PCA Case No. 2014-07

IN THE MATTER OF THE *DUZGIT INTEGRITY* ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE REPUBLIC OF MALTA

- and –

THE DEMOCRATIC REPUBLIC OF SÃO TOMÉ AND PRÍNCIPE

DISSENTING OPINION OF JUDGE KATEKA ON THE AWARD ON REPARATION

---

18 December 2019

1. Regrettably, I disagree with the majority's decision that the Democratic Republic of Sao Tome and Principe (Sao Tome) must pay to the Republic of Malta (Malta) compensation on different heads of claim spelt out in the operative paragraph of the Award on Reparation (the Award). I shall give the reasons for disagreeing with the majority.

2. I stated in paragraph 29 of my Dissenting Opinion on the Award on Jurisdiction and Merits that "[h]aving concluded that Sao Tome did not violate Article 49(3) of the UN Convention on the Law of the Sea (the "Convention" or "UNCLOS"), it goes without saying that I do not agree with the Tribunal that Malta is entitled to proceed to claim reparation in respect of the heads of claim listed in paragraph 333 of the (Merits) Award in a further phase of the proceedings […]".

A. Whether the actions of the Respondent amount to 'composite acts' within the meaning of Articles of the ILC on State Responsibility

3. The Tribunal considers the question at what point the detention of the *Duzgit Integrity* by Sao Tome became unlawful and a breach of the Convention (para 84 of the Award). It invokes the concept of composite acts under the ILC's Articles on State Responsibility ("ARSIWA") to justify its choice of 26 April 2013 as the specific point in time when the conduct of the Respondent became disproportionate. This is a convenient formula to rationalize the cumulative effect argument of the Merits Award where the majority did not establish such a specific point in time.

4. In the Merits Award the majority merely found that the penalties imposed by Sao Tome when taken together (cumulative effect) were unreasonable and disproportionate. The prolonged detention of the Master and the vessel, the monetary sanctions, and the confiscation of the entire cargo on board the vessel are cited by the majority in the present phase of the case as examples of the collective actions which have now been termed composite acts.

5. I do not share this position of the majority. In my view the majority is operating from a mistaken premiss of having lumped together the sanctions which were imposed by Sao Tome against the vessel, the Master and the crew. In paragraph 85 the majority argues that the alleged breach of Article 49 took the form of a composite act. I am of the opinion that this majority view is wrong. As I argued in my Dissenting Opinion in the earlier phase of the case each of the measures taken by Sao Tome should be considered separately. Each penalty should be considered on its own merit. The circumstances of the particular case have to be taken into account including the prevalence of illegal ship-to-ship (STS) transfers and bunkering which have become notorious in the West African region. This in turn fuels illegal, unreported and unregulated (IUU) fishing which is high on the West African coast where Sao Tome is situated.

6. The invocation by the majority of Article 15 of the ARSIWA is meant to link the date chosen as the first element of the composite act with subsequent events. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series.[1] In my view, this is a mistaken approach by the majority for various reasons. Firstly, the commentary to ARSIWA's Article 15 does not refer to such acts as those of the present case. Examples cited in the commentary refer to genocide, apartheid, crimes against humanity and systematic acts of racial discrimination. Secondly, the history of Article 15 shows that the notion of composite acts is limited to composite acts defined as such in the relevant primary rule.[2] The commentary to Article 15(1) reinforces this view of depending on the content of the primary obligation. The majority has not tested the invocation of composite acts by establishing the number of actions or omissions which must occur to constitute a breach of the obligation.

7. In my opinion, there has to be a pattern of identical or analogous breaches which are numerous and interconnected for there to be a composite act.[3] Isolated and separate acts do not constitute composite acts. In the present case, the Tribunal finds the first element of Sao Tome's composite act to have occurred with the completion of the Customs fine on 26 April 2013. From this the Tribunal concludes that Sao Tome's detention of the *Duzgit Integrity* was incompatible with the Convention's Article 49 and internationally wrongful from the April date extending until the release of the vessel on 25 November 2013.

