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