DISSENTING OPINION OF JUDGE NDIAYE

[Translation]

(Submitted pursuant to article 30, paragraph 3, of the Statute and article 8, paragraph 4, of the Resolution on the Internal Judicial Practice of the Tribunal.)

1. Having, to my regret, been unable to concur with the Judgment of the Tribunal, I felt it was my duty to state my dissenting opinion.

In my view, the submission of the Government of Guinea to the effect that the Application of Saint Vincent and the Grenadines was inadmissible due to the fact that the *Saiga* was not duly registered should have been sustained by the Tribunal. Similarly, the question with regard to jurisdiction and the question relating to the objections raised by Saint Vincent and the Grenadines to the challenges to admissibility should have been dealt with otherwise, for the following reasons:

I. JURISDICTION

2. The present proceedings between Saint Vincent and the Grenadines and the Republic of Guinea were introduced by notification of a special agreement. It is by the Exchange of Letters of 20 February 1998 ("the 1998 Agreement") that Saint Vincent and the Grenadines and Guinea agreed to submit the dispute between them relating to the vessel *Saiga* to the jurisdiction of the International Tribunal for the Law of the Sea (Hamburg) and to transfer to the Tribunal the arbitration proceedings initiated by Saint Vincent and the Grenadines by its notification of 22 December 1997.

3. The 1998 Agreement provides that the dispute shall be submitted to the International Tribunal on the following terms:

> 1. The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines;
>
> 2. The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998;
>
> 3. The written and oral proceedings shall follow the timetable set out in the Annex hereto;
>
> 4. The International Tribunal for the Law of the Sea shall address all claims for damages and costs referred to in paragraph 24 of the Notification of 22 December 1997 and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before the International Tribunal;
>
> 5. The Request for the Prescription of Provisional Measures submitted to the International Tribunal for the Law of the Sea by St. Vincent and the Grenadines on

> 13 January 1998, the Statement of Response of the Government of Guinea dated 30 January 1998, and all subsequent documentation submitted by the parties in connection with the Request shall be considered by the Tribunal as having been submitted under Article 290, paragraph 1, of the Convention on the Law of the Sea and Article 89, paragraph 1, of the Rules of the Tribunal.

4. It is this Agreement which provides the basis for the jurisdiction of the Tribunal. The dispute as to the merits is submitted to the Tribunal on behalf of Saint Vincent and the Grenadines as Applicant and Guinea as Respondent. The parties have, in the present case, accepted the jurisdiction of the Tribunal. They have discussed in substance all of the questions to be presented to it. That attitude on the part of the parties would also suffice to provide a basis for the Tribunal's jurisdiction.

5. However, the Tribunal sought to place its jurisdiction upon another footing, an endeavour which appears to me somewhat superfluous.

The jurisdictional act here does not differ significantly from other jurisdictional acts and is no exception to the rule that such jurisdictional acts are, by their nature and effect, essentially procedural rather than substantive provisions. Naturally, the 1998 Agreement contains provisions relating to substance, due to its legislative history (the arbitral proceedings) but it is the purview of the Tribunal to determine whether or not they exist. There should be no misunderstanding as to a "universal principle of procedural law" indicating that a distinction must be made between, on the one hand, the right to bring a case before a tribunal and the tribunal's right to take cognizance of the substance of the application, and, on the other hand, the right in light of the purpose of the application which the applicant must demonstrate to the satisfaction of the tribunal (see *South-West Africa, I.C.J. Reports 1966,* paragraph 64).

6. Here, we are concerned only with the first two. In other words, it is only the provisions of the 1998 Agreement by which the parties give effect to the transfer of the dispute to the Tribunal that provide the basis for its jurisdiction.

II. ADMISSIBILITY

7. In its Counter-Memorial, Guinea raised three challenges to the admissibility of the claims of Saint Vincent and the Grenadines. The first pertains to the nationality of the vessel *Saiga*, the second to diplomatic protection of aliens, and the third to non-exhaustion of local remedies.

8. Saint Vincent and the Grenadines, the Applicant, questions the right of Guinea, the Respondent, to raise objections to admissibility, adducing the jurisdictional act (the 20 February 1998 Agreement) and the Rules of the Tribunal (article 97, paragraph 1).

9. According to Saint Vincent and the Grenadines the Respondent is precluded, firstly, because paragraph 2 of the 1998 Agreement bars the raising of an objection to admissibility. That paragraph reads as follows:

> The written and oral proceedings before the International Tribunal for the Law of the Sea shall comprise a single phase dealing with all aspects of the merits (including

> damages and costs) and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998.

10. The Applicant adds that, in agreeing to recognize the Tribunal's jurisdiction to examine "*all aspects of the merits*", the parties understood that such examination should not be barred by an objection to admissibility raised in the name of the legitimate interest of the Applicant State, and that, in all of the correspondence between the parties and the exchanges between them over a period of nearly four months, the Republic of Guinea never so much as hinted that Saint Vincent and the Grenadines had not shown a legitimate interest in the vessel flying its flag. Moreover, Saint Vincent and the Grenadines argues that the reference to "the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January 1998" ruled out any other objection to jurisdiction or to the admissibility of the claims, the more so in that paragraph 2 stipulates that the proceedings shall comprise "a single phase dealing with all aspects of the merits".

11. Guinea disagrees with that interpretation and maintains that it never waived any objection to the admissibility of the Applicant's claims. Guinea holds that, since the 1998 Agreement deals essentially with the jurisdiction of the Tribunal, the parties were of the view that it was necessary expressly to mention the objections relating to issues of jurisdiction in this Agreement which transferred the dispute to the jurisdiction of the International Tribunal. The Respondent points out in this connection that, "interestingly enough", it was the opposite party who initiated the inclusion in the 1998 Agreement of the reference to the objection to jurisdiction by the Tribunal. In support of the fact that it never waived raising objections to the admissibility of the claims advanced by Saint Vincent, Guinea mentions the fact that it formulated its objection concerning non-exhaustion of local remedies, as provided for in article 295 of the United Nations Convention on the Law of the Sea ("the Convention") at the hearing of 24 February 1998 concerning the Request for prescription of provisional measures, i.e., only four days after the conclusion of the 1998 Areement which - according to the opposing party - excludes the possibility of raising such objections. During the aforementioned hearing, Saint Vincent had not made this position known; and its counsel would certainly not have failed to do so if it had been the intention of the parties to exclude objections to the admissibility of the claims, Guinea maintains.

