Marine insurance cover for detainment of vessels by a foreign state – the *Team Tango* case[1]

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Contents

1 Introduction and overview

The topic of this article is marine insurance cover for the detainment of vessels by a foreign state, as illustrated by a recent Norwegian arbitration case – the *Team Tango* case.[3] It is well known that vessels entering foreign ports may be detained by the governing state, with or without an accepted legal basis for making such intervention. This may prevent the vessel from leaving the port and so lead to delay, resulting in loss of income under the vessel's freight contract. Detainment may also lead to damage to the vessel, and, if the vessel is not freed from the detainment, in the vessel being lost. The question will then be whether such delay, damage and total loss are covered under the vessel's hull and loss of hire insurance. Unfortunately, this issue has gained importance in recent years, because states have arrested foreign vessels in their ports on dubious legal bases and then detained them for lengthy periods, even ending up confiscating the vessel. The question of insurance cover for this peril is therefore an important issue for both the ship owners and the insurance community.

This question was on the agenda when the Nordic Marine Insurance Plan 2013 was amended in 2019.[4] A principal concern with this amendment was to extend the cover for intervention by foreign states, and also to clarify issues that had been disputed in the previous versions.[5] However, even with this amendment, the question of insurance cover for state intervention is difficult. This is illustrated by the arbitration award concerning the vessel *Team Tango*. *Team Tango* was insured under the

[3] Arbitration award from 10 April 2019. The arbitration tribunal consisted of previous Chief Justice of the Supreme Court Tore Schei (chairman), previous Supreme Court Justice Karin Bruzelius and professor Trine-Lise Wilhelmsen. The award is currently unpublished, but will be published in Nordiske Domme i Sjøfartsanliggende. The award is written in Norwegian, but is partly translated by the author for use in this article.

[4] The Nordic Association of Marine Insurers (Cefor), 'The Nordic Marine Insurance Plan 2013, Version 2019' < http://nordicplan.org/The-Plan/> (accessed 21 October 2021).

[5] Trine-Lise Wilhelmsen, 'Cover for Intervention by State Power in the Nordic Plan from 2019: a Fair and Timely Compromise?' (2018) JIML 24, 354-368; Trine-Lise Wilhelmsen, 'Marine Insurance for Intervention by State Power' (2019) MarIus 519, 151-198.

Nordic Marine Insurance Plan 2013 Version 2016, but the regulation of the disputed issue is similar to the regulation under the 2019 Plan and demonstrates some of the difficulties involved. The main issue in the *Team Tango* case was whether the detainment constituted a marine peril or a war peril, see 4 below. However, the assured also submitted that there was a combination of war peril and marine peril, and the case illustrates the relationship between the concept of peril and issues of causation in this situation, see 5 below. Furthermore, it is interesting to see how the case would have been solved under the UK conditions, see 6 below.

Before we address these questions, it is first necessary to give a presentation of the Nordic Marine Insurance Plan in 2, and then outline the amendment of the cover for intervention by foreign states in 3.

2 The Nordic Marine Insurance Plan 2013

The Nordic Marine Insurance Plan 2013 (NP) is an agreed insurance contract covering i.a. hull insurance, hull interest insurance and loss of hire insurance for vessels. It contains both insurance against marine risk, as well as insurance against war risk. The NP is used in all the Nordic countries and contains a comprehensive regulation which also provides provisions for questions ordinarily regulated under national insurance legislation.[6]

The NP is based on the Norwegian Marine Insurance Plan 1996 Version 2010 (NMIP 2010),[7] but some of the clauses are adjusted to conform to national background law in the other Nordic countries. Most of the clauses, however, including thereunder the clauses relevant for this

[6] The main textbooks on the NP are Sjur Brækhus and Alex. Rein, *Håndbok i Kaskoforsikring* (Oslo, Sjørettsfondet, 1993) and Trine-Lise Wilhelmsen and Hans Jacob Bull, *Handbook on Hull Insurance* (2nd edn, Gyldendal 2017)

[7] The Nordic Association of Marine Insurers (Cefor), 'The Norwegian Marine Insurance Plan of 1996, Version 2010' <http://nordicplan.org/Archive/The-Norwegian-Plan-2010/> (accessed 21 October 2021).

article, are identical or similar to the previous clauses. Previous practice on these clauses is therefore still relevant.

As the NP is based on the NMIP 2010, it is necessary to outline the historical development of the NMIP, in order to understand the relationship between the NMIP and the NP and the different versions of the NP.

The first NMIP was published in 1871, and was later followed by several more Plans,[8] the most recent being the 1996 Plan. The NMIP 1996 was published in several versions, the most recent in 2010.[9] At this time, the Nordic Association of Marine Insurers (Cefor), which is responsible for the maintenance and publishing of standard marine insurance conditions in the Nordic market, decided that, instead of operating with a separate set of standard conditions in each of the Nordic countries, the maintenance effort should be concentrated on one common set of conditions. Cefor chose the Norwegian Marine Insurance Plan 1996 Version 2010 as the basis for a set of unified Nordic conditions. An agreement was entered into between Cefor and the Norwegian, Danish, Swedish and Finnish ship-owner associations on 3 November 2010 to construct the Nordic Marine Insurance Plan of 2013, which came into force in January 2013. The agreement established the Standing Revision Committee to be responsible for amending the NP every third or fourth year. The NP was amended in 2016 and again in 2019.[10] *Team Tango* was insured under the 2016 Version. The cover for interventions by foreign states was however, amended in the 2019 Version i.a. to clarify the previous clauses, and the arbitration case also refers to the Commentary to this version. Both versions will therefore be addressed in this article.

The NP is supplemented by extensive and published commentaries (the Commentary). Until 2007 the Commentary was published both in hard copy and on the website. From 2007 onward the Commentary has only been published on Cefor's website.[11] The references to the 2019 Com-

8 The Plans of 1881, 1894, 1907, 1930 and 1964.

9 Version 1997, Version 1999, Version 2000, Version 2002, Version 2003, Version 2007 and Version 2010.

10 Wilhelmsen and Bull (n 4) 26.

11 Wilhelmsen and Bull (n 4) 27.

mentary in this article are to the pdf-download placed on this website for the 2019 Version.[12] The references to the 2016 Commentary are also to the version on the website.

The starting point for interpretation of the NP is of course the wording of the clauses. However, the Commentary is a relevant and highly significant legal source for the interpretation, cf. the following remark in the Commentary:

> 'The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. … Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes.'[13]

The opinion of the Plan Committee that the Commentary is a significant factor for the interpretation of the Plan has been accepted both by the Supreme Court[14] and also in arbitration cases.[15] It should also be noted that arbitration awards are more relevant as a legal argument for interpretation in marine insurance than is the case in many other legal disciplines.[16] The reason for this is that many marine insurance conflicts are solved by arbitration, and that those arbitration awards are often published. Cases concerning matters of principle will then be discussed by the Standing Revision Committee, which will either agree upon the award and include it as a legal source in the Commentary, or instead dis-

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12 The Nordic Association of Marine Insurers (Cefor), 'Commentary' <http://www.nordicplan.org/Commentary/> (accessed 21 October 2021).

