INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
YEAR 1997

4 December 1997

List of cases:
No. 1

THE M/V "SAIGA" CASE

(SAINT VINCENT AND THE GRENADINES *v.* GUINEA)

JUDGMENT

Present: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, YAMAMOTO, KOLODKIN, PARK, BAMELA ENGO, NELSON, CHANDRASEKHARA RAO, AKL, ANDERSON, VUKAS, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON, NDIAYE; *Registrar* CHITTY.

In the M/V "SAIGA" case

between

Saint Vincent and the Grenadines,

represented by

Mr. Nicholas Howe, Solicitor, Partner, Stephenson Harwood, London, United Kingdom,

as Agent;

Mr. Yérim Thiam, Advocate, President of the Senegalese Bar, Dakar, Senegal,
Mr. Oliver Heeder, Attorney at Law, Partner, Büsing, Müffelmann & Theye, Bremen, Germany,

as Counsel,

and

Guinea,

represented by

Mr. Hartmut von Brevern, Attorney at Law, Röhreke, Boye, Remé and von Werder, Hamburg, Germany,

as Agent;

Mr. Barry Alpha Oumar, Advocate, Conakry, Guinea,
Capt. Mamadou Salion Kona Diallo, Legal Adviser, Guinean Navy Headquarters, Conakry, Guinea,

as Counsel;

Capt. Ibrahim Khalil Camara, Commander, Naval Operations, Guinean Navy Headquarters, Conakry, Guinea,
Major Leonard Ismael Bangoura, Head of Customs Squad, Port of Conakry, Conakry, Guinea,
Mr. Mamadi Askia Camara, Head of Research and Regulations Division, Customs Service, Conakry, Guinea,

as Advisers,

THE TRIBUNAL,

composed as above,

after deliberation,

delivers the following judgment:

1. On 13 November 1997, the Agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal by facsimile an Application under article 292 of the United Nations Convention on the Law of the Sea (hereinafter "the Convention") instituting proceedings against Guinea in respect of a dispute concerning the prompt release of the M/V *Saiga* and its crew.

2. Pursuant to article 24, paragraph 2, of the Statute of the Tribunal and to article 52, paragraph 2(a), and article 111, paragraph 4, of the Rules of the Tribunal, a certified copy of the Application was sent by special courier the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea, Conakry, and also in care of the Ambassador of Guinea to Germany.

3. In accordance with article 24, paragraph 3, of the Statute of the Tribunal, States Parties to the Convention were notified of the Application by a note verbale from the Registrar dated 19 November 1997, *inter alia* through Permanent Representatives to the United Nations.

4. The Application was entered in the List of cases under No. 1 and named the *M/V* "SAIGA".

5. The Application of Saint Vincent and the Grenadines included a request for the submission of the case to the Chamber of Summary Procedure. Guinea was duly notified by the Registrar in a note verbale dated 13 November 1997. Guinea did not notify the Tribunal of its concurrence with the request within the time-limit provided for in article 112, paragraph 2, of the Rules of the Tribunal.

6. In accordance with article 112, paragraph 3, of the Rules of the Tribunal, the President of the Tribunal, by Order dated 13 November 1997, fixed 21 November 1997 as the date for the opening of the hearing with respect to the Application, notice of which was communicated to the parties.

7. The original copy of the Application and documents in support were subsequently submitted by the Agent of Saint Vincent and the Grenadines in accordance with paragraph 10 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

8. By letter dated 20 November 1997 transmitted by facsimile the same day, the Minister of Justice of Guinea requested a postponement of the hearing on account of difficulties in the receipt of certain documentation.

9. In accordance with article 45 of the Rules of the Tribunal, the President of the Tribunal consulted the parties and ascertained their views with regard to the hearing.

10. Prior to the opening of the hearing, on 20 November 1997, the Tribunal held its initial deliberations in accordance with article 68 of the Rules of the Tribunal.

11. On 21 November 1997, the Tribunal opened the hearing at a public sitting at the City Hall in the Free and Hanseatic City of Hamburg and, by an Order of the same date, postponed the continuation of the hearing until 27 November 1997.

12. By letter dated 21 November 1997, the Registrar transmitted the said Order to the parties and informed the Minister for Foreign Affairs of Guinea that the Statement in response of Guinea, consistent with article 111, paragraph 4, of the Rules of the Tribunal, could be filed in the Registry not later than 24 hours before the date fixed for continuation of the hearing.

13. On 26 November 1997, Guinea transmitted by facsimile to the Tribunal its Statement in response. The same day, the Registrar sent a certified copy of the Statement in response to the Agent of Saint Vincent and the Grenadines. The original was filed in the Registry on 27 November 1997.

14. At two meetings with the representatives of the parties held on 26 and 27 November 1997, the President of the Tribunal ascertained the views of the parties as regards the procedure for the hearing and the presentation by each of the parties. The Agent of Saint Vincent and the Grenadines informed the President of its intention to call witnesses at the hearing. Pursuant to article 72 of the Rules of the Tribunal, information regarding those witnesses was transmitted to the Registrar on 26 and 27 November 1997.

15. On 26 and 27 November 1997, prior to the public sitting on 27 November 1997, additional written statements were filed in the Registry by the Agents of Saint Vincent and the Grenadines and of Guinea. The Registrar forthwith transmitted those statements to the other party.

16. At two public sittings held on 27 and 28 November 1997, the Tribunal was addressed by the following representatives of the parties:

For Saint Vincent and the Grenadines:	Mr. Nicholas Howe, Mr. Yérim Thiam.
For Guinea:	Mr. Hartmut von Brevern, Mr. Barry Alpha Oumar, Capt. Ibrahim Khalil Camara, Mr. Mamadi Askia Camara.

17. At the public sitting held on 27 November 1997, the following witnesses were called by Saint Vincent and the Grenadines and gave evidence:

Mr. Sergey Klyuyev, Second Officer of the M/V *Saiga* (examined by Mr. Thiam);
Mr. Mark Vervaet, ORYX Senegal S. A. (examined by Mr. Thiam).

A question was put by Mr. Barry Alpha Oumar to Mr. Vervaet who replied orally.

18. At the public sitting held on 27 November 1997, a map showing areas off the coast of Guinea was projected and commented on by the Agent of Saint Vincent and the Grenadines; a composite photograph of injured crew members of the M/V *Saiga* was also shown.

19. At a meeting held on 28 November 1997, the President of the Tribunal informed the Agents of the parties of the points or issues which the Tribunal would like the parties specially to address, in accordance with article 76 of the Rules of the Tribunal.

20. At the public sitting held on 28 November 1997, in replying to the first oral arguments made by each party on 27 November 1997, the parties also addressed the questions raised with the Agents of the parties by the President of the Tribunal. When doing so, the Agent of Saint Vincent and the Grenadines made reference to a map produced by him.

21. The presence of Their Excellencies Mr. Maurice Zogbélémou Togba, Minister of Justice of Guinea, Mr. Lamine Bolivogui, Ambassador of Guinea to Germany, and Mr. Lothar Golgert, Honorary Consul-General of Guinea in Hamburg, at the hearing and at consultations with the President of the Tribunal and the Registrar was noted.

22. Pursuant to article 67, paragraph 2, of the Rules of the Tribunal, copies of the Application and the Statement in response and documents annexed thereto were made accessible to the public from the date of opening of the oral proceedings.

23. In the Application and in the Statement in response, the following submissions were presented by the parties:

On behalf of Saint Vincent and the Grenadines,
in the Application:

"The Applicant submits that the Tribunal should determine that the vessel, her cargo and crew be released immediately without requiring that any bond be provided. The Applicant is prepared to provide any security reasonably imposed by the Tribunal to the Tribunal itself, but in view of the foregoing seeks that the Tribunal do not determine that any security be provided directly to Guinea."

On behalf of Guinea,
in the Statement in response:

"Guinea committed no illegal act and no violation of the procedure; it sought and is still seeking to protect its rights. This is why it is requesting that it may please the Tribunal to dismiss the Applicant's action."

24. In their further statements, the following submissions and arguments were presented by the parties:

On behalf of Saint Vincent and the Grenadines:

"The Tribunal will be aware that under the Convention a coastal State is entitled to exercise limited and specific rights as a sovereign within its exclusive economic zone as prescribed in the Convention and in particular article 56 thereof. In this matter it is submitted that the Respondent has erred in two respects:

First, in so far as the Respondent may have jurisdiction over the "Saiga" pursuant to the provisions of the Convention, that it has failed to comply with the relevant provisions for the prompt release of the vessel and her crew upon the posting of a reasonable bond or other financial security;

Second, that the Respondent has wrongly purported to exercise sovereign jurisdiction within its exclusive economic zone beyond what is permitted by the Convention ... with the effect that it has interfered with the rights of others in its exclusive economic zone, including those of the "Saiga" flying the flag of the Applicant.

It is therefore submitted that the Tribunal may determine that the Respondent has failed to comply with the provisions of article 73, paragraph 2, of the Convention by not promptly releasing the "Saiga" and her crew upon the posting of a reasonable bond or other security, no such reasonable bond or other security having even been sought.

It is further submitted that the Tribunal may determine the amount, nature and form of bond or financial security to be posted for the release of the "Saiga" and her crew ... . In this regard it is submitted that it is also within the jurisdiction of the Tribunal to order that the "Saiga" be returned to her original state, that is with a cargo of gasoil on board, at the time of her prompt release and before any further bond or financial security is to be provided to secure her release."

On behalf of Guinea:

- "Messrs. Stephenson Harwood are not authorized according to article 110, paragraph 2, of the Rules of the Tribunal.

- It is doubtful whether Tabona Shipping Company Ltd. is the owner of the M/V Saiga.

- Article 73 of the Convention does not apply and there was no violation of this article by the Government of Guinea.

- Article 292 does not apply. The claimant has not alleged that the Government of Guinea has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. It is our understanding that article 292 only applies if for and on behalf of the State Party whose vessel has been detained, or on behalf of the owner of the vessel, a reasonable bond or other financial security has been posted or at least has been offered to the detaining State Party. No security or bond has been offered on behalf of the M/V Saiga.

