SEPARATE OPINION OF JUDGE LAING

OVERVIEW

1. As I see it, this case involves, among other things, two major institutions of the law of the sea. One is the closely-negotiated new institution of the exclusive economic zone; the other is the venerable freedom of navigation. These institutions have never been the subject of in-depth judicial scrutiny. Neither has the vaunted internal harmony of the 1982 United Nations Convention on the Law of the Sea (hereafter "the Convention"). The factual setting of this case underscores the need for such scrutiny. In this separate opinion, I interpret relevant provisions of the Convention in a systematic manner in accordance with the rules in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.[1] The emphasis is on ascertaining the meaning of the provisions in their context and in the light of their object and purpose, with reference, as appropriate, to supplementary means of interpretation.[2] As necessary, prior law has also been referred to. At times, a literary source is doctrine.

2. Based on the Applicant's submissions, the Tribunal has stated that the main rights claimed to have been violated by the Respondent are:

(a) the right of freedom of navigation and other internationally lawful uses of the sea;

(b) the right not to be subjected to the customs and contraband laws of Guinea;

(c) the right not to be subjected to unlawful hot pursuit;

(d) the right to obtain prompt compliance with the Judgment of the Tribunal of 4 December 1997;

(e) the right not to be cited before the criminal courts of Guinea.

Regarding these issues, the Tribunal has decided that the application of Guinea's customs and related laws in the customs radius violates the rights of Saint Vincent and the Grenadines in the exclusive economic zone. This is on the basis of (1) incompatibility of those laws of Guinea with Part V of the Convention, (2) the similar incompatibility of Respondent's asserted justification for its actions based on its public interest and Respondent's failure to satisfy the

---

[1] The 1969 Convention has been described as an "international custom recognized by States". *Guinea/Guinea Bissau Maritime Delimitation arbitration*, *77 I.L.R.* 635 (1985) (hereafter "*Guinea/Guinea-Bissau* arbitration"), p. 658, para. 41**,** citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (I.C.J. Reports 1971,* p. 4 at 47, para. 94) and *Fisheries Jurisdiction Cases (I.C.J. Reports 1973,* p. 3 at 18, para. 36 and p. 49 at 63, para. 36.

[2] While the leading commentary, referred to below, is extremely helpful, there are substantial limitations as far as concerns preparatory work which, in the case of this Convention, is very limited due to the amorphous nature of and absence of concrete chains of causation between materials and the Convention, its frequent "random and disorderly character," the deliberate informality of much of the negotiating process and the limited utility of formal unilateral statements made at or after the final session of the Third United Nations Conference on the Law of the Sea (hereafter "UNCLOS III"). See generally Allott, *77 A.J.I.L.* (1983) (hereafter "Allott"), p. 7; and *United Nations Convention on the Law of the Sea – A Commentary* (M. Nordquist, gen. ed., 1982-1995) (hereafter "Virginia Commentary").

conditions for the application of the so-called state of necessity to justify its actions, and (3) the Tribunal's conclusion that, largely as a consequence of the two foregoing sets of decisions, the asserted hot pursuit by Guinea, which was employed to subject the *Saiga* to its purported jurisdiction, was in violation of the Convention. In view of the uncertainty attending Guinea's apparent invocation of the Convention's provisions on the contiguous zone in support of its actions, the Tribunal has not made a decision about that question.

3. Although not specifically mentioned in the Judgment, these decisions of the Tribunal logically imply that the Convention requires the non-impairment by coastal States of the freedom of navigation or other internationally lawful uses of the seas vouchsafed to other States in articles 58, paragraph 3, of Part V and 87–115 of Part VII of the Convention. However, the Tribunal found that it did not have to address the broader question of the rights of coastal States and other States with regard to bunkering in the exclusive economic zone.

4. I agree with the Tribunal's conclusions. However, I find it necessary to provide a more elaborate exposition of the nature and status of the freedom of navigation in the exclusive economic zone. In turn, this requires an exposition of the nature and status of the exclusive economic zone and a general appreciation of national claims related to it. An alternative way of phrasing the required exercise is the need to examine the respective rights, jurisdiction and functions of the flag State and coastal State in the above-mentioned maritime space against the background of the freedom of navigation. Having concluded that exercise, I have found it necessary to raise some preliminary questions relating to offshore bunkering and two other matters.

5. The ordinary meaning in immediate context of the pertinent provisions of the Convention does not adequately serve for the tasks at hand. A systematic contextual interpretation of the provisions of Parts V and VII that are of intimate relevance does not produce a firm meaning. Therefore, I have found it useful to consider additional provisions of the Convention that constitute the broader context of the provisions relied on in the Judgment and others that are pertinent. There is a considerable number of such contextual provisions, located in Parts II, III, IV, X and XIII of a Convention which has a significant number of interrelated Parts and provisions. Exposing this contextual background involves an exposition of several matters not fully covered in the Judgment. These include the issues relating to the contiguous zone, which are somewhat interrelated to the facts and legal issues before the Tribunal. As already noted, it has also been necessary to refer to several supplementary means of interpretation. My discussion will take the following order and manner:

(1) Contiguous zone.

(2) Freedom of navigation.

There will first be discussed several suggested bases for the freedoms of the high seas and navigation. Then, in seeking an understanding of the freedom of navigation in the framework of the exclusive economic zone, the following topics will be examined under various subheadings:

- the various incidents of freedom of navigation under the Convention;

- the impact of the Convention's provisions establishing the exclusive economic zone institution;
- the impact of other provisions of the Convention;
- conclusion on freedom of navigation.

(3) Some remaining questions.

These are:
- offshore bunkering;
- prompt release;
- settlement of disputes between developing countries.

CONTIGUOUS ZONE

6. The first set of substantive questions concerns the contiguous zone. The parties are agreed that on 27 October 1997, the *Saiga* bunkered three non-Guinean vessels in this zone. The vessels or their cargo were not alleged or proven to have had as an immediate destination Guinean territorial waters. Although its positions on this seem to have varied at different stages of the proceedings, at one point at least the Respondent appeared to argue that it had prescriptive jurisdiction to apply its customs code and a customs-related law, L/94/007, concerning sales involving transshipments of petroleum in the zone in order to prevent and punish the *Saiga*'s acts, which it claimed were contrary to its laws (Respondent's Counter-Memorial (hereafter "CM"), pp. 123-25). In the oral proceedings, counsel for the Respondent stated that the *Saiga* was hotly pursued (in accordance with the Convention) "because it had bunkered fishing vessels in the contiguous zone." In stating the relevant jurisdictional provisions, the Respondent repeatedly adverted to the customs radius, in which its laws provided that it could take actions of a "preventive" and "suppressive" nature. Counsel stated that in response to the *Saiga*'s "violation committed in the contiguous zone, pursuit commenced at a moment at which the smuggling ship ... was bunkering in this zone ..." (Uncorrected Verbatim Record (hereafter "ITLOS/PV.99/…"), ITLOS/PV.99/15, pp. 15-16 (16 March)). In a submission at the end of the oral proceedings, it was argued on behalf of the Respondent that the bunkering operation of the ship in the contiguous zone was "of no relevance" in connection with the question "whether or not Guinea could and did apply its Customs law within its Customs radius". Yet, later in the same submissions on Guinea's behalf, it was argued in a "digression" in answer to the Applicant's "repeated" submissions, that Guinea had definitely established a contiguous zone notwithstanding any possible failure to notify that fact to the United Nations (ITLOS/PV.99/18, pp. 17-18 (20 March)).

7. The Tribunal has not addressed this question. Nevertheless, it is evident that, for a period, or from time to time, the Respondent was relying on violations occurring in the contiguous zone as forming a basis for the hot pursuit that the Respondent claimed to be entitled to undertake. In relation thereto, while a coastal State's justifications for actions against foreign vessels on the basis of the Convention's provisions on the contiguous zone would not necessarily extend to its actions occurring in the rest of the exclusive economic zone, invalidation of justifications on the basis of those provisions would, *a fortiori,* have negative implications for its actions occurring further away from the baseline in the exclusive economic zone. This is

because, as traditionally, the law of the sea generally tolerates greater exercises of authority closer to the baseline. This discussion will also illuminate my later examination of freedom of navigation. And it is broadly relevant to the Tribunal's findings on the compatibility of Guinea's laws with the Convention, including its conclusions about hot pursuit. Therefore, I will somewhat fully discuss the Convention's provisions on the contiguous zone.

8. In essence, the underlying facts and issues call for the interpretation of article 33 of the Convention, providing for the following species of authority for the protection of coastal State interests (protective jurisdiction):

> *Article 33*
> *Contiguous zone*
>
> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The main issues may be phrased as follows: *First*, whether the only permitted exercise of authority under article 33 is that of acts of control within the zone related to conduct occurring on the territory or in the territorial sea, as opposed to prescriptive or enforcement jurisdiction. *Secondly*, even if control is all that is permitted, whether under article 33 Guinea was at liberty to and did properly prescribe measures for such control concerning infringement of its customs and related laws occurring in the contiguous zone and outside of its territorial sea. *Thirdly*, did article 33 authorize Guinea's punishment of infringement of such laws committed in the contiguous zone and outside of the territorial sea? At one point, the Respondent identified a further issue, suggesting that violation of its above-mentioned laws in the contiguous zone justifies the actions it took as long as the *Saiga* remained in its exclusive economic zone, because further violations of customs laws had to be expected (Respondent's Rejoinder (hereafter "RJ"), p. 100). However, the Respondent later abandoned this line.

9. The first issue is whether, in connection with its endeavours to prevent and punish infringements of the four types of laws specified in article 33, a coastal State's authority is limited to the exercise of "control," as opposed to the jurisdictional exercises of prescription and enforcement. Control evidently is not coincident with generalized and plenary sovereign activity. Furthermore, it has been argued that such control semantically is more limited than jurisdiction. Even so, it has been suggested that the exercise of control could encompass acts of physical coercion in the contiguous zone by way of preventive or punitive measures relating to conduct which is about to take place or has taken place in the territory or territorial sea.[3] This

[3] Shearer, *35 I.C.L.Q. (*1986) (hereafter "Shearer"), pp. 329-330.

suggestion has some limitations, since "control" generally connotes the right and power to command, decide, rule or judge; the act of exercising controlling power, and the continuous exercise of authority over a political unit. In a legal setting, the word means "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. The ability to exercise a restraining or directing influence over something ..."[4]. On the other hand, "jurisdiction" generally connotes: the right and power to command, decide, rule or judge. In a legal setting, "jurisdiction" is generally considered to have a more weighty connotation, in its more common usage in context of the nature, source of authority and scope of judicial power or its frequent international law usage as connoting prescriptive or enforcement authority. Evidently, the ordinary meaning of article 33 is not quite clear or plain.

