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Public hearing

held on Thursday, 18 March 1999, at 2.00 p.m.,

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

President Thomas A. Mensah presiding

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

(Saint Vincent and the Grenadines v. Guinea)

Verbatim Record

Uncorrected
Non-corrigé

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

Saint Vincent and the Grenadines
represented by

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

as Agent;

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

as Deputy Agent and Counsel;

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

and

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

as Counsel and Advocates.

Guinea
represented by

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

as Agent and Counsel;

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

and

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

as Counsel.

THE PRESIDENT: As agreed, at this session we are going to hear the commencement of the submissions of Saint Vincent and the Grenadines. I take it, Mr Howe, that you are going to start for Saint Vincent and the Grenadines.

MR HOWE: I am, Mr President.

THE PRESIDENT: You may proceed.

MR HOWE: Mr President, Members of the Tribunal, today it is my pleasure to address you on two matters: the applicants' further submissions as to why it is not open to Guinea to challenge admissibility, and the delay in releasing the *M/V SAIGA*. I shall also comply with the request made by the Tribunal and Mr von Brevern to supply more information about the relevant insurance arrangements.

I start with the challenge to admissibility. In my speech on the first day of these hearings, I reminded the Tribunal that your jurisdiction in this case is based on the exchange of letters dated 20 February 1998, which I shall refer to as "the February 1998 Agreement". I explained how, objectively, it could be seen that Guinea had waived their rights to raise objections to the admissibility of the case. I pointed out that if Guinea relied on a special meaning to have been attributed to the word "merits" by the parties, the burden would be on Guinea to show that it was the common intention of the parties to give them that special meaning.

In his response on Thursday 11 March, Mr von Brevern stated that there was indeed such a common intention between the parties in February 1998. It followed from this that Guinea found my objective interpretation of the February 1998 Agreement to be "rather sly and unfair conduct consciously misinterpreting and ignoring what has been agreed upon in February last year." It is true that, unfortunately, I was not myself directly party to each and every one of the oral discussions which took place leading up to the conclusion of the February 1998 Agreement. Another counsel also acting for Saint Vincent and the Grenadines at that time also conducted a number of these discussions. However, I was more closely involved in those discussions than anybody else on the Vincentian side of this dispute at that time. For this reason, I am the person best qualified to comment on the common intention of the parties when concluding the February 1998 Agreement.

As Mr von Brevern has pointed out, earlier discussions concerning a proposal to transfer jurisdiction to this Tribunal were substantially recorded in writing for the first time in my fax of 29 January 1998. That fax makes it clear that for such an agreement to be acceptable to Saint Vincent and the Grenadines, it would have to include a number of provisions. The third such provision was that "the proceedings be limited to a single phase dealing with all aspects, including the merits and any jurisdictional issues that may arise." The reference to "any jurisdictional issues that may arise" was included because Guinea had raised a jurisdictional defence in their Statement of Response dated 30 January 1998. However, that jurisdictional defence had been raised in response to the fact that:

> "The Tribunal in its judgment in case number 1 of 4th December 1997 has qualified the dispute in question as one which concerns the interpretation or application of the provisions of the Convention with regard to fisheries."

Guinea had submitted at the application for the prompt release of the vessel that *The Saiga* had been guilty of Customs offences. Clearly if Guinea believed that *The Saiga* was guilty of Customs offences, we should not be too surprised that she should want to question the jurisdiction of this Tribunal in the event that you were to continue to categorise this matter in terms of a fisheries offence. That jurisdictional defence was clearly to be expected at that time.

Of course, it was also open to Guinea to raise other jurisdictional objections at that time. Had they done so, these would have been discussed. Depending on the outcome of such discussions, it may well have been that the February Agreement would have incorporated references to those objections as well. The reason that no such objections were included was because no such objections were ever raised.

The agent for Guinea says "the accuracy of the Guinean position is clearly illustrated by the fact that she put forward the objection concerning the non-exhaustion of local remedies during the hearings in the provisional measures proceedings on 24th February 1998. He points out, quite correctly, that "this was only four days after the conclusion of the 1998 Agreement – we concluded on 20th February and this was on the 24th – which is now claimed to exclude the raising of the objections." Why would Guinea seek to raise objections to admissibility on 24 February if indeed she had consciously intended to waive them only four days earlier?

Of course, it often happens that two parties conclude an agreement believing that they have a common intention only to find out at a later date that they did not in fact see eye to eye on all aspects. Courts in every jurisdiction are frequently asked to review such agreements in those circumstances to determine the respective rights and obligations of the parties notwithstanding their misunderstandings. But I do not believe that this is such a case. Indeed, I shall submit that in this case Guinea did consciously waive her right to raise objections of admissibility or, at best, was completely uninterested in preserving any such rights that she might have had at the time of concluding the February 1998 Agreement. To do this, it is necessary for us to seek to "go back in time" to the circumstances leading up to 20 February Agreement. I propose to do this in some detail and shall deal with the delays in the release of the vessel and the insurance position in the process.

With regard to the background, I do not propose to spend more than a brief moment discussing the earlier attack on the *ALPHA 1* in May 1996 because I know that this is not a matter before the Tribunal today. The position of Guinea with regard to that attack has always been and remains today unclear. Marc Vervaet has explained in paragraph 7 of his statement the ambiguous position adopted by Guinea in response to the investigations made after that attack. In paragraph 13 of their Rejoinder, Guinea – the first time that they addressed this issue in these proceedings – denied any involvement in the attack on the *ALPHA 1*. However, as recently as this Tuesday, 16 March, Professor Lagoni cited the attack on the *ALPHA 1* in support of the proposition that "there is sufficient documentary evidence that the master of *The Saiga* knew that offshore bunkering in the exclusive economic zone of Guinea was prohibited and that the Guinean authorities enforced this prohibition against foreign ships."

I attended the *ALPHA 1* in Dakar a few days after that attack and met with the master and crew members who had been shot at and left on board the burning vessel. As set out in

the statement of Marc Vervaet, the investigations conducted at that time included visiting Conakry and speaking with Guinean lawyers. The Guinean officials who were spoken to denied being involved in that attack. The Guinean lawyers who were spoken to could not identify any provisions of Guinean law that the *ALPHA 1* had been infringing. Most importantly for me, I advised my clients that they were not doing anything unlawful in accordance with the United Nations Convention on the Law of the Sea which Guinea had ratified. The Addax and Oryx Group's determination to continue with their bunkering operations off Guinea, albeit exercising additional caution in doing so, was made taking into account this advice.

Against that background, I turn to discuss the insurance position. The earlier attack on the *ALPHA 1* is material to the insurance position regarding *The Saiga* upon which the Tribunal has sought additional information and to which Mr von Brevern alluded in his closing speech on Tuesday. He said, "Guinea also submits that any payment by insurance companies should be taken into account, be it hull insurers or P&I clubs"; I repeat, "be it hull insurers or P&I clubs."

The fact is that we live and operate in the real world. In the real world, insurance companies charge their clients premiums calculated on the basis that if a claim is to be paid in due course, the underwriter will be able to step into the shoes of the assured to seek to recover that claim from any party truly at fault. In England, the country in which most of the relevant insurance policies were taken out, the underwriter may proceed as if he were the assured, pursuant to his rights of subrogation. Any proceedings will continue to be taken in the name of the assured, and the underwriter may call upon the assured to give all reasonable assistance in the pursuit of such proceedings, for example, in the production of documents and the making available of witnesses of fact. It is for this reason that the insurance position of a party is not regarded as relevant to a claim for damages before the English Courts. I understand that the rules of legal procedure can be different in other jurisdictions. For example, in some jurisdictions a claim may be brought in the name of the underwriter after he has paid the claim. However, I would imagine that the general position is broadly similar, in that an underwriter may expect to be able to recover at least some of the sums paid to it from the other party in the same way that its assured would have been able to recover had that payment not been made.

Certainly that an assured should not do anything to prejudice the ability of the underwriter to recover all losses in due course. I remind the Tribunal that the premium earned by the underwriter has been calculated on this basis. I respectfully submit that it would be quite wrong for an underwriter to have to pay the claim of an assured and then be told that he could not recover sums pursuant to his rights of subrogation because the assured had not truly suffered a loss by virtue of the underwriters' own payment. I venture to suggest that, if this were the case, no underwriter would ever pay a claim again until after all conceivable litigation had been concluded.

But I digress. The fact is, as I have said above, that we live in the real world. In the real world underwriters do not pay claims until they have been properly investigated and the situation has been clarified. The Master of the *ALFA 1* Captain Dimitros Exarchos, came to Hamburg to offer his assistance to the Tribunal at the hearing of the application for the prompt release of the vessel in November 1997. He came willingly, together with a representative of the Owners, to explain precisely what had been done to him and his crew

and his vessel. My understanding is that at that time – and I simply do not know what has happened since – their underwriters had still not made any payment in respect of the damage to that vessel some 18 months earlier, or the loss of hire that they had suffered while the repairs had had to be effected. Their underwriters could not understand the reasons for the attack and so delayed making any payment.

Under vigorous cross-examination from Mr Von Brevern, Mr Stewart, on behalf of the owners of *The Saiga*, explained the position with regard to the dispute between the Owners and the Charterers. Mr Stewart confirmed that it is not yet finally decided whether the Owners will accept the behaviour of the Charterers in not paying hire for the period of the detention. Earlier today we lodged with the Court a small bundle of additional documents evidencing this dispute between the Owners and the Charterers and how this impacts on their respective insurance arrangements. I should explain that the bundle has been prepared chronologically. This has been done for ease of reference to demonstrate the nature of the ongoing discussions. These may be broadly summarised as follows.

