PART II

ORAL STATEMENTS

PUBLIC HEARINGS

held at the Peace Palace, The Hague,
from 26 April to 4 May and on 8 June 1960,
the President, Mr. Klaestad, presiding

DEUXIÈME PARTIE

EXPOSÉS ORAUX

AUDIENCES PUBLIQUES

tenues au Palais de la Paix, La Haye,
du 26 avril au 4 mai et le 8 juin 1960,
sous la présidence de M. Klaestad, Président

MINUTES OF THE HEARINGS HELD FROM 26 APRIL TO 4 MAY AND ON 8 JUNE 1960

SECOND PUBLIC HEARING (26 IV 60, 10.30 *a.m.*)

Present: President KLAESTAD; *Vice-President* ZAFRULLA KHAN; *Judges* BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, Sir Hersch LAUTERPACHT, MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, ALFARO; *Deputy-Registrar* GARNIER-COIGNET.

The States participating in the oral proceedings were represented as follows:

Italy:	Professor Riccardo MONACO, Professor of the University of Rome, Chief of the Department of Contentious Matters of the Ministry for Foreign Affairs.
Liberia:	The Honourable Rocheforte L. WEEKS, former Assistant Attorney-General of Liberia, now President of the University of Liberia;
	The Honourable Edward R. MOORE, Assistant Attorney-General of Liberia;
Netherlands:	Mr. W. RIPHAGEN, Professor of International Law at Rotterdam, Legal Adviser of the Ministry for Foreign Affairs.
Norway:	Mr. Finn SEYERSTED, Director of Legal Affairs in the Norwegian Ministry for Foreign Affairs.
Panama:	Dr. Octavio FÁBREGA, President of the National Council of Foreign Affairs, in the capacity of Ambassador Extraordinary and Plenipotentiary on Special Mission.
United Kingdom of Great Britain and Northern Ireland:	Mr. F. A. VALLAT, Deputy Legal Adviser to the Foreign Office, *assisted by*
	Mr. D. JOHNSON.
United States of America:	Mr. Eric H. HAGER, Legal Adviser of the Department of State, *assisted by*
	Mrs. M. M. FLEMING, Assistant to the Legal Adviser of the Department of State.

The PRESIDENT opened the hearing and announced that the Court included upon the Bench Dr. Ricardo J. Alfaro of Panama, who was elected, at the last session of the General Assembly, by the Assembly and the Security Council, to fill the vacancy existing in the membership

PROCÈS-VERBAUX DES AUDIENCES TENUES DU 26 AVRIL AU 4 MAI ET LE 8 JUIN 1960

DEUXIÈME AUDIENCE PUBLIQUE (26 IV 60, 10 *h.* 30)

Présents : M. KLAESTAD, *Président ;* M. ZAFRULLA KHAN, *Vice-Président ;* MM. BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, Sir Hersch LAUTERPACHT, MM. MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, M. ALFARO, *Juges ;* M. GARNIER-COIGNET, *Greffier adjoint.*

Les États prenant part à la procédure orale sont représentés comme suit :

Italie : M. Riccardo MONACO, professeur à l'université de Rome, chef du contentieux diplomatique du ministère des Affaires étrangères.

Libéria : L'honorable Rocheforte L. WEEKS, ancien *Attorney-General* adjoint du Libéria, actuellement président de l'université du Libéria;
L'honorable Edward R. MOORE, *Attorney-General* adjoint du Libéria.

Pays-Bas : M. W. RIPHAGEN, professeur de droit international à Rotterdam, jurisconsulte du ministère des Affaires étrangères.

Norvège : M. Finn SEYERSTED, directeur des Affaires juridiques au ministère norvégien des Affaires étrangères.

Panama : Le Dr Octavio FÁBREGA, président du Conseil national des relations extérieures, en qualité d'ambassadeur extraordinaire et plénipotentiaire en mission spéciale.

Royaume-Uni de Grande-Bretagne et d'Irlande du Nord : M. F. A. VALLAT, conseiller juridique adjoint du *Foreign Office, assisté de*
M. D. JOHNSON.

États-Unis d'Amérique : M. Eric H. HAGER, conseiller juridique du *Department of State, assisté de*
Mme M. M. FLEMING, adjointe au conseiller juridique du *Department of State.*

Le PRÉSIDENT ouvre l'audience et annonce que la Cour comprend aujourd'hui sur le siège M. Ricardo J. Alfaro, du Panama, qui a été élu à la dernière session de l'Assemblée générale par l'Assemblée et le Conseil de Sécurité au poste vacant de la Cour. M. Alfaro est prêt à entrer en

of the Court. Dr. Alfaro was ready to take up his duties, but before doing so he was required to make the solemn declaration provided for in Article 20 of the Statute of the Court.

The President called upon Dr. Alfaro to make that declaration.

(The Court stood up.)

Judge ALFARO made the solemn declaration provided for in Article 20 of the Statute.

(The Court sat down.)

The PRESIDENT placed on record the declaration made by Judge Alfaro and declared him duly installed as a Judge of this Court.

The President then announced that the Court was sitting today to hear oral statements in connection with a request for an Advisory Opinion submitted to it by the Assembly of the Inter-Governmental Maritime Consultative Organization. That request, made pursuant to a Resolution of the Assembly of 19 January 1959, sought the opinion of the Court on the following question:

> "Is the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?"

Notice of the request had been given to all States entitled to appear before the Court, and the Court had received from the Secretary-General of the Organization the documents likely to throw light upon the question.

By an Order dated 5 August 1959 a time-limit was fixed for the submission of written statements by States considered as likely to be able to furnish information on the question, namely the States which are members of the Organization. Statements had been received from the Governments of France, Liberia, the United States of America, the Republic of China, Panama, Switzerland, Italy, Denmark, the United Kingdom of Great Britain and Northern Ireland, Norway, the Netherlands and India.

The desire to be heard in the present proceedings had been expressed by the Governments of Italy, Liberia, the Netherlands, Norway, Panama, the United Kingdom and the United States of America. The President said he would first call upon the Representative of Liberia, and thereafter on the other Representatives in the following order: Panama, the United States of America, Italy, the Netherlands, Norway, and the United Kingdom.

The President called upon the Representative of Liberia.

Mr. WEEKS began the speech reproduced in the annex [1].

At the request of Mr. Weeks, the PRESIDENT called upon Mr. Moore.

Mr. MOORE began the speech reproduced in the annex [2].

(The Court adjourned from 1 p.m. till 4 p.m.)

Mr. MOORE concluded the speech reproduced in the annex [3].

---

[1] See pp. 269-279.
[2] ,, ,, 280-282.
[3] ,, ,, 282-292.

fonctions, mais il doit au préalable prendre l'engagement solennel prévu à l'article 20 du Statut de la Cour.

Le Président prie M. Alfaro de prononcer cette déclaration.
(La Cour se lève.)

M. ALFARO prononce la déclaration prévue à l'article 20 du Statut.
(La Cour se rassied.)

Le PRÉSIDENT prend acte de la déclaration prononcée par M. Alfaro et le déclare installé en ses fonctions de juge.

Le Président expose que la Cour est réunie aujourd'hui pour entendre les exposés oraux relatifs à la demande d'avis consultatif qui lui a été présentée par l'Assemblée de l'Organisation intergouvernementale consultative de la Navigation maritime. Cette demande, présentée en exécution de la résolution de l'Assemblée du 19 janvier 1959, sollicite l'avis de la Cour sur la question suivante:

> « Le Comité de la Sécurité maritime de l'Organisation intergouvernementale consultative de la Navigation maritime élu le 15 janvier 1959 a-t-il été établi conformément à la convention portant création de l'Organisation? »

La demande d'avis consultatif a été notifiée à tous les États admis à ester en justice devant la Cour et la Cour a reçu du Secrétaire général de l'Organisation les documents pouvant servir à élucider la question.

Par ordonnance du 5 août 1959, un délai a été fixé pour le dépôt d'exposés écrits par les États jugés susceptibles de fournir des renseignements sur la question, à savoir les États membres de l'Organisation. Des exposés ont été reçus des Gouvernements de la France, du Libéria, des États-Unis d'Amérique, de la République de Chine, du Panama, de la Suisse, de l'Italie, du Danemark, du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, de la Norvège, des Pays-Bas et de l'Inde.

Les Gouvernements de l'Italie, du Libéria, des Pays-Bas, de la Norvège, du Panama, du Royaume-Uni et des États-Unis d'Amérique ont exprimé le désir d'être entendus en la présente procédure. Le Président annonce qu'il donnera la parole en premier lieu au représentant du Libéria et ensuite aux autres représentants dans l'ordre suivant: Panama, États-Unis d'Amérique, Italie, Pays-Bas, Norvège et Royaume-Uni.

Le Président donne la parole au représentant du Libéria.

M. WEEKS commence l'exposé reproduit en annexe [1].

A la demande de M. Weeks, le PRÉSIDENT donne la parole à M. Moore.

M. MOORE commence l'exposé reproduit en annexe [2].

(L'audience, suspendue à 13 h., est reprise à 16 h.)

M. MOORE termine l'exposé reproduit en annexe [3].

---

[1] Voir pp. 269-279.
[2] » » 280-282.
[3] » » 282-292.

The PRESIDENT called upon Mr. Weeks.

Mr. WEEKS continued the statement of the case for Liberia [1].

(The Court rose at 6 p.m.)

(Signed) Helge KLAESTAD,
President.

(Signed) GARNIER-COIGNET,
Deputy-Registrar.

THIRD PUBLIC HEARING (27 IV 60, 10.30 *a.m.*)

Present: [As listed for hearing of 26 IV 60.]

The PRESIDENT opened the hearing and called upon Mr. Weeks.

Mr. WEEKS concluded the statement of the case for Liberia [2].

The PRESIDENT called upon the Representative of the Government of Panama.

Dr. FÁBREGA began the speech reproduced in the annex [3].

(The hearing was adjourned from 1.05 p.m. to 4.0 p.m.)

Dr. FÁBREGA concluded the speech reproduced in the annex [4].

(The Court rose at 5.56 p.m.)

[Signatures.]

FOURTH PUBLIC HEARING (28 IV 60, 10.30 *a.m.*)

Present: [As listed for hearing of 26 IV 60.]

The PRESIDENT opened the hearing and called upon the Representative of the United States of America.

Mr. HAGER made the speech reproduced in the annex [5].

The PRESIDENT called upon the Representative of Italy.

M. MONACO began the speech reproduced in the annex [6].

(The hearing was adjourned from 1.05 p.m. to 4 p.m.)

M. MONACO continued the speech reproduced in the annex [7].

(The Court rose at 5.56 p.m.)

[Signatures.]

---

[1] See pp. 293-295.
[2] ,, ,, 295-301.
[3] ,, ,, 302-308.
[4] ,, ,, 309-319.
[5] ,, ,, 320-330.
[6] ,, ,, 331-337.
[7] ,, ,, 337-348.

Le PRÉSIDENT donne la parole à M. Weeks.

M. WEEKS continue l'exposé au nom du Libéria [1].

(L'audience est levée à 18 h.)

Le Président,
(*Signé*) Helge KLAESTAD.

Le Greffier adjoint,
(*Signé*) GARNIER-COIGNET.

TROISIÈME AUDIENCE PUBLIQUE (27 IV 60, 10 *h*. 30)

Présents : [Voir audience du 26 IV 60.]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. Weeks.

M. WEEKS termine l'exposé au nom du Libéria [2].

Le PRÉSIDENT donne la parole au représentant du Panama.

M. FÁBREGA commence l'exposé reproduit en annexe [3].

(L'audience, suspendue à 13 h. 05, est reprise à 16 h.)

M. FÁBREGA termine l'exposé reproduit en annexe [4].

(L'audience est levée à 17 h. 56.)

[*Signatures.*]

QUATRIÈME AUDIENCE PUBLIQUE (28 IV 60, 10 *h*. 30)

Présents : [Voir audience du 26 IV 60.]

Le PRÉSIDENT ouvre l'audience et donne la parole au représentant des États-Unis d'Amérique.

M. HAGER prononce le discours reproduit en annexe [5].

Le PRÉSIDENT donne la parole au représentant de l'Italie.

M. MONACO commence l'exposé reproduit en annexe [6].

(L'audience, suspendue à 13 h. 05, est reprise à 16 h.)

M. MONACO continue l'exposé reproduit en annexe [7].

(L'audience est levée à 17 h. 56.)

[*Signatures.*]

---

[1] Voir pp. 293-295.
[2] » » 295-301.
[3] » » 302-308.
[4] » » 309-319.
[5] » » 320-330.
[6] » » 331-337.
[7] » » 337-348.

FIFTH PUBLIC HEARING (29 IV 60, 10.30 *a.m.*)

Present: [As listed for hearing of 26 IV 60.]

The PRESIDENT opened the hearing and called upon the Representative of Italy.

M. MONACO made the speech reproduced in the annex [1].

The PRESIDENT called upon the Representative of the Netherlands.

Mr. RIPHAGEN made the speech reproduced in the annex [2].

The PRESIDENT called upon the Representative of Norway.

Mr. SEYERSTED began the speech reproduced in the annex [3].

(The hearing was adjourned from 12.57 p.m. to 4 p.m.)

Mr. SEYERSTED concluded the speech reproduced in the annex [4].

The PRESIDENT called upon the representative of the United Kingdom of Great Britain and Northern Ireland.

Mr. VALLAT began the speech reproduced in the annex [5].

(The Court rose at 5.57 p.m.)

[Signatures.]

SIXTH PUBLIC HEARING (2 V 60, 10.30 *a.m.*)

Present: [As listed for hearing of 26 IV 60, with the exception of Judge Sir Hersch LAUTERPACHT.]

The PRESIDENT opened the hearing and called upon the Representative of the United Kingdom of Great Britain and Northern Ireland.

Mr. VALLAT continued the speech reproduced in the annex [6].

(The hearing was adjourned from 12.56 p.m. to 4 p.m.)

Mr. VALLAT concluded the speech reproduced in the annex [7].

The PRESIDENT stated that Judge Córdova wished to put a question to the Representatives.

Judge CÓRDOVA read the question reproduced in the annex [8].

The PRESIDENT announced that, the Government of Liberia having expressed the wish to comment on new points made in the course of previous Oral Statements, it had been decided, as an exception and because of the special character of the case, to allow Representatives to address the Court a second time, provided that the second speech was limited to new points made during the hearings and without any repetition of what had already been said. Representatives could reply to Judge Córdova's question in the course of those speeches.

---

[1] See pp. 348-350.
[2] ,, ,, 351-359.
[3] ,, ,, 360-364.
[4] ,, ,, 364-369.
[5] ,, ,, 370-376.
[6] ,, ,, 376-389.
[7] ,, ,, 389-394.
[8] ,, p. 394.

CINQUIÈME AUDIENCE PUBLIQUE (29 IV 60, 10 *h.* 30)

Présents: [Voir audience du 26 IV 60.]

Le PRÉSIDENT ouvre l'audience et donne la parole au représentant de l'Italie.

M. MONACO prononce le discours reproduit en annexe [1].

Le PRÉSIDENT donne la parole au représentant des Pays-Bas.

M. RIPHAGEN prononce le discours reproduit en annexe [2].

Le PRÉSIDENT donne la parole au représentant de la Norvège.

M. SEYERSTED commence l'exposé reproduit en annexe [3].

(L'audience, suspendue à 12 h. 57, est reprise à 16 h.)

M. SEYERSTED termine l'exposé reproduit en annexe [4].

Le PRÉSIDENT donne la parole au représentant du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord.

M. VALLAT commence l'exposé reproduit en annexe [5].

(L'audience est levée à 17 h. 57.)

[Signatures.]

SIXIÈME AUDIENCE PUBLIQUE (2 V 60, 10 *h.* 30)

Présents: [Voir audience du 26 IV 60, à l'exception de sir Hersch LAUTERPACHT, juge.]

Le PRÉSIDENT ouvre l'audience et donne la parole au représentant du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord.

M. VALLAT continue l'exposé reproduit en annexe [6].

(L'audience, suspendue à 12 h. 56, est reprise à 16 h.)

M. VALLAT termine l'exposé reproduit en annexe [7].

Le PRÉSIDENT annonce que M. Córdova désire poser une question aux représentants et lui donne la parole.

M. CÓRDOVA donne lecture de la question reproduite en annexe [8].

Le PRÉSIDENT annonce que, le Gouvernement du Libéria ayant exprimé le désir de présenter des commentaires sur les nouveaux points soulevés au cours des exposés oraux, il a été décidé, à titre exceptionnel et en raison du caractère particulier de l'affaire, de permettre aux représentants de prendre la parole une seconde fois, pourvu que les deuxièmes exposés soient limités aux nouveaux points soulevés au cours des débats oraux et ne reprennent pas les questions déjà traitées. Les représentants pourront répondre à la question posée par M. Córdova au cours de ces exposés.

---

[1] Voir pp. 348-350.
[2] » » 351-359.
[3] » » 360-364.
[4] » » 364-369.
[5] » » 370-376.
[6] » » 376-389.
[7] » » 389-394.
[8] » p. 394.

The President added that the next hearing would be held the following day at 10.30 a.m. to hear the Representative of Liberia in his second statement.

(The Court rose at 5.17 p.m.)

[Signatures.]

SEVENTH PUBLIC HEARING (3 V 60, 10.30 *a.m.*)

Present: [As listed for hearing of 26 IV 60, with the exception of Judges HACKWORTH and Sir Hersch LAUTERPACHT.]

The PRESIDENT opened the hearing and called upon the Representative of Liberia.

Mr. WEEKS began the speech reproduced in the annex [1].

(The hearing was adjourned from 12.56 p.m. to 4 p.m.)

Mr. WEEKS concluded the speech reproduced in the annex [2].

The PRESIDENT called upon the Representative of Panama.

Dr. FÁBREGA began the speech reproduced in the annex [3].

(The Court rose at 5.58 p.m.)

[Signatures.]

EIGHTH PUBLIC HEARING (4 V 60, 10.30 *a.m.*)

Present: [As listed for hearing of 26 IV 60, with the exception of Judges HACKWORTH and Sir Hersch LAUTERPACHT, and with the inclusion, *for the Netherlands,* of Mr. H. SCHEFFER, Legal Adviser to the Ministry of Transport and "Waterstaat", *as Expert Adviser.*]

The PRESIDENT opened the hearing and called upon Sir Percy Spender.

Sir Percy SPENDER put two questions, reproduced in the annex [4], to the Representatives of States appearing before the Court.

The PRESIDENT stated that Representatives could give their answers in due course and called upon the Representative of Panama.

Dr. FÁBREGA concluded the speech reproduced in the annex [5].

The PRESIDENT called upon the Representatives of the United States of America, of the Netherlands and of the United Kingdom to make their statements in reply.

Mr. HAGER, Mr. RIPHAGEN and Mr. VALLAT made the speeches reproduced in the annex [6].

(The hearing was adjourned from 12.56 p.m. to 4 p.m.)

---

[1] See pp. 395-407.
[2] ,, ,, 407-408.
[3] ,, ,, 409-419.
[4] ,, ,, 419-420.
[5] ,, ,, 420-424.
[6] ,, ,, 425-429, 430 and 431-433.

Le Président ajoute que la prochaine audience se tiendra le lendemain à 10 heures 30 pour entendre le représentant du Libéria en son deuxième exposé.

(L'audience est levée à 17 h. 17.)

[Signatures.]

SEPTIÈME AUDIENCE PUBLIQUE (3 V 60, 10 *h*. 30)

Présents : [Voir audience du 26 IV 60, à l'exception de M. HACKWORTH et de sir Hersch LAUTERPACHT, juges.]

Le PRÉSIDENT ouvre l'audience et donne la parole au représentant du Libéria pour son deuxième exposé.

M. WEEKS commence l'exposé reproduit en annexe [1].

(L'audience, suspendue à 12 h. 56, est reprise à 16 h.)

M. WEEKS termine l'exposé reproduit en annexe [2].

Le PRÉSIDENT donne la parole au représentant du Panama.

M. FÁBREGA commence le discours reproduit en annexe [3].

(L'audience est levée à 17 h. 58.)

[Signatures.]

HUITIÈME AUDIENCE PUBLIQUE (4 V 60, 10 *h*. 30)

Présents : [Voir audience du 26 IV 60, à l'exception de M. HACKWORTH et de sir Hersch LAUTERPACHT, juges, et avec l'adjonction, *pour les Pays-Bas,* de M. H. SCHEFFER, conseiller juridique du ministère des Transports et du « Waterstaat », *comme conseiller expert.*]

Le PRÉSIDENT ouvre l'audience et donne la parole à sir Percy Spender.

Sir Percy SPENDER pose aux représentants des États devant la Cour les deux questions reproduites en annexe [4].

Le PRÉSIDENT donne la parole au représentant du Panama.

M. FÁBREGA termine l'exposé reproduit en annexe [5].

Le PRÉSIDENT donne la parole aux représentants des États-Unis d'Amérique, des Pays-Bas et du Royaume-Uni pour leurs seconds exposés.

MM. HAGER, RIPHAGEN et VALLAT prononcent les exposés reproduits en annexe [6].

(L'audience, suspendue à 12 h. 56, est reprise à 16 h.)

---

[1] Voir pp. 395-407.
[2] » » 407-408.
[3] » » 409-419.
[4] » » 419-420
[5] » » 420-424.
[6] » » 425-429, 430 et 431-433.

The PRESIDENT called upon the Representatives who had not yet done so to reply to the questions put by M. Córdova and Sir Percy Spender.

Mr. WEEKS, Dr. FÁBREGA, Mr. HAGER and Mr. RIPHAGEN made the statements reproduced in the annex [1].

The PRESIDENT declared the hearings closed.

(The Court rose at 4.51 p.m.)

[Signatures.]

NINTH PUBLIC HEARING (8 VI 60, 11 *a.m.*)

Present: President KLAESTAD; *Vice-President* ZAFRULLA KHAN; *Judges* BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, ALFARO; *Deputy-Registrar* GARNIER-COIGNET.

The PRESIDENT opened the hearing and stated that since the Court last sat it had suffered the grievous loss of one of its Members, Sir Hersch Lauterpacht, who died in London, after an operation, on 8 May 1960.

Sir Hersch Lauterpacht had been a Judge of this Court since 1955. At the time of his election he had won for himself a commanding reputation as an international lawyer, in the academic field, as an adviser, and as the author of many learned works.

Born in 1897, he first studied law at Vienna and later in London and Cambridge, securing doctorates from these three Universities. After being an Assistant Lecturer at the London School of Economics and Reader in Public International Law in the University of London, he was in 1937 appointed Professor of International Law in the University of Cambridge. Before this date he was well known at the Hague, having given the first of a number of courses at the Hague Academy of International Law as long ago as 1930. He was called to the Bar of England in 1936 and became a King's Counsel in 1949.

His zeal in the cause of the codification and development of international law found an outlet in the years of his membership of the International Law Commission, in the work of which he played an important part, in the years between 1951 and 1955.

Recognized as one of the greatest authorities on international legal questions, his opinions, as expressed in numerous learned works, were constantly cited wherever such topics were argued, and, apart from his original writings, he had in his compilation and editing of journals and of reports of cases, made a contribution of great value to the literature of international law and to its works of reference. In particular, he had, since 1935, been responsible for the new editions of a great classic, Oppenheim's *International Law*.

In the years, so abruptly and tragically cut short, in which he had been on the Bench, Members of the Court had had an opportunity of

[1] See pp. 434-436, 437, 438 and 439-440.

Le PRÉSIDENT invite les représentants qui ne l'ont pas encore fait à répondre aux questions posées par M. Córdova et par sir Percy Spender.

MM. WEEKS, FÁBREGA, HAGER et RIPHAGEN font les déclarations reproduites en annexe [1].

Le PRÉSIDENT prononce la clôture des audiences.

(L'audience est levée à 16 h. 51.)

[Signatures.]

NEUVIÈME AUDIENCE PUBLIQUE (8 VI 60, 11 *h.*)

Présents : M. KLAESTAD, *Président ;* M. ZAFRULLA KHAN, *Vice-Président ;* MM. BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, MORENO QUINTANA, CÓRDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, M. ALFARO, *Juges ;* M. GARNIER-COIGNET, *Greffier adjoint.*

Le PRÉSIDENT déclare l'audience ouverte et annonce que, depuis sa dernière audience, la Cour a été cruellement frappée par la perte de l'un de ses membres, sir Hersch Lauterpacht, décédé à Londres des suites d'une opération le 8 mai 1960.

Sir Hersch Lauterpacht était membre de la Cour depuis 1955. Lors de son élection il avait déjà acquis une réputation de premier plan comme internationaliste, comme universitaire, comme jurisconsulte et comme auteur de nombreux ouvrages.

Né en 1897, il avait fait ses études de droit à Vienne, puis à Londres et à Cambridge et avait le titre de docteur des universités de ces trois villes. Après avoir été chargé de cours à la *London School of Economics* et professeur de droit international public à l'université de Londres, il avait été nommé professeur de droit international à l'université de Cambridge en 1937. Avant cette date, il était déjà bien connu à La Haye où, dès 1930, il avait donné le premier d'une série de nombreux cours à l'Académie de droit international. En 1936, il avait été admis au barreau d'Angleterre et était devenu *King's Counsel* en 1949

Son zèle en faveur de la codification et du développement du droit international avait trouvé à s'employer de 1951 à 1955, pendant les années où il avait été membre de la Commission du droit international des Nations Unies, aux travaux de laquelle il prenait une part active.

Reconnu comme l'une des principales autorités en matière de droit international, son opinion, exprimée dans de nombreux ouvrages scientifiques, est constamment citée dans les débats sur ce sujet. En dehors de ses œuvres originales, il a, par ses compilations et comme secrétaire de rédaction de périodiques et de recueils de jurisprudence, apporté une contribution d'une grande valeur à la doctrine du droit international et aux ouvrages de référence en la matière. Depuis 1935 en particulier il avait assumé la charge des nouvelles éditions de l'ouvrage classique d'Oppenheim, *International Law.*

Au cours des années pendant lesquelles il a été membre de la Cour et auxquelles il vient d'être mis fin d'une façon si tragique et prématurée,

---

[1] Voir pp. 434-436, 437, 438 et 439-440.

adding to their respect for his learning an appreciation of and admiration for his tireless and whole-hearted devotion to the ideal of the settlement of international disputes by judicial processes and his unremitting labour in the cause of the development of international law, his contribution to which would long survive him.

Sir Hersch Lauterpacht would be remembered, not only for his learning, but as a man who combined with great scholarship great qualities of warm humanity, gentleness, kindness and consideration.

The President asked the Court and all present to stand for a brief moment in tribute to the memory of Sir Hersch Lauterpacht.

The President announced that the Court was sitting to deliver the Advisory Opinion requested by the Assembly of the Inter-Governmental Maritime Consultative Organization in the matter of the constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization. He asked the Vice-President to be good enough to read the English text of the Opinion [1].

The VICE-PRESIDENT read the Opinion.

The PRESIDENT asked the Deputy-Registrar to read the operative part of the Opinion in French.

The DEPUTY-REGISTRAR read the operative part in French.

The PRESIDENT stated that he and Judge Moreno Quintana had appended to the Opinion statements of their dissenting opinions [2].

The President declared that the hearing was closed.

(The Court rose at 12.05 p.m.)

---

[1] See *I.C.J. Reports 1960*, pp. 150-172.
[2] *Ibid.*, pp. 173-176, 177-178.

ses collègues ont eu l'occasion d'ajouter à leur respect pour sa science leur admiration et leur appréciation de son dévouement inlassable et total à l'idéal du règlement judiciaire des différends internationaux et de ses efforts constants et ininterrompus en vue du développement du droit international. Sa participation à cette œuvre lui survivra longtemps.

Sir Hersch Lauterpacht demeura dans les mémoires non seulement pour sa science mais comme un homme qui associait à une haute érudition de grandes qualités humaines de douceur, de bonté et de prévenance.

Le Président invite la Cour et l'auditoire à se lever et à se recueillir quelques instants en hommage à la mémoire de sir Hersch Lauterpacht.

Le Président annonce que la Cour se réunit pour rendre l'avis consultatif qui lui a été demandé par l'Assemblée de l'Organisation intergouvernementale consultative de la Navigation maritime en l'affaire de la composition du Comité de la Sécurité maritime de l'Organisation intergouvernementale consultative de la Navigation maritime.

Le Président prie le Vice-Président de bien vouloir donner lecture du texte anglais de l'avis [1].

Le VICE-PRÉSIDENT donne lecture de l'avis.

Le PRÉSIDENT invite le Greffier adjoint à donner lecture du dispositif de l'avis en langue française.

Le GREFFIER ADJOINT lit le dispositif en français.

Le PRÉSIDENT annonce que le Président et M. Moreno Quintana, juge, ont joint à l'avis les exposés de leur opinion dissidente [2].

Le Président lève l'audience.

(L'audience est levée à 12 h. 05.)

---

[1] Voir *C. I. J. Recueil 1960*, pp. 150-172.

[2] *Ibid.*, pp. 173-176, 177-178.

ANNEX TO THE MINUTES
ANNEXE AUX PROCÈS-VERBAUX

1. ORAL STATEMENT OF Mr. WEEKS

(REPRESENTING THE GOVERNMENT OF LIBERIA)
AT THE PUBLIC HEARING OF 26 APRIL 1960, MORNING

Mr. President and Members of the Court.

This is the first time Liberia is appearing before this Tribunal. May I, therefore, begin this written Statement by reaffirming the great respect in which my Government holds this Court. May I also express my own personal, deep sense of appreciation and that of my colleague, Mr. Moore, who will be associated with me in presenting the Oral Statement of the Government of the Republic of Liberia, at the privilege we enjoy at appearing before this Tribunal.

May I add, Mr. President, with your leave, that it is my proposal to pause at intervals of about ten minutes for the purpose of translation —ten minutes more or less. Thank you.

May it please the Court. The question raised by the present proceedings is exclusively one of the interpretation of a treaty. The Convention establishing the Inter-Governmental Maritime Consultative Organization, a name which I shall abbreviate in these proceedings to IMCO, provides in Article 28 *(a)* for the election of a Maritime Safety Committee. I need hardly tell the Court that this body is intended to be a central organ of IMCO. Even a rapid perusal of the Convention shows that. For this reason, the Article lays down qualifications for membership reflecting the desire of the draftsmen to create a body consisting of States who, for one reason or another, are particularly concerned with advancing the cause of maritime safety. It is, I think, common ground between all States here represented that this must have been the object of those who drew up the Convention.

The provisions in question—and I will not take the time of the Court by going over those provisions—state that of the fourteen Members of IMCO to be elected to the Maritime Safety Committee, "not less than eight shall be the largest ship-owning nations". Article 28 *(a)* also provides that the remainder shall be elected so as to ensure the representation of nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, as well as the representation of major geographical areas. And, as if to describe what must in any case be relatively obvious, the Article refers to all those States as being "Governments of those nations having an important interest in maritime safety".

Now, the issue in the present proceedings relates to the interpretation of this Article—Article 28 *(a)*. It is the contention of my Government that the phrase "of which not less than eight shall be the largest ship-owning nations" imposes upon the Assembly of IMCO a mandatory obligation to elect at least those eight States which are objectively to be regarded as the largest ship-owning nations.

What, then, does "ship-owning" mean? In the context of the IMCO Convention, my Government contends that this word refers to regis-

tration. A ship-owning State is one in which ships are registered. This is so because registration is the normal way of creating a connection between a State and a vessel; and the expression "ship-owning" is intended to refer to whatever is in this context the normal and sensible connecting factor. For the purposes of advancing the cause of maritime safety, it is clear that this factor of registration must be retained. It is a commonplace of international law that it is the State of registration whose laws operate on board a ship. And since it is a vital feature of international measures of maritime safety that such measures should be applied to vessels by the system of municipal law operating on board them, it is clear that the route for the application of those measures must be through the State of registration.

The form in which the issue is raised before this Court is that of a request for an Advisory Opinion as to whether the Maritime Safety Committee, elected on January 15th, 1959, is constituted in accordance with the terms of the IMCO Convention. My Government submits that this question must be answered in the negative, because those provisions of the Convention to which I have just referred were not applied. The eight largest ship-owning nations were not elected, in that Liberia and Panama, at that time the third and eighth largest ship-owning nations respectively by reference to registered tonnage, were not elected. By virtue of this fact, therefore, the Maritime Safety Committee was not constituted—my Government contends—in accordance with the terms of the IMCO Convention.

I have already said that the question involved is one of treaty interpretation. It is concerned solely with the determination of the meaning of an expression in a Convention to which 39 States have become parties for the purpose—and the sole purpose—of advancing the cause of safety of life at sea. Consequently, matters extraneous to the Convention are essentially irrelevant to the problem before this Court. In particular, what is irrelevant is the general problem of so-called "flags of convenience", or "flags of necessity" as they are sometimes called. Nevertheless, sometimes directly, and sometimes indirectly, it has been suggested by States adopting a position adverse to Liberia that Liberian ships fly what has been termed a "flag of convenience". This expression has come to be employed in a hostile and in a derogatory sense. In some way it is inferred that a State against which an allegation of this kind is made is guilty of an improper practice and is not worthy to be elected as a member of the Maritime Safety Committee.

I deny the truth of the allegations and I deny their relevance. But I think I am bound, in all the circumstances, to place before the Court some explanation of the situation which has given rise to allegations of this kind. In embarking upon this brief consideration of the international shipping situation, I must emphasize that it really has no part to play in this case. To put the matter in extreme terms, even if every aspect of the allegations were substantiated, the factual position would remain that Liberia is a State in which the third largest quantity of the world's shipping is registered; that it is the only State which can legislate for that shipping and ensure the application and enforcement of maritime safety measures on board those ships; and that, therefore, in the sense of the treaty, it is one of the eight largest ship-owning nations whose election to the Maritime Safety Committee was mandatorily required by the provisions of Article 28 *(a)* of the Convention.

The suggestion that Liberia's position is in some way tainted or that her activities in the shipping world are disreputable or improper stems from the assertion that Liberian flag ships are not owned by Liberian nationals. This is simply untrue. Liberian flag shipping is in fact very largely owned by Liberian nationals, that is, corporations established under the laws of Liberia. Of the eleven million tons of shipping registered in Liberia, six million tons are owned in this way, that is to say by Liberian nationals. Even this quantity—six million tons—would be sufficient to place Liberia fifth among the eight largest ship-owning nations. However, I would be less than frank with the Court if I attempted to suggest that these corporations were not in the main financed by foreign capital. But this is not a matter on which I feel called upon to make admissions or apologies to the international shipping community. Nor would I expect other countries, similarly affected, to do so—though the United Kingdom's flag covers more than one million tons of shipping beneficially owned by United States corporations; and the flags of the Netherlands, France, Norway and Germany cover nearly another million tons of shipping similarly situated. I feel, however, that I need do no more than refer to two considerations which really meet the criticisms that are so frequently levelled against Liberia.

Mr. President, the first relevant consideration is that, regardless of the quantity of tonnage registered in Liberia, Liberia assumes the international responsibility commensurate with the fact that vessels sail under her flag. This responsibility is discharged in both national and international terms.

In national terms, Liberia enacts and enforces legislation relative to the safety of the vessel and the conditions of those on board her. She maintains an extensive and efficient maritime administration which is concerned, among other things, with ensuring the competence of the crews and the observance of safety standards on board Liberian vessels. Throughout the world there are Liberian Consuls who possess and exercise jurisdiction over Liberian vessels. In addition, in all ports, there are specified agencies, such as Lloyd's agents or the American Bureau of Shipping, who assist the Liberian Authorities in ensuring the observation of the highest safety standards.

On the international plane, Liberia discharges her responsibilities by being a party to the major conventions relating to safety of life at sea, by being a party to certain ILO Maritime Conventions and by taking her share in the functioning and financing of such vital bodies as the Ice Patrol. And, of course, Liberia is a strong supporter of, and an important financial contributor to, the work of IMCO. I may add, incidentally, that her financial contribution to both of these Organizations is proportionate to the quantity of tonnage registered under her flag.

In short, Liberia does for her ships essentially the same things that other States do for their ships.

The second consideration which my Government deems relevant is perhaps even more important as dispelling some of the assumptions upon which criticisms have been based. Criticism of Liberia on the ground of lack of connection between the vessel and the State of registration overlooks the fact that today a great deal of shipping does not, apart from registration, have any exclusive connection with any one State. Any approach which ignores this fact is based upon a picture of the

world of shipping which is now largely outdated. There was, no doubt, a time once when an identifiable single man might have owned a ship; when that ship sailed between the State of which its owner was a national and some other State; when that ship was captained and manned by a crew of the same nationality as the owner. This indeed was the case in Liberia in the second half of the nineteenth century. At that time, a number of individual Liberians owned ships carrying mixed cargo from Liberia to the United Kingdom and the United States; and these were largely manned by Liberian crews.

But that is no longer the situation today. International shipping is so complex—so internationalized, I might say—that apart from registration, it is now difficult to speak of a single simple concept which connects a ship with a particular State.

Perhaps the Court will permit me to illustrate my point by reference to a recent announcement which appeared in the major English papers, including *The Times* and *The Financial Times*. On November 10 1959 a full-page announcement was published relating to an issue in the English market of £4½ million 7 per cent. redeemable secured loan stock by the Anglo-American Shipping Company Limited.

Now it is the details of the Company and its operations which are, in my submission, of considerable significance in illustrating the present structure of the international shipping industry. The Company was incorporated in 1958 in Bermuda, a British Colony, where the tax laws are less stringent than they are in the United Kingdom. Its share capital was £2¼ million Bermuda pounds. Approximately 70 per cent. of these shares are owned by Norness Shipping Company, Incorporated, a company incorporated in Panama, which is itself substantially owned by Erling D. Naess, a United States citizen who was at least until 1946 a Norwegian citizen. The Company will own five vessels, all of which are registered, or to be registered, at United Kingdom ports. One vessel, the smallest, is under charter to a British Company for 15 years. Another is under charter to a German company for a period of 8 years; a third to a Dutch company which is a wholly-owned subsidiary of an American oil company for 5½ years; and the fourth and fifth to a Bermuda company which is a wholly-owned subsidiary of another American oil company, each for a period of fifteen years. During the period of the charter, it is probable that only two of the vessels will visit the United Kingdom, namely, one, the smallest, which will carry iron ore to the United Kingdom, and another which will carry oil from the Middle East to European ports. The other vessels will be engaged in carrying coal from the eastern seaboard of the United States to Northern Europe and crude oil from the Middle East to Australia and the Philippine Islands. The vessels are to be managed by Naess Denholm & Co. Ltd., a company incorporated recently in England, of which 60 per cent. is owned by Naess Shipping Company Inc. (an American Company) and 40 per cent. by J. & J. Denholm, Ltd., of Glasgow. In addition, during the period for which the loan stock is outstanding, the Company excludes its right to mortgage the vessels.

In short, we have here a situation in which it is virtually impossible, apart, that is, from registration, to associate any particular vessel in a real way with any one State. The owner is incorporated in one territory; the vessel flies the flag of another; is chartered to nationals of a third for a considerable portion of its working life; is financed with capital

raised in several States; and in some cases is devoted to a type of carriage which will never bring it near its home port. There are other cases in which one must qualify the concept of ownership, first, by the realization that the freedom to dispose of the vessel is severely restricted by the existence of mortgage debts secured by the vessel's earnings and, secondly, by awareness that the mortgagees may possess a different nationality to that of the mortgagors. In addition, insurance and management are also factors which introduce diverse national elements.

The example which I have just given does not stand alone. With the Court's leave, I should like to read a passage from an issue of *The Pilot*, the publication of the American National Maritime Union. The extract, which is written in somewhat journalistic style, appears in the issue of February 11, 1960. It relates to a fleet of sixteen ships which fly the Norwegian flag. The extract runs as follows:

> "A typical arrangement works this way: Global Bulk Transport and Republic Steel organized a Panamanian company, Tankore. Tankore then entered into a long-term contract with Republic Steel calling for the carriage of iron ore to Republic plants. On the strength of this contract Tankore built ships in Japan. Then, to obtain registry under the Norwegian flag and to protect these ships against unionization by American maritime unions, the ships are transferred to Norwegian corporations.
>
> Norway's laws require ships under the Norwegian flag to be owned 60 per cent. by Norwegian citizens. The other 40 per cent. is owned by Global Transport and Republic Steel through their Panamanian Company, Tankore. The 60 per cent. Norwegian ownership is only a front, however, covered by purchase agreements or mortgages held by the American principals."

Now it is needless to say that I do not subscribe to the suggestion implied in this passage that there is something wrong with what Republic Steel is doing or with the way in which the Norwegian law permits Republic Steel to do it. I merely point to the episode as illustrating both the erosion of the concept of simple ownership and the diversity of national interests in any particular ship.

The fact is that, having regard to modern corporate development, it is frequently extremely difficult, if not impossible, to determine with precision who is the owner of a ship and with what country he is most closely associated. One need only point to one of the world's greatest and most respected industrial concerns, Royal Dutch-Shell, which is an organization of Companies apparently spanning at least two countries and with a shareholding which may spread over many others.

I have gone into this detail because I believe that it shows that it is now no longer possible to speak of a "normal practice" in shipping which calls for a close or exclusive association between a vessel and a particular State. In the absence of a normal practice, there seems to be little substance in the suggestion that the action of the Government of Liberia is open to criticism as a departure from appropriate standards.

Mr. President and Members of the Court, having said this much to help put the position of Liberia into perspective, there are two other matters to which I should refer. In the first place it may perhaps be of assistance if I mention some of the considerations which lead ship owners and operators to place their vessels under foreign flags. Some of

these considerations are general ones; others relate particularly to vessels placed under the Liberian flag.

Among the general considerations that of taxation must be placed first. Its influence is generally understood and has recently been authoritatively restated by such persons as Sir William Currey, the chairman of the famous British shipping line, P. & O. Company, and Lord Melchett, who referred to the problem in a debate on shipping in the House of Lords on February 3, 1960.

In some States the rate of tax on corporate profits is so high that there is a natural tendency to move the operations of the corporations to a State with lower rates. Expressed in terms of shipping, low tax rates accelerate the expansion of fleets, and high tax rates retard it.

Other considerations relate to the cost of operation under foreign flags. In a number of States, notably the United States and France, labour costs are particularly high. For example, the seamen of most nations earn only a third to a half of the amount which United States crews earn. Again, the costs of repairs outside the United States, for instance in Japan, is considerably lower than in the United States. Yet vessels which fly the United States flag are by law bound to employ United States crews and to have their repairs carried out in the United States. It is in order to diminish the uneconomic consequences of requirements such as these—which are not limited of course to the United States—that vessels are placed under the flag of countries which do not impose such conditions.

There is moreover a factor of a historical character which is relevant here. It is that the development of foreign registration on a large scale took place during a period of major change in the shipping industry. The period since the Second World War has witnessed the rapid development of large scale bulk-carrying as a result of the opening up of new sources of raw materials as well as of fresh markets. This development has been accompanied by a corresponding diminution in emphasis on, for example, passenger and liner service. Bulk-carrying, especially for oil, oil products and raw materials, called for the construction of large vessels capable of covering long distances at relatively high speeds and manned by proportionately smaller crews. The construction over quite a short period of a large number of these vessels called for large-scale borrowing and for economic management designed to repay these loans and to provide for new construction. For these reasons factors of taxation assumed a great importance in the determination of the place of registration. Equally, the very size of the ships involved largely explains the rapid growth in the total tonnages of vessels sailing under foreign registration.

In addition to these general considerations associated with the use of foreign registration, there are particular considerations which have attracted shipowners to Liberia. The possession of a dollar currency by Liberia, standing at par with the United States dollar and ranking as a hard currency, assists in convertibility and makes easier operations in world trade. In addition, the language of Liberia is English, which is an important factor when one considers the fact that most of the world's shipping business is conducted in English. Again, the technical maritime law of Liberia is of an advanced type designed to meet modern financial needs. For example, an outstanding and distinctive feature is the provision in the Maritime Law of Liberia that a mortgage on a Liberian

ship may be enforced in any foreign jurisdiction where the ship may be.

In explaining why foreign registration takes place and in particular why ships are registered in Liberia, I think I should also make it plain that there are certain reasons which do not operate in this connection. In the first place, foreign operators do not place their vessels under the Liberian flag because they wish to lower the standard of crew conditions or of ships' safety. I do not think that there is any dispute about this. In respect of wages, those paid to the crews of Liberian vessels, though lower than those paid to United States seamen, are, nevertheless, among the highest paid in the rest of the world. As regards questions of safety, Liberian standards rank among the highest. The Chairman of Lloyd's Register of Shipping said in his Annual Report for 1957, which was published in 1958:

> "It would not be out of place to make it clear that in cases where factors affecting safety come within the Society's scope, no deviation from internationally accepted standards is permitted, whatever the vessel's flag. Ships classed with Lloyd's Register which sail under 'flags of convenience' are required to conform to the Society's standard of strength and efficiency in exactly the same way as ships registered elsewhere and must undergo the same periodical surveys to ensure that they are maintained to those standards."

The same point has been cogently stated by the Chairman of the American Bureau of Shipping in a speech quoted at page 192 of the Written Statements in these proceedings, and with the exact words of which I do not think I need trouble the Court again. In this connection, it is of considerable significance that 49 per cent. of Liberian tonnage is under five years of age—a figure unequalled by any other State. At the other end of the scale, Liberia's record in having only 3 per cent. of ships over 25 years of age is equalled by only one other State. There can, under these circumstances, be no basis for any allegation that Liberian registration is sought by shipowners who underpay their crews or who evade compliance with international safety standards.

I should add in this connection that it is not only the so-called "flags of convenience" countries, such as Liberia and Panama, in which registration occurs as a result of the operation of these factors. There are over a million tons of United States shipping under the British flag; and it is well known, and is illustrated by the Naess episode which I have mentioned in detail, that these factors have been particularly important in Bermuda, in the Bahamas and in Hongkong which are of course all United Kingdom dependencies. Again, their operation is singularly well illustrated by the fact that in the past year the Greek merchant marine has increased in size by nearly one million tons as a result of changes in Greek law which, in effect, permit foreign ownership of Greek flag vessels, which allow special tax concessions, and which facilitate the maintenance of existing ship mortgages.

Perhaps one other consideration affecting the whole question of foreign registration should be mentioned here. It is that registration, while no doubt conferring benefits on the vessels concerned, also imposes upon them correlative obligations. My Government has already indicated in its Written Statement the extent to which the laws of the State of registration are applicable to vessels flying its flag. This means that such

vessels are, of course, subject to various sovereign acts of the foreign flag State—such as modification of the relevant substantive law, changes in the tax rate, and even possibly requisition or expropriation. Owners who seek foreign registration accept these risks. But the point which I seek to make here is that in selecting any one particular State for registration the owners exercise the same discretion as does any other person making a foreign investment. They choose to associate themselves with States in which there is a satisfactory climate for investment and in which, accordingly, they have confidence.

Mr. President and Members of the Court, having explained why it is that shipowners seek foreign registration, I should perhaps also add a few words explaining the basis for the existence of registration facilities in Liberia. At the outset, I must explain that the Liberian Maritime Law was not devised as a deliberate attempt to establish a special system of easy registration designed to subvert the existing system of national registration. Nor was it primarily intended to create a source of national revenue. Indeed, the net revenue now derived by the Government from Liberian flag vessels forms a comparatively small part of the national budget. The fact is that the Liberian Maritime system was established in the exercise of Liberia's sovereign desire to promote a national merchant marine.

In this connection, two facts about Liberia may not always be appreciated. The first is that there are a considerable number of her population who, by tradition, have been active as seafarers. There is a tribe called "Kru", which is simply the transliteration of the English word "crew", whose members are all Liberian nationals but who are scattered up and down the African coast acting as sailors. There are even groups of them to be found away from Africa. One of the objects of the Government of Liberia in enacting its maritime legislation was to develop a merchant marine which would in due course absorb and employ these persons. Secondly, Liberia exports large quantities of raw materials, particularly iron ore, rubber, piassava which is palm fibre, and coffee. Again, the Government was and is anxious to promote the development of a merchant marine which would eventually be available for the carriage of those commodities.

In short, the development of a large fleet, consisting mainly of bulk carriers, was an almost incidental consequence of legislation designed primarily for another purpose. At the same time, the Government of Liberia saw no reason why it should act to prevent foreign operators from registering their ships under the Liberian flag provided that this involved no element of abuse. And there has been no abuse of this right either in terms of Liberian Law or in terms of international law.

Indeed, all that has happened is that Liberian flag vessels have come into strong competition with certain classes of transport services provided by the ships of some of the traditional maritime nations. I may say in passing that there has been some tendency to exaggerate the impact of this competition on the growth of the fleets of the traditional maritime States. It is not without significance in this connection that some of these competitive fleets have increased substantially in size since the Second World War. The United Kingdom fleet, for instance, is now more than three million tons larger than it was in 1939, despite war losses of some 11½ million tons; and the Norwegian fleet has increased by 5¼ million tons, despite war losses of over 2 million tons.

Nevertheless, the countries affected by this competition have opposed it, just as they have opposed other elements of competition such as the system of cargo preference or of foreign State subsidies to shipping. The present proceedings may, I believe, be regarded as a reflection of this reaction to competition. Commercial opposition to the role of the Liberian fleet appears to have led the Governments of a number of States with established interests in maritime transport to oppose Liberia's development as a maritime nation. I believe that this attitude may well be the inarticulate premises underlying the approach of a number of States to the problem of nationality of ships as examined in the International Law Commission and at the First Geneva Conference on the Law of the Sea. Even more clearly, it explains why, in the forum of IMCO, those States opposed the election of Liberia to the Maritime Safety Committee. In the view of my Government, it is a matter of genuine regret that commercial considerations should have been allowed to intrude into the establishment of a technical body such as the Maritime Safety Committee. There really was no need to take opposition so far.

The view that my Government takes of the position is that as a matter of sovereign right it is entitled to develop its merchant fleet even if that development takes place with foreign capital. There is, after all, no impropriety in the acceptance by a State of large sums of foreign capital for the development of its internal natural resources. Indeed, the high level of the flow of both public and private international investment is one of the outstanding phenomena of the current economic scene. Why then, it may be asked, in terms of the legal interest of the recipient, should a distinction be drawn between capital invested, say, in an irrigation project and capital employed in the extension of a merchant fleet?

The Liberian merchant fleet even now is making, and will no doubt in future years continue to make, a general contribution to the economy of the country which cannot be measured simply in terms of direct financial advantage to my Government's treasury. It is, moreover, a fact—too often overlooked—that this form of investment has led to the development of a fleet which has made, is making and will continue to make an important, indeed a vital, contribution to international transport.

With your leave, I shall turn now to examine the substantive question involved in these proceedings. It is my object, in this part of my statement, to avoid repetition of the case which Liberia has already submitted to the Court in its Written Statement. I shall therefore examine only those points raised in the Written Statements of other States which, in my Governments's view, call for specific answer. Nevertheless, I would like, for just a brief moment, to recall the principal contentions submitted by the Government of Liberia in its Written Statement.

The case of the Government of Liberia rests upon a statement of fact and a proposition of law. The statement of fact is not disputed. It is that Liberia and Panama were at the material time, namely, the date of the election of the Maritime Safety Committee on January 15th, 1959, respectively the third and the eighth largest ship-owning States in the world, in terms of quantity of registered tonnage. The proposition of law is as follows. Having regard to the statement of fact just made, and to the terms of Article 28 *(a)* of the IMCO Convention, Liberia and Panama were entitled to membership of the Maritime Safety Committee. As

they were not elected, it cannot be said that the Committee was constituted in accordance with the terms of the IMCO Convention. This convention rests upon the wording of Article 28 *(a)*. The crucial words of that Article are contained in the phrase which dictates the membership of the Committee: "of which not less than eight shall be the largest ship-owning nations". In other words, the Committee must include at least the eight largest ship-owning nations; this is a mandatory provision. The Members of IMCO are under a duty to obey it, and it creates in favour of the States which fall into the appropriate category a right to be elected. There is no room for the exercise of discretion in this matter.

The central question, therefore, is: What States fall into the category of "the largest ship-owning nations"? In the submission of my Government, the appropriate test for determining size of a ship-owning nation is the test of registration.

The question must be looked at solely in the light of the IMCO Convention. Considerations relating, for example, to the question of nationality of claims arising in connection with the diplomatic protection of merchant vessels are essentially irrelevant. They are neither affected by, nor do they affect, the problem of treaty interpretation now before the Court.

There are two principal reasons why registration is the relevant criterion in the present instance. In the first place, the application of this criterion, in preference to any other, will most contribute to the full and effective achievement of the objectives of the Maritime Safety Committee. As its name so clearly implies, the Committee is concerned with Maritime Safety—and with nothing else. As Article 29 of the Convention again so clearly shows, the work of the Committee can be fully implemented if the States concerned give effect, in their own law, to the recommendations of the Committee. It is an indisputable maxim of international law that the legislation applicable on board a ship is the legislation of the flag State and of no other State, except, of course, when the vessel is in the national or territorial waters of another State.

Secondly, registration is the appropriate factor to apply in determining the ship-owning nation, because, as a matter of preponderant State practice, it is the connecting element most commonly employed for attributing a vessel to a State. This is evidenced by its use in major multilateral maritime conventions such as those relating to safety of life at sea; and it is evidenced also by its constant use in commercial, navigation, consular and fishery treaties as a way of associating a vessel with a State. This constant express use of the concept of registration is explained by the fact that it is a clear and certain factor and it is readily ascertainable. It is therefore a convenient and reasonable connecting factor; and it has come, in treaty matters, to be accepted as the normal one.

As an alternative to registration and as a subsidiary contention, the Government of Liberia submits that ownership by nationals is the relevant test. By reference to this test, Liberia still ranks among the eight largest ship-owning nations, since over six million tons of shipping are owned by Liberian corporations.

But whichever test is applied, it must be the exclusive test. It is not open to States to qualify the objective tests by additional criteria, for this would, in effect, be to deprive the test of its exclusive determinative

quality and would amount to replacing it by another test based on additional criteria.

This, in other words, would amount to a revision of the clear terms of the Convention.

On these short and clear substantive grounds Liberia contends that she was entitled to election to the Maritime Safety Committee. In the submission of my Government, the right thus created by the positive direction that the Committee shall include at least the eight largest ship-owning nations is in no way affected by the presence, in Article 28 *(a)*, of the word "elect", or the phrase "having an important interest in maritime safety". In any event, as a matter of construction, the largest ship-owning nations must be regarded as possessing an important interest in maritime safety.

Since the Members of the Assembly of IMCO did not discharge their duty to elect Liberia and Panama to the Maritime Safety Committee, the Committee cannot be said to be constituted in accordance with the Convention.

There is a final argument, which only arises in the event that the Court should consider, contrary to the principal submission of my Government, that the Members of IMCO were granted a discretion in connection with the election of the eight largest ship-owning nations. This argument is that the Committee was not constituted in accordance with the Convention, because the Members did not comply with the requirements of the constitutional law of the Organization. In particular, having regard to all the circumstances, the failure of certain Members to vote for Liberia and Panama must be regarded as an abuse or a *détournement de pouvoir*.

We propose to deal, in the first instance, with the principal points made in the Written Statements of those States which have adopted a position adverse to that of Liberia, that is, those States which contend that the election now in question was valid.

The Written Statements in question are those of France, Italy, the United Kingdom, Norway and the Netherlands. To consider each of these Statements individually would be repetitious. We shall therefore examine these Statements analytically. Where the same point appears in more than one Statement we will deal with them collectively. Where a point appears in one Statement only, it will be referred to at the appropriate point in my Government's observations.

