preparation and conduct of its case" (*id.*). No judicial decisions or state practice and *opinio juris* are cited, and no factual basis for the expectation is reviewed. Presumably, more analysis will come at the merits stage of the case.

Although the attorney-client privilege is well established in many legal systems, the closest analogy might have occurred last year when defense attorneys for a Guantánamo prisoner charged that U.S. intelligence agencies were eavesdropping on conversations with their clients. In that context, the military judge in the case suggested removing the microphone from the defense table to ease the concern.[21] Nevertheless, it is doubtful that one will find many reported instances of government intelligence agencies' seeking to monitor attorney-client communications, with the risk that the communications would be shared with that government's attorneys to the potential prejudice of the client.[22] Nor does it seem likely that one will find precedent—in either reported decisions or state practice—involving the seizure or interception by one state of the communications of an attorney representing another state, when those two states are involved in dispute settlement or negotiations.

The conclusion that such a seizure or intrusion violates customary international law will involve new legal reasoning. It is hard to see how this plausible rule derives from Article 2(1) of the Charter—the principle that the "Organization [i.e., the United Nations] is based on the principle of the sovereign equality of all its Members." How does the seizure in this case affect the United Nations as an organization?

Perhaps the principle in Charter Article 2(3) is more relevant—that members "shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Access by one state to the privileged communications of another state with its legal advisers when those states are engaged in an arbitration or negotiation of a dispute between them may endanger peaceful settlement of the dispute in a manner consistent with justice.

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Exclusive economic zone—fishing—regulation of bunkering—confiscation of vessels—judicial review of penalties—nationality of ships—genuine link—flag state claims for losses by foreign nationals—exhaustion of local remedies—influence of practice on treaty interpretation

THE M/V "VIRGINIA G" (Panama/Guinea-Bissau). Case No. 19. 53 ILM 1164 (2014). International Tribunal for the Law of the Sea, April 14, 2014.

On August 21, 2009, the Panamanian-flagged tanker *Virginia G* was arrested by Guinea-Bissau in its exclusive economic zone (EEZ) for unlawfully bunkering (refueling) foreign vessels fishing there. Several days later, the *Virginia G* and the gas oil (diesel) on board were confiscated by the government. Subsequent provisional measures orders of the Regional Court of

[21] Jane Sutton, *Rip out Guantanamo Microphones to Prevent Eavesdropping: Judge*, REUTERS, Feb. 4, 2013, *at* http://www.reuters.com/article/2013/02/05/us-usa-guantanamo-idUSBRE91400T20130205.

[22] Such a situation was reported in February 2014. Australia intercepted communications between Indonesia and its American lawyers on trade issues and shared that information with the U.S. government while the United States was involved in trade negotiations with Indonesia and in disputes with Indonesia, apparently on the same issues, before the World Trade Organization. James Risen & Laura Poitras, *Spying by N.S.A. Ally Entangled U.S. Law Firm*, N.Y. TIMES, Feb. 16, 2014, at A1, *available in* 2014 WLNR 4661358.

Bissau suspended the confiscation at the request of the owner. Nevertheless, the Guinea-Bissau authorities had the gas oil removed from the ship. The government's decision to release the ship more than a year after its arrest followed "the persistent request by the Embassy of Spain for its release" and took into consideration, among other things, Guinea-Bissau's "friendship and cooperation with the Kingdom of Spain in the field of fisheries, knowing that although the vessel has a Panamanian flag, it belongs to a Spanish company" (paras. 82, 140).

In its judgment of April 14, 2014,[1] the International Tribunal for the Law of the Sea (ITLOS or Tribunal) concluded that, under the United Nations Convention on the Law of the Sea (Convention),[2] the bunkering of vessels fishing in the EEZ is subject to regulation by the coastal state, and that confiscation of a vessel and its cargo is a permissible penalty for violation of the coastal state's fisheries regulations in the EEZ, but that confiscation was not "necessary to ensure compliance" with those regulations in the circumstances of this case (para. 269). Damages were awarded for the confiscation of the gas oil and for the cost of repairs to the ship, but not for lost profits during the ship's detention, the largest element of the damages claimed.