10. A contextual review provides some support for the contention that use of the word "control" indicates that the authority provided in article 33 is relatively limited. Geographically and juridically, the contiguous zone is part of the exclusive economic zone which, according to article 55, is "an area beyond and adjacent to the territorial sea". As will be seen in paragraphs 38-40, the coastal State's authority over the exclusive economic zone relates mainly to natural resources and includes: a specific species of limited "sovereign rights;" "jurisdiction" encompassing three specified exclusive rights of authority, responsibility or dominion, and other specific "rights and duties". No broad and generalized authority is provided. This might be compared to the powers generally attributed by article 2 over the whole sphere of the territorial sea. It categorically provides, without qualification, that "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea." This is supplemented by article 21, which also categorically authorizes the coastal State, in that sea, to "adopt laws and regulations" in respect of a large number of matters, including one set which is identical to the list in article 33.

11. Two other contextual provisions are articles 94 and 303. Paragraph 1 of the first states that the duties of flag States are "effectively [to] exercise … jurisdiction and control in administrative, technical and social matters ... ". Paragraph 2 provides that every State shall maintain a register of ships and "assume jurisdiction under its internal law" in respect of the above-mentioned matters. Therein, control has a limited administrative connotation. Next, article 303 provides that in order to control traffic in archaeological and historical objects found at sea, "the coastal State may, in applying article 33, presume that their removal from the seabed in the [contiguous zone] without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article." Evidently, by itself, article 33 does not authorize control in respect of such traffic taking place within the contiguous zone. Although the scope of this last instance is restricted, overall the foregoing contextual survey rather suggests that article 33 control is of a limited nature.[5]

12. Nevertheless, in view of lingering ambiguity, recourse is now made to supplementary means of interpretation. The direct predecessor of article 33 is article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, the language of which was reiterated in the

[4] *Black's Law Dictionary* (6th ed., J. Nolan and J. Nolan-Haley, co-editors, 1990), p. 329.
[5] UNCLOS III rejected proposals to accord the coastal State sovereign rights over archaeological and historical objects and to extend jurisdiction out to 200 miles. Virginia Commentary, V, pp. 158-162.

language of article 33 of the 1982 Convention.[6] According to the available preparatory work, the draft of that long-standing provision survived several attempts during the Third United Nations Conference on the Law of the Sea (hereafter "UNCLOS III") to have it deleted. It also survived at least one proposal for the insertion of a clause that the establishment of a contiguous zone by a coastal State did not "affect the rights and jurisdiction of [a coastal] State in its exclusive economic zone and its continental shelf, nor ... the establishment of security zones."[7]

13. Since the adoption of the 1958 Convention, the number of the prior domestic, conventional and customary laws on protective jurisdiction, applied in zones analogous to the contiguous zone for over some 200 years, have radically diminished. Their relevance now is marginal, except insofar as they help to illuminate the meaning of the 1958 and 1982 codifications. These laws often sanctioned various exercises of protective jurisdiction which go beyond the four circumstances listed in the codifications. Nevertheless, the older laws seem to have presupposed a generally accepted underlying concept which I believe still obtains under article 33 – that what we now call control in the contiguous zone is permitted to the extent that the coastal State acts reasonably and necessarily and the control is exercised in those four circumstances in order to benefit state territory.[8] I therefore do not entertain any doubt that permissible exercises of control under article 33 include those for taking such actions within the contiguous zone as inspections, verifications, instructions[9] and warnings, all with the purpose of subserving laws and restraining their possible violation in territorial areas.

14. Turning to the second issue, it ineluctably follows that even if control is the only type of action which might be taken against a foreign vessel, the power to prescribe such exercises of control cannot be categorically deemed to be excluded. Control can be undertaken *de facto* or pursuant to prescription for the prevention of conduct occurring or due or intended to occur in the contiguous zone which is likely to infringe the coastal State's laws within its territorial areas, including internal waters or the territorial sea. However, according to the ordinary meaning of its words, article 33 does not authorize the prescription of customs and the specified other types of laws and regulations for conduct occurring inside the contiguous zone itself and not due or intended to occur in the aforementioned territorial areas,[10] as with the arrest of the Saiga and its cargo and the trial and conviction of the Master. This is borne out by article 111, which authorizes hot pursuit in relation to the "violations … of the laws and regulations of the coastal

---

[6] Article 24 of the 1958 Convention differs from article 33 only: in stating that the zone's maximum limit is 12 miles; in containing a provision on delimitation (located elsewhere in the 1982 Convention), and in providing that the contiguous zone is part of the high seas. These differences do not have any real bearing on the question under examination.

[7] See Virginia Commentary, II (S. Nandan and S. Rosenne, eds., 1993), pp. 269-273.

[8] See *Church v. Hubbart 6 U.S. (2 Cranch)* (1804), p. 187; P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 75-96 and 211-238; Jessup in *31 A.J.I.L.* (1937), pp. 101-104; C. Columbus, *The International Law of the Sea* (1967), pp. 131-146 (exhibiting a more guarded attitude towards such exercise of jurisdiction); L. Oppenheim, *International Law* (4th ed., A. McNair, 1928) I, paragraph 190(i)(ii); (7th ed., H. Lauterpacht, 1957) (hereafter "Oppenheim 1957") I, paragraph 190(i)(ii)); P. Rao, *The New Law of Maritime Zones* (1983), pp. 301-331.

[9] In his 1956 Report on the Regime of the High Seas and Regime of the Territorial Sea, the I.L.C. Special Rapporteur refers to "instructions." He notes that "[I]f a different point of view were accepted and a foreign vessel may be boarded by a vessel of the coastal State, the resulting situation would be incompatible with the relations prevailing between powers at peace with each other." *I.L.C. Y.B. 1956 II,* p. 34, paragraph 6.

[10] See Shearer, p. 330.

State applicable" to the territorial sea, the exclusive economic zone or the continental shelf. The wording makes it clear that, in each of those situations, full jurisdiction is authorized. However, hot pursuit in relation to the contiguous zone is authorized only if there has been a violation of the "rights for the protection of which the zone was established", viz. the limited protection, within the contiguous zone, of the territorial areas from violation of customs, fiscal, immigration and sanitary laws. I believe that this analysis enhances the Judgment's discussion of hot pursuit.

15. Turning to the third issue identified in paragraph 8, the ordinary meaning of article 33 is that the power of the coastal State to punish infringement of the stated laws (committed outside territorial areas or within the contiguous zone) is not generally permissible in relation to vessels merely located in the contiguous zone and not proven to have some relevant connection with territorial areas. Again, a contextual analysis is useful. Notwithstanding the broad ambit of the authority vested in coastal States over territorial areas by articles 2 and 21, article 27, paragraph 1, states that in the territorial sea the coastal State can exercise criminal jurisdiction in or over a foreign ship exercising innocent passage only in precisely stated situations, mostly where there are direct effects on the coastal State. More pertinently, according to paragraph 5, criminal jurisdiction cannot be exercised in or over such ships during such passage for offenses committed before the ship entered the territorial sea. It might be argued that it could not have been intended that article 33 provides more authority relating to the identical conduct in respect of which article 27 requires restraint.

16. The limitations of article 33 are also evident from a comparison of the requirements for hot pursuit in relation to the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf, summarized in paragraph 14. However, in the light of the pre-1958 law and the doctrine of objective or effects jurisdiction, I believe that it is tenable that conduct occurring in the contiguous zone which is part of the jurisdictional facts or *actus reus* of conduct intended or due to occur or actually occurring in the territorial sea or other territorial areas can be punished as long as the vessel is apprehended in the course of the exercise of some legitimate means of control as mentioned earlier. Nevertheless, in relation to all three issues, my view is that, under article 33, the coastal State must exercise whatever authority it possesses within the contiguous zone only in the course of contemporaneous apprehension or after a successful hot pursuit properly commenced in the contiguous zone. On the facts of this case, the Respondent appears to have well exceeded this limited scope of its authority.

FREEDOM OF NAVIGATION

The Convention's Provisions

17. As has been seen, the Convention exhibits a somewhat discouraging attitude towards broad exercises of coastal State authority in the contiguous zone. Reciprocally, the Convention possibly here exhibits a tolerant approach to the rights of flag States (and other States) to navigation in the contiguous zone. I now address that subject in the framework of the broader regime of the exclusive economic zone, recalling the Applicant's assertion that its freedom of navigation was violated by the Respondent. The Tribunal has not found it necessary to elaborate on this issue, possibly since it has held that the customs and related laws of the Respondent provide no legal basis for the *Saiga*'s arrest in relation to its activities in the exclusive economic

zone and for Guinea's subsequent actions. In paragraph 176 of the Judgment, the Tribunal formally declares that the Respondent acted wrongfully and violated the rights of the Applicant "in arresting the *Saiga* in the circumstances of this case", holding that that declaration constitutes adequate reparation. In paragraphs (7) and (8) of the operative provisions of the Judgment, the Tribunal:

> (7) … *Decides* that Guinea violated the rights of Saint Vincent and the Grenadines under the Convention in arresting the *Saiga*, and in detaining the *Saiga* and members of its crew, in prosecuting and convicting its Master and in seizing the *Saiga* and confiscating its cargo; …
>
> (8) … *Decides* that in arresting the *Saiga* Guinea acted in contravention of the provisions of the Convention on the exercise of the right of hot pursuit and thereby violated the rights of Saint Vincent and the Grenadines; …

Since the first and chief right in dispute between the parties relates to the freedom of navigation, it is evident that the Judgment reaffirms freedom of navigation. The Tribunal's narrow findings about the legality of the Respondent's actions and their compatibility with the Convention also logically presuppose a determination that the flag State's freedom of navigation was violated. However, since the Tribunal's reaffirmation and determination are somewhat muted, and for the reasons given in paragraph 1 of this Opinion, it is necessary for me somewhat fully to analyse the nature of the freedom of navigation generally and in the context of the exclusive economic zone.

