirement for the genuine link, which follows, in my view, from articles 94, 217 and 235 of the Convention. As I am addressing this point, perhaps I may take the opportunity to remark that the relevant parts of my speech are missing in the uncorrected English verbatim record, PV99/8, page 15, line 19, whereas they are contained in the French verbatim records on page 19 line 6 to page 23 line 6.

It has been submitted there and earlier in the proceedings that the flag State shall have jurisdictional and enforcement jurisdiction over the owner or operator of a ship flying his flag, otherwise the flag State cannot fulfil his obligation under the convention in particular with respect to environmental matters. In the absence of such jurisdiction , the genuine link is missing, and the Respondent State is not required to recognise claims of the flag State.

In his usual enlightening and inspiring speech of 18 March, Dr Plender called my view on this point *Professorenrecht*. I take this as a term of honour, hoping that it will become a German borrowing in the rich English language. It reminds me that the United Kingdom urged the German Reich at the end of the First World War to indicate its industrial goods on export as "Made in Germany". Moreover, Meister Eckhart would certainly not

have speculated whether an angel without wings could fly, if this great medieval thinker had lived in our times of jet propulsion.

But I shall turn back to our issue. Mr President, Members of the Tribunal, we are well aware of the far reaching consequences that your decision on the point of the genuine link might have for international shipping. At any rate, the Republic of Guinea ventures to submit that it is in the interest of all coastal States to strengthen the genuine link in order to improve the protection of the marine environment against pollution from vessels. On the other hand, the implementation of the ownership requirement into the conditions of registration is a small step for a flag State with an open register.

My next point with respect to admissibility relates to the exceptions from the national claims rule. I concede that Guinea has not maintained its argument with respect to claims of the ship owner in relation to the ship. But I have not included the cargo owner, as a look into the English verbatim record PV.99/8 of 11 March 1999 at p.17 line 10, to which Dr Plender refers, can prove. I have only stated in my speech that the protection of foreign cargo owners is, technically speaking, not a case of the application of the exception of foreign seamen. The right of the flag State to exert diplomatic protection over ships flying its flag does not necessarily include a foreign cargo in times of peace. This may be different under the law of warfare and neutrality, but this law is of no relevance in our context.

Therefore, I ask again whether the scope of the flag State's right of diplomatic protection really includes the cargo. Let us imagine a modern container ship of 4000 containers. The flag State, no doubt, may seize the International Tribunal under Article 292 of the Convention if the requirements for prompt release of the vessel including the cargo and of the crew are fulfilled. But can this flag State also bring claims on behalf of cargo owners from various countries with whom he never had any connection whatsoever? I am indeed building this case cautiously on questions, because there is no hard and fast law as yet, which would allow us a simple answer.

As to the foreign seamen, the traditional view of the *duplex ligamen* or double bond, to which Dr Plender was referring, has become completely fictitious under modern conditions of shipping. Foreign seamen, like foreign workers, are subject to the rules of labour law under which they are working. These rules require a certain discipline. But a comparison of their status with armed forces is, under modern working conditions, even in the United Kingdom, which is obviously maintaining its traditions better than other countries, and I mention this with admiration and respect, completely out of time. That foreign seamen and foreign workers are under criminal jurisdiction of the flag State, or respectively of the territorial State, is just confirming the similarities between both groups.

Finally, Dr Plender has pointed to practical considerations. He infers from my thesis that "the number of parties in any proceedings in this Tribunal would be at least as great as the number of nationalities represented on board the vessel." I agree with him that this cannot be right, but for other reasons than he has in mind. I fail to see on which legal basis a home State of a seaman could bring a claim against another State under the Convention before this Tribunal. Article 111(8) of the Convention provides a right of compensation for the ship and accordingly a right of diplomatic protection of the flag State, but not of the home States of the seamen.

Turning to my last point of admissibility, the question of the exhaustion of local remedies, I observe with pleasure that in paragraph 31 of his speech of 18 March, Dr Plender no longer maintains the view that there is no jurisdictional connection between the coastal State and a vessel that is licensed to make use of the coastal State's sovereign rights in the exclusive economic zone. I refer to PV.99/16, p.19, line 48. On this point we are indeed *ad idem*. The common ground ends, however, when it comes to the reason of this jurisdictional connection . Unless the Tribunal decides otherwise, the Republic of Guinea maintains that the prohibition of bunkering is not an exercise of a sovereign right. Instead, it is an exercise of coastal State's jurisdiction which is inclined, but not expressly set forth in the Convention.

Notwithstanding this, the jurisdictional connection comes into existence at the moment when the foreign ship voluntarily enters the customs radius in order to supply fishing vessels with gasoil in this zone. This could easily be shown by an example. A ship which is calling at a port in distress does not establish a jurisdictional connection with the port State. But *The Saiga* came voluntarily and intentionally into the customs radius in order to conduct its bunkering business there.

Dr Plender also pointed to the fact that the local remedies available in the respondent State must be effective. I venture to say that in times of peace, the local remedies in a State nowadays must be presumed as being effective. Saint Vincent and the Grenadines has failed to specify why Guinean remedies should not be effective. Nevertheless, His Excellency Mr Togba, the Minister of Justice of the Republic of Guinea has explained this morning the local remedies available for the different claims within Guinea, and that they are effective.

In concluding my remarks on the admissibility, I submit that the local remedies have not been exhausted in accordance with Article 295 of the Convention. For this reason, and for the reasons set forth before, the respective claims of Saint Vincent and the Grenadines are not admissible.

Mr President, members of the Tribunal, in the case that the Tribunal will nevertheless decide that claims advanced by Saint Vincent and the Grenadines are partly or even *in toto* admissible, I will turn now the second main issue of this dispute. Here I will address the question of the applicability of Guinean customs laws to its customs radius beyond its territorial sea.

As to the question whether or not the Republic of Guinea applies its customs laws in the customs radius in order to prohibit offshore bunkering of fishing vessels beyond its territorial sea, His Excellency, the Minister of Justice of the Republic of Guinea has again set forth in his statement this morning that it does, and how it does. I will dwell on a few aspects of his Statement here.

It has to be noted that the fishing vessels supplied by *The Saiga* are pursuant to their fishing licence obliged to purchase oil only from approved service stations. This obligation enabled the Guinean Customs authorities to make sure that only such gasoil is sold to fishing vessels for which customs duties and taxes have been levied. The fact that the fishing vessels have not been convicted as yet for obtaining fuel from *The Saiga* does not exclude their conviction in future. We have heard from Mr Mamadi Askia Camara in his statement of 16 March, and this is PV.99 no. 15, p.17, lines 46-50, that a prosecution order has been issued on 21 November 1997. Maintaining that this was not successful by now, we also have to take

into consideration certain obstacles which the Guinean authorities are facing in the prosecution of foreign fishing vessels. These vessels are obliged to land their catch only once a year in Guinea. Normally they return to their home ports in Europe after having completed their fishing in the Guinean exclusive economic zone. Hence, their prosecution is difficult for the Guinean authorities.

Besides this, from the point of view of international law, the enforcement measures against *The Saiga* at sea were not merely in execution of criminal prosecution for complicity with the fishing vessels in the violation of their obligations. They were in execution of the prohibition in customs law to supply fishing vessels in the customs radius with fuel. The relevant *Ordre de Mission* No. 770 of 26 October 1997 of the Customs Authority states as "*Object de la Mission¨Récherche et répression de la fraude en Mer et à Terre*". And I emphasise the word "*répression*". The fact that the conviction of the Master in the criminal court in Conakry rested upon criminal law does not alter the fact that *The Saiga* was arrested not on the basis of Guinean criminal law but of customs law.