12. Paragraph 2 of the 1998 Agreement should be interpreted in the light of article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

13. Saint Vincent and the Grenadines maintains that the ordinary meaning of the terms used in paragraph 2 of the 1998 Agreement, in particular the terms

> dealing with all aspects of the merits ... and the objection as to jurisdiction raised in the Government of Guinea's Statement of Response dated ...

as well as the object and purpose of the Agreement reveal that the parties agreed that no objection to the admissibility of the claims presented would be raised in the present proceeding.

14. Guinea contests that interpretation. The terms "a single phase" indicate that the procedure on the merits should not be divided into different procedural phases. Consequently, it is clear that the parties had envisaged procedural phases which could be separated from the proceeding for consideration of the merits or which could lead to suspending said proceeding. Otherwise, the use of the expression "a single phase" would have been superfluous.

15. Guinea wonders what procedural phases, if not the preliminary phase provided for in article 97 of the Rules of the Tribunal, could have been envisaged by the inclusion of this expression in the 1998 Agreement. The prompt release proceeding and the proceeding on the prescription of provisional measures, like the procedural phases other than that on the merits, had already been completed or were in the process of being completed before the Tribunal at the time the 1998 Agreement was concluded. No preliminary proceeding, in particular none of the preliminary proceedings provided for in article 96 of the Rules of the Tribunal, is to take place in a procedural phase distinct from the proceeding on the merits, or else such proceeding would be pointless in the present dispute. The necessary conclusion is that only the preliminary procedural phase provided for in article 97 of the Rules could have been contemplated by the terms "a single phase" in the 1998 Agreement. The Rules of the Tribunal do not mention any other procedural phase different from the proceeding on the merits and which could have been invoked by the parties to the present case. Indeed, the term "merits" must be interpreted in the light of the prompt release proceeding which had already taken place and in the light of the Request for prescription of provisional measures which was taking place at the time the 1998 Agreement was concluded or shortly before.

16. Guinea asserts that the word "merits" must be read in contradistinction to those procedures, which means that no distinction should be drawn between final submissions on the merits and any objection to the admissibility of the claims. There is a close link between objections to the admissibility of a claim and the proceeding on the merits.

17. Guinea also invokes article 31, paragraph 4, of the Vienna Convention on the Law of Treaties, which provides that:

> A special meaning shall be given to a term if it is established that the parties so intended.

18. It is undisputed between the parties that the object and purpose of the 1998 Agreement was to transfer the case from the jurisdiction of an arbitral tribunal to that of the International Tribunal for the Law of the Sea. Therefore, the Respondent maintains that the argument that Guinea excluded the possibility of raising an objection to the admissibility of the claims is groundless.

19. Saint Vincent further contests the right of Guinea to raise objections to admissibility on the ground that it is precluded pursuant to article 97, paragraph 1, of the Rules of the Tribunal. That paragraph reads as follows:

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

Under the terms of paragraph 1 of the Agreement of 20 February 1998, the parties agreed that:

> The dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea on the 22 December 1997, the date of the Notification by St. Vincent and the Grenadines.

20. The 90-day period running from 22 December 1997 came to an end on 22 March 1998. No objection to jurisdiction or to admissibility was raised during that period. According to Saint Vincent and the Grenadines, institution of proceedings and submission of the Memorial are two completely different things. They are governed by different sub-sections of the Rules of the Tribunal. Sub-section 1 of Section B deals with "Institution of Proceedings", while sub-section 2 of that section deals with "The Written Proceedings", including the Memorial of the Applicant (article 60).

21. Saint Vincent also maintains that the reason advanced by the Respondent in support of the assertion that these two distinct phases should be treated as a single phase is that, before that date, the Respondent did not have any opportunity to state its position on the dispute. The Applicant adds that, if Guinea had not agreed, on 20 February 1998, that the International Tribunal would consider all aspects of the merits of the dispute, it would not have been precluded from raising an objection to jurisdiction or to admissibility before the submission of the Applicant's Memorial. To the contrary, one would have expected Guinea to raise such an objection to jurisdiction or to admissibility at that stage. The Applicant adds that Guinea is not free to raise objections to admissibility at whatever stage it chooses. Guinea, for its part, maintains that the words "a single phase" in paragraph 2 of the 1998 Agreement imply that the parties ruled out the possibility of availing themselves of the procedure provided for in article 97, paragraph 1, of the Rules. In other words, the parties agreed, in keeping with article 97 of the Rules, that objections to admissibility should be addressed in the framework of the proceeding on the merits. The Respondent indicates that paragraph 2 of the 1998 Agreement specifically provides for that possibility. He further maintains that he is not precluded from raising the objection to admissibility at that stage because it is within his discretion to decide whether or not there is cause to raise objections upon which a decision is requested before any further proceedings on the merits.

22. Guinea argues out that the third category of objections referred to in article 97, paragraph 1, of the Rules, namely objections "the decision upon which is requested before any further proceedings on the merits", does not refer only to questions such as whether the Application, as formulated, no longer falls within the terms of the *compromis*, or whether the nature of the dispute is such that it cannot be submitted to a jurisdiction such as that suggested by the Applicant. The Respondent points out that it raised objections to the admissibility of the proceeding instituted by Saint Vincent and the Grenadines, that is, an objection to the admissibility of the application itself. The Respondent cites several cases before international jurisdictions in which the States raised preliminary questions pertaining to jurisdiction and admissibility in the Counter-Memorial, or during which such questions

were settled after the hearing of the case on the merits. This, the Respondent says, points to the non-exhaustive character of preliminary objections before international jurisdictions, in the sense that, regardless of whether or not questions of jurisdiction are raised during the phase devoted to preliminary objections, they can always be raised at a later stage, and even by the jurisdiction *ex officio*. The Respondent concludes that State practice seems to have adopted the same approach (see also Shabtai Rosenne*, The Law and Practice of the International Court, 1920-1996, Vol.II, Jurisdiction,* Martinus Nijhoff Publishers, 1997*,* pp. 909-915).

