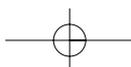
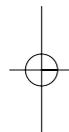
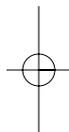
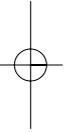
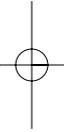
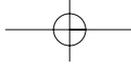




**MEMORIAL SUBMITTED BY SAINT VINCENT AND
THE GRENADINES**







MEMORIAL — SAINT VINCENT AND THE GRENADINES

13

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

ST. VINCENT AND THE GRENADINES

v.

*REPUBLIC OF GUINEA**(m/v "Saiga")***MEMORIAL****Submitted by St. Vincent and the Grenadines****19 June 1998****INTRODUCTION**

1. On 22 December 1997 St. Vincent and the Grenadines instituted arbitration proceedings against the Republic of Guinea (**Annex 1**) ("Arbitration Notification"). The proceedings were brought under Article 287(3) and Annex VII of the 1982 United Nations Convention on the Law of the Sea ("the 1982 Convention") in relation to the dispute which had arisen by reason of the detention and arrest by Guinea on 28 October 1997 of the m/v "Saiga" (an oil tanker registered under the flag of St. Vincent and the Grenadines), its Master and crew. The Arbitration Notification also addressed subsequent actions by Guinea. Paragraph 24 of the Arbitration Notification requested the Arbitral Tribunal which was to be established to adjudge and declare:

"(1) the actions of Guinea (inter alia the attack on the m/v "Saiga" and its crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil, its filing of charges against St. Vincent and the Grenadines and its subsequently issuing a judgment against them) violate the right of St. Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth in Articles 56(2) and 58 and related provisions of the Convention;

(2) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of the Convention, the customs and contraband laws of Guinea, namely inter alia Articles 1 and 8 of Law 94/007/CTRN of

15 March 1994, Articles 316 and 317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;

(3) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of the Convention in respect of the m/v "Saiga" and is liable to compensate the m/v "Saiga" pursuant to Article 111(8) of the Convention;

(4) Guinea has violated Articles 292(4) and 296 of the Convention in not releasing the m/v "Saiga" and her crew immediately upon the posting of the guarantee of US\$400,000 on 10 December 1997 or the subsequent clarification from Credit Suisse on 11 December;

(5) the citing of St. Vincent and the Grenadines as the flag state of the m/v "Saiga" in the criminal courts and proceedings instituted by Guinea violates the rights of St. Vincent and the Grenadines under the 1982 Convention;

(6) Guinea immediately release the m/v "Saiga" and her Master and crew;

(7) Guinea immediately return the equivalent in United States Dollars of the discharged oil and return the Bank Guarantee;

(8) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and

(9) Guinea shall pay the costs of the Arbitral proceedings and the costs incurred by St. Vincent and the Grenadines."

2. By Exchange of Letters of 20 February 1998 (**Annex 2**) ("the 1998 Agreement"), St. Vincent and the Grenadines and Guinea entered into an agreement "to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the m/v "Saiga" and to "transfer to the International Tribunal for the Law of the Sea of the arbitration proceedings instituted by St. Vincent and the Grenadines by Notification of 22 December 1997". The 1998 Agreement was notified to the International Tribunal by the Agent of Guinea on 20 February 1998.

3. The 1998 Agreement provides for the transfer of the dispute to the International Tribunal with the following conditions:

- “1. The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines;
2. The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea’s Statement of response dated 30 January 1998;
3. The written and oral proceedings shall follow the timetable set out in the Annex hereto;
4. The International Tribunal for the Law of the Sea shall address all claims for damages and costs referred to in paragraph 24 of the Notification of 22 December 1997 and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal;
5. The Request for the Prescription of Provisional Measures submitted to the International Tribunal for the Law of the Sea by St. Vincent and the Grenadines on 13 January 1998, the Statement of response of the Government of Guinea dated 30 January 1998, and all subsequent documentation submitted by the parties in connection with the Request shall be considered by the Tribunal as having been submitted under article 290, paragraph 1, of the Convention on the Law of the Sea and article 89, paragraph 1, of the Rules of the Tribunal.”

4. By its Order of 20 February 1998, and in accordance with the Annex to the 1998 Agreement, the International Tribunal fixed 19 June 1998 as the date for the submission by St. Vincent and the Grenadines of its Memorial in the case. This Memorial with accompanying annexes is submitted in accordance with that Order.

* * *

5. The disputes between the Parties relates to the right of the m/v “Saiga” not to be subject to “hot pursuit” otherwise than in accordance with the provisions of the 1982 Convention and to enjoy freedom of navigation and other internationally lawful uses of the sea related to freedom of navigation, as provided by the 1982 Convention. Specifically, St. Vincent and the Grenadines has brought these proceedings to obtain the following determinations by the International Tribunal:
 - that Guinea unlawfully and unjustifiably purported to exercise the right to hot pursuit against the m/v “Saiga” and used excessive force in detaining the vessel;

- that under the 1982 Convention Guinea was not entitled to apply or enforce its customs laws in relation to the bunkering activities of the m/v "Saiga" because (a) Guinea's customs laws do not on their face apply beyond its territorial waters, and (b) the application or enforcement of those laws violated the 1982 Convention, which limits prescriptive and enforcement jurisdiction in the exclusive economic zone to those matters set out in Article 56(1) of the 1982 Convention;
 - that Guinea violated Articles 292(4) and 296 of the 1982 Convention in not releasing the m/v "Saiga" and her crew immediately upon the posting by St. Vincent and the Grenadines of a bank guarantee for US\$400,000 on 10 December 1997, or subsequently; and
 - that Guinea is liable to St. Vincent and the Grenadines for damages for these violations of its rights under the Convention, both material and non-material, including all losses and damages to the vessel, including its crew and cargo.
6. This, in the most summary terms, is the dispute before the Tribunal. The Introductory part of the Memorial sets out some background information on the elements that are at the core of the dispute – the activity of bunkering, the physical location of the dispute, and the two States.
- (1) *Bunkering*
7. The activity in which the m/v "Saiga" was engaged – bunkering – involves the provisions necessary for the operation of vessels. Such provisions are primarily the fuel they need to run (gasoil and/or fueloil and/or lubeoils) but can also involve the supply of other items vessels needed from time to time such as water and food. Bunkering takes place both on- and off-shore and is a global multi-million US dollar industry involving all of the major oil companies (including BP, Mobil, Shell and Caltex) and numerous independent companies. One such company is Addax Bunkering Services, the charterer of the m/v "Saiga" (see **Annex 3**). The importance and scale of bunkering is evident from the fact that the industry is highly organised and has its own trade association, as well as its own industry magazines. One such magazine is "Bunker News" (see **Annex 4**).
8. As one would expect, the mechanics of bunkering are determined by the bunker supplier who of course takes into account the needs of his customers in an effort to maximise revenues. The practise of Addax Bunkering Services is to load the "Saiga" with supplies from their storage tanks located at Dakar, Senegal and make arrangements to supply their customers (usually fishing vessels but also including a number of mining vessels) at convenient

locations within sailing distance from there. It happened on this occasion that the “Saiga” was supplying only gasoil but this is by no means always the case. The locations are generally agreed by balancing the requirement of the customers against the likely route of the vessel, which of course can be varied to take into account those requirements. In this regard matters that are likely to have a bearing on that location include the laws of the coastal state of potential relevance to the bunkering operation. For example, it is usually preferable not to bunker in the territorial waters of a state because duties may be payable and there may be more severe penalties if there is a spillage. The majority of these arrangements are made some weeks in advance of the “Saiga” leaving Dakar by contracts recording essential matters such as quantity to be delivered, price and location of supply. These contracts may be supplemented by a few further contracts concluded while the vessel is sailing. All locations will be confirmed by radio directly between the Master of the “Saiga” and the Master of the vessel being supplied shortly before each particular supply is effected.

9. The global market in off-shore bunkering of gas oil and fuel oil in the exclusive economic zone continues to grow at a rapid pace. The west coast of Africa in particular is an emerging market in competition with Europe and North Africa with very significant potential: see the December 1997 edition of “Bunker News” (**Annex 4**).

(2) *St. Vincent and the Grenadines*

10. St. Vincent and the Grenadines is a developing country comprising a group of small islands located in the Caribbean. It has a population of 109,000. As an island it is inevitably and by definition a maritime state. Its national economy has three principal sources of revenue: tourism, agriculture (including fisheries) and shipping. Each is intimately connected to the sea. For this reason St. Vincent and the Grenadines is committed to the maintenance of orderly relations between States in matters relating to oceans and seas, and to the promotion of and respect for the rule of law.
11. St. Vincent and the Grenadines became a party to the 1982 United Nations Convention on the Law of the Sea on 1 October 1993. It is an active member of the International Maritime Organisation and a party to many international conventions addressing maritime issues, including those relating to the safety of life at sea, the prevention of oil pollution, and liability for oil carried by vessels flying its flag.
12. St. Vincent and the Grenadines has an active merchant shipping fleet registered under its flag. The fleet is engaged in fisheries, bunkering and

other lawful activities on the high seas and in the exclusive economic zone of other States. When St. Vincent and the Grenadines achieved its independence in 1979 its registered fleet was small, comprising for the most part small fishing vessels which were mainly active in Caribbean waters. On achieving independence the Government took a decision to diversify the country's economic base which had until that time been rather narrow. It was considered to be inappropriate to remain too dependent on a single source of income, whether from banana and other agricultural production (the traditional activity) or tourism. Like many other newly independent States the Government took as one of its first steps the decision to establish a maritime register and to do it under conditions in which its reliability and effectiveness could not be questioned. St. Vincent and the Grenadines wished to be – and wished to be seen as – a flag State which would comply with its international obligations and actively promote and protect the interests of vessels flying its flag, including their rights under the 1982 Convention. Starting from a small base, by the end of 1997 the total registered tonnage reached just over 10 million tons (see information on St. Vincent and the Grenadines Maritime Administration, **Annex 5**). That made St. Vincent and the Grenadines the seventeenth largest shipping nation.

(3) *The location of the dispute; Guinea and its maritime laws*

13. The dispute is located off the west coast of Africa which has, as indicated above, emerged as an important market for offshore bunkering. The Republic of Guinea is located between Guinea-Bissau (to the north) and Sierra Leone (to the south). In the shallow waters offshore of the northern coast of Guinea is the small uninhabited island of Alcatraz, which forms part of Guinea.

14. Guinea became a party to the 1982 Convention on 6 September 1995. Shortly before this date it had introduced legislation to give effect to the emerging arrangements governing maritime areas. By Decree No. 336 of 30 July 1980 (**Annex 6**) ("the 1980 Decree"). Guinea determined *inter alia* its territorial waters and an exclusive economic zone. The 1980 Decree provided *inter alia* as follows:

"Article 1

The breadth of the territorial waters of the People's Revolutionary Republic of Guinea shall be twelve (12) nautical miles measured from the low-water line.

Article 2

The breadth of the exclusive economic zone shall be two hundred (200) nautical miles measured from the low-water line.

Article 3

In the exclusive economic zone, the Guinean State reserves the exclusive right to explore and exploit, conserve and manage the natural resources, whether living or non-living, of the seabed, its sub-soil and the superadjacent waters.

[. . .]

Article 7

Foreign ships shall be prohibited from fishing in Guinean territorial waters and in the exclusive economic zone.”

It is to be noted that the 1980 Decree did not establish or define a contiguous zone, and did not purport to establish Guinea’s right to apply or enforce customs duties within its exclusive economic zone. The Decree also confirmed a new maritime boundary with Guinea-Bissau (see Article 4). That maritime boundary (the Original Maritime Boundary) may be seen green on the Map at **Annex A1**.

15. Decree No. 336/1980 was notified to the Secretary General of the United Nations in accordance with the 1982 Convention.
16. The Original Maritime Boundary was not accepted by Guinea-Bissau. By a Special Agreement of 18 February 1983 Guinea and Guinea-Bissau constituted an Arbitral Tribunal, consisting of three members of the International Court of Justice, to effect a delimitation of the maritime zones of the two States, including their respective territorial waters, exclusive economic zones and continental shelf. By Article 10 of the Special Agreement Guinea and Guinea-Bissau agreed that the award would be definitive and that they would take all measures necessary for its execution. In its Award of 14 February 1985 the Arbitral Tribunal unanimously established a single line dividing the two countries (*77 International Law Reports*, p. 636; **Annex 7**). The “Revised Maritime Boundary” differed from the original one. The Award determined that the line delimiting the respective maritime territories of the two States started from the intersection of the thalweg of the Cajet River and the meridian of 15 degrees 06’ 30” west longitude, and

that it was joined by loxodromic segments at three points (A, B, C), and then followed a loxodromic line on an azimuth of 236 degrees from point C to the outer limit of the maritime territories of each State as recognised under general international law. A map establishing those coordinates can be found at **Annex 7** as well as at **Annex A1**, where it is indicated in blue. Although these new coordinates differ from those set out in Decree No. 336/1980, they have apparently not been notified to the United Nations by Guinea. For the purposes of these proceedings St. Vincent and the Grenadines submits that the applicable maritime boundary should be treated by the International Tribunal that "definitively" as determined by the Arbitral Tribunal in its 1985 Award.

17. Subsequent to the Arbitral Award, Guinea enacted new legislation on its maritime areas. The Law of 30 November 1995 (the 1995 *Code de la Marine Marchande*) (**Annex 8**) includes several provisions of relevance. Article 13 of the 1995 Law designates an adjacent or contiguous zone:

"In a zone adjacent to the territorial sea, designated under the name of 'adjacent zone' ("zone contigue") the Republic of Guinea may carry out the necessary controls with a view to:

- (a) preventing violation of customs, tax, sanitary or immigration regulations on national territory or in the territorial sea;
- (b) punishing violations of the same regulations when they are committed on national territory or in the territorial sea.

The adjacent area extends for 24 nautical miles from the baselines from which the width of the territorial sea is measured."

It is to be noted that Article 13 appears to conform to Article 33(1) of the 1982 Convention. It does not purport to establish Guinea's jurisdiction to apply customs regulations within the contiguous zone. The 1995 *Code de la Marine Marchand* confirms that Guinea's sovereignty extends beyond its territory and internal waters to its territorial sea (but not beyond) (Article 4). Articles 40 to 42 of the 1995 *Code* address Guinea's exclusive economic zone, in material part as follows:

"Article 40

The Republic of Guinea exercises, within the exclusive economic zone which extends from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign rights concerning the exploration and exploitation, conservation and management of the natural resources, biological or non-biological, of the sea beds and the subsoils, of the

waters lying [above], as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes.

Article 41

The Republic of Guinea also has exclusive jurisdiction, in the economic zone provided for in the preceding Article, concerning:

- a) the installation and utilisation of artificial islands, installations and works;
- b) scientific marine research;
- c) the protection and conservation of the marine environment.”

It is to be noted that the 1995 Code incorporates into Guinean law the salient provisions of Articles 56 and 57 of the 1982 Convention. It does not purport to establish Guinea’s sovereign rights to apply or enforce customs duties within the exclusive economic zone. This Law has apparently not been notified to the United Nations.

18. The other Guinean laws which are of relevance to this dispute are the laws and regulations on customs and contraband on the basis of which the m/v “Saiga” was charged, convicted and sentenced. These are Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994 (see below at para. 48, **Annex 22**), Articles 316 and 317 of Ordonnance No. 094/PRG/SGG of 28 November 1990 (the 1990 *Code des Douanes*) (see below at para. 48, **Annex 23**), and Articles 361 and 363 of the Penal Code) (see below at para. 48, **Annex 24**). Customs law in Guinea are applied under the authority of the National Director of Customs, under the Ministry of Economy and Finance. These laws have apparently not been notified to the United Nations.
19. Guinea’s fisheries laws and regulations are under the authority of the Minister of Fisheries, which is responsible for their implementation. Relevant fisheries management and conservation laws include the Code of Maritime Fishing (Guinean Law 95/13/CTRM of 15 May 1995) and the General Regulation for the Implementation of the Maritime Fisheries Code of Guinea (Order No. 039 PRG/85 of 23 February 1985). These legislative acts were not invoked in the proceedings in Guinea against the m/v “Saiga” and have apparently not been notified to the United Nations. Indeed, at no point in any of the actions or proceedings involving the m/v “Saiga” have any fisheries laws been invoked or the Guinean fisheries authorities involved.

20. In the context of its fisheries laws, Guinea has entered into bilateral agreements with other states and regional economic integration organisations. One such agreement of particular relevance to this dispute is the 1996 Fisheries Agreement between the European Community and the Government of the Republic of Guinea on fishing off the Guinea coast (*Official Journal of the European Communities*, No. L 157, 29.6.1996, p. 3; **Annex 9**). The 1996 EC-Guinea Agreement establishes the conditions under which EC fisheries vessels may fish in Guinean waters, including "waters beyond 10 nautical miles" (*ibid.*, **Annex**, point H). It provides *inter alia* for Community financing of "fisheries surveillance programmes" and "institutional aid for the [Guinean] Ministry of Fisheries" (Article 6). It makes no mention of such surveillance being carried out by the Guinean customs authorities. The Annex to the 1996 Agreement is entitled "Conditions for the Exercise of Fishing Activities by Community Vessels in Guinea's Fishing Zone". The Annex imposes no conditions – and makes no mention of Guinea's right to impose such conditions – in relation to bunkering or the payment of customs duties in the exclusive economic zone.

(4) *Previous incidents off the Guinean coast involving Guinean customs authorities*

21. In setting out the context it is appropriate to indicate that since the arrest of the m/v "Saiga" St. Vincent and the Grenadines has become aware of a pattern of incidents off the coast of Guinea, including in its exclusive economic zone and beyond, which are similar in character to that involving the m/v "Saiga". These incidents suggest that Guinean authorities may have been actively supporting or, at best, failing to prevent, interferences with foreign vessels within and beyond Guinea's exclusive economic zone. They also suggest that the experience of the m/v "Saiga" is not an isolated incident.

