

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA  
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER



1999

Public hearing

held on Thursday, 11 March 1999, at 2.00 p.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Thomas A. Mensah presiding

in the M/V “SAIGA” (No.2)

*(Saint Vincent and the Grenadines v. Guinea)*

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**Verbatim Record**

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Uncorrected  
Non-corrigé

<i>Present:</i>	President	Thomas A. Mensah
	Vice-President	Rüdiger Wolfrum
	Judges	Lihai Zhao
		Hugo Caminos
		Vicente Marotta Rangel
		Alexander Yankov
		Soji Yamamoto
		Anatoli Lazarevich Kolodkin
		Choon-Ho Park
		Paul Bamela Engo
		L. Dolliver M. Nelson
		P. Chandrasekhara Rao
		Joseph Akl
		David Anderson
		Budislav Vukas
		Joseph Sinde Warioba
		Edward Arthur Laing
		Tullio Treves
		Mohamed Mouldi Marsit
		Gudmundur Eiriksson
		Tafsir Malick Ndiaye
	Registrar	Gritakumar E. Chitty

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*Saint Vincent and the Grenadines*  
*represented by*

Mr. Carlyle D. Dougan Q.C., High Commissioner to London for Saint Vincent and the Grenadines,

*as Agent;*

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

*as Deputy Agent and Counsel;*

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

*and*

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

*as Counsel and Advocates.*

*Guinea*  
*represented by*

Mr. Hartmut von Brevern, Barrister, Röhreke, Boye, Remé, von Werder, Hamburg, Germany,

*as Agent and Counsel;*

Mr. Maurice Zogbélemou Togba, Minister of Justice and Attorney General of Guinea,

*and*

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

*as Counsel.*

1 **THE PRESIDENT:** At this stage it is now the turn of Guinea to commence the presentation  
2 of its case by submissions and witnesses. I shall now invite the agent, Mr von Brevern, to  
3 speak.  
4

5 **MR VON BREVERN:** Mr President, Honourable Judges, first of all I am sorry to say that  
6 the Minister of Justice for Guinea has not yet arrived. I had hoped that he would be here, but it  
7 is my obligation to start with the statement of Guinea now. We will deal, this afternoon, with  
8 the right of Guinea to contest the admissibility and with the objections of admissibility  
9 themselves. I will start with referring and interpreting the agreement between the parties to  
10 refer the matter from the arbitral tribunal to you. I will deal with rule 97 of your rules, and the  
11 question of the 90 days. Then I will deal with the first admissibility point, concerning the  
12 registration of the vessel. Professor Lagoni will then continue with the issues of genuine link  
13 and exhaustion of local remedies. I think that that will take us to four o'clock this afternoon.  
14

15 Mr President, Saint Vincent and the Grenadines, as alleged flag State of the *M/V*  
16 *SAIGA*, has put forward a variety of claims against the Republic of Guinea. Before dealing  
17 with the substantive issues involved, Guinea will raise three objections concerning the  
18 admissibility of these claims. The first objection concerns the nationality of the *M/V SAIGA*;  
19 the second, the right of diplomatic protection of aliens, and the third, the lack of exhaustion of  
20 local remedies.  
21

22 Trying to circumvent dealing with these objections, Saint Vincent and the Grenadines  
23 asserts that Guinea is precluded from raising these objections, because of paragraph 2 of the  
24 exchange of letters dated 20 February 1998 – by which jurisdiction in the present dispute was  
25 transferred from an arbitral tribunal to this Tribunal, and which I will refer to as "The 1998  
26 Agreement". This paragraph would exclude the raising of any objection concerning  
27 preliminary issues except in connection with article 297(3a) of the Convention.  
28

29 This assumption receives some support by a superficial reading of the paragraph which  
30 states that the written and oral proceedings before this Tribunal should comprise a single phase  
31 dealing with all aspects of the merits (including damages and costs) and the objection as to  
32 jurisdiction raised in the Government of Guinea's Statement of Response dated 30 January  
33 1998. Saint Vincent and the Grenadines essentially argues that the express mention of the  
34 objection based on article 297(3) of the Convention, as to the jurisdiction of the Tribunal,  
35 would exclude any other objection to the jurisdiction or admissibility of the claims, the more  
36 so since the paragraph stipulates that the proceedings should comprise one single phase  
37 dealing with all aspects of the merits, assuming that you, Honourable Judges, should decide on  
38 the merits of the case in all aspects.  
39

40 Guinea strongly disagrees with this interpretation and maintains that she did not waive  
41 any possible objection to the admissibility of the claims. The Saint Vincentian interpretation  
42 fails to explain why on earth Guinea should have waived the raising of any such objection.  
43 The answer to the Guinean motivation is easy: there is none. In particular, it is not true, as has  
44 been alleged in the Reply of Saint Vincent and the Grenadines, that Guinea agreed to preclude  
45 objections to the admissibility of the claims because she was anxious to ensure payment of the  
46 US\$400,000 or because she wanted to avoid any delay in the present proceedings. Any  
47 Guinean attempt to receive payment for the release of the *M/V SAIGA* does not have any  
48 connection with the alleged preclusion of objections to the admissibility of the claims and  
49 should be left out in this context.

1  
2 The accuracy of the Guinean position is clearly illustrated by the fact that she put  
3 forward the objection concerning the non-exhaustion of local remedies during the hearings in  
4 the provisional measures proceedings on 24 February 1998. I remember that day very well  
5 because it was my birthday, and the most interesting one I have ever celebrated. This was  
6 only four days after the conclusion of the 1998 Agreement - concluded on 20 February and  
7 this was on the 24<sup>th</sup> – which is now claimed to exclude the raising of the objections. In the  
8 hearing of 24 February 1998, this contention was not brought up by Saint Vincent and the  
9 Grenadines, although Mr Sands would have certainly done so if there had been any intention  
10 between the parties to exclude objections to the admissibility of the claims. The only objection  
11 against the invoking of article 295 of the Convention related to the fact that Guinea had  
12 advanced the argument only at the stage of oral proceedings and should, therefore, have been  
13 estopped from raising it.  
14

15 Guinea finds the new interpretation of the 1998 Agreement to be rather sly and unfair  
16 conduct consciously misinterpreting and ignoring what has been agreed upon in February last  
17 year. I pledge to you, Honourable Judges, very strongly, that this misinterpretation be not  
18 accepted as true, in particular since the 1998 Agreement was concluded under the good offices  
19 of this Tribunal.  
20

21 The 1998 Agreement concerned the choice of procedure for the settlement of the  
22 present dispute. Its object and purpose was to transfer the dispute from an arbitral tribunal to  
23 this Tribunal. The main argument for the transfer was the fact that the constitution of the  
24 arbitral tribunal would have unnecessarily delayed the settlement of the dispute and would  
25 have been much more costly than to resort to this standing Tribunal with its existing servicing  
26 facilities and whose Members and staff are already remunerated and are so able to conduct this  
27 difficult case. There is no argument why the Republic of Guinea should have agreed to  
28 preclude the raising of objections to the admissibility of the claims when it concluded an  
29 agreement concerning the choice of procedure. Had the parties not concluded the  
30 1998 Agreement, recourse would have been made to arbitral proceedings in which the dispute  
31 concerning Guinea's right to contest the admissibility of the claims would never have arisen.  
32

33 Since the 1998 Agreement essentially established the jurisdiction of the Tribunal,  
34 Guinea felt it necessary to expressly mention the objection to the jurisdiction of the Tribunal  
35 she had already raised. Otherwise, she would have put herself into contradiction with what  
36 she had contended before and would have given up a position she was not ready to give up at  
37 that time.  
38

39 The reference in paragraph 2 of the 1998 Agreement to the objection concerning the  
40 jurisdiction of the Tribunal pursuant to article 297(3a) of the Convention does not permit a  
41 conclusion *e contrario* that objections to the admissibility would have been waived. As  
42 Mr Howe has rightly explained to us three days ago, the Guinean objections concern the entire  
43 case and aim in their entirety at a dismissal of all of the claims advanced by Saint Vincent and  
44 the Grenadines.  
45

46 It cannot be that the parties, by concluding the 1998 Agreement, agreed  
47 "concludently" – that is without explicitly mentioning it – that such fundamental objections  
48 would be precluded from being raised. The correspondence between the parties prior to the  
49 agreement shows that this was not the case. Mr Howe himself wrote to me on