- Article 292 of the Convention furthermore is not applicable, because the reference of the claimants as to article 73 of the Convention, which the detaining State allegedly has not complied with, is not an allegation in conformity with article 292. Article 73, paragraph 2, in conformity with article 292, paragraph 1, orders the prompt release of an arrested vessel and their crews only upon the posting of reasonable bond or other security. None has been posted by or on behalf of the M/V Saiga.

- If the Tribunal contrary to our opinion would answer its competence in the affirmative, then the Tribunal ... should determine that the allegation made by the Applicant is not well-founded. When arresting the M/V Saiga outside the Guinean waters the Government of Guinea made use of the right under article 111 of the Convention, namely the right of hot pursuit."

25. The events leading up to the present proceedings are as follows.

26. The M/V *Saiga* is an oil tanker flying the flag of Saint Vincent and the Grenadines. Its charterer at the relevant time was Lemania Shipping Group Ltd., registered in Geneva, Switzerland.

27. The certified extracts of the log book of the M/V *Saiga* were produced by Guinea and the entries therein were not contested by either party.

28. At the time of the incident with respect to which the Application is based, the M/V *Saiga* served as a bunkering vessel supplying fuel oil to fishing vessels and other vessels operating off the coast of Guinea.

29. In the early morning of 27 October 1997, the M/V *Saiga*, having crossed the maritime boundary between Guinea and Guinea Bissau, entered the exclusive economic zone of Guinea approximately 32 nautical miles from the Guinean island of Alcatraz. The same day, at the point 10°25'03" N and 15°42'06" W, between approximately 0400 and 1400 hours, it supplied gasoil to three fishing vessels, the *Giuseppe Primo*, the *Kriti* and the *Eleni S.*

30. On 28 October 1997, the M/V *Saiga* was arrested by Guinean Customs patrol boats. The arrest took place at a point south of the maritime boundary of the exclusive economic zone of Guinea. In the course of action, at least two crew members were injured. On the same day the vessel was brought into Conakry, Guinea, where the vessel and its crew were detained. Subsequently, two injured crew members were allowed to leave and the cargo was discharged in Conakry upon the orders of local authorities.

31. No bond or other financial security was requested by Guinean authorities for the release of the vessel and its crew or offered by Saint Vincent and the Grenadines. It was then that Saint Vincent and the Grenadines instituted the present proceedings under article 292 of the Convention.

32. An account of the facts relating to the arrest of the M/V *Saiga* and the charges against it was recorded by Guinean Customs authorities in a formal document headed "Procès-Verbal" bearing the designation "PV29" (hereinafter PV29). PV29 contains a statement obtained by interrogation by the Guinean authorities of the captain of the M/V *Saiga*.

33. In the course of the oral proceedings, the Tribunal was informed by the Agents of the parties that some of the crew members had left Guinea, that others remained on board and that the captain of the M/V *Saiga* was still detained.

34. The statements of facts and the legal grounds presented by Saint Vincent and the Grenadines and Guinea in their written statements can be summarized as follows.

35. Saint Vincent and the Grenadines stated that the M/V *Saiga* did not enter the territorial waters of Guinea and that on 28 October 1997, from 0800 hours, it was drifting at 09°00' N and 14°59' W in the exclusive economic zone of Sierra Leone when it was attacked at about 0911 hours by two Customs patrol boats of Guinea. Saint Vincent and the Grenadines alleged that the Guinean authorities had no jurisdiction to take such action, that Guinea failed to notify the flag State of reasons for the detention and that Guinea did not comply with article 73, paragraph 2, of the Convention according to which "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security". According to the information contained in the Application, the owner of the M/V *Saiga* is Tabona Shipping Co. Ltd. c/o Seascot Shipmanagement Ltd., Glasgow, Scotland. The vessel is insured for a value of approximately 1.5 million United States dollars and was carrying a cargo of approximately 5,000 tons of gasoil of a value of approximately 1 million United States dollars.

36. Guinea contended that the Application had not been submitted in conformity with article 110 of the Rules of the Tribunal and that article 292 of the Convention was not applicable to the case. Guinea stated that the M/V *Saiga* was involved in smuggling, an offence under the Customs Code of Guinea, and that the detention had taken place after the exercise by Guinea of the right of hot pursuit in accordance with article 111 of the Convention. In this respect, it was alleged that the Guinean authorities had ordered the M/V *Saiga* to stop on 28 October 1997 at about 0400 hours, that the Guinean patrol boats started their pursuit at the point 09°22' N and 13°56'03" W and that the M/V *Saiga* was brought under control at the point 08°58' N and 14°50' W. Guinea questioned also the identity of the real owner of the vessel.

37. The Tribunal will commence by considering the question of its jurisdiction under article 292 of the Convention to entertain the Application. Article 292 of the Convention reads as follows:

> *"Article 292*
> *Prompt release of vessels and crews*
>
> 1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree.
>
> 2. The application for release may be made only by or on behalf of the flag State of the vessel.
>
> 3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
>
> 4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew."

38. In order to establish that the Tribunal has jurisdiction, it is necessary to verify certain conditions.

39. In this regard, the Tribunal first notes that Saint Vincent and the Grenadines and Guinea are both States Parties to the Convention. Saint Vincent and the Grenadines ratified the Convention on 1 October 1993 and Guinea ratified the Convention on 6 September 1985. The Convention entered into force for Saint Vincent and the Grenadines and Guinea on 16 November 1994.

40. Article 292 of the Convention requires that an application may be submitted to the Tribunal failing agreement of the parties to submit the question of release from detention to another court or tribunal within 10 days from the time of the detention.

41. The detention of the M/V *Saiga* and its crew commenced on 28 October 1997. On 11 November 1997, a letter was sent by facsimile to the Minister for Foreign Affairs of Guinea by Stephenson Harwood, Solicitors. In this letter, Stephenson Harwood informed the Minister for Foreign Affairs of Guinea that they had received "authority from the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines to proceed against the Government of Guinea before the International Tribunal for the Law of the Sea" and invited him "to secure the release of the vessel and crew ... immediately".

42. No reply was given to the above-mentioned letter and no agreement was reached between the parties to submit the question of the release to another court or tribunal. The Tribunal finds therefore that the Application has met the requirement mentioned in paragraph 40 above.

43. Guinea maintains that the Agent of Saint Vincent and the Grenadines was not authorized in accordance with article 110, paragraph 2, of the Rules of the Tribunal, and questions the identity of the owner of the vessel.

44. Pursuant to article 110 of the Rules of the Tribunal, an application for prompt release of a vessel and its crew may be made by or on behalf of the flag State of the vessel. In this regard, the Tribunal notes that on 18 November 1997 a certified copy of the authorization of the Attorney General of Saint Vincent and the Grenadines on behalf of the Government of Saint Vincent and the Grenadines to the Commissioner for Maritime Affairs of Saint Vincent and the Grenadines and the original of the authorization of the Commissioner for Maritime Affairs to the Agent were submitted to the Registrar and form part of the record. The Tribunal therefore dismisses the objection of Guinea. As far as the ownership of the vessel is concerned, the Tribunal notes that this question is not a matter for its deliberation under article 292 of the Convention and that Guinea did not contest that Saint Vincent and the Grenadines is the flag State of the vessel.

45. For the above reasons, the Tribunal finds that it has jurisdiction under article 292 of the Convention to entertain the Application.

46. Having dealt above with the question of the jurisdiction to entertain the Application, the main issue to be resolved by the Tribunal is whether the Application is admissible, that is, whether it falls within the scope of the other requirements set out in article 292 of the Convention.

47. The proceedings for prompt release of vessels and crews are characterized by the requirement, set out in article 292, paragraph 3, of the Convention that they must be conducted and concluded "without delay" and by the nature of their relationship to domestic proceedings and other international proceedings.

48. The Rules of the Tribunal give effect, in various ways, to the provision mentioned above that applications for release be dealt with without delay. Article 112, paragraph 1, provides that the Tribunal give priority to applications for prompt release over all other proceedings before the

Tribunal. Article 112, paragraph 3, provides for the setting of the earliest possible date for an oral hearing, but not exceeding ten days from the receipt of the application. The same paragraph sets out the general rule that the oral hearing shall last no longer than one day for each party. Article 112, paragraph 4, provides that the judgment of the Tribunal shall be adopted as soon as possible and read at a sitting to be held not later than ten days after the closure of the oral hearing.

49. As regards the relationship of the proceedings under article 292 of the Convention to domestic proceedings, article 292, paragraph 3, states that the prompt release proceedings shall be "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew". This provision should be read together with the provision of the same paragraph stating that the Tribunal "shall deal only with the question of release" and with the provision of paragraph 4 according to which "upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew". Consequently, this provision means that, while the States which are parties to the proceedings before the Tribunal are bound by the judgment adopted by it as far as the release of the vessel and the bond or other security are concerned, their domestic courts, in considering the merits of the case, are not bound by any findings of fact or law that the Tribunal may have made in order to reach its conclusions.

50. The independence of proceedings under article 292 of the Convention vis-à-vis other international proceedings emerges from article 292 itself and from the Rules of the Tribunal. The Rules deal with the proceedings for the prompt release of vessels and crews in a separate section (section E of Part III). These proceedings are thus not incidental to proceedings on the merits as are the proceedings for interim measures set out in article 290 which in the Rules are dealt with in section C of Part III, on "incidental proceedings". They are separate, independent proceedings. It cannot, however, be excluded 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 to another court or tribunal competent according to article 287 of the Convention. In the view of the Tribunal, this circumstance does not preclude it from considering the aspects of the merits it deems necessary in order to reach its decision on the question of release, but it does require that the Tribunal do so with restraint.

51. The possibility that the merits of the case may be submitted to an international court or tribunal, and the accelerated nature of the prompt release proceedings, considered above, are not without consequence as regards the standard of appreciation by the Tribunal of the allegations of the parties. The Tribunal in this regard considers appropriate an approach based on assessing whether the allegations made are arguable or are of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purposes. By applying such a standard the Tribunal does not foreclose that if a case were presented to it requiring full examination of the merits it would reach a different conclusion. The standard indicated seems particularly appropriate in view of the fact that, in the proceedings under article 292, the Tribunal has to evaluate "allegations" by the applicant that given provisions of the Convention are involved and objections by the detaining State based upon its own characterization of the rules of law on the basis of which it has acted. It is clear to the Tribunal that it cannot base itself solely in this connection on the characterizations given by the parties. It can be added that applying such standard allows the Tribunal in the short time available to exercise the restraint referred to in paragraph 50 above.