Panama originally submitted the dispute to arbitration under Annex VII to the Convention. In its letter of June 3, 2011, notifying Guinea-Bissau of the submission, Panama also raised the possibility of "resolving the dispute contentiously, yet in a less costly manner" pursuant to an agreement to submit it "to ITLOS through an exchange of letters" (para. 2). Guinea-Bissau agreed to the transfer to ITLOS, "whose jurisdiction in this case Guinea-Bissau accepts fully," and Panama notified the Tribunal of the special agreement on July 4, 2011 (paras. 3, 5).[3] The Tribunal upheld the contention of Guinea-Bissau that it retained the right to make counterclaims and to interpose objections to the admissibility of Panama's claims (paras. 24, 101). There were no objections to jurisdiction under Article 297 of the Convention or otherwise.[4]

The objection to admissibility on grounds of the absence of a genuine link between Panama and the ship was rejected unanimously (para. 452(3)). The Tribunal reaffirmed its prior conclusion that the purpose of the genuine link requirement "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" (para. 112).[5] The Tribunal also declared that the "meaning of 'genuine link'" is the requirement for the flag state under Article 94 of the Convention to "exercise effective jurisdiction and control over th[e] ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices" (para. 113).[6]

[1] M/V Virginia G (Pan./Guinea-Bissau), Case No. 19 (ITLOS Apr. 14, 2014), 53 ILM 1164 (2014) [hereinafter Judgment]. Judgments of the Tribunal cited herein are available at its website, http://www.itlos.org.

[2] United Nations Convention on the Law of the Sea, Art. 73(1), *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *available at* http://www.un.org/depts/los/ [hereinafter Convention].

[3] Former ITLOS Judge Tullio Treves and Professor José Manuel Sérvulo Correia were appointed by Panama and Guinea-Bissau, respectively, as judges *ad hoc*.

[4] Article 297 limits compulsory jurisdiction over disputes concerning the exercise of coastal state sovereign rights, including fishing in the EEZ.

[5] Quoting M/V Saiga (No. 2) (St. Vincent v. Guinea), 1999 ITLOS Rep. 10, 42, para. 83 (reported by Bernard H. Oxman & Vincent Bantz at 94 AJIL 140 (2000)) [hereinafter Saiga (No. 2)].

[6] This analysis casts doubt on alternative hypotheses advanced at the International Law Commission in the 1950s and more recently at the International Maritime Organization, the Food and Agriculture Organization, and the UN General Assembly. *See* Vincent P. Cogliati-Bantz, *Disentangling the "Genuine Link": Enquiries in Sea, Air and Space Law*, 79 NORDIC J. INT'L L. 383, 398–415 (2010).

Having examined the information before it and finding no reason to question Panama's exercise of effective jurisdiction and control over the ship, the Tribunal decided that a genuine link existed at the time of the incident (paras. 114, 117, 325). The Tribunal took note of Article 91(1) of the Convention, which does not impose "any limitations on the nationality of shipowners or crew" as regards the right of a state to grant its nationality to ships (para. 323), and unanimously concluded that Guinea-Bissau had violated Article 73(4) of the Convention "by failing to notify Panama, as the flag State, of the detention and arrest of the *M/V Virginia G* and subsequent actions taken against the vessel and its cargo" (paras. 328, 452(11)).

The judgment also rejected the objection to the admissibility of Panama's claims on the grounds that "the owner of the vessel and the crew are not nationals of Panama" (paras. 129, 452(4)). Relying on its prior decision to similar effect,[7] the Tribunal found 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" (para. 127). It therefore held that "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" whether or not they are its nationals (*id.*).

In addition, the Tribunal rejected the objection, on grounds of nonexhaustion of local remedies, to the admissibility of claims made in the interests of individuals or private entities (para. 452(5)). Article 295 of the Convention conditions access to its compulsory dispute settlement procedures on exhaustion of local remedies "where this is required by international law." After examining Article 14(1) of the International Law Commission's Draft Articles on Diplomatic Protection,[8] the Tribunal considered whether the exhaustion of local remedies is required because the preponderant element of the claim related to injury to private persons rather than a direct injury to the state.[9] It concluded that the principal rights under the Convention alleged to have been violated "include the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas" in the EEZ under Article 58 of the Convention "and its right that the laws and regulations of the coastal State [be] enforced in conformity with article 73 of the Convention" (para. 157). Those rights "belong to Panama under the Convention" and violations of them "thus amount to direct injury to Panama" (*id.*).[10]

Panama argued that the provision of bunkering services is encompassed by the freedoms and rights of all states in the EEZ under Article 58(1) of the Convention, notably the freedom of navigation and other internationally lawful uses of the sea related to that freedom (para. 165). In this regard, it distinguished between the coastal state's regulation of bunkering by fishing vessels because of their fishing activities in the EEZ, and the regulation of the bunkering vessel

[7] Saiga (No. 2), at 48, para. 106.