18. In the Convention, freedoms, entitlements or rights relating to navigation are available, under different names, in the high seas, archipelagic waters, straits and the territorial sea. The details, as they are, of such freedom of navigation are provided for in Part VII (on the high seas). Nevertheless, the requirement of that freedom is found in Part V (on the zone), by incorporation by reference in article 58:

> *Article 58*
> *Rights and duties of other States in the exclusive economic zone*
>
> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
> ...
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

Indeed, as article 58, paragraph 1, intimates, the freedom of navigation, properly so called, is provided for only in article 87 of Part VII (on the high seas):

Article 87
Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

(a) freedom of navigation;
(b) freedom of overflight;
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

19. As provided in article 87, paragraph 1, freedom of the high seas itself comprises, *inter alia*, the freedom of navigation. However, freedom of the high seas is not defined. Article 87 simply lists six components or incidents of the freedom. Taking, for expositional convenience, a historical approach, I should draw attention to the partial definition given in the *Lotus* case (*Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 25), that freedom of the high seas is simply the absence of any territorial sovereignty upon the high seas in virtue of which, as the law apparently stood in 1927, no State should purport to exercise any kind of jurisdiction over foreign vessels. However, that source furnishes inadequate understanding of the nature and function of these two freedoms. I therefore will shortly explore the provisions of Part V (on the exclusive economic zone) as the broader context of article 87. However, for convenience, I shall first discuss historical and broadly juridical aspects of the basis of the freedom of the high seas, a subject which requires clarification, especially since it closely touches on some of the arguments of the parties in this case regarding the meaning and scope of navigation.

The Bases of Freedom of the High Seas

Introduction

20. This case has brought into sharp relief the lack of clarity about the essential nature of the closely-related freedoms of navigation and the high seas. Yet it highlights the fact that such matters are of critical importance in solving practical problems under the Convention. It will be recalled that article 58, paragraph 1, states that, in addition to the freedoms, including of navigation, States enjoy "internationally lawful uses ... associated with the operation of ships",

which must be "related to," *inter alia*, the freedom of navigation. In this case, the question has been canvassed whether that freedom or those uses specifically include the provision and receipt by each State or its vessels of ship bunkering supplies. The Applicant claims that offshore bunkering "has a long history" (Applicant's Reply (hereafter "R"), paragraph 129). However, it did not adduce substantial evidence of this. Neither does the literature supplied or referred to in its pleadings, which mainly covers bunkering in ports or at docks, roadsteads and the like and from moored barges or pipelines. Nor is it clear what specific actions have been taken by the newly-formed International Bunkering Industry Association to provide juridical and other studies, e.g. regarding the legitimacy of offshore bunkering of the type involved in this case.[11] The brief report on the industry provided by the Applicant and prepared by MRC Business Information Group Ltd. does suggest that the growing industry is of some magnitude. On the other hand, the Respondent exhibited no authority for its asserted distinction between transportation or unimpeded movement, on the one hand,[12] which is allegedly embraced by the freedom, and trade, on the other hand, which is said not to be so embraced unless the trade occurs entirely on board one vessel. Even assuming that only transportation is encompassed by the freedom, neither has the Respondent furnished support for its contention that the facts of this case involve only trade. The Respondent has not sought to substantiate its contention that obtaining bunkers is ancillary to navigation, and therefore permissible, while selling them is not, or its further assertion that there is a distinction between supplying bunkers to transiting vessels but not to fishing vessels (CM, pp. 94-101; RJ, pp. 88-91). In the absence of clarity in the Convention's text on even the basic nature of the two freedoms, much less the issues mentioned above, I have found it necessary to discuss the broad background of their basis as a supplementary means of interpretation.

Freedom of communication

21. The Respondent categorizes freedom of navigation as a communication freedom of a limited nature from the ambit of which is excluded offshore bunkering (ITLOS/PV.99/14, p. 25 (15 March); *cf.* ITLOS/PV.99/16, p. 31 (18 March)). However, again it has not supplied supportive evidentiary materials. Nevertheless, as article 87 shows, currently[13] the more widely

[11] See C. Fischer and J. Lux, *Bunkers: An Analysis of the Practical, Technical and Legal Issues* (1994), *passim,* esp. pp. 81-117 and 175-84; W. Ewart, *Bunkers – A Guide to the Ship Operator* (1982). In these books, which largely deal with technical matters, the discussion of legal issues tends to be limited to sales and other basic contractual questions. See also ESSO, *International Bunkers Guide* (1953).

[12] Applicant submitted that bunkering often occurs during the movement of both vessels necessitated by the objective of keeping the supply hose taut (ITLOS/PV.99/16, p. 30 (18 March)).

[13] Among older notions about the basis of the institution of freedom of the high seas have been that what cannot be occupied should be shared, that there should be universal access to inexhaustible resources and that the difficulty of demarcating maritime frontiers in distant waters justifies use in common. More recently, it has been suggested that the institution was a reaction against far-reaching national claims to ocean spaces at the beginning of the 17th century. The idea has also been advanced that since the institution commenced to flourish during the era of overseas colonial expansion by Western countries, it was a component of such expansion and colonization. Lapidoth, *6 J.M.L. & C.* (1974-1975) (hereafter "Lapidoth 1974-75"), pp. 259-271; J. Verzijl, *International Law in Historical Perspective* (1971), IV, 30; N. Rembe, *Africa and the International Law of the Sea – A Study of the Contribution of the African States to the United Nations Conference on the Law of the Sea* (1980) (hereafter "Rembe"), pp. 165-167.

accepted, yet somewhat unclear[14], notion about the basis of the institution of freedom of navigation is that it is subsumed under the freedom of the high seas, which is itself based and dependent on a broader freedom of maritime communication and intercourse, given the fact that the sea is essentially an indispensable global highway. There was some erosion of both freedoms of the high seas and of navigation prior to the 1958 Geneva Convention. In part, this was due to the development of protective jurisdiction in the contiguous zone. In part, it was apparently attributed to assertions of extended coastal State jurisdiction over the mineral resources of the "submarine areas". Thus, a leading jurist suggested in 1950 that the freedom of the high seas was not immutable and was losing its paramountcy.[15] Nevertheless, the relationship between these two freedoms, on the one hand, and freedom of communication, on the other, was reinforced in the fourth preambular paragraph of the Convention, in which international communication leads the list of five broad components of the "legal order for the seas and oceans":

> *Recognizing* the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which [1] will facilitate international communication, and [2] will promote the peaceful uses of the seas and oceans, [3] the equitable and efficient utilization of their resources, [4] the conservation of their living resources, [5] and the study, protection and preservation of the marine environment.

22. Notwithstanding the preamble, the Convention strengthens the institution of the continental shelf and established such new regimes as the exclusive economic zone and the Area. Recalling the 1950 suggestion and the uncertain evidence about the nature and basis of the freedoms, I must therefore now discuss another set of alleged bases of the freedoms of the high seas and of navigation.

The Global Economy

23. Those bases relate to the functioning of the global economy, e.g. the propositions that freedom of the high seas and related freedoms subserve the needs of international trade and commerce and that they have been, and remain, an indispensable factor in the development of the world economy and international commerce. Thus, "absolute freedom of navigation upon the seas, outside territorial waters ... except as … may be closed in whole or in part by international action for the enforcement of international covenants" was the second of President Woodrow Wilson's influential Fourteen Points of January 1918. Point II was organically related to Points III, IV and XIV, respectively calling for the removal of economic barriers and instituting equal trade controls among peacekeeping nations; guarantees by such nations for the reduction of arms to "the lowest feasible point," and the establishment of an association of nations mutually to guarantee political independence and territorial integrity of all States. Despite the disavowal of the Fourteen Points by several major States, their essence entered the global normative order. Points II and III are reflected in paragraph (e) of article 23 of the

[14] It has been held that a concrete manifestation of that latter freedom is the obligation of a coastal State, identified by the International Court of Justice as being "for the benefit of shipping in general," to notify approaching warships of the existence of a minefield (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4 at 22).

[15] Lapidoth 1974-75, p. 271; Oppenheim 1957, paragraph 259; Lauterpacht in *27 B.Y.I.L.* (1950), pp. 376-414.

Covenant of the League of Nations (Part I of the Versailles Peace Treaty of 1919), in which the Members of the League agreed to "make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League ...".[16]

24. Article 23(e) was the catalyst for efforts to strengthen the international economic order on a footing of "freedom of communications and of transit and equitable treatment" of commerce. This was done through provisions in the Versailles Treaty for non-discrimination by the vanquished nations both in general commerce and international navigation over the major European rivers and the Kiel Canal in Germany. Commercial and navigational equality were also pursued in related instruments concerning the Mandates System and in various technical studies and conferences. A notable group of Conventions explicitly designed to further the goals of article 23(e) were the Convention on the Regime of Navigable Waterways of International Concern (the 1921 Barcelona Convention); the 1923 Convention on the International Regime of Railways; the 1923 Convention on Maritime Ports, and a number of conventions commencing in 1921 on specific European waterways of international concern.[17]

25. The *S.S. "Wimbledon"* and *Oscar Chinn* judgments of the Permanent Court of International Justice reflected that these early provisions requiring non-discrimination in international navigation soon contributed to an established juridical concept.[18] In the first of those judgments, the Court applied article 380 of the Versailles Treaty, providing that the Kiel Canal "shall be maintained free and open to the vessels ... of all nations at peace with Germany on terms of entire equality." In response to Germany's refusal to permit a vessel carrying armaments into the Canal, the Court held that, under article 380, the Canal had "ceased to be an internal and national navigable waterway" and had become "an international waterway intended to provide ... access ... for the benefit of all nations of the world" (*S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1,* p. 22). On the other hand, in their joint dissent, Judges Anzillotti and Huber emphasized the freedom of communication, noting that the Barcelona conventions were "concluded for the purpose of giving effect to [that] principle … which was enunciated in Article 23 of the Covenant ..." (*1923, P.C.I.J., Series A, No. 1,* pp. 35-36).