The major portion of my Government's statement will, therefore, be devoted to the central contention common to each of these Written Statements—the contention that Article 28 *(a)* conferred upon the Members of IMCO a discretion sufficiently wide to entitle them legitimately to refrain from electing Liberia and Panama to the Maritime Safety Committee. This point, which I have just referred to, will be developed by my colleague Mr. Moore immediately after I pause in a few seconds for the interpretation. After that, I shall examine a number of points which have been dealt with in a more subsidiary manner, such as the contention that registration is not the appropriate test for determining the size of a ship-owning nation.

2. ORAL STATEMENT OF Mr. MOORE

(REPRESENTING THE GOVERNMENT OF LIBERIA)
AT THE PUBLIC HEARINGS OF 26 APRIL 1960

[Public hearing of 26 April 1960, morning]

Mr. President and Members of the Court.

Before I resume the statement of my Government, may I just take this opportunity to associate myself most sincerely with the opening remarks of Dr. Weeks. I am very conscious of the privilege which I enjoy in appearing before you.

With your leave I will now begin to consider the central issue in these proceedings—the issue which may be called the "discretion" issue. It may be stated in the form of a choice between two alternatives: the first alternative is that in electing the first eight members of the Maritime Safety Committee, the Members of IMCO are given a discretion so wide that its exercise cannot be questioned. The second alternative is that the Members of IMCO are obliged, on the other hand, to elect in the first category of membership of the Maritime Safety Committee those eight nations which are objectively the largest ship-owning nations. If the first alternative is correct, then the only basis for questioning the constitution of the Committee would be the failure of the Assembly to act in a constitutionally correct manner. If the second alternative is correct, then the Committee is not properly constituted unless Liberia and Panama cannot both properly be regarded as being among the eight largest ship-owning nations.

The principal argument addressed to the Court in the Written Statements of those States which contend that the election was valid is that Article 28 *(a)* confers upon Members a virtually unfettered discretion in exercising their votes. The terms of Article 28 *(a)* are, these States contend, nothing more than directives; and, in effect, the votes cast by States cannot be challenged.

Five main types of argument are advanced in support of this principal contention by those States which maintain that the election was valid.

The first is based upon the effect of the use of the verb "elect" in Article 28.

The second is based upon the effect of the words "having an important interest in maritime safety".

The third involves interpreting the phrase "of which not less than eight shall be the largest ship-owning nations" in such a way as to make it read: "of which not less than eight shall be from amongst the largest ship-owning nations".

The fourth argument turns upon the effect of the alleged vagueness of the expression "the largest ship-owning nations".

The fifth argument relates to the alleged danger of an automatic test.

Mr. President and Members of the Court, I propose now to deal in turn with each of the five arguments which relate to the alleged existence of a discretion.

I shall, therefore, turn first to the argument based upon the effect of the word "elected" in Article 28 *(a)*.

In at least four Written Statements, those of France, Italy, Norway, and the United Kingdom, reliance is placed upon the use of the word "elected" in Article 28 *(a)*. The concept of election, they contend, involves an element of choice or selection. This element, the argument continues, is incompatible with an obligation to "elect" certain States automatically by reference to precise, objectively ascertainable criteria.

The first defect in this argument is that it appears to assume that the word "elected" is deprived of its function in Article 28 *(a)* if Members are placed under an absolute obligation to choose as the eight largest ship-owning nations those eight which are objectively the largest. With respect, this assumption lacks foundation. As used in Article 28 *(a)* the verb "elected" covers two other situations in which an element of choice is permitted. The first results from the use of the words "of which not less then eight shall be the largest". The words "not less" mean that Members are given a right to elect whether the number of nations to be chosen by reference to the test of size shall be only eight or shall be more than eight. Secondly, the word "elect" when used as to the other members of the Committee covers the right of Member States to choose those members of the Committee who are not selected by reference to the criterion of size alone.

The second defect in the argument based upon the use of the word "elected" is that it fails to recognize that the mere use of the word "elected" is not an open invitation to the exercise of an unfettered discretion. A discretion can only exist to the extent that it is granted by the instrument conferring the power of election. This has been made clear beyond doubt by the Court in the Advisory Opinion on *Conditions of Admission* where it was stated that a power can be exercised only in conformity with the terms of the instrument granting it. Both in the international and the municipal spheres it is a normal phenomenon that the element of choice involved in an election is limited by conditions relating, for example, to the qualifications of the candidates. These conditions can in certain circumstances be so restricted that the process is virtually none other than a formal one of identification. That is, in a sense, the case in the present instance. And there is no reason to believe that international law has endowed the word "election" with so hard a core of the element of choice or discretion that it cannot be overridden by the other terms of the Article or by the circumstances of the case.

It would be wrong to assume—as the argument based on the word "elect" does assume—that it is impossible to describe as an election a purely formal act which endows a given legal person with juridical status, even though the electors are given no opportunity to select or choose between various alternatives. Election can imply choice but it does not necessarily require choice. It is easy to envisage a wide variety of political contexts where in a situation described as an election the electors have no real scope for choice, because there may be only one candidate for the post, or, in the case of a number of vacancies, only so many candidates as there are vacancies. And there may be other factors which eliminate the element of real choice.

It is, I submit, of considerable significance in this context, that in Article XI of the Rules of Procedure of the Food and Agriculture Organization, "election" is defined for the purpose of the Rules as the "selection or appointment of one or more individuals, nations or localities". This definition is clearly wide enough to include as an election a situation in

which the electors could exercise no discretion whatsoever. Again, in Rule 72 of the Rules of Procedure of the Assembly of the World Health Organization, it is provided that "if the number of candidates for elective office does not exceed the number of offices to be filled, no ballot shall be required and such candidates shall be declared elected". In short, the word "elected" is employed to describe a purely formal process. Another example is provided by the Rules of Procedure of the Assembly of the Council of Europe which provide in Rule 9 that during elections in certain circumstances in the event of a tie, "the candidate senior in age shall be declared elected". Yet, though the word "elected" is used, it can be seen that, upon analysis, the election was not due to choice but to an objective factor, namely, age.

There is, therefore, nothing in the use of the word "elect" which excludes the possibility that electors may be doing nothing more than formally identifying a person who satisfies an objective criterion. As the examples which I have mentioned show, the word "elect" has been and is used in international organizations to describe the process of collective identification involved in determining the States which satisfy the criteria relevant in the particular case.

The use of a process of collective and formal identification in the present instance is called for because size as a ship-owning nation can and frequently does change during any given period of four years. Clearly, it would not be practical if such changes in size were to give rise automatically and immediately to changes in the composition of the Maritime Safety Committee. Consequently, it becomes necessary for the Assembly at each of the four year intervals to identify afresh those States that satisfy the criterion of being the eight largest. Although this process of identification may be almost automatic, it is nevertheless of sufficient importance, having regard to the status of the Maritime Safety Committee, for it to be delegated to the Assembly as a whole.

[Public hearing of 26 April 1960, afternoon]

Mr. President and Members of the Court, having provided examples from the Rules of Procedure of at least three international organizations to demonstrate that the word "elect" can be employed to mean appointment or identification on the basis of objective criteria, such as age and size, I pass now to a subsidiary argument employed in connection with the use of the word "election" which has been advanced by the Government of Norway at page 243 of the printed volume. The Government of Norway points out that the word "elect" is used in Article 28 to describe the process both of identifying the eight largest ship-owning nations and of selecting the six other members of the Maritime Safety Committee. The selection of the latter six clearly involves the exercise of an element of choice and discretion. The Government of Norway then says that "it would be strange if the word "elected" were used in one and the same sentence of the Convention in two fundamentally different senses". In consequence, the Government of Norway concludes that the word "elected", when used in relation to the eight, also involves the exercise of an element of discretion, such as exists in relation to the six.

This contention is open to two objections.

In the first place, it is not correct to say that the word "elected" is being used in two different senses in the same sentence. It is being used

on both occasions to describe the process of formally conferring upon certain Members of IMCO the status of a member of the Maritime Safety Committee. The only difference between the two situations is that the conditions affecting "the eight" are different from those affecting "the six". But the formal process remains the same.

The second objection to this Norwegian contention is that there is no valid reason for assuming that in every case in which the same word is used in the same instrument it must of necessity bear the same meaning. The assumption may be correct in many cases, but it is not invariably true, and Article 28 provides not merely one, but two, examples of the differing use of the same word in a single provision.

In the first place, the word "elected" covers not only the choice of what we may call "the six"—it also describes, as I have already mentioned, the decision of the Members whether or not to take advantage of the liberty created by the words "at least" which appear in relation to the election of "the eight"; for Members might, if they wished, elect to choose more than eight States on the basis of the criterion of size.

The second example is provided by the word "interest". It is not improbable that this word, when used in the phrase "an important interest in maritime safety", is also being employed in at least two senses in Article 28 *(a)*. For it is difficult to regard all fourteen States which are elected to the Maritime Safety Committee by reference to different criteria as having an interest of the same kind in maritime safety.

Finally, there is yet another argument employed in connection with the use of the word "election" in Article 28 *(a)* which I should mention. Reference is made in the Written Statement of the Government of Italy at page 224, to the change in the wording of Article 28 *(a)* from "selection" to "election" made during the *travaux préparatoires* of the Convention. The Italian Government contends that the word "selection" implies choice, and that the change to "election" effects no change in the meaning of the Article. My Government would merely wish to draw attention to the fact that no explanation of the change can be found in the *travaux préparatoires*, to which a more precise reference is given at page 103 of my Government's Written Statement. In these circumstances, and having regard to the generally similar meaning of the two words, it is more than doubtful whether any significance whatsoever can be attached to the alteration. In any event, whichever word is used—election or selection—neither eliminates the mandatory requirement that the eight largest ship-owning States shall be members of the Committee.

Mr. President and Members of the Court, I turn now to the second principal argument which has been advanced by some Governments in favour of the existence of a wide measure of discretion. The Government of Italy has contended that the Assembly is free not to elect even one of the eight largest ship-owning nations on the ground that such a nation may not have an important interest in maritime safety. As the Italian Government puts it, at page 221, "the quality asked for first of all, and the one to which others may be added, but which they cannot replace, is that of preponderant interest in maritime safety". And, the argument of the Italian Government continues, since the determination of the existence of an important interest in maritime safety is a matter calling essentially for the exercise of a subjective discretion, there is no basis on which the validity of the election can be challenged.

As to this, I should say that whatever may be the effect of the words "an important interest in maritime safety", the critical point in the present proceedings is that the reference to an important interest in maritime safety does not stand alone. It is qualified by the mandatory obligation upon members imposed by the phrase which follows—"of which not less than eight *shall* be the largest ship-owning nations"—to elect those eight States which are the largest ship-owning nations.

Yet, the Italian Government suggests that other qualities may be added to, but cannot replace, an important interest in maritime safety. The way in which this suggestion is supported is twofold.

In the first place, the Italian Government states (at p. 221) that it arrives "at this result without any difficulty by a literal interpretation of Article 28". To this I would submit the following reply: A strictly literal approach does not support the Italian conclusion. If a literal approach to Article 28 is pursued to the full, it cannot fail to take into account the words "of which not less than eight shall be the largest ship-owning nations". Literally interpretated "shall" means "must". The eight largest ship-owning nations *must* be elected to the Maritime Safety Committee.

Nor can there be any question here of inconsistency between the obligation to elect the eight largest ship-owning nations and the obligation simultaneously imposed to elect only those which have an important interest in maritime safety. "An important interest in maritime safety" is so clearly a wide and flexible concept that in my submission it is difficult to believe that the draftsmen of the Convention could possibly have thought that one of the eight largest ship-owning nations might not have had an important interest in maritime safety. Curiously enough, even though the Netherlands Government generally opposes the position taken by Liberia, this is one of the conclusions reached in its Written Statement. In Section 12 *(a)* of its Conclusions, which appears at page 252 of the printed volume, the Netherlands Government states:

> "As regards eight of the fourteen members of the Maritime Safety Committee the important interest in maritime safety shall be evidenced by the fact that those members are the largest ship-owning nations."

Indeed, upon close scrutiny of Article 28 *(a)*, it becomes apparent that the draftsmen clearly contemplated that the largest ship-owning nations would have an important interest in maritime safety. On reading Article 28 *(a)* the Court will of course observe that provision is made for two classes of members of the Committee—the class which we may call "the eight" and that which may be called "the six". Both groups, it can be seen, must have an important interest in maritime safety. I would now invite the Court to notice that the terms in which this requirement is expressed in relation to the second group, "the six", are as follows: "and the remainder shall be elected so as to ensure adequate representation by Members, governments of *other* nations with an important interest in maritime safety, etc.". Now, it is the word *other* to which I would like to call attention. The use of the word "other" in this context, namely, "other nations with an important interest in maritime safety", clearly implies that there has already been a reference to some nations with an important interest in maritime safety. Which nations are they? On looking back through the earlier lines of Article

28 *(a)*, one finds that the only nations referred to were the largest ship-owning nations. It is, in my submission, impossible to resist the inference that the draftsmen regarded the largest ship-owning nations, whoever they might be, as obviously and inescapably possessing an important interest in maritime safety.

The second reason produced by the Italian Government for its views that the requirement of an important interest in maritime safety overrules all the other qualifications may be described as a "functional" reason. Their argument is, in effect, that since an instrument must be construed in such a way as to advance rather than retard the performance of the function to which it is directed, consideration must be given in interpreting Article 28 to the need to elect those States which are most capable of making a technical contribution to the work of the Maritime Safety Committee.

As to this contention, I need hardly say that the Government of Liberia agrees fully with the Government of Italy in saying that an instrument should be construed in a "functional" or "effective" manner. However, if that approach is adopted in the present case, it does little to further the conclusions reached by the Italian Government. Of course weight must be given to the position of those States that can contribute to maritime safety; but in this context, the States which can make the most contribution are those who have the most ships and can do the most to implement the recommendations of the Committee.

Mr. President and Members of the Court, having disposed of these two points which form the pillars of the argument of the Italian Government on this item, I should not need, in strict logic, to advert to the specific objections made by the Italian Government at page 223 of its Statement about the position of Liberia and Panama as States with an important interest in maritime safety. I feel, nevertheless, that I should make some reference to them, lest I be taken to admit either their relevance or their accuracy.

In my submission these remarks are irrelevant because they proceed upon the basis that the only States which should be members of the Maritime Safety Committee are those having the largest contribution to make in terms of sending technical safety experts who are their own nationals. Nothing is said in the Convention about a requirement of this nature. The Convention speaks of "an important interest in maritime safety" and this, as the selection of "the six" shows, is not—and quite rightly not—dependent exclusively upon present capacity to send a delegation of national technicians. Moreover, the remarks are irrelevant because they really have no bearing on the basic question to which they are notionally related, namely, the question of whether the words "an important interest in maritime safety" really override the mandatory obligation created by the words "of which not less than eight shall be the largest ship-owning nations".

But in addition to their irrelevance, these remarks of the Italian Government are inaccurate. It is not correct to say that Liberia and Panama possess no national organs for superintending the enforcement of rules on maritime safety. I have already stated the facts on this matter and they run completely counter to the allegations made by the Italian Government.

There is one last observation which I feel called upon to make in relation to the arguments based upon the overriding force of the condition

of possession of an important interest in maritime safety. Although it has in fact already been made in the Written Statement of my Government, I ask for the indulgence of the Court in repeating it.

At page 66 of the Liberian Statement reference is made to the passage in the Advisory Opinion on *Conditions of Admission to the United Nations*, which may be found in the *Reports* of the Court for 1948, page 57, at page 64. In this Advisory Opinion the Court applied the principle that special conditions override general ones. The Court was invited to find, in a general statement of the responsibilities and powers of the Security Council, contained in Article 24 of the Charter of the United Nations, a power to override the specific conditions for admission laid down in Article 4 of the Charter. As to this, the Court said:

> "It has been sought to base on the political responsibilities assumed by the Security Council, in virtue of Article 24 of the Charter, an argument justifying the necessity for according to the Security Council as well as to the General Assembly complete freedom of appreciation in connexion with the admission of new Members. But Article 24, owing to the very general nature of its terms, cannot, in the absence of any provision, affect the special rules which emerge from Article 4."

In the present case, it may be said that the specific words "of which not less than eight shall be the largest ship-owning nations" bear to the general words "having an important interest in maritime safety" the same relationship as Article 24 of the Charter was held to bear to Article 4. The reference to "an important interest in maritime safety" cannot thus override the effect of reference to size as a "ship-owning nation".

I may add that the same principle was applied by the Permanent Court of International Justice on at least two occasions. One was the Judgment on *German Interests in Polish Upper Silesia (Merits)*. There the Court said, at page 33 of Series A, No. 7, in interpreting the relation between Head II and Head III of the German-Polish Convention of 1922:

> "As Head III contains special regulations constituting a derogation from the regime established under Head II, it is necessary, in order to define the sphere of application of the clauses composing Head III, to begin by construing these latter clauses and not the more general rules contained in Head II."

Again, the Court made some even more pertinent remarks, in the case of the *Serbian and Brazilian Loans*. At page 30 of Series A, Nos. 20 and 21, the Court said:

> "... it is sufficient to say that the mention of francs generally cannot be considered as detracting from the force of the specific provision for gold francs. The special words, according to the elementary principles of interpretation, control the general expressions. The bond must be taken as a whole, and it cannot be so taken if the stipulation as to gold francs is disregarded."

This concludes my reply to the arguments alleging the overriding effect of the requirement of the possession of "an important interest in maritime safety".

Mr. President and Members of the Court, I will now move on to consider a third argument which has been used in support of the existence

of a discretion affecting the election of the first eight members of the Maritime Safety Committee.

This argument appears at page 28 of the Written Statement of the French Government. The French Government contends that Members of the Assembly were entitled to refrain from voting for Liberia and Panama because the words "of which not less than eight shall be the largest ship-owning nations" should be read as "of which not less than eight shall be chosen from among the largest ship-owning nations".

My first observation upon this suggestion is as follows: Accepting the validity of the doctrines of the "plain and natural meaning" of words, and of "literal interpretation", which have been invoked by those States which adopted the same position as France in the election, there would appear to be no basis for the French contention. The phrase "of which not less than eight shall be the largest ship-owning nations" simply is not the same thing as the phrase "of which not less than eight shall be from amongst the largest ship-owning nations". It is neither a natural nor a literal interpretation to read extra words into the phrase.

If it had been the intention of the parties to incorporate the idea reflected in the wording which France now proposes, it would have been perfectly possible for them to do so by expressly adding those words. Alternatively, the same result could have been achieved by omitting the word "the" before "largest ship-owning nations" and converting "largest" into "large", so that the phrase would have read "of which not less than eight shall be large ship-owning nations". Either of these courses would have made it plain that there was to be a category of large ship-owning nations from which any eight might be selected. But neither of these courses was adopted; and it would be straining the language of the Article in a manner amounting to revision if either of the alternatives considered above were to be read into the present text.

Nevertheless, the French Government supports its contention by a reference to the terms of Article 17 of the IMCO Convention, which contains provisions for the composition of the Council of the Organization. The French argument, which is at page 28 and following of the printed volume, would appear to be as follows: For the purpose of determining the composition of the Council, Article 17 creates four classes of members—those with "the largest interest in providing international shipping services", those with "the largest interest in seaborne trade", and two classes with only "a substantial interest" in each of the matters just referred to. As the expression "the nations with the largest interest in, etc." has been construed in practice as meaning "from among the nations with the largest interest in", so the French argument runs, it is permissible to apply a parallel construction to the phrase "the largest ship-owning nations" in Article 28 *(a)*.

Quite apart from the fact that the two Articles relate to different organs and seek to achieve different objectives, there are, in my submission, other, more basic, flaws in this argument.

In the first place, it is not possible to draw a parallel between Article 17 and Article 28 *(a)*. One cannot say that because in practice members of the Council are drawn from amongst the governments with the largest interest in providing international shipping services, therefore the eight members of the Maritime Safety Committee are to be drawn from amongst the largest ship-owning nations. To argue in this way is to disregard in an impermissible manner the fact that Article 17 is closely linked with

and developed by Article 18; and that it is the latter Article which suggests that Article 17 *(a)* means six from amongst the governments of the nations with the largest interest in providing international shipping services. There is no parallel provision attached to Article 28. However, in saying this my Government should not be taken as admitting that Article 17 *(a)* in fact grants the measure of choice read into it in the French argument.

Secondly, the *travaux préparatoires* reveal another difference between Articles 17 and 28 *(a)* which excludes the possibility of drawing a parallel between them. It is quite clearly stated in the report by the Drafting Committee that the criteria laid down in what eventually became Article 17 were not intended to be determined on a rigid statistical basis which, in any case, would have been difficult to determine. This statement can be found in the United Maritime Consultative Council document 2/2, page 10. But no such statement is to be found in relation to the draft of what became Article 28 *(a)*. This suggests very strongly that different considerations were regarded as applying to this Article, namely, considerations that the criterion was a statistical one and was based on easily ascertainable information. Indeed the very fact that in Article 28 *(a)* a different wording was used from Article 17 *(a)* indicates that the intention was to incorporate a different concept and if there really had been an intention to allow in relation to Article 28 *(a)* the element of discretion for which France now contends, the wording in Article 17 *(a)* could perfectly easily have been used and would have achieved that result. Closely connected with and arising out of this is a third point of contrast between Article 17 and Article 28. As already stated, Article 17 proceeds on the basis that, before the Assembly elects the members of the Council, the Council shall itself establish which Members fall into the groups contemplated in Article 17, paragraphs *(a)*, *(b)* and *(c)*. Article 28 does not require the Council to establish a group of "largest ship-owning nations" from which eight shall be elected. What is the explanation of this difference? The answer, in my submission, is twofold.

First, "an interest in providing international shipping services" is something which involves an element of subjective assessment. As already mentioned, it is not a statistical matter. Therefore, it was considered desirable that the evidence involved should first be sifted by a body capable of giving the question the proper consideration. Where, on the other hand, the question is purely statistical, as in the case of "ship-owning nations" in Article 28 *(a)*, there is no need for the Council to review the matter first. My Government has already elaborated this point in more detail at pages 62 and 63 of its Written Statement.

Secondly, it appears from Articles 17 and 18 that the Assembly of IMCO is to select six out of a group. Article 28 on the other hand does not provide for the prior classification of the group of "largest ship-owning nations". This difference must flow from the fact that the Article contemplates a selection of the eight largest ship-owning nations and not others.

Mr. President and Members of the Court, a second argument which the French Government employs to support the contention that a choice may be made from among the eight largest ship-owning nations may be found at page 30 of the Written Statement. This is based upon the fact that Article 28 *(b)* provides that members of the Maritime Safety Committee shall be eligible for re-election. From this, the French Govern-

ment appears to conclude that because there is a provision permitting re-election of a State, therefore there is also a liberty not to re-elect it. In short, the French Government contends, the paragraph reflects the fact that there is room for choice of eight from amongst the largest ship-owning nations.

The defect in this argument is, in my submission, that it assumes what it sets out to prove. In theory, non re-election is of course possible, but only if the nation in question has ceased to be one of the eight largest ship-owning nations. If, however, it has retained its position among the first eight, then since the same rules will apply at each election, members will remain under an obligation to re-elect those members of the Maritime Safety Committee which retain their position among the eight largest ship-owning nations.

Indeed, it would seem that Article 28 *(b)* fulfils a function which is the reverse of that attributed to it by the French Government. For the Article, having described the formal process of identifying the eight largest ship-owning nations as "election", then goes on to provide for the necessary continuity of the membership of those of the largest ship-owning nations which retain their size. It does this by permitting re-election without limit.

As a third supporting argument the French Written Statement also mentions, at page 31, considerations of international practice. Reference is made to the Advisory Opinion of the Permanent Court on the *Nomination of the Netherlands Workers' Delegate* and to the practice of the ICAO. The precise way in which the French Government employs these references is not quite clear to my Government, but we believe that the reference to the Advisory Opinion may be intended to support the contention that not the eight largest, but eight among the largest, is the correct way in which to read the expression now under consideration.

The French Statement relies upon that part of the Opinion in which the Court held that the obligation of the Netherlands Government to choose delegates in agreement with the industrial organizations which are most representative of the employers did not involve an obligation to reach an agreement with *all* the most representative organizations. That may be a correct statement of the decision of the Court, but my Government remains at a loss to understand how that decision is relevant in the present case. Clearly, it cannot be of any help in interpreting the effect of the words in Article 28 *(a)* of the IMCO Convention, for the words and the ideas in the two instruments are quite different. An obligation to consult the most representative organizations is not the same thing as an obligation to elect the eight largest ship-owning nations. It is not merely that different considerations affect the interpretation of an obligation to consult and of an obligation to elect. It is also that an obligation to elect the eight largest ship-owning nations is a much more specific obligation than one to consult the most representative organizations.

Mr. President and Members of the Court, having concluded my argument that the words "from amongst" must not be read into the phrase "of which not less than eight shall be the largest ship-owning nations", I pass to the fourth class of argument which has been employed by a number of States in favour of the view that the Members of IMCO possess a wide discretion in the election of the Maritime Safety Committee

Although differently presented by various States, the common element in each argument is the reliance placed upon the alleged vagueness and generality of the expression "the largest ship-owning nations".

The Written Statement of the French Government appears to be suggesting, at page 27, that such a vague expression is comparable to the other notions mentioned in Article 28 *(a)*, such as an important interest in maritime safety, an interest in the supply of services, an interest in the supply of crews, etc. The argument seems to be that, since there is a measure of discretion in determining whether these latter criteria are satisfied, so the same discretion attaches to the determination of the existence of the former.

A not dissimilar argument appears in the Written Statement of the United Kingdom, at page 239. There it is contended in paragraphs 37 and 38 that, as the words have no apparent clear-cut or technical meaning, the intention was "to enable the Assembly in the process of election to look at the realities of the situation and to determine according to its own judgment, whether or not candidates for election to the Maritime Safety Committee could properly be regarded as the largest ship-owning nations in a real and substantial sense".

These two approaches prompt the following observations by way of reply.

First, it is not correct to group together as being identical in kind two basically different terms. "An interest in maritime safety" and "size as a ship-owning nation" are intrinsically different concepts. An "interest" is inherently incapable of precise or objective measurement. Size, on the other hand, is capable of such measurement. As the Government of Liberia has been at pains to show in its Written Statement, the expression "the largest ship-owning nations" is not an imprecise expression. The size of a ship-owning nation can be measured readily, accurately and objectively by such tests as the registration of ships or the nationality of owners.

Secondly, the suggestion that the parties intended to use the words "the largest ship-owning nations" to import an element of discretion in their selection, amounts again to a straining of language. If the draftsmen of the Convention had intended the Members to retain the kind of discretion for which the opponents of Liberia's position now contend, they could readily have achieved that situation by the use of extremely simple and non-technical language. If they had merely intended Article 28 *(a)* to contain a guide or a directive for the election of Members, they would, in the first place, not have drawn a distinction between the "eight" and "six". They would simply have said that the Maritime Safety Committee shall consist of fourteen members elected by the Assembly from those Members having an important interest in maritime safety and having regard to their size, to their interests in the supply of crews or the carriage of passengers, and to geographical representation. This would have created the discretion for which those who maintain that the election was valid now contend.

Alternatively, if it had been desired to retain the distinction between the "eight" and the "six" (though for what reasons it is difficult to discern, having regard to the width of the discretion now being sought), it would have been possible to say that eight should be selected primarily by reference to size, while the other six should be chosen primarily by reference to the other factors.

Yet language of this kind was not used; and, with respect, I submit that it is not for the Court now to read such language into what is otherwise a relatively clear text.

Mr. President and Members of the Court, while I am dealing with the general subject of the evidence which the use of the expression "ship-owning nations" provides of the existence of a wide discretionary power, I should perhaps refer to the second instance of international practice cited in the French Written Statement, at page 31. I do so with some hesitation because it appears to me to be even further remote from the interpretation of Article 28 of the IMCO Convention than is the first. The French Government refers to the terms of Article 50 *(b)* of the Chicago Convention of December 7, 1944, which lays down that the Assembly of the ICAO shall elect 21 members of the ICAO Council by giving adequate representation to, among others, States which make the largest contribution to the provision of facilities for international civil air navigation.

The French Statement then proceeds to suggest that the formula thus employed, "States which make the largest contribution" is "identical with that in the second part of Article 28" of the IMCO Convention. If the suggestion of the French Government is that the phrase "States which make the largest contribution" is identical with the phrase "of which not less than eight shall be the largest ship-owning nations", the two phrases have only to be placed next to each other for their dissimilarity to become apparent. A "contribution" of this kind is an imprecise term; whereas "ship-owning", if it has any meaning, must necessarily be an exact term. It is manifest that when such terms as "chief importance" or "largest contribution" are used, the intention is to create vague criteria. But it does not follow that the mere appearance of a superlative adjective in a phrase necessarily renders the noun which it qualifies a vague one. The similarity between the ICAO and IMCO formulae lies only in the word "largest". "Contribution" and "ship-owning" are words so different that, in my submission, the analogy which the French Statement appears to seek to draw between them is both unsound and misleading.

A fifth argument in favour of the retention by members of a wide measure of discretion in electing "the eight" appears at page 237 of the Written Statement of the United Kingdom. The contention is that only by leaving a measure of judgment to the Assembly of the Organization would it be possible to avoid the risks attendant on any automatic test.

As to this, I suggest first that Article 28 *(a)* does not contain *any* automatic test, but a *special* automatic test closely connected with maritime safety; namely, the test of size as a ship-owning nation. If, as the Government of Liberia contends, the determinant of this size is the quantity of shipping registered in a State, it is manifest that no risk is involved in electing such a State to the Maritime Safety Committee. If anything, the risks flow from not electing such a State to the Maritime Safety Committee.

Closely associated with this contention is another one which has been advanced against the Liberian position, namely that the application of an automatic test would lead to an unreasonable result and that it would not ensure "that the best qualified Members were chosen for the Committee". This argument has, I regret to say, been employed by the United Kingdom (at p. 237), France (at pp. 26-28), Italy (p. 223) and

the Netherlands (at p. 249). I do not think that the reflection, implied in this observation, on the limitations on the technical capacity of small, underdeveloped or new States calls for comments in this forum.

Yet I do say this: If the test for election to the Committee is capacity to contribute to the promotion of maritime safety, it would be proper to regard all these members who were in fact elected to the Committee as possessing that capacity to an approximately equal extent. On this basis, I believe that I may say that Liberia and Panama might fairly be regarded as possessing a similar degree of capacity. They will always be in a position to ensure appropriate technical representation of a highly qualified character at the meetings of the Maritime Safety Committee.

This concludes the first part of my consideration of the substantive points raised in those Written Statements which support the validity of the election. I have attempted to rebut each of the arguments which have been advanced in favour of the view that Members of IMCO enjoyed a discretion so wide that they could disregard the claim of Liberia, as one of the eight largest ship-owning nations, to election to the Maritime Safety Committee. In so doing, I have submitted that the word "elected" in Article 28 *(a)* does not create an unfettered discretion; and that the reference to the criterion of the possession of an important interest in maritime safety does not do so either. I have submitted also that it is not permissible to construe the phrase "eight shall be the largest ship-owning nations" as if it read: "eight shall be from amongst the largest ship-owning nations". And finally I have submitted that the alleged vagueness of the expression "ship-owning nations" does not establish the discretion which is sought for.

3. ORAL STATEMENT OF Mr. WEEKS *(cont'd)*

(REPRESENTING THE GOVERNMENT OF LIBERIA)
AT THE PUBLIC HEARINGS OF 26 AND 27 APRIL 1960

[Public hearing of 26 April 1960, afternoon]

Mr. President and Members of the Court.

Mr. Moore has just addressed himself to the principal contention of my Government; the contention raised by most of those States which have opposed the position of the Government of Liberia; the contention that Members of IMCO, according to the terms of Article 28 *(a)*, possessed a discretion wide enough to refrain from electing Liberia and Panama to membership of the Maritime Safety Committee.

I shall now turn to the second main part of my Government's Statement. In this I propose to refer relatively briefly to the question of determining the size of a ship-owning nation for the purpose of identifying "the eight largest ship-owning nations".

I can say that I will make this reference relatively brief because it is a significant feature of the Written Statements which reach conclusions adverse to the position of Liberia that none of them really attempts with any measure of concentration to rebut the Liberian contention that registration is, in the context of Article 28 *(a)* of the IMCO Convention, the correct test of size. The emphasis in each of the Written Statements just mentioned is on the assertion of the existence of a discretion so wide that it eliminates any need to determine what is meant by the phrase "a ship-owning nation". We have already taken a great deal of the Court's time in seeking to rebut that argument, and I do not propose, in the light of the arguments so far presented, to deal with arguments that have not been spelled out in any detail. Nevertheless, I am bound to make some submissions on the role and meaning of the expression "the largest ship-owning nations".

My first observation is that the expression "the largest ship-owning nations" must have some specific meaning, just as the whole phrase "of which not less than eight shall be the largest ship-owning nations" must have some meaning. Otherwise, why should the words have been included in Article 28? If it is said that the words are there merely as a general guide to Members in the exercise of an unfettered discretion, then I would reply that it is more than a little curious that any distinction was drawn between "the eight" and "the six". It is, in my submission, impossible, for reasons already given, to avoid the conclusion that the draftsmen intended to refer here to an objectively verifiable test—the test of size.

What, then, is to be the test of size? The Government of Liberia has contended that the test should be that of registration. Alternatively, the test should be ownership by nationals. My Government's contentions on these points are set out in detail at pages 41-45 of the printed volume of Written Statements, and I do not believe that the Court would wish me to repeat them now.

However, the United Kingdom Government, in its Written Statement, declares at page 239 that "whatever may be the meaning of 'ship-owning nations' it is clear that they do not refer to gross registered tonnage".

Yet, beyond suggesting that the vagueness of the words indicates an intention to create a wide discretion, the United Kingdom Government does not attempt to give them any content whatsoever.

This type of reasoning is, in my submission, unconvincing. Having regard to the weight of authority produced by the Government of Liberia for the contention that registration, as the appropriate connecting factor in cases of this kind, is the criterion for testing the size of ship-owning nations, the United Kingdom can only displace that meaning by pointing to some clear alternative meaning. This, after all, is what the United Kingdom has always asserted had to be done by those States which denied the continuing validity of the three-mile rule in relation to territorial waters. The suggestion that the words create a discretion is not the suggestion of a meaning but an assertion that the words have no meaning. This, in my submission, is inconsistent with the view previously expressed by the United Kingdom in relation to the problem of the creation and modification of rules of international law; and it does nothing to weaken the position of the Government of Liberia that registration is the appropriate test.

I may perhaps add here, in passing, that if further evidence is required of the acceptance by States of registration as practically the only adequate test for connecting a ship to a State, reference may be made to two recent classes of convention. In the first place, there are the Consular Conventions which the United Kingdom has recently concluded with France and the Federal Republic of Germany. For the purposes of the parts of the Conventions connected with the exercise of consular jurisdiction over ships, a vessel is defined in those Conventions as "any ship or craft registered under the law of any of the territories of that party". Again, in a recent exchange of notes between the United Kingdom and Denmark concerning the regulation of fisheries around the Faroe Islands, the vessels to which the agreement is made applicable are those registered in the United Kingdom, the Faroe Islands and Denmark.

Admittedly, those are cases where the concept of registration was expressly invoked. Nevertheless, they are of significance as confirming that in the law of the sea registration is the most frequently employed connecting factor.

A second observation which may be made in connection with the interpretation of "ship-owning nations" arises out of references in the Written Statements of France and the United Kingdom to the character of *Lloyd's Register of Shipping Statistical Tables*, from which the various tonnage figures are drawn. The French Government contends at page 29 that these statistics cannot be made the only source for the appointment of officials in an international agency. The French Statement continues:

> "Need it be added that those statistics cannot be invoked against States as legal documents, which indeed they have never claimed to be. A compilation of figures of which the publishers neither check nor guarantee the accuracy furnishes useful economic information, but has no probative value."

With due respect to the French contention, it does not appear to be to the point. Liberia's position is that Lloyd's Register of Shipping is simply a convenient source to which to turn for information—a source which is as reliable as any which exists in this field; which is generally

respected; and which, it may be added, was employed without demur in the course of the elections and for other purposes connected with IMCO.

The point to which the French argument fails to give due consideration is that it is not the figures in Lloyd's Register which determine which are the eight largest ship-owning nations, but the objective facts which lie behind those figures and of which the Tables merely provide convenient evidence. It would no doubt have been possible for the Secretariat of IMCO to have asked each Member to certify its tonnage figures prior to the opening of the first Assembly—a process which would have produced figures to which the objections of the French Government would not apply. But these figures are unlikely to have differed in any material respect from those in Lloyd's Tables. The Secretariat, quite rightly, therefore, in the opinion of my Government, appears to have taken the view that nothing would be gained by pursuing that course; and in consequence of this conclusion the Secretariat circulated Working Paper No. 5, containing a list of registered tonnages, which was treated by the Assembly as the basis for the election.

The point raised by the United Kingdom, at pages 235-236 of their Written Statement, is slightly different.

The United Kingdom observes that the statistics recorded in Lloyd's Register relate exclusively to the fact of registration and do not attempt to reflect what are said to be the realities of ownership behind the registration.

The Government of Liberia, of course, does not deny this statement. The Lloyd's Tables relate only to registration. That is a fact. But then, it is only on the basis of registration that Lloyd's Tables are invoked. The so-called realities of ownership behind registration are, for present purposes, quite irrelevant.

[Public hearing of 27 April 1960, morning]

Mr. President and Members of the Court, by way of a third observation, I should mention that the views expressed by the United Kingdom on the risks inherent in the use of statistical tests may be of some relevance in the present context. However, Mr. Moore has already referred to them and, with the leave of the Court, I will not repeat the reasons for regarding that argument as unconvincing.

My fourth observation on the meaning and effect of the expression "the largest ship-owning nations" is connected with the effect of acceptance of "registration" as the relevant test. My Government has already submitted, in its Written Statement, that once an objective test such as registration or nationality of owners is accepted as determining size as a ship-owning nation, then that test is the only test that can be applied. It is not possible to go behind registration or ownership by nationals with a view to assessing what the basis of such registration or ownership may be, or with a view to ascertaining whether the State of registration is interested in maritime safety or is in a position to make an original technical contribution to the promotion of maritime safety through its own nationals. If one goes behind the fact of registration, one is in effect rejecting the test of registration and substituting for it whatever may be the criterion one thereby seeks when one goes behind the fact of registration. For the essence of a criterion is that it should be the

exclusive determinative factor in the decision to which it is related and not merely the basis on which a further factor is superimposed.

In particular, there is no warrant for going behind the fact of registration to determine whether the shipping registered in a State in fact has what has been called a "genuine link" with it.

My Government did not refer to this matter in its Written Statement, because the manner in which the concept might be deemed to be applicable in the present situation had never been clearly stated. In any event, it is not, in my Government's view, a relevant consideration. But I refer to it now because four out of the five adverse Written Statements hint at its relevance and one expressly adverts to it. In addition, the Written Statement of the Swiss Government specifically draws the attention of the Court to it.

It is a submission of my Government that the concept of "the genuine link" has nothing to do with the present situation whatsoever. The Court is here confronted with the problem of interpreting an expression in a treaty, namely, the phrase "ship-owning nations". The concept of "the genuine link" is therefore not relevant here. If it were, it would be relevant in every treaty where any formula is employed for connecting an individual, a corporation or a ship with a State. There would be no treaty in which a reference to "registration" could be construed other than as a reference to "registration provided that there exists a genuine link". And, in the light of the uncertainties which attach to the meaning of "the genuine link", it is manifest that the relative clarity which now attaches to—and is intended to attach to—such concepts as registration would be obscured or would be destroyed.

Indeed, I should emphasize in this connection that the IMCO Convention was originally drafted in 1946, at a time when the expression "the genuine link" was still a matter for the future and when the concept to which it relates was still relatively unformed. As my Government has already submitted, at page 59 of the Written Statement, a treaty must be construed in the light of the law existing at the time it was concluded.

It is noteworthy in this connection that in the *Flegenheimer* case, in 1958, the United States-Italian Conciliation Commission appears to have declined to deny effect to the United States nationality of the claimant on the particular ground of lack of effective nationality, though it did reject on other grounds the claimant's assertion of United States citizenship. The significance of that decision lies in the apparent recognition that the connecting factor stipulated in the treaty should not be read as subject to an implied condition relating to the "genuine link".

Despite the basic irrelevance of any discussion of the "genuine link" in the present context, the fact remains that some States have referred to it in their Written Statements. In these circumstances my Government desired briefly to draw attention to certain doubts about the concept which operate, in my submission, to exclude its application in the present context. These uncertainties relate to the status, the content and the effect of the doctrine, "genuine link". I will refer to each of these points in turn.

First, as to the status of the concept of the "genuine link", it should be noted that, in relation to shipping, it has received international recognition only in the Convention on the High Seas adopted at Geneva in April 1958. But this Convention has not yet entered into force and is, therefore, in its precise terms not actually binding on the signatories.

Moreover, it is doubtful whether any form of the concept capable of application in maritime matters can be said to be part of customary international law.

However, if we may assume for a moment, without admitting, the existence of a concept of the "genuine link" in the terms of paragraph 1 of Article 5 of the Convention on the High Seas, the vital question then arises, does that concept have any content relevant in the present circumstances?

There are, in the submission of my Government, two things which are now clear about the concept of the "genuine link" as written into Article 5 of the High Seas Convention.

The first is that it is not intended to refer to the concept of "beneficial ownership". That is to say, there is no requirement that for a genuine link to exist there must be beneficial ownership of a vessel vested in nationals of the State concerned. No such rule found its place in the detailed enumeration of factors prepared by the International Law Commission prior to 1955; and when the detailed enumeration was replaced in 1956 by a general reference to "genuine link", it was not intended that the general expression should give rise to a stricter rule of law than was contemplated in the particular enumeration. Moreover, specific attempts at the Geneva Conference in 1958 to re-introduce a reference to "beneficial interest" were not successful. Indeed, it would hardly seem to be in accord with the interests of certain traditional ship-owning States, such as the United Kingdom, and possibly even the Netherlands, that such concepts should be employed.

If, then, the concept of the "genuine link" does not cover the requirement of ownership by nationals, it follows that it would not cover such lesser matters as the nationality of the directors or the seat of the company's business.

The second point of importance about the "genuine link" concept as included in the High Seas Convention is that not only does it not refer to beneficial ownership, it probably does not refer at all to the conditions which should exist prior to registration. The particulars given of the concept, namely, the effective exercise by the flag State of jurisdiction and control in administrative, technical and social matters, indicate that the concept was in its final form intended to relate not to events before registration, but to events after registration. It became, in effect, an exhortation to States to do something vis-à-vis ships under their flag. And this view of the matter is borne out by the fact that the Geneva Conference eliminated altogether the phrase "for the purpose of recognition", which had originally preceded the statement of the "genuine link" rule. In short, appreciating the fact that the concept as finally defined did not lay down conditions for registration, States withdrew the sanction that would otherwise have been applicable if the conditions precedent to registration had not been fully satisfied.

Closely connected with this point is another difficulty affecting the application of the concept of the "genuine link". At what moment is it to be applied to any particular vessel? If the genuine link exists at the time of registration, but ceases thereafter, does the registration become invalid? Or if there was no genuine link at the time of registration, but one came into existence afterwards, is the registration retrospectively validated? Questions such as these exemplify the uncertainty which is introduced into an area where the need for certainty is essential. Not

only must ships not have two nationalities. It is essential that the one nationality which they have should be readily, rapidly and confidently ascertainable.

This conclusion anticipates my final short observation on the "genuine link" doctrine. As a result of the withdrawal of the words "for the purposes of recognition" from the High Seas Convention, such few teeth as the concept already possessed were drawn. It became clear that non-application of the doctrine could have no direct consequences. In particular, it was clear that States were not prepared to vest in each other a right unilaterally to determine whether or not to recognize a genuine link between a ship and a State. The concept was thus reduced to a statement of principle. It is therefore doubtful whether it can play a part in the customary international law of the sea; and it is, in my submission, more than clear that it has no part to play in the present proceedings.

Finally, before leaving the subject of the "genuine link" completely there are two further observations which I feel bound to make in connection with it.

The first relates to the use which the Government of the Netherlands makes of the concept of the "genuine link" at pages 251 and 252 of the Written Statements. The Government of the Netherlands appears to contend that for the purpose of determining whether registered tonnage should be taken into consideration in determining size as a ship-owning nation, there must exist a genuine link between the ship and the State. The Government of the Netherlands then refers to the laws of Liberia and Panama for the purpose of determining whether certain factors of connection—such as incorporation of a company or the nationality of the management—are conditions required for the registration of a vessel in Liberia or in Panama, Then, stating that these requirements are not present in Liberian or Panamanian law, the Government of the Netherlands concludes that there cannot be a genuine link between Liberia and Panama and any ship registered with them.

I will assume that the position in Liberian and Panamanian law is as the Government of the Netherlands says it is. Though I may add in passing that the difference between the laws of Liberia and Panama and the laws of many other States in this respect is not one of kind but merely one of degree, and is not a very great difference at that. Nevertheless, on the assumption made by the Netherlands, I must submit most strongly that that does not automatically lead to the conclusion that the requirement of the "genuine link" is not satisfied. The point about the concept of the "genuine link" is that it is concerned with the relationship between a particular ship and a particular State. To determine whether the link exists one must look at the facts relevant to that particular ship. I assume for purposes of argument that ownership by nationals is, in terms of international law, the criterion for the existence of a genuine link. In that case the fact that the law of the State concerned does not require ownership prior to registration will not negative the existence of the genuine link if, in the case of the particular ship concerned, it turns out that the ship really is owned by a national.

In other words, if it is said that the registered tonnage of a State is not genuinely linked with that State, this contention must be established not by general reference to the laws of that State but by reference to the position of the individual ships constituting that State's tonnage.

This defect in the approach of the Written Statements of the Netherlands Government would invalidate the conclusions reached by that Government even if the concept of the "genuine link" in relation to ships really enjoyed an effective place in international law. However, in the view of my Government, there are such doubts about the status, the content and the effect of the doctrine in relation to ships that it really cannot be applied, certainly not in the present context and probably not at all.

My second and concluding observation on the "genuine link" is this. If one takes the literal words of Article 5 (1) of the High Seas Convention, there can be no reasonable doubt that Liberia satisfies the requirements of the "genuine link". As Appendix III of our Written Statement shows, Liberia does exercise a real and effective jurisdiction and control in administrative, technical and social matters affecting her ships.

Mr. President and Members of the Court, I have now concluded my Government's Oral Statement on what I may call the substantive issues in the case. There remains, however, one point to which I should like to refer briefly before stating my conclusions. There appears, in the Written Statements of both the United Kindom and Italy (at pp. 240 and 225 respectively) a reference to Article 55 of the IMCO Convention. This Article provides that "any question or dispute concerning the interpretation or application of the Convention shall be referred for settlement to the Assembly, or shall be settled in such other manner as the parties to the dispute agree". Both the United Kingdom and Italy suggest that the effect of this provision is to endow with some special significance the majority vote of the Assembly excluding Liberia and Panama from the Maritime Safety Committee.

Now the Government of Liberia does not deny that the practice of an organization can be an important element in determining whether any particular act is lawful or not. But the practice upon which reliance is placed in such cases is always practice prior to the date of the contested event. If a concept familiar in disputes relating to territory may be introduced here, authoritative practice occurs prior to "the critical date". In the present instance, it would be a complete travesty of the doctrine to suggest that where the legality of a process is challenged at every stage of its development, nevertheless the very process challenged should be adduced as a relevant consideration in determining its legality. Even in the moderate terms in which the proposition is put in the United Kingdom's Statement, it is, in my submission, a quite unsustainable argument. The United Kingdom suggests that due weight should be given to the vote in the Assembly. In my submission, due weight in this instance is no weight.

The fact that the Written Statement of the Italian Government describes the decision of the Assembly as being taken by a large majority simply serves to weaken an already weak argument by founding it upon an inaccuracy. In truth, the vote upon Liberia was: 11 in favour, 14 against, and 3 abstentions. Perhaps we might say that it is a small exaggeration to call that a large majority.

Indeed, an argument of the kind advanced by Italy and the United Kingdom does not give proper weight to the terms of Article 56. This provides that: "Any legal question which cannot be settled as provided in Article 55 shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96

of the Charter of the United Nations." What would be the point of this provision if the very decision of the Assembly which was being challenged was deemed to bind the Court?

And if the point called for further discussion, it is clearly most strongly arguable that the Assembly, in deciding to ask the Court for an Advisory Opinion, was by implication saying: "We are in doubt about the validity of our own action. Please decide the matter by reference to the law of the Organization."

In brief, I submit that the election of the Assembly cannot be regarded as a law-creating fact in the present situation.

I also submit, in passing, that there is equally no warrant for the suggestion, which the United Kingdom makes in this connection, that there is a "presumption in favour of the interpretation on which the Assembly has based its decision". Such a presumption might have existed if there had been some pre-existing consistent trend of practice. But in the absence of precedents, there is no basis for a presumption one way or the other. It would, my Government believes, be unfortunate if a case in which the issues are so clear should be made to turn upon presumptions.

Mr. President and Members of the Court, I have now reached the end of my Government's Statement. We regret that it has been so long. But I can genuinely say that we have endeavoured to restrict it to the points raised in the Written Statements of other participants. With your leave, therefore, I will now present the formal submissions of my Government on the points which arise in this case.

In the submission of the Government of Liberia, the question whether the Maritime Safety Committee elected on January 15, 1959 is constituted in accordance with the Convention for the Establishment of the Organization should be answered in the negative for the following reasons:

1. By its terms, Article 28 *(a)* of the Convention imposes upon the Assembly of IMCO an obligation to elect a Maritime Safety Committee of whose members "not less than eight shall be the largest ship-owning nations".

2. This is an obligation to elect at least those eight members which are objectively to be regarded as the eight largest ship-owning nations.

3. There is nothing in Article 28 *(a)* which weakens the absolute character of this obligation or confers on members a discretion entitling them to disregard the objective requirements of size. In particular, the use of the word "elected" does not create an overriding discretion in this respect nor can the obligation to elect not less than the eight largest ship-owning nations be read as providing for the election of eight from amongst the largest ship-owning nations.

4. The reference to the possession of "an important interest in maritime safety" does not affect the obligation to elect the eight largest ship-owning nations. The particular requirements connected with size are not modified by the general consideration relating to interest in maritime safety. In any event, as a matter of construction as well as of common sense, the largest ship-owning nations must be regarded as possessing an important interest in maritime safety.

5. The factor which determines the size of a ship-owning nation is that of registration. This is the connection most commonly employed for

attributing a vessel to a State. It is simple and it is certain. Moreover, in the present instance, since it is only the State of registration which can apply its law to a vessel, it would be in conformity with the objects of the Convention and in particular with Article 28 *(a)* to adhere to that test. Further, it is a test which has been employed for other purposes in relation to IMCO, including the assessment of contributions.

6. If registration is not regarded as the appropriate test for determining the size of a ship-owning nation, then nationality of the owner of a vessel must be so regarded.

7. Whichever test is accepted as applicable, it is the only test which can be applied. To permit the addition to it of other criteria is, in effect, to substitute the additional criteria for the original test. Any such substitution would amount to a revision of the Convention. The test is intended to be objective, and should not be replaced by discretionary elements.

8. *In particular, the concept of the genuine link is inapplicable in the* present context.

9. At all material times, judged either by the test of registration or by the test of the nationality of owners, Liberia was among the eight largest ship-owning nations. Consequently, Liberia should have been elected to the Maritime Safety Committee on 15 January 1959. As she was not so elected, the Maritime Safety Committee has not been properly constituted.

10. Alternatively, the Maritime Safety Committee was not properly constituted by reason of certain fundamental defects of procedure and of a *détournement de pouvoir* occurring in connection with the election.

For these ten reasons, it is submitted that the answer to be given by the Court to the question put to it should be in the negative.

Finally, I am, in this connection, instructed to reaffirm the declaration made by my Government at the close of its Written Statement. The declaration follows: If the Court decides that the Maritime Safety Committee is not constituted in accordance with the IMCO Convention, and if, in due course, Liberia is enabled to take her rightful place on the Committee, my Government will raise no question as to the validity of the work on maritime safety done within IMCO during the period prior to the date on which Liberia becomes a member of the Maritime Safety Committee.

Mr. President and Members of the Court, I thank you for the consideration and patience with which you have heard this Oral Statement.

4. ORAL STATEMENT OF Dr. FÁBREGA

(REPRESENTING THE GOVERNMENT OF PANAMA)
AT THE PUBLIC HEARINGS OF 27 APRIL 1960

[Public hearing of 27 April 1960, morning]

Mr. President and Members of the Court.

May I begin by presenting, most respectfully, the greetings of the Government of the Republic of Panama and by declaring, personally, that I consider it a great honour and a privilege to appear before this high honourable Court.

Mr. President, I shall speak extemporaneously and I shall try to be very considerate of the time and the patience of this high Court, and consequently I shall try not to repeat any of the ground that has been so admirably covered by my distinguished colleagues the Representatives of Liberia. I shall also try not to repeat what has been covered by the Republic of Panama in its Written Statement, and therefore, if I may describe what is going to be the course of my presentation, I will say that it will be more a matter of emphasis, of stress upon certain aspects of the case, rather than repetition of those aspects. And I may say that I am greatly aided in limiting my work in that fashion because the general ground of this debate has been very admirably and very fully and very thoroughly covered by my predecessors, the Representatives of Liberia.

We think, Mr. President and Members of this Court, that if we take an integral view of this whole problem, this whole debate, we find that very seldom has there been presented before any Court a question which is so simple; I refer to the question itself; the problem involved can be described as of very little complexity, as a very simple, very narrow problem, and although all of the Parties in this debate have been extensive in the presentation of their arguments, that is because we all have gone into quite a number of subordinate or subsidiary questions. But the cardinal question, the basic question in this debate, I think I shall be able to demonstrate, is a very simple and a very narrow one.

This Court has been asked to declare whether the election of the Maritime Safety Committee was made in accordance with Article 28 *(a)* of the Convention creating IMCO. That is all we have for decision. On one hand, the action of the Assembly, in electing the Members of IMCO, that is, the way they were elected, and, on the other hand, the language of Article 28, paragraph *(a)*, which says how the election has to be made. That is all. All the other questions about the "genuine link", about what should be the best way of defining or describing a ship-owning nation, and many other questions, interesting as they may be, are really irrelevant to this debate. And I say they are irrelevant and I shall go into that more fully further on, because the Assembly had already accepted the criterion of ship-owning on the basis of tonnage registered under the flag, and it had accepted Lloyd's as the authoritative list for the listing—if I may repeat—of nations, in the order of tonnage registered under their flag. So, it is beside the question to argue now whether

ship-owning should have been determined on any other basis. That is the basis that the Assembly itself accepted. It acted on that basis, but when having chosen that standard, the Assembly refused to follow the proper order of ship-owning in the very list which it had chosen as its guide. Therefore the question is whether they were entitled to act in that way or whether they were arbitrary, discriminatory and acted in disobedience of the Convention when they proceeded in that fashion.

In our Written Statement we go into a great deal of detail in giving the factual situation. We describe how the very nations, the speaker for the very nation that led the debate—led the action against Liberia and Panama—submitted a proposition to the effect that the election should proceed on the basis of Lloyd's listing of tonnage under the various flags. That was the proposition of the United Kingdom that was accepted as the basis for the election.

Now, let us analyse that, Mr. President and Members of this Court. What does that action mean at that very stage? I am going to read four or five lines, the pertinent lines of the Convention:

> "The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from Members, Governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations."