13 Commentary (2019) 25.

14 ND 1956.323 NSC *Pan;* ND 1956.318 NSC *Bandeirante;* ND 1969.49 NSC *Grethe Solheim;* ND 1998.216 NSC *Ocean Blessing.*

15 ND 2000.442 NA *Sitakathrine.*

16 Trine-Lise Wilhelmsen, 'Choice of Forum in the Nordic Marine Insurance Plan – Regulation and Practice' (2019) MarIus 515, 71-95.

agree with it and make the necessary changes to the text or commentary to depart from it.[17]

3 The NP regulation of detainment by foreign state

The scope of cover in the NP is divided between insurance against marine perils and insurance against war perils. In formal terms, this distinction is made in two stages. The insurance against marine perils is based on the all risks principle, which states that the insurance covers all perils to which the interest is exposed, unless the peril is specifically excluded. Perils covered under the war risk insurance are then excluded from the marine risk cover. The relevant provisions in the NP Version 2016 reads as follows:

> **Clause 2-8. Perils covered by an insurance against marine perils**
> An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:
> (a) the perils covered by an insurance against war perils in accordance with Clause 2-9,
> (b) intervention by a State power. A State power is understood to mean individuals or organisations exercising public or supranational authority. …
>
> **Clause 2-9. Perils covered by an insurance against war perils**
> An insurance against war perils covers:
> (a) war or war-like conditions, including civil war or the use of arms or other implements of war in the course of military exercises in peacetime or in guarding against infringements of neutrality,
> (b) capture at sea, confiscation and other similar interventions by a foreign State power. Foreign State power is understood to mean any State power other than the State power in the ship's State of registration or in the State where the major ownership

[17] ibid 84-92.

> interests are located, as well as organisations and individuals who unlawfully purport to exercise public or supranational authority. Requisition for ownership or use by a State power shall not be regarded as an intervention,
>
> …

None of the clauses specifically mentions detainment of vessels. Clause 2-8 (b) excludes however "intervention by State power", which, from a language point of view, includes "detainment" of the vessel by the state. From the wording of Clause 2-8 (b), such interventions are excluded both when made by the vessel's own state and also if made by a foreign state. However, this issue was disputed, and it could be argued that only interventions by the vessel's own state were excluded.[18] If this was correct, intervention by a foreign state was covered unless the intervention constituted a war peril, cf. Clause 2-8 (a).

Clause 2-9 sub-clause 1 (b) covered "similar interventions" to capture at sea and confiscation. It did not follow from the wording that any kind of motive was required for this, but it was stated in the Commentary that the concept of similar interventions required the intervention to be motivated by primarily political objectives and did not include interventions made as part of the enforcement of customs and police legislation.[19] It was disputed if such a motive was also required for capture and seizure.[20]

In order to clarify the cover for state interventions, both under the marine risk insurance and the war risk insurance, these clauses were amended in the NP Version 2019:

> Clause 2-8. Perils covered by an insurance against marine perils
> An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:
> (a) perils covered by an insurance against war perils in accordance with Clause 2-9,
> (b) **capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such inter-**

[18] Wilhelmsen (2019) (n 3) 185-188.

[19] Commentary (2016) to Cl. 2-9 sub-clause 1 (b), Wilhelmsen 2019 (n 3), 179-180.

[20] Wilhelmsen (2019) (n 3) 175ff.

> **vention is made for the furtherance of an overriding national political objective. …**
>
> **Clause 2-9. Perils covered by an insurance against war perils**
> An insurance against war perils covers:
> …
> (b) **capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective. …**

The result of the amendment is that detainment by a foreign state is included in the war risk cover for interventions by a foreign state, provided the detainment "is made for the furtherance of an overriding national or supranational political objective". If the foreign state detains the vessel for another reason, for instance due to breach of trade legislation on import or export, tax law or police regulation, this will be covered by the insurance against marine perils, because the exclusion in Clause 2-8 (b) is limited to interventions made by the vessel's own state. This means that detainment of vessels by a foreign state is covered by Clause 2-8 unless excluded by Clause 2-8 (a) or (b) or other exclusions not discussed here.

The amendment is, as mentioned, intended to clarify issues which were previously disputed and to make the requirement of an overriding political objective general for all interventions listed in Clause 2-9 subclause 1 (b). Even if it could be disputed whether detainment by a foreign state that was not motivated by an overriding political goal would be covered by the insurance against marine perils under the 2016 Version, it appears that the insurers in the *Team Tango* case accepted that it was. This issue was not addressed in that case, but it is relevant for the question of causation, see below in 5.

However, there is a very important distinction between war risk and marine risk cover:

Insurance against marine perils covers damage according to the NP ch. 12, total loss according to NP ch. 11, and loss of hire according to NP

ch. 16. The characteristic features of these rules are that total loss requires the vessel to be in fact lost to the assured,[21] and that cover for loss of hire is triggered by damage to the vessel.[22]

In addition to this "normal" cover for marine perils, the war risk insurance provides cover for total loss if "the assured has been deprived of the vessel by an intervention by a foreign State power, for which the insurer is liable under Cl. 2-9", and the ship is not "released within twelve months from the day the intervention took place". [23] In such cases it is "irrelevant for the assured's claim that the vessel is released at a later time".[24] This means that if detainment by a foreign state which is covered by Clause 2-9 sub-clause 1 (b) results either in the assured being deprived of the vessel or else in the vessel being prevented from leaving a port for a period of 12 months, the assured is entitled to compensation for total loss.

There is also additional cover for loss of hire under the war risk insurance. The insurer "is liable for loss due to the vessel being wholly or partly deprived of income because it is prevented from leaving a port or a similar limited area", regardless of any damage to the vessel.[25] Thus, if the vessel is detained in port due to a war peril, loss of hire will be covered, even if there is no damage to the vessel.

4 The *Team Tango* case

4.1 The factual background and main submissions

The case concerned the bulk vessel *Team Tango* (TT). TT was owned by a Greek company and registered in the Marshall Islands.[26] TT sailed on a voyage charter party contracted by the Swiss company Vertical. Vertical

[21] NP Cl. 11-1.

[22] NP Cl. 16-1 sub-clause 1. Sub-clause 2 provides cover for a limited number of other circumstances, but they are less relevant here.

[23] NP Cl. 15-11 sub-clause 1.

[24] NP Cl. 15-11 sub-clause 4.

[25] NP Cl. 15-16 sub-clause 2.

[26] The arbitration award (n 1) 2.

sold 13 995 532 tonnage of fertilizer containing urea to the Nigerian company Elephant Group Limited (Elephant). The fertilizer was loaded onto TT in Ukraina. TT then sailed to Lagos, where the cargo was to be received by Elephant. TT arrived at Lagos on 18 July 2016, but then had to wait at anchor until it could go into port to discharge the cargo. While it was still anchored, the Nigerian navy boarded the vessel on 29 August 2016, with marine soldiers carrying weapons. TT was neither allowed to go into port to discharge the cargo, nor to leave the area. The detainment lasted until 14 December 2018, when TT was allowed into the port to discharge the cargo. TT sailed from Lagos on 10 January 2019.

