Prompt Release of Vessels — The M/V "Saiga" Case

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The International Tribunal for the Law of the Sea which had been established under the United Nations Convention on the Law of the Sea in Hamburg on 18 October 1996 started its judicial activity with the Judgment of 4 December 1997 in the M/V "Saiga" Case. This case concerned an application for the release of the oil tanker "Saiga", flying the flag of St. Vincent and the Grenadines, which had been arrested by Guinean patrol boats and detained at the Guinean harbour of Conakry for alleged illegal supply of gasoil to three fishing vessels (one Greek and two Italian) operating in the exclusive economic zone of Guinea.[1]

The tanker "Saiga" (4252 GRT) had been cruising along the West African coast for the purpose of selling fuel to fishing vessels which operated in the exclusive economic zones of West African States. Refuelling at sea has obvious advantages for foreign fishing vessels operating far away from their bases. It allows them to stay longer in the fishing area without being forced to return to their bases or to a West African harbour for refuelling, and to refuel more economically by avoiding the heavy duties which are normally imposed on oil sales in the harbours of West African States. On the other hand, the respective coastal State and its local oil distributors lose the duties and profits from such oil sales that they would otherwise have gained if the foreign fishing vessels were forced to refuel in the harbours of that State. That is why the West African States have an interest to prevent the practice of servicing fishing vessels with fuel from outside sources within their exclusive economic zones. It has been reported that fishing licences which certain West African States had granted to foreign fishing vessels, contain clauses which forbid any refu-

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1 The Judgment is reprinted under the Section Documents in this Volume.

elling except at the authorised national fuel stations and require special authorization for refuelling from other sources.

A Guinean Law of 15 March 1994 provides in its article 4 that the holder of a fishing licence who refuels or attempts to be refuelled by means other than those legally authorized will be punished and fined.[2] The activities of the "Saiga", however, not being a vessel fishing under a Guinean licence, were not covered by this provision. While it may be within the jurisdictional power of the coastal State to determine the conditions under which it will grant fishing licences in its exclusive economic zone, it is rather doubtful whether commercial transactions between foreign ships navigating in the exclusive economic zone could lawfully be made subject to the coastal State's customs and criminal legislation outside the limits of its territorial jurisdiction.

In its pleadings before the Tribunal, Guinea had emphasized the importance of the sale of oil products to the Guinean economy and the loss of revenue from duties on oil sales caused by the activities of the "Saiga" and other foreign vessels selling fuel in Guinea's exclusive economic zone. I shall return later to the legal issue as to whether a coastal State is entitled to prohibit the refuelling of fishing vessels by foreign tankers in its exclusive economic zone.

The application for the prompt release of the oil tanker "Saiga", its crew and its cargo had been brought before the International Tribunal for the Law of the Sea (hereafter in the following referred to as "the Tribunal") by St. Vincent and the Grenadines (hereafter referred to as "the Applicant") against Guinea under the special Jurisdiction conferred on the Tribunal by article 292 of the 1982 Convention on the Law of the Sea (in the following referred to as "the Convention").

Article 292 provides that where the authorities of a State Party to the Convention have detained a vessel flying the flag of another State Party and the detaining State has not complied with a provision of the Convention for the prompt release of the detained vessel upon the posting of a reasonable bond or other financial security, the question of release may be submitted to the Tribunal, and the Tribunal will then, if the application is well-founded, order the release of the vessel and its crew upon the posting of a financial security determined by the Tribunal.

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2 Article 4 reads as follows: "Tout armateur de navire de pêche, détenteur d'une licence de pêche délivrée par l'autorité guinéenne compétente qui se sera fait avitailler ou aura tenté de se faire avitailler en carbourant par des moyens autres que ceux légalement autorisé sera puni de 1 à 3 ans d'emprisonnement et d'une amende égale ou double de la valeur de la quantité de carbourant achetée".

Article 292 para. 3 prescribes that the Tribunal shall deal only with the question of the release without prejudice to the merits of the case. This means that the special jurisdiction of the Tribunal under article 292 relates only and is limited to those cases where there is a provision in the Convention which obliges the detaining State to release the detained vessel upon the posting of a reasonable financial security, irrespective of whether or not arrest and detention were justified. The question of whether arrest and detention were justified will be decided later by the competent local authorities or tribunals and eventually, after the exhaustion of the local remedies,[3] by the competent international tribunal. In these proceedings the financial security which has to be posted by the applicant, takes the place of the vessel.

The articles of the Convention which explicitly lay down an obligation of the detaining State to release an arrested foreign vessel upon the posting of a financial security, are the following: article 73 para. 2 relating to arrests made in the enforcement of laws and regulations of the coastal State in the exercise of its sovereign rights in its exclusive economic zone with respect to the living resources in the zone, and arts 220 paras 6 and 7, and 226 para. 1 relating to arrests made in the enforcement of laws and regulations for the protection of the marine environment. The action of the Guinean authorities culminating in the arrest and detention of the "Saiga" had not been undertaken for enforcing environmental laws and regulations nor had the action of the Guinean authorities been motivated by concerns relating to the protection of the marine environment in Guinea's exclusive economic zone. Therefore, only article 73 para. 2 could provide a possible legal basis upon which the prompt release of the "Saiga" might be obtained under article 292 of the Convention.

