INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 1999

1 July 1999

List of cases:
No. 2

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

(SAINT VINCENT AND THE GRENADINES v. GUINEA)

JUDGMENT

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JUDGMENT

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

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

between

Saint Vincent and the Grenadines,

represented by

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

as Agent;

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

as Deputy Agent and Counsel;

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

and

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

as Counsel and Advocates,

and

Guinea,

represented by

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

as Agent and Counsel;

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

and

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

as Counsel,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following Judgment:

Introduction

1. On 13 January 1998, the Agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal a Request for the prescription of provisional measures in accordance with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") concerning the arrest and detention of the vessel M/V Saiga (hereinafter "the *Saiga*"). The Request was accompanied by a copy of the Notification submitted by Saint Vincent and the Grenadines to the Republic of Guinea on 22 December 1997 (hereinafter "the Notification of 22 December 1997") instituting arbitral proceedings in accordance with Annex VII to the Convention in respect of a dispute relating to the *Saiga*. A certified copy of the Request was sent on the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea in Conakry and also in care of the Ambassador of Guinea to Germany.

2. On 13 January 1998, the Registrar was notified of the appointment of Mr. Bozo Dabinovic, Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, as Agent of Saint

Vincent and the Grenadines. On 20 January 1998, the appointment of Mr. Hartmut von Brevern, Attorney at Law, Hamburg, as Agent of Guinea, was notified to the Registrar.

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

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

> Mr. Bozo Dabinovic
> Agent and Maritime Commissioner of
> St. Vincent and the Grenadines
> …
> Hamburg, 20.02.1998
> …
> Upon the instruction of the Government of the Republic of Guinea I am writing to inform you that the Government has agreed to submit to the jurisdiction of the International Tribunal for the Law of the Sea in Hamburg the dispute between the two States relating to the MV "SAIGA". The Government therefore agrees to the transfer to the International Tribunal for the Law of the Sea of the arbitration proceedings instituted by St. Vincent and the Grenadines by Notification of 22 December 1997. You will find attached hereto written instructions from the Minister of Justice to that effect.
>
> Further to the recent exchange of views between the two Governments, including through the good offices of the President of the International Tribunal for the Law of the Sea, the Government of Guinea agrees that submission of the dispute to the International Tribunal for the Law of the Sea shall include the following conditions:
>
> 1. the dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines;
>
> 2. the written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998;

3. the written and oral proceedings shall follow the timetable set out in the Annex hereto;

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

5. the Request for the Prescription of Provisional Measures submitted to the International Tribunal for the Law of the Sea by St. Vincent and the Grenadines on 13 January 1998, the Statement of Response of the Government of Guinea dated 30 January 1998, and all subsequent documentation submitted by the parties in connection with the Request shall be considered by the Tribunal as having been submitted under Article 290, paragraph 1, of the Convention on the Law of the Sea and Article 89, paragraph 1, of the Rules of the Tribunal.

The agreement of the Government of St. Vincent and the Grenadines to the submission of the dispute to the International Tribunal on these conditions may be indicated by your written response to this letter. The two letters shall constitute a legally binding Agreement ("Agreement by Exchange of Letters") between the two States to submit the dispute to the International Tribunal for the Law of the Sea, and shall become effective immediately. The Republic of Guinea shall submit the Agreement by Exchange of Letters to the President of the International Tribunal for the Law of the Sea immediately after its conclusion. Upon confirmation by the President that he has received the Agreement and that the International Tribunal is prepared to hear the dispute the arbitration proceedings instituted by the Notification dated 22 December 1997 shall be considered to have been transferred to the jurisdiction of the International Tribunal for the Law of the Sea.

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

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

Annex

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

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

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

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

On behalf of the Government of St. Vincent and the Grenadines I have the honour to confirm that my Government agrees to the submission of the dispute to the International Tribunal for the Law of the Sea subject to the conditions set out in your letter of 20th February 1998. A copy of this letter is attached hereto.

I remain Sir,

Yours sincerely,

(Signed)
Carl L. Joseph
Attorney General.
…

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

6. In accordance with articles 59 and 60 of the Rules, the Tribunal, having ascertained the views of the parties, fixed by Order dated 23 February 1998 the following time-limits for the filing of pleadings in the case: 19 June 1998 for the Memorial of Saint Vincent and the

Grenadines, 18 September 1998 for the Counter-Memorial of Guinea, 30 October 1998 for the Reply of Saint Vincent and the Grenadines and 11 December 1998 for the Rejoinder of Guinea.

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

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

1. Unanimously,

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

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

2. Unanimously,

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

3. Unanimously,

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

4. Unanimously,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For Saint Vincent and the Grenadines:

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

For Guinea:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- photographs said to show damage to the *Saiga* and equipment on board as a result of the attack by the Guinean authorities;

- photographs of Mr. Sergey Klyuyev, Second Officer of the *Saiga*, and Mr. Niasse, painter employed on the ship, showing injuries alleged to have been suffered by them as a result of the force used to arrest the *Saiga*;

- a nautical chart showing areas off the coast of Guinea;

- a nautical chart showing the courses said to have been taken by the *Saiga* and the Guinean patrol boats, respectively;

- a radiograph said to be that of Mr. Niasse;

- a handwritten statement said to be a report by the Chief of the Guinean joint mission of Customs and Navy patrol vessels.

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

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

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

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

> the Government of St. Vincent and the Grenadines asks the International Tribunal to adjudge and declare that:
>
> (1) the actions of Guinea (*inter alia* the attack on the m/v "Saiga" and its crew in the exclusive economic zone of Sierra Leone, its subsequent arrest, its detention and the removal of the cargo of gasoil, its filing of charges against St. Vincent and the Grenadines and its subsequently issuing a judgment against them) violate the right of St. Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth in Articles 56(2) and 58 and related provisions of the Convention;
>
> (2) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of the Convention, the customs and contraband laws of Guinea, namely *inter alia* Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;
>
> (3) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of the Convention in respect of the m/v "Saiga" and is liable to compensate the m/v "Saiga" pursuant to Article 111(8) of the Convention;
>
> (4) Guinea has violated Articles 292(4) and 296 of the Convention in not releasing the m/v "Saiga" and her crew immediately upon the posting of the guarantee of US$400,000 on 10 December 1997 or the subsequent clarification from Crédit Suisse on 11 December;
>
> (5) the citing of St. Vincent and the Grenadines as the flag state of the m/v "Saiga" in the criminal courts and proceedings instituted by Guinea violates the rights of St Vincent and the Grenadines under the 1982 Convention;
>
> [...][*]
>
> (7) Guinea immediately return the equivalent in United States Dollars of the discharged oil and return the Bank Guarantee;
>
> (8) Guinea is liable for damages as a result of the aforesaid violations with interest thereon; and

[*] As in the original.

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

On behalf of Guinea,
in the Counter-Memorial:

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

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

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

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

(i) the actions of the Republic of Guinea violated the right of St. Vincent and the Grenadines and of vessels flying her flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea, as set forth in Articles 56(2) and 58 and related provisions of UNCLOS;

(ii) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of UNCLOS, the customs and contraband laws of the Republic Guinea may in no circumstances be applied or enforced in the exclusive economic zone of the Republic of Guinea;

(iii) Guinea did not lawfully exercise the right of hot pursuit under Article 111 of UNCLOS in respect of the M.V. *Saiga* and is liable to compensate the M.V. *Saiga* according to Article 111(8) of UNCLOS;

(iv) the Republic of Guinea has violated Articles 292(4) and 296 of UNCLOS in not releasing the M.V. *Saiga* and her crew immediately upon the posting of the guarantee of US$400,000 on 10th December 1997 or the subsequent clarification from *Crédit Suisse* on 11th December 1997;

(v) the citing of St. Vincent and the Grenadines in proceedings instituted by the Guinean authorities in the criminal courts of the Republic of Guinea in relation to the M.V. *Saiga* violated the rights of St. Vincent and the Grenadines under UNCLOS;

[(vi)...][*]

[*] As in the original.

(vii) the Republic of Guinea shall immediately repay to St. Vincent and the Grenadines the sum realized on the sale of the cargo of the M.V. *Saiga* and return the bank guarantee provided by St. Vincent and the Grenadines;

(viii) the Republic of Guinea shall pay damages as a result of such violations with interest thereon;

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

On behalf of Guinea,
in the Rejoinder:

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

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

On behalf of Saint Vincent and the Grenadines:

the Government of St. Vincent & the Grenadines asks the International Tribunal to adjudge and declare that:

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

(2) subject to the limited exceptions as to enforcement provided by Article 33(1)(a) of the Convention, the customs and contraband laws of Guinea, namely *inter alia* Articles 1 and 8 of Law 94/007/CTRN of 15 March 1994, Articles 316 and 317 of the Code des Douanes, and Articles 361 and 363 of the Penal Code, may in no circumstances be applied or enforced in the exclusive economic zone of Guinea;

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

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

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

(6) Guinea immediately return the equivalent in United States Dollars of the discharged gasoil;

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

(8) Guinea shall pay the costs of the proceedings and the costs incurred by St. Vincent & the Grenadines.

On behalf of Guinea:

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

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

Alternatively, that:

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

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

(4) Guinea did lawfully exercise the right of Hot Pursuit under Article 111 of UNCLOS in respect to the MV "SAIGA" and is not liable to compensate the M/V Saiga according to article 111(8) of UNCLOS;

(5) the Republic of Guinea has not violated article 292(4) and 296 of UNCLOS;

(6) The mentioning of St. Vincent and the Grenadines in the "Cédule de Citation" of the Tribunal de Première Instance de Conakry of 12 December 1997 under the heading

"CIVILEMENT ... RESPONSABLE À CITER" did not violate the rights of St. Vincent and the Grenadines under UNCLOS;

(7) There is no obligation of the Republic of Guinea to immediately return to St. Vincent and the Grenadines the equivalent in United States Dollars of the discharged gasoil;

(8) The Republic of Guinea has no obligation to pay damages to St. Vincent and the Grenadines;

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

Factual background

31. The *Saiga* is an oil tanker. At the time of its arrest on 28 October 1997, it was owned by Tabona Shipping Company Ltd. of Nicosia, Cyprus, and managed by Seascot Shipmanagement Ltd. of Glasgow, Scotland. The ship was chartered to Lemania Shipping Group Ltd. of Geneva, Switzerland. The *Saiga* was provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. The Master and crew of the ship were all of Ukrainian nationality. There were also three Senegalese nationals who were employed as painters. The *Saiga* was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. The owner of the cargo of gas oil on board was Addax BV of Geneva, Switzerland.

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

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

the orders of the Guinean authorities. Seven members of the crew and two painters left Conakry on 17 November 1997, one crew member left on 14 December 1997 and six on 12 January 1998. The Master and six crew members remained in Conakry until the ship was released on 28 February 1998.

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

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

36. On 17 December 1997, judgment was rendered by the Tribunal of First Instance in Conakry against the Master. The Tribunal of First Instance cited, as the basis of the charges against the Master, articles 111 and 242 of the Convention, articles 361 and 363 of the Penal Code of Guinea (hereinafter "the Penal Code"), article 40 of the Merchant Marine Code of Guinea (hereinafter the "Merchant Marine Code"), articles 34, 316 and 317 of the Customs Code of Guinea (hereinafter "the Customs Code") and articles 1 and 8 of Law L/94/007/CTRN of 15 March 1994 concerning the fight against fraud covering the import, purchase and sale of fuel in the Republic of Guinea (hereinafter "Law L/94/007"). The charge against the Master was that he had "imported, without declaring it, merchandise that is taxable on entering national Guinean territory, in this case diesel oil, and that he refused to comply with injunctions by Agents of the Guinean Navy, thus committing the crimes of contraband, fraud and tax evasion".

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

38. The Master appealed to the Court of Appeal (*cour d'appel*) in Conakry against his conviction by the Tribunal of First Instance. On 3 February 1998, judgment was rendered by the Court of

Appeal. The Court of Appeal found the Master guilty of the offence of "illegal import, buying and selling of fuel in the Republic of Guinea" which it stated was punishable under Law L/94/007. The Court of Appeal imposed a suspended sentence of six months imprisonment on the Master, a fine of 15,354,040,000 Guinean francs and ordered that all fees and expenses be at his expense. It also ordered the confiscation of the cargo and the seizure of the vessel as a guarantee for payment of the fine.

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

Jurisdiction

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

41. As stated in paragraph 1, the dispute was originally submitted by the Notification of 22 December 1997 to an arbitral tribunal to be constituted in accordance with Annex VII to the Convention. The parties subsequently agreed, by the 1998 Agreement, to transfer the dispute to the Tribunal. The 1998 Agreement provides, in paragraph 1, that "[t]he dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines".

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

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

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

dispute.

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

Objections to challenges to admissibility

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

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

> The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998.

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

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

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

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

Rules and consistently with the agreement between the parties that the proceedings be conducted in a single phase. The Tribunal, therefore, concludes that the 1998 Agreement does not preclude the raising of objections to admissibility by Guinea.

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

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

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

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

Challenges to admissibility

Registration of the *Saiga*

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

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

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

(a) The *Saiga* was registered provisionally on 12 March 1997 as a Saint Vincent and the

Grenadines ship under section 36 of the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines (hereinafter "the Merchant Shipping Act"). The Provisional Certificate of Registration issued to the ship on 14 April 1997 stated that it was issued by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines on behalf of the Government of Saint Vincent and the Grenadines under the terms of the Merchant Shipping Act. The Certificate stated: "This Certificate expires on 12 September 1997."

(b) The registration of the ship was recorded in the Registry Book of Saint Vincent and the Grenadines on 26 March 1997. The entry stated: "Valid thru: 12/09/1997".

(c) A Permanent Certificate of Registration was issued on 28 November 1997 by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines on behalf of that State. The Certificate stated: "This Certificate is permanent."

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

59. Saint Vincent and the Grenadines controverts Guinea's assertion that the expiry of the Provisional Certificate of Registration implies that the ship was not registered or that it lost the nationality of Saint Vincent and the Grenadines. It argues that when a vessel is registered under its flag "it remains so registered until deleted from the registry". It notes that the conditions and procedures for deletion of ships from its Registry are set out in Part I, sections 9 to 42 and 59 to 61**,** of the Merchant Shipping Act, and emphasizes that none of these procedures was at any time applied to the *Saiga*. In support of its claim, Saint Vincent and the Grenadines refers to the declaration dated 27 October 1998 by the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines which states that the ship was registered under the Saint Vincent and the Grenadines flag on 12 March 1997 "and is still today validly registered".

60. Saint Vincent and the Grenadines further contends that, under the Merchant Shipping Act, a ship does not lose Vincentian nationality because of the expiry of its provisional certificate of registration. In support of its contentions, Saint Vincent and the Grenadines refers to section 36(2) of the Merchant Shipping Act which states that a provisional certificate "shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue". Saint Vincent and the Grenadines argues that, pursuant to this provision, a provisional certificate of registration remains in force until the expiry of one year from the date of its issue. In further support for this contention, Saint Vincent and the Grenadines points out that, under section 36(3)(d) of the Merchant Shipping Act, payment of "the annual fee for one year" is required when an application is made for provisional registration. It further maintains that, just as a person would not lose nationality when his or her passport expires, a vessel would not cease to be registered merely because of the expiry of a provisional certificate. According to

Saint Vincent and the Grenadines, the provisional certificate, like a passport, is evidence, but not the source, of national status. For these reasons, Saint Vincent and the Grenadines contends that the Provisional Certificate in this case remained in force after 12 September 1997 and at all times material to the present dispute. With regard to the question raised by Guinea concerning the previous registration of the ship, Saint Vincent and the Grenadines stated that its authorities had received from the owner of the ship "satisfactory evidence that the ship's registration in the country of last registration had been closed" as required by section 37 of the Merchant Shipping Act.

61. Guinea argues that automatic extension of a provisional certificate of registration is neither provided for nor envisaged under the Merchant Shipping Act. In this connection, it argues that the declarations by the Commissioner for Maritime Affairs of 27 October 1998 and the Deputy Commissioner for Maritime Affairs of 1 March 1999, to the effect that the *Saiga* "remained validly registered in the Register of Ships of Saint Vincent & the Grenadines as at 27th October 1997" do not suffice to fill the gap in registration between 12 September 1997 and 28 November 1997, when the Permanent Certificate of Registration of the *Saiga* was issued. It further argues that these declarations on the registration status cannot be accepted as independent documentary evidence in the context of the present proceedings. According to Guinea, the *Saiga*'s registration could only have continued after the expiry of its Provisional Certificate if the Provisional Certificate had been replaced with another provisional certificate or its expiry date had been extended. Guinea points out that there is no evidence that any such action was taken after the Provisional Certificate expired. It states that a comparison of a provisional certificate of registration of a ship with a person's passport is misplaced, since a ship acquires nationality by registration and is required to have a certificate, while a person's nationality does not depend on the acquisition or retention of a passport. For these reasons, Guinea maintains that the *Saiga* did not have the nationality of Saint Vincent and the Grenadines during the period between the expiry of the Provisional Certificate on 12 September 1997 and the issue of the Permanent Certificate on 28 November 1997.

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

Article 91
Nationality of ships

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

63. Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law.

Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

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

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

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

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

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

69. As far as Guinea is concerned, the Tribunal cannot fail to note that it did not challenge or raise any doubts about the registration or nationality of the ship at any time until the submission of its Counter-Memorial in October 1998. Prior to this, it was open to Guinea to make inquiries regarding the registration of the *Saiga* or documentation relating to it. For example, Guinea could have inspected the Register of Ships of Saint Vincent and the Grenadines. Opportunities for raising doubts about the registration or nationality of the ship were available during the proceedings for prompt release in November 1997 and for the prescription of provisional measures in February 1998. It is also pertinent to note that the authorities of Guinea named Saint

Vincent and the Grenadines as civilly responsible to be summoned in the schedule of summons by which the Master was charged before the Tribunal of First Instance in Conakry. In the ruling of the Court of Appeal, Saint Vincent and the Grenadines was stated to be the flag State of the *Saiga*.

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

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

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

73. The Tribunal concludes:

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

(b) in the particular circumstances of this case, the consistent conduct of Saint Vincent and the Grenadines provides sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute;

(c) in view of Guinea's failure to question the assertion of Saint Vincent and the Grenadines that it is the flag State of the *Saiga* when it had every reasonable opportunity to do so and its other conduct in the case, Guinea cannot successfully challenge the registration and nationality of the *Saiga* at this stage;

(d) in the particular circumstances of this case, it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute.

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

Genuine link

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

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

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

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

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

genuine link existed between the *Saiga* and Saint Vincent and the Grenadines at the time of the incident.

80. With regard to the first question, the Tribunal notes that the provision in article 91, paragraph 1, of the Convention, requiring a genuine link between the State and the ship, does not provide the answer. Nor do articles 92 and 94 of the Convention, which together with article 91 constitute the context of the provision, provide the answer. The Tribunal, however, recalls that the International Law Commission, in article 29 of the Draft Articles on the Law of the Sea adopted by it in 1956, proposed the concept of a "genuine link" as a criterion not only for the attribution of nationality to a ship but also for the recognition by other States of such nationality. After providing that "[s]hips have the nationality of the State whose flag they are entitled to fly", the draft article continued: "Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship". This sentence was not included in article 5, paragraph 1, of the Convention on the High Seas of 29 April 1958 (hereinafter "the 1958 Convention"), which reads, in part, as follows:

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

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

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

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

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

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

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

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

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

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

Exhaustion of local remedies

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

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

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

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

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

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

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

Article 295
Exhaustion of local remedies

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

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

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

(a) the right of freedom of navigation and other internationally lawful uses of the seas;

(b) the right not to be subjected to the customs and contraband laws of Guinea;

(c) the right not to be subjected to unlawful hot pursuit;

(d) the right to obtain prompt compliance with the Judgment of the Tribunal of 4 December 1997;

(e) the right not to be cited before the criminal courts of Guinea.

98. As stated in article 22 of the Draft Articles on State Responsibility adopted on first reading by the International Law Commission, the rule that local remedies must be exhausted is applicable when "the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens …". None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.

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

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

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

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

Nationality of claims

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

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

105. In dealing with this question, the Tribunal finds sufficient guidance in the Convention. The Convention contains detailed provisions concerning the duties of flag States regarding ships flying their flag. Articles 94 and 217, in particular, set out the obligations of the flag State which can be discharged only through the exercise of appropriate jurisdiction and control over natural and juridical persons such as the Master and other members of the crew, the owners or operators and other persons involved in the activities of the ship. No distinction is made in these provisions between nationals and non-nationals of a flag State. Additionally, articles 106, 110, paragraph 3, and 111, paragraph 8, of the Convention contain provisions applicable to cases in which measures have been taken by a State against a foreign ship. These measures are, respectively, seizure of a ship on suspicion of piracy, exercise of the right of visit on board the ship, and arrest of a ship in exercise of the right of hot pursuit. In these cases, the Convention provides that, if the measures are found not to be justified, the State taking the measures shall be obliged to pay compensation "for any loss or damage" sustained. In these cases, the Convention does not relate the right to compensation to the nationality of persons suffering loss or damage. Furthermore, in relation to proceedings for prompt release under article 292 of the Convention, no significance is attached to the nationalities of persons involved in the operations of an arrested ship.

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

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

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

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

Arrest of the *Saiga*

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

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

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

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

> Article 1:
> The import, transport, storage and distribution of fuel by any natural person or corporate body not legally authorized are prohibited in the Republic of Guinea.
>
> Article 4:
> Any owner of a fishing boat, the holder of a fishing licence issued by the Guinean competent authority who refuels or attempts to be refuelled by means other than those legally authorised, will be punished by 1 to 3 years imprisonment and a fine equal to twice the value of the quantity of fuel purchased.
>
> Article 6:
> Whoever illegally imports fuel into the national territory will be subject to 6 months to 2 years imprisonment, the confiscation of the means of transport, the confiscation of the items used to conceal the illegal importation and a joint and several fine equal to double the value of the subject of the illegal importation where this offence is committed by less than three individuals.
>
> Article 8:
> Where the misdemeanor referred to in article 6 of this Law has been committed by a group of more than 6 individuals, whether or not they are in possession of the subject of the illegal importation, the offenders will be subject to a sentence of imprisonment from 2 to 5 years, a fine equal to four times the value of the confiscated items in addition to the additional penalties provided for under article 6 of this Law.

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

> The Republic of Guinea exercises, within the exclusive economic zone which extends from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign rights concerning the exploration and exploitation, conservation and management of the natural resources, biological or non-biological, of the sea beds and their sub-soils, of the waters lying underneath, as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes.

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

> Article 1
> The customs territory includes the whole of the national territory, the islands located along the coastline and the Guinea territorial waters.
> However, free zones, exempt from all or some of the customs legislation and regulations, may be created within the customs territory.
>
> Article 34
> 1. The customs radius includes a marine area and a terrestrial area.
> 2. The marine area lies between the coastline and an outer limit located at sea 250 kilometres from the coast.

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

> Article 361
> Persons who commit or who conceal or abet in the commission of the following offences shall be punished by a term of imprisonment of 5 to 10 years and the forfeiture of all their property:
>
> 1. any fraudulent import or export of currency which is legal tender in Guinea, of Guinean agricultural and industrial products and of merchandise of all kinds;
> 2. any illegal possession of foreign currency and any exchange of such currency otherwise than through legally authorized agents;
> 3. any fraudulent export of masks, figurines and the like which are products of Guinean handicraft or industry.
>
> Article 363
> The killing or injuring by law-enforcement officers of offenders who are found *in flagrante delicto* smuggling at the border and who fail to obey customary summons shall be neither a felony nor a misdemeanor.

116. The main charge against the *Saiga* was that it violated article 1 of Law L/94/007 by importing gas oil into the customs radius (*rayon des douanes*) of Guinea. Guinea justifies this action by maintaining that the prohibition in article 1 of Law L/94/007 "can be applied for the purpose of controlling and suppressing the sale of gas oil to fishing vessels in the customs radius

according to article 34 of the Customs Code of Guinea". In support of this contention, Guinea declares that it is the consistent practice and the settled view of the courts of Guinea that the term "Guinea", referred to in article 1 of the Law L/94/007, includes the customs radius, and that, consequently, the prohibition of the import of gas oil into Guinea extends to the importation of such oil into any part of the customs radius. According to Guinea, the fact that the *Saiga* violated the laws of Guinea has been authoritatively established by the Court of Appeal. In its view, that decision cannot be questioned in this case because the Tribunal is not competent to consider the question whether the internal legislation of Guinea has been properly applied by the Guinean authorities or its courts.

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

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

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

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

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

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

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

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

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

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

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

124. Guinea denies that the application of its customs and contraband laws in its customs radius is contrary to the Convention or in violation of any rights of Saint Vincent and the Grenadines. It maintains that it is entitled to apply its customs and contraband laws to prevent the unauthorized sale of gas oil to fishing vessels operating in its exclusive economic zone. It further maintains that such supply is not part of the freedom of navigation under the Convention or an internationally lawful use of the sea related to the freedom of navigation but a commercial activity and that it does not, therefore, fall within the scope of article 58 of the Convention. For that reason, it asserts that the Guinean action against the *Saiga* was taken not because the ship was navigating in the exclusive economic zone of Guinea but because it was engaged in "unwarranted commercial activities".

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

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

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

> may exercise the control necessary to:
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
> (article 33, paragraph 1)

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

128. Guinea further argues that the legal basis of its law prohibiting the supply of gas oil to fishing vessels in the customs radius is to be found in article 58 of the Convention. It relies on the reference, contained in paragraph 3 of that article, to the "other rules of international law" to justify the application and enforcement of its customs and contraband laws to the customs radius. These "other rules of international law" are variously described by Guinea as "the inherent right to protect itself against unwarranted economic activities in its exclusive economic zone that considerably affect its public interest", or as the "doctrine of necessity", or as "the customary principle of self-protection in case of grave and imminent perils which endanger essential aspects of its public interest".

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

130. The main public interest which Guinea claims to be protecting by applying its customs laws to the exclusive economic zone is said to be the "considerable fiscal losses a developing country like

Guinea is suffering from illegal off-shore bunkering in its exclusive economic zone". Guinea makes references also to fisheries and environmental interests. In effect, Guinea's contention is that the customary international law principle of "public interest" gives it the power to impede "economic activities that are undertaken [in its exclusive economic zone] under the guise of navigation but are different from communication".

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

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

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

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

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

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

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

137. In their submissions, both parties requested the Tribunal to make declarations regarding the rights of coastal States and of other States in connection with offshore bunkering, i.e. the sale of gas oil to vessels at sea. The Tribunal notes that there is no specific provision on the subject in the Convention. Both parties appear to agree that, while the Convention attributes certain rights to coastal States and other States in the exclusive economic zone, it does not follow automatically that rights not expressly attributed to the coastal State belong to other States or, alternatively, that rights not specifically attributed to other States belong as of right to the coastal State. Saint Vincent and the Grenadines asks the Tribunal to adjudge and declare that bunkering in the exclusive economic zone by ships flying its flag constitutes the exercise of the freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as provided for in articles 56 and 58 of the Convention. On the other hand, Guinea maintains that "bunkering" is not an exercise of the freedom of navigation or any of the internationally lawful uses of the sea related to freedom of navigation, as provided for in the Convention, but a commercial activity. Guinea further maintains that bunkering in the exclusive economic zone may not have the same status in all cases and suggests that different considerations might apply, for example, to bunkering of ships operating in the zone, as opposed to the supply of oil to ships that are in transit.

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

Hot pursuit

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

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

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

Convention.

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

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

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

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

Article 111
Right of hot pursuit

> 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.
>
> 2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

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

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the teritorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

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

147. With regard to the pursuit alleged to have commenced on 27 October 1997, the evidence before the Tribunal indicates that, at the time the Order for the Joint Mission of the Customs and Navy of Guinea was issued, the authorities of Guinea, on the basis of information available to them, could have had no more than a suspicion that a tanker had violated the laws of Guinea in the exclusive economic zone. The Tribunal also notes that, in the circumstances, no visual or auditory signals to stop could have been given to the *Saiga*. Furthermore, the alleged pursuit was interrupted. According to the evidence given by Guinea, the small patrol boat P35 that was sent out on 26 October 1997 on a northward course to search for the *Saiga* was recalled when information was received that the *Saiga* had changed course. This recall constituted a clear interruption of any pursuit, whatever legal basis might have existed for its commencement in the first place.

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

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

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

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

> [T]he bunkering operation of the ship in the Guinean contiguous zone is also of no relevance in this context, although it may be relevant to the application of the criminal law. The relevant area here is the customs radius. This is a functional zone established by Guinean customs law within the realm of the contiguous zone and a part of the Guinean exclusive economic zone. One can describe it as a limited customs protection zone based on the principles of customary international law which are included in the exclusive economic zone but which are not a part of the territory of Guinea.

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

Use of force

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

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

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

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop,

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

> 1. The inspecting State shall ensure that its duly authorized inspectors:
>
> ...
>
> (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

157. In the present case, the Tribunal notes that the *Saiga* was almost fully laden and was low in the water at the time it was approached by the patrol vessel. Its maximum speed was 10 knots. Therefore it could be boarded without much difficulty by the Guinean officers. At one stage in the proceedings Guinea sought to justify the use of gunfire with the claim that the *Saiga* had attempted to sink the patrol boat. During the hearing, the allegation was modified to the effect that the danger of sinking to the patrol boat was from the wake of the *Saiga* and not the result of a deliberate attempt by the ship. But whatever the circumstances, there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice.

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

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

Schedule of summons

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

of the *Saiga* before the Tribunal of First Instance of Conakry.

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

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

Compliance with the Judgment of 4 December 1997

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

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

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

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

Reparation

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

168. Saint Vincent and the Grenadines claims compensation for material damage in respect of natural and juridical persons. Compensation is claimed in respect of damage to the ship,

financial losses of the shipowners, the operators of the *Saiga*, the owners of the cargo, and the Master, members of the crew and other persons on board the ship. Compensation is also claimed in respect of loss of liberty and personal injuries, including pain and suffering. Saint Vincent and the Grenadines requests that interest be given at the rate of 8% on the damages awarded for material damage.

169. Article 111, paragraph 8, of the Convention provides:

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

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

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

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

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

172. In the view of the Tribunal, Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation. Damage or other loss suffered by the *Saiga* and all persons involved or interested in its operation comprises injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit.

173. The Tribunal considers it generally fair and reasonable that interest is paid in respect of monetary losses, property damage and other economic losses. However, it is not necessary to apply a uniform rate of interest in all instances. In the present case, the Tribunal has set an interest rate of 6% in respect of award of compensation. In determining this rate, account has

been taken, *inter alia*, of commercial conditions prevailing in the countries where the expenses were incurred or the principal operations of the party being compensated are located. A higher rate of 8% is adopted in respect of the value of the gas oil to include loss of profit. A lower rate of interest of 3% is adopted for compensation for detention and for injury, pain and suffering, disability and psychological damage, payable from three months after the date of the Judgment.

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

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

(a) Damage to the *Saiga*, including costs of repairs, in the sum of US$ 202,764; with interest at the rate of 6%, payable from 31 March 1998;

(b) Loss with respect to charter hire of the *Saiga*, in the sum of US$ 650,250; with interest at the rate of 6%, payable from 1 January 1998;

(c) Costs related to the detention of the *Saiga* in Conakry, in the sum of US$ 256,892; with interest at the rate of 6%, payable from 1 January 1998;

(d) Value of 4,941.322 metric tons of gas oil discharged in Conakry, in the sum of US$ 875,256; with interest at the rate of 8%, payable from 28 October 1997;

(e) Detention of Captain Orlov, the Master, in the sum of US$ 17,750; with interest at the rate of 3%, payable from 1 October 1999;

(f) Detention of members of the crew and other persons on board the *Saiga*, in the sum of US$ 76,000, computed as specified in the Annex; with interest at the rate of 3%, payable from 1 October 1999;

(g) Medical expenses of Second Officer Klyuyev, in the sum of US$ 3,130; with interest at the rate of 6%, payable from 1 January 1998;

(h) Medical expenses of Mr. Djibril Niasse, in the sum of US$ 6,315; with interest at the rate of 6%, payable from 1 January 1998;

(i) Injury, pain and suffering of Second Officer Klyuyev, in the sum of US$ 10,000; with interest at the rate of 3%, payable from 1 October 1999;

(j) Injury, pain, suffering, disability and psychological damage of Mr. Djibril Niasse, in the sum of US$ 25,000; with interest at the rate of 3%, payable from 1 October 1999.

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

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

Financial security

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

179. When it ordered Guinea to release the *Saiga* and its crew from detention in its Judgment of 4 December 1997, the Tribunal stated that the release should be "upon the posting of a reasonable bond or security". The Judgment further ordered that the "security shall consist of: (1) the amount of gasoil discharged from the M/V Saiga; and (2) the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form". Thus, the gas oil discharged from the *Saiga* and the bank guarantee provided by Saint Vincent and the Grenadines were two elements of the "reasonable bond or other financial security" that Saint Vincent and the Grenadines was to provide for the release of the ship and its crew, as required by article 292, paragraph 4, of the Convention.

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

Costs

181. In the 1998 Agreement, the parties agreed that the Tribunal "shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal". In the written pleadings and final submissions, each party has requested the Tribunal to award legal and other costs to it. In addition, in its final submissions in the proceedings on the Request for provisional measures, Guinea requested the Tribunal to award costs to it in respect of those proceedings.

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

Operative provisions

183. For the above reasons, the Tribunal

(1) Unanimously,

Finds that it has jurisdiction over the dispute.

(2) Unanimously,

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

(3) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(4) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(5) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(6) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(7) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(8) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(9) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(10) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(11) By 17 votes to 3,

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

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

AGAINST: *Judges* VUKAS, WARIOBA, NDIAYE.

(12) By 18 votes to 2,

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

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

AGAINST: *Judges* WARIOBA, NDIAYE.

(13) By 13 votes to 7,

Decides that each party shall bear its own costs;

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

AGAINST: *Judges* CAMINOS, YANKOV, AKL, ANDERSON, VUKAS,

TREVES, EIRIKSSON.

ANNEX

(Paragraph 175 (f))

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

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

(Signed) Thomas A. MENSAH,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

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

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

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

(Initialled) T.A.M.

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

(Initialled) R.W.

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

(Initialled) L.Z.

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

(Initialled) L.D.M.N.

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

(Initialled) P.C.R.

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

(Initialled) D.H.A.

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

(Initialled) B.V.

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

(Initialled) E.A.L.

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

(Initialled) J.S.W.

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

(Initialled) T.M.N.

JOINT DECLARATION BY JUDGES CAMINOS, YANKOV, AKL, ANDERSON, VUKAS, TREVES AND EIRIKSSON ON THE QUESTION OF COSTS

We were unable to support the decision in this case on the question of costs for two reasons.

First, the two States parties to the dispute requested the Tribunal to award costs to the successful party. They included their joint request in their Agreement of February 1998. They repeated it individually at the time of making their respective final submissions, in which each party sought recovery of its costs against the other. The parties are in agreement that the successful party should be awarded its costs and, at the request of the Tribunal, each has submitted invoices and accounts which have been duly examined.

In this connection, we recall that, from the outset of the work of the Permanent Court of International Justice, it was understood that the terms of Article 64 of its Statute (comparable to article 34 of the Tribunal's Statute) did not exclude the possibility that a division of the costs between the parties could be ordered pursuant to an agreement between them. The Sub-Committee of the Third Committee of the Assembly of the League of Nations, in reporting on its work in preparation for the adoption by the Assembly of the Statute of the Permanent Court, stated: "The Sub-Committee unanimously recognises that the terms of [Article 64] do not prevent division of the costs between the Parties in accordance with an agreement between them." (*League of Nations, Records of the First Assembly, Meetings of the Committees, I*, p. 537, Geneva, 1920).

In the present case, there is clearly agreement between the parties to the effect that the party found by the Tribunal to have been the "successful party" should receive its costs.

Secondly, this case has resulted in the award of compensation. The Tribunal has determined certain precise amounts of compensation, as well as interest, with the stated aim of wiping out the consequences of acts found to have been contrary to the Convention (paragraph 170 of the Judgment). In our opinion, it would have been consistent with the full achievement of that aim to have departed from the general rule and to have awarded costs to Saint Vincent and the Grenadines, as the generally successful party.

We recognize that, as regards the general question of the award of costs, the Tribunal has not yet elaborated specific rules or procedures, such as have been adopted by other international courts and tribunals. Nonetheless, on the basis of certain general principles and the information provided by each party, we would have awarded, in the circumstances of this case, reasonable costs in respect of the following: professional fees, travel and subsistence of agents, counsel and advocates; travel and subsistence of witnesses; production of evidence; and other expenses necessarily incurred for the purposes of this phase of the proceedings. Such an award, by responding affirmatively to the repeated requests of both parties, would have done no more than meet their legitimate expectations.

Finally, we support the decision of the majority that the general rule on costs is applicable to the phase of the proceedings concerning provisional measures, in the absence in our opinion of a successful party in that phase.

(Signed)	Hugo Caminos
(Signed)	Alexander Yankov
(Signed)	Joseph Akl
(Signed)	David H. Anderson
(Signed)	Budislav Vukas
(Signed)	Tullio Treves
(Signed)	Gudmundur Eiriksson

SEPARATE OPINION OF PRESIDENT MENSAH

1. I have voted in favour of operative paragraph 3 of the Judgment in spite of the serious doubts I have about the registration status of M/V Saiga at the time of the incident which gave rise to the dispute. I have had the opportunity to read the Dissenting Opinions of Judges Warioba and Ndiaye on the issue of the registration and nationality of the *Saiga*, and I agree with the main thrust of their Opinions that, on a correct interpretation of the Merchant Shipping Act of Saint Vincent and the Grenadines, read with the relevant provisions of the Convention, the *Saiga* was not a ship entitled to fly the flag of Saint Vincent and the Grenadines on 28 October 1997 because, on that day, its provisional registration had expired and no other registration had been granted to it under the laws of Saint Vincent and the Grenadines. I have also seen the Separate Opinion of Vice-President Wolfrum on this point, and I agree fully with his reasoning and conclusions.

2. The facts concerning the registration of the *Saiga* in the period between 12 March 1997 and 28 November 1997 are not in dispute. Both parties accept that there was no currently valid document of registration for the ship from 12 September 1997, when the Provisional Certificate of Registration was stated to expire, to 28 November 1997, when the Permanent Certificate of Registration was issued to the ship. (The Provisional Certificate of Registration that was issued to the *Saiga* on 14 April 1997 states: "This Certificate expires on 12 September, 1997"). And it is not disputed that the entry in the Ships Register of Saint Vincent and the Grenadines recorded that the provisional registration of the *Saiga* was valid only up to 12 September 1997 ("Valid thru: 12/09/97"). The disagreement between the parties concerns the conclusion that may be drawn from these facts. Guinea contends that the only conclusion to be drawn from the absence of both a certificate of registration in force and a valid entry in the Ships Register is that the ship was not registered in Saint Vincent and the Grenadines. Consequently, it concludes that the ship did not have the nationality of Saint Vincent and the Grenadines during the period. Saint Vincent and the Grenadines, on the other hand, maintains that provisional registration continued in force during the period, notwithstanding the fact that the Provisional Certificate of Registration had expired and the entry in the Ships Register stated that registration had ceased to be valid with effect from 12 September 1997.

3. Saint Vincent and the Grenadines supports its contention with arguments based on its interpretation of certain provisions of its Merchant Shipping Act of 1982 (hereinafter "the Merchant Shipping Act"), particularly section 36(2) of the Act. It also calls in aid certain "overt signs" of nationality on the ship or on board, as well as documents and declarations issued by the authorities of its Maritime Administration. However, the information and declarations are based on provisions of the Merchant Shipping Act, so the real basis of the case of Saint Vincent and the Grenadines is its interpretation of those provisions. The Judgment states, in paragraph 71, that it considers this "evidence" is sufficient to establish the Vincentian nationality of the *Saiga* at the time it was arrested by Guinea. I do not agree with this conclusion.

4. As has been so comprehensively and cogently demonstrated in the Opinions of Vice-President Wolfrum and Judges Warioba and Ndiaye, nothing in the evidence adduced by Saint Vincent and the Grenadines can be said to have "established" that the *Saiga* was registered in Saint Vincent and the Grenadines on 28 October 1997, either pursuant to the Merchant Shipping

Act or, more crucially, by reference to article 91 of the Convention, which is the controlling provision on the question. I will do no more than recapitulate the extensive recitals of fact and arguments in their opinions.

5. According to the Merchant Shipping Act a ship acquires Vincentian nationality only through registration in accordance with the procedures specified therein for that purpose. Section 2 of the Act provides that "'Saint Vincent and the Grenadines ship' means a ship registered under this Act and includes any ship that is deemed to be registered under this Act". It follows that a ship which is not registered under the Act does not have Vincentian nationality, whatever the officials of the State may declare. The facts in this case show that the *Saiga* was not registered (provisionally or permanently) in the manner required by the Act. Saint Vincent and the Grenadines acknowledges that the Provisional Certificate of Registration of the *Saiga* expired on 12 September 1997. In the letter of 1 March 1999 the Deputy Commissioner for Maritime Affairs stated that "in this case", as frequently, the owners of the *Saiga* had allowed the Provisional Certificate of the *Saiga* to "lapse" before applying either for an extension of the Provisional Certificate or for the issue of a permanent certificate. There was, therefore, a gap in the registration between the date when the Provisional Certificate of Registration was allowed to lapse and the date on which the Permanent Certificate of Registration was issued to the ship, i.e. from 12 September to 28 November 1997. In my view, this gap cannot be cured by the Merchant Shipping Act, because no provision of the Act deals with such a situation. Nor can the gap be cured by declarations of the officials of the Maritime Administration, especially when such declarations are made in the context of litigation proceedings in which they are interested parties.

6. Saint Vincent and the Grenadines seeks to explain away the gap in the registration by recourse to section 36(2) of the Merchant Shipping Act. This provision reads: "The provisional certificate of registration issued under subsection (1) shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue." Saint Vincent and the Grenadines' contention is that this provision serves to keep a provisional certificate of registration in force beyond the period of its expiration specifically indicated at the time of its issue and expressly stated on its face. In effect, the argument of Saint Vincent and the Grenadines is that, although the Provisional Certificate of Registration expired ("lapsed", in its own words) on 12 September 1997, it, nevertheless, continued to have effect after that date, simply because section 36(2) of the Act states that a provisional certificate of registration has the same effect as an ordinary certificate of registration for one year.

7. Saint Vincent and the Grenadines supports its argumentation with the claim that, "when a vessel is registered under its flag, it remains so registered until it is deleted from the Registry". In its submissions before the Tribunal, Saint Vincent and the Grenadines stated: "When a vessel is registered under the flag of Saint Vincent and the Grenadines it remains so registered until it is deleted from the registry in accordance with the conditions prescribed in section 1, articles 9 to 42 and 59 to 61, of the Merchant Shipping Act of 1982. At the time of registration a provisional certificate of registry is issued, followed by a permanent certificate of registry when certain conditions are satisfied. In the case of the *Saiga* her location prevented delivery on board of the Permanent Certificate but this in no way deprived the vessel of its character as Vincentian nor

had the effect of withdrawing it from the register. Had there been any doubt in this regard, inspection of the Ships Register would have eliminated it."

8. As has been shown by Vice-President Wolfrum, this statement has no basis in the Merchant Shipping Act. But even if this statement is true in respect of a ship that has been permanently registered under the Act, it is inaccurate in relation to a ship which is provisionally registered under the Act. Under section 36(2) of the Act, on which Saint Vincent and the Grenadines relies, a ship that is provisionally registered ceases to be so registered one year after the date of the issue of the provisional certificate of registration, unless a permanent certificate has been issued to it prior to or at that time. No specific act or decision is necessary to bring the provisional registration to an end. Similarly, by virtue of section 37 of the Act, a ship that is provisionally registered ceases to be so registered after sixty days if its owners fail to fulfil the conditions specified in that section. Again, no decision or official act is needed to effect the cessation of the provisional registration. Indeed, in spite of the claim of Saint Vincent and the Grenadines, there is no provision for the deletion of a provisionally registered ship from the register. And this is not surprising. Provisional registration means exactly what is says: it is a status of temporary duration. The ship is registered for the specific period indicated in the document issued to that effect. Upon the expiry of that period it ceases to be registered unless one of two measures are taken by the owners. These are either an application for the extension of the provisional registration (subject to the restriction that the total period of provisional registration must not exceed one year) or, alternatively, an application for a permanent registration, provided that the conditions stipulated in the Act for that purpose have been fulfilled. No other possibility is available under the Act after the period of provisional registration expires. The ship is either granted an extended provisional registration or a permanent registration. Failing that, it automatically ceases to be registered. Thus the claim of Saint Vincent and the Grenadines that a ship which is provisionally registered under its flag remains so registered until it is deleted from the registry is incorrect.

