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

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1. I have voted in favour of several provisions of the operative part of the Award. These include the questions of jurisdiction, admissibility and costs. I am also in agreement with the Tribunal's finding that São Tomé acted lawfully in accordance with its law enforcement jurisdiction against *Duzgit Integrity* which did not have authorisation to carry out a ship to ship transfer of fuel oil.[1] I concur with the majority that the IMAP fine was reasonable and proportionate.[2] I also agree with the finding that Malta has failed to establish that there was coercion in the settlement negotiations between São Tomé and the owner of *Duzgit Integrity*;[3] that there was no differing treatment by São Tomé of the various vessels, including *Duzgit Integrity*;[4] that São Tomé did not expose the marine environment to an unreasonable risk in breach of Article 225;[5] that the events in the dispute occurred within the archipelagic waters of São Tomé;[6] and that there was no breach of obligation of Article 25.[7]

2. To my regret, however, I disagree with the Tribunal's finding that São Tomé violated Article 49(3) of the Convention. I also disagree with the finding that Malta is entitled "to proceed to claim reparation in respect of the heads of claim listed at paragraph 333 [of the Award] in a further phase of these proceedings".[8] I shall give the reasons for my disagreement with the majority.

Article 300

3. Before considering the two questions above, let me explain my slightly different approach on the question of Article 300. The Tribunal, in Section A on the merits observes that Malta has invoked Article 300 of the Convention in relation to all its claims.[9] While I am sympathetic with the reason[10] for the Tribunal not finding breach of Article 300, I am of the view that the Tribunal should have said more on this Article which Malta invokes in many of its accusations against São Tomé. The Respondent refers to the issue of bad faith and abuse of rights as "the

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[1] The Award, paras 234-236.

[2] The Award, para. 255.

[3] The Award, para. 265.

[4] The Award, para. 277.

[5] The Award, para. 293.

[6] The Award, para. 300.

[7] The Award, para. 310.

[8] The Award, para. 342(d).

[9] The Award, para. 211.

[10] The Award, para. 262.

most important substantive issue".[11] It is this issue that the Applicant raises primarily against the Respondent in its written and oral pleadings. Malta devotes a whole paragraph of its final submission to request the Tribunal "to declare, adjudge and order that São Tomé and Príncipe violated, and did so abusively and in bad faith, and in connected violation of Article 300 of the Convention . . . ." As the Respondent observes, Malta's case rests on Article 300.[12] Thus both Parties are expecting a substantive pronouncement from the Tribunal on Article 300 and the questions of bad faith and abuse of right.

4. In fact, the Applicant's accusations against the Respondent have implicitly been answered by the Tribunal along the lines of Article 300. For example, one of Malta's seven allegations against São Tomé concerns the calculation of the customs duties on the entire cargo aboard *Duzgit Integrity* whereas only a small fraction of the cargo was intended for transfer to *Marida Melissa.* This is one aspect that leads the Tribunal to conclude that São Tomé acted unreasonably and disproportionately in its sanctions against the Respondent.[13] But as the Respondent states, if *Duzgit Integrity* had sought authorisation it could have demonstrated to the customs authorities what it intended to transfer and the authorities would have checked the same.[14] If *Duzgit Integrity* had requested for permission for the STS transfer, this case would not have arisen.

5. The Tribunal notes that Article 300 is an overarching provision which applies to all provisions of the Convention. I concur with this and add that Article 300 is not a standalone provision, especially in respect of jurisdiction. It must be invoked with another substantive provision of the Convention. The Tribunal has also rightfully noted that it is not sufficient for an applicant merely to state that a respondent by undertaking certain actions did not act in good faith and acted in a manner which constitutes an abuse of rights without invoking particular provisions of the Convention that were violated.[15] This is an apt statement.