Representative examples of the correspondence passing between representatives of the Owners and the Charterers appear at pages 1-2, 4-5, 19-25 and 30-38. This line of correspondence ended with the message from Seascot on 23 February 1998 which, amongst other things, commented on the situation in which the Master had been obliged to discharge the cargo. In that fax they also chose to comment on my previous message as follows, quoting from the fax: "In the words of England's most celebrated writer 'methinks he doth protest too much'". Frankly, I do not think that anybody who chooses to misquote Shakespeare in writing deserves a response. Suffice to say that, as Mr Stewart has confirmed this dispute may yet have to be resolved in arbitration.

As can be seen from pages 4-5, 20, 30-31 and 36-38 of this correspondence, Owners' P&I Club maintain that Charterers should pay the bulk of the losses. I understand that they have not made any payment to the Owners for this reason. Owners are also seeking to effect some sort of recovery in respect of the physical damage to the vessel from their war-risk underwriters. However, I also understand that, as of today, these underwriters have still not accepted that the loss falls within the policy terms. This was confirmed by Mr Stewart. Further proceedings are doubtless being contemplated in this regard.

Perhaps not surprisingly, the view of the Owners' P&I Club is not shared by the underwriters of Charterers or the cargo owners. As could be anticipated in the light of the fax from brokers Henrijean appearing at pages 26-28 Charterers' liability underwriters have taken the view that this matter does not come within their area of responsibility. Charterers can have no objection with this position until any liability to Owners has been established.

THE PRESIDENT: Mr Von Brevern, please.

MR VON BREVERN: Mr President, I wonder whether the document Mr Howe is referring to in the bundle of documents could perhaps also be made available to this side of the proceedings. I see that you Honourable Judges have something before you. We have not received anything, or is the idea that we should not get anything?

THE PRESIDENT: Thank you Mr Von Brevern. No, the bundle will be made available to you. It is not yet available to the Judges.

MR HOWE: I have a spare copy Mr President, which I will be happy to give Mr Von Brevern now.

THE PRESIDENT: Mr Von Brevern, are you speaking about the text of Mr Howe's statement, or the bundle which he is referring to?

MR VON BREVERN: No, I meant the bundle Mr Howe is referring to. He has been referring to page 1, 20 etc., and I could not follow, because I have not got it before me.

THE PRESIDENT: That bundle, I understand, has just been made available to the Tribunal. It is not available to the Judges, and in accordance with normal practice copies will be made available to you as soon as possible.

MR VON BREVERN: Just a remark. It is of course difficult for us to understand when the speaker refers to page 2, 3 or 4, which we do not have before us. Of course we would be in a better position to understand what is said if what is quoted or described in those pages. Thank you Mr President/

THE PRESIDENT: Thank you very much. I think perhaps a compromise could be, as Mr Howe has suggested, that he gives you a copy of the text he is reading, so that you can at least have the references correctly, so when you get the bundle you will be able to check them. That is, I take it, a copy of the statement. The bundle will be made available to you in due course. Thank you very much. Mr Howe, you may proceed.

MR HOWE: Thank you Mr President. I believe I had just finished discussing the position of the charterers' liability underwriters. I intend to discuss, which is perhaps of more interest, the position adopted by the cargo insurers at Lloyds with whom the assured deals through the brokers Lloyd Thompson . The cargo insurers' comment of 29 December 1997 was:

> "On their initial analysis of the information including the fact that the Guinean Tribunal have now ruled that the Assured were in breach of local customs regulation, Underwriters are not convinced that they would be liable in the event of a loss in these circumstances. Although underwriters do not wish in any way to pre-judge any issues in this very complex case, you will appreciate that they must, and hereby do, reserve all of their rights, and in particular with regard to any breach of any warranties in the policy."

I also invite the Tribunal in due course, when the bundle is to hand, to read these underwriters' further comments of 2 June 1998 appearing at pages 42-42. They say that they are not clear on the consequences of the findings of this Tribunal. Additionally they question whether or not the cargo has been lost as a result of the seizure. The implication from this is that further litigation may be necessary between the cargo owners and these underwriters whatever the Tribunal decides in the present case. If this Tribunal were to find that Guinea did act unlawfully, it is still possible that an English Court may subsequently hold that these underwriters are right that the cargo has not yet been lost as a result of the seizure. In this event the cargo owners will additionally have to commence further litigation to exhaust their tracing rights against the oil companies in Conakry, as was anticipated near the outset of this matter in a fax appearing at pages 6-17 of the bundle. This course of action they would have

to undertake before they would be able to recover any sums under the policy on the basis postulated by those underwriters.

In conclusion, as at today's date, we re not aware of any "hull insurers or P&I clubs" that have yet paid so much as a cent in respect of the physical losses or detention time suffered by the interests in *The Saiga* under the terms of any relevant policies of insurance. Indeed, the only insurance claim that has been accepted to date is in respect of the injuries to the crew which was covered by Owners' medical insurance. However, the payment made by those underwriters only represents a very small proportion of the expenses actually paid by the Owners due to the extent of the deductible. As I have outlined, it seems quite likely that there will have to be a good deal more litigation in domestic Courts before the position between the various interests in the vessel and their respective underwriters can be resolved.

I turn to discuss the detention of *The Saiga* and the delay in releasing the crew.

Over the last two weeks we have had the benefit of seeing *The Saiga* matter from a full perspective for the first time. On Tuesday, Mr Camara explained to the Tribunal how Customs revenue represents one of the principal sources of income for the budget of Guinea, and how fraudulent activity with petrol, diesel and oil, puts a large part of this income for the Customs in danger. Under cover of a letter dated 12 March 1999 we were provided with a copy of the *Ordre de Mission* stating, as its object, and I give a loose translation, "locating and prevention of fraud at sea and on land". We have heard from Mr Bangoura and Lieutenant Sow how they undertook their actions against *The Saiga* in accordance with this mission. We have heard Mr Niasse, a very impressive witness, report how one of the first things that the detaining officers said to him was that "you Senegalese are crooks".

As we know, the vessel was detained on the morning of 28 October and brought into Conakry that evening. Unfortunately, upon its arrival at Conakry and only a few days later Mr Vervaet was initially only able to communicate with the Master by making hand signals to the vessel from the shore. As he told you when giving evidence at the *Prompt Release* hearing, the Guinean officials that they were able to speak to, and I quote from his evidence, "quite simply said that we were smugglers engaged in contraband activities and that they had all the evidence but they did not want to give us any of it". Representatives of the Governments of Saint Vincent and the Grenadines and the Ukraine, as well as representatives of the owners, charterers, cargo owners and crew, had similar difficulties in making contact with the vessel and her crew or the Guinean officials responsible for the arrest.

It was in these circumstances that Saint Vincent and the Grenadines determined to make an application for the *Prompt Release* of the vessel by an application filed on 13 November 1997. That application appeared entirely appropriate at that time in view of the urgency of the situation and the very limited information being received about the reasons for the detention. That same day, but after the filing of that application, the Customs *procès-verbal* was made available. The *procès-verbal* talked of Customs offences but, by reference to provisions of Guinean law did not, at least to representatives of Saint Vincent and the Grenadines, appear even on their face to be applicable to the detention of *The Saiga*. The application for *Prompt Release* was accordingly maintained.

As you know, the hearing took place over 27 and 18 November 1997. Guinea throughout maintained their position that *M/V SAIGA* was guilty of Customs offences. I have

counted from the verbatim records that the representatives of Guinea used the expression "smugglers" in relation to the bunkering activities on no less than 16 occasions over the course of that hearing.

I need hardly remind the Tribunal that, by your judgment of 4 December 1997, you unanimously found that the Tribunal had jurisdiction under article 192 of the Convention. You further found that the application was admissible and ordered that Guinea shall promptly release the *M/V SAIGA* and its crew from detention and that the release shall be upon the posting of a reasonable bond or security. You further decided that the security shall consist of: (1) the amount of gasoil discharged from the *M/V SAIGA;* and (2) the 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. The guidance that we were given as to the form of the bond comes from article 113 (91) of the Rules of the Tribunal. This provision talks of the "posting of a reasonable bond".

The subsequent correspondence concerning the bond appears at tab 38 of the Annex to the Memorial. As you know, a bond was initially issued on 19 December 1997 and a copy faxed to the Agent of Guinea that same day. The contemporaneous notes of my telephone conversations with the Agent of Guinea on the following day and the day after appear at tab 14 of the Annexes to the Reply. I spoke with the Agent of Guinea on the morning of 11 December before seeing a fax that he had sent to me that morning. We agreed that I could overcome a number of concerns that they had by procuring a further fax to be sent directly to him by Crédit Suisse in agreed terms, including attaching a translation of the bond. That was done in accordance with our agreement. I do not suggest that in doing this the Agent of Guinea agreed that Guinea would be irrevocably bound to accept the bond and would immediately release the vessel. It was made clear that he would need to speak to somebody in Guinea before this could happen. However, I do suggest that, in the light of our agreement, it was clear that the Agent of Guinea himself considered that the bond was "reasonable" in the form in which it had been provided with his ambiguities clarified by the subsequent fax from Crédit Suisse. In these circumstances, and absent a clear mistake on the part of the Agent of Guinea, which is not evidence in this case, it is difficult to see how it can be open to Guinea to suggest that the bond was not "reasonable" in this form on 11 December 1997. Such a suggestion would be contrary to the advice of the professional advisers that they have retained to advise on precisely such issues.

But Guinea did not release the vessel. Instead, the very next day on 12 December they issued the citation. The cedule to that citation cited the Master as the person charged and Saint Vincent and the Grenadines as a party to be civilly liable. The judgement of the Court of First Instance was given in Conakry only five days later on 12 December. This found the Master guilty of Customs offences. As you know, Mr President, at this time Saint Vincent and the Grenadines were contemplating making an application for interpretation of your judgment of 4 December 1997 under article 126 of the Regulations when it transpired that an application for Provisional Measures might be more expeditious

In these circumstances, and to protect the Master from imprisonment, an appeal was lodged with the Court of Appeal in Conakry. Judgment was again fast and the judgement of the Court of Appeal in Conakry was handed down on 3 February 1998, confirming that the Master was guilty of Customs offence.