9. The claim that every provisional certificate, regardless of its stated period of validity, continues to have effect for one year under all circumstances appears to be contradicted by the practice adopted by the very Maritime Administration which makes the claim. As stated in the brochure issued by the Commissioner, the common practice is to issue provisional certificates for six months with the possibility of renewal. The Deputy Commissioner explained that "[o]ne purpose of this is to encourage owners to comply with the formalities of permanent registration sufficiently in advance of the one-year validity period of the provisional registration period under Section 36 (2) of the Act". This practice is not incompatible with section 36(2) of the Merchant Shipping Act. That section sets a maximum limit of one year for provisional registration but does not establish a minimum period for which provisional registration may be granted. As I see it, the practice indicated in the brochure implements section 36(2) in a manner which is entirely within its meaning and intent. That being the case, one may ask what the purpose of renewing a six-month provisional certificate may be, if the certificate in fact has mandatory effect for a full year, regardless of its stated expiry date? And, if the Administration really interprets section 36(2) to mean that provisional registration remains in effect for one full year in every case, what significance is to be attached to the entry in the Ships Register that the provisional registration of the *Saiga* was "[v]alid thru: 12/09/1997"?

10. It may also be noted in this regard that the submission of Saint Vincent and the Grenadines, quoted in paragraph 7 above, does not tally with the facts as they appear in the evidence before the Tribunal. The claim that the *Saiga*'s "location prevented delivery on board of the Permanent Certificate" is not supported by the evidence, which shows that there was no permanent or other certificate at any time before 28 November 1997. Hence the absence of a permanent certificate on board the ship had nothing to do with the location of the ship. The simple reason is that no such certificate existed at the time. Then again, the suggestion that an inspection of the Ships Register would have confirmed the continued registration of the ship is not borne out by the facts. Prior to 28 November 1997, the only entry in the Ships Register of Saint Vincent and the Grenadines was the one that stated that registration of the ship had ceased to have validity as of 12 September 1997 (was "[v]alid thru: 12/09/1997"). Hence an examination of the Register soon after the arrest, or at any time prior to 28 November 1997, would only have confirmed that, while the ship had previously been registered in Saint Vincent and the Grenadines, it was no longer so registered.

11. In my view, therefore, there is no provision in the Act to justify the proposition of Saint Vincent and the Grenadines that section 36(2) of the Act can be interpreted to extend the period of validity of each and every provisional certificate of registration beyond the date on which the certificate is expressly stated to expire.

12. I wish to emphasize that, in suggesting that the Tribunal should not accept the claim of Saint Vincent and the Grenadines that section 36(2) of its Act restores the lapse of registration of the *Saiga* in this case, I am not proposing that the Tribunal should attempt to interpret the Merchant Shipping Act, or even speculate on how a court in Saint Vincent and the Grenadines would react to that claim. I only suggest that the Tribunal apply a principle which I consider to be generally applicable in international adjudication and appropriate in this case. That principle is that nothing prevents an international court or tribunal from examining whether or not, in interpreting or applying its laws, a State is acting in conformity with its obligations under international law - in this case the Convention which is binding on both parties to the dispute. In the present dispute, Saint Vincent and the Grenadines claims that a ship for which no valid certificate of registration exists and in respect of which there is no entry in its Ships Register, is, nevertheless, to be considered as having Vincentian nationality. Saint Vincent and the Grenadines argues that, under its laws, a ship whose certificate of registration has expired nevertheless continues to have its nationality. Guinea challenges this claim. It bases its challenge on article 91 of the Convention. The task of the Tribunal is to determine whether the interpretation of the Act, as given by Saint Vincent and the Grenadines, is in conformity with article 91 of the Convention. In another context in the present case, the Tribunal has, in my view legitimately, relied on the same principle mentioned above to declare that Guinea's interpretation and application of its laws in the customs zone were incompatible with the Convention (Judgment, paragraphs 121 and 136). I believe that, in this context also, the Tribunal has the competence to examine the interpretation of the Merchant Shipping Act as put forward by Saint Vincent and the Grenadines in order to determine whether the law, as thus interpreted, is consistent with its obligations under the Convention. This appears to me to be even more appropriate in this case since, as Judge Rao pertinently points out in his Opinion (paragraph 7), the interpretation of the Act presented by Saint Vincent and the Grenadines is not based on a pronouncement of a court of Saint Vincent and the Grenadines but is merely a submission by

counsel representing Saint Vincent and the Grenadines in litigation proceedings. I also recall that Guinea made a similar claim regarding the interpretation of a provision of its national legislation on the "customs radius". In response the Tribunal noted, again correctly in my opinion, that Guinea had produced no evidence to support its interpretation beyond the assertion that the interpretation reflects the consistent position of its administration and courts (Judgment, paragraph 122). It is also not without significance that the Tribunal has itself reasserted the principle that domestic law is a fact to be proved by evidence before it (Judgment, paragraph 120). On that basis the Tribunal does no more than its judicial duty if it requests a party before it to provide appropriate evidence and arguments to support an assertion that a given rule is part of its national law.

13. I must also stress that, if the Tribunal had accepted Guinea's challenge to the assertions of Saint Vincent and the Grenadines that the *Saiga* was registered with it, it would not necessarily have been questioning the exclusive jurisdiction which article 91 of the Convention accords to Saint Vincent and the Grenadines to determine the conditions under which it registers ships in its territory, or grants to ships the right to fly its flag. Pursuant to article 91 of the Convention it is for Saint Vincent and the Grenadines to determine the conditions for the registration of ships in its territory and for the grant of its nationality to ships. Saint Vincent and the Grenadines has duly exercised this power in its Merchant Shipping Act. Under the Act, Vincentian nationality is acquired by registration, and registration is effected by the issue of a certificate of registration. What is being questioned by Guinea in this case is the claim, which necessarily underlies the contentions of Saint Vincent and the Grenadines, that a declaration by an official of its Maritime Administration is sufficient to confer Vincentian nationality to a ship, even where the evidence indicates that the conditions established in the law for registration and the grant of the right to fly the Vincentian flag have not been satisfied. For my part I see merit in Guinea's objection. Article 91 of the Convention accords to each State the exclusive right to set the conditions for the acquisition of its nationality by ships, but that provision does not also support the proposition that a ship can acquire nationality merely because an official of the State declares that it has such nationality.

14. The same is true of overt signs of nationality, such as inscriptions and documents, on which Saint Vincent and the Grenadines has relied, and which have apparently been accepted by the Tribunal, as "evidence" to prove the continuance of registration and national status (Judgment, paragraph 67). These are signs that may, and in some cases must, be put on the ship or on board. They are consequences of registration but they do not constitute independent and sufficient evidence of registration when there is no other evidence of such registration.

15. It is in the light of the above considerations that I am not able to support the conclusion in the Judgment that Saint Vincent and the Grenadines has "established" that the *Saiga* was registered in, and had the nationality of, Saint Vincent and the Grenadines at the time it was arrested. By the same token, I am unable to support the other leg of the finding that the evidence and argumentation of Guinea have not been sufficient to warrant a finding that the ship was not registered at the time. In my view all that was required of Guinea in this case was evidence to show that the Provisional Certificate of Registration of the *Saiga* had expired on 12 September 1997; that the provisional registration of the *Saiga*, as recorded in the Ships Registry, was no longer valid after 12 September 1997; and that there was no certificate or record of registration

of any kind on the basis of which the *Saiga* could claim the right to fly the flag of Saint Vincent and the Grenadines on 28 October 1997 when the *Saiga* was arrested. I am satisfied that Guinea has done this convincingly, by means of evidence which has not been contested by Saint Vincent and the Grenadines.

16. But, although I do not agree with the Judgment's finding that Saint Vincent and the Grenadines has established that the *Saiga* was registered under its flag on the day of the incident giving rise to the dispute, I am able, nevertheless, to support the decision to reject Guinea's contention that Saint Vincent does not have legal standing to bring the dispute to the Tribunal. I have joined in the decision to deal with the merits of the case because I agree, as stated in paragraph 73 (d) of the Judgment, that it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute, having regard to the particular circumstances of the case.

17. Although I am in no doubt that there was a gap in the registration of the ship, I am fully satisfied that this was due to lapses in the law and practice in the Maritime Administration of Saint Vincent and the Grenadines, which in turn encouraged a certain lack of diligence on the part of the owners and operators of the ship. The evidence in this case convinces me that both the officials of Saint Vincent and the Grenadines as well as the owners of the *Saiga* genuinely, though misguidedly, believed that the provisional registration of the ship continued in force after 12 September 1997. This appears to account for the fact that the relevant authorities of Saint Vincent and the Grenadines, as well as the owners and charterers of the ship, continued to operate on the basis that the *Saiga* was entitled to fly the flag of Saint Vincent and the Grenadines during the entire period between 12 September and 28 November 1997 when the Permanent Certificate of Registration was issued to the *Saiga*. My conclusion, therefore, is that the defect in the registration of the *Saiga*, though real, was more technical than substantive.

18. I would have felt more comfortable in coming to this conclusion if Saint Vincent and the Grenadines had admitted that there was a gap in the registration and tried to minimize its significance. Instead it has attempted, in my view unsuccessfully, to argue away the gap by relying on provisions of its Merchant Shipping Act. In the process the Tribunal has on occasions not been treated with the full candour and disclosure of facts to which it is entitled. For example, during the oral proceedings on 28 November 1997 counsel for Saint Vincent and the Grenadines, in response to a question from the Agent of Guinea about the ownership of the *Saiga*, stated: "We have been able to obtain this morning a provisional certificate of registration from Saint Vincent and the Grenadines, which unfortunately, although dated 14 April 1997, is dated to expire on 12 September 1997. Efforts are being made to obtain the no longer provisional but full certificate of registration on behalf of the owners. We hope that we will be able to get this to the Tribunal at the latest during the adjournment" (ITLOS/PV.97/2, p. 5, 15-20). However, the certificate that was produced was found to be one that did not apply to the period of the dispute. Indeed, the certificate produced was actually issued on 28 November 1997, the very day on which counsel undertook to make it available, although the impression was given at the time that the certificate already existed. Furthermore, no explanation was given as to the documentary situation prior to the issue of the certificate or why no document that was applicable to the period prior to 28 November 1997 was produced. It is pertinent to note that this period for which no document was forthcoming covered not only the time of the arrest of the *Saiga*, but also the

times when Saint Vincent and the Grenadines invoked the jurisdiction of the Tribunal for the prompt release of the ship and the prescription of provisional measures. It was mainly due to this absence of accurate information from Saint Vincent and the Grenadines that the Tribunal, in its Order of 11 March 1998, accepted without qualification that the *Saiga* was a ship flying the flag of Saint Vincent and the Grenadines. In my view, the Tribunal would have been better served if Saint Vincent and the Grenadines had been more forthcoming with information and explanations on what was an important aspect of the case before it.

19. Be that as it may, the conclusion I draw from the facts before the Tribunal is that the defect in the registration of the *Saiga* was due to lapses in law and administrative practices rather than a conscious decision to abrogate or even interrupt registration. That being the case, I have supported without difficulty the decision to proceed to the merits of the case. This decision, in effect, disregards what is no more than a technical defect in order to do greater justice.

20. In this connection I note that a ruling that Saint Vincent and the Grenadines does not have standing to bring the dispute to the Tribunal would effectively deprive the persons involved or interested in the operation of the *Saiga* of redress in respect of injury, damage and other losses suffered by them as a result of what the Judgment has found to be serious violations of the Convention and other rules of international law committed by Guinea in this case. The violations do not only affect commercial interests but also relate to fundamental human rights and the dignity of the person. I am particularly conscious that some of the persons who have suffered damage or loss as a result of the measures taken by Guinea had no responsibility for the legal and administrative errors and omissions regarding the registration of the ship that have given rise to doubts about its registration and nationality. Thus, refusal to deal with the merits of the case would have had far-reaching consequences for these persons. In my view a court of law and justice should only take a decision which denies justice in such a way if no other course is legally open to it on the evidence. I do not think that this is the case in the circumstances of the present dispute. In his Dissenting Opinion in the *Nottebohm* case, Judge *ad hoc* Guggenheim stated: "The finding that the Application is not admissible on the grounds of nationality prevents the Court from considering the merits of the case and thus from deciding whether the respondent State is or is not guilty of an unlawful act as regards Liechtenstein and its national, who has no other legal means of protection at his disposal. Moreover, a preliminary objection must be strictly interpreted. *It must not prevent justice from being done*" (emphasis supplied) *(Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955,* p. 64). While Guinea's objection in this case is not strictly speaking a "preliminary objection", the effect of upholding Guinea's objection to admissibility in this case would be the same as the result that Judge Guggenheim did not find acceptable. My position in this case is based on the principle so clearly formulated by the eminent Judge.

21. I am further fortified in my view by the knowledge that, in the present case, a ruling to proceed on the merits of the case cannot prejudice any rights of Guinea. As the Judgment notes Guinea has, for much of the period of the dispute, accepted Saint Vincent and the Grenadines as the flag State of the *Saiga*. I must add that I do not share the implication in the Judgment that Guinea's challenge of this fact in the present proceedings is in some sense improper or evidence of bad faith. Indeed, in my opinion, Guinea has a better right to claim that it has been the victim of bad faith on the part of Saint Vincent and the Grenadines. But that is neither here nor there

for present purposes. The fact is that Guinea has accepted and acted upon the representation by Saint Vincent and the Grenadines that it was the flag State of the *Saiga* at the time of the incident. In any case, it is clear from the evidence that the nationality of the *Saiga* did not have any significance at all in the decisions of the authorities of Guinea to take the measures they took against the ship. Nothing in the evidence suggests that the measures taken by Guinea would have been different if the *Saiga's* nationality had been other than that of Saint Vincent and the Grenadines. As far as the authorities of Guinea were concerned, a foreign ship was undertaking activities in Guinea's customs radius which, in their view, violated the laws of Guinea. They set out to arrest that ship, whatever its nationality might be, and to punish it in accordance with Guinea's laws as they understood them to be. Thus, the legality of the measures did not depend on the nationality of the ship. Guinea either had the right under the Convention to take those measures against a foreign ship in the circumstances or it did not have that right. The same objections would have applied to those measures regardless of the nationality of the ship against which they were taken; and Guinea's defence before the Tribunal would have been the same if the action had been brought by any other flag State. Consequently, Guinea does not suffer any prejudice from the fact that the ship happens to be of Vincentian nationality. For these reasons, also, I have no hesitation in agreeing to the decision to proceed to the merits of the case, and thus consider the allegations that Guinea acted in violation of its obligations under the Convention, both in the measures it took against the *Saiga* and in the manner in which the measures were taken.

22. In coming to this conclusion, I find it necessary to express my concerns regarding certain unusual features of the legislation of Saint Vincent and the Grenadines and the administrative practices of its Maritime Authorities concerning the issue of documents to ships. These aspects of the law and practice of Saint Vincent and the Grenadines are at the root of the differences between the parties, and even Members of the Tribunal, concerning the registration of the *Saiga* at the time of the incident. One such feature of the legislation is the fact that the Merchant Shipping Act permits provisional registration to last for as long as twelve months. This long period of provisional registration provides scope for abuse by unscrupulous shipowners who may wish to operate sub-standard ships, for it makes possible for them to switch such ships between flags on consecutive "provisional registrations" for one year at a time. This potential for abuse has already been noted in the discussions in the International Maritime Organization (IMO) on the subject of "Implications Arising when a Vessel loses the Right to fly the Flag of a State". It is also a cause for concern that the Maritime Administration appears to allow and condone the practice by which ships operate under provisional registration without valid certificates of any kind. In this regard, I refer to the statement by the Deputy Commissioner for Maritime Affairs that "it is very common for Owners to allow the … Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate". The lack of diligence on the part of shipowners in renewing or replacing certificates at the appropriate time, and the toleration of such lapses by Saint Vincent and the Grenadines, can have undesirable implications for the effective implementation of the provisions of the Convention on nationality of ships and the duties of flag States. The practice could also encourage abuses and create difficulties in international maritime transport. Specifically, it could encourage or condone neglect on the part of owners and managers of ships and thus lead to situations where, as in the present case, a ship is able to operate for more than six weeks without having on board a currently valid document testifying that it was in fact registered with the State whose flag it was

flying. It is hardly necessary to stress that a certificate of registration is the most important evidence of the nationality of a ship for third States and other parties who may have an interest in the identity of the flag State or in the discharge of flag State responsibilities under the Convention and other international agreements dealing with safety at sea and the prevention and control of pollution of the marine environment from ships. It is also important to note that the issue of such certificates is required by article 91 of the Convention. It is, therefore, imperative that every ship operating internationally should have a valid certificate of registration at all times.

23. It is to be hoped that the lessons learnt from these proceedings will provide an incentive to the Maritime Administration of Saint Vincent and the Grenadines, and other shipping registers, to improve their legislation and also ensure adequate vigilance on the part of the authorities entrusted with administering registers of ships.

(Signed) Thomas A. Mensah

SEPARATE OPINION OF VICE-PRESIDENT WOLFRUM

1. I have voted for operative paragraphs 3 and 5 of the Judgment for reasons which, in some places, differ substantially from those the Judgment is primarily based upon. The separate opinion sets out the grounds for my disagreement and provides for alternative reasons for the holdings of the Judgment; in particular it will concentrate on the following issues: the mode concerning the appreciation of evidence as developed and applied in the Judgment; the reasoning concerning registration and nationality of the M/V Saiga; interpretation and application of the principle of the exhaustion of local remedies; relationship between the Convention on the Law of the Sea and national law as well as the competences of the Tribunal to establish violations of national law.

Appreciation of evidence

2. The Judgment refers to principles on the appreciation of evidence to be applied in this case in several places (paragraphs 66 to 70, 72 to 74, 122, 135, 148, and 175). These paragraphs do not really reveal which mode concerning the appreciation of evidence the Tribunal considers to be appropriate although it is evident that the appreciation of evidence occupies a decisive role in the reasoning of the Judgment. As a matter of transparency of the Judgment, the system on the appreciation of evidence should be clearly identified and fully reasoned. One may even consider this to be a mandatory conclusion to be drawn from the principle of fair trial, an established principle of international law.

3. Before dealing specifically with the mode of appreciation of evidence used in the Judgment some brief general remarks are called for.

4. International jurisprudence does not provide for extended guidance in respect of the appreciation of evidence. Contrary to municipal law, international law, in general, and the rules of international courts and tribunals, in particular, have only developed regulations on procedural aspects concerning the submission of evidence by the parties but not on the appreciation of evidence in general. This is also true for the Rules of the Tribunal which in several provisions refer to the submission of evidence by the parties and the authority of the Tribunal to call upon the parties to produce such evidence the Tribunal considers necessary.

5. Nevertheless, the Tribunal is not totally free in deciding on the mode of appreciation of evidence. It is guided in this respect by the principles of impartiality and fair trial and its duty to arrive at a decision.

6. Rules concerning the appreciation of evidence in all legal systems generally identify two issues to be considered, namely which of the parties has the burden of proof and what is the standard of appreciation to be used in assessing the evidence produced. Both issues are linked. The notion of the burden of proof embraces two aspects: a procedural one, namely who has the duty to present pleadings and evidence, as well as a substantive one, namely which party bears the negative consequences if the alleged facts have not been proven satisfactorily. Whether a fact has been proven satisfactorily is where the standard of proof becomes relevant.

7. It is the prevailing principle governing the appreciation of evidence by adjudicating bodies in all main legal systems that the burden of proof lies on the party who asserts them *(actiori incumbit probatio).* It has been argued occasionally that international tribunals are not tied by such firm rules as developed in all national legal systems since they were not appropriate to litigation between Governments. I have doubts whether this approach is still fully adequate. The principle *actiori incumbit probatio* is recognized in all legal systems. While the particularities of each legal system may result in modifications concerning the implementation of this principle its essence is uncontested, namely that the party which asserts a fact, whether the claimant or the respondent, bears the negative consequences if the respective facts are not proven. This rule was reaffirmed by the International Court of Justice in several cases (*Nicaragua* case, *I.C.J. Reports 1984*, p. 437, paragraph 101; *Frontier Dispute* case, *I.C.J. Reports 1986*, pp. 587-588; *Temple of Preah Vihear* case, *I.C.J. Reports 1962*, pp. 15-16); it has also been upheld by the Permanent Court of International Justice, conciliation commissions, mixed claims commissions and, in particular, The Iran-United States Claims Tribunal.

8. The Judgment does not refer to the burden of proof of either party explicitly although the principle has been invoked in several places. It proceeds implicitly from the premise that it is for Saint Vincent and the Grenadines to establish that the *Saiga* had, at the time of its arrest, the nationality of Saint Vincent and the Grenadines (paragraph 72). To this I agree since it is Saint Vincent and the Grenadines which is the claimant and the nationality of the *Saiga* is a constituent element for the claim advanced by Saint Vincent and the Grenadines. However, the Judgment does not implement this approach consistently. Paragraph 72, in fact, by referring to "the initial burden" of proof makes an unjustified and unjustifiable attempt to ameliorate the consequences for Saint Vincent and the Grenadines of a full implementation of the principle of burden of proof. For similar reasons I disagree with the way of reasoning in paragraph 148 of the Judgment. The Judgment should have elucidated why the burden of proof that visual or auditory signals to stop were given remained with Guinea.

9. I will now turn to the second element of the appreciation of evidence namely the standard of proof.

10. International tribunals enjoy some discretion concerning the standard of proof they apply, namely whether they consider a fact to be proven. Nevertheless, in spite of that discretion there must be a criterion against which the value of each piece of evidence as well as the overall value of evidence in a given case is to be weighed and determined. It is a matter of justice that this criterion or standard is spelled out clearly, applied equally and that deviations therefrom are justified.

11. The Judgment does not establish, however, the general standards of proof it applies. In this respect reference should have been made to article 28 of the Statute of the Tribunal which provides, *inter alia*, that in cases where one of the parties does not appear before the Tribunal, the Tribunal "must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law." This provision of the Statute, although applicable to cases where one of the parties is absent, implies that this is the standard of proof to be applied by the Tribunal in general.

12. Traditionally, in international adjudication, apart from *prima facie* evidence which is reserved for preliminary proceedings, two standards of proof are applied, proof beyond reasonable doubt, which requires a high degree of cogency, and preponderance of evidence. The latter means that the appreciation of evidence points into a particular direction although there remains reasonable or even more than reasonable doubt. International courts or tribunals have not confined themselves strictly to these standards but have combined or modified them where justifiable under the circumstances of the respective case. "[W]ell founded in fact and law" as referred to in article 28 of the Statute is not a standard of proof in the sense of "preponderance of evidence", it is rather comparable to the standard of proof in the sense of "proof beyond reasonable doubt" as applied in many national legal systems (see Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, 1996, at p. 324).

13. The Judgment uses different formulas to describe the standard of proof it applies. For example in paragraphs 72 and 73(a) it is stated that it "… has not been established that the Vincentian registration or nationality of the *Saiga* was extinguished …". In paragraph 148 it is said that "... the evidence adduced by the Respondent does not support its claim that the necessary visual or auditory signals to stop were given ...". The two standards of proof applied seem to differ.

14. More importantly, however, the Judgment does not give any indication which degree of cogency it felt was necessary to accept that the *Saiga* was a ship of Vincentian nationality; obviously it was a low one. The Judgment does not consider it necessary to be satisfied of the Vincentian nationality of the *Saiga* but rather accepts the lack of proof for the contrary to be sufficient. This is irreconcilable with the standard of proof to be applied according to the Statute. There is no sustainable justification for departing from the standard of proof in respect of the registration of the *Saiga*, namely that the Tribunal must be positively satisfied that the claim is well founded in fact and law. Since the nationality of the *Saiga* is a constituent element for the claims of Saint Vincent and the Grenadines as qualified by the Judgment, this standard of proof is not met by the statement that Guinea was not able to prove the contrary, which it actually did. When dealing with the nationality of the *Saiga* I will establish that on the basis of the evidence before the Tribunal one cannot come but to the conclusion that the *Saiga* was not registered in the Register of Ships of Saint Vincent and the Grenadines at the time of its arrest and thus did not have the nationality of Saint Vincent and the Grenadines.

Registration

15. I disagree with the statements made in paragraphs 72 and 73(a) and (b), namely that "… it has not been established that the Vincentian registration or nationality of the *Saiga* was extinguished …" and that "… the consistent conduct of Saint Vincent and the Grenadines provides sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute". I support, however, the statements made in paragraph 73(c) and (d) and it was only for that reason that I was able to vote for operative paragraph 3.

16. My disagreement with the statements in paragraphs 72 and 73(a) and (b) is based on two grounds. The statements and the respective reasoning do not adequately reflect the role of flag States concerning registration of ships and the significance the Convention on the Law of the Sea

attaches to proper documentation of registration. Additionally, these paragraphs are based upon an assessment of facts which I do not share. The evidence before the Tribunal clearly leads to the conclusion that the *Saiga* was not registered with Saint Vincent and the Grenadines at the time of its arrest.

17. Registration of ships has to be seen in close connection with jurisdictional powers flag States have over ships flying their flag and their obligation concerning the implementation of rules of international law in respect to these ships. It is one of the established principles of the international law of the sea that, except under particular circumstances, on the high seas ships are under the jurisdiction and control only of their flag States, e.g. States whose flag they are entitled to fly. But the high seas are subject to international law which governs their utilization. This subjection of the high seas to the rule of international law is organized and implemented by means of a permanent legal relation between ships flying a particular flag and the State whose flag they fly. This link enables and, in fact, obliges States to implement and enforce international as well as their national law governing the utilization of the high seas. The Convention upholds this principle. It further establishes a legal regime balancing the jurisdictional powers of the flag State and the powers and competences of coastal States or port States concerning foreign ships whenever they enter maritime areas under the jurisdiction of the latter or enter respective ports. Since the juridical order of the maritime spaces is based upon the institution of the nationality of ships, it is necessary that this nationality be easily identifiable, that, in case of disputing claims or situations requiring the identification of the ship, its nationality may be established on the basis of verifiable objective data. These essential principles are not reflected adequately in the Judgment when it considers some signs of Vincentian nationality, e.g. some documents, including the ship's seal (see paragraph 67), produced by the charterer or owner, on board of the ship and, in particular, the subsequent conduct of Saint Vincent and the Grenadines (see paragraph 68) as sufficient to prove it to have had the nationality of Saint Vincent and the Grenadines at the time of the arrest.

18. Traditionally the nationality of ships has been established and implemented by linking national rules on the nationality of ships with international ones and in particular by obliging States to mutually respect the national rules on the nationality of ships. It is the traditional rule of international law, frequently confirmed in international and national adjudication, that the national law of each particular country determines which ship should be eligible for receiving the nationality of the particular State. It has been equally recognized that each State may decide upon the criteria of eligibility which must be recognized by other States. Article 91, paragraph 1, first sentence, of the Convention has codified this rule of international customary law.

19. This rule constitutes as much a right as an obligation of States. The provision embraces the prescriptive jurisdiction of every State to establish the respective conditions ships have to meet for being granted the right to fly the flag of that particular State. The wording of the provision further clearly indicates that States are under an obligation to enact respective national regulations.

20. Article 91, paragraph 1, of the Convention refers to nationality as well as registration without clarifying the relationship between the two concepts. This again is an area where States have considerable discretion. Different systems are applied in municipal law; however, it is common to all of them that the attribution of nationality for merchant ships requires a constitutive act from the side of the responsible authorities of the given State. It is the prevailing practice that - except for

warships and sometimes smaller vessels - such constitutive act rests in the registration e.g. that nationality is granted through registration.

21. The obligation to enter ships into a register of ships has developed in national law; most States in that respect followed the example of the Navigation Act of the United Kingdom of 1651 as amended in 1660. This equally holds true for Saint Vincent and the Grenadines. According to section 2(c) of the Merchant Shipping Act of Saint Vincent and the Grenadines a "´Saint Vincent and the Grenadines ship' means a ship registered under this Act and includes any ship that is deemed to be registered under this Act," the latter part of the provision referring to ships registered immediately before the 22 October 1985 under the Merchant Shipping Act of 1894 of the United Kingdom. Although the Judgment acknowledges that under the law of Saint Vincent and the Grenadines a ship acquires nationality through registration it does not clearly distinguish between the two; it indiscriminately refers to one or the other or both (see paragraphs 67 and 68, paragraph 69 and operative paragraph 3 which only refers to registration).

22. To attribute effectively the right to fly its flag to a ship and to be certain that this will be respected a State must take further steps with the view to make other States cognizant of this fact. The mode most traditionally upheld to prove the registration and/or nationality of a particular ship is in making such formal attribution through appropriate documentation. This has been confirmed in hundreds of treaties of friendship, commerce, and navigation. Although different clauses are used they all confirm that the nationality of vessels shall be reciprocally recognized on the basis of documents and certificates on board the vessel issued by the proper authorities of either of the contracting Parties.

23. The Convention follows this approach in its article 91, paragraph 2. The wording of this provision indicates that certificates of registration or equivalent documents issued by the respective national authorities constitute the proof for a particular ship to have the right to fly the flag of that State. The authorities of other States or international authorities, as the case may be, are under an obligation to respect these documents as being accurate and valid, in particular, they must not - except under special circumstances - challenge the validity or accuracy of such documents on the ground that they do not correspond to the national law of the State having issued the documents. Only such understanding of the objective of the documents referred to in article 91, paragraph 2, of the Convention corresponds to the content of the general rule enshrined in article 91, paragraph 1, first sentence, of the Convention. To consider documents as referred to in article 91, paragraph 2, of the Convention as being the authoritative statement of the responsible State on the status of a given ship thus is the necessary mechanism to protect the right of every State to establish its own regime on registration and nationality of ships and to apply it according to its national law.

24. The Tribunal has received as documentary evidence concerning the nationality of the *Saiga* the Certificate of its provisional registration issued 14 April 1997, the entries in the Register of Ships (p.7306/1G, printed out 15 April 1997), the Certificate of the permanent registration of the *Saiga* of 28 November 1997, the respective entry in the Register of Ships and statements of the Commissioner as well as the Deputy Commissioner of Maritime Affairs concerning registration in general and of the *Saiga* in particular. Additionally thereto the registration of the *Saiga* at the time of its arrest was intensively addressed in the hearings by both parties.

25. When establishing whether the *Saiga* was registered under the flag of Saint Vincent and the Grenadines the Tribunal does not utilize these documents, in particular it disregards the content of the Provisional Certificate of Registration and of the Register of Ships. Instead, as already indicated, the Judgment relies as evidence on "several indications of Vincentian nationality on the ship or carried on board" (paragraph 67), the conduct of Saint Vincent and the Grenadines after the arrest of the *Saiga* (paragraph 68) and on the failure of Guinea to challenge the registration or nationality of the *Saiga* (paragraphs 69 and 72(a)). The disregard of the wording of the Provisional Certificate of the *Saiga* and of the entry in the Register of Ships, as printed out 15 April 1997, is at the root of my disagreement with the reasoning of the Judgment on the issue of registration/nationality of the *Saiga*.

26. The Judgment should have proceeded from the documents Saint Vincent and the Grenadines had to issue, according to article 91, paragraph 2, of the Convention, to the *Saiga*, namely the Provisional Certificate of Registration relevant at the time of the arrest of the ship. This Certificate of Registration was marked to be a provisional one and clearly stated that it expired on 12 September 1997. An examination of the Register of Ships (p. 7306/1G, printed out on 15 April 1997, submitted by Saint Vincent and the Grenadines) confirms that the registration of the *Saiga* (ex *Sunflower*) was entered on 12 March 1997 and was valid until 12 September 1997. Apart from confirming that the registration of the *Saiga* ceased to be valid on 12 September 1997, its wording further establishes not that the certificate was provisional but that the registration was a provisional one and thus was valid only for a period of six months, namely from 12 March to 12 September 1997. Since the permanent registration of the *Saiga* was entered in the Register of Ships of Saint Vincent and the Grenadines only on 28 November 1997 the Judgment should have come to the conclusion that the *Saiga* was, according to the documents referred to in article 91, paragraph 2, of the Convention, not registered at the time of its arrest. The further and only possible conclusion to be drawn is that, according to the Merchant Shipping Act of Saint Vincent and the Grenadines, the *Saiga* at the time of its arrest did not have the nationality of Saint Vincent and the Grenadines.

27. The Judgment gives no reason why these documents do not overrule the evidence the Judgment refers to in paragraph 67. Account should have been taken in this context that it was Saint Vincent and the Grenadines which had issued documents according to which the *Saiga* was not registered at the time of its arrest and that the documents the Judgment seems to rely upon do not have the same status. The Judgment further does not explain why it considers acceptable the arguments advanced by Saint Vincent and the Grenadines based upon an interpretation of its Merchant Shipping Act and its administrative practice (paragraph 67). These arguments are untenable and the Tribunal should have rejected them. The Tribunal has the power to do so. As rightly stated in paragraph 66 of the Judgment the nationality of a ship is a fact to be determined, like other facts in dispute before the Tribunal, on the basis of evidence adduced by the parties. To do so the Tribunal may interpret the national law invoked as stated in respect of the national law of Guinea (see paragraphs 120 and 121). In international litigation a State does not have the exclusive power to interpret its national law to the detriment of the other party.

28. The claim advanced by Saint Vincent and the Grenadines that the *Saiga* had remained registered in spite of the wording of the Provisional Certificate and the entry in the Register of Ships cannot be based upon section 36(2) of the Merchant Shipping Act. According to this provision a provisional certificate shall have the same effect as the ordinary certificate of registration until the

expiry of one year from the date of its issue. This provision establishes that a provisional certificate of registry has the same effect as a permanent one. It does, however, not say that a provisional certificate of registry has to be valid for 12 months; it further does not say that a provisional certificate whose validity has expired has the same effect as a permanent certificate. Nothing in the Merchant Shipping Act of Saint Vincent and the Grenadines precludes the authorities to issue a provisional certificate being valid only for a shorter period, namely six months. This is confirmed by the brochure on Saint Vincent and the Grenadines Maritime Administration as well as by a letter of the Deputy Commissioner for Maritime Affairs of 1 March 1999 explaining that it was the practice to issue a provisional certificate of registration for a six-month period only. I agree with the assessments of the Merchant Shipping Act of Saint Vincent and the Grenadines by President Mensah and Judge Rao in their individual Separate Opinions and of Judge Warioba in his Dissenting Opinion.

29. Equally section 37 of the Merchant Shipping Act does not sustain the claim that the *Saiga* remained validly registered even after the expiry date of the provisional registration. It was argued that only on the basis of this provision a ship could be deleted from the Register of Ships and since there had been no suggestion to do so the *Saiga* had remained on the Register of Ships. Section 37 proves the contrary of what Saint Vincent and the Grenadines means to prove by invoking it. Section 37 does not provide that a ship has to be deleted from the Register of Ships if the validity of its registration lapses. Therefore it is impossible to argue that a ship not deleted from the Register remains registered until deleted. Accepting this argument would mean that even ships whose provisional registration had come to an end after 12 months would remain registered. Actually the Merchant Shipping Act does not provide for the removal of ships from the Register of Ships at all although it foresees several reasons why a certificate may become invalid.

30. The other documents submitted by Saint Vincent and the Grenadines through which it intended to establish that the *Saiga* was registered at the time of its arrest confirm that the *Saiga*'s provisional registration was valid for six months only and was not renewed. This is in particular true for the letter of the Deputy Commissioner for Maritime Affairs 1 March 1999. It stated, amongst others, "... that it is Registry practice for Provisional Certificates of Registry to be issued for six-month periods as was done with the 'SAIGA'. One purpose of this is to encourage owners to comply with the formalities of permanent registration sufficiently in advance of the one-year validity period of the provisional registration period under Section 36 (2) of the Act. Moreover, in my experience it is very common for Owners to allow the validity period of the initial Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate (as was the case here)". Nevertheless, she considered the *Saiga* to have remained validly registered.

31. The Judgment further states that the consistent conduct of Saint Vincent and the Grenadines following the arrest of the *Saiga* supports the contention that the nationality of Saint Vincent and the Grenadines was maintained by the *Saiga* (paragraph 68). I cannot agree with the underlying rationale of this reasoning.

32. It is undisputed that Saint Vincent and the Grenadines acted as the flag State of the ship after its arrest and, in particular, in the proceedings before the Tribunal. The question is whether this is relevant, that is to say whether a State may establish the nationality of its claim by initiating and

participating in respective international proceedings or may gain *locus standi* by advancing claims of natural or juridical persons although they do not have its nationality. Such approach does not seem to find support. I have no intention, though, to deal with this important question in depth since in this case there are two reasons why the nationality of the *Saiga* cannot be established retroactively and certainly not through conduct of Saint Vincent and the Grenadines.

33. It is well established in international law that the primary requisite for the making of an international claim is the existence of an interest recognized by law at the time the alleged violation of that interest occurred. This condition is not fulfilled since the *Saiga* did not have the nationality at the time of the arrest and later conduct of Saint Vincent and the Grenadines cannot cure this deficit. Apart from that, the Convention on the Law of the Sea rules out that a State becomes the flag State of a ship retroactively and by mere conduct. According to the Convention, flag States have the duty to "effectively exercise" their jurisdiction and control in several matters over ships flying their flag (article 94 of the Convention); they have further obligations, in particular, in relation to manning, seaworthiness, collision prevention, construction, and crew qualification in conformity with generally accepted international regulations, procedures and practices. Article 94, paragraph 4, of the Convention details some of the measures that a flag State must adopt to ensure regular surveys; appropriate equipment and instruments for the safe navigation of the ship; and appropriate qualifications for the masters, officers, and crew. Further flag State obligations in relation to vessel source pollution are set out in article 211, paragraph 2, of the Convention. In addition, the flag State must comply with applicable international rules and standards established for the prevention of pollution. The respective link between the flag State and the ships concerned being the necessary precondition for the implementation and enforcement of such international rules is established through the registration of ships and their acquiring the respective nationality. As already indicated, article 91, paragraph 1, of the Convention leaves it to the States to prescribe the national rules which specify the conditions for registration. But the said provision does not allow a State to claim the flag State position in international proceedings although there is no valid registration when the very State considers this to be in its interest and to reject it if its interests so require.

34. Finally, I disagree with the reference to the Judgment of the Tribunal of 4 December 1997 where the *Saiga* was described as “an oil tanker flying the flag of Saint Vincent and the Grenadines”. If such a reference was felt to be necessary for factual accuracy, then it should have been equally indicated in the Judgment that this was a reference to the narrative part of the Judgment of 4 December 1997 (paragraph 26) and that this Judgment further stated: “As far as the ownership of the vessel is concerned, the Tribunal notes that this question is not a matter for its deliberation under article 292 of the Convention and that Guinea did not contest that Saint Vincent and the Grenadines is the flag State of the vessel.” Nothing, and this is my second argument against the inclusion of paragraph 71 in the Judgment, can be taken as to suggest that a respective finding had already been made by the Tribunal. This would not accurately reflect the content of this Judgment as can already be seen from its paragraph 44. The statement in paragraph 44 of the Judgment of 4 December 1997 should further be seen against the background of the respective submissions. Counsel of Saint Vincent and the Grenadines stated during the oral proceedings on 28 November 1997 in response to a question from the Agent of Guinea about the ownership of the vessel: “We have been able to obtain this morning a provisional certificate of registration from Saint Vincent and the Grenadines which unfortunately, although dated 14 April 1997, is dated to expire

on 12 September 1997. Efforts are being made to obtain the no longer provisional but full certificate of registration on behalf of the owners. We hope that we will be able to get this to the Tribunal at the latest during the adjournment" (ITLOS/PV.97/2, p. 5, 15-20). In retrospect the statement of Counsel of Saint Vincent and the Grenadines to which also the Separate Opinion of President Mensah and the Dissenting Opinion of Judge Warioba refer, concealed not only that there was a gap in registration but that the Permanent Certificate of Registration which was promised to be delivered was issued only the very same day.

35. I endorse the statement made in paragraph 73(c) of the Judgment namely that the persistent failure of Guinea to question the assertion of Saint Vincent and the Grenadines that it was the flag State of the *Saiga* when it had every reasonable opportunity to do so precluded Guinea of the opportunity to challenge the nationality of the *Saiga* at this stage. This statement lacks, however, adequate reasoning.

36. International law has developed mechanisms which, in fact, preclude a party from raising particular objections or claims due to the preceding conduct of that party, namely estoppel and acquiescence. The concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity.

37. The rule of estoppel operates so as to preclude a party from denying before a tribunal the truth of a statement or a fact made previously by that party to another whereby the other has acted to his detriment or the party making the statement has secured some benefit. It is the prime objective of the rule of estoppel to preclude a party from benefiting from its own inconsistency to the detriment of another party who has in good faith relied upon a representation of facts made by the former party. The International Court of Justice has phrased the rule of estoppel as follows in its Judgment in the *Temple of Preah Vihear* case:

> [T]he principle operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself. (*I.C.J. Reports 1962*, pp. 143-144)

38. In the *Delimitation of the Maritime Boundary in the Gulf of Maine* case the I.C.J. stated:

> The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. (*I.C.J. Reports 1984*, p. 305, para. 130)

39. Two forms of estoppel are recognized in international jurisprudence, namely estoppel by treaties, compromis etc. and estoppel by conduct.

40. The Judgment should have considered as to whether the conclusion of the 1998 Agreement estopped Guinea from questioning the registration/nationality of the *Saiga* at the time of arrest since, in theory, such kind of treaties may contain elements relevant thereto, in particular if they

affirm facts or assessments which cannot be questioned later on. However, as has been pointed out in the judgment in the *Salem* case (UNRIAA vol. II, at p. 1180), the wording has to be clear in acknowledging the facts in question. The Agreement of 1998 does not refer to Saint Vincent and the Grenadines as the flag State of the *Saiga*; it refers instead to "the dispute between the two States relating to the MV 'Saiga' ". This does not amount to a recognition that Saint Vincent and the Grenadines has been accepted as the flag State of the ship at the time of its arrest. Some inspiration may be gained in this respect from the judgment in the *Salem* case. The respective compromis referred to Salem as an American citizen. Nevertheless, the arbitral tribunal allowed Egypt to challenge Salem's American nationality.

41. However, the conduct of Guinea after the arrest of the *Saiga* and in particular in the proceedings in the *M/V "SAIGA"* case (prompt release) points in the direction that it considered Saint Vincent and the Grenadines to be the flag State. For example, Saint Vincent and the Grenadines was referred to in the *cédule de citation* as the flag State and it was not challenged as such in the proceedings of the *M/V "SAIGA"* case (prompt release). Finally, Guinea has entered into negotiations with Saint Vincent and the Grenadines concerning the formulation of the bank guarantee for the release of the ship and has accepted such a guarantee from Saint Vincent and the Grenadines. All these actions or inactions of Guinea could be taken by Saint Vincent and the Grenadines that Guinea would not challenge the status of the latter as a flag State.

42. The Judgment should have further examined whether Guinea had acquiesced in Saint Vincent and the Grenadines as the flag State of the *Saiga*. The conduct of Guinea after the arrest of the ship and, in particular, in the proceedings in the *M/V "SAIGA"* case (prompt release) clearly point in this direction.

43. The doctrine of acquiescence has been applied, either expressly or implicitly, as a principle of substantive law. As the International Court of Justice has stated in the *Gulf of Maine* case the doctrine of acquiescence has, as the doctrine of estoppel, its basis in the concepts of equity and good faith. The case law referred to considers acquiescence to be a type of qualified inaction. There seems to be some uncertainty in international jurisprudence as to what are the prerequisites to establish a binding effect of inaction. It is, however, common ground that the acquiescing State must have remained inactive although a protest or action would have been required (see Judgment of the International Court of Justice in the *Arbitral Award Made by the King of Spain on 23 December 1906 [Honduras* v. *Nicaragua], Judgment, I.C.J. Reports 1960,* pp. 192-217). That is exactly the case here. Guinea should have raised the lack of registration of the *Saiga* at the outset of the proceedings in the *M/V "SAIGA"* case (prompt release). By remaining inactive in this respect and by negotiating the conditions of the bank guarantee to be submitted by Saint Vincent and the Grenadines for the release of the ship and by finally accepting the bank guarantee Guinea accepted Saint Vincent and the Grenadines as the flag State. It would be contrary to good faith if Guinea were now allowed to reverse its position; it is barred from invoking the lapse of registration between the expiry of the Provisional Certificate of Registration and the issuing of the Permanent Certificate of Registration.

