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)

Verbatim Record

Uncorrected
Non-corrigé

present:	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

Saint Vincent and the Grenadines is represented by:

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

as Agent;

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

as Counsel;

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

as Advocates.

Guinea is represented by:

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

as Agent;

Mr. Maurice Zogbélémou Togba, Minister of Justice, of Guinea,
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. Nemankoumba Kouyate, Chargé d'Affaires, Embassy of Guinea, Bonn, Germany,
Mr. Mamadou Saliou Diallo, Naval Staff Officer, Conakry, Guinea,
Mr. Mamadi Askia Camara, Director of the Division of Customs Legislation and Regulation, Conakry, Guinea,
Mr. André Saféla Lenaud, Judge of the Court of Appeal, Conakry, Guinea,

as Counsel.

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

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

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

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

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

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

preclusion of objections to the admissibility of the claims and should be left out in this context.

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

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

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

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

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

It cannot be that the parties, by concluding the 1998 Agreement, agreed "concludently" – that is without explicitly mentioning it – that such fundamental objections would be precluded from being raised. The correspondence between the parties prior to the agreement shows that this was not the case. Mr Howe himself wrote to me on 29 January 1998 stating that one of the conditions upon which Saint Vincent and the Grenadines would agree to submit the dispute to this Tribunal would be that the proceedings should be limited to a single phase dealing with all aspects, including the merits, and any jurisdictional issues that may arise. There was no word or hint at all that objections to the admissibility of the claims should be waived.

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

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

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

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

Moreover, Guinea finds the statements concerning the *Ambatielos* case to be misleading. Of course, Guinea does not want to compare the circumstances of that case with the ones surrounding the present case. This is not necessary for the point that has been made in the Rejoinder, which is merely to indicate, by citing the commentations on the *Ambatielos*

case, that the term "merits" has been and consequently might be used to mean something different than that which ordinarily constitutes the "merits" of a case, having said this, of course, on the premise that an ordinary meaning of this term can be easily established. If such differing interpretations of the term "merits" can be made with respect to the arbitrability of a dispute before another judicial forum, as in connection with the *Ambatielos* case, why should the same not be possible in connection with the preceding provisional measures and prompt release proceedings?

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

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

So far, Mr President, my statement has been with regard to the interpretation of the 1998 Agreement. Now I would like to deal with the preliminary objections based on article 97 of the Rules of the International Tribunal.

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

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

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

It is true that all claims are encountered by a Guinean objection, yet not all objections concern the same or all claims. Moreover, the Guinean objections are all directed against particular claims and not the application in general. It is not correct to assume, as Mr Howe has done, that the Republic of Guinea objects to the application as such, because in this case one should not be able to distinguish the objectives of the different objections. An objection to an application as such would, for example, concern certain formal requirements of the application, but Guinea does not raise such an objection.

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

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

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

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

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

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

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

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

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

The International Court of Justice seems to have recognised this principle in the aerial incident of 3 July 1998 case by having stated:

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

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

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

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

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

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

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

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

After the Republic of Guinea had pointed out that problem in the Counter-Memorial, Saint Vincent and the Grenadines seemed to realise that there might be a very serious issue for their submissions. That they had such a feeling and took the problem seriously is demonstrated by the fact that Saint Vincent and the Grenadines produced some documents, the latest one only very recently, and the arguments provided by Saint Vincent and the Grenadines differed.

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

The 1982 Merchant Shipping Act of Saint Vincent and the Grenadines, on the argument of Saint Vincent, would provide that – "once registered, always registered" – in section 1, article 9-42 and 59-61. The Merchant Shipping Act has been produced in one of the annexes. Of course we had a close look at all the articles of this Act and we realised that a closer look at this Act shows the opposite.

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

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

> "The provisional certificate of registration shall cease to have effect if, before the expiry of 60 days from its date of issue, the owner of the ship in respect of which it was issued has failed to produce to the issuing authority
>
> "(a) a certificate issued by the government of the country of last registration of the ship (or other acceptable evidence) to show that the ship's registration in that country has been closed; and
> (b) evidence to show that the ship has been duly marked as required by section 22."

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

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

If these two documents had not been provided within the time period of 60 days after the issuance of the provisional certificate, this provisional certificate would be invalid after 60 days. That is the clear meaning of section 37.

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

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

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

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

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

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

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

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

In our view this declaration does not create the desired effect that *M/V SAIGA* is to be regarded as having been validly registered under the flag of Saint Vincent and the Grenadines at the relevant time, namely 27 or 28 October 1997. This declaration is of 27 October 1998, one year later, and in fact this declaration of the maritime Administration of Saint Vincent and the Grenadines is silent with respect to the question of *M/V SAIGA's* registration at the end of October 1997. It is not said in this confirmation "To whom it may concern" that the vessel on 28 October 1997 was registered. It just said it was registered in 1997, 12 March, and today, October 1998, it is still validly registered.

This declaration of the Maritime Administration of Saint Vincent and the Grenadines as I said is silent with respect to the question of *M/V SAIGA's* registration at the end of October 1997. The declaration only confirms that the vessel was registered on 12 March and was still registered today. Both statements seem to be correct. The declaration does not,however,make any comment on the gap of registration between December 12 and November 28 1997, the date of issuance of the permanent Certificate of Registration .