6. As the Respondent observes, allegations of bad faith and abuse of right should be supported by compelling evidence that leaves no room for doubt. In my view, States are presumed to act in good faith. Thus any allegation of bad faith cannot be presumed. It must be proved by the Party making such allegations.[16] Such allegations have been made by the Applicant in respect of the

[11] Hearing Transcript (23 Feb. 2016), 133:10-11.

[12] Hearing Transcript (24 Feb. 2016), 70:18-19.

[13] The Award, paras 256-262.

[14] Hearing Transcript (23 Feb. 2016), 138:1-7.

[15] The Award, para. 217, citing *M/V Virginia G* (Panama v. Guinea Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p.4 at p.109, para. 398.

[16] Michael Byers, "Abuse of Rights" (2002) 47 McGill L.J. 389, p. 399; the author refers to the PCIJ cases of Certain German Interests in Polish Upper Silesia (Germany v Poland) (1926) P.C.I.J. Ser. A No. 7 p.30 and Case

trial of the Master of *Duzgit Integrity*, the confiscation of *Duzgit Integrity* and the Settlement Agreement. The Applicant did not provide proof of bad faith and abuse of rights.

7. Malta's allegations that the Master did not get natural justice because of ineffective interpretation and that the *Auto de Notícia* did not mention the radio conversation of the first visit by the Coast Guard were disproved by the Respondent. The Master had local counsel who was chosen by *Agencia Ecuador* who represented the charterer. The courts did not disregard the transcript of the first radio conversation but did not accept it as evidence of the Master's veracity because there was no way of verifying its authenticity. The evidence had been extracted without a court official or prosecutor being present. The decision of the Court of First Instance was appealed to the Supreme Court which confirmed the decision of the lower court.

8. Hence the Master was tried fairly and due process of law was respected. The standard of appreciating the evidence in the trial and fines was in conformity with São Tomé's law. The Tribunal is not an appeal court on the domestic law of São Tomé. Its role is to consider whether São Tomé's enforcement actions were in conformity with the Convention. These comments are relevant in the analysis which follows.

Whether Article 49 was violated and the reasonableness principle

9. The Tribunal states that under international law, enforcement measures taken by a coastal State in response to activity within its archipelagic waters are subject to the requirement of reasonableness[17] "which encompasses the general principles of necessity and proportionality". The Tribunal finds the IMAP fine of EUR 28,875 to be reasonable and proportionate. It "finds that this measure fell well within the exercise by São Tomé of its law enforcement jurisdiction and must be given deference".[18] However, the Tribunal finds that other penalties imposed by São Tomé *when taken together* **(**emphasis added**)** were unreasonable and disproportionate. The measures considered to be unreasonable and disproportionate include the customs fine of EUR

of Free Zones of Upper Savoy and the District of Gex (France v Switzerland) (1932) P.C.I.J. (Ser. A/B) No. 46, p.167.

[17] Paragraph 254 refers to paragraph 209 of the Award which states: "The exercise of enforcement powers by a (coastal) State in situations where the State derives these powers from provisions of the Convention is also governed by certain rules and principles of general international law, in particular the principle of reasonableness. This principle encompasses the criteria of necessity and proportionality. These criteria do not only apply in cases where States resort to force, but to all measures of law enforcement. Article 293(1) requires the application of these principles. They are not incompatible with the Convention.

[18] The Award, para. 255.

1 million, the three year sentence of imprisonment for the Master of *Duzgit Integrity* and the indemnification of EUR 5 million by the two Masters.[19]

10. I disagree with the majority when they consider the cumulative effect of the sanctions by São Tomé to be disproportionate. Instead of considering each measure separately, the Tribunal lumps together penalties of "prolonged detention of the Master and the vessel, the monetary sanctions, and the confiscation of the entire cargo".[20] In my view, each penalty must be considered on its own merit. In any case when considering reasonableness in international law, it must be recalled that "what is reasonable and equitable in any given case must depend on its particular circumstances".[21] As stated by the Respondent in its pleadings, illegal STS transfers and bunkering have become notorious in the West African region. This illegal fuel trade in turn fuels illegal, unreported and unregulated (IUU) fishing which is high on the West African coast where São Tomé is situated.

