

## Declaration of Judge Nelson

1. I have voted with the majority. However, I take this opportunity to make some observations on the Judgment of the Tribunal. At the outset it must be remarked that the Tribunal has evinced a reluctance to state the law with regard to the legal status of bunkering of fishing vessels in the exclusive economic zone. This approach first revealed itself in the *M/V "SAIGA" Case (Saint Vincent and the Grenadines v. Guinea)*, *Prompt release, Judgment*, 4 December 1997.

2. The Tribunal stated then that:

It is not necessary for the Tribunal to come to a conclusion as to which of these two approaches is better founded in law. For 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.

*(M/V "SAIGA" (Saint Vincent and the Grenadines v. Guinea) Prompt release, Judgment, ITLOS Reports 1997, p. 16, at p. 30, para. 59).*

3. Again, in the *M/V "SAIGA" (No. 2) Case* the Tribunal made the following remarks:

In their submissions, both parties requested the Tribunal to make declarations regarding the rights of coastal States and of other States in connection with offshore bunkering, i.e. the sale of gas oil to vessels at sea. The Tribunal notes that there is no specific provision on the subject in the Convention. Both parties appear to agree that, while the Convention attributes certain rights to coastal States and other States in the exclusive economic zone, it does not follow automatically that rights not expressly attributed to the coastal State belong to other States or, alternatively, that rights not specifically attributed to other States belong as of right to the coastal State. Saint Vincent and the Grenadines asks the Tribunal to adjudge and declare that bunkering in the exclusive economic zone by ships flying its flag constitutes the exercise of the freedom of navigation and other internationally lawful uses of the sea related to the freedom of

navigation, as provided for in articles 56 and 58 of the Convention. On the other hand Guinea maintains that "bunkering" is not an exercise of the freedom of navigation or any of the internationally lawful uses of the sea related to freedom of navigation, as provided for in the Convention, but a commercial activity. Guinea further maintains that bunkering in the exclusive economic zone may not have the same status in all cases and suggests that different considerations might apply, for example, to bunkering of ships operating in the zone, as opposed to the supply of oil to ships that are in transit.

(*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 56, para. 137*).

4. The Tribunal, for its part, declared that

it considers that the issue that needed to be decided was whether the actions taken by Guinea were consistent with the applicable provisions of the Convention. The Tribunal has reached a decision on that issue on the basis of the law applicable to the particular circumstances of the case, without having to address the broader question of the rights of coastal States and other States with regard to bunkering in the exclusive economic zone. Consequently, it does not make any findings on that question.

(*Ibid.*, at p. 57, para. 138)

5. With respect to bunkering the Tribunal showed, rightly in my view, a certain amount of judicial caution – a policy which recalled the words of the Court in the *Aegean Sea Continental Shelf* case:

Although under Article 59 of the Statute "the decision of the Court has no binding force except between the parties and in respect of that particular case", it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey.

(*I.C.J. Reports 1978, p. 3, pp. 16–17, para. 39*. Cited by Judge Mohamed Shahabuddeen in his *Precedent in the World Court*, Cambridge University Press, 1996, pp. 218–219).

6. In the present case for the first time the Tribunal was prepared to deal with a dispute relating to bunkering of foreign fishing vessels in the exclusive economic zone. This dispute arose from the fact that the M/V *Virginia G* flying the flag of Panama supplied gas oil to foreign vessels fishing in the exclusive economic zone of Guinea-Bissau.

7. The Tribunal concluded that the regulation of bunkering of foreign vessels fishing in the exclusive economic zone of coastal States is among those measures which a coastal State may take in its exclusive economic zone to conserve and manage the living resources under article 56 read together with article 62, paragraph 4, of the Convention (para. 217).

### Residual rights

8. As we have already seen, the legal status of bunkering activities in the exclusive economic zone is not dealt with in the Convention. The right to regulate such activities has been granted neither to the coastal State nor to third States. The Convention has provided a mechanism, known as the Castañeda formula, to deal with these so-called "residual rights" which reads as follows:

#### Article 59

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

9. As Castañeda, himself the author of this formula, noted

Precisely, because the zone had been identified as a *sui generis* zone, which was neither territorial sea nor high seas, it was indispensable to rely on some guideline or criterion to settle disputes that might arise out of concurrent uses of the sea within the exclusive economic zone, that is by the presence of competitive rights between the coastal State and the other States.

(Jorge Castañeda, "Negotiations on the Exclusive Economic Zone at the Third United Nations Conference on the Law of the Sea", *Essays in International Law in Honour of Judge M. Lachs*)

10. It seems strange that little regard was paid to this formula in these proceedings.

(*signed*) L. Dolliver M. Nelson