Moreover, over this period Guinea continued to take steps against the other vessels for breaches of its Customs laws. You have seen in the statement of Marc Vervaet, appearing at Annex 10 to the Memorial, that at least two fishing trawlers were attacked in the months after *The Saiga* had been detained but before 12 February: the *POSSEIDON* and the *XIFIAS*.

The Agent of Guinea now tries to suggest that the delay in releasing the vessel over this period was largely due to communication difficulties he experienced in sending faxes to Guinea, but there is a wealth of evidence that Guinea knew precisely what had happened at this stage with regard to the bond. Captain Merenyi was clear in his evidence that the authorities in Guinea with whom he was talking "wanted to make us understand that everything was legal". He also said: "They considered the $400,000 as not a bond but a cash payment".

At the hearing of the application for Provisional Measures the Agent of Guinea advised the Tribunal that the Minister of Economy and Finance of Guinea had "advised the release of the vessel immediately if US$400,000 under the guarantee were paid by Crédit Suisse. So far as Guinea was concerned, *M/V SAIGA* had been found guilty of Customs offences and was now obliged to pay the appropriate fine of US$400,000 in accordance with your ruling.

At The hearing of the application for Provisional Measures, Counsel for Saint Vincent and the Grenadines suggested that by categorising this matter as one relating to fisheries in the Prompt Release judgement, this Tribunal had "offered Guinea a perch on which to develop an argument". However, "rather than seize that perch, it chose too ignore the views of the majority and persist with its claims to be entitled to enforce Customs and criminal laws". Why was that? Mr President, Members of the Tribunal, I have tried, with the benefit Of the more complete information that we now have, to demonstrate why it was so clear at the beginning of the hearing on the application for Provisional Measures on 23 February 1998 that Guinea genuinely considered that they had acted lawfully in detaining *The Saiga*. This is what they had maintained steadfastly since the vessel had first been detained back in October 1997. At no stage up until that time in February did Guinea seek to change their position one iota from that which they had maintained from the outset. Their conviction in the position that they had undertaken stood as firm, if I may say SO, as the rock of Alcatraz.

That explains why the desire to preserve arguments questioning the admissibility of the claims of Saint Vincent and the Grenadines was not important to Guinea at any time prior to 20 February when they concluded the February Agreement. Mr President, Members of the Tribunal, this Tribunal is an extremely public forum. Our proceedings have been monitored on video tapes; our words are published every evening to the world at large on the Internet. Guinea did not agree to transfer jurisdiction to this Tribunal under the watch of the whole world in the knowledge that she had done wrong and with the hope that she might be able to get away with this because of some legal technicality – of course not. She, like Saint Vincent and the Grenadines, was absolutely convinced at that stage of the correctness of her acts. Here was an opportunity to prove this to the world, to collect the US$400,000 due to her, but perhaps even importantly to show what happens to smugglers operating off Guinea to help stamp out fraud offshore and inland.

I indicated before that I would seek to explain why it was that Guinea sought to raise objections to admissibility on 24 February when she had intended to waive them only four

days earlier. As you know, this was not *any* four days. The hearing of the application for Provisional Measures commenced on Monday 23 February and concluded the following day. A lot of work was done in respect of that application by both sides. Captain Orlov indicated to this Tribunal how the Saint Vincent and the Grenadines team was up until at least four o'clock in the morning of Monday 8 March preparing this application before you. I know that the Guinean side have been working equally as hard, and so it was on the application for Provisional Measures. I well remember burning the midnight oil on that occasion to make our case, and so, I have no doubt, did Guinea.

What is remarkable is that in the whole of their answering submissions – in two rounds of written pleadings and in the first round of oral pleadings taking place on the afternoon of Monday 23 February – there was not one single mention of any of the three technical objections to admissibility Guinea now seeks to raise. It is true that they developed their arguments that this Tribunal lacked jurisdiction in view of your earlier categorisation of this matter as a fisheries matter, but that was made by way of a defence to the immediate application being made for Provisional Measures. There is no doubt that they wished the subsequent substantive hearing to concentrate on the Customs offences alleged to have been committed by *The Saiga* as, indeed, was to be expected. That was their case.

What changed? I venture to suggest that during the course of those four days it became apparent to the Guinean side, as it did to the Tribunal, that *The Saiga* had not been engaged in any form of smuggling or other illegal activity. On the contrary, it was clear that she had done nothing contrary to Guinean law. Four further days after the hearing, on 28 February 1998, Guinea released *The Saiga* without having received payment under the bond following nearly four months of detention. Only a few days later, on 11 March 1998, this Tribunal prescribed the most important of the Provisional Measures sought, and did so unanimously. Moreover, the National Director of Customs in Guinea has since acknowledged that there is, "a current loophole in the area of the refuelling of boats" in the Customs legislation of Guinea.

Maître Thiam will shortly address you on whether or not the proposed draft decree overcomes the problems identified, but it is sufficient for my purposes to note that Guinea accepted the fact that there is a loophole.

It is against the background described above that the agent of Guinea first raised the failure of Saint Vincent and the Grenadines to exhaust legal remedies in Guinea as a further defence to the application for Provisional Measures. He did that in his closing submissions on the afternoon of 24 February. It was correctly pointed out that he could not then raise this matter for the first time after not having mentioned it at all in two rounds of written proceedings and the first round of oral arguments. That was an end to the point. It could equally have been said that this was contrary to the February Agreement, but this would have involved a more detailed examination of the February Agreement which would have been neither appropriate nor necessary at that stage.

Mr President, Members of the Tribunal, there was no "special agreement" between the parties at the time of concluding the February Agreement, whether to preserve Guinea's rights to raise objections of admissibility or otherwise. Indeed, I can state quite categorically that the intention of Saint Vincent and the Grenadines at least was quite the contrary: we did not wish to be burdened with the additional work and costs of arguing questions of

admissibility. The interpretation of the agreement that I have put forward is neither sly nor unfair conduct. It is exactly how it happened between the parties.

Finally in this regard I would remind you of the submissions I have already made concerning the fact that Guinea is out of time to make this application. I do not propose to repeat those submissions here.

Mr President, Members of the Tribunal, that completes my submissions before you today and, in all likelihood, for ever in *The Saiga* saga. It has been my great pleasure to appear before you in all three hearings in this matter together with my colleague, and now good friend, Maître Thiam, and Mr von Brevern, for whom I have developed the utmost respect. I have also greatly enjoyed working with Dr Plender and Professor Lagoni and learnt a great deal from both of them. Who knows whether or not I shall ever have the honour to appear before this esteemed body again? In some ways I hope so, but in others I hope not. Certainly, I hope that with your judgment in this matter, you can help to prevent further attacks being made along the lines of the one made upon *The Saiga*, so that such an incident never arises again. I thank you once again for your indulgence throughout these hearings.

THE PRESIDENT: Thank you, Mr Howe. Thank you also for your kind words. Dr Plender?

DR PLENDER: Mr President, Members of the Tribunal, in case the Tribunal should judge it appropriate to consider Guinea's objections to admissibility, despite the agreement reached on 20 February and notwithstanding the late stage at which those objections were raised, Saint Vincent and the Grenadines will submit that those objections have no substance; they should be dismissed.

The first objection to admissibility is based on the certificate of registration. Guinea contends that *The Saiga* was not validly registered on 28 October 1998 because the provisional certificate had expired during the preceding month.

The agent for Guinea does not conceal his enthusiasm for the point. On the afternoon of Thursday 11 March he told the Tribunal that once he had drawn attention to the so-called "problem", the Claimant State, "seemed to realise that there might be a really serious issue" and "took the problem seriously" (p.10, lines 1-6 and p.12, lines 25-30 of the transcript).

Since the agent for Guinea has told the Tribunal that we appear very much impressed by his point, I hope that I shall be acquitted of discourtesy if I respond. It is incorrect. The submissions made by the Respondent State on the basis of Vincentian law would be dismissed without hesitation by the Vincentian Court.

Just as a person does not become stateless when his passport expires, so a vessel does not cease to remain on the Vincentian register when the provisional certificate expires. A provisional certificate, like a passport, is evidence of a national status. It is not the source of that status.

The position under Vincentian law is very simple. It is governed by Section 36(2) of the Merchant Shipping Act 1982 (tab 6 of the Annexes to our Reply) which reads as follows:

"The provisional certificate of registration issued under subsection (1) shall have the same effect as an ordinary certificate of registration until the expiry of one year from the date of its issue".

I emphasise the mandatory words that it shall have the same effect for one year.

The effect of a provisional certificate of registration can be shortened in one case only. By Section 37, registration ceases at the end of 60 days if the Applicant fails to provide, during that time, sufficient evidence that the vessel has been removed from its former register and has been duly marked. In the case of *The Saiga*, that evidence was supplied within the 60 day period so the vessel did not cease to be registered. The effect of a provisional certificate was the same as that of an ordinary certificate until the expiry of one year; that is, until 11 March of the following year.

Within the first year of a vessel's registration, an applicant must supply to the Vincentian authorities evidence of several matters. They are all set out in section 36(3) of the 1982 Act. The evidence covers not only such matters as the seaworthiness of the vessel, but also proof of payment of the "*annual fee for one year in respect of the ship.*" I repeat: "annual fee for one year". Obviously, the time taken to satisfy the Vincentian authorities of these matters varies from case to case. That is why provision is made for the issuance of two successive certificates, each of six months. If the applicant satisfies the Vincentian authorities of all the statutory matters within the first six months, the provisional certificate is replaced by an ordinary one. If the paperwork has not been completed within the first six months, another provisional certificate can be issued. It is replaced by an ordinary certificate once the Vincentian authorities have been satisfied of all the matters set out in section 36(3).