[8] Draft Articles on Diplomatic Protection, Art. 14(1), *in* Report of the International Law Commission, Fifty-Eighth Session, UN GAOR, 61st Sess., Supp. No. 10, at 16, 20, UN Doc. A/61/10 (2006).

[9] Panama initially argued that it was bringing the case "within the framework of diplomatic protection," Judgment, para. 119, but thereafter maintained that it was claiming "a violation of its own right to secure, in respect of vessels flying its flag, freedoms for which the Convention provides," *id.*, para. 142. Panama added that it would allocate respective portions of the compensation it might be awarded to the private parties who suffered damage or loss. *Id.*, para. 143.

[10] Two judges, who believed that the claim was preponderantly brought on the basis of an injury to private persons, nevertheless concluded that exhaustion of local remedies was not required because the "repeated intrusion of the political and administrative authorities of the country into the course of justice precluded the possibility of any effective redress or reparation." Judgment, Joint Separate Opinion of Judges Cot and Kelly, para. 32.

that is at issue in this case (para. 177). Guinea-Bissau argued that bunkering in support of fishing operations in the EEZ has a much stronger connection to the right of the coastal state to regulate fishing there under Article 56 and related provisions than to freedom of navigation (para. 193).[11]

The Tribunal interpreted the Article 62(4) list of fisheries management measures that may be taken by the coastal state to require "a direct connection to fishing" (para. 215). It observed that such a connection exists with respect to bunkering of foreign vessels fishing in the EEZ "since this enables them to continue their activities without interruption at sea" (*id.*). In this context, the Tribunal cited and was "guided by" broad definitions in various international agreements of "fishing" and "fishing-related activities" that include support operations and support vessels (para. 216). It also noted that other states, in West Africa and elsewhere, regulate bunkering of foreign vessels fishing in the EEZ, and "that there is no manifest objection to such legislation and . . . it is, in general, complied with" (para. 218).

In the view of the Tribunal, Article 56 of the Convention concerning the coastal state's sovereign rights regarding natural resources in the EEZ is to be read together with Article 58 on the rights and freedoms of all states in the EEZ. It concluded that "the bunkering of foreign vessels engaged in fishing" in the EEZ "is an activity which may be regulated by the coastal State concerned," but that the coastal state "does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention" (para. 223).

Panama argued that the payment required for the authorization of bunkering in reality represents an attempt to extend tax or customs legislation to the EEZ (paras. 178–79, 231). In the *Saiga* case, the Tribunal found that, under the Convention, the coastal state has jurisdiction to apply its customs laws and regulations within the twenty-four-mile limit of the contiguous zone and with respect to artificial islands, installations, and structures in the EEZ, but not with respect to any other parts of the EEZ.[12] Although this finding "applies to laws on taxes as it does to laws concerning customs," the Tribunal agreed with Guinea-Bissau that the requisite payment is a fee that "is not guided by its fiscal interests but is for services rendered in connection with the authorization of bunkering" and "does not constitute an attempt to extend its tax and customs legislation" to the EEZ (paras. 233–34).[13] Moreover, the procedure for obtaining a permit was not unduly burdensome (para. 235).

Article 73(1) of the Convention authorizes the coastal state, in the exercise of its sovereign rights over the living resources in the EEZ, to "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention." Referring to its previous

[11] The Tribunal did not address the environmental protection argument made by Guinea-Bissau, noting that "Guinea-Bissau incorporated its regulations on bunkering in its legislation on fishing rather than in legislation concerning the protection of the marine environment." Judgment, para. 224.

[12] Saiga (No. 2), *supra* note 5, at 54, para. 127.

[13] Article 62(4) of the Convention permits the coastal state to require, from foreign vessels permitted to fish in the EEZ, "fees and other forms of remuneration" and other benefits related to fishing that are of economic value to itself and its nationals. The opinion does not purport to limit that right, or the collection of royalties, taxes, and other revenues in connection with the issuance, enjoyment, and exercise of rights to explore and exploit hydrocarbons and other resources of the continental shelf.

observation to this effect,[14] the Tribunal noted that many coastal states provide for the confiscation of vessels for fisheries violations in the EEZ. It interpreted Article 73(1) in the light of that practice and held that legislation authorizing confiscation "is not *per se* in violation of" that provision (para. 257).