23. In considering the question of admissibility, the Tribunal should have relied upon the 1998 Agreement concluded between the parties to the dispute, whereby they decided to submit the dispute to the Tribunal, and to the procedural rules which they wished to see applied. The Tribunal's first duty, when called upon to interpret and apply the provisions of the 1998 Agreement, is to endeavour to give effect, according to their natural and ordinary meaning, to those provisions viewed in their context. If the relevant words, when one gives them their natural and ordinary meaning, have a meaning in their context, the inquiry should stop there (*Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950*, p. 8).

24. It should be recalled that the 1998 Agreement was concluded through the good offices of the President of the Tribunal in order to determine the dispute-settlement procedure in this case. Its purpose is to transfer the dispute from the jurisdiction of an arbitral tribunal (*to be constituted following the arbitral proceeding instituted by Saint Vincent and the Grenadines on 22 December 1997 against Guinea and which was to be presided by a person appointed by the President of the International Tribunal for the Law of the Sea; the procedure was opened pursuant to article 287, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea)* to that of the International Tribunal for the Law of the Sea, with a view to avoiding lengthy and costly proceedings. It is therefore in that context that one must view paragraph 2 of the 1998 Agreement about which the parties differ. It reads:

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

25. The relevant words here with regard to the discussion on admissibility are "a single phase dealing with all aspects of the merits (including ...".

26. Proceedings on preliminary objections were long considered a distinct phase of the case. It was in 1952, with regard to the *Ambatielos* case, that the International Court of Justice said:

> [The Court] decided that, in future, these proceedings would be treated as an incident of proceedings on the merits and not as a separate case. (*I.C.J. Yearbook 1952-1953*, p. 89)

27. In 1972, that distinction was embodied in article 79, paragraph 1, of the Rules of the I.C.J. That provision is reflected in article 97, paragraph 1, of the Rules of the Tribunal.

In this regard, and bearing in mind the words "a single phase" and "including", the Tribunal should interpret paragraph 2 of the 1998 Agreement as meaning that the parties wish the objections to admissibility to be *joined to the merits* because

> a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction

is the joinder to the merits of the preliminary objections.

Indeed, article 97, paragraph 7, which reflects article 79, paragraph 8, of the Rules of the International Court of Justice, embodies this approach recognizing practice. It reads:

> The Tribunal shall give effect to any agreement between the parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits.

28. Joinder to the merits would also be the result of an examination of the nature of the objections to admissibility in question. They are in fact so closely related to the merits or to points of fact or of law bearing upon the merits that one could not consider them separately without touching upon the merits (see *The Panevezys-Saldutiskis Railway Case, Judgment, 1939, P.C.I.J., Series A/B No.76*, pp. 23-24; *Case concerning the Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 4; *Case of Certain Norwegian Loans, Order, I.C.J. Reports 1956*, p. 73; *Case concerning Right of Passage over Indian Territory, Judgment, I.C.J. Reports 1957*, pp. 150-152).

29. In other words, joinder to the merits is required inasmuch as a decision on the objections requires consideration of the whole or virtually the whole of the merits, in short the essential points of the claims of Saint Vincent and the Grenadines. Because what the Respondent is challenging is not the admissibility of the Application in the light of procedure, but the right which provides the basis for the Application. These are preliminary objections of substance.

30. A judicial decision in favour of an application based on this type of objection in itself results in putting an end to the dispute as a whole, because the findings of law emanating from said decision on the objection completely eliminate the adversarial contest which had arisen from the dispute. These preliminary objections of substance are entirely in keeping with the well-established principle, under the theory of international procedure, that, in an international dispute, each party before the tribunal called upon to resolve the dispute is entitled to make use of such means as it sees fit, provided they are relevant in relation to the same dispute. This principle underlies a number of provisions in the statutes and rules of international jurisdictions. For example, article 88, paragraph 1, of the Rules of the Tribunal provides:

> When, subject to the control of the Tribunal, the agents, counsel and advocates have completed their presentation of the case, the President of the Tribunal shall declare the oral proceedings closed. …

31. It happens that the rules adopted by international jurisdiction are adopted in the light of preliminary procedural objections.

> However, it is of fundamental importance to note that the issues raised by a ... [preliminary] objection [of substance], while they can be characterized as "issues of the merits" as much as those raised by the Application instituting the proceedings concerning interpretation and the application of the legal norm invoked in that Application, remain distinct from *the merits of the case* of which the tribunal is seized by that same Application, said merits having as their identifying element the allegations and submissions around which the Application itself takes shape. (see G. Sperduti, "La recevabilité des exceptions préliminaires de fond dans le procès international", *Rivista di Diritto internazionale*, 1970, Vol. 53, pp. 461-490; p. 485)

III. THE OBJECTIONS

32. The Government of Guinea maintained that the claims of Saint Vincent and the Grenadines were inadmissible in several respects. The first objection to admissibility pertained to the nationality of the M/V *Saiga*.

33. It appears that this challenge to admissibility is of cardinal importance. It raises a problem which bears upon the merits but which takes on priority. It is therefore the duty of the Tribunal to begin by considering this question which is of a character such that a decision upon it may render pointless any further consideration of other aspects of the case.