I am going to stop right there; to make the matter more simple I am not going to consider now the remainder of the article which deals with the election of the other six Members: just the election of the eight "Members, governments of those nations having an important interest in maritime safety of which not less than eight shall be the largest ship-owning nations". We say, and I think anyone would say, as a natural reaction, as a logical proposition, that a body which is faced with a provision stating that it must elect the eight largest ship-owning nations, the first thing that that body would feel that it had to do was to define what "ship-owning nations" meant. What is the meaning of "a ship-owning nation"? And we submit that only two possible meanings could occur to the Assembly of IMCO, or to any other body under similar circumstances; that "ship-owning nations" either meant nations which were the owners of the vessels, in which the Government of those nations were the owner of the vessels, or nations which had tonnage registered under the flag although necessarily the owners of those vessels were not the nations themselves. Those were the only two conceivable, possible meanings of the expression. They had to choose between the two; that was the first step in the process, and of course it is obvious that they could not choose the first meaning, that the Convention was referring to nations that owned the ships. Why? Because that is not customary, that is not the practice in the maritime field. Nations are not the owners of vessels, except ships of war or private vessels in a very limited way. But the reality of the maritime phenomena is that merchant fleets are owned privately by individuals, they are registered under various flags, and therefore the expression "ship-owning nations" referred not to *ownership* in the civil sense of the nation having title to the vessel, fee simple over the vessel, but of *owning* in the political sense, namely, that the vessel was under the flag of that nation and that nation had jurisdiction over it and its laws were applicable and governing on those

ships. That was the natural, the logical interpretation, and that is the interpretation which the Assembly took in fact, when it said: "Let us make the election on the basis of *Lloyd's List.*" Why? Because *Lloyd's List* (which is in evidence, and has been submitted by the various Governments) in so many words states: "Nations to which ships belong" —those words are used in the headings of Lloyd's lists—*to list the various* nations according to the *tonnage* registered under their flag, and not in accordance with private ownership or any other criterion. So right then and there, Mr. President and Members of this Court, the Assembly of IMCO chose as the criterion of "ship-owning", and as the guide to apply such criterion, and make the election, the list issued by Lloyd's. But, in making the election, they chose to disregard the order in the list of Lloyd's, and instead of electing the first eight—or, to use the words of the Convention, "the eight largest ship-owning nations"—they simply went over two of those Members, namely, Liberia and Panama; and they chose the ninth and the tenth ship-owning nations in the place corresponding to Panama and Liberia, who were among the eight ship-owning nations.

So, as Panama sees this debate, the whole question, the entire problem, narrows down even more than the way in which it has been officially presented to the Court. It really narrows, in final analysis, to one question: When the Assembly chose to disregard those two nations, although it had accepted the criterion of "ship-owning" and although it had accepted the list that should serve as a basis for the election, when the Assembly, I repeat, disregarded the order in that list, was the Assembly entitled to do that? Did they have the right to do that? Or were they compelled, by the Convention, to make the election in that order? That is the entire question before the Court; that is the root of the problem and all other issues, we respectfully submit, are subsidiary, are subordinate, and I think it would help the analysis considerably if we maintain full attention to the fact that that is the centre of the controversy, the crucial, the decisive issue.

Mr. President and Members of this Court, I say once more that the entire question is whether the Assembly had the right not to elect those eight nations that were first in the list. We contend that the Assembly was obligated, was bound to elect those eight. The Governments that take a different position contend that it was not. We proceed to demonstrate why, in our opinion, it was an obligation on the part of the Assembly of IMCO to elect Panama and Liberia, as among the eight, and why in not doing so the Assembly of IMCO violated the IMCO Convention as well as well-known principles of international law. The first reason why the Assembly of IMCO was in our opinion bound to make that election of the first eight springs from the letter of the Convention, because the applicable words of the Convention used clear and mandatory language in that regard, of which "not less than eight shall be the largest ship-owning nations". Those are not words of discretion, those are not words of flexibility, of delegation of power to follow one course or the other; that is clear and mandatory language—"not less than eight shall be the largest ship-owning nations"—and it is impossible to reconcile the action of the Assembly with that language. We may repeat for days and days words and phrases in these hearings; we may state all the notions we can think of; and we may exhaust all the legal literature on this question, and still we could not find sufficient basis to

depart from this clear and mandatory language that "not less than eight shall be the largest ship-owning nations". So Mr. President, if we are to follow universal rules of treaty construction, which have been laid down by the decisions of this very high and honourable Court, we find that the first rule—and there are many decisions to that effect, and I may, as one of them, refer to the case of the *Polish postal service in Danzig* which is quoted in our Written Statement—the first rule, I repeat, is that words in a treaty must be given their usual and natural meaning. So, the obvious, the usual, the natural meaning of "shall be the eight largest ship-owning nations" is exactly that; that they shall be those eight largest ship-owning nations. And it is very, very difficult to accept how it can be argued, as it has been argued by one of the Governments taking a different position from ours, that that language may mean "eight from among the largest ship-owning nations"—that is not the natural, the usual meaning of the words. So, I repeat, the first argument comes from the very language of the Convention.

I think we may summarize the position of the Governments which are supporting the validity of the election by saying that their arguments for contending that the Assembly had the right or the power to make the election that it did are derived from two reasons. One, which is really centred upon the meaning of the word "elect"—we may call that the argument of "discretion"—that is, that the Convention used the word "elect" to mean that the electors had the power to choose, had the power of discretion and therefore it was not mandatory for them to make the election in the order in which the eight nations appeared in Lloyd's list of tonnage. The second argument is that the expression in the Convention, "nations with an important interest in maritime safety", gave authority and gave power to the Assembly of IMCO to make an independent analysis, an independent appraisal of the interest in maritime safety of the various countries independently of the fact of size or the fact of whether that country was one of the "eight largest ship-owning nations". In other words the so-called "discretion" that I have mentioned a minute ago could be extended by the electors to try to estimate whether there was enough interest in maritime safety to justify the election of a member, although that member was not one of the "eight largest ship-owning nations". I think I am summarizing fairly, Mr. President, the main arguments of the Governments which are sustaining the election. These two arguments run through the Written Statements of all those Governments. In a slightly different way, with a slightly different presentation, as well as a difference in emphasis or stress, they basically rely on these two arguments. And I respectfully propose now to answer these two arguments and I hope I shall be able to demonstrate to this Court that these two arguments have only a superficial value but are not sound, solid arguments. First, the argument resulting from the word "elect", which I think takes more than half of the Written Statements presented, and rightly so, because I think this is the centre of the controversy; the argument derived from the word "elect", the deduction being that because the word "elect" is used, the election was not mandatory and there was a wide power of discretion. Now, Mr. President, we submit that that is drawing a lot from one word. We submit that substance is more important than form and that if we show to this Court that as a matter of substance, as a matter of intent, the election was to be on the basis of size as to the first eight, the use of the word "elect"

is not sufficient, does not have enough weight to change the mandatory nature of the election. Of course, we do not have to depend upon a matter of intent, because not only the intent but the language, the very language of the Convention uses the mandatory term "shall be". So right then and there—and again, Mr. President, we turn to another well-known rule of treaty construction, of which there are many precedents which have been cited in the Written Statements—we say that when the language in a treaty, if carried to its literal sense, will result in an absurd or unreasonable conclusion or would defeat the purpose or the stipulation, such language should be interpreted in the sense in which it would not lead to an absurd or unreasonable or self-defeating conclusion. That is exactly what we have now, Mr. President and Members of this Court. The word "elect" may, and we so admit, in its usual, in its most common, more current sense, mean a choice, the exercise of a choice, but that is not the only connotation of the word "elect". "Elect" in a broader sense may have and does have the connotation of "designation" or "appointment". Our distinguished colleagues from the Government of Great Britain have made reference in their Written Statement to dictionary definitions of "elect": we have found in a well-known dictionary authority, *Funk and Wagnalls*, that one of the connotations of "elect" is "to designate", which is defined in turn as "to mark out or name for a specific purpose, select or appoint as by authority". So we submit to this Court that "appointment" is one of the connotations of the word "elect", that "elect" does not always have the connotation of "choice", and that, if a word is capable of various connotations and if the Court finds that the use of one connotation, although it is the more current, the more usual, will lead to an absurd or unreasonable result, then the Court should adopt that connotation, although not the most common, which will lead to a result which is reasonable and carries out more properly the intent of the Convention. So the use of the connotation of "choice", "free choice", for "elect", with regard to the first eight members, is an interpretation which will lead to an absurd and unreasonable result because it will lead to a contradiction, to a gross and open contradiction in the language of the Convention, namely, to have a free choice in a mandatory election. You cannot reconcile the mandatory language of "shall be the eight" with the criterion of an open choice. You could not find a more open contradiction in terms so, to avoid that absurdity, we have to give to the word "elect" the connotation, the interpretation of "appointment" as to the first eight members of the Committee.

Mr. President and Members of the Court: I beg the indulgence of the Court if I go out too extensively into this matter of discretion, and the proper meaning of the word "election". My colleagues from Liberia have analysed this aspect of the debate also at great length, but this is a matter on which I think there cannot be too much emphasis and if I seem to appear repetitious on this point it is because, I repeat, Mr. President, that I think this is the very heart of this controversy. This matter of discretion, if any, and the proper extent of that discretion, is really the decisive point in this controversy.

With the permission of the Court, I want to cite from the decision of this Court in the case of the *Conditions of Admission of a State to Membership in the United Nations*, which appears in the 1947-1948 *Reports* of this Court:

"The political character of an organ cannot release it from the observance of Treaty provisions established by the Charter when they constitute limitations on its power or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decision, reference must be made to the terms of its Constitution."

This is fundamental in this case.

How much choice, how much discretion the Assembly of IMCO had depends entirely on what discretion the Convention creating IMCO granted to the Assembly. There is nothing absolute in the nature of things which would tell us that, because the word "elect" appears in this stipulation, that means in an absolute manner that the Assembly of IMCO had wide, unlimited power and discretion to make this election the way it wanted. Certainly not. We have to see the Convention, we have to see the fields in which discretion was granted to the Assembly and the fields in which discretion was withdrawn from the Assembly and, instead of it, a mandatory provision was inserted. And we find that, for the election of the first eight members, no discretion was given; a mandatory phrase was stipulated in the Convention, while for the election of the remaining six members flexible criteria were adopted and discretion was permitted to the Assembly of IMCO. May I read the language briefly, referring to the election of the "six":

"... and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of a large number of crews, or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas".

Here we have that discretion is granted as to the election of the "six" on the basis of the criteria which are here described and enumerated. Criteria which, by their very nature, are flexible and call for the exercise of judgment and for the appraisal of certain factors. But not as to the "eight". As to the "eight", I repeat, at the risk of being too repetitious, as to the "eight" we only have a mandatory language that the eight largest ship-owning nations had to be elected.

So, Mr. President, the measure of the discretion granted to IMCO is something that we must interpret from the terms of the Convention and, no matter how much argument we hear and how well-presented those arguments are, we do not have to assume that there is an inherent right to unfettered discretion in that body, or in any other body, but that the extent of that discretion must come from the enabling Treaty which created that body.

Furthermore, Mr. President, the suggestion has been made in the Written Statements that you would have some sort of an unreasonable situation if you had a body like the Maritime Safety Committee which was partially elected by means of free choice and partially constituted by means of what has been called here "an automatic test". And, frankly, we would say to this honourable Court that we see nothing wrong with that, we see nothing strange or unusual in the order of things to have a body which is constituted in that fashion. We have very important bodies in international life, such as the Security Council for instance, which is partially composed of members determined according to a

fixed and predefined automatic definition, and other members which are determined by free choice. It is all a question of what the Statute creating this organization intended and wished. So, if the drafters of the Convention thought it best and deemed it fit that the majority of the members of this Committee should be determined according to an automatic test, such as size, or ship-owning, and the others as to election (and I shall develop later on that they had very good reason to draft the Convention in that fashion), if that is what they desire, there is nothing unreasonable about it. On the contrary, that is a common practice and surely we must give effect to such mandate.

And, if I may use the *reductio ad absurdum* process, I would have to say that if we are to adopt the arguments which appear in some of the Written Statements of the Governments which sustain this election, we may conceive of a case, and I may cite it, as an extreme example, we may conceive of a case in which a Convention would say—let us assume—that there shall be a body, for example an arbitration body, composed of five Presidents, of which one shall be the President of the United States, and four shall be Presidents chosen from various geographical areas. In other words, I am just citing an example in which one of the members of that body is specifically mentioned, and an election in the sense of free choice is contemplated as to the four other members. Now the logic of the position of the various Governments opposing us is that, even in that case, if the word "elect" is used, if the Convention should say "elect five Presidents of which one shall be the President of the United States and the other four shall be freely chosen", even in that case, I repeat, those Governments would contend that the use of the word "elect" will imply the power not to elect the President of the United States and to disregard that clear specification, because of the absolute meaning of the word "elect" as connoting wide, unlimited power of discretion. I have cited that extreme example just to show that the word "elect" should not always be given an absolute and rigid meaning but should, in every case, be interpreted according to the language of the Convention and always having in mind that an interpretation should be given that will not lead to an absurd or unreasonable result.

So really, Mr. President and Members of this Court, this is a question of treaty construction essentially. In what sense was the word "election" used in this Convention with regards to the first eight and in what sense was the word "election" used with regards to the six? And we submit that with regard to the first eight the sense of the expression was that of "mandate", of "obligation", and with regards to the six the sense is that of "choice" or "discretion". And, again, we see nothing unusual, we see nothing illogical, we see nothing unreasonable in having one term given one connotation for one purpose and a different connotation for another. The suggestion has been made by the honourable Government of Norway that it would be illogical to think that the same word would have different connotations in the same paragraph, in the same article. But there is nothing, Mr. President, in the order of things that requires that, necessarily and rigidly, a word will always have to have the same sense wherever it appears. A word with several connotations may have one connotation for one purpose and a different connotation for another —that is elementary in the field of treaty construction.

[Public hearing of 27 April 1960, afternoon]

Mr. President, Honourable Members of this Court, I think it will not take me much time to terminate the phase of my presentation dealing with the question of the word "elect", the meaning of the word "elect" as related to the scope of discretion granted to the IMCO Assembly in connection with this matter.

The suggestion has been made in one of the presentations of the Governments that argue in support of the election, that if it was the intention that the first eight members should have been appointed on the basis of size, on the basis of tonnage, a different language should have been used in the Convention, in Article 28; like, for instance, "there shall be eight Members who shall be appointed in such and such a manner", and that the word "elect" would not have been used.

Now again, Mr. President, I respectfully submit that that is a superficial criticism, a superficial observation. Because, if we examine the wording of Article 28, paragraph *(a)*, we find that this is a proper way of drafting—the one that was actually adopted; because the verb "[to] elect" in the past sense, "elected", is mentioned in the first sentence with reference to the composition of the entire Committee. It is not used with reference to the selection of the eight Members. The verb "elect" is used twice. First, referring to the composition of the entire Committee, second, referring to the election of the remaining six Members. Maybe by actually reading it, I would illustrate it much better:

> "The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be *elected* so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety", etc.

What I observe is this: that as regards the remaining six, the Convention says: "The remainder shall be *elected*..." With regard to the first eight, the Statute does not say that the "eight shall be elected". If it had been the intention of the drafters of the Convention that an election in the sense of choice—of free, wide choice—should apply both to the eight and to the six, the verb "elect" would have preceded the reference to the eight as well as the reference to the six, but it does not appear as preceding the reference to the eight. As to the eight, what we have is the mandatory expression "shall be the eight". Consequently, the reference, or rather the use of the verb "elect" at the beginning with reference to the fourteen, is a reference to the composition of the entire body—of the entire Committee—and it was perfectly proper to use the verb "elect" in that general way, because no other proper term could have been used. It would not have been possible to use the verb "[to] appoint" with reference to the composition of the whole body, because the entire body was not going to be appointed. There were six that were going to be elected; so it was perfectly natural to use this method of drafting, to use the verb "elect" in its general, in its broad sense, when referring to the entire body, although only part of that body was going to be chosen by means of an election in the true sense of choice, in the true sense of free election.

So there is no valid reason for arguing, we respectfully submit, that the wording should have been different. We submit that the wording is very proper, and that there is absolutely no conflict between the wording as it is and the conclusion advanced or advocated by us, that the election had to be mandatory as to the first eight. Furthermore—and that is a point that was very well brought out by my distinguished colleague from Liberia—the use of the verb "elected" at the beginning and with reference to the entire body, the entire Committee, was also very proper because, as to the election of the majority, there was an element of choice contemplated by the Convention; but not the element of choice that the Assembly arrogated to itself to use. There was a different element of choice, namely, that the statute contemplates that "*not less than eight*" shall be the largest ship-owning nations. In other words, more than eight could have been elected, on the basis of size, on the basis of tonnage. More than eight could have been designated in that fashion; so really, what the Assembly of IMCO was entitled to do was to make a choice as to whether it was going to limit to eight the designation based on tonnage—based on size, or whether it was going to choose more than eight. So there was an election, there was a choice. But there was not a choice as to whether they could disregard a nation which was one of the eight largest nations and fail to elect that nation. They misused—they abused—the discretion of election they were entitled to use and channelled that discretion in a different direction, leading to an arbitrary and discriminatory result.

Mr. President, I stated this morning that there were two arguments which, in a summary way, we could say were the arguments of the Governments supporting the election. One, this kind of semantic argument that I have dwelt upon so much dealing with the use of the verb "elect", with the connotation of election. I think I have said all that I had to say in that regard, Mr. President, and I wish to thank the Court for having been so patient with me for talking so extensively on a matter that was also very forcefully argued by my predecessor. And I will turn now to the second argument of those nations arguing in support of the election and in support of the interpretation that the IMCO Assembly made of Article 28. Such second argument stems from the phrase "having an important interest in maritime safety". The contention amounts to this: that the IMCO Assembly, even as to the first eight Members, even as to the Members of the eight largest ship-owning nations, was entitled to determine whether they had a proper important interest in maritime safety, and to include them or exclude them from the election as the Assembly felt that they did or they did not have such an important interest in maritime safety.

Here again, Mr. President and Members of this Court, we contend that the IMCO Assembly went beyond the language and beyond the meaning and intent of the Convention, and violated both the text and the spirit of the Convention. And we submit that, because we think it is perfectly clear as a matter of construction that this provision of the Convention amounted to a foregone conclusion that being one of the eight largest ship-owning nations indicated the existence of an important interest in maritime safety. In other words, as to the eight largest ship-owning nations there was no necessity to prove the existence of an important interest in maritime safety, because such interest existed *per se, res ipsa loquitur* we might say. The very fact of being the eight largest ship-

owning nations indicated the presence of an important interest in maritime safety.

We shall demonstrate forthwith that such is the language and such is the spirit of this provision in the Convention. But may I, in passing, state at this point, that when we, the Republic of Panama, argue that there was no necessity to demonstrate an interest in maritime safety to be elected as to the eight Members, as to the majority, that does not mean at all—not even by implication—that we have any doubts as to Panama having a proper and an important interest in maritime safety. We extensively demonstrated, in our Written Statement, the important interest that Panama has had, actually has, and continues to have in maritime safety. We demonstrated how, for more than twenty-five years—I will say for over thirty years—the Republic of Panama has taken an active interest in maritime safety; has become a party to all the conventions dealing with maritime safety; co-operates with other maritime nations in supporting the organs in international life which regulate or control matters of maritime safety; has been active in conventions and treaties which have been drawn up dealing with matters of maritime safety, and takes all the necessary measures to see that ships which come under the Panama flag are in a seaworthy condition and are provided with all the necessary elements for the protection of life at sea, and even goes to the point of selecting the best-known advisers, such as Lloyd's, Bureau Veritas, etc., to ascertain that ships are examined properly as to seaworthiness and other conditions dealing with safety.

Panama is not afraid to submit itself to examination at any time, to be subjected to any tests in that regard. But we say, Mr. President, that as a matter of statutory construction, as regards the plain meaning of language, it was absolutely irrelevant and immaterial for the Assembly of IMCO to have gone into the question of interest in maritime safety as to the first eight Members, and it is also immaterial and irrelevant to argue that phase of the matter here now.

Again, let us go to the language of the Convention:

> "The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas."

We find that the Convention, with regard to eight Members, only makes the requirement of size, of being one of the eight largest ship-owning nations: "governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations". In other words, the Assembly took as a first test of an interest in maritime safety, "being one of the largest ship-owning nations". The effect of this language is to say as to those eight that they already *per se* have that interest in maritime safety. Now as to the remainder, we must find that interest in maritime safety according

to the criterion which is described here as saying "nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas". As to the remaining six, the Convention is indicating the criteria that will decide, that will serve to measure, to determine whether they have an interest in maritime safety. As to the first eight, no such criteria or any other criteria are indicated; if it had been the intention that the first eight should have met the specific test of interest in maritime safety, the criterion for determining that interest would have been set forth in the same manner that it was set forth with regard to the remaining six, but no—no such criterion was provided. Why? For the very reason that being one of the eight largest ship-owning nations was conclusively and in anticipation an establishment of an important interest in maritime safety.

Mr. President and Members of the Court, I was at the point of establishing that the eight largest ship-owning nations, by the terms of the Convention, had *per se* an important interest in maritime safety. I had demonstrated how that flows from the language of the Convention and we find in the latter part of Article 28 that, when making a reference to the six remaining members, the Convention says "so as to ensure *adequate representation of Members, governments of other nations with* an important interest in maritime safety...". Now, we lay a good deal of stress upon this word "other". The Convention says that the remaining six shall be chosen from among "other" nations with an important interest in maritime safety, which means, in plain language, that the first eight or no less than eight which have been immediately mentioned, or that had been mentioned in the immediately preceding sentence, have an important interest in maritime safety. Their interest is established by the fact of being the eight largest ship-owning nations. And then the language refers to the other six and indicates the criteria that are to be used to determine whether or not they do have an important interest in maritime safety.

But not only the language, Mr. President, of Article 28 establishes that conclusion. Simple logic and what we may call the realities of maritime life, what we may call the rationale of these rules established by Article 28, plainly indicate that the largest representation in the Committee had to be given to the nations with the largest tonnage under their flag. Why? Because the very purpose of the Committee, and for that matter the very purpose of IMCO, the entire Organization, was to ensure an international organization that would co-ordinate action among maritime Powers the faculty to take measures tending towards betterment, progress, organization of maritime systems and devices, which would guarantee effectively the highest degree of safety at sea. And, as we bring out in our Written Statement—I am not going to reproduce that now—the nations that are in the better position to affect the largest amount of tonnage, the largest number of vessels, and to have those ships, those vessels, adopt the proper rules, the proper regulations, are the nations whose flag is flown by those vessels because they, by law, have jurisdiction over the vessels and are the ones that can impose those rules and regulations on these vessels. When we come to the part of this presentation which deals with the so-called "law of the flag", we shall see that, as an elementary principle known to everyone, a ship is under the jurisdiction of the law of the flag, that the nation under whose

flag the ship is, is the one that is empowered to impose the proper rules and regulations upon that ship. Therefore, it was natural that in this Safety Committee the majority, the largest representation should be that of the largest ship-owning nations. That is only rational, perfectly natural, and in the *travaux préparatoires* leading to this Convention, we find that originally it was even thought that, of a Committee of twelve, nine should be the largest ship-owning nations. And then, by way of compromise, in the course of discussion, the number was changed from twelve to fourteen and the majority of eight was retained for the largest ship-owning nations. And, even at that, with the possibility that there could be more than eight because, as I have stated, the Convention says that "not less than eight", in other words not less than a majority, shall be the largest ship-owning nations.

I think, Mr. President, we have demonstrated to this honourable Court that the two arguments on which the Governments supporting the election try to justify the action of the IMCO Assembly, namely, the so-called argument of discretion based mainly upon the word "elect", and second, the argument of maritime interest as to those nations, are unfounded; that they have no solid foundation and that, therefore, there is no proper justification in those arguments. What remains before this Court to judge is the plain and simple fact that the Assembly of IMCO had to elect the eight members appearing in the list, the authoritative list, that the Assembly itself had chosen as the proper basis; and that, nevertheless, the Assembly failed to elect those eight nations which were the largest ship-owning nations, and, instead, in an arbitrary manner, in a capricious manner, in a discriminatory manner, omitted to elect two of those eight and elected instead two which did not belong to the eight largest ship-owning nations. That action of the IMCO Assembly is plainly invalid, is plainly illegal, was an abuse of power, was an abuse of discretion, if there was any, and is an action that should be checked, that should be curtailed by this venerable Tribunal if we are going to have in international life the same checks and balances we have in private life among nations which have guarantees against excesses of power and authority.

> "The political character of an organ cannot release it from the observance of Treaty provisions established by the Charter when they constitute limitations for its power or criteria for its judgment To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its Constitution."

These are the words of this Court in the case of the *Conditions of Admission of a State to Membership in the United Nations*. The Assembly of IMCO had no right, we respectfully submit, to disobey the conditions imposed upon it by the IMCO Convention as to the eight largest maritime nations and it had no right, no power, to insert new conditions that were not present in the Convention to determine how the election of those eight nations should be made. The same as this Court found that there was no right to impose conditions in the admission of members in the United Nations other than those appearing in the Charter, we say here that when the Convention made it clear, unequivocal, that being one of the eight largest ship-owning nations gave a right to election, the IMCO Assembly had no right to establish, as they apparently did, new conditions, such as having a large number of crews, a large number of tech-

nicians or criteria like that which were not present in the Convention.

We submit, Mr. President, that the action of the Assembly is invalid and that it should be so ruled in this case because, first, the IMCO Assembly violated the terms of the Convention itself, as I think we have demonstrated with regard to Article 28 *(a)*, and second, because it violated well-known principles of international law, as I shall proceed to demonstrate now, with the permission of the Court.

Well-known principles of international law were violated. We submit that the first of those principles is the one that is illustrated in the *Polish Nationality* case which is cited in our Written Statement, that words in the Convention or in any instrument, for that matter, which is for interpretation, must be interpreted in their usual and natural meaning. And only when that meaning is leading to an absurdity, then another meaning than the usual meaning should be chosen. The Convention was plain. And yet, as to the eight largest ship-owning nations, the IMCO Assembly failed to give to those words "the eight largest ship-owning nations" their plain and obvious meaning.

In the case of the *Polish Nationality*, decided by the Permanent Court of International Justice and cited on page 176 of the pamphlet (Written Statement of Panama) the Court said:

> "The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to it, or substituted for it. To impose an additional condition not provided for in the Treaty of June 28th, 1919 would be equivalent not to interpreting the Treaty but to reconstructing it."

We submit that that is another rule of treaty construction that was violated by the IMCO Assembly—failure to give to the wording of the Convention its natural and usual meaning and the injecting of new criteria, of new terms so to speak, not existing in the Convention, of new conditions, in a manner that amounts to what was so well described by the Court as not interpreting the Treaty, but reconstructing it. They made a new Article 28 *(a)* and made a rule for themselves, in an arbitrary manner, that was different from the rule contained in the Convention.

Mr. President, we submit that three principles of construction of international treaties were violated by the action of IMCO. The first one I just mentioned, that words in the Treaty must be given their usual and natural meaning. The second is that when an interpretation leads to an absurd or unreasonable result it is the duty of whoever is interpreting that provision to see if there is any other possible interpretation that will not lead to such an absurd result and will be in better harmony with the intent of the Treaty. The third proposition, probably connected with the second, is that whenever language in a particular Convention or Treaty is not entirely clear, or is ambiguous in some manner, the intent of the Treaty should be ascertained by studying and analysing the Treaty as a whole.

We submit that these principles were disregarded by IMCO in the action it took in this particular election. We submit that the first, that "words must be given their usual meaning", was violated, as I said before, by not giving to the words the "eight largest ship-owning nations"

their natural meaning. Particularly when it refers to "ship-owning", because as we developed in our Written Statement, "ship-owning", both as a matter of practice in maritime life and as it appears in treaties, refers always to tonnage under a particular flag. "Ship-owning" does not refer to ownership of ships by the State, in what we may call the civil sense, as is well settled by the treaties we cited (the Safety of Life at Sea Convention, the Load Line Convention, and a great number of bilateral treaties in which "ship-owning" is always taken to mean registry of tonnage under the flag of one nation).

So, once it became evident to IMCO, to the Assembly of IMCO, who the eight largest ship-owning nations were, by well-known practice, international usage, then we submit that by failing to elect two of those eight nations, that amounted—and here we think there was a more serious violation of international law—to disregarding the law of the flag. In other words—and that is why the Republic of Panama takes a position somewhat more serious with regard to this phase of the case—we feel that the failure to elect the Republic of Panama when it was established that it was one of the eight largest ship-owning nations and when ship-owning meant registration under the flag, was simply a disregard of the flag, a going behind the flag, so to speak, and that that was a most serious offence against the Republic of Panama. I shall develop this point a little later with the permission of the Court.

The other principle of treaty construction that, we submit, was not followed by IMCO in this election is also developed in our Written Statement, to the effect that the intent of the Treaty should have been ascertained by reading the Treaty as a whole. We think that was not necessary because Article 28 *(a)* was clear enough, but even if the IMCO Assembly thought that it was not clear enough, then it was its duty to read the Convention as a whole and to try to ascertain the intent or the spirit of the Convention in an integral manner and then proceed to the election on that basis. We submit that by utilizing that process it would have become evident to the Assembly that the spirit or intent of the Convention was that the largest ship-owning nations should have the largest representation in this Committee.

We find that one of the purposes of the Committee is to adopt measures of safety. And then we ask: who were the more able or capable of ensuring the adoption of those rules of safety and protection?—The nations whose flag was flown by those vessels. We find, in analysing the various sections of the Convention, that the budget of IMCO is mainly distributed on the basis of tonnage registered under the flag. We even find that the date of entry into force of the IMCO Convention is based upon registered tonnage. The Convention says: "this Convention shall go into effect when so much tonnage have adopted the Convention". So it was tonnage all along, it was size, registration, which was the main factor in every way, which was established as the most powerful element in determining the composition of this body.

I have stated, Mr. President, that another rule that was not followed is that whenever a certain interpretation leads to an absurd or illogical decision or result another interpretation should be adopted that does not lead to that conclusion. Now, if we read the minutes of the election we find that although the IMCO Assembly was taking Lloyd's List, based on tonnage, as the basis to proceed on, yet the speakers for the majority, the ones that "carried" the election, so to speak, in stating the reasons

for the election, showed that they were giving to the Convention an *interpretation which surely was leading to an absurd and an unreasonable conclusion.*

The Representative of Great Britain stated in words that practically amounted to saying that they had to take into consideration ownership, private ownership of vessels. Another one of the delegates, I think of Norway, took a similar position, that they had to take into consideration whether the nation had a good number of crews under its nationality, technicians of its nationality, etc., as being factors which had to be taken into consideration to select the eight largest ship-owning nations. Now, right then and there, to take a criterion for ship-owning, for determining what a ship-owning nation is, when such concept had a standard meaning, meaning tonnage under that flag—to take a criterion like the number of crews, number of technicians, private ownership, etc.—that amounted to elements for the determination of ship-owning nations that surely were likely to lead to the most confusing and disturbing situation. This has been amply demonstrated in the Written Statement. You may have a ship under the British flag with beneficial ownership in the United States with a mortgage in the name of a citizen of Argentina, with an equity held by trustees of another nationality. The ship may be chartered to a national of another nation. In other words in the world of today, if you try to ascertain the nationality of a ship on the basis of beneficial ownership, you can very well run into a tower of confusion, because you may have interests distributed among various nationalities and that is why international law, which must be clear and must be precise on the subject, has adopted the simple rule that the nationality of the ship is the nationality of its flag. We then see that the Assembly of IMCO was proceeding on an absurd and an unreasonable basis on that very point.

Mr. President, in our Written Statement we make the allegation that this election was arbitrary, was discriminatory, and was capricious. Now we do not use these epithets lightly, we use them after considerable thought because we think that each one is justifiable on the facts of the case. It was arbitrary because the IMCO Assembly failed to elect members that it was bound to elect under the Convention and, instead, elected members that had no right to be elected. It was discriminatory because it discriminated against two flags—the flags of two nations were disregarded for no valid reason, just in a capricious manner; and we use the word "capricious" because we found, when we analysed the action of the IMCO Assembly, that it is very difficult to find more contradiction in the action of a body than we find here. The IMCO Assembly accepts implicitly the standard or the definition of ship-owning as meaning flag registration, *by adopting Lloyd's list which is based on tonnage, or* registration under the flag, as the basis for the election. It announces that it is going to proceed with the election on the basis of that list. The speaker, the delegate of the United Kingdom, states to the Assembly that there is no question there as to the flags of convenience, that such flags are not going to be analysed. He goes further and says that everybody is satisfied that the ships under the Liberian flag, under the flag of Panama, are ships of—I want to use the same words—"were among the most modern, the most up-to-date in the world". And yet he goes on with the statements that IMCO has to go into considerations of ownership, number of technicians, and such other criteria alien to the proposition, when making the election. So it is using the flag as a test when it is using

Lloyd's, and it is going behind the flag when making the election on the basis of criteria different from the flag, and it goes behind the flag when it is saying that it is not going behind the flag. So this was not only arbitrary and discriminatory but it was, as we have said, action which denotes a capricious attitude on such a serious matter as the election of this important body.

The disregard of the law of the flag, Mr. President and Members of this Court, is one of the most serious phases of this entire matter. In an indirect manner we find that this election, made in this fashion, amounted to a disregard by an important body in the international maritime world of the law of the flag. It is unnecessary for me now to repeat what has been copiously said in the Written Statements and which is the traditional and still today the well-respected principle of international law: that a ship is under the jurisdiction of the law of its flag. We know that that is well-established international law, that this Court has had occasion to reaffirm it in cases like the *Lotus* case, the *Muscat Dhows* case, and furthermore we know that the principle of the law of the flag, despite the efforts that are being made in some sectors today to erode that principle, still is a firm and solid principle of international law and is the only one which is likely to maintain the necessary law and order in the life of the sea. And very respectfully, I would like to bring to the attention of this Court an article which appeared in the last edition of the *American Journal of International Law*, by Mr. Douglas, in which he calls attention to the great danger that may result by the adoption of such loose theories as the so-called "genuine link" or any other similar theory that will depart from the traditional principle of the law of the flag.

Of course we all know that the "genuine link" theory is not law because it appears in a Convention which has not yet been ratified, and it appears in a very loose manner without sufficient definition and in a way that really does not carry much meaning. Still, it is very well brought out by Dr. Douglas in this study that I just referred to, he very well develops the point that in international maritime life it is important, it is imperative that there be order and law, and that, he says, can be determined only by the law of the flag. The moment that you try to go behind the flag and to permit the disregard of the flag by reference to other complex considerations, like private ownership or any other kind, you are just opening the door to chaos and disorder in maritime life since you are practically giving the green light to any State to disregard the flag of any vessel and leave that vessel without protection at sea, and destroy that order and law that is indispensable in maritime life.

Mr. President, Members of this Court, I wish again to thank the Court for the patience and time given me and I think with a few final considerations I shall terminate this oral presentation that I have been given the privilege to make. I was referring to a study appeared in a recent issue of the *American Journal of International Law* indicating the danger that results in international life if the law of the flag is not followed and respected and it is weakened with theories complex and vague, such as the so-called "genuine link" theory which, I repeat, is not the law of today. And in this admirable study proper distinction is made of the nationality conferred by a nation upon a foreign individual which adopts the nationality of that nation and the nationality of a ship conferred through the flag. And it is very well demonstrated that when a foreigner

acquires the nationality of another nation then you have a case in which it is possible that that individual may have two nationalities, perhaps sometimes even more. But in maritime life you do not have the phenomenon of dual nationality. A ship has one flag and only one flag, and we find authors like Oppenheim saying precisely that "a ship with two flags does not have the protection of any". So it is understandable that when you are dealing with individuals you may find the nationality of an individual having two nationalities being analysed by a third nation and sometimes being entitled to a certain amount of scrutiny or discretion in appreciating that phenomenon of dual nationality. But not in the case of maritime life. A ship has one flag and only one flag, and so, if that flag is not respected, if it is not properly regarded, you are creating a situation of lack of proper order and law at sea. And that is the thesis, the very thesis, that is brought out in this study. It is also pointed out that in the case of individuals, an individual, whatever his nationality, he may even have no nationality at all, he may be a stateless person, but when he goes to a foreign country, usually and normally he has the protection of the laws of that country which protects nationals and foreigners; he has police protection, sanitary protection, all the normal protections that a State grants to nationals and foreigners. But when a ship is at sea, that ship only has the protection of the State of its flag. So it is a very serious proposition, it is a very dangerous proposition to start experimenting and introducing vague and complex notions of "beneficial ownership" or "genuine link", or some other, against the well-known rule and principle of the law of the flag. So one of the most serious aspects of this case, if we may respectfully submit, is that the approval or the condoning of the action of the IMCO Assembly does amount, if not directly, at least indirectly to a disregard of well-known principles relating to the law of the flag of a vessel.

And just to terminate this presentation, Mr. President, and I have left this statement to the last, I am going to refer to the final part of our written presentation in which Panama takes the position that the action of IMCO was an offence against the sovereignty of the Republic of Panama. And may I start this with one explanation. We realize that this is a very serious statement. Furthermore, the Republic of Panama is not super-sensitive, is not trying to find an offence to its sovereignty where none exists; we would much have preferred it if we could not make this charge in such strong terms against the IMCO Assembly. But we find that it is inescapable to come to this conclusion: we have the law of the flag as a well-settled principle of international law, we have two nations, Panama and Liberia, entitled to an election by the IMCO Assembly, then we have the IMCO Assembly in a deliberate and discriminatory manner ignoring these two flags and replacing those two flags by the flags of two other nations; then we find in the Charter of the United Nations the clear, the cardinal principle which is the first in the Charter, that all nations shall have equal sovereignty, that there shall be "sovereign equality" among nations, to quote the exact words; and then we also find in the Charter of the United Nations, in Article 2, paragraph 7, that there shall be no interference by one State in the internal matters or affairs of the other. So we are bound to conclude that when two nations have their flags disregarded—when Panama, as I am speaking on behalf of the Republic of Panama, has its flag disregarded and its rights violated—that sovereign equality among all nations

has been disregarded. And when IMCO undertook to go behind the flag and ascertain the terms and conditions of ships registered under the Panama flag, it went into matters that were internal and pertained exclusively to the Republic of Panama, because it has been well brought out by text-writers and by jurisprudence that a State is entitled to grant its flag to ships seeking it, upon the terms and conditions that that State would determine. So IMCO was going into the internal affairs of the Republic of Panama and was disregarding the flag of Panama and not placing it in the terms of equality that the Charter of the United Nations requires be observed as to all nations.

And here I bring to a conclusion this presentation, Mr. President and Members of this Court, and may I say in closing that the Republic of Panama, small as it is as a nation, has been very much interested, historically and for the future, in the development of international law; that Panama has not and is not making this challenge of this election for the sake of contradicting or trying to embarrass an international body. On the other hand, the Republic of Panama has co-operated in international conferences and throughout its international life in the development of international organs that tend to bring progress in maritime life, safety in maritime life, and in general a closer co-operation among nations. Any tendency, any movement to strengthen the existence of international organs and make international life more effective and more responsive, has had and will have the co-operation and the unreserved endorsement of my country. But at the same time we realize that for the very sake of that development of international law and that development of an effective international life and of effective international organs, it is necessary that we resort to sources like this very high and honourable tribunal whenever action is taken by any one of those organs which is in excess of its authority or in abuse of its powers. It is only by having those checks of excessive action, or unauthorized action, that we shall see international life progress in a well-balanced manner. Therefore our attitude here is not one of challenging without reason, but on the contrary of challenging the action of a body in which we wish to participate but in which we want to see that international law and international conventions are properly respected.

I thank the Court for its patience, and I again wish to present to this Court the respects of the Republic of Panama and the profound expressions of my gratitude for the honour and privilege of having appeared before this highest tribunal.

5. ORAL STATEMENT OF Mr. HAGER

(REPRESENTING THE GOVERNMENT OF THE UNITED STATES OF AMERICA)
AT THE PUBLIC HEARING OF 28 APRIL 1960, MORNING

Mr. President, Members of the Court.

Before commencing my statement, I wish first to present the respects of the Government of the United States of America to this Court, and also, if I may, to express my deep personal appreciation of the honour and privilege of appearing before this Court this morning. And now, with your permission, I shall commence the Oral Statement on behalf of the United States of America.

As the Court is aware, there is presented to it in this proceeding, for an Advisory Opinion thereon, the question whether the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, which was elected on the 15th of January, 1959, is constituted in accordance with the Convention for the Establishment of the Organization, which I shall hereafter refer to as IMCO. A number of Written Statements have been filed with the Court on behalf of those Governments, including my own, which contend that the question put to the Court in this proceeding should be answered in the negative. The Government of Liberia and the Government of Panama have also made most thorough and comprehensive Oral Statements to the Court in this proceeding in the course of which they have commented in detail upon the Written Statements of those Governments which contend for the opposite view. In view of the careful argument which has thus far been presented to the Court in both written and oral form, it does not appear possible at this point to avoid entirely touching upon ground which has already been so carefully covered. Although it will therefore involve the necessity of some repetition, I believe that I should nevertheless attempt, in as brief a time as possible, to take up once more three points in the case which the Government of the United States views as the most important for the resolution of the question presented to the Court for its decision.

It should be said at the outset that the fundamental object of the present proceedings is to secure from the Court its opinion as to the correct interpretation of Article 28 *(a)* of the IMCO Convention.

Article 28 *(a)*, as the Court knows, provides in effect that the Maritime Safety Committee shall consist of fourteen members elected from the nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure the representation of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and the representation of major geographical areas. What Article 28 *(a)* does is to create two categories of members, which I shall occasionally refer to as the eight and the six, although the Assembly is of course in its discretion empowered to increase the eight and decrease the six.

I should now like to outline briefly the views of the United States on what appear to be three basic issues with respect to the interpretation of Article 28 *(a)*, and then to discuss each one in turn in a little detail.

One fundamental issue with respect to the interpretation of Article 28 *(a)* relates to the term "largest ship-owning nations". As set forth at pages 131-141 of its Written Statement, the United States considers that this phrase refers to those nations with the largest amounts of tonnage of shipping registered under their laws, and not to the Governments which own the largest tonnage as State property or the States whose nationals have property interests in the largest tonnage.

A second issue relates to the question whether the largest ship-owning nations are automatically deemed, for the purposes of Article 28 *(a)*, to have an important interest in maritime safety. The United States considers that they are automatically deemed to have an important interest in maritime safety.

Finally, the issue has been raised whether Article 28 *(a)* imposes a mandatory obligation upon the IMCO Assembly to include in the Maritime Safety Committee at least the eight largest ship-owning nations, or whether the Assembly has a degree of discretion on this score. The United States is of the view that Article 28 *(a)* does require such nations to be included in the Committee, and that the Assembly is bound to comply with this requirement in electing members of the Committee.

It follows that, since Liberia and Panama were at the time of the election of the members of the Maritime Safety Committee on January 15, 1959, the third and the eighth largest ship-owning nations in the world, respectively, from the standpoint of registered tonnage, the United States considers that they were entitled to be elected as members of the Maritime Safety Committee. In view of the fact that they were not so elected, the Maritime Safety Committee is not constituted in accordance with the Convention for the Establishment of the Organization and it is therefore respectfully submitted that the answer to be given by the Court to the question put to it should be in the negative.

Mr. President, Members of the Court, I would like now to discuss each of the three issues of interpretation in slightly more detail.

I will touch first upon the point that the term "largest ship-owning nations" means those nations which have the greatest amount of tonnage of shipping registered under their laws.

Several different contentions have been advanced as to the proper interpretation of the term "largest ship-owning nations". One possibility that has been raised is that the term refers to ownership by each State in the civil or property sense. However, as noted by the United Kingdom in its Written Statement, at page 239 of the printed volume, since comparatively few States own large fleets of merchant shipping, it is apparent that this is not what was intended. Indeed, this interpretation does not appear to have been espoused seriously in any of the statements submitted to the Court.

It has, however, been contended in several quarters that the term must be interpreted to mean ownership by nationals of the State concerned. For example, the Government of Switzerland states, at page 217 of the printed volume, that the first group of eight is constituted with a view to the representation of material interests in relation to vessels, such as ownership, mortgages and the like.

The Government of Norway also contends in its Written Statement, at pages 243 and 244 of the printed volume, that the phrase refers to the beneficial ownership of vessels by the nationals of the country in question. On this basis, it claims that the statistical table of registered tonnages furnished by the Secretary-General of IMCO at the first meeting of the Assembly would have to be corrected in order to arrive at figures which would take due account of the proper meaning of the phrase "largest ship-owning nations". In effect, the Government of Norway suggests that the tonnage be redistributed so as to allocate to each nation the tonnage beneficially owned by its nationals, with special corrections to give effect to situations where actual beneficial ownership rests with nationals of a State different from that of the corporation or other juridical person owning the ship.

However, as has already been pointed out in the Written Statement of the Government of Panama, at page 181 of the printed volume, this would result in a rule of impossible application, and indeed this is more than amply demonstrated by the description in the Oral Statement of the Government of Liberia of the complex international character of the property interests in shipping. That description graphically illustrates how seldom the concept of ownership would serve to connect a ship with a single State, in view of the many different property interests and national connections that are so often represented by the mortgagor, the mortgagee, and the various kinds of charterers. These complications are of course multiplied when we introduce the juridical person, such as the corporation, which can derive its legal existence from the laws of one State, have its principal place of business located in another, be managed by directors and officers of still another State or several States, have its property mortgaged to nationals of still other States, and, finally, have its shares owned as a matter of record by nationals of certain States but beneficially owned by nationals of other States, and even have bearer shares which give no clue as to ownership. Again, to be practical and workable the test of ownership would of course require that the true location and extent of all of the significant property interests in each ship be readily ascertainable as an objective matter of fact. No one has contended that this is possible, for it is of course not possible. But even if it were, it would also have to be recognized that such property interests are subject to frequent change through stock market transactions, private sales, the creation of loans and mortgages and the like. Finally, if there were to be a fair allocation, there would also be the interesting question of how to evaluate the different property interests on a common scale, as, for instance, evaluating a loan as against an equity interest or a charter contract.

The Convention draftsmen could not have intended to incorporate so unworkable a concept into Article 28 *(a)* as a test of eligibility for membership in this important organ of IMCO. It is submitted that the Court should not construe the phrase "largest ship-owning nations" so as to lead to such an unreasonable and absurd result. In this connection I would refer the Court to its statement in *Competence of the General Assembly for the Admission of a State to the United Nations, I.C.J. Reports 1950*, at page 8, and to the earlier case of the *Polish Postal Service in Danzig* there cited, decided by the Permanent Court of International Justice, which is reported P.C.I.J., Series B, No. 11.

It is further submitted that this concept would not accomplish anything useful from the standpoint of the objectives of the IMCO Convention, even if shipping tonnages actually could be allocated among the nations of IMCO so as to give equitable effect to the various interrelated property interests of their nationals. It is difficult to see what practical value such a listing would have from the standpoint of the furtherance of the functions of the Maritime Safety Committee.

It seems abundantly clear, therefore, that the only meaning which can sensibly be attributed to the term "largest ship-owning nations" is that it signifies the nations with the largest quantity of tonnage of shipping registered under their laws. This is the common understanding of the term "ownership" when used in connection with a nation. As noted by the United States in its Written Statement, at pages 131-132 of the printed volume, Lloyd's Register itself uses the words "belonging to" and "countries where owned" to refer to the registry of vessels. Registration provides a clear criterion, the only one which is readily ascertainable, avoids confusion, and definitely connects the vessel with one single State. It is therefore an eminently workable criterion by comparison with the others, a factor which the Convention draftsmen of Article 28 *(a)* must necessarily have had in mind when they prepared the Article.

But finally, and most important, registered tonnage is the *only* criterion which tends to further the fundamental purposes of the IMCO Convention. As stated in Article 1 *(a)* of the Convention, one of the basic purposes of IMCO is "to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation".

The IMCO Convention provides the following machinery for the accomplishment of this objective. As provided in Article 29, the Maritime Safety Committee generates proposals for safety regulations or for amendments to existing safety regulations. As provided in Articles 22 and 30, the Committee then submits these regulations and amendments through the Council to the Assembly, which then considers the same and determines whether or not to recommend them to the Members for adoption as provided in Article 16.

The basic purpose of Article 1 *(a)* is achieved when such regulations are generally adopted with respect to shipping. Conversely, the purpose is not achieved with respect to any shipping until the respective States of registry adopt the regulations. Only the flag State can make the recommended regulations binding as to its own vessels on the high seas.

The general adoption of the highest standards of maritime safety will therefore come about only when the appropriate regulations are adopted by those nations which have legal and regulatory control over the preponderant amount of the world's tonnage, that is to say, the nations with the preponderant amount of registered tonnage. It stands to reason that the basic objective of general adoption of the highest practicable standards will be furthered if those nations are the ones who discuss the proposed regulations in the formative stage and participate directly in their formulation and promotion. Having in mind, therefore, the basic objective of general adoption of higher standards and the machinery by which it is intended that this shall be accomplished, it is clear that the interpretation of the term "ship-owning

nations" which most furthers the basic objective is that it means the States of registry. A treaty should be interpreted in such fashion as to further its basic purposes and objectives. In this connection, I would refer the Court to its opinion in *Reparation for Injuries Suffered in the Service of the United Nations*, reported in *I.C.J. Reports 1949*, and particularly the language at pages 178 through 180.

Accordingly, it is the view of the United States that the "largest ship-owning nations", as that term is used in Article 28 *(a)* of the IMCO Convention, can only mean those nations with the greatest amount of tonnage registered under their laws.

Mr. President and Members of the Court, the next point which I wish to touch upon is the question whether a nation which is one of the eight largest ship-owning nations is automatically deemed to have an "important interest in maritime safety" for the purposes of Article 28 *(a)*.

It is the view of the United States that this is clearly the intent of Article 28 *(a)*. Let us for a moment analyse the language of this provision. In the first place, Article 28 *(a)* states that "the Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations", etc. I wish to direct the Court's attention to the phrase "of which not less than eight", and particularly the word "which". To what does this relative pronoun refer? When the language is analysed, it is clear that the word "which" can only refer back to the word "nations" in the immediately preceding phrase reading "those nations having an important interest in maritime safety". In other words, of the nations having an important interest in maritime safety, not less than eight shall be the largest ship-owning nations. It is clearly the intention of the Convention draftsmen that the eight necessarily and automatically have an important interest in maritime safety. If the draftsmen had intended otherwise, it would have been a quite simple matter to express the thought by adding the necessary qualifying phrase "among those having an important interest in maritime safety", so that the amended provision as to the eight would have read: "of which not less than eight shall be the largest ship-owning nations among those having an important interest in maritime safety".

Of even greater significance, however, is what follows in Article 28 *(a)*. After the phrase "of which not less than eight shall be the largest ship-owning nations", the provision continues in this manner: "and the remainder shall be elected so as to ensure adequate representation of Members, governments of *other* nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers", etc. Again it is important to note the use of the phrase "other nations with an important interest in maritime safety", and I wish to draw particular attention to the words "other nations". The provision has already referred to certain nations, and now it refers to *other* nations with an important interest in maritime safety. The clear meaning of these words and this arrangement is that the nations previously referred to *also* have an important interest in maritime safety. And those nations previously referred to are the largest ship-owning nations.

The Convention draftsmen have thus made it abundantly clear, not once, but twice, that for the purposes of Article 28 *(a)* the largest ship-owning nations are necessarily understood to have an important interest in maritime safety. It is submitted that this meaning is too clearly expressed to be ignored. The provision must be given effect as written.

Not only is this the inescapable meaning of the language, as stated above, but it is also eminently logical. It stands to reason that a nation which has the right and duty to make and enforce maritime safety regulations with respect to one of the eight largest merchant fleets in the world necessarily has an important interest in maritime safety. The possession of power and responsibility with respect to the maritime safety of a substantial portion of the world's shipping must connote an important interest in the subject of maritime safety.

As has already been pointed out by the Government of Liberia, it is significant that the Government of the Netherlands, which is in disagreement with Liberia on other questions of interpretation, nevertheless recognizes in its Written Statement that for eight members, "the fact of being a large ship-owning nation is mentioned in Article 28 *(a)* as indication of their interest in maritime safety", whereas for the other members other factors have to be considered, such as an interest in the supply of crews or the carriage of passengers, and it concludes that as to the eight, "the important interest in maritime safety shall be evidenced by the fact that those members are the largest ship-owning nations". I refer the Court to pages 248 and 252 of the printed volume.

I recognize that this particular question has been discussed previously in both Written and Oral Statements, and I regret the necessity for having had to dwell upon it again. However, the matter at issue in this proceeding is the proper interpretation of a treaty provision, and it is most important in that connection to consider with great care the actual language itself, and particularly the phrase with respect to "important interest", since it has attracted so much comment.

Quite apart from the question whether each of the largest ship-owning nations necessarily has an important interest in maritime safety for the purpose of Article 28 *(a)*, it is clear in any event that Liberia and Panama have demonstrated such an interest in a number of respects. As the United States has already mentioned at considerable length in its Written Statement, among other things these two nations were among the twenty-eight United Nations Members represented at the first IMCO Assembly, they accepted the international obligations of the Load Line Convention of 1930 and the Safety of Life at Sea Convention of 1948, they participate in the North Atlantic Ice Patrol, they employ highly respected and officially recognized classification societies, as authorized by regulation 6 of Chapter I, Annex to the Safety of Life at Sea Convention, and it is admitted by all that their flag fleets are among the most modern in the world. I refer to pages 125 to 129 of the printed volume. This is a matter, however, which has already been covered quite thoroughly in the Statements of Liberia and Panama, and I shall not take up the time of the Court with a further review of the point.

Mr. President and Members of the Court, I would like to discuss, finally, the third question which I mentioned at the outset of this Statement, namely the issue whether the Assembly is required to elect to the Maritime Safety Committee at least the eight largest ship-owning nations, or whether it has discretion in the matter. The United States

contended in its Written Statement that the Assembly was bound to observe the criteria of Article 28 and that Liberia and Panama should have been included as members of the Committee for the reason that they were among the eight largest ship-owning nations, being respectively third and eighth with respect to quantity of tonnage registered under their laws, on the basis of the Secretary-General's list submitted to and made use of by the Assembly. I refer to pages 122 through 124 of the printed volume.

It has, however, been contended in certain of the other Written Statements that the requirement that the Maritime Safety Committee include not less than eight of the largest ship-owning nations is not mandatory upon the Assembly, but rather furnishes only a general directive or guide. This view is advanced by France, the United Kingdom and the Netherlands, among others, and a number of reasons are given in its support. I refer to pages 29, 239 and 248 of the printed volume, respectively.

The Government of France, for instance, contends that any other interpretation would make an unofficial statistic the only basis for election as one of the eight members, and argues that these statistics may not be used against States as though they were valid legal documents. It must be pointed out that what binds the Assembly is not any particular compilation of statistics, but rather the basic facts as to which nations have the greatest quantity of tonnage registered under their laws. The Assembly is certainly free to consider whatever evidence it deems necessary and competent in connection with its determination of these basic facts. In this particular case, the list submitted by the Secretary-General to the Assembly was the only evidence on the subject which appears to have been considered by the Assembly. Furthermore, the record indicates that the Assembly acted upon this evidence in electing six of the first eight members which were elected to the Maritime Safety Committee. The rejection of this evidence as to the other two forms the basis for the arguments regarding arbitrary action which have already been made by Liberia and Panama.

It is also argued by France that the choice of the eight members should be *from among* the largest ship-owning nations, or in other words that the requirement is not mandatory but a general directive. I refer to page 30 of the printed volume. The most direct answer to this contention is that it does violence to the language of Article 28 *(a)*, which states flatly that at least eight of the members *shall be* the largest ship-owning nations.

In this connection, it should be noted that in the very same Article 28 *(a)* of the Convention, but a few lines earlier, where the Convention draftsmen wished to express the conception of a choice from among alternatives, they were quite able to find the necessary words to convey that thought. I refer to the words which read "the Maritime Safety Committee shall consist of fourteen Members elected by the Assembly *from* the Members, governments of those nations", etc. If the draftsmen had intended to convey the same conception of choice with respect to the eight, they would unquestionably have inserted the necessary word "from" for that purpose.

