

Declaration of Judge Kulyk

My vote in favour of the Judgment should be understood subject to the following observations:

I Special agreement and admissibility

1. The dispute was originally brought to an arbitral tribunal under Annex VII to the 1982 United Nations Convention on the Law of the Sea (the Convention) by means of the Notification and “Statement of claim and grounds on which it is based” submitted by Panama to Guinea-Bissau on 3 June 2011. Panama and Guinea-Bissau later agreed in an exchange of letters to transfer the case to the Tribunal. The proceedings before the Tribunal, therefore, were instituted on the basis of the special agreement between the Parties concluded by an exchange of letters. That agreement contains several important conditions:

1. That the dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea upon agreement between the two governments and on a date so agreed.

[...]

4. That ITLOS shall address all claims for damages and costs (*emphasis added*) and shall be entitled to make an award of legal and other costs incurred by the successful party . . .

2. Guinea-Bissau raised several objections to the admissibility of the claims of Panama, in particular contending that: there was no genuine link between the *M/V Virginia G* and Panama; Panama had no *locus standi* in reference to claims of persons or entities not nationals of Panama; and the rule on exhaustion of local remedies had not been satisfied with regard to claims submitted by Panama in the interests of certain individuals or private entities.

3. The Tribunal concluded that the terms of the special agreement did not impose any restrictions on the possibility for a Party to raise objections to admissibility and after considering the objections separately rejected each of

them. While agreeing with the latter holding, I would like to express reservations as to the former.

4. In international adjudication understandings and agreements between the parties have considerable bearing on the conclusions on jurisdiction and admissibility. Consequently, to reach a conclusion on these issues in the present case the Tribunal should first look at the special agreement. The plain meaning of the special agreement to me is clear and unambiguous. The Tribunal is authorized by both Parties to settle "all claims for damages and costs". These provisions are subject to the general rules of treaty interpretation, in particular those contained in article 31, paragraph 1, of the Vienna Convention on the Law of the Treaties:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(Vienna Convention on the Law of the Treaties of 23 May 1969, United Nations Treaty Series, vol. 1155)

5. It is uncontested by the Parties that the object and purpose of the special agreement was to transfer the case from an arbitral tribunal to ITLOS, where all claims for damages and costs should be addressed. The practice of the Tribunal in such cases is well recognised:

Before the arbitral tribunal, each party would have retained the general right to present its contentions. The Tribunal considers that the parties have the same general right in the present proceedings, subject only to the restrictions that are clearly imposed by the terms of the [special] 1998 Agreement and the Rules.

(M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 32, para. 51)

6. It is evident from the special agreement in the present case that the Parties restricted objections to the admissibility of those claims that relate to damages and costs by specifically agreeing that ITLOS should address all of them.

7. When entering into a special agreement on instituting proceedings before the Tribunal, as in the case of any other international treaty, States should be able to expect that any judicial interpretation of provisions of the special

agreement or treaty will not create situations thwarting their intentions at the time the treaty or special agreement was concluded. I cannot follow the argument that the special agreement does not impose any restrictions on the possibility for a Party to raise objections to admissibility. This interpretation would be contrary to the ordinary meaning of the applicable provisions and in practice render them futile. The purpose of the special agreement was to reflect the common intention of the Parties that the particular dispute and all claims for damages and costs were to be resolved by the Tribunal. The relevant provisions obviously embodied one of the essential elements of the agreement between the Parties. It is not enough in my view to maintain that rights to raise objections to admissibility were never waived. If the Parties intended to subordinate the special agreement to the prior fulfilment of one or several requirements, such as for instance exhaustion of local remedies prior to the submission of certain claims in the interests of private persons or entities, they should have included these requirements in the special agreement, because satisfaction of these requirements would eventually have been a prerequisite for the effective consideration by the Tribunal of the relevant claims.

8. In view of the facts that in the present case neither the exchange of letters nor any other document contains specific agreed prerequisites for consideration by the Tribunal of all the claims of the Parties for damages and costs, and, on the contrary, that the explicit condition that ITLOS would address these issues is clearly set out in the special agreement, I supported the rejection of the objections to admissibility raised by Guinea-Bissau.