11. Thus in applying enforcement measures due regard has to be paid to the particular circumstances of the case and the gravity of the violation.[22] The legislation of São Tomé takes into account the severity of the offence. The fines imposed by São Tomé have to be looked at from the viewpoint of this small island developing State ("**SIDS**"). This SIDS status does not imply that São Tomé has to be treated differently in respect of its international obligations. The remark is made in the context of São Tomé's comment that it does not have advanced technical communication and has only one Coast Guard boat. This necessitates physical checks of what could be done digitally in a country with advanced technology.[23] It is against this background that São Tomé's legislation must be assessed.

12. In considering the reasonableness of the measures taken by São Tomé the starting point is that *Duzigit Integrity* entered the archipelagic waters and commenced performing STS operations without the authorisation of the Respondent. This action contravened São Tomé's *Decreto-Lei*

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[19] The two Masters of *Duzgit Integrity* and *Marida Melissa*. Therefore each Master was supposed to pay EUR 2.5 million.

[20] The Award, para. 260.

[21] *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p.73 at p.96, para. 49.

[22] *M/V Virginia G* (Panama /Guinea Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p.4 at p.81, para. 270.

[23] *See M/V Virginia G* (Panama v. Guinea Bissau), Judgment of 14 April 2014, Joint dissenting opinion of vice president Hoffmann and judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia, ITLOS Reports 2014, p. 214 at p.229, para. 60:

> Offences relating to bunkering are difficult to detect, especially for the developing countries which do not have the capacity to police vast areas of exclusive economic zones. Hence, general deterrence features dominantly upon the assessment of penalty for breaches of fisheries and fishing-related legislation.

No. 4/2010 which requires 24-hour notice of arrival before entering the ports of São Tomé and is interpreted to be applicable to anchorage in the archipelagic waters and territorial sea.[24]

13. It is the entering of São Tomé's waters and the attempted STS operation without prior notification and authorisation that triggered the subsequent actions by the Respondent. The Tribunal has stated that São Tomé "acted lawfully and in accordance with its law enforcement jurisdiction resulting from its sovereignty over its archipelagic waters in relation to *Duzgit Integrity* on 15 March 2013".[25] It is the absence of authorisation[26] that triggered the arrest of the vessel and the Master's trial and fines. In this regard the Tribunal notes that "[n]on compliance with a requirement for prior authorisation under domestic law to undertake an STS operation has been found to be a serious violation".[27]

14. In fact, by attempting to perform an STS operation without authorisation *Duzgit Integrity* not only violated São Tomé's law but also breached internationally accepted standards of IMO's MARPOL.[28] It is in this context that I shall look at the Tribunal's reasoning on the penalties it considers to be unreasonable. The Tribunal finds that the customs fine of EUR 1 million on *Duzgit Integrity* "appears to be misplaced and disproportionate".[29] The Tribunal accepts the Applicant's contention that there was no question of importation of the oil aboard *Duzgit Integrity*. It also accepts that the planned STS operation was not a commercial transfer.[30] To these arguments one can only ask, how was São Tomé supposed to know the intention of the Master? A foreign ship cannot enter the waters of a coastal State with the intent of carrying out an STS operation without permission and then expect the coastal State to read its intentions in advance. If the Master had complied with São Tomé's law by seeking authorisation the problem would not have arisen. São Tomé could not have known that the bulk of the oil cargo[31] was not destined for its territory. If only approximately 1,555 MT of MGO was to be fined for customs

[24] The Award, para. 227.

[25] The Award, para. 235.

[26] The Tribunal's *obiter dictum* that "even though it appears that the Master may have held a *bona fide* but mistaken belief that he had been given permission" will be considered together with the question of mitigating circumstances.