It was undisputed that Elephant did not have the necessary permissions to import the cargo of urea fertilizer, because such import was prohibited by anyone other than two specified Nigerian companies. This was the reason for the vessel being boarded on arrival. The customs authorities went to court to forfeit both the vessel and its cargo in December 2016, but the ship-owner, Elephant and Vertical, intervened in April 2017 and the customs authorities' claim was denied by the High Court on 5 June 2017. The detainment also resulted in several other court cases, i.a. between Elephant and the Nigerian State and between Vertical and the Nigerian State, before the vessel was freed due to diplomatic intervention in December 2018.

It was also undisputed that one reason for the prohibition against the import of urea fertilizer was to prevent the terrorist group Boko Haram from gaining access to urea, in order to make bombs.

TT was insured with the Norwegian Hull Club (NHC) under the NP 2013 Version 2016 against both war risk and marine risk with hull insurance and hull interest insurance, and it claimed cover for total loss under the war risk insurance according to NP Clause 15-11, which provided cover for total loss if the vessel was detained for 12 months. As the vessel was allowed to sail in January 2019, it was clear that there was no cover for total loss under the marine risk insurance. If the detainment was a marine peril, the insurer would pay for any damage caused by the detainment. However, as the time lost was not caused by damage to

the vessel, but instead by the detainment, loss of income would not be covered.

The principal submission of the assured was that the detainment of TT constituted a war peril and thus triggered cover according to NP Clause 2-9 sub-clause 1 (b), cf. Clause 15-11. As a secondary submission, the assured pleaded that there was a combination of a marine peril and a war peril according to NP Clause 2-14, and that the war peril was the dominant cause of the loss. As the arbitration tribunal concluded that there was no war peril involved, it was not necessary to consider the secondary submission, but this is discussed further in 5 below.

The starting point for the decision is NP Clause 2-9 sub-clause 1 (b), stating that war insurance covers "capture at sea, confiscation and other similar interventions by a foreign State power". The tribunal addressed this issue in four steps: the first step outlined the legal starting points, the second the security situation in Nigeria at the time, the third Elephant's failure to obtain import regulation, and the fourth the concrete legal assessment.

4.2 The legal starting points[27]

Clause 2-9 sub-clause 1 (b) contains no reference to "detainment". The legal basis for war risk cover would therefore be the expression "other similar interventions". In relation to the interpretation of this phrase, the tribunal referred to the following remarks in the Commentary:

> … the term implies a limitation as regards the nature of the interventions covered. The wording is aimed at excluding from the war-risk cover the types of interventions that are made as part of the enforcement of customs and police legislation. …
>
> That difficult borderline problems may arise is demonstrated by two arbitration awards (… relating to the Germa Lionel award and ND 1988.275 NV Chemical Ruby) … These decisions show that cover under the war-risk insurance is contingent on the shipowner being divested of the right of disposal of the ship, the authorities

[27] The arbitration award (n 1) 9-11.

> clearly exceeding the measures necessary in order to enforce police and customs legislation, and the intervention being motivated by primarily political objectives. [28]

The tribunal thereafter refers to the 2019 Version, where the expression "provided any such intervention is made for the furtherance of an overriding national or supranational political objective" is added to "similar interventions". The tribunal referred to the Commentary 2019, stating that this qualification refers to all the interventions that are covered according to Clause 2-9 sub-clause 1 (b), and that these must be delimited against measures necessary to enforce i.a. police and customs legislation.[29] The tribunal further referred to the following in the Commentary 2019:

> It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption.[30]

The tribunal stated that cover under the war risk insurance presumes that the peril striking the vessel is a war peril, and that the peril in this case struck the vessel on 29 August 2016 when the vessel was boarded by five marine guards carrying weapons. The fact that the boarding was made by marine soldiers, was not, however, decisive, since detainment of vessels in Nigeria was always made by marine soldiers, regardless of the legal basis for the detainment.

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28 Commentary (2016) to Cl. 2-9 sub-clause 1 letter b.

29 Commentary (2019) 57.

30 Commentary (2019) 58.

The tribunal further emphasized that the expression "similar interventions" was analyzed in arbitration cases and legal theory,[31] and referred to Wilhelmsen and Bull (n 4) 99 summarizing four previous arbitration cases on this question:

> This means that the expression «similar interventions» includes interventions made by the State only if the intervention is made for the furtherance of overreaching political goals. In addition, the intervention must normally be typical for war and times of crises and represent a sanction against breach of security rules and/or explained by foreign policy considerations. It is not sufficient that the intervention can be explained by the general political situation in the State. A State intervention which is tied to regulation or control of the normal commerce and shipping is not covered by the war risk insurance. This is true even if there is an abuse of authority, unless the abuse in reality is motivated by overreaching political motives.

The tribunal also refers directly to ND 2016.251 *Sira* where the arbitrator makes the following summary of the relevant legal sources for the interpretation of the expression "similar intervention":

> For the intervention to be covered under the war risk insurance, the intervention must be made for the furtherance of overreaching political goals. Such interventions are interventions typical for war and times of crises, and can often be explained by foreign policy considerations. The reason for the intervention may be a warranted or not warranted suspicion that the ship has breached rules to protect the security of the State involved. It is not decisive that the general political situation in the State involved has been contributory to the intervention.
>
> A State intervention which is tied to regulation or control of the normal commerce and shipping is not covered by the war risk insurance. Relevant interventions will first and foremost be tied to breach of or suspicion of breach of customs, currency, or police legislation. It is normally not decisive if such intervention due to its

[31] The *Germa Lionel* award 11 June 1985 (unpublished); ND 1988.275 NA *Chemical Ruby*; the *Wildrake* case (a case that was settled); ND 2016.251 *Sira;* Brækhus and Rein (n 4) 73-76; Wilhelmsen and Bull (n 4) 94-97.

> duration represents abuse of authority. However, this can be different if the abuse of authority takes the form of a regular police act or similar act, but in reality is part of an action motivated primarily by overreaching political objectives. [32]

Lastly, the tribunal refers to a passage from ND 1988.275 NA *Chemical Ruby* stating that "a common characteristic feature" for an intervention to be covered by war risk insurance is that the intervention is made "for the furtherance of overriding political goals" typical for war and times of crisis, in contradiction to State intervention in connection with regulation and control of ordinary trade and shipping".

The tribunal concluded that the decisive question is whether the arrest of *Team Tango* was motivated by overriding political goals typical for war and times of crisis. In order to determine this issue, it was necessary to investigate the security situation in Nigeria and Elephant's failure to obtain import permission for the cargo.