34. Guinea maintains that the *Saiga* was not duly inscribed in the registry. According to Guinea, the vessel was built in 1975. On the day of its detention by the Guinean authorities, the 28th of October 1997, it was not registered under the flag of Saint Vincent and the Grenadines. As emerges from Annex 13 of the Memorial, it was on 14 April 1997 that Saint Vincent and the Grenadines granted the *Saiga* a provisional certificate of registration. However, that Provisional Certificate had already expired on 12 September 1997. And the *Saiga* was arrested over a month later.

The final Certificate of Registration was not issued by the competent authorities of Saint Vincent and the Grenadines until 28 November 1997. Thus, it is quite clear that the *Saiga* was not inscribed in the registry in accordance with the law during the period from 12 September 1997 to 28 November 1997. For that reason, the *Saiga* may be characterized as a ship without nationality at the time it was attacked.

35. The Tribunal should have sought to determine whether the registration of the *Saiga* by the competent authorities of Saint Vincent and the Grenadines directly implies an obligation on the part of Guinea to recognize its effect, i.e. legal standing for Saint Vincent and the Grenadines to exercise protection. In other words, it is a question of determining whether the act originating with Saint Vincent and the Grenadines is opposable to Guinea with respect to the exercise of protection, in particular at the time of the arrest of the *Saiga*. Such opposability is to be determined in the light of the rules of international law. The Tribunal should have addressed this question and examined the question of the validity of the registration of the *Saiga* according to the legislation of Saint Vincent and the Grenadines.

36. Naturally, it is up to Saint Vincent and the Grenadines, as it is to any other sovereign State, to regulate by its own legislation the conditions for registration of ships and to grant the privilege to fly its flag by its own organs in accordance with that legislation.

The tribunal entrusted with deciding the *Dispute Concerning Filleting within the Gulf of St. Lawrence* recalled:

> that the right of a State to determine by its legislation the conditions for the registration of ships in general and fishing vessels in particular is part of the exclusive competence of that State. (*Award of 17 July 1986*, paragraph 27)

The principle of the exclusive competence of the State in the determination of nationality has long been enshrined. Let us recall the words of the Permanent Court:

> … in the present state of international law, questions of nationality are … in principle within this reserved domain

of States (*Nationality Decrees Issued in Tunis and Morocco*, *Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24).

This opinion is very clearly confirmed by the International Court of Justice in *Nottebohm*:

> [I]nternational law leaves it to each State to lay down the rules governing the grant of its own nationality. (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 23)

37. But the question which the Tribunal must answer is not solely a matter of the domestic law of Saint Vincent and the Grenadines. "It does not depend on the law or on the decision of [Saint Vincent and the Grenadines] whether that State is entitled to exercise its protection, in the case under consideration" (*Nottebohm*, *op. cit*., p. 20). On the other hand, the internal validity of nationality is the primary condition for its international validity. Just as international law acknowledges that States have exclusive competence in determining nationality, the effect of nationality on the international plane is made subordinate to the requirements of international law. Accordingly, a challenge by a State to an act of nationality does not invalidate it but does render it not opposable.

38. As is noted by Brownlie, "Nationality is a problem, *inter alia*, of attribution, and regarded in this way resembles the law relating to territorial sovereignty. National law prescribes the extent of the territory of a State, but this prescription does not preclude a forum which is applying international law from deciding questions of title in its own way, using criteria of international law" (I. Brownlie, "The Relations of Nationality in Public International Law", *BYBIL, 1963*, pp. 284-364, at pp. 290-291). One may find an illuminating illustration of these views in the law of maritime delimitation. In its decision of 18 December 1951 in the *Fisheries* case, the International Court of Justice said: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law" (*Fisheries, Judgment, I.C.J. Reports 1951*, p. 132). There is a particularly striking resemblance between the act of maritime delimitation and the act of

granting nationality or registration from the standpoint of their status and that of their organic origin.

39. We should recall here that recourse to a tribunal, "[t]o exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is [therefore] international law which determines whether a State is entitled to exercise protection and to seize the Court" (*Nottebohm*, *op cit*., pp. 20-21). And it is from the rules of international law that the Tribunal derives its power to verify the internal validity of the acts of Saint Vincent and the Grenadines pertaining to the registration of the *Saiga*.

40. According to the prevailing view in international judicial decisions, there is no doubt that an international tribunal is entitled to investigate the circumstances in which a certificate of nationality has been granted. (*Nottebohm, I.C.J. Reports 1955*, p. 50, Judge *Ad Hoc* Guggenheim, Dissenting Opinion)

Among the many decisions favouring judicial and arbitral review of certificates of nationality, one should cite that of Commissioner Nielsen in the case *Edgar A. Hatton (U.S.A.)* v. *United Mexican States*, which emphasizes the obligation to prove nationality.

> [C]onvincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement. (*Reports of International Arbitral Awards, United Nations, Volume IV*, p. 331, decision of 26 September 1928)

41. That the Tribunal possesses such a power of oversight derives from the principle of equality of parties. That is why it is not only a right for the Tribunal but also an obligation. ("[T]he presumption of truth must yield to the truth itself", as said by arbitrator Bertinatti in the *Medina* case *(United States* v. *Costa Rica), decision of 31 December 1862,* Moore*, International Arbitration, Vol. 3*, p. 2587).

42. Since the challenged registration is a purely internal act, it is normal that in applying the rules pertaining thereto, the Tribunal should inquire into whether Saint Vincent and the Grenadines, in inscribing the *Saiga* in its registry, duly applied its internal legislation in force. To that end, the Tribunal should have verified the authenticity and compliance with law of the items of evidence produced to show the validity of the registration claimed before the Tribunal. In other words, the determination of the nationality of the *Saiga* at the time of the arrest as challenged by the Guinean side should have been examined in the light of the following items of evidence:

a) the Provisional Certificate of Registration;
b) the Permanent Certificate of Registration;
c) the statements of the Maritime Administration;
d) the statements of the Deputy Commissioner for Maritime Affairs;
e) the Merchant Shipping Act of 1982;
f) the Maltese certificate.

43. On that basis the Tribunal could verify the application of internal law in light of the facts alleged or observed by the parties in order to determine whether they were accurate or inaccurate.