I would like to underscore in this context again that the Republic of Guinea has prohibited the unauthorised sale of fuel in Article 1 of its Law no.7 CTRN 1994. The heading of the law expressly mentions the word "sale" ("*vente*") which is included in the term "distribution" ("*la distribution*") in Article 1.

This prohibition applies to the Republic of Guinea , as it is clearly stated in article 1 and in the heading of that law. The term "Republic of Guinea", as it is conceived in this law, is not confined to the Guinean territory. It also includes the Customs radius. This is the clear and consistent practice of the Guinean administration and the Guinean courts. In short, the Republic of Guinea prohibits the unauthorised sale of fuel, i.e. offshore bunkering, in its Customs radius. As I have submitted earlier, this prohibition does not relate to the bunkering of ships in transit to other countries but to all fishing vessels with Guinean licences.

It is accordingly of no relevance to the question of whether or not Guinea could and did apply its Customs law within its Customs radius to *The Saiga* that the ship itself has not entered the Guinean territorial sea. Moreover, the bunkering operation of the ship in the Guinean contiguous zone is also of no relevance in this context, although it may be relevant to the application of the criminal law. The relevant area here is the Customs radius. This is a functional zone established by Guinean Customs law within the realm of the contiguous zone and a part of the Guinean exclusive economic zone. One can describe it as a limited Customs protection zone based on the principles of customary international law which are included in the exclusive economic zone but which are not a part of the territory of Guinea.

Against the submissions of Dr Plender in his speech of 18 March 1999 before this Tribunal, the Republic of Guinea in no way claims to exercise territorial jurisdiction in this zone. Dr Plender inferred this, *inter alia*, from the fact that Lt Sow spoke several times in his examination as a witness about "our waters" and that other Guinean witnesses apparently used similar descriptions as well. I simply cannot regard this use of circumscription as a national claim to territorial jurisdiction, and I venture to doubt whether the eminent Queen's Counsel seriously does. Especially in the case of Lt Sow who, upon examination, knew quite well the legal difference between the zones of national jurisdiction, this is obviously a matter of the convenience of language.

More important, however, might be the fact that other States have not as yet established a Customs radius or a similar zone, but this does not mean that it would be prohibited for ever. If the practice of States prevailing at any time excluded the development of the law, we would still have the classical order of the ocean which has existed since *Hugo Grotius* until 1958. There would be no exclusive economic zone.

This gives me reason to briefly digress. Maître Thiam has repeatedly submitted that Guinea has not established a contiguous zone of 12 nautical miles beyond its territorial sea, and that at least the relevant law has not been communicated to the Secretary-General of the United Nations. We have contested this. Guinea has set forth in its Counter-Memorial (paras. 120-121) that it has established a contiguous zone also around the island of Alcatraz. In paragraph 101 of its Rejoinder, it has submitted that "the proclamation of a contiguous zone does not require the publication of charts or lists of coordinates, neither must any list or chart be deposited with the Secretary-General of the United Nations." There is also no obligation to communicate the relevant laws to the Secretary-General under the Law of the Sea Convention.

Mr President, Members of the Tribunal, from the point of view of international law, several questions have arisen with respect to this prohibition. I will briefly address some of them.

First, does international law require that the Republic of Guinea should have promulgated a verbatim prohibition of offshore bunkering? The answer is clearly in the negative. Article 58(3) of the Convention speaks of the laws and regulations adopted by the coastal State and article 111(2) correspondingly refers to the "applicable" laws and regulations of the coastal State. Except for the conservation and management laws for living resources that are mentioned in article 62, it is nowhere said in the Convention that the coastal State shall promulgate specific laws for the EEZ. The reference to regulations shows that the prohibition can even be contained in an ordinance. From this, I conclude that the provision of offshore bunkering must be a clear one, but it does not need to be a verbatim one. It is sufficient that it is clearly continued in the applicable laws, leaving those who are subject to these laws in no doubt. These requirements are fulfilled in the case of the Guinean prohibition of offshore bunkering.

Secondly, does international law require that the law prohibiting offshore bunkering was communicated to the Secretary-General of the United Nations? The answer is also clearly in the negative. It is nowhere stated in the Convention that the relevant laws shall be communicated to the Secretary-General. According to article 62(5), the coastal State shall give "due notice" of conservation and management laws and regulations. The law prohibiting offshore bunkering, however, is not a law on conservation and management of living resources. However, even if one were to apply article 62(5) by analogy here, law number 94/007/CTRN has been promulgated and published in the *Journal Officiel de la Republique de Guinee*. Notice on the law has also been given to companies trading with fuel in Guinea.

Thirdly, in the light of good faith, international law requires that *The Saiga* also could have taken notice of the prohibition of offshore bunkering in the Guinean Customs radius. The knowledge of the prohibition must not be based on detailed information of particular Guinean laws. It is sufficient that, in the light of good faith, those to whom this prohibition relates knew about it. As I have set forth on the basis of documentary and oral evidence, not only the master of *The Saiga* but also the charterer, who was actually entertaining this

offshore business, had knowledge of this prohibition. The regional manager of the charterer, Marc Albert Vervaet, has, according to evidence submitted by Saint Vincent and the Grenadines, stated in a report that "Guinea has another regime than other jurisdiction(s) in the region." I have already referred to this Annex in my speech of 15 March.

In addition to this, the Applicant State has already noted in its Memorial to the proceedings on prompt release that it was aware of attacks upon other tankers including the following: *AFRICA, NAPETCO, TOURMALET, ALPHA-1, LEONA-1, LEONA-2* (Memorial 19 June 1998, paras 21-24). He repeated this in his Memorial of 19 June 1998 for the pending proceedings (paras 21-24) as well as in the Reply dated 19 November 1998 (paras 21-22). Nevertheless, Mr Howe advised his clients that, when offshore bunkering, "they were not doing anything unlawful in accordance with the United Nations Convention on the Law of the Sea which Guinea had ratified." He conceded, however, that AOG was exercising "additional caution" in their bunkering operations after the *ALPHA-1* incident of May 1996 (PV.99/16, p.6 line 7).

If I may proceed with my enumeration, the fourth question relates to a general appraisal of the Guinean prohibition of offshore bunkering in the context of the balance of the coastal State's interests versus the flag State's interests in the exclusive economic zone. We have laid down in our submissions that Guinea's prohibition is of cogent necessity for the protection of important interests of the country, which I think we have again heard this morning from the Guinean Minister of Justice; that it is carefully drafted; that it is proportionate; and that it is related to fishing, although it is not fishing.

In this context, I venture to say also that this Tribunal did not regard offshore bunkering as fishing when it concluded, in paragraph 71 of its judgment of 4 December 1997 on the prompt release proceedings, "that for the purpose of the present proceedings, the actions of Guinea can be seen within the framework of article 73 of the Convention". To say that it was not fishing but could be seen as such "for the purpose of" those proceedings is clearly a legal fiction. Furthermore, Guinea has submitted that the effects of its prohibition are very limited and very specific and, last but not least, that it does not affect navigation.

Therefore, we submit that this prohibition of offshore bunkering in the Customs radius does not amount to a residual jurisdiction. It is not a case of the so-called "creeping jurisdiction" of the coastal State. It does not affect the rights of the flag States in the EEZ. It is completely in conformity with the balance of interests underlying the requirement of the EEZ in modern international law.