The Tribunal emphasized that enforcement measures must be necessary to ensure compliance with the laws and regulations of the coastal state (para. 256). "Whether or not confiscation is justified in a given case depends on the facts and circumstances" (para. 257). In this regard, the *Virginia G* did not have the requisite written authorization for bunkering and had not paid the fee prescribed, "amounting to a value of €112.00" (para. 266). This is "a serious violation," but there were "mitigating factors" (paras. 267, 268). The two fishing vessels arrested together with the *Virginia G* for unlawful bunkering were merely fined and quickly released; two others were neither arrested nor fined (para. 268). The proper authorities had been informed of the bunkering. The failure to obtain written authorization was "rather the consequence of a misinterpretation of the correspondence" with government officials "than an intentional violation" (para. 269). In these circumstances, the confiscation "was not necessary either to sanction the violation committed or to deter the vessels or their operators from repeating this violation" (*id.*). The Tribunal thus found that the confiscation of the vessel and the gas oil on board violated Article 73(1) of the Convention (para. 452(8)).

Article 73(2) of the Convention requires prompt release of an arrested vessel and crew upon the posting of reasonable bond. The Tribunal rejected Panama's contention that Guinea-Bissau's statutory procedure for obtaining such a release was unreasonable and unaffordable (paras. 295, 452(9)). This conclusion, in turn, underlay the Tribunal's rejection of Panama's claim for lost profits on behalf of the owner; namely, that there was no direct causal nexus between confiscation of the vessel and loss of profit because the owner failed to use the available procedures for prompt release on bond (paras. 436, 438).[15]

Applying Article 73(2) in a prior case, the Tribunal had required the release on bond of the master of a fishing vessel whose passport had been taken away.[16] In this case, the question whether Guinea-Bissau had violated the Convention by holding the passports of crew members for four months was raised in the context of the prohibition in Article 73(3) on imprisonment or other forms of corporal punishment as penalties for fisheries violations in the EEZ. The Tribunal found no contravention of that prohibition (paras. 310, 452(10)).

* * * *

The judgment in this case helps clarify the interpretation and application of the Convention, especially with regard to the regulation of foreign vessels fishing in the EEZ. In reaching its decision on the two most important fisheries management issues presented, the authority to regulate bunkering and to impose confiscation as a penalty under the Convention, the Tribunal carefully considered the way those issues were addressed in municipal legislation and international agreements on fishing. This attention to the practice of the parties to the Convention

[14] Citing Tomimaru (Japan v. Russ.), Prompt Release, 2005–07 ITLOS Rep. 74, 96, para. 72 (reported by Bernard H. Oxman at 102 AJIL 316 (2008)).

[15] Claims for lost profits of the charterer after the termination date of the charter party were rejected on contractual grounds. Judgment, para. 437. *Contra* Separate Opinion of Judge Akl, paras. 9–10.

[16] Camouco (Pan. v. Fr.), Prompt Release, 2000 ITLOS Rep. 10, 32–33, para. 71 (reported by Bernard H. Oxman & Vincent P. Bantz at 94 AJIL 713 (2000)).

in its application increases the likelihood that the Tribunal's interpretation will be welcomed by governments and will promote stability.[17]

The judgment suggests that bunkering in the EEZ as such is not subject to coastal state jurisdiction; there must be a specific basis in the Convention for the coastal state's competence. That is, Panama correctly argued that in principle bunkering is governed by the freedom of navigation and related activities under Article 58(1), and Guinea-Bissau correctly argued that bunkering of vessels fishing in the EEZ is subject to coastal state jurisdiction over the conservation and management of living resources in the EEZ under Article 56 and related provisions. The tension between the two propositions results from the preservation of freedom of navigation but not freedom of fishing in the EEZ.

Two key questions that divided the Tribunal were the exhaustion of local remedies and the lawfulness of the confiscation. Each was decided by a vote of 14-9, with the same judges on each side.[18]

As to the first question, states implement their freedom of navigation under international law primarily by authorizing private ships of their nationality to exercise that freedom. The security and economy of many states, including, but not limited to, flag states, depend on that freedom. Perhaps its most important legal consequence is the right to ensure that it is respected by other states. This was a principal reason for the inclusion of compulsory dispute settlement provisions in the Convention. Freedom of navigation is particularly important in the EEZ because it applies to the same area where the coastal state has sovereign rights with respect to natural resources and attendant enforcement powers with respect to foreign ships.[19] Making vindication of the freedom of navigation and related rights in an international tribunal dependent on exhaustion of local remedies in the arresting state would undermine that basic construct. The Tribunal performed a signal service in recognizing this.

