

SEPARATE OPINION OF PRESIDENT MENSAH

1. I have voted in favour of operative paragraph 3 of the Judgment in spite of the serious doubts I have about the registration status of M/V *Saiga* at the time of the incident which gave rise to the dispute. I have had the opportunity to read the Dissenting Opinions of Judges Warioba and Ndiaye on the issue of the registration and nationality of the *Saiga*, and I agree with the main thrust of their Opinions that, on a correct interpretation of the Merchant Shipping Act of Saint Vincent and the Grenadines, read with the relevant provisions of the Convention, the *Saiga* was not a ship entitled to fly the flag of Saint Vincent and the Grenadines on 28 October 1997 because, on that day, its provisional registration had expired and no other registration had been granted to it under the laws of Saint Vincent and the Grenadines. I have also seen the Separate Opinion of Vice-President Wolfrum on this point, and I agree fully with his reasoning and conclusions.

2. The facts concerning the registration of the *Saiga* in the period between 12 March 1997 and 28 November 1997 are not in dispute. Both parties accept that there was no currently valid document of registration for the ship from 12 September 1997, when the Provisional Certificate of Registration was stated to expire, to 28 November 1997, when the Permanent Certificate of Registration was issued to the ship. (The Provisional Certificate of Registration that was issued to the *Saiga* on 14 April 1997 states: "This Certificate expires on 12 September, 1997"). And it is not disputed that the entry in the Ships Register of Saint Vincent and the Grenadines recorded that the provisional registration of the *Saiga* was valid only up to 12 September 1997 ("Valid thru: 12/09/97"). The disagreement between the parties concerns the conclusion that may be drawn from these facts. Guinea contends that the only conclusion to be drawn from the absence of both a certificate of registration in force and a valid entry in the Ships Register is that the ship was not registered in Saint Vincent and the Grenadines. Consequently, it concludes that the ship did not have the nationality of Saint Vincent and the Grenadines during the period. Saint Vincent and the Grenadines, on the other hand, maintains that provisional registration continued in force during the period, notwithstanding the fact that the Provisional Certificate of Registration had expired and the entry in the Ships Register stated that registration had ceased to be valid with effect from 12 September 1997.

3. Saint Vincent and the Grenadines supports its contention with arguments based on its interpretation of certain provisions of its Merchant Shipping Act of 1982 (hereinafter "the Merchant Shipping Act"), particularly section 36(2) of the Act. It also calls in aid certain "overt signs" of nationality on the ship or on board, as well as documents and declarations issued by the authorities of its Maritime Administration. However, the information and declarations are based on provisions of the Merchant Shipping Act, so the real basis of the case of Saint Vincent and the Grenadines is its interpretation of those provisions. The Judgment states, in paragraph 71, that it considers this "evidence" is sufficient to establish the Vincentian nationality of the *Saiga* at the time it was arrested by Guinea. I do not agree with this conclusion.

4. As has been so comprehensively and cogently demonstrated in the Opinions of Vice-President Wolfrum and Judges Warioba and Ndiaye, nothing in the evidence adduced by Saint Vincent and the Grenadines can be said to have "established" that the *Saiga* was registered in Saint Vincent and the Grenadines on 28 October 1997, either pursuant to the Merchant Shipping Act or, more crucially, by reference to article 91 of the Convention, which is the controlling provision on the question. I will do no more than recapitulate the extensive recitals of fact and arguments in their opinions.

5. According to the Merchant Shipping Act a ship acquires Vincentian nationality only through registration in accordance with the procedures specified therein for that purpose. Section 2 of the Act provides that "'Saint Vincent and the Grenadines ship' means a ship registered under this Act and includes any ship that is deemed to be registered under this Act". It follows that a ship which is not registered under the Act does not have Vincentian nationality, whatever the officials of the State may declare. The facts in this case show that the *Saiga* was not registered (provisionally or permanently) in the manner required by the Act. Saint Vincent and the Grenadines acknowledges that the Provisional Certificate of Registration of the *Saiga* expired on 12 September 1997. In the letter of 1 March 1999 the Deputy Commissioner for Maritime Affairs stated that "in this case", as frequently, the owners of the *Saiga* had allowed the Provisional Certificate of the *Saiga* to "lapse" before applying either for an extension of the Provisional Certificate or for the issue of a permanent certificate. There was, therefore, a gap in the registration between the date when the Provisional Certificate of Registration was allowed to lapse and the date on which the Permanent Certificate of Registration was issued to the ship, i.e. from

12 September to 28 November 1997. In my view, this gap cannot be cured by the Merchant Shipping Act, because no provision of the Act deals with such a situation. Nor can the gap be cured by declarations of the officials of the Maritime Administration, especially when such declarations are made in the context of litigation proceedings in which they are interested parties.

