

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

THE M/V "SAIGA" (No. 2) CASE  
(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)  
List of cases: No. 2

JUDGMENT OF 1 JULY 1999

**1999**

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU NAVIRE « SAIGA » (No. 2)  
(SAINT-VINCENT-ET-LES-GRENADINES *c.* GUINÉE)  
Rôle des affaires : No. 2

ARRÊT DU 1ER JUILLET 1999

Official citation:

*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea),  
Judgment, ITLOS Reports 1999, p. 10*

---

Mode officiel de citation :

*Navire « SAIGA » (No. 2) (Saint-Vincent-et-les-Grenadines c. Guinée),  
Arrêt, TIDM Recueil 1999, p. 10*

1 JULY 1999  
JUDGMENT

**M/V "SAIGA" (No. 2)**  
**(SAINT VINCENT AND THE GRENADINES v. GUINEA)**

**NAVIRE « SAIGA » (No. 2)**  
**(SAINT-VINCENT-ET-LES-GRENADINES c. GUINÉE)**

1ER JUILLET 1999  
ARRÊT

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

YEAR 1999

1 July 1999

List of cases:  
No. 2

**THE M/V "SAIGA" (No. 2) CASE**

**(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)**

**JUDGMENT**

**TABLE OF CONTENTS**

	<i>Paragraphs</i>
Introduction	1–30
Factual background	31–39
Jurisdiction	40–45
Objections to challenges to admissibility	46–54
Challenges to admissibility	55–109
Registration of the <i>Saiga</i>	55–74
Genuine link	75–88
Exhaustion of local remedies	89–102
Nationality of claims	103–109
Arrest of the <i>Saiga</i>	110–138
Hot pursuit	139–152
Use of force	153–159
Schedule of summons	160–162
Compliance with the Judgment of 4 December 1997	163–166
Reparation	167–177
Financial security	178–180
Costs	181–182
Operative provisions	183
<i>Annex</i>	

**JUDGMENT**

*Present :* *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Registrar* CHITTY.

In the M/V "SAIGA" (No.2) case

*between*

Saint Vincent and the Grenadines,

*represented by*

Mr. Carlyle D. Dougan, Q.C., High Commissioner of Saint Vincent and the Grenadines to the United Kingdom,

*as Agent;*

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

*as Deputy Agent and Counsel;*

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

*and*

Mr. Yérim Thiam, Advocate, President of the Senegalese Bar, Dakar, Senegal,

Mr. Nicholas Howe, Solicitor, Howe & Co., London, United Kingdom,

*as Counsel and Advocates,*

*and*

Guinea,

*represented by*

Mr. Hartmut von Brevern, Attorney at Law, Röhreke, Boye, Remé, von Werder, Hamburg, Germany,

*as Agent and Counsel;*

Mr. Maurice Zogbélemou Togba, Minister of Justice and *Garde des Sceaux* of Guinea,

*and*

Mr. Namankoumba Kouyate, Chargé d'Affaires, Embassy of Guinea, Bonn, Germany,

Mr. Rainer Lagoni, Professor at the University of Hamburg and Director of the Institute for Maritime Law and Law of the Sea, Hamburg, Germany,

Mr. Mamadi Askia Camara, Director of the Division of Customs Legislation and Regulation, Conakry, Guinea,

Mr. André Saféla Leno, Judge of the Court of Appeal, Conakry, Guinea,

*as Counsel,*

THE TRIBUNAL,

composed as above,

after deliberation,

*delivers the following Judgment:*

### **Introduction**

1. On 13 January 1998, the Agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal a Request for the prescription of provisional measures in accordance with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") concerning the arrest and detention of the vessel M/V Saiga (hereinafter "the *Saiga*"). The Request was accompanied by a copy of

the Notification submitted by Saint Vincent and the Grenadines to the Republic of Guinea on 22 December 1997 (hereinafter "the Notification of 22 December 1997") instituting arbitral proceedings in accordance with Annex VII to the Convention in respect of a dispute relating to the *Saiga*. A certified copy of the Request was sent on the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea in Conakry and also in care of the Ambassador of Guinea to Germany.

2. On 13 January 1998, the Registrar was notified of the appointment of Mr. Bozo Dabinovic, Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, as Agent of Saint Vincent and the Grenadines. On 20 January 1998, the appointment of Mr. Hartmut von Brevern, Attorney at Law, Hamburg, as Agent of Guinea, was notified to the Registrar.

3. In accordance with article 24, paragraph 3, of the Statute of the Tribunal (hereinafter "the Statute"), States Parties to the Convention were notified of the Request for the prescription of provisional measures by a note verbale from the Registrar dated 20 February 1998. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the Tribunal, the Registrar notified the Secretary-General of the United Nations of the Request on 20 February 1998.

4. By a letter dated 20 February 1998, the Agent of Guinea notified the Tribunal of the Exchange of Letters of the same date (hereinafter "the 1998 Agreement") constituting an agreement between Guinea and Saint Vincent and the Grenadines, both of which are parties to the Convention, to transfer the arbitration proceedings, instituted by Saint Vincent and the Grenadines by the Notification of 22 December 1997, to the International Tribunal for the Law of the Sea. The 1998 Agreement is as follows:

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

...

Hamburg, 20.02.1998

...

Upon the instruction of the Government of the Republic of Guinea I am writing to inform you that the Government has agreed 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 MV "SAIGA". The Government therefore agrees to the 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. You will find attached hereto written instructions from the Minister of Justice to that effect.



Further to the recent exchange of views between the two Governments, including through the good offices of the President of the International Tribunal for the Law of the Sea, the Government of Guinea agrees that submission of the dispute to the International Tribunal for the Law of the Sea shall include 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.

The agreement of the Government of St. Vincent and the Grenadines to the submission of the dispute to the International Tribunal on these conditions may be indicated by your written response to this letter. The two letters shall constitute a legally binding Agreement ("Agreement by Exchange of Letters") between the two States to submit the dispute to the International Tribunal for the Law of the Sea, and shall become effective immediately. The Republic of Guinea shall submit the Agreement by Exchange of Letters to the President of the International Tribunal for the Law of the Sea immediately after its conclusion. Upon confirmation by the President that he has received the Agreement and that the International Tribunal is prepared

to hear the dispute the arbitration proceedings instituted by the Notification dated 22 December 1997 shall be considered to have been transferred to the jurisdiction of the International Tribunal for the Law of the Sea.

I look forward to receiving your early response.  
Yours sincerely,

*(Signed)*  
Hartmut von Brevern  
Agent of the Republic of Guinea

...

### Annex

In re: m/v Saiga  
(St. Vincent and the Grenadines v. Republic of Guinea)

### AGREED TIMETABLE FOR PROCEEDINGS BEFORE THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

19 June 1998	Memorial to be filed by St. Vincent and the Grenadines
18 September 1998	Counter-Memorial to be filed by Republic of Guinea
30 October 1998	Reply to be filed by St. Vincent and the Grenadines
11 December 1998	Rejoinder to be filed by Republic of Guinea
February 1999	Oral arguments

---

Mr. Hartmut von Brevern,

...

Hamburg

...

20th February 1998

...

I am in receipt of your letter of 20th February 1998 addressed to Mr. Bozo Dabinovic, Agent and Maritime Commissioner of St. Vincent and the Grenadines, in relation to the Arbitration proceedings concerning the M/V "Saiga" as well as the request for provisional measures.

On behalf of the Government of St. Vincent and the Grenadines I have the honour to confirm that my Government agrees to the submission

of the dispute to the International Tribunal for the Law of the Sea subject to the conditions set out in your letter of 20th February 1998. A copy of this letter is attached hereto.

I remain Sir,

Yours sincerely,

(Signed)

Carl L. Joseph  
Attorney General.

...

5. By Order dated 20 February 1998, the Tribunal decided that "the Notification submitted by Saint Vincent and the Grenadines on 22 December 1997 instituting proceedings against Guinea in respect of the M/V 'Saiga' shall be deemed to have been duly submitted to the Tribunal on that date" and that "the request for the prescription of provisional measures ... be considered as having been duly submitted to the Tribunal under article 290, paragraph 1, of the Convention and article 89, paragraph 1, of the Rules of the Tribunal" (hereinafter "the Rules"). By the same Order, the case was entered in the List of cases as: The M/V "SAIGA" (No. 2) case.

6. In accordance with articles 59 and 60 of the Rules, the Tribunal, having ascertained the views of the parties, fixed by Order dated 23 February 1998 the following time-limits for the filing of pleadings in the case: 19 June 1998 for the Memorial of Saint Vincent and the Grenadines, 18 September 1998 for the Counter-Memorial of Guinea, 30 October 1998 for the Reply of Saint Vincent and the Grenadines and 11 December 1998 for the Rejoinder of Guinea.

7. Notice of the Orders of 20 and 23 February 1998 was communicated to the parties and copies thereof were subsequently transmitted to them by the Registrar.

8. By Order dated 11 March 1998, the Tribunal decided upon the Request for the prescription of provisional measures as follows:

1. Unanimously,

*Prescribes* the following provisional measure under article 290, paragraph 1, of the Convention:

Guinea shall refrain from taking or enforcing any judicial or administrative measure 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.

2. Unanimously,

*Recommends* that Saint 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.

3. Unanimously,

*Decides* that Saint 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 authorizes the President to request such further reports and information as he may consider appropriate after that date.

4. Unanimously,

*Reserves* for consideration in its final decision the submission made by Guinea for costs in the present proceedings.

9. A copy of the Order was transmitted to the parties on 11 March 1998 in accordance with article 94 of the Rules.

10. States Parties to the Convention were notified of the 1998 Agreement and of the Orders of 20 and 23 February and 11 March 1998, by a note verbale from the Registrar dated 14 April 1998. The Secretary-General of the United Nations was also notified on the same date.

11. On 19 June 1998, Saint Vincent and the Grenadines transmitted its Memorial by facsimile to the Tribunal. A copy of the Memorial was sent on 22 June 1998 to the Agent of Guinea. The original of the Memorial and documents in support were filed in the Registry on 22 June 1998 and on 1 July 1998.

12. By a letter dated 8 September 1998, the Agent of Guinea requested an extension of the time-limit fixed for the submission of its Counter-Memorial. The President, having ascertained the views of the parties, by Order of 16 September 1998, extended the time-limit for the submission of the Counter-Memorial of Guinea to 16 October 1998. Subsequently, after having ascertained the views of the parties, the Tribunal, by Order of 6 October 1998, extended to 20 November 1998 the time-limit for the filing of the Reply of Saint Vincent and the Grenadines and to 28 December 1998 the time-limit for the filing of the Rejoinder of Guinea.

13. On 16 October 1998, Guinea submitted its Counter-Memorial to the Tribunal, a copy of which was transmitted to the Agent of Saint Vincent and the Grenadines on 19 October 1998. The Reply of Saint Vincent and the Grenadines was filed in the Registry on 20 November 1998. A copy of the Reply was communicated to the Agent of Guinea on 24 November 1998. The Rejoinder of Guinea was filed in the Registry on 28 December 1998. A copy of the Rejoinder was sent to the Agent of Saint Vincent and the Grenadines on 29 December 1998.

14. By Order of 18 January 1999, the President fixed 8 March 1999 as the date for the opening of the oral proceedings.

15. At a meeting with the representatives of the parties on 4 February 1999, the President ascertained the views of the parties regarding issues to be addressed by evidence or submissions during the oral proceedings and requested the parties to complete the documentation in accordance with article 63, paragraphs 1 and 2, and article 64, paragraph 3, of the Rules.

16. Pursuant to article 72 of the Rules, information regarding witnesses and experts was submitted by the parties to the Tribunal on 19 February 1999, and on 1 and 4 March 1999.