This brings me to my fifth and last point of international law relating to the applicability of the Guinean prohibition in its Customs radius. This point touches upon the possible relevance of article 59 of the Convention in the proceedings before this Tribunal. The Republic of Guinea submits that article 59 of the Convention is not applicable because the jurisdiction which Guinea is claiming over offshore bunkering is based on the customary principle of the protection of its vital interests, which is attributed to the coastal State, as I have shown at an earlier stage before this Tribunal.

Notwithstanding this, Guinea is well aware that the solution of the conflict between interests of the flag State and the interests of the flag State and the interests of the coastal State shall be in line with the principles mentioned in article 59 of the Convention. Article 59 is merely a codification of the fundamental conception according to which equity is part and

parcel of general international law, as Judge Jessop said in the 1969 *Continental Shelf* case. Taking into account that, on the one hand, the prohibition of offshore bunkering does not affect the freedom of navigation in the EEZ and on the other hand that the coastal State has a cogent interest in protecting its public interest against unjustified offshore bunkering in the EEZ any equitable solution ought to take Guinea's prevailing interests into consideration.

Moreover, if one looks also to the interests of other participants, in particular at the economic interest of *The Saiga* in offshore bunkering, one has to take into consideration that bunkering within the EEZ is indirectly linked to fisheries. Without the fishing vessels operating in the EEZ, *The Saiga* could achieve its aim to be a mobile bunker station in that zone. From an economic point of view, the fishing vessels in the EEZ form a particular market for offshore bunkering. *The Saiga* took advantage of this market but these fishing activities rest upon the coastal State's sovereign rights over the living resources in the EEZ. Therefore, the public interests of the coastal State prevail also over the economic interests of the bunkering industry in the EEZ.

In conclusion, the Republic of Guinea submits that it had applied its relevant Customs laws prohibiting offshore bunkering in its Customs radius on *The Saiga* in conformity with international law.

Mr President, Members of the Tribunal, the next point in my speech is the question of hot pursuit. Having realised, that the Agent and Counsel of Saint Vincent and the Grenadines have not referred in their concluding speeches to the question of the signals given to *The Saiga* when the pursuit was commenced, I will leave this question out here and refer you kindly to what was said earlier on this point by us.

Instead, I will focus on the issue of whether the pursuit was begun when *The Saiga* was still in the Guinean EEZ on the morning of 28 October 1997. We have submitted two lines of evidence for the fact that the ship was still in the "Guinean waters", if I may use that general description without any further allusions, when it was discovered by Lieutenant Sow on the Guinean patrol boat P328.

The first is a method of calculation on the basis of *The Saiga*'s logbook. The value of this logbook is documentary evidence and the reliability of the entries into it have at no time been contested between the parties. On 28 October 1997 at 00.0 hr *The Saiga* was, according to her logbook, at the position 09°27.5'N and 15°26.5'W. At 04.00 hr on the same morning she was at the position 09°02.7'N and 15°02.6'W. The distance between both positions is 35 nautical miles. Accordingly, *The Saiga*'s speed over ground during these four hours was 8.5 knots, (35 nautical miles divided by 4 is 8.5). *The Saiga*'s position at 4 o'clock was 0.5 nautical miles or 6 cables south of the boundary between the exclusive economic zone of Guinea and Sierra Leone. The boundary line is at 09°3'18" N (which corresponds to 09°03.33'N). If the ship sails 8.5 miles per hour over ground, it has crossed the boundary between 03.55 hr and 03.56 hr on the morning of 28 October 1997. Therefore, this was still north of the boundary within the exclusive economic zone of Guinea when she was discovered at 03.50 hr.

This calculation upon the basis of the logbook is in conformity with the evidence given by Lieutenant Sow. He stated in the cross-examination by Maître Thiam that he discovered *The Saiga* on 28 October 1997 at 03.50 hr at a distance of 44.5 nautical miles (or 445 cables) -- in French one should say *internationale en cablure*s -- in the direction of 205°.

(English PV no. 13, p.22, lines 5-49). The measurement of the distance by way of radar is very precise. He saw, with the help of the radio direction finder in this direction on the radar, only one big target. That this target must have been *The Saiga* became clear when *The Saiga* started answering the fishing vessels by radio at 03.50 hr, giving the fishing boat *POSEIDON ONE* the new meeting point at 09°00'N and 15°00'W. (English PV no.12, p.2, lines 43-50 and p.25, lines 1-14).

It is understandable from their point of view that legal Counsel for the Applicant State tried to shake this clear, precise and in all respects convincing evidence of Lieutenant Sow. I dare to wonder, however, whether the methods chosen by Maître Thiam to contest Lieutenant Sow's credibility are appropriate before an International Tribunal. Yet I am not surprised that Maître Thiam's attempts were in vain. His line of reasoning suffers from misunderstandings and miscalculations. In order to show this, I shall briefly browse through his appraisal of the evidence given on 19 March.

Turning first to the *Ordre de Mission* No. 770 of 26 October 1997, to which he refers in the English verbatim record no. 17, p.4, the fact that *The Saiga* was not yet in the Guinea EEZ on 26 October 1997 is of no relevance because we have set forth that the Guinean Customs administration had monitored the ship since she had left Dakar. The general reference to the purpose of the *Ordre de Mission* and the reason not to mention *The Saiga* in this mission order has been convincingly explained by Guinea as security considerations. We have learned, and this was confirmed by the telex communication between ABS and Captain Orlov warning him about patrol boats leaving Conakry, that obviously "walls have ears" in Conakry, to use at this stage a German saying.

To turn to another example of unfounded conclusions drawn by Maître Thiam, I will mention the matter of the logbook now. Lieutenant Sow explained that the big patrol boat P328 used "board sheets" instead of a logbook. Maître Thiam assailed him in the English PV no.17, p.6, line 7, that the Guinean Navy would be the only navy in the world which does not use a log book on the boat, which is "one of the biggest that they have". The Guinean Navy has much bigger ships; for example, two corvettes with a length of 75 metres armed with 76 mm guns. One has also to bear in mind that the P428 is used as a patrol boat for various coastguard missions. Its operation is being documented in the reports after the respective mission. As to the small patrol boat, P35, Lieutenant Sow answered Maître Thiam's question that he did not know whether board notes were used. In any given case, the officer commanding the small launch may or may not use his own notes. The use of board notes is not required in the small launch which is an open speedboat with two outboard engines.

Another example relates to the naval chart No. 31056-G used by Lieutenant Sow on his mission. First of all, it will be stated here that the chart submitted by Guinea is not the original chart used on board P328 during the mission of 27 to 18 October 1997. The chart was handed in by Lieutenant Sow with his original report to the naval administration. Lieutenant Sow at all stages explained that he drew this chart submitted to the Tribunal on the basis of his report and the entries of the logbook of *The Saiga* before he came to Hamburg. I myself have characterised this chart as an "original document", as compared with the copies of this chart made here in Hamburg, in order to prevent it being changed by Maître Thiam during the cross-examination of Lieutenant Sow, and further to make clear that the copies cannot be used for marine measuring.

Marine charts are always indicated by their numbers and this general knowledge of any man who has ever been at sea. Maître Thiam alleged that there was no entrance with respect to the courses and speed of the patrol boat. A closer look at the chart could, in every respect, easily convince him that he is in error. The courses and speed are noted on the chart.