6. Saint Vincent and the Grenadines seeks to explain away the gap in the registration by recourse to section 36(2) of the Merchant Shipping Act. This provision reads: "The provisional certificate of registration issued under subsection (1) shall have the same effect as the ordinary certificate of registration until the expiry of one year from the date of its issue." Saint Vincent and the Grenadines' contention is that this provision serves to keep a provisional certificate of registration in force beyond the period of its expiration specifically indicated at the time of its issue and expressly stated on its face. In effect, the argument of Saint Vincent and the Grenadines is that, although the Provisional Certificate of Registration expired ("lapsed", in its own words) on 12 September 1997, it, nevertheless, continued to have effect after that date, simply because section 36(2) of the Act states that a provisional certificate of registration has the same effect as an ordinary certificate of registration for one year.

7. Saint Vincent and the Grenadines supports its argumentation with the claim that, "when a vessel is registered under its flag, it remains so registered until it is deleted from the Registry". In its submissions before the Tribunal, Saint Vincent and the Grenadines stated: "When a vessel is registered under the flag of Saint Vincent and the Grenadines it remains so registered until it is deleted from the registry in accordance with the conditions prescribed in section 1, articles 9 to 42 and 59 to 61, of the Merchant Shipping Act of 1982. At the time of registration a provisional certificate of registry is issued, followed by a permanent certificate of registry when certain conditions are satisfied. In the case of the *Saiga* her location prevented delivery on board of the Permanent Certificate but this in no way deprived the vessel of its character as Vincentian nor had the effect of withdrawing it from the register. Had there been any doubt in this regard, inspection of the Ships Register would have eliminated it."

8. As has been shown by Vice-President Wolfrum, this statement has no basis in the Merchant Shipping Act. But even if this statement is true in respect of a ship that has been permanently registered under the Act, it is inaccurate in relation to a ship which is provisionally registered under the

Act. Under section 36(2) of the Act, on which Saint Vincent and the Grenadines relies, a ship that is provisionally registered ceases to be so registered one year after the date of the issue of the provisional certificate of registration, unless a permanent certificate has been issued to it prior to or at that time. No specific act or decision is necessary to bring the provisional registration to an end. Similarly, by virtue of section 37 of the Act, a ship that is provisionally registered ceases to be so registered after sixty days if its owners fail to fulfil the conditions specified in that section. Again, no decision or official act is needed to effect the cessation of the provisional registration. Indeed, in spite of the claim of Saint Vincent and the Grenadines, there is no provision for the deletion of a provisionally registered ship from the register. And this is not surprising. Provisional registration means exactly what it says: it is a status of temporary duration. The ship is registered for the specific period indicated in the document issued to that effect. Upon the expiry of that period it ceases to be registered unless one of two measures are taken by the owners. These are either an application for the extension of the provisional registration (subject to the restriction that the total period of provisional registration must not exceed one year) or, alternatively, an application for a permanent registration, provided that the conditions stipulated in the Act for that purpose have been fulfilled. No other possibility is available under the Act after the period of provisional registration expires. The ship is either granted an extended provisional registration or a permanent registration. Failing that, it automatically ceases to be registered. Thus the claim of Saint Vincent and the Grenadines that a ship which is provisionally registered under its flag remains so registered until it is deleted from the registry is incorrect.