17. On 1 March 1999, the Registrar was informed of the death of the Agent of Saint Vincent and the Grenadines, Mr. Bozo Dabinovic, and of the appointment of Mr. Carlyle D. Dougan, High Commissioner of Saint Vincent and the Grenadines to the United Kingdom, as the Agent of Saint Vincent and the Grenadines.

18. After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 1, 2 and 5 March 1999 in accordance with article 68 of the Rules.

19. At a meeting with representatives of the parties on 2 March 1999, the President ascertained the views of the parties regarding the procedure for the oral proceedings and the order and timing of presentation by each of the parties. In accordance with article 76 of the Rules, the President also indicated to the parties the points or issues which the Tribunal would like them specially to address.

20. Prior to the opening of the oral proceedings, the parties submitted documents required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal. The parties also transmitted further documents, in conformity with article 71 of the Rules. Copies of the documents of each party were communicated to the other party.

21. From 8 to 20 March 1999, the Tribunal held 18 public sittings. At these sittings the Tribunal was addressed by the following:

*For Saint Vincent and the Grenadines:*

Mr. Carlyle D. Dougan,  
Mr. Richard Plender,  
Mr. Carl Joseph,  
Mr. Yérim Thiam,  
Mr. Nicholas Howe.

*For Guinea:*

Mr. Hartmut von Brevern,  
Mr. Maurice Zogbélérou Togba,  
Mr. Rainer Lagoni,  
Mr. Mamadi Askia Camara.

22. At public sittings held on 8, 9 and 10 March 1999, the following witnesses were called by Saint Vincent and the Grenadines:

Mr. Mikhaylo Alexandrovich Orlov, Master of the *Saiga* (examined by Mr. Plender, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Plender);

Mr. Laszlo Merenyi, Superintendent of Seascot Shipmanagement Ltd. (examined by Mr. Plender, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Plender);

Mr. Djibril Niasse, painter on board the *Saiga* (examined by Mr. Thiam, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Thiam);

Mr. Allan Stewart, Managing Director of Seascot Shipmanagement Ltd. (examined by Mr. Plender, cross-examined by Mr. von Brevern and Mr. Lagoni, re-examined by Mr. Plender).

Mr. Orlov gave evidence in Russian and Mr. Niasse in Wolof. The necessary arrangements were made for the statements of those witnesses to be interpreted into the official languages of the Tribunal. In the course of their testimony, Mr. Niasse and Mr. Stewart responded to questions put to them by the President.

23. On 10 March 1999, after the re-examination of Mr. Stewart by Mr. Plender, the Agent of Guinea requested permission to address a further question to the witness. The request was denied by the President, who ruled that further cross-examination was not permitted except where new matters had been introduced in re-examination.

24. At public sittings held on 12 and 13 March 1999, the following witnesses were called by Guinea:

Mr. Léonard Bangoura, Commander, Deputy to the Chief of the National Mobile Customs Brigade (examined by Mr. von Brevern and Mr. Lagoni, cross-examined by Mr. Plender and Mr. Thiam, re-examined by Mr. Lagoni);

Mr. Mangué Camara, Sub-Lieutenant, Customs Inspection Officer (examined by Mr. von Brevern, cross-examined by Mr. Thiam, re-examined by Mr. M. A. Camara and Mr. von Brevern);

Mr. Ahmadou Sow, Lieutenant, Naval Staff Officer (examined by Mr. Lagoni, cross-examined by Mr. Thiam, re-examined by Mr. Lagoni).

25. A written and signed statement of each of the witnesses was submitted by the party calling the witness.

26. In the course of the testimony of witnesses a number of exhibits were presented, including the following:

- photographs said to show damage to the *Saiga* and equipment on board as a result of the attack by the Guinean authorities;
- photographs of Mr. Sergey Klyuyev, Second Officer of the *Saiga*, and Mr. Niasse, painter employed on the ship, showing injuries alleged to have been suffered by them as a result of the force used to arrest the *Saiga*;
- a nautical chart showing areas off the coast of Guinea;
- a nautical chart showing the courses said to have been taken by the *Saiga* and the Guinean patrol boats, respectively;
- a radiograph said to be that of Mr. Niasse;
- a handwritten statement said to be a report by the Chief of the Guinean joint mission of Customs and Navy patrol vessels.

The original or a certified copy of each exhibit was delivered to the Registrar and duly registered.

27. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto, the Notification of 22 December 1997 and the 1998 Agreement were made accessible to the public from the date of opening of the oral proceedings. In accordance with article 86 of the Rules, a transcript of the verbatim record of each public sitting of the hearing was prepared and circulated to the judges sitting in the case. Copies of the transcripts were also circulated to the parties and made available to the public in printed and electronic form.

28. In the Memorial and in the Counter-Memorial, the following submissions were presented by the parties:

*On behalf of Saint Vincent and the Grenadines,*  
in the Memorial:

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 Crédit 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.

*On behalf of Guinea,*  
in the Counter-Memorial:

the Government of the Republic of Guinea asks the International Tribunal to dismiss the Submissions of St. Vincent and the Grenadines in total and to adjudge and declare that St. Vincent and the Grenadines shall pay all legal and other costs the Republic of Guinea has incurred in the M/V "SAIGA" cases nos.1 and 2.

29. In the Reply and in the Rejoinder, the following submissions were presented by the parties:

---

\*As in the original.

*On behalf of Saint Vincent and the Grenadines,*  
in the Reply:

St. Vincent and the Grenadines adheres to her request that the International Tribunal should adjudge and declare that:

- (i) the actions of the Republic of Guinea violated the right of St. Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in Articles 56(2) and 58 and related provisions of UNCLOS;
- (ii) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of UNCLOS, the customs and contraband laws of the Republic Guinea may in no circumstances be applied or enforced in the exclusive economic zone of the Republic of Guinea;
- (iii) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of UNCLOS in respect of the M.V. *Saiga* and is liable to compensate the M.V. *Saiga* according to Article 111(8) of UNCLOS;
- (iv) the Republic of Guinea has violated Articles 292(4) and 296 of UNCLOS in not releasing the M.V. *Saiga* and her crew immediately upon the posting of the guarantee of US\$400,000 on 10th December 1997 or the subsequent clarification from *Crédit Suisse* on 11th December 1997;
- (v) the citing of St. Vincent and the Grenadines in proceedings instituted by the Guinean authorities in the criminal courts of the Republic of Guinea in relation to the M.V. *Saiga* violated the rights of St. Vincent and the Grenadines under UNCLOS;

[(vi)...]\*

---

\*As in the original.

- (vii) the Republic of Guinea shall immediately repay to St. Vincent and the Grenadines the sum realized on the sale of the cargo of the M.V. *Saiga* and return the bank guarantee provided by St. Vincent and the Grenadines;
- (viii) the Republic of Guinea shall pay damages as a result of such violations with interest thereon;
- (ix) the Republic of Guinea shall pay the costs of the Arbitral proceedings and the costs incurred by St. Vincent and the Grenadines.

*On behalf of Guinea,*  
in the Rejoinder:

the Republic of Guinea adheres to her request that the International Tribunal should dismiss the Submissions of St. Vincent and the Grenadines in total and declare that St. Vincent and the Grenadines shall pay all legal and other costs the Republic of Guinea has incurred in the M/V "SAIGA" Cases nos. 1 and 2.

30. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the parties at the end of the hearing:

*On behalf of Saint Vincent and the Grenadines:*

the Government of St. Vincent & 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 her 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 & the Grenadines and its subsequently issuing a judgment against them) violate the right of St. Vincent & 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 Crédit Suisse on 11 December;
- (5) the citing of St. Vincent & 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 & the Grenadines under the 1982 Convention;
- (6) Guinea immediately return the equivalent in United States Dollars of the discharged gasoil;
- (7) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and
- (8) Guinea shall pay the costs of the proceedings and the costs incurred by St. Vincent & the Grenadines.

*On behalf of Guinea:*

the Government of the Republic of Guinea asks the International Tribunal to adjudge and declare that:

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

Alternatively, that:

- (2) the actions of the Republic of Guinea did not violate the right of St. Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in Articles 56(2) and 58 and related provisions of UNCLOS;
- (3) Guinean laws can be applied for the purpose of controlling and suppressing the sale of gasoil to fishing vessels in the customs radius ("rayon des douanes") according to Article 34 of the Customs Code of Guinea;
- (4) Guinea did lawfully exercise the right of Hot Pursuit under Article 111 of UNCLOS in respect to the MV "SAIGA" and is not liable to compensate the M/V Saiga according to article 111(8) of UNCLOS;
- (5) the Republic of Guinea has not violated article 292(4) and 296 of UNCLOS;
- (6) The mentioning of St. Vincent and the Grenadines in the "Cédule de Citation" of the Tribunal de Première Instance de Conakry of 12 December 1997 under the heading "civilement ... responsable à citer" did not violate the rights of St. Vincent and the Grenadines under UNCLOS;
- (7) There is no obligation of the Republic of Guinea to immediately return to St. Vincent and the Grenadines the equivalent in United States Dollars of the discharged gasoil;
- (8) The Republic of Guinea has no obligation to pay damages to St. Vincent and the Grenadines;
- (9) St. Vincent and the Grenadines shall pay the costs of the proceedings and the costs incurred by the Republic of Guinea.

### **Factual background**

31. The *Saiga* is an oil tanker. At the time of its arrest on 28 October 1997, it was owned by Tabona Shipping Company Ltd. of Nicosia, Cyprus, and managed by Seascot Shipmanagement Ltd. of Glasgow, Scotland. The ship was chartered to Lemania Shipping Group Ltd. of Geneva, Switzerland. The *Saiga* was provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. The Master and crew of the ship were all of Ukrainian nationality. There were also three Senegalese nationals who

were employed as painters. The *Saiga* was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. The owner of the cargo of gas oil on board was Addax BV of Geneva, Switzerland.

32. Under the command of Captain Orlov, the *Saiga* left Dakar, Senegal, on 24 October 1997 fully laden with approximately 5,400 metric tons of gas oil. On 27 October 1997, between 0400 and 1400 hours and at a point 10°25'03"N and 15°42'06"W, the *Saiga* supplied gas oil to three fishing vessels, the *Giuseppe Primo* and the *Kriti*, both flying the flag of Senegal, and the *Eleni S*, flying the flag of Greece. This point was approximately 22 nautical miles from Guinea's island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone. The *Saiga* then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. Upon instructions from the owner of the cargo in Geneva, it later changed course and sailed towards another location beyond the southern border of the exclusive economic zone of Guinea.

33. At 0800 hours on 28 October 1997, the *Saiga*, according to its log book, was at a point 09°00'01"N and 14°58'58"W. It had been drifting since 0420 hours while awaiting the arrival of fishing vessels to which it was to supply gas oil. This point was south of the southern limit of the exclusive economic zone of Guinea. At about 0900 hours the *Saiga* was attacked by a Guinean patrol boat (P35). Officers from that boat and another Guinean patrol boat (P328) subsequently boarded the ship and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its Master was detained. The travel documents of the members of the crew were taken from them by the authorities of Guinea and armed guards were placed on board the ship. On 1 November 1997, two injured persons from the *Saiga*, Mr. Sergey Klyuyev and Mr. Djibril Niassé, were permitted to leave Conakry for Dakar for medical treatment. Between 10 and 12 November 1997, the cargo of gas oil on board the ship, amounting to 4,941.322 metric tons, was discharged on the orders of the Guinean authorities. Seven members of the crew and two painters left Conakry on 17 November 1997, one crew member left on 14 December 1997 and six on 12 January 1998. The Master and six crew members remained in Conakry until the ship was released on 28 February 1998.

