

DISSENTING OPINION OF PRESIDENT KLAESTAD

I am to my regret unable to agree with the Court and shall state my different view as briefly as possible.

I. The task of the Court is to interpret the IMCO Convention, Article 28 (a), and to apply it to the circumstances of the present case. This Article lays down two conditions for being elected as Members of the group of eight. In accordance with the first condition, the Members must have "an important interest in maritime safety". The second condition refers to the requirement of being "the largest ship-owning nations". It is seen from the text of Article 28 (a) that these two conditions must both be satisfied by Members of the group of eight. This is clearly expressed in the French text, and it follows also from the English text, though that text is drafted somewhat differently.

I shall now examine the first condition for being elected as Members of the group of eight, namely that those Members must have "an important interest in maritime safety".

Whether a Member has "an important interest in maritime safety" is a question which cannot be determined by the application of legal criteria. It depends essentially on the appraisal of the special qualifications required for membership in the Maritime Safety Committee, having regard *inter alia* to the duties and function of that Committee as defined by the Convention and particularly by Article 29. The appraisal of such qualifications is clearly of a discretionary nature. This discretion cannot be exercised by the Court but only by the electing body itself, the Assembly of the Organization.

It is contended that the Assembly was bound to consider Liberia and Panama as States having an important interest in maritime safety. This, it is said, follows automatically from the fact that these two States belong to the largest ship-owning nations. It is urged that Liberia and Panama were automatically entitled to be elected, since they are among the eight largest ship-owning nations on the basis of tonnage registration under their flags.

This contention is not convincing. The Court, which has to interpret Article 28 (a), is confronted with the question of the election of Members of the Maritime Safety Committee. This is clear also from Article 16 (d). The term "election" ("elect") implies, in conformity with the natural and ordinary sense of that word, the

exercise of a choice or selection. It is not compatible with any automatic test which imposes itself on the electing body in such a manner that no freedom of choice is left to that body.

II. It is further contended that the discretionary power to be exercised by the Assembly with regard to the question whether a Member has "an important interest in maritime safety", is eliminated by the second condition laid down for the election of the group of eight Members, namely that "not less than eight shall be the largest ship-owning nations". The consideration of this contention requires a more detailed examination of the text of Article 28 (a). This text is as follows:

"The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas."

I shall first consider the French text. After having provided that all fourteen Members must have an important interest in maritime safety, the French text has a full stop. Thereafter it provides: "Huit au moins *de ces pays* (I stress the words "*de ces pays*") doivent être ceux qui possèdent les flottes de commerce les plus importantes". This can in my opinion only mean that of the Members which the Assembly has found to have an important interest in maritime safety, not less than eight shall be "the largest ship-owning nations".

The English text, though drafted in a different manner, must be understood in the same way. The words "*of which*" refer to Members which have an important interest in maritime safety. Of these Members, that is to say: of the Members which the Assembly has found to have such an important interest, not less than eight shall be "the largest ship-owning nations". As already said, the Assembly has a discretionary power to decide which Members must be considered as having an important interest in maritime safety. Of the Members which the Assembly, by exercising this discretionary power, has found to have such an important interest, not less than eight "shall be the largest ship-owning nations"—that is to say: "the largest ship-owning nations" of the Members which the Assembly has found to have an important interest in maritime safety.

It will easily be seen that this interpretation of Article 28 (*a*) does not render superfluous the second condition relating to "the largest ship-owning nations" or any other part of that Article. On the other hand, it appears to me that the interpretation of the Court renders superfluous the first condition relating to "an important interest in maritime safety". This would not be in accordance with the usual canons of interpretation.

My interpretation of Article 28 (*a*), which in my view follows directly from the text itself, is confirmed by another consideration. As already mentioned, it is contended that the second condition concerning "the largest ship-owning nations" eliminates the discretionary power of the Assembly, which follows from the first condition. But it would not be natural—indeed it would be highly unnatural and surprising—if the Article, after having by virtue of its first condition conferred upon the Assembly a discretionary power to appraise whether a Member must be considered as having an important interest in maritime safety, should immediately thereafter, by its second condition, have eliminated this discretionary power. I am unable to accept an interpretation which involves such an obvious contradiction between the two conditions laid down by Article 28 (*a*).

It cannot rightly be argued against my interpretation of Article 28 (*a*) that such a discretionary power vested in the Assembly might, in a hypothetical case, lead to abuse or arbitrariness. That is no valid argument against the existence of a discretionary power as such. The possibility that a discretionary power of appraisal vested in a political body may, in extreme and hypothetical cases, be abused by that body, does not of course prove that no such discretionary power exists. A power or a right may in certain cases be abused. Nevertheless, that power or right exists.

III. My interpretation of Article 28 (*a*) leads me to the view that the Assembly, by virtue of the first condition laid down by that Article concerning "an important interest in maritime safety", had a discretionary power not to elect Liberia and Panama as Members of the first group of eight. The facts brought to the knowledge of the Court do not in my opinion show that the Assembly has exercised its discretionary power of appraisal in an improper or arbitrary manner. The Assembly did not state the reasons for its decision and was not obliged to do so.

In such circumstances it becomes unnecessary for me to consider more fully the second condition relating to "the largest ship-owning nations", and I do not express any opinion with regard to the

meaning of that ambiguous term. As already said, this second condition refers, according to the text of Article 28 (a), only to Members which the Assembly, by exercising its discretionary power, has found to satisfy the first condition concerning "an important interest in maritime safety". Whatever the term "the largest ship-owning nations" may mean—whether it should be understood as referring to tonnage registration or to private or public, legal or beneficial ownership, or whether some other view should be adopted—the Question put to the Court must in my opinion be answered in the affirmative.

(Signed) Helge KLAESTAD.