22. The information indicates that in recent times no fewer than eight tankers engaged in off-shore bunkering activities beyond the territory of Guinea have been attacked by or with the support of the Guinean authorities (see Statement of Mr. Mark Vervaet, of 12 February 1998, with Attachments; **Annex 10**; also Statement by Mr. Vincent Kanu, with Attachments, February 1998; **Annex 11**). In earlier proceedings before the International Tribunal none of these instances has been denied by Guinea. The flags of the other vessels known to have been attacked are set out in an extract from Lloyd's Register, which indicates that two of the vessels previously attacked also fly the flag of St. Vincent and the Grenadines (see **Annex 12**).

23. One vessel, the “Napetco 1”, has actually been attacked on two occasions, once in 1993 and then again in October 1996 (**Annex 11**, statement of Mr. Kanu). Both attacks took place in waters beyond the exclusive economic zone of Guinea, off the coast of Sierra Leone. Even after he attack on the m/v “Saiga”, the customs authorities of Guinea have attacked two more vessels, the “Poseidon” and the “Xifias” (**Annex 10**, statement of Mr. Vervaet).
24. These incidents suggest that the situation for merchant shipping off and around the coast of Guinea is an increasingly dangerous one. This is all the more so for tankers engaged in the off-shore bunkering gas oil, since they represent a relatively easy and lucrative target.

(5) *Structure of the Memorial*

25. It is against this general background that the Memorial develops the arguments of St. Vincent and the Grenadines. The Memorial is in four parts:

Part 1 outlines the factual background concerning the stopping and arrest of the m/v “Saiga” and her crew and subsequent developments, both in Guinea and before the International Tribunal.

Part 2 deals with the question of the International Tribunal’s jurisdiction, addressing the one outstanding point which the Court is asked to decide.

Part 3 deals with the substantive legal arguments, being divided into three sub-sections:

- Guinea’s unlawful and unjustified exercise of the right of hot pursuit under Article 111 of the 1982 Convention (including the excessive use of force in detaining and arresting the m/v “Saiga”);
- Guinea’s violation of Articles 56(2) and 58 and related provisions of the 1982 Convention on the right of freedom of navigation in Guinea’s exclusive economic zone and on the high seas;
- Guinea’s violation of Articles 292(4) and 296 of the 1982 Convention by failing to release the m/v “Saiga” and its crew between 11 December 1997 and 5 March 1998 pursuant to this Tribunal’s judgment of 4 December 1997.

Part 4 addresses damages, including interest and legal costs. It is followed by the **Submissions** of St. Vincent and the Grenadines, which have been amended to take account of the fact that the m/v "Saiga" was released on 28 February 1998. The Memorial concludes with a **Table of Annexes**.

SECTION 1: FACTUAL BACKGROUND

1.1 *The m/v "Saiga"*

26. The m/v "Saiga" is an oil tanker of 5,700 metric tonnes registered under the flag of St. Vincent and the Grenadines (see Certificate of Registry, **Annex 13**). It is owned by the Tabona Shipping Company Limited and managed by Seascot Shipmanagement Limited, which is based in Scotland. At all material times her charterer was the Lemania Shipping Group Ltd. based in Switzerland. The vessel is insured for a value of approximately US\$ 1.5 million. At all material times the vessel's Master was Captain Mickael Alexandrovich Orlov, of Ukrainian nationality, and it had a crew of twenty-four, comprising nationals from the Ukraine and Senegal (see **Annex 14**, at pp. 14–15).
27. The m/v "Saiga" operates as a bunkering vessel lawfully supplying gas oil to fishing and other vessels operating *inter alia* off the west coast of Africa, including off the coast of Guinea.
28. Details of the movements of the m/v "Saiga" which follow are confirmed by its Log Book (relevant extracts of which are set out at **Annex 15**). In summary, the m/v "Saiga" left Dakar on 24 October 1997, fully laden with gas oil. She subsequently supplied some 485MT of gasoil to fishing vessels, prior to her detention on 28 October 1997 (see **Annex 16**, p. 231). During that period contracts were made for sixteen bunker parcels of gasoil, amounting to some 1,685 MT. When detained and arrested by Guinean authorities on 28 October 1997 the m/v "Saiga" was carrying a cargo of approximately 4,941 MT of gasoil (which was confiscated and sold by the Guinean authorities reportedly for some US\$ 3,000,000). The oil was owned by Addax BV, Geneva Branch.

1.2 *The detention*

29. The precise location and timetable of the events which occurred from 24 to 28 October 1997 are set out in the Log Book of the m/v "Saiga"

(**Annex 15**) and a series of telexes between the Master of the m/v “Saiga” and Addax (**Annex 16**). The route may be seen on the map at Annex A1.

- On 24 October at 10.00 a.m. the m/v “Saiga” left Dakar (**Annex 16**, p. 236), fully laden with some 5,400 metric tonnes of gas oil (*ibid.*).
- On 24 October the vessel was in contact with the “Itti I” and the “Demetrios” (**Annex 16**, p. 232); they were bunkered respectively on 24 October (17.15–19.10) and 25 October (01.25–04.20) at 1235N/01713W (**Annex 16**, p. 237);
- on 25 October the “Flipper I” was bunkered at 1105N/01658W (**Annex 16**, p. 242 (Point 1 on the Map at **Annex A1**);
- on 26 October the “Ittipesca”, the “Genevieve” and the “Trebba” were bunkered at 1025n/01543w (**Annex 16**, p. 247; Point 5 on the Map at **Annex A1**);
- on 27 October the “Giuseppe Primo” (04.40–06.45), the “Kriti” (07.00–11.05) and the “Eleni G” (13.40–14.00) were bunkered at the same location (**Annex 16**, pp. 247 and 249);
- on 27 October at 16.26 the Master of the m/v “Saiga” telexed that he would move to meet other fishing vessels at 0950n/01615w and “will not proceed closer than 100 miles of Guinea-Conakry” (**Annex 16**, p. 249);
- at 17.24 Addax telexed that these fishing vessels would come to the m/v “Saiga” and that it should wait for them (**Annex 16**, p. 250);
- at 18.42 Addax telexed that the position of 0950N/01615W “is not repeat not safe” (a reference to the attacks on other bunkering vessels; see *supra* paras. 21–4), and asked that the “Saiga” proceed to 0900N/01500W (**Annex 16**, p. 251);
- at 19.24 the Master confirmed that he had received the message and was proceeding to 0900N/01500W, where he expected to arrive on 28 October at 05.00 (**Annex 16**, p. 253);
- on 28 October at 09.03 the Master telexed that he was at 0900N/01459W and “drifting”, and that he had been there since 04.00; fishing vessels were expected at 13.00 that day (**Annex 16**, p. 254; ; Point 10 on the Map at **Annex A1**);
- on 28 October at 10.11 the Master telexed “ataka ataka ataka” (**Annex 16**, p. 255);
- the m/v “Saiga” was then out of communication for several hours and did not respond to five telexes sent (**Annex 16**, pp. 255–61);
- on 29 October at 09.38 the Master telexed to say that the vessel had been attacked and had been escorted back to Conakry where it had been since 21.00 on 28 October (**Annex 16**, p. 262)

30. These events occurred at various locations outside and within Guinea's exclusive economic zone. During the morning of 27 October 1997 the m/v "Saiga" crossed the Original Maritime Boundary between Guinea and Guinea-Bissau and entered the exclusive economic zone of Guinea at a point approximately 32 nautical miles from the Guinean island of Alcatraz (see Map at **Annex A1**, between Points 2 and 3; it is to be noted that at this point the Revised Maritime Boundary which results from the Arbitral Award of 1985 places the "Saiga" within the exclusive economic zone of Guinea-Bissau).
31. When the m/v "Saiga" bunkered the "Giuseppi Primo", the "Kriti" and the "Eleni G" between approximately 04.00 and 14.00 hours (at a point 10°25'03" N and 15°42'06" W) she was located at a point between 22.6 and 22.9 miles off the uninhabited island of Alcatraz (see Log Book, 27 October 1997, **Annex 15**; see Map showing movements of m/v "Saiga", 27/28 October 1997, **Annex A1**, at Point 5). To the extent that Article 13 of the 1995 Code (*supra*, para. 17) applies to the island of Alcatraz (on which no admissions are made) then this location would be within the contiguous zone. None of these vessels flew the flag of Guinea. Each was apparently lawfully present in Guinea's waters pursuant to licences granted by Guinea. The licenses apparently did not impose bunkering conditions or any restrictions purporting to limit or prevent the right of the three vessels from obtaining gasoil from the m/v "Saiga" or any other vessel supplying gasoil in waters beyond Guinea's territorial waters (see the 1996 EC-Guinea Agreement, *supra*, para. 20). At no time has Guinea claimed that these vessels were fishing in violation of their licenses, or that they were carrying out any activities unlawfully. No proceedings appear to have been brought against the vessels in relation to the supply of gasoil to them by the m/v "Saiga".
32. After the bunkering of these three vessels had been completed the m/v "Saiga" proceeded south at a steady speed. As indicated above she had received a telex from Addax at 1842 on 27 October telling her to proceed to a safer area. She left Guinea's exclusive economic zone at approximately 03.45 hours on 28 October 1997, at a point around 1502W (**Annex A1**, Map Point 9), and thereafter remained beyond Guinean waters.
33. At 04.24 hours on 28 October 1997 the m/v "Saiga" reached the rendezvous point by the vessels to be bunkered. This was off the coast of Sierra Leone (beyond its territorial waters). She then drifted in calm waters between 0900N/01459W and 0900N/01500W (**Annex A1**, Map Point 10). At approximately 08.30 hours two targets on the radar were noted. After tracking them for approximately ten minutes it became obvious that both

targets were proceeding towards the m/v “Saiga”, because of the speed and direction of approach, which was opposite to the direction of the vessels to be bunkered. The Master was suspicious that the m/v “Saiga” was about to be attacked by pirate gunboats which had been reported to be active in the area. As the vessel was drifting and would have presented an easy target, the reluctantly Master gave the order for the engine to be started and proceeded westwards.

34. When the first approaching patrol boat was still some distance away it opened fire, smashing a number of the bridge windows and holing the superstructure with heavy calibre rounds. No prior warning or identification had been given, whether by visual or auditory signal, including radio. The Master immediately put the vessel on autopilot and ordered everyone to the safety of the lower engine room. He noted the time of the attack as 09.11 hours on 28 October 1997. The timing of the attack was confirmed by a message sent at 10.11 on 28 October (**Annex 16**, p. 255).
35. After some time the faster of the two Guinean patrol boats caught up with the m/v “Saiga”. Armed personnel boarded and fired light machine guns at doors and locks in an indiscriminate manner to gain access to the accommodation, cabins and ultimately the engine room. On entering the top of the engine room they opened fire again and sprayed bullets without regard for the ship’s personnel on the lower platforms. The Master then ordered the engine stopped and surrendered to the armed personnel. Until an Officer of the Guinean Armed Forces made himself known the Master had no idea if he was dealing with armed pirates or governmental authorities, and sought only to protect his crew and vessel. It transpired that the attack had been carried out by two Guinean customs patrol boats (designation F-328 and P-35) out of Conakry, with speeds of up to 26 knots and 35 knots respectively (see extract from Jane’s Shipping, **Annex 25**). This compares with the m/v “Saiga’s” maximum speed when fully laden of 10 knots.
36. The details of the attack are set out in the Master’s responses to questions put to him by the Guinean authorities on 31 October 1997 (see Procès Verbal, **Annex 19**) the Master’s Statement of 29 October 1997 (**Annex 18**), and his Further Statement of 4 November 1997 (**Annex 17**). In his Statement of 4 November he states as follows:

“On October 28, 1997 at 08.30 I located targets in my radar about 11.5 miles. I was watching them during 6–10 minutes and there were two targets proceeding fast towards us. Remembering warning about “oil hunters” I was afraid and gave order to the Engine to move. When

the distance from targets was about 1–2 miles I heard shooting. I did not hear or see any warning by VHF, sound or light signal from that boats. I closed the bridge's doors, put auto pilot on, announced that there was piracy's attack and everybody should go to Engine room. The most crew members went downstairs in the Engine room. In some minutes later we heard that somebody shoot to the main Engine from upstairs. The 2d officer was injured and we saw broken pipes of main Engine, leakage of oil. I told to the Chief Engineer to stop the Engine and went upstairs. Then the vessel was escorted to Conakry, and had been laid up till now."

37. Further evidence is available from the examination of Mr. Sergei Kluyev, Second Officer of the m/v "Saiga", during the Prompt Release proceedings (Thursday 27 November 1997, uncorrected transcript, at pp. 9–13). During the course of his examination Mr Kluyev said:

"... at that point we were at 4 or 5 o'clock GMT, and we were adrift till the beginning of that time [...] Approximately at 8 o'clock I have a rest because my watch is from 00.00 till 04.00. I heard like hitting nuts but I heard automatic firing and then in two or three minutes later or maybe more, maybe five minutes because I was thinking, I heard the announcement of the captain that there is a piracy attack of the vessel and all the crew should proceed downstairs to the engine room." (at pp. 10–11)

Mr. Kluyev confirmed that no warning was given before the boarding of the vessel (p. 11), and that the crew was subject to threats of violence:

"At that time on the boat they came and as I know on the vessel they have treated some people, the cook and asked him to get something to eat and drink. They take guns and put them at his said and said, 'If you don't give us what we want to eat, we will kill you'" (*ibid.*)

38. Mr Kluyev also confirmed that he had been wounded (receiving two fragments of bullet in his left hand) and that a Senegalese crew member, Mr. Djibril, was seriously injured with glass entering his throat. He also confirmed that the vessel was unarmed and carried no arms or ammunition, and that at no time did anyone resist arrest (pp. 11–2).
39. After the vessel arrived in Conakry, the two injured crew members were taken to hospital. Medical Reports confirm that Mr. Djibril Niassé received two gun shot wounds to the chest, had hemorrhaging in both eyes, severe contusion of the chest, and was suffering from a "very severe state of psy-

chological shock with serious relational impairment (refusal to communicate and to take food)” (**Annex 21**). The Second Officer, Mr. Sergei Kluyev, was treated for gun shot wounds to the left forearm (**Annex 21**). Only through prompt repatriation to Dakar was Mr Kluyev’s arm, and probably his life, saved.

40. During the arrest and apprehension many of the crew were poorly treated by the Armed personnel, had their cabins ransacked, and personal possessions (including money) stolen. A number of minor injuries were sustained and the majority of the crew were forced on to one of the patrol boats, leaving the Master and five crew to man the vessel for the 80 mile trip to Conakry under escort.
41. At 21.00 hours on 28 October the vessel arrived at Conakry anchorage. At least 12 armed guards stayed on board the m/v “Saiga”. The next day at 12.45 the vessel berthed alongside the oil jetty. The Master and some crew were detained on board the ship without access to representation and without radio communication. All passports, ships log books, telex logs, in-use charts and satellite telephones were removed from the vessel. The Log Book was not returned to the Master until the vessel’s release on 28 February 1998 (in the interim, the Log Book was produced by Guinea in evidence during the two prior proceedings before the International Tribunal, the Article 292 (Prompt Release) Proceedings and the Application for Provisional Measures). The Master was advised later that day that his cargo would be confiscated by Customs.
42. The two injured seamen were allowed access to the local naval hospital but no effective medical treatment was available. Pleas were made via the Ukrainian Embassy to repatriate the injured to Dakar. During this period the Master was not allowed to leave the vessel or to contact the Owners or Charterers representatives.
43. St. Vincent and the Grenadines as the flag state of the m/v “Saiga” was not “promptly informed” by the Guinean authorities that the vessel had been arrested, as would have been required by Article 73(4) of the Convention if the Guinean authorities had been acting under their fisheries laws. The first information concerning the allegations levelled at the activities of the m/v “Saiga” were obtained from an article in a local Conakry newspaper.
44. On 10 November, at approximately 11.45, the Master was ordered to commence discharge of the vessel’s cargo of approximately 5,000 metric tons of gas oil to shore tanks. On initial refusal to discharge the cargo, without

instructions from the charterer, the Master was advised by the senior customs officer that he would be taken ashore to jail awaiting trial for smuggling gas oil, and the crew would be required to discharge cargo under force of arms. The discharge was effected on-shore between 10 and 12 November 1997, to the Guinean authorities (**Annex 20**). The cargo was confiscated and sold to oil companies in Conakry upon the orders of local authorities shortly afterwards (apparently realising for the Guinean authorities in excess of US\$3 million). After completing discharge the vessel was moved out to Conakry anchorage but was allowed to return to the harbour periodically and at considerable expense to take fresh water, bunkers and provisions.

45. Charterer's and owner's representatives attending in Conakry succeeded in obtaining permission to repatriate the two injured crew members. All other personnel were detained on board without permission to go ashore and without passports. The Master was advised that he was not permitted to leave the vessel, his passport was retained by immigration authorities, and informed that he would in due course be subject to trial in court for smuggling offences.
46. The owner's and charterer's representatives and lawyers were in attendance at Conakry shortly after arrival, but were not permitted access to the Master for several days. After negotiation, and with some assistance from the Ukrainian Embassy, it was agreed that a number of the crew could be repatriated as they were not essential for the vessel's operation in lay up condition. Nine crew members departed Conakry on 17 November 1997. Further crew members were subsequently repatriated. From mid-December until 28 February 1998 the Master and five crew remained on board without passports.