34. An account of the circumstances of the arrest of the *Saiga* was drawn up by Guinean Customs authorities in a "*Procès-Verbal*" bearing the designation "PV29" (hereinafter "PV29"). PV29 contains a statement of the Master obtained by interrogation by the Guinean authorities. A document, "*Conclusions présentées au nom de l'Administration des Douanes par le Chef de la Brigade Mobile Nationale des Douanes*" (Conclusions presented in the name of the Customs administration by the Head of the National Mobile Customs Brigade), issued on 14 November 1997 under the signature of the Chief of the National Mobile Customs Brigade, set out the basis of the action against the Master. The criminal charges against the Master were specified in a schedule of summons (*cédule de citation*), issued on 10 December 1997 under the authority of the Public Prosecutor (*Procureur de la République*), which additionally named the State of Saint Vincent and the Grenadines as civilly responsible to be summoned (*civilement responsable à citer*). Criminal proceedings were subsequently instituted by the Guinean authorities against the Master before the Tribunal of First Instance (*tribunal de première instance*) in Conakry.

35. On 13 November 1997, Saint Vincent and the Grenadines submitted to this Tribunal a Request for the prompt release of the *Saiga* and its crew under article 292 of the Convention. On 4 December 1997, the Tribunal delivered Judgment on the Request. The Judgment ordered that Guinea promptly release the *Saiga* and its crew upon the posting of a reasonable bond or security by Saint Vincent and the Grenadines. The security consisted of the gas oil discharged from the *Saiga* by the authorities of Guinea plus an amount of US\$ 400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.

36. On 17 December 1997, judgment was rendered by the Tribunal of First Instance in Conakry against the Master. The Tribunal of First Instance cited, as the basis of the charges against the Master, articles 111 and 242 of the Convention, articles 361 and 363 of the Penal Code of Guinea (hereinafter "the Penal Code"), article 40 of the Merchant Marine Code of Guinea (hereinafter the "Merchant Marine Code"), articles 34, 316 and 317 of the Customs Code of Guinea (hereinafter "the Customs Code") and articles 1 and 8 of Law L/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 (hereinafter "Law L/94/007"). The charge against the Master was that he had "imported, without declaring it, merchandise that is taxable on entering national Guinean territory, in this case diesel oil, and that he refused to comply with injunctions by Agents of the Guinean Navy, thus committing the crimes of contraband, fraud and tax evasion".

37. The Tribunal of First Instance in Conakry found the Master guilty as charged and imposed on him a fine of 15,354,024,040 Guinean francs. It also ordered the confiscation of the vessel and its cargo as a guarantee for payment of the penalty.

38. The Master appealed to the Court of Appeal (*cour d'appel*) in Conakry against his conviction by the Tribunal of First Instance. On 3 February 1998, judgment was rendered by the Court of Appeal. The Court of Appeal found the Master guilty of the offence of "illegal import, buying and selling of fuel in the Republic of Guinea" which it stated was punishable under Law L/94/007. The Court of Appeal imposed a suspended sentence of six months imprisonment on the Master, a fine of 15,354,040,000 Guinean francs and ordered that all fees and expenses be at his expense. It also ordered the confiscation of the cargo and the seizure of the vessel as a guarantee for payment of the fine.

39. On 11 March 1998, the Tribunal delivered the Order prescribing provisional measures, referred to in paragraph 8. Prior to the issue of its Order, the Tribunal was informed, by a letter dated 4 March 1998 sent on behalf of the Agent of Saint Vincent and the Grenadines, that the *Saiga* had been released from detention and had arrived safely in Dakar, Senegal. According to the Deed of Release signed by the Guinean authorities and the Master, the release was in execution of the Judgment of the Tribunal of 4 December 1997.

## **Jurisdiction**

40. There is no disagreement between the parties regarding the jurisdiction of the Tribunal in the present case. Nevertheless, the Tribunal must satisfy itself that it has jurisdiction to deal with the case as submitted.

41. As stated in paragraph 1, the dispute was originally submitted by the Notification of 22 December 1997 to an arbitral tribunal to be constituted in accordance with Annex VII to the Convention. The parties subsequently agreed, by the 1998 Agreement, to transfer the dispute to the Tribunal. The 1998 Agreement provides, in paragraph 1, that "[t]he 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".

42. The Tribunal, in its Order dated 20 February 1998, stated that, having regard to the 1998 Agreement and article 287 of the Convention, it was "satisfied that Saint Vincent and the Grenadines and Guinea have agreed to submit the dispute to it".



43. The Tribunal finds that the basis of its jurisdiction in this case is the 1998 Agreement, which transferred the dispute to the Tribunal, together with articles 286, 287 and 288 of the Convention.

44. Paragraph 2 of the 1998 Agreement provides that the Tribunal may consider "the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998". That objection, based on article 297, paragraph 3, of the Convention, was raised in the phase of the present proceedings relating to the Request for the prescription of provisional measures. In the Order of 11 March 1998, the Tribunal stated that "article 297, paragraph 1, of the Convention, invoked by the Applicant, appears *prima facie* to afford a basis for the jurisdiction of the Tribunal". In the current phase of the proceedings, Guinea did not reiterate the objection based on article 297, paragraph 3, of the Convention. On the contrary, it confirmed that, in its view, "the basis for the International Tribunal's jurisdiction on the merits of the dispute is the 1998 Agreement of the parties". The Tribunal, therefore, finds that the reference, in the 1998 Agreement, to the "objection as to jurisdiction" does not affect its jurisdiction to deal with the dispute.

45. Accordingly, the Tribunal finds that it has jurisdiction over the dispute as submitted to it.

### **Objections to challenges to admissibility**

46. Guinea raises a number of objections to the admissibility of the claims set out in the application. Saint Vincent and the Grenadines contends that Guinea does not have the right to raise any objections to admissibility in this case. In support of its contentions, Saint Vincent and the Grenadines relies on the terms of the 1998 Agreement and on article 97, paragraph 1, of the Rules.

47. With respect to the 1998 Agreement, Saint Vincent and the Grenadines refers to paragraph 2 which states:

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.

48. Saint Vincent and the Grenadines asserts that this provision permits Guinea to raise only the objection to jurisdiction and precludes objections to admissibility. According to Saint Vincent and the Grenadines, reservation of the specific objection to jurisdiction implies that all other objections to jurisdiction or admissibility were ruled out by the parties.

49. Saint Vincent and the Grenadines further argues that Guinea has lost the right to raise objections to admissibility because it failed to meet the time-limit of 90 days specified by article 97 of the Rules for making such objections. It points out that Guinea's objections to admissibility were made in the Counter-Memorial submitted on 16 October 1998, more than 90 days after the institution of the proceedings on 22 December 1997.

50. Guinea replies that by agreeing to paragraph 2 of the 1998 Agreement it did not give up its right to raise objections to admissibility. It also contends that article 97 of the Rules does not apply to its objections to admissibility. Guinea submits that, in any case, its objections were made within the time-limit specified in article 97 of the Rules, because, in its opinion, the proceedings were actually instituted by the submission of the Memorial filed by Saint Vincent and the Grenadines on 19 June 1998.

51. In the view of the Tribunal, the object and purpose of the 1998 Agreement was to transfer to the Tribunal the same dispute that would have been the subject of the proceedings before the arbitral tribunal. Before the arbitral tribunal, each party would have retained the general right to present its contentions. The Tribunal considers that the parties have the same general right in the present proceedings, subject only to the restrictions that are clearly imposed by the terms of the 1998 Agreement and the Rules. In the present case, the Tribunal finds that the reservation of Guinea's right in respect of the specific objection as to jurisdiction did not deprive it of its general right to raise objections to admissibility, provided that it did so in accordance with the Rules and consistently with the agreement between the parties that the proceedings be conducted in a single phase. The Tribunal, therefore, concludes that the 1998 Agreement does not preclude the raising of objections to admissibility by Guinea.

52. The Tribunal must now consider the contention of Saint Vincent and the Grenadines that the objections of Guinea are not receivable because they were raised after the expiry of the time-limit specified in article 97, paragraph 1, of the Rules. This paragraph states:

Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of proceedings.

53. The Tribunal observes that, as stated in its Order of 20 February 1998, the proceedings were instituted on 22 December 1997 and not on 19 June 1998, as claimed by Guinea. Article 97 deals with objections to jurisdiction or admissibility that are raised as preliminary questions to be dealt with in incidental proceedings. As stated therein, the article applies to an objection "the decision upon which is requested before any further proceedings on the merits". Accordingly, the time-limit in the article does not apply to objections to jurisdiction or admissibility which are not requested to be considered before any further proceedings on the merits. In the present case, this is confirmed by the fact that the parties agreed that the proceedings before the Tribunal "shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction ...". The Tribunal, therefore, concludes that article 97 of the Rules does not preclude the raising of objections to admissibility in this case.

54. For the above reasons, the Tribunal finds that the objections to admissibility raised by Guinea are receivable and may, therefore, be considered.

## **Challenges to admissibility**

### **Registration of the *Saiga***

55. The first objection raised by Guinea to the admissibility of the claims set out in the application is that Saint Vincent and the Grenadines does not have legal standing to bring claims in connection with the measures taken by Guinea against the *Saiga*. The reason given by Guinea for its contention is that on the day of its arrest the ship was "not validly registered under the flag of Saint Vincent and the Grenadines" and that, consequently, Saint Vincent and the Grenadines is not legally competent to present claims either on its behalf or in respect of the ship, its Master and the other members of the crew, its owners or its operators.

56. This contention of Guinea is challenged by Saint Vincent and the Grenadines on several grounds.

57. The facts relating to the registration of the *Saiga*, as they emerge from the evidence adduced before the Tribunal, are as follows:

- (a) The *Saiga* was registered provisionally on 12 March 1997 as a Saint Vincent and the Grenadines ship under section 36 of the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines (hereinafter "the Merchant Shipping Act"). The Provisional Certificate of Registration issued to the ship on 14 April 1997 stated that it was issued by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines on behalf of the Government of Saint Vincent and the Grenadines under the terms of the Merchant Shipping Act. The Certificate stated: "This Certificate expires on 12 September 1997."
- (b) The registration of the ship was recorded in the Registry Book of Saint Vincent and the Grenadines on 26 March 1997. The entry stated: "Valid thru: 12/09/1997".
- (c) A Permanent Certificate of Registration was issued on 28 November 1997 by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines on behalf of that State. The Certificate stated: "This Certificate is permanent."

58. Guinea contends that the ship was unregistered between 12 September 1997 and 28 November 1997 because the Provisional Certificate of Registration expired on 12 September 1997 and the Permanent Certificate of Registration was issued on 28 November 1997. From this Guinea concludes: "It is thus very clear that the MV 'SAIGA' was not validly registered' in the time period between 12 September 1997 and 28 November 1997. For this reason, the MV 'SAIGA' may [be] qualified to be a *ship without nationality* at the time of its attack." Guinea also questioned whether the ship had been deleted from the Maltese Register where it was previously registered.

59. Saint Vincent and the Grenadines controverts Guinea's assertion that the expiry of the Provisional Certificate of Registration implies that the ship was not registered or that it lost the nationality of Saint Vincent and the Grenadines. It argues that when a vessel is registered under its flag "it remains so registered until deleted from the registry". It notes that the conditions and procedures for deletion of ships from its Registry are set out in Part I, sections 9 to 42 and 59 to 61, of the Merchant Shipping Act, and emphasizes that none of these procedures was at any time applied to the *Saiga*. In support of its claim, Saint Vincent and the Grenadines refers to

the declaration dated 27 October 1998 by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines which states that the ship was registered under the Saint Vincent and the Grenadines flag on 12 March 1997 "and is still today validly registered".