52. As regards the requirement of alleged non-compliance with the provisions of the Convention for the prompt release of vessels upon the posting of a reasonable bond or other financial security, three provisions of the Convention correspond expressly to this description: article 73, paragraph 2; article 220, paragraphs 6 and 7; and, at least to a certain extent, article 226, paragraph 1(c).

53. Saint Vincent and the Grenadines, in relying upon article 292 of the Convention, refers to articles 73, 220 and 226. As an alternative, Saint Vincent and the Grenadines also relies on what could be termed a non-restrictive interpretation of article 292. According to this interpretation the applicability of article 292 to the arrest of a vessel in contravention of international law can also be argued, without reference to a specific provision of the Convention for the prompt release of vessels or their crews. Contravention of article 56, paragraph 2, of the Convention has been quoted in this respect by Saint Vincent and the Grenadines. In the view of Saint Vincent and the Grenadines, 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.

54. Guinea argues that the reference made by the Saint Vincent and the Grenadines to article 73 of the Convention is unfounded because a bond has not been posted and that article 292 is not applicable to the case which, in its opinion, concerns smuggling. Guinea in its oral statements argues that the arrest of the M/V *Saiga* was legitimate as it was executed at the conclusion of hot pursuit following a violation of customs laws in the contiguous zone of Guinea.

55. Saint Vincent and the Grenadines has not pursued its arguments concerning the applicability of articles 220 and 226 of the Convention. It remains therefore to consider the question of the applicability of article 73. Article 73 reads as follows:

> "*Article 73*
> *Enforcement of laws and regulations of the coastal State*
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> 1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
>
> 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
>
> 3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
>
> 4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

56. In light of article 73 of the Convention and the contentions of Saint Vincent and the Grenadines, the question to be considered can be stated as follows: is "bunkering" (refuelling) of

a fishing vessel within the exclusive economic zone of a State to be considered as an activity the regulation of which falls within the scope of the exercise by the coastal State of its "sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone"? If this were the case, violation of a coastal State's rules concerning such bunkering would amount to a violation of the laws and regulations adopted for the regulation of fisheries and other activities concerning living resources in the exclusive economic zone. The arrest of a vessel and crew allegedly violating such rule would fall within the scope of article 73, paragraph 1, of the Convention and the prompt release of the vessel and crew upon the posting of a reasonable bond or other security would be an obligation of the coastal State under article 73, paragraph 2. In case such prompt release is not effected by the coastal State, article 292 could be invoked.

57. 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 exclusive economic zone. It can be argued that refuelling is by nature an activity ancillary to that of the refuelled ship. Some examples of State practice can be noted. Article 1 of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific of 23 November 1989 defines "driftnet fishing activities" as *inter alia* "transporting, transshipping and processing any driftnet catch, and co-operation in the provision of food, *fuel* and other supplies for vessels equipped for or engaged in driftnet fishing" (emphasis added). As documented by Saint Vincent and the Grenadines, Guinea Bissau, in its decree-law No. 4/94 of 2 August 1994, requires authorization of the Ministry of Fishing for operations "connected" with fishing and Sierra Leone and Morocco routinely authorize fishing vessels to be refuelled offshore.

58. Arguments can also be advanced, even though Guinea did not address this issue, 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 mentioned in 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.

59. 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.

60. However, Guinea holds the view that the arrest of the M/V *Saiga* was in conformity with international law and that its release cannot be claimed on the basis of article 292 of the Convention. According to Guinea: (a) the bunkering must be qualified as an infringement of its customs legislation; (b) the bunkering took place in its contiguous zone (less than 24 nautical miles from the island of Alcatraz); and (c) the arrest was justified because it was effected following the exercise of the right of hot pursuit according to article 111 of the Convention.

61. The allegation based on the right of hot pursuit does not meet the same requirements of arguability (or of being of a sufficiently plausible character) as the contention considered above. While the coordinates of the position of the M/V *Saiga* at the time of the bunkering of the fishing vessels the *Giuseppe Primo*, the *Kriti* and the *Eleni S.* in the log book of the M/V *Saiga* and the examination of the relevant maps suggest that the bunkering was in all likelihood carried out within the contiguous zone of Guinea, the arguments put forward in order to support the existence of the requirements for hot pursuit and, consequently, for justifying the arrest, are not tenable, even *prima facie*. Suffice it to say that according to PV29, the Procès Verbal of the Guinean authorities, the first viewing of the M/V *Saiga* by the Guinean patrol boats was by radar at 0400 hours on 28 October 1997, while the bunkering was carried out, according to the log book, between 0400 and 1350 hours on 27 October 1997. In PV29, as well as in its Statement of response, Guinea thus recognizes that the pursuit was commenced one day after the alleged violation, at a time when the M/V *Saiga* was certainly not within the contiguous zone of Guinea, as shown in the vessel's log book.

62. However, the Tribunal is not called upon to decide whether the arrest of the M/V *Saiga* was legitimate. It is called upon to determine whether the detention consequent to the arrest is in violation of a provision of the Convention "for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security".

63. It has already been indicated that laws or regulations on bunkering of fishing vessels may arguably be classified as laws or regulations on activities within the scope of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone. The question now to be addressed is the following: are there such laws and regulations in Guinea and, if so, is it relevant that Guinea qualifies them as "customs" or "smuggling" regulations? The main provisions that are relevant in this connection are those upon which the authorities of the detaining State relied at the time of arrest. It emerges from PV29 that the captain of the M/V *Saiga* is accused of a violation of article 40 of the Maritime Code and Law 94/007/CTRM of 25 March 1994 which prohibits unauthorized import, transport and distribution of fuel in the Republic of Guinea (article 1).

64. The notion that bunkering is seen as an activity ancillary to fishing and connected thereto is not unknown in the law of Guinea. Article 4 of Law 94/007/CTRM specifically makes it an offence for the owners of fishing boats holding a fishing licence issued by the Guinean Government to refuel or attempt to refuel by means other than those legally authorized. The Guinean Law 95/13/CTRM of 15 May 1995 (Code of Maritime Fishing, published in the *Journal officiel de la République de Guinée* dated 10 June 1995) provides that the definition of "fishing" includes "operations connected to fishing" (article 3, paragraph 1), which are defined as including, *inter alia*, "the supplying of fishing vessels or any other activity of logistical support of fishing vessels at sea" (article 3, paragraph 1(c)). Article 60, paragraph 1(k), defines as "fishing violations" violations of rules concerning operations connected to fishing. Article 29 states that "operations connected to fishing" are subject to licence. As article 5 of Law 94/007/CTRM refers to a "licence for the supply of fuel other than that provided for in article 30 [now article 29] of the Code of Maritime Fishing", there is no doubt that the licence mentioned in article 29 may include the supply of fuel. Moreover, several provisions of Order No. 039 PRG/85 of 23 February 1985, General Regulations for the Implementation of the Maritime Fisheries Code of Guinea, mention operations for the "logistical support" of fishing (article 2, section 1(c) and section 7; article 4, section 2(c)) and subject them to authorization (article 12).

65. From the pleadings and documents submitted by Guinea there also emerge indications that the violation of which the M/V *Saiga* was accused was seen as a violation concerning its rights in the exclusive economic zone.

66. Repeatedly, Guinea relies in its pleadings on article 40 of its Maritime Code, which defines Guinea's rights in the exclusive economic zone along the lines of article 56 of the Convention. Article 73 is part of a group of provisions of the Convention (articles 61 to 73) which develop in detail the rule in article 56 as far as sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of the exclusive economic zone are concerned. In the context of a violation concerning the bunkering of fishing vessels, a reference to article 40 of the Guinean Maritime Code, in view of its textual correspondence with article 56 of the Convention, must be read as dealing with the matters covered by article 73 of the Convention.

67. In this connection it should be recalled that Guinea, in rejecting in its pleadings the argument of Saint Vincent and the Grenadines that article 73 applies, does not challenge directly the applicability of article 73 but rather confines itself to the argument that a bond had not been posted or offered.

68. PV29 includes article 40 of the Maritime Code among the provisions which the captain of the M/V *Saiga* is accused of violating. How could this indication be relevant unless it meant that the violations of the substantive provisions listed afterwards are violations that are such when committed in the exclusive economic zone, and, consequently, relate to matters concerning the rights and jurisdiction of the coastal State in such zone? Moreover, PV29 begins by referring to information received by the Guinean patrol boat on the "illicit presence of a tanker in the exclusive economic zone of [Guinean] waters". How could the presence of a tanker in the exclusive economic zone be seen as illicit were it not for suspected violation of the sovereign rights and jurisdiction of Guinea in the exclusive economic zone?

69. Of the several matters encompassed in the sovereign rights and jurisdiction of Guinea in the exclusive economic zone to which article 40 of the Maritime Code refers through its connection with article 56 of the Convention, "sovereign rights to explore, exploit, conserve and manage the living resources" as mentioned in article 73 are the only ones that can be relevant in the present case in the light of the Guinean legislation referred to in paragraph 64 above and of the fact that it was fishing vessels that the M/V *Saiga* refuelled.

70. The allegation that the infringement by the M/V *Saiga* took place in the contiguous zone and that the vessel was captured legitimately after hot pursuit in accordance with article 111, paragraph 1, of the Convention was advanced by Guinea only at the final stage of oral proceedings. This makes the classification of the laws allegedly violated as relating to "customs" or "smuggling" rather doubtful. From the point of view of facts, the only indication that the bunkering of the fishing vessels took place in the contiguous zone is the position given in the M/V *Saiga*'s log book that became known to the Guinean authorities after, and not before, the arrest of the vessel. As late as in its Statement in response, Guinea indicated that the alleged infringement took place in its exclusive economic zone. As the position of the bunkering is close to the 24-nautical-mile limit measured from the low-water line of the island of Alcatraz, only a very accurate observation could have established that the bunkering took place in the contiguous zone. There is no evidence of such observation.

71. In light of the independent character of the proceedings for the prompt release of vessels and crews, when adopting its classification of the laws of the detaining State, the Tribunal is not bound by the classification given by such State. The Tribunal can, on the basis of the arguments developed above, conclude that, for the purposes of the present proceedings, the action of Guinea can be seen within the framework of article 73 of the Convention.