44. The Judgment states that in the particular circumstances of the case it would be unreasonable and unjust if the Tribunal were not to deal with the merits of the case. Although I agree with this statement in substance it would have been appropriate to deal with this issue in depth. In particular,

it was necessary to explain which circumstances led to this conclusion. The Judgment should have referred to the fact that a decision of the Tribunal to dismiss the claims advanced by Saint Vincent and the Grenadines on the ground that the *Saiga* was not registered at the time of its arrest would have been highly detrimental for those who suffered most from the arrest, namely the members of the crew and the owner of the cargo. They, however, had no influence on the management of the ship and, in particular, on its proper registration. The gap in registration was, apart from that, the result of a lax administrative practice on the side of Saint Vincent and the Grenadines and the lack of diligence requested from the shipowner rather than the result of intent. The willingness of the shipowners to maintain the ship's registration was not contested. Finally, it is to be taken into consideration that otherwise Guinea would have been saved, without any justification, from the consequences of the arrest of the *Saiga* which the Judgment rightly qualified as having been illegal and undertaken with excessive use of force. For these reasons justice required as already indicated to preclude Guinea from raising the lack of registration of the *Saiga* at the time of its arrest. I would like, however, to emphasize that this is possible only since Guinea in the first place did not object to Saint Vincent and the Grenadines as the flag State of the *Saiga*. The statements in paragraph 73(c) and (d) of the Judgment are thus to be considered to form a unit.

45. Finally, the Tribunal should have noted in the context of registration that the differences between the parties concerning the nationality of the *Saiga* were the result of unusual features in the legislation of Saint Vincent and the Grenadines, a certain laxity in the administrative practices of the authorities called upon to implement the rules concerning registration and a laxity on the side of the shipowners concerning the proper registration of the *Saiga*. The Merchant Shipping Act of Saint Vincent and the Grenadines opens the possibility of provisional registration for one year, a period which clearly goes beyond that allowed under the national law of other States. The Act further does not provide clear rules for a removal of ships from the Register of Ships and on the effective implementation of such decision or event. The authorities of Saint Vincent and the Grenadines do not seem to intervene in cases where there is, as it was referred to, a lapse of registration. This legislation of Saint Vincent and the Grenadines combined with the administrative practice is likely to weaken the link between it and the ships flying its flag although this link is essential for the implementation of the international rules referred to in article 94 of the Convention. I agree with the assessment of President Mensah in his Separate Opinion in this respect.

Exhaustion of local remedies

46. I agree with the Judgment that Guinea cannot successfully challenge the admissibility of certain claims advanced by the Applicant by invoking that local remedies have not been exhausted for the reasons set out in paragraph 100. However, I disagree with the statement and the supporting arguments advanced in paragraphs 98 and 99 of the Judgment. The subject matter of the case before the Tribunal is not only one which encompasses direct violations of the rights of Saint Vincent and the Grenadines. In qualifying the claims made and exempting them from the scope of the exhaustion of local remedies rule the Judgment deviates without appropriate reasoning from the jurisprudence of the International Court of Justice.

47. It is well established by customary international law that local remedies have to be exhausted before a State may bring an international claim for injuries to its nationals committed in the territory of another State. In order for a State to espouse such a claim it must establish that the alleged

injured person was a national at the time of the injury and continuously thereafter, at least up to the date of the formal presentation of the claim. Furthermore, the person whose claims are espoused is required to have exhausted all remedies reasonably available through the domestic institutions of the State alleged to have caused the injury. There are exceptions to this rule and it may also be waived.

48. It is well accepted that where a State expressly sues in right of diplomatic protection, an examination of the exhaustion of local remedies is mandatory. It is equally accepted that where the claim made by the claimant State is one of direct injury and involves no injury to its nationals as such, the exhaustion of local remedies rule does not apply since the rule does not require a claimant State to have recourse to the domestic remedies available under the legal system of another State. It is therefore crucial to establish whether the injury in question is to be qualified as a direct injury of the claiming State. The Judgment states in this respect: "None of the violations of rights claimed by Saint Vincent and the Grenadines, as listed in paragraph 97, can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations. Accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted." According to the dictum of the International Court of Justice in the *ELSI* case (*I.C.J. Reports 1989*, pp. 42-43 and 51) claims to be exempt from the scope of the exhaustion of local remedies rule have to be "- both distinct from, and independent of", the dispute of the alleged violation in respect of the individuals involved. To decide whether this is the case does not depend upon the wording of the claims made, it is rather necessary to determine the nature of the injury and the rights violated.

49. Although the Submissions No. 1, 2, 4, 5, 7 and 8 are phrased in terms of violations of rights of Saint Vincent and the Grenadines it can hardly be denied that the dispute would not have occurred without the arrest of the *Saiga* by the authorities of Guinea. It is further beyond question that the arrest of the *Saiga* had negative implications predominantly for the owner of the ship, its charterer and its crew. This is reflected by the Judgment. It awards compensation mainly to members of the crew, the captain, the owner and the charterer of the vessel (see operative paragraph 3 and Annex), however, no compensation to Saint Vincent and the Grenadines directly.

50. The crucial question to be decided is whether this is a case whose subject matter is the alleged violation of the rights of a State, i.e. Saint Vincent and the Grenadines, or whether its subject matter also covers alleged violations of rights of individuals. To be more concrete it is decisive whether the freedom of navigation and the freedom not to be subjected to illegal hot pursuit invoked by Saint Vincent and the Grenadines is a right of States only or also a right of ships.

51. The wording of the respective provisions of the Convention concerning the freedom of navigation (articles 58 and 87) seem to point into the former direction whereas article 111, paragraph 8, of the Convention points into the latter. Article 87 of the Convention, to which article 58 refers, deals with freedoms of States although such freedoms are excercised, in practice, mostly not directly by States but rather by natural or juridical persons. However, article 111, paragraph 8, of the Convention provides that in the case of illegal hot pursuit - which constitutes an infringement of the freedom of navigation - the illegally arrested ship will be compensated. According to article 110, paragraph 3, of the Convention a ship having been subject to an illegal visit on the high seas equally has the right to claim compensation. Since in international law the right to receive

compensation depends upon the pre-existence of an internationally protected right whose violation gives rise to international responsibility, both provisions indicate that the freedom of navigation incorporates a right of natural or juridical persons, too. This is indirectly confirmed by two provisions of the Convention. Article 295 of the Convention provides that local remedies are to be exhausted, where required under international law, before a dispute between States Parties may be submitted to a dispute settlement procedure provided for under the Convention. If, as the Judgment seems to indicate, disputes concerning the interpretation or application are only disputes between States Parties arising from alleged violations of States' rights, article 295 of the Convention would be meaningless. This, however, would violate one of the most basic rules concerning the interpretation of international treaties, namely that interpretation should not render a provision inoperative. Finally, according to article 292, paragraph 2, of the Convention the application for the prompt release of a vessel may be made by the flag State or on its behalf. The second alternative of that provision opens the possibility for the flag State to entrust the entity whose interests are directly at stake to initiate the respective proceedings. This again recognizes that disputes concerning the exercise of freedom of navigation, in general, involve rights of natural or juridical persons which may prevail over the rights of States. Accordingly, the concept of freedom of navigation has as its addressees States as well as individual or private entities. Every other interpretation would run counter the objective of the Convention on the Law of the Sea. If the freedom of navigation would be interpreted as the freedom of States only it would be limited to the right of States to have ships flying their flag. However, such definition would not take into consideration that the concept of freedom of navigation encompasses, as stated by the Permanent Court of International Justice in the *Oscar Chinn* case:

> According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers. (*Oscar Chinn, Judgment, 1934, P.C.I.J., Series A/B, No. 63,* p. 83)

52. Although this definition of the concept cannot be applied without modification to the freedom of navigation at sea it is beyond doubt that this freedom comprises activities undertaken by individuals or private entities rather than by States. Accordingly, it is questionable to qualify claims resulting from infringements upon the right of freedom of navigation as interstate disputes.

53. The provisions of the Convention indicate that concerning freedom of navigation the rights of States and those of individuals are interwoven. It is significant that - in respect of the freedom of fishing - article 116 of the Convention refers to the right of States for their nationals to engage in fishing. A similar wording would have appropriately qualified the freedom of navigation.

54. Applying the test developed by the International Court of Justice in the *ELSI* case (*I.C.J. Reports 1989,* pp. 42-43, paragraph 51) whether local remedies are to be exhausted this means that, to the extent the subject matter of a dispute concerns an alleged violation of the freedom of navigation, it is impossible to find a dispute over alleged violations of the Convention which is both distinct from, and independent of, a dispute over the alleged violation of the rights of the ship involved.

55. Guinea could, however, not successfully invoke the exhaustion of the local remedies rule since this rule is only applicable if a prior voluntary link exists between the individual and the Respondent State (see Ian Brownlie, *The Rule of Law in International Affairs*, 1998 at p.104). In consequence it does not apply, as the Judgment rightly points out (paragraph 100), in cases where the State having taken measures acted outside the scope of its jurisdiction. In particular, when a State had no jurisdiction concerning the measures taken, as it is the case here, the requirement to exhaust local remedies would amount to a recognition of the jurisdiction of that State. This is certainly not the objective of the concept on the exhaustion of local remedies.

Relationship between the Convention and national law

56. In paragraph 121 the Judgment states that the Tribunal is "competent to determine the compatibility of such laws and regulations with the Convention". This statement should, in spite of the reference to the jurisprudence of the Permanent Court of International Justice, not be construed as to limit the competences of the Tribunal. In fact its competences are, as a result of the progressive development of international law through the Convention, much broader. For example, according to article 58, paragraph 3, of the Convention States shall "comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention". This means that States are not only bound by the Convention but also by the respective national law enacted by coastal States.

57. National law plays a particular role in respect of the legal regime governing the use and management of the sea. The Convention is to be considered as a framework agreement; it provides for further rules to be enacted by States, in particular coastal States, international organizations or international conferences. Those rules, to the extent they are in accordance with the Convention, supplement the latter and hence they are covered by the jurisdiction of the Tribunal. This is explicitly stated in article 297, paragraph 1(b), of the Convention. According to it the compulsory procedures for the settlement of disputes provided for in section 2 of Part XV of the Convention cover cases where it has been alleged that a State in exercising, for example, the freedom of navigation has acted in contravention of laws or regulations adopted by the coastal State. On that basis the Tribunal could and should have stated that already the law of Guinea does not provide a basis for the arrest of the *Saiga*.

Costs

58. The Judgment has refrained from awarding costs to the successful party. I agree with this decision for the reason that I consider it inappropriate to take such a decision although the Tribunal was mandated to do so as long as it has not established general rules and criteria concerning the assessment of costs and their distribution. If such rules and criteria had been established previously I would have agreed to award reasonable costs and necessary expenses to the successful party.

(Signed) Rüdiger Wolfrum

SEPARATE OPINION OF JUDGE ZHAO

I voted in favour of the Judgment in the *M/V "SAIGA" (No. 2)* case. However, I have my own opinion concerning the thorny issue of "bunkering and freedom of navigation".

1. The Applicant alleges that offshore bunkering is a global multi-million dollar industry involving all of the major oil companies and numerous independent companies. It tries to give the impression that bunkering is a lawful activity on the high seas falling within the freedom of navigation.

Indeed, some States or regions regard offshore bunkering as among their principal activities, as illustrated by the Applicant. This does not mean, however, that bunkering has become a universal practice of States. Far from it, among the 35 offshore bunkering companies illustrated by the Applicant (Reply on behalf of Saint Vincent and the Grenadines, 19 November 1998, pp. 12–13), none is from the UK, France, Italy, Spain, Belgium or Austria in West Europe, or from East European or North American countries except one. None is from China, Russia, Japan, India, Indonesia, Brazil or Argentina, among others. Accordingly, bunkering can hardly be considered as a lawful global industry involving all the major companies.

2. This case presents the question whether bunkering fishing vessels in the contiguous zone or in the exclusive economic zone of a State is freedom of navigation or internationally lawful uses of the sea pursuant to article 58, paragraph 1, of the Convention. In other words, is bunkering an aspect of high-seas freedom of navigation?

Bunkering by its very nature is a means of evading customs duties of coastal States. The Applicant admits that it is usually preferable not to bunker in the territorial waters of a State because duties may be payable. The coastal States of West Africa were also well aware of the problem of "the control and regulation of customs and fiscal matters related to economic activities" in the exclusive economic zone, as the proposal of 18 African States at the Third United Nations Conference on the Law of the Sea and an earlier proposal by Nigeria demonstrate.

The word "navigation" means nothing but "the act of navigating" or "the making of voyages at sea". According to article 58, paragraph 1, of the Convention:

> In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation … and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships ... .

Article 90 (right of navigation) also provides: "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas." Not a single mention of bunkering or the like is made in the 1982 Convention. That is to say, there is no legitimate status for bunkering in the law of the sea.

I share the view that international law should at all times distinguish between navigation and the commercial activities of a shipping business. International lawyers and international litigation always draw a distinction between freedom of navigation and the freedom to trade, the freedom to carry goods and the freedom of movement of shipping.

3. The Applicant submits that bunkering is an aspect of the high-seas freedom of navigation or an internationally lawful use of the sea related thereto, which, under article 58, paragraph 1, of the Convention, the M/V *Saiga* enjoys in the exclusive economic zone of Guinea. It should be pointed out, however, that bunkering of fishing vessels in the exclusive economic zone is not navigation under the Convention. The exclusive economic zone, as a zone with its own legal status, is neither a part of the high seas, nor the territorial sea. Uses of the sea with regard to which the Convention has not expressly attributed rights or jurisdiction in the exclusive economic zone to the coastal State do not automatically fall under the freedom of the high seas. Therefore bunkering must not be regarded as falling within the high seas freedom of navigation or related to it. It is not navigation of the M/V *Saiga* that is involved, but its commercial activities of offshore bunkering in the exclusive economic zone of Guinea. The interpretation that freedom of navigation includes bunkering and all other activities and rights ancillary to it is incorrect. The view that bunkering is free in the exclusive economic zone because it is free on the high seas is legally not tenable.

4. In short, bunkering should not be encouraged, let alone without restraint. On the contrary, the following conditions are generally required for bunkering: (1) For States wishing to undertake bunkering activities in the exclusive economic zone to enter into agreement with the coastal State; and (2) for fishing vessels to obtain licences or approval for bunkering from those States. Unless it is conducted in accordance with these two conditions, there is no legitimate status for bunkering in the law of the sea.

(Signed) Lihai Zhao

SEPARATE OPINION OF JUDGE NELSON

I am in agreement with the Tribunal's Judgment but have reservations on a few points and observations on others.

Admissibility

I agree with the Tribunal that the object and purpose of the 1998 Agreement was "to transfer to the Tribunal the same dispute that would have been the subject of the proceedings before the arbitral tribunal" (paragraph 51). The Tribunal also argues, correctly, in my opinion, that "[b]efore the arbitral tribunal, each party would have retained the general right to present its contentions", which would presumably cover Guinea's right to present objections to admissibility. However, I cannot follow the argument that the parties have "the same general right" before the Tribunal in spite of the terms of the 1998 Agreement. The implication seems to be that the transference of the dispute to the Tribunal somehow also carried with it the right for Guinea to raise objections other than the objection specifically mentioned in the 1998 Agreement i.e. "the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998". The dispute has been transferred but the faculty of making other objections has not been.

Guinea has based its right to submit objections to the admissibility of the application on, *inter alia*, the *travaux préparatoires* of the Agreement. At the oral pleadings (ITLOS/PV.99/8) Guinea referred to the correspondence between the parties which, in its view, supported its argument that objections to admissibility were not precluded from being raised. It referred in particular to Mr. Howe's letter of 29 January 1998. The relevant part of this letter stated that Saint Vincent and the Grenadines would agree to submit the dispute to the Tribunal provided the following provision, *inter alia*, was included:

> the proceedings be limited to a single phase dealing with all aspects, including the merits and any jurisdictional issues that may arise. (This letter is reproduced in Annex 1 to the Counter-Memorial of Guinea.)

The 1998 Agreement by Exchange of Letters between Guinea and Saint Vincent and the Grenadines includes the following provision, *inter alia*:

> The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998.

The phrase "any jurisdictional issues that may arise" was thus not repeated in the 1998 Agreement and was whittled down to one specific objection.

The language is clear and unambiguous. The Tribunal is empowered to deal "with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998". It is established

law that the primacy of the text is the basis for the interpretation of a treaty. The essence of this textual approach is to be found in article 31 of the Vienna Convention on the Law of Treaties.

Resort to preparatory work can only be had to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable (article 32 of the Vienna Convention on the Law of Treaties). The dictum in the advisory opinion concerning the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)* clearly states the rule in this matter.

> The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself. (*Advisory Opinion, 1948, I.C.J. Reports 1947-1948,* p. 63)

This is the case here. To my mind the plain meaning of the terms of the Agreement seems to rule out any resort to the *travaux préparatoires* as supplementary means of interpretation in accordance with article 32 of the Vienna Convention on the Law of Treaties.

Saint Vincent and the Grenadines has raised the argument that the objection to the admissibility of the application was time-barred through the operation of article 97, paragraph 1, of the Rules of the Tribunal which reads as follows:

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

The Tribunal in its Judgment has, correctly in my view, interpreted this rule as meaning that "the time-limit in the article does not apply to objections to jurisdiction or admissibility which are not requested to be considered before any further proceedings on the merits". This exegesis of article 97, paragraph 1, of the Rules of the Tribunal is very much in keeping with the interpretation placed upon the relevant rule of the Permanent Court of International Justice – article 38 (1926 and 1931).

The Court stated that:

> The object of this article was to lay down when an objection to the jurisdiction may validly be filed, but only in cases where the objection is submitted as a preliminary question, that is to say, when the Respondent asks for a decision upon the objection before any subsequent proceedings on the merits. It is exclusively in this event that the article lays down what the procedure should be and that this procedure should be different from that on the merits. (*Rights of Minorities in Upper Silesia (Minority Schools*), *Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 22)

Moreover it must be remembered that the Tribunal itself possesses an inherent right to determine its own jurisdiction – *compétence de la compétence*. This right is formally embodied both in article 288, paragraph 4, of the Convention on the Law of the Sea and article 58 of the Rules of the Tribunal. With respect to the International Court of Justice this right was expressly invoked in its Judgment in the *Appeal Relating to the Jurisdiction of the ICAO Council [India* v. *Pakistan]*. India had contested Pakistan's right to put forward objections to jurisdiction because these objections were not put forward at an earlier stage of the proceedings before the Court as "'preliminary' objections under Article 62 of the Court's Rules (1946 edition)". The Court stated that: "It is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decision in advance of the proceedings on the merits. The Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972*, p. 52).

An eminent authority on the procedure of the World Court has noted that:

> The cases illustrate the non-exhaustive character of preliminary objection proceedings, in the sense that whether or not matters of jurisdiction have been raised at the stage envisaged for preliminary objections, they may still be raised later, even by the Court *proprio motu*.[1]

He has also observed that:

> In various forms, such as a plea in bar or a pre-judicial question, it now appears that questions of jurisdiction and of admissibility and perhaps of the propriety of the Court's deciding a given case can arise at almost any stage of a lawsuit.[2]

For these reasons I am in agreement with the Tribunal's findings that Guinea's objections to admissibility should be dealt with by the Tribunal.

Registration

The M/V "*Saiga*" was granted a Provisional Certificate of Registration under the Merchant Shipping Act of Saint Vincent and the Grenadines on 14 April 1997. The expiry date of this Provisional Certificate was 12 September 1997. A Permanent Certificate of Registration was issued by the authorities of Saint Vincent and the Grenadines on 28 November 1997. On the basis of these facts Guinea has argued that the M/V "*Saiga*" was not validly registered in the period between 12 September 1997 and 28 November 1997. Thus the ship was not registered at the time of the arrest – 28 October 1997. At the oral hearings Guinea concluded that since the Provisional Certificate was not extended and since there was no automatic extension of the Provisional Certificate under the terms of the Merchant Shipping Act the M/V "*Saiga*" was a vessel without nationality when it was arrested.

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[1] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (1997), Vol. II, p. 909.
[2] *Ibid.*, "Lessons of the Past and Needs of the Future", in *Increasing the Effectiveness of the International Court of Justice* (1997), Connie Peck and Roy S. Lee, eds., p. 476.

A provision in the Saint Vincent and the Grenadines' Merchant Shipping Act which has played a significant role in the matter is section 36(2) which reads as follows:

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

On the basis of this provision Saint Vincent and the Grenadines contended that:

> 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. (ITLOS/PV.99/16)

For its part Guinea puts a different meaning to section 36(2). It argues that:

> This provision prescribes that a provisional certificate of registration shall have the same effect as the ordinary certificate until the expiry of one year from the date of its issue. … In other words a provisional certificate cannot be valid for longer than one year, no matter what the circumstances are. Therefore the registrar for example could not issue a provisional certificate for more than 12, [for instance] for 13 months; that he could not do. (ITLOS/PV.99/8)

That is, in my opinion, the correct interpretation of this provision. In short a provisional registration cannot be valid for longer than one year. It cannot, in my submission, mean that a provisional certificate is always in effect even if it is issued for six months.

I have therefore concluded that in the case of the registration of the M/V "*Saiga*" there has been at least some irregularity, that is the failure to extend the provisional registration or to obtain a permanent certificate after the expiry of the provisional registration which may have compromised the validity of the registration. As a result I have some difficulty in accepting the bald conclusion in paragraph 73(a) of the Judgment which reads as follows:

> [I]t has not been established that the Vincentian registration or nationality of the *Saiga* was extinguished in the period between the date on which the Provisional Certificate of Registration was stated to expire and the date of issue of the Permanent Certificate of Registration.

However I agree with the conclusions reached by the Tribunal in paragraph 73(b) and (c), in particular paragraph (b), of the Judgment. There is sufficient evidence to show that Saint Vincent and the Grenadines always considered the ship as having its nationality. Its conduct throughout this affair manifestly demonstrates this. Thus I support the conclusion that "*in the particular circumstances of this case*, the consistent conduct of Saint Vincent and the Grenadines

provides sufficient support for the conclusion that the *Saiga* retained the registration and nationality of Saint Vincent and the Grenadines at all times material to the dispute" (emphasis added).

Although this argument was not raised by the parties nor dealt with by the Tribunal, the question may be asked whether the Tribunal is debarred from questioning the regularity and validity of the registration of the M/V "*Saiga*". In this respect the dictum of the United States Supreme Court in the case of *Lauritzen v. Larsen*, 345 U.S. 571 (1953) could be recalled which reads as follows:

> Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.

The view that the regularity and validity of a registration can be questioned only by the registering State has been supported by some acknowledged authorities on the law of the sea. See, among others, Colombos, *The International Law of the Sea* (1967), p. 290, and McDougal and Burke, *The Public Order of the Oceans* (1987), p. 1060.

O'Connell has, on the other hand, stated:

> Whether a ship is entitled to claim attribution to a State is a matter in the first instance for the law of that State to determine. But it cannot be said that other States and their courts are denied competence to ascertain if the ship's documentation is properly completed, and the flag that is worn really indicates the ship's nationality.[3]

This view, in my submission, seems correct if only for the reason that such an approach would better serve the international legal order of the oceans. Thus the Tribunal is entitled to examine the regularity and validity of the registration of the M/V "*Saiga*" and the matter does not fall within the exclusive domain of Saint Vincent and the Grenadines. However the principle in *Lauritzen v. Larsen* is not altogether without relevance. By throwing into relief the predominant role of the registering State with respect to matters relating to the validity of registration, it justifies to a certain extent the importance which the Tribunal has attributed to the conduct of Saint Vincent and the Grenadines as a registering State.

There is a final remark to be made on this issue. To treat ships in the circumstances raised by the M/V "*Saiga*" as having no nationality and as a consequence "stateless" could have disturbing repercussions on the maintenance of the legal order of the oceans and possibly also on

[3] O'Connell, *The International Law of the Sea* (1984), Vol. 2, p. 756. See too H. Meyers, *The Nationality of Ships* (1967), p. 181.

private maritime law.[4] Gidel once wrote: "La nationalité du navire – règle de droit international – est la condition primordiale de l'utilisation paisible de la haute mer."[5]

Proposals which were not accepted by the Third United Nations Conference on the Law of the Sea

Saint Vincent and the Grenadines has drawn on the *travaux préparatoires* of the Conference in order to confirm the proposition that:

> [W]ith the single exception of Article 60(2), the Convention establishes no right for a coastal State to adopt customs laws and regulations within the exclusive economic zone.
>
> It noted that:
>
> A number of States sought to include a provision in what was to become Article 56 to the effect that coastal States had the right to prescribe and enforce customs laws and regulations within the economic zone. Those efforts were expressly rejected; after August 1974 no composite drafting texts contained any such proposal, limiting any reference to application of customs jurisdiction in any area of the exclusive economic zone to artificial islands, installations and structures in the manner incorporated in Article 60(2) of the 1982 Convention. (Memorial, para. 127)

In its oral pleadings Guinea contended that the *travaux préparatoires* illustrate that coastal States in Africa, at least West Africa, "were well aware of the problem of the 'control and regulation of customs and fiscal matters related to economic activities' in the EEZ as the proposal of 18 States at the second session of the LOS Conference and an earlier proposal by Nigeria demonstrate. Although they have not expressly been included in the Convention, it would be misleading to conclude from this, as Saint Vincent and the Grenadines does, that the coastal States do not have jurisdiction to control and regulate customs and fiscal matters related to economic activities" in the EEZ (ITLOS/PV.99/14, p. 26, and see also Rejoinder of Guinea, para. 87).

This argument of Guinea, in my opinion, deserves comment, given its far-reaching implications. As is well known, both formal and informal proposals purporting to apply customs legislation within the exclusive economic zone were submitted and discussed at the Third United Nations Conference on the Law of the Sea. The draft articles on the exclusive economic zone of 26 August 1974 put forward by 18 African States[6] provide an example. Article 3, paragraph (c), reads as follows:

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[4] Under the Convention on the Law of the Sea a warship is entitled to board and search a ship on the high sea which is without a nationality (article 110, paragraph 1(d)). Fishing vessels on the high seas which are without nationality have been specially mentioned as being subject to similar treatment (article 21, paragraph 17, of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea, 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks).

[5] Document A/CN.4/32, Secretariat Memorandum attributed to Gidel, *Yearbook of the International Law Commission* (1950), Vol. II, p. 74. See also Gidel, *Le droit international public de la mer* (1932), Vol. 1, p. 230.

[6] Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Liberia, the Libyan Arab Republic, Madagascar, Mali, Mauritania, Morocco, Senegal, Sierra Leone, Sudan, Tunisia, the United Republic of Cameroon, the United Republic of

A coastal State shall also have exclusive jurisdiction within the exclusive economic zone, *inter alia*, for the purposes of:

...

(*c*) Control and regulation of customs and fiscal matters related to economic activities in the zone.

Such proposals were not accepted by the Conference and as Saint Vincent and the Grenadines has already pointed out did not appear in the Informal Single Negotiating Text nor in any subsequent revisions and of course did not find a place in the 1982 Convention on the Law of the Sea.

The view that "these drafts [which] have not been included in the overall compromise concerning the exclusive economic zone at the Conference allows no formal conclusion whatsoever"[7] or "that it would be misleading to conclude ... that the coastal State does not have jurisdiction to control and regulate customs and fiscal matters relating to economic activities in the EEZ" seems, in my view, to contain within it the seeds of destruction of the Convention. It would have the startling result that proposals which have not been accepted by the Conference would somehow still remain like shades waiting to be summoned, as it were, back to life if and when required.

The function of international courts and tribunals, as has been so often said, is to interpret and not revise treaties.[8] If the approach advocated by Guinea were to be followed this Tribunal would certainly be engaged in the task of revising and not interpreting the Convention. It cannot be the function of this Tribunal to reconstruct the Convention. That is far from saying that the Tribunal should disregard the development of customary international law.

(Signed) L. Dolliver M. Nelson

Tanzania and Zaire (A/CONF.62/C.2/L.82), *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. 3, p. 241. To the same effect see Nigerian draft articles on the exclusive economic zone of 5 August 1974, A/CONF.62/C.2/L.21/Rev.1, *ibid*., p. 199.

[7] Rejoinder of Guinea, paragraph 87.

[8] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 229; *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 196; and the *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 20.

SEPARATE OPINION OF JUDGE CHANDRASEKHARA RAO

1. While endorsing the operative holdings of the Tribunal in the Judgment, I have considered it necessary to append this separate opinion to emphasize certain aspects, which I consider essential from the legal standpoint. I do not necessarily agree with all the reasons given by the Tribunal in support of its holdings. In particular, my disagreement concerns the reasons on which the Tribunal has based its Judgment in respect of two issues: registration of the *Saiga* and the exhaustion of local remedies.

2. The facts and the rival contentions of Saint Vincent and the Grenadines and Guinea on the question of registration of the *Saiga* are as stated in the Judgment. However, I do not agree with the inferences drawn from them by the Tribunal. The *Saiga* was registered provisionally on 12 March 1997 as a Saint Vincent and the Grenadines ship under section 36 of the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines (hereinafter "the Merchant Shipping Act"). The Provisional Certificate of Registration, issued to the *Saiga* on 14 April 1997, stated: "This Certificate expires on 12 September 1997". The Registry Book of Saint Vincent and the Grenadines showed that the provisional registration of the *Saiga* was recorded on 26 March 1997 and that it was valid till 12 September 1997. The *Saiga* was arrested by the Guinean officers on 28 October 1997. It was issued a Permanent Certificate of Registration on 28 November 1997.

3. Guinea contended that the claims of Saint Vincent and the Grenadines in this case were inadmissible on a number of grounds, the main ground being that, at the relevant time, i.e., when the *Saiga* was arrested on 28 October 1997, the *Saiga* was not registered as a Saint Vincent and the Grenadines ship and that, consequently, Saint Vincent and the Grenadines was not competent to present its claims. This raises the question whether Saint Vincent and the Grenadines was the flag State in relation to the *Saiga* at the relevant time.

4. It is not the claim of either party that the Provisional Certificate of Registration was not validly issued in terms of section 36 of the Merchant Shipping Act of 1982. Therefore, as stated in the Provisional Certificate, it should be taken as having expired on 12 September 1997. It is obvious that, if the provisional registration were to continue after the expiry of the Provisional Certificate of Registration, it must either be replaced by another provisional certificate or have its expiry date extended. It was not even alleged that any such action was taken in the present case.

5. What then is the basis for the Judgment to hold that the registration of the *Saiga* under the laws of Saint Vincent and the Grenadines had not been extinguished in the period between the expiry of the Provisional Certificate of Registration and the issue of the Permanent Certificate of Registration? Paragraph 67 of the Judgment refers to two bases: (i) the Merchant Shipping Act, and (ii) certain "indications of Vincentian nationality on the ship or carried on board". To deal first with the so-called indications of Vincentian nationality, it is not clear how they by themselves are capable of keeping the provisional registration alive. In any event, the Merchant Shipping Act does not say so. Though not so stated in the Judgment, the main basis for the holding that the provisional registration continued even after 12 September 1997 is section 36(2) of the Merchant Shipping Act which provides:

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

6. The parties disagreed on the legal effects of section 36(2). Whereas Saint Vincent and the Grenadines argued that, by virtue of section 36(2), "the provisional certificate continued to have the same effect as an ordinary certificate for one year, measured from 12 March 1997", Guinea contended that section 36(2) could not be read as having that effect and that it was designed to specify that a provisional certificate could not be issued for more than a period of one year from the date of issue.

7. It is pertinent here to know how section 36(2) is being applied in practice in Saint Vincent and the Grenadines. No decision of its municipal courts has been cited in favour of one interpretation or the other. However, Saint Vincent and the Grenadines appended to its Memorial a brochure issued by its Maritime Administration. This brochure explains the procedure for registration as it obtains under the Merchant Shipping Act. It states, among other things: "The provisional registration certificate is issued for six months and can *be extended, under certain circumstances*, for a *further* period of six months" (emphasis supplied). This statement, which was reiterated in the course of the oral proceedings, should, therefore, be taken as representing the Vincentian official interpretation of the meaning and scope of section 36(2). The Tribunal must apply this section as it would be applied in Saint Vincent and the Grenadines (see *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 93 at p. 124).

8. The aforesaid statement signifies that the total validity period of a provisional certificate cannot go beyond one year from the date of the issue, that a provisional registration certificate is issued for six months and not for one year, that it requires *extension* if it were to be valid for more than the initial period of six months, and that such extension can be given "under certain circumstances". If this be so, it is illogical to hold that, by virtue of section 36(2), a provisional certificate issued for a period of six months would continue to be valid for a one-year period even when it fails to receive extension and without regard to the "circumstances" of the case.

9. There is also clear admission by Saint Vincent and the Grenadines that the validity period of the Provisional Certificate of Registration was allowed to be lapsed. In a letter dated 1 March 1999, which was submitted to the Tribunal in the course of the oral proceedings, the Vincentian Deputy Commissioner for Maritime Affairs explained that "it is very common for Owners to allow the validity period of the initial Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate (as was the case here)". This explanation too clearly supports the proposition that once a provisional certificate expires a further provisional certificate or a permanent certificate will have to be *obtained*. And, as noted earlier, it is not the case of Saint Vincent and the Grenadines that a further certificate was either applied for or given. The only certificate that was issued after 12 September 1997 was the Permanent Certificate of Registration.

10. The Vincentian argument that, when a vessel is registered under its flag, "it remains so registered until deleted from the Registry" is not supported by any provision of the Merchant Shipping Act or outside authority. Even if the *Saiga* was shown in the Vincentian Registry Book

after the expiry of the Provisional Certificate of Registration, as claimed by Saint Vincent and the Grenadines, it does not follow that the provisional registration was kept alive. Once a provisional registration is allowed to lapse, it can be revived only by obtaining a further certificate.

11. Under the Merchant Shipping Act, a merchant ship acquires Vincentian nationality through registration. Since the *Saiga* remained without registration in the period between the expiry of the Provisional Certificate of Registration and the issue of the Permanent Certificate of Registration, I am clearly of the opinion that Saint Vincent and the Grenadines was not, at the relevant time, the flag State of the *Saiga* for purposes of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter "the Convention").

12. Even if Saint Vincent and the Grenadines was not the flag State at the relevant time, the question remains whether the Vincentian claims are inadmissible *vis-à-vis* Guinea. The conduct of both the parties, following the arrest of the *Saiga*, is relevant in this regard. Saint Vincent and the Grenadines has always acted as if it was the flag State of the *Saiga* since the inception of the dispute. It was in that capacity that it invoked the jurisdiction of this Tribunal under article 292 of the Convention for the prompt release of the *Saiga* and its crew as also under article 290 for the prescription of provisional measures. Guinea too did not raise the question of the ship's lack of registration at the time when it seized the ship's papers following the arrest of the *Saiga*. In the decisions of the judicial authorities of Guinea, Saint Vincent and the Grenadines was stated to be the flag State of the *Saiga*. Having failed to challenge the status of Saint Vincent and the Grenadines as the flag State of the *Saiga* at all material times when it ought to have done so for protecting its rights, it is not open to Guinea now to contend that it discovered a new fact on the issue of registration which was unknown to it prior to the filing of the Memorial. Guinea has to blame its own negligence in this regard. Principles of fairness clearly demand that a State is not allowed to act inconsistently, especially when it causes prejudice to others.

13. I may now deal with the Guinean objection based on the non-exhaustion of local remedies to the admissibility of the Vincentian claims. Saint Vincent and the Grenadines argued that the local remedies rule did not apply in this case, since the Guinean actions amounted to a direct violation of its rights under the Convention and general international law, Guinea contended that Saint Vincent and the Grenadines was not competent to institute its claims, since the persons who were affected by Guinean actions were natural or juridical persons and they did not exhaust the local remedies in Guinea, as required by article 295 of the Convention. The Judgment upholds the Vincentian argument in this regard. I do not, however, think that the Vincentian argument is well-founded and, if accepted, would greatly diminish the efficacy of article 295 of the Convention.

14. The reliefs sought by Saint Vincent and the Grenadines in this case arise mainly from Guinea's wrongful exercise of the right of hot pursuit under article 111 of the Convention. Paragraph 8 of that article provides: "Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained." The word "it" in this paragraph refers to the ship and not to its flag State. It is not, therefore, open to a flag State to contend that every wrongful exercise of the right of hot pursuit involves direct violation

of its rights rather than of those of the ship. This is in contrast, for instance, with article 106 of the Convention, which deals with liability for seizure of a ship or aircraft without adequate grounds. The article provides that in such a case "the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure". Article 106, unlike article 111, thus provides that it is the flag State which is entitled to claim reliefs for any loss or damage caused by the wrongful seizure.

15. When article 111, paragraph 8, states that it is the ship which is to be compensated, the expression "ship" here is a symbolic reference to everything on the ship and every person involved or interested in the operations of the ship. In short, all interests directly affected by the wrongful arrest of a ship are entitled to be compensated for any loss or damage that may have been sustained by such arrest.

16. Since, as found earlier, this is a case of a ship's entitlement to compensation, in principle, the local remedies in Guinea are required to be exhausted by the persons affected by the arrest of the *Saiga* before Saint Vincent and the Grenadines could bring their claims to this Tribunal. However, I agree with the Judgment that, on the facts of this case (see paragraphs 100 and 101 of the Judgment), the parties concerned were not obliged to exhaust local remedies. In this view of the matter, the Guinean objection based on the non-exhaustion of local remedies deserves to be dismissed.

(Signed) P. Chandrasekhara Rao

SEPARATE OPINION OF JUDGE ANDERSON

I have voted for operative paragraphs (3), (7), (8) and (9) of the Judgment for reasons which differ in certain respects from some of the argumentation set out in the preceding paragraphs of the Judgment.

In the spirit of article 8, paragraph 6, of the Resolution on the Internal Judicial Practice of the Tribunal, this separate opinion will concentrate on these points of difference without traversing the whole ground.

Nationality of the *Saiga*

The question of the nationality of the *Saiga*, which divided the Tribunal, arose indirectly. The real issue for decision was whether to uphold or reject Guinea's objection to the *locus standi* of Saint Vincent and the Grenadines ("St. Vincent") to bring claims before the Tribunal in the capacity of the flag State of the *Saiga*. It was this issue of standing which led to the detailed consideration of what is a technical question of nationality and ship registration, not connected in the slightest way with the reasons for the arrest. It was accepted by all that the *Saiga* had Vincentian nationality during certain periods both before and after its arrest. The difference between the parties was whether or not the *Saiga* had Vincentian nationality during a short period around the end of October 1997 when the ship was arrested. The rival contentions are set out in paragraphs 58 to 61 of the Judgment and need not be repeated here. Paragraph 73 sets out the Tribunal's conclusion on the issue of nationality, a conclusion which I endorse for the following reasons.

Paragraph 73(a)

The law of the sea has long recognised the quasi-exclusive competence of the flag State over all aspects of the grant of its nationality to ships[1]. This aspect of the law is now codified in the Convention, particularly article 91. In addition, as part of the modern law, article 94 imposes detailed obligations on the flag State in respect of all ships flying its flag, including initial obligations relating to registration. There is authority for the propositions that: (1) the regularity and validity of a registration can be questioned only by the registering State[2]; and (2) no State has the right to criticise the conditions governing the attribution of the flag by another State or to refuse to recognise this flag, except in the circumstances provided for in article 92, paragraph 2, concerning the status of ships[3]. These propositions remain generally applicable in inter-state relations, although (as article 92, paragraph 2, indicates) there still exist the general requirements on the part of the State granting its nationality to act in good faith and to respect the comparable rights of other States to grant their nationality to ships. (I do not read paragraph 83 of the Judgment as going so far as to say that the requirement of a "genuine link", which contains an element of good faith in the word "genuine", has no relevance at all to the grant of nationality.) In the first instance, the attribution of nationality is a matter for the law of the State concerned.

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[1] The *Montijo* and *Muscat Dhows* cases.

[2] Colombos, *International Law of the Sea*, 6th edition (1967), p. 289, quoting the decision of the U.S. Supreme Court in *Lauritzen v. Larsen* 345 U.S. 571 (1953).

[3] Dupuy and Vignes, eds., *A Handbook on the New Law of the Sea*, v. 1 (1991), p. 405.

Consequently, the scope, both substantively and procedurally, for other States to challenge the regularity and validity of a particular registration is strictly limited. In this respect, Part XV of the Convention contains procedures available to States Parties to the Convention, a point noted in paragraph 65 of the Judgment.

Turning to the present case, I endorse the approach taken by the Tribunal in paragraphs 62 and 66 to the effect that, on the basis of the Convention, the issue is one of fact to be decided on the evidence, including factual evidence as to the law of St. Vincent. In support of their contentions, the parties submitted the documentation summarised in the Judgment. St. Vincent submitted the text of the Merchant Shipping Act 1982, as amended ("the Act"), which appeared to have been intended amongst other things to implement in its law the terms of articles 91, 92 and 94 of the Convention. However, the parties advanced rival contentions as to the meaning and effect of the Act in regard to the facts of the case. They differed also over the weight to be attached to the wording of the *Saiga*'s certificates as opposed to the terms of the Act. Guinea pointed to the lapse of the Provisional Certificate; St. Vincent pointed to the Act and denied any lapse in the validity of the registration and nationality.

The arguments thus advanced by the parties indicated the existence of an issue with regard to the status of the *Saiga* on 27 and 28 October 1997, namely whether or not the nationality of the *Saiga* had lapsed upon the expiry of the six-month period of validity specified on the face of the Certificate. This was an issue, concerning registration, which arose under the law of St. Vincent. The Deputy Commissioner for Maritime Affairs and the legal representatives of St. Vincent advanced an interpretation of its legislation against the background of the facts of the *Saiga*'s registration. It led St. Vincent to the conclusion that the *Saiga* had been provisionally registered in March 1997 and remained so registered on 27 and 28 October 1997. Guinea challenged this interpretation, advanced an alternative one and came to the opposite conclusion.

Faced with this situation, what was the role of the Tribunal? In my opinion, the Tribunal was not called upon to resolve what amounted to a disputed issue arising under the local law. (The same was true in regard to the question of Guinean law mentioned in paragraph 119 of the Judgment.) The Tribunal was not called upon to decide whether St. Vincent's interpretation or the rival interpretation of Guinea was the legally correct one, nor was it in a position to do so. I express no opinion here on what amounts to a question of the interpretation and application of the law of St. Vincent. Only a court with jurisdiction to apply the law of St. Vincent could give an authoritative ruling on the question. Were the issue to come before such a court, it would have the benefit, unlike the Tribunal, of full disclosure of the documentary evidence and of oral testimony of witnesses as to what exactly had happened in 1997, as well as full legal argument.

Rather, the question for decision was whether St. Vincent's standing, based on the Vincentian nationality of the ship, had been sufficiently established to the satisfaction of the Tribunal or whether, on the other hand, the objection of Guinea had been substantiated. In other words, the question was one of standing and of fact, to be determined on the basis of the contentions of the parties and the rules of international law concerning the proof of the attribution of nationality to ships pursuant to article 91 and related provisions of the Convention.

For present purposes, it was enough, in my view, to consider whether or not the interpretation advanced by St. Vincent was included within the range of the possible or permissible interpretations which may be placed on the wording of the legislation. To that end, it may be noted that section 36(2) reads:

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

The administrative practice of the Commissioner for Maritime Affairs was explained to be to issue provisional certificates for six months (the Deputy Commissioner's letter of 1 March 1999). The Act does not refer to the period of six months, which appears to be an administrative time limit and shorter than the period of one year mentioned in the Act. The Act does not contain a provision to the effect that the provisional registration is "deemed to be closed upon" either full registration or the expiry of the period specified on the face of the certificate, whichever first occurs. An example of such a provision, employing the form of words quoted in the preceding sentence, is to be found in Regulation 21(1) of the Merchant Shipping Ordinance of Gibraltar, another common law jurisdiction with legislation similar in many ways to the Act of St. Vincent (apart from the more usual maximum period for provisional registration of 90 days instead of St. Vincent's full year). In the result, section 36(2) appears to me to be capable of bearing the meaning that a provisional certificate which is expressed on its face to be valid for six months retains the same effect as an ordinary certificate of registration even after the expiry of the six months during a further period extending up to the statutory maximum of one year. On that basis, St. Vincent's interpretation falls within the range of possible interpretations of its legislation. It follows that St. Vincent's "initial burden of proof" (the test adopted in paragraph 72 of the Judgment) was discharged, in my view.