26. In 1934, in the *Oscar Chinn* case, the Permanent Court construed the 1919 Convention on St. Germain en Laye, another instrument associated with the conclusion of World War I. It held that the freedom of fluvial navigation, guaranteed by the Convention, though different from freedom of commerce (which was also guaranteed) "implied" freedom of commerce of the

---

[16] Oppenheim 1957, I, p. 593; R. Lapidoth-Eschelbacher, *Freedom of Navigation with Special Reference to International Waterways in the Middle East* (1975), p. 17; United Nations, DOALOS, *The Law of the Sea – Navigation on the High Seas – Legislative History of Part VII, Section 1 (Articles 87, 89, 90-94, 96-98) of the United Nations Convention on the Law of the Sea* (1989), pp. 47-48; C. Davidson, *The Freedom of the High Seas* (1918), pp. 76-78; P. Crecraft, *Freedom of the Seas* (1935), p. xiii (introduction by E. Borchard), pp. 200-213; H. Temperley, *History of the Peace Conference of Paris* (1920), Vol. 3, pp. 111 and 121-122.

[17] Laing in *14 Wisc. Int'l. L. J.* (1996), pp. 257-261 and 276-280.

[18] Liberal access to international waterways reaches back to provisions in the Act of the 1815 Congress of Vienna and various subsequent multilateral and bilateral instruments in Europe, Africa and North America. See *id.,* pp. 276-284. Furthermore, the avowed purpose of numerous bilateral treaties of Friendship, Commerce and Navigation and other treaties establishing commercial and economic *modi vivendi* for many years has been to guarantee non-discrimination or freedoms, *inter alia,* of navigation.

"business side" of enterprises concerned with navigation but did not "entail" and "presuppose" all aspects of freedom of commerce. Thus, discrimination between national and foreign companies concerning permissible transportation rates was not prohibited (*Oscar Chinn* case, *Judgment, 1934, P.C.I.J., Series A/B, No. 63,* pp. 78-87). While some of the Judges objected to what they considered to be the Court's fine distinction (see Separate Opinions by Judges Anzilotti and Van Eysinga, (*1934, P.C.I.J., Series A/B, No. 63,* pp. 107-112 and 131-145), the judgment nevertheless stands for a reaffirmation of the vitality of freedom of navigation and its close relationship to broader economic principles and institutions.[19]

A Fundamental Principle

27. Whether the basis of freedom of the high seas is the institution of maritime communication, or is an integral aspect of the global economy, the freedom has been described as "an obligatory binding norm;" a "fundamental principle, which has also had great influence on other branches of international law, particularly space law and the regime of the Antarctic Treaty," and "a fundamental principle of international law as a whole". The subsumed freedom of navigation has also been described as a peremptory norm of the law of nations.[20] In the *Corfu Channel* case, Judge Alvarez took a similar approach, noting that:

> The Atlantic Charter of 1941 laid down the freedom of the seas and oceans as a fundamental principle. On January 1st, 1942, the united nations signed a Declaration in which they accepted the principle. Article 3 of the Charter of the United Nations [organization] alludes to that Declaration. Public opinion, also, is favourable to the freedom of the seas; it may therefore be said to form part of the new international law. (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 46)

He also suggested that passage through territorial seas and straits was a right possessed by merchant ships "discharging a peaceful mission and ... contributing to the development of good relations between peoples" (*ibid*.).

28. The Atlantic Charter, to which Judge Alvarez refers, was a joint declaration by the President of the United States of America and the Prime Minister of Great Britain in which they stated the common principles on which they based "their hopes for a better future of the world" upon the conclusion of World War II. This statement of peace aims, incorporated by reference in the above-mentioned 1942 treaty-Declaration, was adopted by all of the Allies of those States between 1942 and 1945. It was the foundation of comprehensive structures for global order painstakingly assembled at conferences and in bilateral and multilateral treaties establishing the current permanent regimes for global cooperation.[21] These edifices were explicitly designed to

---

[19] In my view, *Oscar Chinn* and other precedents do not stand for the proposition that there is some rigid distinction in international law between transportation and navigation, on the one hand, and such commercial activities as may be carried on by, from or within a vessel. *C.f.* CM, paras. 98-100, and RJ, paras. 88-91.

[20] Oppenheim 1992, I, paragraph 280; Lapidoth, *10 Israel L. R.* (1975), p. 456.

[21] In the spheres of general world order and human rights (the United Nations), finance (Bretton Woods institutions), civil aviation (Chicago Convention and the International Civil Aviation Organization), food and agriculture (Food and Agriculture Organization), labour (pre-1941 International Labour Organization) and international trade (the General Agreement on Tariffs and Trade, now succeeded by the World Trade Organization and its network of treaties, other norms and related institutions). During the wartime period, and even thereafter, this was partly

implement the Atlantic Charter. The very extensive archival record[22] clarifies that, rightly or wrongly, the Charter was universally considered to be legally binding. Since the war, until the present day, it has been listed not as a declaration but as a treaty in force between the United States and 47 of its wartime allies. Throughout, the Allies were very concerned with enshrining economic liberalism and non-discrimination in the global order and completing the tasks which had commenced at the conclusion of World War I.[23] There are now vigorous efforts to institutionalize these concepts in most branches of international economic relations.[24] These efforts have been accelerated following the onset of international depolarization.

29. The Seventh Point of the Atlantic Charter deals with the freedom of the seas. This Point is dependent on the Sixth Point. These Points provide for the so-called freedoms from fear and want.[25] The freedoms from fear (security and non-interference, in today's language) and from want were, in turn, related to the Fourth Point, that "they will endeavour ... to further the enjoyment by all States ... of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity". This latter provision is the foundation stone of the current global economic system. These provisions and the archival records reveal the view of the United States of America and its main wartime allies that all eight Points of the Atlantic Charter were integrally related.

30. Thus, continuing the patterns of organic interrelationships of the earlier Fourteen Points, freedom of the high seas has been, and remains, inseparable, *inter alia*, from freedom from want and from economic liberalism and non-discrimination. These principles and goals and their interrelatedness have been reaffirmed in preambular paragraph 7 of the Convention, referring to

> the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and [the] ... promot[ion of] the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.

It is also apparent that freedom of the high seas is an institution well established in the global order with deep and substantial roots and various siblings. It is closely related to the freedom of communication. One of its most important components is the freedom of navigation. Throughout, there is an increasing emphasis on non-discrimination and equality of access for all States, including those that are land-locked or otherwise disadvantaged by geography. At the

---

stimulated by repeated and solemn invocation of the Atlantic Charter worldwide in national constitutions, multilateral and bilateral treaties, resolutions of inter-governmental conferences, diplomatic communications, and other pronouncements by officials, popular elites, journalists and other commentators.

[22] Especially the records of the U.S. Dept. of State's Special Committee on Post-War Policy and its numerous sub-committees at the U.S. Archives. See generally H. Notter, *Postwar Foreign Policy Preparation* (1949); R. Russell and J. Muther, *A History of the United Nations Charter* (1958); Laing, *26 Willamette L.R.* (1989), pp. 124-140.

[23] *Id.,* pp. 113-169; Laing in *22 Cal. West.J.I.L.* (1991-92), pp. 209 and 250-308; Laing in *14 Wisc. I.L.J.* (1996), pp. 261-264; *Treaties in Force for the United States of America on January 1, 1997* (U.S. Department of State, 1997), pp. 1, 324.

[24] See Laing in *14 Wisc. I.L.J.* (1996), pp. 246-348.

[25] This was that after the final destruction of the Nazi tyranny, the declarants hoped to see established a peace which would afford to all nations the means of dwelling in safety within their own boundaries, and which would afford assurance that all the men in all the lands might live out their lives in freedom from fear and want ant that such a peace "should enable all men to traverse the high seas and oceans without hindrance".

same time, all States, rich and poor, coastal and non-coastal, must be afforded opportunities to benefit economically from the bounty of the oceans.[26]

31. Therefore, from the perspective of international economic law and history, *prima facie*, freedom of navigation is one of the fundamental principles of general and economic global order, related to such other fundamental principles as equality of access and security and non-interference (freedom from fear).

Incidents of Freedom of Navigation Under the 1982 Convention

Incidents of freedom of the high seas

32. The incidents of freedom of the high seas under the Convention must now be identified. According to the non-exhaustive list[27] in article 87, paragraph 1 (set out in the preceding section), these include the freedoms of navigation, overflight and of fishing. It also includes the freedoms to construct artificial islands and other installations, to lay submarine cables and pipelines, and of scientific research in accordance with the provisions on the continental shelf, which may extend below the water column well beyond the 200-mile exclusive economic zone. Details concerning the first of these last three freedoms are actually contained in Part V, regulating the zone. The latter two are regulated by Parts VI and XIII, on the continental shelf and on marine scientific research. According to paragraph 1, with these freedoms the high seas are "open to all States, whether coastal or land-locked." However, according to paragraph 2, in exercising their rights and performing their duties, States shall have due regard to the interests of other States in their exercise of the freedom of the high seas. This standard of "due regard" is less ambulatory and open-textured than is the standard of "reasonable regard" in the counterpart article 2 of the High Seas Convention.

Incidents of freedom of navigation

33. As I have shown, the freedom of navigation is one of the high seas freedoms. By article 90, it includes the "right of navigation" of every State "to sail ships flying its flag on the high seas." From the context, it probably includes or is closely related to obligations and duties *inter alia* falling under articles 91, 94 and 97.[28]

---

[26] See Part X of the Convention on the obligatory, though not self-executing, right of access of land-locked States to and from the sea and freedom of transit. *Cf.* article 3 of the 1958 Convention on the High Seas, providing for non-obligatory access. For a post-1958 rationale for the free access basis of freedom of the high seas, see M. McDougal and W. Burke, *The Public Order of the Oceans* (1962) (hereafter "McDougal and Burke"), pp. 748-750. The Convention's notion of coequal sharing in ocean spaces, as expressed in the much-discussed institution of the common heritage of mankind in the Area, is therefore an aspect of a broader phenomenon of some vintage.