8. During the Merits phase, the Tribunal found that Sao Tome acted lawfully when it detained the *Duzgit Integrity* which did not have authorization to carry out STS transfer of fuel oil. The IMAP[4] fine of EUR 28,875, which was imposed on 16 March 2013, was not paid until 8 November 2013 because Malta did not accept the fine and contended it was "excessive and unjustified"[5]. The IMAP fine was part of the penalties imposed by Sao Tome on the owners of the vessel, the Master and the charterer. The Directorate's fine which was appealed against by the Masters (two ships the *Duzgit Integrity* and *Marida Melissa* were involved) was dismissed on 26 April 2013 but the order was withdrawn when the owners of both vessels reached a settlement with Sao Tome in October and November 2013. The criminal proceedings against the Masters for STS transshipment without prior authorization led to conviction and to imprisonment and paying of a fine. The appeal by the Masters was dismissed by the Supreme Court of Sao Tome on 20 June 2013. On 17 July 2013, the Supreme Court decision was considered *res judicata*.

[1] Article 15(2) ARSIWA.
[2] See Annex on Draft Articles of Part I as at April 1999 attached to James Crawford, Revising the Draft Articles on State Responsibility, EJIL 1999 p. 435.
[3] See paragraph 5 of the commentary to ARSIWA's Article 15.
[4] Port and Maritime Institute.
[5] Para 81 of the Merits Award.

9. The above proceedings were carried out in conformity with Sao Tome's law. The Tribunal has not questioned the right of Sao Tome to enforce its legislation within its archipelagic waters. At the merits stage the majority used the argument of cumulative effect of the penalties by Sao Tome to be unreasonable and disproportionate. During that phase of the case the majority seems to have questioned Sao Tome's discretion to enforce its laws. Now the technique of composite acts is used to validate the awarding of high sums of compensation to the Applicant. Even the calculation of the large sums is affected by the start date for the alleged unlawful act by Sao Tome. The appeal process of Sao Tome was invoked by the Applicant through the vessel's owners, the Master and charterer for both civil and criminal matters. The date of 26 April 2013 is arbitrarily chosen by the majority as "the first of the decisions on appeal where acts of organs of Sao Tome could have been corrected" (para 86 of the Award). This argument by the majority of 'self-correction' to be done by Sao Tome is not explained. Furthermore because it is controversial there is even some disagreement among the majority as revealed in footnote 56.

B. The Charter Party Agreement

10. The majority advances arguments that are difficult to understand as regards the cancellability of the Charter Party Agreement – Addendum No. 4 of 28 January 2013. At paragraph 87 of the Award the majority agrees with Sao Tome with respect to the content of the Charter Party Agreement. They agree that the Agreement could be cancelled on five days' notice if the vessel was unavailable for longer than 21 consecutive days. But they disagree with Sao Tome with respect to the implications of this fact. The majority's first argument for the disagreement is that the Charter Party Agreement was not cancelled during the detention of the Duzgit Integrity and Sao Tome's argument relies upon a counterfactual. I find it hard to grasp this argument. The fact that the charterer did not exercise a right available to him under the Agreement makes it a counterfactual. It would be a strange legal situation where litigants who do not exercise their rights under a contract were to be absolved for not exercising their rights!

11. In fact at Malta, the claimant State contends that its head of claim for the owner's loss of hire of the *Duzgit Integrity* covers two categories of loss (paragraph 67 of the Award). It advances that, as a result of the seizure of the vessel by Sao Tome on 15 March 2013, DS Tankers (the owners) could no longer continue service to Stena Oil (the charterers) under the charter party agreement, effectively triggering the charter party agreement's "off-hire" clause, resulting in losses which Malta now claims. There lies the problem, in my view. The first period of detention of the vessel has been found to have been legal by the Tribunal. If one takes the 26 April 2013 date adopted by the majority as the date when Sao Tome's actions became illegal, there are more than 21 days required by the charter party agreement. Why did the charterer not take action?

12. The majority's second argument of the vessel not being available for service falls apart because there was no illegality in the relevant period. And as Sao Tome states (paragraph 77 of the Award) the charter party agreement was not fixed and was not no-cancellable. Thus, by not exercising the right to cancel the agreement the charterer failed in the same way of the analogy with failure to exhaust local remedies in the diplomatic protection situation. Given the importance of the provision on cancellation it is worth quoting the relevant part of the charter party agreement in concluding the issue of cancellability:

"It is understood that the Time Charter Party can be cancelled by Charterers should the vessel suffer a breakdown or in any way be unavailable to Charterers for the performance of the ship-to-ship operations for a period of longer than 21 consecutive days. Should this be the case then Charterers have the option anytime from the 21st day of giving 5 days' notice of cancellation of this Time Charter Party".