44. In other words, the Tribunal should examine the conditions for registration of vessels in Saint Vincent and the Grenadines, i.e. the legal regime as well as the procedural acts relating to the *Saiga*.

45. Saint Vincent and the Grenadines is appearing before the Tribunal as the flag State of the *Saiga*. Guinea maintains that the vessel was not duly registered under the flag of Saint Vincent and the Grenadines at the date of its arrest by the Guinean customs authorities, 28 October 1997. As a consequence, the conditions laid down in article 91 of the United Nations Convention on the Law of the Sea are not satisfied and the *Saiga* can be described as a ship without nationality at the date of its arrest.

46. The *Saiga* obtained a provisional certificate of registration from Saint Vincent and the Grenadines dated 14 April 1997. The date of expiration of that Provisional Certificate was 12 September 1997, i.e. more than a month before the arrest. The competent authorities of Saint Vincent and the Grenadines did not prepare a permanent certificate of registration until 28 November 1997, that is exactly one month after the arrest of the *Saiga*. The conclusion here compelled by logic is that the vessel was not validly registered during the period from 12 September 1997 to 28 November 1997.

47. Saint Vincent and the Grenadines advanced the argument that once a vessel is registered under the flag of Saint Vincent and the Grenadines, it remains registered until it is deleted from the registry. Saint Vincent asserted this position on the basis of the Merchant Shipping Act of 1982.

48. The Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines contains two articles dealing with provisional certificates of registration. These are sections 36 and 37. In its Reply, Saint Vincent and the Grenadines refers in particular to section 37, which reads:

> The provisional certificate of registration shall cease to have effect if, before the expiry of sixty days from its date of issue, the owner of the ship in respect of which it was issued has failed to produce to the issuing authority -
>
> (*a*) a certificate issued by the government of the country of last registration of the ship (or other acceptable evidence) to show that the ship's registration in that country has been closed; or
>
> (*b*) evidence to show that the ship has been duly marked as required by section 22.

49. The certificate of deletion was to come from Malta, the country of last registration of the *Saiga*, which was then called the "*Sunflower*".

50. Guinea points out that these provisions deal with special circumstances, namely the effects which flow from failure to produce certain documents in regard to the Provisional Certificate. If these documents are not produced within sixty days after issuance of the provisional certificate, said certificate ceases to have effect. These provisions cannot, then, be adduced in support of the argument of Saint Vincent and the Grenadines to the effect that the vessel, once it has been provisionally registered under its flag, remains so beyond the

period for which the Provisional Certificate was issued. The purpose of section 37 is precisely to produce the opposite effect, namely to shorten the period of validity.

51. It should be noted that Saint Vincent and the Grenadines did not revert to this argument thereafter.

52. The other provisions of the Merchant Shipping Act dealing with provisional registration are found in section 36(2). This article provides that a provisional certificate of registration has the same effect as the ordinary certificate, for a period of one year from the date of issuance. In other words, a provisional certificate cannot be valid for more than one year regardless of the circumstances.

53. However, section 36(2) does not say that such a provisional certificate of registration is always valid for a period of one year despite the fact that the register limits the validity of the provisional certificate to six months, as it did in the present case.

54. In the official brochure of the Saint Vincent and the Grenadines Maritime Administration concerning procedures for registration, one finds under the heading "Provisional Registration Certificate" the following: "The provisional registration certificate is issued for six months and can be extended, under certain circumstances, for a further period of six months." The total period of validity would then be 12 months, in keeping with section 36(2).

55. Saint Vincent and the Grenadines then produced another item of evidence, in the form of a certificate issued by a representative of its Maritime Administration based in Monaco, dated 27 October 1998, which reads as follows:

> I hereby confirm that m.t. "SAIGA" of GT 4254 and NT 2042 was registered under the St. Vincent and the Grenadines Flag on 12th March, 1997 and is still today validly registered.

56. This certificate adds nothing new. It is dated 27 October 1998, that is one month after the facts, and it does not produce the desired effect, namely for the *Saiga* to be considered as being validly registered under the flag of Saint Vincent and the Grenadines during the relevant period in question, namely from 12 September 1997 to 28 October 1997. This certificate only confirms that the vessel was registered on 12 March 1997.

57. Saint Vincent and the Grenadines then drew a distinction between registration on the one hand and issuance of the certificate on the other. It argued that the validity of a registration certificate and that of a vessel's registration are not necessarily the same. However, such a distinction does not emerge from the Merchant Shipping Act, from the official brochure setting out the formalities of registration, or from the Provisional Certificate itself.

58. This means that the registration and the certificate of registration cannot be considered separately. That is clearly borne out by the letter produced by Saint Vincent and the Grenadines from the Deputy Commissioner for Maritime Affairs dated 1 March 1999 and including a copy of the page from the Registry concerning the M/V *Saiga*, dated 14 April 1997. Under "registrations", it reads: "Valid thru: 12/09/1997". It thus appears that

not only the Certificate but also the registry bear the same date of expiration, i.e. 12 September 1997. The relevant date under discussion is 28 October 1997, which falls between the date of expiration of the Provisional Certificate (12 September 1997) and that of the issuance of the Permanent Certificate of Registration (28 November 1997).

59. Saint Vincent and the Grenadines reverted at length to the question of registration at the hearing of 18 March 1999. Its counsel argued that the situation under the law of Saint Vincent and the Grenadines is such that a certificate of registration is always valid for one year, unless it is replaced meanwhile by a permanent certificate of registration or the exceptional provision of section 37 of the Merchant Shipping Act is applied.

He refers to section 36(2) of that law and asserts that the provisional certificate has the same effect as an ordinary certificate for a duration of one year.

60. However, counsel for Saint Vincent and the Grenadines did not expressly mention the date of expiration of the Provisional Certificate of Registration of the *Saiga*, namely 12 September 1997, when he continued his consideration (section 7) saying that "provision is made for the issuance of two successive certificates, each of 6 months". In the same section, it is said more clearly still that "If the paperwork has been completed within the first 6 months, another provisional certificate is issued".