II Confiscation in the context of article 73 of the Convention

9. Article 73, paragraph 1, of the Convention provides for the enforcement of laws and regulations adopted by a coastal State for the conservation and management of the living resources of its exclusive economic zone. These measures include boarding, inspection, arrest and judicial proceedings. In my view confiscation was deliberately left out of this paragraph as it should be considered a penalty rather than a measure to ensure compliance. That interpretation is supported by the State practice. Many coastal States have provided for measures of confiscation of fishing vessels as a sanction for the violation of the relevant laws and regulations on the conservation and management of marine living resources. However the right to impose the penalty of confiscation is not

unconstrained. It is worth noting in this regard the following statement by the Tribunal in its Judgment in the "*Tomimaru*" Case:

As the Tribunal already stated in its judgment in the "*Monte Confurco*" Case (*ITLOS Reports 2000*, p. 86, at p. 108, para. 70), article 73 of the Convention establishes a balance between the interests of the coastal State in taking appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crew upon the posting of a bond or other security on the other. ("*Tomimaru*" (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at p. 96, para. 74)

10. The position of the Tribunal was further elaborated in its Judgment in the "*Tomimaru*" Case where it stressed that

... confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention.

A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.

(*Idem*, paras. 75 and 76)

11. The logic of article 73 of the Convention, which deals in paragraph 2 with the possibility of prompt release of arrested or detained vessels upon the posting of reasonable bond or other security and only later in paragraph 3 with the penalties, forbidding imprisonment and corporal punishment, clearly reflects the above-mentioned balance of interests.

12. Inclusion of confiscation or forfeiture within the measures to ensure compliance provided for in paragraph 1 would imply empowering the coastal State with the option to preclude application of the prompt release procedure through hasty, or as in the present case *ex officio*, confiscation of a vessel, which obviously would be incompatible with the relevant provisions of the Convention. Indeed, *ex officio* imposition of the penalty of confiscation instantaneously changes the status of the vessel, which is no longer considered arrested or detained, and hence the procedure for its prompt release upon the posting of reasonable bond or other security cannot be applied. Such a confiscation, which apparently occurred in the present case pursuant to the decision of the administrative authority, would also amount to the denial of the due process of law and an abuse by the coastal State of the right to take necessary measures to ensure compliance with its laws and regulations. I therefore supported the decision of the Tribunal that, by confiscating the *M/V Virginia G* and the gas oil on board, Guinea-Bissau violated article 73, paragraph 1, of the Convention.

III Prompt release of foreign flag bunkering vessels fishing in the exclusive economic zone

13. The Tribunal found that the sovereign rights of coastal States in the exclusive economic zone include regulation of bunkering of foreign vessels fishing in that zone. In accordance with article 73, paragraph 1, of the Convention

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.

14. It therefore follows that relevant measures provided for in article 73, paragraph 1, of the Convention may also be taken by the coastal State against foreign flag vessels which are bunkering vessels fishing in its exclusive economic zone. Consequently, other provisions of article 73 of the Convention, such as those on prompt release of arrested vessels and their crews upon the posting of reasonable bond or other security, on the prohibition of imprisonment or

of any form of corporal punishment as coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone, and on prompt notification of the flag State of the action taken and of any penalties subsequently imposed, also apply in cases of arrest or detention of foreign flag vessels which were bunkering vessels fishing in the exclusive economic zone.

15. Furthermore it should be emphasised that, pursuant to article 292 of the Convention, where it is alleged that the detaining State has not complied with the provisions of the 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 the Tribunal by or on behalf of the flag State of the vessel. It is clear that procedures established in article 292 of the Convention may be instituted in cases of arrest or detention not only of foreign flag fishing vessels but also of foreign flag vessels which were providing bunkering to fishing vessels in the exclusive economic zone of a coastal State.

(signed) Markiyan Kulyk