

**SEPARATE OPINION OF JUDGE CHANDRASEKHARA RAO**

1. While endorsing the operative holdings of the Tribunal in the Judgment, I have considered it necessary to append this separate opinion to emphasize certain aspects, which I consider essential from the legal standpoint. I do not necessarily agree with all the reasons given by the Tribunal in support of its holdings. In particular, my disagreement concerns the reasons on which the Tribunal has based its Judgment in respect of two issues: registration of the *Saiga* and the exhaustion of local remedies.

2. The facts and the rival contentions of Saint Vincent and the Grenadines and Guinea on the question of registration of the *Saiga* are as stated in the Judgment. However, I do not agree with the inferences drawn from them by the Tribunal. The *Saiga* was registered provisionally on 12 March 1997 as a Saint Vincent and the Grenadines ship under section 36 of the Merchant Shipping Act of 1982 of Saint Vincent and the Grenadines (hereinafter “the Merchant Shipping Act”). The Provisional Certificate of Registration, issued to the *Saiga* on 14 April 1997, stated: “This Certificate expires on 12 September 1997”. The Registry Book of Saint Vincent and the Grenadines showed that the provisional registration of the *Saiga* was recorded on 26 March 1997 and that it was valid till 12 September 1997. The *Saiga* was arrested by the Guinean officers on 28 October 1997. It was issued a Permanent Certificate of Registration on 28 November 1997.

3. Guinea contended that the claims of Saint Vincent and the Grenadines in this case were inadmissible on a number of grounds, the main ground being that, at the relevant time, i.e., when the *Saiga* was arrested on 28 October 1997, the *Saiga* was not registered as a Saint Vincent and the Grenadines ship and that, consequently, Saint Vincent and the Grenadines was not competent to present its claims. This raises the question whether Saint Vincent and the Grenadines was the flag State in relation to the *Saiga* at the relevant time.

4. It is not the claim of either party that the Provisional Certificate of Registration was not validly issued in terms of section 36 of the Merchant Shipping Act of 1982. Therefore, as stated in the Provisional Certificate, it should be taken as having expired on 12 September 1997. It is obvious that, if the provisional registration were to continue after the expiry of the

Provisional Certificate of Registration, it must either be replaced by another provisional certificate or have its expiry date extended. It was not even alleged that any such action was taken in the present case.

5. What then is the basis for the Judgment to hold that the registration of the *Saiga* under the laws of Saint Vincent and the Grenadines had not been extinguished in the period between the expiry of the Provisional Certificate of Registration and the issue of the Permanent Certificate of Registration? Paragraph 67 of the Judgment refers to two bases: (i) the Merchant Shipping Act, and (ii) certain "indications of Vincentian nationality on the ship or carried on board". To deal first with the so-called indications of Vincentian nationality, it is not clear how they by themselves are capable of keeping the provisional registration alive. In any event, the Merchant Shipping Act does not say so. Though not so stated in the Judgment, the main basis for the holding that the provisional registration continued even after 12 September 1997 is section 36(2) of the Merchant Shipping Act which provides:

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.

6. The parties disagreed on the legal effects of section 36(2). Whereas Saint Vincent and the Grenadines argued that, by virtue of section 36(2), "the provisional certificate continued to have the same effect as an ordinary certificate for one year, measured from 12 March 1997", Guinea contended that section 36(2) could not be read as having that effect and that it was designed to specify that a provisional certificate could not be issued for more than a period of one year from the date of issue.

7. It is pertinent here to know how section 36(2) is being applied in practice in Saint Vincent and the Grenadines. No decision of its municipal courts has been cited in favour of one interpretation or the other. However, Saint Vincent and the Grenadines appended to its Memorial a brochure issued by its Maritime Administration. This brochure explains the procedure for registration as it obtains under the Merchant Shipping Act. It

states, among other things: "The provisional registration certificate is issued for six months and can be *extended, under certain circumstances, for a further period of six months*" (emphasis supplied). This statement, which was reiterated in the course of the oral proceedings, should, therefore, be taken as representing the Vincentian official interpretation of the meaning and scope of section 36(2). The Tribunal must apply this section as it would be applied in Saint Vincent and the Grenadines (see *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 93 at p. 124).

8. The aforesaid statement signifies that the total validity period of a provisional certificate cannot go beyond one year from the date of the issue, that a provisional registration certificate is issued for six months and not for one year, that it requires *extension* if it were to be valid for more than the initial period of six months, and that such extension can be given "under certain circumstances". If this be so, it is illogical to hold that, by virtue of section 36(2), a provisional certificate issued for a period of six months would continue to be valid for a one-year period even when it fails to receive extension and without regard to the "circumstances" of the case.