60. Saint Vincent and the Grenadines further contends that, under the Merchant Shipping Act, a ship does not lose Vincentian nationality because of the expiry of its provisional certificate of registration. In support of its contentions, Saint Vincent and the Grenadines refers to section 36(2) of the Merchant Shipping Act which states that a provisional certificate "shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue". Saint Vincent and the Grenadines argues that, pursuant to this provision, a provisional certificate of registration remains in force until the expiry of one year from the date of its issue. In further support for this contention, Saint Vincent and the Grenadines points out that, under section 36(3)(d) of the Merchant Shipping Act, payment of "the annual fee for one year" is required when an application is made for provisional registration. It further maintains that, just as a person would not lose nationality when his or her passport expires, a vessel would not cease to be registered merely because of the expiry of a provisional certificate. According to Saint Vincent and the Grenadines, the provisional certificate, like a passport, is evidence, but not the source, of national status. For these reasons, Saint Vincent and the Grenadines contends that the Provisional Certificate in this case remained in force after 12 September 1997 and at all times material to the present dispute. With regard to the question raised by Guinea concerning the previous registration of the ship, Saint Vincent and the Grenadines stated that its authorities had received from the owner of the ship "satisfactory evidence that the ship's registration in the country of last registration had been closed" as required by section 37 of the Merchant Shipping Act.

61. Guinea argues that automatic extension of a provisional certificate of registration is neither provided for nor envisaged under the Merchant Shipping Act. In this connection, it argues that the declarations by the Commissioner for Maritime Affairs of 27 October 1998 and the Deputy Commissioner for Maritime Affairs of 1 March 1999, to the effect that the *Saiga* "remained validly registered in the Register of Ships of Saint Vincent & the Grenadines as at 27th October 1997" do not suffice to fill the gap in registration between 12 September 1997 and 28 November 1997, when the Permanent Certificate of Registration of the *Saiga* was issued. It further

argues that these declarations on the registration status cannot be accepted as independent documentary evidence in the context of the present proceedings. According to Guinea, the *Saiga*'s registration could only have continued after the expiry of its Provisional Certificate if the Provisional Certificate had been replaced with another provisional certificate or its expiry date had been extended. Guinea points out that there is no evidence that any such action was taken after the Provisional Certificate expired. It states that a comparison of a provisional certificate of registration of a ship with a person's passport is misplaced, since a ship acquires nationality by registration and is required to have a certificate, while a person's nationality does not depend on the acquisition or retention of a passport. For these reasons, Guinea maintains that the *Saiga* did not have the nationality of Saint Vincent and the Grenadines during the period between the expiry of the Provisional Certificate on 12 September 1997 and the issue of the Permanent Certificate on 28 November 1997.

62. The question for consideration is whether the *Saiga* had the nationality of Saint Vincent and the Grenadines at the time of its arrest. The relevant provision of the Convention is article 91, which reads as follows:

*Article 91*  
*Nationality of ships*

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

63. Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an

obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

64. International law recognizes several modalities for the grant of nationality to different types of ships. In the case of merchant ships, the normal procedure used by States to grant nationality is registration in accordance with domestic legislation adopted for that purpose. This procedure is adopted by Saint Vincent and the Grenadines in the Merchant Shipping Act.

65. Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State. Nevertheless, disputes concerning such matters may be subject to the procedures under Part XV of the Convention, especially in cases where issues of interpretation or application of provisions of the Convention are involved.

66. The Tribunal considers that the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties.

67. Saint Vincent and the Grenadines has produced evidence before the Tribunal to support its assertion that the *Saiga* was a ship entitled to fly its flag at the time of the incident giving rise to the dispute. In addition to making references to the relevant provisions of the Merchant Shipping Act, Saint Vincent and the Grenadines has drawn attention to several indications of Vincentian nationality on the ship or carried on board. These include the inscription of "Kingstown" as the port of registry on the stern of the vessel, the documents on board and the ship's seal which contained the words "SAIGA Kingstown" and the then current charter-party which recorded the flag of the vessel as "Saint Vincent and the Grenadines".

68. The evidence adduced by Saint Vincent and the Grenadines has been reinforced by its conduct. Saint Vincent and the Grenadines has at all times material to the dispute operated on the basis that the *Saiga* was a ship of its nationality. It has acted as the flag State of the ship during all phases of the proceedings. It was in that capacity that it invoked the jurisdiction of the Tribunal in its Application for the prompt release of the *Saiga* and its crew under article 292 of the Convention and in its Request for the prescription of provisional measures under article 290 of the Convention.

69. As far as Guinea is concerned, the Tribunal cannot fail to note that it did not challenge or raise any doubts about the registration or nationality of the ship at any time until the submission of its Counter-Memorial in October 1998. Prior to this, it was open to Guinea to make inquiries regarding the registration of the *Saiga* or documentation relating to it. For example, Guinea could have inspected the Register of Ships of Saint Vincent and the Grenadines. Opportunities for raising doubts about the registration or nationality of the ship were available during the proceedings for prompt release in November 1997 and for the prescription of provisional measures in February 1998. It is also pertinent to note that the authorities of Guinea named Saint Vincent and the Grenadines as civilly responsible to be summoned in the schedule of summons by which the Master was charged before the Tribunal of First Instance in Conakry. In the ruling of the Court of Appeal, Saint Vincent and the Grenadines was stated to be the flag State of the *Saiga*.

70. With regard to the previous registration of the *Saiga*, the Tribunal notes the statement made by Saint Vincent and the Grenadines in paragraph 60. It considers this statement to be sufficient.

71. The Tribunal recalls that, in its Judgment of 4 December 1997 and in its Order of 11 March 1998, the *Saiga* is described as a ship flying the flag of Saint Vincent and the Grenadines.

72. On the basis of the evidence before it, the Tribunal finds that Saint Vincent and the Grenadines has discharged the initial burden of establishing that the *Saiga* had Vincentian nationality at the time it was arrested by Guinea. Guinea had therefore to prove its contention that the ship was not registered in or did not have the nationality of Saint Vincent and the Grenadines at that time. The Tribunal considers that the burden has not been discharged and that it has not been established that the *Saiga* was not registered in or did not have the nationality of Saint Vincent and the Grenadines at the time of the arrest.

73. The Tribunal concludes:

- (a) it has not been established that the Vincentian registration or nationality of the *Saiga* was extinguished in the period between the date on which the Provisional Certificate of Registration was stated to expire and the date of issue of the Permanent Certificate of Registration;



- (b) in the particular circumstances of this case, the consistent conduct of Saint Vincent and the Grenadines provides sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute;
- (c) in view of Guinea's failure to question the assertion of Saint Vincent and the Grenadines that it is the flag State of the *Saiga* when it had every reasonable opportunity to do so and its other conduct in the case, Guinea cannot successfully challenge the registration and nationality of the *Saiga* at this stage;
- (d) in the particular circumstances of this case, it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute.

74. For the above reasons, the Tribunal rejects Guinea's objection to the admissibility of the claims of Saint Vincent and the Grenadines based on the ground that the *Saiga* was not registered in Saint Vincent and the Grenadines at the time of its arrest and that, consequently, the *Saiga* did not have Vincentian nationality at that time.

### **Genuine link**

75. The next objection to admissibility raised by Guinea is that there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines. Guinea contends that "[w]ithout a genuine link between Saint Vincent and the Grenadines and the M/V 'Saiga', [Saint Vincent and the Grenadines'] claim concerning a violation of its right of navigation and the status of the ship is not admissible before the Tribunal *vis-à-vis* Guinea, because Guinea is not bound to recognise the Vincentian nationality of the M/V 'Saiga', which forms a prerequisite for the mentioned claim in international law".

76. Guinea further argues that a State cannot fulfil its obligations as a flag State under the Convention with regard to a ship unless it exercises prescriptive and enforcement jurisdiction over the owner or, as the case may be, the operator of the ship. Guinea contends that, in the absence of such jurisdiction, there is no genuine link between the ship and Saint Vincent and the Grenadines and that, accordingly, it is not obliged to recognize the claims of Saint Vincent and the Grenadines in relation to the ship.

77. Saint Vincent and the Grenadines maintains that there is nothing in the Convention to support the contention that the existence of a genuine link between a ship and a State is a necessary precondition for the grant of nationality to the ship, or that the absence of such a genuine link deprives a flag State of the right to bring an international claim against another State in respect of illegal measures taken against the ship.

78. Saint Vincent and the Grenadines also challenges the assertion of Guinea that there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines. It claims that the requisite genuine link existed between it and the ship. Saint Vincent and the Grenadines calls attention to various facts which, according to it, provide evidence of this link. These include the fact that the owner of the *Saiga* is represented in Saint Vincent and the Grenadines by a company formed and established in that State and the fact that the *Saiga* is subject to the supervision of the Vincentian authorities to secure compliance with the International Convention for the Safety of Life at Sea (SOLAS), 1960 and 1974, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), and other conventions of the International Maritime Organization to which Saint Vincent and the Grenadines is a party. In addition, Saint Vincent and the Grenadines maintains that arrangements have been made to secure regular supervision of the vessel's seaworthiness through surveys, on at least an annual basis, conducted by reputable classification societies authorized for that purpose by Saint Vincent and the Grenadines. Saint Vincent and the Grenadines also points out that, under its laws, preference is given to Vincentian nationals in the manning of ships flying its flag. It further draws attention to the vigorous efforts made by its authorities to secure the protection of the *Saiga* on the international plane before and throughout the present dispute.

79. Article 91, paragraph 1, of the Convention provides: "There must exist a genuine link between the State and the ship." Two questions need to be addressed in this connection. The first is whether the absence of a genuine link between a flag State and a ship entitles another State to refuse to recognize the nationality of the ship. The second question is whether or not a genuine link existed between the *Saiga* and Saint Vincent and the Grenadines at the time of the incident.

80. With regard to the first question, the Tribunal notes that the provision in article 91, paragraph 1, of the Convention, requiring a genuine link between the State and the ship, does not provide the answer. Nor do articles 92 and 94 of the Convention, which together with article 91 constitute the context

of the provision, provide the answer. The Tribunal, however, recalls that the International Law Commission, in article 29 of the Draft Articles on the Law of the Sea adopted by it in 1956, proposed the concept of a "genuine link" as a criterion not only for the attribution of nationality to a ship but also for the recognition by other States of such nationality. After providing that "[s]hips have the nationality of the State whose flag they are entitled to fly", the draft article continued: "Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship". This sentence was not included in article 5, paragraph 1, of the Convention on the High Seas of 29 April 1958 (hereinafter "the 1958 Convention"), which reads, in part, as follows:

There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Thus, while the obligation regarding a genuine link was maintained in the 1958 Convention, the proposal that the existence of a genuine link should be a basis for the recognition of nationality was not adopted.

81. The Convention follows the approach of the 1958 Convention. Article 91 retains the part of the third sentence of article 5, paragraph 1, of the 1958 Convention which provides that there must be a genuine link between the State and the ship. The other part of that sentence, stating that the flag State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, is reflected in article 94 of the Convention, dealing with the duties of the flag State.

82. Paragraphs 2 to 5 of article 94 of the Convention outline the measures that a flag State is required to take to exercise effective jurisdiction as envisaged in paragraph 1. Paragraph 6 sets out the procedure to be followed where another State has "clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised". That State is entitled to report the facts to the flag State which is then obliged to "investigate the matter and, if appropriate, take any action necessary to remedy the situation". There is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State.