72. Why does the Tribunal prefer the classification connecting these laws to article 73 of the Convention to that put forward by the detaining State? The answer to this question is that the classification as "customs" of the prohibition of bunkering of fishing vessels makes it very arguable that, in view of the facts referred to in paragraphs 61 and 70 above, the Guinean authorities acted from the beginning in violation of international law, while the classification under article 73 permits the assumption that Guinea was convinced that in arresting the M/V *Saiga* it was acting within its rights under the Convention. It is the opinion of the Tribunal that given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter.

73. Having decided that the argument of Saint Vincent and the Grenadines based on article 73 of the Convention is well founded, it is unnecessary for the Tribunal to adopt a position on the non-restrictive interpretation of article 292 of the Convention referred to in paragraph 53 above.

74. As a subsidiary argument, Guinea claims that it arrested the vessel in compliance with Security Council Resolution 1132(1997) of 8 October 1997. In paragraph 6 of this resolution, the Security Council decides "that all States shall prevent the sale or supply to Sierra Leone, by their nationals or from their territories, or using their flag vessels or aircraft, of petroleum or petroleum products and arms and related materials of all types". According to Guinea, the M/V *Saiga* "hid in Sierra Leone waters" when pursued by the Guinean vessels for alleged infringements of Guinean law in Guinean waters (pleading of 27 November 1997). It does not, therefore, seem tenable that the purpose of Guinea was to prevent the M/V *Saiga* from performing illicit activities in Sierra Leone.

75. It remains for the Tribunal to consider the submission of Guinea that article 73 of the Convention cannot form a basis for the application because a bond or other security has not been offered or posted.

76. According to article 292 of the Convention, the posting of the bond or security is a requirement of the provisions of the Convention whose infringement makes the procedure of article 292 applicable, and not a requirement for such applicability. In other words, in order to invoke article 292, the posting of the bond or other security may not have been effected in fact, even when provided for in the provision of the Convention the infringement of which is the basis for the application.

77. There may be an infringement of article 73, paragraph 2, of the Convention even when no bond has been posted. The requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when it is alleged that the required bond is unreasonable.

78. In the case under consideration Guinea has not notified the detention as provided for in article 73, paragraph 4, of the Convention. Guinea has refused to discuss the question of bond and the ten-day time-limit relevant for the application for prompt release has elapsed without the

indication of willingness to consider the question. In the circumstances, it does not seem possible to the Tribunal to hold Saint Vincent and the Grenadines responsible for the fact that a bond has not been posted.

79. For the above reasons, the Tribunal finds that the application is admissible, that the allegations made by Saint Vincent and the Grenadines are well founded for the purposes of these proceedings and that, consequently, Guinea must release promptly the M/V *Saiga* and the members of its crew currently detained or otherwise deprived of their liberty.

80. The Tribunal can then consider the question of whether a bond or other security must be posted and, if so, the nature and amount of the bond or security.

81. Such release must be effected upon the posting of a reasonable bond or other financial security. The Tribunal cannot accede to the request of Saint Vincent and the Grenadines that no bond or financial security (or only a "symbolic bond") should be posted. The posting of a bond or security seems to the Tribunal necessary in view of the nature of the prompt release proceedings.

82. According to article 113, paragraph 2, of the Rules of the Tribunal, the Tribunal "shall determine the amount, nature and form of the bond or financial security to be posted". The most important guidance in this determination is the indication contained in article 292, paragraph 1, of the Convention that the bond or other financial security must be "reasonable". In the view of the Tribunal, the criterion of reasonableness encompasses the amount, the nature and the form of the bond or financial security. The overall balance of the amount, form and nature of the bond or financial security must be reasonable.

83. In considering such overall balance of amount, form and nature of the bond or financial security, the Tribunal must take account of the fact that the gasoil carried by the M/V *Saiga* has been discharged in the port of Conakry by order of the Guinean authorities. According to documents produced by Saint Vincent and the Grenadines and not contested by Guinea, the discharge of the full load of the M/V *Saiga* of 4,941.322 metric tons of gasoil, of density 0.8560 at 15°C, was completed on 12 November 1997.

84. Taking into consideration the commercial value of the gasoil discharged and the difficulties that might be incurred in restoring the gasoil to the holds of the M/V *Saiga*, it is reasonable, in the view of the Tribunal, that the discharged gasoil, in the quantity mentioned above, shall be considered as a security to be held and, as the case may be, returned by Guinea, in kind or in its equivalent in United States dollars at the time of judgment.

85. In view of the circumstances, the Tribunal considers reasonable that to this security there should be added a financial security in the amount of four hundred thousand (400,000) United States dollars, to be posted in accordance with article 113, paragraph 3, of the Rules of the Tribunal, in the form of a letter of credit or bank guarantee, or, if agreed by the parties, in any other form.

86. For these reasons,

THE TRIBUNAL,

(1) Unanimously,

Finds that the Tribunal has jurisdiction under article 292 of the United Nations Convention on the Law of the Sea to entertain the Application filed by Saint Vincent and the Grenadines on 13 November 1997.

(2) By 12 votes to 9,

Finds that the Application is admissible;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

(3) By 12 votes to 9,

Orders that Guinea shall promptly release the M/V *Saiga* and its crew from detention;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

(4) By 12 votes to 9,

Decides that the release shall be upon the posting of a reasonable bond or security;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

(5) By 12 votes to 9,

Decides that the security shall consist of: (1) the amount of gasoil discharged from the M/V *Saiga*; and (2) the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form;

IN FAVOUR: *Judges* ZHAO, CAMINOS, MAROTTA RANGEL, YANKOV, KOLODKIN, BAMELA ENGO, AKL, WARIOBA, LAING, TREVES, MARSIT, EIRIKSSON;

AGAINST: *President* MENSAH; *Vice-President* WOLFRUM; *Judges* YAMAMOTO, PARK, NELSON, CHANDRASEKHARA RAO, ANDERSON, VUKAS, NDIAYE.

Done in English and in French, the English text being authoritative, in the Free and Hanseatic City of Hamburg, this fourth day of December, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Saint Vincent and the Grenadines and the Government of Guinea, respectively.

(Signed) Thomas A. MENSAH,
President.

(Signed) Gritakumar E. CHITTY,
Registrar.

President MENSAH availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) T.A.M.

Vice-President WOLFRUM and *Judge* YAMAMOTO, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their collective dissenting opinion to the Judgment of the Tribunal.

(Initialled) R.W.
(Initialled) S.Y.

Judges PARK, NELSON, CHANDRASEKHARA RAO, VUKAS and NDIAYE, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their collective dissenting opinion to the Judgment of the Tribunal.

(Initialled) C.H.P.
(Initialled) L.D.M.N.
(Initialled) P.C.R.
(Initialled) B.V.
(Initialled) T.M.N.

Judge ANDERSON, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(Initialled) D.H.A.

DISSENTING OPINION OF PRESIDENT MENSAH

1. For the reasons given in the Judgment, I agree with the finding in operative paragraph 1 of the Judgment, affirming the jurisdiction of the Tribunal to entertain the Application filed by St. Vincent and the Grenadines on 13 November 1997.

2. I am availing myself of the right given to me under article 30, paragraph 3, of the Statute and article 125, paragraph 2, of the Rules of the Tribunal to append my opinion on the points in the Judgment on which I have some difficulty.

3. I regret that I am not able to concur in the reasoning and conclusions of the Tribunal on operative paragraphs 2 and 3 of the Judgment. Since I do not agree that this is a case in which an order of the Tribunal for the prompt release of the vessel or its crew under article 292 of the Convention is justified, I cannot support the decision in paragraph 4 to order the Applicant to post a bond or security for such release nor the determination, in paragraph 5, of the amount, nature and form of the security.

4. I have had the opportunity of reading the dissenting opinions of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye, and I agree with the opinion in every respect.

5. I have also seen the opinion of Judge Anderson and I agree with the main thrust of that opinion. I wish specially to endorse his view that proceedings under article 292 of the Convention are not preliminary or incidental but definitive proceedings in which a court or tribunal is required to decide whether a case has been made that the allegation of non-compliance is well-founded. For that reason the Tribunal is, in the present case, called upon to make a determination and not, as the Judgment appears to imply, an "appreciation" of whether the allegations made by the Applicant are "arguable or ... of a sufficiently plausible character in the sense that the Tribunal may rely upon them for the present purpose" (paragraph 51). The proceedings in this case are discrete and intended to be finally dispositive of the merits of the only point for decision under article 292, i.e. whether the allegation of non-compliance is well-founded and, in consequence, the vessel or its crew are to be released upon the posting of a reasonable bond or other financial security. In that sense the proceedings are, for the purposes of article 292, proceedings on merits. Since there can be no further phases of these proceedings, there can be no purpose other than "the present purpose" in which the Tribunal may rely on a different requirement for proof of the allegations.

6. I have similarly seen the dissenting opinion of Vice-President Wolfrum and Judge Yamamoto and I endorse their reasoning and conclusions. I wish especially to express my agreement with their views concerning what they rightly describe as the unwarranted "*obiter dictum*" in the Judgment on the issue whether "bunkering of a fishing vessel is an activity the regulation of which falls within the competence of the coastal States when exercising their sovereign rights concerning exploration, exploitation, conservation or management of living marine resources of the exclusive economic zone." I share the concerns expressed by them in paragraph 25 of their opinion.

7. I fully concur in the opinion of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye that the Tribunal cannot order the prompt release of an arrested vessel under article 292 merely on the "allegation" of the flag State that the detaining State has not complied with a provision of the Convention for prompt release upon the posting of a bond. I agree with them that it must be established that the arrest was in fact for a reason covered by the provision of the

Convention which the flag State alleges has not been complied with. The burden of establishing that this is so lies on the party making the allegation of non-compliance, in this case the Applicant. And I have concluded, with them, that the Application has not satisfied the requirements under article 292 and article 113, paragraph 3, of the Rules of the Tribunal. Accordingly, I agree with their conclusion that the allegation of the Applicant that the Respondent has failed to comply with the provisions of article 73 of the Convention is not well-founded.

