

DISSENTING OPINION OF VICE-PRESIDENT WOLFRUM AND JUDGE YAMAMOTO

1. We concur with operative paragraph 1 and the reasoning on the question of jurisdiction in paragraphs 38 to 45 of the Judgment. We voted against operative paragraph 2 and the consequential paragraphs 3 to 5 of the Judgment for several reasons.

2. The decisive point is whether article 292 of the United Nations Convention on the Law of the Sea (Convention) has been properly invoked by the Applicant. In accordance with article 113 of its Rules, the Tribunal has to “determine whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew (in this case the Applicant invoked article 73 of the Convention) ... is well-founded.”

3. The Applicant alleges that the arrest and detention of M/V *Saiga* is in violation of article 73 of the Convention whereas the Respondent contests this and holds that the *Saiga* was arrested on the basis of smuggling, thus denying the applicability of article 73 of the Convention on which the case of the Applicant depends.

4. However, we do not consider that a mere allegation that the detaining State has not complied with the provisions of article 73 of the Convention will satisfy the condition for the application of article 292 of the Convention. There must be a genuine connection between the detention of the vessel and its crew and the laws and regulations of the detaining State relating to article 73. The burden to establish such a connection is upon the Applicant. Without such a connection, the Tribunal must conclude that the allegation that the detaining State has failed to comply with article 73 is unfounded.

5. Concerning the establishment of this connection we have serious reservations with the approach of the so-called “standard of appreciation,” stated in paragraph 51 of the Judgment, as a general rule upon which the Judgment bases its assessment of the Applicant’s allegation (paragraphs 59 and 61). According to this approach, it is sufficient that the allegations made are “arguable” or “sufficiently plausible” (paragraphs 51 and 59 of the Judgment). A similar approach has been applied by the Judgment of the International Court of Justice in the *Ambatielos* case (*I.C.J. Reports 1953*, p. 18); however, this was done concerning the question of jurisdiction or admissibility, whereas the Tribunal, under the procedure of article 292 of the Convention, has to deal with the merits whether the above-mentioned allegation is well-founded.

6. The justification for the approach concerning the standard of appreciation developed in the Judgment is not convincing, nor is the implementation of this approach. The procedure under article 292 of the Convention is a definite procedure, it is not preliminary or incidental. Although we agree with the statement in the Judgment (paragraph 50) that "... a case concerning the merits of the situation that led to the arrest of the M/V *Saiga* could later be submitted for a decision on the merits to the Tribunal or another court or tribunal competent according to article 287 of the Convention", we are of the opinion that this consideration is of no relevance for defining the standard of appreciation. The two cases referred to in the Judgment deal with two distinct issues which have to be kept strictly separate. Therefore, to develop a "standard of appreciation" on the basis that a decision might be taken later on the legality of the respective arrest blurs the differences between the procedure of article 292 and other procedures under section 2 of Part XV of the Convention. In this respect, we particularly endorse the view advanced in the dissenting opinion of Judge Anderson.

7. We are concerned that the Judgment by defining the "standard of appreciation" is likely to transform the procedure under article 292 of the Convention into one which is similar to a procedure for provisional measures (article 290 of the Convention). Such an approach neither reflects the object and purpose of article 292 of the Convention nor can it be reconciled with article 113, paragraph 1, of the Rules of the Tribunal. It is to be emphasized that a judgment under article 292 of the Convention is not incidental, it is final – the ship has to be released.

8. In this connection we note the observation in paragraph 59 of the Judgment that "[f]or the purpose of the admissibility of the application for prompt release of the M/V *Saiga* it is sufficient to note that non-compliance with article 73, paragraph 2, of the Convention, has been 'alleged' and to conclude that the allegation is arguable *or sufficiently plausible*" (emphasis added). This finding is in direct conflict with article 113, paragraph 1, of the Rules of the Tribunal dealing precisely with that point. This provision requires a finding of the Tribunal that the allegation "*is well-founded*."

9. Finally, the "standard of appreciation" adopted by the Judgment has, in reality, the effect – as shown by the Judgment itself – of vesting the Applicant with the right to determine how the measures of the Respondent are to be characterized. This is difficult to reconcile with the principle that it is, first of all, for the State concerned itself to decide upon the characterization of its laws and regulations and the measures taken thereunder. Only in very exceptional cases might it be possible for the Tribunal to question such characterization. The Judgment (paragraph 51) gives no convincing justification why it preferred the interpretation of the

Applicant over the one of the Respondent. Finally, vesting the Applicant with the right to determine the qualification of the measures taken by the Respondent is not in conformity with the object and purpose of the procedure provided under article 292 of the Convention. It cannot be reiterated often enough that this procedure is a special one intended to balance the rights and interests of the coastal State in the exercise of certain powers in the EEZ, on the one hand, and the rights of other States concerning the freedom of navigation and other legitimate uses of the sea in the EEZ, on the other hand. The "*prima facie* test" adopted by the Judgment for deciding whether an allegation made by a flag State is inadequate for the purposes of invoking the procedure under article 292 and would radically upset that balance in favour of flag States.