1 29 January 1998 stating that one of the conditions upon which Saint Vincent and the  
2 Grenadines would agree to submit the dispute to this Tribunal would be that the proceedings  
3 should be limited to a single phase dealing with all aspects, including the merits, and any  
4 jurisdictional issues that may arise. There was no word or hint at all that objections to the  
5 admissibility of the claims should be waived.  
6

7 That this formulation was not in the end incorporated in the 1998 Agreement lay in the  
8 fact that the parties wanted to receive a decision by this Tribunal that would end the dispute,  
9 except, as I just explained, in connection with article 297(3) of the Convention. But a decision  
10 that would end the dispute could also be a decision rejecting the claims on the grounds of the  
11 Guinean objections to their admissibility. Mr. Howe's statement that the parties would try to  
12 "take back with one hand what they had given to the Tribunal with the other" does not hit the  
13 point. Perhaps this statement can be explained by the fact that Mr Howe has wrongly pointed  
14 out twice that the Guinean standpoint would seek to rob you, Honourable Judges, from  
15 exercising your jurisdiction in this case. You know that this is not true. In fact, Guinea is  
16 requesting your jurisdiction to decide this dispute, of course taking into account, and possibly  
17 on the basis of, the Guinean objections to the admissibility of the claims.  
18

19 In her pleadings, Guinea has given a detailed interpretation of the meaning of the term  
20 "a single phase dealing with all aspects of the merits", and so on.  
21

22 I refer to the points made there and note that Mr Howe has not commented on the  
23 argument that the term "merits" has to be interpreted in the present case in the light of the  
24 provisional measures proceedings and, more important, the prompt release proceedings which  
25 have been carried out either shortly before or at the time of the conclusion of the 1998  
26 Agreement. As Article 292(3) of the Convention shows, the term "merits" is used in contrast  
27 to the prompt release proceedings, in which a decision is only sought upon the question of  
28 release. All other questions, including questions of the substantive admissibility of the claims,  
29 are certainly covered by the term "merits".  
30

31 Instead of commenting on this, Mr Howe focused mostly on the commentation of the  
32 term "merits" by Sir Gerald Fitzmaurice in his book *The Law and Procedure of the*  
33 *International Court of Justice*, which Guinea had referred to in the Rejoinder to support her  
34 contention that there are certain difficulties or ambiguities with respect to the definition of the  
35 term "merits". But, while making the point that the ordinary definition of the term "merits"  
36 would exclude questions of the admissibility of the claims, Mr Howe did not mention that  
37 Sir Gerald clearly pointed to the difficulties in separating questions of substantive admissibility  
38 and the ultimate merits. I invite Mr Howe to simply read the respective passages of the text  
39 again.  
40

41 Moreover, Guinea finds the statements concerning the *Ambatielos* case to be  
42 misleading. Of course, Guinea does not want to compare the circumstances of that case with  
43 the ones surrounding the present case. This is not necessary for the point that has been made  
44 in the Rejoinder, which is merely to indicate, by citing the commentations on the *Ambatielos*  
45 case, that the term "merits" has been and consequently might be used to mean something  
46 different than what ordinarily constitutes the "merits" of a case, having said this, of course, on  
47 the premise that an ordinary meaning of this term can be easily established. If such differing  
48 interpretation of the term "merits" can be made with respect to the arbitrability of a dispute  
49 before another judicial forum, as in connection with the *Ambatielos* case, why should the same

1 not be possible in connection with the preceding provisional measures and prompt release  
2 proceedings?

3  
4 Insofar as the Guinean interpretation differs from what constitutes the ordinary  
5 meaning of the term "merits", Guinea invokes article 31(4) of the Vienna Convention on the  
6 Law of Treaties and submits that she has given a sufficient explanation to have it established  
7 that such special meaning has been given to the term "merits" in the 1998 Agreement.  
8

9 Moreover, article 31(1) of the Vienna Convention states that "a treaty shall be  
10 interpreted in good faith in accordance with the ordinary meaning of the terms in their context  
11 and in the light of its object and purpose." Guinea would find it to be bad faith if she was held  
12 to have precluded the raising of objections to the admissibility by concluding an agreement  
13 that concerned simply the choice of judicial forum. There is no argument why Guinea should  
14 have done so.  
15

16 So far, Mr President, my statement with respect to the interpretation of the 1998  
17 Agreement. I would now like to deal with the preliminary objections based on article 97 of the  
18 Rules of the International Tribunal.  
19

20 The Republic of Guinea maintains that the words "in a single phase", as contained in  
21 the 1998 Agreement, imply that the parties excluded that recalls should be made to the  
22 proceedings provided in article 97 of the Rules. In other words, the parties agreed that  
23 objections to the admissibility of the claims should be dealt within the framework of the  
24 proceedings on the merits. This is also supported by the *ratio* of article 97(7) of the Rules,  
25 which says essentially that although the procedure before the Tribunal prescribes, in general,  
26 that objections to the jurisdiction or admissibility are to be dealt within proceedings separate  
27 from the merits, preference is given to the express wish of the parties to have the objections  
28 treated within the proceedings on the merits. The Republic of Guinea submits now, as she has  
29 done before, that paragraph 2 of the 1998 Agreement contains exactly such a wish.  
30

31 In his statement three days ago, Mr Howe did not clearly address this point. Instead,  
32 he tried to make the argument that Guinea would have missed the time period of 90 days to  
33 raise her objections as contained in article 97(1) of the Rules, because they would fall into the  
34 second category of preliminary objections, that is objections to the admissibility of the  
35 application as such, for which the time limit of 90 days from the institution of the proceedings  
36 would necessarily apply.  
37

38 Despite the Saint Vincentian explanations, Guinea continues to maintain that she filed  
39 objections of the third category of preliminary objections, that is "other objections the decision  
40 upon which is requested before any further decision on the merits". This is not to be taken as  
41 a legal statement that the Guinean argument concerning the procedural choice with respect to  
42 preliminary objections would not apply with respect to objections of the first two categories.  
43

44 It is true that all claims are encountered by a Guinean objection, yet not all objections  
45 concern the same or all claims. Moreover, the Guinean objections are all directed against  
46 particular claims and not the application in general. It is not correct to assume, as Mr Howe  
47 has done, that the Republic of Guinea objects to the application as such, because in this case  
48 one should not be able to distinguish the objectives of the different objections. An objection to

1 an application as such would, for example, concern certain formal requirements of the  
2 application, but Guinea does not raise such an objection.

3  
4 At any rate, the Republic of Guinea finds this dispute not to have too much relevance,  
5 in particular in the light of the non-exhaustive character of the preliminary objections. There is  
6 a rich, international judicial practice that reveals that, whether or not objections to the  
7 jurisdiction or admissibility have been raised at the stage envisaged for preliminary objections,  
8 they may still be raised later, even by the Court *proprio motu*.

9  
10 The Permanent Court of International Justice took a very clear position in the *Minority*  
11 *Schools* case with respect to article 38 of the 1926 Rules dealing with preliminary objections.  
12 I quote:

13  
14 "The object of this article was to lay down when an objection to the jurisdiction  
15 may be validly filed but only in cases where the objection is submitted as a  
16 preliminary question, that is to say when the respondent asks for a decision  
17 upon the objection before any subsequent proceedings on the merits. It is  
18 exclusively in this event that the article lays down what the procedure should be  
19 and that this procedure should be different from that on the merits."

20  
21 With respect to the role of the Court, the Court further stated:

22  
23 "The raising of an objection by one party merely draws the attention of the  
24 court to an objection for the jurisdiction which it must *ex officio* consider. A  
25 party may take this step at any stage of the proceedings."

26  
27 Other precedents for the non-exhaustive character of preliminary objections which  
28 I would like to mention here are the *ICAO Council Appeal* case and the *Nottebohm* case  
29 before the International Court of Justice. In the *ICAO Council Appeal* case the respondent  
30 had filed objections to the jurisdiction of the court only at the stage of the oral proceedings,  
31 without there having been a preliminary objections phase. At that stage the respondent had  
32 long exhausted his ability to raise formal preliminary objections. In the *Nottebohm* case, the  
33 respondent had filed objections to the admissibility of the claims after the court had already  
34 delivered a judgement on other preliminary objections. In this case it could be assumed that  
35 the respondent's ability to raise preliminary objections had been precluded because it may be  
36 expected that a respondent files all of his preliminary objections at the same time and as early  
37 as possible.

38  
39 In both cases, however, the court examined the objections in detail. In the *Nottebohm*  
40 case the court even dismissed the application on the grounds that the claims were inadmissible.