Considerable weight has also been placed in a number of the Written Statements upon the use of the word "elected" in Article 28 *(a)*, where it first appears with reference to the fourteen members. It is contended in

these Statements that the word "elected" necessarily implies a choice between alternatives. It is contended that to speak of an automatic "election" would be a contradiction in terms, and would distort the natural meaning of the word. It is also contended that, since the word "elected" implies a free choice between alternatives in its second appearance in Article 28 *(a)*, where it refers to the six nations, it must necessarily have the same meaning in its earlier first appearance in the Article where it refers to all fourteen nations, and must therefore also have the same meaning with respect to the eight nations, since they are a part of the fourteen.

It is natural that the use of this word "elected" should have attracted a large amount of comment, because it forms one of the most important bases for the attack upon the mandatory character of the requirement that not less than eight of the Committee shall be the largest ship-owning nations. I would therefore like to add a few remarks to what has already been said on this subject.

In the first place, I would like to point out that, where it first appears in Article 28 *(a)*, the word "elected" forms a part of the general, introductory portion which indicates the number of members of the Committee. The use of a general opening clause or sentence is of course a common device in legal draftsmanship. It is logical to present a legal matter by beginning with the most general statement or proposition possible, and then proceeding on to the more detailed aspects. After making the general statement, the legal draftsman takes up the more subsidiary matters, in the course of which he goes through a process of explanation, elaboration, qualification and limitation with respect to the general proposition or statement with which he first began. Now, a general statement is often necessarily somewhat imprecise. There is a tendency to make language do double or even multiple duty, with the thought in mind that the inevitable limitation and qualification to be furnished by the particular statements which will follow will safely clarify the meaning of the draftsman. It therefore often happens that broad, unqualified language used in a general introductory statement may contain possible implications which are not in accord with the exact meaning intended by the draftsman. The draftsman relies upon the particular statements which will follow, to eliminate or block off these unwanted implications and thus clarify his meaning. This common practice of draftsmanship gives rise to the fundamental rule of interpretation of legal documents that the particular statement governs or overrides the general.

Now let us see what the draftsmen have done in Article 28 *(a)*. They begin with the general statement:

> "The Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety..."

If Article 28 *(a)* stopped short at that point, it would of course be proper and normal to infer that the word "elected" as there used was intended to express a right freely to choose fourteen from among all the Members of IMCO. However, Article 28 *(a)* does not stop there but continues on to describe in particular detail the composition of this Committee and the qualifications for membership in it. In doing so, it divides the Committee into two separate categories of members. The very first particular statement which follows the general statement as to the

fourteen which I have just quoted sets up the first of these two categories. This is the phrase which reads: "of which not less than eight shall be the largest ship-owning nations". Here is the first particular limitation on the general statement that the Committee is to consist of fourteen members. It creates a category of not less than eight members of the Committee and clearly states of what members that class shall consist. The possible implication flowing from the first use of the word "elected", that all fourteen members of the Committee may be freely elected from among all the Members of IMCO, has thus been eliminated, specifically and intentionally, by this first particular condition in Article 28 *(a)*.

It is submitted that it would be contrary to all normal and natural rules of interpretation of legal documents to permit a possible implication of a word used in the more general part of a legal provision, to override the clear language of a subsequent particular statement of limitation. To let the implications of free choice inherent in the word "elected" override the specific limiting phrase "of which not less than eight *shall be* the largest ship-owning nations", would be clearly to frustrate the purpose of the draftsmen of Article 28 *(a)*. It would amount to saying that the normal way of legal drafting should not have been followed, and that once a word has been put down on paper it is an absolute and can never be qualified or limited by anything said subsequently in the provision or document. It is therefore submitted that the word "elected" where it first appears in Article 28 *(a)* is not intended to and does not confer unfettered discretion upon the Assembly in connection with the eight.

Mr. President and Members of the Court, some interesting arguments have also been advanced which seek to demonstrate that a practice of free choice in the election of the Council under Article 17 indicates that the same practice may properly be followed under Article 28 *(a)*. I feel that this contention has already been most ably dealt with in the Oral Statement of the Government of Liberia, and so will not address myself to that point, but I do wish to take this occasion to say something else on the subject of Articles 17 and 18. I think that these Articles are relevant to the contention of the Government of Norway that it would be strange if the word "elected" were used in one and the same sentence of the Convention in two different senses. I refer to page 243 of the printed volume.

It will be remembered that Article 17 provides that the Council of IMCO shall consist of sixteen members and shall be composed of:

(a) six governments of nations with "the largest interest in providing international shipping services",

(b) six governments of other nations with "the largest interest in international sea-borne trade",

(c) two governments of nations elected by the Assembly from among those having "a substantial interest in providing international shipping services", and

(d) two governments of nations elected by the Assembly from among those having "a substantial interest in international sea-borne trade".

Article 18 provides that, at a reasonable time before each regular session of the Assembly, the Council shall determine, for the purpose of Article 17 *(a)*, the nations with the largest interest in providing inter-

national shipping services, and for the purpose of Article 17 *(c)*, the nations having a substantial interest in providing such services, and, for the purpose of Article 17 *(b)*, the nations with the largest interest in international sea-borne trade.

Now, let us take one of these categories, 17 *(c)*, the nations having a substantial interest in providing international shipping services. Article 18 does not require the Council to determine any particular number of nations having a substantial interest in providing international shipping services. The Council could, under Article 18, quite lawfully determine that only six nations had the largest interest in providing international shipping services, for the purpose of 17 *(a)*, and then determine that only two other nations had a substantial interest in providing such services, for the purpose of 17 *(c)*. Yet Article 17 *(c)* clearly provides that two of the Council shall be "*elected*" by the Assembly from among the Governments of nations having a substantial interest in providing international shipping services. There is no provision that the Assembly can go outside the group of nations nominated by the Council. In the event that the Council were to determine under Article 18 that only two nations had a substantial interest, the Assembly would under Article 17 *(c)* be limited to the election of just those two nations. There would in such case be no freedom of choice on the part of the Assembly. Although this is a perfectly lawful possibility, it should be noted that Article 17 *(c)* nevertheless thus uses the word "elected" to describe both the normal situation of free choice and also a possible situation where there may be no free choice at all. Article 16 *(d)* similarly uses the word "elect", in the phrase which provides that one of the functions of the Assembly shall be "to elect the Members to be represented on the Council, as provided in Article 17, and the Maritime Safety Committee as provided in Article 28". It is submitted that the words "elect" and "elected", as used in two places in the IMCO Convention with reference to the election of the Council, therefore necessarily comprehend a possible situation where the Assembly will have no alternative choices whatever. In that situation, the freedom of choice will have been denied the Assembly just as effectively by the Council as the phrase "not less than eight shall be the largest ship-owning nations" denies it to the Assembly under Article 28 *(a)*. Here, therefore, are other examples in the very same Convention of the use of the word "elect" to refer to what may be, as Liberia has so aptly termed it, a process of "collective identification".

On careful analysis, it therefore appears, both for the reasons which I have already stated and those given in the previous Oral Statements of Liberia and Panama and elsewhere, that the phrase "of which not less than eight shall be the largest ship-owning nations" was clearly intended to impose a mandatory requirement upon the Assembly.

This should not be taken as a capricious act of the Convention draftsmen. Clearly, if one bears in mind the fundamental objective of Article 1 *(a)* of encouraging the general adoption of the highest practicable standards of maritime safety, and the fact that those standards can be made binding upon a vessel only through their adoption by the State of its flag, and that adoption by the States with major quantities of registered tonnage therefore amounts to general adoption, then it is obvious that the mandatory character of the requirement is not fortuitous, but deliberately calculated to insure, so far as possible, the accomplishment of the basic Convention objective referred to.

In connection with this point that there is a mandatory requirement as to the eight, I would like to refer the Court to its opinions in *Conditions of Admission of a State to Membership in the United Nations* (Article 4 of the Charter), *I.C.J. Reports 1947-1948*, page 57, and particularly pages 63 and 64, and in *Voting Procedure and Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, I.C.J. Reports 1955*, page 67, and particularly pages 76 of the Court's opinion and 82, 85 and 108 of the separate opinions.

There are a number of other reasons why the Court should conclude that the Maritime Safety Committee elected on January 15, 1959, is not constituted in accordance with the IMCO Convention. Since they have already been covered most thoroughly by Liberia and Panama and also in various of the Written Statements, however, I shall omit any reference to them at this time.

To conclude, it is the view of the United States,

first, that the "largest ship-owning nations", as that term is used in Article 28 *(a)*, are the nations with the largest amounts of tonnage of shipping registered under their laws;

second, that those nations are automatically deemed to have an "important interest in maritime safety", for the purpose of Article 28 *(a)*;

third, that Article 28 *(a)* imposes a duty on the IMCO Assembly to elect as members of the Maritime Safety Committee of IMCO the eight nations having the largest amounts of tonnage of shipping registered under their laws;

fourth, that since Liberia and Panama were at the time of the election of the members of the Committee on January 15, 1959, respectively the third and the eighth largest ship-owning nations from the standpoint of registered tonnage, they were entitled to be elected as members of the Committee;

fifth, that since they were not so elected, the Committee is not constituted in accordance with the IMCO Convention; and

sixth, that the answer given by the Court to the question put to it should be in the negative.

I do not know, Mr. President, whether the privilege will be granted to any of the Nations here represented of making a second statement, and I do not know, if that privilege were to be granted, whether the United States will find it necessary to do so; but, if any submission or reservation must be made at this time in that connection, I should like to be considered as making it on behalf of the United States and I think I may speak for Liberia and Panama on that basis.

In closing, Mr. President and Members of the Court, I wish to express my appreciation for the patient consideration which you have accorded my Oral Statement. Thank you.

6. EXPOSÉ ORAL DE M. LE PROFESSEUR RICCARDO MONACO

(REPRÉSENTANT DU GOUVERNEMENT ITALIEN)
AUX AUDIENCES PUBLIQUES DES 28 ET 29 AVRIL 1960

[Audience publique du 28 avril 1960, matin]

Qu'il me soit permis, Monsieur le Président, Messieurs de la Cour, de vous exprimer les sentiments respectueux du Gouvernement de la République italienne et de vous dire combien j'apprécie l'honneur et le grand privilège qui me sont réservés de comparaître aujourd'hui pour la première fois devant vous en ma qualité de représentant du Gouvernement italien.

Monsieur le Président, Messieurs de la Cour:

Il ne nous apparaît pas inutile, au début de notre exposé, d'évoquer rapidement les phases de la procédure qui a été suivie par l'Assemblée de l'IMCO en ce qui concerne la question de droit dont la Cour est actuellement saisie. Voilà pourquoi nous nous permettons de faire certaines remarques, qui d'ailleurs ne doivent pas être interprétées comme des critiques adressées aux institutions de l'IMCO.

Nous savons bien que d'après l'opinion unanime de la doctrine et de la jurisprudence, on reconnaît qu'il appartient à la Cour internationale de Justice d'interpréter tous les actes de caractère international, y compris évidemment les constitutions des organisations internationales.

Et nous ne contestons nullement ce principe.

Il y a lieu cependant de rappeler que l'Acte constitutif de l'IMCO lui-même contient des dispositions particulières, ayant pour objet l'interprétation des clauses de la Convention. Il serait alors peut-être opportun de voir si et dans quelle mesure les règles d'interprétation de caractère particulier doivent être prises en considération.

L'article 55 de la Convention précise que tout différend ou que toute question surgissant à propos de l'interprétation ou de l'application de la Convention est soumis à l'Assemblée pour règlement ou réglé de toute autre manière dont les parties au différend seraient convenues.

Ce n'est qu'au cas où l'on constate que la question ne peut être réglée par l'Assemblée elle-même, ou bien en ayant recours à d'autres systèmes de règlement, que la question est portée par l'Organisation par-devant la Cour internationale de Justice pour avis consultatif.

A ce propos on pourrait se demander si la question d'interprétation a déjà été soumise à l'Assemblée, sans que celle-ci soit parvenue à une solution. En tenant compte de ce qui s'est passé l'année dernière, lors de la première assemblée de l'IMCO, on pourrait même avoir certains doutes à cet égard. Mais ces doutes n'ont aucune influence sur la compétence de la Cour, comme nous l'avons déjà souligné dans notre exposé écrit. (Livre jaune, pp. 225-226.)

Dorénavant, si vous me le permettez, Monsieur le Président, je désignerai comme « livre jaune » le volume imprimé qui contient les exposés écrits des différents États.

En réalité, le problème de demander à la Cour internationale de Justice un avis consultatif avait déjà été soulevé avant que l'Assemblée n'adopte le projet de résolution du Royaume-Uni, à la suite duquel elle procéda à l'élection des huit membres du Comité de la Sécurité maritime.

En effet — et nous reprenons le texte tel quel qui figure à la page 13 du livre jaune — le représentant du Libéria, à la huitième séance de l'Assemblée, le 15 janvier 1959, présenta oralement une motion aux fins de soumettre à la Cour internationale de Justice une demande d'avis consultatif, portant sur les points de savoir si le tonnage de jauge brute immatriculé constituait le critère à appliquer pour déterminer l'importance de la flotte de commerce d'un pays donné, en vue de l'élection des huit pays qui possèdent les flottes de commerce les plus importantes, conformément à l'article 28 de la Convention, ou bien si l'immatriculation au nom d'un ressortissant d'un pays donné constituait le critère approprié. Dans le cas d'une réponse affirmative à l'une ou l'autre des questions et en tenant compte du fait que, selon le premier critère, le Libéria viendrait à se placer au troisième rang et le Panama au huitième rang, l'Assemblée aurait-elle le devoir d'élire le Libéria et le Panama au Comité de la Sécurité maritime?

La motion du Libéria donna lieu à un débat, à la suite duquel le représentant de ce pays déclara qu'il introduirait ultérieurement sa motion, sous la forme d'un projet de résolution. Le vote de l'Assemblée pour l'élection des huit membres étant, entre temps, intervenu, le représentant du Libéria présenta un projet de résolution aux termes duquel l'Assemblée déciderait de soumettre à la Cour, pour avis consultatif, les points de droit soulevés par l'interprétation de l'article 28 de la Convention et de charger la Commission juridique de l'Assemblée de formuler les questions à poser à la Cour.

Après que la Commission juridique eut examiné tant la résolution du Libéria que les amendements introduits par d'autres États, on parvint à la formulation des points faisant l'objet de la demande d'avis consultatif.

L'Assemblée de l'IMCO, lors de sa onzième séance, tenue le 18 janvier 1959, adopta un projet de résolution commun du Libéria, du Panama et du Royaume-Uni, qui est précisément celui par lequel la Cour a été saisie de la demande d'avis consultatif.

C'est à travers cette procédure que la question de l'interprétation de l'article 28 a été traitée au sein de l'Assemblée de l'IMCO. Mais cette procédure même démontre qu'il y a eu toute une série de votes et de discussions sur la question, sans que, par contre, l'Assemblée ait tâché de les résoudre. Effectivement, le Gouvernement du Libéria a pensé, dès le premier abord, qu'il y avait lieu de saisir directement la Cour internationale de Justice sans appeler l'Assemblée à trancher la question d'interprétation. D'autre part, on pourrait douter que l'Assemblée ait décidé cette question lorsqu'elle a procédé à l'élection des huit États, puisque, en effet, l'objet de la décision de l'Assemblée n'était pas d'interpréter l'article 28, mais bien d'élire un certain groupe d'États comme membres du Comité de la Sécurité maritime.

Tout cela est prouvé par le libellé même de la Résolution de l'Assemblée, qui dit:

> « Considérant que l'interprétation du paragraphe *a)* de l'article 28 de la Convention portant création de l'Organisation intergouverne-

mentale consultative de la navigation maritime a donné lieu à des divergences d'opinion,

Considérant que la Convention, en son article 56, dispose que les questions de droit peuvent être portées devant la Cour internationale de Justice pour avis consultatif », etc.

En d'autres termes, l'Assemblée n'a pas déclaré formellement qu'elle n'a pu régler la question de droit et que, par conséquent, elle se voit dans l'obligation de la porter, conformément à l'article 56 de la Convention, *devant la Cour, mait tout simplement qu'il existe une interprétation* de l'article 28 qui a donné lieu à des divergences d'opinion, ce qui ne coïncide pas avec la constatation de l'impossibilité, pour l'Assemblée, de parvenir à un règlement.

Monsieur le Président, Messieurs de la Cour, voilà donc pourquoi on pourrait même estimer que le recours au système prévu par l'article 55 de la Convention est toujours possible, car en effet l'Assemblée n'a pas encore été saisie, à proprement parler, du différend qui concerne l'interprétation de l'article 28.

Nous ne savons pas si la Cour voudra se pencher sur les considérations de procédure que nous avons faites tout à l'heure; mais quand même nous avons cru de notre devoir de signaler à la Cour lesdites particularités de procédure. A part cela, nous sommes sûrs que tous les États intéressés souhaitent que la Cour veuille bien trancher ce différend d'interprétation, à la solution duquel les organes de l'IMCO ont déjà apporté une contribution considérable. Et même si la demande d'avis consultatif a été formulée en dehors de la procédure expressément prévue à cet effet par les articles de la Convention, il est bien sûr que la Cour peut toujours connaître à titre consultatif d'une question concernant l'interprétation d'un accord international.

Après les remarques de caractère préalable que nous avons faites tout à l'heure, nous devons aborder les différents points qui ont été mis en évidence par l'analyse juridique très approfondie résultant des différents exposés écrits qui ont été soumis à la Cour.

Nous ne prétendons pas considérer ici tous les problèmes qui touchent au fond de la question. Les représentants des autres États qui me *suivront* à cette barre apporteront à la Cour des éléments précieux. Nous voulons essentiellement élucider les problèmes d'interprétation.

Il est hors de doute que le passage le plus important de l'acte instituant l'IMCO, sur lequel la Cour devra porter son attention, est celui qui figure à l'article 28 *a)*, dont le libellé est le suivant:

> « Huit au moins de ces pays doivent être ceux qui possèdent les flottes de commerce les plus importantes; »

En ce qui concerne l'interprétation de cette phrase, on doit reconnaître que presque tous les arguments possibles ont été avancés et développés de part et d'autre, dans les exposés écrits établis par les différents États intervenus dans le débat. Mais on sait également que l'analyse juridique ne connaît pas de limite et que la recherche tendant à la bonne interprétation d'un texte est presque inépuisable. De plus, il faut souligner qu'il y a lieu ici de corriger certaines interprétations moins correctes du passage en question qui ont été données par certains États.

D'après les critères d'interprétation usuelle, on doit admettre que les rédacteurs du passage précité, en utilisant le mot « possèdent » de pré-

férence à n'importe quel autre terme qui aurait pu être adopté pour formuler les idées à exprimer par l'article 28 *a)*, ont certainement eu des raisons valables.

Cela, par contre, ne semble guère avoir d'importance aux yeux des distingués juristes qui appuient les raisons du Panama et du Libéria.

A la page 179 du livre jaune (exposé du Gouvernement du Panama) on lit que d'après la pratique et les usages généraux, *ship-owing nations* signifie les États sous le pavillon duquel les navires ont été enregistrés; et, à cet égard, on cite la décision de la Cour internationale de Justice inhérente au cas du *Canal de Corfou*. A vrai dire le passage évoqué n'est aucunement décisif, car il se borne à dire que les pavillons des navires ayant traversé le canal sont de telle ou de telle autre nationalité, ou mieux qu'ils battent le pavillon de la Grèce, de l'Italie, de la Roumanie, etc.

Étant donné que dans le mémoire du Panama ainsi que dans celui du Libéria on place très souvent sur le même plan la nationalité, l'appartenance, la propriété et le pavillon des navires, nous estimons qu'il est tout d'abord nécessaire d'établir avec toute clarté la signification de ces différentes expressions.

En ce qui concerne la nationalité on dit très souvent qu'elle dépend du pavillon, c'est-à-dire que tout navire a la nationalité de l'État dont il bat le pavillon; et que le droit de battre tel ou tel autre pavillon dépend à son tour du lieu d'enregistrement du navire. Mais le fait que le navire ait été enregistré par un État et que, par conséquent, il puisse battre le pavillon de cet État, ne signifie point que l'État en question possède le navire, ni qu'il exerce sur celui-ci un droit de caractère réel.

La notion de nationalité des navires est elle-même assez contestée. D'après une doctrine à laquelle ne manque certes pas une autorité bien reconnue, on établit une distinction très nette entre le droit de pavillon et la nationalité. Cela, parce que l'on considère que seules les personnes physiques possèdent une véritable nationalité, tandis que pour les personnes morales et les communautés de choses, il est bien plus difficile d'aboutir à une idée équivalente à celle de la nationalité. Voilà donc pourquoi on dit que le droit de pavillon et la nationalité des navires sont deux choses distinctes. Car le pavillon signifie qu'un bateau a été immatriculé dans un pays déterminé; ce qui nous permet d'admettre l'une de ces notions sans l'autre, parce qu'elles ne se commandent pas mutuellement.

En résumant cette doctrine par les mots mêmes employés par l'un de ses représentants les plus éminents, le professeur Niboyet (voir l'article « Navires de mer » inséré dans le *Répertoire de droit international*, volume X, p. 10), nous pourrions dire que la « nationalité des navires signifie qu'ils sont rattachés par leur enregistrement à un certain pays, qui exerce sur eux ses droits de souveraineté, à la protection duquel ils ont droit, enfin par la loi duquel sont régis les divers faits se produisant à bord durant le voyage et qui s'applique pour de nombreux conflits de lois ».

Comme on le voit très aisément, rien dans les idées qui d'après Niboyet sont contenues dans la conception de nationalité d'un navire ne se réfère à la propriété, au droit sur le navire lui-même.

En tout état de cause, il faut reconnaître que quand on parle de nationalité d'un navire dans le domaine du droit international, car vraiment ici il s'agit de confronter la situation juridique d'un navire par rapport au lien qui le rattache à l'un ou l'autre État, on ne peut pas suivre

les idées sur lesquelles est bâtie la notion de nationalité d'après la loi interne.

Monsieur le Président, Messieurs de la Cour, sur la base ce de qui précède, on peut vraiment affirmer que les navires n'appartiennent pas aux biens de l'État du point de vue international. Quand un État confère son pavillon à un navire, il indique ce navire comme un objet tombant sous le coup de ses lois internes. En d'autres termes, il crée un lien de caractère formel et public entre son système juridique et le navire en tant que celui-ci apparaît comme une communauté qui se déplace d'un endroit à un autre. Tous les rapports qui surgissent entre un État et un navire par le fait que le second a été enregistré par le premier sont donc des relations de caractère public se référant aux différents pouvoirs qui, d'après les lois du lieu d'enregistrement, appartiennent aux autorités publiques à l'égard du navire. Rien donc qui puisse démontrer que de l'enregistrement il découle un droit quelconque pour l'État à considérer le navire comme sa propriété ou, tout au moins, à exercer sur lui des droits de caractère réel touchant au domaine des facultés qui appartiennent au sujet privé.

Nul ne conteste que tout État a le pouvoir de fixer par sa loi interne, sous réserve des limites exigées par le droit international — je tiens à souligner cette limitation —, les conditions auxquelles un navire peut être inscrit dans ses propres registres. Il serait fort souhaitable que des critères uniformes fussent reconnus à cet égard par tous les États qui ont des intérêts prépondérants dans le domaine de la marine marchande; cela pourrait éviter bien des conflits de loi qui se produisent entre les différents systèmes juridiques et dont la solution se heurte très souvent à des difficultés considérables. Cela reconnu, il faut tout de même admettre que les différentes législations nationales, en établissant un lien de caractère public entre l'État et le navire, par le fait de l'enregistrement et de la concession du droit de battre pavillon, ne touchent pas et n'ont pas intérêt à toucher à la propriété du navire. Il s'agit en effet de deux domaines bien différents: celui qui se réfère aux pouvoirs publics de l'État du pavillon et celui des droits privés s'exerçant directement sur les navires. Nous en avons la meilleure preuve dans le fait que des étrangers sont admis à inscrire les navires de leur propriété auprès d'un État différent de celui de leur nationalité, comme c'est précisément le cas pour les États qui sont bien disposés à placer sous leur pavillon les navires de propriété étrangère. Les idées des différents États à cet égard, on le sait, s'éloignent considérablement les unes des autres. Il est des États pour lesquels l'enregistrement des navires n'est possible que si la propriété appartient entièrement à leurs propres nationaux, pour d'autres, il est possible que des ressortissants étrangers participent dans une certaine mesure à la propriété des navires. Enfin, il y a d'autres États qui admettent l'enregistrement et la concession de leur pavillon même pour des navires dont la propriété est entièrement étrangère. Dans cette dernière hypothèse, nous voyons parfois qu'on exige au moins le domicile des propriétaires dans l'État d'enregistrement, mais il se présente encore le cas où aucune condition particulière n'est imposée aux propriétaires de nationalité étrangère. Par ce qui précède nous croyons avoir démontré suffisamment que la nationalité du navire n'a rien à voir avec la propriété de celui-ci, que, tandis que la nationalité exprime un lien de droit public établi entre l'État et le navire, la propriété demeure une notion de droit privé et ne dépasse en aucun cas les limites du système juridique national

de l'État intéressé et qui, par conséquent, ne peut être prise en considération par le droit international.

Les États qui s'opposent à notre thèse font découler toute une série de conséquences de la loi en vigueur dans le lieu où le navire est enregistré. Par exemple, à la page 44 du livre jaune — exposé du Libéria — on affirme que la loi du lieu d'enregistrement vaut comme loi du navire; en outre, que l'État d'enregistrement a une juridiction prédominante sur les navires battant son propre pavillon. Nous ne contestons aucunement ces résultats, étant donné qu'ils sont universellement admis et que, d'autre part, ils n'apportent aucune preuve susceptible d'étendre le domaine de la loi du pavillon à des relations dont elle se trouve être exclue; il s'agit précisément des relations entre l'État et le navire en tant que celui-ci n'est pas seulement soumis à la loi du pavillon, mais qu'il doit aussi appartenir à l'État. C'est précisément ce que veut exprimer, à notre avis, l'article 28 *a)* lorsqu'il emploie le mot « possèdent »: nous avons déjà dit que les rédacteurs de l'article n'ont pas choisi ce mot par hasard. Il est évident que, pour exprimer une idée différente de celle qu'on peut naturellement attribuer à ce terme, ils auraient bien pu utiliser d'autres expressions très faciles d'ailleurs à formuler. Comme l'indique très justement l'exposé écrit du Gouvernement suisse, livre jaune, page 217, ils auraient pu adopter à la place de la formule « pays qui possèdent les flottes de commerce les plus importantes » celle de « pays qui ont sous leur pavillon les flottes les plus importantes » ou n'importe quelle autre phrase d'une signification semblable. Au contraire, le fait qu'ils aient choisi parmi toutes les expressions utilisables une expression tellement concrète comme celle de « possèdent » démontre très *clairement que leur intention a été de signifier quelque chose de bien* différent de l'enregistrement ou du pavillon. Nous savons très bien qu'on ne saurait avancer l'idée que, d'après l'article 28 *a)*, les navires devraient être la propriété de l'État lui-même, mais comme, dans le langage usuel, on entend par « navires de tel ou de tel autre État » les bateaux appartenant à ses ressortissants, l'interprétation la plus logique du terme est que l'article 28 *a)* exige que le navire appartienne à des propriétaires ayant la nationalité de ce même État.

Le mémoire du Gouvernement suisse nous suggère d'autre part une idée à laquelle nous attachons une certaine importance dans l'ensemble de l'interprétation du texte qui nous intéresse ici. Il indique que l'acte constitutif de l'IMCO, afin de désigner certains groupes d'États qui doivent être pris en considération pour la composition de ses différents organes, adopte des critères très variables qui, en aucun cas, ne se réfèrent plus à l'idée de la propriété des navires. Voilà donc les références. En effet, le cas échéant, la constitution de l'IMCO considère:

1) Les pays qui sont le plus intéressés ou qui ont un intérêt notable (art. 17 *c)*) à fournir des services internationaux de navigation maritime (art. 17 *a)*);

2) les pays qui sont le plus intéressés ou bien qui ont un intérêt notable (art. 17 *d)*) dans le commerce international maritime (art. 17 *b)*);

3) les pays qui, comme nous le savons, ont un intérêt important dans les questions de sécurité maritime (art. 28);

4) les pays dont les ressortissants entrent en grand nombre dans la composition des équipages (art. 28 encore); et enfin, les pays qui

sont intéressés au transport d'un grand nombre de passagers de cabine ou de pont (encore art. 28).

Nous voyons donc que jamais on ne fait de référence au tonnage des différentes flottes nationales, et que le lien qui s'établit par l'enregistrement n'entre jamais en ligne de compte en ce qui concerne les critères utilisés aux fins que nous venons d'indiquer.

[Audience publique du 28 avril 1960, après-midi]

Monsieur le Président, Messieurs de la Cour, les gouvernements qui contestent la validité de l'élection effectuée par l'Assemblée de l'IMCO invoquent très souvent à leur appui les procédures qui se sont déroulées au sein de la Conférence de 1948 — Conférence de Genève — qui adopta l'acte constitutif de l'IMCO. Mais ces citations ne sont pas toujours de nature à apporter des éléments utiles à la thèse qui s'oppose à la nôtre.

Par exemple, on lit à la page 180 du livre jaune — exposé du Gouvernement du Panama — que, pendant la Conférence de 1948, lorsqu'on a décidé de former un deuxième groupe de travail chargé d'examiner les matières relatives à la sécurité maritime, le Panama ne fut inclus dans ce groupe de travail qu'après une forte protestation et après que la délégation panaméenne ait menacé de se retirer de la Conférence. A ce moment-là, le Panama était classé à la cinquième place en raison du tonnage enregistré sous son pavillon. Mais cette circonstance ne fut pas considérée comme décisive par la Conférence, laquelle avait marqué sa préférence en constituant le deuxième groupe de travail pour des pays qui, tout en ayant sous leurs pavillons un tonnage inférieur à celui du Panama, donnaient des garanties majeures en matière de sécurité maritime et étaient surtout en mesure de contribuer avec plus d'efficacité à la solution des questions posées devant la Conférence.

Voilà donc que cet épisode, au lieu d'apporter des éléments en faveur de la thèse contraire à la nôtre, renforce notre idée que le tonnage n'est ni le seul, ni même le plus marquant élément qui peut apporter la preuve de l'importance qu'un certain État a dans les questions touchant à la sécurité maritime.

En concluant sur ce point, nous pouvons bien affirmer que les arguments avancés par les États qui s'opposent à notre thèse ne parviennent pas à démontrer que l'idée d'*ownership*, ou de propriété du navire, correspond à celle d'enregistrement ou de pavillon.

Monsieur le Président, Messieurs de la Cour, nous avons tâché de premier abord de soumettre à la Cour une interprétation de l'article 28 *a)* qui nous paraît à la fois logique et correspondant à la réalite de la situation. Mais, à travers la lecture du livre jaune, nous avons vu que la recherche concernant les questions d'interprétation a été poussée jusqu'aux limites les plus avancées, ce qui nous amène à voir les problèmes relatifs à l'interprétation de la constitution de l'IMCO dans un cadre plus large que celui qui touche seulement à certaines dispositions concrètes.

Le mémoire du Gouvernement du Panama a fait un examen approfondi des règles qui régissent l'interprétation des traités; et nous pourrions bien suivre tout d'abord les arguments qu'il soumet à cet égard à la Cour. Nous voyons qu'à la page 175 du livre jaune, ledit mémoire énonce deux règles générales d'interprétation qui seraient universellement reconnues et dont l'Assemblée de l'IMCO aurait dû s'inspirer.

La première est la suivante:

> « Lorsque le texte d'un traité ou d'une loi est clair, inéquivoque et non ambigu, ce texte doit être interprété suivant son sens naturel et usuel, sans qu'on ait besoin d'examiner le traité et la loi dans leur ensemble, ou bien de tenir compte d'autres éléments extrinsèques ayant une connexion avec le texte lui-même, afin de constater l'esprit ou l'intention de la règle particulière qu'il s'agit d'interpréter. »

La deuxième serait conçue de la façon suivante:

> « Si le sens d'une disposition particulière, d'une loi ou d'un traité n'est pas clair, ou bien s'il est ambigu ou équivoque, il s'avère nécessaire de considérer non seulement le traité ou la loi dans leur ensemble, mais aussi bien les autres éléments extérieurs connexes, afin d'établir l'esprit et l'intention de la règle en question. »

Nous pouvons reconnaître, en principe, que les deux règles d'interprétation que nous venons d'évoquer sont généralement appliquées par la jurisprudence internationale. Il serait, par conséquent, superflu de citer à l'appui desdites règles certaines décisions de la Cour et d'autres tribunaux internationaux.

Cela dit, il faut, au contraire, être bien sûr que le mémoire du Gouvernement du Panama, en partant de l'hypothèse que le texte de l'article 28 *a)* est clair, inéquivoque et dépourvu d'ambiguïté, a vraiment posé la question d'une façon logique et correcte au point de vue juridique. Eh bien, c'est précisément sur le point de départ du raisonnement du Panama que nous ne pouvons pas être d'accord.

Cette grande question d'interprétation, à la solution de laquelle tous les gouvernements intéressés ont tâché d'apporter leur contribution, s'est posée précisément du fait que le sens de l'article 28 *a)* n'est pas clair et que la disposition fondamentale de cet article donne lieu à des difficultés d'interprétation. Non seulement le Gouvernement italien mais également les autres gouvernements qui appuient la solution donnée par l'Assemblée de l'IMCO au problème de la composition du Comité de la Sécurité maritime sont convaincus qu'il faut faire un grand effort d'analyse juridique pour parvenir à établir la signification exacte des mots qui figurent dans ce célèbre passage de l'article 28 *a)*.

Voilà donc que si on admet que le sens de l'article n'est pas clair, la Cour ne pourra tenir compte de tous les arguments qui sont fondés sur l'hypothèse contraire.

En tout état de cause, on ne pourrait jamais affirmer que la disposition dont il s'agit est tellement claire qu'il n'est aucunement nécessaire d'avoir recours à des éléments connexes ou même extratextuels. Car si la première règle énoncée par le Gouvernement du Panama est en principe valable, il ne faut pas se cacher qu'elle a eu dans la doctrine et dans la pratique d'autres formulations, peut-être meilleures que celle qui nous est soumise par le mémoire panaméen.

Nous pouvons recourir à cet égard à l'autorité de l'Institut de droit international qui, lors de sa session tenue à Grenade en 1956, a établi quelle est l'opération de base à effectuer quand on se trouve en présence d'un texte qui, en principe, peut apparaître clair.

A l'article premier de la résolution de l'Institut concernant l'interprétation des traités, on lit ce qui suit:

« L'accord des parties s'étant réalisé sur le texte du traité, il y a lieu de prendre le sens naturel et ordinaire des termes de ce texte comme base d'interprétation. »

Ce qui signifie que, au cas où le sens du texte est clair, il est quand même indispensable d'accomplir à son égard une opération d'interprétation. En effet, on sait que même les mots les moins ambigus comportent souvent plusieurs significations: il suffit d'ouvrir les pages d'un vocabulaire pour le constater immédiatement, ce qui est, d'autre part, clairement reconnu par l'Institut de droit international, qui nous dit que les termes du texte doivent être pris comme base d'interprétation, étant donné que, par eux-mêmes, ils ne peuvent pas nous apporter directement l'interprétation dans son entier.

Monsieur le Président, Messieurs de la Cour, la résolution de Grenade de l'Institut de droit international, une fois posée la règle que nous avons expliquée, indique quelles sont les opérations que l'interprète doit accomplir, en spécifiant:

« Les termes des dispositions du traité doivent être interprétés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international. »

Voilà donc que, de l'avis de l'Institut de droit international, le texte, même quand il est clair — ce que nous contestons dans le cas présent —, ne s'interprète pas par lui-même; au contraire, ceux qui sont appelés à en dégager la portée exacte doivent s'inspirer de plusieurs critères, c'est-à-dire, premièrement, de l'interprétation systématique — examen des dispositions dans leur contexte entier —; deuxièmement, du principe de la bonne foi, et enfin, et d'une façon générale, des principes du droit international.

Si nous nous penchons maintenant sur la jurisprudence de la Cour pour vérifier dans quelle mesure elle a donné d'importance au principe de l'ancien jurisconsulte romain *in claris non fit interpretatio*, c'est-à-dire à la règle du sens clair, nous devons reconnaître que ce principe a été appliqué non pas directement, mais seulement à la suite d'une appréciation logique assez compliquée.

Prenons, par exemple, le cas classique du deuxième avis consultatif donné par la Cour sur l'*Interprétation des traités de paix;* c'est l'avis du 18 juillet 1950. Il s'agissait d'interpréter les articles 36, 38 et 40 respectivement, des traités de paix conclus avec la Bulgarie, la Roumanie et la Hongrie; ces articles prévoyaient que certains litiges soient tranchés par une commission arbitrale composée de trois membres, dont deux désignés par chacune des deux parties, et un nommé d'un commun accord par les parties elles-mêmes. Au cas où celles-ci ne tomberaient d'accord, dans un délai d'un mois, sur le choix du troisième membre, le Secrétaire général des Nations Unies aurait eu le pouvoir de le nommer.

A cet égard, deux questions d'interprétation se posaient: la première consistant à savoir si la nomination des arbitres constituait ou non une condition préalable afin que le Secrétaire général puisse nommer, à son tour, le troisième membre; la deuxième tendant à établir si la commission constituée en vertu de l'intervention du Secrétaire général était ou non identique comme structure juridique à celle qui, au contraire, aurait été formée directement par les parties.

On affirmait d'une part que la désignation du troisième membre aurait pu intervenir seulement après que les parties aient déjà choisi leur représentant au sein de la Commission. D'autre part on soutenait que le terme *troisième membre* contenu dans les articles des traités de paix indiquait seulement le caractère neutre de l'arbitre devant être nommé par le Secrétaire général et que, pour cela, sa nomination ne devait pas nécessairement faire suite à celle de deux arbitres nationaux.

La Cour, ayant constaté que le sens naturel et ordinaire des mots employés était suffisant pour une interprétation s'écartant de la valeur littérale des termes, se prononça en faveur de la première solution.

On voit donc ici que la théorie du sens clair a porté la Cour, non pas à adopter la solution découlant de la portée littérale des termes, mais à reconstruire, sur cette base littérale, le sens naturel et ordinaire des mots.

Voyons maintenant d'une manière analogue les conclusions auxquelles est parvenue la Cour dans son avis consultatif du 28 mai 1948 sur l'*Admission d'un État aux Nations Unies.* Il s'agissait, comme tout le monde le sait, d'interpréter l'article 4 du Statut des Nations Unies, en ce qui concerne les conditions requises afin qu'un État puisse être admis à l'Organisation.

La Cour est parvenue à une interprétation logico-littérale du texte en question, en affirmant, entre autres, que le sens naturel des termes employés porte à considérer l'énumération des conditions d'admission comme étant l'interprétation stricte et non de caractère exemplificatif.

C'est pour cela que la Cour a pu écarter toute référence aux travaux préparatoires — références qui, évidemment l'auraient beaucoup éloignée du principe du sens clair —, et elle a souligné que si les rédacteurs de la Charte avaient voulu reconnaître aux Membres la faculté d'introduire dans l'application de l'article 4 des considérations ou des éléments différents de ceux qui y sont exprimés, ils n'auraient pas manqué d'adopter une autre formule. Cette conclusion peut bien s'appliquer au cas dont nous discutons en ce sens que si les auteurs de l'article 28 *a)* avaient eu l'intention de se référer au critère du tonnage au lieu qu'à celui de l'*importance de la flotte*, ils l'auraient sans doute énoncé d'une manière explicite.

Nous voyons donc avec quelle sagesse et quelle pondération la Cour a utilisé le principe du sens clair, et nous remarquons aussi que dans les cas évoqués tout à l'heure l'interprétation du texte est toujours issue d'un long travail d'analyse juridique. Ce travail n'a pas été limité à l'examen littéral des termes employés, mais il a pris aussi en considération d'autres éléments de la théorie générale de l'interprétation des actes juridiques, notamment ceux qui se rapportent à l'interprétation stricte ou à l'interprétation extensive. Si, devant un texte donné, on doit décider s'il faut l'interpréter d'une façon stricte ou bien sur une base large, on fait quelque chose de plus qu'apprécier la valeur littérale des termes employés.

L'Institut de droit international établit encore un critère très connu d'interprétation: à savoir que les dispositions d'un traité doivent être interprétées *dans le contexte tout entier.*

Nous croyons vraiment que, dans le cas présent, il serait très dangereux et même illogique de prendre la phrase: « *Huit au moins de ces pays doivent être ceux qui possèdent les flottes de commerce les plus importantes ;* » séparément du contexte, c'est-à-dire de la phrase qui précède immédiatement le passage précité. Cette phrase se lit, nous le savons, comme suit:

« Le Comité de la Sécurité maritime se compose de quatorze Membres élus par l'Assemblée parmi les Membres, gouvernements des pays qui ont un intérêt important dans les questions de sécurité maritime. »

Monsieur le Président, Messieurs de la Cour, si nous lisons alors l'article 28 dans son entier, comme l'exigent les bonnes règles d'interprétation et comme le souligne l'Institut de droit international, nous constatons que le critère de l'« intérêt important dans les questions de sécurité maritime » qui figure à la toute première place, apparaît aussi comme le critère fondamental sur lequel les autres prévus au même article s'insèrent comme une spécification et un complément. En d'autres termes, la qualité qu'on demande comme toute première aux États en question et à laquelle on peut ajouter les autres sans en pouvoir faire abstraction, c'est cet intérêt prépondérant en matière de sécurité maritime.

Nous savons que l'article 28, après avoir indiqué le critère fondamental et général qui régit le sens et la portée de la disposition tout entière visant la composition du Comité, énonce les critères spécifiques qui fixent la répartition des sièges. Mais c'est précisément pour cela qu'il faut reconnaître que tout critère spécifique présuppose le critère général qui est toujours supposé être à sa base. La lecture du texte dans son entier nous porte donc à constater que le concours du critère général est requis conjointement, car on ne saurait admettre que la seule présence d'un critère spécifique peut permettre de faire abstraction de vérifier si le critère général est rempli. En d'autres termes, il n'est pas suffisant que l'État possède un tonnage grâce auquel sa marine est classée à la tête des flottes marchandes, mais il est nécessaire aussi qu'il ait un intérêt marquant en matière de sécurité maritime.

La comparaison de l'importance que les différents États ici intéressés présentent au point de vue de la sécurité maritime se fait sur la base de données techniques qui ont déjà été expliquées à la Cour. Mais, en ce qui concerne la comparaison entre le Libéria et le Panama d'un côté et les États élus comme membres du Comité de la Sécurité maritime de l'autre côté, qu'il nous suffise de nous référer à ce que nous avons remarqué à la page 223 du livre jaune.

Nous avons donc constaté que l'interprétation logico-systématique du texte de l'article 28 *a)* nous conduit à des résultats bien différents de ceux qui nous sont présentés par les gouvernements qui contestent la légitimité de l'élection du Comité de la Sécurité maritime.

Cela mis au clair, il faut encore suivre les autres critères d'interprétation suggérés par l'Institut de droit international. En ce qui concerne le principe de la bonne foi, celui-ci date d'une époque très ancienne, comme nous le savons tous, de façon qu'on peut dire qu'il se trouve à l'origine même de la première élaboration du droit international. Il suffit de rappeler l'œuvre de Grotius, ainsi que celle des auteurs qui se sont inspirés de son enseignement. Voilà donc qu'on peut même dire que ce principe d'interprétation n'a pas été découvert par l'Institut de droit international, mais plutôt réaffirmé actuellement, compte tenu de l'évolution la plus récente des relations internationales.

Qu'est-ce que cela signifie, que les traités doivent être interprétés de bonne foi? Cela veut dire que le traité ne peut pas toujours être apprécié d'après la signification des mots qui ont été employés et qu'il faut parfois tenir compte de certains éléments de caractère subjectif

qui dépassent la valeur exclusivement formelle des dispositions du traité.

Voilà donc que, en suivant cette méthode, l'interprète sera amené à nier l'importance prédominante de l'élément formel ou, tout au moins, à balancer ce dernier élément avec l'élément psychologique de la bonne foi. Cela, évidemment, dans la mesure où une recherche de raisons psychologiques qui ont conduit les parties à la stipulation du traité soit vraiment possible.

Il faut reconnaître, en tout état de cause, que le domaine d'application du critère de la bonne foi rencontre des limites assez restreintes en ce qui concerne l'interprétation des actes constitutifs d'organisations internationales, cela pour une raison qui me paraît très simple. Tandis que dans les accords bilatéraux il y a opposition d'intérêts et de volontés, ce qui amène parfois les parties à s'écarter d'une conduite tout à fait loyale, dans les actes qui donnent vie à des organisations internationales, nous ne sommes pas en présence de volontés étatiques bien individualisées l'une par rapport à l'autre. Il est par conséquent très difficile de faire une analyse de ces volontés et il est presque impossible de parvenir à l'appréciation des mobiles qui sont à la base de telle ou de telle autre disposition.

La volonté réelle et effective des parties doit toujours être recherchée par l'interprète s'il veut agir de bonne foi, mais la condition préalable de cette recherche est que la volonté elle-même présente sa propre individualité. Ce qui peut bien arriver par rapport à la volonté exprimée dans un accord bilatéral ou même multilatéral de nature normale, mais qui s'avère impossible en ce qui concerne l'acte institutif d'une organisation internationale. Nous savons qu'en effet, à la base de la création d'une organisation internationale se trouvent des raisons politiques de caractére collectif en face desquelles les volontés individuelles des différents États participants perdent leur individualité. Si donc la possibilité d'avoir recours dans le cas dont il s'agit au principe de la bonne foi est assez limitée, les arguments que nous avons ici développés nous servent pour corriger un point apparemment analogue que nous retrouvons dans un des exposés écrits soumis à la Cour (p. 80 du livre jaune, exposé du Libéria).

Il y a là une référence au principe de la bonne foi, non en tant que critère d'interprétation, mais plutôt comme règle d'action des organes des institutions internationales, c'est-à-dire, dans le cas qui nous intéresse, de l'Assemblée de l'IMCO. Les États qui, au sein de cette Assemblée, se sont prononcés contre le Libéria et le Panama auraient agi de mauvaise foi, et c'est pour cette raison que l'élection serait viciée de nullité.

Nous ne croyons pas que cette idée, très difficile d'ailleurs à être appréciée dans le domaine du droit administratif interne, puisse être utilisée en droit international, surtout en ce qui concerne l'application de clauses contenues dans un accord institutif d'une organisation internationale. On dit parfois avec raison que l'exécution des obligations imposées à une partie par un traité international doit être accomplie de bonne foi. C'est là une affirmation bien exacte, mais tout à fait différente de celle dont parlent à cet égard les partisans de la théorie de la mauvaise foi appliquée à l'action des organes internationaux. Cette dernière ne peut pas être supposée par le seul fait qu'un État, en exerçant légitimement ses pouvoirs en vertu d'une disposition de l'acte

constitutif, s'est déterminé par le oui ou par le non. Les États ne se trouvent pas en cette hypothèse dans un domaine quasi-contractuel des accords internationaux, qui posent des obligations réciproques à la charge des parties contractantes. Dans l'exécution de leurs obligations respectives, les États doivent agir de bonne foi; mais le principe de la bonne foi ne s'impose pas lorsqu'ils votent au sein d'un organe international pour la simple raison que leur activité est totalement prévue par le traité et, par conséquent, elle n'est pas même discrétionnaire.

Monsieur le Président, Messieurs de la Cour, après avoir développé le point touchant au critère de la bonne foi, nous devons encore voir comment les principes du droit international entrent en ligne de compte en matière d'interprétation des traités internationaux. Nous avons vu que l'Institut de droit international, se conformant d'autre part à des idées très répandues, indique que les traités doivent être interprétés *à la lumière des principes du droit international*. Cela signifie que l'interprète doit s'inspirer de ces principes, évidemment dans la mesure où, le cas échéant, ils existent. Dans un des mémoires que nous avons étudiés on trouve des développements assez importants touchant aux principes fondamentaux de droit international régissant la matière, dont l'Assemblée de l'IMCO aurait fait mauvais usage. Il s'agit essentiellement du principe d'après lequel seulement l'État dont le navire bat le pavillon possède tout pouvoir, toute autorité et toute juridiction sur ce navire. Sous réserve de certaines limitations qui ont été mises en évidence par la doctrine et par la pratique, nous ne contestons nullement la validité de ce principe.

Nous devons avouer qu'à cet égard il y a peut-être un malentendu, car la question ne consiste pas à établir quels sont les pouvoirs que l'État du pavillon peut exercer sur les navires qui ont été enregistrés auprès de lui, mais, au contraire, elle vise le point suivant: comment et sous réserve de quelles conditions un navire peut faire usage de tel ou de tel autre pavillon. C'est-à-dire qu'avant d'arriver à la question des pouvoirs de caractère public que l'État possède à l'égard des navires *qui battent déjà son pavillon*, on doit résoudre une autre question qui est certainement de caractère préalable.

Et alors nous devons constater que, pour ce qui est de cette question, il n'y a jamais eu d'accord au sein de la doctrine et même de la pratique, de façon qu'ici vraiment il n'existe aucun principe de droit international. En tout état de cause, si on veut penser à un principe de telle nature, on peut plus facilement penser que le seul principe est celui d'après lequel il y a des limites de caractère international au droit pour les navires de faire usage d'un pavillon national.

La question est très ancienne et elle a été longuement débattue même par l'Institut de droit international auquel nous nous sommes déjà référés, à une époque ancienne dans laquelle le problème se posait dans une atmosphère plus tranquille que celle existant aujourd'hui. Voilà donc quelles étaient les idées de l'Institut au résultat de la session de Venise de 1896 en ce qui concerne les règles relatives à l'usage du pavillon national pour les navires de commerce. Pour être inscrit sur un registre national le navire, d'après la résolution de l'Institut de droit international, doit être *pour plus de moitié* la propriété, ou bien de nationaux, ou d'une société en nom collectif ou en commandite simple, dont plus de la moitié des associés personnellement responsables sont nationaux, ou, troisième hypothèse, d'une société par actions (anonyme

ou en commandite) nationale, dont deux tiers au moins des membres de la direction sont nationaux; la même règle s'applique aux associations et autres personnes juridiques possédant des navires.

Mais l'Institut exigeait encore d'autres conditions. Il exigeait en outre que l'entreprise, qu'il s'agisse d'armateurs individuels, de sociétés ou bien encore de corporations, ait son siège dans l'État dont le navire doit porter le pavillon et où il doit être enregistré.

L'Institut avait donc déjà posé toute une série de questions qui devaient beaucoup intéresser ultérieurement la doctrine et la pratique du droit international maritime. Il les avait non seulement posées, mais il avait aussi indiqué certaines solutions équilibrées tendant à ce que la condition juridique du navire corresponde le plus possible à sa condition réelle.

L'évolution ultérieure dans cette matière a quand même montré que, nonobstant la diversité des différentes législations nationales en ce qui concerne le droit de battre un pavillon national, ce droit est toujours soumis à des conditions assez précises et parfois sévères.

Nous voulons bien laisser de côté tout ce qui s'est passé dans le domaine doctrinal et pratique — c'est beaucoup — entre la fin du siècle dernier et l'époque présente, mais, en nous référant à une règle récente de droit international, nous désirons bien marquer la continuité à travers le temps des exigences juridiques dans cette matière.

La première conférence de Genève pour la codification du droit de la mer a inséré dans la convention sur le régime juridique de la haute mer l'article 5, qui résume très clairement les résultats de ce que nous venons de dire. Il est ainsi libellé:

> « Chaque État fixe les conditions auxquelles il accorde sa nationalité aux navires ainsi que les conditions d'immatriculation et du droit de battre son pavillon. Les navires possèdent la nationalité de l'État dont ils sont autorisés à battre pavillon. Il doit exister un lien substantiel [le célèbre *genuine link*] entre l'État et le navire: l'État doit notamment exercer effectivement sa juridiction et son contrôle dans les domaines technique, administratif et social sur les navires battant son pavillon. »

Cet article évidemment demanderait plus d'un commentaire, mais qu'il me suffise d'attirer l'attention de la Cour sur l'idée qu'il pose très clairement que *le droit de battre pavillon est un droit conditionné,* — c'est un droit conditionné — et sur l'autre principe qu'il énonce, c'est-à-dire celui du *lien substantiel.*

La convention de Genève n'est pas encore entrée en vigueur et de même l'ancienne résolution de l'Institut de droit international de 1896 n'a pas non plus force de droit positif, mais la Cour sait bien que la force des idées juridiques ne dépend pas uniquement du fait qu'elles soient contenues dans des textes de loi ou des traités formellement en vigueur.

Le mot *effectivement* que nous trouvons dans l'article 5 précité nous amène à faire certaines considérations sur une idée qui a été énoncée dans les exposés écrits soumis à la Cour. Aux pages 41-42 du livre jaune (exposé du Gouvernement du Libéria), en ce qui concerne les principes qui doivent régir l'interprétation des actes internationaux, on peut lire ce qui suit:

« En interprétant un traité, la Cour doit préférer la solution qui est plus apte à favoriser, ou, tout au moins, à ne pas empêcher la réalisation du but en vue duquel le traité a été conclu. »

Et l'on a cité à cet égard une série de décisions et d'avis consultatifs émis par la Cour.

Voilà donc que le principe de l'*effectivité* dans l'interprétation des traités internationaux est ici invoqué comme un des piliers sur lesquels devait se fonder la construction juridique relative à l'interprétation de la constitution de l'IMCO.

Le principe de l'effectivité a eu dernièrement, dans la théorie générale du droit international, plusieurs développements; il est évidemment un principe très clair et, par conséquent, parfois très utile pour résoudre certaines situations de fait qui, à vrai dire, échappent à une évaluation juridique rigoureuse. Mais précisément à cause de cela, il est un principe à la fois très utile et très dangereux.

A notre avis l'interprétation juridique ne peut pas être plus ou moins effective; ou pour mieux dire elle ne peut être considérée plus ou moins correcte dans la mesure où elle est plus ou moins effective.

Si, au contraire, par interprétation qui s'inspire de l'effectivité on entend la méthode interprétative qui tend à ce que les buts pratiques des règles juridiques se réalisent dans la plus large mesure possible, alors nous pourrons être d'accord avec la théorie énoncée dans les exposés écrits. Seulement, cette théorie n'a rien à voir avec le cas présent; car ce n'est pas sur la base de l'effectivité que l'on peut soutenir que certains États auraient dû être élus comme membres du Comité de la Sécurité maritime, à l'exclusion d'autres États. Et il est bien certain que la présence, conformément à la volonté exprimée par l'Assemblée de l'IMCO, de certains États dans le Comité n'empêche aucunement cette organisation internationale d'atteindre ses buts. Au contraire, on peut bien dire que, peut-être, elle pourra les atteindre avec plus d'efficacité.

Monsieur le Président, Messieurs de la Cour, dans un des exposés écrits, on se réfère avec beaucoup de finesse juridique à l'idée de détournement de pouvoir comme étant une des idées qui s'appliqueraient au cas dont il s'agit (pp. 77 et ss. du livre jaune). Et non seulement on invoque ce principe, mais on tâche aussi de démontrer qu'il serait un principe général de droit. On n'ose cependant pas affirmer qu'il serait un principe de droit international. Nous croyons que la raison en est la suivante: les citations que nous retrouvons à cet égard dans le livre jaune sont toutes reprises, ou bien du droit administratif interne de certains États, ou bien de la jurisprudence administrative de certains tribunaux internationaux. Il s'agit essentiellement de la jurisprudence du Tribunal administratif des Nations Unies et de celle de la Cour des Communautés européennes.