10. To conclude this point, in our view the arguments of the Applicant that the Respondent acted on the basis of article 73 of the Convention are not "preponderant." Concerning the appreciation of the allegation of the Applicant we should like to refer to the dissenting opinion of President Mensah, the joint dissenting opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye and the dissenting opinion of Judge Anderson.

11. The Applicant has not established to our satisfaction that the *Saiga* was arrested on the basis of laws and regulations of the Respondent within the meaning of article 73, paragraph 2, of the Convention. In our view, it is not relevant whether the Respondent could have or even should have invoked a different national legal basis for its action. It is neither for the Applicant nor for the Tribunal to determine the course of action of the Respondent. The Guinean law 95/13/CTRM of 15 May 1995 (Code of Maritime Fishing) used in the Judgment to establish that the Respondent acted under its national laws and regulations concerning fishing rather than the ones on smuggling, as the Respondent repeatedly argued, does not lead to a different conclusion. It rather endorses the conclusions on which this dissenting opinion is based. This Guinean law, to which actually no direct reference was made in the proceedings, contains elaborate provisions concerning its enforcement. The enforcement powers are vested in particular institutions dealing with the surveillance of all fishing activities, including related activities. The arrest of the *Saiga*, however, was executed by customs authorities and there is no indication of an involvement of the respective institutions concerning the management of living resources.

12. In consequence of the foregoing, we come to the conclusion that the connection between the detention of the *Saiga* and the laws and regulations of the Respondent relating to article 73 of the Convention has not been sufficiently established and, accordingly, the allegation should be dismissed.

13. We further consider it unnecessary to reiterate, at quite some length, the Applicant's arguments advanced at a late stage of the hearing that, as phrased in the Judgment, "it would be strange that the procedure for prompt release should be available in cases in which detention is permitted by the Convention (articles 73, 220 and 226) and not in cases in which it is not permitted by it" (paragraph 53 of the Judgment).

14. We note that the Judgment takes no position on the so-called non-restrictive interpretation of article 292 of the Convention. Nevertheless, we consider it appropriate to deal with this approach in this dissenting opinion for two reasons. First, since in our view the allegation of a violation of the provisions of article 73 was not "well-founded," it is necessary to consider other approaches, introduced by the Applicant, before one may come to a final conclusion. Second, it is necessary to balance this argument as reiterated by the Tribunal, since the Tribunal may be called upon to consider it in the future.

15. One may entertain doubts as to whether the wording of article 292 of the Convention, the context in which this procedure is to be seen, and its object and purpose in fact sustain a more extensive interpretation of this provision.

16. According to a purely textual analysis of article 292 of the Convention, endorsed by its legislative history, as referred to in the joint dissenting opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, this procedure applies only where the Convention contains specific provisions concerning the prompt release of vessels. It has to be remembered that article 292 of the Convention constitutes a unique procedure – a special case of interference with the coastal State's judicial authorities – which must as a consequence be interpreted with caution and restraint. This means that the prompt release procedure is a self-contained one, with very precise limits and specific rules.

17. The restrictive nature of the procedure is further mirrored in a significant limitation of the jurisdictional power of the Tribunal which precludes it, when deciding upon the question of prompt release, from going into the merits (article 292, paragraph 3, of the Convention), this aspect being left for the appropriate domestic forum to decide upon.

18. Seen in the wider context of the dispute settlement procedure provided for in Part XV of the Convention, the particular nature of the procedure under article 292 becomes even more apparent. Although disputes concerning the interpretation and application of the Convention may, in accordance with article 286, be submitted at the request of one party to a dispute settlement procedure referred to in section 2 of Part XV, this possibility is restricted to disputes relating to the rights and

jurisdiction of the coastal State in its exclusive economic zone. The procedure under article 292 of the Convention complements normal procedures. Accordingly, the prompt release procedure may be seen as an exception to the limitations on applicability as contained in article 297 of the Convention. For that reason, one should be careful not to give an interpretation to article 292 of the Convention which transforms the procedure into one covering most cases concerning the arrest of ships. This would entail encroaching upon the procedure under article 287, paragraph 1, of the Convention and in particular would undermine the right given to States Parties to choose the procedure for the settlement of disputes.

