

**DISSENTING OPINION OF JUDGES CAMINOS, MAROTTA
RANGEL, YANKOV, YAMAMOTO, AKL, VUKAS, MARSIT,
EIRIKSSON AND JESUS**

1. We regret that we are unable to support the decision of the Tribunal to the effect that it has no jurisdiction to entertain the Application by Belize on the ground that Belize was not the flag State of the *Grand Prince* on the date of the making of the Application.

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2. We agree, of course, as stated in its Judgment in the *M/V "SAIGA" (No. 2) Case* (paragraph 40), that the Tribunal must satisfy itself as to its own jurisdiction and must examine the issue *proprio motu* if necessary. We note, however, that in deciding to examine, *proprio motu*, the nationality of the *Grand Prince*, notwithstanding that France had not in the proceedings questioned the flag State status of Belize, the Tribunal departed from the approach it took in its Judgments in the three previous cases where the nationality of the vessels involved was not challenged: the *M/V "SAIGA" Case* (paragraph 45), the "*Camouco*" Case (paragraph 46) and the "*Monte Confurco*" Case (paragraph 59).

3. In the present case, having decided to take up, *proprio motu*, the question of its jurisdiction, the Tribunal decided to base itself solely on the documents before it and was consequently required to make certain assumptions as to the administrative actions taken or not taken by the Belize authorities. It would not have been necessary to make these assumptions had the Tribunal, once it began its deliberations, exercised its powers under article 77 of its Rules to seek information necessary for the elucidation of any aspects of the matters in issue. As indicated in paragraph 92 of the Judgment, the Tribunal decided not to do so.

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4. In its reasoning, the Tribunal has relied heavily on the note verbale of 4 January 2001 from the Ministry of Foreign Affairs of Belize to the French Embassy in El Salvador, and has consequently attached less importance to other documents before it.

5. If the view set out in the Judgment on the effect of the note verbale could be accepted (paragraph 87), no other questions on the nationality of the vessel would have arisen. In our view, however, the note verbale, even on its face, should be read only to indicate that the Belize authorities were in the process of de-registering the *Grand Prince*. Moreover, later information provided by Belize to the French authorities (the letter of 26 March 2001 from the Director and Senior Deputy Registrar of the International Merchant Marine Registry of Belize (IMMARBE) to the Honorary Consul of France in Belize City) and to the Tribunal (letter from the Director and Senior Deputy Registrar of IMMARBE of 30 March 2001; statement of Agent of Belize on 6 April 2001 (see ITLOS/PV.01/04, p. 4)) indicate that the procedures of de-registration had been suspended. This point was acknowledged by the Agent of France in a statement during the oral proceedings on 6 April 2001 (see ITLOS/PV.01/04, p. 5). Furthermore, the Judgment of 23 January 2001 of the criminal court of the *tribunal de grande instance* at Saint Denis notes that the *Grand Prince* was of the Belize flag, notwithstanding statements before it in the procès-verbaux of seizure of 11 January 2001 that the vessel had been deleted from the Belize registries.

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6. Turning now to the important issue of whether the other documents before the Tribunal could allow the Tribunal to conclude that Belize was not, at the time of making the Application, the flag State of the *Grand Prince*, we begin by noting that the Tribunal has not indicated any intention to deviate from the reasoning in its earlier decisions relevant to the issue of the nationality of ships.

7. The Tribunal cites as a point of departure article 91 of the Convention. The Tribunal had the occasion to invoke article 91 in its Judgment in the *M/V “SAIGA” (No. 2) Case*, where it is stated, in paragraph 63:

Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to 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. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

8. The Judgment in the *M/V “SAIGA” (No. 2) Case* further stated, in paragraph 65:

Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.

and in paragraph 66:

The Tribunal considers that the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties.

9. In the *M/V “SAIGA” (No. 2) Case*, the Tribunal concluded, on the basis of the evidence before it, that Saint Vincent and the Grenadines had discharged the initial burden of establishing that the *Saiga* had Vincentian nationality at the time of its arrest, despite the fact that its Provisional Certificate of Registration had expired.