8. No case has been made to show that the authorities of Guinea have failed to comply with any other provisions of the Convention for the prompt release of the M/V *Saiga* under article 292 of the Convention. I am, therefore, unable to agree that the Applicant is entitled to an order for the release of the M/V *Saiga*, pursuant to article 292.

9. I have carefully examined the reasons given for the conclusion reached in the Judgment that the M/V *Saiga* was arrested for contravening the fisheries laws of Guinea, but I am not able to accept them. In particular, I do not consider that the importance attached to article 40 of the Maritime Code of Guinea in reaching that conclusion is justified.

10. Considerable reliance is placed in this respect on the reference to article 40 of the Maritime Code in the Procès-Verbal No. 29 of 13 November 1997 (hereinafter PV29). In the first place it is to be noted that the Procès-Verbal is essentially a report of the officials who actually arrested the M/V *Saiga*, together with a statement of the charges for which the arrest took place. In this context it is not without significance that these persons were officials of the Customs Department and the Navy. Guinea has a Fisheries Ministry, with its own enforcement agents responsible for implementing the laws and regulations of Guinea for the control, management and conservation of fisheries resources. If the authorities of Guinea had, indeed, at any time considered that the M/V *Saiga* might be engaged in activities which violate their fisheries laws, it would be difficult to explain why the officials sent to investigate and arrest the vessel did not include any personnel of the Fisheries Ministry. It is even harder to understand why none of the measures taken following the arrest should have alluded, directly or indirectly, to any aspects of Guinea's laws relating to fisheries, or involved any of the State agencies concerned with fisheries.

11. As previously stated, the Judgment attaches considerable significance to the fact that PV29 includes article 40 of the Maritime Code among the provisions which the Master of the M/V *Saiga* is "accused of violating." I am unable to see the justification of this assertion. Article 40 of the Maritime Code reads as follows (informal translation):

> The Republic of Guinea exercises, within the exclusive economic zone which extends from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign rights concerning the exploration and exploitation, conservation and management of the natural resources, biological or non-biological, of the sea beds and their subsoils, of the waters lying underneath, as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes.

12. This article merely incorporates into Guinean law the provisions of article 56 of the Convention on the Law of the Sea. It contains nothing more than a statement of the limits of the exclusive economic zone of Guinea, and the nature and extent of the "sovereign rights" which Guinea exercises in the zone. It does not contain any rules or regulations which can be infringed nor does it create any offences. It is, therefore, difficult to see in what sense the Captain of the

Saiga, or indeed any other person, can be said to have "violated" article 40 of the Maritime Code.

13. There is, in my view, a perfectly reasonable explanation for the reference to article 40 of the Maritime Code in PV29. It was intended to establish the geographical area in which offences under the specific legal provisions listed in PV29 are alleged to have been committed.

14. In that sense it is wrong to state that the Master of the M/V *Saiga* is "accused of violating article 40," just because that provision is included in the laws of Guinea listed in PV29. This is acknowledged by the Judgment when it states, quite rightly, in paragraph 68 that the reference to article 40 could only have meant that the "*violations of the substantive provisions listed afterwards are violations that are such when committed in the exclusive economic zone*" (emphasis added). This would appear to be an admission that the charges against the Captain of the *Saiga* are in the "substantive provisions" listed. These substantive provisions cannot include article 40 of the Maritime Code, because that article, as such, does not create an offence and so nobody can be accused of "violating" it.

15. In spite of this, the Judgment suggests that the reference to article 40 of the Maritime Code in PV29 is, somehow, evidence that the *Saiga* was arrested for violation of the fisheries laws and regulations of Guinea. The reason given for this claim is that the violations of which the M/V *Saiga* is accused was "such when committed in the exclusive economic zone"; and "consequently", that they must relate to "matters concerning the rights and jurisdiction of the coastal State in such zone" (paragraph 68). In the same vein the Judgment implies that Guinea could not consider the presence of a tanker in the exclusive economic zone to be "illicit" "were it not for suspected violation of the sovereign rights and jurisdiction of Guinea in the exclusive economic zone" to which article 40 of the Maritime Code refers. It is argued that this is so because "'sovereign rights to explore, exploit, conserve and manage living resources' … are the only ones that can be relevant in the present case in the light … of the fact that it was fishing vessels that the M/V *Saiga* refueled" (paragraph 69). On the basis of this reasoning, the Judgment concludes that the charges against the *Saiga* must have been related to violations of the laws of Guinea concerning fisheries in the exclusive economic zone.

16. In reaching this conclusion the Judgment obviously decided not to take into account the fact that the charges actually raised against the *Saiga* by the Guinean authorities, in the self-same PV29, relate to violations of laws which declare that they apply in the entire territory of Guinea, both land and sea. It would appear also that the Judgment considers it of no consequence that no action taken by any official or authority in Guinea, before and after the arrest of the *Saiga*, has had the faintest link with fisheries. As observed earlier, no officials or agencies of Guinea concerned with fisheries matters have been involved in any aspect of the measures - administrative, judicial or quasi-judicial - which have so far been taken against the M/V *Saiga*.

17. It should be said in passing that the fact that the vessels to which the *Saiga* sold oil were fishing vessels does not necessarily support the conclusion that the offence committed must be related to fisheries. Indeed the argument would still not be valid even if the M/V *Saiga* had itself been a fishing vessel. It is possible, and it has been known frequently to happen, for a fishing vessel to commit a smuggling or drug trafficking offence.

18. I do, of course, accept that where the reasons given by a coastal State for its actions are patently at variance with the facts of the case placed before it, a court or tribunal may conclude that the ostensible reasons given were not in fact the real reasons for the actions in question.

This may also be the case where there is clear evidence of bad faith on the part of the coastal State or its officials. However, in the present case all the ascertainable facts surrounding the arrest of the M/V *Saiga* by the customs authorities point to the fact that those actions were indeed based on a particular law or laws which the officials concerned considered, rightly or wrongly, to be applicable to the situation. Accordingly it is, in my view, not right for the Tribunal to declare that laws on which they clearly based themselves in arresting the vessel did not in fact form the basis of their actions. I consider it even less justifiable for the Tribunal, on its own motion, to decide that other laws of Guinea should be deemed to have been the laws which were in fact being applied. It is worth noting that the laws "preferred" by the Judgment were not referred to by any of the parties in their pleadings or oral presentations and the Tribunal has had no opportunity to form a view as to their nature or scope.

19. The Judgment gives a clear reason why the Tribunal "prefers the classification" connecting the laws of Guinea against the selling of oil to fishing vessels (under which the M/V *Saiga* was arrested) to article 73 of the Convention instead of the classification, used by the Guineans officials, i.e. that the act amounted to smuggling. The answer is that the classification of the prohibition of bunkering of fishing vessels as a "customs" offence "makes it very arguable that from the beginning the Guinean authorities acted in violation of international law", while "classification under article 73 permits the assumption that Guinea was convinced that in arresting the M/V *Saiga* it was acting within its rights under the Convention." The Judgment goes on to state that: "It is the opinion of the Tribunal that, given the choice between a legal classification that implies a violation of international law and one that avoids such implication, it must opt for the latter." (paragraph 72)

20. Two conclusions follow from this line of reasoning. The first is that the Tribunal is claiming the right, not only to disregard completely the choice of law which a State has, clearly in good faith (whether or not justifiably), made in taking its actions, but actually to determine the laws on which the State should have based itself, solely on the grounds that the Tribunal considers that the laws preferred by it would he more likely to justify the actions of the State under international law than those upon which the State itself decided to base its actions. It is rather ironic that the "justification" under international law proffered to Guinea by the Tribunal also provides the only basis for the decision of the Tribunal against Guinea in the case.

21. The second conclusion to be drawn from the answer given for the "preference" of the Judgment is that, when it expresses a preference for the classification of the arrest of the M/V *Saiga* as falling under article 73 to the characterization of the action as "smuggling" by Guinea, the Tribunal is, in effect, pronouncing on which of the two alternative "classifications" is more in accord with international law. This would seem to follow from the statement that the classification of bunkering as a customs offence "implies a violation of international law", whereas classification of bunkering as coming under article 73 "avoids such implication." In that sense the Judgment is doing no less than asserting that a law which assimilates bunkering to fisheries activity is NOT a violation of international law: in other words that such assimilation is a valid exercise of coastal State rights and jurisdiction under article 73 of the Convention.

22. In this connection, I note that the Judgment had previously stated (in paragraph 59) that "it is not necessary for the Tribunal to a come to a conclusion" as to which of the two classifications "is better founded in law." But it would appear that this is exactly what the Judgment does when it implies (indeed asserts) that a classification of bunkering of fishing vessels as "customs" would imply a violation *ab initio* of international law by Guinea, but that a classification of bunkering as assimilated to fisheries activities would avoid such implication.

23. In my view it is not appropriate for the Tribunal to pronounce, even by implication, on an issue of such fundamental importance as the scope and extent of coastal State legislation for fisheries control in the exclusive economic zone permissible under article 73 of the Convention. That question was not in issue in the present case, either in specific or general terms. It would, therefore, have been far better if it had not been addressed in the way it has been done in the Judgment.

24. In paragraph 70, the Judgment states that the "allegation that the infringement by the M/V *Saiga* took place in the contiguous zone and that the vessel was captured legitimately after hot pursuit was advanced by Guinea only at the final stages of the oral proceedings". This is not correct. In the Application by which the case was submitted to the Tribunal, the Applicant stated: "such information as the Applicants have been able to discover concerning the detention of the vessel is set out in an article appearing in a local newspaper. This maintains, among other things, that the *Saiga* was detained by Customs for 'smuggling' in Guinean territorial waters." The Application goes on to deny that "the vessel ... [has] even been involved in smuggling." Attached to the Application was a translation of the report in the local newspaper referred to in the body of the Application. That report stated in its first paragraph that "a mixed expedition of customs and marine made the largest arrest in the frame of the fight against fuel smuggling and traffic ... by the arrest of the tanker Saiga ... ." The report then stated that "the Saiga was arrested *near our territorial waters* after a long hid and find [sic] game between the tanker and the customs-marine patrol boat" (emphasis supplied).