[27] Respondent however argues that since it is not mentioned in article 87, bunkering cannot be a freedom of navigation (ITLOS/PV.99/14, p. 25 (15 March)).

[28] According to article 91, it is an obligatory State function to fix the conditions for the grant to and exercise of nationality of ships. Article 94 states a variety of flag State duties. These include the exercise of jurisdiction and control in administrative, technical, social, safety and regulatory matters over ships flying the flag. Under article 97, paragraph 1, the flag State has penal and disciplinary responsibility in the event of a collision of any of its vessels. And under article 97, paragraph 2, the flag State has general discipline over masters and others holding certificates of competence or licenses.

34. Nevertheless, the nature of the incidents of freedom of navigation is still unclear. The final sub-section of the preceding section implies that the incidents of freedom of navigation (as an aspect of the freedom of the high seas) include navigational activities associated with equal economic access and opportunity to benefit economically, including through trade. It is therefore tempting provisionally to state that the coastal State and flag State have co-equal rights of access, at least in discrete spheres, in the exclusive economic zone. However, such a conclusion cannot be made on the basis of the data examined so far. Therefore, I will devote much of the remainder of this Opinion to exploring whether the provisions on the exclusive economic zone institution and other provisions of the Convention provide more illumination.

Impact of the Convention's Provisions establishing the EEZ Institution

Introduction

35. The question must now be examined whether the new institution of the exclusive economic zone is so comprehensive and preemptive that the freedom of navigation has been eroded or subordinated by the respective provisions of Part V of the text of the Convention. I will then briefly explore whether trends in claims by various States to or in respect of exclusive economic zones have had an impact on this question.

Status under the Convention of the exclusive economic zones

36. During UNCLOS III and for some time after the adoption of the Convention in 1982, there was considerable discussion about the status of exclusive economic zones.[29] The matter has perhaps been conclusively resolved by article 55, categorizing the exclusive economic zone as subject to "the specific legal regime established in this Part [V]". In an influential arbitral decision relevant to this case, this regime has been determined not to be one of sovereignty (*Guinea/Guinea Bissau Maritime Delimitation Case, 77 ILR* (1985), paragraph 124). In interpreting the expression "exclusive economic zone" or the language of article 55 and other articles, several synonyms, paraphrases and explanations have been suggested. The first of these was devised for the former 12-mile maritime zone of exclusive fisheries jurisdiction for each coastal State carved out of the high seas by State practice. This zone was actually in derogation of the provisions of the 1958 High Seas Convention. Yet it was ambiguously referred to as a *"tertium genus* between the territorial sea and the high seas" in the *Fisheries Jurisdiction* cases (*I.C.J. Reports 1974,* p. 3, at 23-24, paragraphs 52 and 54, and p. 175, at 191-192, paragraphs 44 and 46). However, reliance on the precise language of article 55 is the correct and more helpful approach to the task of ascertaining ordinary meaning, though the phrase "*sui generis*," which is sometimes used, might be relatively innocuous. Precisely determining status is partly dependent upon identification of the incidents of the status, a matter which is postponed until the next sub-section.[30]

---

[29] In particular there was discussion of whether the nature of such zones is essentially territorial, thus having a close resemblance to the territorial sea and analogous maritime areas proximate to coastal States; whether they are more akin to the high seas, the geographical area into which such waters fell prior to 1982; or whether they are hybrids, with attributes of territorial seas and high seas.

[30] However, in my view, it is unhelpful to define exclusive economic zone status in terms of national jurisdiction or resemblance to the high seas. "[A]ll the rules relating to navigation and communication on the high seas are applicable beyond the outer limits of the territorial sea, but other rights formerly included within the concept of the

37. Starting with article 56 (stating the rights, jurisdiction and duties of the coastal State in the exclusive economic zone), the bulk of the text of Part V of the Convention deals with the subject of natural resources and related controls. Furthermore, the text of article 58 stresses that other States, whether coastal or land-locked, have simultaneous rights and duties in the exclusive economic zone. Such States also have certain jurisdiction in that zone. This appears from the text of many portions of Part VII and the context of article 87, which are incorporated by reference in articles 58 and 87. The exclusive economic zone is therefore an area in which the coastal State has concurrent, though not identical, rights, jurisdiction and duties with flag and other States. It has been suggested that this concurrence is horizontal but I do not find the suggestion helpful. I would only stress that the scope of authority of both groups of States is evidently not identical. I should point out that coexistence of uses and authority seems to have always characterized the various maritime zones. Regrettably, there has been a tendency to assume that, despite the permeability of the oceanic water column and the diversity of maritime spaces, rights and jurisdiction necessarily have to be exclusive.[31] That this is the wrong approach is emphasized by the "due regard" standard for the exercise of concurrent rights, duties and jurisdiction set out in articles 58, paragraph 3, and 87, paragraph 2. The same language is used in article 56, paragraph 2.[32]

Incidents under the Convention of exclusive economic zone status

38. There are several groups of incidents enjoyed by the coastal State. *Firstly*, according to article 56, paragraph 1(a), there are the "*sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters ..." (emphasis added), subject to certain rights of participation in exploitation by land-locked and geographically disadvantaged States preserved or regulated by articles 69-72. *Secondly*, the same paragraph provides for *sovereign rights* with regard to "other activities for the economic exploitation and exploration ..., such as the production of energy from the water, currents and winds". The text clearly limits these activities to natural resources. *Thirdly*, articles 56, paragraph 1(b), and 60 provide for *exclusive rights and jurisdiction* in two discrete areas, viz. (i), rights of and with regard to the construction, operation and use of artificial islands, installations and structures (for the purposes mentioned so far in this portion of this Opinion) and (ii), jurisdiction over such artificial islands, installations and structures. *Fourthly*, article 56, paragraph 1(b), affords *jurisdiction* with regard to (i) marine scientific research and (ii) the protection and preservation of the marine environment. *Fifthly*, by article 58, paragraphs 1 and 2, along with all other States the coastal State enjoys *freedom* of navigation and such other article 87 *freedoms and other uses* described in paragraph 33 of this Opinion. *Sixthly*, articles 56, paragraph 2, and 58, paragraph 3, provide for obligatory *reciprocal due regard* by coastal States, on the one hand, and by other States, on the other hand, of each others' rights and duties. *Seventhly*, articles 61-68 authorize *rights and powers* of conservation, utilization and management of living resources by coastal States with some collaboration by specified elements

---

freedom of the high seas, in particular those relating to natural resources, are abridged or abrogated entirely in the [EEZ] ...," Virginia Commentary, III (S. Nandan and S. Rosenne, eds., 1995), p. 70.

[31] On concurrence see Allott, pp. 14-17; D. Attard, *The Exclusive Economic Zone* (1987) (hereafter "Attard"), p. 64.

[32] In fact, since "freedom" is a broader species than "right," freedom of navigation might logically be said to trump some coastal State rights. See Oppenheim 1992, I, paragraph 342. However, I do not so propose.

of the international community. *Finally,* by article 73, the coastal State may *optionally enforce, within parameters* therein set forth, its laws and regulations related to exploration, exploitation, conservation and management of living resources. The limitations to coastal State authority and the concurrence or mutual tolerance of rights and jurisdiction of coastal and other States appearing throughout is somewhat reaffirmed by article 73, paragraph 3, providing that "penalties for violations of fisheries laws and regulations ... may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment."

39. Despite the use of the word "economic" in the title, there is no doubt that the essence of the incidents of exclusive economic zone status is the control, exploration and exploitation of and jurisdiction over natural resources and other related activities. At the same time, the framework is broadly economic, the focus in many places being on proper and appropriate access by entitled States in what is an economic, as well as natural, set of assets. In some cases, the nature of access is particularized. Examples are articles 69 and 70, providing for "equitable" access of land-locked and geographically disadvantaged States.

40. In the event that article 56, read in context, is nevertheless considered to be ambiguous, these conclusions are borne out by the limited available preparatory work for the Convention. They are also supported by such other available extrinsic evidence as scholarly opinion and the history of claims to extended maritime jurisdiction outside of the territorial seas of 3 to 12 miles that were commonplace prior to the early 1970s[33]. Therefore, *prima facie,* the Respondent's acts cannot be categorized as having been in implementation of these provisions.

---

[33] (1) Preparatory work: Exclusivity or predominance of natural resources orientation of article 55 and related articles: Virginia Commentary, II, pp. 519-520 (language of article 55, paragraph 1(a), evolved from sole exercise by coastal State in decision-making authority to exclusion from use of fishing vessels by other States in EEZ); Scovazzi in *The Law of the Sea: What Lies Ahead?* (T. Clinghan, Jr., ed., 1986) (hereafter "Scovazzi"), pp. 310 and 321-322; United Nations, DOALOS, *The Law of the Sea – Exclusive Economic Zone – Legislative History of Articles 56, 58 and 59 of the United Nations Convention on the Law of the Sea* (1992) (hereafter "DOALOS EEZ"), pp. 80-81 (rejection of proposal by 18 African States, not including Guinea, at UNCLOS III, 2nd session, to accord to coastal State jurisdiction under article 56 to "[c]ontrol and regulation of customs and fiscal matters related to economic activities in the zone."; see also Virginia Commentary, II, p. 530, and U.N. Doc *A.CONF.62/C.2/L.82* (26 Aug. 1974)); Virginia Commentary, II, p. 529 (rejection of El Salvador proposals at UNCLOS III, 2nd session, to insert in article 56 reference to jurisdiction of coastal State over other economic uses of the waters); *id.,* pp. 784-795 (rejection of repeated proposals at UNCLOS III for flag State enforcement, under article 73, of violation of laws and regulations; rejection of proposal at UNCLOS III of 18 African States, not including Guinea, regarding exclusive coastal State legislative and enforcement power regarding drilling, scientific research, artificial islands and other installations and fishing); Attard, p. 128 (one reason why, during UNCLOS, some States wished to retain contiguous zone concept was to emphasize economic function of EEZ, was fear that elimination of the former would lead to extension of existing contiguous zone rights into entire EEZ); see also *Third United Nations Conference on the Law of the Sea, Official Records, II, Summary Records of Meetings of the Second Committee,* 1st- 41st Meetings (20 June – 29 Aug. 1974) (summarizing the views of, *inter alia,* Austria, Italy, Honduras, Bahrein).
(2) Scholarly work: Exclusivity or predominance of natural resources orientation of article 55 and related articles: Nelson in *22 I.C.L.Q. (*1973), p. 682 (on earlier Latin-American patrimonial sea concept); Galindo Pohl in *The Exclusive Economic Zone – A Latin-American Perspective* (F. Orrego Vicuña, ed., 1984) (hereafter "A Latin-American Perspective"), p. 48. Functionalism of Part V provisions: F. Orrego Vicuña, *The Exclusive Economic Zone – Regime and Legal Nature Under International Law (*hereafter "Orrego Vicuña"), pp. 261-262; Attard, p. 67 (EEZ an experiment in functionalism); Scovazzi, pp. 321-322 (construing article 56, paragraph 1(a)'s "other activities" clause); R. Churchill and A. Lowe, *The Law of the Sea* (1988) (hereafter "Churchill and Lowe"), p. 137. No sovereignty and substantive equality orientation: Rembe, p. 125 (original EEZ concept has been "voided of its