1.3 *Guinea's Allegations concerning the violations of Guinea's customs and related laws*

47. The allegations against the Master and Vessel are set out in a Procès Verbale dated 13 November 1997 (**Annex 19**). The Procès Verbale records that the authors left the port of Conakry with two launches of the national navy, F-328 and P-35 (see **Annex 25**, extract from Jane's Shipping, indicating the character of these vessels). The Procès Verbale refers to "information regarding the illicit presence of a Tanker in the exclusive economic zone of our waters". It goes on to state:

"... at about 4 a.m. (standard local time) [on 28 October 1997], we detected on the radar the presence of a target which, according to the

parameters given, appeared to be the one we were seeking. Immediately we dashed towards it, increasing speed in order to catch up with it. But it seemed to go faster than us in the direction of the southern border. We attempted to cut it off, but it succeeded nevertheless in getting through. The vessel was again caught up with and ordered to stop; but it still persisted in its refusal to comply.

Having signalled our identity in advance, we continued to order it heave to. When we alongside, it twice attempted to sink our launch, which we barely managed to avoid . . .” (**Annex 19**)

48. The Procès Verbale alleged violations of four acts of Guinean laws:

(a) Article 40 of the 1995 *Code de la Marine Marchande* (*supra*, para. 17);

(b) Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994 concerning the fight against fraud covering the import, purchase and sale of fuel in the republic of Guinea (**Annex 22**). This provides *inter alia* as follows:

“Article 1

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

[. . .]

Article 8

Where the misdemeanour referred to in Article 6 of this law has been committed by a group of more than 6 individuals, whether or not they were in possession of the subject of the illegal importation, the offenders will be subject to a sentence of imprisonment from 2 to 5 years, a fine equal to four times the value of the confiscated items in addition to the additional penalties provided for under Article 6 of this Law.”

(c) Articles 316 and 317 of Ordonnance No. 094/PRG/SGG of 28 November 1990 (the 1990 *Code des Douanes*) (**Annex 23**) which provide:

“Article 316

The following incur confiscations of the object of the fraud, confiscation of the means of transport, confiscation of the objects used to hide

the fraud, a fine equal to quadruple the value of the objects confiscated and imprisonment of six months to three years:

1. Criminal offences of contraband committed either by more than six persons, or by three persons or more, on horseback or on velocipede, whether all carry goods resulting from the fraud or not;
2. Criminal offences of contraband by aircraft, by a harnessed vehicle or by a self-propelled vehicle, by ship or by small sea-going vessel of less than 500 tonnes net capacity or by river boat.

Article 317

1. Contraband is taken to mean importation and exportation outside the customs houses and every violation of the legal and regulatory provisions concerning the holding and circulation of goods within customs territory.

2. The following in particular constitute acts of contraband:

(a) the violation of the provisions of articles 60, 62-1, 65-1, 73, 191, 192 and 197 above;

(b) fraudulent payments or fraudulent loading carried out either insider ports or along the coasts with the exception of fraudulent loadings provided for in article 325-1 above;

(c) acts of the removal or substitution during transportation of goods sent under a suspensive system, the non-observation without a legitimate reason of fixed itineraries and timetables, actions aimed at altering or rendering ineffective methods of sealing, security or identification and, in a general way, every act of customs fraud relating to the transportation of goods sent under a suspensive system;

(d) the violation of provisions, either legislative or regulatory, bearing on the prohibition of exportation or re-exportation to the payment of duties and taxes or on the carrying out of special formalities when the act of fraud has been committed or attempted outside the customs houses, and is not punished by a different provision of the present code,

3. Acts of importation or exportation without declaration are included in acts of contraband when the goods that pass through customs are hidden from the inspection of the customs department by concealment in hiding places especially designed to house goods."

(d) Articles 361 and 363 of the Penal Code (**Annex 24**), which provide as follows:

“Article 361

Delinquents, receivers and accomplices will be punished by imprisonment of 5 to 10 years and confiscation of all the property from any fraudulent import of money being legal tender in the Republic of Guinea from agricultural and industrial products.

Article 363

There is no crime or offence in the event of murder or wounding committed by the forces of order on trespassers who as a flagrant offence smuggle at the border and who have not complied with the demands of customs.”

It is to be noted that the Procès Verbaux makes no reference to any Guinean fisheries laws or regulations.

49. The Master was questioned without the assistance of an interpreter, and was detained on the vessel without any legal order having been obtained (see Statement of Maître Bangoura, 13 February 1998, **Annex 25**). No charges were filed against the Master or the vessel until 10 December 1997 (see para. 56 below). At no point did the Guinean authorities offer to release the vessel and crew upon the posting of a bond or other security, as envisaged by Article 73(2) of the 1982 Convention.

1.4 *Application for the Prompt Release of the “Saiga”*

50. Between 29 October 1997 and 10 November 1997 negotiations took place between the owner’s representative, Captain Laszlo Merenyi, and the Guinean customs authorities. During the course of these negotiations the Guinean customs authorities indicated that they would be willing to release the vessel and crew on payment of a customs fine. The amount of this fine was eventually negotiated to 250 million G.F. (equivalent to US\$250,000) plus the value of the confiscated cargo (equivalent to approximately US\$1 million). Negotiations were however not concluded since it was considered by the owners and charterers that the m/v “Saiga” had not violated any Guinean laws and was fully within its rights, under both Guinean law and the 1982 Convention, to supply gas oil to fishing vessels in Guinea’s exclusive economic zone.
51. With no prospect of release imminent, on 13 November 1997 St. Vincent and the Grenadines filed in the Registry of the International Tribunal an

34

M/V "SAIGA" (No. 2)

application under Article 292 of the 1982 Convention instituting proceedings against Guinea in respect of a dispute concerning the prompt release of the vessel and its crew.

52. By Judgment dated 4 December 1997 the Tribunal:

“Orders that Guinea shall promptly release the m/v “Saiga” and her crew;

Decides that the release shall be upon the posting of a reasonable bond or security; and

Decides that the security shall consist of : (1) the amount of gasoil discharged from the m/v “Saiga”; and (2) the amount of 400,000 United States dollars to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.”

The Tribunal also noted that

“the discharged gasoil . . . shall be considered as a security to be held and, as the case may be, returned by Guinea in kind or in its equivalent United States dollars at the time of judgment.”

53. Throughout the period during which the Article 292 proceedings were underway, including the Judgment, no charges had been filed by Guinean authorities against the Master or the vessel.

1.5 *The Bank Guarantee*

54. Pursuant to the Judgment of the International Tribunal, on 10 December 1997 St. Vincent and the Grenadines posted a reasonable Bank Guarantee in the amount of 400,000 United States dollars with Guinea’s Agent at the International Tribunal, Mr. Hartmut von Brevern (the “Agent of Guinea”) (**Annex 37**). Guinea refused to accept the Bank Guarantee and refused to release the vessel and crew. Instead, and as described in further detail below (paras. 145–54, **Annex 37**), Guinea requested changes to the Bank Guarantee. In the view of St. Vincent and the Grenadines these were neither reasonable nor justifiable. Changes of an essentially cosmetic nature were requested by the Agent (on 11 December 1997) and then by the Minister of Justice (on 6 January 1998). Without prejudice to its view that the original Bank Guarantee was “reasonable” in the form in which it had been originally posted, St. Vincent and the Grenadines nevertheless

accommodated the requested changes in order to expedite the release of the vessel, the Master and the crew. In that form the Bank Guarantee was eventually accepted by Guinea on or about 6 February 1998. Nevertheless the Master, crew and vessel were not released.

1.6 *Charges, Criminal Proceedings and Conviction and Sentencing by the Municipal Courts of Guinea*

55. Six days after the International Tribunal gave its Judgment of December 4th, the Guinean authorities brought criminal charges against the Master (on behalf of the vessel) in relation to customs offences based upon the three customs and contraband laws referred to in the Procès Verbal (*supra*, para. 48).
56. The charges were set out in a *Cedule de Citation* dated 10 December 1997, issued by the Procureur de la Republique of Guinea (**Annex 26**). This document charged the Master with contraband activities in violation of the laws indicated in the Procès-Verbal. The *Cedule de Citation* additionally joined the State of St. Vincent and the Grenadines as a party “Civilement – Responsable a Citer”. The *Cedule de Citation* was brought in the name of the “Agent Judiciaires de l’Etat” and the “Administration des Douanes” (Customs Administration). It was not brought by – and did not involve in any way – the Fisheries authorities. The *Cedule de Citation* purported to inform these two parties that a first hearing was scheduled for two days later – on 12 December 1997 – before the Tribunal de Premiere Instance in Conakry.
57. On or around 10 December 1997 Maitre Bangoura, the lawyer in Guinea acting on behalf of the Master, was presented with a copy of the “*Conclusions Presents au Nom de l’Administration des Douanes par Le Chef de la Brigade Mobile Nationale des Douanes*” (the “*Conclusions*”) (**Annex 27**). The *Conclusions* were dated 14 November 1997. They set out the basis of the criminal charges and invited the Tribunal in Conakry to impose a sentence. The *Conclusions* stated that the basis of the charges was

“une infraction qui consiste en une importation en contrabande de produits pétroliers” (translated as “a violation occasioned by the importation by contraband of petroleum products”)

The *Conclusions* invoked violations of the same four laws (Article 40 of the 1995 *Code de la Marine Marchand*, Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of Ordonnance No. 094/

PRG/SGG of 28 November 1990 (the Code des Douanes), and Articles 361 and 363 of the Penal Code). The *Conclusions* made no mention of the violation of any fisheries laws.

58. The *Conclusions* invited the Tribunal to condemn the Master for importation of contraband, to order the confiscation of the gasoil and the m/v "Saiga", to condemn the Master to a fine equal to four times the value of the objects confiscated (15,354,024,040 Guinean francs – equivalent to approximately US\$15 million) and other penalties prescribed by the laws cited in the "Cedule de Citation", and to reserve to the customs authorities other rights of recourse.
59. The *Cedule de Citation* and the *Conclusions* formalised the charge of importation of contraband and violation of customs laws. It became clear from the time that they were issued that there was no longer any question of either the Master or St. Vincent and the Grenadines being charged with offences related to fisheries conservation matters: they were being charged exclusively with offences related to customs matters.
60. On 12 December 1997 criminal proceedings opened before the Tribunal de Première Instance in Conakry. They continued on December 15th. According to Maitre Bangoura (**Annex 25**, para. 16.2) the proceedings were subject to numerous procedural violations, including:
- the summons' against the Master and St. Vincent and the Grenadines were not issued in accordance with the Code of Criminal Procedure;
 - the Master was judged without having had an opportunity of prior consultation with his lawyer; and
 - the Tribunal failed to address the grounds for nullity raised by the defence.
61. The Tribunal de Première Instance gave oral judgment on 17 December 1997 (the written judgment was not made available to St. Vincent and the Grenadines until 6 February 1998) (**Annex 28**). In application of Articles 111 and 242 of the 1982 Convention, Article 40 of the 1995 *Code de la Marine Marchande*, Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of Ordonnance No. 094/PRG/SGG of 28 November 1990 (the *Code des Douanes*), and Articles 361 and 363 of the Penal Code), the Tribunal found the Master to be guilty and sentenced him to the payment of a sum of 15,354,024,040 GNF (approximately US\$15 million). The Tribunal also ordered the confiscation of the vessel and its cargo as a guarantee of payment. The Judgment of 17 December

1997 made no reference to any laws relating to fisheries or other resources of the exclusive economic zone.

62. St. Vincent and the Grenadines was advised that as a party “Civilement – Responsable a Citer” the enforcement of the approximately US\$15 million fine could be effected directly against the State of St. Vincent and the Grenadines itself and/or vessels flying its flag which were located *inter alia* within the exclusive economic zone of Guinea (or beyond).¹
63. The decision of the Tribunal de Première Instance was appealed by the Master to the Cour d’Appel of Conakry. Pending the judgment of the Cour d’Appel, whilst under guard in the port of Conakry the vessel and its crew were attacked (**Annex 32**). Money and goods were stolen and a member of the crew beaten up.
64. On 3 February 1998 the Cour d’Appel handed down its Judgment (**Annex 29**). The Judgment of 3 February 1998:
 - rejected the appeal;
 - declared the Master guilty of smuggling offences under Article 196 of the Code of Criminal Procedure; Article 111 of the 1982 Convention; Articles 361 and 363 of the Penal Code; Article 40 of the *Code de la Marine Marchande*; Articles 33, 34, 316 and 317 of Ordonnance No. 094/PRG/SGG of 28 November 1990 (the Code des Douanes); and Articles 1, 8 and 162 of the Code of Civil Procedure;
 - confirmed the fine of 15,354,040 Guinean francs;
 - confiscated the cargo;
 - seized the ship as surety; and
 - imposed fees and expenses against the Master.
65. In addition, the judgment of the Cour d’Appel imposed a suspended prison sentence of six months upon the Master. As with the judgment of first instance, the judgment of the appeal court made no mention of any fisheries violations. It did, however, confirm that the arrest of the vessel had taken place in accordance with Article 111 of the 1982 Convention.

¹ This matter was only clarified after the hearing for the prescription of Provisional Measures when a letter of 23 February 1998 from the Minister of Justice to the Agent of Guinea was made available to St. Vincent and the Grenadines [**Annex 42**]. That letter stated, while confirming the verdicts of the domestic courts, that “. . . l’Etat de St. Vincent n’est pas civilement responsable . . . La mention qui figure la cédule de citation est donc sans effet” (“the state of St. Vincent and the Grenadines is not civilly responsible [for the fine of US\$15 million] and therefore its inclusion in the ‘cédule de citation’ is without effect”).

66. The two judgments confirmed that Guinea's actions were premised solely on the prosecution of customs laws. Neither made any reference to fisheries conservation or management in the exclusive economic zone. And at no point from the stopping and arrest of the m/v "Saiga" to the judgment of the Cour d'Appel of 3 February 1998 was the Guinean Ministry of Fisheries or any of its officials involved in the case.

1.6* *Application Instituting Arbitration Proceedings under the 1982 Convention*

67. With the judgment of the Tribunal de Première Instance of 17 December 1997, it became clear that the dispute involving the m/v "Saiga" went beyond a matter of mere interpretation of the reasonableness of the Bank Guarantee. It had also become clear that Guinea's actions were entirely unrelated to the conservation or management of fisheries in its exclusive economic zone. In the face of its own legislation to the contrary, Guinea was claiming the right to impose customs duties in relation to bunkering activities in its exclusive economic zone, in a manner entirely unconnected with fisheries.

68. On 22 December 1997 St. Vincent and the Grenadines notified Guinea that it was instituting Arbitral Proceedings in accordance with Annex VII of the Convention. The object of the proceedings were set out at paragraph 24 of the Arbitration Notification (*supra*, para. 1; **Annex 1**). Given the urgency of the situation the Notification included a Request for Provisional Measures.

1.7 *Request for Provisional Measures*

69. On 13 January 1998 St. Vincent and the Grenadines submitted to the Registry of the International Tribunal a Request for the prescription of Provisional Measures pursuant to Article 290(5) of the Convention. Further written pleadings were filed by Guinea (on 30 January 1998) and by St. Vincent and the Grenadines on 13 February 1998. Hearings were held at the International Tribunal in Hamburg on 23 and 24 February 1998.

70. In the meantime, by Exchange of Letters dated 20 February 1998 (the 1998 Agreement, *supra*, para. 2; **Annex 2**), the parties had agreed to transfer the dispute on the merits from the Arbitral Tribunal to the International

* Paragraph numbering as in original [note by the Registry].

Tribunal. By Order of the Tribunal of that same date, the Request for Provisional Measures was considered as having been duly submitted to the Tribunal under Article 290 (1) of the 1982 Convention.

1.8 *Release of the m/v "Saiga"*

71. After the hearings had concluded on 24 February 1998 but before the Tribunal's Order on Provisional Measures the m/v "Saiga" was finally released. On 28 February 1998 a release document (*Acte de Mainlevée*) was signed by Mr. Bocar Cissoko (National Director of Customs of the Republic of Guinea) and the Master (**Annex 31**). The vessel left Conakry with her remaining crew at approximately 17.00 hours on 28 February 1998. Due to its damaged condition, resulting from enforced idleness, the m/v "Saiga" was only able to sail at three or four knots per hour. She arrived in Dakar on 4 March 1998.

72. From the time of its detention on 28 October 1997 until the release on 28 February 1998 the m/v "Saiga" was detained, together with the Master, for a total of 123 days (a period of over 17 weeks). This period included more than 11 weeks after the Bank Guarantee had first been posted pursuant to the Tribunal's Judgment (on 10 December 1997), and more than 4 weeks after the essentially unchanged Bank Guarantee was accepted by Guinea's Minister of Justice. Of the original Master and 24 crew members, six persons finally remained on board as a necessary requirement at anchorage. The Master was refused permission to leave the vessel throughout the period. During the four month period the balance of the crew were repatriated due to injuries, poor health or poor morale, leaving only the most able and determined seafarers to look after the vessel in difficult and depressing conditions.

1.9 *Order for Provisional Measures*

73. By Order dated 11 March 1998 the International Tribunal prescribed Provisional Measures. The Tribunal ordered that:

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

The International Tribunal recommended that:

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

The Tribunal also decided that:

"St. Vincent and the Grenadines and Guinea shall each submit the initial report referred to in article 95, paragraph 1, of the rules as soon as possible and not later than 30 April 1998, and authorises the President to request that such further reports and information as he may consider appropriate after that date".