C. The Settlement Agreement

13. The Settlement Agreement between the Government of Sao Tome and Principe and DS Tankers (the owners the *Duzgit Integrity*) was concluded on 23 November 2013. The Tribunal considers this settlement agreement under two headings. First, whether the settlement agreement mitigates any of the damages suffered by DS Tankers (paragraphs 185 – 191 of the Award). Secondly, whether the acts or omissions of the DS Tankers (the owners of the vessel), Stena Oil (the charterer of the vessel), the Master or the crew could give rise to contributory fault (paragraphs 192 – 198).

14. Before considering each of the above headings, it must be observed that the difference between mitigation and contributory fault is not so clear. The close relationship between the two concepts makes it difficult to differentiate between them and creates an element of confusion. A general guidance is that mitigation arises only after the damage has occurred while contributory fault relates to the situation at the time of the breach or the original infliction of damage.[6] Furthermore, contribution consists of actions or omissions whereas mitigation requires action. Under article 39 of the ARSIWA, "[i]n determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought".

15. In its analysis of the first heading regarding mitigation in the present phase of the case, the Tribunal refers to the Merits Award where it stated that the Settlement Agreement reached between DS Tankers and Sao Tome has no bearing on Malta's entitlement to bring claims against Sao Tome under the Convention. Also, the Tribunal noted that Malta was not a party to the Settlement

[6] Stephan Wittich, Compensation, MPEPIL 2008.

Agreement and therefore was not bound by it. The Tribunal also emphasized that, DS Tankers having settled its claim with Sao Tome, the claim brought by Malta was a direct claim to its rights as the flag State of the *Duzgit Integrity*, and not a claim of diplomatic protection. Then, the Tribunal asks whether the settlement agreement precludes Malta from quantifying the harm to its rights as the flag State on the basis of harm for which DS Tankers itself could no longer claim. The Tribunal answers this question in the negative. The Tribunal adds: "[t]o hold otherwise would effectively empower a ship owner to settle an international claim on the flag State's behalf without its consent and potentially without its knowledge. Such an outcome would be incompatible with the particular status and rights of the flag State under the Convention".

16. I do not share this view of the majority. Here it may be recalled that the majority noted during the merits phase that there was no prior instance of a case brought under the Convention in which one of the entities within the unit of a ship concluded a settlement agreement with a State against which proceedings were brought under the Convention. I suspect that the majority has been influenced by this view to conclude that the right of Malta as the flag State is not affected by the settlement agreement. However, as ITLOS jurisprudence shows, the concept of the ship as a unit was developed to protect members of the crew. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue[7]. In my view this rationale of a ship as a unit does not stop a person (natural or juridical) from bringing action individually or the State of nationality acting as appropriate. The concept of a ship as a unit does not glue the individual units to be inseparable. Hence, the settlement agreement outside the context of the ship as a unit is not incompatible with the concept and is not invalid.

17. The settlement agreement of November 2013 was freely entered into by DS Tankers, the owners of the vessel without any coercion. This situation was acknowledged by the Tribunal in its Merits Award. If the settlement agreement is valid, the legality of what is contained in it cannot be doubted. The First Clause of the Agreement stipulates the conditions which include paying forthwith the IMAP fine of EUR 28,875 and the owner paying for the onboard oil cargo in the lump sum of USD 625,000. In the Second Clause of the Agreement, the owner waived any judicial action against Sao Tome at the domestic and international levels. The waiver by the owner encompassed any request for indemnification, compensation and/or similar action.

18. The view of the majority at paragraph 191 that the settlement agreement does not preclude Malta from raising the harm to its rights as the flag State on the basis of harm for which the vessel's owners could no longer claim is mistaken. Firstly, during the Jurisdiction and Merits phase the

[7] *M/V SAIGA* (No.2) case (Saint Vincent and Grenadines v Guinea), Judgment, ITLOS Reports 1999, paragraph 107. This case is cited in the commentary of the ILC Draft article 18 on Ships' crews, ILC Draft Articles on Diplomatic Protection, 2006.

Tribunal stated, with regard to admissibility, that the settlement agreement could be relevant to a later phase of the case. Thus, it is relevant for the present reparation phase. In its consideration of the settlement agreement at the admissibility level, the Tribunal acknowledged that the practical difficulty to decide whether a claim is "direct" or "indirect" where it is "mixed" (contains elements both injury to the State and injury to nationals of the State) would have presented itself were it not for the fact that DS Tankers (the owners of the vessel) concluded a settlement agreement whereby the owners waived judicial action. In other words, the Tribunal impliedly accepted the validity of the settlement agreement when considering the issue of the exhaustion of local remedies (paragraph 154). Everything concluded under the settlement agreement is thus legal.