41  
42 In the light of what has just been said, it does not matter whether Guinea filed her  
43 objections within the 90-days time limit contained in article 97(1) of the Rules. In case you,  
44 Honourable Judges, do not follow this argumentation, I request that the objections be  
45 admitted and decided upon because of the fact that it belongs to the essential rights of the  
46 respondent to be furnished with a pleading on the merits of a case before he has to advance  
47 preliminary objections.  
48

1 The Republic of Guinea raised the objections to the admissibility of the claims  
2 immediately after receipt of the Memorial of Saint Vincent and the Grenadines and within the  
3 time limits granted for the filing of the first responding pleading, namely the  
4 Counter-Memorial.

5  
6 The International Court of Justice seems to have recognized this principle in the  
7 *aAerial* Incident of 3 July 1998 case by having stated:

8  
9 "While a respondent which wishes to submit a preliminary objection is entitled  
10 before doing so to be informed as to the nature of the claim by the submission  
11 of a memorial by the applicant, it may nevertheless file its objection earlier."

12  
13 Professor Rosenne has also endorsed this principle and said that it would be rare that  
14 the application alone would be sufficient to elucidate questions of jurisdiction or admissibility.

15  
16 Guinea submits that it would be unfair if she were precluded from raising the  
17 objections, since it was only in the Memorial, and not in any other pleading in the prompt  
18 release or provisional measures proceedings, that Saint Vincent and the Grenadines fully  
19 elaborated her claims, in particular the ones for compensation and satisfaction. As will be  
20 shown, it is exactly these claims that the objections raised by Guinea primarily oppose.

21  
22 To conclude the argumentation on the question of whether or not Republic of Guinea  
23 is precluded from raising objections, I request that you, Honourable Judges, believe that  
24 Guinea submitted the objections on the admissibility of the claims in the Counter-Memorial in  
25 good faith in so far as that it is and was her understanding that she was entitled to do so under  
26 the 1998 Agreement.

27  
28 Mr President, after these introductory remarks, I now come to a first objection  
29 concerning the admissibility: the problem of the effective or non-effective registration of the  
30 *M/V SAIGA* in the registry of Saint Vincent and the Grenadines.

31  
32 As I have already said, Guinea's first objection concerns the nationality of the  
33 *M/V SAIGA*; in other words, of Saint Vincent and the Grenadines standing before this Tribunal  
34 as flag State of that vessel.

35  
36 The Republic of Guinea maintains that *M/V SAIGA* was not validly registered under  
37 the flag of Saint Vincent and the Grenadines on the day of its arrest by the Guinean Customs  
38 authorities on 28 October 1997. Thus, the requirements of article 91 of the Convention are  
39 not fulfilled and *M/V SAIGA* may be qualified to have been a ship without nationality at the  
40 time of its attack.

41  
42 The tanker had been granted a Provisional Certificate of Registry by Saint Vincent and  
43 the Grenadines on 14 April 1997. The expiry date of this Provisional Certificate was on 12  
44 September 1997, more than a month before its arrest. A Permanent Certificate of Registry  
45 had only been issued by the responsible authority of Saint Vincent and the Grenadines on 28  
46 November 1997, exactly one month after the arrest of the *M/V SAIGA*. The logical  
47 conclusion is that the *M/V SAIGA* was not validly registered in the time period between 12  
48 September 1997 and 28 November 1997.

1 After the Republic of Guinea had pointed at that problem in the Counter-Memorial,  
2 Saint Vincent and the Grenadines seemed to realize that this might be a very serious issue for  
3 their case. That the Applicant State had such a feeling and took the problem serious is  
4 demonstrated by the fact that Saint Vincent and the Grenadines produced some documents,  
5 the latest one only very recently, and that the explanations provided by Saint Vincent and the  
6 Grenadines differed.

7  
8 Saint Vincent and the Grenadines first tried to invalidate the Guinean conclusion by  
9 arguing that, at any rate, a vessel, once registered under the flag of Saint Vincent and the  
10 Grenadines, would remain so registered until deleted from the Registry. In private maritime  
11 law there is a rule: once on demurrage, always on demurrage. It seems that Saint Vincent  
12 takes up this idea and says: once registered, always registered.

13  
14 The 1982 Merchant Shipping Act of Saint Vincent and the Grenadines would  
15 according to the Applicant State provide that – "once registered, always registered" – would  
16 be regulated in section 1, article 9-42 and 59-61 of the Act. The Merchant Shipping Act is  
17 produced in one of the annexes. Of course we had a close look at all the articles of this Act  
18 and we realized that the Act shows the opposite.

19  
20 There are only two relevant provisions of that Act dealing with provisional certificates  
21 of registration: sections 36 and 37.

22  
23 In her reply, Saint Vincent and the Grenadines referred particularly to section 37,  
24 which reads:

25  
26 "The provisional certificate of registration shall cease to have effect if, before the  
27 expiry of 60 days from its date of issue, the owner of the ship in respect of which it  
28 was issued has failed to produce to the issuing authority

29  
30 "(a) a certificate issued by the government of the country of last registration of the ship  
31 (or other acceptable evidence) to show that the ship's registration in that country has  
32 been closed; and

33 (b) evidence to show that the ship has been duly marked as required by section 22."  
34

35 This provision deals with special circumstances, namely the failure to produce certain  
36 documents in which a provisional certificate ceases to have effect only after two months of its  
37 issuance. The wording was:

38  
39 "the provisional certificate shall cease to have effect before the expiry of sixty  
40 days from its date of issue".

41  
42 If these two documents have not been provided within the time period of 60 days after  
43 the issuance of the provisional certificate, this provisional certificate is invalid after 60 days.  
44 That is the clear meaning of section 37.

45  
46 The Republic of Guinea does not understand how this very particular provision might  
47 support the argument made by Saint Vincent and the Grenadines that a vessel, having been  
48 provisionally registered under its flag, remains so registered, exceeding the period for which  
49 the provisional certificate was issued.

1  
2 Saint Vincent did so by referring to section 37, which I have just quoted. This does  
3 not make sense.  
4

5 The object and purpose of section 37 is to have the opposite effect, namely to diminish  
6 the period of validity. So if true documentation had not been delivered to the Registry. The  
7 validity of the provisional certificate would have, in the case of *M/V SAIGA*, come to an end  
8 already on 12 May 1997. The reference to section 37 does not help Saint Vincent and the  
9 Grenadines.  
10

11 The other provision of the Merchant Shipping Act that deals with provisional  
12 registration is section 36(2). This provision prescribes that a provisional certificate of  
13 registration shall have the same effect as the ordinary certificate until the expiry of one year  
14 from the date of its issue. Consequently a provisional certificate expires one year from the  
15 date of its issue. In other words, a provisional certificate cannot be valid for longer than one  
16 year, no matter what the circumstances are. Therefore the Registrar could not issue a  
17 provisional certificate for more than for example 12 or 13 months.  
18

19 Section 36(2) does not however, state that such certificate of registration is always in  
20 effect for one year, notwithstanding the situation that the Registrar terminates its validity  
21 already after 6 months, as he did in the present case. You will remember the validity of the  
22 provisional certificate was only for 6 months. In our opinion the Registrar of Saint Vincent  
23 and the Grenadines is neither prevented by this paragraph, 36(2) nor by any other provision of  
24 the Act to issue provisional certificates with a validity of less than 12 months. In case the  
25 Registrar limits the validity of the provisional certificate to 6 months, it cannot be argued that  
26 such limitation would be invalid, pursuant to Section 36(2) of the Act.  
27

28 This reasoning is supported by the official brochure by the Saint Vincent and the  
29 Grenadines Maritime Administration which is contained in Annex 5 of the Memorial, and  
30 I have that with me and before me. The Procedure for Registration is described on page 2 and  
31 it is clearly separated on the left side and on the right side, and on page 2 it has referred to the  
32 provisional registration certificate, and on the right side it has referred to the permanent  
33 registration certificate. In this official brochure of Saint Vincent and the Grenadines under the  
34 heading of Provisional Registration Certificate it is expressly said, if I may quote: "The  
35 Provisional Registration Certificate is issued for 6 months and can be extended under certain  
36 circumstances for a further period of 6 months". That is correct, so that it would altogether be  
37 12 months. This would conform to section 36(2), but it is very clearly said "normally it is  
38 issued for 6 months", and that it can be extended under certain circumstances as a provisional  
39 certificate for another 6 months. In light of this, the assertion of Saint Vincent and the  
40 Grenadines that a vessel once registered remains so registered until deletion from the registry,  
41 cannot be accepted.  
42