9. The claim that every provisional certificate, regardless of its stated period of validity, continues to have effect for one year under all circumstances appears to be contradicted by the practice adopted by the very Maritime Administration which makes the claim. As stated in the brochure issued by the Commissioner, the common practice is to issue provisional certificates for six months with the possibility of renewal. The Deputy Commissioner explained that "[o]ne purpose of this is to encourage owners to comply with the formalities of permanent registration sufficiently in advance of the one-year validity period of the provisional registration

period under Section 36 (2) of the Act". This practice is not incompatible with section 36(2) of the Merchant Shipping Act. That section sets a maximum limit of one year for provisional registration but does not establish a minimum period for which provisional registration may be granted. As I see it, the practice indicated in the brochure implements section 36(2) in a manner which is entirely within its meaning and intent. That being the case, one may ask what the purpose of renewing a six-month provisional certificate may be, if the certificate in fact has mandatory effect for a full year, regardless of its stated expiry date? And, if the Administration really interprets section 36(2) to mean that provisional registration remains in effect for one full year in every case, what significance is to be attached to the entry in the Ships Register that the provisional registration of the *Saiga* was "[v]alid thru: 12/09/1997"?

10. It may also be noted in this regard that the submission of Saint Vincent and the Grenadines, quoted in paragraph 7 above, does not tally with the facts as they appear in the evidence before the Tribunal. The claim that the *Saiga*'s "location prevented delivery on board of the Permanent Certificate" is not supported by the evidence, which shows that there was no permanent or other certificate at any time before 28 November 1997. Hence the absence of a permanent certificate on board the ship had nothing to do with the location of the ship. The simple reason is that no such certificate existed at the time. Then again, the suggestion that an inspection of the Ships Register would have confirmed the continued registration of the ship is not borne out by the facts. Prior to 28 November 1997, the only entry in the Ships Register of Saint Vincent and the Grenadines was the one that stated that registration of the ship had ceased to have validity as of 12 September 1997 (was "[v]alid thru: 12/09/1997"). Hence an examination of the Register soon after the arrest, or at any time prior to 28 November 1997, would only have confirmed that, while the ship had previously been registered in Saint Vincent and the Grenadines, it was no longer so registered.

11. In my view, therefore, there is no provision in the Act to justify the proposition of Saint Vincent and the Grenadines that section 36(2) of the Act can be interpreted to extend the period of validity of each and every provisional certificate of registration beyond the date on which the certificate is expressly stated to expire.

12. I wish to emphasize that, in suggesting that the Tribunal should not accept the claim of Saint Vincent and the Grenadines that section 36(2) of its Act restores the lapse of registration of the *Saiga* in this case, I am not proposing that the Tribunal should attempt to interpret the Merchant Shipping Act, or even speculate on how a court in Saint Vincent and the Grenadines would react to that claim. I only suggest that the Tribunal apply a principle which I consider to be generally applicable in international adjudication and appropriate in this case. That principle is that nothing prevents an international court or tribunal from examining whether or not, in interpreting or applying its laws, a State is acting in conformity with its obligations under international law – in this case the Convention which is binding on both parties to the dispute. In the present dispute, Saint Vincent and the Grenadines claims that a ship for which no valid certificate of registration exists and in respect of which there is no entry in its Ships Register, is, nevertheless, to be considered as having Vincentian nationality. Saint Vincent and the Grenadines argues that, under its laws, a ship whose certificate of registration has expired nevertheless continues to have its nationality. Guinea challenges this claim. It bases its challenge on article 91 of the Convention. The task of the Tribunal is to determine whether the interpretation of the Act, as given by Saint Vincent and the Grenadines, is in conformity with article 91 of the Convention. In another context in the present case, the Tribunal has, in my view legitimately, relied on the same principle mentioned above to declare that Guinea's interpretation and application of its laws in the customs zone were incompatible with the Convention (Judgment, paragraphs 121 and 136). I believe that, in this context also, the Tribunal has the competence to examine the interpretation of the Merchant Shipping Act as put forward by Saint Vincent and the Grenadines in order to determine whether the law, as thus interpreted, is consistent with its obligations under the Convention. This appears to me to be even more appropriate in this case since, as Judge Rao pertinently points out in his Opinion (paragraph 7), the interpretation of the Act presented by Saint Vincent and the Grenadines is not based on a pronouncement of a court of Saint Vincent and the Grenadines but is merely a submission by counsel representing Saint Vincent and the Grenadines in litigation proceedings. I also recall that Guinea made a similar claim regarding the interpretation of a provision of its national legislation on the "customs radius". In response the Tribunal noted, again correctly in my opinion, that

Guinea had produced no evidence to support its interpretation beyond the assertion that the interpretation reflects the consistent position of its administration and courts (Judgment, paragraph 122). It is also not without significance that the Tribunal has itself reasserted the principle that domestic law is a fact to be proved by evidence before it (Judgment, paragraph 120). On that basis the Tribunal does no more than its judicial duty if it requests a party before it to provide appropriate evidence and arguments to support an assertion that a given rule is part of its national law.