41. I now turn to whether the provisions establishing the status and setting out the incidents of the exclusive economic zone answer the question whether the regulation of bunkering in the exclusive economic zone is categorically an incident of exclusive economic zone status within the sole competence of the coastal State. One authority construes the language in article 58, paragraph 1, "other internationally lawful uses of the sea related [*inter alia,*] to" the freedom of navigation and such as those associated with the operation of ships as long as they are "compatible with the other provisions of this Convention," and suggests that "[i]t seems ... that the determination of whether a given activity, such as offshore servicing, is to be considered as a 'related' lawful use or not, will depend largely on the coastal State."[34] Similarly, Respondent denies that such activities in this case can be related to navigation by non-coastal States, urging that they are more related to fishing (being supportive thereto) and that, at any rate, the coastal State has a considerable fiscal interest in sales to the foreign flag vessels (CM, paragraphs 102-104). However, the materials in this section confirm the view emerging from my broader analysis and suggest that, *prima facie*, the matter is more complex. It must therefore be concluded that, subject to what is said below, the further evidence discussed so far does not reveal any presumption or predilection favouring any class of State.[35]

Possible effects of coastal State claims relating to exclusive economic zones

42. In paragraph 21, I noted views predating the commencement of the process of widespread adoption of multilateral conventions regulating ocean spaces consistent with the notion that by a process of claims and responses thereto, the customary law of the sea could be modified. Thereby, it was considered that *inter alia*, rights and jurisdiction could be expanded, especially as new perceptions of national welfare and technological, economic and scientific needs and discoveries became manifest. That view was previously advanced with particular force in relation to sovereignty over submarine areas.[36] However, in the context of the new law of the

---

content" favouring needs of developing countries; *id.,* p. 128 (various African proposals at UNCLOS to make EEZ rights more akin to sovereignty or include non-living resources); Burke, *20 S.D.L.R. (*1983), pp. 600-622 (any interpretation of Part V going beyond authorized enforcement of laws concerning illegal fishing, to allow interference with in-transit fishing vessels should be limited by requirements of essentiality to effective enforcement, insignificant effect on passage and significant benefit to coastal State). However, note Arias in A Latin-American Perspective, p. 136 (envisaging numerous areas for future coastal State competencies in territorial sea, including smuggling and fiscal fraud).

(3) Essential natural resources orientation of pre-UNCLOS III national claims to extended maritime jurisdiction: DOALOS EEZ*,* pp. 1-2 (Truman Proclamation); *id.,* pp. 3-13 (regional declarations and statements); Lupiacci, pp. 79-95 (Latin-American national claims up to 1969; Latin-American regional Declarations 1940s to mid-1970s; African regional Declarations and positions in 1970s; discussions in U.N. Seabed Committee; joint draft articles submitted by Kenya and Latin-American States in 1970s).

[34] Attard*,* p. 64. This, he says, is subject to the requirement, imposed by article 300, that the parties should undertake to discharge in good faith their obligations and exercise their rights, jurisdiction and freedoms "in a manner which would not constitute an abuse of right".

[35] It will be noted that, on their face, the legislation cited by Guinea neither apply in the EEZ nor cover the acts of the Saiga of which she complains (Applicant's Memorial (hereafter "M"), pp. 106-111; CM, p. 9; R, pp. 14-19). In effect, this is the conclusion implied in the Tribunal's Judgment.

[36] For some, such views are related to the notion of the *dédoublement fonctionnel*, according to which States perform dual functions as claimants which, in pursuing national interests, seek to attain normative change (generally of a customary law variety) and as members of the international community which determines the outcome of such claims.

sea, the salience of that approach has been very much diminished with: new global consensual developments; comprehensive texts of a widely accepted conventional law of the sea which are in places detailed and in others open-textured; guidelines and institutions for solving unfolding problems, especially of a technical nature; and various touchstones and standards for effective solution of controversies, with comprehensive procedures and institutions for dispute settlement. Note must be taken of the slightly diminished importance in the Convention of certain geographical considerations; the overarching conception of sharing or concurrent uses of resources, spaces and authority, and a significant notion of communal decision-making.[37] This is consistent with that basis of the freedom of the high seas, previously discussed, which is an aspect of the current global order of liberal economic access which has been expressed in such expressions as equal access, free access, non-discrimination and equitableness (see paragraphs 27-31 above). In that setting, flag State freedom of navigation would easily coexist with the rights of the coastal State and the claims by such States would be less relevant.

43. It is nevertheless useful briefly to explore whether, in recent years, national claims to exclusive economic zones and rights and jurisdiction therein have had a *de facto* or *de jure* impact on the balance between flag States and coastal States in the exclusive economic zone. Practice after 1982 will be surveyed. It must be stressed that this broad overview is not intended to be complete.

Coastal State claims: Post-1982 practice

44. Prior to 1982, there were several significant claims by States. There also were significant joint statements elaborating regional positions on maritime entitlements outside of territorial areas in several regions, notably Latin America and the Caribbean and Africa. After 1982, such statements appear to have generally abated.[38] After that year, also, State claims to or declarations and other statements about sovereignty or "sovereign jurisdiction" have significantly diminished. Nevertheless, several States are today thought to claim territorial seas wider than 12 miles and a number do not distinguish between that sea and the exclusive economic zone. In its 1984 Declaration on signing the Convention, Guinea declared that it reserved "the right to interpret any article of the Convention in the context and taking due account of the sovereignty of Guinea and of its territorial integrity as it applies to the land, space and sea."[39] The

[37] See Allott, pp. 7-27.

[38] Pre-1970 practice: Prior to the Convention, close examination of claims to maritime jurisdiction generally had a substantial economic and marine scientific thrust. Even claims which, on first impression, appeared to encompass sovereignty, upon analysis almost invariably appeared not to do so, or did so in an equivocal, non-categorical or non-exclusive manner. In addition, these claims were predominantly for natural, especially living, resources. By 1970, a general economic and natural resources orientation was patent, especially in the regional declarations in Latin America and the Caribbean and Africa. Orrego Vicuña, pp. 3 and 11; Attard, pp. 3-16; Nandan in *The Law of the Sea: Essays in Memory of Jean Carroz* (FAO 1987), pp. 171-187. See Argentina's Declaration proclaiming sovereignty over the epicontinental sea and the continental shelf, 9 Oct. 1946 (*41 A.J.I.L. Supp.* (1947), pp. 379-380 (while art. 1 declares sovereignty, the recitals clarify the concern with the matters stated in the text). *C.f.* art. 7 of the 1950 Constitution of El Salvador (quoted in Lauterpacht in *27 B.Y.I.L.* (1950), p. 413). It seems that the legislation implementing this constitutional provision was limited to fishing and marine hunting (Attard, pp. 453-456). Post 1970 practice: Orrego Vicuña, pp. 11-12; Attard, pp. 16-30.

[39] In fact, the legislation exhibited in this case reveals that Guinea previously never redeemed this promise. Its customs code is limited to the national territory, including territorial waters. And its "customs radius" of 250 kilometers is a zone for surveillance and the presentation and permissible inspection of documentation relating to dutiable cargo destined for the national territory. As stated earlier in the text, this case concerns an effort, in the

declarations or legislation of several coastal States merely envisage that they might make future claims to significant exercises of authority. Elsewhere, sovereignty seems to be contemplated mainly in the use of the expression "sovereign rights" - language identical to that in article 56. A small handful of States have declared that residual rights belong to coastal States as long as they do not affect the rights granted to other States. The topic provoking the largest number of statements is military activity in the zone.

45. On the other hand, some language mentions the issue of regulation of the passage of fishing vessels, i.e., the orientation is on natural/economic resources. Not unrelatedly, some States claim exclusive jurisdiction in relation to the protection of the marine environment and pollution controls or prohibit the passage of ships transporting injurious cargo. One claim requires a license for the conduct of "any economic activity" in the exclusive economic zone or for activities relating to the recovery of archaeological or historical objects. Yet, an increasing number of States acknowledge freedom of navigation in the zone.[40]

46. I am aware of only one State which makes the claim of the power "to prevent the contravention of any fiscal law or any law relating to customs, immigration, health or the natural resources of the sea."[41] Even if a few more States concurrently make such claims, this paucity is of some significance. Mention should be made of opinions provided in these proceedings at the request of the Applicant by legal practitioners from some 22 countries on the application of laws of their countries in relation to offshore bunkering in hypothetical circumstances similar to those in this case where the supply of oil products involves parties which do not possess the coastal State's nationality and occurs outside territorial waters. Those opinions all seem to suggest that such offshore bunkering would not be contrary to those laws.[42] Without proper fact-finding in a case with several dimensions of domestic law, these opinions do not provide much further guidance regarding the apparent competition between the flag State's freedom of navigation and the coastal State's rights in the exclusive economic zone than do the other materials and

---

absence of specific legislation, to extend these norms to the field of bunkering fishing vessels. In its final arguments, Respondent called the zone "a limited [and functional] Customs protection zone based on the principles of customary international law which are included in the [EEZ]" but which are not a part of the territory of Guinea (ITLOS/PV.99/18, p. 17 (20 March)). It will be recalled that the critical law allegedly applicable in the zone is No. 94/007/CTRN on petroleum sales which, in Respondent's final arguments, was "clear," even though it did not prohibit off-shore bunkering "verbatim" and "does not affect the rights of … flag States in the EEZ [and] is completely in conformity with the balance [of coastal and flag States] underlying the … EEZ in modern international law" (ITLOS/PV.99/18, pp. 18-19 (20 March)). (See also M, pp. 107-109, CM, p. 9; ITLOS/PV.99/7, pp. 6-8 (11 March); ITLOS/PV.99/15, pp. 8-10 (16 March); ITLOS/PV.99/16, pp. 20-23 (8 March)).