43 To invalidate this conclusion, Saint Vincent and the Grenadines then produced a  
44 declaration of its Maritime Administration in Geneva dated 27 October 1998, which is  
45 produced as Annex 7 in the Reply. It is a declaration or confirmation: "To whom it may  
46 concern", and the Commissioner for Maritime Affairs said the following:  
47

1 "I hereby confirm that the *M/V SAIGA* was registered under the Saint Vincent and the  
2 Grenadines flag on 12 March 1997 and is still today validly registered. Monaco  
3 27 October 1998".  
4

5 In our view this declaration does not create the desired effect that the *M/V SAIGA* is to  
6 be regarded as having been validly registered under the flag of Saint Vincent and the  
7 Grenadines at the relevant time, namely 27 and 28 October 1997. This declaration is dated 27  
8 October 1998, one year after the arrest of the *M/V SAIGA*, and is in fact silent with respect to  
9 the question of the *M/V SAIGA*'s registration at the end of October 1997. This declaration  
10 does not say that the vessel was registered on 28 October 1997. It just says that it was  
11 registered in, on 12 March 1997 and is still validly registered today, October 1998.  
12

13 Both statements seem to be correct. The declaration does not, however, make any  
14 comment on the gap of registration between 12 September and 28 November 1997, the date  
15 of issuance of the permanent Certificate of Registration .  
16

17 Saint Vincent and the Grenadines might differentiate between registration on the one  
18 hand and the issuance of a certificate on the other hand. St Vincent seems to argue that the  
19 validity of a certificate and the registration of a vessel do not stand and fall together. Such  
20 differentiation is, however, neither reflected in the Merchant Shipping Act, nor in the  
21 brochure, as I have referred to, nor in the Provisional Certificate itself. The Republic of  
22 Guinea contends that registration and certificate may not be considered separately.  
23

24 Saint Vincent and the Grenadines, realized that there might still be a grave problem  
25 with respect to what we are discussing at the moment. That is why Saint Vincent produced  
26 only very recently another letter of the Deputy Commissioner for Maritime Affairs dated 1  
27 March 1999. This letter was produced to you, Honourable Judges. It contains the following  
28 confirmation of the Deputy Commissioner for Maritime Affairs  
29

30 "I can confirm that the owners of *The Saiga* fulfilled the requirements of article 37 of  
31 the Merchant Shipping Act, having provided satisfactory evidence that (a) the ship's  
32 registration in the country of last registration had been closed, and (b) the ship had  
33 been duly marked as required by section 22."  
34

35 A copy of the ship's carving and marking note in respect of (b) appears at Annex B  
36

37 I am a little astonished about the deletion certificate from the former Registry. We  
38 have heard that *The M/V Saiga* was registered under the Maltese flag, before it was bought in  
39 auction by Tabona Shipping Company, was registered under the Maltese flag. I would have  
40 expected that if the idea or purpose of this confirmation was to give all evidence possible, then  
41 such a certificate should enclose the Declaration of the Classification Society of the Russian  
42 Registry. I am not happy that we just read: "I can confirm that the owners fulfilled the  
43 requirement of Article that the ship's registration in the last country has been closed", and that  
44 the Deputy Commissioner just mentions the two documents.  
45

46 We should remember that article 37 is the section according to which the Provisional  
47 Certificate expires after two months if these two documents have not been provided. So if  
48 these documents have been provided, my conclusion is that the Provisional Certificate is still  
49 valid after 60 days from the date of issuance. Yet, what does the Deputy Commissioner

1 conclude from this? She writes: "The register entry made on 26 March 1997 accordingly  
2 remained effective as of 27 October 1997." That conclusion, as I just explained, really does  
3 not follow from section 37. Therefore it is rather astonishing to read this in such an important  
4 letter. But the Deputy Registrar then goes on and provides a very interesting further  
5 document as Annex A, that is a copy, not of the certificate, but of the Registry Book page.  
6

7 On one hand, there is the certificate, and on the other we have the register. You  
8 remember that Saint Vincent and the Grenadines may have made, or would perhaps like to  
9 make, a differentiation between the certificate that might be of no great importance, and the  
10 Registry Book, which is according to Saint Vincent and the Grenadines, the really essential  
11 document.  
12

13 Annex A, which I have before me, contains a page of the registry. Here, we find the  
14 accuracy of the Guinean position clearly demonstrated because this page of the registry says,  
15 under the heading, "Registration", "registered 12 March 1997, valid thru 12/09/97". So this is,  
16 for us, a very clear demonstration that the registration of the *M/V Saiga* expired on 12  
17 September 1997, not only according to the Provisional Certificate but also to the formal  
18 registration book.  
19

20 You will remember the date, which is the important and relevant one, 28 October  
21 1997. This is nearly six weeks after the validity of the Provisional Certificate expired, not only  
22 according to the certificate but also to the Registry Book.  
23

24 To sum up, if one analyses the two certificates of registration, the provisional one and  
25 the permanent one of a later date, the Declarations by the Maritime Administration of  
26 Saint Vincent and the Grenadines and of the Deputy Commissioner for Maritime Affairs, as  
27 well as the Merchant Shipping Act, one has to draw the conclusion that the *M/V SAIGA* was  
28 not validly registered at the relevant time, on 28 October 1997. The fact that the *M/V SAIGA*  
29 was detained after this time – a fact which might have prohibited the delivery of the Permanent  
30 Certificate of Registration – does not change this analysis.  
31

32 Consequently, the Republic of Guinea asserts that the *M/V SAIGA* was a vessel  
33 without nationality at the time of its arrest by the Guinean Customs authorities. Therefore,  
34 Saint Vincent and the Grenadines may not claim the rights and obligations of a flag State with  
35 respect to the *M/V SAIGA* concerning the incident of 28 October 1997.  
36

37 Having said this, Mr President, I would now like to ask you to give the floor to my  
38 colleague, Professor Lagoni, Counsel for the Republic of Guinea, who will now continue with  
39 the objection as to the missing genuine link between Saint Vincent and the Grenadines and the  
40 *M/V SAIGA* and as to other points of admissibility.  
41

42 **THE PRESIDENT:** Thank you, Mr von Brevern. Professor Lagoni, you may proceed.  
43

44 **PROFESSOR LAGONI:** Mr President, Members of the Tribunal, after Mr von Brevern has  
45 addressed the admissibility of objections to admissibility of these proceedings on the merits  
46 before this Tribunal in the light of the 1998 Agreement between the parties, as well as under  
47 article 97(1) of the Rules of the Tribunal, I will now turn to three substantial objections  
48 relating to the admissibility of different claims in this case of the *M/V SAIGA*. But before  
49 doing so, I would like to start with a general observation.

1  
2 Mr Howe remarked in his opening submission before this Tribunal on  
3 Monday 8 March that our objections to admissibility relate to different claims submitted by  
4 Saint Vincent and the Grenadines. It is indeed so that there is an objection to the Vincentian  
5 claim to the flag State's freedom of navigation, and there is another one to the submission of  
6 the flag State to bring a damage claim on behalf of *The Saiga*. Both objections are based on  
7 the absence of a genuine link between the flag State and the ship.  
8

9 There is also an objection against the claim of Saint Vincent and the Grenadines to  
10 bring claims on behalf of foreigners, except in certain very specific situations. We submit that  
11 none of these exceptions is given here.  
12

13 Finally, there is still another objection to claims advanced by Saint Vincent and the  
14 Grenadines on behalf of private persons. This objection is made under the exhaustion of local  
15 remedies rule, which is provided for in article 295 of the Convention.  
16

17 So far, Mr Howe's observations are correct and we agree with them. Guinea does,  
18 indeed, submit different objections to different claims. We also agree with him that if the  
19 Tribunal would accept all objections made by Guinea, it would not be necessary any more to  
20 decide the case on the substance of the different claims because every claim the applicant State  
21 advances is alleged to be inadmissible or – to take up one of Mr Howe's phrases – "nothing is  
22 left".  
23

24 But we do not agree with the conclusion Mr Howe draws from this, when he submits  
25 that the Guinean objections are objections to the admissibility of the entire case. This  
26 submission is, in our view, confusing the different substantial claims advanced in this dispute  
27 with the whole case. This case before this International Tribunal is, no doubt, more than the  
28 sum of the different substantial claims advanced in it. The case includes also procedural  
29 claims; in particular claims concerning the admissibility of a substantial claim. This means that  
30 if the International Tribunal would decide the dispute because of a lacking genuine link and  
31 because of the nationality of the claims and the non-exhaustion of local remedies – and we,  
32 indeed, ask the Tribunal to do so – this would not be a decision on the jurisdiction of the case,  
33 of course. Neither would it be a decision on the admissibility of the entire case. It would be a  
34 decision on the merits of the case based on different legal reasons relating to the admissibility  
35 of the different substantial claims that are advanced by the applicant State.  
36