4.3 The security situation in Nigeria

When TT arrived in Lagos in July 2016, the security situation in Nigeria was characterized by a conflict between the authorities and the terrorist group Boko Haram that had already lasted for several years. The ship owner and the insurer agreed that the situation could be described as "war" according to political science definitions. Boko Haram had taken control over a significant area in the north east parts of Nigeria, as well as bordering areas in neighboring countries. The Nigerian authority, however, won most of the occupied land back in a successful counter attack against the group in 2014-2015. As a result, Boko Haram went into hiding and started "terror bombing" using so-called "Improvised Explosive Devices" (IED) against institutions, the military and civilians. The bombings were intensive, represented a serious security problem and had a destabilizing effect on society. It was therefore an important goal for the authorities to hinder Boko Haram from getting hold of material

[32] Here referencing the translation in Wilhelmsen and Bull (n 4) 98.

for the bombs. The political effort to control Boko Haram was intensified after the presidential election in 2015, where i.a. the national security advisor (NSA) was changed and his agency (ONSA) was strengthened.[33]

The tribunal referred to a series of documents starting from 13 August 2015 that demonstrated how important it was for the Nigerian authorities to prevent Boko Haram from having access to raw material for making bombs.[34] The main aim was to prevent Boko Haram from stealing urea from different storage facilities in Nigeria in order to make bombs. Among the proactive measures taken to prevent this was the suspension of the "issuance of EUC for importation of Urea Fertilizer", "discourage the local manufacture, distribution and sale of Urea Fertilizer in the country", as well as identifying fertilizers that cannot be used as raw material for bombs.[35] Another measure was a temporary embargo on importation of Urea and Potassium Nitrate Fertilizers.[36] This embargo was sustained by the NSA and stopped the Nigerian company Notore Chemical Industries Ltd (Notore) from obtaining permits to import Urea Formaldehyde.[37] The temporary prohibition on the import of urea was continued through January and February 2016, even though the authorities also acknowledged that import of urea was necessary for Nigerian food supply. It was also emphasized that the prohibition was necessary to prevent urea from going astray.[38]

The minister of agriculture (NAFDAC) decided in March 2016 that only two named companies should be allowed to import and produce urea fertilizer. This would ease control and perhaps also protect local companies.[39] The decision was upheld in August 2016,[40] where the NSA

33 The arbitration award (n 1) 2-3.

34 The arbitration award (n 1) 12-14.

35 Letter from ONSA to several civilian and military institutions (13 August 2015).

36 Minutes from meeting between ONSA and representatives for public institutions and representatives for the fertilizer producers 18 November 2015, dated 3 December 2015).

37 Letter from Department of agriculture (NAFDAC) to Notore Chemical Industries Ltd (13 January 2016).

38 Letters from ONSA to the minister of agriculture (29 January 2016 and 16 February 2016); letters from ONSA to i.a. NAFDAC (26 February 2016 and 3 March 2016).

39 Letter from NAFDAC to ONSA (3 March 2015).

40 Meeting with fertilizer producers (4 August 2016).

described the increasing use of IED by terrorists and urea as a raw material for these bombs, and that free import of urea resulted in a lack of control and eased access to the urea for illegal purposes. Free import also created difficulties for local producers as well as having a negative impact arising from the use of foreign currency.

The arbitration tribunal concluded that even if protection of local production may have been an issue, the measures concerning urea were mainly explained by political considerations of security, and that it was a key goal to prevent Boko Haram from having access to urea for making IEDs.

4.4 Elephant's import of urea

The import of goods to Nigeria is regulated by the Nigerian Customs and Excise Management Act. The act provides authority to prohibit the import of specific goods and to require special permission for imports. Cargo being imported against the rules is forfeited or may be detained or seized. The act also allows for the forfeiture of a vessel used to import prohibited goods.[41]

The import of fertilizer into Nigeria requires import permission from the National Administration for Food and Drug Administration and Control, as well as an End-User Certificate, which in 2015-2016 was awarded by the NSA/ONSA. Elephant had a permission to import urea that had expired in 2015, and so applied for a renewed import permit for fertilizer from NAFDAC on 14 April 2016.[42] The application concerned three types of fertilizers:

1. Prilled Urea – 100,000mt
2. NPK 15-15-15 – 150,000mt
3. Single Super Phospate – 25,000mt.

41 The arbitration award (n 1) 3.

42 The arbitration award (n 1) 14.

NAFDAC granted permission to import two types of fertilizer, but not urea, on 27 May 2016, and stated:

> 'This permit does not authorize the importer to clear the chemical substances from the Nigerian Ports without first obtaining a 'permit to clear' from the Chemical Permit Section of the Chemical Evaluation and Research Directorate, National Agency for Food And Drug Adrninistration and Control. lt is an offence to, import or c!ear the chemical substances without obtaining the required permits.'

The legal basis for denial of import of urea is given in a letter from NAFDAC to the NSA on 10 February 2017: 'the third (3rd) · request being for Urea was denied because of the ban on importation of Urea fertilizer.'

The tribunal concludes that the refusal was based on regulation and practice that first and foremost were in effect due to considerations of national security.

4.5 The assessment of the concrete reason for the arrest of the vessel

The last step in the decision was to assess the concrete reason for the navy to take control over the vessel and detain the vessel and cargo. The tribunal points out that Elephant had not received import permission for urea from the NAFDAC, did not have EUC, and did not notify the navy on arrival, as required in the legislation. There were also other permissions that were not in order.

The tribunal found it self-evident that the lack of necessary permissions and notifications gave the Nigerian authorities a legal basis for detaining the vessel and cargo. Even so, the question was whether the overriding political considerations for control of urea meant that the detainment must be considered a war peril. The tribunal repeated the starting point from the *Chemical Ruby* case: that, for an intervention to constitute a war peril, the intervention must be made for the furtherance of political goals, typical for war and times of crisis, and that the inter-

vention should not be connected to regulation and control of normal trade and shipping.

This assessment was not completely clear in this case, but the main point for the tribunal was that Nigeria had import regulation for fertilizer and for a long list of other commodities, where permission etc. was required. This kind of regulation was not specific to Nigeria or for states in war or crisis. The reason for import regulations could differ from country to country. If the rules are not followed, for instance because the required permissions are not obtained or notification not sent, it is quite normal for the authorities to intervene by detaining vessel and cargo. In most states, breach of such rules would result in confiscation, criminal punishment and other economic sanctions.

The assured had argued that the war peril struck the vessel when *Team Tango* was ordered to change anchor position and naval guards were placed onboard. The tribunal found that it was not proved that the intervention against the vessel was motivated by considerations of security. For the Nigerian authorities the situation must have appeared to be an attempt of illegal import, because Elephant had tried to avoid all import requirements and control measures. Intervention against illegal import was not something that per se pointed to more than enforcement of rules for trade and import. The detainment of vessel and cargo would be a normal sanction against breaches of such regulation. It was not extraordinary for the navy to have boarded the vessel, because Nigeria did not have a functional police or custom institution to control and detain vessels in breach of import regulation or other breaches of shipping trade.