The counter-argument of Guinea was to the effect that this interpretation was untenable and that section 36(2) bore a different meaning. Taking the latter point, this meaning confined the effect of section 36(2) to a prohibition of provisional registration for a period extending beyond twelve months. To my mind, that prohibition was an additional possible meaning. It did not represent the only meaning or exhaust the possible meanings of the provision. The two possible meanings advanced by the parties were not mutually exclusive. Reverting to the first point, I was not persuaded by the simple assertion that the argument of St. Vincent was untenable. Moreover, before an international body the competent administrative officers and legal representatives of a State must be presumed to know the law of that State. There was insufficient reason to decide that, in effect, the government of St. Vincent has misconstrued its own legislation or was acting in bad faith. Only the strongest evidence would have allowed the Tribunal to have reached such a conclusion, evidence which was not present in this case. For these reasons, Guinea failed to discharge the burden of sustaining its objection to the *locus standi* of St. Vincent by proving its contention that a gap existed in the registration.

Finally, the change of flag from Malta to St. Vincent and the change of name took place after a real change of ownership. There was no evidence of the use of the Maltese flag on the part of the new owners of the ship. The evidence given to the Tribunal by St. Vincent concerning the closure of the Maltese registration took the form of a statement to the effect that

"other acceptable evidence" of the closure of the Maltese registration had been produced to the competent authority, as required by section 37 of the Act. On the question of this evidence, I agree with the conclusion in paragraph 70 of the Judgment.

Paragraph 73(b) and (c)

Paragraph 73 of the Judgment also alludes to the conduct of the two parties in its subparagraphs (b) and (c).

As regards subparagraph (b), St. Vincent showed that it had acted consistently as the *Saiga*'s flag State, both before and after the filing of the objection by Guinea (paragraph 68 of the Judgment). There was also evidence showing that the obligation regarding registration laid down in article 94 of the Convention had been fulfilled in the case of the *Saiga*; and there was no evidence of a subsequent failure to comply with other requirements in that article in regard to the ship. In this respect, the conduct of St. Vincent carries particular significance in view of the predominant role of the registering State over the grant of nationality. (On this point, I share the view of Judge Nelson, set out in his Separate Opinion.) In my view, this conduct by St. Vincent corroborates its legal argument concerning the question of nationality and the underlying issue of its standing to bring the case before the Tribunal.

Turning to subparagraph (c), the conduct of Guinea (as noted in paragraph 69 of the Judgment) over a period of several months was consistent with its acceptance of the *locus standi* of St. Vincent. Thus, Guinea's conduct in first citing St. Vincent in the proceedings in Conakry and then seeking to deny the latter's status as the flag State in proceedings before the Tribunal arising from the same facts (including a claim relating to that same citation), appears to be "blowing hot and cold" and is not easy to reconcile with the principle *allegans contraria non est audiendus*. Moreover, the conclusion of the Agreement of 1998 also amounts to relevant conduct. By the terms of this Agreement, Guinea agreed that the Tribunal should deal with "all aspects of the merits" of the dispute with St. Vincent concerning the *Saiga*. The merits are different from the question of *locus standi*. Although the Agreement did not describe St. Vincent as the flag State of the *Saiga* in express terms, the only possible capacity in which St. Vincent was involved was that of the flag State, it not being the State of nationality of the shipowners, the crew, the cargo-owners, etc. St. Vincent's *locus standi* to conclude the Agreement rested solely upon the Vincentian nationality of the *Saiga*. In the proceedings before the Tribunal, Guinea subsequently submitted that the Tribunal should reject the claims as inadmissible on the ground *inter alia* that St. Vincent was not the flag State and thus lacked standing. Now, I agree with the Tribunal's finding that the Agreement of 1998 "does not preclude the raising of objections to admissibility by Guinea" (paragraph 51) over issues such as exhaustion of local remedies and nationality of claims. However, I still retain doubts about the finding in regard to the objection to the specific issue of *locus standi*. The conclusion of the Agreement and its terms are both fully consistent with the unequivocal acceptance of St. Vincent's standing as the flag State of the *Saiga* and the Agreement is the basis of the Tribunal's jurisdiction. The conclusion of the Agreement remains relevant conduct and in my opinion that conduct displayed inconsistency which the Tribunal could not overlook.

In conclusion on these questions of nationality and conduct, St. Vincent was able in my view to establish, on the balance of probabilities and having regard to the predominant role of the registering State in the matter of nationality, that the *Saiga* possessed Vincentian nationality on the relevant dates. The consistent conduct of St. Vincent supported that conclusion. The conduct of Guinea prior to the delivery of its Counter-Memorial was inconsistent with its subsequent objection to St. Vincent's standing before the Tribunal, first presented in the Counter-Memorial. In my view, paragraph 73(d) of the Judgment should be seen in the context of the respective conduct of the parties, as dealt with in paragraph 73(b) and (c), and the general principle of fairness in international legal proceedings.

Finally on this subject, having seen the separate opinion of Vice-President Wolfrum, I wish to associate myself with his criticisms of the administrative practice of St. Vincent in the matter of provisional registration as described in the Deputy Commissioner's letter of 1 March 1999.

Arrest of the *Saiga*

I have voted for the finding in operative paragraph (7) of the Judgment to the effect that the arrest, etc. of the *Saiga* in respect of its bunkering activity on 27 October 1997 violated the rights of St. Vincent. A coastal State is not empowered by the Convention to treat bunkering in its contiguous zone or EEZ as amounting *ipso facto* to the illegal import of dutiable goods into its customs territory, without further proof of matters such as the entry of the goods into its territory or territorial sea. By doing so in this instance, Guinea, in my opinion, went beyond articles 33 and 56 and failed to respect article 58 of the Convention.

I also endorse the decision recorded in paragraph 138 of the Judgment not to make any general findings on questions of bunkering in the EEZ. These questions are far from being straightforward. Today, bunkering is conducted under all manner of different circumstances and may involve distinct types of recipient vessels, including passenger vessels, warships, cargo ships and fishing vessels. For example, immediately before and after taking on bunkers, a recipient vessel may be exercising the freedom of navigation. In such a case, its bunkering could well amount to an "internationally lawful use of the sea" related to the freedom of navigation and "associated with the operation of ships" within the meaning of article 58, paragraph 1, of the Convention. To take a different example, a fishing vessel may be engaged in fishing in the EEZ with permission and subject to conditions established in the laws and regulations of the coastal State, consistent with the Convention (in particular, its article 62, paragraph 4). Here, the accent is not so much on the navigation of the fishing vessel as upon its efficient exploitation of the stocks in accordance with the terms of its licence. Yet again, a fishing vessel may also be in need of bunkers whilst navigating in transit between its home port and some distant fishing grounds. And the supply of bunkers to a ship which has run out of fuel as a result of a mishap may also have a safety or humanitarian dimension. Several other examples could be imagined. Plainly, the Tribunal could not address such varied situations in the abstract and without the necessary materials and evidence. The Tribunal was right to confine its decision to the particular question of the application of customs and fiscal legislation to bunkering in the EEZ which arose in this case and to leave aside the many other possible questions.

Hot Pursuit

The right of hot pursuit is one of the exceptions provided for in the Convention to the rule of exclusive flag State jurisdiction stated in article 92, paragraph 1. I fully share the finding in paragraph 149 of the Judgment that the conditions set out in article 111 are cumulative. Yet, article 111 contains sufficient flexibility to permit the arrest of suspected smugglers or poachers who attempt to flee when ordered to stop. In this case, Guinea satisfied the requirement in article 111, paragraph 5, that the right be exercised by a naval or customs vessel marked as being on government service. Patrol vessels P328 and P35 were specifically authorised to undertake the mission. However, other conditions contained in article 111 were not satisfied in this instance.

First, the activity of the small patrol vessel P35 on 27 October 1997, described in paragraph 150, amounted in my view to nothing more than a fruitless search for a possible suspect vessel, prompted by intercepted radio messages.

Secondly, the evidence produced with regard to the events described in paragraph 151 discloses no more than suspicions on the part of the patrol vessels at 0400 hours on 28 October 1997. A suspicion is something less than the "good reason to believe" required by paragraph 1 of article 111. The Customs document PV29 contained much information concerning the bunkering of the three fishing vessels which was first obtained from the *Saiga*'s log book and the questioning of the Master. From a reading of the terms of the judgments handed down by the two criminal courts in Conakry, much of the evidence produced in the proceedings against the Master of the *Saiga* was obtained only after the arrest of the ship, thereby putting in doubt the existence before that time of sufficient information to amount to "a good reason to believe".

Thirdly, article 111, paragraph 1, requires that an order to stop must be received before pursuit begins. Even if the Tribunal had been willing in principle (and after due consideration of the point) to consider the possibility of accepting as an auditory signal a radio message sent over a distance of 40 miles or so, the alleged signal from P328 could still not have been deemed to constitute a valid signal in the absence of any evidence of: (1) the sending of the message from P328 (e.g. a recording on board P328 or an entry in its log book setting out the text of the order and the time of its transmission); and (2) more importantly, the receipt of the message by the *Saiga* and the latter's understanding of the message as an order to stop by officials of Guinea (e.g. from the *Saiga*'s tape recordings of its incoming radio traffic or an entry in its log book). Moreover, there was other evidence which tended to show that, far from having received any intimation of the approach of the patrol vessels, the *Saiga* was taken completely by surprise by their arrival, whilst drifting outside Guinea's EEZ, over four hours after the time of the alleged signal. In the circumstances, the Judgment in paragraph 151 rightly concludes that there was insufficient evidence to establish that an order was given and received.

Finally, P35 did not approach the *Saiga* in the accepted manner for law enforcement vessels. Instead, P35 fired live rounds which, according to the testimony of two witnesses, broke bridge and cabin windows on board the *Saiga*. Occasionally, when there is good reason to believe that a ship has violated applicable laws, law enforcement officers may need to use force in order to arrest suspected smugglers or poachers who fail to respond to orders to stop. However, as paragraph 156 of the Judgment indicates, force must be resorted to only in the last

resort and after warnings (including shots across the bow) have been given. Even then, any live shots must be fired in such way as to avoid endangering the lives of those on board. In order to ensure respect for these standards, law enforcement officers should receive adequate training in maritime practices and, if armed, should be provided with specific Rules of Engagement. Some of the testimony in this case indicated that this had not happened in this instance.

(Signed) David H. Anderson

SEPARATE OPINION OF JUDGE VUKAS

(a) Submissions of the parties on the exercise of the right of Saint Vincent and the Grenadines in the exclusive economic zone of Guinea.

1. Although I do not agree with every single argument and every detail of the analysis of the Tribunal, I voted in favour of the operative paragraphs of the Judgment (except paragraphs (11) and (13)) as I do agree with the conclusions they contain.

However, I am obliged to attach this Separate Opinion to the Judgment as I do not fully share the attitude of the Tribunal in respect of the main submission of both parties. In paragraph 1 of its final submissions, Saint Vincent and the Grenadines asks the Tribunal to adjudge and declare that:

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

In its final submissions, the Government of the Republic of Guinea asked the Tribunal to adjudge and declare that "the claims of St. Vincent and the Grenadines are dismissed as non-admissible". Alternatively, Guinea asked the Tribunal to conclude that:

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

2. The quoted paragraphs of the final submissions clearly indicate that the basic issue in this case is the opposite views of the parties concerning the interpretation and application of some of the provisions of the Convention to which they both are States Parties. Therefore, they submitted the dispute to the compulsory procedures entailing binding decisions, provided for in Part XV, section 2, of the Convention. Saint Vincent and the Grenadines first instituted arbitral proceedings in accordance with Annex VII to the Convention (by the Notification of 22 December 1997), but on 20 February 1998 the two States concluded an agreement transferring the arbitration proceedings to the Tribunal.

3. As the basic disagreement between the parties is the alleged violation of the right of Saint Vincent and the Grenadines under "Articles 56(2) and 58 and related provisions of the Convention", the opposite claims of the parties should primarily be analyzed and evaluated on the basis of the provisions of the Convention.

The fact that Saint Vincent and the Grenadines as well as Guinea are States Parties to the Convention does not suffice for the application of Part V of the Convention concerning the exclusive economic zone in "an area beyond and adjacent to the territorial sea"(article 55) of Guinea. Namely, unlike the case of the continental shelf (article 77, paragraph 3) and as the contiguous zone (article 33, paragraph 1), the rights of the coastal State over the exclusive economic zone depend on an express proclamation of the zone by the respective coastal State. Guinea proclaimed its exclusive economic zone by Decree No. 336/PRG/80, which entered into force on 30 July 1980.

Guinea proclaimed also its contiguous zone; in the proceedings, it even claimed that the *Saiga* supplied gas oil to the fishing boats in its contiguous zone off the coast of the island of Alcatraz. However, in the course of the proceedings, its reference to its contiguous zone became sporadic and inconsistent. It finally based its claims only on its alleged rights to enforce its customs legislation in its exclusive economic zone. Therefore, I will not deal with the rules on the contiguous zone, and the possibility that the bunkering activities of the *Saiga* took place in the contiguous zone of Guinea.

4. Having established its exclusive economic zone, Guinea put in force the specific legal régime of the zone, consisting of its rights and jurisdiction, and of the rights and freedoms of other States, governed by the relevant provisions of the Convention (article 55). The legal régime of the zone is automatically applied once the zone is proclaimed; it does not need internal, municipal rules in order to be operative. The ratification of the Convention, and the proclamation of the zone, suffice for the application of all the rules on the exclusive economic zone contained in the Convention. Of course, States are entitled to incorporate the provisions of the Convention into their internal laws and regulations, i.e. to transform into their domestic law the rules set out in the Convention. They may also formulate additional domestic rules to the extent that they are not contrary to the Convention and other relevant international rules.

5. Considering, therefore, that since 1980, beyond and adjacent to the territorial sea of Guinea, there has existed the exclusive economic zone of that State, I do not agree with the Judgment which bases its scrutiny of the legality of the arrest of the *Saiga* on the laws and regulations of Guinea. The Judgment has neglected the relevant provisions of the Convention directly applicable to the parties. This approach cannot be justified by the mere fact that, after referring to the relevant provisions of the Convention (see *supra* paragraph 1), Guinea also claimed that:

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

Although in the course of the proceedings Guinea referred to the Customs Code and some other laws, the main purpose of these references was the claim that neither their content nor their application to the *Saiga* violated the Convention.

6. In my opinion, it is indispensable to commence the inquiry concerning the legality of the actions of Guinea by analyzing the relevant provisions of the Convention.

As demonstrated in paragraph 1 above, the parties have opposite views concerning the content and the application of "Articles 56(2) and 58 and related provisions of the Convention". The main provision on the rights of "other States" in the exclusive economic zone is article 58, paragraph 1, which provides that all States enjoy, "subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."

Article 56, paragraph 2, states that the coastal State, in exercising its rights and performing its duties under this Convention in the exclusive economic zone, "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".

Although not specifically indicated in the submissions of Saint Vincent and the Grenadines, the "related provisions of the Convention" are particularly those which determine the rights and duties of the coastal State, as their application could interfere with the freedom of navigation of ships flying its flag.

(b) Arguments of the parties

7. Before any further discussion, it is necessary to recall that the final submissions of Saint Vincent and the Grenadines (paragraph 1), as well as the corresponding paragraphs in the Memorial and the Reply, call on the Tribunal generally to protect "the right of St. Vincent & the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation" from "the actions of Guinea". The attack on the *Saiga* and the subsequent events are mentioned only as an example of the Guinean actions violating this right of Saint Vincent and the Grenadines and the ships flying its flag.

8. According to the Memorial, freedom of navigation and related rights, guaranteed under article 58 of the Convention, include bunkering which, therefore, must not be subject to customs duties or contraband laws in Guinea's exclusive economic zone.

The last part of paragraph 101 of the Memorial reads:

> *A priori* the right to bunker gas oil within the exclusive economic zone falls squarely within freedom of navigation rights and other internationally lawful uses of the sea. This is confirmed by the text of the 1982 Convention (and its *travaux préparatoires*), by the Convention's object and purposes, and by state practice. It is also consistent with international judicial authority on the extent of coastal state's rights in the exclusive economic zone.

Saint Vincent and the Grenadines did not indicate precisely where in the text of the 1982 Convention it has been *confirmed* that bunkering "within the exclusive economic zone falls squarely within freedom of navigation rights and other internationally lawful uses of the sea". It

also did not provide any evidence that the *travaux préparatoires* for the Convention supported the above claim, or at all referred to bunkering.

The only argument of Saint Vincent and the Grenadines concerning the freedom of navigation, which is based on the Convention, is its claim that the exclusive economic zone is a zone *sui generis* (article 55 of the Convention), in which all the "pre-existing rights of states to exercise high seas freedoms, … including bunkering, … are unaltered, except where subject to express limits under the 1982 Convention" (Memorial, paragraph 104).

Saint Vincent and the Grenadines did not refer to any "international judicial authority" or any specific "state practice" supporting its claim concerning bunkering.

9. Guinea, on its side, claimed that bunkering was not included in the high seas freedoms applicable in the exclusive economic zone. It considered the zone a régime where rights or jurisdiction which the Convention has not expressly attributed to the coastal State do not automatically fall under the freedoms of the high seas. Concerning bunkering undertaken by the *Saiga* it stated:

> Contrary to the Applicant's opinion that "bunkering is a freedom of navigation right", Guinea contends that the M/V "Saiga's" bunkering of fishing vessels *in the Guinean exclusive economic zone* is neither comprised by the freedom of navigation referred to in article 87 of the Convention, nor does it form any other internationally lawful use of the sea related to these freedoms, such as those associated with the operation of ships. It is not navigation of the M/V "Saiga" that is at issue in this case, but its commercial activity of off-shore bunkering in the Guinean exclusive economic zone. Article 58(1) of the Convention does not apply to the mentioned bunkering activities which caused Guinea to take measures against the M/V "Saiga" … . (Counter-Memorial, paragraph 95)

In addition, Guinea made two clarifications which reduce the scope of disagreement of the parties. First, it distinguishes the situation of the buyer from that of the seller of the fuel:

> Obtaining fuel, which is necessary to sail a ship, could reasonably be considered as ancillary or related to navigation, whereas providing fuel could not. (Counter-Memorial, paragraph 97)

Thus, a ship buying fuel from a vessel engaged in bunkering in the exclusive economic zone of a third State does not violate article 58, paragraph 1, of the Convention.

Second, Guinea distinguishes between supplying bunkers to fishing vessels in the Guinean exclusive economic zone and to other vessels navigating in transit through that zone (Counter-Memorial, paragraph 101). It opposes only bunkering of fishing vessels, not of other types of ships.

10. Therefore, on the basis of the mentioned explanations provided by Guinea, it appears that both parties accept as legal the supplying of bunkers to all other types of ships in transit through an exclusive economic zone other than fishing vessels. The task of the Tribunal is thus reduced

to the analysis and adjudication of the conflict of the positions of the parties respecting the bunkering only of fishing vessels.

In this respect, Saint Vincent and the Grenadines makes no distinction whatsoever. It is exactly in respect of a case of bunkering fishing vessels by the *Saiga* that it brought the case to the Tribunal. Indeed all its argumentation mentioned concerns bunkering in general.

11. On the other hand, Guinea argued against the legality of the supply of bunkers to fishing vessels in the exclusive economic zone. However, it did not want to base its opposition to the bunkering of such ships on the regard other States owe to its sovereign rights over the living resources of its exclusive economic zone. Namely, article 58, paragraph 3, in this respect reads:

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

12. Guinea decided not to base its claim on the rights it is guaranteed, as all other coastal States, in the exclusive economic zone under article 56, paragraph 1(a). It advanced two economic reasons for not permitting bunkering of fishing vessels in its exclusive economic zone, not willing to base them on its sovereign rights granted under article 56, paragraph 1(a). Its first reason is the following.

> Through obtaining fuel at sea, a fishing vessel can spend a longer time fishing on the fishing grounds and hence can catch a greater amount of fish, before it is bound to call at a port. Accordingly the coastal State has an interest to regulate offshore bunkering in its exclusive economic zone as an aspect of its fisheries policies. (Counter-Memorial, paragraph 104)

The second reason, linked to the first, concerns fiscal interests of Guinea:

> Whereas customs revenues on oil products represent at least 33% of the total customs revenue destined for the Guinean Public Treasury, and whereas only 10% of the fishing fleet operating in the Guinean exclusive economic zone is flying the Guinean flag, customs revenues from fishing vessels flying foreign flags are an important fiscal resource for Guinea. (Counter-Memorial, paragraph 104)

13. Yet, notwithstanding the link of its arguments with fishing, Guinea insists that bunkering fishing vessels in the exclusive economic zone is not inherent to the sovereign rights of the coastal State, provided for in article 56, paragraph 1(a), of the Convention. It claims that "[a]lthough the bunkering activities are ancillary measures of a considerable importance for the fishing vessels concerned, they constitute neither fishing nor conservation or management activities with respect to the living resources themselves" (Counter-Memorial, paragraph 106).

Guinea also rejected the possibility of using the remaining part of article 56, paragraph 1(a):

> Neither does Guinea contend that the economic activities employed by the M/V "Saiga" in its exclusive economic zone are "other activities for the economic exploitation and exploration of the zone, such as the production of energy from [the] water, currents and winds" in the sense of article 56(1)(a) of the Convention. The activities envisaged in the mentioned provision are those constituting an exploitation and exploration of the zone itself and its natural resources, as the example of energy production indicates, whereas bunkering activities are of a different nature. They are business activities … . Although these activities are conducted with a view to fisheries and although they represent ancillary measures for the fishing vessels in the exclusive economic zone, they do not form an economic exploitation of the zone itself. In conclusion Guinea does not contend that bunkering the fishing vessels would constitute a part of its sovereign rights in its exclusive economic zone. (Counter-Memorial, paragraph 108)

14. Having rejected any link of its assertion concerning the bunkering of fishing vessels with article 56, paragraph 1(a), of the Convention, Guinea eventually points out the legal basis for its claim.

The first field in which Guinea seeks justification for its action towards foreign tankers supplying bunkers to fishing ships are rules and principles of general international law. Such rules and principles, according to Guinea, are referred to in "the last operative sentence of the preamble to the Convention" and in article 58, paragraph 3. These rules and principles of general international law serve as a source of Guinea's claim that it is justified to exercise jurisdiction in respect of such bunkering in order to protect its *public interest*:

> Guinea alleges that it has an inherent right to protect itself against unwarranted economic activities in its exclusive economic zone that considerably affect its public interest. (Counter-Memorial, paragraph 112)

Endorsing this view throughout the proceedings, Guinea submitted, as a subsidiary argument, that its actions were justified on the basis of article 59 of the Convention, which reads:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

However, Guinea invoked article 59 with some reluctance, as according to its Rejoinder, article 59 applies only when there is "a lacuna in the law which is not present here" (Rejoinder, paragraph 86).

15. In my view, "public interest" cannot be advanced as a reason for departing from the rules establishing a régime at sea. "Public interest" is not a notion indicating exceptional, momentary interests of a State, but a constant interest of the entire society of a State. It was exactly on the basis of the public interests of various participants in the Third United Nations Conference on the Law of the Sea (hereinafter: UNCLOS III) that the specific legal régime of the exclusive economic zone was established. The provisions on the rights and duties of coastal States, "other States", land-locked States, geographically disadvantaged States, are the result of protracted negotiations and of a balance of interests of all the groups of States, achieved in the régime of the exclusive economic zone.

From "public interest", Guinea switches to "the doctrine of necessity in general international law" permitting acts of "self-protection" or "self-help" (Rejoinder, paragraph 97; Counter-Memorial, paragraphs 112 and 113). As far as the application of these notions/principles in this case is concerned, I share the conclusions reached in paragraphs 132–135 of the Judgment.

(c) The relevant provisions of the Convention

16. Since the first initiatives for the extension of sovereignty/jurisdiction of coastal States, which eventually resulted in the establishment of the régime of the exclusive economic zone, coastal States envisaged the protection of their rights in respect of the natural resources of the sea. This was the main purpose for the adoption, and the essential element of the content of the 1952 Declaration on the Maritime Zone (the Santiago Declaration), the 1970 Montevideo Declaration on the Law of the Sea, the 1970 Declaration of the Latin American States on the Law of the Sea, the 1971 Report of the Subcommittee on the Law of the Sea of the Asian-African Legal Consultative Committee, the 1972 Declaration of Santo Domingo, the Conclusions in the 1972 General Report of the African States Regional Seminar on the Law of the Sea, and of several other instruments adopted by various organizations and groupings of States.[1]

Rights over natural resources in the proposed zone were also the dominant concern of coastal States in the work of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction.[2]

During the drafting of Part V of the Convention, the majority of States participating in UNCLOS III did not have in mind the protection of other economic activities of coastal States except the resource-related ones. An early proposal of 18 African States, to insert in the future Convention a provision on the jurisdiction of coastal States for the purpose of "control and regulation of customs and fiscal matters related to economic activities in the zone", and a similar proposal by Nigeria,[3] were reflected in the 1974 Conference document listing the various trends of the States participating in UNCLOS III (Main Trends Working Paper). However, due to the

[1] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Exclusive Economic Zone, Legislative History of Articles 56, 58 and 59 of the United Nations Convention on the Law of the Sea*, United Nations, New York, 1992, pp. 3-13.
[2] *Ibid.*, pp. 14-59.
[3] Documents A/CONF.62/C.2/L.82 and A/CONF.62/C.2/L.21/Rev.1, *ibid.*, pp. 80-82 and 73-76.

expressed opposition of several delegations[4], customs regulation in the exclusive economic zone was not mentioned in the drafts of the Convention.

The following paragraph relative to article 59, written by the most authoritative commentators of the Convention, confirms that in conceiving economic sovereign rights and jurisdiction of the coastal State, UNCLOS III never reasoned beyond their resource contents:

> On *issues not involving the exploration for and exploitation of resources*, where conflicts arise, the interests of other States or of the international community as a whole are to be taken into consideration. (emphasis added)[5]

17. It appears from all the above mentioned that the drafting history and the content of Part V of the Convention do not provide valid reasons for considering bunkering of any type of ships as an illegal use of the exclusive economic zone. In this respect, a note circulated at the beginning of the fifth session of UNCLOS III by the President of the Conference should be recalled. Pleading for a consensus on the régime of the exclusive economic zone, the President wrote:

> A satisfactory solution must ensure that the sovereign rights and jurisdiction accorded to the coastal State are compatible with well-established and long recognized rights of communication and navigation which are indispensable to the maintenance of international relations, *commercial* and otherwise. (emphasis added)[6]

Thus, the President did not see a strict separation of *ius communicationis* and *ius commercii*. It should be stressed that it was only after this President's appeal that the final formula of article 58, paragraph 1, was included in the draft of the Convention (Informal Composite Negotiating Text).

Bunkering should, although as a rather new activity at the time it was not expressly mentioned at the Conference, be considered an "internationally lawful use of the sea" in the sense of article 58, paragraph 1, of the Convention. It is related to the freedom of navigation "and associated with the operation of ships". This claim is not difficult to defend from the point of view of navigation as well as international law. Supply of bunkers is the purpose of the navigation of a tanker, and refuelling is essential for further navigation of the ship to which gas oil has been supplied. This close relationship of bunkering and navigation with the terms used in article 58, paragraph 1, forces me to recall here article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, to which the parties often referred in their pleadings: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

(d) Developments after UNCLOS III

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[4] *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. II, pp. 180, 211, 220, 233.
[5] Center for Oceans Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea 1982, A Commentary*, Volume II, S.N. Nandan and Sh. Rosenne, Volume Editors, (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993), p. 569.
[6] Document A/CONF.62/L.12/Rev.1, para. 13; *Official Records of the Third United Nations Conference on the Law of the Sea*, Vol. VI, p. 123.

18. Of course, subsequent development of customary law can clarify and/or amend any previous solution. Guinea wanted to use this usual phenomenon for explaining its claim. Yet, inadvertently, it provided evidence against its assertion concerning the existence of economic rights in the exclusive economic zone which are not resource-related:

> A recent report on State practice points out that especially African States do either explicitly recognise international law as the standard for determining any additional rights beyond those specifically provided for in Article 56 of the Convention or *retain other unspecified rights and jurisdiction in their exclusive economic zone related to the sovereign rights over the resources. The latter describes exactly what Guinea is claiming.* (Rejoinder, paragraph 94 – emphasis added)

This claim of Guinea opposes its basic reasoning, particularly the statements quoted above in paragraphs 12 and 13. However, the practice of States in the twenty years after the acceptance of the régime of the exclusive economic zone at UNCLOS III does not permit a different conclusion. Namely, in their legislation on the exclusive economic zone, in Africa and elsewhere, States repeat the provisions of the Convention concerning the rights, jurisdiction and the duties of coastal States, and on the rights and duties of other States. On the basis of article 56, paragraph 1(a), some of them adopted more elaborate rules, particularly on fisheries, the establishment of artificial islands, installations and structures, marine scientific research and the protection of the marine environment. In doing so, they neither go beyond their "sovereign rights over the resources", nor do they restrict in any manner the rights or duties of other States as defined in article 58, paragraph 1[7]. It is interesting to note that the mentioned characteristics of national legislation are expressed with no difference whatsoever in the collections of national legislation on the exclusive economic zone published by the United Nations in 1985 and in 1993[8].

The declarations of States made upon their signature and/or ratification of the Convention, in accordance with its article 310, do not indicate any significant disagreement with the régime of the exclusive economic zone as adopted at UNCLOS III.[9]

19. Guinea itself did not provide a meaningful input into the establishment of any new customary rule concerning the rights of coastal States. In respect to the legislation it invoked in

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[7] Bureau du Représentant spécial du Secrétaire général pour le droit de la mer, *Le droit de la mer, Evolution récente de la pratique des Etats*, Nations Unies, New York, 1987; Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Current Developments in State Practice*, No. II, United Nations, New York, 1989: Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Current Developments in State Practice*, No. III, United Nations, New York, 1992; Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Current Developments in State Practice*, No. IV, United Nations, New York, 1995.

[8] Office of the Special Representative of the Secretary-General for the Law of the Sea, *The Law of the Sea: National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone*, United Nations, New York, 1985: Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: National Legislation on the Exclusive Economic Zone*, United Nations, New York, 1993.

[9] *Multilateral Treaties Deposited with the Secretary-General*, Status as at 31 December 1997, ST/LEG/SER.E/16, pp. 801 – 826.

order to justifiy its actions regarding the *Saiga, grosso modo* I share the conclusions of the Tribunal (see, in particular, paragraphs 122, 127 and 136 of the Judgment).

In fact, Guinea offered interesting evidence of its awareness about the insufficiency of its existing legislation for preventing bunkering of fishing vessels in its exclusive economic zone. After the arrest of the Saiga, the Government of Guinea undertook an initiative to adopt a decree expressly regulating "the activity of refuelling fishing boats and other vessels in transit to Conakry" (draft Joint Decree No.A/98…MEF/MCIPSP/98). In a letter of the National Director of Customs to the Minister of Economy and Finances, it is expressly stated that the proposed Decree is "*intended to close the current legal loophole* in the area of the refuelling of boats, an activity where the State currently registers large losses in customs revenue" (Counter-Memorial, paragraph 101, and Annex XVI, p. 9 - emphasis added).

20. In respect to Guinea's claims and its own legislation, it is interesting to note that an overview of the practice of States, prepared in 1994 by the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs, pointed out the case of an African State which is quite opposite to the tendency of Guinea. The following quotation demonstrates the attitude of Namibia, which amended its legislation in order to follow the content of the régime of the exclusive economic zone under the Convention:

> It may be noted that in 1991 Namibia adopted an amendment to section 4(3)(b) of the Territorial Sea and Exclusive Economic Zone Act of Namibia (1990), which had provided for the right to exercise powers necessary to prevent the contravention of fiscal law or any law relating to customs, immigration and health in its exclusive economic zone. The amendment deletes the reference to such right, which, under article 33 of the Convention, belongs to the contiguous zone and not to the exclusive economic zone, so that the Act may conform with the Convention.[10]

21. However, my conclusion concerning the non-existence of additional international rules concerning the rights and duties of coastal and/or other States in the exclusive economic zone beyond those in the Convention does not mean that I rule out the possibility of the development of such rules by a constant practice of States.

Article 59 of the Convention itself is a confirmation of the awareness of States participating in UNCLOS III that the specific legal régime they have established has not attributed all possible rights and jurisdiction to the coastal States or to other States. Therefore, not only in respect of fishing vessels, but also of other types of ships or specific situations in which they can find themselves at sea, new rules may be established not only through the practice of States, but also through other sources of international law.

(Signed) Budislav Vukas

[10] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea*, United Nations, New York, 1994, p. 36.

SEPARATE OPINION OF JUDGE LAING

OVERVIEW

1. As I see it, this case involves, among other things, two major institutions of the law of the sea. One is the closely-negotiated new institution of the exclusive economic zone; the other is the venerable freedom of navigation. These institutions have never been the subject of in-depth judicial scrutiny. Neither has the vaunted internal harmony of the 1982 United Nations Convention on the Law of the Sea (hereafter "the Convention"). The factual setting of this case underscores the need for such scrutiny. In this separate opinion, I interpret relevant provisions of the Convention in a systematic manner in accordance with the rules in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.[1] The emphasis is on ascertaining the meaning of the provisions in their context and in the light of their object and purpose, with reference, as appropriate, to supplementary means of interpretation.[2] As necessary, prior law has also been referred to. At times, a literary source is doctrine.

2. Based on the Applicant's submissions, the Tribunal has stated that the main rights claimed to have been violated by the Respondent are:

(a) the right of freedom of navigation and other internationally lawful uses of the sea;

(b) the right not to be subjected to the customs and contraband laws of Guinea;

(c) the right not to be subjected to unlawful hot pursuit;

(d) the right to obtain prompt compliance with the Judgment of the Tribunal of 4 December 1997;

(e) the right not to be cited before the criminal courts of Guinea.

Regarding these issues, the Tribunal has decided that the application of Guinea's customs and related laws in the customs radius violates the rights of Saint Vincent and the Grenadines in the exclusive economic zone. This is on the basis of (1) incompatibility of those laws of Guinea with Part V of the Convention, (2) the similar incompatibility of Respondent's asserted justification for its actions based on its public interest and Respondent's failure to satisfy the

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[1] The 1969 Convention has been described as an "international custom recognized by States". *Guinea/Guinea Bissau Maritime Delimitation arbitration, 77 I.L.R.* 635 (1985) (hereafter "*Guinea/Guinea-Bissau* arbitration"), p. 658, para. 41**,** citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (I.C.J. Reports 1971,* p. 4 at 47, para. 94) and *Fisheries Jurisdiction Cases (I.C.J. Reports 1973,* p. 3 at 18, para. 36 and p. 49 at 63, para. 36.

[2] While the leading commentary, referred to below, is extremely helpful, there are substantial limitations as far as concerns preparatory work which, in the case of this Convention, is very limited due to the amorphous nature of and absence of concrete chains of causation between materials and the Convention, its frequent "random and disorderly character," the deliberate informality of much of the negotiating process and the limited utility of formal unilateral statements made at or after the final session of the Third United Nations Conference on the Law of the Sea (hereafter "UNCLOS III"). See generally Allott, *77 A.J.I.L.* (1983) (hereafter "Allott"), p. 7; and *United Nations Convention on the Law of the Sea – A Commentary* (M. Nordquist, gen. ed., 1982-1995) (hereafter "Virginia Commentary").

conditions for the application of the so-called state of necessity to justify its actions, and (3) the Tribunal's conclusion that, largely as a consequence of the two foregoing sets of decisions, the asserted hot pursuit by Guinea, which was employed to subject the *Saiga* to its purported jurisdiction, was in violation of the Convention. In view of the uncertainty attending Guinea's apparent invocation of the Convention's provisions on the contiguous zone in support of its actions, the Tribunal has not made a decision about that question.

3. Although not specifically mentioned in the Judgment, these decisions of the Tribunal logically imply that the Convention requires the non-impairment by coastal States of the freedom of navigation or other internationally lawful uses of the seas vouchsafed to other States in articles 58, paragraph 3, of Part V and 87–115 of Part VII of the Convention. However, the Tribunal found that it did not have to address the broader question of the rights of coastal States and other States with regard to bunkering in the exclusive economic zone.

4. I agree with the Tribunal's conclusions. However, I find it necessary to provide a more elaborate exposition of the nature and status of the freedom of navigation in the exclusive economic zone. In turn, this requires an exposition of the nature and status of the exclusive economic zone and a general appreciation of national claims related to it. An alternative way of phrasing the required exercise is the need to examine the respective rights, jurisdiction and functions of the flag State and coastal State in the above-mentioned maritime space against the background of the freedom of navigation. Having concluded that exercise, I have found it necessary to raise some preliminary questions relating to offshore bunkering and two other matters.

5. The ordinary meaning in immediate context of the pertinent provisions of the Convention does not adequately serve for the tasks at hand. A systematic contextual interpretation of the provisions of Parts V and VII that are of intimate relevance does not produce a firm meaning. Therefore, I have found it useful to consider additional provisions of the Convention that constitute the broader context of the provisions relied on in the Judgment and others that are pertinent. There is a considerable number of such contextual provisions, located in Parts II, III, IV, X and XIII of a Convention which has a significant number of interrelated Parts and provisions. Exposing this contextual background involves an exposition of several matters not fully covered in the Judgment. These include the issues relating to the contiguous zone, which are somewhat interrelated to the facts and legal issues before the Tribunal. As already noted, it has also been necessary to refer to several supplementary means of interpretation. My discussion will take the following order and manner:

(1) Contiguous zone.

(2) Freedom of navigation.

There will first be discussed several suggested bases for the freedoms of the high seas and navigation. Then, in seeking an understanding of the freedom of navigation in the framework of the exclusive economic zone, the following topics will be examined under various subheadings:

- the various incidents of freedom of navigation under the Convention;

- the impact of the Convention's provisions establishing the exclusive economic zone institution;
- the impact of other provisions of the Convention;
- conclusion on freedom of navigation.

(3) Some remaining questions.

These are:
- offshore bunkering;
- prompt release;
- settlement of disputes between developing countries.

CONTIGUOUS ZONE

6. The first set of substantive questions concerns the contiguous zone. The parties are agreed that on 27 October 1997, the *Saiga* bunkered three non-Guinean vessels in this zone. The vessels or their cargo were not alleged or proven to have had as an immediate destination Guinean territorial waters. Although its positions on this seem to have varied at different stages of the proceedings, at one point at least the Respondent appeared to argue that it had prescriptive jurisdiction to apply its customs code and a customs-related law, L/94/007, concerning sales involving transshipments of petroleum in the zone in order to prevent and punish the *Saiga*'s acts, which it claimed were contrary to its laws (Respondent's Counter-Memorial (hereafter "CM"), pp. 123-25). In the oral proceedings, counsel for the Respondent stated that the *Saiga* was hotly pursued (in accordance with the Convention) "because it had bunkered fishing vessels in the contiguous zone." In stating the relevant jurisdictional provisions, the Respondent repeatedly adverted to the customs radius, in which its laws provided that it could take actions of a "preventive" and "suppressive" nature. Counsel stated that in response to the *Saiga*'s "violation committed in the contiguous zone, pursuit commenced at a moment at which the smuggling ship ... was bunkering in this zone ..." (Uncorrected Verbatim Record (hereafter "ITLOS/PV.99/…"), ITLOS/PV.99/15, pp. 15-16 (16 March)). In a submission at the end of the oral proceedings, it was argued on behalf of the Respondent that the bunkering operation of the ship in the contiguous zone was "of no relevance" in connection with the question "whether or not Guinea could and did apply its Customs law within its Customs radius". Yet, later in the same submissions on Guinea's behalf, it was argued in a "digression" in answer to the Applicant's "repeated" submissions, that Guinea had definitely established a contiguous zone notwithstanding any possible failure to notify that fact to the United Nations (ITLOS/PV.99/18, pp. 17-18 (20 March)).

7. The Tribunal has not addressed this question. Nevertheless, it is evident that, for a period, or from time to time, the Respondent was relying on violations occurring in the contiguous zone as forming a basis for the hot pursuit that the Respondent claimed to be entitled to undertake. In relation thereto, while a coastal State's justifications for actions against foreign vessels on the basis of the Convention's provisions on the contiguous zone would not necessarily extend to its actions occurring in the rest of the exclusive economic zone, invalidation of justifications on the basis of those provisions would, *a fortiori*, have negative implications for its actions occurring further away from the baseline in the exclusive economic zone. This is

because, as traditionally, the law of the sea generally tolerates greater exercises of authority closer to the baseline. This discussion will also illuminate my later examination of freedom of navigation. And it is broadly relevant to the Tribunal's findings on the compatibility of Guinea's laws with the Convention, including its conclusions about hot pursuit. Therefore, I will somewhat fully discuss the Convention's provisions on the contiguous zone.

8. In essence, the underlying facts and issues call for the interpretation of article 33 of the Convention, providing for the following species of authority for the protection of coastal State interests (protective jurisdiction):

> *Article 33*
> *Contiguous zone*
>
> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The main issues may be phrased as follows: *First*, whether the only permitted exercise of authority under article 33 is that of acts of control within the zone related to conduct occurring on the territory or in the territorial sea, as opposed to prescriptive or enforcement jurisdiction. *Secondly*, even if control is all that is permitted, whether under article 33 Guinea was at liberty to and did properly prescribe measures for such control concerning infringement of its customs and related laws occurring in the contiguous zone and outside of its territorial sea. *Thirdly*, did article 33 authorize Guinea's punishment of infringement of such laws committed in the contiguous zone and outside of the territorial sea? At one point, the Respondent identified a further issue, suggesting that violation of its above-mentioned laws in the contiguous zone justifies the actions it took as long as the *Saiga* remained in its exclusive economic zone, because further violations of customs laws had to be expected (Respondent's Rejoinder (hereafter "RJ"), p. 100). However, the Respondent later abandoned this line.

9. The first issue is whether, in connection with its endeavours to prevent and punish infringements of the four types of laws specified in article 33, a coastal State's authority is limited to the exercise of "control," as opposed to the jurisdictional exercises of prescription and enforcement. Control evidently is not coincident with generalized and plenary sovereign activity. Furthermore, it has been argued that such control semantically is more limited than jurisdiction. Even so, it has been suggested that the exercise of control could encompass acts of physical coercion in the contiguous zone by way of preventive or punitive measures relating to conduct which is about to take place or has taken place in the territory or territorial sea.[3] This

[3] Shearer, *35 I.C.L.Q. (*1986) (hereafter "Shearer"), pp. 329-330.

suggestion has some limitations, since "control" generally connotes the right and power to command, decide, rule or judge; the act of exercising controlling power, and the continuous exercise of authority over a political unit. In a legal setting, the word means "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. The ability to exercise a restraining or directing influence over something ..."[4]. On the other hand, "jurisdiction" generally connotes: the right and power to command, decide, rule or judge. In a legal setting, "jurisdiction" is generally considered to have a more weighty connotation, in its more common usage in context of the nature, source of authority and scope of judicial power or its frequent international law usage as connoting prescriptive or enforcement authority. Evidently, the ordinary meaning of article 33 is not quite clear or plain.

10. A contextual review provides some support for the contention that use of the word "control" indicates that the authority provided in article 33 is relatively limited. Geographically and juridically, the contiguous zone is part of the exclusive economic zone which, according to article 55, is "an area beyond and adjacent to the territorial sea". As will be seen in paragraphs 38-40, the coastal State's authority over the exclusive economic zone relates mainly to natural resources and includes: a specific species of limited "sovereign rights;" "jurisdiction" encompassing three specified exclusive rights of authority, responsibility or dominion, and other specific "rights and duties". No broad and generalized authority is provided. This might be compared to the powers generally attributed by article 2 over the whole sphere of the territorial sea. It categorically provides, without qualification, that "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea." This is supplemented by article 21, which also categorically authorizes the coastal State, in that sea, to "adopt laws and regulations" in respect of a large number of matters, including one set which is identical to the list in article 33.