To a common lawyer, at least, this is obvious from the text of the statute. To a native speaker of the English language, at least, it appears with equal clarity from the brochure appended at Annex 5 to the Memorial. This provides that registration is governed by the Act of 1982; that the issuance of a provisional registration certificate is contingent on payment of "*registration and annual fees"*; and that a provisional certificate is issued for six months and can be extended for a further six months.

Not only is this clear from the statute and from the brochure; it is also consistent with the practice of many other States. There were appended to my speech, and will no doubt be copied and supplied to each of your Lordships in due course, extracts from the third edition of *Ship Registration* by NP Ready. This describes the procedures for registration in a variety of jurisdictions. You will find extracts from the sections dealing with The Bahamas, Barbados, Cyprus, Malta and Panama, as well as Saint Vincent and the Grenadines. In all these cases, initial registration is provisional; the period is commonly six months; the period can be extended; during the period of provisional registration period, the applicant is required to satisfy the authorities of the flag State of certain statutory matters; and once this is done, the provisional certificate becomes definitive or is replaced by a definitive certificate. One searches the book in vain to find a single case of any jurisdiction in which a vessel becomes stateless in the interval between the expiry of the provisional certificate and the issuance of a new certificate.

Moreover, the Tribunal has heard evidence that the Vincentian law on the subject is well understood and known by those whose business it is to register vessels on the Vincentian registry. Allan Stewart gave evidence that he had experience of registering numerous vessels on the Vincentian registry, not only *The Saiga*. On the afternoon of Wednesday 10 March he stated (p 23 of the transcript, beginning at line 43):

> "Usually the initial, provisional registry document is issued for six months. You can get another extension for six months if the ship happens to be in a place and you cannot finally get all the bits and pieces together within the six months for permanent registration, or issuance of a permanent registration document, as they call it, because obviously, once you fill in the application form and the ship is accepted for registry, it remains on the register until or unless it is deleted for some reason or other…"

His understanding of the procedure, which is correct and consistent with that of other jurisdictions, is also consistent with the letter dated 1 March 1999 from the Deputy Commissioner for Maritime Affairs. She states:

> "In my experience it is very common for owners to allow the validity period of the provisional certificate to lapse for a short period before obtaining either a further provisional certificate or a permanent certificate (as was the case here)".

At paragraph 17 of the Rejoinder, the Republic of Guinea observed that "an inspection of the ship registry of Saint Vincent and the Grenadines would eliminate any doubt that the *M/V SAIGA* was not registered on 28 October 1997." It was presumably in the light of that comment that the President invited us to produce, at a meeting on 2 March this year, the appropriate extract from the register. That was done. In complying with the Guinean comment and the President's suggestion, we failed to satisfy the Guinean agent. In his speech of 11 March (at page 12) he complained that the extract had been produced "only very shortly" and declared that the production of this material was evidence that "Saint Vincent and the Grenadines [realized] that they might still be in a grave problem."

For convenience, I have asked that a further copy of the extract from the register should be appended to the copy of my speech delivered to your Lordships. As you have seen and will conveniently see again, the Vincentian register is not an old-fashioned handwritten log but a computerised database. On 15 April 1997, a copy of the relevant extract was printed from the registry book. You will see the date in the top left-hand corner. This shows that on that date the vessel had been granted provisional registration, valid until 12 September 1997. That is exactly what one would expect. On 15 April 1997, it was impossible to predict whether the necessary formalities would have been completed before 12 September. If the formalities had been completed within that period, registration would have become permanent within the first six months. Section 36(2) of the 1982 Act would not have come into play. In the event, the formalities were not completed within the six month period, so section 36(2) did come into play. In accordance with that sub-section, the provisional certificate continued to have the same effect as an ordinary certificate for one year, measured from 12 March 1997.

The agent for Guinea invites you to conclude that on 13 September 1997 the registration had expired and the vessel had become stateless. That submission, as I have explained, ignores the effect of section 36(2) of the 1982 Act. It also ignores the extract from

the register dated 24 February 1999, a copy of which was also supplied to the registry and should be distributed to each of your Lordships. This shows that *The Saiga* held a permanent certificate of registration *beginning on 12 March 1997*. This certificate, I suggest, is conclusive even if all the rest is not conclusive. If the provisional registration had expired on 13 September, it would obviously have been necessary to register the vessel again and a different date of registration would have appeared on the registration certificate. The permanent certificate confirms that the registration was effective from 12 March 1997 and continuously thereafter.

In the same context, the agent for Guinea declared himself to be " a little astonished that the Maltese deletion certificate was not exhibited" and "not happy" with the statement declaring that the owners had produced alternative evidence to show that the Maltese registration had been closed. Indeed, as we entered the Tribunal building today we received a letter asking us to elaborate on just this point. There is no cause for astonishment nor for unhappiness. Section 37(a) of the Merchant Shipping Act provides for the registration of a vessel where the applicant has produced *either* a certificate issued by the government of the last country of registration *or* "other acceptable evidence" to show that the registration had been closed. In the case of *M/V SAIGA*, it met the second of those conditions. Since there has never been any suggestion that *The Saiga* remains on the Maltese register, we have judged it unnecessary to trouble the Tribunal with details of her history under a different name and a different flag years before the events which have given rise to this litigation. The Tribunal may judge that it has enough questions to answer in this case without enquiring into the history of a different named vessel under a different flag which was never the subject of any arrest.

I shall not labour further the question of the certificate of registration, for, although the agent of Guinea declares that he cannot understand our submission (page 10, line 46), we submit that Vincentian law is simple, clear, consistent with other States' practice and widely understood in the industry. Before leaving the subject, however, I should say something about the letter from the Commissioner for Maritime Affairs, Mr Dabinovic, dated 27 October 1997. This will be found at Annex 7 to our Reply. So far as relevant, it reads as follows:

> "I hereby confirm that the *M/V SAIGA* was registered under the Saint Vincent and the Grenadines flag on 12 March 1997 and is still validly registered".

Mr von Brevern commented on that letter on 11 March, at page 12 of the transcript. He suggested that the letter was silent about a gap in registration from 12 September 1997 to 28 November 1997. If that had been the case, the letter would certainly have been both misleading and improper. In the language used by Mr von Brevern elsewhere in his speech (page 5, lines 15-16) it would have been "sly and unfair conduct, consciously misinterpreting and ignoring" the relevant facts. We owe it to Mr Dabinovic to repudiate any such construction of his letter.

By irresistible implication, the letter states that *The Saiga* was registered on 28 October 1997. It is consistent with the words of the Merchant Shipping Act and with extracts from the register. It is confirmed in the letter written by his Deputy and daughter. It is consistent with the practice described by Mr Stewart, and it is correct.

The Respondent State's second objection to admissibility is based on Article 9(1) of the United Nations Convention . This provides that "There must exist a genuine link between the State and the ship". In my opening address, I proposed that if the Tribunal thought it right to deal with this objection at all, it should dispose of it on the basis of the evidence.

As is well known, the words "genuine link" owe their origin to the judgment of the International Court of Justice in the *Nottebohm Case (Second Phase)*. For convenience, I have had a copy supplied to the Court, though I have to add that this had to be from the International; Law Reports rather than the International Court of Justice Reports.

The Court there held that it was not open to Liechtenstein to espouse the claim of Mr Nottebohm against Guatemala, in the absence of a genuine link between that man and the principality. The Court pointed out that his actual connections with Liechtenstein were extremely tenuous. He had paid no more than a short visit to the principality, and in the Court's words:

> "the application confirms the transient character of this visit by its request that the naturalisation proceedings should be initiated and concluded without delay."

The Court added:

> "There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein and no manifestation of any intention whatsoever to transfer all or some of his interests and business activities to Liechtenstein."

In the case of *The Saiga*, by contrast, the links between the State and the vessel are far from transient; and there *is* evidence of economic activities exercised in the flag State. The ship is now, and at all material times has been, represented in St Vincent by a Vincentian company formed, managed and present on St Vincent. She is subject to the supervision of the Vincentian authorities to secure compliance with various Conventions to which Saint Vincent and the Grenadines are a party. Effective supervision of her seaworthiness is secured by regular inspections conducted by classification societies nominated by Saint Vincent and the Grenadines Preference is given to Vincentian nationals in respect of her manning. Saint Vincent and the Grenadines has been vigorous in attempting to secure her protection at the international level both before and through this litigation.

There is also supplied to the Tribunal with a copy of my speech an extract from the latest edition of *Oppenheim's International Law*, Volume I, p.732. At that point the eminent editors, Sir Robert Jennings and Sir Arthur Watts, give some indication of the meaning of the "genuine link" for the purposes of the United Nations Convention. After acknowledging that the point is not without difficulty, they use the following words, and I quote.

> "The 1982 Convention sets out the duties of the flag state such as maintaining a register, assuming jurisdiction under its internal law over its flag ships ,master, officers and crew in respect of administrative, technical and social matters relating to the ship, measures concerning construction and seaworthiness, manning, training and labour conditions, signals and communications, regular survey, appropriate qualifications, conversance with international regulations, reports and enquiries."

Each one of these links, without exception, is established between the Applicant State and *The Saiga*.

It is therefore unnecessary to enquire what the effects would be if these links were absent. Professor Lagoni invites the Tribunal to consider that question, nevertheless. There is, I believe, a German word, apt to describe this sort of legal speculation. It is *Professorenrecht.* I am content to consider what the law would be, on the hypothesis that a genuine link were absent in the present case; but I do so in the same spirit as that in which Meister Eckhart asked whether angels could fly if they did not have wings.

In his speech on 11 March at p.15 of the transcript, Professor Lagoni argued that if there had been no genuine link between the Applicant State and *The Saiga*, Guinea would not have been bound to recognise claims relating to the vessel, advanced by Saint Vincent and the Grenadines. I beg to differ.