25. In addition to this, it is on record that counsel for both the Applicant and the Respondent made extensive references to the charges of "smuggling" and the presence of the M/V *Saiga* in the "territorial sea" and "contiguous zone" of Guinea. In their very first submission to the Tribunal on 27 November, Mr. Khalil Camara, counsel for Guinea, repeatedly referred to the fact that Guinea's case did not relate only to the exclusive economic zone. Indeed his very first sentence stated: "I would simply like to explain the position in which the *Saiga* was seen, not only in the EEZ but also in the contiguous zone ..." (Verbatim Record, page 27). A little later in the submission he stated: "The pursuit was commenced when the ship was in the proximity of the first buoy of the *cité minière de Kamsar*; that is, within the limits of the contiguous zone of the island known as Alcatraz" (ibid.). All this took place on the first day of the oral proceedings and on the very first occasion when Guinea had the opportunity to present its case before the Tribunal

26. It is, therefore, not correct that either the charge of smuggling in the contiguous zone or the allegation of "hot pursuit" was introduced by Guinea "in the final stages of the oral proceedings" and, by implication, that this is an attempt *ex post facto*, to rationalize an action taken for different reasons. Whether or not the charges of smuggling or the allegation of hot pursuit are valid is, of course, a different matter.

27. In the Judgment, the Tribunal has chosen to disregard completely the charges which Guinea made against the *Saiga* right from the very beginning of the case, and which the authorities of Guinea have consistently maintained at all stages of the proceedings. It has instead substituted a basis for the accusation against the M/V *Saiga* which has not been used or even alluded to by any of the officials in Guinea. In doing so the Tribunal is, in my view, arrogating to itself a power and competence which it does not have and does not need to have in order to discharge its mandate. I cannot subscribe to the reasoning which seeks to justify the exercise of such power and competence by the Tribunal.

(Signed) Thomas A. Mensah

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

DISSENTING OPINION OF JUDGES PARK, NELSON, CHANDRASEKHARA RAO, VUKAS AND NDIAYE

1. While we have voted for the jurisdiction of the Tribunal to entertain the Application, filed by Saint Vincent and the Grenadines, (the Applicant), we regret that we are unable to concur in the conclusions of the Tribunal in operative paragraphs 2 to 5 of the Judgment. We shall explain our reasons, as briefly as possible.

2. In our view, the principal point to be considered by the Tribunal in deciding on the Application is whether it falls within the ambit of article 292 of the United Nations Convention on the Law of the Sea (the Convention). The Applicant alleges that the arrest and detention of the M/V *Saiga*, the oil tanker involved in this case, by the authorities of Guinea is in violation of article 73 of the Convention. For that reason, it requests the Tribunal to order the release of the vessel and its crew pursuant to article 292 of the Convention.

3. Guinea, the Respondent, contends that the Tribunal does not have the competence to entertain the Application on the ground that it does not show that the authorities of Guinea have failed to comply with any provisions of the Convention for the release of the vessel upon the posting of a bond or other financial security. In fact, the entire case of the Respondent is based on the premise that the M/V *Saiga* was arrested for "smuggling." This amounts to a clear denial of the applicability of article 73 of the Convention on which the Application is based.

4. The question is whether article 73 of the Convention is attracted in this case. Article 73 reads as follows:

> "1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
>
> 2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
>
> 3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
>
> 4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

5. There is no doubt that, if article 73 is attracted, article 292 can be invoked as a basis of the allegation referred to therein. This is clear from article 292, paragraph 1, of the Convention which reads as follows:

> "Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of the release from detention

> may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree."

6. Article 292, paragraph 1, requires that three conditions are to be satisfied before an order for the prompt release of an arrested vessel or its crew is made by the Tribunal. The first condition is that a vessel flying the flag of a State Party has been detained by the authorities of another State Party and the second is that the flag State of the vessel has made an allegation that the detaining State has not complied "with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security." The third condition is that a different forum or procedure for settling the dispute has not been agreed upon between the flag State and the detaining State within 10 days from the time of detention of the vessel or its crew.

7. Since we agree with the Judgment that the first and third conditions have been fulfilled, the only issue for determination is whether the second condition, referred to above, is satisfied. If the Tribunal concludes that the allegation of the Applicant is well-founded, it is competent to order the release of the vessel or its crew upon the posting of a reasonable bond or other financial security, as provided for in article 292.

8. We do not consider that a mere allegation that the detaining State has not complied with the provisions of article 73 will satisfy the second condition for the application of article 292. There must be a direct connection between the allegation and the actions of the coastal State in the application of article 73. Without such a connection, the Tribunal must conclude that the allegation is not "well-founded." In this connection, it is relevant to recall the provisions of article 113, paragraph 1, of the Rules of the Tribunal which reads:

> "The Tribunal shall in its Judgment *determine* in each case in accordance with article 292 of the Convention 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 upon the posting of a reasonable bond or other financial security is *well-founded*." (emphasis added)

9. What this Rule requires is that the Tribunal should "determine" that the allegation is "well-founded." The burden on the Applicant to establish that its allegation is "well-founded" can be discharged successfully only when it establishes to the satisfaction of the Tribunal that there is a direct connection between the arrest of the vessel and the actions taken by the Respondent based on its laws and regulations referable to article 73 of the Convention. As enjoined by article 292, paragraph 3, of the Convention, the Tribunal has to make its determination "without prejudice to the merits of any case before the appropriate domestic forum against the vessel." Equally, the determination of the Tribunal must be based on an examination of facts submitted by the parties and not independently of them. It may be noted here that article 73, paragraph 1, of the Convention permits the coastal State to arrest a vessel in the circumstances stated therein; it offers a protective cover to the coastal State. If a coastal State were to argue that its actions fall outside article 73, this ought to become a relevant factor, for it is losing thereby a valuable right conferred by article 73, paragraph 1, of the Convention.

10. In our view, the Application does not satisfy the requirements of article 292 of the Convention and of article 113, paragraph 1, of the Rules of the Tribunal. There is no evidence

that the actions taken by the authorities of Guinea against the M/V *Saiga* were under the laws and regulations of Guinea concerning the exploration, exploitation, management and conservation of marine living resources or the prevention of illegal fishing. The Respondent has from the very outset clearly and consistently maintained that the M/V *Saiga* was arrested for the offence of smuggling in the sense of *illegally supplying oil to fishing vessels in contravention of its customs legislation*. In this connection, it has emphasized the importance to its national economy of customs revenue from petroleum products, which it claims constitutes as much as thirty-seven per cent of its total national revenue.

11. Although the Applicant has alleged that the Respondent has acted "contrary to article 73 of the Convention," it has not, either in the Application or in its oral arguments, explained how the Respondent has not complied with the provisions of that article. In support of its allegation that the Respondent acted contrary to article 73 of the Convention, the Applicant relied on the reference to article 40 of the Maritime Code in the Procès-Verbal of 13 November 1997, prepared by the officials of Guinea in connection with the arrest of the M/V *Saiga*. In that document, reference was made to article 40 of the Maritime Code of Guinea, articles 1 and 8 of Law 007 of 1994, articles 316 to 317 of the Customs Code and articles 361 and 363 of the Penal Code. The Applicant relied heavily on the reference to article 40 of the Maritime Code in an effort to establish a link between the arrest of the M/V *Saiga* and the fisheries laws of Guinea, and hence to support its allegation that article 73 of the Convention applies in this case. Article 40 of the Maritime Code of Guinea reads as follows:

> *[Translation]*
>
> "The Republic of Guinea exercises, within the exclusive economic zone which extends from the limit of the territorial sea to 188 nautical miles beyond that limit, sovereign rights concerning the exploration and exploitation, conservation and management of the natural resources, biological or non-biological, of the sea beds and their subsoils, of the waters lying underneath, as well as the rights concerning other activities bearing on the exploration and exploitation of the zone for economic purposes."

12. The question remains as to what action taken by the Respondent pursuant to article 40 brings the case within the ambit of article 73 of the Convention. The Applicant contends:

> "We submit that the activities of M/V *Saiga* in bunkering within the exclusive economic zone of Guinea is an activity which could come within article 40 of Guinean law, the Maritime Code, and as such it is a provision that clearly comes within, we submit, article 73 of the Convention. This being a matter coming within article 73 of the Convention, it is therefore subject to article 292 and the Jurisdiction of this Tribunal.
>
> To put that submission in context, I would postulate a circumstance where a small fishing vessel may only be able to travel to limited areas within the exclusive economic zone with the full tank of fuel loaded at a port in the coastal State which would therefore limit the fish that vessel could catch were it obliged to bunker in that port. However, given the opportunity to bunker at high seas as well, the small fishing vessel could multiply its potential catch by a number of times because it would be able to travel further distances within the exclusive economic zone and stay within the exclusive economic zone for longer without having to return back to the port of the coastal State for bunkers.

> That being the case, it is not difficult to imagine that *the fishing stocks of coastal States could be depleted over time by smaller fishing vessels taking the opportunity to bunker in the exclusive economic zone* and thereby increasing their catches, such that it is submitted that a coastal State would be entitled to exercise sovereign rights over such activities pursuant to article 73, that being rights concerning the exploitation and management of the natural resources." (emphasis supplied)

13. The Applicant has not produced any evidence that the authorities of Guinea proceeded against the vessel as part of an anti-bunkering operation to protect fishing stocks in the EEZ of Guinea; nor is there any evidence for such a proposition in any of the documents placed before the Tribunal. Indeed, the Applicant's own submission reinforces this contention when it stated:

> "In fact, so far as we are aware, despite extensive researches and the Guineans now having presented their case in an outline of their case before the Tribunal today, it would appear that the Guinean Government has not yet themselves enacted any specific legislation concerning the rights of bunkering vessels within its exclusive economic zone and consequently *there is no legislation to which it could be said M/V Saiga was infringing or in breach of, and consequently it is not within the potential but as yet unexercised rights* of the Government of Guinea to exercise powers over bunkering vessels in their exclusive economic zone to actually impose any penalty on M/V Saiga." (emphasis supplied)