Even so, the tribunal accepted that it could be argued that the time period of the detainment, close to 2 years and 5 months, meant that the intervention was a result of overriding political goals typical for war and time of crisis. The starting point in NP is that the peril strikes at a certain period of time. In relation to NP Clause 2-9 sub-clause 1 (b), this occurs when the intervention takes place. The length of the intervention is decisive for whether it results in total loss according to NP Clause 15-11, but not for the character of the casualty. The tribunal still found that the

length of the time period could shed light on the kind of peril that struck the vessel in the first place.

The tribunal referred to documents presented in the case explaining that the NSA accepted that the vessel was not involved in the illegal import, and that "they may be looking at discharging the cargo into a controlled area by them and afterwards, the vessel can sail", but that "because the cargo is bulk and they do not have facilities to discharge it, this might constitute a challenge, but they hope this can be overcome, working with the Ministry of Agriculture".[43] The NSA was also concerned about "what effect any directive to release the vessel might have on the ongoing court proceedings".[44]

It was clear that Elephant in all the court proceedings had opposed any solution that would not result in the cargo being discharged to storage facilities under Elephant's control. The tribunal found it probable that this resulted in significant delay in the discharge of the cargo and thus also in freeing the vessel. The tribunal also pointed out that the cargo was eventually discharged and the vessel was freed because of diplomatic intervention, even if the claim from Elephant was still pending before the Nigerian Supreme Court.

The tribunal found that even if the underlying reason for denial of an import permit to Elephant was an overriding goal typical for war and times of crisis, this was too remote to be the decisive cause for detainment of the vessel. The main causative factor was that the import of urea was in breach of the established import regulation, and that detainment is a regular sanction against such breach, independent of any overriding political goal. Based on this, the timing aspect of the detainment appeared to be a consequence of non-compliant performance from Elephant.

The tribunal thus concluded that it had not been established that the vessel was detained due to political goals typical for war and times of crisis. The overriding political goal behind the regulation and prac-

[43] Email from the ship owner's legal adviser in Nigeria, Femi Atoyebi, to Alexandra Davison in North of England P&I (23 March 2017).

[44] Email from the ship owner's legal adviser in Nigeria, Femi Atoyebi, to Alexandra Davison in North of England P&I (23 March 2017 and 30 March 2017).

tice with regard to the import of urea was overshadowed by Elephant breaching the regulation when they tried to import the cargo without the required permits, together with Elephant's obstructive behaviour when they refused to participate in the discharge of the cargo so that the vessel could sail. Thus, the intervention could not be considered to be motivated by overriding political goals typical for war and times of crisis, and the claim for compensation for total loss under the war risk insurance was denied.

The assured had argued that it was not correct that the assured should carry the risk for Elephant's actions. The tribunal remarked that the decisive question for the interpretation of the expression "similar intervention" is whether the intervention is for the furtherance of overriding political goals typical for war or times of crisis. With regard to this assessment, it would not be correct to disregard causative factors tied to the behaviour of those responsible for the import. In this context, the risk for Elephant's behaviour rested with the assured. [45]

5 The *Team Tango* case as a question of causation

5.1 Problem and overview

The assured pleaded as a secondary submission that the war risk was the dominant cause according to NP Clause 2-14. As the court viewed the *Team Tango* case as being a question of whether the intervention constituted a marine peril or a war peril, there was no need to go into this issue. The approach of the court is also supported by the passage in the Commentary that "if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or

[45] The arbitration award (n 1) 15-18.

if the intervention has the character of abuse of power or corruption."[46] From this, it may be deduced that in the case of a "double objective" one should always look to the "real character" of the intervention.

However, in the last part of the judgment, the tribunal uses causation terminology when it states that the "main causative factor" was the import of urea contrary to the established import regime of the country, and that the overriding political goal was "too remote". It is clear that Elephant's breach of the import regulation was the direct or immediate cause of the detainment. It appears, however, that the ban on import of urea was mainly caused by the authority's goal of preventing Boko Haram from gaining access to urea as a raw material for making bombs. The tribunal accepted that this constituted an overriding political goal typical for war and times of crisis. It may therefore be argued that the overriding political goal was the cause of the ban that again was the cause of Elephant's breach, and thus that the detainment was the result of a combination of a war peril and a marine peril. This situation is regulated by NP Clause 2-14, which reads:

> If the loss has been caused by a combination of marine perils, cf. § 2-8, and war perils, cf. § 2-9, the whole loss shall be deemed to have been caused by the class of perils which was the dominant cause. If neither of the classes of perils is considered dominant, both shall be deemed to have had equal influence on the occurrence and extent of the loss.

This leads to the question of whether an alternative approach to the situation could be to treat the case as an issue of causation, i.e. as a question of a combination of a marine and a war peril.

This approach is interesting, both because it demonstrates the close relationship between the definition of the perils insured and causation, and because the judgment according to the tribunal was not completely clear and was also questioned afterwards by the assured. It would therefore be of interest to see if another approach could support the tribunal's decision.

[46] Commentary (2019) 58.

In order to discuss this question, it is necessary first to analyze whether detainment of a vessel as an intervention according to Clause 2-9 sub-clause 1 (b) is a peril or rather constitutes the "casualty" or the "insured event", see 5.2. Following on from that, the concept of "combination of causes" is then discussed in 5.3, before the *Team Tango* case is analyzed in light of previous cases with similar causation issues as those of the *Team Tango* case in 5.4 and 5.5.

5.2 Is an intervention by a state a peril or an insured event?

NP Clause 2-8 and Clause 2-9 regulate "perils" covered by insurance against marine perils and war perils respectively. The relevant peril in this case, according to NP 2016 Clause 2-9 sub-clause 1 (b) is "other similar interventions by a foreign State power", but it is accepted in the arbitration award that the addition in NP 2019 "provided any such intervention is made for the furtherance of an overriding national … political objective" shall be applied. The peril is thus described as a combination of the intervention and the objective for the intervention. If it is decided that the intervention is a war peril, there is no room for analyzing the reasoning behind it as a question of combination of perils. That discussion is already over when determining the "real cause" for the intervention.

This approach is less clear, however, if it is analyzed in light of Nordic terminology on the scope of cover for a marine insurance contract. Nordic marine insurance makes a distinction between the perils insured against, i.e. marine perils and war perils as defined in Clause 2-8 and Clause 2-9, the insured event or casualty, which occurs when the peril strikes the insured interest,[47] and the damage or loss.[48] The requirement for causation connects the peril to the insured event, and the insured event to the loss.[49]

[47] NP Cl. 2-11 sub-clause 1: 'The insurer is liable for loss incurred when the interest insured is struck by an insured peril during the insurance period'.

[48] Wilhelmsen and Bull (n 4) 78-79. See also Hans Jacob Bull, *Forsikringsrett* (Universitetsforlaget 2008) 205-209 for the similar terminology in Norwegian insurance law generally.

[49] Wilhelmsen and Bull (n 4) 115-116.