In this context it should be mentioned that the Applicant had argued in his pleadings that article 292 of the Convention should not only apply where a specific provision of the Convention obliged the coastal State to release an arrested vessel upon the posting of a financial security, but also in those other cases where the release of an arrested vessel could be claimed on the ground that the arrest had been made in violation of other provisions of the Convention. The Judgment of the Tribunal has taken no position on this so-called "non-restrictive" interpretation of article 292 because the Judgment considered article 73 applicable in the present case so that there was no need to deal with the argument for a wider interpretation of article 292. The dissenting Judges, however, who considered article 73 not being applicable in the present case, felt it necessary, from their point of view, to deal with the question of a "non-restrictive"

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3 Article 295 of the Convention.

interpretation of article 292 which had been advanced by the Applicant as a subsidiary argument for the application of that article in the present case. Two dissenting opinions commented rather extensively on this argument and rejected the "non-restrictive" interpretation of article 292 on textual and conceptual grounds which were well taken, but also recalled the legislative history of that article.[4] In particular the development of the various formulations of article 292 in the negotiations at the Law of the Sea Conference appear to provide the strongest argument against a wider interpretation of article 292. While the initial formulation, based on a proposal made by the United States at the beginning of the Conference, could be interpreted to cover all cases of arrest and detention by the coastal State[5], the scope of application of this provision had been substantially narrowed in the subsequent negotiating texts by inserting the additional proviso that the detaining State must have "failed to comply with the relevant provisions of the present Convention for the prompt release of the vessel"[6], a formulation which obviously restricted the application of article 292 to those provisions of the Convention which specifically prescribed the release of a detained vessel upon the posting of a financial

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4 Dissenting Opinion of the Judges Wolfrum and Yamamoto, paras 14 to 19; Dissenting Opinion of the Judges Park, Nelson, Chandrasekhara Rao, Vukas and Ndiaye paras 22 to 25.

5 Article 15 para. 1 of Part IV of the Informal Single Negotiating Text, submitted by the President of the Conference on 21 July 1975, read as follows: " In case of the detention by the authorities of a Contracting Party of a vessel flying the flag of another Contracting Party, or of its crew or passengers, in connexion with an alleged violation of the present Convention, the State of the vessel's registry shall have the right to bring the question of detention before the Law of the Sea Tribunal in order to secure prompt release of the vessel or of its crew or passengers in accordance with the applicable provisions of the present Convention, including the presentation of a bond, and without prejudice to the merits of any case against the vessel, or its crew or passengers".

6 Article 14 para. 1 of Part IV of the Revised Single Negotiating Text, submitted by the President of the Conference on 6 May 1976, reads as follows: "Where the authorities of a Contracting Party have detained a vessel flying the flag of another Contracting Party 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, the question of release from detention may be brought before the Law of the Sea Tribunal, or any other court or tribunal which the parties have accepted in accordance with Article 9 for the settlement of disputes relating to navigation, unless the parties otherwise agree".

security. Whether and to what extent article 292 may or should be interpreted in such a way as to cover also analogous cases will have to be decided by the Tribunal in its future jurisprudence.

The jurisdiction of the Tribunal under article 292 of the Convention is compulsory and without exception applicable between all States which have ratified the Convention irrespective of whether they have formally accepted the jurisdiction of the Tribunal for their maritime disputes under article 287 of the Convention. In the present case, the application by St. Vincent and the Grenadines to the Tribunal under article 292 of the Convention appeared to offer the best prospects to obtain a speedy and reasonably certain release of the "Saiga" because the release would have to be ordered without regard to the merits of the case. The other procedural alternative that had been open to the Applicant, would have been to request arbitration for dealing with the lawfulness of the arrest and the detention of the "Saiga" and, pending the constitution of the arbitral tribunal, to apply to the Tribunal for the release of the "Saiga" as a provisional measure under article 290 para. 5 of the Convention.[7]

If the Applicant had chosen this procedural line, he would have had to face the objection by the other Party that a dispute about the exercise of the coastal State's sovereign rights in its exclusive economic zone is excluded from compulsory judicial settlement (article 297 para. 3 lit. (a) of the Convention). It may be mentioned in this context that the Applicant had, in fact, by notification of 22 December 1997, requested arbitration and again applied to the Tribunal for the release of the "Saiga" as a provisional measure under article 290 para. 5, since the release of the "Saiga" which had been ordered by the Judgment of the Tribunal of 4 December 1997, had not been forthcoming until that date. However, the "Saiga" and its crew were reported to be released on 4 March 1998 before the Tribunal decided on the application for provisional measures by Order of 11 March 1998.[8] I shall return later to this phase of the proceedings.

In his application under article 292 of the Convention the Applicant relied on article 73 para. 2 of the Convention alleging that the arrest of the "Saiga" constituted an enforcement measure in Guinea's exclusive economic zone under article 73 para. 1. Guinea argued in defence that the reliance by the Applicant on article 73 was unfounded because the "Saiga"

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7 Neither St. Vincent and the Grenadines nor Guinea had chosen the Tribunal for the Law of the Sea or any other available procedure for the settlement of their maritime disputes by a declaration under article 287 para. 1, of the Convention. Therefore, disputes between them will have to be decided by arbitration (article 287 para. 3) unless both parties agree otherwise.

8 Order reprinted in this Volume under Documents.

had been arrested for violating Guinea's customs laws by selling gasoil to ships operating before the Guinean coast and not for violating Guinea's fishery legislation envisaged in article 73 para. 1. The Tribunal found that the Applicant could rely on article 73 para. 2 of the Convention and consequently ordered the release of the "Saiga" and fixed the amount of the financial security to be posted for obtaining the release.