Or, il faut avoir bien clairement à l'esprit la différence qui sépare les appréciations juridiques d'un tribunal administratif des évaluations qui sont accomplies par une Cour de droit international. Lorsqu'un tribunal administratif est appelé à juger qu'un acte administratif ou bien qu'une activité administrative est viciée à cause d'un détournement de pouvoir, il considère l'action administrative mise en œuvre par un organe administratif. Ce n'est pas alors la légitimité de telle ou telle autre disposition de loi ou la légitimité du comportement de tel ou

tel autre organe constitutionnel qui font l'objet de son jugement. Au contraire, c'est seulement l'activité administrative concrète d'un organe administratif dans l'exercice de fonctions d'administration qu'il lui appartient d'apprécier.

Cela établi, on comprend fort bien que le Tribunal administratif des Nations Unies ait pris en considération l'activité concrète du Secrétaire général des Nations Unies en matière d'emploi des fonctionnaires du Secrétariat. Et si ce tribunal a jugé comme entachés de détournement de pouvoir certains actes du Secrétaire général qui ont mis fin à l'emploi de fonctionnaires, c'est précisément parce que le Secrétaire général, lorsqu'il prend des décisions en matière d'emploi, exerce un pouvoir discrétionnaire de caractère administratif. En effet, le Secrétaire général, en tant que chef du personnel du Secrétariat, apparaît véritablement comme un organe typiquement administratif.

Cela n'a rien à voir, donc, avec l'exercice des attributions de caractère souverain des États qui siègent à l'Assemblée d'une organisation internationale, qui est l'institution suprême et qui agit toujours en s'inspirant de motifs d'ordre politique. En effet, si vraiment nous devons tâcher ici de dégager de l'ensemble des idées communes de droit public certaines conceptions qui soient valables aussi dans le domaine international, nous pourrions bien affirmer que, dans presque tous les États qui possèdent un système de justice administrative, les actes politiques, et particulièrement les actes émanant d'organes constitutionnels, ne sont pas susceptibles d'être jugés et annulés par les tribunaux administratifs.

D'autre part, un des gouvernements intéressés soutient lui-même que, dans l'espèce, la majorité des États ayant voté au sein de l'Assemblée de l'IMCO dans le sens que nous connaissons, auraient violé sa souveraineté (p. 197 du livre jaune). Dans un des exposés écrits, la recherche relative au détournement de pouvoir est fondée sur l'application qui en est faite par le traité instituant la Communauté européenne du Charbon et de l'Acier. On dit précisément que la référence au détournement de pouvoir qu'on trouve à l'article 33 de ce traité aurait un caractère simplement déclaratif, car il serait évident qu'une Cour qui a un pouvoir de contrôle sur certains actes pourrait bien, en tout cas, apprécier ce vice de légalité.

Mais nous pouvons affirmer, au contraire, qu'il n'en est pas ainsi. Car il n'existe pas de notion de détournement de pouvoir commune à tous, ou du moins à la plupart des systèmes juridiques et qui, par conséquent, pourrait être utilisée aussi dans le droit international.

Ainsi que le souligne un des auteurs italiens les plus récents du droit administratif (Gasparri, *Le détournement de pouvoir dans le droit de la C. E. C. A.* — c'est-à-dire de la Communauté européenne du Charbon et de l'Acier — il se trouve dans les actes officiels du congrès international d'études sur la C. E. C. A., vol. IV, p. 155) la formule « détournement de pouvoir » n'a pas un fondement commun dans le droit européen, ou, pour mieux dire, dans le droit de certains pays européens, mais elle a été empruntée par les auteurs du traité — le traité instituant la C. E. C. A. — à la jurisprudence française en matière de contentieux de l'administration. Ce qui signifie que cette référence historique ne suffit pas à nous donner la solution des problèmes très complexes d'interprétation qui en découlent. En effet, même dans la jurisprudence et la doctrine françaises, la formule en question ne correspond pas à

une notion définie d'une manière indiscutable et absolument claire. Il s'agit donc d'une de ces formules qui, plutôt qu'elles n'expriment une notion précise, font pressentir une notion dont on entrevoit les grandes lignes, mais qui a encore besoin d'être pleinement mise en lumière.

Il serait pour nous facile maintenant de citer à l'appui de cette affirmation toute une série d'autorités doctrinales françaises, mais nous ne voulons pas soustraire un temps précieux à la Cour.

Dans le livre jaune on trouve, à l'égard du détournement de pouvoir, des références à la doctrine et à la jurisprudence italiennes. Voilà donc que nous serions amenés à approfondir ici ce point. Qu'il nous suffise, au contraire, de rappeler tout simplement que, même dans le droit italien, cette notion est loin d'être claire et univoque. Car, sur la base de la notion d'excès de pouvoir, posée par la loi italienne sur le contentieux administratif, et qui englobe plusieurs vices entachant une décision d'illégitimité, on a élaboré d'autres vices, qui ne sont pas toujours bien définis, tels que le travestissement des faits, l'illogisme manifeste, l'injustice manifeste, et d'autres encore. La doctrine italienne qui fait le plus d'autorité est entièrement orientée dans ce sens (on pourrait citer, par exemple, Santi Romano, *Droit administratif*, Padoue, 1937, p. 270; Borsi, *La Justice administrative*, Padoue, 1941, p. 44; Zanobini, *Cours de droit administratif*, 2me volume, Milan, 1954, p. 195; De Valles, *Éléments du droit administratif*, Padoue, 1951, p. 164, et d'autres encore).

Bien qu'il soit donc très difficile de définir d'une façon uniforme le détournement de pouvoir, on peut dire qu'il y a, dans les différentes définitions, certains traits fondamentaux communs. Ces définitions s'accordent pour dire que le détournement de pouvoir est un vice typique des actes qui doivent être accomplis par une autorité administrative dans l'exercice d'un pouvoir administratif. Il consiste précisément dans l'usage du pouvoir discrétionnaire pour une fin ou un but, pour un motif ou une cause autres que ceux pour lesquels la loi veut que le pouvoir en question soit exercé.

Et nous pouvons déduire encore d'autres éléments qui confirment les idées que nous venons de préciser; nous pouvons en déduire des études, par exemple, accomplies par l'un des interprètes les plus qualifiés du droit de la C. E. C. A. — la Communauté du Charbon et de l'Acier —, c'est-à-dire l'avocat général Lagrange, qui est un expert particulièrement connu.

Dans un exposé très connu qu'il a fait, lorsque la Cour de Luxembourg aborda pour la première fois la notion de détournement de pouvoir (*Recueil de la jurisprudence de la Cour*, vol. I, p. 152), il a brossé un tableau comparatif de cette notion, dans le droit de différents pays membres, ce qui a montré précisément les diversités de conception existant à cet égard, même dans le domaine des pays européens.

Plus tard, dans un article qui est intitulé « L'ordre juridique de la C. E. C. A. vu à travers la jurisprudence de sa Cour de Justice », qui a été publié dans la *Revue du droit public* de 1958, et précisément à la page 856, l'avocat général Lagrange, en faisant une synthèse de la pensée de la Cour, a souligné que la notion de détournement de pouvoir est incontestablement une notion de pur droit administratif. Sans doute, a-t-il ajouté, peut-on la rattacher à un principe de droit très général, qui se traduit, par exemple, en droit civil, par la théorie de l'abus du droit ou, en droit international, par celle de l'*abuse of power*. Mais, conclut-il, étant donné les termes du traité qui emploie l'expres-

sion même de « détournement de pouvoir », et le contexte de l'article 33 qui énumère les quatre cas traditionnels en France d'ouverture de recours pour excès de pouvoir, il est évident que la notion s'insère dans un système ayant pour objet d'organiser le recours en annulation contre les décisions de l'exécutif de la Communauté et qui est directement emprunté à la technique du droit administratif dans ce domaine.

[Audience publique du 29 avril 1960, matin]

Monsieur le Président, Messieurs de la Cour, hier, à la fin de notre exposé, nous avons tâché de résoudre le problème consistant à savoir si et dans quelle mesure la notion de détournement de pouvoir accompli par une institution appartenant à une organisation internationale serait admissible en droit international.

L'analyse que nous avons faite de la doctrine et de la jurisprudence, soit interne, soit communautaire — je m'en réfère spécialement à la jurisprudence de la Cour de la Communauté européenne du Charbon et de l'Acier —, nous a amenés à des conclusions essentielles négatives, car, en dehors du contentieux administratif international qui se déroule devant les tribunaux administratifs internationaux, il n'y a pas lieu de concevoir la notion de détournement de pouvoir telle qu'elle a été présentée par les Gouvernements qui s'opposent à notre thèse. Et alors, de tout ce qui précède, on peut donc, à juste titre, tirer la conclusion suivante:

Il n'y a aucunement lieu d'invoquer la notion de détournement de pouvoir afin d'entacher d'illégalité l'action mise en œuvre par l'Assemblée de l'IMCO, lorsque celle-ci a constitué le Comité de la Sécurité maritime.

En effet, nous espérons avoir assez clairement établi: premièrement, que la notion de détournement de pouvoir n'appartient pas au droit international commun; deuxièmement, que cette idée a un caractère purement administratif et que, par conséquent, elle n'est utilisable que dans des procédures de droit administratif. Si tel est vraiment le cas, nous avons vu que le détournement de pouvoir peut se réaliser seulement si l'acte est accompli par une autorité administrative dans l'exercice d'un pouvoir discrétionnaire. Or l'Assemblée de l'IMCO n'est certes pas une autorité administrative dans le domaine du système juridique de l'IMCO même. De plus, l'Assemblée de l'IMCO, en élisant les membres du Comité de la Sécurité maritime, ne jouissait certainement pas de la latitude d'appréciation qui est le propre du pouvoir discrétionnaire.

En affirmant cela, Monsieur le Président, Messieurs de la Cour, nous n'excluons cependant pas l'autre idée de discrétionnalité dans le choix des membres du Comité de la Sécurité maritime, que nous avons déjà développée lorsque nous avons considéré la notion d'élection. Il s'agit en effet de deux notions tout à fait distinctes.

L'Assemblée de l'IMCO, nous le savons, est un organe constitutionnel, qui s'inspire, dans son activité, à des motifs de caractère politique; par conséquent, elle n'accomplit pas les actes administratifs qui seraient normaux pour le Secrétariat d'une organisation internationale. De plus, quand elle a appliqué l'article 28 *a)*, elle a accompli une opération obligatoire, qui ne lui laissait pas de marge discrétionnaire. Voilà donc pourquoi nous concluons, sur le point du détournement de pouvoir, d'une façon tout à fait négative, en repoussant tous les arguments qui tendent à introduire dans le système du contentieux qui appartient au droit

international commun une idée qui ne peut, en aucune façon, lui appartenir.

Monsieur le Président, Messieurs de la Cour, j'en arrive maintenant au dernier point de mon exposé.

L'exposé écrit du Gouvernement du Panama (pp. 197 et 198 du livre jaune) contient une protestation de ce Gouvernement qui se réfère aux deux points suivants:

Premièrement: L'activité mise en œuvre par les États appartenant à la majorité des membres qui ont voté contre l'inclusion du Panama dans le Comité de la Sécurité maritime constitue une violation du principe qui affirme l'égalité souveraine des États dans l'ordre international;

Deuxièmement: Les États appartenant à ladite majorité de l'Assemblée de l'IMCO, en donnant leur vote, ont pris comme base la nationalité des propriétaires privés des navires arborant le pavillon du Panama, ou bien la nationalité de leurs équipages, ou bien encore la nationalité des experts et des techniciens qui rendent leurs services aux mêmes navires. En faisant cela, les États en question ont porté atteinte à la compétence exclusive du Panama et ils sont intervenus dans les affaires internes de cet État.

Voilà les deux points.

En ce qui concerne le premier point, il suffit de remarquer que le principe de l'égalité des États dans la communauté internationale est certainement un principe fondamental et même constitutionnel de l'ordre juridique international. C'est précisément pour cela que ce principe s'applique seulement dans la mesure où n'existent pas des règles juridiques spéciales relatives à des situations juridiques particulières. C'est exactement le cas de l'article 28, qui requiert certaines qualités des États en vue de leur élection au Comité de la Sécurité maritime. A cet égard l'ordre juridique international est tout à fait semblable au droit interne: d'après une règle constitutionnelle commune — que nous retrouvons dans presque toutes les constitutions des États —, tous les ressortissants d'un État jouissent de l'égalité juridique. Mais cela n'empêche aucunement que d'innombrables inégalités de situations juridiques se produisent par application des règles juridiques particulières qui visent telle ou telle autre catégorie de personnes.

Pour ce qui est du deuxième point qui se réfère à la compétence exclusive des États, nous devons observer que l'argument du Panama suppose qu'il soit déjà prouvé, ce qui, au contraire, d'après la doctrine du droit international et la jurisprudence de la Cour, est bien loin d'être reconnu. Nous croyons avoir prouvé qu'un État n'est pas libre d'enregistrer, sans observer aucune condition, n'importe quel navire, et qu'il peut concéder son pavillon à un navire seulement sous réserve des limitations imposées par le droit international.

En tout état de cause, il faut aussi admettre que la matière elle-même qui forme l'objet de la protestation du Panama n'appartient pas au domaine réservé de l'État, aux termes de l'article 2, paragraphe 7, de la Charte des Nations Unies. Cette matière a été réglée sur le plan international, comme il résulte, entre autres, de l'article 5 de la Convention de Genève de 1958, que nous avons déjà cité; cela dit, il n'y a qu'à rappeler la jurisprudence de la Cour, qui, à maintes reprises, a établi qu'une matière ne peut pas appartenir au domaine réservé d'un État lorsqu'elle est l'objet d'une règle de droit international.

Monsieur le Président, Messieurs de la Cour, nous sommes arrivés à la fin de notre exposé.

En résumant tout ce que nous venons de dire, nous sommes convaincus que les développements ultérieurs du débat ont montré une fois de plus le bien-fondé des conclusions que nous avons déjà formulées par écrit et que nous allons répéter ici, c'est-à-dire:

Premièrement: Le Comité de la Sécurité maritime de l'IMCO a été correctement constitué en conformité des dispositions de la convention qui a créé ladite organisation;

Deuxièmement: L'Assemblée de l'IMCO, en choisissant les membres du Comité de la Sécurité maritime, a exercé ses pouvoirs d'une façon légitime.

Le Gouvernement de la République italienne a l'honneur de demander à la Cour de bien vouloir se prononcer dans le sens susindiqué.

Monsieur le Président, Messieurs de la Cour, en terminant mon exposé, qu'il me soit permis de vous remercier vivement pour la patience, l'attention et la considération avec lesquelles vous avez bien voulu écouter mon discours.

7. ORAL STATEMENT OF Mr. RIPHAGEN

(REPRESENTING THE GOVERNMENT OF THE NETHERLANDS)
AT THE PUBLIC HEARING OF 29 APRIL 1960, MORNING

Mr. President and Members of the Court.

The present request for an Advisory Opinions raises a number of important legal questions. Since—apart from the Written Statements submitted by the various States Members of the International Maritime Consultative Organization—not less than seven States take part in the oral proceedings, you will allow me to limit myself to some aspects of the case only, and not to elaborate other, no less important, points.

Mr. President and Members of the Court, I venture to submit that the Written Statements presented to the Court by Liberia, the United States and Panama set forth many—in themselves very interesting—legal tenets and offer a formidable array of texts which are, however, in my submission, not really relevant to the question with which your Court is confronted.

Surely the Court is *not* faced—as the United States' Written Statement at page 149 seems to suggest—with a question regarding "the sovereign right of a nation, under international law, to grant its flag to merchant ships and to prescribe the terms of registration of such ships under its flag".

Neither does the present case involve any problem of voting procedure or of the majority required for taking decisions, such as the problem on which the Court's Advisory Opinion of 7 June 1955 and the various separate opinions attached thereto provide the authoritative considerations and solution.

The point at issue is a much more particular one; it concerns a specific election—that which has taken place on 15 January 1959—for a specific international body: the Maritime Safety Committee of the IMCO.

Now, nobody denies that in proceeding to the election of the fourteen members of the Maritime Safety Committee the Assembly is bound by certain directives. And these directives are to be found in the Convention establishing the IMCO and nowhere else.

The law on the matter is clear: as the Court has stated in its Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations*, the international organ shall observe the treaty provisions which constitute criteria for its judgment and may take into account every factor which it is possible reasonably, and in good faith, to connect with the conditions laid down in such treaty provisions. In other words, a State wishing to challenge the election which has taken place on 15 January 1959 is bound to establish that the Assembly on that occasion overstepped the limits of its discretion in basing its designation of the States to serve, for a term of four years, as members on the Maritime Safety Committee, on factors which *cannot* be reasonably and in good faith connected with the conditions laid down in the IMCO Convention.

In trying to arrive at such a conclusion, the Written Statements of Liberia, the United States and Panama all tend to put into the clauses of the IMCO Convention a rigidity which they do not have and which, more-

over, is incompatible with any reasonable and practicable construction of treaty provisions concerning the composition of international bodies. In effect, those Written Statements endeavour to establish that there is an absolute right of certain States Members of the IMCO to be a member of the Maritime Safety Committee, a right depending solely on statistical data, leaving no room for choice or judgment of the Assembly at all. According to the thesis put forward in the said Statements, the Assembly, in proceeding to the election of the Maritime Safety Committee, would actually only have to go through the mechanics of taking the *Lloyd's Register of Shipping Statistical Tables*, striking out the names of States not Members of IMCO, putting the remaining figures of registered tonnage in decreasing order and looking at the eight States appearing at the top of the list.

Leaving aside, for the moment, that such a procedure could hardly warrant the term "elected" as used in Article 28 *(a)* of the IMCO Convention, it may be observed that the thesis of Liberia, the United States and Panama, really narrows down the directives laid down in Article 28 of the IMCO Convention to the point of completely changing their meaning and purpose.

Mr. President and Members of the Court, the relevant language of Article 28, and I must ask for the indulgence of the Court for reading it out once more, reads as follows:

> "The Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the Members, governments of *those nations having an important interest in maritime safety*, of which not less than eight shall be the largest ship-owning nations."

Now, in the construction advanced by Liberia, the United States and Panama, this clause would read as follows:

> "The Maritime Safety Committee shall consist of fourteen members of which not less than eight shall be the States in which the largest amount of tonnage is registered."

The element of having an important interest in maritime safety, and the corresponding criterion of being a large ship-owning nation, have vanished into thin air.

Now, what device of magic has been applied to perform this metamorphosis?

We are told, *inter alia* in the United States' Written Statement on page 141 and following, that "the IMCO Convention should be interpreted and applied so as to give effect to its purposes", and, in particular, at page 143, that "the Convention should be considered in its entirety".

Surely those are wise remarks, which the Court has already several times expressed in its Judgments and Advisory Opinions. But can they lead *to a complete disregard for one essential group of words in the Convention*—the important interest in maritime safety—and to the replacement of another criterion of the Convention—the fact of being a ship-owning nation—by the completely different test of registered tonnage?

Obviously, the Court's Advisory Opinions cited in the United States' Written Statement do not warrant such a conclusion. Neither do the Articles of the IMCO Convention, cited on pages 144 to 147 of the same Statement, imply any necessity of modifying the wording of Article 28, under colour of giving effect to the purpose of the Convention. On the

contrary, the Articles cited are either irrelevant for the question now before the Court or rather point in the direction of a large measure of discretion for the Assembly in designating the members of the Maritime Safety Committee.

Thus, for instance, it would seem obvious that Articles 41 and 42 of the IMCO Convention concerning the financial obligations of the Members vis-à-vis the Organization have nothing to do with conditions of eligibility for the Maritime Safety Committee. It is a matter of common knowledge that the determination of the scale of apportionment of the expenses of an international organization among its members is the subject of manifold considerations including such things as capacity to pay and prospective benefits from the work of the organization. Quite different scales are applied to different organizations and it would be hard to draw from the solutions adopted any principle beyond the purely financial sphere.

Equally irrelevant is Article 60 of the Convention, concerning the entry into force of the Convention. It would seem obvious that for the determination of the date of entry into force of a multilateral Convention, a purely factual criterion, which can be applied automatically and without any need or indeed any possibility of discussion, appreciation or choice, is required. Hence, in that Article, the reference to registered tonnage which, it may be remarked in passing, indicates that the framers of the IMCO Convention were well aware of the possibility of using the criterion of registered tonnage in a context where such criterion would be appropriate. Indeed, it is apparent from the preparatory work for the IMCO Convention that the draftsmen of that Convention very well saw the difference between one criterion and the other. In Appendix II of the Liberian Written Statement there is cited, on page 101, a Report of the Committee responsible for the first draft of the Convention. In regard to the composition of the Council of IMCO, this Report expressly states: "we have not intended that the selection should be made on a rigid, statistical basis".

Now it is true, as the Liberian Statement remarks, that no such comment was made with respect to Article 28 *(a)*—then Article VII—concerning the Maritime Safety Committee. But I do not think that I need take up the time of the Court by an elaboration of the relative merits and demerits of the ***argumentum a contrario*** and the ***argumentum per analogiam*** in general. It would appear sufficient to note, firstly, that a distinction between a rigid, automatic test on the one hand and a comprehensive guiding concept on the other hand was present in the mind of the drafters, and, secondly, that they expressly chose the latter when the election of an inter-governmental body was concerned.

Mr. President, Members of the Court, the other articles cited in the United States' Written Statement in support of their thesis refer to the task entrusted to the Maritime Safety Committee and to the machinery through which the results of its work are being dealt with by the Council and eventually by the Assembly of the IMCO.

If it is possible to draw from these articles any conclusion with regard to the composition of the Maritime Safety Committee, it would seem that they rather underline the measure of discretion left to the Assembly in the election of the members of the Maritime Safety Committee. It is the Assembly—a body in which all Member States are represented—which recommends to Members for adoption regulations concerning maritime

safety which have been referred to it by the Maritime Safety Committee through the Council. The Maritime Safety Committee has primarily a technical task of preparing such recommendations for consideration by the Assembly. The final word is with the Assembly in which—I repeat—every Member State is represented. In the Maritime Safety Committee, though this is certainly a principal and permanent organ of the organization, the emphasis is not so much on the *political* representation of the States members of IMCO as on a composition which corresponds to the *expert* duties it has to perform. There is certainly nothing here which could justify or even give any support to an interpretation of the criteria of Article 28 *(a)* in the sense of substituting the purely formal test of registered tonnage to the directive of important interest in maritime safety as *evidenced by the fact of being one of the largest ship-owning nations.*

In this connection I may perhaps, in view of the Oral Statements of Liberia and the United States, make some remarks in passing on the inter-relationship between the concept of an "important interest in maritime safety" and that of "large ship-owning nation". Indeed it is clear from the text of Article 28 *(a)* that in this Article both concepts are closely connected. If the Representatives of Liberia and of the United States have read in the Netherlands' Written Statement an affirmation of this fact, they have rightly done so. But the same Representatives are mistaken in the conclusions to be drawn from this fact. Actually they *start* from the assumption that the amount of registered tonnage determines exclusively, absolutely and automatically the size of a State as a ship-owning nation, and then draw from this wrong premise the conclusion that the amount of registered tonnage also determines exclusively, absolutely and automatically the size of a State's interest in maritime safety.

The correct reasoning, in our submission, is rather the reverse. The close connection in Article 28 *(a)* of "interest in maritime safety" and the concept of "ship-owning nation" underlines the sense in which the drafters have used the latter concept; they have used that concept not as a formal concept referring to a purely administrative fact—the registration—and capable of being determined by a simple examination of statistical figures, but as a general concept referring to all sorts of considerations and factors which are relevant in respect of the task entrusted to the members of the Maritime Safety Committee.

Even less convincing than the arguments drawn from the clauses of the IMCO Convention and the preparatory work are those advanced by Liberia, the United States and Panama on the basis of other Conventions and agreements, and on that of the general rules of international law.

First of all, one has some difficulty in understanding what light can possibly be thrown on the question of the composition of the Maritime Safety Committee of IMCO by other multilateral conventions, and even bilateral conventions, in respect of shipping. There does not exist a single other convention in which the concept of "States having an important interest in maritime safety" or the concept of "ship-owning nation" has been utilized. Nor is the question of election of the members of the Maritime Safety Committee in any way connected with general rules of international law with regard to maritime jurisdiction. Once again we are presented with a wealth of material on the obligations of a State under international agreements in respect of the ships registered

in that State, and on the jurisdiction of a State under international law in respect of ships on the high seas; both matters of great interest, but in our submission wholly irrelevant to the case at present before the Court. Indeed, it is true that numerous multilateral conventions on shipping oblige the States parties to such conventions to take legislative and other measures in order to secure the safety of life at sea, the seaworthiness of vessels, adequate living and labour conditions of crews on board ship, and so forth and so on.

Appendix I of the Liberian Written Statement cites a number of such conventions. There is really nothing surprising in the fact that such obligations are imposed on a State with respect to *all* ships to which that State has granted the right to fly its flag. Evidently there is no escape from the argument that a State which has granted a ship the right to fly its flag should be internationally responsible for such ship, its conduct and the conditions on board. Such responsibility exists irrespective of the national system of registration. It is the express grant by a State of the right to fly its flag which entails its responsibility.

But such responsibility cannot be advanced as the basis of a claim of a State vis-à-vis another State in an international organization, with regard to the right to be elected as a member of an international body, even if a right of that sort could exist at all under the constitution of that organization.

Mr. President and Members of the Court, now that we are on the subject of the treaties cited in Appendix I of the Liberian Written Statement, the Court may perhaps allow me to observe between parentheses that several of these treaties, indicated by Liberia as "illustrating the use of registration as a connecting factor in maritime matters", do not even rank as such under their own wording. Some of them use the concept of the flag as expression of the link between a ship and a State, without any reference to the conclusiveness of national determination of the right to fly the flag or to registration. Thus, for instance, the Treaty of Mannheim, the Convention and Statute of the Regime of Navigable Waterways, and the Convention relating to Simplification of the Inspection of Emigrants on Shipboard. Other conventions, in particular the Convention for Regulating the Police of the North Sea Fisheries and the Final Act of the International Fisheries Conference 1943, *require* registration of fishing vessels, for obvious reasons, which have nothing to do with an alleged *right* of a State to determine, with international effect vis-à-vis other States, which ships belong to it.

These remarks are only made in passing and by way of illustrating the irrelevancy of much of the material presented. Already in itself it does not make much sense to put together a series of treaty provisions "using registration as a connecting factor" since it is obviously impossible to draw, without further argument, a conclusion from the use of a "connecting factor" in one context for the suitability of that same factor in quite another context. One might as well pretend that the use of domicile as the connecting factor for determining the law applicable to family relations is a strong argument in favour of construing domicile of the owner as the situs of real property!

Now it might be argued that at least some of the bilateral agreements cited by Liberia do give rights in respect of shipping to one State vis-à-vis another State, and expressly state that such right exists with regard to any ship that is registered within the territory of the former

State. But again, this fact cannot have any bearing on the question now before the Court, since the question now before the Court does not concern the right of the vessels of one State to enter the ports of another, nor does it concern the treatment of foreign shipping, nor anything else relating to the status of a ship in foreign waters.

On the other hand, the present case does involve the position of member States within an international organization and the alleged absolute right of a State to be elected as a member of one of its organs. Liberia and Panama claim such right on the basis of the fact that a very large amount of tonnage is registered within their respective territories.

Now if, for instance, Liberia, under its bilateral Treaty of Friendship, Commerce and Navigation of August 8, 1938, with the United States, claimed, in respect of a vessel registered within its territory, any privilege accorded under that Treaty to Liberian merchant vessels, I do not think that the United States would oppose such a claim.

Neither would anyone doubt that interference by, say, a Netherlands man-of-war, in time of peace, with a ship registered in Liberia and pursuing a lawful avocation on the high seas, would constitute a violation of Liberian sovereignty.

Again, ships registered in Liberia and passing the North Corfu Channel or any other strait connecting two parts of the high seas would certainly count in determining whether such strait is being used for international navigation.

If, by mischance, a vessel registered in Liberia were to collide on the high seas with a Turkish ship, Liberia could exercise its criminal jurisdiction in respect of the crew on board the Liberian ship with regard to such incident of navigation.

All this is not contested and is indeed undeniable. It has, however, nothing to do with the question whether or not the Assembly overstepped the limits of its discretion in not electing Liberia as a member of the Maritime Safety Committee.

Many a page of the Written Statements of Liberia, the United States and Panama has been devoted to the exclusive jurisdiction of a State over the vessels registered in that State when they are on the high seas. Cases are cited and learned authors are quoted at some length. All this, in our submission, is completely beside the point, because the statements fail to show what necessary connection there could possibly exist between the exclusive jurisdiction of a State over a *ship* on the high seas and the qualification of a *State* as "having an important interest in maritime safety" and as being a "ship-owning nation" in the sense of Article 28 *(a)* of the IMCO Convention. Surely the enforcement of the national legislation of a State concerning such matters as are enumerated in Article 29 of the Convention, *on the high seas*, can only be effected by the flag State. But it requires no great effort of imagination to see that the national rules and regulations in respect of aids to navigation, construction and equipment of vessels, manning from a safety standpoint, prevention of collisions, handling of dangerous cargoes, and so forth and so on, are not at all enforced by warships, police patrol boats and Government vessels on the high seas, but they are enforced by the authorities on the shore at the home port of the vessel, through establishments in the country where the ships actually belong and regularly return, in the exercise of the jurisdiction of the State over the territory where the real centre of the shipping enterprise is located.

From the point of view of effective application of such regulations few things could be less relevant than the mere fact of registration of a ship in a specific country.

Mr. President and Members of the Court, I have tried to demonstrate that most of the decisions of the Court cited by Liberia, the United States and Panama, the treaties and agreements enumerated and quoted in their statements and the other material adduced in their arguments have little or no bearing on the problem with which the Court is now faced, or, if they have, do not point in the direction of the solution advocated by those States.

It is perhaps not surprising that in the mass of texts and dicta thus put forward in the Written Statements, there are some rather conspicuous omissions.

No reference has been made, at least in the Written Statements, to Article 5 of the Convention on the High Seas adopted at Geneva in 1958, with 65 votes for and none against. I need not read out this Article once again, it has already been done by several other speakers. These Conventions, however, are certainly the most recent and comprehensive codification of the law of the sea, and I may perhaps stress again the point that it is abundantly clear from the discussions leading to the adoption of that Article that, according to a general consensus, mere registration is *not* sufficient to establish a link between a ship and a State. And it is perhaps significant that in the Written Statements Liberia and Panama do not seriously endeavour to support their claim for qualification as "large ship-owning nations" by indications of a genuine link between their respective countries and the ships registered there.

Another omission is that we cannot find in those Written Statements any reference to the important and relevant decision of the Court in the *Nottebohm* case. In this Judgment, I may recall, your Court stated that the question whether the nationality conferred by the Government of Liechtenstein on Mr. Nottebohm could be invoked vis-à-vis Guatemala in a case of diplomatic protection must be answered *on the basis of international law.* In this case your Court made a remark which is fully pertinent to the present contentions of Liberia, the United States and Panama, and which, on page 21 of the Court's *Reports* for 1955, runs as follows:

> "... international practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction, which do no necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions...".

Indeed, one cannot fail to notice the striking analogy with the present case, where some States claim an absolute right vis-à-vis other States to be elected on an international body, on the simple basis of the fact that they have, by their national legislation and practice, granted the right to fly their flag to a considerable amount of tonnage of shipping.

With your permission. Mr. President and Members of the Court, I may here devote some remarks to the similarities and differences between the *Nottebohm* case and the present case.

In the *Nottebohm* case the Court, in deciding whether under the *general rules* of international law a State is entitled to bring a claim before the

Court against another State, has directly applied international law to the question of the qualification of the requesting State. In other words, in order to invoke a rule of international law against another State, the former State must possess the status required to this effect under the said rule of international law.

It would seem to me that this principle applies with even greater force to cases such as the present one. In order to invoke vis-à-vis other States whatever rights —if any—that Article 28 of the IMCO Convention might give, the requesting State should have the status described in the rule in question.

Now, in the *Nottebohm* case, the status of a State as entitled to bring a claim against another State was, so to say, the counterpart of the status of an individual having the nationality of that State. Now, that last-mentioned status of nationality is one which is the subject of *national* legislation and national administrative practice. Nevertheless, the Court was of the opinion that national determination of the status of a *person*, as being a national of a State, is not decisive for the status of that *State*, in respect of the rule of international law concerning the conditions under which such State can present a claim against another State.

In the present case, the status relevant for the application of Article 28 *(a)* is the status of a State "having an important interest in maritime safety by reason of its being a large ship-owning nation". Now, to this international status does not correspond any pre-existing status of "interests" or "ships" as determined by national legislation.

That status is not the reverse of any status defined under national law. It does not necessarily follow from the fact that a large number of ships have, under Liberian legislation, the status of Liberian ships, that Liberia is, in the sense of Article 28 *(a)* of the IMCO Convention, a large "ship-owning nation". Thus there is even less reason than in the *Nottebohm* case to consider the fact of ships being registered in Liberia as relevant, let alone as decisive for the question now before the Court.

Again, if there were a necessary connection between the status of a State as circumscribed in Article 28 *(a)* of the IMCO Convention and the status of a ship as defined under national legislation, there would still apply by analogy what the Court has said in the *Nottebohm* case:

> "A State cannot claim that the rules it has thus laid down are entitled to recognition by other States, unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."

But there is not even such a necessary connection between the two types of status.

Obviously the absence of such a connection makes the concept of "having an important interest in maritime safety by reason of being a large ship-owning nation" somewhat less precise than the concept of nationality as the basis of a State's right under general international law.

Now this is not at all an inconvenience. And here we come to the other reason why the principle underlying the Court's decision in the *Nottebohm* case, in our submission, applies *a fortiori* to the present case.

Indeed, in contradistinction to the rule of international law applied in the *Nottebohm* case, Article 28 *(a)* is not—to borrow a phrase from another

branch of the law—a *self-executing clause*. Whatever interpretation of the word "elected" in Article 28 *(a)* is adopted, not even Liberia, Panama, and the United States deny that Article 28 *(a)* does not in *itself* make any State a member of the Maritime Safety Committee, but must be *applied* by an international body, in this case by the Assembly of IMCO.

Accordingly, Article 28*(a)* is a directive for the Assembly and such a directive need not have the same precision as is advisable for rules which directly determine the rights and duties of States.

Mr. President and Members of the Court, as I indicated at the outset, I have limited myself to some aspects only of the case. I may be allowed at the end of my statement to summarize the main points.

First—in proceeding to the election of the Members of the Maritime Safety Committee, the Assembly enjoys a large measure of discretion limited only by the directive that all Members of the Maritime Safety Committee should have "an important interest in maritime safety", whereas with regard to at least eight of them, such interest should be evidenced by the fact that they are "the largest ship-owning nations".

Second—there is no support whatsoever in the IMCO Convention for the thesis that the amount of registered tonnage alone qualifies a State for election under those directives.

Third—other multilateral and bilateral treaties which may or may not use registration as a connecting factor in maritime matters, and the rules of general international law in regard to jurisdiction over vessels on the high seas, are irrelevant to the question at present before the Court.

---

8. ORAL STATEMENT OF Mr. SEYERSTED

(REPRESENTING THE GOVERNMENT OF NORWAY)
AT THE PUBLIC HEARINGS OF 29 APRIL 1960

[Public hearing of 29 April 1960, morning]

Mr. President, Honourable Members of the Court.

Before presenting the Oral Statement of my Government, I wish to express to you the great respect which my Government has for this High Court. I also wish to state that I consider it a great honour and a privilege to be given the opportunity of presenting my Government's view to you, Mr. President, and to the honourable Members of the Court.

I shall confine myself to first stating the principal contention of my Government, and then, on a subsidiary basis, I shall deal with some of the points raised by the learned Representatives of Liberia, Panama and the United States in the course of their Oral Statements—without, however, making any attempt to cover the entire field of their argument.

I

Article 28 of the IMCO Convention provides that all fourteen members of the Maritime Safety Committee shall be "elected" by the Assembly. It has been pointed out by Representatives from both sides that this Court has, on several occasions, stated that the terms applied in international conventions should be interpreted in accordance with their natural meaning. My Government submits that the term "elected" implies a choice, and that it would be inconsistent with this term to hold that the Assembly is bound by one automatic and mathematical criterion.

Moreover, my Government feels that the term "ship-owning nations" in itself is not sufficiently clear and specific to lend itself to such an automatic application. Indeed, we believe that it would not be in accordance with the natural meaning of the term "ship-owning" to make it mean "ship-registering". If this had been the intention, the drafters would have used another term.

These considerations are, in the view of my Government, decisive. And they are sufficient to establish that it was the intention of the drafters of the IMCO Convention to allow the Assembly a real choice, by a comparative evaluation of each candidate in all relevant respects, when it was to select the eight largest ship-owning nations.

This interpretation is also supported by the general requirement, laid down in Article 28, that the members of the Maritime Safety Committee should be "nations having an important interest in maritime safety". This requirement is placed at the head of Article 28 *(a)* and thus applies to both groups of members to be elected, including those which shall be "the largest ship-owning nations". This general applicability is also reflected in the ensuing text of the Article. With the indulgence of the Court, which has heard this Article on several occasions already, I would like to read it out once more:

> "The Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, *of which* not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of *other* nations with an important interest in maritime safety", etc.

Unlike the learned Representatives of Liberia, Panama and the United States, we believe the words "of which" and "other" give further evidence that the drafters meant that both groups should have an important interest in maritime safety. And the least we can then do is to interpret the term "ship-owning nations" in the way I have indicated above, so that it conforms with the general condition of "important interest in maritime safety". Otherwise, if the Assembly were to apply the mere fact of registration as an automatic criterion, and disregard all other factors which qualify a nation as "ship-owning", one could not be assured that all those members it would thus "elect" really have an important interest in maritime safety.

I might add that the Assembly, which is expressly authorized by Article 55 of the Convention to interpret its terms, did, after a full discussion, adopt the view that Article 28 does not involve any automatic, mathematical test. This it did when it decided to arrange for separate votes for each of the eight places on the Committee and when it subsequently failed to elect two of the States included in *Lloyd's List.*

The Oral Statement made by the learned Representative of Liberia has left no doubt that the rules for registration in that country are particularly liberal and thus differ greatly from the rules of those countries which were elected to the Maritime Safety Committee. The difference in the conditions for registration leads to a difference between the countries as far as the real meaning of flying a flag is concerned—a difference which it is natural that the Assembly should take into account when electing the eight largest ship-owning nations. Indeed it is common knowledge that Liberia and Panama differ from those eight ship-owning nations which were elected to the Maritime Safety Committee in a number of respects which are entirely relevant to the requirements laid down in Article 28, and which the Assembly was, therefore, entitled to take into account when electing a committee to perform the functions described in Article 29—compare Article 1 *(a)* of the Convention.

Should the Court require further information concerning some of the important differences between Liberia and Panama, on the one hand, and the eight ship-owning nations elected by the Assembly, on the other hand, I beg to refer *inter alia* to certain publications of the United Nations and to two reports by committees of the United States. The publications of the United Nations are a book in the *United Nations Legislative Series* entitled "*Laws Concerning the Nationality of Ships*" and a supplementary volume to this collection. These books reproduce the texts of the various national laws on the subject. One of the United States committees to which I wish to refer submitted a report to the United States Department of Commerce through the National Academy of Sciences. The report is entitled "*The Role of the U.S. Merchant Marine in National Security*". It describes the extent of United States control over American-owned ships under Panamanian and Liberian flags, as

compared to the modest control exercised by the flag countries. The report may be found in Publication No. 748 of the National Academy of Sciences and was published in Washington, D.C., in 1959. I refer especially to pages 55 to 60. The last report to which I might refer is one by the Interstate and Foreign Commerce Committee of the United States Senate. It can be found in 81st Congress, 2nd Session, *Final Report of the Interstate and Foreign Commerce Committee, Washington, 1950* and I refer to pages 65 and following. I do not believe it is necessary for me to take up the time of the Court by quoting from these or other publications. But I shall, of course, be glad to submit them to the Court, should it so desire.

Some other Governments have already recalled that the same distinction as was made by the Assembly in electing the members of the Maritime Safety Committee was made by the Geneva Conference which adopted the IMCO Convention in 1948, when it designated the members of another principal organ of the Organization—the Council. Article 17 provides that the Council shall consist of 16 members, of which "six shall be governments of the nations with the largest interest in providing international shipping services". The Article provides further that "in accordance with the principles set forth in this Article the first Council shall be constituted as provided in Appendix I to the present Convention". And Appendix I provides that the six members referred to should be Greece, the Netherlands, Norway, Sweden, the United Kingdom and the United States.

Before this list was adopted by the Conference, the delegate of Panama, which at that time was ranking fifth on the list of registered tonnage, argued that Panama was entitled to a seat on the Council. However he received no support from other delegates, and Panama was not included in the list. Information on this point may be found in document E/CONF.4/SR Revised, pp. 57-59.

Those who established the IMCO Convention in 1948 have thus themselves recognized the special position of Panama as compared to the other countries. And there is no evidence that they intended to instruct the Assembly to take a different stand in electing the members of the Maritime Safety Committee. On the contrary, in Article 28, relating to the composition of this Committee, they expressly used the word "elect". And this word does not appear in Article 17 *(a)*, relating to the six members of the Council. Article 17 merely says that "the Council shall consist of sixteen Members and *shall be composed as follows*". And Article 18, relating to the composition of subsequent Councils, says that "the Council shall *determine—determine*—for the purpose of Article 17 *(a)*, the Members, governments of nations with the largest interest in providing international shipping services".

It is true that in certain other respects it is impracticable for the Organization to rely upon a discretionary decision by a deliberative organ. In such cases it may be necessary to resort to an automatic test. The drafters of the Convention themselves found it necessary to resort to such a test with regard to the question of the date upon which the Convention was to enter into force. Article 60 of the Convention provides in fact that the Convention "shall enter into force on the date when twenty-one States, of which seven shall each have a total tonnage of not less than one million gross tons of shipping, have become parties to the Convention...". I would like to emphasize

that in this case, where the drafters of the Convention considered it essential to have a simple test, they chose a form of words which is different from those employed in Article 28. Indeed, they chose the terms which are normally used when one wants to refer to registered tonnage.

The Assembly, too, has resorted to such terms, when at its first session it made a provisional decision on the apportionment of the expenses of the Organization among its members, in accordance with Article 31 *(b)* of the Convention. In its Resolution A. 29 (I), the Assembly decided that each member should contribute a basic assessment, apportioned on the same scale as the budget of the United Nations, *plus* an additional assessment "determined by its gross registered tonnage as shown in the latest edition of Lloyd's Register of Shipping". These terms are still more categorical, and still more different from those employed in Article 28. But it may be interesting to note that, before they were adopted, the Norwegian representative in the Assembly Finance Committee suggested that Liberia and Panama should only be required to pay the basic assessment, not the additional assessment. However, this idea was disapproved of by the representative of Liberia, and it was therefore not given further consideration by the Committee.

In both these examples which I have cited, the drafters of the Convention and the Assembly, respectively, wanted for practical reasons a simple or even a mathematical test, and they chose their words accordingly. My Government is convinced that had the same drafters wanted this simple test for election to the Maritime Safety Committee, they would have used the same words in Article 28. But they did not do so because they rightly considered it neither necessary nor appropriate to bind the Assembly for all time to a mathematical criterion in these important elections.

Mr. President, Honourable Members of the Court, I have now concluded the presentation of the principal conclusions of my Government, and I would like to summarize it as follows.

The Assembly is entitled to exercise a certain amount of discretion in electing the members of the Maritime Safety Committee, by taking into consideration all those facts and relationships which together constitute a "ship-owning nation" having "an important interest in maritime safety". It is not possible to single out any special criterion, in the sense that the Assembly should be bound to elect those eight members which satisfy this particular criterion on a purely mathematical test, thus depriving it of the genuine choice which is an inherent element in an election.

II

I shall then, with your permission, Mr. President, pass on to the second part of the Oral Statement of my Government.

Some of the learned Representatives who have preceded me in this presentation have maintained that the Assembly was bound to apply one *single criterion*. This makes it necessary for me to make the *subsidiary* observation that should the Court, despite the words employed in Article 28 and despite the other reasons I have indicated, hold that Article 28 does impose upon the Assembly one single test, my Government submits that this test must be *ownership* rather than

registration. And ownership must be *ownership by genuine interests* of the country concerned. This is the test which comes closest to the actual words used: "ship-owning nations".

It would not be in accordance with the natural meaning of the admittedly imprecise words of Article 28 to term a Member a large ship-owning nation, if neither itself nor its citizens or companies domiciled in and operating from that country are genuine owners of a large amount of shipping. Even if the Assembly is considered obliged to "elect" by one single standard, this standard must be a real one, and not based upon mere nominal ownership, which, we submit, does not necessarily reflect an "important interest in maritime safety".

My Government therefore submits, as its subsidiary view, that if it is held that the Assembly is bound to apply one single test, this must be the test of ownership by genuine interests of the country concerned. It is for the Assembly to judge which members satisfy this test. And, in our view, the Assembly exercised this judgment in a correct manner when it elected those countries which it did elect, in preference to Liberia and Panama.

[Public hearing of 29 April 1960, afternoon]

Mr. President, Honourable Members of the Court, at the last session I submitted the principal contention of my Government, which is that the Assembly had a certain measure of discretion in selecting the eight largest ship-owning nations, and that it is not bound to apply one single criterion to the exclusion of all others. I then submitted the subsidiary view of my Government, which is that, should the Court consider that the Assembly was obliged to apply one single test, then this test must be ownership by genuine national interests.

III

My Government would have preferred to stop its argument here—as it did in its Written Statement. However, in their Written and Oral Statements, the honourable Representatives of some other Governments maintain that the Assembly was bound to apply solely the test of *registered tonnage*. Although my Government believes that this—for a number of reasons, which I have already indicated—would imply a violation of both the words and the spirit of Article 28, and would not be in harmony with the purposes of the Organization and the Maritime Safety Committee, I would like, in conclusion, to make some further observations of a subsidiary nature with regard to the situation which would arise, should the Court agree with the view that *registration* is to be applied as a single test.

My Government submits that, even in this case, the Assembly could not—in the application of Article 28—indiscriminately accept *any* registration, without looking at the realities behind it and the applicable rules of international law.

It is *not* in accordance with sound principles of law to let the right of a country depend exclusively upon facts which it is within the exclusive power of the Government concerned to create. Should one consider such a criterion to provide a single test for establishing certain international rights of the State, one must at least ascertain that the

State has exercised its power within certain limits laid down in international law. Otherwise, one would arrive at complete arbitrariness. As was pointed out by the learned Representative of the Netherlands this morning, this Court has already had occasion to recall that:

> "... international practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily binding on other States or which are binding on them only subject to *certain conditions*".

The quotation is from the *Nottebohm* case, *I.C.J. Reports 1955*, page 21.

One of the clearest examples of this has been provided by the Court itself in its Judgment in the *Nottebohm* case between Liechtenstein and Guatemala, where the Court held that Guatemala was *not* obliged to recognize a former German citizen—who had been domiciled in Guatemala for nearly forty years—to recognize him as a citizen of Liechtenstein merely because this country had naturalized him under its own law. Although the Court of course is well acquainted with its own Judgment, I hope I shall be forgiven if I recall some of the statements made therein, in addition to the one which was quoted by the honourable Representative of the Netherlands this morning. The Court stated, *inter alia:*

> "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its bases a social fact of attachment, a *genuine connection* of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact *more closely connected* with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

And there is a further quotation, which I would like to read:

> "The Court must ascertain ... whether the *factual connection* between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently *close*, so *preponderant* in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as *real* and *effective*, as the exact juridical expression of a *social fact of connection* which existed previously or came into existence thereafter."

The quotations are from *I.C.J. Reports 1955*, pages 23-24.

It may be noted in passing, although I do not propose to dwell on this aspect, that here the Court deals with a point which is similar to that raised by the learned Representative of Liberia at the end of his

Oral Statement; namely, the question at what time should the facts which constitute the "genuine link" exist—before or after registration?

In the Judgment which I quoted, the Court based its decision upon the principle that the mere naturalization of a physical person does not entitle the naturalizing State to represent the person concerned internationally, if such naturalization does not reflect a genuine connection between the person and the State concerned.

The *International Law Commission*, in its draft articles of 1956 on the Law of the Sea, employed a similar term with regard to the nationality of *ships*. It provided, in Article 29 of its draft, that there must exist a genuine link between the ship and the State whose flag it flies. Like the Court in the *Nottebohm* case, the Commission did not define any single criterion upon which such genuine link would depend. It declared, in its commentary to Article 29, that, as in the case of the grant of nationality to a person, national legislation on the subject of nationality of ships "must not depart too far from the principles adopted by the majority of States, which [and this I emphasize] may be regarded as forming part of international law". In other words, like the International Court of Justice had done with regard to physical persons, the International Law Commission considered with regard to ships that a pure act of registration, although valid under domestic law, could not automatically be invoked internationally. It must satisfy certain requirements laid down in international law itself, and these depended, in the view of the Commission, upon the principles adopted by the majority of States.

The first *Conference on the Law of the Sea* at Geneva in 1958 took a similar view when it considered the draft articles of the International Law Commission and turned them into the four Conventions on the Law of the Sea. It was felt at the Conference that States would not be able to carry out their international obligations in respect of ships flying their flag unless there existed a genuine link between the State and the ship, and, in particular, unless the State exercised effective jurisdiction and control over the ship. The Conference consequently adopted unanimously the following provision in Article 5 of the Convention on the High Seas:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control* in administrative, technical and social matters over ships flying its flag."

The learned Representatives of Liberia and Panama, in their Oral Statements, questioned this provision in respect of its status and its contents. They maintained that Article 5 was not binding, since the Convention had not yet been ratified. And they claimed that the contents were too vague and that nobody knew what "genuine link" implied. At the same time the honourable Representative of Liberia suggested that genuine ownership and a number of other important criteria did not enter into the term "genuine link", and he based this upon the legislative history of the Article.

I shall deal with these points successively.

First—the question of *status*. I have already indicated that the International Law Commission in its commentary stated that national legislation on the nationality of ships must not depart too much from the principles adopted by the majority of States, which may be regarded as *forming part of international law.* The same view was expressed at the Conference itself by those who supported the proposal of the Commission. And the Conference adopted the following preamble to the Convention:

> "The States Parties to this Convention,
> Desiring to codify the rules of international law relating to the high seas,
> Recognizing that the United Nations Conference on the Law of the Sea held at Geneva from 24 February to 27 April 1958, adopted the following provisions as *generally declaratory of established principles of international law,*
> Have agreed as follows: ..."

In accordance with this, my Government submits that Article 5 expresses established principles of international law, since States cannot fulfil their international obligations in respect of ships flying their flag unless there exists a genuine link and, in particular, effective jurisdiction and control.

Then I shall deal with the question of the *contents* of this Article 5. I have already indicated that the International Law Commission did not specify any criteria which should form part of the genuine link, but that they referred to the principles adopted by the majority of States. As pointed out by the learned Representative of Liberia, the Commission in an earlier draft did specify certain criteria, based in fact upon the criteria which were adopted by the *Institut de Droit International* in 1896, and which were quoted by the learned Representative of Italy yesterday. But the International Law Commission decided in the end that "existing practice in the various States is too divergent to be governed by the few criteria adopted by the Commission". and it also said that these few criteria "could not prevent abuse". This it said expressly in paragraph (3) of its commentary to the draft article. *That* was why the Commission decided to adopt one general formula. It wanted to include *more* criteria. There is thus, in the submission of my Government, no basis for asserting, as did the honourable Representative of Liberia, that it follows from the successive drafts of the International Law Commission that a number of the most important criteria must be left out of consideration in the application of the "genuine link". The honourable Representative of Liberia stated that the Commission did not intend that the general expression which it introduced in its last draft should give rise to a stricter rule of law than the earlier text with the enumeration of criteria. But this, I submit, does not conform with the Commission's own words when it said that the old text "could not prevent abuse".

As for the interpretation of the formula, it was submitted at the Conference, by those who supported it, that *effective jurisdiction and control* were indispensable elements of the genuine link, and that this should, therefore, be added to the text proposed by the Commission, and that was done. Otherwise, it was pointed out that there must be many other links between a ship and the State whose flag it flies. Many examples of such links were given by the special rapporteur of the Commission,

who had prepared the draft articles, and also by other speakers. These examples included *inter alia* the nationality and the domicile of the owner and his principal place of business, the nationality of the officers and the crew, and the extent to which parties suing the shipowners might in fact have recourse to the courts of the flag States. But it was emphasized that one could not point out any one of these elements as indispensable. It was the aggregate of these links which, together with the effective jurisdiction and control, constituted the genuine link. And it was very difficult to single out certain criteria as necessary and others as insignificant in this respect. It was the sum total which mattered. I shall again quote from the commentary of the International Law Commission to Article 29. It says:

> "With regard to the national element required for permission to fly the flag, a great many systems are possible, but there must be a minimum national element."

There is thus no basis for claiming that the contents of the "genuine link" consist of, or preclude, any particular criterion, except that effective jurisdiction and control, which were added to the text of the International Law Commission, are a condition *sine qua non*. Nor is it possible to claim that the term "genuine link" is any more vague than many other general legal terms to which international conventions, like national legislation, frequently resort. This too was clearly pointed out at the Conference on the Law of the Sea, *inter alia* by the special rapporteur who prepared the draft article for the International Law Commission.

Further information on these questions may be found in the *Report of the International Law Commission* covering its eighth session, pages 24 and 25, and in the *Official Record of the United Nations Conference on the Law of the Sea, Volume IV*. The statement by the special rapporteur is reproduced in this volume at pages 32 to 35. And I shall not take up the time of the Court by quoting any more from these documents.

Mr. President, if I may make one small digression, I would like to draw attention to the fact that even *national courts* have in certain respects found it necessary to disregard registrations when they do not reflect the realities involved. The Supreme Court of the United States took cognizance of this fact in its judgment of 25 May 1953 in *Lauritzen* v. *Larsen*. In this judgment it is stated as follows:

> "It is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them."

As an illustration of such court practice, the Court cited *Gerradin* v. *United Fruit Co., 1933 American Maritime Cases*, page 81, and *Central Vermont Co.* v. *Durning, 1935 American Maritime Cases*, page 9. I shall not take up the time of the Court by adding yet other citations to this list, but I might add that, in the particular case before the Supreme Court, the Court did not find it necessary to disregard the registration, because it found that the ship, which was flying the Danish flag, was genuinely owned by a Danish national.

Having made this digression, I would like to make a concluding observation on the genuine link as part of international law.

Naturally, it is not the contention of my Government that the registration of ships in Liberia and Panama must be regarded as invalid in any and all respects. One cannot, of course, deny the *de facto* existence of such registrations. And in a number of cases, I admit, registration in Liberia and Panama is, for practical purposes, taken at face value by other Governments and by international organizations.

But, Mr President, and this is important, *any* type of registration of ships which a State sees fit to adopt does not confer upon that State a right or a privilege in its relationships with other nations and with international organizations.

Therefore, if the Court should consider that registered tonnage is the only valid test for the purpose of determining the eight largest ship-owning nations, I submit that it is perfectly permissible, before applying this test, to scrutinize the types of registration used by the nations ranking highest on the tonnage list. And frankly, Mr. President, I can think of no organ better placed to pass judgment on the merits of different types of national registration of ships than the supreme body of the Inter-Governmental Maritime Consultative Organization.