83. The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.

84. This conclusion is not put into question by the United Nations Convention on Conditions for Registration of Ships of 7 February 1986 invoked by Guinea. This Convention (which is not in force) sets out as one of its principal objectives the strengthening of "the genuine link between a State and ships flying its flag". In any case, the Tribunal observes that Guinea has not cited any provision in that Convention which lends support to its contention that "a basic condition for the registration of a ship is that also the owner or operator of the ship is under the jurisdiction of the flag State".

85. The conclusion is further strengthened by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks opened for signature on 4 December 1995 and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993. These Agreements, neither of which is in force, set out, *inter alia*, detailed obligations to be discharged by the flag States of fishing vessels but do not deal with the conditions to be satisfied for the registration of fishing vessels.

86. In the light of the above considerations, the Tribunal concludes that there is no legal basis for the claim of Guinea that it can refuse to recognize the right of the *Saiga* to fly the flag of Saint Vincent and the Grenadines on the ground that there was no genuine link between the ship and Saint Vincent and the Grenadines.

87. With regard to the second question, the Tribunal finds that, in any case, the evidence adduced by Guinea is not sufficient to justify its contention that there was no genuine link between the ship and Saint Vincent and the Grenadines at the material time.

88. For the above reasons, the Tribunal rejects the objection to admissibility based on the absence of a genuine link between the *Saiga* and Saint Vincent and the Grenadines.

### Exhaustion of local remedies

89. Guinea further objects to the admissibility of certain claims advanced by Saint Vincent and the Grenadines in respect of damage suffered by natural and juridical persons as a result of the measures taken by Guinea against the *Saiga*. It contends that these claims are inadmissible because the persons concerned did not exhaust local remedies, as required by article 295 of the Convention.

90. In particular, Guinea claims that the Master did not exhaust the remedies available to him under Guinean law by failing to have recourse to the Supreme Court (*cour suprême*) against the Judgment of 3 February 1998 of the Criminal Chamber (*chambre correctionnelle*) of the Court of Appeal of Conakry. Similarly, the owners of the *Saiga*, as well as the owners of the confiscated cargo of gas oil, had the right to institute legal proceedings to challenge the seizure of the ship and the confiscation of the cargo, but neither of them exercised this right. Guinea also states that the Master and owners of the ship as well as the owners of the cargo could have availed themselves of article 251 of the Customs Code which makes provision for a compromise settlement.

91. Saint Vincent and the Grenadines challenges this objection of Guinea. It argues that the rule on the exhaustion of local remedies does not apply in the present case since the actions of Guinea against the *Saiga*, a ship flying its flag, violated its rights as a flag State under the Convention, including the right to have its vessels enjoy the freedom of navigation and other internationally lawful uses of the sea related to that freedom, as set out in articles 56 and 58 and other provisions of the Convention. It points out that the actions of Guinea complained of include: the attack on the *Saiga* and its crew outside the limits of the exclusive economic zone of Guinea in circumstances that did not justify hot pursuit in accordance with article 111 of the Convention; the illegal arrest of the ship by the use of excessive and unreasonable force; the escort of the ship to Conakry and its detention there; the discharge of the cargo; the criminal prosecution and conviction of the Master and the imposition of a penal sentence and fine on him, as well as the confiscation of the cargo and the seizure of the ship as security for the fine. Saint Vincent and the Grenadines' other complaints are that Guinea violated articles 292, paragraph 4, and 296 of the Convention by failing to comply with the Judgment of the Tribunal of 4 December 1997; and that the rights of Saint Vincent and the Grenadines were violated by

Guinea when it was cited as the flag State of the M/V *Saiga* in the criminal courts and proceedings instituted by Guinea.

92. Saint Vincent and the Grenadines further contends that the rule that local remedies must be exhausted applies only where there is a jurisdictional connection between the State against which a claim is brought and the person in respect of whom the claim is advanced. It argues that this connection was absent in the present case because the arrest of the ship took place outside the territorial jurisdiction of Guinea and the ship was brought within the jurisdiction of Guinea by force. According to Saint Vincent and the Grenadines, this is further reinforced by the fact that the arrest was in contravention of the Convention and took place after an alleged hot pursuit that did not satisfy the requirements set out in the Convention.

93. Saint Vincent and the Grenadines rejects Guinea's submission that the voluntary presence of the *Saiga* in its exclusive economic zone to supply gas oil to fishing vessels established the jurisdictional connection between the ship and the State of Guinea needed for the application of the rule on the exhaustion of local remedies. It argues that the activity engaged in by the *Saiga* did not affect matters over which Guinea has sovereign rights or jurisdiction within the exclusive economic zone, pursuant to article 56 of the Convention. Accordingly, the presence of the ship in the exclusive economic zone did not establish a jurisdictional connection with Guinea.

94. Finally, Saint Vincent and the Grenadines argues that there were no local remedies which could have been exhausted by the persons who suffered damages as a result of the measures taken by Guinea against the *Saiga*. It maintains that, in any case, the remedies, if any, were not effective. Saint Vincent and the Grenadines claims that, "having regard to all the circumstances of the present case, including ... the manner in which the Guinean authorities and courts dealt with the master, vessel, cargo and crew; the manner in which St. Vincent and the Grenadines were added to the *cédule de citation*; the speed with which the master was summonsed once the guarantee of US\$ 400,000 had been posted; the speed and manner with which the *tribunal de première instance* and *cour d'appel* proceeded to judgment thereafter; and the errors contained in those judgments, ... the master, owners and owners or consignees of the cargo were not, in any event, bound to exercise any right of appeal that they might have had".

95. Before dealing with the arguments of the parties, it is necessary to consider whether the rule that local remedies must be exhausted is applicable in the present case. Article 295 of the Convention reads as follows:

*Article 295*  
*Exhaustion of local remedies*

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in [section 2 of Part XV] only after local remedies have been exhausted where this is required by international law.

96. It follows that the question whether local remedies must be exhausted is answered by international law. The Tribunal must, therefore, refer to international law in order to ascertain the requirements for the application of this rule and to determine whether or not those requirements are satisfied in the present case.

97. The Tribunal considers that in this case the rights which Saint Vincent and the Grenadines claims have been violated by Guinea are all rights that belong to Saint Vincent and the Grenadines under the Convention (articles 33, 56, 58, 111 and 292) or under international law. The rights claimed by Saint Vincent and the Grenadines are listed in its submissions and may be enumerated as follows:

- (a) the right of freedom of navigation and other internationally lawful uses of the seas;
- (b) the right not to be subjected to the customs and contraband laws of Guinea;
- (c) the right not to be subjected to unlawful hot pursuit;
- (d) the right to obtain prompt compliance with the Judgment of the Tribunal of 4 December 1997;
- (e) the right not to be cited before the criminal courts of Guinea.

98. As stated in article 22 of the Draft Articles on State Responsibility adopted on first reading by the International Law Commission, the rule that local remedies must be exhausted is applicable when "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens ...". None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of

obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.

99. But even if the Tribunal accepts Guinea's contention that some of the claims made by Saint Vincent and the Grenadines in respect of natural or juridical persons did not arise from direct violations of the rights of Saint Vincent and the Grenadines, the question remains whether the rule that local remedies must be exhausted applies to any of these claims. The parties agree that a prerequisite for the application of the rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage. Saint Vincent and the Grenadines argues that no such jurisdictional connection existed in this case, while Guinea contends that the presence and activities of the *Saiga* in its customs radius were enough to establish such connection.

100. In the opinion of the Tribunal, whether there was a necessary jurisdictional connection between Guinea and the natural or juridical persons in respect of whom Saint Vincent and the Grenadines made claims must be determined in the light of the findings of the Tribunal on the question whether Guinea's application of its customs laws in a customs radius was permitted under the Convention. If the Tribunal were to decide that Guinea was entitled to apply its customs laws in its customs radius, the activities of the *Saiga* could be deemed to have been within Guinea's jurisdiction. If, on the other hand, Guinea's application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed. The question whether Guinea was entitled to apply its customs laws is dealt with in paragraphs 110 to 136. For reasons set out in those paragraphs, the Tribunal concludes that there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. Accordingly, on this ground also, the rule that local remedies must be exhausted does not apply in the present case.

101. In the light of its conclusion that the rule that local remedies must be exhausted does not apply in this case, the Tribunal does not consider it necessary to deal with the arguments of the parties on the question whether local remedies were available and, if so, whether they were effective.



102. The Tribunal, therefore, rejects the objection of Guinea to admissibility based on the non-exhaustion of local remedies.

### **Nationality of claims**

103. In its last objection to admissibility, Guinea argues that certain claims of Saint Vincent and the Grenadines cannot be entertained by the Tribunal because they relate to violations of the rights of persons who are not nationals of Saint Vincent and the Grenadines. According to Guinea, the claims of Saint Vincent and the Grenadines in respect of loss or damage sustained by the ship, its owners, the Master and other members of the crew and other persons, including the owners of the cargo, are clearly claims of diplomatic protection. In its view, Saint Vincent and the Grenadines is not competent to institute these claims on behalf of the persons concerned since none of them is a national of Saint Vincent and the Grenadines. During the oral proceedings, Guinea withdrew its objection as far as it relates to the shipowners, but maintained it in respect of the other persons.

104. In opposing this objection, Saint Vincent and the Grenadines maintains that the rule of international law that a State is entitled to claim protection only for its nationals does not apply to claims in respect of persons and things on board a ship flying its flag. In such cases, the flag State has the right to bring claims in respect of violations against the ship and all persons on board or interested in its operation. Saint Vincent and the Grenadines, therefore, asserts that it has the right to protect the ship flying its flag and those who serve on board, irrespective of their nationality.

105. In dealing with this question, the Tribunal finds sufficient guidance in the Convention. The Convention contains detailed provisions concerning the duties of flag States regarding ships flying their flag. Articles 94 and 217, in particular, set out the obligations of the flag State which can be discharged only through the exercise of appropriate jurisdiction and control over natural and juridical persons such as the Master and other members of the crew, the owners or operators and other persons involved in the activities of the ship. No distinction is made in these provisions between nationals and non-nationals of a flag State. Additionally, articles 106, 110, paragraph 3, and 111, paragraph 8, of the Convention contain provisions

applicable to cases in which measures have been taken by a State against a foreign ship. These measures are, respectively, seizure of a ship on suspicion of piracy, exercise of the right of visit on board the ship, and arrest of a ship in exercise of the right of hot pursuit. In these cases, the Convention provides that, if the measures are found not to be justified, the State taking the measures shall be obliged to pay compensation "for any loss or damage" sustained. In these cases, the Convention does not relate the right to compensation to the nationality of persons suffering loss or damage. Furthermore, in relation to proceedings for prompt release under article 292 of the Convention, no significance is attached to the nationalities of persons involved in the operations of an arrested ship.

106. The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.

107. The Tribunal must also call attention to an aspect of the matter which is not without significance in this case. This relates to two basic characteristics of modern maritime transport: the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship. A container vessel carries a large number of containers, and the persons with interests in them may be of many different nationalities. This may also be true in relation to cargo on board a break-bulk carrier. Any of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue.

108. The Tribunal is, therefore, unable to accept Guinea's contention that Saint Vincent and the Grenadines is not entitled to present claims for damages in respect of natural and juridical persons who are not nationals of Saint Vincent and the Grenadines.

109. In the light of the above considerations, the Tribunal rejects the objection to admissibility based on nationality of claims.

### Arrest of the *Saiga*

110. Saint Vincent and the Grenadines asserts that the arrest of the *Saiga* and the subsequent actions of Guinea were illegal. It contends that the arrest of the *Saiga* was unlawful because the ship did not violate any laws or regulations of Guinea that were applicable to it. It further maintains that, if the laws cited by Guinea did apply to the activities of the *Saiga*, those laws, as applied by Guinea, were incompatible with the Convention.