Maître Thiam placed great emphasis on the fact that Lieutenant Sow did not indicate the position of *The Saiga* on 27 October 1997 at 20.00 hrs on the chart. He infers from these conclusions concerning the reliability of Lieutenant Sow and his plotting of *The Saiga*'s course, as well as to the documentary value of the chart drawn by Lieutenant Sow. The naval officer gave a simple and convincing answer that he did not need the position of *The Saiga* at 20.00 hrs for the purpose of his report. The ship was anywhere on her course between her position at 16.00 hr and 24.00 hr but he could have included the position at 20.00 hrs without a problem, of course.

I turn now to the miscalculations I mentioned earlier. Maître Thiam tried to calculate the distance of 445 cables from the position of P328 on 27 October 1997 at 0350 hrs in kilometres. Anyone who ever went to sea knows that kilometres are a strange species for seamen in general and navigation officers in particular. The trap into which Maître Thiam stepped in his calculation, however, was the conversion from cables to metres which he undertook. He took the French measure of *encablures* as the basis for his calculation because, as he stated in PV 99/7 of 18 March 1999, p.10, line 13:

"The Lieutenant did this by talking about *encablures* in French".

We all know that the French *encablures* is longer than the international cable. It is more than 185.2 cm. I have always been a great admirer of the influence of the French culture, - especially the French language – upon Africa. This influence obviously gives rise to a presumption that also the nautical measures have been adopted from *La Grande Nation.* I regret to say, however, that Maître Thiam, a native of the neighbouring country of Senegal, has become a victim of an error in this respect.

The Guinean Navy uses, for maritime measurement, the international nautical mile of 1,852 metres and the international cable of 185.2 metres. We have heard this again from His Excellency, the Minister of Justice of Guinea this morning. Accordingly, one cable - and the French term used is in fact *encablures* – is one tenth of a nautical mile. Lieutenant Sow stated this time and again in his examination and cross-examination. This is in complete conformity with the nautical measures used in the Republic of Guinea. Guinea has this in common with other naval States, such as the United Kingdom, the United States, Germany, Russia, the former Soviet Union and many others. The reason for this adoption of the international measure of the cable - the *encablure internationale*, - is that the Guinean naval charts are based on hydrographic data supplied by the former Soviet Union. You may see that the official charts used by the Guinean Navy, like our chart 31056-G, are still printed by the *Département Principal de la Navigation et de L'Oceanographie of the Ministère de la Dèfense de l'URSS*. Lieutenant Sow has consistently, and under heavy fire from Maître Thiam, confirmed all this.

However, I will not go any further with my analysis of the appraisal that Maître Thiam has given about the examination and cross-examination of Lieutenant Sow. I will also, therefore, not dwell further on such details as the wrong date repeatedly contained in Maître Thiam's speech with respect to the important time of 0350 hrs. It was on 28th and

not on 27th October 1997 (PV99/17 of 19 March, p.10, lines 11 and 33 and p.11, line 37). I will not do that because everybody can be subject to slight errors, even in a speech which aims at bringing about the truth.

Mr President, Members of the Tribunal, in conclusion, I submit that the Guinean patrol boats commenced the pursuit of *The Saiga* before the ship left the Guinean EEZ and, correspondingly, the Customs radius of the Republic of Guinea. As all other conditions of hot pursuit were fulfilled at that time, including the requirement of signals, as we have set forth before this Tribunal on the basis of sufficient evidence, I conclude that the hot pursuit was justified under Article 111 of the Law of the Sea Convention.

Before coming to an end, Mr President, please allow me to make two remarks. The first remark relates to the facts of *The Saiga* case as they have been presented by Saint Vincent and the Grenadines. The eminent lawyers of the Applicant State succeeded in presenting their facts of the case in a dramatised way, which is really surprising for a humble professor of international law such as me. We lastly heard from Dr Plender a version of *The Saiga* saga which came close to one of its ancient Nordic predecessors. It was insinuated that an innocent merchant vessel was illegally arrested in neutral waters by a gang of uncontrolled land dwellers who used excessive force in order to intimidate the crew and rob the valuable cargo. This smells of a kind of "state piracy". No wonder that the local press, always open to sensations of this calibre, gave the headline, a few days ago:"*21 Richter und der Seekrieg vor Guinea"* which means, in English, "21 Judges and the naval warfare off Guinea".

Yet, from the point of view of an innocent academic, who is not acquainted with the customs and usages of litigation, the facts of *The Saiga* case wear another garment. The strong and powerful offshore bunkering business is pursuing its business interests in the exclusive economic zone of a small developing country and to the disadvantage of this country. If you, Mr President, distinguished Judges, permit this today, tomorrow the offshore business will turn from oil to all kinds of merchandise. Then it will soon become not only an issue of certain small States but of the whole world. We cannot neglect that mankind is moving out to sea. The next step, after navigation, fishing, the exploration and exploitation of non-living resources of the protection of the environment is tax-free business at sea close to the coast and just outside the territorial sea. To make this very clear here today, I am not against business, neither am I against business at sea. But this has to be regulated and I believe that the foundations of such regulations are already laid down in the Law of the Sea Convention. The Convention provides for the right of the coastal State to regulate this business in order to protect its own essential interests.

Mr President, Members of the Tribunal, my second remark is of a personal nature. I would simply like to express my highest respect to my learned colleagues. I admired Dr Plender's profound legal thinking; I was enchanted by the elegance of Maître Thiam's forensic argument; I was impressed by Mr Howe's great experience in maritime law, and I enjoyed every moment of common work with my esteemed colleagues, Mr von Brevern and Mr von Carlowitz on the Guinean side, even when we were preparing statements until 0350 hrs.

Mr President, distinguished Judges, a Prince of Denmark was mourning in his great monologue about "the law's delay". After two weeks of hard work, both by the Tribunal and the Agents and Counsels of the parties, I am deeply convinced that you will hand down,

within an appropriate time, a just and equitable solution of this challenging case; a case which, no doubt, will be included in the list of great cases of the modern law of the sea. It has been said that the Law of the Sea Convention is a constitution for the oceans. You are the guardians of this constitution. We are in your hands.

I once learnt that before a Court, and as a sailor on duty, one never says, "thank you", and so I shall simply state that this is the end of my speech.

THE PRESIDENT: Thank you, Professor Lagoni. Mr von Brevern, as we agreed, it is clear that we cannot conclude everything by twelve o'clock. The next scenario is whether you believe you can conclude your presentation by one o'clock. If you believe so, in accordance with our practice we will have a short break of about ten minutes. You can then resume and that time will be added to the one hour that you will be claiming. Do you think that you can complete your presentation in one hour? If that is so, we will break for just ten minutes. If you cannot complete in one hour, we will break for two hours and come back at two o'clock.

MR VON BREVERN: Mr President, I can conclude in one hour.

THE PRESIDENT: In that case, we will break for ten minutes. You will then resume and will have one hour to complete.

DR PLENDER: Mr President, before we do that, perhaps I may, with great reluctance, speak to the Tribunal once more. There has been presented, this morning, some fresh evidence. I request to know whether, in accordance with article 71(4) and 74, I shall be permitted to comment on that evidence. My comments would take some five minutes. However, it may be desirable to find a suitable place for their insertion if I am to be allowed that right.

THE PRESIDENT: Thank you, Dr Plender. The information that I have been given is information that was referred to in your submission. I hope you are referring to the information attached to the letter that we have just received?

DR PLENDER: I am, Mr President - the fishing licences which we have now seen for the first time this morning and upon which I understand reliance is placed for the assertion that these limit the places in which the vessels in question may obtain their supplies.

THE PRESIDENT: The normal rule which we have followed, and which I have explained, is that the presentations are made by the Applicant and then by the Respondent. There is no provision for further presentations. However, if the Applicant feels that in the circumstances a further submission is necessary, the Tribunal would be willing to receive that submission in writing.

