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