

**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