The United Nations Convention does *not* deprive a flag State of competence to advance a claim in respect of a vessel, in the absence of a genuine link. On the contrary, in 1958 there was a proposal to insert such wording into the High Seas Convention. It was expressly rejected. In an earlier incarnation, Article 29 of the 1958 Convention provided that there must be a genuine link between the State and the ship, and continued with the following words:

"for the purpose of recognition of the national character of the ship by other States"

As Professor Brown points out in *The International Law of the Sea,* Vol. I, 1994 at 288, copy also supplied to the Tribunal

> "The formulation would have provided a basis for challenging the exclusive discretion of the State to grant its nationality and for refusing to recognise the nationality of a ship considered to lack a genuine link with the flag State. This proved too much for UNCLOS I and, in the end, the clause…was omitted."

This was, of course, well known to the International Law Commission and to the negotiators when the 1982 Convention came to be drafted. Neither the Commission nor the parties sought to reinstate the language omitted from the corresponding provision in 1958.

Some might perhaps regret that what had been proposed in 1958 did not mature into international law. Others, no doubt, would vigorously take the opposing view. This Tribunal can only interpret the Convention consistently with its object and purpose, taking account of the intentions of the parties. Such an interpretation will lead to the conclusion that the function of the "genuine link" is not to limit the opposability of international claims. It is to secure the effective discharge of the supervisory functions entrusted to flag States under the Convention, by ensuring that they do not place on their register vessels which they are unable to administer. So even if *The Saiga* had not been genuinely linked to Saint Vincent and the Grenadines, Guinea's objection to admissibility would not be further advanced.

Guinea's third objection to admissibility concerns alien seamen. Guinea has now abandoned her argument that the flag State cannot advance claims in respect of the ship owner and the cargo owner (transcript, p.17 line 11), and she has abandoned the argument

advanced in the Counter-Memorial (paragraphs 73-8) that a flag State is in principle unable to advance a claim in respect of alien crew. Instead, Guinea advances a narrower argument (p.16 line 12). Professor Lagoni submits that the rule whereby a flag State can advance claims in respect of alien crew does not apply in the case of "open register". I note in passing that no workable definition is given to distinguish between those registers which do not permit flag States to espouse claims of alien seamen, and those which do enable the flag States to do so. The proposition advanced by Professor Lagoni is not supported by any judicial authority or any academic writer, or any evidence of state practice. In the authorities that we have cited, there is much support for the proposition that a flag State may protect alien crew; but no suggestion that the rule is subject to an exception in the case of certain types of register.

Professor Lagoni builds his case on a question. He asks (p.16 line 45) "Why should foreign seamen be in a better position than foreign workers who live in the country?" The answer to that question has been given by international courts and tribunals many times. It is the same in the case of open registers (however these may be defined) as in the case of other registers. Indeed, it is the same as in the case of alien seamen and alien members of a State's armed forces. Foreign seamen, like foreign members of a State's armed forces, are subject to the discipline of the State under whose flag they serve. They are commonly subject to the flag State's criminal jurisdiction. This is the case, for example, under the law of Saint Vincent and the Grenadines as it is in the united Kingdom. They owe the State a duty of loyalty and can expect its protection in return. This is the *duplex ligamen* or double bond to which some writers refer.

There are also practical considerations. Diplomatic intercourse would be hugely complicated if seaman had to look for protection to his own State of nationality when questions arose about the treatment of a vessel. The same would be true of litigation before this Tribunal. On Professor Lagoni's thesis, the number of parties in proceedings before this Tribunal could be at least as great as the number of nationalities represented on board the vessel. That cannot be right.

Guinea's final objection to admissibility is the claim that the master failed to exhaust local remedies. He did not pursue his appeal to the Supreme Court. Instead, Saint Vincent and the Grenadines seized this Tribunal in prompt release proceedings. I anticipated that argument in my speech on 8 March. I then submitted that the rule requiring exhaustion of local remedies applies only when the alien has created a voluntary, conscious and deliberate connection between himself and the flag State whose actions are impugned. That was not the case with *The Saiga*.

As to the effectiveness of local remedies, we heard from Professor Lagoni that another member of the Guinean delegation will deal with that in due course. We shall, of course, listen to him with interest. At this stage I can only question whether a person who complains that a state has exercised within its exclusive economic zone powers which it does not enjoy under the United Nations Convention truly has an effective remedy where the effect of exercising it is to submit to the law of the state to which he maintains he is not subject, particularly where that law provides for the detention of the vessel and the payment of a bond, this detention to continue throughout the exhaustion of the proceedings.

On that aspect of the case, since it has yet, I understand, to be developed, I have simply attached to the text of my speech an extract form the book by A.A. Cancado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*.

It is, however, unnecessary for this Tribunal to decide this issue on the effectiveness of the remedy. Before any question of effectiveness of a remedy can arise, the Tribunal must first determine whether the Master was under an obligation to exercise any remedy, effective or otherwise. On that question, Professor Lagoni makes submissions that take the Tribunal to the heart of this case. He maintains that the necessary jurisdictional connection is established "in any case where the coastal State's sovereign rights in the exclusive economic zone are affected" (p 17-18). From this I infer that Professor Lagoni and I are *ad idem*, we are agreed. If the United Nations Convention conferred on coastal States the sovereign right to prohibit the bunkering of vessels within their exclusive economic zone for the purpose of raising revenue and if the coastal State made and proclaimed such a prohibition, a jurisdictional connection would be established between that State and the vessel where the vessel enters for the purpose of bunkering. Conversely, if the United Nations Convention did not confer such a right upon coastal States, and if the coastal States did not make and proclaim such a prohibition, no jurisdictional connection would be established.

It is our case that the Republic of Guinea has not made and proclaimed such a prohibition and that, even if she had done so, such a law could not be invoked in relation to the other States, since it would exceed the competence accorded to States by the United Nations Convention.

My learned friend Maître Thiam will now develop the first of those contentions, and I will then address the second.

THE PRESIDENT: Thank you, Dr Plender. In view of the arrangements that this session will last for three hours, I propose we break for 15 minutes and return at 3.50, at which point Maître Thiam will then continue the submission.

(The session was suspended from 1535 until 1550 hours)

MAITRE THIAM (Interpretation from French): Mr President, Members of the Tribunal, allow me, first of all, to address my remarks to Professor Lagoni.

Professor, I am going to quote you several times in my comments but, before doing so, I would like to impose somewhat on your sense of modesty.

Circumstances have led us to maintain opposite theories but I have had great pleasure in listening to you, and I have been able to appreciate, as has the Tribunal, your talents and qualities which command respect. Your students will be proud to be under your direction. No matter what decision the Tribunal takes, the Guinean State will be proud to have been defended by you. As for myself, I am gratified that this case has given me the opportunity to make your acquaintance. However, I must contradict you on several points of your submissions.

I am going now to address the Tribunal and to talk about the scope of the application of Guinean law in terms of national law.

Mr President, in talking of the law of hot pursuit, Professor Lagoni said: "As regards the violation of the relevant Guinean laws, may I invite your attention to the fact that *The Saiga* supplied the foreign fishing vessels *GUILERMO PRIMO, KRITTI* and *ELENI G* on the morning of 27 October 1997 at 10°25.3N 15°42.6W with fuel. This position is about 22.5 and 22.9 nautical miles off the Guinean Island of Alcatraz. Accordingly, it is within the Guinean contiguous zone, the Guinean exclusive economic zone and the Customs radius as well. It violated the prohibition of offshore bunkering within the Customs radius contained in the Guinean Customs laws. (P/V in French, p.14, lines 8-16).

In this declaration there are two assertions that deserve a response. The first is relative to the contiguous zone of the Island of Alcatraz. The second is relevant to Guinean Customs law.

I assure you that I do not see the need to dwell at length on the first affirmation relative to the contiguous zone of the Island of Alcatraz because in fact the Claimant State has already explained without being seriously contradicted that there could not be a contiguous zone for this island unless Guinea had filed the necessary instruments with the General Secretary of the United Nations. Moreover, it has also been noted that Guinea has already declared that the law of hot pursuit exercised against *The Saiga* was not based on the existence of a contiguous zone for the island in question (Counter-Memorial para. 37). Consequently, I will conclude on this question simply by remarking to the Tribunal that the hearings which have just taken place before the Tribunal have not permitted Guinea to bring in new evidence in relation to the claimed contiguous zone of the island in question.

Concerning the Guinean law applicable to *The Saiga* in the exclusive economic zone, Professor Lagoni said, and I quote him: "Domestic rules and regulations are facts which of course have to be presented by the parties." (Verbatim Report in French, p.12, P/V15, lines 19 and 20). I would agree with this affirmation of his. This is why, as in the case of the Tribunal, I expected Guinea to present the relevant laws passed by the Guinean legislator to be applied to the exclusive economic zone of Guinea. Knowing the weakness on this point of Guinean law presented to the Tribunal as fact, Professor Lagoni hastened to add: "measures of national authorities or decisions of domestic courts applying the domestic laws and regulations are not subject to legal scrutiny under the national law of one party before this Tribunal." In other words, the International Tribunal is not a Court of Appeal which reviews decisions of domestic courts in accordance with national law (Verbatim Report, p.9, lines 7 to 10).

It is indubitably true that your Tribunal is not an Appeal Tribunal for decisions of Guinean courts but that is not the question. The question is the following. It is up to Guinea to reinforce and to justify its theory before the Tribunal. It is up to Guinea to produce facts, its laws being considered as such as evidence. It cannot take as a basis decisions of its own courts to justify before the jurisdiction of the Tribunal the alleged relevance of these laws. In other words, it cannot claim that your Tribunal should be bound by consideration and interpretation of its laws by its own courts. It cannot impose on the international community a line unilaterally drawn up by itself for its frontiers in violation of international law. Neither can it impose upon you the decision of its courts taken in violation of international law.