111. The laws invoked by Guinea as the basis for the arrest of the *Saiga* and the prosecution and conviction of its Master are the following:

- (a) Law L/94/007;
- (b) The Merchant Marine Code;
- (c) The Customs Code;
- (d) The Penal Code.

112. Articles 1, 4, 6 and 8 of Law L/94/007 read (in translation) as follows:

Article 1:

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

Article 4:

Any owner of a fishing boat, the holder of a fishing licence issued by the Guinean competent authority who refuels or attempts to be refuelled by means other than those legally authorised, will be punished by 1 to 3 years imprisonment and a fine equal to twice the value of the quantity of fuel purchased.

Article 6:

Whoever illegally imports fuel into the national territory will be subject to 6 months to 2 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.

**Article 8:**

Where the misdemeanor referred to in article 6 of this Law has been committed by a group of more than 6 individuals, whether or not they are 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.

113. Article 40 of the Merchant Marine Code reads (in translation) as follows:

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 their sub-soils, of the waters lying underneath, as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes.

114. Articles 1 and 34, paragraphs 1 and 2, of the Customs Code read (in translation) as follows:

**Article 1**

The customs territory includes the whole of the national territory, the islands located along the coastline and the Guinea territorial waters. However, free zones, exempt from all or some of the customs legislation and regulations, may be created within the customs territory.

**Article 34**

1. The customs radius includes a marine area and a terrestrial area.
2. The marine area lies between the coastline and an outer limit located at sea 250 kilometres from the coast.

115. Articles 361 and 363 of the Penal Code read (in translation) as follows:

**Article 361**

Persons who commit or who conceal or abet in the commission of the following offences shall be punished by a term of imprisonment of 5 to 10 years and the forfeiture of all their property:

1. any fraudulent import or export of currency which is legal tender in Guinea, of Guinean agricultural and industrial products and of merchandise of all kinds;

2. any illegal possession of foreign currency and any exchange of such currency otherwise than through legally authorized agents;
3. any fraudulent export of masks, figurines and the like which are products of Guinean handicraft or industry.

#### Article 363

The killing or injuring by law-enforcement officers of offenders who are found *in flagrante delicto* smuggling at the border and who fail to obey customary summons shall be neither a felony nor a misdemeanor.

116. The main charge against the *Saiga* was that it violated article 1 of Law L/94/007 by importing gas oil into the customs radius (*rayon des douanes*) of Guinea. Guinea justifies this action by maintaining that the prohibition in article 1 of Law L/94/007 "can be applied for the purpose of controlling and suppressing the sale of gas oil to fishing vessels in the customs radius according to article 34 of the Customs Code of Guinea". In support of this contention, Guinea declares that it is the consistent practice and the settled view of the courts of Guinea that the term "Guinea", referred to in article 1 of the Law L/94/007, includes the customs radius, and that, consequently, the prohibition of the import of gas oil into Guinea extends to the importation of such oil into any part of the customs radius. According to Guinea, the fact that the *Saiga* violated the laws of Guinea has been authoritatively established by the Court of Appeal. In its view, that decision cannot be questioned in this case because the Tribunal is not competent to consider the question whether the internal legislation of Guinea has been properly applied by the Guinean authorities or its courts.

117. Saint Vincent and the Grenadines contends that the *Saiga* did not violate Law L/94/007 because it did not import oil into Guinea, as alleged by the authorities of Guinea. It points out that article 1 of the Customs Code defines the "customs territory" of Guinea as including "the whole of the national territory, the islands located along the coastline and the Guinean territorial waters". It notes also that, according to articles 33 and 34 of the Customs Code, the customs radius is not part of the customs territory of Guinea but only a "special area of surveillance" and that Guinea is not entitled to enforce its customs laws in it. Saint Vincent and the Grenadines, therefore, argues that the *Saiga* could not have contravened Law L/94/007 since it did not at any time enter the territorial sea of Guinea or introduce,

directly or indirectly, any gas oil into the customs territory of Guinea, as defined by the Customs Code.

118. For these reasons, Saint Vincent and the Grenadines maintains that, on a correct interpretation of Law L/94/007 read with articles 1 and 34 of the Customs Code, the *Saiga* did not violate any laws of Guinea when it supplied gas oil to the fishing vessels in the exclusive economic zone of Guinea.

119. In the alternative, Saint Vincent and the Grenadines contends that the extension of the customs laws of Guinea to the exclusive economic zone is contrary to the Convention. It argues that article 56 of the Convention does not give the right to Guinea to extend the application of its customs laws and regulations to that zone. It therefore contends that Guinea's customs laws cannot be applied to ships flying its flag in the exclusive economic zone. Consequently, the measures taken by Guinea against the *Saiga* were unlawful.

120. In the view of the Tribunal, there is nothing to prevent it from considering the question whether or not, in applying its laws to the *Saiga* in the present case, Guinea was acting in conformity with its obligations towards Saint Vincent and the Grenadines under the Convention and general international law. In its Judgment in the *Case Concerning Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice stated:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.

(*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, p. 19*)

121. A denial of the competence of the Tribunal to examine the applicability and scope of national law is even less acceptable in the framework of certain provisions of the Convention. One such provision, which is also relied upon by Guinea, is article 58, paragraph 3, which reads as follows:

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.

Under this provision, the rights and obligations of coastal and other States under the Convention arise not just from the provisions of the Convention but also from national laws and regulations "adopted by the coastal State in accordance with the provisions of this Convention". Thus, the Tribunal is competent to determine the compatibility of such laws and regulations with the Convention.

122. The Tribunal notes that Guinea produces no evidence in support of its contention that the laws cited by it provide a basis for the action taken against the *Saiga* beyond the assertion that it reflects the consistent practice of its authorities, supported by its courts. Even if it is conceded that the laws of Guinea which the *Saiga* is alleged to have violated are applicable in the manner that is claimed by Guinea, the question remains whether these laws, as interpreted and applied by Guinea, are compatible with the Convention.

123. Saint Vincent and the Grenadines claims that, in applying its customs laws to the *Saiga* in its customs radius, which includes parts of the exclusive economic zone, Guinea acted contrary to the Convention. It contends that in the exclusive economic zone Guinea is not entitled to exercise powers which go beyond those provided for in articles 56 and 58 of the Convention. It further asserts that Guinea violated its rights to enjoy the freedom of navigation or other internationally lawful uses of the sea in the exclusive economic zone, since the supply of gas oil by the *Saiga* falls within the exercise of those rights.

124. Guinea denies that the application of its customs and contraband laws in its customs radius is contrary to the Convention or in violation of any rights of Saint Vincent and the Grenadines. It maintains that it is entitled to apply its customs and contraband laws to prevent the unauthorized sale of gas oil to fishing vessels operating in its exclusive economic zone. It further maintains that such supply is not part of the freedom of navigation under the Convention or an internationally lawful use of the sea related to

the freedom of navigation but a commercial activity and that it does not, therefore, fall within the scope of article 58 of the Convention. For that reason, it asserts that the Guinean action against the *Saiga* was taken not because the ship was navigating in the exclusive economic zone of Guinea but because it was engaged in "unwarranted commercial activities".

125. Guinea further argues that the exclusive economic zone is not part of the high seas or of the territorial sea, but a zone with its own legal status (a *sui generis* zone). From this it concludes that rights or jurisdiction in the exclusive economic zone, which the Convention does not expressly attribute to the coastal States, do not automatically fall under the freedom of the high seas.

126. The Tribunal needs to determine whether the laws applied or the measures taken by Guinea against the *Saiga* are compatible with the Convention. In other words, the question is whether, under the Convention, there was justification for Guinea to apply its customs laws in the exclusive economic zone within a customs radius extending to a distance of 250 kilometres from the coast.

127. The Tribunal notes that, under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea (articles 2 and 21). In the contiguous zone, a coastal State

may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

(article 33, paragraph 1)

In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above.

128. Guinea further argues that the legal basis of its law prohibiting the supply of gas oil to fishing vessels in the customs radius is to be found in article 58 of the Convention. It relies on the reference, contained in paragraph 3 of that article, to the "other rules of international law" to justify the application and enforcement of its customs and contraband laws to the



customs radius. These "other rules of international law" are variously described by Guinea as "the inherent right to protect itself against unwarranted economic activities in its exclusive economic zone that considerably affect its public interest", or as the "doctrine of necessity", or as "the customary principle of self-protection in case of grave and imminent perils which endanger essential aspects of its public interest".

129. The Tribunal finds it necessary to distinguish between the two main concepts referred to in the submissions of Guinea. The first is a broad notion of "public interest" or "self-protection" which Guinea invokes to expand the scope of its jurisdiction in the exclusive economic zone, and the second is "state of necessity" which it relies on to justify measures that would otherwise be wrongful under the Convention.

130. The main public interest which Guinea claims to be protecting by applying its customs laws to the exclusive economic zone is said to be the "considerable fiscal losses a developing country like Guinea is suffering from illegal off-shore bunkering in its exclusive economic zone". Guinea makes references also to fisheries and environmental interests. In effect, Guinea's contention is that the customary international law principle of "public interest" gives it the power to impede "economic activities that are undertaken [in its exclusive economic zone] under the guise of navigation but are different from communication".

131. According to article 58, paragraph 3, of the Convention, the "other rules of international law" which a coastal State is entitled to apply in the exclusive economic zone are those which are not incompatible with Part V of the Convention. In the view of the Tribunal, recourse to the principle of "public interest", as invoked by Guinea, would entitle a coastal State to prohibit any activities in the exclusive economic zone which it decides to characterize as activities which affect its economic "public interest" or entail "fiscal losses" for it. This would curtail the rights of other States in the exclusive economic zone. The Tribunal is satisfied that this would be incompatible with the provisions of articles 56 and 58 of the Convention regarding the rights of the coastal State in the exclusive economic zone.

132. It remains for the Tribunal to consider whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone can be justified under general international law by Guinea's appeal to "state of necessity".

133. In the *Case Concerning the Gabčíkovo-Nagymaros Project (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 40 and 41, paragraphs 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on "state of necessity" which in general international law justifies an otherwise wrongful act. These conditions, as set out in article 33, paragraph 1, of the International Law Commission's Draft Articles on State Responsibility, are:

- (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
- (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

134. In endorsing these conditions, the Court stated that they "must be cumulatively satisfied" and that they "reflect customary international law".

135. No evidence has been produced by Guinea to show that its essential interests were in grave and imminent peril. But, however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone.

136. The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the *Saiga*, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.

137. In their submissions, both parties requested the Tribunal to make declarations regarding the rights of coastal States and of other States in connection with offshore bunkering, i.e. the sale of gas oil to vessels at sea. The Tribunal notes that there is no specific provision on the subject in the Convention. Both parties appear to agree that, while the Convention attributes certain rights to coastal States and other States in the exclusive economic zone, it does not follow automatically that rights not expressly attributed to the coastal State belong to other States or, alternatively, that rights not specifically attributed to other States belong as of right to the coastal State. Saint Vincent and the Grenadines asks the Tribunal to adjudge and declare that bunkering in the exclusive economic zone by ships flying its flag constitutes the exercise of the freedom of navigation and other

internationally lawful uses of the sea related to the freedom of navigation, as provided for in articles 56 and 58 of the Convention. On the other hand, Guinea maintains that "bunkering" is not an exercise of the freedom of navigation or any of the internationally lawful uses of the sea related to freedom of navigation, as provided for in the Convention, but a commercial activity. Guinea further maintains that bunkering in the exclusive economic zone may not have the same status in all cases and suggests that different considerations might apply, for example, to bunkering of ships operating in the zone, as opposed to the supply of oil to ships that are in transit.