13. I must also stress that, if the Tribunal had accepted Guinea's challenge to the assertions of Saint Vincent and the Grenadines that the *Saiga* was registered with it, it would not necessarily have been questioning the exclusive jurisdiction which article 91 of the Convention accords to Saint Vincent and the Grenadines to determine the conditions under which it registers ships in its territory, or grants to ships the right to fly its flag. Pursuant to article 91 of the Convention it is for Saint Vincent and the Grenadines to determine the conditions for the registration of ships in its territory and for the grant of its nationality to ships. Saint Vincent and the Grenadines has duly exercised this power in its Merchant Shipping Act. Under the Act, Vincentian nationality is acquired by registration, and registration is effected by the issue of a certificate of registration. What is being questioned by Guinea in this case is the claim, which necessarily underlies the contentions of Saint Vincent and the Grenadines, that a declaration by an official of its Maritime Administration is sufficient to confer Vincentian nationality to a ship, even where the evidence indicates that the conditions established in the law for registration and the grant of the right to fly the Vincentian flag have not been satisfied. For my part I see merit in Guinea's objection. Article 91 of the Convention accords to each State the exclusive right to set the conditions for the acquisition of its nationality by ships, but that provision does not also support the proposition that a ship can acquire nationality merely because an official of the State declares that it has such nationality.

14. The same is true of overt signs of nationality, such as inscriptions and documents, on which Saint Vincent and the Grenadines has relied, and which have apparently been accepted by the Tribunal, as "evidence" to prove the continuance of registration and national status (Judgment, paragraph 67). These are signs that may, and in some cases must, be put on

the ship or on board. They are consequences of registration but they do not constitute independent and sufficient evidence of registration when there is no other evidence of such registration.

15. It is in the light of the above considerations that I am not able to support the conclusion in the Judgment that Saint Vincent and the Grenadines has "established" that the *Saiga* was registered in, and had the nationality of, Saint Vincent and the Grenadines at the time it was arrested. By the same token, I am unable to support the other leg of the finding that the evidence and argumentation of Guinea have not been sufficient to warrant a finding that the ship was not registered at the time. In my view all that was required of Guinea in this case was evidence to show that the Provisional Certificate of Registration of the *Saiga* had expired on 12 September 1997; that the provisional registration of the *Saiga*, as recorded in the Ships Registry, was no longer valid after 12 September 1997; and that there was no certificate or record of registration of any kind on the basis of which the *Saiga* could claim the right to fly the flag of Saint Vincent and the Grenadines on 28 October 1997 when the *Saiga* was arrested. I am satisfied that Guinea has done this convincingly, by means of evidence which has not been contested by Saint Vincent and the Grenadines.

16. But, although I do not agree with the Judgment's finding that Saint Vincent and the Grenadines has established that the *Saiga* was registered under its flag on the day of the incident giving rise to the dispute, I am able, nevertheless, to support the decision to reject Guinea's contention that Saint Vincent does not have legal standing to bring the dispute to the Tribunal. I have joined in the decision to deal with the merits of the case because I agree, as stated in paragraph 73 (d) of the Judgment, that it would not be consistent with justice if the Tribunal were to decline to deal with the merits of the dispute, having regard to the particular circumstances of the case.

17. Although I am in no doubt that there was a gap in the registration of the ship, I am fully satisfied that this was due to lapses in the law and practice in the Maritime Administration of Saint Vincent and the Grenadines, which in turn encouraged a certain lack of diligence on the part of the owners and operators of the ship. The evidence in this case convinces me that both the officials of Saint Vincent and the Grenadines as well as the owners of the *Saiga* genuinely, though misguidedly, believed that the provisional registration of the ship continued in force after 12 September 1997. This appears to account for the fact that the relevant authorities of Saint Vincent

and the Grenadines, as well as the owners and charterers of the ship, continued to operate on the basis that the *Saiga* was entitled to fly the flag of Saint Vincent and the Grenadines during the entire period between 12 September and 28 November 1997 when the Permanent Certificate of Registration was issued to the *Saiga*. My conclusion, therefore, is that the defect in the registration of the *Saiga*, though real, was more technical than substantive.