Unfortunately, the Judgment of the Tribunal of 4 December 1997 did not find the assent of all the Judges. Twelve of the Judges found that the Applicant could rely on article 73 para. 2 and supported the Judgment ordering the release of the "Saiga", while the 9 dissenting Judges were of the opinion that article 73 para. 2 could not be invoked by the Applicant because the arrest of the "Saiga" had not been a measure of enforcing Guinea's fishery legislation, but rather a measure of enforcing its customs legislation so that article 73 could not apply. The range of application of article 73 may become an important aspect in the future jurisprudence of the Tribunal in matters relating to the prompt release of vessels. The reasoning of the Judgment and of the Dissenting Opinions may give us some indication about the course which the future jurisprudence will take in this respect:

Before the Judgment approached the crucial question of whether the arrest of the "Saiga" by the Guinean authorities was covered by article 73, the Judgment made some general observations on the role of the Tribunal in the release proceedings under article 292, which may influence the future jurisprudence of the Tribunal in respect to such proceedings. In the present case the Judgment defined some general guidelines for the evaluation of the pleadings of the Parties in order to find out whether the arrest of the "Saiga" had been made within the scope of article 73. The Judgment as well as the dissenting opinions emphasized that the special proceedings under article 292 are distinct and separate from the proceedings on the merits and that they were not incidental proceedings in relation to the proceedings on the merits as were an application for provisional measures. In this context it should be added that the proceedings for the prompt release of the "Saiga" under article 292 and the proceedings on the merits, that is on the lawfulness of Guinea's arrest and detention of the vessel, concerned different legal issues, each to be decided on the basis of its own legal and factual basis. Consequently, the reasons for the decision under article 292 as far as they touch, the merits of the case, will in no way be binding in the subsequent proceedings on the lawfulness of arrest and detention of the "Saiga".

Nevertheless, the Judgment assumed that the legal classification of the action of the Guinean authorities may become relevant in both proceedings and, if already answered conclusively in the proceedings under article 292, might unduly foreclose a different evaluation of the facts in the

proceedings on the merits of the case. The Judgment thought it conceivable that either the Tribunal itself or any other international court or tribunal which may later be confronted with the task of adjudicating the merits of the case, might then come to a different conclusion with respect to the legal classification of Guinea's action because it would have more time for a full examination of the facts of the case than the Tribunal has had within the limited time which its Rules of Procedure allow for the proceedings under article 292.[9]

Therefore, the Judgment recommended[10], that the Tribunal, in the evaluation of the facts in the proceedings under article 292, should act with "restraint" in the appreciation of the allegations of the Parties with respect to the legal classification of the action of the Guinean authorities and to regard it as sufficient to conclude "whether the allegations made are arguable or of a sufficiently plausible character in the sense that the Tribunal may rely on them" for the purpose of article 292. Thereby "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". This approach will, in effect, considerably facilitate the application of article 292 because it would require the applicant merely to submit an "arguable" case for classifying the action of the detaining State as a measure under article 73 para. 1 of the Convention for obtaining the release of the detained vessel.

The approach recommended by the Judgment has been criticized by the dissenting Judges with the argument that the Applicant had to establish a well-founded basis for his application under article 292 which shows that the arrest of the "Saiga" is to be classified as an action within the ambit of article 73. But it seems doubtful whether article 292 does require to establish conclusively that the arrest of the "Saiga" must be so classified because that will have to be decided in the proceedings on the merits. As will be shown later, the issue under article 292 is not how the arrest of the vessel had to be legally classified, but rather whether the Guinean authorities acted with a purpose which would bring their action within the scope of article 73 of the Convention. In this respect it seems to be sufficient to show that among several alternative purposes there is one which would satisfy the assumption that Guinea may have acted with a purpose that would qualify the arrest as a measure within the scope of article 73 para. 1 of the Convention.

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9 See article 112 of the Rules of the Tribunal which restricts the proceedings to one hearing only and limits the time between application, hearing and decision to ten days each.

10 Paras 50 and 51 of the Judgment.

The cautious approach by the Judgment not to foreclose a different legal classification of the action of the Guinean authorities in the subsequent proceedings on the merits, may be considered tenable, if not appropriate in proceedings under article 292. But, the critic of the dissenting Judges appears to be justified in as much as the reasoning of the Judgment did not keep fully within the limits of its self-imposed "restraint" and went deeply into the merits of the case by trying to find an "arguable" or "plausible" legal basis of Guinea's action without taking account of Guinea's own legal qualification of its action against the "Saiga" as an enforcement measure under its customs legislation.

In supporting article 73 para. 2 of the Convention as an "arguable" and "plausible" legal basis for claiming the release of the "Saiga", the Judgment appeared to have gone deeper than necessary into the merits of the case. The so-called "plausibility" test should not be employed as a test for the lawfulness of the action of the Guinean authorities. That will be decided later in the proceedings on the merits of the case. The "plausibility" should relate rather to the purpose behind the action of the Guinean authorities.

Having explained how it would evaluate the facts and arguments which the Parties had advanced in their pleadings, the Judgment then approached the crucial question whether the refuelling of a foreign fishing vessel taking place within the exclusive economic zone "may be considered 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", or in short within the scope of regulating the fishery regime in the zone. The Judgment found that arguments could be advanced to support such a classification because it could be argued that "refuelling is by nature an activity ancillary to that of the refuelled ship"[11]. The Judgment cited some examples of State practice which seem to point in the direction of this argument. The Judgment, however, also admitted that arguments could be advanced which would support the opposite view that refuelling a vessel in the exclusive economic zone could be classified "as an independent activity whose legal regime should be that of the freedom of navigation ..." in the exclusive economic zone.[12]

The Judgment did not find it necessary to come to a conclusion as to which of these two lines of argument is better founded in law. The Judgment found the first alternative as being "arguable or sufficiently plausible" as basis for the action of the Guinean authorities[13] which would

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11 Para. 57 of the Judgment.
12 Para. 58 of the Judgment.
13 Para. 59 of the Judgment.

consequently bring the arrest of the "Saiga" within the ambit of article 73 para. 1 of the Convention.