10. In the present case, the evidence before the Tribunal dealing with the question of the registration of the *Grand Prince* was all to the effect that the competent Belize authorities regarded the vessel as flying the Belize flag: the letter of the Attorney General of Belize of 15 March 2001; and the two communications of 26 and 30 March 2001 from the Director and Senior Deputy Registrar of IMMARBE. It can be noted that the Attorney General is the Minister responsible for IMMARBE and that the Senior Deputy Registrar of IMMARBE has, under the Belize legislation, all the relevant powers of the Registrar, including authority to register vessels in the Registry and to revoke the registration of vessels.

11. Dealing with the effect of the expiry of the patent of navigation, the Tribunal notes in passing the means by which the competent authorities could have extended the registration of the *Grand Prince* (paragraph 84). Following on the statements of the Belize authorities in the documents

referred to above, this listing of possible means should have satisfied the Tribunal as to the registration of the *Grand Prince* on the basis of the Tribunal's reasoning in the *M/V "SAIGA" (No. 2) Case*.

12. Instead, the Tribunal notes that the assertion on this question in the letter of 30 March 2001 "remained unsubstantiated" and "contains an element of fiction" (paragraph 85) and goes on to state that the communications from the Belize authorities were in the nature of administrative letters, "unsupported by references to any entries in the merchant marine register of Belize or any other action" (paragraph 86). The Tribunal based its consequential decision that the *Grand Prince* was not registered in Belize on the absence of such information. This approach would certainly have been more justified had the Tribunal chosen to use its powers to seek further information on the question under article 77 of its Rules.

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13. In connection with the documents before it, the Tribunal appears to have identified some difference of position among the Belize authorities on the question of the nationality of the *Grand Prince*. We, on the other hand, note from the documents that there was coordination on the question among the Belize authorities involved.

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14. In summary, we are of the view, firstly, that it cannot be concluded, on the basis of the documents before the Tribunal, that the registration of the *Grand Prince* had been revoked by the Belize authorities. Secondly, we are of the view that the statements of the competent Belize authorities that the *Grand Prince* was registered in Belize suffice to discharge the initial burden of establishing that it had Belize nationality, given that the Belize legislation provided for means by which the validity of provisional registration could be extended beyond the period of the provisional patent of navigation. Accordingly, we are of the view that the Tribunal has jurisdiction to entertain the Application.

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15. A more general point of interpretation of the Convention, going beyond the scope of the present case, is raised by the fact that the decision of the Tribunal proceeded from the assumption that the applicant in a proceeding under article 292 of the Convention must be the flag State at the time the application is submitted. In the circumstances of prompt release proceedings, the flag State at the time of detention, and at the time when an allegation is made of non-compliance with the provisions of the Convention on prompt release, would ordinarily still be the flag State at the time of making an application under article 292. The reasoning of the Tribunal to justify this as a legal requirement under article 292 is, however, not convincing. Regrettably, the deliberations in the present case have not allowed a full treatment of the consequences of this approach in various other circumstances which could be contemplated.

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16. The decision of the Tribunal has the effect, perhaps unintended, when depriving Belize of its rights as a flag State, albeit for the limited purposes of actions under article 292 of the Convention, also of condoning a system under which a flag State can in certain circumstances absolve itself of its duties as a flag State, including those laid down in article 94 of the Convention. It will be recalled that, under article 94, paragraph 1, every State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. It certainly cannot suffice for a flag State to seek to comply with this obligation merely by revoking, without more, the registration of ships flying its flag. The Tribunal should not have dealt as it did with a matter with such important consequences without the benefit of full consideration of the legal questions involved.

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17. Finally, we regret that the decision of the Tribunal has prevented it from considering issues of a legal nature which can significantly affect the development of the procedures to be followed in prompt release proceedings under article 292 of the Convention, including the relationship

of such proceedings with the merits of cases before the domestic forum of the detaining State.

(Signed) Hugo Caminos

(Signed) Vicente Marotta Rangel

(Signed) Alexander Yankov

(Signed) Soji Yamamoto

Signed) Joseph Akl

(Signed) Budislav Vukas

(Signed) Mohamed Marsit

(Signed) Gudmundur Eiriksson

(Signed) José Luis Jesus