[27] The Award, para. 236 where the Tribunal cites ITLOS jurisprudence: "In the view of the Tribunal, breach of the obligation to obtain written authorization for bunkering and to pay the prescribed fee is a serious violation", *M/V Virginia G* (Panama/Guinea-Bissau), Judgment of 14 April 2014, ITLOS Reports 2014, p.4 at p.80, para. 267. STS transfers and bunkering are similar in that both involve the transfer of oil from one vessel to another.

[28] Regulation 42 of Annex 1 to MARPOL.

[29] The Award, para. 257.

[30] *Ibid.*

[31] Approximately 8,200 MT of HFO.

evasion, it would be an incentive for oil tankers not to declare goods,[32] in view of the notorious illegal bunkering in West Africa already mentioned above.

15. It is in the light of this fact that the Customs Code of Procedure of São Tomé must be considered. Pursuant to Article 37(3) of the Code, the movement of goods illegally is considered smuggling (contraband offence). Smuggling is a serious offence which attracts commensurate serious penalties. In accordance with Article 38 of the Customs Code of Procedure "the perpetrators of the crime of contraband shall be punished with a fine of six to twelve times the amount of the duties or taxes due on the merchandise".

16. The Tribunal has not found São Tomé's legislation to contravene the Convention. The customs fine of EUR 1 million is seen as excessive because the goods on board the vessel were not being imported into São Tomé and the Master was a first time offender. This is an untenable argument as discussed below. The detention and prosecution of the Master must also be seen in the light of the severity of the offence of attempting an unauthorised STS transfer. For this, São Tomé's law in addition to administrative and civil proceedings, provides for criminal proceedings for failure to follow required procedures of paying customs duties. Article 274 of the Criminal Code states: "Any party that imports prohibited goods or merchandise or in other cases evades the customs duties due for the entry or exit of goods or merchandise whether as a whole or in part, shall be punished with a prison sentence of between 1 and 5 years" (emphasis added).[33] The Master was sentenced to 3 years imprisonment.[34]

17. The Tribunal states that the Master was convicted of serious offences that had never taken place. As already indicated above, this argument and those of first time offender and 'no importation intention' are untenable. In most legal systems, an attempt to commit an illegal act is a crime. Some inchoate crimes such as attempted murder or robbery are viewed as serious in municipal law. Given the serious state of smuggling on the West African coast, an incomplete act of smuggling has to be viewed as a grave violation.

18. The Tribunal also argues that the Master had no authorisation "even though it appears that the Master may have held a *bona fide* but mistaken belief that he had been give permission". This

[32] The Award, para. 242.

[33] Pursuant to Article 126 of the Criminal Code and Articles 483, 497 and 562 of the Civil Code, the owners and charterers of *Duzgit Integrity* were convicted jointly and severally with the Master and the vessel (and the Master of *Marida Melissa*) to pay indemnification of São Tomé Dobras 122.5 billion (approximately EUR 5 million) for damage suffered by São Tomé.

[34] Pursuant to Article 104(1) of the Criminal Code the vessel and the cargo were confiscated. Many coastal States' legislation provides for measures of confiscation of fishing vessels (and also for marine pollution) for the violation of relevant laws and regulations. Thus the Convention has to be interpreted in the light of the practice of coastal States – *Virginia G* case, para. 253.

and similar arguments made in the context of the cumulative effect reasoning are in fact seen as mitigating circumstances[35] by the Tribunal. But how can these be mitigating circumstances when the Tribunal has already found that the Master of the vessel did not seek prior authorisation for the STS operation? Even the Master himself was not convinced that he had obtained authorisation because he tried to contact the Coast Guard again to request permission for the operation.[36]

19. Furthermore, the charterers of *Duzgit Integrity*[37] were fully aware of the procedures and requirements for obtaining prior written authorisation to enter São Tomé waters. In view of the severity of the offence, the argument of first time offender does not persuade me. The need to deter smuggling offences outweighs this argument of first time offender. Even the legislation of the Applicant takes the offence of smuggling to be serious. Malta's Customs Ordinance states that "if any goods liable to the payment of duties are unshipped from any ship in Malta, duty not being first paid or secured . . . all such goods shall be forfeited".[38] I may add that ultimately the Master got a pardon after serving three months of the imprisonment. Only the IMAP fine was paid. The other fines were subsumed in the Settlement Agreement of 23 November 2013 between São Tomé and the owner of *Duzgit Integrity*. The Tribunal was not provided with evidence of these fines to have been paid.