DR PLENDER: I am grateful, Mr President. That is a most convenient way of dealing with it, if I may respectfully say so. I am much obliged.

THE PRESIDENT: I am very pleased to hear that. The sitting will be suspended for ten minutes. We will resume at 12.10 pm. The sitting is suspended.

(Adjourned at 12.00 hrs)

THE PRESIDENT: Yes Mr Von Brevern, you may proceed now.

MR VON BREVERN: Mr President, Honourable Judges, in my last address now on behalf of the Republic of Guinea, I would like to deal with some facts, and with the problem of damages.

The International Tribunal will not be surprised to hear that the facts of the case as stated by Dr Plender in his speech of 19 March 1999 under no.21 do not conform to the facts as experienced and witnessed by the Republic of Guinea. At least some of the facts will be mentioned, and some of the allegations put forward by Dr Plender will be rejected and corrected in the following.

M/V SAIGA had been auctioned in February 1997 by a Cyprus company, Tabona Shipping Company. Tabona had contracted with Seascot in Scotland, a company that had taken over the total management of the vessel including the crewing, equipment and employment of the vessel. It was decided to register the vessel under the flag of Saint Vincent and the Grenadines, and therefore two weeks after the auction the vessel received a provisional certificate from Saint Vincent and the Grenadines for half a year. Interestingly enough, three days before the vessel was bought in auction – the auction date is mentioned in all certificates of the St Vincent Maritime Administration – Seascot, on behalf of Tabona Shipping Company, chartered out *M/V SAIGA* to the charterer. See annex 19 of the Reply. The charterer was the Lemania Shipping Group Ltd of Tortola British Virgin Islands. Part of the regulation of the charterparty on p.1, line 20 reads: "The vessel shall have on board all certificates and documents required." Line 310 states: "The service speed of the vessel is 10 knots laden." And finally, according to clause 66, it was agreed that any delay, expense and/or fines incurred on account of smuggling to be for charterers account if caused by the charterer."

The charterer did not give any instructions to the vessel. It was the oil company Addax Bunkering Services, Geneva, that instructed the vessel and furnished the captain with the names and positions of the boats that wanted to be supplied with gasoil, as well as the amount of gasoil wanted. Captain Orlov made clear in his cross-examination in PV.99 no.3 p.5 line 39, and p.6 line 25, that he was receiving all his instructions from the operator in Geneva, as can also be seen in annex 16 of the Memorial of Saint Vincent and the Grenadines

On 24 October 1997, *The Saiga* left the port of Dakar. She had on board more than 5,000 tons of gasoil. When leaving Dakar, she had received orders for only about 400 tons of gasoil. The clients are supplied on average with about 50 tons per client. *The Saiga* had loaded 5,391,435 tons in Dakar. This means that about 100 vessels needed to be found and supplied if all the gasoil on board was to be sold. Including the three vessels supplied on 27 October 1997 in the contiguous zone of Guinea, *The Saiga,* having left Dakar, had so far supplied 9 vessels. More than another 90 vessels had to be found for the gasoil owners.

The interests of *The Saiga* captain were therefore exclusively focused on the information as to which further vessels could be supplied, as well as their positions and the amount of gasoil to be supplied.

In *The Saiga* supply procedure, both the tanker and the fishing boats had to sign bunker receipts on Addax Bunkering Services letterheads which Addax had provided Captain Orlov with beforehand. See annex 20 to the Memorial.

The vessel therefore did not receive its instructions from the charterer, but from the company that was exclusively interested in the sale of the cargo offshore. It is not clear whether the company Addax Bunkering Services was indeed the owner of the gasoil on board *M/V SAIGA*. In the documentation, some invoices of other companies are found, under the names of Adryx Oil Company, N.V Curaçao or Oryx Senegal S.A. All these companies seem to be connected to each other. It is not clear who the cargo owner of the gasoil on board *The Saiga* was. However, in signing bunker receipts, the captain performed functions, not on behalf of his employer or the ship owner, but on behalf of the oil trading company.

From what has been said above, it becomes evident that *M/V SAIGA* was a floating warehouse in the form of a petrol station. The very purpose of *M/V SAIGA* was to facilitate the sale of gasoil and to transport the gasoil to the potential buyers. *The Saiga* therefore did not leave the port in transit to another harbour. Having left the port of Dakar and having supplied the first clients, the vessel will drift or be at anchor without the aim of a destination, merely waiting for new clients. This shows that my esteemed colleague Professor Lagoni is correct in his interpretation of the activity of *The Saiga* being commerce instead of navigation.

Before he left Dakar on 24 October 1997, the captain of *M/V SAIGA* had been informed by the oil traders Addax Bunkering Services that in the region of Guinea it was not safe to bunker fishing trawlers because there would be a hunt for the tankers. That is P/V 99/3, p.15, line 31. Captain Orlov continued by saying that he had been informed privately by Mr Lee, a Chinese interpreter working on another tanker, that it was possible that officials of the port of Conakry took part in that hunt. That is p.10, line 45.

In the bridge order book of 26 October 1997, the captain notified the officer in charge: "If you notice any fast moving target coming towards our vessel, call me at once." This was also noted in the bridge order book of 27 October 1997. On the same day at 18.42 hours the captain received a telex from the operator in Geneva, informing him that Guinean port authorities were sending out patrol boats and that he should watch out day and night on radar for fast navy speed boats.

On the same day, the two patrol boats left the Conakry region after they had received the *ordre de mission* on 26 October 1997. This *ordre* was caused by the fact that *The Saiga* was engaged in an unlawful activity in the customs radius and in the contiguous zone of Guinea. Radio communications between *The Saiga* and fishing vessels were already listened into by Guinean authorities as early as 26 October 1997. The Tribunal has already been provided with the radio recordings in the previous proceedings, and you will find the transcript of those radio messages in annex 9 of the reply of Saint Vincent and the Grenadines. Due to that communication, Guinea was absolutely and perfectly informed about the exact position of the three fishing vessels to be supplied in the contiguous zone of Guinea.

The small and fast patrol boat was sent ahead alone to the position where *The Saiga* had already been supplying fishing boats ,and was ordered to stop *The Saiga*. When it became evident that *The Saiga* had left her former position and was sailing in a westerly

direction, the small patrol boat was ordered back because she was not in a position to pursue such a mission on her own without the assistance of the big patrol boat.

The search for *The Saiga* by the patrol boats, and her successful identification by radar has been explained at length by Professor Lagoni. I will proceed with the facts when the small patrol boat reached *The Saiga*. As has been clearly confirmed by all three witnesses called by Guinea, she was repeatedly asked to stop on channel 16, signalled to stop by siren and blue light, and was rounded twice by the small patrol boat without any reaction. The events that then took place in order to stop the vessel involving the boarding of the motor vessel, the search for the crew, and finally the immobilisation of the vessel, have been stated at length and fully confirmed by the Guinean witnesses. It has been made clear that no excessive force was exercised by the Customs representatives on board the small patrol boat. With respect to the force used, it must always be borne in mind that the situation in which the Guinean officials found themselves, was not comparable to normal police action. It must be understood that it is a very difficult and dangerous task for only three people to stop and search a ship of the size of the *M/V SAIGA*. It is not denied by Guinea that the Customs officials made use of their arms. However, this use was justified in view of the behaviour of the crew of *M/V SAIGA*.

