DISSENTING OPINION OF PRESIDENT MENSAH

1. For the reasons given in the Judgment, I agree with the finding in operative paragraph 1 of the Judgment, affirming the jurisdiction of the Tribunal to entertain the Application filed by St. Vincent and the Grenadines on 13 November 1997.

2. I am availing myself of the right given to me under article 30, paragraph 3, of the Statute and article 125, paragraph 2, of the Rules of the Tribunal to append my opinion on the points in the Judgment on which I have some difficulty.

3. I regret that I am not able to concur in the reasoning and conclusions of the Tribunal on operative paragraphs 2 and 3 of the Judgment. Since I do not agree that this is a case in which an order of the Tribunal for the prompt release of the vessel or its crew under article 292 of the Convention is justified, I cannot support the decision in paragraph 4 to order the Applicant to post a bond or security for such release nor the determination, in paragraph 5, of the amount, nature and form of the security.

4. I have had the opportunity of reading the dissenting opinions of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, and I agree with the opinion in every respect.

5. I have also seen the opinion of Judge Anderson and I agree with the main thrust of that opinion. I wish specially to endorse his view that proceedings under article 292 of the Convention are not preliminary or incidental but definitive proceedings in which a court or tribunal is required to decide whether a case has been made that the allegation of non-compliance is well-founded. For that reason the Tribunal is, in the present case, called upon to make a determination and not, as the Judgment appears to imply, an "appreciation" of whether the allegations made by the Applicant are "arguable or ... of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purpose" (paragraph 51). The proceedings in this case are discrete and intended to be finally dispositive of the merits of the only point for decision under article 292, i.e. whether the allegation of non-compliance is well-founded and, in consequence, the vessel or its crew are to be released upon the posting of a reasonable bond or other financial security. In that sense the proceedings are, for the purposes of article 292, proceedings on merits. Since there can be no further phases of these proceedings, there can be no purpose other than "the present purpose" in which the Tribunal may rely on a different requirement for proof of the allegations.

6. I have similarly seen the dissenting opinion of Vice-President Wolfrum and Judge Yamamoto and I endorse their reasoning and conclusions. I wish especially to express my agreement with their views concerning what they rightly describe as the unwarranted "*obiter dictum*" in the Judgment on the issue whether "bunkering of a fishing vessel is an activity the regulation of which falls within the competence of the coastal States when exercising their sovereign rights concerning exploration, exploitation, conservation or management of living marine resources of the exclusive economic zone." I share the concerns expressed by them in paragraph 25 of their opinion.

7. I fully concur in the opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye that the Tribunal cannot order the prompt release of an arrested vessel under article 292 merely on the "allegation" of the flag State that the detaining State has not complied with a provision of the Convention for prompt release upon the posting of a bond. I agree with them that it must be established that the arrest was in fact for a reason covered by the provision of the Convention which the flag State alleges has not been complied with. The burden of establishing that this is so lies on the party making the allegation of non-compliance, in this case the Applicant. And I have concluded, with them, that the Application has not satisfied the requirements under article 292 and article 113, paragraph 3, of the Rules of the Tribunal. Accordingly, I agree with their conclusion that the allegation of the Applicant that the Respondent has failed to comply with the provisions of article 73 of the Convention is not well-founded.

8. No case has been made to show that the authorities of Guinea have failed to comply with any other provisions of the Convention for the prompt release of the M/V *Saiga* under article 292 of the Convention. I am, therefore, unable to agree that the Applicant is entitled to an order for the release of the M/V *Saiga*, pursuant to article 292.

9. I have carefully examined the reasons given for the conclusion reached in the Judgment that the M/V *Saiga* was arrested for contravening the fisheries laws of Guinea, but I am not able to accept them. In particular, I do not consider that the importance attached to article 40 of the Maritime Code of Guinea in reaching that conclusion is justified.

10. Considerable reliance is placed in this respect on the reference to article 40 of the Maritime Code in the Procès-Verbal No. 29 of 13 November 1997 (hereinafter PV29). In the first place it is to be noted that the Procès-Verbal is essentially a report of the officials who actually arrested the M/V *Saiga*, together with a statement of the charges for which the arrest took place. In this context it is not without significance that these persons were officials of the Customs Department and the Navy. Guinea has a Fisheries Ministry, with its own enforcement agents responsible for

implementing the laws and regulations of Guinea for the control, management and conservation of fisheries resources. If the authorities of Guinea had, indeed, at any time considered that the M/V *Saiga* might be engaged in activities which violate their fisheries laws, it would be difficult to explain why the officials sent to investigate and arrest the vessel did not include any personnel of the Fisheries Ministry. It is even harder to understand why none of the measures taken following the arrest should have alluded, directly or indirectly, to any aspects of Guinea's laws relating to fisheries, or involved any of the State agencies concerned with fisheries.

11. As previously stated, the Judgment attaches considerable significance to the fact that PV29 includes article 40 of the Maritime Code among the provisions which the Master of the M/V *Saiga* is "accused of violating." I am unable to see the justification of this assertion. Article 40 of the Maritime Code reads as follows (informal translation):

> "The Republic of Guinea exercises, within the exclusive economic zone which extends from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign rights concerning the exploration and exploitation, conservation and management of the natural resources, biological or non-biological, of the sea beds and their subsoils, of the waters lying underneath, as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes."