This reasoning seems to go too far into the merits of the case. By calling the action of the Guinean authorities as being an "arguable" or even "plausible", exercise of Guinea's sovereign rights in regulating and controlling the fishery regime in its exclusive economic zone, the Judgment already transgressed its self-imposed "restraint" and provided Guinea with arguments for the defence of its action in the subsequent proceedings on the merits. This became apparent in the subsequent proceedings which will be discussed below, where Guinea objected to the jurisdiction of the Tribunal by invoking article 297 para. 3 lit. (a) of the Convention.

It is true that the Judgment in its further reasoning emphasized again that the Tribunal was not called upon to decide whether the arrest of the "Saiga" was legitimate. But, by indicating 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 ..." in the exclusive economic zone[14], the Judgment again implied that such laws and regulations could be considered legitimate.

It might become difficult for the Tribunal to come to a different conclusion in the subsequent proceedings on the merits of the case, a situation the Judgment wanted to avoid. The problematic tendency of the Judgment to go unnecessarily into the merits of the case became even more apparent when the Judgment, after it had found its classification of Guinea's action as a measure under article 73 para. 1 "arguable" or even "plausible", added more arguments which tried to show that the Guinean customs laws and regulations upon which arrest and detention of the "Saiga" had been based, were in effect to be interpreted as constituting part of Guinea's exclusive economic zone regime.[15] In this context the Judgment puts considerable weight on the reference by the Guinean authorities on article 40 of Guinea's Maritime Code[16] although this provision merely reiterates the coastal State's sovereign rights in the exclusive economic zone as listed in the Convention. The Judgment took the reference to article 40 of Guinea's Maritime Code as an indication that Guinea purported to act within the exercise of its sovereign rights in the zone. Thereupon the Judgment concluded that it was sufficiently plausible that the action of the Guinean authorities should be regarded as a measure under article 73 para. 1 of the Convention, in particular because such a classification

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14 Para. 63 of the Judgment.

15 Paras 63 to 69 of the Judgment.

16 Para. 66 of the Judgment.

avoided the conclusion that Guinea had wilfully acted in violation of international law.[17] This last argument seems virtually to imply that the Tribunal would be inclined to regard Guinea's action as being justifiable under article 73 para. 1 of the Convention.

The dissenting Judges criticized the reasoning of the Judgment mainly by the argument that it did not take account of the specific classification of the laws on which the arrest and detention of the vessel had been founded, by Guinea itself.

In the pleadings Guinea had consistently maintained that arrest and detention of the "Saiga" had been made on the ground of "smuggling" and other contraventions of its customs legislation, and not because of a contravention of its fishery legislation in the sense of article 73 para. 1 of the Convention. This critic may be justified in as much as the legal classification by Guinea of its own action had to be taken into account, although such a technical classification of Guinea's action as an act of enforcing its customs legislation did not preclude the Tribunal from classifying it differently in view of the special purpose pursued by Guinea with the application of its customs legislation to activities connected with fishing activities in its exclusive economic zone.

The dissenting Judges were certainly justified in critisizing the Judgment in its efforts to find an "arguable" or even "plausible" legal basis for Guinea's action. As the President of the Tribunal, in his Dissenting Opinion, rightly remarked: "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. This question was not in issue in the present case, either in specific or general terms ..."[18]

In the proceedings under article 292 the only relevant question was whether article 73 para. 2 of the Convention gave rise to an obligation of Guinea to release the detained vessel upon the posting of a reasonable financial security. This question had to be answered by the Tribunal on the basis of all available facts and not only on the basis of the legal classification of Guinea's action by one or the other of the Parties. The answer will depend on the interpretation of article 73 of the Convention, in particular on the relationship between para. 1 and 2 of this article. In the following discussion I shall address this question in more detail.

For defining the scope of article 73 para. 2 it may be helpful to recall the history of this provision. It had been inserted into the text of the Conven-

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17 Para. 72 of the Judgment.

18 Dissenting Opinion of President Mensah, para. 23.

tion at a very early stage of the Law of the Sea Conference when the exclusive economic zone concept was debated at the Conference. In view of the prescriptive and enforcement powers that were to be conferred on the coastal State with respect to the fisheries regime in this zone, the maritime powers, in particular the United States insisted on adequate safeguards against the arrest of foreign vessels in the new maritime zone of the coastal State. The practice of releasing arrested ships upon posting of a financial security has become common practice in private maritime law proceedings in view of the disproportionate financial loss incurred by the operator of a ship lying idle during the time of the arrest. In cases dealing with private maritime law claims arising out of the operation of the arrested ship, the practice of releasing the ship upon the posting of an adequate financial security has even been made mandatory by article 5 of the International Convention Relating to the Arrest of Seagoing Ships of 10 May 1952.[19]

With this maritime law practice in mind the maritime powers insisted that enforcement powers against foreign ships in the exclusive economic zone should be conferred on the coastal State only under the proviso of the mandatory release of an arrested ship upon the posting of a reasonable financial security which takes the place of the arrested ship in the subsequent proceedings. Article 73 para. 2 of the Convention found its way into the first draft submitted to the Law of the Sea Conference, into the so-called Informal Single Negotiating Text.[20] This provision remained unchallenged in the subsequent negotiations at the Conference until the adoption of the Convention. Thus, article 73 para. 2 may be regarded as a *quid pro quo* for extending the enforcement powers of the coastal State into the exclusive economic zone and as an important safeguard for the freedom of navigation in that zone as enshrined in article 58 of the Convention.