18. I would have felt more comfortable in coming to this conclusion if Saint Vincent and the Grenadines had admitted that there was a gap in the registration and tried to minimize its significance. Instead it has attempted, in my view unsuccessfully, to argue away the gap by relying on provisions of its Merchant Shipping Act. In the process the Tribunal has on occasions not been treated with the full candour and disclosure of facts to which it is entitled. For example, during the oral proceedings on 28 November 1997 counsel for Saint Vincent and the Grenadines, in response to a question from the Agent of Guinea about the ownership of the *Saiga*, stated: "We have been able to obtain this morning a provisional certificate of registration from Saint Vincent and the Grenadines, which unfortunately, although dated 14 April 1997, is dated to expire on 12 September 1997. Efforts are being made to obtain the no longer provisional but full certificate of registration on behalf of the owners. We hope that we will be able to get this to the Tribunal at the latest during the adjournment" (ITLOS/PV.97/2, p. 5, 15–20). However, the certificate that was produced was found to be one that did not apply to the period of the dispute. Indeed, the certificate produced was actually issued on 28 November 1997, the very day on which counsel undertook to make it available, although the impression was given at the time that the certificate already existed. Furthermore, no explanation was given as to the documentary situation prior to the issue of the certificate or why no document that was applicable to the period prior to 28 November 1997 was produced. It is pertinent to note that this period for which no document was forthcoming covered not only the time of the arrest of the *Saiga*, but also the times when Saint Vincent and the Grenadines invoked the jurisdiction of the Tribunal for the prompt release of the ship and the prescription of provisional measures. It was mainly due to this absence of accurate information from Saint Vincent and the Grenadines that the Tribunal, in its Order of 11 March 1998, accepted without qualification that the *Saiga* was a ship flying the flag of Saint Vincent and the Grenadines. In my view, the Tribunal would have been better served if Saint Vincent and the Grenadines had been more forthcoming with information and explanations on what was an important aspect of the case before it.

19. Be that as it may, the conclusion I draw from the facts before the Tribunal is that the defect in the registration of the *Saiga* was due to lapses in law and administrative practices rather than a conscious decision to abrogate or even interrupt registration. That being the case, I have supported without difficulty the decision to proceed to the merits of the case. This decision, in effect, disregards what is no more than a technical defect in order to do greater justice.

20. In this connection I note that a ruling that Saint Vincent and the Grenadines does not have standing to bring the dispute to the Tribunal would effectively deprive the persons involved or interested in the operation of the *Saiga* of redress in respect of injury, damage and other losses suffered by them as a result of what the Judgment has found to be serious violations of the Convention and other rules of international law committed by Guinea in this case. The violations do not only affect commercial interests but also relate to fundamental human rights and the dignity of the person. I am particularly conscious that some of the persons who have suffered damage or loss as a result of the measures taken by Guinea had no responsibility for the legal and administrative errors and omissions regarding the registration of the ship that have given rise to doubts about its registration and nationality. Thus, refusal to deal with the merits of the case would have had far-reaching consequences for these persons. In my view a court of law and justice should only take a decision which denies justice in such a way if no other course is legally open to it on the evidence. I do not think that this is the case in the circumstances of the present dispute. In his Dissenting Opinion in the *Nottebohm* case, Judge *ad hoc* Guggenheim stated: "The finding that the Application is not admissible on the grounds of nationality prevents the Court from considering the merits of the case and thus from deciding whether the respondent State is or is not guilty of an unlawful act as regards Liechtenstein and its national, who has no other legal means of protection at his disposal. Moreover, a preliminary objection must be strictly interpreted. *It must not prevent justice from being done*" (emphasis supplied) (*Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 64). While Guinea's objection in this case is not strictly speaking a "preliminary objection", the effect of upholding Guinea's objection to admissibility in this case would be the same as the result that Judge Guggenheim did not find acceptable. My position in this case is based on the principle so clearly formulated by the eminent Judge.

