

ITLOS Round Table
Proceedings available before the International Tribunal for the Law of the Sea
in cases involving the arrest and detention of vessels

Introduction and overview of compensation cases before the Tribunal for the
arrest and detention of vessels

Statement by the President of the Tribunal
Judge Jin-Hyun Paik

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Ladies and Gentlemen,

It is a great pleasure for me to welcome you to the International Tribunal for the Law of the Sea. I am glad that so many members of Hamburg's shipping community have found their way here to attend today's roundtable discussions. Of course I also recognize several distinguished participants from London, Lisbon and elsewhere. I take this as a sign that questions concerning the arrest and detention of vessels are of concern to you and that you are interested in what the Tribunal can offer you in this respect.

As you are aware, the Tribunal is an international judicial body entrusted to deal with disputes concerning the interpretation and application of the United Nations Convention on the Law of the Sea. This Convention, (to which I will refer, in the course of my statement, simply as "the Convention",) constitutes without doubt the most important milestone in the codification and development of the modern international law of the sea.

The Convention provides, among others, for an elaborate regime of navigation. For example, ships of all States enjoy the right of innocent passage through the territorial sea. All ships and aircraft enjoy the right of transit passage in straits used for international navigation. The Convention also enshrines the freedom of the high seas, including freedom of navigation for all States, both for coastal and land-locked, which applies in the exclusive economic zone as well under article 58, paragraph 1, of the Convention. However, these rights and freedom have to be balanced with the rights of others, in particular those of coastal States. The coastal States, in exercising their sovereignty or sovereign rights in several maritime zones established by the Convention, may even have the right to arrest and detain foreign-flagged vessels.

It is not surprising that, in such cases, flag States and coastal States will often disagree as to whether an arrest or detention of a vessel was lawful under the

Convention. Flag States may then consider initiating legal action, including before the Tribunal, to seek a judicial decision on this matter.

Different procedures are available before the Tribunal that may be taken into consideration in such situation. Thus, the flag State may submit a case on the merits to the Tribunal and the subject-matter of such a case could be the release of the vessel and/or compensation for any damages incurred as a result of the arrest or detention.

I will return to compensation cases in a minute. Before I do so, however, let me mention that, in addition to its jurisdiction over contentious cases on the merits, the Tribunal enjoys specific competencies with regard to provisional measures and the prompt release of arrested vessels and their crews. Those procedures also offer possible remedies that you might be interested in.

During today's roundtable discussions, the Tribunal's Registrar, Mr Philippe Gautier, will therefore address the relevance of provisional measures proceedings as an "alternative avenue" in cases involving the arrest and detention of vessels. Thereafter, the Deputy Registrar, Ms Ximena Hinrichs, will speak about the prompt release procedure as an "efficient tool" in those cases of arrest and detention that are covered by this procedure.

I am glad that we also have a representative of the maritime legal community on the list of today's speakers. Mr Schwampe, of the law firm Dabelstein & Passehl, will address the interesting question of what the shipping community may expect from the Tribunal.

In this context, let me add one thing. You may know that proceedings before the Tribunal are in principle open to States only. Also, it is States that are the principal bearers of rights and obligations under the Convention. When it comes to questions of the arrest and detention of vessels, it is in particular flag States that play a central role. Nevertheless, proceedings before the Tribunal can be of great assistance to private actors involved in maritime transport, such as ship-owners or ship-operator. And we shall see how private actors can benefit from those procedures in the further course of today's presentations.

Ladies and Gentlemen,

Before I pass the floor to the other speakers, I wish to give you, as I mentioned before, an overview of an important category of cases before the Tribunal, namely those in which flag States were seeking compensation for what they deemed to be an illegal arrest or detention of vessels sailing under their flag.

The Tribunal was confronted with such a claim for compensation already in its earliest judgment on the merits, in 1999, in the *M/V "Saiga"* case. The *M/V "Saiga"*, an oil tanker sailing under the flag of Saint Vincent and the Grenadines, had been arrested and detained by the authorities of Guinea under the allegation that it had

violated Guinea's customs laws by selling gas oil to vessels in Guinea's exclusive economic zone. While Guinea confiscated the vessel's cargo and conducted criminal proceedings against its Master, the *M/V "Saiga"* was released about four months after its arrest.

Before dealing with the merits of the case, however, the Tribunal had to address questions of jurisdiction and admissibility of claims such as objections based on the nationality of the *Saiga*, requirement of genuine link, the exhaustion of local remedies, and nationality of claims. These objections, if accepted, would terminate the proceedings before examining the merits of the case. I have no time to dwell on this matter today but the Tribunal rejected the objections to admissibility based on these grounds. The Tribunal's jurisprudence in this regard has been reaffirmed in the subsequent cases.

For the nationality of a ship, the Tribunal observed that "article 91 of the Convention leaves to each State exclusive jurisdiction over the granting of its nationality to ships". It further observed that "the nationality of a ship is a question of fact to be determined on the basis of evidence adduced by the parties." Therefore in case of dispute over the nationality of a ship, the initial burden of proof lies with the State claiming that a vessel possesses its nationality.

With respect to the requirement of a genuine link, the Tribunal stated that "the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States."