Three points are to be made. First, the master of the *M/V SAIGA* was not prepared to stop the ship, although it must have been obvious to him that he was ordered to do so by the Guinean authorities. Secondly, the crew of *The Saiga* behaved in a manner which naturally made the Guinean authorities believe that the situation on board constituted a substantive danger. It must be seen in this light that a shot for the purpose of defence was fired at the bridge. Finally, the immobilisation of the *M/V SAIGA* was only possible by means of the use of arms. Even Captain Orlov, who was the only member of the crew of the *M/V SAIGA* not being in the engine room or somewhere else below deck, could not confirm that he had seen that the Customs official applied excessive force.

Dr Plender stated in his concluding remarks that the crew of *The Saiga* was handcuffed, threatened and insulted. Furthermore, he stated that the ship was pillaged, money stolen and goods bonded. This is not only in contradiction of the testimony of the witnesses called by Guinea, but it must also be considered that the applicant's witnesses contradicted themselves with regard to the events concerning the arrest of *The Saiga*. As has been pointed out at an earlier stage, this especially applies to the testimony given by Captain Orlov compared to that of Mr Niasse.

We contest Dr Plender's statement made in his speech of 19 March 1999 under number 21 that the Guinean Customs representatives had seen men on the deck. Contrary to his statement, the Customs representatives had given a warning; they did not apply handcuffs; they did not threaten or insult members of the crew. The injuries of two crew members were caused by splintered glass. The Guineans did not pillage *The Saiga*, nor did they steal money or bonded goods. However, they did have to open the locked doors with hammers in order to find crew members. When finally the crew was found, the three vessels sailed to Conakry. There, the two injured crew members were treated in a hospital. There is no reason whatsoever to assume, as Dr Plender did, that they were not given adequate medical attention. It is not correct that one of the two was refused medical treatment because he was a foreigner.

This is confirmed by the applicant's witness Mr Niasse. His statement cannot be misunderstood in regard to the fact that it was he who refused to be treated by Guinean doctors. When asked whether he had medical treatment in Conakry, he answered "I did not want people touching my eyes because I did not want to be treated in Guinea because I was afraid of losing my sight if that had been the case". (PV 99/5, p.15, line 35)

It is correct that guards were put on the vessel in Conakry, but their mission was to safeguard the vessel and the crew. It is not correct that the conditions for the crew were harsh. The vessel was the crew's usual environment. They were able to leave the vessel for a visit to the town of Conakry when accompanied by someone from the Guinean authorities. No-one was beaten by Guinean armed personnel.

Contrary to Dr Plender's statement, the *procès-verbal* was correct. There is no reason to criticise Mr Manguè Camara's testimony that he had signed the *procès-verbal* without having read it. By signing it, he only confirmed that he had taken part in the immobilisation of *The Saiga*. Incidentally, apart from Mr Bangoura and Mr Camara, twelve other men from Guinea who had taken part in the manoeuvre signed the *procès-verbal* to testify that they had taken part. It is not correct to say that the witness Mr Bangoura acknowledged that important facts in the document did not correspond with reality.

It was in full compliance with Guinean law that the cargo on board the vessel was seized and confiscated. Captain Orlov was subjected to criminal proceedings, represented by his lawyers, in two cases. He was charged with a penalty that was upheld in the second instance in accordance with Guinean law. He voluntarily decided not to call the Court of Cassation. Neither the shipowner nor the cargo owner, both of whom had and still have the right to file a suit for damages against the Guinean Customs according to article 300 of the Guinean Customs Code, chose to exercise these rights, although they were duly represented by excellent lawyers, as, for example, Maître Thiam, who we all know. None of the crew members, neither the injured ones nor the rest of the crew, took court measures.

Almost immediately after *The Saiga* arrived at Conakry, Captain Merenyi and others were able to board the vessel and talk to the crew. This has been very clearly stated by Captain Merenyi. During the four months that the vessel was harboured in Conakry, Seascot's superintendent and other representatives were often in Conakry on board the vessel. During this long period, however, not a single photograph was taken of the vessel or of any possible damage to the vessel by the superintendent or other representatives of Seascot or by representatives of the owners or by the P&I Club representative. The latter did not even organise a survey of the alleged damage to the vessel.

To conclude as to these facts, all these facts contribute to a clear picture documenting that the Republic of Guinea cannot be blamed for the allegations made by Dr Plender.

Mr President, Members of the Tribunal, I will now deal with the last issue, that of damages. On the premise that the Guinean State was held to have pursued and arrested the *M/V SAIGA* in violation of article 111 of the Convention, the Applicant State invokes article 111(8) of the Convention and claims damages totalling nearly US$5.5 million. The claim includes both damages sought on behalf of individuals and corporations, as well as damages claimed in the applicant's own right.

Guinea submits that article 111(8) of the Convention does not constitute a legal basis for all the claims advanced. Yesterday, Dr Plender argued that the fact that article 111(8) of the Convention mentions the ship as claimant, whereas article 106 of the Convention mentions the flag State as claimant, was a point which was "true but not interesting." This opinion is not shared by Guinea, although it is obvious that in both cases the flag State has to advance the claim before an international Tribunal. The relevant point in the different wording of the two articles lies in the fact that article 111(8) concerns only the claims that arose to the shipowners as a result of the pursuit or arrest of the vessel. It is apparent from that wording that this article does not provide for the recovery, for example, of moral damages of the flag State in its own right. I will further address the issue of moral damages for States proper below.

Moreover, Guinea contends that the wording of article 111(8) of the Convention does not permit the recovery of damages that did not arise from the pursuit or arrest but from subsequent actions like the removal of the cargo. This is a question of causation. Dr Plender has rightly pointed out that in the present case the arrest of the *M/V SAIGA* was a *conditio sine qua non* without which the cargo would not have been removed. This is, of course, true. It is equally true that not every *conditio sine qua non* can be taken into consideration when determining compensation for loss or damage. International arbitral practice often uses the criterion of a direct link between violation and damage in order to determine whether the damage should be compensated. In the present case, the removal of the cargo or the alleged attack on 30 January 1998 was not directly caused by the arrest of *The Saiga*. The cargo was confiscated as an *instrumentum sceleris* by an act entirely distinct from the arrest of the *M/V SAIGA*.

Dr Plender also addressed the issue of mitigation of damages. He argued that the master could not be held to have contributed to the damages sustained because he would have acted in accordance with international law. At this point, I would like to stress that a Guinean liability pursuant to article 111(8) of the Convention does not necessarily mean that the master acted in conformity with international law.

However, even if this Tribunal found that the *M/V SAIGA* acted in conformity with international law when bunkering the fishing vessels off the Guinean coast, there would be an obligation to mitigate damages. Guinea submits that this case, namely where the injured State has acted in accordance with international law, is the very basic case as regards the principle of mitigation of damages.

The provocation of the Guinean enforcement action not only lies in the fact that the *M/V SAIGA* entered the Guinean contiguous and exclusive economic zone despite her knowledge that these actions were held to be illegal by Guinea, but also in the fact that the *M/V SAIGA* did not stop when signals were given to her to halt and when she saw the Guinean patrol boat P-35 approaching. The fact that the *M/V SAIGA* activated the automatic pilot and tried to escape from the Guinean inspection contributed severely to the damages. This conduct gave the Guinean Customs authorities no other choice but to use force in order to fulfil their mission. Since the *M/V SAIGA* saw that the Guinean authorities were determined to inspect her, it would have been reasonable for her to stop. Had the *M/V SAIGA* stopped, she would have avoided any shooting. *The Saiga*'s obligation to act reasonably exists independently of the question whether or not the Guinean actions were lawful. This point is, for example, indicated by article 111(1) of the Convention, which requires the coastal State to have good reason to believe that the pursuit ship has committed a violation.