138. The Tribunal considers that the issue that needed to be decided was whether the actions taken by Guinea were consistent with the applicable provisions of the Convention. The Tribunal has reached a decision on that issue on the basis of the law applicable to the particular circumstances of the case, without having to address the broader question of the rights of coastal States and other States with regard to bunkering in the exclusive economic zone. Consequently, it does not make any findings on that question.

### **Hot pursuit**

139. Saint Vincent and the Grenadines contends that, in arresting the *Saiga*, Guinea did not lawfully exercise the right of hot pursuit under article 111 of the Convention. It argues that since the *Saiga* did not violate the laws and regulations of Guinea applicable in accordance with the Convention, there was no legal basis for the arrest. Consequently, the authorities of Guinea did not have "good reason" to believe that the *Saiga* had committed an offence that justified hot pursuit in accordance with the Convention.

140. Saint Vincent and the Grenadines asserts that, even if the *Saiga* violated the laws and regulations of Guinea as claimed, its arrest on 28 October 1997 did not satisfy the other conditions for hot pursuit under article 111 of the Convention. It notes that the alleged pursuit was commenced while the ship was well outside the contiguous zone of Guinea. The *Saiga* was first detected (by radar) in the morning of 28 October 1997 when the ship was either outside the exclusive economic zone of Guinea or about to leave that zone. The arrest took place after the ship had crossed the southern border of the exclusive economic zone of Guinea.

141. Saint Vincent and the Grenadines further asserts that, wherever and whenever the pursuit was commenced, it was interrupted. It also contends that no visual and auditory signals were given to the ship prior to the commencement of the pursuit, as required by article 111 of the Convention.

142. Guinea denies that the pursuit was vitiated by any irregularity and maintains that the officers engaged in the pursuit complied with all the requirements set out in article 111 of the Convention. In some of its assertions, Guinea contends that the pursuit was commenced on 27 October 1997 soon after the authorities of Guinea had information that the *Saiga* had committed or was about to commit violations of the customs and contraband laws of Guinea and that the pursuit was continued throughout the period until the ship was spotted and arrested in the morning of 28 October 1997. In other assertions, Guinea contends that the pursuit commenced in the early morning of 28 October 1997 when the *Saiga* was still in the exclusive economic zone of Guinea. In its assertions, Guinea relies on article 111, paragraph 2, of the Convention.

143. Guinea states that at about 0400 hours on 28 October 1997 the large patrol boat P328 sent out radio messages to the *Saiga* ordering it to stop and that they were ignored. It also claims that the small patrol boat P35 gave auditory and visual signals to the *Saiga* when it came within sight and hearing of the ship. The Guinean officers who arrested the ship testified that the patrol boat sounded its siren and switched on its blue revolving light signals.

144. Guinea admits that the arrest took place outside the exclusive economic zone of Guinea. However, it points out that since the place of arrest was not in the territorial sea either of the ship's flag State or of another State, there was no breach of article 111 of the Convention.

145. The relevant provisions of article 111 of the Convention which have been invoked by the parties are as follows:

*Article 111*  
*Right of hot pursuit*

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.
3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.
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 territorial 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.

146. The Tribunal notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention. In this case, the Tribunal finds that several of these conditions were not fulfilled.

147. With regard to the pursuit alleged to have commenced on 27 October 1997, the evidence before the Tribunal indicates that, at the time the Order for the Joint Mission of the Customs and Navy of Guinea was issued, the authorities of Guinea, on the basis of information available to them, could have had no more than a suspicion that a tanker had violated the laws of Guinea in the exclusive economic zone. The Tribunal also notes that, in the circumstances, no visual or auditory signals to stop could have been given to the *Saiga*. Furthermore, the alleged pursuit was interrupted.

According to the evidence given by Guinea, the small patrol boat P35 that was sent out on 26 October 1997 on a northward course to search for the *Saiga* was recalled when information was received that the *Saiga* had changed course. This recall constituted a clear interruption of any pursuit, whatever legal basis might have existed for its commencement in the first place.

148. As far as the pursuit alleged to have commenced on 28 October 1998 is concerned, the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the *Saiga* prior to the commencement of the alleged pursuit, as required by article 111, paragraph 4, of the Convention. Although Guinea claims that the small patrol boat (P35) sounded its siren and turned on its blue revolving light signals when it came within visual and hearing range of the *Saiga*, both the Master who was on the bridge at the time and Mr. Niasse who was on the deck, categorically denied that any such signals were given. In any case, any signals given at the time claimed by Guinea cannot be said to have been given at the commencement of the alleged pursuit.

149. The Tribunal has already concluded that no laws or regulations of Guinea applicable in accordance with the Convention were violated by the *Saiga*. It follows that there was no legal basis for the exercise of the right of hot pursuit by Guinea in this case.

150. For these reasons, the Tribunal finds that Guinea stopped and arrested the *Saiga* on 28 October 1997 in circumstances which did not justify the exercise of the right of hot pursuit in accordance with the Convention.

151. The Tribunal notes that Guinea, in its pleadings and submissions, suggests that the actions against the *Saiga* could, at least in part, be justified on the ground that the *Saiga* supplied gas oil to the fishing vessels in the contiguous zone of the Guinean island of Alcatraz. However, in the course of the oral proceedings, Guinea stated:

[T]he bunkering operation of the ship in the Guinean contiguous zone is also of no relevance in this context, although it may be relevant to the application of the criminal law. The relevant area here is the customs radius. This is a functional zone established by Guinean customs law within the realm of the contiguous zone and a part of the

Guinean exclusive economic zone. One can describe it as a limited customs protection zone based on the principles of customary international law which are included in the exclusive economic zone but which are not a part of the territory of Guinea.

152. The Tribunal has not based its consideration of the question of the legality of the pursuit of the *Saiga* on the suggestion of Guinea that a violation of its customs laws occurred in the contiguous zone. The Tribunal would, however, note that its conclusion on this question would have been the same if Guinea had based its action against the *Saiga* solely on the ground of an infringement of its customs laws in the contiguous zone. For, even in that case, the conditions for the exercise of the right of hot pursuit, as required under article 111 of the Convention, would not have been satisfied for the reasons given in paragraphs 147 and 148.

### **Use of force**

153. Saint Vincent and the Grenadines claims that Guinea used excessive and unreasonable force in stopping and arresting the *Saiga*. It notes that the *Saiga* was an unarmed tanker almost fully laden with gas oil, with a maximum speed of 10 knots. It also notes that the authorities of Guinea fired at the ship with live ammunition, using solid shots from large-calibre automatic guns.

154. Guinea denies that the force used in boarding, stopping and arresting the *Saiga* was either excessive or unreasonable. It contends that the arresting officers had no alternative but to use gunfire because the *Saiga* refused to stop after repeated radio messages to it to stop and in spite of visual and auditory signals from the patrol boat P35. Guinea maintains that gunfire was used as a last resort, and denies that large-calibre ammunition was used. Guinea places the responsibility for any damage resulting from the use of force on the Master and crew of the ship.

155. In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is

reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. "I'm Alone" case (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; The Red Crusader case (Commission of Enquiry, Denmark – United Kingdom, 1962), I.L.R., Vol. 35, p. 485*). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Article 22, paragraph 1(f), of the Agreement states:

1. The inspecting State shall ensure that its duly authorized inspectors:

...

- (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

157. In the present case, the Tribunal notes that the *Saiga* was almost fully laden and was low in the water at the time it was approached by the patrol vessel. Its maximum speed was 10 knots. Therefore it could be boarded without much difficulty by the Guinean officers. At one stage in the proceedings Guinea sought to justify the use of gunfire with the claim that the *Saiga* had attempted to sink the patrol boat. During the hearing, the allegation was modified to the effect that the danger of sinking to the patrol boat was from the wake of the *Saiga* and not the result of a



deliberate attempt by the ship. But whatever the circumstances, there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice.

158. The Guinean officers also used excessive force on board the *Saiga*. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

159. For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the *Saiga*, and thereby violated the rights of Saint Vincent and the Grenadines under international law.

### **Schedule of summons**

160. Saint Vincent and the Grenadines requests the Tribunal to find that Guinea violated its rights under international law by citing Saint Vincent and the Grenadines as "civilly liable" in the schedule of summons issued in connection with the criminal proceedings against the Master of the *Saiga* before the Tribunal of First Instance of Conakry.

161. The Tribunal notes Guinea's explanation that the citation of Saint Vincent and the Grenadines in the schedule of summons did not have any legal significance under the law of Guinea. Moreover, the schedule of summons did not feature in the judicial proceedings against the Master and there is no evidence that it was served on any officials of Saint Vincent and the Grenadines.

162. While the Tribunal considers that the naming of Saint Vincent and the Grenadines in connection with the criminal proceedings against the Master of the *Saiga* was inappropriate, it does not find that this action by itself constitutes a violation of any right of Saint Vincent and the Grenadines under international law.

### **Compliance with the Judgment of 4 December 1997**

163. Saint Vincent and the Grenadines requests the Tribunal to find that Guinea violated articles 292, paragraph 4, and 296 of the Convention by failing to release the *Saiga* promptly after the posting of the security, in the form of a bank guarantee, in compliance with the Judgment of the Tribunal of 4 December 1997.

164. It is common ground between the parties that the bank guarantee was communicated to the Agent of Guinea on 10 December 1997, six days after the delivery of the Judgment of the Tribunal on 4 December 1997. It is also not contested that the *Saiga* was not able to leave Conakry until 28 February 1998. There was, therefore, a delay of at least 80 days between the date on which the bank guarantee was communicated by Saint Vincent and the Grenadines to Guinea and the release of the ship and its crew.

165. The Tribunal notes that the ship was released on 28 February 1998. The release was expressly stated in the Deed of Release to be in execution of the Judgment of 4 December 1997. A release of the ship 80 days after the posting of the bond cannot be considered as a prompt release. However, a number of factors contributed to the delay in releasing the ship and not all of them can be said to be due to the fault of Guinea. Therefore, the Tribunal does not find that, in the circumstances of this case, Guinea failed to comply with the Judgment of 4 December 1997.

166. Accordingly, the Tribunal does not find that Guinea failed to comply with articles 292, paragraph 4, and 296 of the Convention.

### **Reparation**

167. Saint Vincent and the Grenadines requests the Tribunal to declare that Guinea is liable, under article 111, paragraph 8, of the Convention and under international law which applies by virtue of article 304 of the Convention, for damages for violation of its rights under the Convention.

168. Saint Vincent and the Grenadines claims compensation for material damage in respect of natural and juridical persons. Compensation is claimed in respect of damage to the ship, financial losses of the shipowners, the operators of the *Saiga*, the owners of the cargo, and the Master, members of the crew and other persons on board the ship. Compensation is also claimed in respect of loss of liberty and personal injuries, including pain

and suffering. Saint Vincent and the Grenadines requests that interest be given at the rate of 8% on the damages awarded for material damage.

169. Article 111, paragraph 8, of the 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.

Reparation may also be due under international law as provided for in article 304 of the Convention, which provides:

The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

170. It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No.13, 1928, P.C.I.J., Series A, No. 17, p. 47*).

171. Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination" (article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.

172. In the view of the Tribunal, Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation. Damage or other loss suffered by the *Saiga* and all persons involved or interested in its operation comprises injury to

persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit.