19. Secondly, the majority position evokes the question whether the settlement agreement precludes the invocation of litigation against Sao Tome. As noted above the Tribunal acknowledged that this was the first settlement agreement in the context of a ship as a unit. There are no judicial precedents to rely upon. Existing case law concerns investor – State arbitration. Some cases preclude proceedings while others do not. I am of the view that Sao Tome is not precluded from raising the settlement agreement in the present phase of the arbitration. Thus under the waiver clause already raised above there is no justification for the majority to award USD 625,000 as compensation for the amount paid by DS Tankers pursuant to the settlement agreement for the use of the *Duzgit Integrity's* cargo as bunkers (para 221(c) of the *dispositif*).

20. The second heading of the settlement agreement concerns the question of contributory fault. The majority contends that there is no contributory fault because there is no evidence of action by Malta, DS Tankers, Stena Oil, the Master, the crew or other agents acting on their behalf that served to prolong the detention of the *Duzgit Integrity* in Sao Tome or prompted the criminal proceedings and fines that the Tribunal found disproportionate (paragraph 198 of the Award). I do not share this view. The Tribunal found that the Master attempted a ship-to-ship transfer operation without explicit authorization by Sao Tome. Such an unauthorized operation is viewed as a serious violation (paragraph 236 of the Merits Award). Thus, as the Respondent maintains, the *Duzgit Integrity* materially contributed to the damages claimed by Malta by not complying with the applicable rules and regulations of Sao Tome. I shared this view in my Dissenting Opinion when I cited Article 39 ARSIWA. Hence the unauthorized STS transfer is a contributory factor that prolonged the detention of the vessel and prompted the criminal proceedings.

D. The question of quantum

21. The majority has awarded large sums of compensation to Malta under eight heads of claim plus reimbursement for Sao Tome's share of the cost for the final phase of the proceedings and plus interest (paragraph 221). The breakdown of the sums is as follows:

(i) USD 9,776,539.43 as compensation for the loss of hire, the value of the cargo, reimbursement to DS Tankers for bunkers cargo and compensation for non-material damage.

(ii) EUR 277,406.57 as compensation for DS Tankers' port agent, for legal expenses, for classification expenses, for vessel's repairs and reimbursement of Sao Tome's share of the case cost of the final phase.

(iii) GBP 142,775.30 as compensation for legal expenses and cost of repairs.

(iv) USD 2,804,499.52, EUR 37,727.59 and GBP 34,734.16 as interest on the amounts awarded in (i) – (iii).

This totals to USD 12,581,038.95, EUR 315,134.16 and GBP 177,509.46. The grand total is approximately USD 13,164,448.28 using one currency.

22. The above sums raise several issues. First, the evidence for such sums must be sufficient. The question of causation between the damage and the unlawful act is essential to the award of reparation. Different tests of causation have been applied by international courts and tribunals including proximate cause, foreseeability and directness. However, it is the directness test that seems to be preferred in case law. This test has been applied by ITLOS in the *Saiga* and *Virginia G* cases. In the latter case, ITLOS was of the view that only damages and losses which are direct consequences of an illegal act can be accepted for damages claim. The ICJ in its case law has also applied the direct nexus formula between the unlawful act and the damage in order to satisfy the causation test. In the *Ahmadou Diallo* case (paragraph 14), the Court stated that the causation test requires a sufficiently direct and certain causal nexus between the wrongful act and the injury suffered by the applicant. This causation test of "sufficiently direct and certain" has been applied again by the Court in the *Costa Rica* v *Nicaragua* case of 2018 (paragraph 32). The ILC commentary (paragraph 10) to article 31 of the ARSIWA refers to the criterion of directness.

23. Applying the test of directness to the present case leads to some evidentiary difficulty which has not been overcome by the Applicant. As to the value of the cargo, there is uncertainty regarding the portion of oil transferred to the *Marida Melissa* or what portion remained on board (paragraph 106 of the Award). Another point of uncertainty regarding causation concerns the Tribunal appointing an expert marine surveyor (paragraph 166) to deal with the technical question of repairs to the vessel. The majority states (paragraph 170) that Malta's response to the expert's report concerning the extended detention of the *Duzgit Integrity* and the requirement of additional repairs as "essentially speculative". In spite of this remark and the expert's report doubting the reliability of Malta's evidence, the majority goes ahead to award damages for extraordinary repairs by reducing

the claims to proportions. Furthermore, the issue of waiver was raised by the Respondent in respect of several heads of claim by the Applicant such as for the travel expenses, classification expenses, extraordinary repairs, port agency expenses, damages suffered by the Master and the crew as well as the settlement agreement itself. The majority does not address the issue of waiver in any specific detail except to state that the settlement agreement does not preclude Malta's claims. At paragraph 119, the majority excludes bank charges on the transfer payment and reserves the effect of the settlement agreement to paragraphs 185 to 191. We have already considered the agreement above.