11. Two other contextual provisions are articles 94 and 303. Paragraph 1 of the first states that the duties of flag States are "effectively [to] exercise … jurisdiction and control in administrative, technical and social matters ... ". Paragraph 2 provides that every State shall maintain a register of ships and "assume jurisdiction under its internal law" in respect of the above-mentioned matters. Therein, control has a limited administrative connotation. Next, article 303 provides that in order to control traffic in archaeological and historical objects found at sea, "the coastal State may, in applying article 33, presume that their removal from the seabed in the [contiguous zone] without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article." Evidently, by itself, article 33 does not authorize control in respect of such traffic taking place within the contiguous zone. Although the scope of this last instance is restricted, overall the foregoing contextual survey rather suggests that article 33 control is of a limited nature.[5]

12. Nevertheless, in view of lingering ambiguity, recourse is now made to supplementary means of interpretation. The direct predecessor of article 33 is article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the language of which was reiterated in the

[4] *Black's Law Dictionary* (6th ed., J. Nolan and J. Nolan-Haley, co-editors, 1990), p. 329.
[5] UNCLOS III rejected proposals to accord the coastal State sovereign rights over archaeological and historical objects and to extend jurisdiction out to 200 miles. Virginia Commentary, V, pp. 158-162.

language of article 33 of the 1982 Convention.[6] According to the available preparatory work, the draft of that long-standing provision survived several attempts during the Third United Nations Conference on the Law of the Sea (hereafter "UNCLOS III") to have it deleted. It also survived at least one proposal for the insertion of a clause that the establishment of a contiguous zone by a coastal State did not "affect the rights and jurisdiction of [a coastal] State in its exclusive economic zone and its continental shelf, nor ... the establishment of security zones."[7]

13. Since the adoption of the 1958 Convention, the number of the prior domestic, conventional and customary laws on protective jurisdiction, applied in zones analogous to the contiguous zone for over some 200 years, have radically diminished. Their relevance now is marginal, except insofar as they help to illuminate the meaning of the 1958 and 1982 codifications. These laws often sanctioned various exercises of protective jurisdiction which go beyond the four circumstances listed in the codifications. Nevertheless, the older laws seem to have presupposed a generally accepted underlying concept which I believe still obtains under article 33 – that what we now call control in the contiguous zone is permitted to the extent that the coastal State acts reasonably and necessarily and the control is exercised in those four circumstances in order to benefit state territory.[8] I therefore do not entertain any doubt that permissible exercises of control under article 33 include those for taking such actions within the contiguous zone as inspections, verifications, instructions[9] and warnings, all with the purpose of subserving laws and restraining their possible violation in territorial areas.

14. Turning to the second issue, it ineluctably follows that even if control is the only type of action which might be taken against a foreign vessel, the power to prescribe such exercises of control cannot be categorically deemed to be excluded. Control can be undertaken *de facto* or pursuant to prescription for the prevention of conduct occurring or due or intended to occur in the contiguous zone which is likely to infringe the coastal State's laws within its territorial areas, including internal waters or the territorial sea. However, according to the ordinary meaning of its words, article 33 does not authorize the prescription of customs and the specified other types of laws and regulations for conduct occurring inside the contiguous zone itself and not due or intended to occur in the aforementioned territorial areas,[10] as with the arrest of the Saiga and its cargo and the trial and conviction of the Master. This is borne out by article 111, which authorizes hot pursuit in relation to the "violations … of the laws and regulations of the coastal

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[6] Article 24 of the 1958 Convention differs from article 33 only: in stating that the zone's maximum limit is 12 miles; in containing a provision on delimitation (located elsewhere in the 1982 Convention), and in providing that the contiguous zone is part of the high seas. These differences do not have any real bearing on the question under examination.

[7] See Virginia Commentary, II *(*S. Nandan and S. Rosenne, eds., 1993), pp. 269-273.

[8] See *Church v. Hubbart 6 U.S. (2 Cranch)* (1804), p. 187; P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 75-96 and 211-238; Jessup in *31 A.J.I.L.* (1937), pp. 101-104; C. Columbus, *The International Law of the Sea* (1967), pp. 131-146 (exhibiting a more guarded attitude towards such exercise of jurisdiction); L. Oppenheim, *International Law* (4th ed., A. McNair, 1928) I, paragraph 190(i)(ii); (7th ed., H. Lauterpacht, 1957) (hereafter "Oppenheim 1957") I, paragraph 190(i)(ii)); P. Rao, *The New Law of Maritime Zones* (1983), pp. 301-331.

[9] In his 1956 Report on the Regime of the High Seas and Regime of the Territorial Sea, the I.L.C. Special Rapporteur refers to "instructions." He notes that "[I]f a different point of view were accepted and a foreign vessel may be boarded by a vessel of the coastal State, the resulting situation would be incompatible with the relations prevailing between powers at peace with each other." *I.L.C. Y.B. 1956 II*, p. 34, paragraph 6.

[10] See Shearer, p. 330.

State applicable" to the territorial sea, the exclusive economic zone or the continental shelf. The wording makes it clear that, in each of those situations, full jurisdiction is authorized. However, hot pursuit in relation to the contiguous zone is authorized only if there has been a violation of the "rights for the protection of which the zone was established", viz. the limited protection, within the contiguous zone, of the territorial areas from violation of customs, fiscal, immigration and sanitary laws. I believe that this analysis enhances the Judgment's discussion of hot pursuit.

15. Turning to the third issue identified in paragraph 8, the ordinary meaning of article 33 is that the power of the coastal State to punish infringement of the stated laws (committed outside territorial areas or within the contiguous zone) is not generally permissible in relation to vessels merely located in the contiguous zone and not proven to have some relevant connection with territorial areas. Again, a contextual analysis is useful. Notwithstanding the broad ambit of the authority vested in coastal States over territorial areas by articles 2 and 21, article 27, paragraph 1, states that in the territorial sea the coastal State can exercise criminal jurisdiction in or over a foreign ship exercising innocent passage only in precisely stated situations, mostly where there are direct effects on the coastal State. More pertinently, according to paragraph 5, criminal jurisdiction cannot be exercised in or over such ships during such passage for offenses committed before the ship entered the territorial sea. It might be argued that it could not have been intended that article 33 provides more authority relating to the identical conduct in respect of which article 27 requires restraint.

16. The limitations of article 33 are also evident from a comparison of the requirements for hot pursuit in relation to the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, summarized in paragraph 14. However, in the light of the pre-1958 law and the doctrine of objective or effects jurisdiction, I believe that it is tenable that conduct occurring in the contiguous zone which is part of the jurisdictional facts or *actus reus* of conduct intended or due to occur or actually occurring in the territorial sea or other territorial areas can be punished as long as the vessel is apprehended in the course of the exercise of some legitimate means of control as mentioned earlier. Nevertheless, in relation to all three issues, my view is that, under article 33, the coastal State must exercise whatever authority it possesses within the contiguous zone only in the course of contemporaneous apprehension or after a successful hot pursuit properly commenced in the contiguous zone. On the facts of this case, the Respondent appears to have well exceeded this limited scope of its authority.

FREEDOM OF NAVIGATION

The Convention's Provisions

17. As has been seen, the Convention exhibits a somewhat discouraging attitude towards broad exercises of coastal State authority in the contiguous zone. Reciprocally, the Convention possibly here exhibits a tolerant approach to the rights of flag States (and other States) to navigation in the contiguous zone. I now address that subject in the framework of the broader regime of the exclusive economic zone, recalling the Applicant's assertion that its freedom of navigation was violated by the Respondent. The Tribunal has not found it necessary to elaborate on this issue, possibly since it has held that the customs and related laws of the Respondent provide no legal basis for the *Saiga*'s arrest in relation to its activities in the exclusive economic

zone and for Guinea's subsequent actions. In paragraph 176 of the Judgment, the Tribunal formally declares that the Respondent acted wrongfully and violated the rights of the Applicant "in arresting the *Saiga* in the circumstances of this case", holding that that declaration constitutes adequate reparation. In paragraphs (7) and (8) of the operative provisions of the Judgment, the Tribunal:

> (7) … *Decides* that Guinea violated the rights of Saint Vincent and the Grenadines under the Convention in arresting the *Saiga*, and in detaining the *Saiga* and members of its crew, in prosecuting and convicting its Master and in seizing the *Saiga* and confiscating its cargo; …
>
> (8) … *Decides* that in arresting the *Saiga* Guinea acted in contravention of the provisions of the Convention on the exercise of the right of hot pursuit and thereby violated the rights of Saint Vincent and the Grenadines; …

Since the first and chief right in dispute between the parties relates to the freedom of navigation, it is evident that the Judgment reaffirms freedom of navigation. The Tribunal's narrow findings about the legality of the Respondent's actions and their compatibility with the Convention also logically presuppose a determination that the flag State's freedom of navigation was violated. However, since the Tribunal's reaffirmation and determination are somewhat muted, and for the reasons given in paragraph 1 of this Opinion, it is necessary for me somewhat fully to analyse the nature of the freedom of navigation generally and in the context of the exclusive economic zone.

18. In the Convention, freedoms, entitlements or rights relating to navigation are available, under different names, in the high seas, archipelagic waters, straits and the territorial sea. The details, as they are, of such freedom of navigation are provided for in Part VII (on the high seas). Nevertheless, the requirement of that freedom is found in Part V (on the zone), by incorporation by reference in article 58:

> *Article 58*
> *Rights and duties of other States in the exclusive economic zone*
>
> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
> ...
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Indeed, as article 58, paragraph 1, intimates, the freedom of navigation, properly so called, is provided for only in article 87 of Part VII (on the high seas):

Article 87
Freedom of the high seas

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

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

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

19. As provided in article 87, paragraph 1, freedom of the high seas itself comprises, *inter alia*, the freedom of navigation. However, freedom of the high seas is not defined. Article 87 simply lists six components or incidents of the freedom. Taking, for expositional convenience, a historical approach, I should draw attention to the partial definition given in the *Lotus* case (*Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 25), that freedom of the high seas is simply the absence of any territorial sovereignty upon the high seas in virtue of which, as the law apparently stood in 1927, no State should purport to exercise any kind of jurisdiction over foreign vessels. However, that source furnishes inadequate understanding of the nature and function of these two freedoms. I therefore will shortly explore the provisions of Part V (on the exclusive economic zone) as the broader context of article 87. However, for convenience, I shall first discuss historical and broadly juridical aspects of the basis of the freedom of the high seas, a subject which requires clarification, especially since it closely touches on some of the arguments of the parties in this case regarding the meaning and scope of navigation.

The Bases of Freedom of the High Seas

Introduction

20. This case has brought into sharp relief the lack of clarity about the essential nature of the closely-related freedoms of navigation and the high seas. Yet it highlights the fact that such matters are of critical importance in solving practical problems under the Convention. It will be recalled that article 58, paragraph 1, states that, in addition to the freedoms, including of navigation, States enjoy "internationally lawful uses ... associated with the operation of ships",

which must be "related to," *inter alia*, the freedom of navigation. In this case, the question has been canvassed whether that freedom or those uses specifically include the provision and receipt by each State or its vessels of ship bunkering supplies. The Applicant claims that offshore bunkering "has a long history" (Applicant's Reply (hereafter "R"), paragraph 129). However, it did not adduce substantial evidence of this. Neither does the literature supplied or referred to in its pleadings, which mainly covers bunkering in ports or at docks, roadsteads and the like and from moored barges or pipelines. Nor is it clear what specific actions have been taken by the newly-formed International Bunkering Industry Association to provide juridical and other studies, e.g. regarding the legitimacy of offshore bunkering of the type involved in this case.[11] The brief report on the industry provided by the Applicant and prepared by MRC Business Information Group Ltd. does suggest that the growing industry is of some magnitude. On the other hand, the Respondent exhibited no authority for its asserted distinction between transportation or unimpeded movement, on the one hand,[12] which is allegedly embraced by the freedom, and trade, on the other hand, which is said not to be so embraced unless the trade occurs entirely on board one vessel. Even assuming that only transportation is encompassed by the freedom, neither has the Respondent furnished support for its contention that the facts of this case involve only trade. The Respondent has not sought to substantiate its contention that obtaining bunkers is ancillary to navigation, and therefore permissible, while selling them is not, or its further assertion that there is a distinction between supplying bunkers to transiting vessels but not to fishing vessels (CM, pp. 94-101; RJ, pp. 88-91). In the absence of clarity in the Convention's text on even the basic nature of the two freedoms, much less the issues mentioned above, I have found it necessary to discuss the broad background of their basis as a supplementary means of interpretation.

Freedom of communication

21. The Respondent categorizes freedom of navigation as a communication freedom of a limited nature from the ambit of which is excluded offshore bunkering (ITLOS/PV.99/14, p. 25 (15 March); c*f.* ITLOS/PV.99/16, p. 31 (18 March)). However, again it has not supplied supportive evidentiary materials. Nevertheless, as article 87 shows, currently[13] the more widely

[11] See C. Fischer and J. Lux, *Bunkers: An Analysis of the Practical, Technical and Legal Issues* (1994), *passim*, esp. pp. 81-117 and 175-84; W. Ewart, *Bunkers – A Guide to the Ship Operator* (1982). In these books, which largely deal with technical matters, the discussion of legal issues tends to be limited to sales and other basic contractual questions. See also ESSO, *International Bunkers Guide* (1953).

[12] Applicant submitted that bunkering often occurs during the movement of both vessels necessitated by the objective of keeping the supply hose taut (ITLOS/PV.99/16, p. 30 (18 March)).

[13] Among older notions about the basis of the institution of freedom of the high seas have been that what cannot be occupied should be shared, that there should be universal access to inexhaustible resources and that the difficulty of demarcating maritime frontiers in distant waters justifies use in common. More recently, it has been suggested that the institution was a reaction against far-reaching national claims to ocean spaces at the beginning of the 17th century. The idea has also been advanced that since the institution commenced to flourish during the era of overseas colonial expansion by Western countries, it was a component of such expansion and colonization. Lapidoth, *6 J.M.L. & C.* (1974-1975) (hereafter "Lapidoth 1974-75"), pp. 259-271; J. Verzijl, *International Law in Historical Perspective* (1971), IV, 30; N. Rembe, *Africa and the International Law of the Sea – A Study of the Contribution of the African States to the United Nations Conference on the Law of the Sea* (1980) (hereafter "Rembe"), pp. 165-167.

accepted, yet somewhat unclear[14], notion about the basis of the institution of freedom of navigation is that it is subsumed under the freedom of the high seas, which is itself based and dependent on a broader freedom of maritime communication and intercourse, given the fact that the sea is essentially an indispensable global highway. There was some erosion of both freedoms of the high seas and of navigation prior to the 1958 Geneva Convention. In part, this was due to the development of protective jurisdiction in the contiguous zone. In part, it was apparently attributed to assertions of extended coastal State jurisdiction over the mineral resources of the "submarine areas". Thus, a leading jurist suggested in 1950 that the freedom of the high seas was not immutable and was losing its paramountcy.[15] Nevertheless, the relationship between these two freedoms, on the one hand, and freedom of communication, on the other, was reinforced in the fourth preambular paragraph of the Convention, in which international communication leads the list of five broad components of the "legal order for the seas and oceans":

> *Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which [1] will facilitate international communication, and [2] will promote the peaceful uses of the seas and oceans, [3] the equitable and efficient utilization of their resources, [4] the conservation of their living resources, [5] and the study, protection and preservation of the marine environment.

22. Notwithstanding the preamble, the Convention strengthens the institution of the continental shelf and established such new regimes as the exclusive economic zone and the Area. Recalling the 1950 suggestion and the uncertain evidence about the nature and basis of the freedoms, I must therefore now discuss another set of alleged bases of the freedoms of the high seas and of navigation.

The Global Economy

23. Those bases relate to the functioning of the global economy, e.g. the propositions that freedom of the high seas and related freedoms subserve the needs of international trade and commerce and that they have been, and remain, an indispensable factor in the development of the world economy and international commerce. Thus, "absolute freedom of navigation upon the seas, outside territorial waters ... except as … may be closed in whole or in part by international action for the enforcement of international covenants" was the second of President Woodrow Wilson's influential Fourteen Points of January 1918. Point II was organically related to Points III, IV and XIV, respectively calling for the removal of economic barriers and instituting equal trade controls among peacekeeping nations; guarantees by such nations for the reduction of arms to "the lowest feasible point," and the establishment of an association of nations mutually to guarantee political independence and territorial integrity of all States. Despite the disavowal of the Fourteen Points by several major States, their essence entered the global normative order. Points II and III are reflected in paragraph (e) of article 23 of the

[14] It has been held that a concrete manifestation of that latter freedom is the obligation of a coastal State, identified by the International Court of Justice as being "for the benefit of shipping in general," to notify approaching warships of the existence of a minefield (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4 at 22).
[15] Lapidoth 1974-75, p. 271; Oppenheim 1957, paragraph 259; Lauterpacht in *27 B.Y.I.L.* (1950), pp. 376-414.

Covenant of the League of Nations (Part I of the Versailles Peace Treaty of 1919), in which the Members of the League agreed to "make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League ...".[16]

24. Article 23(e) was the catalyst for efforts to strengthen the international economic order on a footing of "freedom of communications and of transit and equitable treatment" of commerce. This was done through provisions in the Versailles Treaty for non-discrimination by the vanquished nations both in general commerce and international navigation over the major European rivers and the Kiel Canal in Germany. Commercial and navigational equality were also pursued in related instruments concerning the Mandates System and in various technical studies and conferences. A notable group of Conventions explicitly designed to further the goals of article 23(e) were the Convention on the Regime of Navigable Waterways of International Concern (the 1921 Barcelona Convention); the 1923 Convention on the International Regime of Railways; the 1923 Convention on Maritime Ports, and a number of conventions commencing in 1921 on specific European waterways of international concern.[17]

25. The *S.S. "Wimbledon"* and *Oscar Chinn* judgments of the Permanent Court of International Justice reflected that these early provisions requiring non-discrimination in international navigation soon contributed to an established juridical concept.[18] In the first of those judgments, the Court applied article 380 of the Versailles Treaty, providing that the Kiel Canal "shall be maintained free and open to the vessels ... of all nations at peace with Germany on terms of entire equality." In response to Germany's refusal to permit a vessel carrying armaments into the Canal, the Court held that, under article 380, the Canal had "ceased to be an internal and national navigable waterway" and had become "an international waterway intended to provide ... access ... for the benefit of all nations of the world" (*S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1,* p. 22). On the other hand, in their joint dissent, Judges Anzillotti and Huber emphasized the freedom of communication, noting that the Barcelona conventions were "concluded for the purpose of giving effect to [that] principle … which was enunciated in Article 23 of the Covenant ..." (*1923, P.C.I.J., Series A, No. 1,* pp. 35-36).

26. In 1934, in the *Oscar Chinn* case, the Permanent Court construed the 1919 Convention on St. Germain en Laye, another instrument associated with the conclusion of World War I. It held that the freedom of fluvial navigation, guaranteed by the Convention, though different from freedom of commerce (which was also guaranteed) "implied" freedom of commerce of the

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[16] Oppenheim 1957, I, p. 593; R. Lapidoth-Eschelbacher, *Freedom of Navigation with Special Reference to International Waterways in the Middle East* (1975), p. 17; United Nations, DOALOS, *The Law of the Sea – Navigation on the High Seas – Legislative History of Part VII, Section 1 (Articles 87, 89, 90-94, 96-98) of the United Nations Convention on the Law of the Sea* (1989), pp. 47-48; C. Davidson, *The Freedom of the High Seas* (1918), pp. 76-78; P. Crecraft, *Freedom of the Seas* (1935), p. xiii (introduction by E. Borchard), pp. 200-213; H. Temperley, *History of the Peace Conference of Paris* (1920), Vol. 3, pp. 111 and 121-122.

[17] Laing in *14 Wisc. Int'l. L. J.* (1996), pp. 257-261 and 276-280.

[18] Liberal access to international waterways reaches back to provisions in the Act of the 1815 Congress of Vienna and various subsequent multilateral and bilateral instruments in Europe, Africa and North America. See *id.*, pp. 276-284. Furthermore, the avowed purpose of numerous bilateral treaties of Friendship, Commerce and Navigation and other treaties establishing commercial and economic *modi vivendi* for many years has been to guarantee non-discrimination or freedoms, *inter alia*, of navigation.

"business side" of enterprises concerned with navigation but did not "entail" and "presuppose" all aspects of freedom of commerce. Thus, discrimination between national and foreign companies concerning permissible transportation rates was not prohibited (*Oscar Chinn* case, *Judgment, 1934, P.C.I.J., Series A/B, No. 63,* pp. 78-87). While some of the Judges objected to what they considered to be the Court's fine distinction (see Separate Opinions by Judges Anzilotti and Van Eysinga, (*1934, P.C.I.J., Series A/B, No. 63,* pp. 107-112 and 131-145), the judgment nevertheless stands for a reaffirmation of the vitality of freedom of navigation and its close relationship to broader economic principles and institutions.[19]

A Fundamental Principle

27. Whether the basis of freedom of the high seas is the institution of maritime communication, or is an integral aspect of the global economy, the freedom has been described as "an obligatory binding norm;" a "fundamental principle, which has also had great influence on other branches of international law, particularly space law and the regime of the Antarctic Treaty," and "a fundamental principle of international law as a whole". The subsumed freedom of navigation has also been described as a peremptory norm of the law of nations.[20] In the *Corfu Channel* case, Judge Alvarez took a similar approach, noting that:

> The Atlantic Charter of 1941 laid down the freedom of the seas and oceans as a fundamental principle. On January 1st, 1942, the united nations signed a Declaration in which they accepted the principle. Article 3 of the Charter of the United Nations [organization] alludes to that Declaration. Public opinion, also, is favourable to the freedom of the seas; it may therefore be said to form part of the new international law. (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949,* p. 46)

He also suggested that passage through territorial seas and straits was a right possessed by merchant ships "discharging a peaceful mission and ... contributing to the development of good relations between peoples" (*ibid*.).

28. The Atlantic Charter, to which Judge Alvarez refers, was a joint declaration by the President of the United States of America and the Prime Minister of Great Britain in which they stated the common principles on which they based "their hopes for a better future of the world" upon the conclusion of World War II. This statement of peace aims, incorporated by reference in the above-mentioned 1942 treaty-Declaration, was adopted by all of the Allies of those States between 1942 and 1945. It was the foundation of comprehensive structures for global order painstakingly assembled at conferences and in bilateral and multilateral treaties establishing the current permanent regimes for global cooperation.[21] These edifices were explicitly designed to

[19] In my view, *Oscar Chinn* and other precedents do not stand for the proposition that there is some rigid distinction in international law between transportation and navigation, on the one hand, and such commercial activities as may be carried on by, from or within a vessel. *C.f.* CM, paras. 98-100, and RJ, paras. 88-91.

[20] Oppenheim 1992, I, paragraph 280; Lapidoth, *10 Israel L. R.* (1975), p. 456.

[21] In the spheres of general world order and human rights (the United Nations), finance (Bretton Woods institutions), civil aviation (Chicago Convention and the International Civil Aviation Organization), food and agriculture (Food and Agriculture Organization), labour (pre-1941 International Labour Organization) and international trade (the General Agreement on Tariffs and Trade, now succeeded by the World Trade Organization and its network of treaties, other norms and related institutions). During the wartime period, and even thereafter, this was partly

implement the Atlantic Charter. The very extensive archival record[22] clarifies that, rightly or wrongly, the Charter was universally considered to be legally binding. Since the war, until the present day, it has been listed not as a declaration but as a treaty in force between the United States and 47 of its wartime allies. Throughout, the Allies were very concerned with enshrining economic liberalism and non-discrimination in the global order and completing the tasks which had commenced at the conclusion of World War I.[23] There are now vigorous efforts to institutionalize these concepts in most branches of international economic relations.[24] These efforts have been accelerated following the onset of international depolarization.

29. The Seventh Point of the Atlantic Charter deals with the freedom of the seas. This Point is dependent on the Sixth Point. These Points provide for the so-called freedoms from fear and want.[25] The freedoms from fear (security and non-interference, in today's language) and from want were, in turn, related to the Fourth Point, that "they will endeavour ... to further the enjoyment by all States ... of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity". This latter provision is the foundation stone of the current global economic system. These provisions and the archival records reveal the view of the United States of America and its main wartime allies that all eight Points of the Atlantic Charter were integrally related.

30. Thus, continuing the patterns of organic interrelationships of the earlier Fourteen Points, freedom of the high seas has been, and remains, inseparable, *inter alia*, from freedom from want and from economic liberalism and non-discrimination. These principles and goals and their interrelatedness have been reaffirmed in preambular paragraph 7 of the Convention, referring to

> the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and [the] ... promot[ion of] the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.

It is also apparent that freedom of the high seas is an institution well established in the global order with deep and substantial roots and various siblings. It is closely related to the freedom of communication. One of its most important components is the freedom of navigation. Throughout, there is an increasing emphasis on non-discrimination and equality of access for all States, including those that are land-locked or otherwise disadvantaged by geography. At the

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stimulated by repeated and solemn invocation of the Atlantic Charter worldwide in national constitutions, multilateral and bilateral treaties, resolutions of inter-governmental conferences, diplomatic communications, and other pronouncements by officials, popular elites, journalists and other commentators.

[22] Especially the records of the U.S. Dept. of State's Special Committee on Post-War Policy and its numerous sub-committees at the U.S. Archives. See generally H. Notter, *Postwar Foreign Policy Preparation* (1949); R. Russell and J. Muther, *A History of the United Nations Charter* (1958); Laing, *26 Willamette L.R.* (1989), pp. 124-140.

[23] *Id.*, pp. 113-169; Laing in *22 Cal. West.J.I.L.* (1991-92), pp. 209 and 250-308; Laing in *14 Wisc. I.L.J.* (1996), pp. 261-264; *Treaties in Force for the United States of America on January 1, 1997* (U.S. Department of State, 1997), pp. 1, 324.

[24] See Laing in *14 Wisc. I.L.J.* (1996), pp. 246-348.

[25] This was that after the final destruction of the Nazi tyranny, the declarants hoped to see established a peace which would afford to all nations the means of dwelling in safety within their own boundaries, and which would afford assurance that all the men in all the lands might live out their lives in freedom from fear and want ant that such a peace "should enable all men to traverse the high seas and oceans without hindrance".

same time, all States, rich and poor, coastal and non-coastal, must be afforded opportunities to benefit economically from the bounty of the oceans.[26]

31. Therefore, from the perspective of international economic law and history, *prima facie*, freedom of navigation is one of the fundamental principles of general and economic global order, related to such other fundamental principles as equality of access and security and non-interference (freedom from fear).

Incidents of Freedom of Navigation Under the 1982 Convention

Incidents of freedom of the high seas

32. The incidents of freedom of the high seas under the Convention must now be identified. According to the non-exhaustive list[27] in article 87, paragraph 1 (set out in the preceding section), these include the freedoms of navigation, overflight and of fishing. It also includes the freedoms to construct artificial islands and other installations, to lay submarine cables and pipelines, and of scientific research in accordance with the provisions on the continental shelf, which may extend below the water column well beyond the 200-mile exclusive economic zone. Details concerning the first of these last three freedoms are actually contained in Part V, regulating the zone. The latter two are regulated by Parts VI and XIII, on the continental shelf and on marine scientific research. According to paragraph 1, with these freedoms the high seas are "open to all States, whether coastal or land-locked." However, according to paragraph 2, in exercising their rights and performing their duties, States shall have due regard to the interests of other States in their exercise of the freedom of the high seas. This standard of "due regard" is less ambulatory and open-textured than is the standard of "reasonable regard" in the counterpart article 2 of the High Seas Convention.

Incidents of freedom of navigation

33. As I have shown, the freedom of navigation is one of the high seas freedoms. By article 90, it includes the "right of navigation" of every State "to sail ships flying its flag on the high seas." From the context, it probably includes or is closely related to obligations and duties *inter alia* falling under articles 91, 94 and 97.[28]

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[26] See Part X of the Convention on the obligatory, though not self-executing, right of access of land-locked States to and from the sea and freedom of transit. *Cf.* article 3 of the 1958 Convention on the High Seas, providing for non-obligatory access. For a post-1958 rationale for the free access basis of freedom of the high seas, see M. McDougal and W. Burke, *The Public Order of the Oceans* (1962) (hereafter "McDougal and Burke"), pp. 748-750. The Convention's notion of coequal sharing in ocean spaces, as expressed in the much-discussed institution of the common heritage of mankind in the Area, is therefore an aspect of a broader phenomenon of some vintage.

[27] Respondent however argues that since it is not mentioned in article 87, bunkering cannot be a freedom of navigation (ITLOS/PV.99/14, p. 25 (15 March)).

[28] According to article 91, it is an obligatory State function to fix the conditions for the grant to and exercise of nationality of ships. Article 94 states a variety of flag State duties. These include the exercise of jurisdiction and control in administrative, technical, social, safety and regulatory matters over ships flying the flag. Under article 97, paragraph 1, the flag State has penal and disciplinary responsibility in the event of a collision of any of its vessels. And under article 97, paragraph 2, the flag State has general discipline over masters and others holding certificates of competence or licenses.

34. Nevertheless, the nature of the incidents of freedom of navigation is still unclear. The final sub-section of the preceding section implies that the incidents of freedom of navigation (as an aspect of the freedom of the high seas) include navigational activities associated with equal economic access and opportunity to benefit economically, including through trade. It is therefore tempting provisionally to state that the coastal State and flag State have co-equal rights of access, at least in discrete spheres, in the exclusive economic zone. However, such a conclusion cannot be made on the basis of the data examined so far. Therefore, I will devote much of the remainder of this Opinion to exploring whether the provisions on the exclusive economic zone institution and other provisions of the Convention provide more illumination.

Impact of the Convention's Provisions establishing the EEZ Institution

Introduction

35. The question must now be examined whether the new institution of the exclusive economic zone is so comprehensive and preemptive that the freedom of navigation has been eroded or subordinated by the respective provisions of Part V of the text of the Convention. I will then briefly explore whether trends in claims by various States to or in respect of exclusive economic zones have had an impact on this question.

Status under the Convention of the exclusive economic zones

36. During UNCLOS III and for some time after the adoption of the Convention in 1982, there was considerable discussion about the status of exclusive economic zones.[29] The matter has perhaps been conclusively resolved by article 55, categorizing the exclusive economic zone as subject to "the specific legal regime established in this Part [V]". In an influential arbitral decision relevant to this case, this regime has been determined not to be one of sovereignty (*Guinea/Guinea Bissau Maritime Delimitation Case, 77 ILR* (1985), paragraph 124). In interpreting the expression "exclusive economic zone" or the language of article 55 and other articles, several synonyms, paraphrases and explanations have been suggested. The first of these was devised for the former 12-mile maritime zone of exclusive fisheries jurisdiction for each coastal State carved out of the high seas by State practice. This zone was actually in derogation of the provisions of the 1958 High Seas Convention. Yet it was ambiguously referred to as a "*tertium genus* between the territorial sea and the high seas" in the *Fisheries Jurisdiction* cases (*I.C.J. Reports 1974,* p. 3, at 23-24, paragraphs 52 and 54, and p. 175, at 191-192, paragraphs 44 and 46). However, reliance on the precise language of article 55 is the correct and more helpful approach to the task of ascertaining ordinary meaning, though the phrase "*sui generis*," which is sometimes used, might be relatively innocuous. Precisely determining status is partly dependent upon identification of the incidents of the status, a matter which is postponed until the next sub-section.[30]

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[29] In particular there was discussion of whether the nature of such zones is essentially territorial, thus having a close resemblance to the territorial sea and analogous maritime areas proximate to coastal States; whether they are more akin to the high seas, the geographical area into which such waters fell prior to 1982; or whether they are hybrids, with attributes of territorial seas and high seas.

[30] However, in my view, it is unhelpful to define exclusive economic zone status in terms of national jurisdiction or resemblance to the high seas. "[A]ll the rules relating to navigation and communication on the high seas are applicable beyond the outer limits of the territorial sea, but other rights formerly included within the concept of the

37. Starting with article 56 (stating the rights, jurisdiction and duties of the coastal State in the exclusive economic zone), the bulk of the text of Part V of the Convention deals with the subject of natural resources and related controls. Furthermore, the text of article 58 stresses that other States, whether coastal or land-locked, have simultaneous rights and duties in the exclusive economic zone. Such States also have certain jurisdiction in that zone. This appears from the text of many portions of Part VII and the context of article 87, which are incorporated by reference in articles 58 and 87. The exclusive economic zone is therefore an area in which the coastal State has concurrent, though not identical, rights, jurisdiction and duties with flag and other States. It has been suggested that this concurrence is horizontal but I do not find the suggestion helpful. I would only stress that the scope of authority of both groups of States is evidently not identical. I should point out that coexistence of uses and authority seems to have always characterized the various maritime zones. Regrettably, there has been a tendency to assume that, despite the permeability of the oceanic water column and the diversity of maritime spaces, rights and jurisdiction necessarily have to be exclusive.[31] That this is the wrong approach is emphasized by the "due regard" standard for the exercise of concurrent rights, duties and jurisdiction set out in articles 58, paragraph 3, and 87, paragraph 2. The same language is used in article 56, paragraph 2.[32]

Incidents under the Convention of exclusive economic zone status

38. There are several groups of incidents enjoyed by the coastal State. *Firstly*, according to article 56, paragraph 1(a), there are the "*sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters ..." (emphasis added), subject to certain rights of participation in exploitation by land-locked and geographically disadvantaged States preserved or regulated by articles 69-72. *Secondly*, the same paragraph provides for *sovereign rights* with regard to "other activities for the economic exploitation and exploration ..., such as the production of energy from the water, currents and winds". The text clearly limits these activities to natural resources. *Thirdly*, articles 56, paragraph 1(b), and 60 provide for *exclusive rights and jurisdiction* in two discrete areas, viz. (i), rights of and with regard to the construction, operation and use of artificial islands, installations and structures (for the purposes mentioned so far in this portion of this Opinion) and (ii), jurisdiction over such artificial islands, installations and structures. *Fourthly*, article 56, paragraph 1(b), affords *jurisdiction* with regard to (i) marine scientific research and (ii) the protection and preservation of the marine environment. *Fifthly*, by article 58, paragraphs 1 and 2, along with all other States the coastal State enjoys *freedom* of navigation and such other article 87 *freedoms and other uses* described in paragraph 33 of this Opinion. *Sixthly*, articles 56, paragraph 2, and 58, paragraph 3, provide for obligatory *reciprocal due regard* by coastal States, on the one hand, and by other States, on the other hand, of each others' rights and duties. *Seventhly*, articles 61-68 authorize *rights and powers* of conservation, utilization and management of living resources by coastal States with some collaboration by specified elements

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freedom of the high seas, in particular those relating to natural resources, are abridged or abrogated entirely in the [EEZ] ...," Virginia Commentary, III (S. Nandan and S. Rosenne, eds., 1995), p. 70.

[31] On concurrence see Allott, pp. 14-17; D. Attard, *The Exclusive Economic Zone* (1987) (hereafter "Attard"), p. 64.

[32] In fact, since "freedom" is a broader species than "right," freedom of navigation might logically be said to trump some coastal State rights. See Oppenheim 1992, I, paragraph 342. However, I do not so propose.

of the international community. *Finally*, by article 73, the coastal State may *optionally enforce, within parameters* therein set forth, its laws and regulations related to exploration, exploitation, conservation and management of living resources. The limitations to coastal State authority and the concurrence or mutual tolerance of rights and jurisdiction of coastal and other States appearing throughout is somewhat reaffirmed by article 73, paragraph 3, providing that "penalties for violations of fisheries laws and regulations ... may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment."

39. Despite the use of the word "economic" in the title, there is no doubt that the essence of the incidents of exclusive economic zone status is the control, exploration and exploitation of and jurisdiction over natural resources and other related activities. At the same time, the framework is broadly economic, the focus in many places being on proper and appropriate access by entitled States in what is an economic, as well as natural, set of assets. In some cases, the nature of access is particularized. Examples are articles 69 and 70, providing for "equitable" access of land-locked and geographically disadvantaged States.

40. In the event that article 56, read in context, is nevertheless considered to be ambiguous, these conclusions are borne out by the limited available preparatory work for the Convention. They are also supported by such other available extrinsic evidence as scholarly opinion and the history of claims to extended maritime jurisdiction outside of the territorial seas of 3 to 12 miles that were commonplace prior to the early 1970s[33]. Therefore, *prima facie,* the Respondent's acts cannot be categorized as having been in implementation of these provisions.

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[33] (1) Preparatory work: Exclusivity or predominance of natural resources orientation of article 55 and related articles: Virginia Commentary, II, pp. 519-520 (language of article 55, paragraph 1(a), evolved from sole exercise by coastal State in decision-making authority to exclusion from use of fishing vessels by other States in EEZ); Scovazzi in *The Law of the Sea: What Lies Ahead?* (T. Clinghan, Jr., ed., 1986) (hereafter "Scovazzi"), pp. 310 and 321-322; United Nations, DOALOS, *The Law of the Sea – Exclusive Economic Zone – Legislative History of Articles 56, 58 and 59 of the United Nations Convention on the Law of the Sea* (1992) (hereafter "DOALOS EEZ"), pp. 80-81 (rejection of proposal by 18 African States, not including Guinea, at UNCLOS III, 2nd session, to accord to coastal State jurisdiction under article 56 to "[c]ontrol and regulation of customs and fiscal matters related to economic activities in the zone."; see also Virginia Commentary, II, p. 530, and U.N. Doc *A.CONF.62/C.2/L.82* (26 Aug. 1974)); Virginia Commentary, II, p. 529 (rejection of El Salvador proposals at UNCLOS III, 2nd session, to insert in article 56 reference to jurisdiction of coastal State over other economic uses of the waters); *id.*, pp. 784-795 (rejection of repeated proposals at UNCLOS III for flag State enforcement, under article 73, of violation of laws and regulations; rejection of proposal at UNCLOS III of 18 African States, not including Guinea, regarding exclusive coastal State legislative and enforcement power regarding drilling, scientific research, artificial islands and other installations and fishing); Attard, p. 128 (one reason why, during UNCLOS, some States wished to retain contiguous zone concept was to emphasize economic function of EEZ, was fear that elimination of the former would lead to extension of existing contiguous zone rights into entire EEZ); see also *Third United Nations Conference on the Law of the Sea, Official Records, II, Summary Records of Meetings of the Second Committee*, 1st- 41st Meetings (20 June – 29 Aug. 1974) (summarizing the views of, *inter alia*, Austria, Italy, Honduras, Bahrein).
(2) Scholarly work: Exclusivity or predominance of natural resources orientation of article 55 and related articles: Nelson in *22 I.C.L.Q. (*1973), p. 682 (on earlier Latin-American patrimonial sea concept); Galindo Pohl in *The Exclusive Economic Zone – A Latin-American Perspective* (F. Orrego Vicuña, ed., 1984) (hereafter "A Latin-American Perspective"), p. 48. Functionalism of Part V provisions: F. Orrego Vicuña, *The Exclusive Economic Zone – Regime and Legal Nature Under International Law (*hereafter "Orrego Vicuña"), pp. 261-262; Attard, p. 67 (EEZ an experiment in functionalism); Scovazzi, pp. 321-322 (construing article 56, paragraph 1(a)'s "other activities" clause); R. Churchill and A. Lowe, *The Law of the Sea* (1988) (hereafter "Churchill and Lowe"), p. 137. No sovereignty and substantive equality orientation: Rembe, p. 125 (original EEZ concept has been "voided of its

41. I now turn to whether the provisions establishing the status and setting out the incidents of the exclusive economic zone answer the question whether the regulation of bunkering in the exclusive economic zone is categorically an incident of exclusive economic zone status within the sole competence of the coastal State. One authority construes the language in article 58, paragraph 1, "other internationally lawful uses of the sea related [*inter alia*,] to" the freedom of navigation and such as those associated with the operation of ships as long as they are "compatible with the other provisions of this Convention," and suggests that "[i]t seems ... that the determination of whether a given activity, such as offshore servicing, is to be considered as a 'related' lawful use or not, will depend largely on the coastal State."[34] Similarly, Respondent denies that such activities in this case can be related to navigation by non-coastal States, urging that they are more related to fishing (being supportive thereto) and that, at any rate, the coastal State has a considerable fiscal interest in sales to the foreign flag vessels (CM, paragraphs 102-104). However, the materials in this section confirm the view emerging from my broader analysis and suggest that, *prima facie*, the matter is more complex. It must therefore be concluded that, subject to what is said below, the further evidence discussed so far does not reveal any presumption or predilection favouring any class of State.[35]

Possible effects of coastal State claims relating to exclusive economic zones

42. In paragraph 21, I noted views predating the commencement of the process of widespread adoption of multilateral conventions regulating ocean spaces consistent with the notion that by a process of claims and responses thereto, the customary law of the sea could be modified. Thereby, it was considered that *inter alia*, rights and jurisdiction could be expanded, especially as new perceptions of national welfare and technological, economic and scientific needs and discoveries became manifest. That view was previously advanced with particular force in relation to sovereignty over submarine areas.[36] However, in the context of the new law of the

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content" favouring needs of developing countries; *id.*, p. 128 (various African proposals at UNCLOS to make EEZ rights more akin to sovereignty or include non-living resources); Burke, *20 S.D.L.R. (*1983), pp. 600-622 (any interpretation of Part V going beyond authorized enforcement of laws concerning illegal fishing, to allow interference with in-transit fishing vessels should be limited by requirements of essentiality to effective enforcement, insignificant effect on passage and significant benefit to coastal State). However, note Arias in A Latin-American Perspective, p. 136 (envisaging numerous areas for future coastal State competencies in territorial sea, including smuggling and fiscal fraud).

(3) Essential natural resources orientation of pre-UNCLOS III national claims to extended maritime jurisdiction: DOALOS EEZ, pp. 1-2 (Truman Proclamation); *id.*, pp. 3-13 (regional declarations and statements); Lupiacci, pp. 79-95 (Latin-American national claims up to 1969; Latin-American regional Declarations 1940s to mid-1970s; African regional Declarations and positions in 1970s; discussions in U.N. Seabed Committee; joint draft articles submitted by Kenya and Latin-American States in 1970s).

[34] Attard, p. 64. This, he says, is subject to the requirement, imposed by article 300, that the parties should undertake to discharge in good faith their obligations and exercise their rights, jurisdiction and freedoms "in a manner which would not constitute an abuse of right".

[35] It will be noted that, on their face, the legislation cited by Guinea neither apply in the EEZ nor cover the acts of the Saiga of which she complains (Applicant's Memorial (hereafter "M"), pp. 106-111; CM, p. 9; R, pp. 14-19). In effect, this is the conclusion implied in the Tribunal's Judgment.

[36] For some, such views are related to the notion of the *dédoublement fonctionnel*, according to which States perform dual functions as claimants which, in pursuing national interests, seek to attain normative change (generally of a customary law variety) and as members of the international community which determines the outcome of such claims.

sea, the salience of that approach has been very much diminished with: new global consensual developments; comprehensive texts of a widely accepted conventional law of the sea which are in places detailed and in others open-textured; guidelines and institutions for solving unfolding problems, especially of a technical nature; and various touchstones and standards for effective solution of controversies, with comprehensive procedures and institutions for dispute settlement. Note must be taken of the slightly diminished importance in the Convention of certain geographical considerations; the overarching conception of sharing or concurrent uses of resources, spaces and authority, and a significant notion of communal decision-making.[37] This is consistent with that basis of the freedom of the high seas, previously discussed, which is an aspect of the current global order of liberal economic access which has been expressed in such expressions as equal access, free access, non-discrimination and equitableness (see paragraphs 27-31 above). In that setting, flag State freedom of navigation would easily coexist with the rights of the coastal State and the claims by such States would be less relevant.

43. It is nevertheless useful briefly to explore whether, in recent years, national claims to exclusive economic zones and rights and jurisdiction therein have had a *de facto* or *de jure* impact on the balance between flag States and coastal States in the exclusive economic zone. Practice after 1982 will be surveyed. It must be stressed that this broad overview is not intended to be complete.

Coastal State claims: Post-1982 practice

44. Prior to 1982, there were several significant claims by States. There also were significant joint statements elaborating regional positions on maritime entitlements outside of territorial areas in several regions, notably Latin America and the Caribbean and Africa. After 1982, such statements appear to have generally abated.[38] After that year, also, State claims to or declarations and other statements about sovereignty or "sovereign jurisdiction" have significantly diminished. Nevertheless, several States are today thought to claim territorial seas wider than 12 miles and a number do not distinguish between that sea and the exclusive economic zone. In its 1984 Declaration on signing the Convention, Guinea declared that it reserved "the right to interpret any article of the Convention in the context and taking due account of the sovereignty of Guinea and of its territorial integrity as it applies to the land, space and sea."[39] The

[37] See Allott, pp. 7-27.