37 Only for the sake of clearness I venture to add that this is even more evident when the  
38 Tribunal would accept certain objections relating to the admissibility of certain claims while  
39 refusing other objections and deciding the relevant claims on the substance of the law.  
40

41 After this introductory remark, Members of the Tribunal, I will turn now to the  
42 different objections to admissibility. Therefore, I will address the following questions: first, is  
43 there a genuine link between the flag State and the ship? Secondly, may the applicant State  
44 seize the International Tribunal with respect to claims of persons which are not its nationals?  
45 Thirdly, have the natural or juridical persons, on behalf of which the applicant State has seized  
46 the International Tribunal, exhausted the local remedies in Guinea and were they required to  
47 do so?  
48

1 The Republic of Guinea has clearly indicated in the pleadings which objection refers to  
2 which claim of Saint Vincent and the Grenadines. Furthermore, we have submitted a number  
3 of arguments relating to these questions in the Counter-Memorial (paragraphs 56-89) and in  
4 our Rejoinder (paragraphs 51-79). I understand that it is in line with the rules and guidelines  
5 of the Tribunal to be as succinct as possible in the oral proceedings. Therefore, I will not  
6 repeat these arguments here. Instead, I will try to focus on those essential points on which the  
7 parties are still divided in this issue.  
8

9 Turning first to the genuine link, which, pursuant to the third sentence of article 91(1)  
10 of the Convention, must exist between Saint Vincent and the Grenadines and the *M/V SAIGA*,  
11 the Republic of Guinea submits that there is no such link.  
12

13 It is further submitted that in the absence of a genuine link between the applicant State  
14 and the ship, Guinea is not bound to recognize claims relating on the one hand to asserted  
15 violations of the flag State's freedom of navigation and, on the other hand, to claims submitted  
16 by Saint Vincent and the Grenadines on behalf of *The Saiga* by way of diplomatic protection.  
17

18 Mr. President,  
19 Members of the Tribunal!  
20

21 After Mr von Brevern has addressed the admissibility of objections to the admissibility in  
22 these proceedings on the merits before this Tribunal in the light of the "1998 Agreement" between  
23 the parties as well as under article 97, paragraph 1, of the Rules of the Tribunal, I will turn to three  
24 substantial objections relating to the admissibility of different claims in the case.  
25

26 But before doing so, I would like to start with a general observation:  
27

28 Mr. Howe has remarked in his opening submission before this International on Monday,  
29 March 8th, that our objections to admissibility relate to different claims submitted by St. Vincent  
30 and the Grenadines.  
31

32 It is indeed so that there is an objection to the Vincentian claim to the flag State's freedom  
33 of navigation and another one to the submission of the flag State to bring a damage claim on behalf  
34 of the "Saiga". Both objections are based on the absence of a genuine link between the flag State  
35 and the ship.  
36

37 There is also an objection against the claim of St. Vincent and the Grenadines to bring  
38 claims on behalf of foreigners, except in certain very specific situations. And we submit that none of  
39 these exceptions are given here.  
40

41 And finally there is still another objection to claims advanced by St. Vincent and the  
42 Grenadines on behalf of private persons. This objection is made under the exhaustion of local  
43 remedies rule that is provided for in article 295 of the Convention.  
44

45 So far, Mr Howe's observations are correct, and we agree with him.

46 Guinea does indeed submit different objections to different claims. We also agree with him  
47 that, if the Tribunal would accept all objections submitted by Guinea, it would not be necessary any  
48 more to decide the case on the substance of the different claims, because every claim the Applicant

1 State advances is alleged to be inadmissible, - or to take up one of Mr Howe's phrases: Nothing is  
2 left.

3  
4 But we do not agree with the conclusion Mr Howe draws from this when he submits that  
5 the Guinean objections are objections to the admissibility of the "entire case".  
6

7 This submission is in our view confusing the different substantial claims advanced in this  
8 dispute with the whole case. This case before this International Tribunal, no doubt, is more than the  
9 sum of the different substantial claims advanced in it. The case includes also procedural claims, in  
10 particular claims concerning the admissibility of a substantial claim.

11 This means: if the International Tribunal would decide the dispute because of a lacking genuine  
12 link, and because of the nationality of the claims and the non-exhaustion of local remedies - and we  
13 ask the Tribunal to do so - this would, of course, not be a decision on the jurisdiction of the case.  
14 Neither would it be a decision on the admissibility of the entire case. It would be a decision on the  
15 merits of the case based on different legal reasons relating to the admissibility of the different claims  
16 that are advanced by the Applicant State.  
17

18 Only for the sake of clearness I venture to add that this is even more evident, when the  
19 Tribunal would accept certain objections relating to the admissibility of certain claims while refusing  
20 other objections and deciding the relevant claims on the substance of the law.  
21

22 After this introductory remark, I will turn now to the different objections to admissibility.  
23 Therefore I will address the following questions:  
24

25 Is there a genuine link between the flag State and the ship?  
26

27 May the Applicant State seize the International Tribunal with respect to claims of persons  
28 which are not its nationals?  
29

30 Have the natural or juridical persons on behalf of which the Applicant State has seized the  
31 International Tribunal exhausted the local remedies in Guinea?  
32

33 The Republic of Guinea has clearly indicated in the pleadings which objection refers to  
34 which claim of St Vincent and the Grenadines. Furthermore we have submitted a number of  
35 arguments relating to these questions in the Counter-Memorial (paragraphs 56-89) and in the  
36 Rejoinder (paragraphs 51-79). I understand it is in line with the Rules and Guidelines of the  
37 Tribunal to be as succinct as possible in the oral proceedings. Therefore I will not repeat these  
38 arguments here.  
39

40 Instead I will focus on those essential points on which the parties are still divided.  
41  
42

43 Genuine link (article 91, paragraph 1, third sentence of the Convention)  
44

45 Turning first to the genuine link, which pursuant to the third sentence of article 91,  
46 paragraph 1, of the Convention must exist between Saint Vincent and the Grenadines and the M/V  
47 "Saiga", the Republic of Guinea submits that there is no such link.  
48

1 It is further submitted that in the absence of a genuine link between the Applicant State and  
2 the ship, Guinea is not bound to recognise claims relating on the one hand to asserted violations of  
3 the flag State's freedom of navigation, and on the other hand to claims submitted by St Vincent and  
4 the Grenadines on behalf of the "Saiga" by way of diplomatic protection.  
5

6 It needs hardly any further explanation here that there is no genuine link between a ship and  
7 a State which has not duly registered the ship in its territory.  
8

9 Therefore the question of the genuine link is only relevant in this dispute if St Vincent has  
10 duly registered the M/V "Saiga".  
11

12 If this is the case, the essential point of the dispute between the parties relating to the  
13 genuine link is the legal concept of such link required under the third sentence of article 91,  
14 paragraph 1, of the Law of the Sea Convention.  
15

16 Saint Vincent and the Grenadines submits that it has ratified a number of Conventions of  
17 the International Maritime Organisation (IMO). This is not contested by Guinea.  
18

19 Neither is it contested that the St. Vincent and the Grenadines has authorised eleven  
20 reputable classification societies to inspect, survey and deliver the safety documents on behalf of St.  
21 Vincent and the Grenadines.  
22

23 What is contested by the Republic of Guinea, however, is the view of St. Vincent and the  
24 Grenadines that this administrative oversight of vessels flying the Vincentian flag might be a  
25 sufficient condition for the genuine link under the LOS Convention. This is evidently a legal issue.  
26

27 Guinea submits for the following reasons that administrative oversight is not a sufficient  
28 condition for the genuine link:  
29

30 The concept of the genuine link in the modern law of the sea requires more than the  
31 adoption of safety, environmental and other shipping legislation of the flag State for ships flying its  
32 flag. It also requires more than an effective control over the ship with respect to the IMO  
33 conventions. I mention here in particular MARPOL and SOLAS, and for oil tankers since 1 July  
34 1998 the application of the binding International Safety Management (ISM) Code.  
35