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

Saint Vincent and the Grenadines, realising that they might be still in a grave problem in connection with what we are discussing at the moment only very recently produced another letter of the Deputy Commissioner for Maritime Affairs dated March 1 1999. This letter is also produced by St Vincent to you Honourable Judges. I have that letter before me, and in this letter the Deputy Commissioner for Maritime Affairs has pointed out the following:

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

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

I am a little astonished about the deletion certificate from the former Registry. We have heard that *The Saiga,* before it was bought in auction by the Tabona Shipping Company, was registered under the Maltese flag. I would have expected that if the idea or purpose is to give all evidence possible, then such a certificate would be enclosed, as the other one, the Declaration of the Classification Society of the Russian Registry, is enclosed. I am not happy that we just read: "I can confirm that the owners fulfilled the requirement and the ship's registration in the last country has been closed".

When the Deputy Commissioner said "We, *The Saiga*, fulfilled the requirement of article 37", and then she mentioned the two documents. We remember article 37 was the section according to which the Provisional Certificate would expire after two months if these two documents had not been provided. So if, and as, perhaps these documents have been provided, my conclusion would be that the Provisional Certificate is still valid after 60 days after the issuing state. What does the Deputy Commissioner conclude from this? She writes: "The register entry made on 26 March 1997 accordingly remained effective as at 27 October 1997." That conclusion, as I just mentioned, really does not follow from section 37. Therefore it is rather astonishing to read this in such an important letter. But the Deputy Registrar then goes on and provides a very interesting further document as Annex A. A copy not of the certificate, a copy of the registry book page.

On one side there is the certificate but here we have the registry. You remember that Saint Vincent and the Grenadines may have made, or would like perhaps to make, a differentiation between the certificate that might be of no great importance, and the registry. That is, according to Saint Vincent and the Grenadines, the really essential document.

In Annex A, which I have before me, is the page of the registry. Here we find the accuracy of the position of the Republic of Guinea clearly demonstrated because in this page of the registry, under the heading, "Registration" it says "registered 12 March 1997, valid thru 12/09/97". So this is, for us, a very clear demonstration that not only in the certificate but also in the formal registration book, the validity terminates at 12 September 1997.

You will remember the date which is the important and relevant one, 28th October, which is nearly six weeks later than the certificate – not only the certificate but also the registration – has come to an end.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Taking all this into account, the Republic of Guinea submits that "registered agent", as required in section 9(3) of the Merchant Shipping Act 1982 of Saint Vincent and the

Grenadines (Annex 6 to the Reply), for *M/V SAIGA* could not fulfil the conditions of a genuine link under the Law of the Sea Convention. Neither does the mere presence of Vincentian nationals which is provided in the law I have mentioned in respect of the manning of Vincentian ships provide a sufficient requirement of a genuine link.

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

Accordingly, the Republic of Guinea submits that there was no genuine link between the flag State and *M/V SAIGA* at the time when the ship was arrested by Guinean authorities, at least no genuine link as we read that term in the Law of the Sea Convention in the context of other obligations the flag State has.

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

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

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

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

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

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

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

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

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

Accordingly, we submit that the exception from the general rule that there is no right to of diplomatic protection of foreigners loses its original sense in the circumstances of an open register. Why should foreign seamen be in a better position than foreign workers who live in the country? Why should the flag State have the right to protect foreign seamen, whereas the territorial State would have no such right in relation to foreigners who are not seamen but who have perhaps lived for many years in that country?

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

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

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

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

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

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

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

Here again a question of the new Law of the Sea is at stake. It is common ground between the parties that the local remedies rule applies in proceedings before the International Tribunal in accordance with article 295 of the Convention . It is also not in dispute that the necessary jurisdictional connection is lacking in a case which has occurred on the high seas. On the other hand, one cannot conclude from the fact that exclusive economic zone is not a part of the territorial sea, that there is no jurisdictional connection between the coastal state and a foreign ship in the exclusive economic zone. There is certainly such jurisdictional connection in any case where the Coastal State's sovereign rights in the exclusive economic zone are affected. Dr Plender is emphatic in rejecting this proposition. The distinction between sovereignty and sovereign rights to which he refers is, in our opinion, of no relevance when, as Dr Plender, quoting Judge Cordova in the *Interhandel* case, states that the purpose of the local remedies rule is respect for the sovereignty of the states. But this does not confine the local remedies rules to a case occurring in the territory of the State. The respect for the sovereignty of the State is equally required when its sovereign rights in its exclusive economic zone are affected or involved. Moreover, as the claim to exclusive jurisdiction in the exclusive economic zone flows also from the sovereignty of the State, only sovereign states can establish an exclusive economic zone. The same is in our view also true with respect to the dispute concerning the coastal State's jurisdiction in its exclusive economic zone. That in our case this is also a case that involves a neighbouring exclusive economic zone on the basis of article 111 of the Law of the Sea Convention does not alter the situation .

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

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

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

THE PRESIDENT: Thank you very much indeed Professor Lagoni. Mr Von Brevern, will that be all for today? Could you indicate what your plans for tomorrow morning are? Will

you be making a statement before you call witnesses, or will you be calling witnesses, and if so, how many witnesses?

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

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

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

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

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