20. The Tribunal has found that São Tomé violated Article 49(3) of the Convention[39] which provides: "[t]his sovereignty is exercised subject to this Part".[40]

21. The Tribunal devotes nearly sixty paragraphs[41] to the consideration of the alleged violation of Article 49(3) of the Convention in connection with a violation of Article 300. In essence this is the core of the Tribunal's judgment. I have already commented on some of the findings of the Tribunal under this heading in the context of reasonableness and proportionality.

22. The Applicant conflates Article 49(3) with Article 2(3) of the Convention which the Tribunal considers briefly in paragraphs 294 to 301 of the Award. Indeed Article 2(3) of the Convention

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[35] Malta also cites bad weather with high swells – not ideal for an STS transfer – as exonerating and extenuating circumstances which São Tomé should have taken into account with respect to the Master and the vessel. São Tomé counters this argument by noting that bad weather cannot be an exonerating circumstance because the STS operation was not an emergency situation.

[36] The Award, para. 231.

[37] Stena Oil of Sweden.

[38] Article 60, Part XI of the Customs Ordinance. *See also* the Award, para. 250.

[39] The Award, para. 342(c).

[40] Part IV of the Convention.

[41] The Award, Section B, paras 219-277.

was central to Malta's case against São Tomé. It covers much of Malta's argument in the written pleadings. Even at the oral hearing Malta continued to rely on this article which provides:

23. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

24. While Malta does not challenge São Tomé's sovereignty under either Article it argues that there is no difference between the sovereignty granted to a coastal State in the territorial sea and in the archipelagic waters. Malta challenges the enforcement actions by São Tomé of its domestic law as being excessive. It is contesting the manner in which São Tomé exercised its sovereignty. The Tribunal too has not questioned São Tomé's sovereignty. The Tribunal has found that the relevant events in the dispute occurred within the archipelagic waters of São Tomé and that therefore the relevant provisions of the Convention are those contained in Part IV.[42] It rejected Malta's argument that the sovereignty of São Tomé was triggered under Article 2(3) the moment *Duzgit Integrity* entered São Tomé's territorial sea.

25. In my view the Tribunal should have gone further and declared categorically that Article 2(3)[43] is irrelevant to the present case. The Applicant tactically corrected its position in the Reply after the Respondent had spelt out clearly in the Counter Memorial that the events of 15 March 2013 and subsequent ones took place in the archipelagic waters and not in the territorial sea.

26. The Convention provides for different regimes in its seventeen parts. Limitations are set out to the exercise of sovereignty. There is no absolute sovereignty in the legal order of UNCLOS. States Parties have put some limitations to State sovereignty in order to ensure peaceful international cooperation. Even the freedom of navigation, contrary to what the Applicant contends[44] is limited in archipelagic waters by Article 19 of the Convention. The sovereignty enjoyed by an archipelagic State in its archipelagic waters is subject to a number of limitations in order to cater for the rights of third States. Article 49(3) of the Convention states that the sovereignty is exercised subject "to this Part" – *i.e.*, Part IV on archipelagic States.

27. The exceptions listed in Part IV include respect of existing agreements with other States, recognition of traditional fishing rights, respect of existing submarine cables laid by other

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[42] The Award, para. 300.

[43] In the *Chagos Islands Case* where Article 2(3) was relevant, the Tribunal concluded that "the obligation in Article 2(3) is limited to exercising sovereignty subject to the general rules of international law" which require the Respondent to act in good faith, *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), Award of 18 March 2015, PCA, paras 514-517.

