

The right of the flag State to make claims in respect of its vessels



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Cases relating to the arrest and detention of ships

- In its 23-year history, the International Tribunal for the Law of the Sea (ITLOS) has dealt with 27 cases
- Two-thirds, 18, of these cases have related to the arrest and detention of ships
 - 9 prompt release cases (art. 292 UNCLOS)
 - 5 provisional measures cases (art. 290(5) UNCLOS)
 - 4 cases on the merits
 - The Tribunal found that it had no jurisdiction *ratione materiae* to entertain one of those cases (the *M/V “Louisa” Case*) but dealt with the other three cases on the merits
 - In those three cases, the Tribunal had the opportunity to clarify the legal notion of a ship and various related issues

1. The M/V “SAIGA” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999



2. *The M/V “Virginia G” Case (Panama v. Guinea-Bissau), Judgment of 14 April 2014*



3. *The M/V “Norstar” Case (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016



Claims by the flag State for reparation for damage arising from the illegal arrest and detention of a ship

- These three cases all related to the arrest and detention of oil tankers that had been engaged in bunkering activities, within national jurisdiction (1 and 2) or on the high seas (3)
- The flag States claimed compensation for damage arising from the arrest and detention of the ships in question
 - Direct injury to flag State
 - Damage to ship
 - Financial loss of shipowner
 - Financial loss of operator/charterer
 - Financial loss of cargo owners
 - Financial loss of master
 - Financial loss of crew
 - Non-material damage
 - Many different nationalities involved

Objections to admissibility of claims

- In all of these cases, the respondent (the coastal State) filed several objections to admissibility of the flag State's claims
- The objections to admissibility were, *inter alia*, based on:
 - The nationality of claims
 - The rule of exhaustion of local remedies
- These are fundamental questions, because, if accepted, such objections terminate the proceedings before the merits of the case are examined

The nationality of claims

- In the *M/V “SAIGA” (No. 2) Case*, the Tribunal clarified the unique nature of a ship as a unit – a finding that has a particular relevance for the right of the flag State to seek redress for the ship’s crew members who are not its nationals
- In response to the argument that the flag State has no right to seek redress for non-national crew members, the Tribunal, having examined the relevant provisions of the Convention, stated that
the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.

- The Tribunal supported this finding with practical considerations based on the realities of modern maritime transport – the transient and multinational composition of ships' crews and the multiplicity of interests that may be involved in the cargo on board a single ship
- The Tribunal stated:

If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue.

- The Tribunal's finding influenced the preparation by the International Law Commission of the Draft Articles on Diplomatic Protection, in particular article 18 on the protection of ships' crews which reads as follows:

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

- In the ***M/V “Virginia G” Case***, the Tribunal reaffirmed its jurisprudence by finding that

the M/V Virginia G, its crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated as an entity linked to the flag State. Therefore, Panama is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in damages to these persons or entities.

- Finally, in the ***M/V “Norstar” Case***, the Tribunal reiterated its position

The rule of exhaustion of local remedies

- In these three cases, the Tribunal also addressed the question what is the nature of an injury to a ship resulting from an internationally wrongful act
- Is it
 - a) injury to persons with interest in the ship, or
 - b) injury to the ship's flag State?
- The answer to this question has an implication for the applicability of the rule of exhaustion of local remedies stipulated in article 295 of UNCLOS

Article 295

Exhaustion of local remedies

Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.

- In the ***M/V “SAIGA” (No. 2) Case***, the Tribunal noted that

in this case the rights which Saint Vincent and the Grenadines [the flag State] claims have been violated by Guinea [the coastal State] are all rights that belong to Saint Vincent and the Grenadines under the Convention (articles 33, 56, 58, 111 and 292) or under international law

and that

[n]one of the violations of rights claimed by Saint Vincent and the Grenadines ... can be described as breaches of obligations concerning the treatment to be accorded to aliens. They are all direct violations of the rights of Saint Vincent and the Grenadines. Damage to the persons involved in the operation of the ship arises from those violations.

- The Tribunal concluded that, “[a]ccordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted.”

- In the ***M/V “Virginia G” Case***, the Tribunal also examined the nature of the rights which Panama (the flag State) claimed had been violated by Guinea-Bissau (the coastal State)

- The Tribunal noted that

most provisions of the Convention referred to in the final submissions of Panama confer rights mainly on States [and that] in some of the provisions referred to by Panama, however, rights appear to be conferred on a ship or persons involved.

- The Tribunal observed in this regard that

[w]hen the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant.

- The Tribunal then took the view that the principal rights that Panama alleged had been violated by Guinea-Bissau were rights such as the right to enjoy freedom of navigation that belonged to Panama under the Convention, and “the alleged violations of them thus amount to direct injury to Panama.”
- The Tribunal accordingly concluded that “the claims in respect of such damage are not subject to the rule of exhaustion of local remedies.”
- Finally, in the *M/V “Norstar” Case*, the Tribunal followed the same approach as in the *M/V “SAIGA” (No. 2)* and *M/V “Virginia G” Cases*
- Having examined Panama’s rights that it claimed had been violated by Italy, the Tribunal found that

the right of Panama to enjoy freedom of navigation on the high seas is a right that belongs to Panama under article 87 of the Convention, and that a violation of that right would amount to direct injury to Panama.

- Accordingly, the Tribunal came to the conclusion that “the claims in respect of such damage are not subject to the rule of exhaustion of local remedies.”

Objections to admissibility of claims rejected – merits examined

- Consequently, in all three cases, the Tribunal rejected the above objections to admissibility of claims and examined the merits, including claims for reparation

A case on the docket:
The M/T “San Padre Pio” Case (Switzerland v. Nigeria)



THANK YOU FOR YOUR ATTENTION