This requirement demonstrates that a hot pursuit can be lawful even if the pursuit ship has in fact not violated the laws and regulations of the coastal State.

The Applicant State has advanced a variety of claims that are challenged by Guinea, partly on the basis of their legal grounds, partly on the basis of insufficient evidence and partly with respect to their quantum.

The claims involve moral damages for the benefit of the Master and the crew mainly for illegal detention, as well as for the two crew members for serious personal injuries. Whereas Guinea concedes that the arrest of the *M/V SAIGA* might have caused personal injuries, she rejects the case for the detention of the Master and crew. Guinea has pointed out before that no crew member was detained, let alone suffered any damages on the grounds of a *de fact* detention. With respect to the two injured crew members, Guinea doubts the seriousness of the injuries and questions, in particular, the evidence offered by the X-ray photograph without a name or date or anything comparable on it.

Guinea submits that the claimed moral damages are highly excessive and agrees with Dr Plender that the practice of the United Nations Compensation Com mission might provide useful guidelines for the assessment of any moral damages to be awarded.

Similarly, Guinea requests the Tribunal to apply the standards of the United Nations Compensation Commission in admitting and evaluating documentary evidence with respect to the material claims advanced. Guinea submits that only those material damages should be granted that have been proved by full documentary evidence. No award should be made with respect to claimed damages, the exact amount of which has either not been ascertained yet – as is the case with respect to any insurance payment – or which cannot be exactly determined, as it the case with respect to the time that public servants of the Applicant State devoted to the case or what might have been incurred to other vessels flying the flag of Saint Vincent and the Grenadines.

Guinea concedes that a certain amount of damages might have been caused to the vessel as a result of its arrest. Yet, the quantum of these damages is contested. In my statement of 16 March I described in detail the doubts Guinea has with respect to the evidence offered by the Applicant State. At any rate, Guinea submits that no substantial damages to the vessel were caused by her authorities. Substantial damage has occurred to the ballast tank, which seems to have been caused by a crew member of *M/V SAIGA* who forgot to switch off the pump and left the safety valve of the tank closed, while the right ballast tank was being filled.

When calculating the material damages incurred to the vessel, it should also be considered that *M/V SAIGA* was built in 1975; in other words, she was a very old tanker. Any award on repair costs should take into account her reasonable market value at the time of the attack and the increase of value incurred by any exchange of old parts for new parts of the vessel.

Finally, Guinea submits that if there should be any award at all for the cargo, it should be made on the basis of the loss of profit claimed by ABS Geneva. As shown by the Applicant State to the Tribunal yesterday, the cargo was calculated to have had a value of US$1,164,887. The calculation was detailed and profound and should not be questioned. The Permanent Court stated in the *Chorzow Factory* case that "any reparation must, as far as

possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". This statement makes clear that the calculation of what constitutes the equivalent in US dollars of the discharged cargo must be based on the profit which ABS Geneva would have received after deduction of the necessary costs the cargo owners would have to bear to earn the profit. Thus, any extra price for the gasoil which Guinea has recovered due to Guinean taxes levied is irrelevant for the calculation and not to be taken into account.

When turning to moral damages for the Applicant State in its own right, Dr Plender rightly observed that the parties continue to be divided on the issue. He stated that there was no basis in international case law to distinguish between moral damages awarded for direct injuries to a State and moral damages that a State has suffered indirectly in consequence of injuries to its nationals.

In particular, the second *Rainbow Warrior* award would, according to Dr Plender, constitute a precedent that pecuniary compensation could be calculated to cover both the moral damages sustained by the injured individuals and, at the same time, the moral damages sustained by the State in its own right as a result of the injury to the individual. Yet, this is not so. The award in the *Rainbow Warrior No. 2* case did not pronounce on compensation, since New Zealand had not requested any. It was in the first *Rainbow Warrior* case where a ruling was made on compensation. Here New Zealand had claimed damages in its own right for an injury suffered directly. This request was initially understood to relate only to material damages. In the course of written proceedings, it then became clear that New Zealand was also seeking moral damages for the public outrage that the sinking of *THE RAINBOW WARRIOR* had caused. But New Zealand had explicitly not requested compensation for the moral damages on behalf of the injured individuals and Greenpeace. Thus, the *Rainbow Warrior* case cannot be said to be a precedent for a simultaneous award of both moral damages for direct injuries of the State and moral damages suffered by individuals.

However, the crucial question is not whether an award on moral damages can be made at the same time for direct and indirect State injuries. The crucial question is which moral damages are to be compensated. In the case where an individual is injured, the moral damages suffered are usually compensated by payment to the State of nationality of the individual on behalf of the individual. It is in this context that the Permanent Court said that the State was, in reality, asserting its own right when seeking reparation for loss suffered by its national. Yet if the injury to the individual also involves an injury to the honour of a State which might be manifested by public outrage, for example, the State might be eligible for moral damages to be paid to it independent of any moral damages to be paid on behalf of the injured individual.

It is with respect to such moral damages of a State that the arbitral tribunal in the *Rainbow Warrior No. 2* case made its *obiter dictum*. Similarly, it is in this context that the International Law Commission commented on moral damages to be compensated to a State for gross infringements of its own rights, irrespective of losses to private individuals.

Guinea submits that neither article 111(8) of the Convention – as I have explained previously – nor customary international law gives a legal basis for such an award. It is clear that the comment of the International Law Commission, which was cited, falls within the scope of progressive development and the codification of international law. Article 15 of the

Statute of the Commission describes "codification of international law" to cover the "more precise formulation and systematisation of rules of international law in fields where there has already been extensive State practice, precedent and doctrine". Guinea submits that neither extensive State practice, compelling judicial precedents nor sufficient and uncontradicted doctrine exist to support the assumption that such claims are warranted by customary international law.

But, even if this were not so, no award on moral damages should be granted to the Applicant State for a violation of its own rights, independent of injuries to its nationals. Guinea submits that Saint Vincent and the Grenadines has not suffered such injury, but has based its claim for moral damages primarily on the injuries sustained to the individuals and companies involved.

There has been no public outrage comparable to the one caused by the sinking of the *RAINBOW WARRIOR*. There were no pictures of *M/V SAIGA* going around the world. There were no international public campaigns in favour of the cause of *M/V SAIGA*. This is because the dispute concerns, at its core, economic interests in the Guinean exclusive economic zone. It concerns the lawfulness of the enforcement of Guinean Customs legislation with respect to an activity that has not been expressly regulated by the Convention. Article 59 of the Convention indicates that the balance of rights enjoyed by the coastal State and the international shipping community in the exclusive economic zone is a matter of juridical and political delicacy.

Apart from the individuals concerned, the dispute caused concern to the companies involved because their economic interests were endangered. Guinea fails to see how such an essentially commercial dispute should have caused serious public outrage, for example, to the population of Saint Vincent and the Grenadines. This reasoning is supported by the fact that the connection between *M/V SAIGA* and her flag State was so loose as to even allow that the vessel was not validly registered at the relevant time.

Further, the Republic of Guinea contests the allegation that she insulted Saint Vincent and the Grenadines. Guinea regrets, as she has always done, that individuals and companies have suffered damage resulting from the arrest of *M/V SAIGA*. Guinea has explained in detail that there was a certain contribution to these damages *by M/V SAIGA* herself. This Tribunal will soon decide on the appropriate remedies. We shall await the outcome with curiosity.

