

SEPARATE OPINION OF JUDGE ZHAO

I voted in favour of the Judgment in the *M/V "SAIGA" (No. 2)* case. However, I have my own opinion concerning the thorny issue of "bunkering and freedom of navigation".

1. The Applicant alleges that offshore bunkering is a global multi-million dollar industry involving all of the major oil companies and numerous independent companies. It tries to give the impression that bunkering is a lawful activity on the high seas falling within the freedom of navigation.

Indeed, some States or regions regard offshore bunkering as among their principal activities, as illustrated by the Applicant. This does not mean, however, that bunkering has become a universal practice of States. Far from it, among the 35 offshore bunkering companies illustrated by the Applicant (Reply on behalf of Saint Vincent and the Grenadines, 19 November 1998, pp. 12–13), none is from the UK, France, Italy, Spain, Belgium or Austria in West Europe, or from East European or North American countries except one. None is from China, Russia, Japan, India, Indonesia, Brazil or Argentina, among others. Accordingly, bunkering can hardly be considered as a lawful global industry involving all the major companies.

2. This case presents the question whether bunkering fishing vessels in the contiguous zone or in the exclusive economic zone of a State is freedom of navigation or internationally lawful uses of the sea pursuant to article 58, paragraph 1, of the Convention. In other words, is bunkering an aspect of high-seas freedom of navigation?

Bunkering by its very nature is a means of evading customs duties of coastal States. The Applicant admits that it is usually preferable not to bunker in the territorial waters of a State because duties may be payable. The coastal States of West Africa were also well aware of the problem of "the control and regulation of customs and fiscal matters related to economic activities" in the exclusive economic zone, as the proposal of 18 African States at the Third United Nations Conference on the Law of the Sea and an earlier proposal by Nigeria demonstrate.

The word "navigation" means nothing but "the act of navigating" or "the making of voyages at sea". According to article 58, paragraph 1, of the Convention:

5. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation ... and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships

Article 90 (right of navigation) also provides: "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas." Not a single mention of bunkering or the like is made in the 1982 Convention. That is to say, there is no legitimate status for bunkering in the law of the sea.

I share the view that international law should at all times distinguish between navigation and the commercial activities of a shipping business. International lawyers and international litigation always draw a distinction between freedom of navigation and the freedom to trade, the freedom to carry goods and the freedom of movement of shipping.

3. The Applicant submits that bunkering is an aspect of the high-seas freedom of navigation or an internationally lawful use of the sea related thereto, which, under article 58, paragraph 1, of the Convention, the M/V *Saiga* enjoys in the exclusive economic zone of Guinea. It should be pointed out, however, that bunkering of fishing vessels in the exclusive economic zone is not navigation under the Convention. The exclusive economic zone, as a zone with its own legal status, is neither a part of the high seas, nor the territorial sea. Uses of the sea with regard to which the Convention has not expressly attributed rights or jurisdiction in the exclusive economic zone to the coastal State do not automatically fall under the freedom of the high seas. Therefore bunkering must not be regarded as falling within the high seas freedom of navigation or related to it. It is not navigation of the M/V *Saiga* that is involved, but its commercial activities of offshore bunkering in the exclusive economic zone of Guinea. The interpretation that freedom of navigation includes bunkering and all other activities and rights ancillary to it is incorrect. The view that bunkering is free in the exclusive economic zone because it is free on the high seas is legally not tenable.

4. In short, bunkering should not be encouraged, let alone without restraint. On the contrary, the following conditions are generally required for bunkering: (1) For States wishing to undertake bunkering activities in the exclusive economic zone to enter into agreement with the coastal State; and (2) for fishing vessels to obtain licences or approval for bunkering from those States. Unless it is conducted in accordance with these two conditions, there is no legitimate status for bunkering in the law of the sea.

(Signed) Lihai Zhao