61. Moreover, the official document published by the Saint Vincent and the Grenadines Maritime Administration provides that a provisional certificate is issued for six months and can be renewed for another six months. The same holds true as to procedures of registration under other shipping registries, for example all of those cited by counsel for Saint Vincent and the Grenadines, where the initial registration is provisional and where the initial period of registration is generally six months, subject to renewal.

(*See also, "Laws Concerning Nationality of Ships", UN Document ST/Leg./Ser.B/5 (UN 1954), where laws relating to registration and nationality of ships of sixty-five (65) countries are presented; N. Singh, "International Law Problems of Merchant Shipping", RCADI, 1962 (III), v. 107, pp. 7-161.)*

62. It emerges clearly from the foregoing that when the provisional certificate of registration expires six months after issuance, the Commissioner for Maritime Affairs must step in and take steps. We should stress that this necessity derives from the fact that there is no automatic extension of the validity of the certificate provided by law. This explains the fact that Saint Vincent and the Grenadines abandoned its argument (Reply, paragraph 24) to the effect that a vessel registered under the flag of Saint Vincent and the Grenadines remains so registered until it is deleted from the registry.

63. Counsel for Saint Vincent and the Grenadines admits that action by the Commissioner for Maritime Affairs is necessary but does not spell out the nature of that action. He explains (Reply, paragraph 7) that in such cases "another provisional certificate is issued"; however, in another part of his statement dealing with provisional certificates, he says that the provisional certificate is issued initially for six months and can be renewed for an additional period of six months. The form of the action, however, is not spelled out. The Commissioner for Maritime Affairs can either issue a new provisional certificate or renew the original provisional certificate. But regardless of the kind of action taken, it must be done by the

Commissioner, and done in keeping with the provisions of the "implementing enactment" and the rules governing other shipping registers.

64. The fact is that no measure was taken by the Commissioner for Maritime Affairs to deal with the expiration of the Provisional Certificate. This is confirmed by the cross-examination of Captain Orlov of the *Saiga* (Verbatim Record ITLOS/PV.99/3, page 6, line 12). He indicates that he had not received any information from Seascot (the representative of the owners) with regard to a possible extension of the Provisional Certificate after its expiration.

65. In order to get around this difficulty, counsel for Saint Vincent and the Grenadines cites the letter from the Commissioner for Maritime Affairs dated 1 March 1999, in which he indicates that it is common practice for owners to allow the validity of their certificates to lapse for a brief time.

66. This statement is serious. It emanates from the authority responsible for registering vessels in Saint Vincent and the Grenadines, who, in a letter to the Tribunal, writes that it is common in Saint Vincent and the Grenadines for owners to be unconcerned about the date of expiration of their provisional certificate. It was thus quite deliberately that the owners of the *Saiga* sent out to sea a vessel whose papers were not in order. There is culpable negligence in this. Would Saint Vincent and the Grenadines ever consent to incur responsibility for damages (pollution, for example) caused by vessels under its flag whose registration documents were expired at the time of the unlawful acts?

67. In the latter part of the letter, the Commissioner confirms, however, that after the expiration of the validity of the provisional certificate, the owner must obtain either another provisional certificate or a permanent certificate. He recalls that, in the case of the *Saiga*, it was a permanent certificate that was obtained.

68. It was shown, in the form of a probative document, that the Permanent Certificate of the *Saiga* was dated 28 November 1997, i.e. the second day of the oral proceedings in the prompt release proceeding when Saint Vincent and the Grenadines produced the Permanent Certificate to the Tribunal and the parties.

69. Saint Vincent and the Grenadines argued that it had been difficult to send the Permanent Certificate aboard the *Saiga* because the vessel might have been at sea. If that were the case, the Permanent Certificate would have indicated a date prior to the arrest of the vessel, i.e. prior to 28 October 1997. In that case, the date of issuance of the certificate could have been done later. However, it was not so. The Permanent Certificate is dated a month after the arrest of the *Saiga* and, apparently, was requested of the shipping registry only at the time when the problem of the owners of the *Saiga* arose in the context of the prompt release proceeding. The statements of Counsel for Saint Vincent and the Grenadines at the sitting of 28 November 1997 clearly bear this out.

70. Saint Vincent and the Grenadines then produced documents emanating from the Commissioner for Maritime Affairs with a view to supporting the idea that the provisional registration of 12 March 1997 remained valid after its expiration. For example, an extract from the registry dated 24 February 1999 was adduced, in which the validity of the registration was indicated as permanent. However, such an effect occurs on the date of

issuance of the extract. This means that the vessel was registered on a permanent basis as from 24 February 1999, which adds nothing to the debate.

71. On 12 March 1997, the registration of the *Saiga* was not permanent, as is borne out by Annex A to the letter of the Deputy Commissioner for Maritime Affairs of 1 March 1999 containing the extract of the registry of 15 April 1997, which bears the clear indication "Valid thru: 12/09/1997". The same holds true for the certificate of the Commissioner for Maritime Affairs of 27 October 1998 produced in Annex 7 of the Reply of Saint Vincent and the Grenadines.

72. In this regard, the only probative document which could have been instructive to the Tribunal would be the production of a request from Seascot Management addressed to the Saint Vincent Maritime Administration asking for an extension of the Provisional Certificate or the issuance of another certificate. But no evidence of such a request has been produced.

73. Saint Vincent advanced another argument consisting of comparing the provisional certificate of registration of a vessel to the passport of an individual. The Respondent rejected the argument, explaining that "A natural citizen retains the nationality of his State independent of the expiry of his passport. A vessel, however, acquires the nationality of a State only by express application for registration. Such registration can be and will often be changed in the life of a vessel. The registration is a constitutional act by which the nationality of the flag State is granted to the vessel. If this act of registration is limited in its validity, indeed the vessel becomes stateless, which is quite different from the case of a natural citizen" (ITLOS/PV.99/18, page 12, lines 40-46). One might add that it is irregular to travel with an expired passport.