The Republic of Guinea regrets that *M/V SAIGA* was not released sooner. As has been extensively shown in the pleadings, the prompt release judgment of 4 December 1997 left the parties to find the concrete steps to be taken for the posting of the bond and the release of the vessel and crew. This procedure was new to both parties and to this Tribunal. It should not be taken as an insult that, for this reason, as well as for other reasons that lay in the sphere of both parties, it might have been that the finding of appropriate wording and other modalities of the bank guarantee has unfortunately delayed the release of *M/V SAIGA*.

Neither should the issue of the *cédule de citation* addressed to the Master of *M/V SAIGA* on 12 December 1997 be taken as an insult to the Applicant State. The Republic of Guinea has declared several times that the *cédule de citation* did not have the effect to make Saint Vincent and the Grenadines liable for any penalty imposed on the Master. I do not see how this administrative document could justify any award on moral damages for the Applicant State on the basis of a direct injury.

The Applicant State claims damages with a total of nearly US$5.5 million. Nearly one-third of those damages are assessed on a speculative basis, that is without having an exact scale for their assessment. About four-fifths of these damages are made on behalf of multi-national companies making huge profits with bunkering activities off the African coast. The Republic of Guinea, on the other hand, is one of the poorest countries in the world with a per capita income of around US$540 per year. In comparison thereto, Switzerland, the country of the seat of the cargo owner, with a population of nearly the same size as Guinea, has a per capita income of around US$33,519.

Maître Thiam pledged to you yesterday to contribute with your judgment to more justice in the world. The Republic of Guinea embraces this pledge and requests you to dismiss the claims advanced. On an auxiliary basis, Guinea requests you to reduce the quantum of the claims to a reasonable and equitable amount.

Mr President, Honourable Judges, I have come to the end of the oral presentation of the Republic of Guinea's argument. Before reading out the formal submissions, please allow me to make the following remarks.

Both parties in these proceedings have contributed to the development of the International Law of the Sea by consenting to submit this case to the International Tribunal. In so doing, both parties have enabled the International Tribunal to preside over its second case. We have greatly appreciated the privilege of presenting our case to the Tribunal's honourable members and to thereby participate in the creation of a positive profile of the new International Tribunal from the very beginning of its activities. Simultaneously, both parties had the privilege of making the acquaintance of the Tribunal's members and establishing a high regard for them.

Speaking for the Republic of Guinea, the Tribunal's decision of 4 December 1997 in the prompt release proceedings is an eminent demonstration of the International Tribunal's careful and conscientious treatment of the party's petitions. The Tribunal's order concluding the proceedings for provisional measures is proof of the Tribunal's wisdom in finding a solution that is acceptable to both parties.

The proceedings on the merits that have now, finally, come to an end, cannot be compared, in the least, with the two previous proceedings as the actual proceedings have required outstanding performance on all sides. This does not only apply to the representatives of the parties, but also to the Honourable 21 Judges of the International Tribunal and to the Tribunal's administration, Mr Chitty and his staff, including the translators and those who prepared the transcripts. It is due to your very able conduct of the proceedings, Mr President, that both parties have co-operated reciprocally.

Despite the increased efforts that the proceedings required of all participants, the past fortnight was worth it. Participating in the discussion of the multitude of highly interesting problems during the past two weeks was a particular experience. Of course, I also listened with great respect to the arguments of the representatives of Saint Vincent and the Grenadines. I express my thanks, and those of Professor Lagoni, to His Excellency the Minister of Justice for Guinea, and to his delegation. The co-operation with Professor Lagoni will always remain an unforgettable pleasure. Finally, I thank my assistants and Mr von Carlowitz for their invaluable support.

Perhaps I may now read out the final submissions on behalf of the Republic of Guinea, 20 March 1999. I herewith, on behalf of the Government of the Republic of Guinea, in accordance with article 75, paragraph 2 of the Rules of the International Tribunal, present the final submissions as follows:

For the reasons given in writing and in oral argument, or any of them, or for any other reason that the International Tribunal deems to be relevant, the Government of the Republic of Guinea asks the International Tribunal to adjudge and declare that:

1 The claims of Saint Vincent and the Grenadines are dismissed as non-admissible. Saint Vincent and the Grenadines shall pay the costs of the proceedings and the costs incurred by the Republic of Guinea.

Alternatively, that:

2 The actions of the Republic of Guinea did not violate the right of Saint Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful users of the sea, as set forth in articles 56(2) and 58 and related provisions of UNCLOS.

3 Guinean laws can be applied for the purpose of controlling and suppressing the sale of gasoil to fishing vessels in the Customs radius ("*rayon des douanes*") according to article 34 of the Customs Code of Guinea.

4 Guinea did lawfully exercise the right of hot pursuit under article 111 of UNLCOS in respect of *M/V SAIGA* and is not liable to compensate *M/V SAIGA* according to article 111(8) of UNCLOS.

5 The Republic of Guinea has not violated 292(4) and 296 of UNCLOS.

6 The mentioning of Saint Vincent and the Grenadines in the C*édule de Citation* of the *Tribunal de Première Instance de Conakry* of 12 December 1997 under the heading, "CIVILEMENT … RESPONSIBLE A CITER" did not violate the rights of Saint Vincent and the Grenadines under UNCLOS.

7 There is no obligation of the Republic of Guinea to immediately return to Saint Vincent and the Grenadines the equivalent in United States dollars of the discharged gasoil.

8 The Republic of Guinea has no obligation to pay damages to Saint Vincent and the Grenadines.

9 Saint Vincent and the Grenadines shall pay the costs of the proceedings and the costs incurred by the Republic of Guinea.

Thank you very much, Mr President.

THE PRESIDENT: Thank you, Mr von Brevern. That brings us to the end of the presentations and to the oral proceedings in the *M/V SAIGA* (No.2) case. I should like to take

this opportunity to thank the Agents, counsel and advisers for both parties for the presentations they have given to the Tribunal over the past two weeks.

In particular, the Tribunal appreciates the professional competence and personal courtesies exhibited so conscientiously by Agents and counsel on both sides. We have greatly benefited from your expertise and we thank both sides for the very kind words you have expressed to the Tribunal. I should like to repeat that Saint Vincent and the Grenadines has the permission of the Tribunal to comment in writing on the documents presented to the Tribunal under cover of the letter of 19 March from the Agent of Guinea. Pursuant to the Rules of the Tribunal, the comments of Saint Vincent and the Grenadines on this document will be communicated to Guinea for information and reaction, in any.

The Registrar will now address questions relating to documentation and costs for the parties.

THE REGISTRAR: Thank you, Mr President. In conformity with article 86(4) of the Rules of the Tribunal, the parties have the right to correct the transcripts of the presentations and statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible but in any case not later than the end of Wednesday 24 March 1999. In addition, the parties are requested to certify that all the documents they have submitted are true and accurate copies of the originals of those documents. For that purpose, they will be provided with a tentative list of the documents concerned.

The parties are also requested to submit, not later than the end of Tuesday 6 April 1999, any documentation they wish the Tribunal to take into account when making its determination on the costs of the proceedings.

THE PRESIDENT: Thank you. The Tribunal will now withdraw to deliberate and take a decision with regard to the judgment in this case. The judgment will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the judgment. That date is 29 June but I repeat that that is a tentative date. The Agents will be informed reasonably in advance if there is any change to this schedule, either in advance or by way of postponement.

In accordance with the usual practice, I will ask that the Agents kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that the Tribunal may need in its deliberation of the case prior to the delivery of the judgment. The sitting is now closed.

(Adjourned at 13.10 hrs)