24. The large amounts of reparation awarded to Malta in spite of the Respondent not committing any unlawful act raise another concern. The majority is not mindful of the delicate situation of the Respondent. Sao Tome did not participate in the present phase of the case. The Award rightly observes in paragraph 64 that the "[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings". The absence of Sao Tome is linked to the withdrawal of its Co-Agents and Counsel from the case. While it is not for an arbitrator to speculate as to the causes of this situation one must draw attention to footnote 2 on Sao Tome receiving a grant from the PCA Financial Assistance Fund during the first phase of the case. The Terms of Reference and Guidelines of the PCA Fund show that the financial assistance is given subject to the availability of funds. There are many qualifying States for the Fund.

25. Following from this situation is the issue of Sao Tome paying "full" reparation which includes interest as discussed in the next section. On the question of "full" reparation, during the ILC debate of the ARSIWA, some members raised concern about the obligation to pay "full" reparation. It was contended that what was required was not "full" but "as much reparation as possible". It was also contended that in determining reparation due, a responsible State's ability to pay should be taken into account. It was decided by the Drafting Committee of the ILC not to add the qualifier "full" to reparation although it was understood that the obligation to provide "full reparation" only requires the elimination of the consequences of the wrongful act "as far as possible", as stated in the *Chorzow Factory* case.

26. In spite of the 'neutral' drafting by the Commission's Drafting Committee, members of the ILC continued to express their concern on the question of ability to pay reparation. Some members who were concerned about the developing countries' ability referred to an earlier ILC draft which stated that reparation should not result in depriving the population of a State of its own means of subsistence.[8] The main concern was the potentially crippling effect of compensation payments.[9]

[8] Article 42 paragraph 3 of the First reading Draft Articles (1996) states: "In no case shall reparation result in depriving the population of a State of its own means of subsistence".
mes Crawford, *State Responsibility – The General Part*, CUP 2013, p. 482.

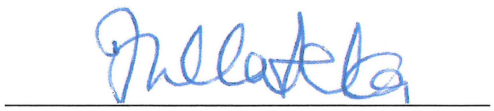
The commentary to paragraph 7 of Article 50 (obligations not affected by countermeasures) of the ARSIWA cites common Article 1, paragraph 2 of the 1966 UN Covenants on Human Rights.[10]

D. Interest

27. The last area of my disagreement concerns the question of interest. The majority in paragraph 203 observes that neither the Convention nor the Articles on State Responsibility provides guidance on how full reparation would best be achieved in a particular case. Rather this determination falls within the Tribunal's discretion, subject to the overarching goal of achieving full reparation. In paragraph 211, the majority justifies its award of compound interest. I do not share this position.

28. Some tribunals including ITLOS have awarded compound interest. In the *Norstar* case, the Tribunal decided to give interest based on LIBOR (London Interbank Offered Rate) "compounded annually" (para 456) with no explanation for doing so. Historically, compound interest was not awarded as noted by the majority. The Permanent Court in the *SS Wimbledon* case[11] awarded simple interest of 6% from the date of judgment. A noted commentator of the time, Whiteman, stated in 1943 that compound interest was not allowable[12]. The ILC commentary to Article 38 in the same vein states that "the general view of courts and tribunals has been against the award of compound interest". It is only recently that a tendency has developed for international courts and tribunals to award compound interest. This trend is influenced by the fact that commercial bank loans involve compound interest. In my view, there is need for caution before awarding compound interest.

Dated: 18 December 2019



Judge James L. Kateka
Arbitrator

[10] See International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.
[11] 1923 PCIJ Series A. No. 1, p.32
[12] Marjorie Whiteman, *Damages in International Law*, (Washington DC, US Government Press, 1943), Vol.III 1997, quoted by Elihu Lauterpacht and Penelope Nevill, "The Different Forms of Reparation: Interest" in *The Law of International Responsibility* edited by James Crawford, Alain Pellet, Simon Olleson.