74. Saint Vincent further invokes section 36(2) of the Merchant Shipping Act of 1982, which provides that a provisional certificate of registration "shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue". It should be noted that the law does not say that an expired certificate continues to have the same effect as an ordinary certificate. Moreover, provisional certificates are designed to have a period of validity of three to six months, their renewability depending on the country. This is sufficiently demonstrated by practice and internal legislation on the matter. Saint Vincent itself adopted a duration of six months for provisional certificates which it issues, which can be renewed once under certain conditions or replaced by a permanent certificate of registration. This is borne out by the official brochure produced by Saint Vincent, which appears as an implementing enactment of the Merchant Shipping Act of 1982.

75. To support its argument concerning the one-year validity of the Provisional Certificate of Registration, Saint Vincent and the Grenadines indicates that, pursuant to section 36(3)(d) of the Merchant Shipping Act of 1982, payment of an "annual fee for one year" is required at the time of submission of an application for provisional registration. For this reason, Saint Vincent and the Grenadines concludes that the Provisional Certificate of Registration had retained its validity after 12 September 1997 and at all times during the present dispute.

76. This argument, as framed by Saint Vincent and the Grenadines, may lead to error. section 36(3) reads as follows:

(3) Every applicant for registration of a ship under this section shall, without prejudice to the generality of the provisions of subsection (1), produce the following evidence, namely -

(*a*) in respect of the ship -

(i) evidence to establish that any foreign certificate of registration or equivalent document has been legally cancelled or the registration has been duly closed;

(ii) if there is an outstanding certificate, evidence to show that the government who issued it has consented to its surrender for cancellation or closure of registration; or

(iii) a declaration from previous owners undertaking to delete the ship from the existing registration and confirming that all outstanding commitments in respect of the ship have been duly met;

(*b*) evidence to show that the ship is in a seaworthy condition;

(*c*) evidence to show that the ship has been marked as provided in section 22 or that the owner of the ship has undertaken to have the ship so marked immediately upon receipt of a provisional certificate of registration;

(*d*) evidence of payment of the fee due on the first registration and of the annual fee for one year in respect of the ship.

77. In light of section 36(3) it appears that the argument of Saint Vincent and the Grenadines is, to say the least, specious. This section appears, rather, counter-productive to the argument advanced by Saint Vincent. The various items of evidence required as preconditions were not provided to the Tribunal. None of the first three items required, concerning cancellation or deletion from the register of the country of last registration was provided. Saint Vincent and the Grenadines was unable to produce the certificate of deletion from Malta before the Tribunal. It now invokes the "annual fee" out of context to support the idea of annual validity of the Provisional Certificate. We know that provisional certificates are issued in Saint Vincent and the Grenadines for a duration of six months, renewable under certain conditions, as indicated by the "implementing enactment" of the Merchant Shipping Act, which provides:

> The provisional registration certificate is issued for six months and can be extended, under certain circumstances, for a further period of six months.

78. With regard to section 37 of the Merchant Shipping Act, Counsel for Saint Vincent and the Grenadines explained to the Tribunal (sitting of 18 March 1999) that the letter from the Deputy Commissioner gives the owner of the *Saiga* other acceptable evidence showing that the registration of the vessel in the country of last registration was closed. However, that counsel did not show what that "other acceptable evidence" of the *Saiga*'s deletion from the previous register was.

79. The only evidence should have been - in accordance with section 37 - production of a certificate of deletion from the Maltese register from the authorities of that country. However, that certificate of deletion was not produced; Counsel for Saint Vincent and the Grenadines was content to say that:

> Since there has never been any suggestion that the *Saiga* remains on the Maltese register, we have judged it unnecessary to trouble the Tribunal with details of her

history under a different name and a different flag years before the events which have given rise to this litigation.

80. Under these circumstances, it is impossible to form a precise idea of the situation of the *Saiga* at the time of its arrest. Was the vessel in a position to sail under the flags of two States which it could use according to its convenience, with the ensuing consequences?

81. In my view, the Tribunal should have directly turned to Malta, which is a State party to the Convention, to inquire into the situation of the vessel in the registry of that country, in order to settle the point as to whether the deletion certificate could or could not be produced. In any event, the fact that this item of evidence was not produced leads one to think that the *Saiga* was not deleted from the Maltese registry at the time of its arrest.

82. All in all, consideration of the Provisional Certificate of Registration, the Permanent Certificate of Registration, the official brochure of the Maritime Administration concerning procedures for registration, the certificate of the Deputy Commissioner for Maritime Affairs, the 1982 Merchant Shipping Act, and the non-production of the Maltese certificate of deletion enables us to conclude that the *Saiga* was not validly registered on the relevant date (27 and 28 October 1997), i.e. at the time of its arrest by the Guinean authorities.

83. The Tribunal finds that Saint Vincent and the Grenadines acted at all times on the basis of the fact that the *Saiga* was a vessel of its nationality, that it acted as a flag State of the vessel at all stages of the dispute and in all phases of the proceedings under way. It is in that capacity, says the Tribunal, that it invoked the jurisdiction of the Tribunal to request the prompt release of the vessel and its crew, pursuant to article 292 of the Convention, and in filing an application for the prescription of provisional measures pursuant to article 292.

84. With regard to Guinea, the Tribunal notes that it did not contest or in any way cast doubt upon the registration or nationality of the vessel at any time before the submission of its Counter-Memorial in October 1998. Previously, says the Tribunal, Guinea had latitude to make inquiries concerning the registration of the *Saiga* or the papers pertaining thereto. For example, says the Tribunal, Guinea could have inspected the shipping registry of Saint Vincent and the Grenadines. Other opportunities to challenge the registration or nationality of the vessel arose in the course of the proceedings before the Tribunal concerning the prescription of provisional measures in February 1998. The Tribunal adds that it is also relevant to note that the Guinean authorities cited Saint Vincent and the Grenadines as the flag State of the *Saiga* in the *cédule de citation* by which criminal proceedings were lodged against the Master of the vessel before the Court of First Instance of Conakry. In the judgment of the Court of First Instance, and in the subsequent judgment by the Court of Appeal affirming it, Saint Vincent and the Grenadines had been mentioned as the flag State of the *Saiga*.