19. One may have doubts whether the equity argument alone, as advanced by the Applicant, would be sufficient to outweigh these considerations based upon a textual and conceptual analysis of the procedure under article 292 of the Convention. In particular in this respect it has to be borne in mind that a procedure initiated under article 286 of the Convention can deal with the legality of an arrest, including the question to what extent an illegal arrest would entail the obligation to make reparations or to offset the effects of an illegal arrest. Further, a release of an arrested vessel may be requested under article 290, paragraph 5, of the Convention even without a bond or other financial security. Such procedure would, according to the applicable Rules of the Tribunal, be equally expeditious while making it possible to consider an arrest from a broader perspective taking into consideration the respective arguments advanced by the parties.

20. Another point of concern which has prompted our dissent are some of the arguments set out in paragraphs 56 to 59 of the Judgment concerning the question whether bunkering of a fishing vessel is an activity the regulation of which falls within the competences of coastal States when exercising their sovereign rights concerning exploration, exploitation, conservation or management of the living resources of the exclusive economic zone. Although the Judgment qualifies the respective considerations as an *obiter dictum* (see paragraph 59), its findings in paragraph 72 imply that regulations concerning the bunkering of fishing vessels in the exclusive economic zone are covered by the respective competences of the coastal States referred to.

21. We consider it appropriate to respond to some of the arguments which the Judgment states might be advanced to support the classification of "bunkering of fishing vessels" as an activity which can be assimilated to the activities which a coastal State may regulate in the exercise of its sovereign rights concerning marine living resources in the exclusive economic zone.

22. Already from a purely textual analysis, one may entertain doubts whether services rendered to fishing vessels fall under "the laws and regulations" referred to in article 73, paragraph 1, of the Convention. Such laws and regulations are qualified in paragraph 3 of the same provision as "fisheries laws and regulations". The term "fisheries laws and regulations" again is a shorthand reference to the laws and regulations enacted pursuant to article 62, paragraph 4, of the Convention which lists the issues coastal States may deal with under their fishing laws. Although this list is not meant to be fully comprehensive, it gives no indication that the competence of the coastal State concerning fishing might encompass activities of merchant ships, associated with the freedom of navigation, for the sole reason that they service fishing vessels.

23. The attempted assimilation of service activities into the regulation of marine living resources by the coastal States is further not supported by the consideration that the Wellington Agreement for the Prohibition of Fishing with Long Driftnets in the South Pacific, 1989 includes co-operation in the provision of food, fuel and other supplies for vessels equipped for or engaged in driftnet fishing (article 1(c)(vi)) within the notion of "driftnet fishing activities." Such a definition, agreed upon by the States Parties specifically for the purpose of that Agreement, cannot have an impact on the interpretation of the Convention on the Law of the Sea. Additionally, article 1(c)(vi) of the Wellington Convention refers to the jurisdiction of the flag State and thus is covered by the competence of States concerning ships flying their flag (article 94 of the Convention), whereas the competence of coastal States concerning ships exercising the freedom of navigation in the exclusive economic zone have to conform to article 58 of the Convention.

24. Reverting to the interpretation of article 73 of the Convention, it seems to be appropriate to refer, in this context, to the views taken by the International Court of Justice in its Advisory Opinion on the Competence of the General Assembly for Admission of a State to the United Nations concerning the interpretation of treaties in general. The Court stated: "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur" (*I.C.J. Reports 1950*, p. 8). It further has been underlined by the International Court of Justice that interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain (*Certain Expenses of the United Nations, I.C.J. Reports 1962*, p. 159; *South-West Africa, Second Phase, I.C.J. Reports 1966*, pp. 39, 48).

25. This dictum should be kept in mind; it cannot be excluded that in the future the Tribunal will be called upon to consider the question of how to qualify services to fishing vessels. Only then will it be appropriate to deal with such a question, taking into consideration all the aspects involved and, in particular, after full argument by the parties before the Tribunal. That this issue has been addressed in this Judgment in general terms, outside its proper context, in a procedure under article 292 of the Convention and without the case calling for it to do so, is a matter of concern since the arguments advanced may prejudice future decisions of the Tribunal.

26. On other points, not referred to in this dissenting opinion, we should like to associate ourselves with the thrust of the joint dissenting opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye as well as with the ones of the dissenting opinions of President Mensah and of Judge Anderson.

(Signed) Rüdiger Wolfrum

(Signed) Soji Yamamoto