14. The Applicant's contention that the Respondent could have taken the action of the type that it took against M/V *Saiga* under article 40 of the Maritime Code may be seen as a futile effort on its part to link its allegation under article 292 of the Convention with article 73 of the Convention via article 40 of the Maritime Code. It may be recalled that the Respondent also referred in the Procès-Verbal to articles 1 and 8 of the Law of 1994, articles 317 to 316 of the Customs Code of 1990, and articles 361 and 363 of the Penal Code. Articles 1 and 8 of the 1994 Law deal with the prohibition of the import, transport, storage and distribution of fuel by any person or body not legally authorised and the punishment prescribed in relation thereto. Articles 317 and 316 of the Customs Code deal with the acts which constitute contraband and the punishment for it. Articles 361 and 363 of the Penal Code deal with imprisonment of delinquents, receivers and accomplices involved in the offence of smuggling and confiscation of the property involved in any fraudulent import, etc. Thus, all these laws deal with offences which may be broadly characterised as customs offences and the punishments and penalties that may be inflicted in respect of such offences. These laws have nothing to do with the protection of the living resources in the exclusive economic zone of Guinea. Nor can the measures based on these laws be understood as enforcement measures falling within article 73, paragraph 1, of the Convention. Furthermore, nothing in the measures taken by the authorities of Guinea after the arrest of the M/V *Saiga* (administrative, judicial or quasi-judicial) suggests that the Respondent has at any time linked the arrest of the vessel and its crew to the implementation of any laws relating to the regulation or control of fisheries activities in the exclusive economic zone. Article 40 might have been referred to by the Guinean authorities simply to indicate the maritime area over which they might have thought that they could enforce their legislation referred to above. Or, it may be for some other purpose. But, what is important for the present purposes is that article 40, or for that matter the Maritime Code itself, does not create criminal offences of the type which are said to be involved in this case by the Respondent. The reference to article 40 cannot be read in isolation from the other legislation relied upon by the Respondent.

15. At any rate, as seen earlier, the Applicant itself admitted that the Respondent did not exercise any rights under article 40 of the Maritime Code. If it is the case of the Applicant that the Respondent did not exercise any rights under article 40, how could it even allege that the Respondent acted within the framework of article 73 of the Convention? An allegation cannot be brought within the framework of article 292 of the Convention on the basis of what a coastal State could have done but did not admittedly do.

16. The Respondent has denied that the measures taken by it were under article 73, paragraph 1, of the Convention. In fact, it has taken the consistent stand that it proceeded against M/V *Saiga* on account of the sale of fuel to three trawlers in the exclusive economic zone which, according to the Respondent, amounted to an act of smuggling under the relevant Guinean laws. The Respondent also claims that, although the arrest took place outside the waters of Guinea, it was a valid arrest because it was in the exercise by the Guinean authorities of the right of hot pursuit in accordance with article 111, paragraph 1, of the Convention. In this regard, it is to be noted that the Respondent contends that the offence which the M/V *Saiga* committed is a customs offence which falls within the competence of the appropriate courts in Guinea and that under the Guinean laws the customs authorities are not obliged to offer prompt release of a vessel arrested for customs offence. It is not for the Tribunal to go into the validity of these contentions in this case. What is relevant is that the Respondent rests its case on what it considered to be a smuggling offence by the M/V *Saiga* under its national laws which it claims directly and seriously affects its economy. If the Respondent thought that its action was connected with the enforcement of its customs law, its case before the court or tribunal competent to hear the case on the merits would stand or fall on that basis. It is not for the Tribunal to find or postulate a possible justification for the action of the Respondent. The Guinean Law 95/13/CTRM of 15 May 1995, referred to in paragraph 64 of the Judgment, was not even cited by the parties in their pleadings. Since the parties do not rely on that law, we do not deem it appropriate to examine its relevance to the rival positions of the parties, especially having regard to the Applicant's clear statement that the Respondent does not have legislation concerning the rights of bunkering vessels.

17. The Respondent argued, in our view persuasively, that its actions against the M/V *Saiga* were to enforce its legislation against smuggling. There is no justification for changing this characterization of the basis of the Respondent's action from smuggling to fishing with a view to bringing this action within the purview of article 73 for the purpose of applying article 292 of the Convention. There is no basis whatsoever to disregard the characterization of the basis given by the Respondent itself.

18. The Judgment states in paragraph 68 that the Procès-Verbal makes reference to information received by the Guinean patrol boat on the "illicit presence of a tanker in the exclusive economic zone of [Guinean] waters" and observes: "How could the presence of a tanker in the exclusive economic zone be seen as illicit were it not for suspected violation of the sovereign rights and jurisdiction of Guinea in the exclusive economic zone?" It is difficult to see how the characterization by the Guinean authorities of the nature of presence of the tanker in the EEZ of Guinea necessarily establishes that article 73 of the Convention, which deals with enforcement of laws and regulations of the coastal State in the matter of living marine resources in the EEZ, is attracted.

19. The Judgment observes in paragraph 72:

> "Why does the Tribunal prefer the classification connecting these laws to article 73 of the Convention to that put forward by the detaining State? The answer to this question is that the classification as 'customs' of the prohibition of bunkering of fishing vessels makes it arguable that, in view of the facts referred to in paragraphs 61 and 70 above, the Guinean authorities acted from the beginning in violation of international law, while the classification under article 73 permits the assumption that Guinea was convinced that in arresting the M/V *Saiga* it was acting within its rights under the Convention. It is the opinion of the Tribunal that given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter."

20. In our opinion, it is neither necessary nor appropriate for the Tribunal to comment on the validity or otherwise of Guinean actions under international law or advise Guinea on how it might defend its actions under international law. We cannot appear to be better custodians of Guinean interests than Guinea itself, apart from the fact that this is not a role which properly belongs to the Tribunal. We consider that it is totally unjustified to use such an unwarranted evaluation of the legality of the Respondent's actions as the basis for determining whether or not the Applicant's allegation has been substantiated. It is illogical to assume that, for the sake of avoiding the invocation of article 292 of the Convention, the Respondent would undertake the risk of endangering its position on the merits of the case to be adjudged later by the competent court or tribunal. Accordingly, we conclude that the allegation of the Applicant that the Respondent has failed to comply with article 73 of the Convention is not "well-founded."

21. The Applicant has also argued that, if its case did not fall under article 73 of the Convention, it could fall under articles 220 and 226 of the Convention. Since, as the Judgment observes in paragraph 55, the Applicant "has not pursued its argument concerning the applicability of articles 220 and 226," it is not necessary for us to pronounce an opinion in the matter.

22. The Applicant further advanced, in passing, an argument that the detention of the M/V *Saiga* should be taken as having contravened article 56, paragraph 2, of the Convention which provides that the "coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention." The Judgment observes in paragraph 73 that it is "unnecessary to adopt a position on this interpretation of article 292," since it accepts that article 73 is applicable in the case. As we conclude that, on the facts as presented, the actions of the Respondent have no connection with article 73, we consider it necessary to examine the contention that contravention of article 56 of the Convention would be an appropriate basis for an Application to the Tribunal under article 292 of the Convention.

23. A textual analysis of article 292 of the Convention clearly establishes that it applies only where the Convention contains specific provisions concerning the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. If article 292 was also intended to cover other cases of ship arrests, it would have been phrased differently. The limited scope of the special procedure under article 292 of the Convention is also confirmed by the legislative history of the article. The text of article 292, paragraph 1, assumed its present form in 1976, when the relevant passage read as follows: "… and have failed to comply with the relevant provisions of the present Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other security." In a statement made in the Preparatory Commission by the Secretariat in 1985, as a result of its examination of the legislative history of

article 292, this text was interpreted as meaning that "where a ship or vessel has been detained for violation of coastal State regulations, such as fisheries or marine pollution, *and if* the substantive provisions of the Convention provide for its release upon the posting of a bond or financial security, then access could be had to an international court or tribunal if the release could not be obtained promptly. Relevant substantive provisions are to be found, for instance, in articles 73, 220 and 226." (emphasis added - see Report of the Preparatory Commission, vol. III, p. 390 in UN Doc. LOS/PCN/152)

24. Further light is thrown on the true meaning of the text in a commentary on the Convention where it is stated:

> "To make it clear that this provision *did not apply to all cases of detention* (including, for instance, those in territorial waters), the introductory phrase in paragraph 1 of President Amerasinghe's third draft contained a cross-reference to the failure of the detaining State to comply 'with the relevant provisions of the present Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other security.' *Thus the right to complain about detention is restricted to the cases expressly provided for in the substantive parts of the Convention.*" (emphasis added - see *United Nations Convention on the Law of the Sea 1982, A Commentary* (by the Center for Oceans Law and Policy, University of Virginia), vol. V, p. 69)

25. It is important to emphasize that the meaning of the text, as confirmed by the travaux préparatoires, does not lend support to the wide-ranging interpretation put forward in paragraph 53 of the Judgment. There is nothing strange or illogical in the approach of article 292 of the Convention.

26. For these reasons, we are unable to accept the request of the Applicant and declare that, in our opinion, the Application filed by Saint Vincent and the Grenadines is not admissible under article 292 of the Convention.

(Signed) Choon-Ho Park
(Signed) L. Dolliver M. Nelson
(Signed) P. Chandrasekhara Rao
(Signed) Budislav Vukas
(Signed) Tafsir Malick Ndiaye

DISSENTING OPINION OF JUDGE ANDERSON

1. I agree fully with operative paragraph 1 on the question of jurisdiction and the reasoning in paragraphs 37 to 44 of the Judgment. To my regret, I have felt obliged to vote against operative paragraph 2 and the consequential paragraphs 3, 4 and 5 of the Judgment for the following reasons.

2. The Applicant has invoked article 73 of the Convention in support of an application for the prompt release of the *Saiga* under article 292. Accordingly, the task of the Tribunal, in accordance with the terms of that article and article 113, paragraph 1, of its Rules, is to "determine whether or not the allegation made by the Applicant that the detaining State has not complied" with, in this case, the provision contained in article 73, paragraph 2, "for the prompt release of the vessel or its crew upon the posting of a reasonable bond ... is well-founded." The issue, in short, is whether or not Saint Vincent's allegation is well-founded, a question of the interpretation and application of article 73, in the context of the Convention as a whole.

The scope of the present proceedings and the standard of appreciation

3. Paragraph 50 of the Judgment notes correctly that the proceedings are "not incidental to proceedings on the merits" and "are separate, independent proceedings". Paragraph 50 goes on, however, to allude to the hypothesis that "the merits of the situation that led to the arrest ... could later be submitted for a decision on the merits ... according to article 287." The scope of the present proceedings is confined to the question of release and the issue of whether or not the allegation is well-founded. Any further proceedings which may be instituted on the merits of issues arising from the facts would amount to a different case, or cases, in my opinion.