[38] Pre-1970 practice: Prior to the Convention, close examination of claims to maritime jurisdiction generally had a substantial economic and marine scientific thrust. Even claims which, on first impression, appeared to encompass sovereignty, upon analysis almost invariably appeared not to do so, or did so in an equivocal, non-categorical or non-exclusive manner. In addition, these claims were predominantly for natural, especially living, resources. By 1970, a general economic and natural resources orientation was patent, especially in the regional declarations in Latin America and the Caribbean and Africa. Orrego Vicuña, pp. 3 and 11; Attard, pp. 3-16; Nandan in *The Law of the Sea: Essays in Memory of Jean Carroz* (FAO 1987), pp. 171-187. See Argentina's Declaration proclaiming sovereignty over the epicontinental sea and the continental shelf, 9 Oct. 1946 (*41 A.J.I.L. Supp.* (1947), pp. 379-380 (while art. 1 declares sovereignty, the recitals clarify the concern with the matters stated in the text). *C.f.* art. 7 of the 1950 Constitution of El Salvador (quoted in Lauterpacht in *27 B.Y.I.L.* (1950), p. 413). It seems that the legislation implementing this constitutional provision was limited to fishing and marine hunting (Attard, pp. 453-456). Post 1970 practice: Orrego Vicuña, pp. 11-12; Attard, pp. 16-30.

[39] In fact, the legislation exhibited in this case reveals that Guinea previously never redeemed this promise. Its customs code is limited to the national territory, including territorial waters. And its "customs radius" of 250 kilometers is a zone for surveillance and the presentation and permissible inspection of documentation relating to dutiable cargo destined for the national territory. As stated earlier in the text, this case concerns an effort, in the

declarations or legislation of several coastal States merely envisage that they might make future claims to significant exercises of authority. Elsewhere, sovereignty seems to be contemplated mainly in the use of the expression "sovereign rights" - language identical to that in article 56. A small handful of States have declared that residual rights belong to coastal States as long as they do not affect the rights granted to other States. The topic provoking the largest number of statements is military activity in the zone.

45. On the other hand, some language mentions the issue of regulation of the passage of fishing vessels, i.e., the orientation is on natural/economic resources. Not unrelatedly, some States claim exclusive jurisdiction in relation to the protection of the marine environment and pollution controls or prohibit the passage of ships transporting injurious cargo. One claim requires a license for the conduct of "any economic activity" in the exclusive economic zone or for activities relating to the recovery of archaeological or historical objects. Yet, an increasing number of States acknowledge freedom of navigation in the zone.[40]

46. I am aware of only one State which makes the claim of the power "to prevent the contravention of any fiscal law or any law relating to customs, immigration, health or the natural resources of the sea."[41] Even if a few more States concurrently make such claims, this paucity is of some significance. Mention should be made of opinions provided in these proceedings at the request of the Applicant by legal practitioners from some 22 countries on the application of laws of their countries in relation to offshore bunkering in hypothetical circumstances similar to those in this case where the supply of oil products involves parties which do not possess the coastal State's nationality and occurs outside territorial waters. Those opinions all seem to suggest that such offshore bunkering would not be contrary to those laws.[42] Without proper fact-finding in a case with several dimensions of domestic law, these opinions do not provide much further guidance regarding the apparent competition between the flag State's freedom of navigation and the coastal State's rights in the exclusive economic zone than do the other materials and

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absence of specific legislation, to extend these norms to the field of bunkering fishing vessels. In its final arguments, Respondent called the zone "a limited [and functional] Customs protection zone based on the principles of customary international law which are included in the [EEZ]" but which are not a part of the territory of Guinea (ITLOS/PV.99/18, p. 17 (20 March)). It will be recalled that the critical law allegedly applicable in the zone is No. 94/007/CTRN on petroleum sales which, in Respondent's final arguments, was "clear," even though it did not prohibit off-shore bunkering "verbatim" and "does not affect the rights of … flag States in the EEZ [and] is completely in conformity with the balance [of coastal and flag States] underlying the … EEZ in modern international law" (ITLOS/PV.99/18, pp. 18-19 (20 March)). (See also M, pp. 107-109, CM, p. 9; ITLOS/PV.99/7, pp. 6-8 (11 March); ITLOS/PV.99/15, pp. 8-10 (16 March); ITLOS/PV.99/16, pp. 20-23 (8 March)).

[40] Orrego Vicuña, pp. 149-151; Burke in *9 O.D.I..L.* (1981), pp. 294, 298 and 305-309; *U.S. Panel* 383; *DOALOS Bulletin No. 21* (Aug. 1992), pp. 28 and 31, *No. 23 (*Jun. 1993), pp. 17 and 19, *No. 25* (Jun. 1994), pp. 11 and 37.

[41] *DOALOS Bulletin, No. 16* (Dec. 1990), pp. 18-19.

[42] The countries are Argentina, Belize, Brazil, Bulgaria, Cameroon, China, France, Germany, Ghana, Iceland, India, Italy, Japan, Republic of Korea, Lebanon, Norway, Russia, Sweden, Tanzania, Tunisia, United States of America. In the case of the opinion by an Italian lawyer, it is stated that "whilst Italy has not proclaimed an exclusive economic zone, it is not inconceivable that the Italian authorities might seek to exercise customs surveillance and enforcement powers with respect to deliveries of liable oil products, taking systematically place in the contiguous zone (or reasonably beyond), if the buyer or recipient of the delivery, albeit a foreign registered vessel, presented a sufficiently visible and regular factual connection with Italy." A footnote gives as an example of such a connection "if a foreign registered tanker regularly supplied fuel oil in the contiguous zone for registered leisure or fishing vessels, which subsequently regularly called on Italian ports, regularly loaded or unloaded passengers or unloaded its catch there, and then regularly sailed with empty tanks" (M, Annex 37).

arguments furnished by both parties. However, *prima facie*, they suggest that several coastal States are not purporting to exercise authority in relation to freedom of navigation. This somewhat strengthens the inference that Guinea did not act consistently with international law.

Coastal State claims: Guinea's public interest and state of necessity claim

47. The Judgment has correctly rejected Guinea's justification for its actions based on the "essential aspects of its public interest" (RJ, paragraph 97), holding that that justification is incompatible with Part V and therefore contrary to article 58, paragraph 3. Similarly, the Judgment rejects Guinea's appeal to the so-called state of necessity, indicating its adoption of the conditions for that doctrine as approved by the International Court of Justice in the *Gabčíkovo-Nagyamaros Project* case (*I.C.J. Reports 1997*, paragraphs 51 and 52) and article 33 of the International Law Commission's Draft Articles on State Responsibility. If claims negatively affecting the freedom of navigation cannot be appropriately based on the Convention, then resistance to sanction them on the basis of extra-Convention sources is not unreasonable.[43]

Coastal State claims: preliminary assessment

48. The foregoing survey provides only very broad indications of the scope of claims by coastal States in respect of the exclusive economic zone and their relationship to the freedom of navigation. Just over ten years ago, a study of the subject suggested that there was an "absolute" consensus that in all legislation claiming coastal State rights over the exclusive economic zone, the claims were in terms of the natural resources language of article 56, paragraph 1(a), of the Convention. Speaking more generally, it concluded that despite "the complexity of [much] national legislation ... they do not reach the point of forming general trends ...". This appears to be still the case. The study also suggested that the legislation did not "affect the nature" of the zone. That also appears to be accurate.[44] With reference to freedom of navigation in some of the specific waters involved in this case, as stated in the *Guinea/Guinea-Bissau* arbitration, the exclusive economic zone is not, *prima facie*, a zone of sovereignty. In other respects, also, exclusive economic zone status is not without substantial limitations, including those favouring flag States.

Impact of Other Provisions of the 1982 Convention

49. I noted earlier that much of the sizeable Convention forms part of the broader context for the articles of Parts V and VII that have a direct bearing on the main issues in this case. For that reason, both parties have sought to draw interpretative guidance from widely differing provisions relating to the high seas and maritime areas outside of the territorial sea and analogous areas.

[43] Precisely for similar reasons, after the U.K. Government took dramatic action to protect its coastline following the Torrey Canyon disaster in 1967, in 1969 the parties to the International Maritime Organization adopted the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. In turn, article 221 of the 1982 Convention, recognizing the right of States to take measures beyond the territorial sea to protect coastlines and related interests from grave and imminent danger from pollution or threat of pollution following a maritime casualty, requires that such measures shall be "in accordance with international law," undoubtedly meaning the 1969 Convention. See eighth report, paragraphs 28-29.

[44] Orrego Vicuña, pp. 143 and 153; *Guinea/Guinea-Bissau* arbitration, paragraph 124.

Provisions of this nature cover flag State obligations and privileges;[45] flag State participation in maritime order;[46] pollution control;[47] and marine scientific research.[48] What they have in common is the careful balance of authority and responsibility between the two classes of States; the cooperative nature of the relationship between the two that is generally expected; and the substantial nature of the rights generally given to all users. Circumstances permit discussion of only one group of provisions – those dealing with innocent and related passage through territorial areas.

50. Several articles relating to maritime territorial areas have a facially negative bearing on navigation. Article 19, paragraph 2, contains a list of 12 groups of "prejudicial" activities that deprive passage through the territorial sea of its innocence. Five of them are:

> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
>
> (h) any act of wilful and serious pollution contrary to this Convention;
>
> (i) any fishing activities;
>
> (j) the carrying out of research or survey activities;
>
> (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; ...[49].

Comparison of these, and other, activities listed in this paragraph with the many provisions of Parts V, VII, XII and XIII that this Opinion has reviewed elsewhere is instructive. Breaches of the provisions in those Parts do not have any stated impact on the freedom of navigation in the exclusive economic zone as far-reaching as the nullification of innocent passage status. And of particular importance to the facts of this case, there is no language in article 56 (on coastal State rights, jurisdiction and duties in the exclusive economic zone) comparable to article 19, paragraph 2(g). Only article 60, paragaph 2, contains similar language, which gives the coastal State exclusive jurisdiction over those matters but *only* in respect of artificial islands,

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[45] See articles 91-94 on registration, nationality and authority and jurisdiction over ships. Burke 1981, p. 303 citing Oxman, *72 A.J.I.L.* (1978), pp. 57 and 72; Warbrick in *New Directions on the Law of the Sea* (R. Churchill, K. Simmonds and J. Welch, eds 1973), III, p. 148.

[46] See articles 98, 99, 108, 109, 110; Virginia Commentary, III, pp. 176-77; *Third United Nations Conference on the Law of the Sea* (R. Platzöder, ed.) (hereafter "Platzöder"), V, pp. 13, 17, 66 and 67; Virginia Commentary, V *(*S. Rosenne and Louis B. Sohn, eds, 1989), pp. 13-17 and 66; *id.* III, pp. 237-242.

[47] See articles 210, 211, 216-218, 220, 221, 231, 234; Virginia Commentary, IV (S. Rosenne and A. Yankov, eds., 1991), pp. 183, 232-237, 279-302, 334-344 and 365; Platzöder, X, pp. 473, 481, 497 and 507.

[48] See articles 246 and 252; Virginia Commentary, IV, pp. 392-398 and 519.

[49] Article 21, paragraph 1, contains a list of eight groups of laws or regulations relating to innocent passage that coastal States may adopt. It is somewhat similar to the list in article 19. Of note is sub-paragraph (h) which, like article 19, paragraph 2(g), mentions the prevention of infringement of "the customs, fiscal, immigration or sanitary laws or regulations of the coastal State." Article 42, paragraph 1, is a cognate list of laws and regulations that States bordering straits may adopt. Sub-paragraph (d) is essentially identical to article 19, paragraph 2(g). According to article 54, article 42 applies, *mutatis mutandis*, to archipelagic sea lane passage.

installations and structures – not over the exclusive economic zone *per se*.[50] By the terms of Part V, no such general power is given to coastal States in that zone.

51. On close examination, even in the territorial areas the powers of coastal States over foreign vessels are specified and not without specific limits. This is quite consistent with the unambitious authority exemplified in article 33 (on the contiguous zone). All of this has considerable significance as the broader context for the interpretation of the provisions regulating the exclusive economic zone and the freedom of navigation and related uses of the exclusive economic zone.

52. It must therefore be concluded that, as regards the respective jurisdiction and rights of the coastal State and the flag State, at least over vessels, these provisions in other parts of the Convention provide confirmation of the concurrence and non-preeminence of authority of the different classes of States in the exclusive economic zone.

Conclusion on Freedom of Navigation

53. This Separate Opinion has corroborated the Tribunal's finding that Guinea's customs and related laws are not applicable because of incompatibility with Part V of the Convention and because of the unacceptability of the alleged special justifications of public interest and state of necessity for extension of its laws into the customs radius portion of Guinea's exclusive economic zone. Differing from the Judgment, but nevertheless consistently with its findings, the method of this Opinion has been a detailed exploration of the viability of the flag State's freedom of navigation in the exclusive economic zone through the interpretation of articles 58 and 87. In interpreting those articles, I have primarily examined aspects of Parts V and VII, their immediate context; the broader context of various other Parts and provisions, including those dealing with the territorial sea and contiguous zone, and, as necessary, supplementary means of interpretation, including the historical background and the bases of the principles of freedoms of the high seas and navigation, and aspects of the historical and juridical basis of the contemporary global economic and general order. Throughout, the internal consistency of the Convention has led to my finding that the rights and jurisdiction of coastal and flag States are concurrent and that neither has *prima facie* paramountcy or preeminence. Certainly, the institution of the exclusive economic zone has not diminished the well-established freedom of navigation. On the evidence presented, I therefore find that Guinea violated the freedom of navigation of Saint Vincent and the Grenadines. However, in cases such as the present, fuller evidence and arguments would be required in order to determine whether the vessel in question was involved in activities encroaching on specific and clearly identified aspects of the coastal State's jurisdiction over the exclusive economic zone under the Convention.

SOME REMAINING QUESTIONS

54. Some of the questions remaining include aspects of offshore bunkering, prompt release and the settlement of disputes involving developing States. Some preliminary comments on these matters will now be offered.

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[50] See Virginia Commentary, II, pp. 164-178, 184-203, 367-378 and 481-487; *id.*, IV, pp. 152 and 158-159; *id*, IV, pp. 151 and 156.

Offshore Bunkering

55. If properly handled, the notion of concurrence of authority can contribute to the avoidance of potential disputes and, in the case of an actual dispute, the avoidance of a *non liquet*, given the unlikelihood that there can be easy or early negotiated reform of the Convention. These goals are also facilitated by the Convention's unique feature of a significant variety of norms and formulas to address the diverse potential disputes and matters requiring resolution. One of the formulas used in Parts V and VII has already been mentioned – language requiring States to have "due regard to the rights and duties" of other States with which they have concurrent authority and jurisdiction. The device is used in a carefully balanced and institutionalized manner in articles 56, paragraph 2, 58, paragraph 3, and 87, paragraph 2, which evidently must interact with each other. Another formula is article 59:

> *Article 59*
> *Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*
>
> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

However, neither party to this case has seriously relied on article 59. The reason might be the apparent position of the parties that the facts of this case do not call for the application of this provision.[51] Nevertheless, without my taking a position on article 59, the "attribution" aspect of the provision might be noted. It serves as a reminder that many articles of the Convention deal with jurisdictional issues, which can be phrased in terms of attribution. The coastal State has authority and jurisdiction mainly in relation to natural resources and related matters which have been attributed to it in several provisions. Simultaneously, even in relation to the environmental protection of those resources, concurrent though non-identical, authority and jurisdiction has been attributed to port and flag States, international organizations and coastal States. It has been said that rights concerning economic interests, communication, scientific research and seabed drilling have been attributed to the coastal State by Part V. However, notwithstanding the over-complete and ambitious nature of the institutional title "exclusive economic zone," economic rights, on the whole, have not been attributed solely to that State. In view of what this Opinion reveals, the same holds true about the attribution of such other rights as those concerning communication and navigation.

56. While, in the absence of full argument and data, I am today unable to make a finding about attribution or specifically identifying the ownership of rights in relation to offshore bunkering, speaking very generally and based on the systematic review in this Opinion, I must recall that by

[51] Several substantial questions of interpretation arise in relation to article 59. These have spawned a very substantial literature.

virtue of the prevailing global economic order, all States have a right to free general and maritime economic access and non-discrimination. Against that background and my detailed examination of provisions of the Convention, a full and clear body of evidence would be required properly to address attribution and bunkering. *Prima facie*, however, the available evidence is not inconsistent with at least a measure of tolerance of the use of this maritime space by all States that are legitimate users of non-territorial waters within their respective functional or other spheres.[52]

Prompt Release

57. In this case, the Tribunal has ruled against the Applicant's claim for damages for the Respondent's alleged delayed compliance with the Tribunal's Judgment of 4 December 1997, ordering the prompt release of the *Saiga* upon provision by the Applicant of specific financial security. The reasons given are that while the release of a ship 80 days after the posting of the bond "cannot be considered as a prompt release,"[53] in this case, several factors contributed to the delay in releasing the ship. I believe that different factors can be attributed to each party. Factors include the parties' disagreement about the implementation of the requirements of the prompt release Judgment, the actual wording on the bank guarantee (originally written in English), communications difficulties, travel by the representatives of the parties and the novelty in the international community of the Convention's prompt release requirement.

58. In view of the need for promptness, everything must be done by the parties to expedite the process. I believe that, following the Tribunal's successful handling of its first case of this nature, prompt release cases will, in time, become relatively routine proceedings in which the crucial matter for decision is the reasonableness of the financial security.[54] Reasonableness

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[52] See Juda in *16 O.D.I.L.* (1986), pp. 32-33 and 40-41 (concurrence of jurisdiction between flag State and coastal State in relation to protection of marine environment; wholesale interference with navigation rights not allowed by Convention. *Cf.* Arias in A Latin-American Perspective, pp. 136-137 (future contingencies connote increases over time of EEZ authority and jurisdiction of coastal States); Butler in *6 Ga.J.I.L.* (1976), p. 114 (near-term competing uses in what is now (pre-1982) high seas might become so intense that flag State jurisdiction must give way to a new order of the high seas regulated, perhaps, by international institutions); Attard, pp. 64-65 (all economic, communication, scientific research and drilling rights already attributed; unattributed rights regarding EEZ can be solved by resorting to equity in a process in which contestants strengthen their cases by identifying with international community's needs); Galindo Pohl in A Latin-American Perspective, p. 46 (economic rights attributed to coastal State; residual rights are subject to a certain degree of uncertainty).

[53] Paragraph 165 of the Judgment. It will be noted that the article 292, paragraph 1, of the Convention allows the parties a maximum of 10 days from the date of detention to reach agreement on the court or tribunal to handle the dispute. Thereafter, the Tribunal's Rules envisage a total of 20 days for completion of all stages of the proceedings, including the reading of the judgment. This suggests that implementation of the judgment must be similarly prompt.

[54] This is underscored by the nature of the application threshold adopted by the Convention for such cases - that "it is alleged" that the detaining State has not complied with the somewhat undemanding provisions of the Convention relating to prompt release. It will therefore be recalled that in the *Saiga* prompt release case, the Tribunal announced that the standard of appreciation in such cases is that the allegation is "arguable" or "sufficiently plausible." See Lauterpacht in *Liber Amicorum: Professor Ignaz Seidel-Hohenveldern in honour of his 80th birthday* (G. Hafner et al, eds., 1998), p. 395, noting (1) the nature of the "allegation" threshold and how its saliency can better be appreciated in view of the utilization of the technique in five other litigation contexts in article 287 and (2) the nature of the standard of appreciation selected by the Tribunal. See also Rosenne in *13 Int'l Jo. Mar. & Coastal L.*, pp. 487 and 513-514 (this standard "reflects the wide practice of international courts and tribunals that, in instances of provisional measures, the benefit of the doubt goes to the applicant State").

evidently comes into play in paragraph 1 of article 292, in the context of an allegation, generally by a flag State, that domestic authorities have not complied with the Convention's various provisions for prompt release "upon the posting of a reasonable bond or other financial security". Reasonableness also is critical in relation to the discretion which paragraph 4 gives to international courts or tribunals to order prompt release "[u]pon the posting of the bond or other financial security determined by the court or tribunal". The security ordered by an international judicial body will presumptively be reasonable. Although, in the *M/V "SAIGA"* case, the Tribunal fixed the amount and broadly determined the "nature and form" of the security, it left the latter details to the parties. There is no presumption of reasonableness in such situations and, as seen in the current case, considerable scope for delay. Therefore, it is evident that, in the future, the objectives of expediting prompt release and ensuring reasonableness will be facilitated, *inter alia*, if parties sometimes seek the Tribunal's participation in various aspects of the post-judgment task of coming to agreement on aspects of the security.

The Settlement of Disputes between Developing Countries

59. In this case, in relation to its assertion that the application of its legislation in the customs radius was justified by the notions of public interest and the state of necessity, the Respondent summoned in aid the great importance to it of the revenue it could obtain from taxes on sales of petroleum products presently sold offshore (see, e.g., ITLOS/PV.99/15, pp. 7 and 15 (16 March)). At another point, the Respondent referred to the difficulty experienced by some small developing countries without aeroplanes to give the required (auditory or visual) signals at the commencement of hot pursuit of perpetrators in fishing matters (ITLOS/PV.99/15, p.14 (16 March)).

60. Evidently, these appeals by the Respondent were based on the serious and understandable difficulties of a developing country, with scarce resources for the support of national welfare, to benefit from many aspects of the Convention, to compete in the international marketplace and to defend its international economic interests. In that connection, it is necessary to recall the objects and purposes of the Convention mentioned in paragraph 5 of the Preamble, that "the achievement of [the] goals [set forth in Preambular paragraph 4] will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole ...". Paragraph 5 goes on to embrace "in particular, the special interests and needs" of one highly deserving sector of mankind which very much influenced the development of the exclusive economic zone institution. That sector is the developing countries, for the benefit of which the Convention makes special provision in several places. While the intensity and sincerity of the Respondent's desire are thus sympathetically acknowledged, the practical constraints on attaining it must be taken into consideration. For example, it must be recalled that in this case the Applicant is also a developing country.

61. Nevertheless, the Respondent's invocation of such largely extra-Convention devices as public interest and state of necessity recalls an existing set of approaches for attempted relief: to apply escape mechanisms expressly or impliedly envisaged by the terms of a governing treaty, or acknowledged by the parties to a dispute or by the court or tribunal as being applicable under international law. An example is *rebus sic stantibus.* Another is the device for obtaining temporary relief or escape from the obligations of an economic treaty well known in the field of

international economic law, where the treaty itself often provides broad standards for such relief or escape. Such approaches, and others, may be relevant.[55] Naturally, in cases involving the Convention, such assertions would be subject to normal interpretative scrutiny. In addition, they face such hurdles as arguments that: the complex and numerous institutions of the 1982 Convention represent significant and change-resistant compromises; also that they have an elevated status in the hierarchy of juridical norms that is resistant to derogation.[56]

(Signed) Edward A. Laing

[55] See Laing, *14 Wisc. I.L.J.*(1996), pp. 311-312. An example of such mechanisms is article 221 of the Convention. It cannot be predicted whether such approaches would satisfactorily address such concerns as those expressed by the Respondent in relation to a possible future off-shore tax-free world (ITLOS/PV.99/18, p. 21 (20 March)). Nevertheless, appropriate juridical mechanisms must be used for addressing perceived problems.

[56] I take no position on the view that the Convention's norms, or many of them, are of a "constitutional" nature.

DISSENTING OPINION OF JUDGE WARIOBA

1. Although I find the reasoning of the Tribunal is inadequate I agree with the decision reached in paragraph 183(1), (2) and (13) and therefore I have voted in favour. I do not however agree with the decision of the Tribunal in paragraph 183(3) and (5) and consequently I have been obliged to vote against on the rest of the paragraph.

2. The Judgment as a whole lacks transparency. In the first place the summary of evidence and arguments of the parties is inadequate in that it has omitted some important aspects of such evidence and argument. The summary of evidence and arguments that has been made is not objective. I do not intend to elaborate further on this point in greater detail as far as the whole judgement is concerned but I will demonstrate this point as I deal with the issues on which I have reached a different conclusion from that of the majority.

3. The reasoning of the majority is also not adequate in the sense that it has in places departed from the evidence and arguments of the parties. In addition such reasoning has been vague to the extent of making the Judgment lack transparency. Having said that I now turn to the issue of the registration of the *Saiga*.

4. On the question of nationality of the *Saiga* the Judgment of the Tribunal states as follows in paragraphs 62 and 63:

> 62. The question for consideration is whether the *Saiga* had the nationality of Saint Vincent and the Grenadines at the time of its arrest. The relevant provision of the Convention is article 91, which reads as follows:
>
> *Article 91*
> *Nationality of ships*
>
> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.
>
> 63. Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

5. In these two paragraphs the Tribunal has correctly stated the legal position. It would therefore be expected that the Tribunal would reach a decision by interpreting article 91 of the Convention in the light of the evidence and arguments submitted before it. There was sufficient evidence submitted by the parties, including the pertinent law of Saint Vincent and the Grenadines. The two parties had also submitted extensive arguments on this point.

6. In the context of this case, the Tribunal is obliged to examine the issue of nationality and registration of the *Saiga* from the standpoint of what is enshrined in article 91 of the Convention, taking into account the conditions set by Saint Vincent and the Grenadines.

7. The relevant law of Saint Vincent and the Grenadines for the purposes of the present case is the Merchant Shipping Act 1982 (with subsequent amendments). In determining whether the *Saiga* had the nationality of Saint Vincent and the Grenadines at the time of its arrest we have to examine this law.

8. When Guinea raised the issue of the nationality of the *Saiga* (see Counter-Memorial, paragraph 10) Saint Vincent and the Grenadines responded by stating that the ship was registered on 12 March 1997 and was still validly registered and would remain registered until deleted from the registry in accordance with the conditions prescribed by the Merchant Shipping Act (see Reply, paragraph 24 and Annex 7). At the oral hearing counsel for Saint Vincent and the Grenadines argued that the expiry of a registration certificate does not lead to cessation of nationality. He put it as follows:

> 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.

9. The meaning conveyed here is that the grant of nationality is different from registration under the law of Saint Vincent and the Grenadines. Examination of the Merchant Shipping Act, however, shows that nationality is acquired through registration. The relevant provisions in the Merchant Shipping Act are sections 9, 12, 16, 17 and 18 (see Annex 6 to the Reply). Section 9 sets requirements of age and ownership of any ship seeking registration in Saint Vincent and the Grenadines. Originally the age of the ship was set at forty years or below but was later amended to twenty-five years. Section 12 specifies who may make an application to register a ship. That application has to be made to the Registrar or the Commissioner for Maritime Affairs and fees must be paid. Sections 16, 17 and 18 state as follows:

> 16. (1) Before any ship is registered for the first time as a Saint Vincent and the Grenadines ship under this Act, the following evidence, in addition to the declaration of ownership, shall be produced before the Registrar or the Commissioner, namely -
>
> (*a*) in the case of a ship built in Saint Vincent and the Grenadines or in any other Commonwealth country, a certificate signed by the builder of the ship containing a true account of the proper denomination and of the tonnage of

the ship as estimated by him, the time when and the place where the ship was built, the name of the person, if any, on whose account the ship was built and, if there has been any sale, the bill of sale under which the ship has become vested in the person who applies for registration;

(*b*) in the case of a ship built elsewhere, the same particulars as in paragraph (*a*) unless the person who makes the declaration of ownership declares that the time and place of the building of the ship are unknown to him or that the builder's certificate cannot be obtained, in which case the bill of sale or other document under which the ship has become vested in the applicant for registration shall be sufficient;

…

17. As soon as the requirements preliminary to registration have been complied with, the Registrar or Commissioner shall, unless he has reason to withhold further action, enter in the register the following particulars regarding the ship, namely -

(*a*) the name of the ship and the name of the port to which the ship belongs;

(*b*) the details comprised in the surveyor's certificate of tonnage;

(*c*) the particulars respecting her origin stated in the declaration of ownership;

(*d*) the name, address and occupation of the registered owner, and if there are more owners than one the name of all of them and the proportion in which they are interested; and

(*e*) the official number of the ship.

18. (1) Every ship registered under this Act shall have as its flag the national flag of Saint Vincent and the Grenadines without any modifications whatsoever.

…

10. From these provisions it can be seen that as soon as the conditions specified in section 16 are complied with a ship will be registered under section 17. Once a ship is registered it becomes entitled to fly the flag of Saint Vincent and the Grenadines under section 18. As has been seen above, under article 91, paragraph 1, of the Convention "[s]hips have the nationality of the State whose flag they are entitled to fly". It follows, therefore, that under the law of Saint Vincent and the Grenadines registration confers nationality to a ship. A certificate issued under section 26 of the Merchant Shipping Act is evidence of registration. Since registration confers nationality to the ship the certificate is conclusive evidence of nationality. It is therefore not correct to compare a certificate of registration to a passport because the process of acquiring citizenship is different from that of obtaining a passport. A passport is not conclusive evidence of citizenship. A person may be issued a passport without acquiring citizenship. A passport is a document which enables an individual to travel abroad under the protection of a State. Many refugees in the world, particularly

political refugees, have been issued passports in countries of asylum without acquiring or even seeking citizenship in those countries.

11. The Judgment of the Tribunal is premised on four grounds set out in paragraph 73. The first ground is that Saint Vincent has adduced evidence to support the claim that registration had not been extinguished at the time of the arrest of the *Saiga*. The evidence that the Tribunal has relied upon includes references to the Merchant Shipping Act 1982 and overt signs such as the inscription of "Kingstown" as the port of registry, the documents on board and the ship's seal, which contained the words "SAIGA Kingstown" and the charter-party which recorded Saint Vincent and the Grenadines as the flag State. This is very weak reasoning.

12. The *Saiga* was bought through an auction by Tabona Shipping Company of Cyprus in February 1997. The new owners decided to register it in Saint Vincent and the Grenadines and two weeks after buying the vessel, Tabona Shipping Company submitted an application. A Provisional Certificate was issued on 14 April 1997, valid up to 12 September 1997. A Permanent Certificate was issued on 28 November 1997.

13. The relevant provisions in the Merchant Shipping Act are sections 36, and 37. They state:

> 36. (1) Where any ship, registered under a flag other than the national flag of Saint Vincent and the Grenadines, is sought to be registered provisionally as a Saint Vincent and the Grenadines ship under this Act, an application shall be made for the purpose, by or on behalf of the owner, to the Registrar or the Commissioner, and every such application shall contain such particulars, comply with such formalities, be accompanied by such documents and be subject to payment of such fee as may be prescribed, and upon compliance the Registrar or the Commissioner, as the case may be, shall issue a provisional certificate of registration of the ship.
>
> (2) The provisional certificate of registration issued under subsection (1) shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue.
>
> (3) Every applicant for registration of a ship under this section shall, without prejudice to the generality of the provisions of subsection (1), produce the following evidence, namely -
>
> (*a*) in respect of the ship -
>
> (i) evidence to establish that any foreign certificate of registration or equivalent document has been … duly closed;
>
> (ii) if there is an outstanding certificate, evidence to show that the government who issued it has consented to its surrender for cancellation or closure of registration; or

(iii) a declaration from previous owners undertaking to delete the ship from the existing registration and confirming that all outstanding commitments in respect of the ship have been duly met;

(*b*) evidence to show that the ship is in a seaworthy condition;

(*c*) evidence to show that the ship has been marked as provided in section 22 or that the owner of the ship has undertaken to have the ship so marked immediately upon receipt of a provisional certificate of registration;

(*d*) evidence of payment of the fee due on the first registration and of the annual fee for one year in respect of the ship.

…

37. The provisional certificate of registration shall cease to have effect if, before the expiry of sixty days from its date of issue, the owner of the ship in respect of which it was issued has failed to produce to the issuing authority -

(*a*) a certificate issued by the government of the country of last registration of the ship (or other acceptable evidence) to show that the ship's registration in that country has been closed; or

(*b*) evidence to show that the ship has been duly marked as required by section 22.

14. It will be noted that under sections 16, 17, and 18 of the Merchant Shipping Act a ship does not get registered until all the conditions for the grant of nationality are cumulatively fulfilled. A mere application does not entitle a ship to registration and nationality. The procedure for provisional registration is, however, different as can be seen in sections 36 and 37.

15. In such a case, once an application is made a provisional registration is immediately effected. That provisional registration confers temporary nationality to the ship while at the same time it retains its existing nationality for a short time. Under the law of Saint Vincent and the Grenadines the time allowed for a ship to have double nationality is two months. Two conditions are set by the Act, conditions which will lead to the loss of the temporary nationality if they are not performed. The first condition is for the owners of the ship to terminate the nationality of the previous flag State and the second is the inscription of "Kingstown" as the port of registry.

16. The question is whether the *Saiga* had fulfilled the conditions for provisional registration at the time of its arrest in October 1997. In my view the answer is in the negative. Two conditions under section 37 had to be satisfied in the first two months. One of them, the inscription of "Kingstown" on the ship, was satisfied. But there was no evidence that the second condition of terminating the nationality of Malta was fulfilled. Saint Vincent and the Grenadines failed completely to provide evidence on this point.

17. The issue of the registration of the *Saiga* was first raised by Guinea as follows:

> 10. The MV "SAIGA" was built in 1975. On the day of its arrest by Guinean authorities on 28 October 1997, it was not registered under the flag of St. Vincent and the Grenadines. As can be seen in Annex 13 of the Memorial, the MV "SAIGA" had been granted a Provisional Certificate of Registry by St. Vincent and the Grenadines on 14 April 1997. This Provisional Certificate, however, had already expired on 12 September 1997. The MV "SAIGA" was arrested more than a month later.
>
> The Permanent Certificate of Registry has only been issued by the responsible authority of St. Vincent and the Grenadines on 28 November 1997. It is thus very clear that the MV "SAIGA" was not validly registered in the time period between 12 September 1997 and 28 November 1997. For this reason, the MV "SAIGA" may [be] qualified to be ***a ship without nationality*** at the time of its attack.
> (see Counter-Memorial, paragraph 10)

18. Saint Vincent and the Grenadines responded as follows:

> 24. … When a vessel is registered under the flag of St Vincent and the Grenadines it remains so registered until deleted from the registry in accordance with the conditions prescribed by Section 1, articles 9 to 42 and 59 to 61 of the Merchant Shipping Act 1982. At the time of registration a provisional certificate of registry is issued, followed by a permanent certificate of registry when certain conditions are satisfied. In the case of the M.V. *Saiga* her location prevented delivery on board of the permanent certificate but this in no way deprived the vessel of its character as Vincentian nor had the effect of withdrawing it from the register. Had there been any doubt in this regard, inspection of the Ship Register would have eliminated it. Further re-confirmation of this position is supplied with this Reply.
> (see Reply, paragraph 24)

19. In October 1998, the Commissioner for Maritime Affairs had written as follows:

> TO WHOM IT MAY CONCERN
> …
> I hereby confirm that m.t. "SAIGA" of GT 4254 and NT 2042 was registered under the St. Vincent and the Grenadines Flag on 12th March, 1997 and is still today validly registered.
> (see Annex 7 to Reply)

20. It is significant to note that the Commissioner for Maritime Affairs wrote this letter after Guinea had raised the issue of registration in the Counter-Memorial. It is also significant to note that the statement that the location of the *Saiga* prevented the delivery of the Permanent Certificate is not true because that certificate was issued after the arrest of the vessel. Guinea replied as follows:

14. St. Vincent and the Grenadines initially produced in Annex 13 of the Memorial a Provisional Certificate of Registry for the M/V "SAIGA" dated 14 April 1997 and a Permanent Certificate of Registry dated 28 November 1997. In Annex 7 of the Reply, there is now produced a declaration of the Maritime Administration of St. Vincent and the Grenadines in Geneva dated 27 October 1998. It is addressed "to whom it may concern" and confirms that the M/V "SAIGA" was registered under the flag of St. Vincent and the Grenadines on 12 March 1997 and would still be validly registered today, *i.e.* on 27 October 1998.

15. St. Vincent and the Grenadines argues that the M/V "SAIGA" had its nationality on the relevant date of 28 October 1997, because a vessel once registered under the flag of St. Vincent and the Grenadines remains so registered until deleted from the Registry. This, however, is neither reflected in the 1982 Merchant Shipping Act of St. Vincent and the Grenadines, nor in the above-mentioned certificates of registry. The Provisional Certificate expressly states that it "expires on 12 September 1997." According to Section 37 of the Merchant Shipping Act, a provisional certificate of registry shall cease to have effect even earlier, namely before the expiry of 60 days from the date of issuance of the certificate if the owner of the vessel failed to produce some documents. In any case, the latest date when the Provisional Certificate for the M/V "SAIGA" could have expired is 12 September 1997. Contrary to the assertion of St. Vincent and the Grenadines, there is no section in the Act that provides that a provisionally registered vessel remains registered until deleted from the Registry.
(see Rejoinder, paragraphs 14 and 15)

21. At the close of the written proceedings it appeared that registration of the *Saiga* would be one of the key issues. The Tribunal, acting in accordance with its rules of procedure, required the parties to submit certain documentation. Among other things Saint Vincent and the Grenadines was required to submit documentation on the registration of the *Saiga* (see letter of 4 February 1999 from the Registrar). The Deputy Commissioner for Maritime Affairs responded on 1 March 1999 as follows:

I refer to the recent request from the International Tribunal for the Law of the Sea for further documentation on the registration status of the MV "SAIGA" on 27th October including a copy of the register entry of the MV "SAIGA" in the Register of Ships of Saint Vincent & the Grenadines as at 27th October 1997. I can advise the Tribunal as follows:

The registration of the MV "SAIGA" was recorded on 26th March 1997 and a copy of the Registry Book page was printed on 15th April 1997 as appears at "A". I can confirm that the Owners of the "SAIGA" fulfilled the requirements of Article 37 of the Merchant Shipping Act (the "Act") having provided satisfactory evidence that (a) the ship's registration in the country of last registration had been closed; and (b) the ship had been duly marked as required by Section 22. A copy of the Ship's Carving and Marking Note in respect of (b) above appears at "B". The Register entry made on 26.03.1997 accordingly remained effective as at 27th October 1997.

> The Registry Book page could have remained the same for up to a year in accordance with Section 36 (2) of the Act unless the MV "SAIGA" had been deleted from the Register (in which case a copy of the Registry Book page would have been issued showing this). An example of a Registry Book page showing a vessel that has been deleted appears at "C". However this was not the case with the "SAIGA" which remained provisionally registered until 28th November 1997 when a Permanent Certificate of Registry was issued. The Registry Book page would have been changed around this time to show that a Permanent Certificate had been issued and a copy of the Registry Book page showing this as issued at a subsequent date appears at "D".
>
> I should add that it is Registry practice for Provisional Certificates of Registry to be issued for six-month periods as was done with the "SAIGA". One purpose of this is to encourage owners to comply with the formalities of permanent registration sufficiently in advance of the one-year validity period of the provisional registration period under Section 36 (2) of the Act.
>
> Moreover, in my experience it is very common for Owners to allow the validity period of the initial Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate (as was the case here). However, for the reasons given above this does not affect the fact that the MV "SAIGA" remained validly registered in the Register of Ships of Saint Vincent & the Grenadines as at 27th October 1997.
>
> I trust this assists.
> Best regards,
>
> Najla Dabinovic
> Deputy Commissioner for Maritime Affairs
> (*Signed*)

22. As can be seen from the letter the Deputy Commissioner submitted a copy of the relevant page of the Registry book and a copy of the Ship's Carving and Marking Note but did not submit the certificate of deletion from the Registry of Malta.

23. At the oral hearing Counsel for Guinea made the following comment:

> I am a little astonished about the deletion certificate from the former Registry. We have heard that the *Saiga*, before it was bought in auction by the Tabona Shipping Company, was registered under the Maltese flag. I would have expected that if the idea or purpose is to give all evidence possible, then such a certificate would be enclosed, as the other one, the Declaration of the Classification Society of the Russian Registry, is enclosed.
> (see ITLOS/PV.99/8 of 11 March 1999)

24. The Tribunal still considered it important to have documentary evidence on the deletion of the *Saiga* from the Malta Register. On behalf of the Tribunal and again in accordance with the rules of procedures, the President conveyed this, among other matters, to the parties at a meeting

on 2 March 1999. (Dr. Plender, Counsel for Saint Vincent and the Grenadines, referred to this meeting in his submission on 18 March 1999 (see ITLOS/PV.99/16, page 15).) Saint Vincent and the Grenadines still failed to produce documentary evidence.

25. On March 11, 1999, during the oral hearing Guinea made the following submission:

> The Republic of Guinea maintains that the M/V *Saiga* was not validly registered under the flag of Saint Vincent and the Grenadines on the day of its arrest by the Guinean Customs authorities on 28 October 1997. Thus, the requirements of article 91 of the Convention are not fulfilled and the M/V *Saiga* may be qualified to have been a ship without nationality at the time of its attack.
>
> The tanker had been granted a Provisional Certificate of Registry by Saint Vincent and the Grenadines on 14 April 1997. The expiry date of this Provisional Certificate was already up on 12 September 1997, more than a month before its arrest. A Permanent Certificate of Registry had only been issued by the responsible authority of Saint Vincent and the Grenadines on 28 November 1997, exactly one month after the arrest of M/V SAIGA. The logical conclusion is that M/V SAIGA was not validly registered in the time period between 12 September 1997 and 28 November 1997.
> …
>
> There are only two relevant provisions of that Act dealing with provisional certificates of registration: sections 36 and 37.
>
> In her reply, Saint Vincent and the Grenadines referred particularly to section 37, which reads:
>
> > "The provisional certificate of registration shall cease to have effect if, before the expiry of 60 days from its date of issue, the owner of the ship in respect of which it was issued has failed to produce to the issuing authority
> >
> > (a) a certificate issued by the government of the country of last registration of the ship (or other acceptable evidence) to show that the ship's registration in that country has been closed; and
> >
> > (b) evidence to show that the ship has been duly marked as required by section 22."
>
> This provision deals with special circumstances, namely the failure to produce certain documents in which a provisional certificate ceases to have effect only after two months of its issuance. The wording was:
>
> > "the provisional certificate shall cease to have effect before the expiry of sixty days from its date of issue".

> If these two documents had not been provided within the time period of 60 days after the issuance of the provisional certificate, this provisional certificate would be invalid after 60 days. That is the clear meaning of section 37.
> (see ITLOS/PV.99/8, pp. 36 and 37)

26. On 18 March 1999 the Tribunal again addressed a communication to Saint Vincent and the Grenadines as follows:

> I refer to the note "Completion of Documentation" transmitted to you on 4 February 1999 (copy attached). May I draw your attention to item 14 of the note regarding any documentary record concerning the deletion of the "Saiga" from the Register of Malta.
> (see letter of 18 March 1999)

27. The response of Counsel for the Applicant was as follows:

> 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 the 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.
> (ITLOS/PV.99/16 of 18 March 1999)

28. Guinea responded to the statement of Saint Vincent and the Grenadines in the following manner:

> The Deputy Commissioner, as well as Dr. Plender, failed to explain what was the other acceptable evidence that apparently proved that the registration in the former registry had been closed. There would be no other acceptable evidence besides a deletion certificate of the Maltese register. The fact that Saint Vincent and the Grenadines is not in a position to provide the International Tribunal with such a deletion certificate serves, in my view, as clear evidence that the M/V *Saiga* was not deleted from the Maltese Registry at the time of the arrest. I have no doubt that the International Tribunal will also come to this conclusion, particularly when considering Dr. Plender's explanation for not having produced the deletion certificate when he said it is unnecessary to trouble the Tribunal with details of her history under a different name and registry.
> (see ITLOS/PV.99/18 of 20 March 1999)

29. I accept the argument of Guinea. The Tribunal had addressed written communication twice and oral communication once to Saint Vincent and the Grenadines and Counsel knew well the importance of providing a certificate of deletion from the Maltese government or "other acceptable evidence". The Tribunal specifically wanted this evidence but Counsel brushed aside the request. There is no other conclusion except to accept that there was no deletion of the *Saiga* from the

Registry of Malta. On this point alone the *Saiga* had lost its provisional registration and provisional nationality two months after March 26, 1997. The *Saiga*, therefore, did not have the nationality of Saint Vincent and the Grenadines when it was arrested in October 1997.