9. There is also clear admission by Saint Vincent and the Grenadines that the validity period of the Provisional Certificate of Registration was allowed to be lapsed. In a letter dated 1 March 1999, which was submitted to the Tribunal in the course of the oral proceedings, the Vincentian Deputy Commissioner for Maritime Affairs explained that "it is very common for Owners to allow the validity period of the initial Provisional Certificate to lapse for a short period before obtaining either a further Provisional Certificate or a Permanent Certificate (as was the case here)". This explanation too clearly supports the proposition that once a provisional certificate expires a further provisional certificate or a permanent certificate will have to be *obtained*. And, as noted earlier, it is not the case of Saint Vincent and the Grenadines that a further certificate was either applied for or given. The only certificate that was issued after 12 September 1997 was the Permanent Certificate of Registration.

10. The Vincentian argument that, when a vessel is registered under its flag, "it remains so registered until deleted from the Registry" is not supported by any provision of the Merchant Shipping Act or outside authority. Even if the *Saiga* was shown in the Vincentian Registry Book after the expiry of the Provisional Certificate of Registration, as claimed by

Saint Vincent and the Grenadines, it does not follow that the provisional registration was kept alive. Once a provisional registration is allowed to lapse, it can be revived only by obtaining a further certificate.

11. Under the Merchant Shipping Act, a merchant ship acquires Vincentian nationality through registration. Since the *Saiga* remained without registration in the period between the expiry of the Provisional Certificate of Registration and the issue of the Permanent Certificate of Registration, I am clearly of the opinion that Saint Vincent and the Grenadines was not, at the relevant time, the flag State of the *Saiga* for purposes of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereinafter "the Convention").

12. Even if Saint Vincent and the Grenadines was not the flag State at the relevant time, the question remains whether the Vincentian claims are inadmissible *vis-à-vis* Guinea. The conduct of both the parties, following the arrest of the *Saiga*, is relevant in this regard. Saint Vincent and the Grenadines has always acted as if it was the flag State of the *Saiga* since the inception of the dispute. It was in that capacity that it invoked the jurisdiction of this Tribunal under article 292 of the Convention for the prompt release of the *Saiga* and its crew as also under article 290 for the prescription of provisional measures. Guinea too did not raise the question of the ship's lack of registration at the time when it seized the ship's papers following the arrest of the *Saiga*. In the decisions of the judicial authorities of Guinea, Saint Vincent and the Grenadines was stated to be the flag State of the *Saiga*. Having failed to challenge the status of Saint Vincent and the Grenadines as the flag State of the *Saiga* at all material times when it ought to have done so for protecting its rights, it is not open to Guinea now to contend that it discovered a new fact on the issue of registration which was unknown to it prior to the filing of the Memorial. Guinea has to blame its own negligence in this regard. Principles of fairness clearly demand that a State is not allowed to act inconsistently, especially when it causes prejudice to others.

13. I may now deal with the Guinean objection based on the non-exhaustion of local remedies to the admissibility of the Vincentian claims. Saint Vincent and the Grenadines argued that the local remedies rule did not apply in this case, since the Guinean actions amounted to a direct violation of its rights under the Convention and general international law, Guinea contended that Saint Vincent and the Grenadines was not competent

to institute its claims, since the persons who were affected by Guinean actions were natural or juridical persons and they did not exhaust the local remedies in Guinea, as required by article 295 of the Convention. The Judgment upholds the Vincentian argument in this regard. I do not, however, think that the Vincentian argument is well-founded and, if accepted, would greatly diminish the efficacy of article 295 of the Convention.

14. The reliefs sought by Saint Vincent and the Grenadines in this case arise mainly from Guinea's wrongful exercise of the right of hot pursuit under article 111 of the Convention. Paragraph 8 of that article provides: "Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained." The word "it" in this paragraph refers to the ship and not to its flag State. It is not, therefore, open to a flag State to contend that every wrongful exercise of the right of hot pursuit involves direct violation of its rights rather than of those of the ship. This is in contrast, for instance, with article 106 of the Convention, which deals with liability for seizure of a ship or aircraft without adequate grounds. The article provides that in such a case "the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure". Article 106, unlike article 111, thus provides that it is the flag State which is entitled to claim reliefs for any loss or damage caused by the wrongful seizure.

15. When article 111, paragraph 8, states that it is the ship which is to be compensated, the expression "ship" here is a symbolic reference to everything on the ship and every person involved or interested in the operations of the ship. In short, all interests directly affected by the wrongful arrest of a ship are entitled to be compensated for any loss or damage that may have been sustained by such arrest.

16. Since, as found earlier, this is a case of a ship's entitlement to compensation, in principle, the local remedies in Guinea are required to be exhausted by the persons affected by the arrest of the *Saiga* before Saint Vincent and the Grenadines could bring their claims to this Tribunal. However, I agree with the Judgment that, on the facts of this case (see paragraphs 100 and 101 of the Judgment), the parties concerned were not obliged to exhaust local remedies. In this view of the matter, the Guinean objection based on the non-exhaustion of local remedies deserves to be dismissed.

(Signed) P. Chandrasekhara Rao