4. Paragraph 51 of the Judgment adopts the approach that, because the merits of the case may be submitted to an international court or tribunal, the "standard of appreciation" should be "whether the allegations made are arguable or are of *a sufficiently plausible character*". At this point, in my opinion, the majority fall into error. No authority is cited, but the underlined words were used by the International Court of Justice in the *Ambatielos* case (*I.C.J. Reports 1953*, at p. 18). The Court adopted that standard in the context of defining its own role *vis à vis* that of the Commission of Arbitration. In my opinion, the majority's approach in this case is mistaken because, on the issues over which the Tribunal has jurisdiction, there exists no equivalent of the Commission of Arbitration. The Tribunal's limited jurisdiction is exclusive and the normal standard of appreciation should apply.

5. It is not a question here of assessing whether the allegations are "arguable" or "plausible," as postulated in paragraph 51 of the Judgment. Article 292, paragraph 4, refers, rather, to "the *decision* of the court or tribunal". ("Decision" is a strong word, of course.) In the same vein, article 113, paragraph 1, of the Rules contemplates a determination (another strong word). This is not a finding which is to be followed by an examination of the merits of the question by another court or tribunal, including this Tribunal, at a later stage. Proceedings under article 292 form a discrete case, not a first phase in a case which proceeds on to the merits. Such proceedings are not preliminary or incidental and they conclude, in accordance with the Rules of the Tribunal, not with an order but with a judgment. They are

definitive proceedings in which the court or tribunal decides whether or not the applicant has made out the initial allegation, that is to say, whether it is well-founded or not.

The issue of article 73 of the Convention

6. In my opinion, the charges against the *Saiga* cannot properly be characterised as falling within the ambit of article 73. In the first place, the *Saiga* is a tanker and off-shore support vessel, not a fishing vessel. Secondly, before the Tribunal, the Respondent has explained the arrest in terms of smuggling, contraband and the importance to its national economy of safeguarding customs revenues from petroleum products. Most importantly, the charges set out in the Procès-Verbal issued by the customs authorities have been laid under the following legislation:

- Article 40 of *le Code de la marine marchande*, which establishes and provides for the Exclusive Economic Zone (EEZ) of Guinea in standard terms drawn from article 56 of the Convention, terms which do not appear on their face to create any criminal offences.

- Article 1 of Law L/94/007 which reads:

> "*Sont interdits en République de Guinée l'importation, le transport, le stockage, la distribution du carburant par toute personne physique ou morale non légalement autorisée*."

Unofficial translation submitted to the Tribunal by the Applicant:

> "The import, transport, storage and distribution of fuel by any natural person or corporate body not authorised are prohibited in the Republic of Guinea."

- Articles 316 and 317 of *le Code des douanes* which prohibit the smuggling of goods into the "*territoire douanier*", defined in article 1 as including:

> "*l'ensemble du territoire national, les îles situées le long du littoral et les eaux territoriales guinéennes*."

Unofficial translation of the first paragraph of article 1 submitted to the Tribunal by the Applicant:

> "The customs territory includes the whole of the national territory, the islands located along the coastline and the Guinea territorial waters."

- Article 361 of *le Code pénal*, which reads as follows:

> "*Seront punis d'un emprisonnement de 5 à 10 ans et de la confiscation de tous les biens des délinquants, receleurs et complices de toute importation frauduleuse de la monnaie ayant cours en République de Guinée et des produits agricoles et industriels.*"

Unofficial translation submitted to the Tribunal by the Applicant:

> "Delinquents, receivers and accomplices will be punished by imprisonment of 5 to 10 years and confiscation of all the property for any fraudulent import of money being legal tender in the Republic of Guinea from agricultural and industrial products."

- Article 363 of *le Code Pénal*, which reads as follows:

> *"Il n'y a ni crime, ni délit en cas d'homicide ou de blessures commises par les forces de l'ordre sur les personnes délinquantes qui en flagrant délit fraudent à la frontière et qui n'ont pas obtempéré aux sommations d'usage*."

Unofficial translation submitted to the Tribunal by the Applicant:

> "There is no crime, or offence in the event of murder or wounding committed by the forces of order on trespassers who as a flagrant offence smuggle at the border and who have not complied with the demands of customs."

To sum up, the key provisions of criminal law in this case are those contained in Law L/94/007 and the Customs Code, which refer to the territory of Guinea, its customs territory and its territorial sea (12 nautical miles). Article 40 appears simply to supply the 200 mile limit, whilst the two articles in the Penal Code supply the penalties upon conviction, as well as immunity for the "forces of order" - presumably including those who captured the *Saiga*. On its face, article 40 does not appear to create any fisheries offences. Accordingly, the relevant provisions of the legislation can be characterised or classified only as customs or fiscal, not fisheries, legislation. The extended significance given in the Judgment to article 40 cannot be justified. It follows that the offences charged can be classified in these proceedings only as customs or fiscal offences. Any other view is implausible, in my opinion.

7. In the perspective of this legislation, the considerations that the three vessels (according to the Respondent's evidence, two Italian and one Greek) which were admittedly bunkered by the *Saiga* in the EEZ were (1) fishing vessels and (2) engaged in fishing in the EEZ (in at least one instance, according to the Respondent[1], under the Fisheries Cooperation Agreement between Guinea and the European Community) do not appear to have been material factors. Despite what is stated in paragraph 64 of the Judgment, the fact that Law L/94/007 contains article 4 concerning offences by fishing vessels is not a material consideration since no charge has been laid in the Procès-Verbal under that article against the *Saiga*. The actual charges laid in the Procès-Verbal could have been brought, it would appear, even if the *Saiga* had refuelled in the EEZ any merchant vessel afloat today. Moreover, Guinea did not submit to the Tribunal, or rely upon in argument before it, the fisheries legislation mentioned in paragraph 64 of the Judgment.

8. It will, of course, be for the national courts in Guinea to decide upon the merits of the charges. The foregoing analysis of the legislation has been made for the sole purpose of responding to the classification of the charges contained in paragraph 71 of the Judgment.

9. There is insufficient justification in this case for changing the Respondent's own description of the charges from smuggling to fisheries offences, for the purposes of this case. The charges in the Procès-Verbal are *facts* before this Tribunal. The choice referred to in paragraph 72 is one which has not been given to the Tribunal, either by the limited jurisdiction in article 292, paragraph 3, or by the Parties in front of the Tribunal. In order to avoid implying a particular violation by the Respondent of international law as laid down in the Convention (a finding which, of course, the Tribunal has no jurisdiction to make in these proceedings under article 292), the majority has chosen instead to find that the Applicant's allegation is well founded (paragraph 73). It follows that Guinea has failed to comply with

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[1] Provisional Verbatim Record of the Oral Proceedings, 27 November 1997, page 27 (English version) and page 37 (*version française*).

the obligation contained in article 73, paragraph 2, in not releasing the vessel. In other words, the sense of the Judgment is that Guinea has violated a different part of the Convention, since a failure to comply amounts to a breach: *pacta sunt servanda*.

10. My overall conclusion is that the *Saiga* is not an "arrested vessel" within the meaning of article 73, paragraph 2. No other article is applicable. It follows that the Applicant's allegation is not "well founded" within the meaning of article 113 of the Rules, and that there is insufficient basis in law for "the decision ... concerning the release of the vessel" under article 292, paragraph 4. I have voted against operative paragraph 2 without hesitation. Moreover, this is not a case of "admissibility" as that paragraph suggests. Rather, it is a final decision on the merits of the allegation and not a finding of admissibility in incidental proceedings.

The scope of this dissenting opinion

11. Article 292 represents a self-contained, special procedure, separate from the other provisions for the settlement of disputes contained in Part XV of the Convention. The task of the Tribunal is to "deal only with the question of release without prejudice to the merits ..." (article 292, paragraph 3). Nonetheless, in the proceedings before the Tribunal, both parties have submitted extensive evidence and argument on the merits of several issues arising under article 111 and other provisions of the Convention, thereby going beyond the scope of article 292. My negative votes should not be taken as expressing any opinions whatsoever on the merits of those issues, which may still be the subject of further proceedings before a court or tribunal under Part XV of the Convention.

The issue in paragraph 53

12. I see nothing "strange" in the situation postulated by the Applicant and recorded in paragraph 53 of the Judgment. There is a perfectly valid explanation. It is set out in paragraphs 23 and 24 of the joint dissenting opinion by Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye.

The relevance of imprisonment to prompt release

13. The world is plagued by many types of smuggling, including narcotic drug smuggling. All types of vessels participate in this traffic, including fishing vessels entering the customs territory of a coastal State from the EEZ. Upon arrest, suspected smugglers are often refused bail for obvious reasons. International standards for the protection of human rights[2] require that they be given a fair trial on criminal charges. Upon conviction by a competent court, smugglers are often sentenced to monetary penalties, confiscation orders *and imprisonment*. Against that background, the Convention obviously does not confine permissible penalties in respect of smuggling offences to fines and confiscation orders (as, generally, in the case of fisheries offences in article 73) or to monetary penalties (as in the case of pollution offences in article 230); imprisonment remains available in regard to

[2] See Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", 36 *Columbia Journal of Transnational Law* (1997) 339.

smuggling offences. Prompt release orders reduce the penalties available to the appropriate domestic forum and may even prejudice the holding of the trial in the first place. Part XV of the Convention is available to the flag State Party in the event of any abusive use by a coastal State Party of its powers of arrest and prosecution, whether on smuggling or any other criminal charges. In that perspective, article 292 is not the appropriate remedy in such cases. In my opinion, the aspect of imprisonment should not be overlooked.

The other dissenting opinions

14. I should like to associate myself generally with the thrust of the separate opinions of President Mensah, of Vice-President Wolfrum and Judge Yamamoto, and of Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye. In particular, I endorse paragraphs 20 to 25 of the opinion by Vice-President Wolfrum and Judge Yamamoto concerning the question of bunkering, which is an internationally lawful use of the sea related to navigation in my opinion.

(Signed) David H. Anderson