12. This article merely incorporates into Guinean law the provisions of article 56 of the Convention on the Law of the Sea. It contains nothing more than a statement of the limits of the exclusive economic zone of Guinea, and the nature and extent of the "sovereign rights" which Guinea exercises in the zone. It does not contain any rules or regulations which can be infringed nor does it create any offences. It is, therefore, difficult to see in what sense the Captain of the *Saiga*, or indeed any other person, can be said to have "violated" article 40 of the Maritime Code.

13. There is, in my view, a perfectly reasonable explanation for the reference to article 40 of the Maritime Code in PV29. It was intended to establish the geographical area in which offences under the specific legal provisions listed in PV29 are alleged to have been committed.

14. In that sense it is wrong to state that the Master of the M/V *Saiga* is "accused of violating article 40," just because that provision is included in the laws of Guinea listed in PV29. This is acknowledged by the

Judgment when it states, quite rightly, in paragraph 68 that the reference to article 40 could only have meant that the "*violations of the substantive provisions listed afterwards are violations that are such when committed in the exclusive economic zone*" (emphasis added). This would appear to be an admission that the charges against the Captain of the *Saiga* are in the "substantive provisions" listed. These substantive provisions cannot include article 40 of the Maritime Code, because that article, as such, does not create an offence and so nobody can be accused of "violating" it.

15. In spite of this, the Judgment suggests that the reference to article 40 of the Maritime Code in PV29 is, somehow, evidence that the *Saiga* was arrested for violation of the fisheries laws and regulations of Guinea. The reason given for this claim is that the violations of which the M/V *Saiga* is accused was "such when committed in the exclusive economic zone"; and "consequently", that they must relate to "matters concerning the rights and jurisdiction of the coastal State in such zone" (paragraph 68). In the same vein the Judgment implies that Guinea could not consider the presence of a tanker in the exclusive economic zone to be "illicit" "were it not for suspected violation of the sovereign rights and jurisdiction of Guinea in the exclusive economic zone" to which article 40 of the Maritime Code refers. It is argued that this is so because "'sovereign rights to explore, exploit, conserve and manage living resources' ... are the only ones that can be relevant in the present case in the light ... of the fact that it was fishing vessels that the M/V *Saiga* refueled" (paragraph 69). On the basis of this reasoning, the Judgment concludes that the charges against the *Saiga* must have been related to violations of the laws of Guinea concerning fisheries in the exclusive economic zone.

16. In reaching this conclusion the Judgment obviously decided not to take into account the fact that the charges actually raised against the *Saiga* by the Guinean authorities, in the self-same PV29, relate to violations of laws which declare that they apply in the entire territory of Guinea, both land and sea. It would appear also that the Judgment considers it of no consequence that no action taken by any official or authority in Guinea, before and after the arrest of the *Saiga*, has had the faintest link with fisheries. As observed earlier, no officials or agencies of Guinea concerned with fisheries matters have been involved in any aspect of the measures – administrative, judicial or quasi-judicial – which have so far been taken against the M/V *Saiga*.

17. It should be said in passing that the fact that the vessels to which the *Saiga* sold oil were fishing vessels does not necessarily support the conclusion that the offence committed must be related to fisheries. Indeed the argument would still not be valid even if the M/V *Saiga* had itself been a fishing vessel. It is possible, and it has been known frequently to happen, for a fishing vessel to commit a smuggling or drug trafficking offence.

18. I do, of course, accept that where the reasons given by a coastal State for its actions are patently at variance with the facts of the case placed before it, a court or tribunal may conclude that the ostensible reasons given were not in fact the real reasons for the actions in question. This may also be the case where there is clear evidence of bad faith on the part of the coastal State or its officials. However, in the present case all the ascertainable facts surrounding the arrest of the M/V *Saiga* by the customs authorities point to the fact that those actions were indeed based on a particular law or laws which the officials concerned considered, rightly or wrongly, to be applicable to the situation. Accordingly it is, in my view, not right for the Tribunal to declare that laws on which they clearly based themselves in arresting the vessel did not in fact form the basis of their actions. I consider it even less justifiable for the Tribunal, on its own motion, to decide that other laws of Guinea should be deemed to have been the laws which were in fact being applied. It is worth noting that the laws "preferred" by the Judgment were not referred to by any of the parties in their pleadings or oral presentations and the Tribunal has had no opportunity to form a view as to their nature or scope.