21. I am further fortified in my view by the knowledge that, in the present case, a ruling to proceed on the merits of the case cannot prejudice any rights of Guinea. As the Judgment notes Guinea has, for much of the period of the dispute, accepted Saint Vincent and the Grenadines as the flag State of the *Saiga*. I must add that I do not share the implication in the Judgment that Guinea's challenge of this fact in the present proceedings is in some sense improper or evidence of bad faith. Indeed, in my opinion, Guinea has a better right to claim that it has been the victim of bad faith on the part of Saint Vincent and the Grenadines. But that is neither here nor there for present purposes. The fact is that Guinea has accepted and acted upon the representation by Saint Vincent and the Grenadines that it was the flag State of the *Saiga* at the time of the incident. In any case, it is clear from the evidence that the nationality of the *Saiga* did not have any significance at all in the decisions of the authorities of Guinea to take the measures they took against the ship. Nothing in the evidence suggests that the measures taken by Guinea would have been different if the *Saiga*'s nationality had been other than that of Saint Vincent and the Grenadines. As far as the authorities of Guinea were concerned, a foreign ship was undertaking activities in Guinea's customs radius which, in their view, violated the laws of Guinea. They set out to arrest that ship, whatever its nationality might be, and to punish it in accordance with Guinea's laws as they understood them to be. Thus, the legality of the measures did not depend on the nationality of the ship. Guinea either had the right under the Convention to take those measures against a foreign ship in the circumstances or it did not have that right. The same objections would have applied to those measures regardless of the nationality of the ship against which they were taken; and Guinea's defence before the Tribunal would have been the same if the action had been brought by any other flag State. Consequently, Guinea does not suffer any prejudice from the fact that the ship happens to be of Vincentian nationality. For these reasons, also, I have no hesitation in agreeing to the decision to proceed to the merits of the case, and thus consider the allegations that Guinea acted in violation of its obligations under the Convention, both in the measures it took against the *Saiga* and in the manner in which the measures were taken.

22. In coming to this conclusion, I find it necessary to express my concerns regarding certain unusual features of the legislation of Saint Vincent and the Grenadines and the administrative practices of its Maritime

Authorities concerning the issue of documents to ships. These aspects of the law and practice of Saint Vincent and the Grenadines are at the root of the differences between the parties, and even Members of the Tribunal, concerning the registration of the *Saiga* at the time of the incident. One such feature of the legislation is the fact that the Merchant Shipping Act permits provisional registration to last for as long as twelve months. This long period of provisional registration provides scope for abuse by unscrupulous shipowners who may wish to operate sub-standard ships, for it makes possible for them to switch such ships between flags on consecutive "provisional registrations" for one year at a time. This potential for abuse has already been noted in the discussions in the International Maritime Organization (IMO) on the subject of "Implications Arising when a Vessel loses the Right to fly the Flag of a State". It is also a cause for concern that the Maritime Administration appears to allow and condone the practice by which ships operate under provisional registration without valid certificates of any kind. In this regard, I refer to the statement by the Deputy Commissioner for Maritime Affairs that "it is very common for Owners to allow the ... Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate". The lack of diligence on the part of shipowners in renewing or replacing certificates at the appropriate time, and the toleration of such lapses by Saint Vincent and the Grenadines, can have undesirable implications for the effective implementation of the provisions of the Convention on nationality of ships and the duties of flag States. The practice could also encourage abuses and create difficulties in international maritime transport. Specifically, it could encourage or condone neglect on the part of owners and managers of ships and thus lead to situations where, as in the present case, a ship is able to operate for more than six weeks without having on board a currently valid document testifying that it was in fact registered with the State whose flag it was flying. It is hardly necessary to stress that a certificate of registration is the most important evidence of the nationality of a ship for third States and other parties who may have an interest in the identity of the flag State or in the discharge of flag State responsibilities under the Convention and other international agreements dealing with safety at sea and the prevention and control of pollution of the marine environment from ships. It is also important to note that the issue of such certificates is

required by article 91 of the Convention. It is, therefore, imperative that every ship operating internationally should have a valid certificate of registration at all times.

23. It is to be hoped that the lessons learnt from these proceedings will provide an incentive to the Maritime Administration of Saint Vincent and the Grenadines, and other shipping registers, to improve their legislation and also ensure adequate vigilance on the part of the authorities entrusted with administering registers of ships.

(Signed) Thomas A. Mensah