74. By letter dated 7 April 1998, St. Vincent and the Grenadines wrote to the Agent of Guinea (with a copy to President of the Republic of Guinea), pursuant to the Tribunal's "Recommendations" (**Annex 34**). The letter contained a proposal for an interim arrangement with respect to the matter in dispute, namely bunkering within the Contiguous and Exclusive Economic Zones of Guinea. It was made clear in the letter that such an arrangement and correspondence connected therewith would not bind either Government to any position on the merits. Guinea has not responded to that letter.
75. On 29 April 1998 St. Vincent and the Grenadines submitted its Report to the Registrar of the Tribunal pursuant to Article 95(1) of the Rules of the Tribunal (**Annex 34**). Guinea has apparently provided no substantive Report.

Summary

76. The facts can be summarised as follows:

- the m/v "Saiga" was an unarmed vessel lawfully carrying out bunkering activity off the west coast of Africa, including within the exclusive economic zone of Guinea;
- at no point did the m/v "Saiga" enter the territorial waters of Guinea;
- on 28 October 1998 the m/v "Saiga" was stopped and arrested by Guinean customs authorities in waters beyond the exclusive economic zone of Guinea;
- in making the detention the Guinean authorities gave no prior warning and used excessive force, including gunfire, in the course of which two members of the crew of the m/v "Saiga" were seriously injured;

- the detention and arrest were based upon alleged violations of customs and contraband laws: the Master was subsequently charged, convicted and sentenced for criminal offences relating to customs and contraband;
- at no time were Guinean fisheries authorities involved in the proceedings against the m/v “Saiga”, and no violation of any fisheries management or conservation laws has been alleged by Guinea; and
- no proceedings have been brought by Guinean authorities against any of the vessels bunkered by the m/v “Saiga”.

SECTION 2: JURISDICTION

77. The Tribunal has jurisdiction over this dispute by virtue of the 1998 Agreement between St. Vincent and the Grenadines and Guinea. By the terms of the 1998 Agreement the parties accepted the jurisdiction of the International Tribunal subject to the right of Guinea to invoke only

“the objection as to jurisdiction raised in the Government of Guinea’s Statement of Response dated 30 January 1998”

78. In its Statement of 30 January 1998 (**Annex 35**) Guinea raised only one objection to jurisdiction. It claimed that the dispute between the two states concerned

“the interpretation or application of the provisions of the [1982] Convention with regard to fisheries” (**Annex 35**, para. 4, emphasis added.)

79. On that basis Guinea argued that the compulsory jurisdiction of the Arbitral Tribunal (and that of the International Tribunal in relation to the Request for Provisional Measures) were excluded by application of Article 297(3)(a) of the 1982 Convention. In its written and oral pleadings in the Provisional Measure proceedings (**Annex 36**) St. Vincent and the Grenadines provided detailed rebuttals to Guinea’s characterisation of the dispute as being *prima facie* about fisheries, submitting that the claim was without merit or basis and should be rejected.

80. In its Order on Provisional Measures the International Tribunal rejected Guinea’s argument that the dispute was *prima facie* about fisheries. The International Tribunal ruled:

“29. Considering that before prescribing provisional measures the Tribunal need not finally satisfy itself that it has jurisdiction on the

merits of the case and yet it may not prescribe such measures unless the provisions invoked by the Applicant appear prima facie to afford a basis on which the jurisdiction of the Tribunal might be founded;

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

81. Nothing has changed since that finding by the International Tribunal. Guinea's claim that the International Tribunal lacks jurisdiction is entirely without foundation. The judgments of the Tribunal de Premiere Instance of 17 December 1997 (**Annex 29**) and the Cour d'Appel of 3 February 1998 (**Annex 30**), no Guinean fisheries authorities have been involved in the actions or the proceedings before the Guinean courts. At no point has Guinea alleged violations of any fisheries laws (whether directly or indirectly). It follows inevitably that on the facts this is a dispute about the conduct of hot pursuit and the extent of Guinea's rights to apply its customs laws. It has nothing to do with Guinea's "sovereign rights with respect to living resources within the exclusive economic zone". This is confirmed by Guinea's most recent act, namely the *Acte de Mainlevée* (**Annex 31**) which finally released the m/v "Saiga": the decision was taken by Guinea's National Director of Customs at the Ministry of Economy and Finance.

82. St. Vincent and the Grenadines submits that there can be no question but that under the 1998 Agreement the International Tribunal has jurisdiction over this dispute.

SECTION 3: LEGAL ARGUMENTS

83. In this Section St. Vincent and the Grenadines addresses the substantive violations of the 1982 Convention for which Guinea is internationally responsible. The Section will show that:

- in purporting to exercise the right of hot pursuit Guinea violated Article 111 of the 1982 Convention, as well as the obligation not to use excessive or unreasonable force in detaining and arresting the m/v "Saiga" (3.1) (paras. 85–99);
- by applying and enforcing its customs laws against the m/v "SAIGA" in the circumstances described above Guinea violated the right of St. Vincent and the Grenadines to enjoy freedom of navigation in Guinea's exclusive economic zone and on the high seas as provided by Articles 56(2) and 58 of the 1982 Convention (3.2) (paras. 100–138);

- by failing to release the m/v “Saiga” and its crew between 10 December 1997 and 28 February 1998, following the posting by St. Vincent and the Grenadines of a reasonable bond pursuant to the International Tribunal’s judgement of 4 December 1997, Guinea violated Articles 292(4) and 296 of the 1982 Convention (3.3) (paras. 139–158).

3.1 GUINEA HAS VIOLATED ARTICLE 111 OF THE 1982 CONVENTION (“HOT PURSUIT”) AND IN SO DOING USED EXCESSIVE AND UNREASONABLE FORCE

84. In pursuing the detention and arrest of the m/v Saiga the Guinean authorities purported to exercise their right to undertake hot pursuit in accordance with Article 111 of the 1982 Convention. The right to exercise hot pursuit was claimed by Guinea in the prompt release proceedings, where it was rejected by the Tribunal as being *prima facie* untenable. It was also invoked by Guinea in proceedings before its own courts, where its actions were upheld as being consistent with the Convention (see Annex 30). St. Vincent and the Grenadines submits that several of the conditions set forth in Article 111 have not been met, and that accordingly the m/v “Saiga” was stopped and arrested outside the territorial sea of Guinea in circumstances which did not justify the exercise of the right of hot pursuit. It follows from Article 111(8) of the 1982 Convention that St. Vincent and the Grenadines is entitled to recover on behalf of the m/v “Saiga” compensation “for any loss or damage” sustained by Guinea’s unjustified and unlawful exercise of hot pursuit (see below at paras. 164–72). St. Vincent and the Grenadines further submits that in detaining and arresting the vessel and crew the Guinean authorities used excessive force in violation of international law. This too entails the international responsibility of Guinea.

3.1.1 Guinea violated Article 111 of UNCLOS

85. In determining the compatibility of Guinea’s exercise of hot pursuit with the conditions of Article 111 it is appropriate to recall the following facts. First, the Parties are in agreement that at no point did the m/v “Saiga” enter the territorial waters of Guinea. When carrying out the bunkering activity alleged by Guinea to have been unlawful the m/v “Saiga” was located either in a contiguous zone or in the exclusive economic zone of Guinea. Second, by its own account in the Prompt Release Proceedings Guinea has confirmed that hot pursuit was commenced at 04.00 hours on 28 October 1997, a day after the alleged violation of its laws.² Third, and also by its

² See Judgment of 4 December 1997, paragraph 62.

own account, Guinea confirms that the alleged violation of its laws by the m/v "Saiga" was not actually seen by any of its vessels, and that its vessels only came into visual or auditory contact with the m/v "Saiga" shortly before its detention. And fourth, Guinea has not denied that the m/v "Saiga" was detained in waters beyond Guinea's exclusive economic zone. It is in the context of these facts that the legality of Guinea's actions under Article 111 fall to be determined.

86. Article 111 of UNCLOS³ provides, in relevant part, as follows:

"(1) The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in Article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

(2) The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

[. . .]

(4) Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the terri-

³ The provisions of Article 111 broadly reproduce those previously found in Article 23 of the 1958 Convention on the High Seas, 400 UNTS 82.

torial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.”

87. Assuming that the alleged violation of Guinea’s customs laws occurred in its contiguous zone, as Guinea has contended, then *inter alia* the following four conditions imposed by Article 111 are applicable:

- the pursuit cannot commence in waters beyond Guinea’s exclusive economic zone (a);
- the hot pursuit must have been commenced when the m/v “Saiga” was within Guinea’s contiguous zone and could only be continued beyond the contiguous zone if it had not been interrupted (b);
- the competent authorities of Guinea must have had good reason to believe that the m/v “Saiga” had violated laws and regulations which were applicable in that zone and which it was entitled to enforce in accordance with the Convention (c);
- the pursuit may only be undertaken if there has been a violation of the rights for the protection of which Guinea’s contiguous zone was established (d).

The violation of any one of these conditions is sufficient to render the hot pursuit unlawful. On Guinea’s own account none of these conditions have been met.

(a) Hot pursuit did not begin until after the m/v “Saiga” had left Guinea’s exclusive economic zone, as no visual or auditory signal was given to or seen or heard by the m/v “Saiga” until that time

88. According to Article 111(4) of the Convention hot pursuit is deemed to have commenced after a “visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship”. As set out above (see paras. 33–8), no such signal was given to or seen or heard by the m/v “Saiga” while it was in Guinea’s contiguous zone or exclusive economic zone. As described by the Master, first contact between Guinea’s patrol vessels and the m/v “Saiga” was in the form of a hail of bullets in waters beyond Guinea’s exclusive economic zone. The Convention does not permit hot pursuit to commence in these waters, or by this form of signal. Guinea’s exercise of hot pursuit was *a priori* unjustified and unlawful.

(b) *The purported exercise of hot pursuit was interrupted*

89. The 1982 Convention indisputably establishes that where the m/v "Saiga" was in Guinea's contiguous zone, as Guinea claims it to have been, hot pursuit must be commenced in the contiguous zone and may only be continued outside the contiguous zone "if the pursuit has not been interrupted" (Art. 111(1)). There is no dispute on the facts that Guinea did not commence hot pursuit of the m/v "Saiga" while it was in Guinea's contiguous zone. The m/v "Saiga" sailed at its own pace to the point at which it was stopped outside Guinea's exclusive economic zone where hot pursuit was deemed to have begun in application of Article 111(4) of the 1982 Convention (see preceding paragraph). It follows that hot pursuit beyond Guinea's contiguous zone was interrupted. This second basic requirement of Article 111 has not been met.

90. These facts appear to have been recognised by the International Tribunal in the Prompt Release proceedings. On the basis of the evidence then available to it (which evidence has now been confirmed) the majority of the Tribunal characterised as not meeting "the requirements of arguability" (para. 61) Guinea's claim that the arrest of the m/v Saiga was justified because it was effected following the exercise of the right of hot pursuit under Article 111 of the Convention. The Tribunal noted:

"While the coordinates of the position of the M/V Saiga at the time of the bunkering of the fishing vessels the Giuseppe Primo, the Kriti and the Eleni S. in the log book of the m/v Saiga and the examination of the relevant map suggest that the bunkering was in all likelihood carried out within the contiguous zone of Guinea, the arguments put forward in order to support the existence of the requirements for hot pursuit and, consequently, for justifying the arrest, are not tenable, even prima facie. Suffice it to say that according to PV 29, the Procès Verbal of the Guinean authorities, the first viewing of the m/v Saiga by the Guinean patrol boats was by radar at 0400 hours on 28 October 1997, while the bunkering was carried out, according to the log book, between 0400 hours and 1350 hours on 27 October 1997. In PV29, as well as in its Statement of Response, Guinea thus recognises that the pursuit was commenced one day after the violation, at a time when the m/v Saiga was certainly not within the contiguous zone of Guinea, as shown in the vessel's log book." (para. 62)

(c) The competent authorities of Guinea did not have good reason to believe that the m/v Saiga had violated its laws and regulations, and (d) there was no violation of the rights for the protection of which Guinea's contiguous zone was established

91. There was no basis upon which Guinea's authorities could be said to have had "good reason to believe" that the m/v "Saiga" had violated its laws and regulations (as required by Article 111(1) of the Convention). As described below the customs laws and regulations upon which Guinea's actions were based are nowhere in its own legislation said to apply beyond its territorial waters. Further, even if those laws did purport to be applicable and enforceable within the exclusive economic zone, they could not be so applied or enforced consistently with the 1982 Convention. Accordingly, this basic requirement of Article 111 has also not been met.
92. Nor can Guinea claim that there had been a violation of the rights for the protection of which the contiguous zone was established (as required by Article 111(1) of the Convention). Although Guinea may have declared the existence of a contiguous zone (see *supra* para. 17) it does not appear to have identified the rights which are to be protected in such a zone. And if it has, the relevant legislation does not appear to have been notified to the United Nations.
93. For the purposes of completeness it is appropriate to confirm that the same conclusions are reached if, contrary to the view put by Guinea during the Prompt Release proceedings, Alcatraz island does not have a contiguous zone and consequently the m/v "Saiga" supplied the three vessels within Guinea's exclusive economic zone. Even in this circumstance hot pursuit would have commenced beyond Guinea's waters, would not have been "uninterrupted", and could not be said to be based on "good reasons" to believe that Guinea's laws and regulations had been violated.
94. For all of these reasons, or indeed for any one of them, Guinea has not satisfied the conditions required for the exercise of hot pursuit under Article 111 of the 1982 Convention. Its conduct of hot pursuit was unjustified and unlawful. It follows that Guinea is liable for all the consequences, under Article 111(8) and general international law.

3.1.2 Guinea violated the obligation not to use excessive force in detaining the m/v "Saiga"

95. As set out above, Guinea used excessive and unreasonable force in detaining the m/v "Saiga" (paras. 33–8). The m/v "Saiga" was an unarmed, merchant vessel with a maximum speed of 10 knots. As an oil tanker she was at serious risk of fire and explosion if fired at indiscriminately. Nevertheless, the Guinean authorities *inter alia*:

- failed to provide adequate warning and instruction to stop the m/v "Saiga";
- failed to use internationally recognised visual signals and sound signals;
- failed to make prior radio contact;
- did not use blank shots or shots deflected across the bow;
- fired solid shot at the vessel in such a way as to endanger human life and cause serious damage to the vessel;
- fired further shot while boarding the vessel, causing serious bodily injury to two members of the crew; and
- ransacked the vessel.

96. The use of force by Guinean authorities was excessive and unlawful. On a review of the authorities and of practise Professor O'Connell has concluded that the use of violence is "a measure of last resort":

"At the least there must be adequate warning and instruction, which includes internationally recognised visual signals and sound signals. Only when these are clearly ineffective may gunfire be used, and then it must be in the form of blank shots, or shots deflected across the bow; and only when these measures are also clearly ineffective may a ship be fired into. But in that case solid shot with minimal effect and of the lowest feasible calibre must be used. Unless arrest is resisted by return of fire, explosive shot should not be used."⁴

97. This summary is based upon the two leading cases. In the *I'm Alone* the pursued vessel was sunk by gunfire.⁵ In the *Red Crusader* small calibre gunfire was used by a Danish fishery protection vessel, the *Neils Ebbesen*.

⁴ D.P. O'Connell, *The International law Of the Sea, Vol. II* (I. Shearer, ed., 1984), at 1072. Professor O'Connell notes this provision of the International Code of Signals for All Nations: "When in consequence of distance or the state of the atmosphere, it is impossible to distinguish the colours of the flags of the International Code, signals may be given by cones, balls, and drums, square flags, pennants, and wefts, or fixed coast semaphore." To this list can now be added radio signals.

⁵ 7 *ILR* 203 (1935).

In both cases the degree of force was considered to be excessive.⁶ In the *Red Crusader* the Commission of Enquiry found as follows:

“In opening fire at 03.22 hours up to 03.53 hours, the Commanding Officer of the Neils Ebbesen exceeded legitimate use of armed force on two counts: (a) firing without warning of solid-gunshot; (b) creating danger to human life on board the *Red Crusader* without proved necessity, by the effective firing at the *Red Crusader* after 03.40 hours.”⁷

The Commission of Enquiry reached the conclusion that “such violent action” was unjustified even where the *Red Crusader* had escaped custody “in flagrant violation of the order received and obeyed”. It said:

“The Commission is of the Opinion that other means should have been attempted, which, if duly persisted in, might have finally persuaded [the skipper of the *Red Crusader*] to stop and revert to the normal procedure which he himself had previously followed.”⁸

98. In the *Red Crusader* prior warnings were given, in the form of siren and searchlights. In the case of the m/v “*Saiga*” it is clear from the log book and from all the evidence available that no prior warning was given, by radio or by any other signal, and that gunfire was used with debilitating effect on the vessel and with scant regard to the consequences for the members of the crew.
99. In the circumstance St. Vincent and the Grenadines submits that the force used was excessive and unlawful, and that Guinea is internationally responsible for the consequences.

3.2 GUINEA HAS VIOLATED RIGHTS TO ENJOY FREEDOM OF NAVIGATION AND OTHER INTERNATIONALLY LAWFUL USES OF THE SEA

100. As described above (paras. 48, 56, 57), the basis for Guinea’s actions against the m/v “*Saiga*”, the Master and the crew was the alleged violation of Guinean customs laws. The parties are in agreement that the vessel never entered Guinean territory, and that the bunkering of the three fishing vessels took place beyond Guinea’s territorial waters. It therefore

⁶ 35 *ILR* 485 (1962).

⁷ *Ibid.*, p. 499.

⁸ *Ibid.*

appears that Guinea is claiming the right to apply and enforce its customs and contraband laws beyond its territory, notwithstanding the fact that on their face the laws invoked are only applicable within Guinean territory up to the limit of its territorial waters. In its actions Guinea has violated the right of St. Vincent and the Grenadines to enjoy freedom of navigation and other internationally lawful uses of the sea, as guaranteed by the 1982 Convention.