[40] Orrego Vicuña, pp. 149-151; Burke in *9 O.D.I..L.* (1981), pp. 294, 298 and 305-309; *U.S. Panel* 383; *DOALOS Bulletin No. 21* (Aug. 1992), pp. 28 and 31, *No. 23 (*Jun. 1993), pp. 17 and 19, *No. 25* (Jun. 1994), pp. 11 and 37.

[41] *DOALOS Bulletin, No. 16* (Dec. 1990), pp. 18-19.

[42] The countries are Argentina, Belize, Brazil, Bulgaria, Cameroon, China, France, Germany, Ghana, Iceland, India, Italy, Japan, Republic of Korea, Lebanon, Norway, Russia, Sweden, Tanzania, Tunisia, United States of America. In the case of the opinion by an Italian lawyer, it is stated that "whilst Italy has not proclaimed an exclusive economic zone, it is not inconceivable that the Italian authorities might seek to exercise customs surveillance and enforcement powers with respect to deliveries of liable oil products, taking systematically place in the contiguous zone (or reasonably beyond), if the buyer or recipient of the delivery, albeit a foreign registered vessel, presented a sufficiently visible and regular factual connection with Italy." A footnote gives as an example of such a connection "if a foreign registered tanker regularly supplied fuel oil in the contiguous zone for registered leisure or fishing vessels, which subsequently regularly called on Italian ports, regularly loaded or unloaded passengers or unloaded its catch there, and then regularly sailed with empty tanks" (M, Annex 37).

arguments furnished by both parties. However, *prima facie,* they suggest that several coastal States are not purporting to exercise authority in relation to freedom of navigation. This somewhat strengthens the inference that Guinea did not act consistently with international law.

Coastal State claims: Guinea's public interest and state of necessity claim

47. The Judgment has correctly rejected Guinea's justification for its actions based on the "essential aspects of its public interest" (RJ, paragraph 97), holding that that justification is incompatible with Part V and therefore contrary to article 58, paragraph 3. Similarly, the Judgment rejects Guinea's appeal to the so-called state of necessity, indicating its adoption of the conditions for that doctrine as approved by the International Court of Justice in the *Gabčíkovo-Nagyamaros Project* case (*I.C.J. Reports 1997*, paragraphs 51 and 52) and article 33 of the International Law Commission's Draft Articles on State Responsibility. If claims negatively affecting the freedom of navigation cannot be appropriately based on the Convention, then resistance to sanction them on the basis of extra-Convention sources is not unreasonable.[43]

Coastal State claims: preliminary assessment

48. The foregoing survey provides only very broad indications of the scope of claims by coastal States in respect of the exclusive economic zone and their relationship to the freedom of navigation. Just over ten years ago, a study of the subject suggested that there was an "absolute" consensus that in all legislation claiming coastal State rights over the exclusive economic zone, the claims were in terms of the natural resources language of article 56, paragraph 1(a), of the Convention. Speaking more generally, it concluded that despite "the complexity of [much] national legislation ... they do not reach the point of forming general trends ...". This appears to be still the case. The study also suggested that the legislation did not "affect the nature" of the zone. That also appears to be accurate.[44] With reference to freedom of navigation in some of the specific waters involved in this case, as stated in the *Guinea/Guinea-Bissau* arbitration, the exclusive economic zone is not, *prima facie*, a zone of sovereignty. In other respects, also, exclusive economic zone status is not without substantial limitations, including those favouring flag States.

Impact of Other Provisions of the 1982 Convention

49. I noted earlier that much of the sizeable Convention forms part of the broader context for the articles of Parts V and VII that have a direct bearing on the main issues in this case. For that reason, both parties have sought to draw interpretative guidance from widely differing provisions relating to the high seas and maritime areas outside of the territorial sea and analogous areas.

---

[43] Precisely for similar reasons, after the U.K. Government took dramatic action to protect its coastline following the Torrey Canyon disaster in 1967, in 1969 the parties to the International Maritime Organization adopted the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. In turn, article 221 of the 1982 Convention, recognizing the right of States to take measures beyond the territorial sea to protect coastlines and related interests from grave and imminent danger from pollution or threat of pollution following a maritime casualty, requires that such measures shall be "in accordance with international law," undoubtedly meaning the 1969 Convention. See eighth report, paragraphs 28-29.

[44] Orrego Vicuña, pp. 143 and 153; *Guinea/Guinea-Bissau* arbitration, paragraph 124.

Provisions of this nature cover flag State obligations and privileges;[45] flag State participation in maritime order;[46] pollution control;[47] and marine scientific research.[48] What they have in common is the careful balance of authority and responsibility between the two classes of States; the cooperative nature of the relationship between the two that is generally expected; and the substantial nature of the rights generally given to all users. Circumstances permit discussion of only one group of provisions – those dealing with innocent and related passage through territorial areas.

50. Several articles relating to maritime territorial areas have a facially negative bearing on navigation. Article 19, paragraph 2, contains a list of 12 groups of "prejudicial" activities that deprive passage through the territorial sea of its innocence. Five of them are:

> (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
>
> (h) any act of wilful and serious pollution contrary to this Convention;
>
> (i) any fishing activities;
>
> (j) the carrying out of research or survey activities;
>
> (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; ...[49].

Comparison of these, and other, activities listed in this paragraph with the many provisions of Parts V, VII, XII and XIII that this Opinion has reviewed elsewhere is instructive. Breaches of the provisions in those Parts do not have any stated impact on the freedom of navigation in the exclusive economic zone as far-reaching as the nullification of innocent passage status. And of particular importance to the facts of this case, there is no language in article 56 (on coastal State rights, jurisdiction and duties in the exclusive economic zone) comparable to article 19, paragraph 2(g). Only article 60, paragaph 2, contains similar language, which gives the coastal State exclusive jurisdiction over those matters but *only* in respect of artificial islands,

---

[45] See articles 91-94 on registration, nationality and authority and jurisdiction over ships. Burke 1981, p. 303 citing Oxman, *72 A.J.I.L.* (1978), pp. 57 and 72; Warbrick in *New Directions on the Law of the Sea* (R. Churchill, K. Simmonds and J. Welch, eds 1973), III, p. 148.

[46] See articles 98, 99, 108, 109, 110; Virginia Commentary, III, pp. 176-77; *Third United Nations Conference on the Law of the Sea* (R. Platzöder, ed.) (hereafter "Platzöder"), V, pp. 13, 17, 66 and 67; Virginia Commentary, V (S. Rosenne and Louis B. Sohn, eds, 1989), pp. 13-17 and 66; *id.* III, pp. 237-242.

[47] See articles 210, 211, 216-218, 220, 221, 231, 234; Virginia Commentary, IV (S. Rosenne and A. Yankov, eds., 1991), pp. 183, 232-237, 279-302, 334-344 and 365; Platzöder, X, pp. 473, 481, 497 and 507.

[48] See articles 246 and 252; Virginia Commentary, IV, pp. 392-398 and 519.

[49] Article 21, paragraph 1, contains a list of eight groups of laws or regulations relating to innocent passage that coastal States may adopt. It is somewhat similar to the list in article 19. Of note is sub-paragraph (h) which, like article 19, paragraph 2(g), mentions the prevention of infringement of "the customs, fiscal, immigration or sanitary laws or regulations of the coastal State." Article 42, paragraph 1, is a cognate list of laws and regulations that States bordering straits may adopt. Sub-paragraph (d) is essentially identical to article 19, paragraph 2(g). According to article 54, article 42 applies, *mutatis mutandis,* to archipelagic sea lane passage.

installations and structures – not over the exclusive economic zone *per se*.[50] By the terms of Part V, no such general power is given to coastal States in that zone.

51. On close examination, even in the territorial areas the powers of coastal States over foreign vessels are specified and not without specific limits. This is quite consistent with the unambitious authority exemplified in article 33 (on the contiguous zone). All of this has considerable significance as the broader context for the interpretation of the provisions regulating the exclusive economic zone and the freedom of navigation and related uses of the exclusive economic zone.

52. It must therefore be concluded that, as regards the respective jurisdiction and rights of the coastal State and the flag State, at least over vessels, these provisions in other parts of the Convention provide confirmation of the concurrence and non-preeminence of authority of the different classes of States in the exclusive economic zone.

Conclusion on Freedom of Navigation

53. This Separate Opinion has corroborated the Tribunal's finding that Guinea's customs and related laws are not applicable because of incompatibility with Part V of the Convention and because of the unacceptability of the alleged special justifications of public interest and state of necessity for extension of its laws into the customs radius portion of Guinea's exclusive economic zone. Differing from the Judgment, but nevertheless consistently with its findings, the method of this Opinion has been a detailed exploration of the viability of the flag State's freedom of navigation in the exclusive economic zone through the interpretation of articles 58 and 87. In interpreting those articles, I have primarily examined aspects of Parts V and VII, their immediate context; the broader context of various other Parts and provisions, including those dealing with the territorial sea and contiguous zone, and, as necessary, supplementary means of interpretation, including the historical background and the bases of the principles of freedoms of the high seas and navigation, and aspects of the historical and juridical basis of the contemporary global economic and general order. Throughout, the internal consistency of the Convention has led to my finding that the rights and jurisdiction of coastal and flag States are concurrent and that neither has *prima facie* paramountcy or preeminence. Certainly, the institution of the exclusive economic zone has not diminished the well-established freedom of navigation. On the evidence presented, I therefore find that Guinea violated the freedom of navigation of Saint Vincent and the Grenadines. However, in cases such as the present, fuller evidence and arguments would be required in order to determine whether the vessel in question was involved in activities encroaching on specific and clearly identified aspects of the coastal State's jurisdiction over the exclusive economic zone under the Convention.