As to the applicability of the rule of the exhaustion of local remedies stipulated in article 95 of the Convention, the Tribunal noted that "in this case the rights which Saint Vincent and the Grenadines claims have been violated by Guinea are all rights that belong to Saint Vincent and the Grenadines under the Convention or under international law" and that "none 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." The Tribunal concluded that "accordingly, the claims in respect of such damage are not subject to the rule that local remedies must be exhausted."

Finally concerning the nationality of claims, the Tribunal emphasized the unique nature of a ship as a unit. According to the Tribunal, "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. Thus the ship, everything on it, and every person involved or interested in its operation are treated as an entity linked to the flag State. The nationalities of these persons are not relevant."]

As for the merits of the dispute, the Tribunal found that the Convention did not empower Guinea to apply its customs laws and regulations in the exclusive economic zone in this case¹ and that therefore “the arrest and detention of the *Saiga* ... were contrary to the Convention”.² In addition, the Tribunal found that Guinea had “used excessive force ... before and after boarding the *Saiga*”.³

Having thus established that Guinea had violated the rights of the flag State under the Convention,⁴ the Tribunal further declared that “[i]t is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act”.⁵ The Tribunal added that such reparation may, *inter alia*, “take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case”.⁶

It may be interesting for you at this point that, while such a case for compensation needs to be submitted to the Tribunal by the flag State, the scope of the possible compensation is not limited to damage suffered by that State directly. In the *M/V “Saiga”* case, the Tribunal has made it clear that the flag State “is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation”.⁷

The Tribunal finally awarded compensation to Saint Vincent and the Grenadines which included the cost of repairs of damage to the vessel; loss with respect to charter hire of the vessel; the value of the gas oil cargo as well medical expenses and compensation for injury, pain and suffering of crew members affected by the excessive use of force employed by the authorities of Guinea.⁸

It may further be interesting to you that the Tribunal, in this case, paved the way for a broad competence of the flag State to pursue compensation claims with regard to all persons and interests involved in the operation of the ship, regardless of their nationalities. The Tribunal concluded that “the Convention considers a ship as a unit”, including as regards “the right of a flag State to seek reparation for loss or damage caused to the ship”.⁹ Thus, “the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State” and “[t]he nationalities of these persons are not relevant”.¹⁰

1 *M/V “SAIGA” (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1997*, para. 127.

2 *Ibid.*, para. 35.

3 *Ibid.*, para. 159.

4 *Ibid.*, para. 183 (7) and (9).

5 *Ibid.*, para. 170.

6 *Ibid.*, para. 171.

7 *Ibid.*, para. 172.

8 *Ibid.*, para. 175.

9 *Ibid.*, para. 106.

10 *Ibid.*

The Tribunal has reaffirmed this jurisprudence in 2014 in another compensation case, concerning the vessel *M/V “Virginia G”*, sailing under the flag of Panama.¹¹ Again, this vessel was an oil tanker supplying gas oil to fishing vessels, this time in the exclusive economic zone of Guinea-Bissau. The authorities of that State arrested the vessel and later confiscated it together with the gas oil it carried.¹² While the vessel was released about thirteen months after its arrest, the confiscated gas oil was not returned.

Unlike Guinea in the *M/V “Saiga”* case, Guinea-Bissau in the *M/V “Virginia G”* case did not seek to extend its customs or tax legislation to the exclusive economic zone.¹³ Rather, it considered the bunkering of fishing vessels in that zone a “fishing related operation”¹⁴ which the coastal State had the right to regulate as a consequence of its sovereign rights over the living resources of that zone.¹⁵

The Tribunal agreed with Guinea-Bissau on this point. It found that “coastal States have jurisdiction to regulate the bunkering of foreign vessels fishing in their exclusive economic zones and to provide for the necessary enforcement measures”.¹⁶ It also found that possible sanctions may include confiscating the respective vessel.¹⁷

However, the Tribunal was of the view that, under the circumstances of the case before it, the confiscation of the vessel and its cargo was “not necessary” and “not reasonable”, and, therefore, “in violation of ... the Convention”.¹⁸ As a consequence, the Tribunal awarded Panama compensation for the value of the gas oil confiscated and the costs of repairs to the vessel,¹⁹ insofar as the latter had a causal link with the confiscation of the vessel.²⁰

Ladies and Gentlemen,

In sum, I think those two cases demonstrate that proceedings before the Tribunal may offer an efficient remedy through which ship-owners and others involved in the operation of a vessel may obtain compensation for damages and loss they suffered as a result of an unlawful arrest or detention of their vessel. Admittedly, this requires the active involvement of the flag State. The Tribunal’s practice shows, however, that flag States, in appropriate cases, do have the will to pursue such cases before the Tribunal.

¹¹ *M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, para. 126.

¹² *Ibid.*, para. 64.

¹³ *Ibid.*, para. 234.

¹⁴ *Ibid.*, para. 188.

¹⁵ *Ibid.*, para. 187, 195.

¹⁶ *Ibid.*, para. 264.

¹⁷ *Ibid.*, para. 251, 255.

¹⁸ *Ibid.*, paras. 269, 270, 271.

¹⁹ *Ibid.*, para. 446.

²⁰ *Ibid.*, para. 442.

This brings me to the end of my introductory remarks. I give the floor now to Mr Gautier who will acquaint you with the Tribunal's jurisdiction over requests for the prescription of provisional measures.