SEPARATE OPINION OF JUDGE NELSON

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

Admissibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court stated that:

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

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

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

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

He has also observed that:

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

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

Registration

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

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[1] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (1997), Vol. II, p. 909.

[2] *Ibid.*, "Lessons of the Past and Needs of the Future", in *Increasing the Effectiveness of the International Court of Justice* (1997), Connie Peck and Roy S. Lee, eds., p. 476.

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

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

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

> The effect of a provisional certificate of registration can be shortened in one case only. By Section 37, registration ceases at the end of 60 days if the Applicant fails to provide, during that time, sufficient evidence that the vessel has been removed from its former register and has been duly marked. In the case of *The Saiga*, that evidence was supplied within the 60 day period so the vessel did not cease to be registered. The effect of a provisional certificate was the same as that of an ordinary certificate until the expiry of one year; that is, until 11 March of the following year. (ITLOS/PV.99/16)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

(Signed) L. Dolliver M. Nelson

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

[7] Rejoinder of Guinea, paragraph 87.

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