The tribunal states that the peril struck *Team Tango* when the vessel was boarded in August 2016 and ordered to shift its place of anchorage. The boarding thus constituted the insured event. It should be noted that a peril can strike the vessel before either damage or loss occur.[50] This is the core difference between defining the casualty through the "peril strikes" principle and the "damage occurred principle", which is the normal rule in Norwegian insurance law.[51] An intervention of the vessel does not necessarily result in loss of or damage to the vessel, but even so the intervention may still qualify as an insured event. The loss in the *Team Tango* case was total loss of the vessel defined according to Clause 15-11 sub-clause 1 occurring once the vessel had been detained for 12 months. It was clear that this requirement was fulfilled in this case, as the vessel was detained for more than two years. But if the intervention constitutes the insured event, it may be argued that the relevant peril or cause is the objective behind the intervention. With this terminology, the regulation in Clause 2-8 and Clause 2-9 defines not only the relevant marine and war perils, but also to some extent how the peril must materialize or strike the vessel, i.e. the insured event.[52]

This distinction between the motive as a peril and the intervention as the casualty/insured event is also supported by the relationship between the all risks principle in Clause 2-8, and the regulation in Clause 2-9 sub-clause 1 (b). NP Clause 2-9 sub-clause 1 (b) lists several types of interventions as "perils", and the same interventions are, according to the Commentary,[53] covered by the all risks principle in Clause 2-8. The same intervention cannot be both a war peril and a marine peril, but it can qualify as an insured event under both insurances, if caused by different perils. The element that determines whether such intervention is covered under marine insurance or war insurance is therefore not the intervention itself, but the reason for it. With this line of reasoning, the

50 ibid 130 ff.

51 ibid 129-130. See also Trine-Lise Wilhelmsen, 'Periodisering av Forsikringstilfellet – Finnes det en «Patentløsning»' (1997) *Ånd og rett Festskrift til Birger Stuevold Lassen*, 1077ff.; Bull (n 46) 237ff.

52 Such overlap in insurance clauses is not uncommon, see Bull (n 46) 205-206.

53 Commentary (2019) 43. See also Wilhelmsen (2019) (n 3) 185-188 for Version 2016.

peril that makes the distinction between the marine risk and war risk insurance is the motive behind the intervention, and not the intervention itself. A combination of "war related motive" and "marine related motive" can then be addressed as a combination of perils.

5.3 The regulation of combination of perils

NP Clause 2-14 states that losses caused by a combination of perils "shall be deemed to have been caused by the class of perils which was the dominant cause". If neither of the classes of perils is considered dominant, both shall be deemed to have had an equal influence on the occurrence and extent of the loss, cf. Clause 2-14 second sentence. The starting point is therefore that the whole loss shall be attributed to the "dominant cause", even if caused by a combination of perils. The concept of "cause" means that the peril must be a necessary condition for the casualty.[54] This means that the overriding political goal of controlling the import and use of urea must be a necessary condition for the detainment to be caused by a war peril.

The expression "combination of perils" applies first and foremost to the situation where there is a combination of two independently acting causal factors which result in a casualty. However, the expression also includes the situation where the first cause is a necessary condition for the second cause to occur.[55] This appears to be situation here, where the overriding political goal to prevent Boko Haram from gaining access to urea caused the ban on the import of urea, and the ban on import was a necessary condition for Elephant's breach. As Elephant did have permission to import urea before the ban, it is presumed that such permission would have been obtained if the authorities had not prohibited the import.

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54 Brækhus and Rein (n 4) 254; Bull (n 46) 244; Trine-Lise Wilhelmsen, 'Årsaksprinsipper og tolkningsprinsipper i forsikringsretten' (2011) *TfE* 4, 228-258, 235; Wilhelmsen and Bull (n 4) 116.

55 Wilhelmsen and Bull (n 4) 119. See also Commentary (2019) 83-85; Ole Steen-Olsen, 'Om adækvans og samvirkende skadesårsager ved forsikring mod tidstab' (1977) *TfR* 90, 230–280, 260. The terminology is also presumed in ND 1989.263 NA *Scan Partner.*

The starting point in Clause 2-14 is that the dominant-cause rule shall apply. This is in line with the general approach in Norwegian insurance law and means that the loss shall be attributed to the cause that is "dominant" or "main", i.e. carries most weight in the chain of events.[56] If neither of the classes of perils is considered dominant, both shall be deemed to have had equal influence on the occurrence and extent of loss. The natural understanding of the expression "dominant cause" is that a relatively considerable predominance is required, in order to characterize a peril as the "dominant cause".[57] This is further elaborated on in the Commentary to the provision: 'It is not sufficient to reach the conclusion – perhaps under doubt – that one peril is slightly more dominant than the other; it is precisely the arbitrary choice between two causes which carry approximately the same weight that should be avoided. On the other hand, a 60/40 apportionment should probably constitute the upper limit for an equal distribution. If we get close to 66 %, one of the groups of perils is after all considered twice as «heavy» as the other ….'[58]

As already mentioned, the provision applies to a situation where the two perils or causes interact in a chain of events leading to the casualty, which appears to be the case in the *Team Tango* case, where the political security consideration to prevent Boko Haram from access to urea resulted in a ban on import of urea for other than two named Nigerian producers. It also appears however, to be a situation with combination of causes after the casualty had first occurred, since the length of time of the detention was at least partly caused by Elephant's actions to prevent loading outside Elephant's control. As the considerations on causation in these two situations are somewhat different, they are discussed separately below.

56 Commentary (2019) 80; Wilhelmsen (n 52) 239; Wilhelmsen and Bull (n 4) 117.

57 Wilhelmsen and Bull (n 4) 124-125.

58 Commentary (2016) to Cl. 2-14.

5.4 Was the detainment caused by a war peril or a marine peril?

There are no cases concerning NP Clause 2-14 according to the NP or NMIP 1996, but there are two relevant arbitration cases concerning the similar clause in the NMIP 1964, both concerning the Iran-Iraq war. According to the Commentary, these cases are relevant for the assessment, according to the NP 2016/2019.[59] The first case is ND 1989.263 NA *Scan Partner*.[60]

> The supertanker *Barcelona*, which was employed as a storage ship at an Iranian oil terminal in the Persian Gulf, was hit by several bombs when the terminal was attacked by Iraq. *Scan Partner*, a towing and fire extinguishing ship chartered by the terminal, attended the fire extinguishing two days after the bombing. Twenty hours later, *Scan Partner* was sprayed with oil resulting from an explosion onboard the *Barcelona*. The oil started burning, and *Scan Partner* sustained a total loss in the fire. It was not clear whether the explosion on *Barcelona* was due to the detonation of a blind shell from the air attack, a bomb explosion following a gas explosion, or a gas explosion.
>
> *Scan Partner* was insured against marine perils and war perils according to the NMIP 1964. The marine insurer claimed that the loss was caused by a war peril, and that, if the loss was caused by a combination of a war peril and a marine peril, the war peril constituted the dominant cause of the loss, cf. NMIP 1964 § 21 second sentence.
>
> The arbitration tribunal emphasized that if the explosion was caused by the detonation of a blind shell from the air attack 14 May, the war risk insurer would be liable for the loss, cf. NMIP § 16 (a), cf. § 22 (a). The result would be the same if it was a blind shell that first exploded 17. May and immediately resulted in a gas explosion onboard *Barcelona*. However, the tribunal did not find it probable that the explosion onboard the *Barcelona* was caused by a bomb, or a combined bomb/gas explosion that would constitute a war risk.