173. The Tribunal considers it generally fair and reasonable that interest is paid in respect of monetary losses, property damage and other economic losses. However, it is not necessary to apply a uniform rate of interest in all instances. In the present case, the Tribunal has set an interest rate of 6% in respect of award of compensation. In determining this rate, account has been taken, *inter alia*, of commercial conditions prevailing in the countries where the expenses were incurred or the principal operations of the party being compensated are located. A higher rate of 8% is adopted in respect of the value of the gas oil to include loss of profit. A lower rate of interest of 3% is adopted for compensation for detention and for injury, pain and suffering, disability and psychological damage, payable from three months after the date of the Judgment.

174. With regard to the amounts of compensation to be awarded, Saint Vincent and the Grenadines has submitted substantial documentation. Guinea challenges the validity of some claims and the reasonableness of the amounts presented. It also questions the evidence submitted in respect of some of the claims.

175. After a careful scrutiny of invoices and other documents submitted, the Tribunal decides to award compensation in the total amount of US\$ 2,123,357 (United States Dollars Two Million One Hundred and Twenty-Three Thousand Three Hundred and Fifty-Seven) with interest, as indicated below:

- (a) Damage to the *Saiga*, including costs of repairs, in the sum of US\$ 202,764; with interest at the rate of 6%, payable from 31 March 1998;
- (b) Loss with respect to charter hire of the *Saiga*, in the sum of US\$ 650,250; with interest at the rate of 6%, payable from 1 January 1998;
- (c) Costs related to the detention of the *Saiga* in Conakry, in the sum of US\$ 256,892; with interest at the rate of 6%, payable from 1 January 1998;
- (d) Value of 4,941.322 metric tons of gas oil discharged in Conakry, in the sum of US\$ 875,256; with interest at the rate of 8%, payable from 28 October 1997;

- (e) Detention of Captain Orlov, the Master, in the sum of US\$ 17,750; with interest at the rate of 3%, payable from 1 October 1999;
- (f) Detention of members of the crew and other persons on board the *Saiga*, in the sum of US\$ 76,000, computed as specified in the Annex; with interest at the rate of 3%, payable from 1 October 1999;
- (g) Medical expenses of Second Officer Klyuyev, in the sum of US\$ 3,130; with interest at the rate of 6%, payable from 1 January 1998;
- (h) Medical expenses of Mr. Djibril Niasse, in the sum of US\$ 6,315; with interest at the rate of 6%, payable from 1 January 1998;
- (i) Injury, pain and suffering of Second Officer Klyuyev, in the sum of US\$ 10,000; with interest at the rate of 3%, payable from 1 October 1999;
- (j) Injury, pain, suffering, disability and psychological damage of Mr. Djibril Niasse, in the sum of US\$ 25,000; with interest at the rate of 3%, payable from 1 October 1999.

176. With regard to the claims of Saint Vincent and the Grenadines for compensation for violation of its rights in respect of ships flying its flag, the Tribunal has declared in paragraphs 136 and 159 that Guinea acted wrongfully and violated the rights of Saint Vincent and the Grenadines in arresting the *Saiga* in the circumstances of this case and in using excessive force. The Tribunal considers that these declarations constitute adequate reparation.

177. Saint Vincent and the Grenadines requests the Tribunal to award compensation for the loss of registration revenue resulting from the illegal arrest of the *Saiga* by Guinea, and for the expenses resulting from the time lost by its officials in dealing with the arrest and detention of the ship and its crew. The Tribunal notes that no evidence has been produced by Saint Vincent and the Grenadines that the arrest of the *Saiga* caused a decrease in registration activity under its flag, with resulting loss of revenue. The Tribunal considers that any expenses incurred by Saint Vincent and the Grenadines in respect of its officials must be borne by it as having been incurred in the normal functions of a flag State. For these reasons, the Tribunal does not accede to these requests for compensation made by Saint Vincent and the Grenadines.

## Financial security

178. The submissions of the parties raise the question of action to be taken in respect of the security provided by Saint Vincent and the Grenadines as the condition for the release of the *Saiga* and her crew, pursuant to the Judgment of the Tribunal of 4 December 1997. In its Reply, Saint Vincent and the Grenadines requests that Guinea be ordered to "repay to St. Vincent and the Grenadines the sum realized on the sale of the cargo of the M.V. *Saiga*". In its submissions in the Memorial and Reply, Saint Vincent and the Grenadines requested that the bank guarantee it had provided to Guinea as part of the security ordered by the Tribunal be returned.

179. When it ordered Guinea to release the *Saiga* and its crew from detention in its Judgment of 4 December 1997, the Tribunal stated that the release should be "upon the posting of a reasonable bond or security". The Judgment further ordered 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". Thus, the gas oil discharged from the *Saiga* and the bank guarantee provided by Saint Vincent and the Grenadines were two elements of the "reasonable bond or other financial security" that Saint Vincent and the Grenadines was to provide for the release of the ship and its crew, as required by article 292, paragraph 4, of the Convention.

180. The Tribunal must emphasize that the M/V "SAIGA" (No. 2) case is distinct from the prompt release proceedings and that the Judgment of 4 December 1997 is not in issue in the present case. However, Saint Vincent and the Grenadines has identified the security provided by it as one of the losses for which it seeks reparation. The Tribunal has awarded damages for the part of the loss which is due to the discharge of the gas oil in Conakry. It deems it necessary also to take appropriate action with respect to the bank guarantee. The Tribunal considers that the bank guarantee provided by Saint Vincent and the Grenadines as part of the security is to be treated as no longer effective. Accordingly, the relevant document should be returned by Guinea forthwith to Saint Vincent and the Grenadines.

## Costs

181. In the 1998 Agreement, the parties agreed that the 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 written pleadings and final submissions, each party has requested the Tribunal to award legal and other costs to it. In addition, in its final submissions in the proceedings on the Request for provisional measures, Guinea requested the Tribunal to award costs to it in respect of those proceedings.

182. The rule in respect of costs in proceedings before the Tribunal, as set out in article 34 of its Statute, is that each party shall bear its own costs, unless the Tribunal decides otherwise. In the present case, the Tribunal sees no need to depart from the general rule that each party shall bear its own costs. Accordingly, with respect to both phases of the present proceedings, it decides that each party shall bear its own costs.

## Operative provisions

183. For the above reasons, the Tribunal

(1) Unanimously,

*Finds* that it has jurisdiction over the dispute.

(2) Unanimously,

*Finds* that Guinea is not debarred from raising objections to the admissibility of the claims of Saint Vincent and the Grenadines.

(3) By 18 votes to 2,

*Rejects* the objection to the admissibility of the claims of Saint Vincent and the Grenadines based on Guinea's contention that the *Saiga* was not registered in Saint Vincent and the Grenadines at the time of its arrest;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(4) By 18 votes to 2,

*Rejects* the objection to the admissibility of the claims of Saint Vincent and the Grenadines based on Guinea's contention that there was no genuine link between Saint Vincent and the Grenadines and the *Saiga* at the time of its arrest;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(5) By 18 votes to 2,

*Rejects* the objection to the admissibility of certain of the claims of Saint Vincent and the Grenadines based on Guinea's contention that local remedies were not exhausted;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(6) By 18 votes to 2,

*Rejects* the objection to the admissibility of certain of the claims of Saint Vincent and the Grenadines based on Guinea's contention that the persons in respect of whom Saint Vincent and the Grenadines brought the claims were not its nationals;



IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(7) By 18 votes to 2,

*Decides* that Guinea violated the rights of Saint Vincent and the Grenadines under the Convention in arresting the *Saiga*, and in detaining the *Saiga* and members of its crew, in prosecuting and convicting its Master and in seizing the *Saiga* and confiscating its cargo;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(8) By 18 votes to 2,

*Decides* that in arresting the *Saiga* Guinea acted in contravention of the provisions of the Convention on the exercise of the right of hot pursuit and thereby violated the rights of Saint Vincent and the Grenadines;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(9) By 18 votes to 2,

*Decides* that while stopping and arresting the *Saiga* Guinea used excessive force contrary to international law and thereby violated the rights of Saint Vincent and the Grenadines;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(10) By 18 votes to 2,

*Rejects* the claim by Saint Vincent and the Grenadines that Guinea violated its rights under international law by naming it as civilly responsible to be summoned in a schedule of summons;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(11) By 17 votes to 3,

*Rejects* the claim by Saint Vincent and the Grenadines that Guinea violated its rights under the Convention by failing to release promptly the *Saiga* and members of its crew in compliance with the Judgment of the Tribunal of 4 December 1997;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* VUKAS, WARIOBA, NDIAYE.

(12) By 18 votes to 2,

*Decides* that Guinea shall pay compensation to Saint Vincent and the Grenadines in the sum of US\$ 2,123,357 (United States Dollars Two Million One Hundred and Twenty-Three Thousand Three Hundred and Fifty-Seven) with interest, as indicated in paragraph 175;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *Judges* WARIOBA, NDIAYE.

(13) By 13 votes to 7,

*Decides* that each party shall bear its own costs;

IN FAVOUR: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, MAROTTA RANGEL, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, Warioba, LAING, MARSIT, Ndiaye;

AGAINST: *Judges* CAMINOS, YANKOV, AKL, ANDERSON, VUKAS, TREVES, EIRIKSSON.

**ANNEX**  
**(Paragraph 175 (f))**

Name	Crew members/ other persons	Amount of Compensation in US\$
Klyuyev, Sergey	Crew member	1,700
Bilonozhko, Mykola	Crew member	3,300
Bobrovnik, Oleksandr	Crew member	3,300
Gaponenko, Oleksandr	Crew member	3,300
Ivanov, Oleksandr	Crew member	3,300
Komanych, Yevgeniy	Crew member	3,300
Krivenko, Vadim	Crew member	3,300
Kutovy, Volodymyr	Crew member	3,300
Lashchyonyk, Yevhen	Crew member	3,300
Lymar, Volodymyr	Crew member	3,300
Maslov, Sergiy	Crew member	3,300
Nezdiyminoha, Vyacheslav	Crew member	3,300
Popov, Nikolay	Crew member	3,300
Shevchenko, Volodymyr	Crew member	3,300
Soltys, Vasyl	Crew member	3,300
Stanislavsky, Denys	Crew member	3,300
Svintsov, Yevegeniy	Crew member	3,300
Tatun, Sergiy	Crew member	3,300
Vadym, Baranov	Crew member	3,300
Volynets, Konstantin	Crew member	3,300
Vyshnevsky, Oleksandr	Crew member	3,300
Fall, Lat Soukabe	Painter	3,300
Niasse, Djibril	Painter	1,700
Sene, Abdulaye	Painter	3,300
	<b>Total</b>	<b>76,000</b>

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

(*Signed*) Thomas A. MENSAH,  
President.

(*Signed*) Gritakumar E. CHITTY,  
Registrar.

*Judges* CAMINOS, YANKOV, AKL, ANDERSON, VUKAS, TREVES and EIRIKSSON, availing themselves of the right conferred on them by article 125, paragraph 2, of the Rules of the Tribunal, append their joint declaration to the Judgment of the Tribunal.

(Initialled) H.C.  
 (Initialled) A.Y.  
 (Initialled) J.A.  
 (Initialled) D.H.A.  
 (Initialled) B.V.  
 (Initialled) T.T.  
 (Initialled) G.E.

*President* MENSAH, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) T.A.M.

*Vice-President* WOLFRUM, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) R.W.

*Judge* ZHAO, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) L.Z.

*Judge* NELSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) L.D.M.N.

*Judge* CHANDRASEKHARA RAO, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(Initialled) P.C.R.

*Judge ANDERSON*, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*Initialled*) D.H.A.

*Judge VUKAS*, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*Initialled*) B.V.

*Judge LAING*, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*Initialled*) E.A.L.

*Judge WARIOBA*, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(*Initialled*) J.S.W.

*Judge NDIAYE*, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(*Initialled*) T.M.N.