In the interests of brevity, I will not return to case law practice of international courts -- you are quite aware of that -- but allow me, minor provincial Counsel, to call humbly upon the conscience of this young Tribunal and your jurisdiction.

Allow me to ask you whether, if Guinea had the possibility of imposing its laws on you - and especially the interpretation, which is manifestly erroneous and partisan - and if we did this, what would be the hopes of the international community which they have so justifiably placed in international jurisdictions like yourselves? In truth, it is up to you to judge the facts - in complete independence of the Guinean courts - whether the Guinean laws presented and invoked by Guinea during these proceedings have or have not been taken in the spirit of the Guinean legislator to be applied within the exclusive economic zone of Guinea.

During the hearings which have just been held in front of the Tribunal, Guinea has not produced any new evidence. Of course, one of its witnesses, M. Bangoura, quoted an alleged decision of the Ministry which, in Guinea, would have extended the Customs territory to the limits of the Customs radius. (Verbatim Report, French version, p.10) But this alleged decision from the Ministry has not been produced.

Of course, Guinea has also produced, during the hearings, a copy of its basic law; that is, its constitution. But there is no new provision to be found in this law enabling one to conclude that at the place where the vessel was at the time it was bunkering ships, *The Saiga* was contravening a legal Guinean prohibition on bunkering within the exclusive economic zone. On the contrary, one finds evidence which proves, all the more, even with regard to national Guinean law, that Guinea could not apply this law outside the circumstances expressly envisaged by the legislator for the application of this law. Articles 9 and 22 of this Constitution are particularly clear here. Article 9 stipulates that no one may be arrested, detained or convicted except for reasons and in a form provided for by the law. In Article 22, the law guarantees to everyone the exercise of freedom and fundamental rights. It defines the conditions under which these are exercised.

It is also clear that in Guinea, no matter what his rank, function and motivations, no official can believe himself to be authorised to bridge, on his own behalf, a legislative gap by applying a law outside of the cases especially foreseen by the legislator. Instead of bringing new legislative or regulatory evidence, Guinea simply invoked, again, the same text. Professor Lagoni said:

> "Instead, the Republic of Guinea tried to prevent the refuelling - that means bunkering - of fishing vessels and/or other vessels in transit to Conakry in its waters for this purpose as established by Articles 33 and 34 of the Customs Code and Customs radius. This Customs code has to do with the Guinean law 094/PRG/SGG of 20 November 1990." (Verbatim Report no.3, French Version, p.10, lines 10-14)

Professor Lagoni has also drawn our attention to the fact that none of the articles of the law of 1994, which was cited, constitute an offence against the owners or Masters of bunkering vessels, and that therefore this law has been applied outside the cases specifically foreseen by the legislator for a bunkering vessel.

On the other hand, and to all appearances, the Customs surveillance radius must not be confused with the Customs territory. Therefore, one has applied the law of 1994 as cited and the Guinean Customs Code for importation into a Customs radius instead of applying, as the Guinean legislator wished, for importation into the Guinean Customs territory.

It is not going too far to say that the responses expected should have been precise. The Tribunal cannot be satisfied simply with litany instead of repetition. We have every right to require that it must be clearly established that the law of 1994 creates an offence for owners of bunkering vessels within the Guinean exclusive economic zone. It is our right, after having been severely and unjustly convicted, to require that it is clearly established that Guinean law extended the Customs territory of Guinea to the exclusive economic zone. In waiting to find out whether this extension is or is not legal in terms of international law, is it too much to ask Guinea to deign to at least explain clearly to the international community in which way its national legislation has been violated. Professor Lagoni does not reply to this question for the Claimant State.

As for M. Mamadi Askia Camara, he does not do any better. I quote exactly the same text without adding anything new. He says, according to this text:

> "With regard to Customs legislation, goods which are inside the Customs radius must be taken, by legal procedures, to the border Customs offices to be declared there." (Verbatim Report, p.16, lines 9-10)

But this affirmation is extraordinary. It is absolutely contrary to the very clear and precise provisions of the Guinean Customs Code. M. Mamadi Askia Camara feigns not to know that the transport of Customs goods is the subject of article 3 of the Customs Code. Instead, within article 3 we find the first chapter which relates to the importation of goods. This also contains Section 1 which relates to the import of goods by maritime means. Section 1 contains articles 53 – 58. Of these articles, only article 54 contains a specific obligation for the Master of a vessel entering the Customs radius. It stipulates that the Master of a ship, arriving in the maritime area of the Customs radius is required upon first demand (a) to subject the original of the manifest to the "*ne varietur*" endorsement by the Customs officials who come on board, and (b) to hand them a copy of the manifest.

Who, in this prestigious courtroom, could claim in good faith that this text enables the justification of the purely gratuitous affirmation of M. Mamadi Askia Camara, according to whom the goods, once within the Customs radius, must be taken by legal means to the Customs border posts to be declared? No one. The goods, which simply enter the Customs radius without entering the Customs territory, are not submitted to declaration and they must not even be subject to the summary declaration in article 57 of the Customs Code which addresses vessels entering the port.

Is it permitted that the Customs, when interested in a cargo or vessel outside the Customs territory but within the Customs radius, mobilises itself, boards the vessel and submits requirements to the Master to submit the cargo manifest to the *"ne varietur*" endorsement? It is all the more incumbent upon the Customs officers boarding the vessel to do so without abuse of rights and with all the courtesy their uniforms impose upon them.

It has never been claimed in front of this Tribunal that *The Saiga* had been searched for in order to have it submit its cargo manifest to any "*ne varietur*" endorsement. Who has claimed, in front of this Court, that Captain Orlov of *The Saiga* was requested to submit his manifest to such an endorsement? No one. Furthermore, in the declaration which he presented to the Tribunal, the witness, M. Bangoura, submitted the list of documents which he asked for from Captain Orlov. The cargo manifest is not part of this list. Of course, M. Bangoura, the captain, did try to escape but not for reasons of refusal to present a manifest of his cargo.

This is the correct time and place to reply briefly to an affirmation from Professor Lagoni who, in order to reject the theory of abuse of right said, in substance, that Captain Orlov could not be unaware of the existence of Guinean legislation because measures had been taken against the *ALFA 1* vessel. I refer to the comments of Professor Lagoni (Verbatim Report no.15, p.15, lines 4-7 and p.16, lines 28-29) But instead of reinforcing the position of Guinea, this theory, on the contrary, reinforces that of the Claimant State. In fact, one has to be reminded that the vessel *ALFA 1* was attacked by launches which were recognised by the Master of this vessel as being launches of the Guinean Navy.

The vessel, *ALFA 1*, was abandoned at sea in a cowardly way, with all the men of its crew, when it was burning and when the assailants thought it was going to sink. They did nothing to offer assistance to the crew. When the owner questioned the Guinean authorities, the latter denied the facts and affirmed that they had never sent any vessel out to sea on that day. *ALFA 1* had never been taken to the Port of Conakry. Its Master had never been taken in front of Guinean Courts for an alleged violation of Guinean law. From then on, the owner had reason to think that his vessel had been subject to attack perpetrated either by pirates disguised as military or by Guinean military having escaped from the control of their superiors. In any case, the owner had no reason to think that *ALFA 1* had been attacked because it had contravened Guinean law on bunkering. Consequently, this owner had no reason to think that such a law existed.

To conclude my comments on the provisions of article 54 of the Customs Code, I would say that the hearings have never been about an alleged violation of this text by Captain Orlov. The case was brought about simply because it was the intention to extend the Customs territory of Guinea beyond the wishes of the Guinean legislator.

If the Guinean legislator had never wished to extend the application of its Customs Code for the maritime area beyond the Guinean territorial waters, it is because it never wanted his country to "go it alone" and grant to itself rights within the exclusive economic zone which the international community would not recognise and which no other State in the world would claim to confer upon itself. It is also because this legislator knows that Guinea, by ratification of the Convention of 1982, like all the other States of the international community, confirmed that it could have no fiscal claim whatever on the exclusive economic zone, a claim which would not be in conformity with the provisions of the Convention.

We also have said that, no matter how far our research has led us, we have never found any example of a State which had prohibited the bunkering activity in the exclusive economic zone. We said that Guinea, with its legislator, did not become an exception to this rule, but we have been convinced to the contrary. We had been expecting evidence to the

contrary but this has not been forthcoming; we were expecting new texts but they were not produced; we were expecting experts to be announced by Guinea but they shied off.

Since Dr Richard Plender and Professor Lagoni have both cited the author Sir Arthur Conan Doyle, I am going to do so as well. In his novel entitled *The Hound of the Baskervilles*, the author reports an imaginary dialogue between imaginary people. Sherlock Holmes says to Dr Watson, "It is illuminating to take account of the curious incident with the dog in the night." Dr Watson replies to the famous detective, "But the dog did nothing in the night" and the detective replies, "That, my dear Watson, is the curious incident." I apologise for my pronunciation.

What is curious in this case, Mr President, is precisely the silence of Guinea when it is invited to produce a new, relevant text which would have been taken by its legislator to be applied within the exclusive economic zone. What is also curious is that when it broke its silence, Guinea did so simply to contradict evidence, as, for example, to affirm that the draft text drawn up by itself to bridge the question relative to bunkering in Guinea was not done to bridge a legislative gap. In reality, absolutely everything in this case leads us to believe that Guinean officials extended *proprio motu* the field of application of two Guinean laws, whereas this field of application had been clearly delimited by the Guinean legislator solely to national territory. The motivations (whether real or supposed) of its officials, as certain witnesses have said, matter little.

