Declaration of Judge *ad hoc* Treves

1. In the present Declaration I would like to explain the reasons for my vote against point 18 of the Judgment's Operative Paragraph 452, in which the Tribunal decides not to award Panama compensation for loss of profit. I would also like to express some concerns about the reasoning of the Tribunal on the key issue of the legal regime of bunkering in the exclusive economic zone. These concerns have not, however, prevented me from voting in favour of the relevant operative points.

2. I do not agree with the statement in paragraph 435 of the Judgment that "only damages and losses related to the value of the gas oil confiscated and the cost of repairing the vessel are direct consequences of the illegal confiscation" nor with the statements in the following paragraphs 436, 437 and 438, denying Panama any compensation for loss of profit.

3. It is difficult for me to believe that the owner of a vessel remaining idle for more than one year, and subject during most of that time to confiscation in violation of the Convention, has not lost some profit because of such confiscation. While it may be difficult to quantify exactly the amount of such loss of profit, there are ways to award compensation on the basis of approximation. For example, in the *M/V "SAIGA"* (*No. 2*) Judgment the Tribunal awarded an interest rate of 8 per cent in lieu of 6 per cent, in respect of the value of the gas oil, "to include loss of profit".[1] Another such approximation was put forward by Panama in claiming, inter alia, an increment of 10 per cent on the calculated costs, damages and losses "as a lost business-related consideration to reflect the future business lost as a result of the negatively affected reputation of the vessel and of her owner as a result of the published falsehoods, and the arrest and detention" (see paragraph 418 of the Judgment). In dismissing such claim at paragraph 440, the Tribunal states that the loss of reputation "lacks a causal link with the action taken by Guinea-Bissau", thus making the damage too "indirect and remote". A more detailed approach to this claim, distinguishing its various components, would have been useful for determining a lump sum

1 *M/V "SAIGA"* (*No. 2*) (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment,* ITLOS *Reports 1999*, p. 10, at p. 38, para. 73.

as compensation for loss of profit, which would have avoided the total, and unconvincing, rejection of any compensation for it.

4. In paragraphs 437 and 438 the Tribunal advances specific reasons for the dismissal of Panama's claim of compensation for loss of profit. Neither of them, in my view, justifies such total dismissal. The termination of the contract between Lotus Federation and Gebaspe, referred to in paragraph 437, means only that no profit could be made out of that contract, while no consideration is given to other contracts that could have been entered into. Even if accepted as a justification, such termination may concern loss of profit only for the two weeks between 21 August and 5 September 2009, a very short period as compared with the time the vessel was under confiscation. The reasoning in paragraph 438 based on the determination that the owner of the *M/V Virginia G* did not use the procedures available in Guinea-Bissau to obtain the release of the vessel does not demonstrate that there could be no profit during the time the *M/V Virginia G* was confiscated in violation of the Convention.

5. As regards the legal regime of bunkering, it is, in my view, regrettable that the Tribunal does not refer to its previous judgments in which it envisaged this issue. Even though not finding it necessary to take a stand, the Tribunal in the Judgments in the *M/V "SAIGA"*[2] and in the *M/V "SAIGA"* (*No. 2*) cases explored the issue for the first time in international case-law, examining various arguments to support different answers to the question concerning the legal regime of bunkering of fishing vessels in the exclusive economic zone.

6. In the *M/V "SAIGA"* Judgment, the Tribunal remarks that:

> Arguments can be advanced to support the qualification of "bunkering of fishing vessels" as an activity the regulation of which can be assimilated to the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the

2 *M/V "SAIGA"* (*Saint Vincent and the Grenadines* v. *Guinea*), *Prompt Release, Judgment,* ITLOS *Reports 1997*, p. 16).

> exclusive economic zone. It can be argued that refuelling is by nature an activity ancillary to that of the refuelled ship.
> (paragraph 57)

And that:

> Arguments can also be advanced . . . in support of the opposite view that bunkering at sea should be classified as an independent activity whose legal regime should be that of the freedom of navigation (or perhaps – when conducted in the exclusive economic zone – that of article 59 of the Convention). The position of States with exclusive economic zones which have not adopted rules concerning bunkering of fishing vessels might be construed as indicating that such States do not regard bunkering of fishing vessels as connected to fishing activities. In support of this view it could also be argued that bunkering is not included in the list of the matters to which laws and regulations of the coastal State may, *inter alia*, relate according to article 62, paragraph 4, of the Convention.
> (paragraph 58)

7. In the *M/V "SAIGA" (No. 2)* Judgment, at paragraph 137, the Tribunal considers the view, already envisaged in the *M/V "SAIGA"*[3] Judgment, that bunkering in the exclusive economic zone "constitutes the exercise of the freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation". It also mentions, however, the argument of Guinea that

> bunkering in the exclusive economic zone may not have the same status in all cases and . . . 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.

8. What seems regrettable is that the Tribunal has chosen not to discuss arguments such as: that based on the "ancillary" character of bunkering in relationship to the activity conducted by the vessel receiving bunker; and that, which is not necessarily an argument in the alternative, concerning the possibility of

3 *Idem.*

making distinctions based on the activity of the ship receiving bunker. Article 59 could also have been discussed. Instead, the Tribunal has chosen to rely on the interpretation of article 56, paragraph 1, and especially on the interpretation that the sovereign right to "manage" living resources includes the right to regulate bunkering of foreign fishing vessels.

9. This approach, while adequate for settling the question submitted to it, leads the Tribunal to state, in paragraph 223, after underlining that bunkering of foreign vessels engaged in fishing in the exclusive economic zone "is an activity which may be regulated by the coastal State concerned":

> The coastal State, however, does not have such competence [i.e. the competence to regulate] with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.

Had the Tribunal, in order to conclude that the coastal State is competent to regulate bunkering of foreign fishing vessels in the exclusive economic zone, taken the approach that such competence follows from the ancillary character of such bunkering in relationship with fishing activities, the same logic could have applied – without any need to consider the question explicitly – to the bunkering of vessels engaged in activities other than fishing. The sweeping sentence in paragraph 223 quoted above could have been avoided.

10. I agree with the reasoning of the Tribunal that, once it is established that the coastal State may take measures related to bunkering of vessels engaged in fishing in its exclusive economic zone, its rules governing fishing apply to such bunkering, including those providing for the penalties (among which confiscation), but that, in the circumstances of the specific case, the penalty of confiscation was not "necessary" under article 73, paragraph 1, of the Convention.

11. This reasoning seems to me correct in light of the present situation of the legislation of Guinea-Bissau and of other States. The *M/V "Virginia G" Case* shows, however, that the automatic application of all the rules applicable to fishing vessels to vessels engaged in bunkering fishing vessels is far from satisfactory. A more specific and nuanced regime should be introduced in domestic legislation and, let it be hoped, in an international convention. In light of the *M/V "Virginia G" Case*, in particular, two points should be made. First, there seems to be no need to require that separate bunkering authorizations be

obtained by the bunkering vessel and by the vessel receiving bunker. Second, penalties should be established separately, and on the basis of considerations specific to each, for violations concerning bunkering and fishing activities.

(*signed*) Tullio Treves