[44] Hearing Transcript (23 Feb. 2016), 21:11-14.

States[45] and the right of archipelagic sea lanes passage.[46] The Convention also recognises the right of innocent passage through archipelagic waters, in accordance with Part II, Section 3.[47] Article 2(3) of the Convention is not incorporated into Part IV. This non incorporation was deliberate by the drafters of the Convention.

28. Sovereignty enjoyed in the territorial sea is not the same as that in the archipelagic waters.[48] Otherwise the drafters of the Convention would have included the phrase "other rules of international law" in Article 49(3). The fact that they did not do so means that Article 49 is only subject to the rights referred to in the preceding paragraph. This then confirms that the concepts of archipelagic waters and the territorial sea, although bearing a number of resemblances, are not the same.[49] Thus I am of the opinion that even if there are limitations on the coastal State's enforcement jurisdiction in archipelagic waters, the coastal State still enjoys a broad margin of appreciation in determining what constitutes appropriate measures in the context of Article 49(3) of the Convention.[50] I therefore do not agree with the majority that there was a violation of Article 49(3) and that the measures taken by the Respondent were unjustified or manifestly disproportionate.

Whether Malta is entitled to proceed to claim reparation

29. Having concluded that São Tomé did not violate Article 49(3), 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 Award in a further phase of the proceedings. I shall not go into details on the subject of reparation which is likely to come up at a subsequent phase of the proceedings. I shall make some comments on contributory factors and then conclude that São Tomé has not committed an internationally wrongful act which warrants the invocation of State responsibility leading to the making of reparation.

30. As regards the form of reparation claimed by Malta, the Tribunal considers that the first two forms of reparation – namely full satisfaction and a declaratory judgment – have been disposed

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[45] Article 51 of the Convention.

[46] Article 53 of the Convention.

[47] Articles 17 to 32 of the Convention on innocent passage in the territorial sea.

[48] Sovereignty is not of equal quality in both maritime zones as Malta claims.

[49] Churchill and Lowe, *The Law of the Sea*, 3rd Edition 1999, p.125. The authors state that the concept of archipelagic waters is a new one in international law. They argue, nevertheless, that there is a good deal of evidence to suggest that the provisions concerning archipelagic waters have passed into custom; *ibid*. p. 129. The fact of the concept being new does not make the archipelagic waters a lesser right than the territorial sea regime, for example.

[50] *See* Hearing Transcript (23 Feb. 2016), 118:23-25.

of by the declaratory judgment.[51] It is the third form of reparation, namely, compensation that the Tribunal finds that Malta is entitled to claim in a further phase of the proceedings.

31. In this regard, I share the view of the Respondent that *Duzgit Integrity* has materially contributed to the damages claimed by Malta by not complying with the applicable rules and regulations.[52] The Master of *Duzgit Integrity*, by not seeking authorisation for the STS transfer, has contributed to the alleged injury. Article 39 of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts states:

> **Article 39**
> *Contribution to the injury*
> In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

32. The commentary to Article 39 states that the conduct of the injured State or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. Only those actions or omissions which can be considered as wilful or negligent should be taken into account in considering contribution to the damage.

33. In the present case, the owners of *Duzgit Integrity* waived their right to bring any claim against São Tomé in the Settlement Agreement of 23 November 2013. Furthermore, the charterers of the vessel, Stena Oil, contributed to the delay in reaching a negotiated settlement due to its defamatory statements against São Tomé.[53] All these issues should be taken into account as contributory factors when considering the question of compensation.

Dated: 5 September 2016

Judge James L. Kateka
Arbitrator

[51] The Award, para. 332.

[52] The Award, para. 331.

[53] The Award, para. 94, where Stena Oil calls São Tomé "an unscrupulous government trying to enrich themselves by confiscating assets from foreign business"; *see also* the Award, para. 101.