No more than Professor Lagoni do I wish to return to a question which can only be embarrassing for the Government of Guinea, and I am not trying to embarrass the government of a sister republic of the Senegalese Republic, of which I am a subject. However, I must in fact ask myself one particular question: if the Guinean officials have really drawn on Guinean law for the motivation for their proceedings against *The Saiga,* why did they not also pursue the vessels which *The Saiga* bunkered? Unfortunately, on this point it would seem that our questions will also remain unanswered.

It is true that Guinea has always claimed that the vessels bunkered by *The Saiga* were subject to prosecution, but the proof of the exactness of this affirmation has still not been brought before the Tribunal. Guinea concluded by admitting that prosecution had not been exercised. Again by quoting M. Mamadi Askia Camara in correspondence 839/PR/TPI/C of 21 November 1997, the public prosecutor addressed a letter to the commander to find and arrest these vessels and their masters for infractions of which *The Saiga* was accused. They can be prosecuted according to article 4 of Law 007/CTRN of 15 March 1994. This is in the French version of the verbatim report at page 17, lines 48-50. I think that this law should have been 94/007/CTRN of 15 March 1994.

However, we must affirm first of all that the public prosecutor's letter was not produced during the hearings. Furthermore, and incidentally, we do not see how the public prosecutor could have given orders for arrest which, even in Guinea, are within the sole competence of an examining judge. Finally, and above all, we cannot see how and why since 1997 the alleged instructions of the public prosecutor have not been executed. Guinea offers no explanation on this point either, and has not said to the Tribunal that there would be difficulties in executing the instructions of the court.

I must say here that the lack of action of the Court of the Republic of Guinea is all the more surprising since one of the vessels mentioned in the famous *bord* notes (tidied up by Captain Sow), the vessel *COMBAT*, belongs to the Guinean Navy. As in many other instances, it was during the hearings in the last few days that we heard for the first time of the *COMBAT* vessel in this case, and therefore at the last minute I simply cannot bring you the evidence of what I am putting forward, but we know very well that the owner of this ship lives in Guinea and operates his vessel there. Nevertheless, it is up to Guinea to bring the evidence either that it has exercised prosecution against the vessels bunkered by *The Saiga* or that it was prevented from doing so for reasons independent of its wishes or due to the negligence of its agents entrusted with pursuit. This evidence has not been introduced to the hearings.

In view of the major difficulties which Guinea has met in justifying its theory according to which its agents were acting in conformity with the will of the legislator, the defendant State is trying to reduce the scope of its affirmation by maintaining in substance that in fact the extension of the application of its laws and rules in the EEZ would only concern the activity of bunkering for fishing vessels with special fishing licences, and I think it is doing so especially on the basis of its law 94/007/CTRN of 15 March 1994. However, the Tribunal will not have failed to observe, first of all, that even the alleged Guinean fishing licences granted to the vessels in question have not been produced during the hearings, and therefore the argument of Guinea is in fact necessarily totally lacking.

The Tribunal will not fail to observe either that in law a text has never been produced which establishes that the Customs territory in the first article of this law has been extended to the Customs radius, and therefore the argument of Guinea is also totally lacking in law.

Mr President, Members of the Tribunal, this terminates my submissions on the alleged extension of the Guinean law to the exclusive economic zone I would now like to hand over to Dr Plender.

DR PLENDER: Mr President, Members of the Tribunal, although Maître Thiam has shown that Guinean law does not prohibit bunkering in the exclusive economic zone and also Maître Bangoura of the Conakry Bar advised at an earlier stage that this was so, although the Guinean Government has been unable to produce any text of a law which purports to prohibit that activity, and although the Guinean *projet de loi* confirms that there is no such current prohibition, we do not ask the Tribunal to rely on these facts when determining whether the Guinean authorities acted within the scope of their authority.

As Mr Mamadi Askia Camara rightly observed in the course of his short presentation, the central issue for this Tribunal is whether it would have been open to Guinea to apply and enforce against other States and their nationals a prohibition on bunkering in her exclusive economic zone. In other words, the question is whether such a prohibition, had it existed, would have been opposable against other States.

It is elementary that a State is entitled to apply its legislation to the person or property of aliens only when it has jurisdiction under public international law to do so. As the Permanent Court of International Justice put it in the *Lotus* case (at page 19) it is:

"required of a State … that it should not overstep the limits which international law places upon its jurisdiction."

I do not say that jurisdiction is co-extensive with sovereignty, but the connection between them is close. To quote the words of the Permanent Court in the *Lotus* case once more, "A State's title to exercise jurisdiction rests on its sovereignty."

The exercise of a State's jurisdiction beyond the area over which it is sovereign is apt to entail an infringement of the rights of other States. That is particularly so when it involves the application of force to foreign vessels over whom the flag State exercises sovereign jurisdiction. So when a State claims to exercise extra-territorial jurisdiction in relation to a foreign vessel, it must demonstrate that it has a firm basis for the claim.

Guinea's claim to exercise extra-territorial jurisdiction in the exclusive economic zone was expressed with admirable clarity by Professor Lagoni on the afternoon of Monday 15 March (see p.26). The claim is that Guinea is entitled to prohibit the bunkering of one foreign vessel by another, outside her territorial waters but within her exclusive economic zone for fiscal purposes, so as to encourage fishing boats to buy their supplies of oil in Conakry.

In vain does one search the United Nations Convention, to find any support for that assertion. The rights and jurisdiction of the coastal state in the exclusive economic zone are regulated by Article 56 of that Convention. This sets out, in careful and measured terms, the sovereign rights that coastal States enjoy, for the purpose of exploring and exploiting, conserving and managing the natural resources of the zone. It also defines the jurisdiction that coastal States may exercise in that area. The rights and duties of other States in the exclusive economic zone are set out in Article 58. This provides that other States enjoy the right of navigation and other related freedoms, associated with the operation of ships. Neither in Article 56 nor in Article 58, nor in the *travaux preparatoires* does one find the faintest scintilla of a hint of an inkling of an insinuation of a ghost of a suggestion that a coastal State has the right claimed by Guinea in these proceedings.

At page 26 of the transcript for the afternoon of 15 March, Professor Lagoni offered three explanations for the absence from the Convention of any provision authorising a coastal State to prohibit commercial activities generally, or bunkering in particular, within the exclusive economic zone.

First, he stated that "the jurisdiction on customs and fiscal matters in the EEZ is already implied in the sovereign rights of coastal States". If I may respectfully say so, that does not meet the objection. Since coastal States have sovereign rights for the purposes of exploring and exploiting the natural resources of the waters in the exclusive economic zone, they can of course impose customs duties or fiscal charges on the exploitation of those resources. They may for instance charge for the issuance of fishing licences. That is not this case. *The Saiga* was not exploiting the natural resources of the zone. The jurisdiction asserted by the Guinean authorities was not jurisdiction with respect to fisheries. That is a point to which I shall revert.

Secondly, Professor Lagoni stated that "there was no need to regulate comprehensively the customs and fiscal jurisdiction with the EEZ, at least at that early stage

of development, before most EEZs had been established." On the contrary, one of the principal purposes and achievements of the Convention was to regulate the rights and duties of coastal States and others within the exclusive economic zone. There a number of specific rights are conferred and defined, it is to be presumed that no others are conferred: *expressio unius exclusio alterius*.

Thirdly, he asserted that when the regime for the exclusive economic zone was emerging, as part of an overall compromise between coastal and shipping States, there was little room for discussion about details; but, he said, west African States were well aware of the problem of extending customs duties to the exclusive economic zone. In a conference, as in a courtroom, details can be overlooked; but it would be misleading to suggest that delegates had it in mind to confer on coastal States the right to impose taxes on any activity other than the exploration, exploitation, conservation and management of the exclusive economic zone. There was indeed a concern on the part of some west African States to ensure that they would be in a position to levy licence fees for the exploitation of the zone. That is not at all the same as the desire to extend customs duties to the exclusive economic zone generally. The preoccupation of African States at the time is accurately and succinctly described by Dr Akintoba in his book *African States and Contemporary International Law: a Case Study of the exclusive economic zone ".* An appropriate extract from the book has been circulated with the text of my speech. At p.121 he writes as follows:

> "African governments…proposed and actively campaigned for the establishment in international law of an exclusive economic zone. This was a prudent move, designed in the short term to protect their coastline from and overfishing and exploitation by distant water fishing fleets. Over the long term, the intention was to catalyse diverse efforts to establish national fishing industries. From an African perspective, the EEZ concept was couched in terms of sovereignty over resources rather than complete sovereignty over areas that potentially threatened marine movement and other customary rights, such as the laying of pipelines and cables."

There ends the quotation. It is precisely that distinction that the Guinean argument seems to overlook, or to elide. The Tribunal cannot have failed to notice how frequently the Respondent State's witnesses spoke of the exclusive economic zone as though it were an area of Guinean waters, subject to Guinean sovereignty.

For instance, on the afternoon of Saturday 13 March, Lieutenant Sow gave evidence about his work which was (in his words, p.7 line 2) "to maintain order *in our waters*". He referred consistently to "our waters" until Professor Lagoni (at p.12 line 19) asked whether the Guinean radar bases monitor "the whole *exclusive economic zone* of Guinea." Lieutenant Sow answered "I do not understand the question." He was again asked which area was monitored and he replied: "These bases listen to the *entire zone of Guinea.*" Thereafter Professor Lagoni reminded the witness that the relevant area was termed "the *exclusive economic zone*". He did so again at p.13 line 13, p.14 line 38, p.16 line 22, p.18 line 23, and p.18 line 27. Then at p.21 line 8 a question was put to the witness about a line on the chart. He was asked: "which boundary is that?" He answered "It is the southern boundary between the Republic of Guinea and the Republic of Sierra Leone". Professor Lagoni corrected him, saying "It is the boundary between their *exclusive economic zone,* I guess". At that stage, as you will remember, I raised an objection, and Professor Lagoni put questions to the witness

about his knowledge of maritime zones. Even in answer to those questions, the witness described the relevant line as "the border line between Guinea and Sierra Leone".