History and purpose of article 73 para. 2 of the Convention have a considerable bearing on the interpretation of this provision.

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19 UNTS Vol. 439 No. 6330.

20 Doc. A/Conf.62/WP.8/Part II of 7 May 1975, article 60 para. 1 and 2 which read 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 enacted by it in conformity with the provisions of the present Convention.

(2) Arrested vessels and their crew shall be promptly released upon the posting of reasonable bond or other security".

At first, it may be questioned whether article 73 para. 2 refers and is limited to arrests for alleged violations of laws and regulations made under article 73 para. 1, so that only those arrests which enforce laws and regulations enacted by the coastal State for managing and controlling the fishery regime in its exclusive economic zone are covered by article 73 para. 2. The position of para. 2 immediately behind para. 1 in the same article very strongly suggests the interpretation that the term "arrest" in para. 2 refers back to arrests made under para. 1. This is certainly the most obvious, but by no means a cogent interpretation of article 73 of the Convention. The question of a wider interpretation of article 73 to the effect that any arrest within the exclusive economic zone would be subject to the release procedure, had not been taken up by the Tribunal, neither by the Judgment nor by the dissenting Judges. The Tribunal may find an opportunity to rule on this aspect of the interpretation of article 73 para. 2 in its future jurisprudence.

If it is assumed that arrests in order to be covered by article 73 para. 2, must have been made within the ambit of article 73 para. 1, it may then be questioned whether only those arrests are covered which have been lawfully made in enforcing laws and regulations enacted by the coastal State for managing and controlling its fishery regime in the exclusive economic zone, or also those which, although allegedly enforcing such laws and regulation, are unlawful because the alleged conduct of the foreign vessel did not amount to a contravention of the coastal State's laws and regulations or because these laws and regulations themselves were not in conformity with the Convention.

As mentioned above, the obligation of the coastal State to release an arrested vessel upon the posting of a reasonable financial security, had been inserted into the Convention as a safeguard for the freedom of movement of foreign ships in the exclusive economic zone. Therefore, it would be paradoxical and illogical if only those arrests which are legally well-founded, could trigger a release procedure, but those which had been made without a sufficient legal basis in the fishery legislation of the coastal State, would lack that protection. The legal validity of the arrest relates to the merits of the case and remains outside the purview in the proceedings under article 292.

Finally, the question may be raised as to whether an arrest which has been made in enforcing a law or regulation which had not been expressly classified by the coastal State as part of its fishery legislation, but which had nevertheless the purpose to regulate matters connected with the fishery regime in the exclusive economic zone, may also qualify as being made within the ambit of article 73 para. 1 and will therefore give rise to a claim for release of the vessel by application of article 73 para. 2 of the Convention. There are good grounds to answer this question in the

affirmative because the same considerations are valid here as have been alluded to above.

The present case represents an example for such a situation, because the Guinean customs legislation has been applied *de facto* to the refuelling of fishing vessels in the exclusive economic zone without having been expressly incorporated into the fishery legislation by a respective enabling law. Here again it does not seem relevant whether the action of the coastal State has been kept within the legal limits of its competence under the Convention or has exceeded them. The decisive criterion is rather whether the coastal State has acted in pursuance of asserting and enforcing alleged sovereign rights with respect to the fishery regime in its exclusive economic zone. The legal validity of such action will later be adjudicated in the proceedings on the merits of the case. In the present context the question of what purpose has been pursued with the application of the customs legislation is more relevant than the technical classification of this legislation.

The dissenting Judges have pointed to the fact that Guinea had justified the arrest of the "Saiga" by relying exclusively and consistently on its customs laws by accusing the operators of the vessel of "Smuggling" by selling gasoil to fishing boats in its exclusive economic zone, but not by accusing them of a violation of its fishery legislation. The dissenting judges concluded therefrom that Guinea's own characterization of its action did not allow to classify Guinea's action as a measure within the ambit of article 73 para. 1 of the Convention, and that therefore a claim for the release of the vessel could not be based on article 73 para. 2. This critic seems to be justified in so far as the Judgment had not made sufficiently clear in its reasoning why the Tribunal was justified to substitute its classification for Guinea's own classification. The technical denomination as "customs legislation" did not preclude the Tribunal for classifying such legislation in its substance as part of the fisheries legislation in so far as its provisions were applied to matters connected with Guineas fishery regime in the exclusive economic zone. In view of the purpose of article 73 para. 2 to provide a safeguard for the freedom of navigation in the exclusive economic zone, it is understandable that the Judgment looked for arguments which would allow the Tribunal to interpret the action of the Guinean authorities as a measure undertaken within the ambit of article 73 para. 1.

The question whether or not the arrest of the "Saiga" could be interpreted as a measure undertaken by Guinea within the ambit of Article 73 para. 1 of the Convention cannot be answered conclusively merely by reference to the legal characterization given to the measure by either party. The answer must rest on the objective evaluation of all available facts in order to ascertain the purpose of the measure.

In the present case Guinea founded the arrest of the vessel technically on penal provisions of its customs laws, but referred also to article 40 of its Maritime Code. That appeared to be a clear indication that Guinea intended to make its customs legislation applicable to foreign fishing vessels by asserting a corresponding competence flowing from its sovereign rights in the exclusive economic zone.

There are certainly good grounds to conclude that this *de facto* extension of Guinea's customs legislation into its exclusive economic zone did not find a sufficient basis in the catalogue of sovereign rights which have been conferred upon the coastal State under the exclusive economic zone regime of the Convention. But the purpose, revealed by the reference to article 40 of the Guinean Maritime Code, may be considered sufficient to bring the arrest of the "Saiga" within the scope of article 73 para. 1.