30. It was stated by Saint Vincent and the Grenadines that section 36(2) overrides any practice and instructions to the extent that they are inconsistent with it (and the Tribunal implicitly seems to have accepted this argument). This argument is without merit. The official brochure (see Memorial, Annex 5) states clearly that the practice of Saint Vincent and the Grenadines is to issue a provisional certificate for six months and if need arises extend it for another six months. There is nothing in the Merchant Shipping Act which forbids the authorities to issue a provisional certificate of any duration. The Applicant submitted evidence that showed that other States in the region have similar laws and practice on the issue. Clearly section 36(2) is not an extension section but rather a limiting one. What it says is that provisional registration cannot exceed one year. It can be less, but whenever it is valid the holder has the same rights that are accorded under an ordinary certificate. There is nowhere in the Act a provision which states that section 36(2) revives an expired certificate.

31. The *Saiga* was provisionally registered in March 1997. The provisional registration expired on 12 September and it was not renewed. Since no permanent certificate was issued during that time the assumption is that not all the conditions for the acquisition of nationality had been satisfied. The provisional registration was not extended or renewed and Saint Vincent and the Grenadines and the shipowner admitted in evidence that there was a lapse. This means provisional nationality lapsed at the latest on 12 September 1997. From that date, the *Saiga* did not possess the nationality of Saint Vincent until 28 November 1997. So when it was arrested on 28 October 1997, it did not have the right to fly the flag of Saint Vincent and the Grenadines.

32. In paragraph 72 the Judgment has in some way established a standard of appreciation of the evidence. That paragraph reads as follows:

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

33. The Tribunal, by this paragraph, is in fact saying that the burden of proof was initially on Saint Vincent and the Grenadines. That burden is not of a high standard but something less. After that the burden would shift to Guinea. The Tribunal has not explained what sort of standard Saint Vincent and the Grenadines had to meet but when the Tribunal talks simply of initial burden it sounds like Saint Vincent and the Grenadines was only under obligation to produce *prima facie* evidence. I do not believe that standard was applicable here. I do not however feel the need to discuss the issue because I believe the burden was all the time on Guinea to prove that the *Saiga* was not registered at the time of the arrest. I say so because the issue of registration was raised by Guinea and it was incumbent upon her to prove it.

34. The evidence required to prove that a ship has the nationality and is registered in Saint Vincent and the Grenadines under the terms of article 91 of the Convention in reality consists of documents. The first important document was the Merchant Shipping Act 1982. That Act was important in order to ascertain the conditions of nationality and registration as determined by Saint Vincent and the Grenadines in terms of article 91, paragraph 1, of the Convention.

35. Under the Merchant Shipping Act provisional registration is signified by the issue of a provisional certificate. The Provisional Certificate was submitted to the Tribunal and it indicated that it was issued on 14 April 1997 and would expire on 12 September 1997. The same procedure is followed with regard to a permanent certificate. The Permanent Certificate was also presented to the Tribunal and it indicated that it was issued on 28 November 1997. The Merchant Shipping Act also requires that registration should be recorded in the Registry Book. The relevant page of the Registry Book was produced and it showed that the *Saiga* was registered on 12 March 1997 and recorded in the book on 26 March 1997 and registration would expire on 12 September 1997. Lastly the Merchant Shipping Act requires the marking of the ship and the production of a certificate of deletion from the previous State of registry. A Carving and Marking Note was produced, dated 14 April 1997. Guinea and the Tribunal requested Saint Vincent and the Grenadines to provide the deletion certificate or other acceptable evidence of deletion but Saint Vincent and the Grenadines failed to do so.

36. The Merchant Shipping Act 1982 does not specifically provide for the duration of a provisional certificate, but the Tribunal was provided with the official brochure of the Government of Saint Vincent and the Grenadines, which stated:

> The provisional registration certificate is issued for six months and can be extended, under certain circumstances, for a further period of six months.

37. That is the official practice of Saint Vincent and the Grenadines given in an official document. But other documents were submitted which appeared to give a contrary view. The first one was the letter of the Commissioner for Maritime Affairs dated 27 October 1997 which stated that the *Saiga* was registered on 12 March 1997 and was still registered. This cannot be accepted because the Certificate, as issued and recorded, was to expire on 12 September 1997 and the Permanent Certificate had not been issued on 27 October 1997 (it was issued on 28 October 1997).

38. The other document, which was submitted, was the letter of the Deputy Commissioner for Maritime Affairs dated 1 March 1997. This letter makes several statements. It states that the registration of the *Saiga* was recorded on March 26 1997, which agrees with the entry in the Registry Book. It also states that the owners had provided satisfactory evidence that the registration in the previous registry had been closed (but that evidence was not produced). It further states that the duration for a provisional certificate, according to section 36(2) of the Merchant Shipping Act, was one year. And finally it states that the Provisional Certificate had expired.

39. The basis for the Tribunal accepting the evidence of Saint Vincent and the Grenadines is contained in paragraph 67 of the Judgment, which reads:

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

40. The Tribunal has not given a list of the documents on board the *Saiga* but the only document produced at the hearing, which had relevancy to registration as required by the law of Saint Vincent and the Grenadines, was the Provisional Certificate, which had expired. The other documents including the charter-party had no relevance to registration. They were documents which had relevancy to administration and operational matters.

41. The inscription of "Kingstown" on the stern of the vessel is one of the conditions for provisional registration, which had to be fulfilled in the first two months. The other was the certificate of deletion from Malta, which could not be produced. The non-production of that document alone deprived the vessel of provisional registration.

42. The Tribunal also has not identified the provisions in the Merchant Shipping Act that Saint Vincent and the Grenadines made reference to. But the provision, which was referred to, is section 36(2) which states that "[t]he provisional certificate of registration issued under subsection (1) shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue". It had been stated by the Deputy Commissioner that this provision extends the duration of the certificate to one year. Counsel for Saint Vincent and the Grenadines put a lot of emphasis on it. I have rejected this explanation (see paragraph 30).

43. Judge Anderson, in his Separate Opinion, makes the point that the meaning and effect of, in particular, section 36(2) was explained in regard to the Provisional Certificate of Registration. I disagree. The explanation, which was offered, came from the Deputy Commissioner for Maritime Affairs in her letter of March 1999. Certainly it cannot be held that the Deputy Commissioner is competent to explain legislation. The other "explanation" came from Counsel for Saint Vincent and the Grenadines. If that explanation has to be taken into account the contrary explanation of the Counsel for Guinea should also be taken into account.

44. In any case the statement of the Deputy Commissioner is full of contradictions. The Commissioner is the one who issued the Provisional Certificate and stated it would expire after six months. This must have been done in accordance with the law. So it is a contradiction to turn around and say the duration of a provisional certificate is one year. Secondly she admits in the same letter that the Provisional Certificate had lapsed. Lastly the statement of the Deputy Commissioner contradicts the explanation in the official brochure. Clearly the official

explanation in the brochure should be accepted over the explanation of the Commissioner, who in any case would be interested to defend herself in a situation where it appears something was wrong.

45. The majority has accepted the explanation of the Deputy Commissioner to the effect that satisfactory evidence was provided by the owners (paragraph 70 of the Judgment). The statement of acceptance has been made without giving reasons. It is, however, disturbing for the majority to take this position. It is the Tribunal itself which insisted on the production of the deletion certificate or other acceptable evidence. The Deputy Commissioner gave her explanation on 1 March 1999. The Tribunal was not convinced and that is why on 18 March 1999 it wrote another letter asking for documentary evidence. It is disturbing that the explanation which was not convincing up to the end of the oral hearing has suddenly become convincing without explanation.

46. The second ground on which the Judgment is based is what is termed as the consistent behaviour of the Applicant. It is argued that the Applicant has operated at all times as the flag State in all the phases of the case. This is indeed a strange argument in the context of article 91 of the Convention. Under that article, as has already been stated, States have exclusive jurisdiction to set the conditions for the grant of nationality to ships. Saint Vincent and the Grenadines has set those conditions in the Merchant Shipping Act. Either a ship is registered under those conditions or it is not registered. The behaviour of Saint Vincent and the Grenadines will not change what is in its law, it will not change the words on the Certificate of Registration, and it will not change what is inscribed in the Book of Registry.

47. The Tribunal is in a way trying to amend the Convention by introducing new conditions outside article 91. Under that article it is only the flag State which can fix conditions for registration of ships. If the Tribunal determines that the consistent behaviour of a State should lead other States to accept it as a condition of registration it will be a violation of the principle of exclusive jurisdiction enshrined in article 91 of the Convention.

48. It is relevant to note that Saint Vincent and the Grenadines admitted on three occasions that the Provisional Certificate had expired on 12 September 1997. On 27 November 1997, during the proceedings on prompt release of the vessel (*M/V "SAIGA"* case, prompt release), Guinea raised the issue of ownership of the *Saiga*. The next day, on 28 November, Counsel for the Applicant had this to say:

> The second preliminary point to address that was raised by Guinea yesterday concerns the ownership of the vessel, M/V *Saiga*. From the information that we have it is very clear that the owners, Tabona Shipping Company Limited, are indeed the owners. We have been able to obtain this morning a provisional certificate of registration from St Vincent and the Grenadines, which unfortunately, although dated 14 April 1997, is dated to expire on 12 September 1997. Efforts are being made to obtain the no longer provisional but full certificate of registration on behalf of the owners. We hope that we will be able to get this to the Tribunal at the latest during the adjournment.
> (see ITLOS/PV.97/2, page 5)

49. The second time was the letter of the Deputy Commissioner of Maritime Affairs of 1 March 1999 and the third time was the evidence of Mr. Stewart at the oral hearings. In the face of this one cannot seriously accept the explanation of the Deputy Commissioner.

50. The third ground on which the Judgment of the Tribunal is based is the behaviour of Guinea. It is argued that Guinea did not make inquiries about registration or documentation relating to it nor did it raise the issue during the prompt release proceedings in November 1997 and the provisional measures proceedings in February 1998. It is also alleged that Guinea cited Saint Vincent and the Grenadines in the *cédule de citation* by which the Master was charged in the courts of Guinea. The Tribunal is trying without explaining itself to introduce some notions of estoppel or preclusion or acquiescence. Clearly these principles do not apply here when the provisions of article 91 of the Convention are so clear on registration and nationality of ships.

51. When a State arrests a ship, as Guinea did, it is under no obligation to first ascertain its nationality before taking measures. The facts of registration were with Saint Vincent and the Grenadines. If anything it is the behaviour of Saint Vincent and the Grenadines which misled Guinea to believe at the beginning that the *Saiga* was validly registered and had its nationality. Guinea in fact raised issues which should have led Saint Vincent and the Grenadines to disclose the fact of registration at the prompt release proceedings in November 1997. When Guinea raised the issue of ownership Saint Vincent and the Grenadines announced to the Tribunal that the Provisional Certificate had expired, Saint Vincent and the Grenadines promised the Tribunal the delivery of a valid certificate on 28 November 1997. It did not honour that promise because the certificate did not exist. It was issued on the same day. On three occasions the Tribunal asked Saint Vincent and the Grenadines to produce a deletion certificate without success. If it is a question of bad faith it is on the side of Saint Vincent and the Grenadines and it is utterly surprising for the Tribunal to pin this on Guinea. Clearly this is not a case of estoppel, preclusion or acquiescence.

52. The fourth ground on which the Tribunal has relied is the need to go into the merits in order to achieve justice. The Tribunal has given absolutely no explanation as to what are the particular circumstances of this case which have made it so important that the Tribunal must go to the merits. It would appear, however, that this is the main ground on which the majority have based their decision. No one can dispute the importance of the issues involved in this case. But important issues arise in all manner of cases and they cannot be a basis for a court or tribunal to decide that procedural issues are less important. In fact it is dangerous for a tribunal to brush aside important issues of procedure simply because it feels it has to deal with the merits. It is even more serious when the Tribunal does not explain the justification. It could lead to arbitrary decisions.

53. But my main problem with the Judgment is the manner by which the Tribunal has reached its decision. The Tribunal received sufficient documentary evidence which should have been evaluated in order to come to the proper conclusion. The Tribunal had before it the Merchant Shipping Act 1982, which properly responds to the requirement in article 91 that "[e]very State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag". It had before it the documents which are required under article 91. There was the Provisional Certificate, which clearly stated the date of expiry,

12 September 1997. There was also an extract from the Register of Ships, which showed again the expiry date of the provisional registration to be 12 September 1997. There was also the ordinary Certificate of Registration, which showed that permanent registration took place on 12 November 1997.

54. In addition, the Tribunal had before it the official brochure of the Government of Saint Vincent and the Grenadines explaining generally the registration procedure. The Tribunal, in formal communication by letter and formal meetings, requested documentation relevant to the Merchant Shipping Act 1982, the deletion certificate in particular. The parties addressed this issue sufficiently in the written proceedings and, with the indications of the Tribunal, they addressed the issue of registration very extensively.

55. All this evidence is on record but the Tribunal has not made an evaluation. It has instead relied mainly on the behaviour of the parties and the need to deal with the merits. There is absolutely no evidence on these issues on the record.

56. It is a cardinal principle of law that a person should not be judged without being given the opportunity to be heard. I believe the Tribunal has based its decision mainly on issues on which the parties were not given the opportunity to be heard. The Tribunal did not request the parties to address it on the issues of the behaviour of Saint Vincent and the Grenadines and the behaviour of Guinea as an issue of relevance. Nor did the Tribunal request the parties to address it on the importance of dealing with the merits. The parties were requested to address the Tribunal on a number of issues, sometimes with clear insistence, but in the end the Tribunal has not attached the importance that was expected on those issues. I have explained one of them in some detail; the question of the deletion of the *Saiga* from the Maltese Register. By taking a different approach in reaching its decision the Tribunal did in a way mislead the parties. The parties were led by the Tribunal to produce certain evidence and argue certain points, but in the end the Tribunal has not considered that evidence. It has relied on something different.

57. The Tribunal has used its discretion and power to consider evidence which was not submitted before it. In my opinion the Tribunal is showing a tendency of being more conscious of its power than the need to act with fairness. In my Separate Opinion during the provisional measures stage of this case I had cautioned on the arbitrary use of the Tribunal's discretion. That caution has not been taken account of.

58. Paragraph 71 of the Judgment reads:

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

The majority has adopted this paragraph as part of its reasoning. Although the Judgment gives no explanation whatever for this statement, it is plain that what the majority is trying to imply is that the issue of nationality had been decided by the Tribunal in its Judgment of 4 December 1997 and the Order of 11 March 1998. In other words the majority holds the issue is *res judicata*. This is not true and it is grossly misleading. As Vice-President Wolfrum has stated in

his Separate Opinion, the issue of nationality had not been raised at that time. In any case the Tribunal had stated clearly that that issue was not relevant in the prompt release case. Saint Vincent and the Grenadines did not raise it in these proceedings nor did the Tribunal require the parties to address it. In any case counsel for Saint Vincent had misled the Tribunal as I have shown in paragraph 51 above. It is utterly wrong to introduce the notion of *res judicata* without explanation, and especially when there is no ground in doing so.

59. I also differ with the Judgment of the Tribunal on the issue of non-exhaustion of local remedies. The first ground on which the Tribunal has based its conclusion is that the claims of Saint Vincent and the Grenadines concern direct violations of the right of the State. The Tribunal has absolutely made no attempt to examine whether these claims have been substantiated. The claims have been taken at face value without the evaluation of the evidence. To quote paragraphs 96 and 97 of the Judgment:

> 96. It follows that the question whether local remedies must be exhausted is answered by international law. The Tribunal must, therefore, refer to international law in order to ascertain the requirements for the application of this rule and to determine whether or not those requirements are satisfied in the present case.
>
> 97. The Tribunal considers that in this case the rights which Saint Vincent and the Grenadines claims have been violated by Guinea are all rights that belong to Saint Vincent and the Grenadines under the Convention (articles 33, 56, 58, 111 and 292) or under international law. The rights claimed by Saint Vincent and the Grenadines are listed in its submissions and may be enumerated as follows:
>
> (a) the right of freedom of navigation and other internationally lawful uses of the seas;
>
> (b) the right not to be subjected to the customs and contraband laws of Guinea;
>
> (c) the right not to be subjected to unlawful hot pursuit;
>
> (d) the right to obtain prompt compliance with the Judgment of the Tribunal of 4 December 1997;
>
> (e) the right not to be cited before the criminal courts of Guinea.

60. The Tribunal, therefore, rejects Guinea's objection on the ground that the claims of Saint Vincent and the Grenadines concern direct violations of the right of the State. It will be noted that the Tribunal has made its decision on the basis of the claims of Saint Vincent and the Grenadines. It has not even made a finding whether these claims were founded. In other words the Tribunal has made a decision without evaluating the evidence.

61. I have read the Separate Opinion of Vice-President Wolfrum and Judge Rao and I largely share their reasoning and I also share their conclusions on this point. The facts of this case show that the rights which could have been violated are rights of the ship embodied in article 111, paragraph 8, of the Convention. The rights of States are referred to in article 58 and elaborated

in article 87 of the Convention. The arguments of Saint Vincent and the Grenadines on this point were not convincing. The award of damages in paragraph 175 and the decision in paragraphs 176 and 177 clearly demonstrate that this is a case of diplomatic protection and not of direct injury to Saint Vincent and the Grenadines and therefore the rule on the exhaustion of local remedies should apply.

62. The Tribunal has also rejected the objection on the ground that there was no jurisdictional connection between the State of Guinea and the *Saiga*. The reason that the Tribunal has given is that the laws that Guinea applied were incompatible with the Convention, particularly articles 56 and 58.

63. Throughout the proceedings Saint Vincent and the Grenadines argued that the laws of Guinea could not apply to the *Saiga*. In particular Saint Vincent and the Grenadines laid emphasis on the non-applicability of the customs laws of Guinea in the exclusive economic zone (see Memorial, paragraphs 106-113; Reply, paragraphs 122-125; ITLOS/PV.99/2, pages 4-9; ITLOS/PV.99/16; ITLOS/PV.99/7, pages 4-14).

64. On the other hand Guinea argued that its laws, including customs laws, apply to the exclusive economic zone in order to protect public interest in accordance with rules of international law not incompatible with the Convention (article 58, paragraph 3). Guinea argued that the measures were taken to fight contraband (smuggling) (see Counter-Memorial, paragraphs 109-115; Rejoinder, paragraphs 92-103; ITLOS/PV.99/18, pages 4-5, 16-20).

65. The Tribunal has accepted the argument of Saint Vincent and the Grenadines and in doing so it has laid emphasis on the point that the *Saiga* did not import gas oil into the territory of Guinea. The facts of the case however point in a different direction.

66. Guinea has maintained throughout the proceedings that its laws and measures were intended to protect public interest by fighting smuggling. Indeed, Counsel for Saint Vincent and the Grenadines conceded that Guinea had used the word "smugglers" sixteen times in the proceedings (see ITLOS/PV.99/16, page 9). Guinea maintained the same position in the prompt release proceedings (*M/V "SAIGA"* case). The Judgment of the Tribunal has, however, omitted mention of the evidence and arguments on smuggling along the West Coast of Africa.

67. The laws of Guinea which are relevant in this connection are:

1. L/94/007/CTRN of 15 March 1994;
2. The Merchant Marine Code;
3. The Customs Code;
4. The Penal Code.

68. Of all the laws of Guinea which have been submitted in this case the governing law was L/94/007/CTRN. In paragraph 38 of the Judgment the Tribunal has acknowledged that the Master of the *Saiga* was convicted under L/94/007/CTRN.

69. The Tribunal in its reasoning and finding in paragraphs 110–136 of the Judgment has based itself on the term "importation" and as a result it has characterised L/94/007/CTRN as a customs law. Following that reasoning the Tribunal has reached the conclusion that the application of customs laws in the exclusive economic zone is not compatible with the Convention.

70. The law, however, deals not only with importation but also distribution, storage and selling of fuel. The Tribunal has selected only the word import from this law, as Saint Vincent and the Grenadines did, and based all its arguments on that word or term. In other words the Tribunal has adopted the argument of Saint Vincent and the Grenadines for its reasoning and has chosen to completely keep silent on the arguments of Guinea. Secondly, the Tribunal has for unexplained reason characterised this law as a customs law of general application whereas it is quite clear it is a law which is *specifically intended to deal with smuggling by fishing vessels licensed by Guinea to operate in the exclusive economic zone of Guinea* (see Counter-Memorial, Annex16; Reply, Annex 18).

71. The title of the law is not "customs" but "the fight against fraud". The title of the law reads: "Law no. L/94/007/CTRN of March 15th 1994 concerning the fight against fraud covering the import, purchase and sale of fuel in the Republic of Guinea".

72. A law does not become a customs law purely because it includes customs provisions; in as much as a law does not become a penal or criminal law simply because it includes criminal offences. The Fishing Code of Guinea, which was submitted to the Tribunal, has provisions on fiscal matters and criminal offences. That does not make it a taxation law or a criminal law. It remains a law to regulate fishing and in doing so it is necessary to include fiscal and criminal offences provisions. Article 33 of the Convention mentions customs and fiscal laws among other laws. That does not make it an article dealing with customs laws only. It is a provision intended to protect public interest in the contiguous zone. The purpose of L/94/007/CTRN was to fight smuggling of fuel into Guinea. The use of customs law was primarily intended to fight smuggling, which is an offence which affects the fiscal interests of a State.

73. The seriousness of smuggling along the coast of Guinea and the coast of West Africa generally was adequately given in evidence during both the prompt release (*M/V "SAIGA"* case) and these proceedings. The clearest evidence was, ironically, given by Saint Vincent and the Grenadines, through Mr. Marc Vervaet. He was one of the principal witnesses of Saint Vincent and the Grenadines and this is part of what he said:

> I am the regional manager of the ADDAX and ORYX Group ("AOG") responsible for the area covering the western coast of Africa from Morocco down to Sierra Leone. I am also in charge of ORYX Senegal S. A. ("ORYX"), a company afflicted to AOG. I have been based in Dakar in these roles since 1990.
> …
>
> Our experience over the recent past is that Guinea has a different regime than the other jurisdiction in the area. I cannot recall precisely where I first heard that the Guinea authorities acted illegally but for some time it has been suggested that navy patrol boats have demanded money or stores from tankers and fishing trawlers unlucky enough to get in

their path. Initially, and without any direct experience or specific details, I was of the view that the navy vessels were simply taking what could be described as “undue advantage” of local regulations (for example if they found a fishing trawler without an appropriate licence). Accordingly, I was not unduly concerned about the safety of our vessels operating in the area.
…

The smuggling of petroleum products into the territory of Guinea has long been a thorn in the eye of World Bank Officials offering cheap loans but to see government revenues slipping away. Individuals, foreigners or nationals alike, enriched themselves over the years cashing in huge margins on fuels they sold onshore.

The system was quite easy: a tanker or converted fishing trawler was stationed in front of the port of Conakry, the capital city of Guinea, containing stocks of gasoil, the most popular fuel in the country, and supplying all sizes of fishing boats and canoes with 200 litres drums of gasoil. These drums were then transported to the shore and sold well below the market price but with profit margins of 100% to 200%. The secret of the system was that this interesting profit had to be shared with the customs and navy officers who authorised and participated in this official smuggling ring.

The individuals who unwillingly developed the idea were German barge owners who transported gasoil from the port by the river upcountry to end users like mining companies. Though legal those days, since mining companies were exonerated on excise taxes and duties, consumption steadily increased because of demand for cheaper fuel available through the absence of customs control, on the contrary, with the help of those same officers, a system came into place until for one or other reason, the Germans were ordered to pull out.

Nevertheless, it didn't take long until resident foreigners was a lucrative and available market and with the military and customs officers short in money, corruption flourishing at that time, profit sharing for privileges was a common practice. Personal favours given by higher authorities in a country like Guinea short in money but rich in resources has always been a popular sport and official at higher levels were all involved in all kinds of trafficking.

The next distributor for the coastline was an Italian with Greek connections (Mr. “Olivier”), owner of an old Polish trawler, its holds converted into gasoil tanks and not much later when things were flourishing, a second converted trawler was positioned on the roads of Conakry port. The successful distribution of gasoil even made him collect all existing empty drums to satisfy the demand and at a rhythm of 600,000 litres per month, he continued so for about two years until another petroleum pirate, a Greek named Dimoulas came up with an even bigger ship called the Africa causing a rivalry between the two, fighting for the favour of the military and customs officers who shared in the profit. It didn't take long before the Italian had to back off and leave the market to the Greek who was better organised and also started providing the fishing fleet with fuel in large quantities.

> As an experienced smuggler, he found his gasoil on the Nigerian market, gasoil reserved for the local Nigerian fishing fleet paid cheap local currency and smuggled out to Guinea.
>
> But under pressure from the World Bank and after a new government was installed in 1995, one of the conditions imposed to benefit from World Bank loans, a crackdown on this traffic started under the leadership of the Customs and Navy.
>
> At once, the smuggling was sharply reduced with the arrest of the AFRICA who was released after long negotiations with the customs department ending with confiscation of remaining cargo and a cash payment as is usual practice.

74. Incidentally the M/V *Africa* seems also to have Kingstown as the home port. In a document submitted to the Tribunal by Saint Vincent and the Grenadines during the prompt release case it was stated as follows:

> *[Translation]*
>
> The SAIGA was arrested near our territorial waters after a long hid[e] and find game between the tanker and the customs-marine patrol boat. … Alike the other tanker arrested, tanker AFRICA, it has the same home port Kingstown.
> (see *M/V "SAIGA"* case, Memorial, Annex 4)

75. It is quite clear all the laws which were relied upon by Guinea had the intention of suppressing smuggling or contraband as characterised by Guinea. The question which arises is whether Guinea could apply these laws in the exclusive economic zone. According to the statement of Mr. Marc Vervaet the smuggling that was done along the coast of Guinea was mainly through fishing vessels. In order to reduce smuggling of gas oil, Guinea took steps to prohibit the sale of gas oil to fishing vessels except through approved service stations. Fishing in the exclusive economic zone is regulated by the coastal State. Under article 56 of the Convention the coastal State has sovereign rights in that regard. One of the rights it has is licensing fishing vessels. In issuing licences the coastal State can impose any conditions that are compatible with the Convention. Guinea has argued that it has the right to do so in order to protect her public interest, that is to safeguard public revenue. In his submission Professor Lagoni, Counsel for Guinea, put the issue as follows:

> It has to be noted that the fishing vessels supplied by the *Saiga* are pursuant to their fishing licence obliged to purchase oil only from approved service stations. This obligation enabled the Guinean Customs authorities to make sure that only such gas oil is sold to fishing vessels for which customs duties and taxes have been levied.
> …
> I would like to underscore in this context again that the Republic of Guinea has prohibited that unauthorized sale of fuel in article 1 of its Law no.7 CTRN 1994. The heading of the law expressly mentions the word "sale" ("*vente"*) which is included in the term "distribution" ("*la distribution*") in article 1.

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

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

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

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

76. The question must be raised whether it is prohibited under the Convention to include customs matters in the licensing of fishing vessels. In my opinion it is not. Under article 62 of the Convention coastal States make laws and regulations to "licenc[e] fishermen, fishing vessels and … remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry" (article 62, paragraph 4(a)). This shows that it is not prohibited to make laws and regulations relating to earning revenue in the exclusive economic zone. More relevant however is article 62, paragraph 4(h), which concerns "the landing of all or any part of the catch by such vessels in the ports of the coastal State". If a catch is landed in the port of a State it is certainly going to be subject

to tax laws, including customs laws. In my opinion, therefore, it is not incompatible for a State to make laws to earn revenue. If its source of revenue is threatened, as Guinea's was, by smuggling through fishing vessels, it has the right to establish the necessary laws and regulations to deal with the situation.

77. Agreements made between the European Community and coastal States normally include financial provisions. For example, the agreement concluded between Guinea and the European Community has provisions to that effect (see Memorial, Annex 9). Under that agreement there is financial compensation amounting to ECU 2,450,000, ECU 350,000 for surveillance bodies, ECU 300,000 for institutional aid and ECU 250,000 for non-industrial fishing. The total from this one agreement is ECU 3,500,000.

78. In his statement to the Tribunal on 20 March 1999, Mr. Togba, the Guinean Minister of Justice, stated that the total of levies and taxes from fuel for 1997 was 81,705,308,207 Guinean francs and for the first six months of 1998 the figure was 50,172,815,249 (equivalent to approximately 81.7 and 50.2 million dollars respectively). For a developing country like Guinea it is a very substantial amount to its national budget and it is worthwhile taking measures to safeguard this revenue.

79. As explained by Mr. Vervaet, when the tanker *Africa* was arrested in 1995 "smuggling was sharply reduced". It should be remembered that the year 1995 is when L/94/007/CTRN became really effective. Guinea has shown that after the *Saiga* was arrested in 1997 smuggling was once more sharply reduced. In the first ten days of December 1997, Guinea collected 23 billion francs (about 23 million dollars) from only two oil companies, Shell and Elf. That amount was more than had been collected in the previous ten days from all the oil companies operating in Guinea (see Counter-Memorial, Annex 16).

80. On the whole we are talking of substantial amounts of revenue derived from activities undertaken in the exclusive economic zone of Guinea, including taxation on fuel used by the many fishing vessels licensed by Guinea. That definitely constitutes a public interest for Guinea, indeed for any developing country. However, in rejecting Guinea's argument, the Tribunal says in paragraph 131 of the Judgment:

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

81. The philosophy underlying the concept of the exclusive economic zone is, as the term implies, the economic interest of the coastal State. This is what is embodied in article 56 of the

Convention. Certainly it cannot be argued that fiscal interests are not economic interests. The purpose of the entire Part V of the Convention was to curtail the rights of other States in favour of the economic and other interests of the coastal States. It was part of the compromise which led to the restriction on the breadth of the territorial sea and the regimes of straits used for international navigation and archipelagos (Part III, Section 2, and Part IV). For the Tribunal to deny this is to pull the clock back to the time, as Professor Lagoni put it "we would still have the classical order of the ocean which has existed since Hugo Grotius until 1958. There would be no exclusive economic zone".

82. Judge Nelson, in his Separate Opinion, has made the point that the proposals which were made by African countries relating to control and regulations of customs and fiscal matters in the exclusive economic zone were not accepted. He further says that it would be a "startling result that proposals which have not been accepted by the Conference would somehow still remain like shades waiting to be summoned, as it were, back to life if and when required". I do not agree with that statement. Nowhere in the preparatory work is there a decision that those proposals were not accepted. Unlike the 1958 Conference where voting took place and proposals were either accepted or not accepted or, to put it in plain language, were rejected, the procedure in the Third Conference on the Law of the Sea was different. Only proposals which achieved consensus were included in the Convention. A proposal having not been included in the compromise does not mean it is buried forever and would not see the light of day in future as Judge Nelson seems to imply. In 1959 the proposal on the 12 nautical miles territorial sea was rejected by vote but just over two decades later State practice forced it into conventional law. Anyway this was a digression. My point is that in this particular case we are dealing with a law the intention of which is to fight smuggling, not to extend the power of a coastal State to generally apply customs law in the exclusive economic zone.

83. Guinea claims the right to impose regulations under customs law. She makes this claim under article 58, paragraph 3, which states:

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

84. "This Part" means the part of the Convention which deals with the exclusive economic zone. This zone was created in order to protect the economic interests of the coastal States. Any other State undertaking any activity in the exclusive economic zone is required to pay due regard to the economic interests of the coastal State. Therefore fishing vessels licensed by the coastal State are required to pay due regard to the economic interests of the State which has given them licences.

85. The practice of States, which later developed into the rule that is enshrined in article 33 of the Convention on the contiguous zone, was based on the protection of public interest, including customs and fiscal interests. Indeed the prevention of smuggling was one of the main reasons for

States to claim a contiguous zone. The same reason should very well apply in the exclusive economic zone, where now the economic interests of the coastal State are clearly recognised.

86. The suppression of smuggling is particularly important in protecting the economic interests of a coastal State. Guinea enacted a law to combat smuggling not only on its own initiative but also with the encouragement of the World Bank. Tankers can be conduits of smuggling and there is evidence in the present case to prove that. On the evidence submitted, the *Africa* was the main conduit of smuggling before L/94/007/CTRN was enacted. It continued to do so after the law was established and was arrested and punished. When these proceedings had started the *Africa* had again been arrested for a similar offence. The bunkering activities of the *Saiga* could also encourage smuggling. For example between 24 October and 27 October it supplied several vessels with fuel amounting to between 45 and 100 metric tons. The *Flipper* for example was supplied 100,555 metric tons of gas oil off the coast of Guinea-Bissau just north of Guinea. That was a lot of fuel for a vessel fishing at a distance of twenty or less nautical miles from the coast. (During the oral hearing Lt. Sow was asked to show on the map where fishing activities are located along the coast of Guinea and he indicated an area close to the coast and within the contiguous zone. This is confirmed by the location of the pre-arranged bunkering points of the *Saiga*.)

87. When the *Saiga* was forced to flee the waters under the jurisdiction of Guinea, it was instructed to wait for the Greek vessels at a point in Sierra Leone waters south of Guinea. These so called Greek vessels were near the northern part of Guinea, more than 100 nautical miles away. It would have been easy and cheaper to refuel along the coast but they were willing to travel all that distance to be supplied with fuel. In the circumstances of the history of smuggling in this area it is not unreasonable to believe Guinea that these fishing vessels were engaged in smuggling and the *Saiga* was the deliberate and willing conduit.

88. Saint Vincent and the Grenadines also argued that Guinea could not apply its custom laws in the customs radius. The Tribunal has accepted the argument. I have already argued that L/94/007/CTRN was intended to fight smuggling. For that purpose the customs radius is irrelevant to me. The relevant area is the exclusive economic zone. The relevancy of the customs radius was in terms of operational matters. The smuggling that Guinea intended to prevent related to the activities of fishing vessels. As was shown on the map the fishing area is close to the coast and Guinea does not have a large naval fleet, nor does it have fast patrol boats equipped to operate far from the coast. In the light of that the customs radius, as an operational zone, becomes relevant. Otherwise legally Guinea has the right to apply the law to fishing vessels which have been licensed to operate in the entire exclusive economic zone.

89. Saint Vincent and the Grenadines also argued that the Guinean laws could not be binding to her because they had not been communicated to the Secretary-General of the United Nations. The Convention, however, does not require States to communicate laws to the Secretary-General of the United Nations. In certain cases the Convention requires States to give notice of their laws and regulations. One such provision in the Convention is article 62, paragraph 5, which requires States to give due notice of conservation and management laws and regulations applicable in the exclusive economic zone. Giving notice includes the publication of the laws and regulations and this was done by Guinea through the *Journal Officiel de la République de Guinée*. In fact the

laws submitted as evidence to the Tribunal came as part of the Official Journal. In any case it was quite clear from the evidence that the owners, managers and the operators of the ship had knowledge of these laws.

90. From the evidence which was submitted it was clear that Saint Vincent and the Grenadines knew the laws of Guinea concerning supplying fishing vessels with gas oil in the exclusive economic zone of that country. Mr. Marc Vervaet has been connected with vessels of the operators since 1993. He has given a clear account of what was taking place along the coast of Guinea. He has been in charge of three vessels hired by the operators during this time, the *Dior*, the *Alfa-I* and the *Saiga*. He has admitted in his evidence that Guinea had a different regime from the other countries in the region. He has given a detailed account of the vessels, which have been arrested by Guinea since 1995. This is the period after Law L/94/007/CRTN was enacted by Guinea. At around the time the *Saiga* was arrested the *Africa* was also arrested for the second or third time. Mr. Vervaet has stated that the arrest of the *Africa* led to reduction in smuggling. (It is actually baffling why Saint Vincent and the Grenadines has taken up the case of the *Saiga* and not the case of the *Africa*.)

91. When all the evidence is taken together it is quite clear that Guinea could properly apply customs and contraband laws against the *Saiga* when it undertook bunkering activities in the exclusive economic zone.

92. Another argument advanced by Saint Vincent and the Grenadines was that the law of Guinea could not be applicable because the *Saiga* was arrested outside Guinea waters. This argument cannot be accepted because the events, which led to hot pursuit, took place in the exclusive economic zone of Guinea.

93. The *Saiga* left Dakar, Senegal, on 24 October 1997 laden with approximately 5,400 metric tons of gas oil. The purpose of the voyage of the *Saiga* was to sell gas oil to mainly fishing vessels at pre-arranged locations off the coast of West Africa. On the day it left Dakar it reached the first pre-arranged location off the coast of Guinea-Bissau and supplied gas oil to three fishing vessels. On 27 October 1997 it reached another pre-arranged location at the point 10º25'03 N and 15º42'06 W near the Guinean island of Alcatraz which lies about 22 nautical miles from the coast of Guinea. This point lies in the contiguous zone and exclusive economic zone of Guinea. At that location at between 0400 and 1400 hours it supplied gas oil to fishing vessels licensed by Guinea to operate in waters under Guinea's jurisdiction. These vessels were the *Giuseppe Primo*, the *Kriti* and the *Eleni G.* While it was at this location it was detected by Guinea authorities who decided to dispatch a navy patrol boat towards the location.

94. The *Saiga* was supposed to move towards another pre-arranged location which is also within the exclusive economic zone of Guinea off the northern part of the coast. The owners of the cargo, who were actually giving instructions to the Master of the ship, gave instructions that the next pre-arranged position should be abandoned and the ship should proceed to a point which is in waters under the jurisdiction of Sierra Leone. The reason given for abandoning the pre-arranged location was that Guinea was sending out patrol boats. The Master was to keep at least one hundred nautical miles off the coast of Guinea and to keep a lookout on the radar day and night for fast navy vessels. Following the instructions the *Saiga* moved in a southerly direction

until it reached the point in Sierra Leone waters. It had been instructed to wait at that point for vessels which were at the time off the northern coast of Guinea near the first two pre-arranged locations. At 0800 the *Saiga* was at a point 09º00'01 N and 14º58'58 W waiting for the vessels to which it was to supply gas oil. At about 0900 it was arrested by Guinean navy boats (see Memorial, paragraph 29, Annex 16, pp. 236, 240, 247, 249, 250; Counter-Memorial, paragraphs 15, 16).

95. In the context of the facts above there was jurisdictional connection between the *Saiga* and Guinea. The purpose of the voyage of the *Saiga* was to sell gas oil. This was done by bunkering fishing vessels along the coast of West Africa. For that purpose locations were pre-arranged and two of such locations on this particular voyage were in the exclusive economic zone of Guinea. The *Saiga* purposely and willingly proceeded to those locations. It accomplished its purpose at the first location but had to abandon the second location and flee because it was informed of the approach of the naval vessels of Guinea. The successful flight of the *Saiga* would simply make the hot pursuit and arrest illegal in terms of article 111 of the Convention. But the events which led to the arrest started in the exclusive economic zone of Guinea where the *Saiga* had entered willingly as part of its planned mission.

96. The last argument advanced by Saint Vincent and the Grenadines against the objection of Guinea relates to what is termed as absence or ineffectiveness of local remedies. The Tribunal has found it unnecessary to make a finding on this argument. In my opinion, if the Tribunal had proceeded to determine the issue, the argument of Saint Vincent and the Grenadines would fail. The Tribunal has accepted that article 22 of the Draft Articles on State Responsibility adopted by the International Law Commission is reflecting international law on this issue (see paragraph 97 of the Judgment). I also accept that view.

97. Under article 22 of the Draft Articles on State Responsibility, Saint Vincent and the Grenadines was obliged to take the initiative. In paragraph 2 of the commentary the International Law Commission says:

> To be able to conclude that there is a breach of an international obligation "of result" concerning the treatment of individuals, and particularly foreign individuals, it is first necessary to establish that the individuals who consider themselves injured through being placed in a situation incompatible with the internationally required result have not succeeded, even after exhausting all the remedies available to them at the internal level, in getting the situation duly rectified; for it is only if these remedies fail that the result sought by the international obligation will become definitely unattainable by reason of the act of the State. If, for various reasons, individuals who should and could set the necessary machinery in motion neglect to do so, the State cannot normally be blamed for having failed to take the initiative to obliterate the concrete situation created by initial conduct attributable to it and militating against the achievement of the internationally required result – provided, of course, the State itself is not responsible for the inaction of the individuals.

98. The *Saiga* was arrested on 28 October 1997. Saint Vincent and the Grenadines did not submit evidence at all that it took initiative to obtain remedies in Guinea. Nor did the owners of

the ship, the owners of the oil, the managers of the ship, the operators or the crew. They cannot therefore claim that there were no remedies when they did nothing to find out.

99. The argument of Saint Vincent and the Grenadines is based on the conviction of the Master of the ship. But that was not initiated by Saint Vincent and the Grenadines. In any case it cannot be claimed that the Master represented Saint Vincent and the Grenadines, the owner of the ship and the rest.

100. The argument that the remedies were ineffective is based on the action taken in the Guinean courts. The evidence submitted was the declaration of Maitre Bangoura (see Memorial, Annex 26). Examination of that declaration reveals that it deals with legal issues appropriate to the Supreme Court of Guinea. The Tribunal would not be called upon to act as the Supreme Court of Guinea.

101. The evidence submitted by Saint Vincent and the Grenadines also revealed that other vessels have been subject to the same treatment in the recent past as was taken against the *Saiga*. These vessels include the *Africa*, which has Saint Vincent and the Grenadines as the flag State. All those cases have been settled locally and the vessels have continued to operate in the exclusive economic zone of Guinea. As the Minister of Justice of Guinea, Mr. Togba, pointed out, the Guinean law is similar to the laws of other countries in the region, for example Senegal (see ITLOS/PV.99/18, page 5). The Tribunal would not accept argument without an attempt to find out the facts.

102. Having reached the conclusion that Saint Vincent and the Grenadines was not the flag State at the time of the arrest of the *Saiga* and that local remedies were not exhausted, there is no need for me to examine the issues on the merits.

103. This opinion has been longer than would have been necessary because as I said at the beginning the Judgment lacks objectivity in the summary of the evidence and arguments of the parties. I have, therefore, been obliged to quote extensively from the proceedings in order to bring out some of the evidence and arguments which I believe should have been taken into account in reaching the right conclusions.

104. President Mensah has made the point in his Separate Opinion that if Saint Vincent and the Grenadines were denied standing to bring the dispute to the Tribunal it would completely deprive the persons involved in the operation of the *Saiga* any redress in respect of injury, damage and other losses suffered by them. I agree that the issue of redress was extremely important. But I do not believe a decision that Saint Vincent and the Grenadines was not the flag State would have prevented consideration of the issue of redress. The *Saiga* still had the protection of the State of nationality of the owner and it could still bring action to this Tribunal. On this point I agree with the reasoning of Judge Ndiaye in his Dissenting Opinion and share his conclusions. Neither would a decision that local remedies had to be exhausted prevent for all time consideration of the issue of redress. At most, there would only be a short delay.

105. More disturbing however is the lack of acknowledgement by the Tribunal of the problem of smuggling in West Africa. While it is important to do justice in addressing redress in terms of

compensation to injured parties, it is also important to insure that peace and security is maintained. The primary purpose of the 1982 Convention on the Law of the Sea is to promote and maintain order in the oceans. Without order there will be no peace and without peace there would be no justice. Smuggling disturbs peace and security. In the face of clear evidence of smuggling along the coast of Guinea, it was not appropriate for the Tribunal not to say anything about the matter. It is more so when one of the vessels flying the flag of Saint Vincent, the *Africa*, was shown conclusively to have been a conduit in this smuggling.

106. President Mensah has again made the point of giving a word of caution to Saint Vincent and the Grenadines and other registry States on their laws and practices. I do not believe that that word of caution was well placed in this particular case. It would have been more appropriate to give a word of caution on the danger of smuggling that may be associated with bunkering activities in the exclusive economic zones of the coastal States. For if that is not discouraged there will be no peace along the coast of Africa. It should be hoped that the silence of the Tribunal on the issue of smuggling will not be interpreted as a licence for unwarranted bunkering activities which encourage smuggling.

(Signed) Joseph Sinde Warioba

DISSENTING OPINION OF JUDGE NDIAYE

[Translation]

(Submitted pursuant to article 30, paragraph 3, of the Statute and article 8, paragraph 4, of the Resolution on the Internal Judicial Practice of the Tribunal.)

1. Having, to my regret, been unable to concur with the Judgment of the Tribunal, I felt it was my duty to state my dissenting opinion.