IV

Mr. President, honourable Members of the Court, this concludes the final part of my Statement. I have entered into these questions of the international validity of the registration of ships because I felt that I ought to deal not only with the principal submission of my own Government, but also with the submissions made by the learned Representatives of other Governments. However, as you will have inferred from my preceding remarks, my Government for its part feels that it is not really necessary to enter into these questions of what conditions a registration must satisfy under international law, because, in our view, Article 28 does not impose upon the Assembly any automatic criterion in its election of the members of the Maritime Safety Committee.

I therefore would like, in concluding my Statement, to revert to the original—and principal—submission of my Government. This is that Article 28 allows the Assembly a certain amount of discretion in its election of the members of the Maritime Safety Committee, and that in electing the eight largest ship-owning nations, the Assembly has in fact exercised this discretion within any reasonable limitations that can be inferred from the words and the spirit of Article 28, as interpreted against the background of the purposes of the Organization and the Maritime Safety Committee as laid down in other articles of the Convention.

I wish to thank you, Mr. President and honourable Members of the Court, for your patience in listening to the statement which I have had the honour to make on behalf of the Norwegian Government.

9. ORAL STATEMENT OF Mr. VALLAT

(REPRESENTING THE GOVERNMENT OF THE UNITED KINGDOM) AT THE PUBLIC HEARINGS OF 29 APRIL AND 2 MAY 1960

[Public hearing of 29 April 1960, afternoon]

May it please you, Mr. President and Members of the Court.

I appear, as you know, to make a statement on behalf of the Government of the United Kingdom.

This is the first occasion on which it has been my honour to appear before this Court as the Representative of my Government, and I am fully conscious of the privilege and responsibility of appearing before this high tribunal.

In trying to fulfil my task, Mr. President and Members of the Court, I conceive that it is my duty to try to lay before the Court all the considerations which may seem to be relevant and which, in the view of the Government of the United Kingdom, may help the Court towards a proper conclusion. I cannot accept, either for the Government of the United Kingdom or for those who oppose their views, the limitation which has been suggested by the Government of Liberia in the passage which appears on page 65 of the printed volume containing the Written Statements submitted to the Court. It is somewhat surprising to read there the suggestion that Members of IMCO who gave reasons during the debate in the Assembly for their line of conduct are not free to invoke in the present proceedings arguments which they did not advance or which they may not have contemplated during the relevant debate in the Assembly. In our submission, Mr. President, any such limitation would not be in the interests of justice and the suggestion is based on a misunderstanding of the procedure and functions of the Court in its advisory capacity.

The Government of the United Kingdom are represented here today in the spirit of Article 66 of the Statute of the Court. We, and I take it all the other Representatives present, appear in order to comment in whatever may seem the most appropriate way on the Statements, both Written and Oral, made by other States.

The Government of the United Kingdom have studied all the Written Statements, giving special attention to the arguments of those who claim that the Maritime Safety Committee, as selected by the First Assembly of IMCO, is not validly constituted. I have also listened with great care to the comments made here which have been adduced in an attempt to show that the Committee is not validly constituted. But I am bound to say that these arguments and comments do not carry conviction. In my submission, they leave substantially untouched the essential considerations submitted by those who maintain that the Committee is validly constituted. Accordingly, I see no reason to depart from, or to repeat, the considerations already submitted by the Government of the United Kingdom in their Written Statement, and without troubling the Court with a repetition of what was said there, I wish to maintain the reasons and the conclusions made in that Statement.

My chief purpose today is to offer comment on the arguments of those who oppose the valid constitution of the Maritime Safety Committee. In fact, the greater part of my remarks will be directed to the arguments put forward on behalf of the Government of Liberia, whose case has been so ably and fully presented by the Representatives of that Government. But this is merely for convenience and my comments will in effect be directed to the arguments of all those who have attacked the election of the Committee. Indeed, the main threads of their arguments are substantially the same, and the criticisms of the arguments made by one of them apply also to the arguments of the others.

Mr. President and Members of the Court, the issue in this case is a comparatively simply one. As was said at the beginning of this oral hearing by the distinguished Representative of Liberia, Mr. Weeks, "it is exclusively one of the interpretation of a treaty". It is maintained on the one hand

(i) that Article 28 *(a)* of the IMCO Convention makes no mention of and does not provide for any statistical criterion governing the election of members of the Maritime Safety Committee,

(ii) that the election of the Committee under that Article implies room for the exercise of judgment or discretion by the Assembly of the Organization, and

(iii) that the idea of an election is inconsistent with the application of *any* automatic statistical criterion giving certain countries the right to be members of the Committee.

On the other hand, it is argued that there is "a mandatory duty to elect" certain States according to the statistical criterion of "the quantity of tonnage which appears on the National Register".

That, in essence, Mr. President and Members of the Court, I suggest is the essential issue that we have to consider.

Although the essential issue is a simple one, the views of the Members of the Organization who argue in favour of the automatic statistical criterion indicate that there is room for differences of opinion as to what the criterion should be. One test suggested is the one which I have just mentioned, namely "the quantity of tonnage which appears on the National Register", that is, of course, the register maintained by each individual State. Another is the figures for gross registered tonnage as they appear in *Lloyd's Register of Shipping Statistical Tables* current on the date of the election. These two tests are not in fact the same. A third possible test, which has been suggested by the Government of Liberia, is the tonnage of shipping on the National Register which is nominally owned by nationals of the State concerned, whether they be natural persons or corporations. A fourth possible test, also suggested in the Written Statement of the Government of Liberia (and I refer here to p. 34 of the printed volume) is "those nations which *really* are 'the largest shipowning nations' ". That of course is not the submission of the Government of Liberia but it is interesting that those words are, in fact, used in the Written Statement of that Government.

It may be that the last of these criteria is beginning to approach the true interpretation of Article 28 *(a)* of the Convention, but it is not simply a matter of statistics to say which are "really" the largest shipowning nations. For example, it will be seen from the figures of 31 De-

cember 1958, quoted by the Government of Liberia on pages 34 and 35 of the printed volume, that at that date 1,073 vessels flew the Liberian flag and their total gross registered tonnage was 11,074,559 tons. But according to the same statement only 514 ships, totalling 6,076,030 gross registered tons, were registered in the name of Liberian nationals, whether they be individuals or companies. In other words, only about half of the total gross registered tonnage of Liberia was even nominally owned by individuals or companies who might be regarded as Liberian nationals.

Even so, one has not arrived at the amount of shipping which can *really* be regarded as Liberian because much of the shipping which is nominally owned by Liberian nationals is beneficially owned by the nationals of other States. This was, in effect, admitted by the Representative of Liberia himself in his Oral Statement on the morning of 26 April. He explained that the web of ownership is one which cannot, in all cases, easily be untangled. Real ownership cannot be determined on the basis of any purely statistical test. In my submission this fact serves to show that the Assembly of IMCO, and in the last analysis its Members, have the right and, indeed, the duty to exercise their own judgment as to whether in reality the country in question is one of the eight largest ship-owning nations. This right and duty of the Assembly, of course, applies equally to all Members of the Organization including the United States, the United Kingdom and the Netherlands, as well as Liberia and Panama. But there is no doubt that according to any test of beneficial ownership Liberia and Panama would not be among the eight largest ship-owning nations.

Mr. President, from these general remarks I should like now to turn to a more detailed consideration of the various subjects that have been discussed during the course of this oral hearing. I think it is convenient to use Part II of the Written Statement by the Government of Liberia as the key for this purpose. That part dealing with the interpretation of Article 28 *(a)* of the Convention does so under four heads. These are:—

I. *The Mandatory Character of Article 28* (a).

II. *The Largest Ship-Owning Nations.*

III. *"An Important Interest in Maritime Safety"*, and, to complete the heading, *Its Limited Relevance.*

IV. *Effects of the Correct Interpretation of Article 28* (a).

I think these headings also cover the greater part of what has been said during the present oral hearing by other Representatives. Therefore, I hope that it will be convenient to Members of the Court if I comment on each of these sections separately. I should, however, like to change the order and to comment first on Section IV, then on Sections I, III and II in that order.

First then, as to Section IV which relates to the effects of what is called "the correct interpretation of Article 28 *(a)*". According to the view stated by the Government of Liberia in this section, the conclusion to be drawn from their interpretation is that Liberia was "entitled to election" to the Maritime Safety Committee. In other words, the effect of adopting the interpretation suggested by Liberia, Panama and the United States would be to give individual States a *right* to be elected. Liberia and Panama are thus asserting their own claims and their own

interest. They are seeking to impose their own claim, as a matter of right, on the other Members and on the Organization. They are, in this way, also seeking to deprive the Organization of any measure of discretion or judgment with respect to the election of the majority of the Maritime Safety Committee. It is odd, I suggest, that this attempt should be made to deprive the plenary body of the normal function of protecting the interests of the Organization.

Yet, it is argued that the application of an automatic criterion is necessary in the interests of the Organization. On examination, this is clearly seen not to be so. In particular, the criterion of gross registered tonnage would not, as seems to be implied, provide a uniform test equally applicable to all the Members of the Organization. Each State is responsible for the maintenance of its own National Register of Shipping. The registration of vessels is in the first instance dependent on the national law of each State. Conditions for registration may, and do, vary from country to country. For example, under the law in force in the United Kingdom, registration of a ship is dependent on the British nationality of its owner. To qualify for registration the ship must be a British ship. In some countries, as we know, registration of a ship is not dependent on the nationality of its owner.

Further examples of variations are ready to hand. If the Members of the Court were to turn to the well-known volume in the *United Nations Legislative Series* entitled "*Laws Concerning the Nationality of Ships*", published in 1955, and the supplementary volume on the same subject, published in 1959, they would find that, quite apart from the question of the nationality of ownership, the practice of States varies in regard to such important matters as the definition of a ship for purposes of registration and the limits of tonnage below which registration is not required. This point is quite significant, I submit. In this connection, the Philippines appear to require all ships of more than three tons to be registered (I refer to p. 138 of the 1955 volume). Most countries, on the other hand, impose a rather higher minimum. These variations might well have significant results if the national register were made the sole test of a nation's position as a ship-owning nation and if, for instance, the nation in question had a large fleet of small fishing boats falling just below the minimum limit for registration. Practice differs too in the matter of provisional registry certificates and as regards Government-owned ships. Some countries register Government-owned ships, though not necessarily all such ships, whereas others do not. Yet if there is one category of ships which can scarcely be left out of the account when interpretating the phrase "ship-owning nations", it must surely be ships owned by the Governments of those nations.

Practice varies too as regards the extent to which charterers can register ships as well as owners, and it is even possible—though of course rare—for a ship to appear on two National Registers at one and the same time.

Can it, therefore, reasonably be held that an international organization, in electing members to a body such as the Maritime Safety Committee, must be bound by the action of each of its members in laying down conditions for registration and maintaining its own National Register of Shipping? I suggest, Mr. President and Members of the Court, that it would be most unreasonable to leave an international organization in effect at the mercy of individual States in that way.

It may be recalled, in passing, that in the *Nottebohm* case, which has already been cited before the Court, this Court did not regard itself as bound by the unilateral act of a State in the grant of its nationality to an individual. I suggest that still less is it right that an international organization should be regarded as bound in this respect by the unilateral act of registration.

I submit that in a case such as the present where the interests of an organization as a whole are involved (and not the liabilities or duties of the individual State) it would be unreasonable to regard the hands of the organization as being tied by the law and action of the individual State.

Mr. President, Members of the Court, as I was saying in the previous portion of my statement, the practice in the matter of registration varies considerably from State to State according to the national laws of those States, and therefore, in my submission, it would be unreasonable to regard the hands of an international organization as being tied by registration under the national laws of the individual State.

Likewise I submit that it would be unreasonable for the hands of the Organization to be tied permanently by its constitution to the action of a private enterprise such as Lloyd's Register of Shipping, which acts independently of the control of Governments or of the Organization. The statistical tables produced by Lloyd's Register of Shipping are prepared on its own responsibility. Information for the tables is derived partly from Governments, partly from the Society's own surveyors, and partly from information provided by shipowners. There is room here perhaps for error, and certainly for differences of assessment. Thus, not only may there be differences between the bases on which national registers are prepared, but there may also be differences between the bases on which those registers and the Lloyd's Register of Shipping Statistical Tables are prepared. For example, the United Kingdom Register of Shipping includes vessels down to a gross tonnage of 15 tons, whereas the relevant tables in the Lloyd's Register of Shipping Statistical Tables for 1958 do not include ships of less than 100 tons gross. It may well be asked, therefore, whether it is reasonable to regard these Statistical Tables as being conclusive—and that is what is said, Mr. President, *conclusive*—for the purposes of election to the Maritime Safety Committee.

Now there is another respect in which the automatic applicability of the Statistical Tables is open to serious doubt. Although the Tables for 1958 were published in November, they were based on the gross tonnage of ships entered in *Lloyd's Register Book* as printed and published in July of that year. The election of members to the Maritime Safety Committee was held on 15 January 1959. This was about six months after the date of publication of the gross tonnage of ships on which the Statistical Tables for 1958 were based. Whether the figures published in July of 1958 were then completely up to date I cannot say, but having regard to the ordinary processes involved in the collection of information, its printing and publication, the chances are that even at that date—at the date of publication of the figures—there had already been changes in the gross tonnage of ships on the National Registers. It is certain that there must have been changes in the gross tonnage of ships on the National Registers between July 1958 and the election held on 15 January 1959.

Such changes could easily have a material effect on the statistical position at the date of the election. Let me take an example from the facts. It will be seen that according to the Statistical Tables for 1958, the gross tonnage for Panama was 4,357,800 tons, while the gross tonnage for France was 4,337,935. Thus there was a difference of less than 20,000 tons between Panama and France according to *Lloyd's Register Book* as printed and published in July 1958. The registration of one large ship by France between July 1958 and 15 January 1959 could have altered the statistical position as between France and Panama. The figures for various countries in the Statistical Tables might easily be closer to one another than the figures for France and Panama were. But even on the basis of that illustration it would, in my submission, be manifestly absurd to take the figures from the Lloyd's Register of Shipping Statistical Tables as determining the so-called right to be elected to the Maritime Safety Committee.

In any event, not only might the application of a test of this kind lead in terms of figures to the wrong results in particular cases, but it might well lead to unsatisfactory results in cases where the figures of registered tonnage for two Members, either on the National Register or as shown in the Statistical Tables, were further apart than in the French/Panamanian example just given. Of course I am taking a hypothetical case now, but the application of the automatic test could result in a State with a larger registered tonnage but with comparatively little to contribute on the subject of maritime safety becoming a member of the Maritime Safety Committee, in preference to a State with a smaller tonnage on its National Register but having vastly more experience and more to contribute on the subject. From the point of view of the Organization, surely this would be a most unsatisfactory result.

Therefore, it may be concluded that the application of an automatic statistical test would not contribute best to the fulfilment of the functions of the Maritime Safety Committee or of the purposes of the Organization.

The comments which I have just been making relate, in the main, to the practical effects of what is claimed by the Governments of Liberia and Panama to be the correct interpretation of Article 28 *(a)*. I have used the heading as a peg on which to hang these comments. In fact, the relevant section of the Liberian Written Statement is concerned mainly with an attempt to apply the Advisory Opinion of this Court on *Conditions of Admission of a State to Membership in the United Nations*, which is cited as *I.C.J. Reports 1948*, page 57. The purpose of that comparison is to try to lead to the conclusion that the Assembly of the Organization is legally bound to elect those Members which fulfil the conditions laid down in Article 28 *(a)*. It is suggested that no valid distinction can be drawn in this respect between Article 28 *(a)* of the IMCO Convention and Article 4 (1) of the Charter of the United Nations. There is indeed a parallel, Mr. President, between the two provisions, and in large measure the reasoning of the Court in that case applies to the present case. The Government of the United Kingdom do not contend, and have at no stage contended, as has been alleged here, that the Assembly of the Organization has an unfettered discretion or is entitled to ignore the limitations on its powers or the criteria for its judgment laid down in Article 28 *(a)*.

However, to say that the Assembly of the Organization is bound by the conditions laid down in Article 28 *(a)* does not answer the question now before the Court. In the submission of the Government of the United Kingdom, the conditions laid down in that Article do not provide any automatic criterion. On the contrary, as in the case of *Admissions to the United Nations*, a measure of judgment or discretion is left to the Assembly in determining whether particular States fulfil the conditions and should be elected to the Maritime Safety Committee.

[Public hearing of 2 May 1960, morning]

Mr. President, Members of the Court, I am sure that we all note with regret the absence of Sir Hersch Lauterpacht from the Court, and particularly the reasons for it, and I hope I may be forgiven for expressing the wish that he may have a speedy and successful recovery and return to the Court at an early date.

May it please you, Mr. President and Members of the Court, I should now like to continue the exposition which I began on Friday afternoon. Perhaps I may start with a brief summary of what I was then saying. The Court will recall that I explained my intention of commenting on the statements already made under the following four headings. First, the effects of what may be called the automatic interpretation of Article 28 *(a)*; secondly, the alleged mandatory character of that article; thirdly, the significance of the expression "an important interest in maritime safety", and fourthly, the meaning of the "largest ship-owning nations". It will be remembered that the subjects correspond to Sections IV, I, III and II respectively of the Written Statement submitted by the Government of Liberia.

In connection with the effects of the automatic interpretation of Article 28 *(a)*, I had pointed out that the United States, Liberia and Panama were seeking to assert, as against both the Organization and its Members, the right for certain individual States to be members of the Maritime Safety Committee, and that, if their view were accepted, the plenary body would be deprived of the normal function of protecting the interests of the Organization.

Moreover, the application of an automatic criterion dependent on gross registered tonnage, whether on the basis of figures supplied by the individual Members of the Organization or taken from Lloyd's Register of Shipping, would not be satisfactory or in the best interests of the Organization. Among the reasons for this conclusion were the following.

First, National Registers of Shipping are maintained by States on the basis of their own laws: laws governing registration differ considerably from State to State. National registration, therefore, does not provide a uniform test for all Members of the Organization.

Secondly, so far as Lloyd's Register of Shipping is concerned, the figures are produced on a basis which differs in some measure from that of the National Registers and are inevitably out of date by the time the election to the Maritime Safety Committee takes place. Accordingly, the Statistical Tables, produced on the basis of *Lloyd's Register Book*, cannot provide a satisfactory criterion automatically giving a State a right to be elected to the Maritime Safety Committee.

Thirdly, I submitted that it is a fact that interest in, and ability to contribute to, matters of maritime safety do not necessarily depend on the amount of tonnage on the National Register.

I had concluded my remarks on this Section by pointing out that the Advisory Opinion of the Court on *Conditions of Admission of a State to Membership in the United Nations* by no means answered the question of interpretation now before the Court. No one claims that the Assembly of IMCO is entitled to ignore the conditions governing the election under Article 28 *(a)*. The difference of opinion is as to what those conditions are. In accordance with the *Admissions* case, we maintain that the Assembly of the Organization is free, within the conditions provided, to exercise its own discretion or judgment.

Mr. President, reference to the *Admissions* case leads naturally to the next part of my statement. This relates to Section I of Part II of the Written Statement submitted by the Government of Liberia, which deals with the so-called mandatory character of Article 28 *(a)*.

It is argued there that the language of Article 28 *(a)* means that the Assembly of IMCO is obliged to elect the eight largest ship-owning nations and, of course, that this must be done on the basis of registered tonnage. In the submission of the Government of the United Kingdom, the words "of which not less than eight shall be the largest ship-owning nations" were not intended to impose an obligation which nullifies completely either the condition that the Governments of nations to be elected must have "an important interest in maritime safety" or the right of choice inherent in the phrase "elected by the Assembly". If properly construed, in my submission the words do not have that effect.

It may well be, Mr. President and Members of the Court, that the true intent of Article 28 was more nearly expressed by the United States delegation in a document dated 23 February 1948, which was circulated at the United Nations Maritime Conference that drew up the Convention now under consideration between 19 February and 6 March 1948. The document to which I am referring is the one listed as No. 52 among the documents transmitted by the Secretary-General of the Organization in accordance with Article 65, paragraph 2, of the Statute of the Court. The United States delegation said, at page 23 of that document:

> "The provisions of the draft Convention are tentative, and are intended to be developed in detail at contemplated technical conferences. The Maritime Safety Committee, under the tentative provisions, is to be comprised of fourteen Member Governments which the Assembly will select from nations having the greatest interest in maritime safety, eight of which are to be from the largest ship-owning nations and six to be selected with a view to adequate representation of other nations having important interests in maritime safety and of major geographical areas."

Now of particular interest in this statement is the use of the words "greatest interest", that is, greatest interest in maritime safety, the comparative factor being clearly in the mind of the United States delegation at that time. Also of interest is the use of the word "from". It is quite clear in this interpretation of the relevant clause that there was, at any rate in the view of the United States delegation at that

time, an intention that there should be an element of choice *from* the nations having the greatest interest in maritime safety, eight of which were to be *from* the largest ship-owning nations.

Well, that was the interpretation given by the United States delegation to the text submitted to the Conference which, as regards the words now under consideration, was not, I think, materially different from the final text of Article 28*(a)*. If I may just give the reference, the text submitted to the 1948 Conference is to be found in document No. 50 submitted by the Secretary-General of the Organization.

Now, as I should like to explain more fully a little later, from a purely grammatical point of view, having regard to the position of the word "from" in the first part of Article 28*(a)*, and of the clause "of which no less than eight shall be the largest ship-owning nations", there is much to be said for the interpretation given to the provision by the United States delegation in 1948. But for the moment I should like to point out that, in any event, there is no hint whatever in their Statement that any automatic, statistical test was to be applied by the Assembly or that the Assembly was not to exercise a genuine choice.

Mr. President, Members of the Court, it is interesting to compare what was said by the United States delegation at the 1948 Conference with the comments made by the learned Representative of the United States at the present oral hearings on Thursday, 28 April. He maintained that, while the opening words of Article 28*(a)* could properly be read as giving the Assembly a right freely to choose fourteen from among all the Members of IMCO, this implication, flowing from the first use of the word "elected", was eliminated by what he called the first particular condition in Article 28*(a)*. He was, of course, referring to the clause "of which not less than eight shall be the largest ship-owning nations". He argued that to let the implication of free choice override the specific limiting clause would be to frustrate the purpose of the draftsmen of Article 28*(a)*. Apart from the obvious comment that this view differs from what was said by the United States delegation at the Conference, there are two comments that may be made.

First, the remarks made here by the Representative of the United States assume in effect that "the largest ship-owning nations" are to be determined according to an automatic criterion. Secondly, as a matter of the pure order of words, if one looks at Article 28*(a)*, it is apparent that the statement made ignores the previous condition, which appears first in Article 28*(a)*, this condition of course is that the Maritime Safety Committee is to be elected "from the Members, governments of those nations having an important interest in maritime safety".

Surely there is some inconsistency between the remarks of the United States Representative to which I have referred and the contention which he made earlier in his statement, that the eight largest ship-owning nations are automatically deemed to have "an important interest in maritime safety" for the purpose of Article 28*(a)*. May I explain a little more fully.

What was said by the Representative of the United States is of some interest because he embarked on a grammatical treatment of the language of Article 28*(a)*. With the leave of the Court, I should like to quote what he said, which appears on page 11 of the uncorrected

record for Thursday, 28 April *[cf. p. 324]*. Referring to the first half of Article 28*(a)*, he said:

> "I wish to direct the Court's attention to the phrase 'of which not less than eight', and particularly the word 'which'... When the language is analysed [he said], it is clear that the word 'which' can only refer back to the word 'nations' in the immediately preceding phrase reading 'those nations having an important interest in maritime safety'. In other words, of the nations having an important interest in maritime safety, not less than eight shall be the largest ship-owning nations."

Now, that is what he said. From a purely grammatical point of view, this construction appears to be right. But, if it is right, the effect on the grammatical construction of the whole provision is very interesting. The result would be to include the eight largest ship-owning nations among, and here I use the words of the Article itself, "the Governments of those nations having an important interest in maritime safety". These words, however, are quite clearly governed by the words which precede them, namely, "elected by the Assembly *from* the Members". If I may be forgiven for reading the whole of the language once more, it reads as follows: "elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety". Thus, if the clause relating to the eight largest ship-owning nations grammatically refers to the word "nations", then it is quite clear that the clause is governed by the preceding words "elected by the Assembly from the Members". On this grammatical approach it seems that both the clauses which follow the words "elected by the Assembly from the Members" describe a class of Members from which some of the fourteen members of the Maritime Safety Committee are to be elected. It may be observed that this interpretation would be, literally or grammatically, consistent with the wording of the second branch of Article 28*(a)* which refers to the "remainder" to be elected, which, as a matter of purely literal interpretation, could be either more or less than six. In any case, it may be observed that the effect of construing the words of Article 28*(a)* as suggested, on behalf of the United States, would be to give the Assembly the right to choose from among the eight largest ship-owning nations, and that this result would be consistent with the words which I quoted from the document submitted by the United States delegation in 1948.

Mr. President, if I may I should like to return to the arguments which were submitted by the Government of Liberia in their Written Statement, and to make a few brief comments on them.

The attempt which is made at page 41 of the printed volume to explain away the use of the word "elected" by reference to the necessity to have a point of time at which the relative size of ship-owning States one to another could be determined carries, I suggest, no conviction. If it had been desired to fix a point of time for the application of a statistical test, such as the tonnage on the national register, it would have been very simple for the draftsmen to have provided that eight members of the Maritime Safety Committee should be those having the largest gross tonnage at, for example, the first day of the session of the Assembly. Of course the draftsmen did no such thing.

Then, the alternative explanation of the word "elected" offered by the Government of Liberia is, in my submission, equally unsatisfactory. It is true, as they say at page 41 of the printed volume, that the language of Article 28 *(a)* appears to leave it open to the Assembly to elect more than eight as the largest ship-owning nations, but this does not detract from the fact that the clear and express language of the Convention provides for all fourteen members of the Maritime Safety Committee to be elected by the Assembly. Indeed, these rather unsatisfactory attempts to explain away the significance of the word "elected" seem to show how ill-conceived is the notion that Article 28 *(a)* is mandatory in the sense which has been suggested.

If the language of Article 28 *(a)* is to be regarded as mandatory, it is rather in the sense of laying down conditions for the guidance of the Assembly in proceeding to the election. Within the framework of those conditions, the Assembly is left to exercise its own judgment or discretion. This, of course, is to be done in the process of election.

The adoption of the automatic statistical criterion for the election of eight members would, in practice, have the effect of depriving the words "governments of those nations having an important interest in maritime safety" in the first half of Article 28 *(a)* of any material significance, and indeed that is what is intended. But the Government of Liberia themselves were reluctant to go so far as to strip the words "having an important interest in maritime safety" of all significance. Thus, at page 34 of the printed volume, they admit that the possession of "an important interest in maritime safety" applies equally to the election of "the eight" and of "the six", but they allege that the expression is "so broad that taken by itself it can scarcely qualify the positive obligation, as regards the election of the first category of members of the Maritime Safety Committee, to select only those nations which are *really*—and I am quoting—'the largest ship-owning nations' and not others".

In the submission of the Government of the United Kingdom, so far as this conclusion purports to render meaningless the words "an important interest in maritime safety", it is not justified, either in common sense, or by the wording of Article 28 *(a)*.

Mr. President and Members of the Court, that completes the comments which I should like to make on the so-called mandatory character of Article 28 *(a)*, and my last remarks lead, very naturally, to a consideration of the expression "an important interest in maritime safety". This expression is discussed in Section III of the Written Statement by the Government of Liberia on the interpretation of Article 28 *(a)*. Now, as I was pointing out a few minutes ago, the Government of Liberia, in the earlier Section, were reluctant to assert that the expression is wholly devoid of meaning. Again, we find in Section III that they are reluctant to assert that the expression is wholly irrelevant. Thus they refer, in the title to this Section, to its "limited relevance" and then assert that the reference to an important interest in maritime safety of the eight largest ship-owning nations plays a distinctly limited role—thus, I suggest, by implication admitting, as appears from other parts of the Written Statement by the Government of Liberia, that the condition regarding an important interest in maritime safety has at least some relevance, though naturally the Government of Liberia are at pains to reduce that relevance to a minimum.

Now in particular they say two things. First, that special conditions override general ones and, secondly, that the largest ship-owning nations as a matter of construction have an important interest in maritime safety. The first assertion is based on an alleged similarity with the case concerning the *Conditions of Admission of a State to Membership in the United Nations,* where the Court was invited to find in the general statement of the responsibility and powers of the Security Council, contained in Article 24 of the Charter of the United Nations, a power to override the specific requirements for admission laid down in Article 4 of the Charter. Well, it is apparent that there is no parallel between the specific provisions made by Article 4 of the Charter concerning the admission of a State to Membership of the United Nations in relation to the general powers of the Security Council, and the conditions concerning elections to the Maritime Safety Committee laid down in Article 28 *(a)* of the IMCO Convention. We are not here concerned with general powers overriding the exercise of specific powers. We are concerned with the interpretation of conditions relating to the exercise of the power of election. What the Government of the United Kingdom say is that not only must a State be one of the eight largest ship-owning nations, but it must also have an important interest in maritime safety if it is to qualify for election. Those, we suggest, are the terms of guidance given to the Assembly in electing the members of the Maritime Safety Committee.

To say that the largest ship-owning nations have an important interest in maritime safety is, in one sense, to state the obvious, but it by no means follows that a State with the largest tonnage on its national register has "an important interest in maritime safety" within the meaning of Article 28 *(a)*. Of course, it is unlikely that any State would join the Organization unless it had, from its own point of view, an important interest in maritime safety. However, what is an important interest from the point of view of the individual State is not necessarily an important interest from the point of view of the Organization. As stated by the United States Delegation in the document submitted to the United Nations Maritime Conference, which I have already mentioned, the Assembly is to select fourteen member Governments from nations having the greatest interest in maritime safety. What, for the purposes of election to the Committee, is an important interest must, I submit, be a matter of degree which is left to the judgment of the Assembly and its Members.

I submit that in the nature of things an important interest in maritime safety for the purposes of Article 28 *(a)* *must* be determined on a comparative basis, and *must* be a matter for judgment or assessment by the Assembly. Even if it were thought that that were not true in relation to the first half of Article 28 *(a)*, it is certainly true in relation to the second half. Therefore I suggest that there is no reason for taking a different view in relation to the first half of Article 28 *(a)*. Nevertheless, even if this view of the effect of the language of Article 28 *(a)* is not taken, it does *not* follow that any State is entitled to election to the Maritime Safety Committee as one of the eight largest ship-owning nations merely by virtue of the gross tonnage of shipping on its National Register or any other statistical test. If the view should be taken, contrary to my submission, that as a matter of construction the eight largest ship-owning nations are to be deemed to be included among the nations having an important interest in maritime safety, I further submit that two conse-

quences follow. First, as I have already pointed out, the effect of this construction would be to include the eight simply among the members of a class from whom the Assembly is entitled to elect members of the Committee. Secondly, it would be the strongest possible indication that the expression "largest ship-owning nations" should not be interpreted as dependent on gross registered tonnage, but should have a content which, in the judgment of the Assembly, would truly qualify the nations as being ship-owning nations in a real and substantial sense, which would *involve their having an important interest in maritime safety.* Such an interest, as I have already pointed out, by no means necessarily flows from a large registered tonnage.

Mr. President and Members of the Court, I now come to what is undoubtedly the heart of this matter. Whatever view is taken of the relevance of the reference to an important interest in maritime safety, we would probably all agree that the expression to which we should direct most of our attention is the "largest ship-owning nations". This is dealt with in Section II of Part II of the Liberian Written Statement on the interpretation of Article 28 *(a).*

It is scarcely necessary to answer *seriatim* every point made in this connection by those who oppose the validity of the election. The gist of their case seems to be as follows. They start with the assumption that gross registered tonnage is the test and then argue that it would be wrong to rewrite the text by the importation of some different condition or criterion. But the text does not use the word "registration" or any language appropriate to registration. The expression used is "ship-owning nations". It is those who seek to substitute the test of gross registered tonnage who, in my submission, are trying to rewrite the words used in Article 28 *(a).*

Not only are they attempting to re-write the expression "ship-owning nations", but they go even further. Having made the assumption, having attempted to rewrite the expression, they then rely upon the amended text as a basis for arguing that the word "elected" should be given a secondary or subsidiary meaning. In other words, at both stages of their argument they seek to give words meanings which are far removed from their natural and ordinary meanings. It is, therefore, not surprising that a great deal of their argument is directed not so much to showing what the Convention says but what, in their view, the Convention ought to say.

These simple observations, based directly on the language of the Article itself, are, I submit, sufficient to dispose of the whole of this case. Nevertheless, I am afraid that I feel bound to comment on a number of the detailed points or arguments which have been put forward. In fact there are seven points on which I should like to comment and I shall do so if I may, one by one.

First, it is said that, if there is serious doubt as to the meaning of Article 28 *(a)*, that interpretation should be preferred which gives full value to the language actually used and which is likely to contribute to the effective working of the Organization and not to frustrate its purpose. I have already submitted that the interpretation which we maintain does give full effect to the language of the Article and gives full effect much better than the opposite view. As regards the purposes and the effective working of the Organization, the difference between the opposing views is not the principle of interpretation but the effect of its application. In the view of the Government of the United Kingdom,

the purposes of the Organization are not so likely to be achieved by the automatic statistical test of registered tonnage for the election of members of the Maritime Safety Committee, but rather by the exercise of some measure of judgment by the Assembly which, after all, is composed of all the Members of the Organization. The Assembly should, of course, be guided to some extent by the figures of registration but if, in the opinion of the Assembly, a State having a large registered tonnage is not in reality one of the largest ship-owning nations, it is not only the right but also the duty of the Assembly to reject that State as a candidate for election to the Committee.

There are very good reasons for this view. Registration, as has been said here by several Representatives, registration of vessels is no guarantee of a genuine link between those vessels and the State of registration. Still less is it a guarantee of ability to contribute in a positive sense to drawing up regulations and recommendations on the subject of maritime safety. It by no means follows that, because the application of conventions and agreements is often made dependent on registration, ability to contribute to the work of the Maritime Safety Committee must also depend on registration. On the contrary, it is quite possible that the State with the largest registered tonnage might be the least concerned with maritime safety and its lack of concern with maritime safety might be one of the factors contributing to the large tonnage on its Register. Therefore, in the submission of the Government of the United Kingdom, it is unreasonable to say that the test of registered tonnage for membership of the Maritime Safety Committee is most likely to contribute to the fulfilment of the functions of that Committee or the purposes of the Organization. It is equally unreasonable to suggest as a corollary that the State having the largest gross tonnage on its Register should have the right to be elected to the Maritime Safety Committee.

I submit that the interest of a State in maritime safety is much more likely to flow from, for example, benefical ownership of shipping on its Registry than from the mere fact of registration. Real interest, ability and technical experience are much more likely to be found in countries whose nationals *really* own large fleets than in countries where, for the sake of convenience, such fleets are registered.

Now if I may pass to my second point. It is argued that, because registration is so frequently used in international treaties, and by writers, as a connecting factor between a State and a ship, its use for the purpose of interpreting an expression such as "ship-owning nations" must be presumed unless the contrary can be proved. I suggest that that is far from being a sound legal proposition. I should like to refer to the article by Dr. Jenks in Volume XIX of the *Journal of Comparative Legislation* (1937) which has been invoked in support of this argument. A careful reading of the whole of that article, as opposed to the few extracts which have been cited, serves to show the following three propositions:

(i) there is a considerable degree of confusion between nationality, registration and flag, each being used for different purposes as a connecting factor;

(ii) the fact that international maritime conferences sometimes use deliberately what Dr. Jenks calls, and I quote from

page 249, "a certain vagueness in the terminology" of the conventions they adopt, with reference to the connecting factor;

(iii) that, where vagueness was not acceptable and uniformity was desired, as for instance in the case of the series of International Labour Conventions on maritime questions, it was decided to provide expressly for the inclusion of registration as the connecting factor.

I submit that the clear distinction which appears, for example, between the concept of ownership and registration is only sharpened by the citation of a large number of international conventions and agreements which make their applicability depend on registration. The fact that the application of conventions and agreements to ships is often made expressly to depend on the registration of those ships only serves to stress the *unique character* of the expression "ship-owning nations" used in Article 28 *(a)* of the IMCO Convention. No other convention or agreement has been cited which uses this expression; nor has any other case been called to my attention. So far from proving that the words used must refer to registered tonnage, surely the natural inference is that those who drafted the Convention deliberately used different language and did not intend to refer to registered tonnage. I submit that it adds nothing to the argument to assert that "ship-owning nation" is normally used to refer to registration when the expression is not normally used in international agreements at all.

Mr. President and Members of the Court, thirdly, before I pass on to say something about the practice of the Organization, there is one more point which I should like to make in connection with the suggestion that it is necessary to the effective working of the Organization that the State with the largest registered tonnage should automatically be elected to the Maritime Safety Committee. This suggestion seems to ignore the procedure under the IMCO Convention by which regulations on maritime safety are to be adopted and submitted to Governments. The implication or suggestion seems to be that, if a State is not represented on the Maritime Safety Committee, it will have no opportunity for expressing its view on draft regulations. This, of course, is far from the truth. There will, in practice, be ample opportunity for any Member of the Organization to put before the Maritime Safety Committee its views on any particular matter in which it has a particular interest or concern. Article 32 of the Convention expressly provides that the Maritime Safety Committee shall invite any Member to participate, without vote, in its deliberations on any matter of particular concern to that Member. I have no doubt that, if a Member has sufficient concern on a particular aspect of maritime safety to submit its views in writing to the Committee, it will be accepted as having shown sufficient concern to merit an invitation to participate in the deliberations of the Committee.

Nevertheless, if a Member of the Organization is for any reason unable to place its views before the Committee, that is not an end of the matter because the Committee, by Article 30 of the Convention, has tos ubmit its proposals for safety regulations through the Council to the Assembly of the Organization. It is the Assembly which, by virtue of Article 16, paragraph (i), ultimately has the function of recommending

to Members for adoption regulations concerning maritime safety or amendments to such regulations which have been referred to it by the Maritime Safety Committee through the Council. Therefore, regulations, before they are recommended for adoption, must go to the Assembly, in which all Members of the Organization are represented. When the regulations are before the Assembly, Members will, of course, have as full an opportunity to object or to make constructive comments as they would in the case of any proposal going before the plenary body of an international organization.

For these reasons, failure to elect a Member of IMCO to the Maritime Safety Committee will not deprive the Organization of the possibility of benefiting from such contribution as that Member may be able and willing to make on the subject of maritime safety.

And fourthly. Mr. President, I should like to refer to the practice of the Organization itself, which has also been mentioned in support of the views of those who contest the validity of the election. It is agreed that in the interpretation of the constituent instrument of an international organization the practice of the organization should be taken into account. But once more, this factor tends, if anything, to support the views of those who accept the validity of the election of the members of the Committee rather than the views of those who oppose its validity. So far as there is any practice on the specific point, it is that the Assembly of the Organization deliberately took the view that it was not bound either by national registers or by *Lloyd's Register of Shipping Statistical Tables* in connection with the election of the eight largest ship-owning nations.

The fact that the Members have implicitly accepted registered tonnage for the purposes of Article 60 of the Convention in my submission only serves to underline the different attitude of the Organization towards the different language of Article 28 *(a)*.

Again, the fact that gross registered tonnage was taken into account as one of the factors—an important factor, it is true—in elections to the Council, the apportioning of the contributions and elections to the Maritime Safety Committee does not show that it is the sole obligatory criterion for the election of the eight largest ship-owning nations. We do not dispute that registered tonnage is one of the factors that should be taken into account in the process of election, but we do say, as the Assembly decided, that it is not the *sole* factor or *sole* criterion in determining what are really the largest ship-owning nations. The fact that the Assembly elected to the Maritime Safety Committee eight out of the first ten according to the amount of registered tonnage shown in *Lloyd's Register of Shipping Statistical Tables* for 1958 only serves to demonstrate that the Assembly acted deliberately and in a responsible fashion. This fact, and the debate at the First Session of the Assembly, also show that it deliberately rejected the criterion now pressed upon us by those who oppose the validity of the election of the Maritime Safety Committee.

In this connection, I should like to mention in passing certain criticisms which have been levelled at the reliance placed by the Government of the United Kingdom on Article 55 of the Convention. An attempt has been made to throw doubt on the conclusions drawn by them from the proceedings of the First Assembly of IMCO. In this context, with the indulgence of the Court, I feel that it is necessary to refer to what actually happened at the first Assembly. The documents are already before

the Court and therefore I shall try to be as brief as possible, but I think some importance attaches to this and, therefore, I beg leave to refer to these documents.

The key paper is Working Paper 11 of the First Assembly of IMCO. This is Document No. 18 submitted by the Secretary-General. In that paper, Liberia and the United States proposed, *inter alia*, the following amendment to a draft resolution which had been submitted by the United Kingdom. It was proposed to insert, as part of the resolution of the Assembly, the following:

"*(a)* that for the purposes of Article 28, the eight largest ship-owning nations shall be determined by reference to the figures for gross registered tonnage as they appear in the issue of Lloyd's Register of Shipping Statistical Tables current on the date of the election.

(b) that at the present time the eight largest ship-owning nations are the United States of America, the United Kingdom, Liberia, Norway, Japan, Italy, the Netherlands and Panama."

In this proposal, Liberia and the United States not only asked the Assembly to apply the interpretation of Article 28 *(a)* for which they now contend, but they also asked the Assembly to name the eight largest ship-owning nations, including Liberia and Panama, so that they might then be regarded as elected in accordance with the interpretation proposed. This interpretation and this list were put to vote by roll-call at the Eighth Meeting of the Assembly on 15 January 1959, and were rejected by 17 votes to 11. This is surely a substantial majority. Moreover, the action of the Assembly was overwhelming endorsed when, after it declined to elect Liberia and Panama to the Maritime Safety Committee, France and the Federal Republic of Germany were both elected on a roll-call vote by 23 votes to two, with three abstentions. I suggest that it is very significant that, after Liberia and Panama had been rejected, although certain States said that it would be inconsistent with their legal view to vote for France and the Federal Republic of Germany, 23 Members of the Organization voted in favour of those two States and regarded them as falling within the eight largest ship-owning nations. Surely that is an overwhelming majority of the Assembly?

Are we now, Mr. President, to assume that the 23 States whose representatives voted for France and the Federal Republic were acting illegally and in breach of the Convention in so doing? This, I suggest, is the logical conclusion of the argument by those who attack the validity of the election. Because, if they are right that an automatic test must as a matter of legal duty be applied, it must accordingly be the duty of each Member of the Organization to vote for the *eight largest ship-owning nations as determined by gross registered tonnage* and for *no others* in that category.

In these circumstances, I feel confident that the Court will understand that it was not because of any doubts or qualms of conscience that the Government of the United Kingdom agreed to submit the present question for an Advisory Opinion, but on the contrary, because they were confident that what they had done was right and would stand the test of full and public examination before this honourable Court.

Mr. President, Members of the Court, the fifth point on which I should like to comment is the suggestion by the Government of Liberia, on

page 60 of the printed volume, that consideration should be given to the position prevailing at the time when the IMCO Convention was drafted. I accept this proposition. I also accept that the expression "the largest ship-owning nations" appeared in paragraph 1 of Article VII of the draft Convention as prepared by the United Maritime Consultative Council in 1946. But this, of course, was not the end of the story. Account should be taken, not only of circumstances at the date, say in October 1946, when the draft Convention emerged from the United Maritime Consultative Council, but also the circumstances during the period when the draft Convention was under consideration and, in particular, in February and March 1948 when the draft was being completed by the Geneva Conference.

In the 1946 to 1948 period, it is true that Liberia had no material registered tonnage. But the position of Panama was quite different. I regret to have to say it, Mr. President, but it is a fact, there was anxiety about the policies and practices of Panama towards the registration of shipping, and it was believed that mere registration would, in relation to Panama, be an unsatisfactory criterion in matters of maritime safety. That, at any rate, was the view of the Government of the United Kingdom, and I have no doubt it was a view also shared by many other Governments represented both on the United Maritime Consultative Council and at the Geneva Conference.

It was also known that the shipping on the Panamanian register was rapidly increasing and that this was not accounted for by ships which were genuinely Panama-owned. Furthermore, it is a matter of record that, although Panama claimed at that time to have a merchant marine of approximately two and a half million tons and thus to occupy fifth or sixth place in world tonnage, the United Nations Maritime Conference held in Geneva in 1948 did not at that time consider Panama worthy of being nominated as a member of the first Council of IMCO and that this decision led to Panama's withdrawal from the Conference. In the light of this history, it cannot be maintained that those who drafted the IMCO Convention were unaware of the risk, which it seems to be admitted has subsequently arisen, of applying the automatic test of registration to countries in the position of Liberia and Panama.

It may be worth pointing out that reliable figures for registered tonnage were not available in the period from the close of the Second World War to the date of the adoption of the Convention in March 1948. Some figures, however, were of course available. The authorities of the United Kingdom and, no doubt, the authorities of other countries had for their own purposes kept figures of ships on the registers of other countries. The United Kingdom figures, which relate to ships over 500 tons, as they were understood to stand on the register at the end of each year, are of some interest. According to the United Kingdom's figures—these are our own domestic figures collected by our own authorities—in 1939, there was 722,000 tons gross on the Panamanian Register; in 1946, the United Kingdom figure was 1,085,000; in 1947, it was 2,458,000; and in 1948 it was 2,843,000. These figures show the rapid growth in the amount of shipping on the Panamanian Register after 1939 and, particularly, in the 1946 to 1948 period. According to the United Kingdom figures, in 1946, Panama stood eighth in the list of countries with the largest gross tonnage, and in 1947 and 1948 was in fourth position. Broadly speaking, these facts were undoubtedly known to other Governments which took part in the drafting of the IMCO Convention.

It is perhaps also pertinent to consider the figures from *Lloyd's Register of Shipping*. It will be recalled that the figures published by Lloyd's Register refer to ships over 100 tons and are published originally in July of each year. The figure for the Panamanian registry, according to Lloyd's, was 717,525 gross tons in 1939. No figures were published by Lloyd's Register in 1946. The figure published in July 1947 was 1,702,260, and the figure published in July 1948 was 2,716,468. So again it is apparant from the figures published by Lloyd's that there was a considerable increase in the Panamanian registry.

There is really no room for doubt that in the 1946 to 1948 period it was known that the Panamanian registration of shipping was rapidly increasing and that the application of what is now known as the automatic test according to registered tonnage would involve the possibility that Panama would thereby become a member of the Maritime Safety Committee. Mr. President, I mention these facts with no derogatory intention but only because it has been suggested—quite wrongly—that the situation with which we are now faced was neither known nor foreseen at the time when the Convention was drafted.

I further suggest that having regard to the uncertainty about figures of registered tonnage in 1946, and to the circumstances generally, the natural inference is that there was no intention at that time to rely on the figures on the national registers. Circumstances show, moreover, that there cannot possibly have been any intention at that time to rely on the figures published by Lloyd's Register of Shipping.

In this connection, I should, with the leave of the Court, like to refer to the history of Lloyd's Register of Shipping during the relevant period. I think that it is quite important. Owing to war, no statistics were compiled and published regarding the ships recorded in *Lloyd's Register Books* for the years 1940 to 1947. Then, in what was called an appendix to *Lloyd's Register Book for 1947/1948*, Statistical Tables were published and these were based upon the entries in *Lloyd's Register Books* as printed and published in July 1947. These Tables were published subject to a acution as to their accuracy.

In passing, it is interesting to note the further caution given by Lloyd's Register of Shipping in the Statistical Notes on those Tables that they did not reflect any changes in the British Commonwealth of Nations or elsewhere for which the operative dates had been between 1 July 1947 and the date of publication of the Tables. This illustrates again very pointedly how unsatisfactory as an automatic test would be the figures published by Lloyd's Register of Shipping in July with respect to an election held, say, in the following January or February, because similar changes in the figures of the two dates could always occur.

In the Statistical Notes relating to the figures for July 1947, published in *Lloyd's Register Book*, the following was also said:

> "In view of the exceptional changes in the distribution and allocation of ships which must occur after a prolonged war, and which are continuing, the figures in the Tables should be regarded as indicating an intermediate stage in the transition from wartime to peacetime conditions. It is hoped that figures based on the 1948/49 edition of the Register Book, which will be compiled as soon as possible after its publication, will furnish a more accurate record of the position of the merchant fleets of the world."

Therefore, it appears that in 1946, when the expression "the largest ship-owning nations" was first used in the draft Convention, *no*, I say *no* figures of gross tonnage published by Lloyd's Register of Shipping were available, and that in March 1948, when the Convention was concluded, all that was available were unreliable figures and an expression of hope that in future more accurate figures would be published. In fact, when the Statistical Tables based on the figures in *Lloyd's Register Book* of July 1948 were eventually published, long after the signature of the IMCO Convention, the figures based on the July 1947 edition of the *Register Book* were regarded as so inaccurate that Lloyd's Register of Shipping advised that they should not be used. How then, in these circumstances, can it possibly be said that those who drafted the IMCO Convention intended to rely on the figures published by Lloyd's Register of Shipping in their Statistical Tables as being the criterion for determining the eight largest ship-owning nations for the purposes of election to the Maritime Safety Committee?

[Public hearing of 2 May 1960, afternoon]

Mr. President, Members of the Court, this morning I was discussing five points relating to the interpretation of the expression "largest ship-owning nations" used in Article 28 *(a)* of the IMCO Convention. I should now like to pass to my sixth point which relates to the appeal to the procedure for electing the Council of the Organization. It has been suggested that the procedure provided for the Council in some way opens the door to the interpretation of the word "elected" so as to have a dual meaning in Article 28 *(a)*. I submit that the appeal does not help the arguments of those who contest the validity of the election of the Maritime Safety Committee. On the contrary, it shows that where the drafters of the Convention considered it necessary, they were quite capable of laying down a special procedure and of distinguishing, as they did in Articles 17 and 18, between the procedure for determination by the Council and the ordinary process of election by the Assembly. The provision of a special procedure for the determination of certain classes of members of the Council is in very marked contrast with the simple procedure of election which is provided in Article 28 *(a)*. The natural conclusion to be drawn from this comparison is that by Article 28 *(a)* it was intended that the word "elected" should be used in its ordinary sense, thus leaving a measure of choice or judgment to the Assembly.

Now if I may pass to my seventh and last point on the interpretation of the expression "the largest ship-owning nations", it relates to the nature of the expression itself. In the Written Statement of the Liberian Government, the expression has been described as "vague terminology" and, to quote again from the Liberian Statement, it is described as, and these are the words, "so general a provision as 'ship-owning nations'". As these remarks emphasize, the expression is indeed broad. If those who drafted the Convention had intended to lay down the specific test of gross registered tonnage or any statistical test, they could easily have done so. But, as has already been pointed out, the plain fact is that those who search for a rigid criterion in terms of the gross tonnage on the national register or figures to be derived from *Lloyd's Register of Shipping Statistical Tables* are trying to write provisions into the Convention which are not there. What they seek to do *might*, I say *might*, as a

matter of policy, be achieved by rules of procedure, which might be adopted by the Assembly for its own guidance but, I respectfully submit, not as a proposition to be laid down by this Court.

Mr. President and Members of the Court, in the light of these comments on the various arguments that have been submitted by those who contest the validity of the election, I submit that it is unnecessary, strictly speaking, to refer to the *travaux préparatoires* because it is plain both that the language of Article 28 *(a)* in its natural and ordinary meaning does not require, and that it was not intended to require, that the Assembly should apply an automatic criterion. But since reference has been made to the *travaux préparatoires* by the Representatives of other Governments, I should like to add a few remarks about them. Indeed, I have already mentioned the statement made by the United States Delegation which is referred to in Document No. 52 submitted by the Secretary-General of the Organization. There is no need now to say anything further about those remarks except that they clearly do not support the view of those who challenge the validity of the election.

In the *travaux préparatoires*, I have not found a single statement that there should be any automatic criterion for the purposes of the election of any members of the Maritime Safety Committee or that registered tonnage or any other statistical criterion should be applied. So far as there is any indication, it seems to be in a contrary sense. Certain relevant passages are conveniently set out in Annex 1 to the Written Statement submitted by the United States of America. These appear on pages 157 to 160 of the printed volume. With the permission of the Court, Mr. President, I should like to refer to some of the remarks which are there recorded as having been made at the sixth meeting of the United Maritime Consultative Council held at Washington on October 28, 1946. I should like to refer to substantial portions of the record, as I think it is necessary to do so in order to show what was being said. Now the Council was, according to the records, discussing what was then Article VII of the draft Convention—the article dealt with the Maritime Safety Committee, of course that is the article which corresponded to what is now Article 28 of the IMCO Convention. Now in paragraph 105—and I am referring here to the paragraphs of the record—in paragraph 105 of the record, it is said that Mr. Koerbing of Denmark "maintained his point of view that if the number of participating ship-owning nations could be raised from seven to nine and the total number of member Governments in the Maritime Safety Committee from twelve to fourteen, the Indian alternative draft would be acceptable to him. He stressed the *interest of seafaring nations* in the work done by safety at sea conferences." And I should like respectfully to call attention to the words "interest of seafaring nations".

In paragraph 107, it is recorded that the Indian delegation "wished, in connection with the importance of the Maritime Safety Committee to *seafaring nations, as explained by the Danish delegation, to point out* the interests that other countries had in these matters. These interests could be divided into three main categories"—the categories are not relevant to my purpose and I omit them—but, continuing the quotation from the record: "These three categories, the Indian delegate felt, would make it clear how vital matters of maritime safety could be to non-seafaring nations, that is to say to nations who did not actually own or have a large number of merchant vessels." Again, the key is

"seafaring nations"; and that expression coming from the mouth of the Indian delegate is very interesting when placed side by side with the words "who did not actually own or have a large number of merchant vessels".

From these remarks it would seem that the distinction being drawn between ship-owning, and other, nations was not based on registered tonnage but on the distinction between what were regarded as the seafaring nations and the non-seafaring nations. It is difficult to imagine anything that looks less like a reference to the test of registered tonnage or to any other statistical test. Now, no comment seems to have been made to the effect that either the Danish or the Indian delegation were drawing a wrong distinction. Certainly no criticism was made by Mr. Morse of the United States, who is recorded in paragraph 110 as having said "that the figures to be used", which were of course the figures for division between the two branches of the Committee, "were more or less unimportant to the United States delegation except, of course, for the underlying principle which was generally accepted by all that the largest ship-owning nations should be in predominance on the Maritime Safety Committee".

The distinction drawn by the Danish and Indian delegations was taken up by Mr. Oyevaar of the Netherlands who is recorded, in paragraph 119 *(j)*, as having wondered "whether the figures of fifteen in total and eight as membership of seafaring nations might not be suitable" and again may I call special attention to the words "seafaring nations".

Then, in paragraph 123 of the records, Mr. Koerbing of Denmark is recorded as having said "as maritime safety was a question of technical knowledge of the practical possibilities of the steps to be undertaken to secure increased safety, it was logical that seafaring nations who, as a matter of course, had experts on these subjects available, held a predominant position".

Then, in paragraph 124, it is recorded that "the Indian delegation again referred to the interest in safety matters for nations which did not have a large ownership interest in shipping" and that is the end of the quotation from the record.

Now I submit that if, which surely cannot be the case, there were the slightest inclination to read the words "the largest ship-owning nations" as "the States having the largest gross registered tonnage", these remarks from the record would entirely dispel that inclination.

Mr. President and Members of the Court, in the submission of the United Kingdom Government, the answer to the question submitted to the Court by the Assembly of IMCO turns on the interpretation of Article 28 *(a)* of the Convention, as indeed was said several times by the Representatives of Liberia in their Oral Statements. If those who oppose the validity of the election are right in their interpretation, then the failure to elect Liberia and Panama must be regarded as contrary to or in breach of the Convention. If, on the other hand, the Court rejects, as I submit they should, the interpretation which has been suggested involving the automatic application of a statistical criterion, then the election must be regarded as valid. There is in reality no room for the application of the arguments made in Part III of the Written Statement of the Government of Liberia. Accordingly, it is not my intention to delay the Court long with comments on arguments which it seems cannot possibly carry weight with the Court.