36 The Republic of Guinea is of the opinion that both the exercise of legislative jurisdiction of  
37 the flag State over ships flying its flag as well as an effective control are certainly necessary  
38 conditions to establish a genuine link between the flag State and the ship.  
39

40 But they are no sufficient conditions for the such genuine link under the Law of the Sea  
41 Convention.  
42

43 Therefore Guinea maintains that the Law of the Sea Convention requires, in addition to the  
44 aforementioned conditions, an effective enforcement jurisdiction of the flag State over the ship.  
45 "Enforcement jurisdiction" means in this context criminal and civil jurisdiction of the flag State's  
46 courts over the owner or operator of the ship. Accordingly it would not be sufficient that the flag  
47 State may have the possibility to withdraw the registration and nationality of a ship in the case that  
48 the shipowner or operator would not comply with its laws and regulations.  
49

1 This is made clear in several provisions of the Convention:  
2

3 For example the second sentence of article 217, paragraph 1, reads, and I may quote with  
4 your permission, Mr. President: "States shall provide for the effective enforcement of such rules,  
5 standards, laws and regulations, irrespective of where the violation occurs. "The provision speaks  
6 of "enforcement", not merely of "control". If the ship is abroad, and most sea-going ships are  
7 usually abroad especially if they fly the flag of a small country, control is normally exercised on  
8 behalf of the flag State by classification societies. Sometimes flag States send also their own  
9 inspectors abroad.  
10

11 But the question arises: How could the flag State provide under article 217, paragraph 1,  
12 for an effective enforcement of their laws and regulations adopted in accordance with the  
13 Convention for the prevention, reduction and control of pollution of the marine environment from  
14 vessels, if the ship violates these laws and regulations abroad, and neither the shipowner or  
15 operator, or the Master or the crew is under its jurisdiction. Enforcement of public laws relating to  
16 the protection of the environment cannot be undertaken against a ship, especially if the ship is  
17 abroad.. Enforcement of environmental laws can only be undertaken against a responsible person.  
18

19 To take another provision of the Convention:  
20

21 According to article 217, paragraph 4, of the Convention, "if a vessel commits a violation  
22 of rules and standards established through the competent international organisation or general  
23 diplomatic conference, the flag State, ..., shall provide" not only "for immediate investigation". The  
24 flag State shall also, "where appropriate institute proceedings in respect of the alleged violation  
25 irrespective of where the violation occurred." In these proceedings the flag State can impose  
26 penalties, as it is provided in article 217, paragraph 8 and also in article 228, paragraphs 1 and 3.  
27 Such proceedings can only be instituted against the perpetrator, if he or she is under the jurisdiction  
28 of the flag State.  
29

30 In the case of the "Saiga", for example, the owner is a company established in Cyprus on  
31 behalf of which a British ship management company operates with respect to the technical  
32 maintenance and general operational and financial administration including the placing of crew on  
33 the ship. The crew is mainly from Ukraine with a few Senegalese maintenance workers. Although  
34 the flag State has formally flag State jurisdiction over the Master and the crew, in practice all  
35 responsible persons are out of the reach of the flag State's courts and its administration. The  
36 institution of criminal proceedings, for example, would be useless in such a case. On the other hand,  
37 proceedings against a "registered agent" present in the flag State are useless if not illegal because  
38 the agent is not the perpetrator.  
39

40 I take a final example:  
41

42 Article 235, paragraph 2 of the Convention reads: "States shall ensure that recourse is  
43 available in accordance with their legal system for prompt and adequate compensation or other  
44 relief in respect of damage caused by pollution of the marine environment by natural or juridical  
45 persons under their jurisdiction." How could a flag State fulfil this obligation to ensure recourse for  
46 compensation, when the liable shipowner or operator is not subject to its civil jurisdiction, because  
47 he is a foreigner residing abroad.  
48

1 In conclusion, the Convention requires that the flag State has also enforcement jurisdiction  
2 in criminal and civil matters over the shipowner or operator. Therefore, in the law of the sea of  
3 today, this kind of jurisdiction forms an essential aspect of the genuine link. Or, to say this in more  
4 general terms, States cannot grant their nationality to ships without adopting the obligations and  
5 responsibilities which the Law of the Sea Convention provides for flag States.  
6

7 However, contesting this view, Dr. Plender mentioned in his opening submission of March  
8 8th, and I may quote him: "I venture the observation, in passing, that if this proposition were  
9 accepted, a substantial proportion of the world's tonnage would immediately be deprived of the  
10 protection of international law." This is in fact a very relevant observation, because reliance on the  
11 flag is very important for international shipping and could not be left out of sight by the  
12 International Tribunal.  
13

14 But not all "open registers" consider a registered agent in the country as sufficient for  
15 registration. Others do require that the owner, which is normally a company, is a national of or a  
16 resident in the flag State. The requirement of a "registered agent", who is not responsible for the  
17 shipowner, is by far the lowest standard in this respect international shipping registers may require.  
18

19 On the other hand, one has to take into account that the Law of the Sea Convention has  
20 considerably enlarged the obligations of the flag State with respect to ships flying its flag to a great  
21 extent as compared with the legal situation before the Convention has come into force in 1994. The  
22 Convention has also changed the legal situation for open registers, and I invite the International  
23 Tribunal to take this into consideration.  
24

25 But the Applicant State has submitted in its Reply of 19 November 1998 (paragraph 81)  
26 still another argument against the view taken here. It has suggested there that according to the text  
27 of article 91, paragraph 1, the genuine link must exist between the flag State and the ship, not  
28 between the State and the shipowners. We submit that this view is not tenable because otherwise  
29 already the registration would be sufficient to grant nationality to a ship. In this case the third  
30 sentence of article 91, paragraph 1, would be redundant. The "ship" is in this provision a generic  
31 term which stands for the shipowner or, in the case of bare-boat charter, the bareboat charterer.  
32

33 Taking all this into account, the Republic of Guinea submits that a "registered agent", as it  
34 is required in section 9, paragraph 3, of the Merchant Shipping Act of 1982 of Saint Vincent and  
35 the Grenadines (Annex 6 to the Reply) for the M/V "Saiga", could not fulfil the conditions of a  
36 genuine link under the Law of the Sea Convention.  
37

38 Neither would the mere precedence of Vincentian nationals, which is provided in the just  
39 mentioned law, in respect of the manning of Vincentian ships be a sufficient requirement for the  
40 genuine link. The example of the M/V "Saiga" shows that, in the light of the numbers of qualified  
41 seamen needed for all ships flying the Vincentian flag, this is a provision of the Merchant Shipping  
42 Act with practically no effect, at least in the case of the "Saiga".  
43

44 Accordingly the Republic of Guinea submits that there was no genuine link between the  
45 flag State and the M/V "Saiga" at the time when the ship was arrested by Guinean Authorities.  
46

47 Nationality of aggrieved persons  
48

1 Turning now to my second question, whether St Vincent and the Grenadines could claim  
2 damages on behalf of persons who are not its nationals, I will again try to be succinct because the  
3 issue has also been submitted at some length in the written proceeding both in the Counter-  
4 Memorial (paragraphs 73-78) and in particular in the Rejoinder (paragraphs 66-70)  
5

6 In the centre of this issue is the so-called "exception of foreign seamen"-rule from the  
7 general principle that a State can exercise diplomatic protection only if the injured persons are its  
8 nationals. It is indeed common ground between the parties that such an exception exists in  
9 customary international law.  
10

11 There is essentially one aspect, however, on which the parties are still divided. This aspect  
12 relates to the application of the mentioned exception to the claims submitted by Saint Vincent and  
13 the Grenadines on behalf of the Master and crew.  
14

15 The Republic of Guinea contests that the mentioned customary rule is still valid under the  
16 circumstances of the open registers of our times.  
17

18 There are several reasons for this submission: The mentioned exception of the general rule  
19 of the nationality requirement has been developed in times, when open registers were unknown in  
20 international shipping. Furthermore, this exception has been developed mainly in immigrant  
21 countries which wanted to attract foreign seamen. Hence most decisions confirming this exception  
22 are decisions of national courts in the United States. In other decisions, the foreign seamen were at  
23 least domiciled in the flag State. None of the crew members of the M/V "Saiga" apparently were  
24 domiciled in St Vincent and the Grenadines. Moreover the exception had been developed in times  
25 of conflict in the interest of the flag State with a view to protect the seamen on board neutral ships.  
26 Accordingly, as quoted by Dr. Plender, the Arbitral Tribunal in *Worth v. United States* held about  
27 100 years ago in 1898 that:  
28