In my view, the submission of the Government of Guinea to the effect that the Application of Saint Vincent and the Grenadines was inadmissible due to the fact that the *Saiga* was not duly registered should have been sustained by the Tribunal. Similarly, the question with regard to jurisdiction and the question relating to the objections raised by Saint Vincent and the Grenadines to the challenges to admissibility should have been dealt with otherwise, for the following reasons:

I. JURISDICTION

2. The present proceedings between Saint Vincent and the Grenadines and the Republic of Guinea were introduced by notification of a special agreement. It is by the Exchange of Letters of 20 February 1998 ("the 1998 Agreement") that Saint Vincent and the Grenadines and Guinea agreed to submit the dispute between them relating to the vessel *Saiga* to the jurisdiction of the International Tribunal for the Law of the Sea (Hamburg) and to transfer to the Tribunal the arbitration proceedings initiated by Saint Vincent and the Grenadines by its notification of 22 December 1997.

3. The 1998 Agreement provides that the dispute shall be submitted to the International Tribunal on the following terms:

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

> 13 January 1998, the Statement of Response of the Government of Guinea dated 30 January 1998, and all subsequent documentation submitted by the parties in connection with the Request shall be considered by the Tribunal as having been submitted under Article 290, paragraph 1, of the Convention on the Law of the Sea and Article 89, paragraph 1, of the Rules of the Tribunal.

4. It is this Agreement which provides the basis for the jurisdiction of the Tribunal. The dispute as to the merits is submitted to the Tribunal on behalf of Saint Vincent and the Grenadines as Applicant and Guinea as Respondent. The parties have, in the present case, accepted the jurisdiction of the Tribunal. They have discussed in substance all of the questions to be presented to it. That attitude on the part of the parties would also suffice to provide a basis for the Tribunal's jurisdiction.

5. However, the Tribunal sought to place its jurisdiction upon another footing, an endeavour which appears to me somewhat superfluous.

The jurisdictional act here does not differ significantly from other jurisdictional acts and is no exception to the rule that such jurisdictional acts are, by their nature and effect, essentially procedural rather than substantive provisions. Naturally, the 1998 Agreement contains provisions relating to substance, due to its legislative history (the arbitral proceedings) but it is the purview of the Tribunal to determine whether or not they exist. There should be no misunderstanding as to a "universal principle of procedural law" indicating that a distinction must be made between, on the one hand, the right to bring a case before a tribunal and the tribunal's right to take cognizance of the substance of the application, and, on the other hand, the right in light of the purpose of the application which the applicant must demonstrate to the satisfaction of the tribunal (see *South-West Africa, I.C.J. Reports 1966,* paragraph 64).

6. Here, we are concerned only with the first two. In other words, it is only the provisions of the 1998 Agreement by which the parties give effect to the transfer of the dispute to the Tribunal that provide the basis for its jurisdiction.

II. ADMISSIBILITY

7. In its Counter-Memorial, Guinea raised three challenges to the admissibility of the claims of Saint Vincent and the Grenadines. The first pertains to the nationality of the vessel *Saiga,* the second to diplomatic protection of aliens, and the third to non-exhaustion of local remedies.

8. Saint Vincent and the Grenadines, the Applicant, questions the right of Guinea, the Respondent, to raise objections to admissibility, adducing the jurisdictional act (the 20 February 1998 Agreement) and the Rules of the Tribunal (article 97, paragraph 1).

9. According to Saint Vincent and the Grenadines the Respondent is precluded, firstly, because paragraph 2 of the 1998 Agreement bars the raising of an objection to admissibility. That paragraph reads as follows:

> The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including

> damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998.

10. The Applicant adds that, in agreeing to recognize the Tribunal's jurisdiction to examine "*all aspects of the merits*", the parties understood that such examination should not be barred by an objection to admissibility raised in the name of the legitimate interest of the Applicant State, and that, in all of the correspondence between the parties and the exchanges between them over a period of nearly four months, the Republic of Guinea never so much as hinted that Saint Vincent and the Grenadines had not shown a legitimate interest in the vessel flying its flag. Moreover, Saint Vincent and the Grenadines argues that the reference to "the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998" ruled out any other objection to jurisdiction or to the admissibility of the claims, the more so in that paragraph 2 stipulates that the proceedings shall comprise "a single phase dealing with all aspects of the merits".

11. Guinea disagrees with that interpretation and maintains that it never waived any objection to the admissibility of the Applicant's claims. Guinea holds that, since the 1998 Agreement deals essentially with the jurisdiction of the Tribunal, the parties were of the view that it was necessary expressly to mention the objections relating to issues of jurisdiction in this Agreement which transferred the dispute to the jurisdiction of the International Tribunal. The Respondent points out in this connection that, "interestingly enough", it was the opposite party who initiated the inclusion in the 1998 Agreement of the reference to the objection to jurisdiction by the Tribunal. In support of the fact that it never waived raising objections to the admissibility of the claims advanced by Saint Vincent, Guinea mentions the fact that it formulated its objection concerning non-exhaustion of local remedies, as provided for in article 295 of the United Nations Convention on the Law of the Sea ("the Convention") at the hearing of 24 February 1998 concerning the Request for prescription of provisional measures, i.e., only four days after the conclusion of the 1998 Areement which - according to the opposing party - excludes the possibility of raising such objections. During the aforementioned hearing, Saint Vincent had not made this position known; and its counsel would certainly not have failed to do so if it had been the intention of the parties to exclude objections to the admissibility of the claims, Guinea maintains.

12. Paragraph 2 of the 1998 Agreement should be interpreted in the light of article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

13. Saint Vincent and the Grenadines maintains that the ordinary meaning of the terms used in paragraph 2 of the 1998 Agreement, in particular the terms

> dealing with all aspects of the merits ... and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated ...

as well as the object and purpose of the Agreement reveal that the parties agreed that no objection to the admissibility of the claims presented would be raised in the present proceeding.

14. Guinea contests that interpretation. The terms "a single phase" indicate that the procedure on the merits should not be divided into different procedural phases. Consequently, it is clear that the parties had envisaged procedural phases which could be separated from the proceeding for consideration of the merits or which could lead to suspending said proceeding. Otherwise, the use of the expression "a single phase" would have been superfluous.

15. Guinea wonders what procedural phases, if not the preliminary phase provided for in article 97 of the Rules of the Tribunal, could have been envisaged by the inclusion of this expression in the 1998 Agreement. The prompt release proceeding and the proceeding on the prescription of provisional measures, like the procedural phases other than that on the merits, had already been completed or were in the process of being completed before the Tribunal at the time the 1998 Agreement was concluded. No preliminary proceeding, in particular none of the preliminary proceedings provided for in article 96 of the Rules of the Tribunal, is to take place in a procedural phase distinct from the proceeding on the merits, or else such proceeding would be pointless in the present dispute. The necessary conclusion is that only the preliminary procedural phase provided for in article 97 of the Rules could have been contemplated by the terms "a single phase" in the 1998 Agreement. The Rules of the Tribunal do not mention any other procedural phase different from the proceeding on the merits and which could have been invoked by the parties to the present case. Indeed, the term "merits" must be interpreted in the light of the prompt release proceeding which had already taken place and in the light of the Request for prescription of provisional measures which was taking place at the time the 1998 Agreement was concluded or shortly before.

16. Guinea asserts that the word "merits" must be read in contradistinction to those procedures, which means that no distinction should be drawn between final submissions on the merits and any objection to the admissibility of the claims. There is a close link between objections to the admissibility of a claim and the proceeding on the merits.

17. Guinea also invokes article 31, paragraph 4, of the Vienna Convention on the Law of Treaties, which provides that:

> A special meaning shall be given to a term if it is established that the parties so intended.

18. It is undisputed between the parties that the object and purpose of the 1998 Agreement was to transfer the case from the jurisdiction of an arbitral tribunal to that of the International Tribunal for the Law of the Sea. Therefore, the Respondent maintains that the argument that Guinea excluded the possibility of raising an objection to the admissibility of the claims is groundless.

19. Saint Vincent further contests the right of Guinea to raise objections to admissibility on the ground that it is precluded pursuant to article 97, paragraph 1, of the Rules of the Tribunal. That paragraph reads as follows:

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

Under the terms of paragraph 1 of the Agreement of 20 February 1998, the parties agreed that:

> The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines.

20. The 90-day period running from 22 December 1997 came to an end on 22 March 1998. No objection to jurisdiction or to admissibility was raised during that period. According to Saint Vincent and the Grenadines, institution of proceedings and submission of the Memorial are two completely different things. They are governed by different sub-sections of the Rules of the Tribunal. Sub-section 1 of Section B deals with "Institution of Proceedings", while sub-section 2 of that section deals with "The Written Proceedings", including the Memorial of the Applicant (article 60).

21. Saint Vincent also maintains that the reason advanced by the Respondent in support of the assertion that these two distinct phases should be treated as a single phase is that, before that date, the Respondent did not have any opportunity to state its position on the dispute. The Applicant adds that, if Guinea had not agreed, on 20 February 1998, that the International Tribunal would consider all aspects of the merits of the dispute, it would not have been precluded from raising an objection to jurisdiction or to admissibility before the submission of the Applicant's Memorial. To the contrary, one would have expected Guinea to raise such an objection to jurisdiction or to admissibility at that stage. The Applicant adds that Guinea is not free to raise objections to admissibility at whatever stage it chooses. Guinea, for its part, maintains that the words "a single phase" in paragraph 2 of the 1998 Agreement imply that the parties ruled out the possibility of availing themselves of the procedure provided for in article 97, paragraph 1, of the Rules. In other words, the parties agreed, in keeping with article 97 of the Rules, that objections to admissibility should be addressed in the framework of the proceeding on the merits. The Respondent indicates that paragraph 2 of the 1998 Agreement specifically provides for that possibility. He further maintains that he is not precluded from raising the objection to admissibility at that stage because it is within his discretion to decide whether or not there is cause to raise objections upon which a decision is requested before any further proceedings on the merits.

22. Guinea argues out that the third category of objections referred to in article 97, paragraph 1, of the Rules, namely objections "the decision upon which is requested before any further proceedings on the merits", does not refer only to questions such as whether the Application, as formulated, no longer falls within the terms of the *compromis*, or whether the nature of the dispute is such that it cannot be submitted to a jurisdiction such as that suggested by the Applicant. The Respondent points out that it raised objections to the admissibility of the proceeding instituted by Saint Vincent and the Grenadines, that is, an objection to the admissibility of the application itself. The Respondent cites several cases before international jurisdictions in which the States raised preliminary questions pertaining to jurisdiction and admissibility in the Counter-Memorial, or during which such questions

were settled after the hearing of the case on the merits. This, the Respondent says, points to the non-exhaustive character of preliminary objections before international jurisdictions, in the sense that, regardless of whether or not questions of jurisdiction are raised during the phase devoted to preliminary objections, they can always be raised at a later stage, and even by the jurisdiction *ex officio*. The Respondent concludes that State practice seems to have adopted the same approach (see also Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996, Vol.II, Jurisdiction*, Martinus Nijhoff Publishers, 1997, pp. 909-915).

23. In considering the question of admissibility, the Tribunal should have relied upon the 1998 Agreement concluded between the parties to the dispute, whereby they decided to submit the dispute to the Tribunal, and to the procedural rules which they wished to see applied. The Tribunal's first duty, when called upon to interpret and apply the provisions of the 1998 Agreement, is to endeavour to give effect, according to their natural and ordinary meaning, to those provisions viewed in their context. If the relevant words, when one gives them their natural and ordinary meaning, have a meaning in their context, the inquiry should stop there (*Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950*, p. 8).

24. It should be recalled that the 1998 Agreement was concluded through the good offices of the President of the Tribunal in order to determine the dispute-settlement procedure in this case. Its purpose is to transfer the dispute from the jurisdiction of an arbitral tribunal (*to be constituted following the arbitral proceeding instituted by Saint Vincent and the Grenadines on 22 December 1997 against Guinea and which was to be presided by a person appointed by the President of the International Tribunal for the Law of the Sea; the procedure was opened pursuant to article 287, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea)* to that of the International Tribunal for the Law of the Sea, with a view to avoiding lengthy and costly proceedings. It is therefore in that context that one must view paragraph 2 of the 1998 Agreement about which the parties differ. It reads:

> The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998.

25. The relevant words here with regard to the discussion on admissibility are "a single phase dealing with all aspects of the merits (including ...".

26. Proceedings on preliminary objections were long considered a distinct phase of the case. It was in 1952, with regard to the *Ambatielos* case, that the International Court of Justice said:

> [The Court] decided that, in future, these proceedings would be treated as an incident of proceedings on the merits and not as a separate case. (*I.C.J. Yearbook 1952-1953*, p. 89)

27. In 1972, that distinction was embodied in article 79, paragraph 1, of the Rules of the I.C.J. That provision is reflected in article 97, paragraph 1, of the Rules of the Tribunal.

In this regard, and bearing in mind the words "a single phase" and "including", the Tribunal should interpret paragraph 2 of the 1998 Agreement as meaning that the parties wish the objections to admissibility to be *joined to the merits* because

> a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction

is the joinder to the merits of the preliminary objections.

Indeed, article 97, paragraph 7, which reflects article 79, paragraph 8, of the Rules of the International Court of Justice, embodies this approach recognizing practice. It reads:

> The Tribunal shall give effect to any agreement between the parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits.

28. Joinder to the merits would also be the result of an examination of the nature of the objections to admissibility in question. They are in fact so closely related to the merits or to points of fact or of law bearing upon the merits that one could not consider them separately without touching upon the merits (see *The Panevezys-Saldutiskis Railway Case, Judgment, 1939, P.C.I.J., Series A/B No.76*, pp. 23-24; *Case concerning the Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 4; *Case of Certain Norwegian Loans, Order, I.C.J. Reports 1956*, p. 73; *Case concerning Right of Passage over Indian Territory, Judgment, I.C.J. Reports 1957*, pp. 150-152).

29. In other words, joinder to the merits is required inasmuch as a decision on the objections requires consideration of the whole or virtually the whole of the merits, in short the essential points of the claims of Saint Vincent and the Grenadines. Because what the Respondent is challenging is not the admissibility of the Application in the light of procedure, but the right which provides the basis for the Application. These are preliminary objections of substance.

30. A judicial decision in favour of an application based on this type of objection in itself results in putting an end to the dispute as a whole, because the findings of law emanating from said decision on the objection completely eliminate the adversarial contest which had arisen from the dispute. These preliminary objections of substance are entirely in keeping with the well-established principle, under the theory of international procedure, that, in an international dispute, each party before the tribunal called upon to resolve the dispute is entitled to make use of such means as it sees fit, provided they are relevant in relation to the same dispute. This principle underlies a number of provisions in the statutes and rules of international jurisdictions. For example, article 88, paragraph 1, of the Rules of the Tribunal provides:

> When, subject to the control of the Tribunal, the agents, counsel and advocates have completed their presentation of the case, the President of the Tribunal shall declare the oral proceedings closed. …

31. It happens that the rules adopted by international jurisdiction are adopted in the light of preliminary procedural objections.

> However, it is of fundamental importance to note that the issues raised by a ... [preliminary] objection [of substance], while they can be characterized as "issues of the merits" as much as those raised by the Application instituting the proceedings concerning interpretation and the application of the legal norm invoked in that Application, remain distinct from *the merits of the case* of which the tribunal is seized by that same Application, said merits having as their identifying element the allegations and submissions around which the Application itself takes shape. (see G. Sperduti, "La recevabilité des exceptions préliminaires de fond dans le procès international", *Rivista di Diritto internazionale*, 1970, Vol. 53, pp. 461-490; p. 485)

III. THE OBJECTIONS

32. The Government of Guinea maintained that the claims of Saint Vincent and the Grenadines were inadmissible in several respects. The first objection to admissibility pertained to the nationality of the M/V *Saiga*.

33. It appears that this challenge to admissibility is of cardinal importance. It raises a problem which bears upon the merits but which takes on priority. It is therefore the duty of the Tribunal to begin by considering this question which is of a character such that a decision upon it may render pointless any further consideration of other aspects of the case.

34. Guinea maintains that the *Saiga* was not duly inscribed in the registry. According to Guinea, the vessel was built in 1975. On the day of its detention by the Guinean authorities, the 28th of October 1997, it was not registered under the flag of Saint Vincent and the Grenadines. As emerges from Annex 13 of the Memorial, it was on 14 April 1997 that Saint Vincent and the Grenadines granted the *Saiga* a provisional certificate of registration. However, that Provisional Certificate had already expired on 12 September 1997. And the *Saiga* was arrested over a month later.

The final Certificate of Registration was not issued by the competent authorities of Saint Vincent and the Grenadines until 28 November 1997. Thus, it is quite clear that the *Saiga* was not inscribed in the registry in accordance with the law during the period from 12 September 1997 to 28 November 1997. For that reason, the *Saiga* may be characterized as a ship without nationality at the time it was attacked.

35. The Tribunal should have sought to determine whether the registration of the *Saiga* by the competent authorities of Saint Vincent and the Grenadines directly implies an obligation on the part of Guinea to recognize its effect, i.e. legal standing for Saint Vincent and the Grenadines to exercise protection. In other words, it is a question of determining whether the act originating with Saint Vincent and the Grenadines is opposable to Guinea with respect to the exercise of protection, in particular at the time of the arrest of the *Saiga*. Such opposability is to be determined in the light of the rules of international law. The Tribunal should have addressed this question and examined the question of the validity of the registration of the *Saiga* according to the legislation of Saint Vincent and the Grenadines.

36. Naturally, it is up to Saint Vincent and the Grenadines, as it is to any other sovereign State, to regulate by its own legislation the conditions for registration of ships and to grant the privilege to fly its flag by its own organs in accordance with that legislation.

The tribunal entrusted with deciding the *Dispute Concerning Filleting within the Gulf of St. Lawrence* recalled:

> that the right of a State to determine by its legislation the conditions for the registration of ships in general and fishing vessels in particular is part of the exclusive competence of that State. (*Award of 17 July 1986*, paragraph 27)

The principle of the exclusive competence of the State in the determination of nationality has long been enshrined. Let us recall the words of the Permanent Court:

> … in the present state of international law, questions of nationality are … in principle within this reserved domain

of States (*Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24).

This opinion is very clearly confirmed by the International Court of Justice in *Nottebohm*:

> [I]nternational law leaves it to each State to lay down the rules governing the grant of its own nationality. (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 23)

37. But the question which the Tribunal must answer is not solely a matter of the domestic law of Saint Vincent and the Grenadines. "It does not depend on the law or on the decision of [Saint Vincent and the Grenadines] whether that State is entitled to exercise its protection, in the case under consideration" (*Nottebohm*, *op. cit.*, p. 20). On the other hand, the internal validity of nationality is the primary condition for its international validity. Just as international law acknowledges that States have exclusive competence in determining nationality, the effect of nationality on the international plane is made subordinate to the requirements of international law. Accordingly, a challenge by a State to an act of nationality does not invalidate it but does render it not opposable.

38. As is noted by Brownlie, "Nationality is a problem, *inter alia*, of attribution, and regarded in this way resembles the law relating to territorial sovereignty. National law prescribes the extent of the territory of a State, but this prescription does not preclude a forum which is applying international law from deciding questions of title in its own way, using criteria of international law" (I. Brownlie, "The Relations of Nationality in Public International Law", *BYBIL, 1963*, pp. 284-364, at pp. 290-291). One may find an illuminating illustration of these views in the law of maritime delimitation. In its decision of 18 December 1951 in the *Fisheries* case, the International Court of Justice said: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law" (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 132). There is a particularly striking resemblance between the act of maritime delimitation and the act of

granting nationality or registration from the standpoint of their status and that of their organic origin.

39. We should recall here that recourse to a tribunal, "[t]o exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is [therefore] international law which determines whether a State is entitled to exercise protection and to seize the Court" (*Nottebohm, op cit.*, pp. 20-21). And it is from the rules of international law that the Tribunal derives its power to verify the internal validity of the acts of Saint Vincent and the Grenadines pertaining to the registration of the *Saiga*.

40. According to the prevailing view in international judicial decisions, there is no doubt that an international tribunal is entitled to investigate the circumstances in which a certificate of nationality has been granted. (*Nottebohm, I.C.J. Reports 1955*, p. 50, Judge *Ad Hoc* Guggenheim, Dissenting Opinion)

Among the many decisions favouring judicial and arbitral review of certificates of nationality, one should cite that of Commissioner Nielsen in the case *Edgar A. Hatton (U.S.A.)* v. *United Mexican States*, which emphasizes the obligation to prove nationality.

> [C]onvincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement. (*Reports of International Arbitral Awards, United Nations, Volume IV*, p. 331, decision of 26 September 1928)

41. That the Tribunal possesses such a power of oversight derives from the principle of equality of parties. That is why it is not only a right for the Tribunal but also an obligation. ("[T]he presumption of truth must yield to the truth itself", as said by arbitrator Bertinatti in the *Medina* case *(United States* v. *Costa Rica), decision of 31 December 1862*, Moore, *International Arbitration, Vol. 3*, p. 2587).

42. Since the challenged registration is a purely internal act, it is normal that in applying the rules pertaining thereto, the Tribunal should inquire into whether Saint Vincent and the Grenadines, in inscribing the *Saiga* in its registry, duly applied its internal legislation in force. To that end, the Tribunal should have verified the authenticity and compliance with law of the items of evidence produced to show the validity of the registration claimed before the Tribunal. In other words, the determination of the nationality of the *Saiga* at the time of the arrest as challenged by the Guinean side should have been examined in the light of the following items of evidence:

a) the Provisional Certificate of Registration;
b) the Permanent Certificate of Registration;
c) the statements of the Maritime Administration;
d) the statements of the Deputy Commissioner for Maritime Affairs;
e) the Merchant Shipping Act of 1982;
f) the Maltese certificate.

43. On that basis the Tribunal could verify the application of internal law in light of the facts alleged or observed by the parties in order to determine whether they were accurate or inaccurate.

44. In other words, the Tribunal should examine the conditions for registration of vessels in Saint Vincent and the Grenadines, i.e. the legal regime as well as the procedural acts relating to the *Saiga*.

45. Saint Vincent and the Grenadines is appearing before the Tribunal as the flag State of the *Saiga*. Guinea maintains that the vessel was not duly registered under the flag of Saint Vincent and the Grenadines at the date of its arrest by the Guinean customs authorities, 28 October 1997. As a consequence, the conditions laid down in article 91 of the United Nations Convention on the Law of the Sea are not satisfied and the *Saiga* can be described as a ship without nationality at the date of its arrest.

46. The *Saiga* obtained a provisional certificate of registration from Saint Vincent and the Grenadines dated 14 April 1997. The date of expiration of that Provisional Certificate was 12 September 1997, i.e. more than a month before the arrest. The competent authorities of Saint Vincent and the Grenadines did not prepare a permanent certificate of registration until 28 November 1997, that is exactly one month after the arrest of the *Saiga*. The conclusion here compelled by logic is that the vessel was not validly registered during the period from 12 September 1997 to 28 November 1997.

47. Saint Vincent and the Grenadines advanced the argument that once a vessel is registered under the flag of Saint Vincent and the Grenadines, it remains registered until it is deleted from the registry. Saint Vincent asserted this position on the basis of the Merchant Shipping Act of 1982.

48. The Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines contains two articles dealing with provisional certificates of registration. These are sections 36 and 37. In its Reply, Saint Vincent and the Grenadines refers in particular to section 37, which reads:

> The provisional certificate of registration shall cease to have effect if, before the expiry of sixty days from its date of issue, the owner of the ship in respect of which it was issued has failed to produce to the issuing authority -
>
> (*a*) a certificate issued by the government of the country of last registration of the ship (or other acceptable evidence) to show that the ship's registration in that country has been closed; or
>
> (*b*) evidence to show that the ship has been duly marked as required by section 22.

49. The certificate of deletion was to come from Malta, the country of last registration of the *Saiga*, which was then called the "*Sunflower*".

50. Guinea points out that these provisions deal with special circumstances, namely the effects which flow from failure to produce certain documents in regard to the Provisional Certificate. If these documents are not produced within sixty days after issuance of the provisional certificate, said certificate ceases to have effect. These provisions cannot, then, be adduced in support of the argument of Saint Vincent and the Grenadines to the effect that the vessel, once it has been provisionally registered under its flag, remains so beyond the

period for which the Provisional Certificate was issued. The purpose of section 37 is precisely to produce the opposite effect, namely to shorten the period of validity.

51. It should be noted that Saint Vincent and the Grenadines did not revert to this argument thereafter.

52. The other provisions of the Merchant Shipping Act dealing with provisional registration are found in section 36(2). This article provides that a provisional certificate of registration has the same effect as the ordinary certificate, for a period of one year from the date of issuance. In other words, a provisional certificate cannot be valid for more than one year regardless of the circumstances.

53. However, section 36(2) does not say that such a provisional certificate of registration is always valid for a period of one year despite the fact that the register limits the validity of the provisional certificate to six months, as it did in the present case.

54. In the official brochure of the Saint Vincent and the Grenadines Maritime Administration concerning procedures for registration, one finds under the heading "Provisional Registration Certificate" the following: "The provisional registration certificate is issued for six months and can be extended, under certain circumstances, for a further period of six months." The total period of validity would then be 12 months, in keeping with section 36(2).

55. Saint Vincent and the Grenadines then produced another item of evidence, in the form of a certificate issued by a representative of its Maritime Administration based in Monaco, dated 27 October 1998, which reads as follows:

> I hereby confirm that m.t. "SAIGA" of GT 4254 and NT 2042 was registered under the St. Vincent and the Grenadines Flag on 12th March, 1997 and is still today validly registered.

56. This certificate adds nothing new. It is dated 27 October 1998, that is one month after the facts, and it does not produce the desired effect, namely for the *Saiga* to be considered as being validly registered under the flag of Saint Vincent and the Grenadines during the relevant period in question, namely from 12 September 1997 to 28 October 1997. This certificate only confirms that the vessel was registered on 12 March 1997.

57. Saint Vincent and the Grenadines then drew a distinction between registration on the one hand and issuance of the certificate on the other. It argued that the validity of a registration certificate and that of a vessel's registration are not necessarily the same. However, such a distinction does not emerge from the Merchant Shipping Act, from the official brochure setting out the formalities of registration, or from the Provisional Certificate itself.

58. This means that the registration and the certificate of registration cannot be considered separately. That is clearly borne out by the letter produced by Saint Vincent and the Grenadines from the Deputy Commissioner for Maritime Affairs dated 1 March 1999 and including a copy of the page from the Registry concerning the M/V *Saiga*, dated 14 April 1997. Under "registrations", it reads: "Valid thru: 12/09/1997". It thus appears that

not only the Certificate but also the registry bear the same date of expiration, i.e. 12 September 1997. The relevant date under discussion is 28 October 1997, which falls between the date of expiration of the Provisional Certificate (12 September 1997) and that of the issuance of the Permanent Certificate of Registration (28 November 1997).

59. Saint Vincent and the Grenadines reverted at length to the question of registration at the hearing of 18 March 1999. Its counsel argued that the situation under the law of Saint Vincent and the Grenadines is such that a certificate of registration is always valid for one year, unless it is replaced meanwhile by a permanent certificate of registration or the exceptional provision of section 37 of the Merchant Shipping Act is applied.

He refers to section 36(2) of that law and asserts that the provisional certificate has the same effect as an ordinary certificate for a duration of one year.

60. However, counsel for Saint Vincent and the Grenadines did not expressly mention the date of expiration of the Provisional Certificate of Registration of the *Saiga*, namely 12 September 1997, when he continued his consideration (section 7) saying that "provision is made for the issuance of two successive certificates, each of 6 months". In the same section, it is said more clearly still that "If the paperwork has been completed within the first 6 months, another provisional certificate is issued".

61. Moreover, the official document published by the Saint Vincent and the Grenadines Maritime Administration provides that a provisional certificate is issued for six months and can be renewed for another six months. The same holds true as to procedures of registration under other shipping registries, for example all of those cited by counsel for Saint Vincent and the Grenadines, where the initial registration is provisional and where the initial period of registration is generally six months, subject to renewal.

(*See also, "Laws Concerning Nationality of Ships", UN Document ST/Leg./Ser.B/5 (UN 1954), where laws relating to registration and nationality of ships of sixty-five (65) countries are presented; N. Singh, "International Law Problems of Merchant Shipping", RCADI, 1962 (III), v. 107, pp. 7-161.)*

62. It emerges clearly from the foregoing that when the provisional certificate of registration expires six months after issuance, the Commissioner for Maritime Affairs must step in and take steps. We should stress that this necessity derives from the fact that there is no automatic extension of the validity of the certificate provided by law. This explains the fact that Saint Vincent and the Grenadines abandoned its argument (Reply, paragraph 24) to the effect that a vessel registered under the flag of Saint Vincent and the Grenadines remains so registered until it is deleted from the registry.

63. Counsel for Saint Vincent and the Grenadines admits that action by the Commissioner for Maritime Affairs is necessary but does not spell out the nature of that action. He explains (Reply, paragraph 7) that in such cases "another provisional certificate is issued"; however, in another part of his statement dealing with provisional certificates, he says that the provisional certificate is issued initially for six months and can be renewed for an additional period of six months. The form of the action, however, is not spelled out. The Commissioner for Maritime Affairs can either issue a new provisional certificate or renew the original provisional certificate. But regardless of the kind of action taken, it must be done by the

Commissioner, and done in keeping with the provisions of the "implementing enactment" and the rules governing other shipping registers.

64. The fact is that no measure was taken by the Commissioner for Maritime Affairs to deal with the expiration of the Provisional Certificate. This is confirmed by the cross-examination of Captain Orlov of the *Saiga* (Verbatim Record ITLOS/PV.99/3, page 6, line 12). He indicates that he had not received any information from Seascot (the representative of the owners) with regard to a possible extension of the Provisional Certificate after its expiration.

65. In order to get around this difficulty, counsel for Saint Vincent and the Grenadines cites the letter from the Commissioner for Maritime Affairs dated 1 March 1999, in which he indicates that it is common practice for owners to allow the validity of their certificates to lapse for a brief time.

66. This statement is serious. It emanates from the authority responsible for registering vessels in Saint Vincent and the Grenadines, who, in a letter to the Tribunal, writes that it is common in Saint Vincent and the Grenadines for owners to be unconcerned about the date of expiration of their provisional certificate. It was thus quite deliberately that the owners of the *Saiga* sent out to sea a vessel whose papers were not in order. There is culpable negligence in this. Would Saint Vincent and the Grenadines ever consent to incur responsibility for damages (pollution, for example) caused by vessels under its flag whose registration documents were expired at the time of the unlawful acts?

67. In the latter part of the letter, the Commissioner confirms, however, that after the expiration of the validity of the provisional certificate, the owner must obtain either another provisional certificate or a permanent certificate. He recalls that, in the case of the *Saiga*, it was a permanent certificate that was obtained.

68. It was shown, in the form of a probative document, that the Permanent Certificate of the *Saiga* was dated 28 November 1997, i.e. the second day of the oral proceedings in the prompt release proceeding when Saint Vincent and the Grenadines produced the Permanent Certificate to the Tribunal and the parties.

69. Saint Vincent and the Grenadines argued that it had been difficult to send the Permanent Certificate aboard the *Saiga* because the vessel might have been at sea. If that were the case, the Permanent Certificate would have indicated a date prior to the arrest of the vessel, i.e. prior to 28 October 1997. In that case, the date of issuance of the certificate could have been done later. However, it was not so. The Permanent Certificate is dated a month after the arrest of the *Saiga* and, apparently, was requested of the shipping registry only at the time when the problem of the owners of the *Saiga* arose in the context of the prompt release proceeding. The statements of Counsel for Saint Vincent and the Grenadines at the sitting of 28 November 1997 clearly bear this out.

70. Saint Vincent and the Grenadines then produced documents emanating from the Commissioner for Maritime Affairs with a view to supporting the idea that the provisional registration of 12 March 1997 remained valid after its expiration. For example, an extract from the registry dated 24 February 1999 was adduced, in which the validity of the registration was indicated as permanent. However, such an effect occurs on the date of

issuance of the extract. This means that the vessel was registered on a permanent basis as from 24 February 1999, which adds nothing to the debate.

71. On 12 March 1997, the registration of the *Saiga* was not permanent, as is borne out by Annex A to the letter of the Deputy Commissioner for Maritime Affairs of 1 March 1999 containing the extract of the registry of 15 April 1997, which bears the clear indication "Valid thru: 12/09/1997". The same holds true for the certificate of the Commissioner for Maritime Affairs of 27 October 1998 produced in Annex 7 of the Reply of Saint Vincent and the Grenadines.

72. In this regard, the only probative document which could have been instructive to the Tribunal would be the production of a request from Seascot Management addressed to the Saint Vincent Maritime Administration asking for an extension of the Provisional Certificate or the issuance of another certificate. But no evidence of such a request has been produced.

73. Saint Vincent advanced another argument consisting of comparing the provisional certificate of registration of a vessel to the passport of an individual. The Respondent rejected the argument, explaining that "A natural citizen retains the nationality of his State independent of the expiry of his passport. A vessel, however, acquires the nationality of a State only by express application for registration. Such registration can be and will often be changed in the life of a vessel. The registration is a constitutional act by which the nationality of the flag State is granted to the vessel. If this act of registration is limited in its validity, indeed the vessel becomes stateless, which is quite different from the case of a natural citizen" (ITLOS/PV.99/18, page 12, lines 40-46). One might add that it is irregular to travel with an expired passport.

74. Saint Vincent further invokes section 36(2) of the Merchant Shipping Act of 1982, which provides that a provisional certificate of registration "shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue". It should be noted that the law does not say that an expired certificate continues to have the same effect as an ordinary certificate. Moreover, provisional certificates are designed to have a period of validity of three to six months, their renewability depending on the country. This is sufficiently demonstrated by practice and internal legislation on the matter. Saint Vincent itself adopted a duration of six months for provisional certificates which it issues, which can be renewed once under certain conditions or replaced by a permanent certificate of registration. This is borne out by the official brochure produced by Saint Vincent, which appears as an implementing enactment of the Merchant Shipping Act of 1982.

75. To support its argument concerning the one-year validity of the Provisional Certificate of Registration, Saint Vincent and the Grenadines indicates that, pursuant to section 36(3)(d) of the Merchant Shipping Act of 1982, payment of an "annual fee for one year" is required at the time of submission of an application for provisional registration. For this reason, Saint Vincent and the Grenadines concludes that the Provisional Certificate of Registration had retained its validity after 12 September 1997 and at all times during the present dispute.

76. This argument, as framed by Saint Vincent and the Grenadines, may lead to error. section 36(3) reads as follows:

(3) Every applicant for registration of a ship under this section shall, without prejudice to the generality of the provisions of subsection (1), produce the following evidence, namely -

(*a*) in respect of the ship -

(i) evidence to establish that any foreign certificate of registration or equivalent document has been legally cancelled or the registration has been duly closed;

(ii) if there is an outstanding certificate, evidence to show that the government who issued it has consented to its surrender for cancellation or closure of registration; or

(iii) a declaration from previous owners undertaking to delete the ship from the existing registration and confirming that all outstanding commitments in respect of the ship have been duly met;

(*b*) evidence to show that the ship is in a seaworthy condition;

(*c*) evidence to show that the ship has been marked as provided in section 22 or that the owner of the ship has undertaken to have the ship so marked immediately upon receipt of a provisional certificate of registration;

(*d*) evidence of payment of the fee due on the first registration and of the annual fee for one year in respect of the ship.

77. In light of section 36(3) it appears that the argument of Saint Vincent and the Grenadines is, to say the least, specious. This section appears, rather, counter-productive to the argument advanced by Saint Vincent. The various items of evidence required as preconditions were not provided to the Tribunal. None of the first three items required, concerning cancellation or deletion from the register of the country of last registration was provided. Saint Vincent and the Grenadines was unable to produce the certificate of deletion from Malta before the Tribunal. It now invokes the "annual fee" out of context to support the idea of annual validity of the Provisional Certificate. We know that provisional certificates are issued in Saint Vincent and the Grenadines for a duration of six months, renewable under certain conditions, as indicated by the "implementing enactment" of the Merchant Shipping Act, which provides:

> The provisional registration certificate is issued for six months and can be extended, under certain circumstances, for a further period of six months.

78. With regard to section 37 of the Merchant Shipping Act, Counsel for Saint Vincent and the Grenadines explained to the Tribunal (sitting of 18 March 1999) that the letter from the Deputy Commissioner gives the owner of the *Saiga* other acceptable evidence showing that the registration of the vessel in the country of last registration was closed. However, that counsel did not show what that "other acceptable evidence" of the *Saiga*'s deletion from the previous register was.

79. The only evidence should have been - in accordance with section 37 - production of a certificate of deletion from the Maltese register from the authorities of that country. However, that certificate of deletion was not produced; Counsel for Saint Vincent and the Grenadines was content to say that:

> 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.

80. Under these circumstances, it is impossible to form a precise idea of the situation of the *Saiga* at the time of its arrest. Was the vessel in a position to sail under the flags of two States which it could use according to its convenience, with the ensuing consequences?

81. In my view, the Tribunal should have directly turned to Malta, which is a State party to the Convention, to inquire into the situation of the vessel in the registry of that country, in order to settle the point as to whether the deletion certificate could or could not be produced. In any event, the fact that this item of evidence was not produced leads one to think that the *Saiga* was not deleted from the Maltese registry at the time of its arrest.

82. All in all, consideration of the Provisional Certificate of Registration, the Permanent Certificate of Registration, the official brochure of the Maritime Administration concerning procedures for registration, the certificate of the Deputy Commissioner for Maritime Affairs, the 1982 Merchant Shipping Act, and the non-production of the Maltese certificate of deletion enables us to conclude that the *Saiga* was not validly registered on the relevant date (27 and 28 October 1997), i.e. at the time of its arrest by the Guinean authorities.

83. The Tribunal finds that Saint Vincent and the Grenadines acted at all times on the basis of the fact that the *Saiga* was a vessel of its nationality, that it acted as a flag State of the vessel at all stages of the dispute and in all phases of the proceedings under way. It is in that capacity, says the Tribunal, that it invoked the jurisdiction of the Tribunal to request the prompt release of the vessel and its crew, pursuant to article 292 of the Convention, and in filing an application for the prescription of provisional measures pursuant to article 292.

84. With regard to Guinea, the Tribunal notes that it did not contest or in any way cast doubt upon the registration or nationality of the vessel at any time before the submission of its Counter-Memorial in October 1998. Previously, says the Tribunal, Guinea had latitude to make inquiries concerning the registration of the *Saiga* or the papers pertaining thereto. For example, says the Tribunal, Guinea could have inspected the shipping registry of Saint Vincent and the Grenadines. Other opportunities to challenge the registration or nationality of the vessel arose in the course of the proceedings before the Tribunal concerning the prescription of provisional measures in February 1998. The Tribunal adds that it is also relevant to note that the Guinean authorities cited Saint Vincent and the Grenadines as the flag State of the *Saiga* in the *cédule de citation* by which criminal proceedings were lodged against the Master of the vessel before the Court of First Instance of Conakry. In the judgment of the Court of First Instance, and in the subsequent judgment by the Court of Appeal affirming it, Saint Vincent and the Grenadines had been mentioned as the flag State of the *Saiga*.

85. Thus, the Tribunal alludes to the conduct of the two parties in support of the argument that Saint Vincent and the Grenadines was the flag State of the *Saiga* at the time of the events, without one knowing whether it seeks to qualify the conduct of Guinea as a case of estoppel, consent, or preclusion. One would have liked to be certain of this point. One point that does emerge consistently, on the other hand, is the fact that the statement of Guinea that the *Saiga* was not duly registered in the registry of Saint Vincent and the Grenadines at the time of its arrest is a *new fact* in the present case. This falls within the category of a fact "of

such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Tribunal ..." (Rules of the Tribunal, article 127).

86. Indeed, this fact revealed in the Counter-Memorial of Guinea was unknown to the Tribunal at the time of the first *Saiga* case concerning prompt release of the vessel and in the first phase of the present proceedings pertaining to the request for prescription of provisional measures. The discovery of this fact gives Guinea legal grounds to request the revision of judgments given in the course of the aforementioned proceedings. As was recalled by the International Court of Justice in the case *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)*:

> This rule contained in article 10, paragraph 2, cannot however be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered; and the Tribunal has already exercised this power. Such a strictly limited revision by the Tribunal itself cannot be considered as an "appeal" within the meaning of that article and would conform with rules generally provided in statutes or laws issued for courts of justice, such as for instance in article 61 of the Statute of the International Court of Justice. (*Advisory Opinion, I.C.J. Reports 1954*, p. 55)

87. The discovery of this fact appears rather to be opposable to Saint Vincent and the Grenadines. It can also be viewed as a fundamental change of circumstances.

88. The approach of the Tribunal in reaching these conclusions is lacking in clarity. The Judgment refers to the principles by which the evidence is evaluated without one knowing the method actually used. Rather, the Judgment indicates that the Tribunal, in evaluating the evidence, is of the view that, as a general rule, it should not lightly be concluded that a ship is without nationality.

89. This is, to say the least, a singular approach. Facts must be legally characterized and rules of law are made to be applied. There is a specific and very detailed legal regime which applies to cases of commercial vessels whose papers are not in order. The case of the *Saiga* is a case of absence of nationality. That does not mean that the vessel is completely without protection as the words of the Tribunal might suggest. Quite the contrary, as pointed out by O'Connell, "It follows that the right to protect a ship is not necessarily exclusive to the State of nationality, but might equally extend to the State whose nationals own the ship. It also follows, perhaps, that when a ship loses her nationality she falls subject to the law of nationality of the owners. A ship which is without nationality, then, is not necessarily a ship without law, but it may be one lacking a State to protect it" (see *The Chiquita, 19 F.2d 417 (1927);* Moore, D., Vol. II, p. 1002 *et seq.*; *US v. The Pirates, 5 Wheat.* 184 at 199 (1820)*; U.S. v. Jenkins, 26 Fed. Cas. No. 15473a* (1838); *The Alta, 136 Fed.* 513 at 519 (1905). See *Molvan v. Att.-Gen. for Palestine* (1948) A.C. 351). *(*D. P. O'Connell, *International Law*, Second Edition, Vol. II, London, Stevens & Sons, 1970, p. 607. As regards the probative value of statements of ship's papers concerning the nationality of the vessel, see G. Gidel, *Le Droit International Public de la Mer,* Volume I, Paris, E. Duchemin, 1981, p. 89.)

90. This amounts to saying that everything tends to support the admissibility of the Guinean objection but the Tribunal judged that in the particular circumstances of the case it would not be doing justice if it did not consider the merits of the case. This attitude is somewhat

surprising. As the International Court of Justice has had occasion to point out (*I.C.J. Reports 1966, op. cit.*, p. 34), humanitarian considerations may inspire rules of law; thus, the preamble of the United Nations Charter constitutes the moral and political underpinning for the legal provisions which are set forth therein. Such considerations are not, however, rules of law in themselves. All States take an interest in these matters; it is in their interest to do so. But it is not because an interest exists that it has a specifically legal character.

(Concerning the function of a Tribunal, see, for example, the case *Northern Cameroons [Cameroon* v. *United Kingdom], Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.)

91. According to the United Nations Convention on the Law of the Sea (article 91, paragraph 1, second sentence) "[S]hips have the nationality of the State whose flag they are entitled to fly". Authorization to fly the flag is given by the Registry on the condition that the vessel be registered. In the case of the *Saiga*, the validity of the registration was limited to 12 September 1997. And, since there was no extension of the provisional registration, **the *Saiga* was a ship without nationality at the time of its arrest**.

92. Consequently, the Tribunal should declare that the *Saiga* was a ship without nationality at the time of its arrest and, in keeping with the principle of continuous nationality, i.e.

> the rule of international law that a claim must be national not only at the time of its presentation but also at the time of the injury

hold that Saint Vincent and the Grenadines may not exercise rights on behalf of the *Saiga* because it is the bond of nationality between the State and the vessel which alone confers upon the State the right of diplomatic protection (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16).

93. In other words, Saint Vincent and the Grenadines does not have standing, not in the sense of "Applicants' standing … before the Court" (i.e. the question of jurisdiction) but in the sense of "legal right or interest regarding the subject-matter of their claim" (*I.C.J. Reports 1966*, p. 18).

94. The Tribunal, consequently, did not have to take up the other preliminary objections raised by Guinea or the submissions of the parties other than those upon which it decided in accordance with the reasoning set forth above.

(Signed) Tafsir Malick Ndiaye