The arguments there set out seem to involve in a greater or less degree, although in a somewhat disguised form, allegations of bad faith. The burden of proving such allegations must indeed be a heavy one. In my submission, there is no foundation whatever for the allegation that the majority who voted against Liberia and Panama, and by implication those who subsequently voted for France and the Federal Republic of Germany, acted in bad faith. The fact that the Government of the United Kingdom and other Governments who voted with them were ready and willing to submit the question of validity of the election to this Court demonstrates amply that they were acting in good faith and were quite prepared to have their interpretation of Article 28 *(a)* of the Convention and the validity of the election tested before this honourable Court.

In the present case, the burden of proving that the Assembly of IMCO acted improperly must be a particularly heavy one. By Article 16, paragraph *(b)*, of the Convention, the Assembly is expressly given the function of determining its own rules of procedure. This it did for the purposes of the election, and it acted in accordance with the rules which it had adopted. Moreover, by Article 55, as I have already pointed out, the Assembly is expressly given the power to settle any question or dispute concerning the interpretation or application of the Convention.

All these, I suggest, are weighty considerations, but I feel bound to refer briefly to those particular contentions made by the Government of Liberia in Part III of their Written Statement. There are three points made.

It is suggested, first of all, that the Members of IMCO voted in a manner inconsistent with the evidence of size of various ship-owning nations placed before them or arbitrarily without reference to any evidence whatsoever. This allegation is ill-founded both in fact and in law. It is ill-founded in fact because the Members of IMCO clearly took into account the information laid before them in the form of extracts from the Statistical Tables published in *Lloyd's Register of Shipping* as well as the various considerations which were placed before the Assembly in the course of the debates. No doubt Members were also well aware of the special factors affecting the position of Liberia and Panama, and indeed these factors do not now seem to be in dispute. But—I might mention in passing—it is not without significance, perhaps, that in the Notes on *Lloyd's Register of Shipping Statistical Tables* for 1958, it is said, for all the world to read: "This record increase in the post-war expansion of world tonnage is widely distributed among the principal maritime nations, but its main impetus again comes from the Liberian flag of convenience which has ousted Norway from third position in spite of the latter's continued advancement." That is to say that Lloyd's stated publicly, in their Notes, that it was due to the Liberian flag of convenience that Norway had been ousted from third position in the Statistical Tables on registered tonnage.

In my submission, the contention of the Liberian Government is also ill-founded in law, because the Assembly of an international organization is not a court of law bound to act judicially on the basis of the evidence placed formally before it, but it is a body in which the members are at liberty to exercise their own individual judgment not only on the basis of information placed before them in the organization but also on the basis of their own assessment of their own information. I suggest that this is implicit in the passage from the Court's

Advisory Opinion on the *Admission of New Members*, which has been quoted more than once before. The relevant quotation appears on page 71 of the printed volume, namely: "The judgment of the Organization means the judgment of the two organs mentioned in paragraph 2 of Article 4 and, in the last analysis, that of its Members." It was not suggested by the Court in that case that Members were bound to exercise their judgment only on the basis of the information placed before the Security Council or the General Assembly of the United Nations in the course of their deliberations.

Indeed, Members of the United Nations must be free to judge for themselves whether applicants for admission to the Organization are "peace-loving States" and are able and willing to carry out the obligations contained in the Charter. Likewise, in the submission of the Government of the United Kingdom, the Members of IMCO must be free to exercise their judgment as to whether candidates for election to the Maritime Safety Committee have an important interest in maritime safety and are really the largest ship-owning nations.

Secondly, it is alleged that the majority of the Assembly acted in a manner that cannot be regarded as responsible. That, I suggest, depends entirely on the interpretation given to Article 28*(a)*, and it adds nothing to the arguments submitted on that score. It cannot seriously be contended that, if both the alternative interpretations suggested by the Government of Liberia are rejected, the majority acted in an unreasonable or irresponsible manner.

There is no evidence whatever in that sense, Mr. President and Members of the Court.

Substantially the same comment applies to the third allegation, namely, that of *détournement de pouvoir*. In this connection, nothing material is added by reference to cases in which decisions by administrative authorities have been criticized or quashed by courts of law. We are not now dealing with an administrative authority exercising limited powers, but with the Assembly of the representatives of independent sovereign States, exercising the function of election for the purposes of an international organization. The allegation of unreasonableness or irresponsibility against the representatives of those sovereign States should be firmly rejected.

Mr. President and Members of the Court, I should now like to summarize very briefly the conclusions which I submit to the Court:

First, no member of the Organization has the right to become a member of the Maritime Safety Committee as one of the largest ship-owning nations by the automatic application of any statistical criterion.

2. In particular, Article 28*(a)* of the IMCO Convention does not confer such a right by virtue of *(a)* the gross tonnage of shipping on the National Register of a State, or *(b)* the quantity of such tonnage nominally owned by its nationals whether individuals or corporations, or *(c)* any other purely statistical criterion.

3. Therefore, the Assembly of IMCO was under no legal obligation, as alleged, to elect Liberia or Panama to the Maritime Safety Committee on the basis of any such statistical criterion.

4. There is, accordingly, no legal ground for holding that the Assembly of IMCO acted in breach of the Convention in declining to elect Liberia and Panama to the Maritime Safety Committee.

5. Therefore, the correct answer to the question before the Court is in the affirmative.

In other words, Mr. President, I maintain the conclusions set out in the Written Statement submitted by the Government of the United Kingdom and, very respectfully, invite the Court to find accordingly.

I have now finished my Oral Statement and I should like to thank you, Mr. President and Members of the Court, for the very patient and courteous and attentive hearing which you have given to my rather lengthy remarks. I thank you very much indeed.

The PRESIDENT: Judge Córdova wants to present a question to the Representatives.

Judge CÓRDOVA: Mr. President, in order to clarify at least one aspect of the case in my mind, I would like very much to put a question to the Representatives for the Governments present before the Court, and I have written this question in order to be more precise. I shall read it. Would it be possible for the Representatives of the Governments appearing before the Court in this case to present to the Court, at their convenience, reliable information, as well as their points of view, with regard to the tonnage owned by nationals of both Liberia and Panama respectively at the date of the election of the Maritime Safety Committee, January 15, 1959? And I would like very much to thank the Representatives who will be kind enough to comply with my request. Thank you very much.

The PRESIDENT: The Government of Liberia has expressed the wish to comment upon new points which may have been made in the course of the previous Oral Statements. Though this is the first time a Government Representative wishes to speak twice in an Advisory Case, it has been thought that an exception should be made in the present case because of its special character, provided that the second speech is limited to new points made during the hearings and without any repetition of what has already been said.

The question put by Judge Córdova may be answered in the course of the second speech made by Representatives.

10. SECOND ORAL STATEMENT OF Mr. WEEKS

(REPRESENTING THE GOVERNMENT OF LIBERIA)
AT THE PUBLIC HEARINGS OF 3 MAY 1960

[Public hearing of 3 May 1960, morning]

Mr. President and Members of the Court.

We regret to learn of the illness of Judge Hackworth and should like to express the wish that he will soon recover.

Before I begin this reply, Mr. President and Members of the Court, on behalf of the Government of Liberia, may I first express my appreciation of the consideration which you have shown in providing me with additional time by adjourning early yesterday. For my own part, I hope that I may be able in some small respect to reciprocate that consideration by adhering as closely as I can to the conditions upon which you have given us leave to speak again.

However, before beginning the substance of my statement, may I address myself to the question which Judge Córdova put to the Parties yesterday on the subject of the tonnage owned by nationals of Liberia. I am not yet in a position to give an answer which relates to the very day on which the election was held. But I can give a figure for a date two weeks prior to that. At page 35 of my Government's Written Statement there appears the following passage:

> "Without prejudice to its position in relation to the adoption of registration as the relevant criterion, the Government of Liberia also refers to another possible test of size, namely, that of the quantity of shipping owned by the nationals of the Members. Applying this criterion to the Liberian merchant marine, the position, as at December 31, 1958, was that 514 ships, totalling 6,076,030 gross registered tons, were registered in the name of Liberian nationals, whether individuals or companies."

I am making enquiries by cable to ascertain the position on January 15, 1959. When I receive a reply, I shall, of course, communicate it to the Court.

Mr. President, you indicated that you wished us to restrict this statement to a consideration of new points arising in the course of the Oral Statements. At the outset, there is one matter to which I should refer which cannot precisely be described as a new point, but which can, I believe, be fairly called a new feature of these proceedings; and on which, in all the circumstances, I hope you will permit me to comment.

This feature to which I refer is the failure on the part of the four States who have taken up positions adverse to Liberia and Panama to deal directly or at all with the major contentions advanced by my Government. The effect of this has been substantially to deflect the discussion in this case from the course which it should have followed. So considerable has this deflection been that it has changed the whole perspective of the case. I feel that I ought, therefore, at the outset, to make some brief attempt to redress the situation. This I would propose to do by indicating

shortly the principal points in the case which have simply been left untouched by the statements addressed to the Court by the Representatives of Italy, the Netherlands, Norway and the United Kingdom.

There has, in the first place, been no real analysis of the vital words in Article 28 *(a)*—I quote those words, "of which not less than eight shall be the largest ship-owning nations". None of what may be called the opposing States has really put before the Court a consideration which deprives the words "of which not less than eight *shall* [and I emphasize shall] be the largest ship-owning nations" of their obligatory context. There has been no explanation why the draftsmen should have used mandatory language if, instead, they only intended to create a discretion. The particular issue has simply been avoided.

Secondly, no real attempt has been made to meet another vital contention in this case. My Government considers that Article 28 *(a)* creates a positive obligation to do something—to elect "the eight largest ship-owning nations". I have submitted that the word "ship-owning" must have some objectively definable content. When coupled with the words "largest" and "nations", it must refer to some concept which is capable of specific measurement. The only question is: what test should be used for the purpose of measuring comparative size? Some test there must be, and it makes nonsense of the case to contend, as does the United Kingdom, that there is no need to lay down a test because there exists a complete liberty of appreciation. My Government has, therefore, contended that the proper way of measuring a State's size as a ship-owning nation is by determining the quantity of tonnage on the register of each State. It has supported this contention by three reasons to which I shall refer for the purpose of showing how failure to deal with them has changed the character of the case.

The first reason is that, in at least two other multilateral conventions where a possessive concept is used to connect ships with States, the concept has clearly related to registration. Both the Convention on the Safety of Life at Sea of 1929 and the Load Line Convention of 1930 are expressed to apply to ships, and I quote, "belonging to countries the Governments of which are contracting Governments". I will repeat that quotation for emphasis: "belonging to countries the Governments of which are contracting Governments". The precise terms of the two Conventions are printed as items 7 and 8 at page 89 of the printed volume of Written Statements. Now "belonging to" are words which for all practical purposes are identical with "owned by". The two words are interchangeable. I can say either "to whom does this desk belong" or I can say "who owns this desk". The effect is identical. Consequently, it is of critical significance that both the Safety of Life at Sea Convention of 1929 and the Load Line Convention of 1930 provide expressly that "a ship is regarded as belonging to a country if it is registered at a port of that country". After all, it is an elementary, logical proposition that if "*a*" equals "*b*" and "*b*" equals "*c*", then "*a*" equals "*c*". If, therefore, "owned by" equals "belonging to", and "belonging to" equals "registered at", then "owned by" must equal "registered at". Thus one reaches the conclusion that a ship-owning nation is the equivalent of a nation in which ships are registered.

The drafts of the IMCO Convention were prepared in 1946 by maritime experts. When they dealt with safety matters they *must* have had the 1929 and the 1930 Conventions in mind. After all, in 1946, 1929 and 1930

were scarcely further away than 1946 is from 1960. The draftsmen could not have forgotten the two major Conventions then in force, the application of which would be one of the principal functions of the Maritime Safety Committee. Is it likely, one may ask, that they would have used an expression so close to the one which they were already using without intending it to have the same meaning? Or, to put the question the other way round, is it reasonable to believe that they would have tried to convey some idea other than that of registration by using a word which was, in the sphere of maritime safety, so specifically associated with the concept of registration?

Members of the Court, it is indeed a fact that despite the central character of the argument about the import of the 1929 and 1930 Conventions on Article 28, none of the opposing States have seen fit to deal with it. Instead, they have sought to obscure it by the allegation that the use of the word "ship-owning" in this Convention is a unique use of the word, and endows it, therefore, with a special meaning. But once it is seen that "ship-owning" is but another way of saying "ships belonging to a State", one sees the very direct connection between the terms of Article 28 and the concept of registration used in the Safety Convention of 1929 and the Load Line Convention of 1930.

Again, Mr. President, an attempt was made to obscure the real issues by the repeated reference by the United Kingdom Representative to *Lloyd's Register of Shipping* and the difficulties involved in relying on it. However, in so doing, he either misunderstood or overlooked the point which I presented in my Oral Statement to the effect that Liberia does not pin her case to Lloyd's Register of Tonnage or to any other statistical service. The case of Liberia is that it is the *objective fact* of registration, not the evidence of that fact, to which reference is made by the word "ship-owning". The United Kingdom simply disregarded this critical point.

Again, no State really dealt with Liberia's second reason for saying that a ship-owning nation is one in which ships are registered. No State came to grips with the Liberian contention that the cause of maritime safety would be best advanced by adopting as the test of size the same concept as determines what law shall operate on board a vessel. The United Kingdom has merely denied the Liberian proposition. It has not shown—indeed, it could not—that, when it comes to the interpretation of the word "ship-owning" in the context of maritime safety, any other test than registration could really or readily be applied.

Nor has any State attempted to meet Liberia's third reason for contending that registration is the test for determining the size of a ship-owning nation. This reason, which is of a somewhat negative character, but which is nevertheless important, is that if registration is abandoned it can only be abandoned in favour of some other concept. The difficulty is that there is no single, simple concept which can be invoked to associate a ship with a State. It is of little practical value to keep referring to a concept of "ownership" which has become unreal and meaningless, or to a concept of "beneficial ownership" which has become untraceable. We cited the striking example of the Anglo-American Shipping Company as an instance of the splitting up in the modern world of the various elements of ownership. Curiously enough, no attempt was made to deny what we said about the complexities of ownership. Indeed, the Representative of the United Kingdom, at one point in his argument, himself

referred to, and I quote his words, "the web of ownership" as being one which "cannot, in all cases, easily be untangled". In my submission, the economic realities of the international shipping situation exclude, at least in this context, any satisfactory attempt to attribute to a single State the diverse national interests in a ship, for these only constitute true ownership when they are concentrated in the hands of one person. And, as I have pointed out at length, such concentration is by no means the general rule in modern economic conditions. These are contentions which no opposing State was prepared to answer.

Apart from these reasons for regarding registration as the determinant of the size of ship-owning nations, there are other positive aspects of the Liberian case which were so completely overlooked as to make it appear almost as if the two sides were talking about absolutely different matters. For example, when it came to the grammatical interpretation of Article 28 *(a)*, no State attempted to grapple with the effect of the use of the word "the" before "largest"—"the *largest* ship-owning nations". Nobody explained why the definite article was used; nobody rejected the clear implication that there are eight nations which are *the largest* and which are required by the Article to be elected.

I will not take more of your time, Mr. President and Members of the Court, by prolonging this demonstration of the manner in which the direction of the present proceedings has been altered by the refusal of the opposing States to deal with the central issues. I hope that I have said enough to justify my assertion that this feature of the case is so striking that it constitutes a new approach upon which it is appropriate to comment at this juncture.

Mr. President and Members of the Court, I will now turn to consider the line of argument which the opposing States have pursued instead of addressing themselves to Liberia's contentions. Their argument is a simple one and its simplicity makes it superficially attractive. These States close their eyes to the obligation created by Article 28 *(a)* and, instead, they *assert* the existence of a discretion.

What is striking about the assertion is its imprecision. What sort of a discretion do States possess? To what does it relate? What are the limitations upon it? These questions must be answered if the conditions laid down in Article 28 *(a)* are not to be rendered entirely meaningless. Yet no answer is given by the States which assert the existence of a discretion.

The Representative of Norway spoke in one place of "a *large* amount of discretion" and in another of "a *certain* amount of discretion". Well, which did he mean—"large" or "certain" (whatever that may mean) or small? At one point the Representative of the United Kingdom spoke of a right of Members "to exercise judgment as to whether in reality the country in question is one of the eight largest ship-owning nations". At another, he said that "a measure of judgment or discretion" is left to the Assembly. But he never said how much judgment or discretion should be left to the Assembly. Where is this discretion to stop? What was the point of even putting the words "the largest ship-owning nations" into Article 28 *(a)* if there is to be no limit to the discretion?

Mr. President and Members of the Court, if it is really asserted that the Members of the Assembly possess a discretion in electing the first eight members of the Maritime Safety Committee, I would submit that the Court should be told by those who make this assertion exactly what

the limits of this discretion are. The fact is that the presence of detailed conditions negatives the existence of an unlimited discretion.

So what do the States which assert the existence of a discretion do? They have recourse to expressions which suggest that their discretion is not unlimited, but limited. Yet, Mr. President, I have looked in vain, and listened in vain, to find an indication of the limits placed by its sponsors upon this so-called limited discretion, and I am forced to the obvious conclusion that a discretion without limits is an unlimited discretion. This is so regardless of the name which one may attach to the discretion.

The fact is that neither the United Kingdom nor Norway can state the limits of the discretion which they assert, or accept the implications of such limitation without putting themselves in an untenable position.

There are two reasons for this.

In the first place, any discretion must relate to some specific matter calling for decision. In the present case, if a discretion exists at all, which of course I do not admit, it must relate to something. One possibility is that it relates to the choice of factors leading to the election of the eight. In other words, the assertion of a discretion in this context may mean that the election of the eight can be made by reference to factors other than size as a ship-owning nation. The difficulty with this possibility is that it so plainly runs contrary to the terms of the Article, and it must, therefore, be rejected.

Another possibility is that the discretion may relate not to the choice of the criterion of size, but to the determination of whether that criterion is satisfied. If that is right, then it is first necessary to determine what that criterion is. There must be a fixed criterion before we can have a discretion to decide whether the criterion is satisfied. But the United Kingdom and Norway never do declare what this criterion is.

The United Kingdom and Norway are bound, if their assertion of the existence of a discretion is to have any weight, to inform the Court of the specific class of matter to which their discretion relates. Only after they have done this is it at all possible to determine whether they have exercised their discretion within proper limits.

This brings me to the second difficulty which confronts the United Kingdom and Norway in their argument about the existence of a limited discretion.

As my Government understands the situation, a discretion, if it is truly to be described as limited, must be subject to some form of review. A limited discretion which is not subject to review is limited in name only. In fact, it is absolute. If the Governments of Norway and the United Kingdom say that their discretion is limited, then, if they really mean that, they must be willing to admit some review of their exercise of discretion. In terms of everyday life, an unreviewable limited discretion is a contradiction in terms. Yet, if they admit that their discretion may be reviewed, the Court and the present proceedings are the only place and mode in which such review can take place.

I find it necessary to lay emphasis on this aspect of the argument asserting the existence of a discretion because it reveals the fundamental defect in their whole argument. The essence of a treaty is that it lays down courses or standards of conduct for the parties to it. Predictable standards are objective ones. As soon as a party begins to assert that a standard is subjective, it begins to destroy the effect of the agreement.

I have referred to the argument about discretion in these terms because, in my submission, if accepted it would be destructive of the terms of Article 28 *(a)* of the IMCO Convention. But there is also another basis on which the argument may be criticized. It is that there is, in fact, no adequate justification for reading a discretion into Article 28 *(a)*.

Three grounds appear to have been invoked in the course of the oral argument for the existence of a discretion.

In the first place, it has been suggested, particularly by the Representative of the United Kingdom, that an "objective", or, as he puts it, an "automatic" test would not be in the best interests of IMCO. He talks at one point about the Organization being put, and I quote his words, "at the mercy of individual States". If the implication of that observation is that IMCO is at the mercy of Liberia, it would, I believe, be fair comment to say that IMCO is being put at the mercy *not* of Liberia but of those members who by their collective action are trying to exclude from the Maritime Safety Committee two States who between them are responsible in terms of national and international obligation for the safety at sea of over 15,000,000 tons of world shipping.

But this observation leads me to the real answer to the United Kingdom on this point. It is, if I may say so, rather far-fetched to suggest that the effectiveness of an organ is imperilled by placing upon it those very States who will, in the largest way, be responsible for implementing its recommendations. Why should Liberia, as the State responsible for the third largest quantity of tonnage, be kept out of the Committee? The United Kingdom merely begs the issue when it says that States will have an opportunity to comment upon drafts proposed by the Committee. The simple fact is, either it is important to be on the Maritime Safety Committee or it is not important to be on the Maritime Safety Committee. If it is important, then the reasons which make it important indicate why Liberia makes her claim. If it is not important, then I confess that I am at a loss to know why the United Kingdom is making such a fuss about the matter.

Mr. President and Members of the Court, the one fact from which it is quite impossible to escape in this case is that it is the State of registration, and only the State of registration, which can really implement the work of the Maritime Safety Committee.

Mr. President and Members of the Court, the second line of argument used to support the existence of a discretion is essentially a negative one. It is a simple argument. In effect, Italy, the Netherlands, Norway and the United Kingdom contend that if the draftsmen of the IMCO Convention had intended to create an objective test, they would have said so.

With respect, this seems to me to be a curious argument, for it tends to assume what it seeks to prove. To argue that if the draftsmen had intended to adopt an objective test they would have said so, is to assume that the test which they have employed is not objective. That assumption fails to take into consideration the circumstances in which the original draft of the IMCO Convention was prepared in 1946. As I have already stated, it was prepared by maritime, and not by legal, experts. They were acquainted with the language of the Safety of Life at Sea Convention of 1929 and the Load Line Convention of 1930. They knew that the expression "belonging to" referred to registration. It is, I submit, a fair inference that in using the equivalent of the words "belonging to", they wanted to use an equally objective test.

Nor is it any argument against this to ask: "Why then did they refer to tonnage expressly in Article 60 and why is there a contrast between Article 60 and Article 28 *(a)*?" The answer to this question is that Article 28 and Article 60 were drafted at different times. The original draft laid before the United Maritime Consultative Council on 24 October 1946 contained the terms of Article 28 *(a)* in almost its present form; but it did not contain the final clauses, of which Article 60 is one. Those were added later during the Conference and no consideration appears to have been given to systematizing the drafting.

I would submit, Mr. President, that the question might much more appropriately be revised. Surely, it would be more reasonable to suggest that if the draftsmen had intended to create a discretion, they would have said so. After all, why should they have troubled to draw a distinction between the "eight" and the" six", why should they have bothered to describe the "eight" as "the eight largest ship-owning nations", if they had merely intended that Members of the Assembly should be free to disregard the objective characteristics of size?

It is, I submit, a clear feature of treaty drafting that if the parties intend to create a discretion they normally do so in explicit and unambiguous terms. After all, a discretion does not strengthen legal objections, it weakens them. Since parties to treaties must be presumed to have endeavoured to create specific, binding and effective obligations, it may at least equally be assumed that they will not accidentally have left room for the exercise of discretions capable of altering the whole sense of the text. The practice of States shows that they are fully aware that if a State desires to retain a unilateral discretion in determining a question connected with a treaty, it must do so in express words. Examples of this practice may be found in the case of States making so-called automatic reservations to their Declarations under the Optional Clause. They take great care to say expressly that the question of whether the case relates to the excluded class of matter shall be determined by themselves. In the absence of such reservation, no one would have dreamed that there was a right of unilateral determination.

This view of the matter is confirmed in a more positive fashion by the practice relating to the interpretation of Article 15 of the European Convention on Human Rights. This is the Article which authorizes parties to the Convention to give notice of derogation, that is to say, of suspension of application, of its provisions in times of emergency affecting the life of the nation. Now, one might have thought that this was a context in which States would clearly have a discretion to determine when such an emergency had arisen. Yet it is of considerable significance that when the Government of Greece raised the question of human rights in Cyprus before the European Commission on Human Rights, and when the United Kingdom invoked a notice of derogation which it had given in respect of Cyprus, the Commission sent a sub-committee to Cyprus to investigate the facts. The inference is inescapable that, even in the context of public emergency, the Commission was not prepared to read into Article 15 of the Convention a right of unilateral determination or of subjective discretion. If such a right cannot be read into Article 15 of the European Convention on Human Rights, there is even stronger reason for not reading it into Article 28 *(a)* of the IMCO Convention.

It is, of course, true that some attempt has been made to argue that the draftsmen really did expressly create a discretion. This argu-

ment is that the *travaux préparatoires* show that the participants in the 1946 and 1948 Conferences at which the Convention was drafted were to some extent conscious of what some chose to call the problem of "flags of convenience". The word "ship-owning", it is argued, must be read against that awareness. If States were aware of the problem, surely they must have intended to reserve to themselves the power to deal with it; and how else would they have done this than by the reservation of a discretion? So runs the argument of those who allege the existence of a discretion.

But, as to this argument, surely it can be said that if the draftsmen were fully aware of the growth of tonnage under non-traditional flags and if the intention was to avoid the consequences attaching to large registered fleets, then it would be reasonable to assume that steps would have been taken clearly and explicitly to create a discretion allowing Members to disregard registration. The use of the word "ship-owning" simply does not do that. What cautious draftsman would use a word generally associated with registration to describe a situation in which it was intended to abandon registration? After all, there were good precedents available in the field of transport for avoiding registration and creating a right to seek what the United Kingdom calls the "realities" of the situation. I need only recall the reference, at page 61 of my Government's Written Statement, to the Chicago Air Services Transit Agreement of 1944, which contains express provision for the possession of "substantial ownership and effective control" over aircraft by nationals and the contracting States. And, indeed, if, as the United Kingdom argues, the position changed between 1946 and 1948, it seems even more extraordinary that no steps were taken to change the word "ship-owning". Does not the absence of change suggest that there was no desire for change; and that, in the context of maritime safety, as distinct from the composition of the Council, size as a ship-owning nation was to be determined by registered tonnage?

Mr. President and Members of the Court, I have been dealing with the second of the three main grounds on which an attempt has been made to read a discretion into Article 28*(a)*, and I submit that this ground is as unconvincing as the previous one. I turn now to the third ground. This, if I may be permitted to say so, is even less convincing. It may be summed up under the head of difficulties connected with registration. The opponents of Liberia point to various problems connected with registration and then conclude that it must be assumed that States intended to eliminate these problems by retaining a general discretion.

Some indication of the general character of these arguments is provided by the United Kingdom's discussion of the difficulties of achieving complete accuracy in the registration figures of the various States. Figures, they say, may change in the interval between their collection by *Lloyd's Register* and the date of the election. Some States do not register ships under 100 tons, others do not register ships under 15 tons. The result, contends the United Kingdom, is to create a condition of uncertainty which calls for the exercise of a discretion.

Mr. President, before I deal with the United Kingdom conclusion, namely that the position creates a discretion, let me consider the relevancy of the premise. The United Kingdom challenges the adequacy, accuracy and applicability of the figures in *Lloyd's Register*. I am not

really concerned to dispute this point. The Representative of the United Kingdom may be right or he may be wrong. It just does not matter. My Government contends that the appropriate criterion of size is the objective fact of registration. We do not assert, for this purpose, that any particular single source of evidence must be used. If Lloyd's List is inaccurate, then of course some other source may be employed. In our view, as we have said before, a suitable alternative procedure would be for each State to certify its own tonnage to the Secretariat immediately before the election. The United Kingdom, it may be noted, makes no constructive suggestion at all. It merely proposes to add to the uncertainties of the situation by granting to Members a right to weight the statistics in a manner which, in the light of what has been said, cannot be other than arbitrary, imprecise and unpredictable. This type of weighting is inherently inconsistent with the concept of a discretion reasonably exercised.

Perhaps I may turn now, Mr. President, from the United Kingdom premise to its conclusion. The United Kingdom says that there is a discretion resulting from difficulties connected with registration figures. Should that be correct, which of course I do not admit, I submit that the extent of the discretion must be limited to the occasion which gave rise to it. If inaccuracies in registration figures occasion a discretion, that discretion can only extend to correcting the registration figures. If, as the United Kingdom contends, problems of a time lag between the compilation of the statistics and the date of the election, or of variable lower limits of registration, lead to inaccuracies, then the discretion can be employed to correct those defects.

But, if that reasoning is applied to the present case, it can be seen that the United Kingdom is not using its discretion to correct those defects. There just could not be six million tons of Liberian shipping affected by the time lag in the use of the statistics. Some other factor, alien to the justification for the existence of the discretion, has been imported; and the exercise of a discretion by reference to an alien factor is, by any system of law, unlawful.

Mr. President and Members of the Court, it is of course possible that I have misunderstood the United Kingdom's argument and that, in fact, the discretion for which it contends is wider than mere rectification of registered tonnage figures to meet marginal errors. In that event, I am forced to assume that the United Kingdom is contending, as do the Netherlands and Norway, that there exists a discretion which entitles Members to determine whether there is an effective connection or a "genuine link" between ships and the States in which they are registered. I will not repeat what I have already said about the "genuine link". I adhere to that. In my submission, it is the task of the Court to determine what is meant by the expression "ship-owning". Once the Court has done that and has pointed to an objectively ascertainable criterion, the concept of the "genuine link" has no relevance at all in the present context.

Mr. President and Members of the Court, if I may for a moment assume, but of course without admitting, that the genuine link concept as contained in Article 5 of the Geneva Convention is relevant here, there is one vital point which has been completely ignored in the Oral Statement made on behalf of the Government of Norway.

In introducing the concept of the genuine link into this case, Italy, Norway and the United Kingdom are, in effect, saying: for the purposes of recognition, of registration, Members of IMCO are entitled to consider whether or not a genuine link exists between a State and the ships on its register. But, Mr. President, this is the very thing which, having regard to the development of Article 5 of the Geneva Convention on the High Seas, they are not entitled to do. When the draft of Article 5 was placed before the Geneva Conference, the sentence about the genuine link was prefaced by the words, and I quote those words, "nevertheless, for the purposes of recognition of the national character of the ship by other States". Those words are no longer in the Article. They were removed on the initiative of El Salvador, supported by the United Arab Republic and Iran, by a vote of the Plenary Session of the Conference by 30 votes to 15, with 17 abstentions. It was only after the removal of those words that the Article was adopted by the Convention. The Government of the Netherlands, it may be noted, did not trouble the Court with that essential detail when referring to the adoption of the Article.

In my submission, assuming for the moment that the Court is entitled to apply Article 5 in the present context, the Court should not put back into Article 5 what the Geneva Conference expressly took out of that Article. Or, putting the point in another way, since the Geneva Conference removed the sanctions for non-compliance with the requirement of the genuine link, it would not be appropriate, in the context of Article 28 *(a)* of the IMCO Convention, to exclude a State from the Maritime Safety Committee on the ground that there was no genuine link between the State and the ships registered with it.

Moreover, there is another point of major significance which stands out upon examination of the records of the International Law Commission and the Geneva Conference. That is that there was a clear sentiment both in the Commission and the Conference that it should not be open to States unilaterally to deny the nationality of ships, because this would lead to stateless ships—a status which international law seeks to avoid on the high seas.

Mr. President and Members of the Court, closely connected with the genuine link is another point which has been raised by the Netherlands and Norway. It relates to the *Nottebohm* case. The Government of the Netherlands has, indeed, commented on the fact that my Government has not referred to the case in our Written Statement. Nor, it may be said in passing, did the Netherlands. But the real answer, Mr. President and Members of the Court, is that the case is not relevant. We might much more pertinently comment on the failure of the Netherlands Government to cite to the Court the *Montijo* case (reported in Lapradelle and Politis, *Recueil des Arbitrages internationaux*, Vol. III) or the case of the *Muscat Dhows*, decided by the Permanent Court of Arbitration in 1905. After all, both these cases recognized the right of States to determine the circumstances in which they would grant the right to fly their flags. They deal with ships. They have not in any way been overruled. They are relevant. The *Nottebohm* case is not relevant.

To say this is not to question the importance of the constructive character of that decision in any way. But the *Nottebohm* case is, as the Court itself says in the Judgment, a case relating to diplomatic protection of individuals; it is a case relating to the nationality of a naturalized

person; it is a case in which at the material times the naturalized person not only did not have a genuine link with the country of naturalization, but in which in fact he had a genuine link with the very country against which the claim was brought. The Court, as I have mentioned, has itself laid emphasis on those factors, and I do not believe that it is appropriate to introduce in the context of ships—which can *never* have dual nationality, and I emphasize which can *never* have dual nationality—decisions relating to individuals in circumstances which can occasion dual nationality. Moreover, the *Nottebohm* case was decided before the conclusion of the Geneva Convention on the High Seas; and there is no reason to assume that States intended to transfer that Judgment in its entirety into the law relating to the status of vessels. Indeed, it is difficult to see how some of the factors enumerated by the Court in the Judgment could possibly be applied to ships.

There is, however, one other aspect of the *Nottebohm* case to which reference has been made—namely, those parts of the Judgment which relate to the effects in the international sphere of unilateral acts by States. I need hardly assure the Court that my Government fully accepts the view of the Court that there are some unilateral acts which are conclusive upon foreign States and others which are not. This is a fundamental axiom of international law, and I believe that it is correct to say that in referring to the matter in the Judgment of the *Nottebohm* case the Court was not intending to do more than restate an accepted principle.

But the real objection to unilateral acts does not apply here. This is not a situation in which a State by its unilateral act seeks to acquire benefits without obligations. Membership of the Maritime Safety Committee, Mr. President and Members of the Court, is not a simple benefit. It is an assumption of responsibility; it is a necessary discharge of duty owed by a State which is responsible for vessels—owed by that State not only to the world generally, but particularly to the men who sail on those vessels and whose lives are at stake. Mr. President, my Government is not represented before the Court today out of selfish motives. It will receive no pecuniary benefit if the Court decides that it should be a member of the Maritime Safety Committee. It merely feels that it has a responsibility to discharge and that there rests upon it, that is my Government, as the Government of an independent State, a duty to fulfil its obligations. There is here no motive for the exercise in an unrestrained fashion of a unilateral power designed to improve the position of Liberia. Yet the discharge of its duties is the highest function of Government: and it is in the sense that a Government has a right to discharge its function that my Government seeks the aid of this high Court in the application of Article 28 *(a)* of the IMCO Convention.

Mr. President and Members of the Court, this brings me to the final point which calls for comment. The Court will recall that in Part III of its Written Observations my Government raised a fundamental question relating to the conduct of the election. We submitted that if the Court should find that Members possess a limited discretion in connection with the election of the eight largest ship-owning nations, that discretion was not properly exercised. In consequence, we submitted, there was a failure to comply with the constitutional law of the Organization; and the Maritime Safety Committee could not therefore be regarded as properly constituted.

Somewhat curiously, the Netherlands and Norway have said nothing about this point. Only Italy and the United Kingdom have referred to it briefly. They have contended that there was no generally accepted concept of *détournement de pouvoir;* alternatively, that if there was, it was restricted to administrative powers.

My submission to you on this point is that there is a general principle, which forms part of international law as well as of municipal law, that any discretionary power must be exercised in accordance with the terms of the grant and only for the purpose for which it was granted. If I may put it in those terms, I would submit that a principle of this kind is to be found in each of the systems of law which, in accordance with the Statute of the Court, are represented in the Bench. Such a principle is inherent in the concept of discretionary powers; for, were it absent, it would mean, as I have already pointed out, that discretions which were intended to be limited, *de facto* became unlimited.

It may well be that there are variations from State to State as to the way in which this general principle is given effect in the local law. But that does not deprive the general principle of its validity; nor does it diminish its applicability in this Court. It is these local variations which explain why in some States there may be a limitation of the actual scope of judicial review to acts of an administrative kind. This is a purely local jurisdictional limitation. It goes to procedure and not to substance. And it cannot be employed, as the Representative of Italy sought to employ it, for the purpose of laying down a general rule that only administrative discretions can be challenged, unless, of course, one defines "administrative" quite widely. With respect, that statement does not reflect the position outside Italy, or, indeed, even in Italy. Perusal of Dr. Galeotti's comparative study on *Judicial Control of Public Authorities in England and Italy*, especially at pages 93-95, shows that in Italy even legislative acts are subject to review.

In view of the generality of this rule—that no power should be abused —I hardly need do more than add that if the concept were in some way limited to administrative acts, this classification is not so clear or rigid as to exclude the election of the eight largest ship-owning members of the Maritime Safety Committee as an administrative act. In choosing those members of the Committee, the Members of IMCO are not performing a policy function: they are performing what in English law would be called a ministerial act—an act of administration.

If the Court will permit, I would respectfully draw to its attention an extremely helpful article on "*Détournement de pouvoir* by International Organizations" which appears in the *British Year Book of International Law* for 1957, at page 311. The author is Mr. James Fawcett, the General Counsel of the International Monetary Fund, who is a person with special experience in these matters.

There are two passages in his article which I should like to quote. The first, which is on page 314, reads as follows:

> "Some form of majority rule has become the normal practice in contemporary international organizations, and consequently it may come about that the representative or executive bodies of such an organization exercise their discretion in a manner thought to harm the interests or encroach on the rights of particular members, in so far as the decision exercising the discretion is constitutionally

binding upon all. But just as no majority of shareholders can purport to sanction what is *ultra vires* the company or commit a fraud upon the minority, so it is believed that the minority of member States of an interntional organization are entitled to protection against acts of the majority in excess of power."

The second excerpt, from page 315, is as follows:

"It is hardly possible to define exhaustively the class of actions by an international organization which might constitute *détournements*. But in the relations between an organization and its component States, it is believed that the following would be typical: actions or decisions by any organ which, though formally consistent with the provisions of the founding instrument of the organization, are designed (i) to accord unequal treatment to a particualr member by diminishing its rights, or reducing or increasing its burdens as compared with the other members of the organization, or (ii) to alter generally relations of the members established in the founding instrument."

Both these passages, in my submission, lend full support to my general point—the first limb of our proposition—that there exists a general principle relating to abuse of power. As to the second limb, that there has been an abuse in the present case, there has been singularly little said. Perhaps it was felt by our opponents that it was better to say nothing about this lest the wrong thing be said.

[Public hearing of 3 May 1960, afternoon]

Mr. President and Members of the Court, we have contended that a discretion, if possessed, must be exercised by reference to the purposes for which it existed. There are two basic types of reason why, if a discretion existed at all, it may have existed here. The first is a limited reason. As the United Kingdom has contended, it may have existed for the purpose of adjusting out of date or variable registration figures. If so, then the room for discretion is a small one. It certainly does not extend to using a discretion to abandon registration figures entirely. In those circumstances, it is difficult to see how, on the basis of a marginal modification, States could legitimately have voted against Liberia and Panama.

Moreover, even if they did have a discretion to move away from registration to some such concept as "genuine link", their consequent action would be unlawful by reference to another rule governing the exercise of a power. The rule is that if a discretion is granted, it has to be applied in a proper manner, taking all relevant factors into consideration and omitting all irrelevant ones. As I have indicated in my first Oral Statement, there is clear evidence in the Written Statement of the Netherlands that that Government has completely misconceived the application of the "genuine link" rule. The relevant part of my statement may be found at pages 298-299 of the Verbatim Record for 27 April 1960.

The second possible justification of the possession of a discretion in this situation is this: there may be a general purpose—the advancement of maritime safety; and States may be able to justify their vote by saying that what they did was for the purpose of advancing the work of

the Maritime Safety Committee. But if States say this, then how, by reference to the Record of the First Assembly and what has been written and said in these proceedings, can there be any doubt as to the real motives for voting against Panama and Liberia?

Mr. President and Members of the Court, if ever there was a case in which alien considerations of commerce intruded into a technical matter, this is the case. It is, I submit, of the greatest significance that no State represented in these proceedings, and which voted against Liberia and Panama, has even indirectly asserted that its conduct in all these proceedings was motivated by the only consideration which is possibly relevant, namely, the advancement of the work of the Maritime Safety Committee and the general cause of safety of life at sea.

In short, Mr. President and Members of the Court, it is my submission that even if there did exist a discretion in relation to the election of the Maritime Safety Committee, it was in all the circumstances abused or exceeded in such a way as to render the election void.

There clearly lies upon the Court a heavy responsibility to refrain from any action which could be regarded as an interference with the liberty of an international organization to regulate its own affairs in accordance with its constitution. But equally, it is, in my submission, the compelling duty of the Court to recognize and to protect the rights of each individual member of an organization. That duty is even more compelling when, as in the present case, a distinct flavour of oppression hangs over the whole matter.

Article 1 of the IMCO Convention declares that one of the purposes of the Organization is the removal of discriminatory action and the promotion of the availability of shipping services to the commerce of the world without discrimination. Mr. President and Members of the Court, I ask you, on behalf of the Government of Liberia, to recognize our right to conduct our maritime affairs without discrimination and I ask you, to that end, to recognize our right to a seat on the Maritime Safety Committee.

Mr. President and Members of the Court, this is the end of my oral reply. I wish that I could have been briefer in my reply. I should like nevertheless to thank you, to express my appreciation for the opportunity to have addressed the Court a second time, and, particularly, for the patience and the courtesy with which you have listened to this reply. I thank you.

---

11. SECOND ORAL STATEMENT OF Dr. FÁBREGA

(REPRESENTING THE GOVERNMENT OF PANAMA)
AT THE PUBLIC HEARINGS OF 3 AND 4 MAY 1960

[Public hearing of 3 May 1960, afternoon]

Mr. President, Members of the Court.

I wish to thank the President for giving the Republic of Panama an opportunity to be heard again in this important case, and I wish to promise the Court that I shall heed the observation of the Court that in this second intervention we should try not to repeat matters that were covered in the initial presentation, and also that we confine our statements—our arguments—to matters which were brought by what we may call the other side of this case during the oral hearing.

Before I go any further, Mr. President, I would like to express our deep regret at the absence of two Judges by reason of illness, and to express our deep and sincere hope that they have a full and speedy recovery.

At this moment, I would like to refer to the question presented to the various Representatives of the respective Governments here by Judge Córdova. And I regret very much that on behalf of Panama I cannot give now an exact or precise answer to his question. I must say that I am not in a position now to give a precise answer because, frankly, we did not expect that question to be raised and therefore that information was not brought by me to the hearing; and furthermore, because, as I shall try to explain in a moment, that information —the way we understand the question—may be very difficult to obtain. If the question is to be understood as defining the word "nationals" to include individuals, as well as corporations, then I would say that the question becomes very difficult, almost impossible, to answer, and, if possible to be answered, such answer might require considerable time, because—and that is one of the main points on which we lay stress in the course of our arguments—when one tries to ascertain individual or beneficial ownership in the case of corporations owning ships under the Panama flag or any other flag for that matter, we run into very complicated and complex questions of bearer shares, shares in trust, equity interest in one or another party, so that the matter becomes really a very complex one.

If the question is intended to refer to nationals as including only corporations, then I could give an approximate answer to Judge Córdova, to the effect that we can safely say (I do not have the figures with me but we can safely say) that more than 75 per cent of the tonnage under the Panama flag is owned by corporations registered and constituted under Panama law and under Panama domicile. I cannot tell now what the excess over 75 per cent is, and also I must make this statement with the reservation that I cannot guarantee that that is an accurate statement as of 15 January 1959, but currently —currently—more than 75 per cent of the tonnage under Panama registration has been and is owned by Panama corporations.

Now, if I may, I shall proceed with my second Oral Statement, and again I apologize to the Court for having to speak extemporaneously as I did the first time, and I do hope that this fact of speaking extemporaneously does not make me prolong unduly this presentation as I would like to keep it as brief and as summary as possible.

Mr. President, I think that as a matter of convenience we should group the subjects, which have been discussed here by the Governments which oppose our position, under four categories, and I suggest as convenient titles for those four subject-matters (we have discussed them so long that the matters now should be familiar to all of us, that is why I am using this informal method of grouping them as a convenient one) the four headings, being: (1) the meaning of "ship-owning nations"; (2) important interest in maritime safety; (3) discretion; and (4) "genuine link" and related matters.

Let us now take the first group, Mr. President and Members of the Court.

Ship-owning nations—the meaning of "ship-owning nations", and I agree, Mr. President, with the Representative of the United Kingdom that that is really the heart of this matter; I think that if we are to weigh the relative value of the various matters that have been dealt with in this debate, probably the greatest value—the greatest importance—lies in the proper analysis of the concept of "a ship-owning nation". Once we reach a conclusion as to what a ship-owning nation is, what is the proper test for determining what a ship-owning nation is, the rest of our problem, and for that matter the rest of the problem for the IMCO Assembly, should have been very simple: just to take the eight largest ship-owning nations. So now, in analysing this aspect of what a ship-owning nation is, I must start by saying that it is very curious, it is very striking indeed, that the distinguished Representatives of the Governments which oppose our position have been very elaborate in saying what ship-owning *is not*, in their opinion. But we do not get any constructive, any positive assertions from them as to what a ship-owning nation *is*, as to what ship-owning *is*.

I find that the Representative of Italy—and this is repeated by all the Representatives that spoke in favour of that position—in trying to define what a ship-owning nation is, only gave as an answer what we may call "the theme song" of the position of the other side, the matter of discretion; he said we should not have an automatic test, we should have discretion in the matter—and so we do not get, we never get, a positive statement of what a "ship-owning nation" is in their opinion.

The Representative of the Netherlands does not say that at all, does not answer that in a positive manner at all. The Representative of Italy says: "If there should be a test, it should be ownership by nationals." The Representative of Norway again says that it is a matter of discretion; that it cannot be stated in precise terms; and repeats that if there must be a test it must be ownership and not registration, and curiously enough he goes as far as saying that, even if tonnage should be the test, you could still go behind the figures of tonnage to analyse them and use discretion in interpreting those figures. (This, I think, amounts to saying that, even if tonnage should be the test, tonnage should not be the test!) But the extreme negative position we find in the Representative from the United Kingdom.

He definitely, in his conclusions (which may be found on page 393 of the printed copies that we have received from the Court)—says: "registration is *not* a test, ownership by nationals is *not* a test"; in fact *no* test—there is no test that could be taken, no automatic test that could be accepted—as defining ship-owning nations: it is a matter of discretion.

So, Mr. President and Members of the Court, the Republic of Panama submits that what is a ship-owning nation, what are the eight largest ship-owning nations, is a matter which by the very nature of things requires a clear-cut, a definite test. This is a field in which it is illogical, it is irrational to say that there can be no definition, because it is precisely a field that requires precision, a clear-cut test. Just to bring this proposition to an extreme, to try to reduce it to the *absurdum*, I would want to take the liberty to bring a parallel of this attitude within municipal law, within the private law of nations. What would be the reaction of, let us say, the average registrar in an office of real-estate property, if I would appear before him and I would ask: "I would like to know who owns this piece of property", and the registrar would answer me: "That is a matter of discretion. We cannot have an automatic test to determine who is the owner of that property"?

Well, now, that is an example in private municipal law. But there is no reason why in international life, in international relations, the nature of things should not be the same on this subject. I repeat, this is a subject-matter on which there must be—by the very nature of things—precision. To determine ship-owning the test must be a clear-cut, a definite, test; and it is no answer, it is no reply on this particular field, on this particular concept, to say that "it is a matter of discretion and we will have no automatic test".

Mr. President, Members of the Court, I was saying a minute ago that the test of "ship-owning nation" must be clear and definite. I add to that that that test must be objective which is our position, that it must be determined by reference to an authoritative source of information, whether official or unofficial, which could give the figures as in the case of tonnage. It must be objective in addition to being clear because, if we make it a subjective test, we are not only introducing subjectivity in a matter where subjectivity is not proper, but we will be creating a situation which may be more subject to abuse and arbitrary findings. If we have a body like IMCO, and we say the Assembly of that body, not only in January 1959 but at any other date in the future, may appreciate at all times what the "largest ship-owning nations" are according to a subjective test, that may mean in actual practice that the majority of the members present may, in a self-serving manner, consider themselves the "largest ship-owning nation". And then a simple majority of countries represented would override the meaning of tonnage or any other objective test which should be the determining factor. No, this test should not be subjective, it must be objective and it should be a clear and objective test.

And now, Mr. President and Members of the Court, having established this point that the test must be clear and definite, we submit that just as much for this Court as it was the problem for the IMCO Assembly, there are only three possible alternatives to what "ship-owning nation" could mean. By no stretch of logic or imagination can we think of more than three: first, "ship-owning nation" meaning the nation having title

or the fee simple over the vessel; two, the State not having title or owning the fee simple but having control over the vessel, ownership in the political sense of control, jurisdiction and the power to apply its laws and regulations to that vessel; third, the vessel being owned by nationals of the State: those are the only three possible alternatives.

Now, we submit that the only logical way to find which of these three concepts, of these three tests, is the controlling one, the decisive one, should proceed through a process of exclusion, analysing which ones are not, and then leaving the one that is the proper test. And for the purposes of exclusion I take first the question of title, or fee simple in the State, the State being the owner, in the civil sense, of the vessel. We submit that that could not be the test simply because that would again be against the realities of the situation, it would be against international practice in maritime life, against the experiences of previous maritime conventions and conferences which preceded IMCO, which were related to IMCO, such as the Safety of Life at Sea Convention, the Load Line Convention and many others. They never thought of "ship-owning nations" in terms of vessels belonging actually to the nation. As a matter of fact, even today, only a very small number, an almost insignificant percentage of merchant shipping, is owned by the Government in the civil law sense.

Let me now take alternative number three for the purposes of exclusion, that is, the possibility that what is meant is ownership by the nationals of the State. We submit, Mr. President—and I beg now to explain to the Court that I am not repeating our previous argument but I am simply stating this to show that the answer of the Governments opposing our side has not replied to the position that we stated from the beginning—we submit that they could not have meant ownership by the nationals of the State. In the first place, Mr. President, we say this because the very language that we are now interpreting here reads "ship-owning *nations*", it does not say ship-owning *individuals*, it does not say ship-owning corporations—the "eight largest ship-owning *nations*"—so we must think of ownership by the nation, either in the civil sense which I have discarded, or in the political sense which we submit is the true test.

Mr. President, Members of the Court, I shall try very briefly to terminate describing our position so as to be able to show how the other side avoids answering that position, intend of answering it positively. I will say that ownership by nationals of a State could not be the test because, in the first place, the language of the Statute referred to ship-owning nations and not individuals. We say secondly that ownership by nationals cannot be the test because, as we stated in our Written Statement, that would make the rule one of almost impossible application. It will throw us inevitably into the matter of beneficial ownership, because certainly one would not think that you would go behind the flag and into ownership merely to stop at the juridical fiction of the corporation. If you go behind the flag and go into ownership, you would want to go into the real roots of ownership, if you want to be philosophically consistent—and then that takes us directly and deeply into the matter of beneficial ownership; I think it was precisely one of the Representatives from the other side that called it, very appropriately, the "web" of beneficial ownership.

I may say candidly to this Court that I have had occasion, and I frequently do have occasion in my private practice of law, to witness the

intricate picture of this beneficial ownership, to see a vessel which has been built in Belgium owned by a Panama corporation, financed by New York companies, then chartered to European interests, then mortgaged to certain trustees of a corporation with many different shares, some of which are bearer shares which do not permit the identification of the owner; with groups of shareholders of different nationalities sometimes forming a voting trust by which they agree to vote *en bloc*, although they are of different nationalities.

So, ownership by nationals, or rather the resorting to ownership by nationals in search of a test, is simply trying to choose the most complex and complicated solution that one can imagine.

Mr. President, that has been our position throughout. That leaves, of the three, only one test—tonnage registered under the flag. We have submitted that that is the test that answers the criterion of usage; that that is the test that answers the criterion of treaties signed on the very subject; that that is the test that answers the criterion of achievement of the purpose of the Convention—the intent of the Convention—analysed in its entirety. It answers the test of usage because we find that in *Lloyd's* which we may mention as the standard reference, the columns in *Lloyd's* are entitled "Nations which *own* the vessels", and then under that title of "nations which own the vessel" we find the name of the nation having such tonnage under its flag. The criterion of treaties—and here I want to refer to a statement on page 384 of the Oral Statement of the Representative of the United Kingdom, wherein he states that he has heard of no treaty or convention using the expression "ship-owning nation". In our Written Statement we mention two: the Safety of Life at Sea Convention and the Load Line Convention of 1930. The Load Line Convention of 1930 states, and I think that this is so important that I want to quote the exact words: "A ship is regarded as belonging to a country if it is registered by the government of that country." "Belonging to a country" and "ship-owning nations"—these are equivalent terms. This is the language in the Load Line Convention. This is also the language of the Safety of Life at Sea Convention. And in this connection, Mr. President, I think it is very important that I bring out to the attention of the Court that the Safety of Life at Sea Convention and the IMCO Convention are closely interrelated. There is a very tight connection between the two. I would say that IMCO is nothing else than an organization to implement and to put into practice principles of safety which have been adopted by the Safety of Life at Sea Convention—by the two Safety of Life at Sea Conventions, by the Load Line Conventions and other similar ones; and the close relationship between the two is so evident that (when the IMCO Conference took place in 1948) we find that in the final act of that Convention there appears a resolution, which was approved by the Assembly of IMCO, saying that it is recommended to the IMCO Conference—which was to meet, to take place several months later—that it is recommended to that Assembly, I repeat, that it take into effect the principles of the Convention in its deliberations. So the Safety of Life at Sea which has tonnage under the flag as the definition of ship-owning is telling IMCO to accept their principles as the guiding principles, because they are two closely interrelated Conventions.

And I will say, to try to give over-abundance of evidence to my distinguished colleague, the Representative of the United Kingdom, that

I have another convention here using the same words, and the reference that I have for this citation is in the *American Journal of International Law*, Volume 54 of January 1960, at page 64, and here a quotation is made from the Brussels Convention of 1926 relating to maritime liens and mortgages, and it is provided:

> "Mortgages, hypothecations and other similar charges upon vessels duly effected in accordance with the law of the contracting State to which the vessel belongs, and registered in the public register *either at the port of the vessel's registry or at a central* office, shall be regarded as valid and respected in all the other contracting countries."

"Effected in accordance with the law of the contracting State to which the vessel belongs" is the same language used in treaties all along, as vessels belonging to the State, ship-owning nations—referring to ownership, as I say, in the political sense.

Mr. President, our opponents also have not answered our argument that tonnage registered under the flag is the intended test, because it meets all the proper criteria already mentioned and such test in addition meets the well-known rule of treaty construction which is that the treaty must be read as a whole for the purpose of ascertaining the intent and the way of accomplishing the purpose of the treaty. We went to great lengths to explain tonnage under the flag, as interpreted in other provisions of IMCO, like Article 60—I am not going to repeat them all, I only mention the Article which dealt with the coming into effect of the Convention—which made it dependent on tonnage. And mainly, and most important of all, we stated the argument that it is the State having the power, the jurisdiction over the vessels, the one that is in the best position to impose the laws and regulations which would put into effect the objectives of maritime safety. We proved that, therefore, it was only logical that the drafters of the Convention should have given a majority position to the nations representing the largest tonnage in the sense of tonnage under the flag, because in that manner the greatest amount of tonnage could be affected by the rules and regulations in implementing safety which were contemplated by the IMCO Convention.

I do not want to extend myself on that point, Mr. President. I only want to make a very brief reference, in fact I shall read it because it is only one paragraph, which appears in the Written Statement of the Government of India, and which brings out very clearly and very effectively this aspect of our position:

> "The Government of India considers that the questions submitted to the International Court of Justice should be answered in the light of the international practices and through the reasoned application of the generally accepted principles of international law, for example, the principle that each State is free 'to fix conditions for the grant of its nationality to ships, for the registration of ships in *its territory, and for the right to fly its flag'. The other applicable* principle is that vessels on the high seas are subject to no authority except to that of the State whose flag they fly, for the entire international legal system which the States have evolved to maintain law, order and safety on the high seas is predicated on the possession

by each vessel of a connection with a State having a recognized maritime flag."