101. In particular, Guinea's actions against the m/v "Saiga" and crew violate freedom of navigation and related rights under Article 58 and related provisions of the 1982 Convention. These rights include that of the m/v "Saiga" not to be subject to the application or enforcement of Guinean customs duties or contraband laws in Guinea's exclusive economic zone. In simple terms, the 1982 Convention does not permit Guinea, as a coastal state, to apply or enforce its customs or contraband laws to oil bunkering in its exclusive economic zone. Specific proposals to that effect in the course of the negotiation of the 1982 Convention were rejected (see below at para. 127). *A priori* the right to bunker gas oil within the exclusive economic zone falls squarely within freedom of navigation rights and other internationally lawful uses of the sea. This is confirmed by the text of the 1982 Convention (and its *travaux préparatoires*), by the Convention's object and purposes, and by state practice. It is also consistent with international judicial authority on the extent of coastal state's rights in the exclusive economic zone.

102. The lawfulness of Guinea's actions are to be determined by the 1982 Convention, in particular Part V thereof (Exclusive Economic Zone). Article 55 of the 1982 Convention provides that:

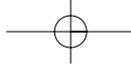
"The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

103. The exclusive economic zone is a "specific legal regime". To support actions in its exclusive economic zone Guinea must demonstrate that they are based on provisions of the Convention under Part V. To the extent that no such basis can be shown, as St. Vincent and the Grenadine submits is the case here, then Guinea's actions are unlawful under the Convention.

104. With the establishment of the exclusive economic zone as a “specific legal regime” under the Convention, maritime areas of what were previously high seas became subject to this new regime. St. Vincent and the Grenadines submits that the pre-existing rights of states to exercise high seas freedoms (as to which see further below), including bunkering, within an exclusive economic zone are unaltered, except where subject to express limits under the 1982 Convention.
105. In the sections which follow St. Vincent and the Grenadines will show that under the 1982 Convention Guinea was not entitled to apply or enforce its customs and contraband laws to the bunkering activities of the m/v “Saiga”. The violation may be established in one of two ways: first, because the Guinean customs are on their face clearly not intended to apply beyond Guinea’s territorial waters (3.2.1), and second their application and enforcement beyond Guinea’s territorial waters is incompatible with the 1982 Convention, which limits jurisdiction only to those matters expressly permitted by Article 56(1) of the 1982 Convention (3.2.2).

3.2.1 Guinea’s customs and contraband laws do not apply in its exclusive economic zone

106. As set out above, Guinea’s actions against the m/v “Saiga” were based on four laws: Article 40 of the *Code de la Marine Marchande*, Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of Ordonnance No. 094/PRG/SGG of 28 November 1990 (the *Code des Douanes*), and Articles 361 and 363 of the Penal Code). A plain reading of these laws shows that none has the effect of extending the application of these customs and contraband laws to the exclusive economic zone. Guinea’s actions are entirely unjustified by its own legislation. The legislation has not been notified to the United Nations, or to any other international body with relevant responsibility for maritime issues. Accordingly, no “due notice” can be said to have been given of any obligation not to bunker in the exclusive economic zone.
107. Article 40 of the 1995 *Code de la Marine Marchande* (*supra* para. 9) merely gives effect to Article 56(1)(a) of the 1982 Convention, in declaring Guinea’s right to exercise limited sovereign rights within its exclusive economic zone. It is silent as to the application or enforcement of customs or contraband laws. It establishes no penal requirements.



108. The *Code des Douanes* (Ordonnance No. 094/PRG/SGG of 28 November 1990) (**Annex 23**) is Guinea's comprehensive customs law. The Master of the m/v "Saiga" was prosecuted under Articles 316 and 317. However, Article 1 of the *Code des Douanes* explicitly states:

"The customs territory includes the whole of the national territory, the islands located along the coastline and the Guinean territorial waters."

It follows from this provision that Guinea's customs laws and regulations clearly are not intended to apply outside Guinea's territory or territorial waters. They do not apply in Guinea's exclusive economic zone. Neither Article 316 nor 317 purport to extend the application of any customs laws or regulations beyond the national territory.

109. Law 94/007/CTRN of 15 March 1994 concerns the fight against fraud covering the import, purchase and sale of fuel *in* the Republic of Guinea (**Annex XX**; emphasis added). Article 1 prohibits the import into Guinea of fuel by any natural person or corporate body not legally authorised. Article 6 provides:

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

Although the 1994 Law does not define national territory, according to ordinary principles (and the obligations Guinea has assumed under the 1982 Convention) it does not include the exclusive economic zone (see above). The m/v "Saiga" did not import fuel into Guinean "territory".

110. Similar considerations apply in relation to Article 361 of the Penal Code (*supra* para. 48 and **Annex 24**), the application of which is premised upon an illegal importation into Guinea's territory. There was no such importation.
111. That these laws have no application in Guinea's exclusive economic zone is confirmed by Maitre Bangoura (**Annex 26**). He confirms that the Guinean customs laws used to justify the prosecution of the Master do not apply within Guinea's exclusive economic zone:



“17.2.2.2 By declaring Captain ORLOF guilty on the basis of the law of 1994 that modifies and adds to the Customs Code, the Court of First Instance of Conakry and the Appeal Court of Conakry have seriously misinterpreted this legislation, which does not provide, even in relation to refuelling within customs jurisdiction, for any offence for refuelling ships and accessories of refuelled ships;

17.2.2.3 In declaring Captain ORLOF guilty of violating Article 40 of the Merchant Navy Code, the Court of First Instance of Conakry and the Appeal Court of Conakry have seriously misinterpreted this legislation, which does not provide for any penal sanction.

[. . .]

17.2.2.6 [. . .] Article 1 of the Customs Code, combined with Article 1 of Decree 336/PRG of 309 July 1980 (relating to the extent of territorial waters) which fixes customs territory **in a way that excludes from the territory the area in which the “Saiga” was moving**, the area where it was inspected and the “adjacent area”, in which, moreover, it was perfectly in compliance with the [1982] Convention” [. . .]

17.2.2.7 **In respect of international law**, it cannot be seriously contested that:

- the judicial proceedings are not founded on any offence committed on Guinean territory or in Guinean territorial waters;
- [. . .] the judicial proceedings are founded solely on customs offences that it is claimed were committed in the adjacent area itself; [. . .]
- Guinea cannot apply its Customs Code in the areas where the “Saiga” was moving and was inspected [. . .]”

112. If any of these customs laws could be considered as “fisheries conservation and management law” (which in the view of St. Vincent and the Grenadines they cannot) then due notice should have been given of them. Article 62(5) of the 1982 Convention provides that “Coastal States shall give due notice of conservation and management laws and regulations”. No due notice has been given by Guinea of its customs laws or of their application to the exclusive economic zone. *A priori* the Master of the vessel cannot have known of them. The Master has stated: “I was never informed that bunkering fishing vessels inside economical zone of Guinea was prohibited” (**Annex 15**). In the circumstances for Guinea to have invoked these provisions constitutes a failure to fulfil its obligations under the 1982 Convention in good faith and an abuse of its rights (see Article 300).

113. By Article 58(3) of the 1982 Convention vessels flying the flag of St. Vincent and the Grenadines are required to comply with the laws and regulations adopted by Guinea as a coastal State. Since the customs laws upon which the m/v "Saiga" was prosecuted patently do not apply to the exclusive economic zone, no violation can be said to have occurred.

3.2.2 The application and enforcement by Guinea of the customs laws beyond its territorial waters by Guinea violates the 1982 Convention

114. The 1982 Convention seeks to balance the rights, jurisdiction and duties of the coastal state in its exclusive economic zone (Article 56) with the rights and duties of other states (Article 58). In the sections which follow St. Vincent and the Grenadines will show that bunkering falls within freedom of navigation (A), and that the rights and jurisdiction of Guinea as a coastal State are limited to those connected with the exploitation and management of the natural resources within the zone (B). Under the Convention Guinea is not entitled to prescribe and enforce customs laws and regulations in relation to bunkering activities carried out within its exclusive economic zone. Guinea has violated Articles 56(2) and 58 and related provisions of the 1982 Convention.

A Bunkering is a freedom of navigation right

115. St. Vincent and the Grenadines submits that the bunkering of gasoil by the m/v "Saiga" falls within the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set forth in Article 58(1) of the 1982 Convention.
116. The rights and duties of states other than the coastal state in an exclusive economic zone are set out under Article 58 (Rights and duties of other States in the exclusive economic zone). This provides *inter alia* in paragraph (1):

"In the exclusive economic zone, all States, whether coastal or landlocked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in Article 87 of navigation [. . .] and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."

Article 58(3) provides that

“In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”

Article 87 of the Convention (Freedom of the high seas) provides *inter alia* that

“1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

(a) freedom of navigation; [. . .]

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”

117. The freedom to navigate includes all activities and rights ancillary to, related to or contained within the freedom itself. St. Vincent and the Grenadines submits that an activity or right ancillary or related to this freedom is the freedom of a vessel flagged by one State to provide fuel to other vessels, including those flagged by other States. There can be no question but that bunkering on the high seas falls within freedom of navigation rights: nothing in the 1982 Convention indicates any limitation on the right of a vessel on the high seas to bunker another vessel. *A priori* the right to bunker within the same freedom of navigation rights as are incorporated into the exclusive economic zone by the reference in Article 58(1) to Article 87. In summary: bunkering is to be regarded as an internationally lawful use of the sea related to navigation.

118. Within the exclusive economic zone of Guinea the m/v “Saiga” was required to comply with the laws and regulations adopted by Guinea with respect to its zone. However, under Article 58(3) such laws and regulations must be “in accordance with [the] Convention and other rules of international law in so far as they are not incompatible with this Part”. Guinea did not have any laws or regulations which it invoked to require the m/v “Saiga” to pay customs duties on any gasoil bunkered within its

exclusive economic zone. To the extent that Guinea asserts to the contrary, any such laws or regulations would not be "in accordance with the Convention and other rules of international law" and would be incompatible with Part V of the Convention (in this regard it is evident there are no "other rules of international law" which are relevant for these purposes). There is no residual authority in a coastal state to make any such laws, and all such laws must be in accordance with the provisions of the Convention. The idea that residual authority in respect of the emerging exclusive economic zone should be with the coastal state was suggested by a small number of states during the negotiations for the 1982 Convention but was rejected overwhelmingly.⁹

119. It is clear from the *travaux préparatoires* to the 1982 Convention that the vast majority of States, even those who in the negotiations argued for the exclusive economic zone to be a maritime area subject to the "sovereignty" of the coastal state, supported the preservation and protection of the freedom of navigation and other internationally lawful used of the seas within the EEZ. They also supported the concept that such freedoms of the seas were only to be limited in accordance with any rights recognised expressly to the coastal state in the new Convention.

120. Any assertion by Guinea to the effect that bunkering does not fall within freedom of navigation would be at variance with the 1982 Convention, and constitute an unwarranted limitation on the right of all States to enjoy freedom of navigation which the parties to the 1982 Convention clearly did not intend. If Guinea's actions are endorsed the consequence would be a severe curtailment in the international movement of vessels. Vessels would have to seek prior authorisation from coastal States to receive provisions and fuel where they found themselves short of either whilst in an exclusive economic zone. International trade would be subject to restrictions, and there would be *de facto* limits imposed on distance which vessels could travel across maritime areas. This would impinge upon the basic notion of freedom of navigation, compelling the construction of ever-larger vessels with a capacity to navigate with sufficient fuel and provisions.

⁹ See Second Committee Summary Records of 5 August 1974, at para. 12. See e.g. the view of Italy: "Any residual regime applied in the area should be that of freedom of the seas, not that of the authority of the coastal state", in R. Platzöder, Third United Nations Conference on the Law of the Sea, Vol. V, p. 332.

B Guinea's rights and jurisdiction as a coastal State are limited to those connected with the exploitation and management of the natural resources within the zone

121. Guinea's rights in its exclusive economic zone area limited to those set out in Article 56 of the 1982 Convention. This provides:

“1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention. [. . .]”

122. Article 56 makes no reference to the right of a coastal state to apply and enforce customs duties in its exclusive economic zone. St. Vincent and the Grenadines submits that no such right may be implied into the text. Clearly the application of customs duties are unrelated to artificial islands and structures, scientific research, or the protection of the marine environment. Article 56(1)(b) therefore provides no assistance to Guinea. Similarly, since there are no “other rights and duties” provided for in the 1982 Convention upon which Guinea could or has relied, Article 56(1)(c) of the 1982 Convention can be of no assistance.

123. That leaves Article 56(1)(a), which provides the principal basis for coastal state jurisdiction in the exclusive economic zone. Can it be said that in seeking to apply and enforce customs duties against the m/v “Saiga” Guinea was exercising “sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether

living or non-living, of the waters superadjacent to the sea-bed . . . and with regard to other activities for the economic exploitation . . . of the zone"? At no time in the proceedings against the m/v "Saiga" has Guinea sought to justify its actions on this basis. The laws invoked by Guinea to prosecute and convict the m/v "Saiga" make no mention – directly or indirectly – of the rights envisaged by article 56(1)(a). Relevant bilateral fisheries agreements (such as the 1996 EC-Guinea Agreement, Annex 9) makes no mention of the right to impose bunkering conditions on EC vessels.

124. It cannot reasonably be said that the application and enforcement by Guinea of its customs duties in relation to the bunkering of gasoil by the m/v "Saiga" within its exclusive economic zone was related to the "exploring and exploiting, conserving and managing the natural resources". Nor can it be said that the application of customs duties constitutes the economic exploitation of resources in the zone, in the sense the Convention clearly intends (i.e. "production of energy from the water, currents and winds"). Guinea's actions were not intended to, did not and cannot be justified as falling within Article 56(1)(a) of the 1982 Convention.
125. The right to prescribe and enforcement customs laws and regulations is inherently part of a State's "sovereignty". Where the 1982 Convention recognises the right to prescribe customs laws and regulations it does so only in relation to activities occurring within a coastal State's territorial sea (see Article 19(2)(g) and 21(1)(h) of the 1982 Convention),¹⁰ or in relation to transit passage in straits used for international navigation (see Article 42(1)(d) of the 1982 Convention).¹¹ This is confirmed by Article 33(1)(a) of the Convention, which implies that customs duties cannot be applied within the contiguous zone. With the single exception of Article 60(2), the Convention establishes no right for a coastal state to adopt customs laws and regulations within the exclusive economic zone. The Convention was not intended to establish such a right.

¹⁰ Article 19 provides: "2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: [. . .] (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;". Article 21 provides: "1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following: [. . .] (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State."

¹¹ Article 42 provides: "1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following: [. . .] (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits."

126. The failure to insert such a provision underscores the point that the Convention does not grant prescriptive jurisdiction to the coastal state to legislate in respect of customs matters in the exclusive economic zone, save in the limited circumstance relating to artificial islands, installations and structures, in accordance with Article 60(2). This limited reference to customs jurisdiction in the exclusive economic zone clearly reflects the desire of the international community to exclude all other claims by coastal states to the exercise of customs jurisdiction in the exclusive economic zone. These conclusions are consistent with the scheme of the Convention in so far as it provides that the “sovereignty of a state extends beyond its land territory and its internal waters . . . to the adjacent belt of sea, described as the territorial sea” (see Article 2 of the 1982 Convention).
127. The conclusion is also consistent with the *travaux préparatoires* of the Convention, and the draft texts proposed during the negotiations. A number of States sought to include a provision in what was to become Article 56 to the effect that coastal States had the right to prescribe and enforce customs laws and regulations within the economic zone.¹² Those efforts were expressly rejected; after August 1974¹³ no composite drafting texts contained any such proposal, limiting any reference to application of customs jurisdiction in any area of the exclusive economic zone to artificial islands, installations and structures in the manner incorporated in Article 60(2) of the 1982 Convention. The effort to extend customs jurisdiction was strongly resisted by many States representing different perspectives.¹⁴ In this context it was specifically put that the application and enforcement of customs laws within the exclusive economic zone would limit freedom of navigation.
128. Similarly, there exists no basis upon which Guinea can claim enforcement jurisdiction within its exclusive economic zone in respect of this case. As Article 33(1) and 111(1) of the Convention make clear, enforcement within the exclusive economic zone jurisdiction of the kind claimed by

¹² See e.g. the text proposed by Nigeria at Document A/CONF.62/C.2/L.21/REV.1 of 5.8.74, at Article 1(2)(f); the Second Committee Informal Working Paper no. 4, of 5.8.74, Provision III, Formula C; Document A/CONF.62/C.2/L78 of 23.8.74; Document A/CONF.62/C.2/L82 of 26.8.74 (proposal from African States, not including Guinea) and Second Committee Informal Working Paper No.4/rev.1 of 26.8.74, Provision III, Formula B and C).

¹³ See Second Committee Informal Working Paper No. 4/rev.2 of 27.8.74.

¹⁴ See e.g. Portugal, Second Committee Summary Records of 31.7.74, at para 21; Switzerland, *ibid.* at para.138; Ukrainian SSR, Second Committee Summary Records of 5.8.74; Egypt, Second Committee Summary Records of 5.8.74; and Singapore, Second Committee Summary Records of 5.8.74.

Guinea is limited to its contiguous zone, and only then to prevent or punish the infringement of the customs laws and regulations occurring within the territorial sea. Since it is not in dispute that the m/v "Saiga" never entered Guinea's territorial sea, there can be no basis upon which Guinea can claim enforcement jurisdiction by reference to any contiguous (or adjacent) zone which it might have established around Alcatraz island.