[59] Commentary (2019) 86.

[60] Here referred from the translated version in Wilhelmsen and Bull (n 4) 125-126, which is based on the presentation in Brækhus and Rein (n 4) 270-271.

> The fact that the vessel was situated in a war area was not per se sufficient for the loss to be caused by a war peril. The bombing of *Barcelona* constituted a war peril, and this bombing was a necessary condition for *Scan Partner* to be present at the site. However, the chain of causation from this peril had to be limited, i.a. based on the closeness in time and place between the bombing and the total loss. The distance in time between the two occasions was three days and during this period many other events occurred. Therefore, it was not straightforward to state that the total loss of *Scan Partner* was caused by a war peril. The tribunal also argued that *Scan Partner* was lost during the extinguishing of the fire, in which the vessel had a duty to participate in accordance with the charter party. In this respect, it was not relevant whether the fire was caused by bombing or was due to another cause. Thus, the marine peril constituted the dominant cause.

This case is comparable to our situation, as the bomb damage to *Barcelona* was caused by a war risk and this was a necessary condition for *Scan Partner* to be present at the site, i.e. there is a chain of causes resulting in the casualty. The tribunal brings forward two arguments: firstly, the closeness or distance in time and space between the first and the second causes, and secondly, that fire extinguishing was in any case *Scan Partner*'s normal working risk, and that it was irrelevant whether the fire was caused by a bomb or was due to other reasons. The distance in space seems less relevant in the *Team Tango* case, but the other arguments may still be applied.

It was not clear in the *Team Tango* case exactly when the ban on import of urea was first instigated, but the first enclosed letter referring to suspension of the End Users Certificate is dated 13 August 2015. Without such an EUC, the import of urea was illegal. The temporary embargo on importation of urea is mentioned in minutes from a meeting dated 3 December 2015. Import of urea to Nigeria was therefore suspended from 13 August 2015 and upheld throughout 2015 and until Team Tango arrived in Lagos. However, Elephant had import permission and apparently a EUC for 2015. It is not clear whether the import and EUC ban applied to existing permissions, but these permissions expired in

January 2016. Elephant did not apply for new permissions until April 2016, at which point in time the ban had been in place for 8 months. Elephant also received the refusal of the application at a point in time when it would still have been possible to reroute the vessel. The required closeness in time thus does not seem to be fulfilled.

In addition, it can be argued that it was part of Elephant's business to import fertilizers and that a general part of such activity was to have the necessary permissions to receive the cargos. In this capacity, Elephant should be able to cope with changes in the regulation and prevent detainment of vessel and cargo. According to the legislation, any breach of the import regime could result in sanctions, regardless of the political security considerations. It was thus not relevant for Elephant's situation whether the ban was caused by a war consideration or a marine consideration.

Based on the criteria from the *Scan Partner* case, it may therefore be argued that the marine peril was the dominant cause in the *Team Tango* case.

The other case concerns a collision between two tankers in the Persian Gulf during the Iran-Iraq war, cf. ND 1993.464 NA *Nova Magnum*:[61]

> The two super tankers *Nova* and *Magnum* collided between Kharg Island and Sirri Island. Both vessels sustained severe damage. *Nova* had marine risk insurance and war risk insurance based on the NMIP 1964. The marine risk insurer compensated the losses *Nova* had sustained and claimed 50 % of this compensation repaid from the war risk insurer according to NMIP 1964 § 21 second sentence, which is identical to NP Clause 2-14 second sentence.
>
> The collision was caused by a combination of both ships sailing with no light, which constituted a war peril, and gross errors of navigation on both parts, which was a marine peril. In particular, *Nova* sailed with one instead of two sets of radar, and due to insufficient training, the second mate was unable to make use of the information provided by the radar immediately before the collision.

[61] Here referred from the translation in Wilhelmsen and Bull (n 4) 125, which is based on the presentation in Brækhus and Rein (n 4) 270.

> The question was thus whether the element of war risk was sufficiently significant to justify application of the equal influence rule. The court referred to several cases from the Second World War, where no light or reduced light had been given decisive weight. However, the importance of the use of lanterns had been significantly reduced in the period since these decisions were made, due to the development of advanced radar systems, which the assured had a duty to install onboard. This radar equipment provided a navigation tool which was far more efficient than conventional lanterns. The tribunal assessed the war risk caused by sailing with reduced light against Nova's negligent use of radar, failure to change the course and failure to call for the captain in time, and in addition navigational errors made by Magnum, and found that the nautical errors – i.e. the marine peril – constituted the dominant cause of the loss.

In the *Nova Magnum* case, the war peril and the marine peril constituted two independent causes interacting before the casualty occurred, which is different from the situation in the *Team Tango* case. Even so, it is interesting to see if the arguments are relevant for our case. The general starting point when two independent causes interact and lead to a casualty is that the direct cause shall be given more weight than a previous indirect cause, unless the former indirect cause has increased the probability of the subsequent loss. The greater the risk, the greater the importance to be attributed to the earlier cause.[62] In line with this, the court points to an assessment of the risk created by the war peril. However, contrary to previous cases where the war risk created by sailing with no lights was given decisive weight, with modern navigation equipment less sight caused by no light could be handled with prudent use of radar. The serious nautical errors that were made were therefore given decisive weight.

Applied to the *Team Tango* case, it can be argued that the direct cause of the intervention was the breach of the import regime, whereas the political security consideration was the previous and indirect cause.

[62] Wilhelmsen and Bull (n 4) 121, similar Commentary (2019) 84. Both are based on Brækhus and Rein (n 4) 262 ff. where a large number of arbitration cases with a combination of war risk and marine risk from the first and second world war is analyzed.

The overriding political security goal that resulted in several measures – hereunder a stricter import regime for urea – was to control the use of raw material for IEDs and to prevent Boko Haram from obtaining this material. This created a risk for anyone who would be producing, trading with or transporting urea. However, this risk could have been avoided if Elephant had accepted the ban on import and EUCs and thus prevented the vessel from arriving in Lagos with the prohibited cargo.

It may be argued that in the *Nova Magnum* case, it was the equipment of the vessel and the use of the equipment that failed, whereas in the *Team Tango* case, the marine peril was caused by a third party. But intervention due to breach of trading regulation will normally be the responsibility of the sender or receiver of the cargo, and the point here is that such breaches constitute a marine peril, not a war peril. It is therefore not – as the assured seemed to claim in the *Team Tango* case – a question of identification between the owner and the receiver, but instead a question of how to treat regulatory breaches as a legal basis for detainment.