I do not for a moment suggest that Professor Lagoni intended to coach his witness, and it is no part of my case to raise the slightest suggestion of that character; nor is it necessary to enquire whether the witness was familiar with the existence and extent of the various maritime zones. My point is different. What I deduce from his answers is that he regarded the whole exclusive economic zone as part of the "Guinean waters" within which he had general authority "to maintain order", and that this was, in his words, an area where Guinean law applied as part of the Republic of Guinea. Indeed, it appears from his answer at p.23 line 14 that he either understood at the time, or that he now believes, that it was important to locate *The Saiga* while she was in the exclusive economic zone in order that she could be arrested for an offence committed within what is said to be the contiguous zone much earlier.

He was not alone. Mr Bangoura took the view that Guinea's customs legislation applied throughout the "customs zone". (See his answers when cross-examined by me on 12 March, morning session, pages 17 line 40 and 18 line 7). The view of both of these witnesses about the extraterritorial effect of Guinean law are consistent with the submissions made on the morning of 16 March by Mr Camara.

Whatever may be the position under Guinean law, it would be plainly incorrect to assert that a State may extend its customs legislation to foreign vessels within the exclusive economic zone. One need hardly say that a State's exclusive economic zone is *not* subject to its sovereignty.

As the Tribunal will know, some writers take the view that the exclusive economic zone is part of the high seas in which a coastal State has jurisdiction in respect of resources; others, like Professor Lagoni, take the view that it is a region *sui generis* within which certain rules relating to the high seas are to be applied. The controversy over that question explains the extraordinary and tortured wording of Article 86 of the Convention. The Tribunal is not asked to resolve that dispute in this case. All that matters is that the exclusive economic zone is not subject to the coastal State's sovereignty.

The rules relating to the high seas are, however, of present relevance. That is so because the second paragraph of Article 58 9of the Convention provides that virtually the whole of the rules relating to the high seas shall apply within the exclusive economic zone in so far as they are not incompatible with Part V. The provisions thus applied to the exclusive economic zone include not only Article 89 (which provides that no State may validly purport to subject any part of the high seas to its sovereignty), but also Article 87, which defines freedom of the high seas in the broadest of terms.

We cannot therefore accept Professor Lagoni's assertion (made on 15 March, afternoon session, p.25 line 23) that it is confusing or irrelevant to refer to the rules relating to the high seas. Since those rules have been largely incorporated into the Part of the Convention dealing with the exclusive economic zone , they are highly relevant.

By Article 73 of the Convention, a coastal State may enforce its laws in the exclusive economic zone only to the extent that they relate to the exploration, exploitation,

conservation and management of the natural resources. A customs law designed to augment the revenues of the coastal State, by encouraging vessels to buy fuel there, does not relate to any of the matters mentioned in Article 73.

It is true that by your judgement dated 4 December 1997, a majority of your members expressed the view that the rights conferred on coastal States might include the right to prohibit the bunkering of fishing vessels. At paragraph 57 of your judgement you said:

> "Argument can be advanced to support the qualification of 'bunkering of fishing vessels' as an activity, the regulation of which can be assimilated to the regulation of the exercise of the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone."

The majority that expressed that view was not, of course, announcing its conclusion. The majority took the view that, for the purposes of the application for prompt release, it was sufficient that there was an arguable allegation that the arrest was made in enforcement of the coastal State's laws governing the exploitation of the natural resources of the exclusive economic zone.

The difficulty in which the Republic of Guinea finds herself is that she steadfastly and persistently refuses to adopt and advance the argument that the majority of this Tribunal considered to be arguable or defensible. She insists that the arrest was not effected in connection with the exploitation of fisheries but in the interests of maximising receipts from Customs. On this she is emphatic. M. Bangoura said, in response to one of my questions (12 March, morning p. 21, line 28): "the object of the mission was to look for and combat fraud. I am talking about smuggling fuel." Lieutenant Sow confirmed that this was a Customs operation, not a fisheries operation (13 March, afternoon, p.7, lines 8-15). These witnesses have confirmed by their evidence the position as it appeared previously to you, Mr President and to Vice-President Wolfrum and Judge Yamamoto. At paragraph 27 of your Dissenting Opinion dated 4 December 1997, Mr President, and at paragraph 11 of the Dissenting Opinion of your two colleagues, you emphasised that the action taken by the Guinean authorities was not based on the Code of Maritime Fishing but on the Customs Code. In the words of Judges Wolfrum and Yamamoto:

> "The arrest of *The Saiga* was executed by Customs authorities and there is no indication of an involvement of the respective institutions concerning the management of living resources."

That was the situation as it appeared. Now it is the situation as it has been confirmed and reaffirmed by witnesses on behalf of the Republic of Guinea.

It is therefore the submission of Saint Vincent and the Grenadines that the application and enforcement of Guinean Customs law within the exclusive economic zone entailed a breach of the Convention. It was an excessive exercise of jurisdiction or, as we say in English, an *exces de pouvoir*. For that reason, it was a breach of the Claimant State's freedom of navigation and related freedoms. The propositions are two sides of one coin.

Professor Lagoni contends, however, that bunkering is not navigation, nor even a use of the sea "related to those freedoms, such as those associated with the operation of ships"

(15 March, afternoon session, p.25). He asserts that the contrary proposition confuses freedom of navigation with other matters not expressly mentioned in article 87 of the Convention and emphasises that commercial bunkering on the high seas is not expressly mentioned in article 87.

It is very clear that the draftsmen of the Convention did not intend to imbue the word "navigation" with a narrow and literal meaning. In the words of *Oppenheim's International Law*, at p. 729:

> "The list of freedoms contained in article 87 of the Convention on the Law, as the wording clearly indicates, is not restrictive. Not only are there freedoms here other than those specified, but they must change form time to time, for example, with the development of new technologies."

The editor's words reflect those of the International Law Commission when commenting on the draft for article 2 of the High Seas Convention of 1958. The Commission said:

> "The list of freedoms of the high seas contained in this article is not restrictive. The Commission has merely specified four of the main freedoms, but is aware that there are other freedoms."

It would utterly frustrate the intentions of the draftsmen if freedom of navigation were read so restrictively as to exclude bunkering. That is so whether one relies upon the Latin origins of the word "navigation", as Professor Lagoni did, or on the alternative argument based upon the economic interest of the coastal State. A vessel is engaged in navigation when bunkering another at sea. Generally the bunkering vessel and the vessel receiving the supply are in motion, at slow speed, so that the fuel pipes remain taut. In any event, when a vessel is drifting at sea (not at anchor or in port) it is engaged in navigation. I venture to suggest that the same is true of the verb *navigare*. It adds nothing to the debate.

Professor Lagoni argues that bunkering is not navigation or a related activity because it is commercial and may be inconsistent with the economic interests of the coastal State. It will not escape the Tribunal's attention that this contention is inconsistent with the language in which article 58 is expressed. That is so whether one fixes attention on the word "navigation" or on the phrase "lawful uses of the sea related to navigation, such as those associated with the operation of ships". Nor will it escape the Tribunal's attention that article 56 does not confer on the coastal State a general right to prohibit within the exclusive economic zone commercial activities which it considers injurious to its fiscal interests. It confers defined rights for defined purposes. A coastal State cannot, for instance, prohibit the sale of duty-free goods on foreign vessels within its exclusive economic zone on the premise that passengers might otherwise buy similar goods within the coastal State and so contribute to its resources. Professor Lagoni asserted that such commercial activities "do not affect the interests of the coastal State" (15 March afternoon, p.24 line 31). That, I respectfully suggest, is incorrect A coastal State's fiscal interests may be affected by the sale at sea of duty-free goods (or in the case of Germany, by the offshore sale of butter) in just the same way as it may be affected by the sale of dutiable fuel.

There is a further objection to Guinea's claim that she is entitled to prohibit bunkering in her exclusive economic zone for the purpose of increasing her Customs revenue. There is literally no State practice on which she can rely as evidence of such a right. We have conducted extensive surveys of State practice, supplemented by further reports produced on 2 March. Not one single State maintains legislation of the kind that Guinea claims to be able to enforce.

Indeed, as the hearing has proceeded, the press has reported a fresh development suggesting that States cannot prohibit such bunkering. A major oil company has announced its entry into the market in providing offshore bunkers in the Gulf of Guinea off the Nigerian coast. According to press reports, the decision to enter the market has followed a legal examination of the question, in view of these present proceedings, upon which the press reports. So, even as we speak, others who consider their position very carefully, take the view that bunkering within the exclusive economic zone is a lawful activity.

Mr President, Members of the Tribunal, the freedoms enjoyed by all States in the exclusive economic zone are expressed in the broadest of terms in article 58 of the Convention. They include the "freedoms referred to in article 87 of navigation and of over-flight and *other internationally lawful uses of the sea related to those freedoms*, such as those associated with the operation of ships". The breadth of that language is, if I may respectfully say so, inadequately expressed in Professor Lagoni's phrase when he characterised these as "communication freedoms". Gidel describes the principle of the freedom of the high seas as "*multiforme et fugace*". It would be regrettable indeed if this Tribunal were to support a reversion to the days of *mare clausum*, the very antithesis of the tract by Hugo Grotius, from which modern international law has developed.

In his address tomorrow morning, Maître Thiam will present our comments on the Respondent State's witnesses. I shall then close our case by reverting to questions of damages and costs.

THE PRESIDENT: Thank you very much, Dr Plender. That brings us almost to the minute to the time for closing. I adjourn the sitting and we will resume tomorrow morning at 10 o'clock.

(Adjourned at 1700 hrs until 1000 hrs on Friday, 19 March 1999)