129. Moreover, Guinea is not assisted in justifying its actions by reference to Article 73 of the 1982 Convention. Under that provision enforcement measures are authorised only in respect of the exercise of Guinea's "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone". The actions taken by Guinea have not been – and cannot be – justified on that basis. Although it appeared to St. Vincent and the Grenadines on the facts available in November 1997 that Guinea was justifying its actions on that basis, subsequent developments – the *Cedule de Citation* and the legal charges brought against the Master, the judgements of 17 December 1997 and 3 February 1998, the *Acte de Mainlevée* – make it absolutely clear that the customs violations were entirely unrelated to the management or conservation of the living resources in the exclusive economic zone.

130. The limited scope of Guinea's rights under Article 56(1)(a) of the 1982 Convention, in relation to the management and conservation of living resources within the exclusive economic zone, is also confirmed by Articles 61 and 62 of the 1982 Convention.

131. Under Article 61 Guinea is entitled to determine the allowable catch of the living resources in its exclusive economic zone, and to ensure that "the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation" (Article 61(2)). Under Article 62 Guinea is required to "promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61." To that end Guinea is entitled to establish laws and regulations, provided that they are "consistent with" the 1982 Convention. Article 62(4) provides that such laws and regulations

"may relate, inter alia, to the following:

(a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the

field of financing, equipment and technology relating to the fishing industry;

(b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;

(d) fixing the age and size of fish and other species that may be caught;

(e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(f) requiring, under the authorisation and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) the placing of observers or trainees on board such vessels by the coastal State;

(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) terms and conditions relating to joint ventures or other co-operative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.”

132. Article 62(4) does not include in its list laws and regulations relating to bunkering, or to the applications of customs duties as ancillary obligations. *Prima facie*, therefore, laws and regulations on bunkering and customs duties incidental thereto do not fall within the category of laws and regulations which a coastal State may, consistently with the Convention,

adopt in the name of fisheries conservation and management, under Article 56(1) and 62(4). It is difficult to see how such measures could be so justified: they must be addressed to the restricted purpose of "ensur[ing] . . . that the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation". Customs provisions are not – and cannot be – addressed to ensuring any such matter. Saint Vincent and the Grenadines submits that any such purported exercise would violate Guinea's obligation to exercise its rights "in a manner which would not constitute an abuse of right" (see Article 300 of the 1982 Convention).

133. This view is consistent also with the limited international jurisprudence which exists in this area. The 1986 *La Bretagne* Arbitration (Canada-France) raised the issue of whether Canada could apply and enforce regulations concerning the filleting of fish on board a vessel to vessels located in the Gulf of St. Lawrence.¹⁵ The Arbitral Tribunal ruled that the term "fisheries regulations" was limited to "designating the legislative or regulatory prescriptions [. . .] which fix the conditions under which all fish-catching activities are subject and are generally designed to maintain order on fishing grounds as well as to protect and preserve resources".¹⁶ The term "fishery regulations" could not be applied to subject the vessels of the other State to regulations unconnected with the purpose of fishing.¹⁷ Consequently, Canada's regulations were not within the term "fishery regulations" and so were unlawful. The Tribunal's conclusion took into account developments that had taken place in the international law of the sea which reflected the growing concern to protect resources from over-exploitation (as reflected in Articles 61– to 72 of the 1982 Convention).¹⁸ The Tribunal concluded that

"Article 56 [. . .] recognises that the coastal state possesses sovereign rights not only for the exploitation of natural resources, but also for their management; but it does not appear that this power of management, constantly coupled by the Convention with the idea of conservation, has any other purpose than conservation of resources [. . .]"

¹⁵ 82 *International Law Reports* 590; Award of 17 July 1986 (De Visscher, *Chairman*; Pharand and Quéneudec, *Members*)

¹⁶ *Ibid.*, para 38.

¹⁷ *Ibid.*, para 39.

¹⁸ *Ibid.*, at paras 49ff.

Although the list [in Article 62(4)] is not exhaustive, it does not appear that the regulatory authority of the coastal state normally includes the authority to regulate subjects of a different nature than those described.”¹⁹

134. The imposition of customs duties on bunkering sales is of a qualitatively “different nature” from anything to be found on the list set out at Article 62(4). Moreover, as indicated above, Article 62(5) requires that the Coastal states must give due notice of conservation and management laws and regulations adopted under Article 61 and 62. There has been no such notice. The customs laws invoked to prosecute the m/v “Saiga” do not purport to apply in the exclusive economic zone.
135. St. Vincent and the Grenadines submits that customs laws dealing with refuelling are not related to either “conservation” or to the “management” of any fisheries resources. The customs laws used to prosecute the m/v “Saiga” make no mention of this objective, and no Guinean fisheries authorities were involved in the prosecution. These laws are intended solely to raise customs revenue, and they were relied upon against the m/v “Saiga” solely to justify that purpose. They cannot be justified as falling within Article 62(4), which defines the full extent of Guinea’s rights in this matter.
136. Finally, the submissions of St. Vincent and St. Grenadines are consistent with and fully supported by the practice by a representative group of other States parties to the 1982 Convention, none of which do not claim the right to apply customs duties against foreign vessels bunkering within their exclusive economic zone (see **Annex 34**).
137. For its part, St. Vincent and the Grenadines confirms that it applies customs duties only within its territory, including its territorial waters. Customs duties are not applied *inter alia* to the activities of foreign vessels within the exclusive economic zone of St. Vincent and the Grenadines.

3.2.3 Conclusions

138. In conclusion, Saint Vincent and the Grenadines submits that the customs laws relied upon to prosecute the m/v “Saiga” do not on their face apply within Guinea’s exclusive economic zone, do not purport to be related to

¹⁹ *Ibid.*, paras 50 and 52.

fisheries conservation in the sense envisaged by Articles 56(1)(a), 61 and 62(4) of the 1982 Convention, and cannot otherwise be justified as a lawful interference with the right of Saint Vincent and the Grenadines to enjoy freedom of navigation and related rights under the 1982 Convention. The actions taken against the m/v "Saiga" and its crew violate freedom of navigation under the 1982 Convention, in particular Article 58(1).

3.3 Guinea has violated Articles 292(4) and 296 of the 1982 Convention (Prompt Release)

139. On 4 December 1997 the International Tribunal ordered the prompt release of the m/v "Saiga" and crew upon payment of a reasonable bond or security in the amount of US\$400,000. On 10 December 1997 St. Vincent and the Grenadines posted a reasonable bond in this amount, but Guinea failed to release the vessel or crew. This failure violated the rights of St. Vincent and the Grenadines under the 1982 Convention, specifically Articles 292(4) and 296, and incurs the international responsibility of Guinea.

140. St. Vincent and the Grenadines submits that the only question for the International Tribunal to determine is whether the bond posted by St. Vincent and the Grenadines on 10 December 1997 and then resubmitted on 12 December 1997 or 20 January 1998 was "reasonable" within the meaning of the judgment of 4 December 1997.

141. Article 292(4) of the 1982 Convention provides that

"Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."

Article 296 of the 1982 Convention provides that

"1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute."

142. On 4 December 1997 the International Tribunal gave its judgment ordering prompt release upon the posting of a "reasonable" bond in the amount

of US\$400,000. On 10 December 1997 Bank Guarantee No. 30537/97 was issued by Credit Suisse in the amount of US\$400,000 (the “Bank Guarantee”). It was posted with the Agent of Guinea (**Annex 38**, pp. 538–42) and copies sent to the Ministry of Foreign Affairs of Guinea and to the Registrar of the Tribunal.

143. The Bank Guarantee was addressed to “The Government of Guinea”. In relevant part it provided:

“NOW WE, Credit Suisse, Geneva . . . hereby GUARANTEE to pay you forthwith on your first written demand in immediately disposable US\$ funds such sum or sums as may be due to you by a final judgement, or if such judgement be appealed or otherwise challenged, by final decision of a final appeal court or tribunal or arbitral tribunal or the Tribunal to be due to you or as otherwise amicably agreed to be owing to you on behalf of the M/V “SAIGA” in respect of the claims pursuant to which the M/V “SAIGA” was detained PROVIDED that your first demand is accompanied by a certified copy of such final judgement or decision or confirmation of agreement from “SAIGA” represented by Stephenson Harwood.

PROVIDED ALWAYS that our liability hereunder shall be limited to US\$400,000 (four hundred thousand United States dollars)”. (**Annex 38**, p. 539)

144. St. Vincent and the Grenadines considered that the instrument conformed fully to the express terms of the Tribunal’s Judgement of 4 December: it was a bank guarantee, and it was in the amount of US\$400,000. It also conformed to the terms necessarily implied by the Judgement: it was payable to the Government of Guinea (a term which included all Guinean governmental authorities), and it was payable upon final decision or judgement relating to claims made by Guinean authorities in relation to the m/v “Saiga”. The Bank Guarantee was issued in a form with which Credit Suisse and other international banking institutions for instruments of this type would be very familiar and was “reasonable” within the meaning of the Tribunal’s Judgement of 4 December 1997. With the posting of the Bank Guarantee on 10 December 1997 all conditions of the Tribunal’s Judgement were satisfied and the m/v “Saiga” and its crew should have been released immediately thereafter.

145. The posting of the Bank Guarantee did not procure the release of the vessel or crew. On the morning of 11 December 1997 the Agent of Guinea confirmed, in a telephone conversation with Mr. Nicholas Howe of the

law firm Stephenson Harwood (acting on behalf of Saint Vincent and the Grenadines), that he had received the original Bank Guarantee that morning. However, he advised that he had a number of concerns that were being set out in a fax that Mr Howe had not yet seen. Mr Howe and the Agent discussed those concerns in further detail and agreed how they could be overcome by a fax to be sent directly from Credit Suisse to the Guinean Agent. That conversation therefore superseded the fax of the Guinean Agent of 11 December 1997 (**Annex 38**, p. 541) which Mr Howe received shortly afterwards. The fax from Credit Suisse was duly procured in the agreed terms as required by the Guinean Agent and sent to him later that day (**Annex 38**, pp. 545–9). Mr. Howe wrote later that day (11 December 1997) to the Agent of Guinea attaching a further copy of the fax from Credit Suisse and asking that the "Saiga" be released "forthwith" (**Annex 38**, pp. 543–9).

146. On 12 December 1997 the Guinean Agent confirmed receipt of the letter from Credit Suisse (**Annex 38**, pp. 550–5). This was the letter then relied upon by Guinea to argue that the Bank Guarantee posted by Guinea was not "reasonable" within the meaning of the judgment of the International Tribunal of 4 December 1997 (see Response of Guinea, **Annex 35**). By that letter the Agent informed Mr. Howe that he could not "personally" decide whether the Bank Guarantee was "reasonable in the sense of the Judgement of the International Tribunal for the Law of the Sea" (**Annex 38**, pp. 550–4 and 555). His letter demanded that the Bank Guarantee be provided in French and went on to set out a series of "further problems" posed by its terms and calling for further clarifications and changes to be made. These new demands were made notwithstanding the fact that Saint Vincent and the Grenadines had already fully addressed the concerns expressed by the Agent of Guinea the previous day.
147. Saint Vincent and the Grenadines considered that the further changes requested by the Agent were unreasonable and not required by the Tribunal's Judgement. Furthermore, by this stage it had become evident that the reasons why the bond was considered "unreasonable" constituted the Agent's personal views and were not intended to be ascribed to the Republic of Guinea. In the circumstances it appeared to St. Vincent and the Grenadines that the primary aim of the request for further changes and clarifications was to delay the release of the m/v "Saiga" and her crew, possibly until after the completion of the proceedings in Guinea (see paras. 55–60 above).

148. The Agent of Guinea was thus informed by letter dated 12 December 1997 that Saint Vincent and the Grenadines would prepare an application pursuant to Article 126 of the Rules of the Tribunal if the vessel was not released the following morning (**Annex 38**, pp. 556–7).

149. On 15 December 1997 the Agent of Guinea wrote to St. Vincent and the Grenadines in the following terms (**Annex 38**, pp. 558–9, 560–1):

“I again would like to make it very clear to you that since December 11 I have not had any reaction or instruction from the Government of Guinea so I am not sure at this very moment that they have seen the French text of the guarantee. Repeatedly I have asked the Government of Guinea to instruct me and as long as this has not been done I am in no way in a position to agree to any wording of the bank guarantee.”

150. Between 15 December 1997 and 6 January 1998 (twenty-two days) St. Vincent and the Grenadines received no communications from Guinea as to the reasonableness or otherwise of the Bank Guarantee. On 22 December 1997 St. Vincent and the Grenadines notified Guinea that it was instituting arbitration proceedings *inter alia* for a determination that the Bank Guarantee posted on 10 December was reasonable. By this time it had become clear that the dispute went beyond the “reasonableness” of the Bank Guarantee and could not be resolved by an application for interpretation under Article 126 of the Rules of the Tribunal. Further, it was unclear whether such an application could be treated expeditiously by the Tribunal. On 5 January 1998 a Request for Provisional measures was submitted to the International Tribunal to obtain, *inter alia*, a provisional Order from the International Tribunal indicating the reasonableness of the Bank Guarantee.

151. On 6 January 1998 – more than four weeks after the Tribunal had given its judgement, and with the m/v Saiga and crew still being held in Conakry – the Guinean Agent wrote to indicate that he had finally received instructions from the Minister of Justice of Guinea as to the Bank Guarantee (**Annex 38**, pp. 562–3). The letter confirmed that the Agent’s “personal” letter of 12 December 1997 had been superseded and that the Minister of Justice had concerns as to the reasonableness of the bank guarantee which were different from those expressed by the Agent in his letter of 11 December. The Minister of Justice considered that the Bank Guarantee could not be accepted (and was presumably “unreasonable”) for the following reasons:

- in paragraph A of the Bank Guarantee he asks for the deletion of all words after "28 October 1997";
 - paragraphs B(i) and B(iii) of the bank guarantee were said to be not in conformity with the judgement of the International Tribunal because (a) the sum of US\$400,000 was an integral part of the guarantee, and (b) all aspects of the payment of that sum had to be accepted by the Guinean government;
 - the French language translation of the Bank Guarantee erroneously referred to the instrument's expiration on 10 December 1996; and
 - the status of the two signatories of the guarantee on behalf of Credit Suisse was not indicated and the Bank Guarantee was therefore not valid.
152. By letter of 19 January 1998 St. Vincent and the Grenadines responded (**Annex 38**, pp. 564–5). The letter explained that St. Vincent and the Grenadines did not accept that any of the objections raised by the Minister of Justice of Guinea was valid and that they did not justify the failure to release the m/v Saiga on receipt of the bond (on 10 December 1997) or upon clarification (the following day). Nevertheless, in the interests of expediting the release of the m/v Saiga and the crew – which by now had been in captivity for nearly two months, including in excess of six weeks after the Tribunal's judgement, St. Vincent and the Grenadines expressed a willingness to accommodate the views of the Minister of Justice, "without prejudice" to its position that the Guinean demands were not valid. The letter also requested that Guinea provide acceptable substitute language in relation to paragraph B(i) and (iii). By letter of 22 January 1998 the Agent of Guinea provided substitute language (**Annex 38**, pp. 570–1).
153. On 29 January 1998 St. Vincent and the Grenadines sent to the Minister of Justice in Conakry, by registered courier, the revised Bank Guarantee incorporating the suggestions (**Annex 38**, pp. 572–7). The revised bank guarantee was accepted by the Minister of Justice, on or around 3 February 1998, according to submissions made by the Guinean authorities in the course of oral arguments made in the appeal proceedings in the Cour d'Appel in Conakry.
154. The acceptability of the terms of Bank Guarantee was confirmed in the letter of 17 February 1998 from the Agent of Guinea to Mr Howe (**Annex 38**, pp. 582–3). However, in this letter the Minister of Justice for Guinea added that a further condition to the release of the vessel and crew would now be imposed by Guinea: the release of the vessel would be consequent upon the payment of the Bank Guarantee in the sum of \$400,000 (*ibid.*).

On 18 February 1998, Guinea sought to obtain payment of the Bank Guarantee directly from Credit Suisse (**Annex 38**, p. 586). On 19 February 1998 Credit Suisse refused to pay (**Annex 38**, p. 609), on the grounds that not all the conditions of the Bank Guarantee had been satisfied. Specifically, [Guinea] had not provided copies of the “required statement accompanied with the relating documents” which evidenced that there had been a “final decision of a final appeal court or tribunal or arbitral tribunal or the [International] Tribunal [for the Law of the Sea]” (*ibid.*).

155. St. Vincent and the Grenadines submits that the Bank Guarantee originally posted on 10 December 1997 was “reasonable”. The failure to release the m/v Saiga immediately after receipt of the Bank Guarantee on 10 December 1997 – and certainly after clarifications had been incorporated on the 11th – was unjustifiable.
156. In its judgement of 4 December 1997 the International Tribunal decided that “the release shall be upon the posting of a reasonable bond or security” (Judgement, para. 86(4)). The International Tribunal provided no further guidance as to the meaning of the word “reasonable”. The 1982 Convention itself provides no guidance.²⁰
157. The changes introduced into the revised Bank Guarantee of 28 January 1998 were of no material effect. In all substantive respects the revised guarantee – accepted by Guinea and presented to Credit Suisse for payment – was identical to the original one. The original one was in standard form which conformed to ordinary banking practise and usage. Since the official languages of the Tribunal are English and French (Rules of the Tribunal, Article 43) it cannot be said that the posting of a guarantee in English with a French translation is “unreasonable”.
158. St. Vincent and the Grenadines submits that the original Bank Guarantee was reasonable. Guinea’s failure to accept the Bank Guarantee immediately and release the m/v “Saiga” and her crew violated Guinea’s obligation to comply “promptly” with the Tribunal’s Judgment of 4 December 1997.

²⁰ On the practice of international courts and tribunals as to “reasonableness” in international law see O. Corten, “Interprétation du ‘raisonnable’ par les juridictions internationales: au-delà du positivisme juridique?”, in 1998 *Rev. Gen. de Droit International Public*, p. 5.