This far the reliance by the Judgment on article 40 of the Guinean Maritime Code for the legal classification of the Guinean action against the "Saiga" had some merit. The dissenting Judges denied the legal relevance of the reference to article 40 of the Guinean Maritime Code because it referred only in very general terms to the exclusive economic zone regime, but did not contain specific legal authority for the enforcement of the Guinean customs legislation within the zone. However, under the relationship between paras 1 and 2 of article 73 as outlined above, the purpose of the Guinean authorities to act under the regime of the exclusive economic zone may well be considered a sufficient basis for bringing the arrest of the "Saiga" under the ambit of article 73 although Guinea had not enacted specific legislation to this effect.

It should again be emphasized that the question of whether or not Guinea was legally entitled to apply its customs legislation to the supply of fuel to foreign fishing vessels operating under a Guinean licence in Guinea's exclusive economic zone, is immaterial in the release proceedings under article 292 of the Convention. There was no need for the Tribunal to answer this question for the purpose of determining that the claim for the release of the "Saiga" under article 73 para. 2 was well-founded. On the other hand, it was equally immaterial that the laws enforced by Guinea had been classified as part of the Guinean customs legislation and enforced by the customs authorities, and that they were not specifically denominated as fishery legislation. The facts reveal that the Guinean customs legislation had been applied and enforced with respect to activities connected with the fishery regime in Guinea's exclusive economic zone. This appears to be sufficient to bring the arrest within the scope of article 73 para. 1 of the Convention.

On the basis of the preceding considerations the Judgment ordering the release of the "Saiga" could have been conclusively justified on the finding that arrest and detention of the vessel had been undertaken by the Guinean

authorities in applying, whether rightly or wrongly, its customs legislation to the refuelling of fishing vessels operating under Guinean licence in its exclusive economic zone, in apparent reliance on alleged sovereign rights in the zone to regulate and control such activities. Although the Judgment has advanced some arguments in its reasoning which appear to have taken a position unnecessary on the legitimacy of Guinea's action under article 73 para. 1 of the Convention, I would support the operative part of the Judgment, in particular because it is in conformity with the purpose of the arts 73 para. 2 and 292 of the Convention to protect freedom of navigation in the exclusive economic zone.

I would like to add some comments on the determination by the Tribunal of the financial security which was to be posted for the release of the "Saiga" and its crew. The Judgment contained some points which were useful in clarifying the interpretation of this provision in article 292 of the Convention. In his pleadings, the Applicant had maintained that because of the alleged unlawfulness of the arrest the release should be ordered without requiring the posting of a security, while Guinea had maintained that the application was premature because no financial security had been posted by the Applicant. The Judgment rejected both lines of argument. The Judgment made it clear that under article 292 the posting of a security is an indispensable requirement to obtain an order for the release of the vessel and its crew,[21] irrespective of whether or not the arrest had been lawful, a question so decided in the proceedings on the merits. With respect to Guinea's contention the Judgment made clear that the prior posting of the security is not a prerequisite for submitting an application for the release of the vessel and its crew under article 292 of the Convention, and that article 292 may be invoked even in cases where no security had been offered or posted prior to the application for the release of the vessel.[22] The Tribunal added that because the Guinean authorities had not notified the arrest and refused to discuss the question with representatives of the operators of the "Saiga", the Applicant could not be held responsible for the fact that no security had been posted, but the Tribunal did not indicate that it would consider a lack of effort by the applicant to come to an agreement with the detaining State about a security, as a legal ground which might adversely affect the admissibility of an application under Article 292.

The Tribunal decided that the security which had to be posted by the Applicant, consisted of the gasoil discharged from the "Saiga" in the port of Conakry by order of the Guinean authorities, amounting to nearly

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21 Para. 81 of the Judgment.

22 Paras 76 to 78 of the Judgment.

5,000 metric tons of gasoil, in addition to amount of 500,000 US$ to be posted in the form of a letter of credit or bank guarantee.

The Judgment did not indicate any criteria on the basis of which the amount of the security had been calculated. The Judgment found it sufficient to state that according to article 73 para. 2 the security had to be "reasonable" and that the criterion of reasonableness encompassed amount, nature and form of the security.[23] Although "reasonableness" does not mean free discretion, the short time available in the proceedings under article 292 did not allow the Tribunal to spend much time on fact finding and calculations. Therefore, it appeared to be appropriate to accord the tribunal a wide range of discretion in fixing the amount of the security on the basis of the facts as far as they have been made available by the Parties. There are, however, certainly some obvious criteria for calculating the amount of the financial security, such as that it should not be higher than the value of the claims for which the vessel had been arrested or that it should not exceed the value of the vessel. An interesting aspect of the decision of the Tribunal is the determination of the discharged tons of gasoil as part of the security. The articles of the Convention require a "financial" security that has to be posted; the cargo normally does not qualify as such a security, particularly in those cases where the cargo is not the property of the operator of the vessel. In the present case, however, it may be "reasonable" to take account of the fact that the Guinean authorities have unilaterally ordered the discharge of the cargo and are *de facto* capable of using it as an equivalent security on the assumption that the discharged cargo is the property of the operators of the "Saiga".

Article 113 para. 3 of the Rules of the Tribunal prescribes that the financial security which has been determined by the Tribunal in its Judgment, has to be posted with the detaining State[24] or, if deposited with the Tribunal, has forthwith to be transmitted by the Registrar of the Tribunal to the detaining State.[25]

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23 Paras 83 to 85 of the Judgment.

24 Article 113 para. 3 reads as follows: "The bond or other financial security for the release of the vessel or the crew shall be posted with the detaining State unless the parties agree otherwise. The Tribunal shall give effect to any agreement between the parties as to where and how the bond or other financial security for the release of the vessel or crew should be posted".