29 "the flag protects the ship and every person and thing thereon not contraband".  
30

31 Besides this, the exception avoided discrimination of foreign seamen belonging to the crew  
32 with respect to the protection by the flag State.  
33

34 In the case of an open register the situation is a completely different one: the ships are  
35 usually manned with foreigners of different countries. Discrimination of foreigners is no real  
36 problem if all crew members are foreigners. The foreign crew members are not inclined to become  
37 resident of the flag State or to immigrate. The crews frequently change.  
38

39 Accordingly we submit that the exception from the general rule that there is no right of  
40 diplomatic protection of foreigners is losing its original sense under the circumstances of an open  
41 register. Why should foreign seamen be in a better position than foreign workers who live in the  
42 country? Why should the flag State have the right to protect foreign seamen, whereas the territorial  
43 State would have no such right in relation to foreigners who are no seamen?  
44

45 Therefore the Republic of Guinea submits that it is highly doubtful whether the customary  
46 exception of foreign seamen from the general rule of the nationality of the claims would apply in the  
47 case of the M/V "Saiga".  
48

1 The second aspect relates to the protection of the claims of the foreign shipowner and the  
2 foreign cargo owner. It is agreed between the parties that the flag State can protect the ship only if  
3 the ship has the nationality of the flag State. The protection of foreign shipowners and cargo  
4 owners is technically speaking not a case of the application of the exception of foreign seamen. It is  
5 essentially a question of the scope of the flag State's right to diplomatic protection of ships having  
6 its nationality. This right relates generally to the ship having the nationality of the flag State.  
7 Therefore I concede that we do not maintain any more the objection of the nationality of the claims  
8 with respect to the claims of the shipowner relating to the ship.

9  
10 Exhaustion of local remedies (article 295 of the Convention)

11  
12 The third objection against the claims in respect of which Saint Vincent and the Grenadines  
13 have seized this Tribunal relates to the local remedies rule. This again is not new in this dispute. The  
14 views of the Republic of Guinea have been submitted in its Counter-Memorial of 16 October 1998  
15 (paragraphs 79-85) and in the Rejoinder of 28 December 1998 (paragraphs 71-79). In this context  
16 the Republic of Guinea submits that effective local remedies available in Guinea have not been  
17 exhausted by the Master of the "Saiga", the crew members, the shipowner and the cargo owners on  
18 behalf of whom Saint Vincent and the Grenadines have filed claims.

19  
20 The main point which is dividing the parties on this issue is the view submitted by Dr.  
21 Plender on Monday March 8th. He stated as follows: "Where a State acts in breach of international  
22 law, in relation to a person or property beyond its territorial jurisdiction, the State cannot demand  
23 that the individuals who have suffered damage should exhaust local remedies, for such demand  
24 would reinforce that State's wrongful assertion of jurisdiction." It is asserted by St Vincent and the  
25 Grenadines here that the "jurisdictional connection", as this requirement between the State against  
26 which the claim is brought and the person in respect of whom it is advanced is lacking, because the  
27 arrest of the "Saiga" took place outside the territorial waters of Guinea.

28  
29 Saint Vincent and the Grenadines submit that voluntary presence of the "Saiga" in the  
30 Guinean exclusive economic zone in order to bunker fishing vessels is not sufficient to establish a  
31 jurisdictional connection for the purpose of the exhaustion of local remedies.

32  
33 Here again a question of the new law of the sea is at issue.

34  
35 It is common ground between the parties that the local remedies rule applies in proceedings  
36 before the International Tribunal in accordance with article 295 of the Convention. It is also not in  
37 dispute that the necessary jurisdictional connection is lacking in a case which has occurred on the  
38 high seas. On the other hand, one cannot conclude from the fact that the exclusive economic zone  
39 is not a part of the territorial sea that there is no jurisdictional connection between the coastal State  
40 and a foreign ship in the EEZ. There is certainly such jurisdictional connection in any case where  
41 the coastal State's sovereign rights in the exclusive economic zone are affected. But Dr. Plender  
42 was emphatic on the point that this is not so. Yet, the distinction between sovereignty and  
43 sovereign rights is of no relevance when, as Dr. Plender quoting Judge Cordova's statement in the  
44 *Interhandel Case* has rightly pointed out in his opening submissions last Monday, "the purpose of  
45 the local remedies rule is the respect for the sovereignty of States."

46  
47 But this does not confine the local remedies rule to cases occurring in the territory of a  
48 State. The respect for the sovereignty of the State is equally required when its sovereign rights in  
49 the exclusive economic zone are involved.

1  
2           Moreover, as the claim to exclusive jurisdiction in the exclusive economic zone flows also  
3 from the sovereignty of the State - only sovereign States can establish an exclusive economic zone -  
4 the same is also true with respect to a dispute concerning the coastal State's jurisdiction in the  
5 exclusive economic zone.  
6

7           In dispute in this case is whether or not the coastal State has exclusive jurisdiction over  
8 bunkering activities in its exclusive economic zone. The mere fact that the Applicant State is  
9 contesting this jurisdiction cannot determine the question of the objection Guinea is raising against  
10 the admissibility of the claims. Otherwise an objection against the coastal State's measures against a  
11 ship on innocent passage through its territorial sea would also exclude the local remedies rule,  
12 despite of the fact that this rule applies in the territorial sea.  
13

14           Therefore the Republic of Guinea, considering that there was a jurisdictional connection  
15 with the *M/V "Saiga"*, submits that diplomatic protection requires the exhaustion of local remedies  
16 in this case as well.  
17

18           On the other hand, one has to take into account that the International Law of the Sea  
19 Convention has considerably enlarged the obligations of the flag State with respect to ships  
20 flying its flag to a great extent as compared with the legal situation before the Convention  
21 came into force in 1994. The Convention has also changed the legal situation for open  
22 registers. I invite the International Tribunal to take this into consideration.  
23

24           But the applicant State has submitted in its Reply of 19 November 1998  
25 (paragraph 81) yet another argument against the view taken here. It has been suggested there  
26 that according to the text of article 91(1) the genuine link must exist between the flag State  
27 and the ship, not between the State and the shipowner. This is, according to the text, true but  
28 we submit that this view is not tenable because otherwise the registration would already be  
29 sufficient to grant nationality to a ship. In this case the third sentence of article 91(1) would  
30 be redundant. If registration were sufficient to grant nationality, we would not need a genuine  
31 link. Article 91(1) would be redundant and redundancy cannot be presumed. The "ship" in  
32 this provision is, in our view, a generic term which stands for the shipowner also or, in the  
33 case of bareboat charter, the bareboat charterer.  
34

35           Taking all this into account, the Republic of Guinea submits that "registered agent", as  
36 required in section 9(3) of the Merchant Shipping Act 1982 of Saint Vincent and the  
37 Grenadines (Annex 6 to the Reply), for *M/V SAIGA* could not fulfil the conditions of a  
38 genuine link under the Law of the Sea Convention. Neither does the mere presence of  
39 Vincentian nationals which is provided in the law I have mentioned in respect of the manning  
40 of Vincentian ships provide a sufficient requirement for a genuine link.  
41

42           The example of *M/V SAIGA* shows that, in the light of the numbers of qualified seamen  
43 needed for all ships flying the Vincentian flag, this is a provision of the Merchant Shipping Act  
44 with practically nil effect, certainly at least with respect to *M/V SAIGA* because no Vincentian  
45 national was on board.  
46

47           Accordingly, the Republic of Guinea submits that there was no genuine link between  
48 the flag State and *M/V SAIGA* at the time when the ship was arrested by Guinean authorities,

1 at least no genuine link as we read that term in the Law of the Sea Convention in the context  
2 of other obligations the flag State has.

3  
4 Turning now to my second question, whether Saint Vincent and the Grenadines could  
5 claim damages on behalf of persons who are not its nationals, I will again try to be succinct  
6 because the issue has been submitted at some length in the written proceedings, both in our  
7 Counter-Memorial, paragraphs 73-78, and in particular in the Rejoinder, paragraphs 66-70.

8  
9 At the centre of this issue is the so-called "exception of foreign seamen" rule from the  
10 general principle that a state can exercise diplomatic protection only if the injured persons are  
11 its nationals.

12  
13 It is indeed common ground between the parties that such an exception exists in usual  
14 international law.

15  
16 There is essentially one aspect, however, on which the parties are still divided. This  
17 aspect relates to the application of the aforementioned exception to the claims submitted by  
18 Saint Vincent and the Grenadines on behalf of the Master and the crew.