I now move on with our rebuttal, Mr. President, by saying that we submit that once registration under the flag, tonnage registered under the flag is decided to be the test of ship-owning nations, the rest of the matter should have been very simple for the IMCO Assembly. What else did they have to do, having determined what a ship-owning nation was? They had to proceed to elect the eight largest ship-owning nations, which, as we know, they failed to do.

Now, the Representative of the United Kingdom, at this point, went to great lengths—and certainly I shall not devote ten percent of the time that he used on this point—went to great lengths to explain the inherent possibilities of inaccuracies in Lloyd's as an authoritative list. We submit, Mr. President, that once you accepted the principle that it meant tonnage registered under the flag, the question of which authoritative list you should use or should not use is a secondary matter. It happened that in this particular case the Assembly chose Lloyd's. And we say if they chose Lloyd's, they should have been consistent in the choice of Lloyd's—which the Assembly majority was not. If Members of IMCO, tomorrow, on another conference, should wish to take the American Bureau of Shipping as an authoritative list, or Bureau Veritas, nobody would quarrel with that. But the important thing is that the list, the authoritative list, be used consistently and in good faith, and not in the manner in which it was used in this election. Certainly the Assembly of IMCO did not take Lloyd's List purely for the sake of having a list. For that matter, any list. If that had been the case, they could have proceeded in alphabetical order, called the names of the various States and voted in alphabetical order. They chose Lloyd's, which is a list which contained tonnage registered under the flag and having the order of such tonnage registration. And they chose to disregard the nations which they did not want to elect. That is what this case comes down to.

It is very curious to pause for a moment, Mr. President, to think of how far you can carry that type of inconsistency. If you are using Lloyd's, which, I repeat, contains a list on the basis of tonnage registered under the flag, and then you say, as the IMCO majority did: "Oh, we don't have to take the first eight in the list", and yet you were looking for the largest ship-owning nations, now, where are you going to stop in the list? Are you going to take a list of fifteen, of twenty, of thirty members? If you strike out, so to speak, as the Assembly did, the word "eight", and are looking for the largest, we can see that there is no limit to how far you can go. So that goes to show that consistency is required, that if they chose Lloyd's as the authoritative list, and if the definition of "ship-owning" was "registered under the flag", they were bound to take the first eight nations appearing in that list. To have chosen the list and to have failed to elect two Members in that list is what we call in our Statement an arbitrary, inconsistent and capricious action which should be declared to be invalid by this High Court.

Now, Mr. President, with the permission of the Court, I want to take up a reference that is made by the distinguished Representative of the United Kingdom to what occurred in 1948 in the IMCO Conference. And I regret to say that perhaps this is not the most agreeable portion of my presentation because I now must run into some statements which, we

submit, were presented to this Court in a manner that does not accord entirely with the true facts. And, second, because in that presentation certain adjectives or epithets were used with reference to my country which I cannot pass or let go without comment.

The United Kingdom Representative says that in 1948 the Assembly of IMCO already was aware of the fact of the flags of convenience and did not consider Panama worthy to be a member of one of the organs of IMCO. Now, Mr. President, I say that this is not telling the entire story, the complete story. If I could refer the Court to page 180 of the Written Statement of the Republic of Panama, the Court will be able to find that the representative of Panama protested because a group—and this has always been our complaint—a group of interests, of commercial interest, guided purely by reasons of commercial competition, had united to act against the Governments of certain flags—Liberia was not an active maritime nation at the time, but they united against Panama, and they tried to exclude Panama from the Second Working Party of the Conference, which was a very important party as far as the conduct of the Conference was concerned. And the delegate of Panama brought out the fact that Panama was the fifth nation on the basis of tonnage under the Panama flag, and that Panama could not be excluded from the Working Party, and it was on the basis of that representation and that protest that the IMCO Assembly included Panama in the Second Working Party. In our Written Statement we give the reference to the Working Paper which gives evidence of that fact. That is not the story that has been presented to this Court by the Representative of the United Kingdom.

Mr. President, Members, of the Court, the Representative of the United Kingdom stated that the 1948 IMCO Conference felt that Panama was not worthy of forming a part of one of the important organs of that Convention. As I said a minute ago, this matter of one nation passing judgment upon whether another nation is worthy or not worthy for a particular position really brings us into a not too pleasant analysis of the situation. Because this "holier than thou" attitude of one nation against the other frankly compels the nation that is referred to to make a counter-estimate of the holiness of the position of the nation making the accusation; and I am not going to extend myself upon that. I only have to say this: that if we want to go into the relevant high moral tone of the nations acting in this manner, I would like to have the Court pause for a minute and consider, by the very description which my distinguished colleague makes of the situation, how would the Court describe what these members or some members of the Conference were doing with Panama? He says there was *anxiety* among those members because tonnage under the Panama flag was growing; because it was fourth or fifth. He has not said, in one instance, that ships under the Panama flag were not seaworthy, were not proper ships, were not in good condition, did not come up to the standards of safety; no, he has not said that, and he could not very well say it, because from that time up to the present—and we have evidence in our Statement—ships under the Panama flag, and today also under the Liberian flag, meet with all the standards of safety and seaworthiness and are abiding by all the conventions which ensure safety at sea. No; but it was not that at all! Those members having anxiety were worried because the fleet was growing, was growing in size. So, what does that mean, Mr. President?

I submit that they were worried, there was anxiety, because of a matter of competition. It was purely a matter of commercial competition. And that is what I do not like to see, Mr. President, when in a situation like this one country begins to invoke the morals and the holiness of the position of one country as compared with the other.

Panama was not worthy. Why? Because Panama was competing with other nations. That was the only sin that Panama was committing; and, surely, we do not want to see an important international instrument like IMCO being motivated in its important decisions by the purely commercial interest of competition; and, surely, we would not want the highest Court in the world, namely this Court, to be asked to make a decision in one direction or in another direction, when the party requesting that decision may in any manner have been motivated by purely commercial reasons of competition. We mention this in our Written Statement, Mr. President, and with those words I leave this unpleasant subject of the reference as to which nation was worthy or was not worthy of being a Member of the Organization.

Mr. President, I shall try to summarize as much as possible the balance of my presentation. As to the next two headings of the four into which I divided my presentation, I think I could take them together, because they really overlap each other, and that is: the question of important interest in maritime safety and the matter of discretion.

Mr. President, we submit that the Governments which oppose our position have not answered our presentation, or our position, to the effect that the "eight largest ship-owning nations have, *per se,* and by that very fact, an important interest in maritime safety". We supported that position, first, on the basis of the simple grammatical test of the Convention. We brought out that the word "elect" in the Article is used twice; first, in the sentence at the beginning which refers to the composition of the entire body, to the fourteen Members; second, when it refers to the election of the remaining six Members. And we took the position that if it had been the intention of the drafters that there should be discretion in the election of the first eight, the word "elect" should have preceded the reference to the "eight" Members in the same way that it had preceded the reference to the election of the "six".

We also made the grammatical argument, or rather a deduction from the grammatical sense, that to use the word "elect" as meaning "discretion" with regard to the first eight Members was in open contradiction with the mandatory nature of the words "shall be". That, we submit, has not been answered by our opponents.

Mr. President and Members of the Court, we cannot help feeling—and I do not mean to be unduly critical in saying this—we cannot help feeling that the Representatives of the Governments which oppose our position, in presenting their entire case which practically hinges, turns upon the idea of discretion—that they appear to have made a confusion between interpretation and discretion. We see that running throughout their arguments; they say "ship-owning nations" are words that had to be interpreted; consequently, there was wide discretion to interpret that and to reach the conclusion which the Assembly thought best.

Now I think that right there there is the fallacy, there is the vulnerable position, which runs through the entire analysis of the case: this confusion of interpretation with discretion. Now we have taken the position that there was no need for interpretation because the words are clear

and have a definite standard and well-known meaning. But, even if we were to assume that the words were not entirely clear, if we had to interpret them, that does not give the Assembly of IMCO an unlimited right and discretion to reach any conclusion which they thought best. No; that only meant it had to interpret them according to the well-known rules of treaty interpretation, namely, the language, the meaning of the language, the taking of the Convention as a whole, precedents, what other treaties in the matter said, the consequences of interpretation; all the well-known rules of the statutory construction. Now the IMCO Assembly was just as bound by those rules of interpretation as courts are in interpreting any treaties, and that is what we contend: that even if there was room for interpretation, the interpretation had to be according to those rules. But that is where, I think, the main fallacy of the position of our opponents lies. And I think, Mr. President, right then and there is where we think we should apply a case which we consider very important in the present debate, which is the *Polish Nationality Case*. Interpretation, the process of interpretation, cannot enable the interpreter to reconstruct the treaty. It is very interesting in this connection to note that the Representative of the United Kingdom makes the statement, much to my surprise, that, "Well, the Members of IMCO will not have to act like judges. No! They have discretion." Now I think that that is an untenable statement. The Members of the Assembly of IMCO, as well as any organ which is created by a treaty and which derives its powers and its criteria from a treaty, must interpret those treaties properly and according to legal rules. But if we say that "No, because they are not lawyers or because they are not judges they may interpret the treaty the way they want", then I do not see how, when, the abuse of power, the abuse of discretion of those organs, is going to come for proper review before this Court. No, Mr. President. The Court is bound to say that there has been excess of power, excess of authority or abuse of discretion, when, in the process of interpretation, any of those organs did not follow the proper rules of construction.

The Representative of the United Kingdom has been elaborate in trying to demonstrate that the *Admissions* case, which we cite as very pertinent and applicable in this case, is not applicable at all. And I think, without taking too much of the time of the Court, that this is a very important precedent, and even if I take a little more of the time of the Court, I want to show the close parallel between the *Admissions* case and the present case.

As I understand the position of the Representative of the United Kingdom, he says that in this case the IMCO Assembly was not trying to impose on Members new conditions which were not present in the Treaty. But we submit, Mr. President, that that is exactly what the Assembly did. And I ask permission to read one paragraph, on page 195 of the Written Statement of Panama, which gives the words of the United Kingdom's delegate at the IMCO Convention just before the election took place:

> "In regard to Liberia's interest in questions of maritime safety, it was undeniable that the vessels registered in that country were among the most modern and up-to-date in the world. That was due to the fact that the Liberian Merchant Navy largely belonged to excellent American shipowners and that, furthermore, because

Liberia left questions of administration to very experienced international companies such as Lloyd's.

The same was true of Panama. But the matter in hand was not the election of the United States or of those companies to the Maritime Safety Committee. What the Assembly had to do was to consider how far Governments were interested in maritime questions, and see to what extent they were able to make a contribution in specific fields such as the furnishing of crews, the training of naval architects, the conducting of surveys after collisions, the handling of cargoes, etc."

Now there were very few speakers in that Conference, and what the United Kingdom's delegate said (and there was one other delegate who added a little more to it) represents the criterion that led the majority into voting as it did. And I want to emphasize this: that these words were said when the election was going to take place as to the eight; and here, the delegate of Great Britain—and this is the criterion the majority followed—said that consideration had to be given in the election, not to the good and proper condition of the fleets of those nations, but to matters as to the contribution in specific fields such as the furnishing of crews. Now, I am going to stop right here. Because the ability to furnish crews, Mr. President, is one of the elements which, according to Article 28, must be taken into consideration for the election of the *six*—the remaining *six*. So it could not be one of the criteria to be taken into account in the election of the *eight*; and yet, in so many words it is here stated that that was one of the criteria for the election of the eight: the ability to contribute in the furnishing of crews, the training of naval architects, the conducting of surveys of collisions, the handling of cargoes. Mr. President, our position is that, when dealing with the election of the eight who have *per se*, automatically, an interest in maritime safety, these words, which were adopted by the majority of the voters, amounted to the imposing of new conditions for the election of the eight which were not required by the Convention; exactly the same as was being done in the *Admissions* case decided by this Court.

[Public hearing of 4 May 1960, morning]

The PRESIDENT: Sir Percy Spender wants to put certain questions to the Representatives. The questions may be answered when the Representatives find it convenient to do so. I call upon Sir Percy Spender to put his questions.

Sir Percy SPENDER: Thank you, Mr. President. One important question is, what is the meaning in that context of the words in Article 28: "eight shall be the largest ship-owning nations"? The questions I desire to put to all Representatives, the answers to which will I think assist me, are the following; and the answers, I hope, may be given in summarized form:

Question 1: What significance, if any, is to be attached to the definite article "*the* largest ship-owning nations"?

Question 2: Since the word "ship-owning" qualifies the noun "nations",

(a) does this word "ship-owning" have one meaning, and one meaning only, directed to all States Members of the Assembly, and

(b) what meaning, stated as concisely as possible, does each State represented give to the word "owning", and what are the criteria which determine whether, within that meaning, a State owns any given amount of shipping?

Thank you, Sir.

The PRESIDENT: I call upon the Representative of Panama to continue his statement.

Dr. FÁBREGA: Mr. President, Members of the Court, I do not think I have much to cover, Mr. President, before I terminate this second exposition which I have been given the privilege to make.

I would like at this moment, Mr. President, to state to the Honourable Judge Sir Percy Spender who has put this question to us, that I would like to reserve my answer for a little later, until I have had more time to think over the question for reply.

Mr. President, in my last intervention yesterday and before closing time, I was at the point of trying to demonstrate to this Court the applicability of the *Admissions Case* to the present case; an applicability which, of course, has been denied by the Representative of the United Kingdom. I was demonstrating that the explanations given by the delegate of the United Kingdom before the election of the *eight* members took place were implicitly adopted by the Members that voted with him: that that, in essence, amounted to the laying down of conditions for the eligibility as the eight members, which were conditions not present in Article 28; and they were, therefore, new conditions which, just as the Court stated in the *Admissions Case*, the Assembly of IMCO had no authority to interpose into Article 28 *(a)*. And I even call the attention of the Court to the very curious fact that not only were those *new* conditions, but that at least as to one of those new conditions, they were conditions that in Article 28 were stated as conditions governing the election of the *six*—of the remaining six; which of course shows more patently, more clearly, that those conditions were totally inapplicable to the first eight and that it was entirely unauthorized, entirely improper, to try to impose those conditions with regard to the election of the first eight members.

So again, Mr. President, I say that this was an arbitrary election, this was a capricious election, and that there was an inconsistency in the action of the Assembly of IMCO. I will repeat that, although that has been emphatically stated so many times, both in writing and verbally; but a fact that I cannot repeat too much is that all this action which we have called arbitrary and discriminatory was taken in the face of the *mandatory* language in Article 28 *(a)*. And the thing that strikes me, Mr. President, perhaps more than anything else, is the very able, the very strenuous, effort that has been made by the distinguished Representatives opposing our position, to *get away* from that mandatory language. It is very difficult; I do not think that I would be able to do it, no matter how much I try. But the thing that strikes me particularly is the language which I find on page 380 of the Report of the meeting of 2 May, which contains the *exposé* of the Representative of the United Kingdom in which he says:

> "If the language of Article 28*(a)* is to be regarded as *mandatory*, it is rather in the sense of laying down conditions for the guidance of the Assembly in proceeding to the election."

Now, Mr. President, with your permission and with due respect to the distinguished Representative of the United Kingdom, I think that here we are playing with words. I do not know—maybe my mind is not flexible enough—but to me, I respectfully submit, to say that something is "mandatory" in the sense that it is a guide is a plain contradiction. If I may be permitted, I would like to recall to my distinguished colleague a very famous phrase from the literature of his own country: "To be or not to be, that is the question". Something is mandatory or it is not mandatory. But to say that something is mandatory, in the sense that it is a guide or a directive, to me is just a plain contradiction in terms.

Mr. President, I am now approaching the final part of my intervention, but by way of parenthesis I would like to refer to one point of fact, purely for the sake of making the record straight on the matter. And I refer to the statement made by the Representative of the United Kingdom, which appears on page 386 of the Record of the hearing of 2 May, in which he refers to the session on 15 January 1959 when the election took place, and I read:

> "Moreover, the action of the Assembly was overwhelmingly endorsed when, after it declined to elect Liberia and Panama to the Maritime Safety Committee, France and the Federal Republic of Germany were both elected on a roll-call vote by 23 votes to two, with three abstentions."

I suggest that it is very significant that, after Liberia and Panama had been rejected and although certain States said it would be inconsistent with the legal view to vote for France and the Federal Republic of Germany, nevertheless, 23 Members of the Organization voted in favour of those two States and regarded them as falling within the "eight largest ship-owning nations". Surely that is an overwhelming majority of the Organization?

Now, Mr. President, this is the kind of statement that, although it is true, I say is misleading, and I say that because it does not tell the complete story.

Why does not the distinguished Representative of the United Kingdom make reference to the voting, when the voting took place as to Liberia and Panama? The voting as to Liberia was 14 against, 11 in favour, 3 abstentions. The vote on Panama was 9 in favour, 5 abstentions and 14 against. Of course with Panama there were less votes in favour because the number of abstentions had increased after the voting on Liberia; so let us take Liberia as the key voting on that point: 14 against, 11 for Liberia, 3 abstentions. Surely that was a very close election. There was only a difference of three. The abstentions alone could have switched the election one way or the other. So, why the emphasis on the 23 votes that subsequently were given in favour of France and Germany? To me that has absolutely no significance; to me it is a very strained, a very far-fetched, a very remote deduction, to deduct from that heavy voting in favour of France and Germany a viewpoint or a criterion of the Assembly with regard to the position

of Liberia and Panama. The 23 votes were produced when the voting on Liberia and Panama had already taken place—when it was a *fait accompli*. The show had to go on, if I may use that expression. So even if it had been a unanimous election in favour of France and Germany, that would have no meaning whatsoever on the question of the thought, of the criterion of the Assembly, as regards the voting on Panama and Liberia.

I say that this is the type of statement that ought to be clarified. And I may say, Mr. President, that we have had a very similar situation, on which I was commenting yesterday, when the distinguished Representative of the United Kingdom made reference to the situation in 1948, *during the IMCO Conference. He made a statement which was* equivalent to saying that, in 1948, the question of tonnage registered under the Panama flag did not carry weight—well, this is the essence of his statement—that it did not carry weight because Panama had not been elected to the Council on the basis of tonnage, and the representative of Panama had withdrawn from the Assembly. Again, he makes a statement which is true: that Panama was not elected to the Council and the Panamanian delegate finally withdrew from the Assembly. But that does not tell the whole story, so again I say that in that sense it may be misleading. He does not tell the whole story, because Panama, on the basis of tonnage, and after the delegate of Panama made evident the matter of tonnage under the Panama flag, was appointed as a Member of the Working Party of the Assembly, which Working Party was very important in the sense of being the sort of Steering Committee of the Assembly. So tonnage and registration under *the Panama flag did have a positive weight in the minds of the* Members of the Assembly.

Now I come, Mr. President, with your permission and the permission of the Court, to the last of the four headings which I had chosen as a division of this presentation, and that will be the shortest of all, because I think that we will be dealing with a subject-matter which I consider is not particularly relevant to this debate, and that is the one that I have entitled "the genuine link".

Frankly, Mr. President, we think that all the literature that has been presented here on "genuine link" is beside the point, it is irrelevant. If I may be permitted to use a figure of speech in a forum of this nature, I would say that "genuine link" is the "Big Stranger" in this whole debate. When does the notion of "genuine link" come into this controversy? We fail to see that. Of course "genuine link" is not law, is not in effect yet—that has been brought out; but, even if it were law, the "genuine *link" theory would have no proper application in this* case. If this were a case in which somebody would argue that a certain flag was granted by a certain country, to a certain ship, and that such flag registration should not have been granted or that it was improperly granted, then we would have a case for the arguing of the "genuine link" theory, assuming that it were law. But nobody has suggested here that the ships now under the Panama flag, or under the Liberian flag, should not have been granted those flags, and should not have been registered in the respective countries. As a matter of fact, we submit that not even at the Assembly—not even the delegate of the United Kingdom, who was the leader in speaking for the majority in the Assembly—neither he nor the other delegates ever suggested

at that time that that was the question. In fact, the delegate of Great Britain—and we make proper references to his remarks in our Written Statement—said: "we are not dealing with the question of flags of convenience, that is not in debate". In fact, he went even further and made a praise of the fleets registered under the flags of each of those two nations, but that is beside the point now. So at no time has any question ever been raised as to those flags having been properly or improperly granted. So all this talk about "genuine link", interesting as it may be, is really beside the point, and we have, all of us (and I take my share in that blame and in that fault), we have all taken up considerable time of this high Tribunal with these expositions on "genuine link", and of course I wish to apologize for my part in taking up the time of the Tribunal on that subject.

Just to finish with that topic and in a summary way, I repeat what I said in my first intervention. "Genuine link" is not law, is not international law, because it is contained in a Convention which has not been ratified by the number of States required. In fact, I think that only one, to my knowledge, has ratified that Convention. I went on and said in my first intervention that we should be thankful for the fact that the "genuine link" is not law, because—and I made reference to an admirable study in the last number of the *American Journal of International Law*—the "genuine link" doctrine, a vague and imprecise doctrine as it is worded in that Convention, can do tremendous harm in international maritime life and in international relations; because if it were the law, it might lead to a number of situations in which a third State will be at liberty not to recognize the flag of a State and, therefore, would be introducing disorder and chaos in the life at sea. And of course the thesis of this study, to which I respectfully refer the attention of the Court, is that we *must have* law and order at sea, and that the recognition of the nationality of a vessel must be a clear and definite proposition, must be guided by a definite standard. Ships at sea cannot be subject to the individual subjective action of all the other States, as to whether they wish to recognize or not to recognize the flag that that ship is flying. It is a very serious proposition, just to throw the whole shipping, so to speak, into the high seas, subject to the danger of their flags not being recognized through a process of subjective analysis and decision of the individual States.

Mr. President, Members of the Court, on behalf of the Republic of Panama, I wish to submit that the statements that I have made in this last intervention of mine may be summarized by way of the following conclusions:

(1) "Ship-owning nations" means "nations having tonnage registered under their flag" (and in that respect I give, in part, my answer to the Honourable Judge from Australia; that it has that sense and that sense only, and I repeat: "tonnage registered under the flag of that nation").

(2) That that being the criterion, and the only criterion, both in international law and practice, it is a secondary proposition, or rather a proposition of secondary importance, of subsidiary importance, which reference is to be used to determine the *fact* of tonnage registered under the various flags of the various nations. The choosing of the proper list, of the proper source, to determine the *fact* of registration and the amount

of tonnage is a secondary proposition and not one of the decisive aspects of this debate.

(3) That the meaning of "ship-owning" having been determined, and the reference—a proper, authoritative reference to establish that tonnage —having been chosen, nothing is left but the *mandatory* instruction to proceed to the election of the "eight largest" appearing in that list—the nations with the largest tonnage appearing in that list in their uninterrupted order.

(4) That although Panama has well established, in the proceedings, its proper and important interest in maritime safety, which Panama is reiterating now by its very insistence and desire to participate in this Committee—I repeat that although Panama has established its important interest in maritime safety, as a proposition of law it was not necessary for Panama, or Liberia, to establish that important interest in maritime safety independently of the fact of its being one of the "eight largest ship-owning nations", because that fact automatically established Panama's important interest in maritime safety.

(5) That the election of the first eight members—or may I, with your permission, Mr. President, put it in another way—that the fact that in the election of the fourteen members the choosing of the first eight was mandatory, and was based upon the fact that I have just mentioned, shows that there was no discretion as to the selection of the first eight, but only with regard to the remaining six, and that the exercise of discretion on the part of the Assembly was unwarranted, was unauthorized on the part of the Convention. But, we go further: we say that, even if we were to assume for the sake of argument that the Assembly was entitled to discretion as to the selection of the eight, the Assembly was bound to exercise that discretion within the well-known rules of law regarding the use of discretion, but that, nevertheless, the Assembly made an abuse of that discretion and used that discretion in an arbitrary, capricious and discriminatory manner, and therefore the selection should be declared invalid even under that supposition.

(6) We said that the "genuine link" doctrine is irrelevant, has no application to the present case, and of course I may add that, even if it had some bearing on the case, no evidence has been submitted that there is no genuine link between Panama and Liberia on the one side, and the ships registered respectively under the flags of Liberia and Panama on the other side.

So, Mr. President, the Republic of Panama respectfully submits that, in view of these conclusions, the question that has been put before this high Court for an Advisory Opinion should be answered in the negative, and we so respectfully request once more.

I only have to say now, to terminate, that I wish once more to thank this high and most honourable Court for having granted me the privilege of appearing twice before the Court in these oral hearings. I am highly appreciative of this privilege on behalf of my Government and in my own name, and I shall always consider it a great honour to have been present before this high and most honourable Court. I thank you.

12. SECOND ORAL STATEMENT OF Mr. HAGER

(REPRESENTING THE GOVERNMENT OF THE UNITED STATES OF AMERICA) AT THE PUBLIC HEARING OF 4 MAY 1960, MORNING

Mr. President and Members of the Court.

I wish to express my appreciation for the opportunity of making a second Statement to the Court on behalf of the Government of the United States. These oral proceedings have already extended over several days. I therefore intend to be brief, and I hope that what I have to say will be new material of use to the Court.

I should also like to express my regret at the absence of Judge Hackworth and Judge Lauterpacht from the hearing due to illness, and my hope that each will enjoy a speedy recovery.

I should like next to state, with respect to the question asked by Judge Córdova at the close of the afternoon session on Monday, that I do not at this time have any information with regard to the tonnage owned by nationals of Liberia and Panama respectively at the date of the election of the Maritime Safety Committee, January 15, 1959. I have communicated with my Government in order to ascertain whether it has any reliable information of that character which could be presented to the Court as requested.

As to the point of view requested in that connection, I would like to refer back to the passages in my Oral Statement of last Thursday, 28 April, set forth at pages 6 to 8 in the uncorrected transcript [*cf. p. 322*], in which I stated the grounds for the view that the tests based on ownership by nationals, suggested by the Government of Norway and certain others, would be impracticable and unworkable.

As to the questions asked by Sir Percy Spender this morning, I would prefer to study the exact language of the questions before attempting an answer.

I should now like to comment on two matters which have been raised during the course of the oral proceedings which refer particularly to the United States.

The learned Representative of the United Kingdom, in the course of his Oral Statement rendered on Monday morning, 2 May, took occasion to call to the Court's attention Document No. E/CONF/4/13, dated February 23, 1948, introduced by the United States delegation at the United Nations Maritime Conference held in February and March of 1948. In that connection, he quoted from that document a brief passage, the essential part of which had also been quoted by the Italian Government in its Written Statement, at pages 224 and 225 of the printed volume. I regret the necessity for taking up the Court's time with further reference to this document, but since the learned Representative appeared to be drawing some conclusion from inconsistency between language contained in that 1948 document and the position of the United States at the present proceeding, I feel that I ought to make a brief statement in this regard.

I should like to say first that the Conference document in question consisted entirely of a reprint of an article previously published in the

Department of State Bulletin. The purpose of this article had been to describe the historical developments from 1897 onward, leading toward a world maritime organization, which were about to culminate in the then impending United Nations Maritime Conference of 1948. After over twenty pages of detailed discussion of that history and background, the article concluded with a brief description of the tentative IMCO Convention. Some of this description consisted of direct quotations of the language of the draft Convention, but other portions took the form of a somewhat loose, and occasionally inaccurate, paraphrase of certain provisions of the Convention.

The very passage quoted by Italy and the United Kingdom is an inaccurate paraphrase, for instance, in two respects. Not only does it incorrectly paraphrase the draft Convention language as to the eight largest ship-owning nations, but it also takes the draft Convention language reading "an important interest in maritime safety" and arbitrarily paraphrases that to read "the greatest interest in maritime safety". It is submitted that no legal significance ought to be attached to this kind of loose description in what was not a legal document. This was an article written and published for popular consumption. It was in no sense a careful legal analysis of the draft Convention, nor was it intended to be such. The United States delegation did not submit the article as a reasoned statement of its legal position on the language of the draft Convention, but rather purely for background information, as a matter of possible interest to other delegations at the Conference because of its description of the historical developments which had preceded the Conference. It was specifically stated at the beginning of the Conference Document itself that the article was "submitted to the Conference for information as representative of background development leading up to the present Conference". Under the circumstances, it would seem that the passage in question has been made the object of considerably more emphasis and attention than it warrants.

I might say I believe that this may have come about quite naturally because of the fact that Document No. 52, filed with the Court in this proceeding by the Secretary-General of IMCO, relating to the *travaux préparatoires,* was only an extract of the passage in question and it did not set forth the remainder of the Conference Document submitted by the United States delegation. I would, therefore, like to submit the full Conference Document to the Court if I may be permitted to do so.

If previous statements of the United States' legal position are indeed relevant to this proceeding, however, the United States delegation made that legal position abundantly clear at the first session of the IMCO Assembly, out of which this proceeding arises. Pursuant to its instructions, the delegation took the position that the eight largest ship-owning nations were those with the largest registered tonnage of ships. In that connection, I would like particularly to refer the Court to the footnote in the Written Statement of the United States, appearing at page 118 of the printed volume.

I should next like to discuss a statement made by the learned Representative of the Government of Norway during the course of his Oral Statement on Friday, 29 April. He argued that the Assembly, in refusing to elect Liberia and Panama as members of the Maritime Safety Committee, took into account differences between those countries and others with regard to the conditions of registration of vessels under their

laws. In this connection, he cited a report entitled *The Role of the U.S. Merchant Marine in National Security* which, he said, "describes the extent of United States control over American-owned ships under Panamanian and Liberian flags as compared to the modest control exercised by the flag countries". I am not certain as to exactly what the intended implication of his statement was. However, the implication may have been that American-owned ships under the Panamanian and Liberian flags are primarily regulated by the United States Government, and only secondarily and modestly by the nations of registry themselves. This is absolutely incorrect. I am quite hesitant at this late stage in the proceedings to take up any further time of the Court; however, since this allegation may have been made, even though only somewhat lightly, I believe it is important that the Court be in possession of the correct information on this particular subject.

Mr. President and Members of the Court, it is well known that a substantial number of vessels of American ownership are registered under Liberian or Panamanian laws, particularly tankers and bulk carriers. Such registry has taken place over the years for a number of economic reasons, a subject which has already been discussed at length in the first Oral Statement of Liberia last week. Much of this tonnage is regarded by the United States as essential for its national defence needs in the event of possible war.

Under United States law, during any national emergency declared by proclamation of the President, the United States Government may requisition, purchase or charter any vessel owned by citizens of the United States, subject to the payment of just compensation. The statute in question is Section 902 of the Merchant Marine Act of 1936, as amended, and it is codified as Section 1242 of Title 46 of the United States Code. However, if the vessel is transferred to foreign ownership, such as ownership by a foreign corporation, this right to requisition for war or emergency purposes would become inapplicable.

Futher, United States flag vessels are also subject to various prohibitions against trading with respect to arms and other commodities, in certain geographical areas, under Department of Commerce Transportation Orders T-1 and T-2, which are published at Title 32A, Chapter VII of the Code of Federal Regulations. A transfer to foreign registry would also render these regulations inapplicable.

It has been considered important that vessels of United States ownership and registration, and vessels constructed in the United States, remain subject to emergency Government requisition in the case of war or emergency and to the above trading restrictions, even though their owners may for various reasons desire to transfer them to foreign ownership or foreign registry. Accordingly, such foreign transfers are permitted only where the new owner agrees to comply with those two conditions. This continuation of the vessel's availability for emergency use by the Government has been referred to from a national defence standpoint as the concept of "effective United States control". It is not founded on treaties with other nations, but depends upon private arrangements with the shipowners. The legal basis for these arrangements is as follows:

The United States law provides that in time of war or a lawfully proclaimed emergency—and such a state of emergency exists at the present time by Presidential proclamation—it is unlawful to transfer to foreign registry any vessel owned in whole or in part by a United States citizen

or corporation, or to transfer such a vessel, or any United States registered vessel, to a person not a citizen of the United States, without prior authorization from the Maritime Administrator. There are also restrictions on the transfer to foreign registry of vessels constructed in the United States. I refer to Section 37 of the Shipping Act of 1916, as amended, codified as Section 835 of Title 46 of the United States Code, and to the delegation of the authority thereunder to the Maritime Administrator.

The Maritime Administrator's authorization is thus required if the transfer abroad is to be lawful. When a United States citizen or corporation seeks to transfer a vessel owned by it to foreign ownership or to register it under foreign law, or when a new vessel is constructed in the United States for foreign ownership or foreign registry, if the vessel is of 3,000 gross tons or over, the Maritime Administrator will impose certain conditions to his authorization of such transfer in accordance with his published policy on the subject, which appears at Title 46, part 221 of the Code of Federal Regulation.

These conditions are the two conditions referred to a moment ago. The first provides that the foreign owner and any subsequent transferee agree to sell or charter the vessel to the United States Government upon request in time of war or emergency on the same terms and conditions that apply to a United States citizen by law. An exception is made in the case of transfer to the registry of a nation which is a signatory of the North Atlantic Pact or NATO. The NATO nations have agreed to commit the preponderance of their shipping to a common pool in event of a NATO war. The second condition is that the vessel shall not engage in trade prohibited to United States flag vessels under Department of Commerce Transportation Orders T-1 and T-2 referred to earlier. The authorization will also contain certain supplementary provisions designed to continue the two basic conditions in force in the event of subsequent transfers or mortgages, and also provisions of an implementing nature, such as a provision requiring the foreign owner to furnish a surety bond to secure performance, payable to the United States in the event of default. Where there is a transfer to foreign ownership, as distinguished from registry, the conditions are also included in a contract between the United States transferor and the foreign transferee.

Violation of any of the conditions to the Maritime Administrator's authorization of the requested transfer constitutes a violation of United States law and a breach of the contract between the two private parties, and payment may have to be made to the Government on the surety bond.

When a vessel is transferred from United States registry to a foreign registry, the existence of these conditions of course becomes known to the foreign State in question. However, it must be stressed that these conditions are *not* the subject of any treaty, convention or inter-governmental agreement of any kind with the foreign flag State, but purely private arrangements with the shipowner.

The important point, from the standpoint of what is concerned in this proceeding, is the fact that once the vessels are thus transferred to foreign registry, they become flag vessels of the foreign country and as such are fully subject to all of the maritime safety regulations and other laws of the foreign country applicable to shipping. They are no longer United States flag vessels and are no longer subject to any United States regulations as flag vessels.

I hope that the foregoing somewhat lengthy and technical explanation will help to explain to the Court the nature of the conditions which the United States Government imposes on the shipowners in connection with the transfers of United States vessels to foreign ownership and registry, and clarify the point that the arrangements in question have no bearing on the subject of this case. If the Court should desire any further information regarding this matter, I shall, of course, be glad to submit it upon request.

Mr. President and Members of the Court, once again, the Oral Statements of the learned Representatives of Liberia and Panama have been most thorough and comprehensive, and I believe that at this stage of the oral proceedings the significant legal points in this case require no further comment.

I should like to add just one final remark. The fundamental issue in this case is whether the eight largest ship-owning nations, from the standpoint of the quantity of tonnage of shipping registered under their laws, are entitled to be members of the Maritime Safety Committee of IMCO.

In the submission of the United States, the language of Article 28 *(a)* itself, the practical realities of the maritime world, and the expressed fundamental objectives of the IMCO Convention itself, all combine to lead irresistibly to the conclusion that those eight nations are entitled to that membership. Those nations which have the duty and power to adopt and enforce maritime safety regulations for almost three-quarters of the world's registered tonnage were clearly, and wisely, intended to be members of this basic organ of IMCO, so that as such members they could participate from the earliest stages in the formulation of the maritime safety regulations whose general adoption forms the basic objective of IMCO. I therefore submit once more that for these reasons Liberia and Panama were both entitled to be elected as Members of the Maritime Safety Committee.

In closing, Mr. President and Members of the Court, I wish to thank you again for providing me with the opportunity to address additional remarks to the Court of behalf of my Government, and also for the patient and courteous consideration which you have accorded to my Second Oral Statement.

13. SECOND ORAL STATEMENT OF Mr. RIPHAGEN

(REPRESENTING THE GOVERNMENT OF THE NETHERLANDS)
AT THE PUBLIC HEARING OF 4 MAY 1960, MORNING

Mr. President and Members of the Court.

In respect of the question put to the Representatives by Judge Córdova, I might perhaps say that I do not possess at present information which would permit me to give a precise figure in respect of the ownership position of ships registered in Liberia and Panama. And, in so far as ships registered in the name of corporations are concerned, it would seem difficult to get at short notice full information in respect of the nationality of the beneficial owners at the date specified in Judge Córdova's question. With regard to the questions put by Judge Sir Percy Spender, I might perhaps recall to the Court the words of a philosopher who, when writing to a friend, said "I am writing you a long letter because I have no time to write you a short letter". I respectfully request the permission of the Court to study these questions somewhat more carefully in order to be able to reply in the most summarized form.

Mr. President and Members of the Court, with regard to the Oral Statements made today and yesterday by the Representatives of Liberia, Panama and the United States, I may perhaps be permitted to make a very short observation. It is respectfully submitted that, in our opinion, the question laid before the Court could only be answered in the negative if the Court were to adopt the position that, firstly, there is absolute right of specific States to be elected as members of the Maritime Safety Committee, and, secondly, that such absolute right is solely—solely—dependent upon the amount of tonnage registered in the State concerned. I have tried to show that the arguments advanced in the Written Statements of Panama, Liberia and the United States do not offer any support for either the first or the second contention. The Oral Statements made yesterday and today by the Representatives of Liberia, Panama and the United States have, in our submission, not brought out any really new point on which a comment on our part would be required. I would therefore, with the Court's permission, limit myself to state that my Government maintains the conclusions set out in its previous Statements.

14. SECOND ORAL STATEMENT OF Mr. VALLAT

(REPRESENTING THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC HEARING OF 4 MAY 1960, MORNING

Mr. President and Members of the Court.

May I associate myself with the expressions of regret at the absence of Judge Hackworth.

Now, I am not at present in possession of information which would enable me to give the figures for which Judge Córdova asked, nor can I usefully add to the comments already made on behalf of the United Kingdom as to the significance of statistics in this case.

With regard to the questions which have been asked by Judge Sir Percy Spender, I should like to offer some provisional comments although it may be necessary later, if I may with the permission of the Court, to submit the answers in writing. It may not be necessary.

As to the first question, I think the significance of the word "the" by itself is not great. It is merely the introductory word to the description of a class. The important point is the interpretation of the expression "ship-owning nations".

As to the second question, I would first comment that it is, with the greatest respect, not necessarily right to identify the word "nations" with the word "State". If I may refer to earlier articles of the Convention, in Articles 5 and 7 and 8 of the Convention, dealing with membership, the word "States" is used, and I suggest, used quite deliberately. In connection with membership of the Council, in Article 18, the expression used is "Governments of the nations", and the word "States" is avoided. In Article 28, again one finds that the expression used is "Governments of the nations". Therefore, I suggest that the Convention, in this respect, was not trying to lay down a technical test with reference to States but was drawn rather more broadly and rather more freely in terms of nations.

Subject to those comments, may I try to answer first question 2 *(a)* on the meaning of the expression—if I may with respect take the whole of the expression—"ship-owning nations"? It has the same meaning for all Members but its applications must depend on the facts in each country.

As to question 2 *(b)*, having regard to the remarks which I have already made, perhaps I may be forgiven for trying to say briefly what, in our submission, is the meaning of the expression "ship-owning nations" as a whole. It is, as I have pointed out before, a unique and broad expression enabling the Assembly of the Organization to take into account all relevant factors, including registration, beneficial ownership and other factors relating to the real connection between ships and nations. It is here that there is room for, and need for, a measure of discretion or judgment by the Assembly of IMCO.

Mr. President, with regard to the statements which have just been made, I should only like to comment on two points. The only reason that I wish to trouble the Court at this stage is because it has been suggested that I misled the Court.

The first is the suggestion made by the Representative of Panama that I misled the Court about the withdrawal of Panama from the United Nations Maritime Conference held in Geneva in 1948. I submit that this accusation was entirely unjustified, but on a point of this kind I can only place myself in the hands of the Members of the Court. I would, therefore, respectfully ask them to compare my remarks, which are recorded on pages 22 and 23 of the uncorrected record for 2 May 1960 *[cf. pp. 387-388]*, with the letter of 27 February 1948 in which the delegate of Panama announced his decision to withdraw from the Conference. His letter, and the reply from the President of the Conference, may be found in Document E/CONF/4/29 of the 28th of February 1948. And if I may, Mr. President, I should like to make that Document available to the Court.

The second point related to the Second Working Party of the 1948 Conference. In my submission, this had nothing to do with the point which I was previously trying to make and is a matter of very small importance. I cannot, however, accept that Panama was included in that Working Party on the basis of tonnage. With your permission, Mr. President, may I refer to page 180 of the printed volume from which it will be seen that Panama was included in that Working Party in the face of a strong threat by the delegation of Panama to withdraw from the Conference. And it will be seen that the Panamanian delegate referred not only to tonnage in his remarks of protest, but also to other factors. Perhaps, so that the record may be clear, I might read the relevant passage—this is on page 180. It is there said that—I think perhaps I had better read the whole paragraph, Mr. President:

> "As a matter of fact, the proceedings of the United Maritime Conference of 1948, under which IMCO originated, show that, pursuant to a proposal by the United States of America, which was supported by the United Kingdom, it was decided to establish, in addition to the Main Working Party, a Second Working Party to consider matters affecting maritime safety. Panama was elected to the above Maritime Safety Working Party after a strong protest made by the Panamanian Delegate who threatened to withdraw from the Conference. The Panamanian Delegate emphasized that Panama ranked fifth *in terms of tonnage* and was situated at a meeting point of world shipping lines, and had a long-standing interest in international trade, and that, if Panama was not added to the countries listed in such Party, it had no part to play at the Conference."

Mr. President, it was on 27 February 1948 that, in the face of this threat, Panama was included in the list of countries for Working Party Two. On the same date, the delegate of Panama wrote the letter to which I have just referred, and in which he gave notice of withdrawal from the Conference on the ground that his delegation had not been included in the First Working Party and, as I said in my previous remarks, that Panama had not been included in the list of countries or the list of States for the First Council. Then on the same day, 27 February, Panama was designated to serve on the Second Working Party and was so informed by the President by a letter of 28 February, which is included in the document which I have now submitted to the Court.

Well, that, Mr. President, is the story, and I hope the Court will accept that I in no way misled the Court on the facts.

Turning to the statements made on behalf of Liberia and Panama and the United States, in my submission, nothing essentially new has been added. The relevant information and comments have been laid fully before the Court and the issues have been made clear. We are all agreed, I submit, that the heart of the matter is the interpretation of the expression "largest ship-owning nations" as used in Article 28 *(a)* of the IMCO Convention. Put in another way, the question is whether the Assembly of IMCO is, for the purposes of elections to the Maritime Safety Committee, bound by the figures for gross registered tonnage on the register of each Member State of the Organization. I submit that the answer to that question is clearly "No" and, in support of this view, am content to rest on the Written and Oral Statements already made on behalf of the Government of the United Kingdom.

Mr. President and Members of the Court, I thank you for this further opportunity of commenting and I have concluded my second Statement.

---

15. REPLY OF Mr. WEEKS

(REPRESENTING THE GOVERNMENT OF LIBERIA)
AT THE PUBLIC HEARING OF 4 MAY 1960, AFTERNOON

The PRESIDENT: The hearing is open. The object of this meeting is to give the Representatives who have not yet answered the questions put by Judges Córdova and Sir Percy Spender an opportunity to do so briefly.
I call upon the Representative of Liberia.

Mr. WEEKS: Mr. President and Members of the Court.
May I take this opportunity of replying to the questions put by Sir Percy Spender to the Representatives this morning? I shall reply in summary form, as requested by him.
As to the meaning and effect of the word "the" in the phrase "the largest ship-owning nations", my submission is as follows:
(1) The function of the word "the" in this particular context is to give a specific quality to the concept of "largest ship-owning nations". It makes clear that we are dealing not generally with largest ship-owning nations, but quite specifically with eight in particular, and those eight are the eight which are the largest.

(2) Taken by itself, "largest ship-owning nations" simply describes a category of States. It creates an indefinite class. But when the number eight is attached to the class, and when the word "the" is introduced, the class becomes definite. If one reads the phrase first without the word "the" and then with the word "the", its limiting effect becomes clear and apparent. It completely excludes a freedom to choose any eight from amongst largest ship-owning nations, and it limits the choice to those eight which are objectively the eight largest.

(3) The use of the word "the" reflects the intention of the draftsmen to refer to a precise, objectively ascertainable, group of eight States. It excludes any room for the exercise of a discretion, and therefore Members are not entitled to elect other than those nations which are *the* eight largest.
The second question, which relates to the meaning of the word "ship-owning", put by Sir Percy Spender this morning, falls into three parts:
In the first part, Sir Percy Spender asks whether the word "ship-owning" creates a uniform standard which is to be applied by all Members of the IMCO Assembly. I would answer this question in the affirmative. It creates, in all the circumstances, a single, uniform, objective standard which must be applied by all the Members in the same way.
In the second part of the question, Sir Percy Spender asks what meaning each State gives to the word "owning". In this context—and having regard especially to the word "ship" which is joined to it—we submit that the word "owning" means registration. In other words, a ship-owning nation is one to which ships belong. A ship belongs to the nation with which it is registered. This is really the only con-

venient and satisfactory test that can be applied if the objective character of the criterion is to be maintained. Moreover, by reference to the two principal multilateral treaties on safety matters in force at the time the IMCO Convention was drafted, it is clear that the draftsmen had just this test in mind. My Government has also submitted, alternatively, that if registration is not the appropriate test, then the only other test that could possibly be applied is that of ownership by nationals of the Members.

In the third part of the second question, Sir Percy Spender asks what are the criteria which determine whether a State owns any given amount of shipping, in the sense which we have just given to it. As to this, my submission is that the determination must be made by reference to the objective facts involved. In the present case, the Assembly of IMCO adopted the figures of registration in *Lloyd's Register of Tonnage*, and adhered to the order laid down in that Table, even when electing France and the Federal Republic of Germany. The Assembly is not necessarily bound to use this method. It may adopt another method of ascertaining the facts, as, for example, by asking individual Members to certify what their tonnage is at the date of the election. But whatever method the Assembly adopts, it must be the only method which is, in fact, applied by all Members participating in the election. It is not permissible for one Member to use one method, and another Member to use a different method. Again, whatever method the Assembly selects, it is always bound by the limitation that that method must not be used so as to give the Members a discretion enabling them to depart from the strictly objective criterion involved. I need hardly add that, in determining what the registered tonnage of each State is, Members do not have the right to counterbalance the objective registration figures by reference to subjective and uncontrollable factors of appreciation, such as the nature of the link between the ship and the State of registration. If the application of such factors is permitted, the objective character of the basic criterion is destroyed.

Mr. President and Members of the Court, before resuming my seat, may I refer once again to the question put, the day before yesterday, by Judge Córdova as to the tonnage owned by nationals of Liberia and Panama at the date of the election of the Maritime Safety Committee. Yesterday, I gave the Court a preliminary answer based on figures relating to the position existing on 31 December 1958. I then said that I would seek further information as to the position on 15 January 1959. I have now received that information, and it is as follows: on 15 January 1959, Liberian nationals owned 6,124,572 tons of shipping registered in Liberia.

Mr. President and Members of the Court, Judge Córdova also asked for the points of view of the Representatives on these figures. There is one short comment which, in the circumstances, I submit that I may properly make. It is that the question was asked of all States represented in these proceedings. It is, I submit, an interesting and significant reflection of the difficulties arising out of the adoption of *any other* test than registration, that neither the Netherlands nor the United Kingdom have produced the figures which were asked for. This suggests a lack of knowledge, which has a direct bearing on our submission relating to the exercise of a discretion in this case. If those two States did not even know the figures

relating to tonnage owned by Liberian nationals, or by Panamanian nationals, how could they have had sufficient knowledge to exercise any sort of a reasonably founded discretion? After all, apart from registration, the figures relating to ownership by nationals are relatively the easiest to ascertain. As was generally admitted, those relating to interests behind such ownership are much more difficult, if not impossible, to find. How, in these circumstances then, can the United Kingdom Representative speak, as he did again this morning, of a discretion to determine the existence of a real connection, when such a discretion would have to be based on mere guess-work?

Mr. President and Members of the Court, as I resume my seat for the last time in these proceedings, may I say again how greatly honoured I have been by the opportunity to appear before this high Tribunal. On behalf of the Government of Liberia and on behalf of my colleague, Mr. Moore, I should like again to thank you for your patience, courtesy and the consideration with which you have listened to our Oral Statements. Thank you.

16. REPLY OF Dr. FÁBREGA

(REPRESENTING THE GOVERNMENT OF PANAMA)
AT THE PUBLIC HEARING OF 4 MAY 1960, AFTERNOON

Mr. President, Members of the Court.

With regard to the question asked by the Honourable Judge, Mr. Cordóva, yesterday, in my intervention I tried to answer as best I could that question, and I stated that I was very sorry that I did not have an exact answer, an exact reply, to the question, but in the general way I indicated that more than seventy-five per cent. of the tonnage under the Panama flag was owned by Panama corporations.

To that I only wish to add that Panama corporations also own an appreciable amount of tonnage raised under the flag of Liberia, and also appreciable tonnage raised under the flag of Honduras. So that in reality Panamanian corporations own tonnage raised under each of the three flags, Panama, Liberia and Honduras. I again regret to state that I am not in a position now to reply with an exact figure to that question. I also stated that in so far as the question might refer to individual ownership, beneficial ownership, I felt that it might be almost impossible to get a fully comprehensive answer.

With regard to the question asked by Sir Percy Spender, we respectfully beg to reply as follows. As to the first question, our reply is submitted as follows:

The significance to be attached to the definite article "the" in the phrase "*the* largest ship-owning nations", is the significance normally attached to the definite article "the", which is that of referring to something definite and not to something indefinite. In other words, the significance is that the *eight*, or not less than eight nations, which "shall" be designated, are not *any* eight ship-owning nations, nor even *any eight large* ship-owning nations, but *"the eight largest ship-owning nations"*.

On question No. 2 *(a)* we respectfully submit the following reply: "Ship-owning", when qualifying the noun "nations", has one meaning and one meaning only directed to all States Members of the Assembly, as it would seem unreasonable to suppose that the same word should have been intended to have different meanings as to different States, particularly on a matter on which a uniform meaning was necessary so that all members would have a proper understanding as to how to proceed.

On question No. 2 *(b)* our answer would be as follows: "Owning", if interpreted alone and out of context, generally means "being the owner of", "having title to", or a similar expression denoting ownership in the civil sense. But this same word "owning" when appearing in the context "ship-owning nations", does have a different meaning because of the evident intent not to refer to ownership by a State in the civil sense—an interpretation which would be against the realities of the maritime world. Consequently, the only other acceptable criterion is that of the ship belonging to the State in the political sense, that is, in the sense that the State has jurisdiction and control over the vessel, including the right of "eminent domain", by virtue of flag registration.

That is our reply, Mr. President.

17. REPLY OF Mr. HAGER

(REPRESENTING THE GOVERNMENT OF THE UNITED STATES OF AMERICA)
AT THE PUBLIC HEARING OF 4 MAY 1960, AFTERNOON

Mr. President and Members of the Court.

I have nothing further to add to the answer this morning that I gave to Judge Córdova's question. I should like to make the following summary answers to the questions put by Sir Percy Spender to the Representatives at this morning's session regarding the meaning in their context of the following words in Article 28 of the IMCO Convention: "Eight shall be the largest ship-owning nations".

Regarding Question 1, the significance to be attached to the definite article "the" in the clause "eight shall be *the* largest ship-owning nations" is that the use of the definite article makes the class definite, and excludes flexibility or vagueness. The function of the definite article in English grammar is to convey the quality of uniqueness. It is therefore also described as a limiting adjective. In the clause quoted, the use of the definite article excludes any interpretation that the eight shall be chosen from, or from among, the largest ship-owning nations. When coupled with the number "eight" the class designated is definite, particular and unique—"*The* eight largest ship-owning nations".

Regarding Question 2 *(a)*, the word "ship-owning" has one meaning, and one meaning only, directed to all States Members of the Assembly of IMCO.

Regarding Question 2 *(b)*, the word "owning" has the meaning that the ships *belong to* the State, in the sense that the ships are registered under the laws of that State and are therefore subject to its laws, particularly the power of the State to impose maritime safety regulations upon them. The criterion which determines whether a State owns any given amount of shipping for the purpose of Article 28 *(a)* is the quantity of tonnage of shipping registered under the laws of that State.

I thank you.

18. REPLY OF Mr. RIPHAGEN

(REPRESENTING THE GOVERNMENT OF THE NETHERLANDS)
AT THE PUBLIC HEARING OF 4 MAY 1960, AFTERNOON

Mr. President and Members of the Court.

The reply to the question that was put by Judge Sir Percy Spender would really require some elaboration. I will, however, try to summarize my point in as few words as possible.

In my submission, Article 28 of the IMCO Convention lays down a directive addressed to the Assembly. This directive is couched in general terms. All Members of the Maritime Safety Committee should have an important interest in maritime safety. Now, such interest may depend on various circumstances and may exist from various points of view. Consequently, Article 28 *(a)* embodies a further directive which envisages a balanced representation of those various points of view. Accordingly, at least eight of the fourteen seats of the Maritime Safety Committee should be taken by those Governments whose important interest in maritime safety is primarily based on their activities in respect of shipping as such. The six other seats shall be allotted to States whose important interest in maritime safety lies mainly in the fact of their providing crews and passengers. There are obviously more than eight, or even more than fourteen, States which have an important interest in maritime safety based on their activities in respect to shipping as such. The choice between these States should, according to Article 28, be made in such a way that the largest ship-owning nations are represented. Now it is submitted, Mr. President and Members of the Court, that the Assembly in making this choice may take into consideration every factor which it can reasonably and in good faith connect with the purpose of IMCO and of the Maritime Safety Committee. This implies, of course, that the method of choice is applicable to all members of IMCO. There is, however, no single rigid test for determining whether a nation is a ship-owning nation, nor is there a yardstick for measuring mathematically whether one State is in this respect larger than another. We are here confronted with the type of qualification, such as, in another context, the qualification of "peace-loving nation", which does not lend itself to mathematical computation. Surely, the Assembly can, in making its choice, take into account, and indeed start from, the number of gross registered tonnage. But there are also other factors which have a role to play and, in this connection, I may underline once more that we are not here dealing with a rule of international law which directly determines rights and duties of States, but we are confronted with a clause governing the election of an international organ.

I have already tried to explain that mere registration is not, in itself, significant from the point of view of the composition of the Maritime Safety Committee. It does, in itself, not mean anything for the activities of the State in which ships are registered in respect of these ships.

In our submission, Mr. President and Members of the Court, for the purpose of the present request for an Advisory Opinion, it might be sufficient to mention this point. I have understood that neither Liberia

nor Panama, nor, for that matter, the United States contends that Liberia and Panama should have been elected on the basis of any other test than that of registered tonnage. Mr. President and Members of the Court, I may respectfully submit that the qualification "the largest ship-owning nations" in a context of a directive such as that of Article 28 *(a) cannot, without losing its comprehensive meaning,* be analysed by taking each word or part of a word separately. I may therefore be allowed to reply to the questions put to the Representatives by Sir Percy Spender in the general way I have now done.

I thank you, Mr. President.

The PRESIDENT: I assume that the Representative of the United Kingdom has already given an answer to the questions put by the two Members of the Court. The Representatives have now completed their presentation. I, therefore, declare the hearing closed.

The Court is closed.