19. The Judgment gives a clear reason why the Tribunal "prefers the classification" connecting the laws of Guinea against the selling of oil to fishing vessels (under which the M/V *Saiga* was arrested) to article 73 of the Convention instead of the classification, used by the Guineans officials, i.e. that the act amounted to smuggling. The answer is that the classification of the prohibition of bunkering of fishing vessels as a "customs" offence "makes it very arguable that from the beginning the Guinean authorities acted in violation of international law", while "classification under article 73 permits the assumption that Guinea was convinced that in arresting the M/V *Saiga* it was acting within its rights under the Convention." The Judgment goes on to state that: "It is the opinion of the Tribunal that, given the choice between a legal classification that implies a violation of international law and one that avoids such implication, it must opt for the latter." (paragraph 72)

20. Two conclusions follow from this line of reasoning. The first is that the Tribunal is claiming the right, not only to disregard completely the choice of law which a State has, clearly in good faith (whether or not

justifiably), made in taking its actions, but actually to determine the laws on which the State should have based itself, solely on the grounds that the Tribunal considers that the laws preferred by it would he more likely to justify the actions of the State under international law than those upon which the State itself decided to base its actions. It is rather ironic that the "justification" under international law proffered to Guinea by the Tribunal also provides the only basis for the decision of the Tribunal against Guinea in the case.

21. The second conclusion to be drawn from the answer given for the "preference" of the Judgment is that, when it expresses a preference for the classification of the arrest of the M/V *Saiga* as falling under article 73 to the characterization of the action as "smuggling" by Guinea, the Tribunal is, in effect, pronouncing on which of the two alternative "classifications" is more in accord with international law. This would seem to follow from the statement that the classification of bunkering as a customs offence "implies a violation of international law", whereas classification of bunkering as coming under article 73 "avoids such implication." In that sense the Judgment is doing no less than asserting that a law which assimilates bunkering to fisheries activity is NOT a violation of international law: in other words that such assimilation is a valid exercise of coastal State rights and jurisdiction under article 73 of the Convention.

22. In this connection, I note that the Judgment had previously stated (in paragraph 59) that "it is not necessary for the Tribunal to a come to a conclusion" as to which of the two classifications "is better founded in law." But it would appear that this is exactly what the Judgment does when it implies (indeed asserts) that a classification of bunkering of fishing vessels as "customs" would imply a violation *ab initio* of international law by Guinea, but that a classification of bunkering as assimilated to fisheries activities would avoid such implication.

23. In my view it is not appropriate for the Tribunal to pronounce, even by implication, on an issue of such fundamental importance as the scope and extent of coastal State legislation for fisheries control in the exclusive economic zone permissible under article 73 of the Convention. That question was not in issue in the present case, either in specific or general terms. It would, therefore, have been far better if it had not been addressed in the way it has been done in the Judgment.

24. In paragraph 70, the Judgment states that the "allegation that the infringement by the M/V *Saiga* took place in the contiguous zone and that the vessel was captured legitimately after hot pursuit was advanced by Guinea only at the final stages of the oral proceedings". This is not correct. In the Application by which the case was submitted to the Tribunal, the Applicant stated: "such information as the Applicants have been able to discover concerning the detention of the vessel is set out in an article appearing in a local

newspaper. This maintains, among other things, that the *Saiga* was detained by Customs for 'smuggling' in Guinean territorial waters." The Application goes on to deny that "the vessel ... [has] even been involved in smuggling." Attached to the Application was a translation of the report in the local newspaper referred to in the body of the Application. That report stated in its first paragraph that "a mixed expedition of customs and marine made the largest arrest in the frame of the fight against fuel smuggling and traffic ... by the arrest of the tanker Saiga ... ." The report then stated that "the Saiga was arrested *near our territorial waters* after a long hid and find [sic] game between the tanker and the customs-marine patrol boat"(emphasis supplied).

25. In addition to this, it is on record that counsel for both the Applicant and the Respondent made extensive references to the charges of "smuggling" and the presence of the M/V *Saiga* in the "territorial sea" and "contiguous zone" of Guinea. In their very first submission to the Tribunal on 27 November, Mr. Khalil Camara, counsel for Guinea, repeatedly referred to the fact that Guinea's case did not relate only to the exclusive economic zone. Indeed his very first sentence stated: "I would simply like to explain the position in which the *Saiga* was seen, not only in the EEZ but also in the contiguous zone ..."(Verbatim Record, page 27). A little later in the submission he stated: "The pursuit was commenced when the ship was in the proximity of the first buoy of the *cité minière de Kamsar*; that is, within the limits of the contiguous zone of the island known as Alcatraz" (ibid.). All this took place on the first day of the oral proceedings and on the very first occasion when Guinea had the opportunity to present its case before the Tribunal.

26. It is, therefore, not correct that either the charge of smuggling in the contiguous zone or the allegation of "hot pursuit" was introduced by Guinea "in the final stages of the oral proceedings" and, by implication, that this is an attempt *ex post facto*, to rationalize an action taken for different reasons. Whether or not the charges of smuggling or the allegation of hot pursuit are valid is, of course, a different matter.

27. In the Judgment, the Tribunal has chosen to disregard completely the charges which Guinea made against the *Saiga* right from the very beginning of the case, and which the authorities of Guinea have consistently maintained at all stages of the proceedings. It has instead substituted a basis for the accusation against the M/V *Saiga* which has not been used or even alluded to by any of the officials in Guinea. In doing so the Tribunal is, in my view, arrogating to itself a power and competence which it does not have and does not need to have in order to discharge its mandate. I cannot subscribe to the reasoning which seeks to justify the exercise of such power and competence by the Tribunal.

(*Signed*) Thomas A. Mensah