SOME REMAINING QUESTIONS

54. Some of the questions remaining include aspects of offshore bunkering, prompt release and the settlement of disputes involving developing States. Some preliminary comments on these matters will now be offered.

---

[50] See Virginia Commentary, II, pp. 164-178, 184-203, 367-378 and 481-487; *id.,* IV, pp. 152 and 158-159; *id,* IV, pp. 151 and 156.

Offshore Bunkering

55. If properly handled, the notion of concurrence of authority can contribute to the avoidance of potential disputes and, in the case of an actual dispute, the avoidance of a *non liquet*, given the unlikelihood that there can be easy or early negotiated reform of the Convention. These goals are also facilitated by the Convention's unique feature of a significant variety of norms and formulas to address the diverse potential disputes and matters requiring resolution. One of the formulas used in Parts V and VII has already been mentioned – language requiring States to have "due regard to the rights and duties" of other States with which they have concurrent authority and jurisdiction. The device is used in a carefully balanced and institutionalized manner in articles 56, paragraph 2, 58, paragraph 3, and 87, paragraph 2, which evidently must interact with each other. Another formula is article 59:

> *Article 59*
> *Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*
>
> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

However, neither party to this case has seriously relied on article 59. The reason might be the apparent position of the parties that the facts of this case do not call for the application of this provision.[51] Nevertheless, without my taking a position on article 59, the "attribution" aspect of the provision might be noted. It serves as a reminder that many articles of the Convention deal with jurisdictional issues, which can be phrased in terms of attribution. The coastal State has authority and jurisdiction mainly in relation to natural resources and related matters which have been attributed to it in several provisions. Simultaneously, even in relation to the environmental protection of those resources, concurrent though non-identical, authority and jurisdiction has been attributed to port and flag States, international organizations and coastal States. It has been said that rights concerning economic interests, communication, scientific research and seabed drilling have been attributed to the coastal State by Part V. However, notwithstanding the over-complete and ambitious nature of the institutional title "exclusive economic zone," economic rights, on the whole, have not been attributed solely to that State. In view of what this Opinion reveals, the same holds true about the attribution of such other rights as those concerning communication and navigation.

56. While, in the absence of full argument and data, I am today unable to make a finding about attribution or specifically identifying the ownership of rights in relation to offshore bunkering, speaking very generally and based on the systematic review in this Opinion, I must recall that by

[51] Several substantial questions of interpretation arise in relation to article 59. These have spawned a very substantial literature.

virtue of the prevailing global economic order, all States have a right to free general and maritime economic access and non-discrimination. Against that background and my detailed examination of provisions of the Convention, a full and clear body of evidence would be required properly to address attribution and bunkering. *Prima facie,* however, the available evidence is not inconsistent with at least a measure of tolerance of the use of this maritime space by all States that are legitimate users of non-territorial waters within their respective functional or other spheres.[52]

Prompt Release

57. In this case, the Tribunal has ruled against the Applicant's claim for damages for the Respondent's alleged delayed compliance with the Tribunal's Judgment of 4 December 1997, ordering the prompt release of the *Saiga* upon provision by the Applicant of specific financial security. The reasons given are that while the release of a ship 80 days after the posting of the bond "cannot be considered as a prompt release,"[53] in this case, several factors contributed to the delay in releasing the ship. I believe that different factors can be attributed to each party. Factors include the parties' disagreement about the implementation of the requirements of the prompt release Judgment, the actual wording on the bank guarantee (originally written in English), communications difficulties, travel by the representatives of the parties and the novelty in the international community of the Convention's prompt release requirement.

58. In view of the need for promptness, everything must be done by the parties to expedite the process. I believe that, following the Tribunal's successful handling of its first case of this nature, prompt release cases will, in time, become relatively routine proceedings in which the crucial matter for decision is the reasonableness of the financial security.[54] Reasonableness

---

[52] See Juda in *16 O.D.I.L.* (1986), pp. 32-33 and 40-41 (concurrence of jurisdiction between flag State and coastal State in relation to protection of marine environment; wholesale interference with navigation rights not allowed by Convention. *Cf.* Arias in A Latin-American Perspective, pp. 136-137 (future contingencies connote increases over time of EEZ authority and jurisdiction of coastal States); Butler in *6 Ga.J.I.L.* (1976), p. 114 (near-term competing uses in what is now (pre-1982) high seas might become so intense that flag State jurisdiction must give way to a new order of the high seas regulated, perhaps, by international institutions); Attard, pp. 64-65 (all economic, communication, scientific research and drilling rights already attributed; unattributed rights regarding EEZ can be solved by resorting to equity in a process in which contestants strengthen their cases by identifying with international community's needs); Galindo Pohl in A Latin-American Perspective, p. 46 (economic rights attributed to coastal State; residual rights are subject to a certain degree of uncertainty).

[53] Paragraph 165 of the Judgment. It will be noted that the article 292, paragraph 1, of the Convention allows the parties a maximum of 10 days from the date of detention to reach agreement on the court or tribunal to handle the dispute. Thereafter, the Tribunal's Rules envisage a total of 20 days for completion of all stages of the proceedings, including the reading of the judgment. This suggests that implementation of the judgment must be similarly prompt.

[54] This is underscored by the nature of the application threshold adopted by the Convention for such cases - that "it is alleged" that the detaining State has not complied with the somewhat undemanding provisions of the Convention relating to prompt release. It will therefore be recalled that in the *Saiga* prompt release case, the Tribunal announced that the standard of appreciation in such cases is that the allegation is "arguable" or "sufficiently plausible." See Lauterpacht in *Liber Amicorum: Professor Ignaz Seidel-Hohenveldern in honour of his 80th birthday* (G. Hafner et al, eds., 1998), p. 395, noting (1) the nature of the "allegation" threshold and how its saliency can better be appreciated in view of the utilization of the technique in five other litigation contexts in article 287 and (2) the nature of the standard of appreciation selected by the Tribunal. See also Rosenne in *13 Int'l Jo. Mar. & Coastal L.*, pp. 487 and 513-514 (this standard "reflects the wide practice of international courts and tribunals that, in instances of provisional measures, the benefit of the doubt goes to the applicant State").

evidently comes into play in paragraph 1 of article 292*,* in the context of an allegation, generally by a flag State, that domestic authorities have not complied with the Convention's various provisions for prompt release "upon the posting of a reasonable bond or other financial security". Reasonableness also is critical in relation to the discretion which paragraph 4 gives to international courts or tribunals to order prompt release "[u]pon the posting of the bond or other financial security determined by the court or tribunal". The security ordered by an international judicial body will presumptively be reasonable. Although, in the *M/V "SAIGA"* case, the Tribunal fixed the amount and broadly determined the "nature and form" of the security, it left the latter details to the parties. There is no presumption of reasonableness in such situations and, as seen in the current case, considerable scope for delay. Therefore, it is evident that, in the future, the objectives of expediting prompt release and ensuring reasonableness will be facilitated, *inter alia,* if parties sometimes seek the Tribunal's participation in various aspects of the post-judgment task of coming to agreement on aspects of the security.

The Settlement of Disputes between Developing Countries

59. In this case, in relation to its assertion that the application of its legislation in the customs radius was justified by the notions of public interest and the state of necessity, the Respondent summoned in aid the great importance to it of the revenue it could obtain from taxes on sales of petroleum products presently sold offshore (see, e.g., ITLOS/PV.99/15, pp. 7 and 15 (16 March)). At another point, the Respondent referred to the difficulty experienced by some small developing countries without aeroplanes to give the required (auditory or visual) signals at the commencement of hot pursuit of perpetrators in fishing matters (ITLOS/PV.99/15, p.14 (16 March)).

60. Evidently, these appeals by the Respondent were based on the serious and understandable difficulties of a developing country, with scarce resources for the support of national welfare, to benefit from many aspects of the Convention, to compete in the international marketplace and to defend its international economic interests. In that connection, it is necessary to recall the objects and purposes of the Convention mentioned in paragraph 5 of the Preamble, that "the achievement of [the] goals [set forth in Preambular paragraph 4] will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole ...". Paragraph 5 goes on to embrace "in particular, the special interests and needs" of one highly deserving sector of mankind which very much influenced the development of the exclusive economic zone institution. That sector is the developing countries, for the benefit of which the Convention makes special provision in several places. While the intensity and sincerity of the Respondent's desire are thus sympathetically acknowledged, the practical constraints on attaining it must be taken into consideration. For example, it must be recalled that in this case the Applicant is also a developing country.

61. Nevertheless, the Respondent's invocation of such largely extra-Convention devices as public interest and state of necessity recalls an existing set of approaches for attempted relief: to apply escape mechanisms expressly or impliedly envisaged by the terms of a governing treaty, or acknowledged by the parties to a dispute or by the court or tribunal as being applicable under international law. An example is *rebus sic stantibus.* Another is the device for obtaining temporary relief or escape from the obligations of an economic treaty well known in the field of

international economic law, where the treaty itself often provides broad standards for such relief or escape. Such approaches, and others, may be relevant.[55] Naturally, in cases involving the Convention, such assertions would be subject to normal interpretative scrutiny. In addition, they face such hurdles as arguments that: the complex and numerous institutions of the 1982 Convention represent significant and change-resistant compromises; also that they have an elevated status in the hierarchy of juridical norms that is resistant to derogation.[56]

(Signed) Edward A. Laing

[55] See Laing, *14 Wisc. I.L.J.*(1996), pp. 311-312. An example of such mechanisms is article 221 of the Convention. It cannot be predicted whether such approaches would satisfactorily address such concerns as those expressed by the Respondent in relation to a possible future off-shore tax-free world (ITLOS/PV.99/18, p. 21 (20 March)). Nevertheless, appropriate juridical mechanisms must be used for addressing perceived problems.

[56] I take no position on the view that the Convention's norms, or many of them, are of a "constitutional" nature.