85. Thus, the Tribunal alludes to the conduct of the two parties in support of the argument that Saint Vincent and the Grenadines was the flag State of the *Saiga* at the time of the events, without one knowing whether it seeks to qualify the conduct of Guinea as a case of estoppel, consent, or preclusion. One would have liked to be certain of this point. One point that does emerge consistently, on the other hand, is the fact that the statement of Guinea that the *Saiga* was not duly registered in the registry of Saint Vincent and the Grenadines at the time of its arrest is a *new fact* in the present case. This falls within the category of a fact "of

such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Tribunal ..." (Rules of the Tribunal, article 127).

86. Indeed, this fact revealed in the Counter-Memorial of Guinea was unknown to the Tribunal at the time of the first *Saiga* case concerning prompt release of the vessel and in the first phase of the present proceedings pertaining to the request for prescription of provisional measures. The discovery of this fact gives Guinea legal grounds to request the revision of judgments given in the course of the aforementioned proceedings. As was recalled by the International Court of Justice in the case *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)*:

> This rule contained in article 10, paragraph 2, cannot however be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered; and the Tribunal has already exercised this power. Such a strictly limited revision by the Tribunal itself cannot be considered as an "appeal" within the meaning of that article and would conform with rules generally provided in statutes or laws issued for courts of justice, such as for instance in article 61 of the Statute of the International Court of Justice. (*Advisory Opinion, I.C.J. Reports 1954*, p. 55)

87. The discovery of this fact appears rather to be opposable to Saint Vincent and the Grenadines. It can also be viewed as a fundamental change of circumstances.

88. The approach of the Tribunal in reaching these conclusions is lacking in clarity. The Judgment refers to the principles by which the evidence is evaluated without one knowing the method actually used. Rather, the Judgment indicates that the Tribunal, in evaluating the evidence, is of the view that, as a general rule, it should not lightly be concluded that a ship is without nationality.

89. This is, to say the least, a singular approach. Facts must be legally characterized and rules of law are made to be applied. There is a specific and very detailed legal regime which applies to cases of commercial vessels whose papers are not in order. The case of the *Saiga* is a case of absence of nationality. That does not mean that the vessel is completely without protection as the words of the Tribunal might suggest. Quite the contrary, as pointed out by O'Connell, "It follows that the right to protect a ship is not necessarily exclusive to the State of nationality, but might equally extend to the State whose nationals own the ship. It also follows, perhaps, that when a ship loses her nationality she falls subject to the law of nationality of the owners. A ship which is without nationality, then, is not necessarily a ship without law, but it may be one lacking a State to protect it" (see *The Chiquita, 19 F.2d 417 (1927);* Moore, D., Vol. II, p. 1002 *et seq*.; *US v. The Pirates, 5 Wheat.* 184 at 199 (1820)*; U.S. v. Jenkins, 26 Fed. Cas. No. 15473a* (1838); *The Alta, 136 Fed.* 513 at 519 (1905). See *Molvan v. Att.-Gen. for Palestine* (1948) A.C. 351). (D. P. O'Connell*, International Law,* Second Edition, Vol. II*,* London, Stevens & Sons, 1970, p. 607. As regards the probative value of statements of ship's papers concerning the nationality of the vessel, see G. Gidel, *Le Droit International Public de la Mer,* Volume I, Paris, E. Duchemin, 1981, p. 89.)

90. This amounts to saying that everything tends to support the admissibility of the Guinean objection but the Tribunal judged that in the particular circumstances of the case it would not be doing justice if it did not consider the merits of the case. This attitude is somewhat

surprising. As the International Court of Justice has had occasion to point out (*I.C.J. Reports 1966, op. cit.*, p. 34), humanitarian considerations may inspire rules of law; thus, the preamble of the United Nations Charter constitutes the moral and political underpinning for the legal provisions which are set forth therein. Such considerations are not, however, rules of law in themselves. All States take an interest in these matters; it is in their interest to do so. But it is not because an interest exists that it has a specifically legal character.

(Concerning the function of a Tribunal, see, for example, the case *Northern Cameroons [Cameroon* v. *United Kingdom], Preliminary Objections, Judgment, I.C.J. Reports 1963,* pp. 33-34.)

91. According to the United Nations Convention on the Law of the Sea (article 91, paragraph 1, second sentence) "[S]hips have the nationality of the State whose flag they are entitled to fly". Authorization to fly the flag is given by the Registry on the condition that the vessel be registered. In the case of the *Saiga*, the validity of the registration was limited to 12 September 1997. And, since there was no extension of the provisional registration, **the *Saiga* was a ship without nationality at the time of its arrest**.

92. Consequently, the Tribunal should declare that the *Saiga* was a ship without nationality at the time of its arrest and, in keeping with the principle of continuous nationality, i.e.

> the rule of international law that a claim must be national not only at the time of its presentation but also at the time of the injury

hold that Saint Vincent and the Grenadines may not exercise rights on behalf of the *Saiga* because it is the bond of nationality between the State and the vessel which alone confers upon the State the right of diplomatic protection (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16).

93. In other words, Saint Vincent and the Grenadines does not have standing, not in the sense of "Applicants' standing … before the Court" (i.e. the question of jurisdiction) but in the sense of "legal right or interest regarding the subject-matter of their claim" (*I.C.J. Reports 1966*, p. 18).

94. The Tribunal, consequently, did not have to take up the other preliminary objections raised by Guinea or the submissions of the parties other than those upon which it decided in accordance with the reasoning set forth above.

(Signed) Tafsir Malick Ndiaye