SECTION 4: DAMAGES

159. By the terms of the 1998 Agreement the parties agreed that

“The International Tribunal for the Law of the Sea shall address all claims for damages and costs referred to in paragraph 24 of the Notification of 22 December 1997 and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal.”

160. The claims for damages and costs referred to in paragraph 24 of the Arbitration Notification (see *supra* para. 1) related to *inter alia* the attack on the M/V Saiga and its crew, the subsequent arrest and detention and the removal of the cargo of gasoil. It also included the violation of the rights of St. Vincent and the Grenadines under the 1982 Convention relating to *inter alia* freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation (Articles 56(2) and 58) and related provisions of the Convention, the right not to be subject to hot pursuit except in accordance with the terms of the Convention (Article 111), and the right to expect Guinea to comply with the International Tribunal's Prompt Release Order of 4 December 1997 (Articles 292(4) and 296).

161. Further, in paragraph 24 of the Arbitration Notification St. Vincent and the Grenadines requested the Arbitral Tribunal to adjudge that Guinea was liable to compensate the m/v "Saiga" pursuant to Article 111(8) of the Convention, and that Guinea was liable for damages as a result of the violations (as now set out in Section 3 above). St. Vincent and the Grenadines also sought interest on any awards of compensation or damages, together with the award of legal costs.

162. This Section of the Memorial addresses the basis for the claim by St. Vincent and the Grenadines for the award of compensation and damages, and quantifies claims under each of four principal heads. St. Vincent and the Grenadines wishes to stress that the various heads are set out for ease of reference, and do not indicate any priority as between the various heads. Each head of claim is considered to be of equal importance, given the gravity of the violations of international law occasioned by Guinea's actions against the m/v "Saiga", and each is pursued with equal vigour.

4.1 The basis of the claims for compensation and damages

163. The claim by St. Vincent and the Grenadines for compensation and damages has two separate bases: Article 111(8) of the 1982 Convention (4.1.1) and the general rules of international law establishing the responsibility of states for the consequences of their unlawful actions (4.1.2). St. Vincent and the Grenadines submits that the assessment of damages under either basis leads to the same results, namely that Guinea is liable to compensate St. Vincent and the Grenadines for all the consequences of its unlawful activities: damage to the vessel (including to the crew and the cargo) and damage to St. Vincent and the Grenadines occasioned by violations of the 1982 Convention (initially Article 111 and consequently Articles 292(4) and 296).

4.1.1 Article 111(8) of the 1982 Convention

164. Article 111(8) of the 1982 Convention provides:

“Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.”

165. As has been demonstrated above, the two conditions establishing the right to make a claim under Article 111(8) have been met: the m/v “Saiga” was detained and arrested outside Guinea’s territorial sea in circumstances which did not justify the exercise of the right of hot pursuit. It follows that Guinea is liable to compensate for “*any loss or damage*” which was thereby sustained.
166. The language of Article 111(8) is drawn from Article 23(7) of the 1958 Geneva Convention on the High Seas.²¹ That provision was introduced by the UN Conference which drew up the 1958 Convention, drawing upon a similar provision found in Article 46(3) of the ILC’s draft Convention (dealing with rights of visit on the high seas).²²

²¹ It was included in the first “Informal Composite Negotiating Text of UNCLOS III”: see R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, Vol. 1, p. 322.

²² See UN Doc. A/CONF.13/C.2/L.96/Rev.1 (proposal by the United Kingdom) and UN Doc. A/CONF.13/C.2/L.116 (proposal by Israel).

167. Article 111(8) explicitly mentions as claimant the ship. This contrasts with the language of Article 106 of the 1982 Convention (liability for seizure on the grounds of piracy without adequate grounds), which mentions as claimant the flag State. As one commentator has noted (in reference to the analogous provisions of the 1958 High Seas Convention which draws the same distinction):

“The practical importance of this difference of wording is that under Article [106] no exhaustion of local remedies seems necessary – as under [Article 111(8)] – since this Article explicitly provides that there is a direct liability towards the flag State. This State may apparently directly sue, before an international jurisdiction, the State whose organs have seized its ship . . . for any loss or damage caused by the seizure.”²³

168. As indicated above (*supra* para. xx*) in this case the question of the exhaustion of local remedies rule is without relevance since the 1998 Agreement establishing the jurisdiction of the International Tribunal excludes its application.²⁴ Accordingly St. Vincent and the Grenadines is entitled to bring proceedings directly against Guinea under Article 111(8) for “any loss or damage” caused by Guinea’s seizure, including both in respect of damage to the vessel (including crew and cargo) and to its own interests.

169. The language of Article 111(8), as well as its predecessor (Article 23(7) of the 1958 Convention) was clearly intended to conform to pre-existing rules and practice under customary international law, to the effect that a State will be responsible for any violations of international law. St. Vincent and the Grenadines submits that the legal consequences of liability under Article 111(8) are the same as the legal consequences of international responsibility arising out of an improper exercise of the right of hot pursuit (on which see below). As Poulantzas puts it in relation to Article 23(7):

²³ See N. Poulantzas, *The Right to Hot Pursuit in International Law*, (1969), at p. 263 (substituting the Article numbers of the 1982 Convention for those of the 1958 Convention as referred to by Poulantzas).

* *As in original [note by the Registry]*.

²⁴ Poulantzas seems to have foreseen this case when he expressly noted in the context of Article 23(7) of the 1958 High Seas Convention that “the rule of exhaustion of local remedies may be excluded by a contrary wish of the parties to an agreement since it is not an obligatory rule of international law”: *supra* at pp. 263–4, note 38.

“The wording obviously comprises pecuniary reparation for the material or moral wrong suffered, as well as satisfaction of a moral character”.²⁵

170. The leading case under the general rule which existed prior to Article 23(7) was the *I'm Alone*. The Commissioners had found that the intentional sinking of the *I'm Alone* by officers of the United States Coast Guard was an unlawful act (the vessel was sunk on the high seas at a distance of more than two hundred miles from the coast of the United States, having refused to stop when hailed by a US coast guard vessel outside the three mile limit but within the limit provided by a 1924 Convention between the United States and Great Britain, and whilst engaging in smuggling alcoholic liquor).²⁶ The Commissioners recommended that the United States Government should formally acknowledge the illegality of the sinking of the vessel and apologise, and as a material amend pay the sum of \$25,000 to the Canadian Government. The Commissioners also made *inter alia* a recommendation that \$25,666.50 should be paid by the United [States] to the Canadian Government “for the benefit of the captain and the members of the crew, none of whom was a party to the illegal conspiracy to smuggle liquor into the United States”.²⁷ It is to be noted that neither the captain nor the crew had British or Canadian nationality,²⁸ the Commissioners recommendation confirming Canada’s right to bring international proceedings on their behalf.²⁹

171. An earlier case was that involving the seizure and confiscation in the Sea of Ochotsk, on the high seas, of various American vessels – the *Cape*

²⁵ *Supra*. at p. 266.

²⁶ *The I'm Alone* (Canada-United States) 7 ILR 203 (Joint Interim Report and Final Report of the Commissioners, 30 June 1933 and 5 January 1935). The editors of ILR note that “the question whether the Government of the United States under the Convention had the right to hot pursuit . . . does not seem to have been answered by the Commissioners. But the answer to the principal question [. . .] seems to have been given on the assumption that a right of hot pursuit existed in the circumstances of the case”: *ibid.* p. 206.

²⁷ *Ibid.*

²⁸ It is well established that in relation to maritime claims the traditional nationality of claims rule does not apply in relation to crew members not having the nationality of the flag State: see *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory opinion, ICJ Reports 1949, p. 174, at 181 (Dissenting Opinions of Judge Hackworth at 202 and Judge Badawi Pasha at 206–7, note 1); *McReady (US) v. Mexico*, Moore, *International Arbitrations*, Vol. III, p. 2536; and the *I'm Alone* case, *infra*. 7 ILR 203.

²⁹ It is also to be noted that the Commissioners did not recommend the payment of compensation in respect of the loss of the ship or the cargo, on the grounds that at all material times the *I'm Alone* was *de facto* owned, controlled, managed and directed, and her cargo dealt with and disposed of, by United States nationals. This approach has been superseded by subsequent conventional developments in the 1958 Conventions and the 1982 Convention, and in any event does not apply on the facts of this case: there is no suggestion that Guinean nationals had any interest in the m/v “SAIGA” or its crew.

Horn Pigeon, the *James Hamilton Lewis*, the *C. H. White* and the *Kate and Anna* – by Russian cruisers.³⁰ Having found that the seizures were unlawful, the Arbitrator (Mr TMC Asser) awarded damages in respect of each seizure of US\$38,750, US\$28,588, US\$32,444 and US\$1484, together with interest (at 6% per annum). The compensation covered various heads, including loss of the cargo, unlawful detention of the crew, and loss of profit.

172. In conclusion, Article 111(8) entitles St. Vincent and the Grenadines to recover from Guinea, in respect of the unjustified exercise of hot pursuit against the m/v "Saiga", compensation for "any loss or damage" thereby sustained. This includes pecuniary reparation for the material damage (to the vessel, including crew and cargo) and the moral wrong suffered (by St. Vincent and the Grenadines for the interference with its rights under the 1982 Convention). The financial claim under each of these heads is set out below at sections 4.2.1 to 4.2.4.

4.1.2 The law of state responsibility and Guinea's obligation of reparation

173. In accordance with the general rules of international law Guinea is internationally responsible to St. Vincent and the Grenadines for the violations of international law occasioned by its actions in respect of the m/v "Saiga", including its crew and cargo as well as the rights of St. Vincent and the Grenadines under the 1982 Convention.
174. The International Law Commission's draft Articles on State Responsibility, as established by two successive Special Rapporteurs, portray the general obligation to cease the wrongful act, to restore the situation prevailing before the wrongdoing, and provide full reparation by every appropriate means, including satisfaction.³¹
175. The guiding principle was laid down by the Permanent Court of International Justice in the *Chorzow Factory (Indemnity)* case, in the following terms:

³⁰ Sentence Arbitrales Rendues par M.T.M.-C. Asser dans l'*Affaire des Navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, en date du 29 novembre 1902; reprinted in K. Simmonds, *Cases on the Law of the Sea*, Vol. III, p. 315 (1980). See also *In the Matter of the Schooners Jessie, Thomas F. Bayard and Pescawha*, 1922 *AJIL* p. 114.

³¹ See W. Riphagen, *Preliminary Report*, ILC Ybk 1980 vol. II pt 1, pp. 110ff; *Second Report*, *ibid.*, 1981 vol. II pt 1, pp. 85ff; *Sixth Report*, *ibid.*, 1985 vol. II pt 1, pp. 9-10; G. Arangio Ruiz, *Preliminary Report*, UN Doc A/CN.4/416 & Add 1; *Second Report*, UN Doc S/CN.4/425 & Add 1.

“The essential principle contained in the actual notion of an illegal act – a principal which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that 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 the act had not been committed. Restitution in kind, or, if this is not possible payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”³²

176. This rule is now restated in draft Articles 41 to 46 of the ILC’s draft Articles on State Responsibility.³³ Draft Article 42 provides:

“(1) The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.”

As to compensation, draft Article 44 provides:

“(1) The injured state is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

(2) For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.”

The draft Articles also recognise that reparation for moral damages “reflecting the gravity of the infringement” may be recovered “in cases of gross infringement of the rights of the injured State” (draft Article 45(2)(c); see further below).

177. It follows from the application of the general rules of state responsibility, as reflected in the ILC’s draft Articles, that Guinea is liable to provide

³² (1927) PCIJ, Series A, No. 17, p. 47.

³³ 37 *ILM* 440 (1998).

reparation which will wipe out all the consequences of its illegal acts. This extends to the material damage to the vessel (including crew and cargo) as well as the non-material, or moral damage, occasioned to St. Vincent and the Grenadines by the numerous violation of its rights under the 1982 Convention.

4.2 The quantification of the claim

178. On the basis of the facts set out in Section 1 of this Memorial, the claim for loss or damage made by St. Vincent and the Grenadines for its own behalf or those of the other interests in the vessel falls within the following heads:

- the claim on behalf of the loss or damage to the vessel arising from the detention and arrest and its subsequent treatment (4.2.1);
- the claim for the benefit of the master and crew, including personal injury and deprivation of liberty (4.2.2);
- the claim in respect of the removal of the cargo from the vessel (4.2.3);
- the claim in respect of damages or loss suffered by the State of St. Vincent and the Grenadines (4.2.4);
- interest (4.2.5); and
- legal costs (4.2.6).

4.2.1 *The claim on behalf of the loss or damage to the vessel and owners arising from the detention and arrest and its subsequent treatment*

179. As set out above, the m/v "Saiga" was damaged and members of its crew injured during the course of its detention and arrest by the Guinean authorities on 28 October 1997. Further damage has been suffered as a result of the enforced idleness of the vessel as result of its detention for 123 days in Conakry.

180. It is well established in international practise and under the 1982 Convention that St. Vincent and the Grenadines is entitled to recover for any loss or damage to the vessel. Full particulars of the damage, including the costs of repair, are set out at **Annex 41**. In summary, the loss or damage is:

- (a) Losses arising as a result of the injury to crew members:
1. Second Officer Kluyev US\$10,350
 2. AB/Painter Djibril US\$10,450

- (b) Damage to the vessel as result of the attack by Guinean authorities, including damages as a result of lying at anchor for four months:
US\$332,255
- (c) Losses to owners consequential to detention of the vessel in Conakry from 28 October 1997 to 28 February 1998 and until completion of damage repairs in Dakar on 29 March 1998:
US\$759,675
- Comprising:
1. Time charter hire for that period (153 days @ US\$4250/day)
US\$650,250
 2. Bunkering, Agency and port costs in Conakry:
US\$60,725
 3. Local expenses for attendance in Conakry of Owners representative:
US\$48,700

181. Under this head St. Vincent and the Grenadines claims a total of **\$1,091,930**.

4.2.2 *The claim for the benefit of the master and crew, including personal injury and deprivation of liberty*

182. As set out above, the Master and the crew were subject to the following losses relating to personal injury and deprivation of liberty:

- during the course of the arrest on 28 October 1997 and subsequently the Master and crew were subject to the excessive use of force;
- the Master and five members of the crew were unlawfully detained for four months, from 28 October 1997 to 28 February 1998;
- seven members of the crew were unlawfully detained from 28 October 1997 to 17 November 1997;
- nine members of the crew were unlawfully detained from 28 October to mid-December 1997;
- two members of the crew were severely injured by the excessive use of force occasioned by personnel acting under the authority of Guinean state authorities;
- personal possessions belonging to the Master and crew were stolen by Guinean customs authorities (see list set out at **Annex 18**).

183. There is clear precedent for recovering damages of this kind. In 1935 the Commissioners in the *I'm Alone* case recommended the payment of

\$25,666.50 to be paid by the United States to the Canadian Government "for the benefit of the captain and the members of the crew" who were on board the vessel when it was sunk (one crew member drowned, the others were rescued).³⁴ The Commissioners recommended the payment of \$10,185 as compensation to the surviving spouse and family in respect of the crew member who drowned, \$7,906 for the captain of the vessel, and between \$907 and \$1323 to the other seven crew members.

184. Further guidance is also available from the practice of international human rights courts and tribunals, in particular the Inter-American Court of Human Rights and the European Court of Human Rights (both of which are formally empowered to make decisions as to the question of reparation following a violation of the relevant instrument).³⁵ Their practice reflects the fact that although general international law requires the restoration of the *status quo ante* (*restitutio in integrum*), in cases of human rights violations and personal injury a restorative act alone will usually be insufficient, if not impossible. Reparation therefore usually involves indemnification in the form of pecuniary compensation. Such compensation will seek to indemnify both patrimonial damages, such as destruction of property or loss of earnings, and non-patrimonial damages, including 'emotional' or 'moral' harm.³⁶

185. Quantification of the requisite levels of indemnity in the case of patrimonial damage (or 'pecuniary damage') is usually quite simple. The difficult question, however, is the quantification of the 'emotional', 'psychological', or 'moral' damage that is said to attach to a particular form of human rights violation. For both the European Court and the Inter-American Court, the quantification of such damage is determined primarily by principles of equity.³⁷ Whilst neither Court has gone so far as to elucidate the content of such 'principles of equity', certain general principles applied by the Courts may be identified:

³⁴ *Supra* note 26 and accompanying text; see also the awards in respect of the *Cape Horn Pigeon*, *James Hamilton Lewis*, *C. H. White et Kate and Anna*, *supra* note.

³⁵ See Article 50 of the European Convention on Human Rights 1950, and Article 63(1) of the American Convention on Human Rights 1969 (Pact of San José).

³⁶ Cf. *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation)*, Judgment No. 3, 1924, PCIJ, Series A, No. 3, p. 9; *Maal Case*, 1 June 1903, 10 R.I.A.A. 732; *Campbell Case*, 10 June 1931, 11 R.I.A.A. 1158.

³⁷ See, *Godínez Cruz Case: Compensatory Damages*, Inter-American Court of Human Rights, Judgment of July 21, 1989, para. 25. *Velasquez-Rodríguez Case, Compensatory Damages*, Inter-American Court of Human Rights, Judgment of July 21, 1989, para. 27.