19  
20 The Republic of Guinea contests that the aforementioned customary rule is still valid in  
21 the circumstances of open registers at present.

22  
23 There are, in our view, several reasons for this submission. The previously mentioned  
24 exception of the general rule of the nationality requirement was developed in times when open  
25 registers were unknown in international shipping, and this exception has been developed  
26 mainly in immigrant countries which wanted to attract foreign seamen. Hence, most decisions  
27 confirming this exception are decisions of national courts in the United States. In other  
28 decisions – there are decisions from other States as well – the foreign seamen were at least  
29 domiciled in the flag State. None of the crew members of the *M/V SAIGA* apparently were  
30 domiciled in Saint Vincent and the Grenadines.

31  
32 Moreover, the previously mentioned exception of foreign seamen rule was developed  
33 in times of conflict in the interest of the flag State with a view to protecting the seamen on  
34 board neutral ships. Accordingly, as quoted by Dr Plender, the arbitral tribunal in the  
35 *Worth v. United States* case held, about 100 years ago in 1898:

36  
37 "the flag protects the ship and every person and thing thereon not contraband".

38  
39 Besides this, the exception avoided discrimination of foreign seamen belonging to the  
40 crew with respect to the protection of the flag State. In the case of an open register, however,  
41 the situation is completely different. The ships are usually manned with foreigners from  
42 different countries. Discrimination of foreigners against nationals is no real problem on such a  
43 ship if all crew members are foreigners. The foreign crew members are not inclined to become  
44 resident in the flag State, or even to immigrate. The crews frequently change.

45  
46 Accordingly, we submit that the exception from the general rule that there is no right  
47 of diplomatic protection of foreigners loses its original sense in the circumstances of an open  
48 register. Why should foreign seamen be in a better position than foreign workers who live in  
49 the country? Why should the flag State have the right to protect foreign seamen, whereas the

1 territorial State would have no such right in relation to foreigners who are not seamen but who  
2 have perhaps lived for many years in that country?  
3

4 Therefore, the Republic of Guinea submits that it is highly doubtful whether the  
5 customary exception of foreign seamen from the general rule of the nationality of the claims  
6 would apply in the case of *M/V SAIGA*.  
7

8 The second aspect of this question relates to the protection of claims of the foreign  
9 shipowner and the foreign cargo owner. It is agreed between the parties that the flag State  
10 can protect the ship only if the ship has the nationality of the flag State. The protection of  
11 foreign shipowners and cargo owners is, technically speaking, not a case of the application of  
12 the exception of foreign seamen; it is essentially a question of the scope of the flag State's right  
13 to exert diplomatic protection over ships with its nationality. This right relates generally to the  
14 ship with the nationality of the flag State. Therefore, I concede that we no longer maintain the  
15 objection of the nationality of the claims with respect to the claims of the shipowner in relation  
16 to the ship.  
17

18 The third objection against the claims in respect of which Saint Vincent and the  
19 Grenadines has seized this Tribunal relates to the local remedies rule. This again is not new in  
20 this dispute. The view of the Republic of Guinea has been submitted in its Counter-Memorial  
21 of 16 October 1998 (paragraphs 79-85) and in the Rejoinder of 28 December 1998  
22 (paragraphs 71-79).  
23

24 In this context the Republic of Guinea submits that effective local remedies available in  
25 Guinea have not been exhausted by the Master of *The Saiga*, its crew members, the shipowner  
26 and the cargo owner on behalf of whom Saint Vincent and the Grenadines have filed claims. I  
27 should add that another member of this delegation will come at a later date to address you on  
28 details of the local remedies that are effectively available in Guinea.  
29

30 The main point that is dividing the parties in this issue is the view submitted by  
31 Dr Plender on Monday, 8th March. He stated as follows:  
32

33 "Where a State acts in breach of international law in relation to a person or  
34 property beyond its territorial jurisdiction, the State cannot demand that the  
35 individuals who have suffered damage should exhaust local remedies, for such  
36 demand would reinforce that State's wrongful assertion of jurisdiction."  
37

38 It is asserted by Saint Vincent here that the "jurisdictional connection", this  
39 requirement between the State against which the claim is brought and the person in respect of  
40 whom it is advanced, is lacking because the arrest of *The Saiga* took place outside the  
41 territorial waters of Guinea. Saint Vincent and the Grenadines submit that the voluntary  
42 presence of *The Saiga* in the Guinean exclusive economic zone in order to bunker fishing  
43 vessels there is not sufficient to establish a jurisdictional connection for the purpose of the  
44 exhaustion of local remedies.  
45

46 Here again a question of the new Law of the Sea is at stake. It is common ground  
47 between the parties that the local remedies rule applies in proceedings before the International  
48 Tribunal in accordance with article 295 of the Convention. It is also not in dispute that the  
49 necessary jurisdictional connection is lacking in a case which has occurred on the high seas.

1 On the other hand, one cannot conclude from the fact that exclusive economic zone is not a  
2 part of the territorial sea, that there is no jurisdictional connection between the coastal state  
3 and a foreign ship in the exclusive economic zone. There is certainly such jurisdictional  
4 connection in any case where the Coastal State's sovereign rights in the exclusive economic  
5 zone are affected. Dr Plender is emphatic in rejecting this proposition. The distinction  
6 between sovereignty and sovereign rights to which he refers is, in our opinion, of no relevance  
7 when, as Dr Plender, quoting Judge Cordova in the *Interhandel* case, states that "the purpose  
8 of the local remedies rule is respect for the sovereignty of the States". But this does not  
9 confine the local remedies rules to a case occurring in the territory of the State. The respect  
10 for the sovereignty of the State is equally required when its sovereign rights in its exclusive  
11 economic zone are affected or involved. Moreover, as the claim to exclusive jurisdiction in  
12 the exclusive economic zone flows also from the sovereignty of the State, only sovereign  
13 States can establish an exclusive economic zone. The same is in our view, also true with  
14 respect to the dispute concerning the coastal State's jurisdiction in its exclusive economic  
15 zone. That in our case this is also a case that involves a neighbouring exclusive economic  
16 zone on the basis of article 111 of the Law of the Sea Convention does not alter the situation.  
17

18 The dispute in this case is whether or not the coastal State has exclusive jurisdiction  
19 over bunkering activities in its exclusive economic zone. The mere fact that the applicant  
20 State is contesting this jurisdiction cannot determine the question of the objection Guinea is  
21 raising as to the admissibility of claims, otherwise an objection against the coastal State's  
22 measures against a ship on innocent passage through its territorial sea would also exclude the  
23 local remedies rule, in spite of the fact that this rule applies as said in the territorial sea.  
24

25 Therefore in conclusion, the Republic of Guinea, considering that there was  
26 a jurisdictional connection with the *M/V SAIGA*, submits that diplomatic protection requires  
27 the exhaustion of local remedies in this case as well. We have shown in the Pleadings that it  
28 was not required, and, as I mentioned, we will show at a later stage that there were effective  
29 possibilities to exhaust local remedies.  
30

31 Thank you very much Mr President, Members of the Tribunal. This ends my  
32 presentation for today.  
33

34 **THE PRESIDENT:** Thank you very much indeed Professor Lagoni. Mr von Brevern, will  
35 that be all for today? Could you indicate what your plans for tomorrow morning are? Will  
36 you be making a statement before you call witnesses, or will you be calling witnesses, and if  
37 so, how many witnesses?  
38

39 **MR VON BREVERN:** Mr President, I am sorry to say again that I will see the Minister of  
40 Justice only tomorrow morning or perhaps this evening, and it depends upon his own intention  
41 whether we make a statement before calling the witnesses. We will call Mr.Sow, Mr  
42 Bangoura and Mr Camara as witnesses, unless I receive different information tonight, but I  
43 will hand over that information as soon as I receive it, if it is different from what I have told  
44 you.  
45

46 **THE PRESIDENT:** Thank you very much indeed. That being the case, we will leave  
47 matters as they are, and tomorrow morning you will inform us as to how you intend to  
48 proceed. Mr Plender, do you have any comments?  
49

1 **DR PLENDER:** I have no comment to make at this stage Mr President.

2

3 **THE PRESIDENT:** That being the case, we are only ten minutes ahead of schedule.  
4 I suggest that we break off at this time. The meeting will be closed and we will resume  
5 tomorrow morning at 10 o'clock.

6

7 **(Adjourned at 1550 hrs until 1000 hrs on Friday, 12 March 1999)**

8