The duty of the coastal state under Article 62(2) of the Convention to "give other States access to the surplus of the allowable catch" and the extensive provisions addressing the rights and duties of the coastal state regarding fishing, including Article 73, form part of the overall balance between the interests of the coastal state and those of the flag state in the EEZ. The protection of the regulatory and enforcement interests of the coastal state in the EEZ from interference by international tribunals is addressed by the Convention in great detail, notably in Articles 292(3), 294, 297, and 298. In that context, one cannot easily sustain the suggestion that the flag state faces an additional obstacle of exhaustion of local remedies when a foreign ship is arrested in the EEZ; that position could also have the perverse effect of discouraging the kind of liberal interpretation of the scope of the coastal state's rights that characterizes the opinion in this case on the basic issues of the coastal state's competence with respect to fishing. A very different situation would be presented where, for example, the object of a confiscation is a property interest in continental shelf hydrocarbons or installations. That is not this case.

As to the second question, the Tribunal revealed substantial sensitivity to the difficulties posed by the widespread temptation to resort to confiscation of fishing vessels. Mandating harsh treatment of foreigners is perhaps too facile a way to curry favor with local constituencies.

[17] The Tribunal did not, however, assert that the subsequent practice amounted to an agreement of the parties regarding the interpretation of the Law of the Sea Convention. *See* Vienna Convention on the Law of Treaties, Art. 31(3)(b), *opened for signature* May 23, 1969, 1155 UNTS 331.

[18] The majority on these issues did not include judges from African or Lusophone countries.

[19] *See* Convention, *supra* note 2, Art. 297(1)(a).

Confiscation can be a useful enforcement tool, but it can also be a blunt instrument that is not readily calibrated to make the punishment fit the crime. This case offered a good opportunity to address the problem.[20] The Tribunal emphasized that the necessity and reasonableness of a penalty must be assessed on a case-by-case basis in light of the circumstances. In that context, it went out of its way to uphold the law of Guinea-Bissau by finding that its statute affords the authorities and courts flexibility over whether or not to confiscate. Accordingly, it seems unlikely that reasoned determination of penalties by law enforcement professionals and municipal courts in light of the circumstances of the violation will be second-guessed.

The implications of this decision for international human rights law merit further analysis. The Tribunal quoted a passage from a prior case that a decision to confiscate should not be taken "through proceedings inconsistent with international standards of due process of law" (para. 254).[21] While it did not explicitly rely on that statement in assessing the penalty of confiscation in this case, it did state that the "principle of reasonableness applies generally to enforcement measures under article 73" (para. 270).

The *Virginia G* judgment was accompanied by five declarations, four separate opinions, and four dissenting opinions. In all, sixteen of the twenty-three judges wrote or joined one of these, and two judges wrote or joined two. The president and four other judges neither wrote nor joined any.

Judges, scholars, and practitioners are familiar with the possible tension between the need to forge and maintain a coherent majority on a collegial court and the need to write a coherent opinion. If remedies, including the quantification of damages, can offer a fertile field for accommodation in aid of the first objective, articulation of the outcome may take its toll on the second. The rationale for the decision to deny any recovery for lost profits in this case is a good example.[22] In reaching their decision, the judges were doubtless aware of alternatives, such as reducing damages on grounds of contributory fault or failure to mitigate losses. It is perhaps not coincidental that the proffered rationale for denying any damages for the shipowner's lost profits, namely, that the owner had failed to seek prompt release under the laws of Guinea-Bissau, evokes at least some of the considerations that inform the exhaustion-of-local-remedies requirement and mirrors the consequences of failure to do so.

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[20] This is not the first time that the Tribunal has confronted complexity and lack of clarity in coastal state legislation. The law of Guinea-Bissau created confusion in the *Juno Trader* case over the effect of a decision by an administrative body to confiscate the vessel. *See* Juno Trader (St. Vincent v. Guinea-Bissau), Prompt Release, 2004 ITLOS Rep. 17; Vincent P. Bantz, *Views from Hamburg: The* Juno Trader *Case or How to Make Sense of the Coastal State's Rights in the Light of Its Duty of Prompt Release*, 24 U. QUEENSL. L.J. 415, 422 (2005). In the *Tomimaru* case, *supra* note 14, considerable controversy surrounded the procedure in Russian law applicable to a bond in parallel administrative and criminal proceedings.

[21] Quoting Tomimaru, *supra* note 14, at 96, para. 76.

[22] *See* Judgment, Separate Opinion of Judge Akl, *passim*; Separate Opinion of Judge Paik, paras. 39–48; Declaration of Judge *ad hoc* Treves, paras. 2–4.