- Where the harm caused is minimal, the judgment may will be sufficient compensation.³⁸ In other cases, the judgment may be counted against the amount of compensation to be paid.³⁹
- Compensation will certainly be payable on evidence of emotional or psychological harm. It will also be payable, however, even if no physical or psychological harm has been evidenced. In such cases the harm can be said to be strictly “moral”. Thus an individual who has been unlawfully detained in violation of a protected right will be entitled to compensation even if he/she could not show any evidence of psychological or mental harm. In practice, an individual’s award is increased where emotional or psychological harm is shown.⁴⁰
- Reparation is generally considered to be compensatory, but not punitive, in nature.⁴¹

186. By and large, awards of ‘moral’ or ‘non-pecuniary’ damages have been in the form of a single lump sum (which is subject to interest if not paid within a specified period of time). The calculation of that lump sum has taken into account prevailing costs of living and involved the identification of a per-diem rate in cases of unlawful imprisonment. Both the European and Inter-American Courts have indicated levels of payment across a range.⁴²

187. In the circumstances, St. Vincent and the Grenadines claims the following damages in respect of damages suffered by the crew members occasioned by the excessive use of force against them and their unlawful detention:

³⁸ See e.g., *Reinhardt and Simone-Kaid v. France*, E.Ct. H.R. Judgment of 31 March 1998; *K-F v. Germany*, E. Ct. H.R., Judgment of 27 Nov. 1997.

³⁹ See e.g., *Van Mechelen and Others v. The Netherlands (Article 50)*, E.Ct.H.R. Judgment of 30 Oct 1997.

⁴⁰ E.g., *Van Mechelen Case*.

⁴¹ *Godinez Cruz*, para. 36; *Velasquez-Rodriguez*, para. 38; *Akhdivar v. Turkey (Article 50)* E.Ct.H.R., Judgment of 1 April 1998.

⁴² Inter-American Court of Human Rights: *Velasquez Rodriquez* (disappearance): 250,000 Honduran Lempiras; *Godinez Cruz* (disappearance): 250,000 Honduran Lempiras; *Aloeboetoe* (deprivation of life): US\$29,000; *Gangaram Panday* (illegal detention): US\$10,000 (nominal damages because Surinam’s responsibility was merely inferred); European Court of Human Rights: *Leterme v. France* 29/4/98 (unreasonable length of compensation proceedings): FF 200,000; *Selcuk and Asker v. Turkey* 24/4/98 (destruction of home): £ 10,000; *Clooth v. Belgium* 5/3/98 (unlawful detention) BeF 125,000 (calculated on the basis of 200 Bef/day for 625 days); *Akhdivar v. Turkey* 1/4/98 (destruction of home): £ 8,000; *Raninen v. Finland* 16/12/97 (brief unlawful detention): FiM 10,000; *Sakik and Others v. Turkey* 26/11/97 (unlawful detention): FF 25,000 (12 days) and FF 30,000 (14 days); *Van Mechelen et al v. The Netherlands* 30/10/97 (unlawful detention); NLG 25,000; (. . . & distress) NLG 5,000; *Johnson v. UK*, 24/10/97 (unlawful detention): £ 10,000; *Lukanov v. Bulgaria*, 20/3/97 (unlawful detention – 115 days): FF 40,000; *Sur v. Turkey*, 3/10/97 (ill-treatment in custody – Friendly Settlement): FF 100,000; *Aksoy v. Turkey*, 18/12/96 (unlawful detention & torture): £ 25,000.

- for the Master, \$50,750;⁴³
- for the five crew members detained for 123 days, \$12,300 each;⁴⁴
- for the eight crew members detained for approximately 45 days, \$4,500 each;⁴⁵ and
- for the nine crew members detained for 21 days, \$2,100 each.⁴⁶

188. In respect of the serious personal injury suffered by the two crew members who were shot St. Vincent and the Grenadines claims the following amounts:

- for Mr Kluyev, \$50,000;
- for Mr Djibril, \$50,000.

189. In respect of the loss of personal possessions, taken by the Guinean authorities from various cabins on board the vessel (radio officer, cook, Master, two crew members: see **Annex 18**), St. Vincent and the Grenadines claims US\$9502.

190. Under this head St. Vincent and the Grenadines claims a total of **\$276,652**.

4.2.3 *The claim in respect of the removal of the cargo from the vessel*

191. On arrival at Conakry on 28 October 1997 the m/v "Saiga" was laden with 4,949.032MT of oil. Between 10 and 12 November 1997 that cargo was entirely removed from the vessel. It was subsequently "sold to a third party buyer", as confirmed by the Agent of Guinea (see Prompt Release Proceedings, 27 November 1997, Verbatim Records, p. 28, lines 10 and 11), reportedly for some US\$3 million.

192. General principles of equity referred to in the maxim "*nullus commodum capere de sua injuria propria*"⁴⁷ (or "*ex turpi causa non oritur actio*") dictate that a party should not benefit from its own wrongful acts. It follows that Guinea must account for the proceeds of the sale it has received from the third parties referred to above. Otherwise it would have been unjustly enriched as a result of its internationally unlawful actions.

⁴³ Calculated at \$250/day for detention over 123 days plus a sum to cover the emotional and psychological consequences of his treatment, including threats, by Guinea's authorities.

⁴⁴ \$100/day for detention over 123 days.

⁴⁵ \$100/day for detention over 45 days.

⁴⁶ \$100/day for detention over 21 days.

⁴⁷ See Bin Cheng, *General principles of law as applied by International Courts and Tribunals* (1987, Grotius), 149–158.

St. Vincent and the Grenadines therefore claims these sums in the order of US\$3 million.

194. *Under this head St. Vincent and the Grenadines claims **\$3,000,000**

4.2.4 *The claim in respect of damages or loss suffered by the State of St. Vincent and the Grenadines*

195. As set out in this Memorial, Guinea has violated the following right of St. Vincent and the Grenadines:

- the right of vessels flying the flag of St. Vincent and the Grenadines to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as provided by Articles 56(2) and 58 and related provisions of the 1982 Convention;
- the right of vessels flying the flag of St. Vincent and the Grenadines not to be subject to hot pursuit except in accordance with the strict requirements of Article 111 of the 1982 Convention (Article 111);
- the right of vessels flying the flag of St. Vincent and the Grenadines not to be subject to unnecessary and unreasonable force, in accordance with the requirements of general international law; and
- the right of St. Vincent and the Grenadines to prompt compliance by Guinea with the judgement of 4 December 1997 of the International Tribunal concerning the release of the m/v SAIGA and its crew, following the posting of a reasonable bond by St. Vincent and the Grenadines on 10 December 1997, in accordance with Articles 292(4) and 296 of the 1982 Convention.

196. Guinea's violation of these rights has occasioned significant losses for St. Vincent and the Grenadines. It has been required to take steps to protect the rights of the m/v "Saiga" as well as its own rights, in particular by commencing proceedings in November 1997 under Article 292 of the 1982 Convention to obtain the prompt release of the vessel and crew, and the institution of arbitration proceedings after Guinea failed to comply with the Tribunal's judgment. St. Vincent and the Grenadines has been required to spend considerable time and effort in supporting the efforts of the other interests in the vessel to ensure the protection of the crew and effect the release of the vessel. It has been compelled to act decisively

* Paragraph numbering as in original [note by the Registry].

because of the economic importance of its registry and the fear that a failure to so act might result in a loss of new registration or a renewal of existing registration. As a small country these efforts have come at some cost, deflecting resources away from other activities, including at the highest levels. Further, vessels flying its flag may have been precluded from exercising freedom of navigation rights within the exclusive economic zone of Guinea. These waters may have been put out of bounds, at least pending a judgment on the merits by the International Tribunal.

197. Measuring the precise value, in financial terms, of the damage which St. Vincent and the Grenadines has suffered as a result of Guinea's actions would be an almost impossible task. It is not known, for example, whether the inability of ships flying the flag of St. Vincent and the Grenadines to bunker off the coast of Guinea has led or might lead to a loss of registrations in the future. Certainly that possibility cannot be excluded altogether. Nevertheless, in respect of each of these violations of its rights St. Vincent and the Grenadines is entitled to full reparation by every appropriate means, including satisfaction. There exists clear precedent in support of the claim by St. Vincent and the Grenadines for the non-material damage which it has and might continue to suffer as a result of Guinea's actions. In particular, guidance may be obtained from the Commissioners' recommendation in the *I'm Alone* case that Canada be award \$25,000 compensation as a material amend in respect of the violations by the United States.

198. Since that decision there have been numerous other cases in other fields in which non-material, moral damages have been compensated. Recently, for example, in its 1992 award in decision of *Re Letelier and Moffitt* the Chile-United States of America International Commission awarded moral damages to the United States against Chile of \$780,000, for the benefit of the families of victims of the acts of Chile which the United States claimed to be internationally unlawful (Chile accepted the payment of compensation on an *ex gratia* basis whilst denying responsibility).⁴⁸ Of particular note for these purposes is the Separate Concurring Opinion of Professor Orrego Vicuna on the question of moral damages, which in the view of St. Vincent and the Grenadines accurately states the current law:

⁴⁸ 88 ILR 727, at 735-6 (11 January 1992). The Commission members were Andres Aguilar Mawdsley (President), Julio Maria Sanguinetti Coirolo, Sir John Freeland, Francisco Orrego Vicuna and Malcolm Wilkey.

“Compensation for moral damages is clearly included among the important principles of international law in the matter. This damage being by its very nature non-material, the determination of the amount of compensation is a most difficult question requiring that both the standards of justice and reasonableness be met.”⁴⁹

199. Monetary compensation for non-material damage was also reflected in the France-New Zealand Agreement of 9 July 1986 concerning the sinking of the vessel *Rainbow Warrior* by French agents in New Zealand (the 1986 Agreement),⁵⁰ made pursuant to a ruling by the United Nations Secretary General. The Agreement and the Secretary-General’s ruling provided for France to pay \$7 million as compensation to New Zealand for “all the damage which it has suffered”. This sum includes the non-material (moral and legal) damage claimed by New Zealand. New Zealand had claimed US\$9 million in respect of all the damage it had suffered, including in respect of “violation of [its] sovereignty and the affront and insult that that involved” and to “take into account the fact that France has refused to extradite or prosecute other persons in France responsible for carrying out the illegal and criminal act of 10 July 1985.” France offered compensation of \$4 million to cover only the actual expenses incurred by New Zealand. The two countries requested the Secretary-General of the United Nations to mediate and to propose a solution in the form of a ruling, which both parties agreed in advance to accept. In his ruling the UN Secretary-General noted that:

“the attack against the *Rainbow Warrior* was indisputably a serious violation of basic norms of international law. More specifically it involved a serious violation of New Zealand’s sovereignty and of the Charter of the United Nations”.⁵¹

200. The Secretary-General ruled that France “should pay the sum of US\$7 million to the Government of New Zealand as compensation for all the damage it had suffered”. Of this sum US\$3 million appears to be in respect of the non-material damage suffered by New Zealand.
201. The 1986 Agreement contained a provision for arbitration of any dispute arising out of the agreement. A dispute arose and was submitted to

⁴⁹ *Ibid.*, at p. 743.

⁵⁰ *Rainbow Warrior, New Zealand v. France*, 74 *ILR*, 241 at 274.

⁵¹ Ruling of 6 July by the Secretary-General of the United Nations; p. 201.

arbitration. On the issue of damages and specifically in relation to monetary compensation for moral and legal damage, the Tribunal held:

“an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage. As already indicated, the breaches are serious ones, involving major departures from solemn treaty obligations entered into in accordance with a binding ruling of the United Nations Secretary-General. It is true that such orders are unusual but one explanation of that is that these request are relatively rare, for instance by France in the Carthage and Manouba cases (1913) (11 UNRIAA 449, 463), and by New Zealand in the 1986 process before the Secretary-General, accepted by France in the First Agreement. Moreover, **such orders have been made, for instance in the last case**”.⁵²

The award confirms that the sum of \$7 million decided on by the Secretary-General included an amount for the non-material (moral) damage.

202. As indicated above, in its Draft Articles on State Responsibility the ILC has also recognised that “[t]he injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular, moral damage, caused by that act, if and to the extent necessary to provide full reparation” (draft Article 45(1)). Satisfaction may take a number of forms, including:

“in cases of gross infringement of the rights of the injured State damages reflecting the gravity of the infringement.” (draft Article 45(2)(c))

203. In its Commentary, the ILC emphasised that such a remedy was of an exceptional nature as indicated by the phrase “in case of gross infringement of the rights of the injured State”.⁵³ The ILC further explains that such a remedy is

“given to the injured party over and above the actual loss, when the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party”.⁵⁴

⁵² *Rainbow Warrior (New Zealand v. France)* France-New Zealand Arbitration Tribunal; 30 April 1990, 82 *ILR* p. 499 at 575 (emphasis added).

⁵³ *Report of the International Law Commission on the work of its forty-fifth session*, p. 67, in 1993 *Yb of ILC*, Part II, p. 79.

⁵⁴ *Ibid.*, the ILC noted that this is akin to “exemplary damages” under the common law.

As an illustration of the practical applicability of the reference to “damages reflecting the gravity of the infringement”, the ILC refers to the *Rainbow Warrior* case, in particular the decision of the Secretary-General to award \$7 million as “exceeding by far the value of the material loss”.

204. St. Vincent and the Grenadine submits that this is a case in which gross infringements of its rights have occurred, for which it is entitled to claim damages for non-material loss. The violence used against the m/v “Saiga” and its crew members, the detention for 123 days of the vessel and the Master and five crew, the violations of the conditions under which hot pursuit may be exercised and freedom of navigation enjoyed, the failure to notify St. Vincent and Grenadines of the arrest, the treatment of the Master and crew, the seizure of the cargo before any charges had been brought or conviction obtained, the failure to give effect to the International Tribunal’s judgment of 4 December 1997, individually and cumulatively point to “gross infringements” in the sense envisaged by the ILC and reflected in previous practise. In determining what is just and reasonable in relation to Guinea’s actions the International Tribunal should also take into account the fact Guinea has not taken any steps to satisfy or otherwise address the concerns which St. Vincent and the Grenadines has consistently expressed in these and other matters. Further, no reply has been received to the letter of 7 April 1997 inviting Guinea to enter into a non-binding arrangement with respect to bunkering off its coast pending the decision of the International Tribunal in these proceedings (*supra* para. 74). And Guinea has not provided a Report to the Tribunal concerning its implementation of the Provisional Measures Order, as required by that Order (*supra* para. 75).
205. In the circumstances St. Vincent and the Grenadine submits that it is just and reasonable for it to be awarded the following in damages by way of material amend for Guinea’s acts:
- in respect of the violations by Guinea of Article 111 of the 1982 Convention and the obligation under general international law not use unreasonable or excessive force, the sum of US\$400,000;
 - in respect of the violations by Guinea of Articles 56(2) and 58 of the 1982 Convention, the sum of US\$400,000;
 - in respect of the violation by Guinea of Articles 292(4) and 296 of the 1982 Convention, the sum of US\$200,000.
206. Under this head St. Vincent and the Grenadines claims **\$1,000,000**.

4.2.5 *Interest*

207. Under the 1998 Agreement and by paragraph 24 of the Notification of 22 December 1997 St. Vincent and the Grenadines claims interest in respect of the claims for material damages, namely heads 4.2.1–3. Interest is claimed on the sum awarded by the International Tribunal at the rate of 8% with effect from 11 December 1998 and/or 28 February 1998.

4.2.6 *Legal costs*

208. The 1998 Agreement provides that the International Tribunal "shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal". In the period up to 6 May 1997 the legal and other costs incurred are in excess of US\$660,000. Full particulars of these costs and additional costs arising will be provided to the Tribunal in accordance with any Orders as to costs which it may make.

4.3 *Conclusions*

In sum, St. Vincent and the Grenadines claims the following damages in respect of the losses and damages suffered by St. Vincent and the Grenadines:

| | |
|--|----------------|
| Loss or damage to the vessel: | US\$1,091,930 |
| Loss or damage to the master and crew: | US\$276,652 |
| Loss of the cargo: | US\$3,000,0000 |
| Damage suffered by St. Vincent & the Grenadines: | US\$1,000,000 |
| The total claim is for US\$5,368,582 , plus interest and legal costs. | |

SUBMISSIONS

As set out above, the m/v "Saiga" and her remaining crew were released by Guinea on 28 February 1998. The original claim of 22 December 1997 for their release is therefore no longer necessary.

For the abovementioned reasons or any of them or for any other reason that the International Tribunal deems to be relevant, the Government of St. Vincent and the Grenadines asks the International Tribunal to adjudge and declare that:

- (1) the actions of Guinea (*inter alia* the attack on the m/v "Saiga" and its crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil, its filing of charges against St. Vincent and the Grenadines and its subsequently issuing a judgment against them) violate the right of St. Vincent and the

Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth in Articles 56(2) and 58 and related provisions of the Convention;

- (2) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of the Convention, the customs and contraband laws of Guinea, namely *inter alia* Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;
 - (3) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of the Convention in respect of the m/v “Saiga” and is liable to compensate the m/v “Saiga” pursuant to Article 111(8) of the Convention;
 - (4) Guinea has violated Articles 292(4) and 296 of the Convention in not releasing the m/v “Saiga” and her crew immediately upon the posting of the guarantee of US\$400,000 on 10 December 1997 or the subsequent clarification from Credit Suisse on 11 December;
 - (5) the citing of St. Vincent and the Grenadines as the flag state of the m/v “Saiga” in the criminal courts and proceedings instituted by Guinea violates the rights of St. Vincent and the Grenadines under the 1982 Convention;
- [. . .]*
- (7) Guinea immediately return the equivalent in United States Dollars of the discharged oil and return the Bank Guarantee;
 - (8) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and
 - (9) Guinea shall pay the costs of the arbitral proceedings and the costs incurred by St. Vincent and the Grenadines.

[Signed]

Bozo Dabinovic
Agent and Commissioner of Maritime Affairs
St. Vincent and the Grenadines

19 June 1998

* *As in original [note by the Registry].*