25 Article 114 paras 1 and 2 reads as follows: " (1) If the bond or other financial security has been posted with the Tribunal, the Registrar shall promptly inform the detaining State thereof. (2) The Registrar shall endorse and transmit the bond or other financial security to the detaining State to the extent that it is required to satisfy the final judgment, award or decision of the competent authority of the detaining State."

This procedure may not always be in the interests of an applicant who has obtained from the Tribunal an order for the release of a detained vessel, but would like to have some leverage on the detaining State to release the vessel immediately after the security had been posted. In the present case the Applicant had complained that, although he had posted the required security in accordance with the Judgment of the Tribunal, the release of the vessel had not been forthcoming so that he had to institute new proceedings to obtain the release of the vessel. In order to forestall such a situation, it should be allowed to the Tribunal to keep the financial security in its custody until the release of the vessel and its crew had been performed. Apparently, the procedural Rules of the Tribunal do not allow the Tribunal to keep the security in its custody unless the Parties agree to that. It will be for the Tribunal to consider whether its Rules should be amended in order to allow more flexibility in this respect. The provisions of the Convention do not prohibit that the security remains in the custody of the Court until the release of the vessel has been performed, where such a procedure may be appropriate.

When this commentary was written, the Tribunal had already been seized with the merits of the dispute between the Parties concerning the lawfulness of the arrest and detention of the "Saiga". As mentioned above, St. Vincent and the Grenadines had, on 22 December 1997, instituted arbitration proceedings against Guinea under Annex VII of the Convention in respect of their dispute concerning the "Saiga". On 13 January 1998, St. Vincent and the Grenadines filed with the Tribunal a request for the prescription of provisional measures under article 290 para. 5 of the Convention because the release of the "Saiga" had not been forthcoming in spite of the Judgment of 4 December 1997. By Exchange of Letters of 20 February 1998, which constituted a special agreement between them, the Parties submitted their dispute concerning the "Saiga" to the Tribunal, thereby "transferring" to the Tribunal the arbitration proceedings instituted by St. Vincent and the Grenadines on 22 December 1997.[26]

The so-called "transfer" of the proceedings was a juridical misnomer because such a continuation of the proceedings has no basis in the procedural Rules of the Tribunal. The proceedings before the Tribunal are new proceedings, distinct from the arbitration proceedings, and have their basis solely in the special agreement. What was meant by the "transfer" were rather the specific stipulations in the Exchange of Letters which purported to establish a procedural situation as if the dispute had already been

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26 The text of the Exchange of Letters has been reproduced in the Order of the Tribunal of 11 March 1998 prescribing provisional measures, see reprinted Order under Section Documents in this Volume.

submitted to the Tribunal from the beginning. In detail the Exchange of Letters stipulated that the date of the institution of proceedings before the Tribunal should be "deemed" to be the date of the institution of arbitration proceedings and that the request for provisional measures should be "deemed" to have been made on 13 January 1998, the date when this request had been filed during the phase of the arbitration proceedings. It was further stipulated that the request for provisional measures, all statements, responses and other communications already made by the Parties in these proceedings, "shall be considered to be made before the Tribunal" and that, in particular, the objection raised by Guinea against the jurisdiction of the tribunals in respect of the dispute between the Parties by invoking article 297 para. 3 (a) of the Convention, shall be dealt with by the Tribunal.

A special agreement submitting a dispute to an international tribunal allows the Parties a wide spectrum in defining the issues to be decided by the tribunal and in structuring the proceedings before the tribunal provided they do not offend against cogent rules of procedure of the tribunal. The stipulations contained in the Exchange of Letters of 20 February 1998 were not objected to by the Tribunal. The text of the Exchange of Letters has been cited in the Order of the Tribunal of 11 March 1998 prescribing provisional measures.

At this stage of the proceedings the legal classification of the arrest and detention of the "Saiga" became again an issue between the Parties. Guinea, now obviously relying on the legal reasoning of the Judgment of 4 December 1997, did not accept the jurisdiction of the Tribunal with respect to the arrest and detention of the "Saiga" by arguing that the dispute concerned the exercise by Guinea of its sovereign rights with respect to the living resources in its exclusive economic zone and that, consequently, Guinea was not obliged to accept the jurisdiction of the Tribunal. The Tribunal, however, did not take up this legal issue in its decision on provisional measures of 11 March 1998, but stated merely that before prescribing provisional measures the Tribunal need not finally satisfy itself that is has jurisdiction.

The Tribunal found that article 297 para. 1 lit.(a) of the Convention, invoked by the Applicant, appeared *prima facie* to afford a basis for the jurisdiction of the Tribunal. Article 297 para. 1 lit.(a) provides for compulsory judicial settlement when it is alleged that the coastal State has acted in contravention of the provisions of the Convention in regard to the freedoms and rights and other internationally lawful uses of the sea by other States in the exclusive economic zone.

This cautious approach by the Tribunal was certainly prudent in view of the unresolved legal issue, whether or not the application of Guinea's customs legislation to foreign fishing vessels in its exclusive economic zone

was a lawful exercise of Guinea's sovereign rights in the zone. Because the answer to this question will determine both the jurisdictional as well as the substantive issue, the Tribunal correctly left this issue to be decided together in the merits of the case.

As the main object of the request by the Applicant for provisional measures, the release of the vessel "Saiga" had already been obtained, the Order issued by the Tribunal followed the traditional lines by admonishing the Parties to make every effort to avoid incidents similar to those which lead to the arrest and detention of the "Saiga" and to prevent any aggravation or extension of the dispute, and, in particular, not to subject the "Saiga", its crew or its operators to further administrative or judicial measures in connection with the incident which led to the arrest of the vessel on 28 October 1997. A novel and perhaps useful addition was, however, the recommendation by the Tribunal that the Parties "endeavour to find an arrangement to be applied pending the final decision". Unfortunately, this recommendation did not indicate the object and purpose which such an arrangement should serve. However, under the circumstances of the case it must be assumed that the Tribunal envisaged an arrangement effecting a *modus vivendi* between the Parties which would allow the "Saiga" to continue its activities in selling fuel to non-Guinean fishing vessels, pending the final decision of the Tribunal, under conditions to be agreed between the Parties which would satisfy the interests of both of them, such as, e.g. a provisional authorization for a certain amount of fuel allowed to be sold, possibly coupled with a fee which would partially compensate Guinea for the loss of revenue from the customs duties it might have collected if the foreign fishing boats had refuelled in Guinean harbours.

As the suggestion for an arrangement has been purposely termed a recommendation, although in the context of the prescription of provisional measures it may be qualified as a strong recommendation, the Parties remain free whether or not to take this option.

It is not the purpose of this commentary to deal with the merits of the case and to take a position on the substantive legal issues in these proceedings as long as the dispute is *sub judice*. It may, however, reflect upon the question of the jurisdiction of the Tribunal since Guinea had already raised its objection to the jurisdiction of the Tribunal in the Exchange of Letters of 20 February 1998. The Tribunal has so far avoided taking a position on this issue when it prescribed provisional measures, but it will have to decide it in the proceedings on the merits of the case. Guinea has invoked article 297 para. 3 lit. (a) of the Convention which provides that a coastal State is not obliged to accept the submission to judicial settlement of disputes

relating to the exercise of its sovereign rights with respect to the living resources in its exclusive economic zone.[27]

In order to determine whether Guinea may invoke this provision, the Tribunal will have to define the scope of the limitation of its jurisdiction by article 297 para. 3 lit. (a) in relation to article 297 para. 1 lit. (a), which preserves the jurisdiction of the Tribunal for disputes where it is alleged that the coastal State has infringed on the freedoms and rights of navigation or other internationally lawful uses of the sea.[28] The line of interpretation the Tribunal will follow in this respect, is of general interest beyond the present case.

Article 297 para. 3 lit. (a) which excludes disputes relating to the fishery regime of the coastal State from compulsory judicial settlement, has been inserted into the dispute settlement system of the Convention with the purpose of preserving the free discretion of the coastal State in regulating the exploitation of the fishery resources in its exclusive economic zone. On the other hand, article 297 para. 1 lit. (a), has the purpose of protecting other States in the exercise of their freedoms and rights with respect to navigation and other internationally lawful uses of the sea against contraventions by the coastal State. Thus, it will be necessary to draw the borderline between these two provisions which will determine whether or not the Tribunal has jurisdiction to deal with the dispute.

Article 297 para. 1 lit. (a) and article 297 para. 3 lit. (a) stand in the relationship of rule and exception. It remains within the jurisdiction of the Tribunal to determine the borderline of the exception. Therefore, in

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27 Article 297 para. 3 (a) reads as follows: "Disputes concerning the interpretation or application of the provision of this Convention with regard to fisheries shall be settled in accordance with section 2 (that means: by compulsory judicial settlement), except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."

28 Article 297 para. 1 lit. (a) reads as follows: "Disputes concerning the interpretation and application of this Convention with regard to the exercise by the coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedure provided for in section 2 in the following cases:
(a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight, submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in Article 58."

contrast to the proceedings under article 292, it will not suffice to assume that the coastal State has "arguably" or even "plausibly" purported to act in the exercise of its sovereign rights in the exclusive economic zone. Rather it will be incumbent on the coastal State to establish beyond doubt that it had acted on the basis of its specific discretionary powers in the exclusive economic zone, and it is for the Tribunal to determine conclusively whether the action of the coastal State falls, in principle, legitimately within the categories the discretionary powers that have been conferred by the Convention on the coastal State in executing its fishery regime in the exclusive economic zone before article 297 para. 3 will apply.

In the present case it will suffice for establishing the jurisdiction of the Tribunal that the Applicant "alleges" that Guinea had acted in contravention of the provisions of the Convention relating to the freedoms and rights of navigation in the exclusive economic zone. In order to establish that the jurisdiction of the Tribunal is excluded by article 297 para. 3 lit. (a), it will be incumbent on Guinea to establish that the application of its customs legislation to the refuelling of foreign fishing vessels in its exclusive economic zone is a legitimate exercise of its discretionary sovereign rights in regulating and controlling the fishery regime. It will be difficult for Guinea to show convincingly that this unprecedented extension of its sovereign rights may be considered legitimately as part of the fishery laws and regulations envisaged by article 297 para. 3 lit. (a), in particular since Guinea had not enacted any legislation which specifically incorporated the relevant provisions of its customs laws into its fishery legislation. The regulation of services rendered to foreign fishing vessels operating in the exclusive economic zone has not been mentioned in the catalogue of the coastal State's regulatory powers which have been listed in article 62 para. 4 of the Convention. This catalogue is not exhaustive, but it will be for the Tribunal to determine whether any such novel extension of the coastal State's legislative powers has a legitimate basis in the categories of the coastal State's sovereign rights in the exclusive economic zone before article 297 para. 3 lit. (a) will apply. In the event of a dispute as to whether the Tribunal has jurisdiction, the matter will have to be decided by the Tribunal (article 288 para. 4 of the Convention, article 58 of the Rules of the Tribunal).