5.5 Was the total loss caused by a marine peril?

Team Tango was detained in August 2016. The intervention lasted for more than two years, which, if the detainment was caused by a war peril, would result in total loss according to NP Clause 15-11 sub-clause 1. The implication of the discussions above is that the marine peril constituted the dominant cause for the intervention. This marine peril intervention then interacted with the problems that were met when the authorities tried to discharge the cargo under their control. The starting point when a casualty interacts with a new peril or cause and this results in increased damage is that this increased damage shall be attributed to the initial casualty, cf. ND 1977.38 NSC *Vestfold I*:[63]

[63] Referred from the translated version in Wilhelmsen and Bull (n 4) 121-122, based on the presentation in Brækhus and Rein (n 4) 263-264, 266. See also Commentary (2019) 84.

> *Vestfold I* grounded and sustained damage to the gear, which was repaired. Approximately two months later, the gear broke down. The new gear damage was due either to damage that had not been discovered duringr the previous repair, or instead to an inadequate installation under this repair, or a combination of these causes. The insurance covered damage to machinery caused by, for instance, grounding, but did not cover break-down of machinery per se. The question was therefore whether the grounding had caused both the break-down of the axle and also the later break-down of the gear, or whether instead the break-down of the gear constituted a new casualty.
>
> The Supreme Court held that the question of causation had to be decided by use of the allocation principle in the NMIP 1964 § 20. Furthermore, the court found that there was a legally relevant chain of causation between the grounding and the damage to the gear, and that the inadequate repair could not breach the chain of causation from the grounding. The grounding was a significant element in the total causative picture, because it was due to this grounding that the vessel sustained its initial damage, which then developed into further damage to the machinery. Whether the errors committed by the yard could breach the chain of causation from the grounding would depend on the kind of error that was committed in the individual case. A repair would normally be successful. However, it could be the case that a repair yard overlooked damage or carried out repairs incorrectly, for instance, by making a wrong installation. Such errors were foreseeable. The assessment could be different if the yard had acted with gross negligence. Even so, the errors committed by the yard in this case implied that part of the damage should be allocated to this cause. The court allocated the damage with 2/3 to the insurance and 1/3 to the assured.

The implication here is that when a new cause intervenes through an initial casualty, the initial casualty is a "major part" of the total picture. The case concerned repair of the initial damage, but due to failures during this repair the vessel sustained new damage. Similarly, one might argue that the expected remedy, when a vessel is detained because of breach of import regulation on the part of the receiver of the cargo, would be

to discharge the cargo and let the vessel sail. If problems occur under such a procedure that cannot be seen as being unexpected, any extended damage due to such problems should be attributed to the initial casualty.

In this case, however, the delay could not be considered as ordinary. The assured argued that the problems tied to discharge of the urea were the security considerations and the measures instigated to control storage of urea so that Boko Haram could not obtain it. This could be assessed as a new war peril resulting in a new intervention, which would then be a war risk casualty. However, the court found that the delay of the discharge was caused by Elephant's obstructive behaviour and not the political security considerations. From the *Vestfold I* case it may be deduced that gross negligence by a third party may sever the causal link from a casualty, but the result would be that there was a new state intervention caused by breaches of import regulation, i.e. a new casualty caused by a marine peril, which would not trigger cover for total loss, since the vessel was freed.

6 The UK clauses on arrest or detainment of vessels

A principal consideration during the 2019 revision of the NP was that the cover for state intervention in the NP should be similar to or better than the UK conditions. In the *Team Tango* case, the insurers also argued that it was important for the UK and Nordic solutions to be similar because the insurers competed in the same market, but the UK regulation was not actually addressed in that case.[64] It is therefore interesting to see how the *Team Tango* case would have been solved according to these UK conditions.

Marine risk insurance for ocean-going ships is regulated by several UK sets of clauses.[65] A common feature of these clauses is that they are

[64] The arbitration award (n 1) 7.

[65] Institute Times Clauses (Hulls) (ITCH) of 1983 and 1995; International Hull Clauses (IHC) of 2002 and 2003.

based on the named perils principle, whereby the perils insured against are specifically listed.[66] None of the clauses used provides cover for detainment by state power, which means that this peril is not covered under the UK clauses covering marine perils. The clauses even contain the following paramount war risk exclusion:

> In no case shall this insurance cover loss damage liability or expense caused by
> ….
> 24.2 capture seizure arrest restraint detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat[67]

However, the Institute War and Strike Clauses (Hulls-Time) 1/10/83 as amended 1/11/95 (IWSCH) (Clause 281) covers:[68]

> 1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat

The clauses exclude:

> 4.1.5 capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered
> 4.1.6 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations

The UK regulation is thus simpler than the Nordic regulation, since interventions are either covered by the war risk clauses or else not covered at all. There is no question of there being different levels of cover.

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66 Bull (n 46) 210; Wilhelmsen and Bull (n 4) 79ff.

67 ITCH (n 64) 1995 clause 24; IHC (n 64) 2001/2003 clause 29.2.

68 'Institute War and Strikes Clauses Hulls-Time' 1/10/83 amended 1/11/95 <Marine Insurance Clauses 329-548.indd (seamanship.eu))> (accessed 27 October 2021).

The interventions listed in clause 1.2 overlap,[69] but the relevant concept with regard to the *Team Tango* case is "detainment". It is clear that the vessel was detained in a commercial sense, as it was "unable to leave without infringing regulations and would have been stopped by force if it tried to do so."[70] According to the wording of clause 1.2, the cover applies regardless of any war or war-like situation, of who is performing the actions and the legal basis for the actions. The cover thus also applies in times of peace,[71] and there is no explicit requirement for state involvement or legal justification for such intervention. As a starting point therefore, the detainment of *Team Tango* would be covered unless the exclusion applies. The terms originally referred, however, to political or executive acts and did not include ordinary judicial process.[72] The same effect is achieved today by the express exclusions in clause 4.1.5,[73] cf. below.

Clause 4.1.5 excludes detainment "by reason of infringement of any customs or trading regulations". In order to apply the exclusion, there must therefore have been an infringement.[74] This was clearly the situation in the *Team Tango* case. The term "customs regulation" refers to laws in force in the country concerned, whatever their form, which deal with smuggling or other offences in the field of customs.[75] The concept of "trading regulations" refers to regulations forbidding, controlling or otherwise regulating the sale or importation of goods into a country and

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69 Michael Miller, *Miller's Marine War Risks* (Michael Davey, James Davey and Oliver Caplin eds, 4th edn, Informa Law from Routledge 2020) 105. See also N. Geoffrey Hudson, Tim Madge and Keith Sturges, *Marine Insurance Clauses* (5th edn, Informa Law 2012) 342 and 360; Wilhelmsen (2019) (n 3) 165; Joseph Arnould, *Arnould: Law of Marine Insurance and Average* (Jonathan Gilman and others eds, 20th edn, Sweet & Maxwell 2021) 1296.

70 Miller (n 68) 107.

71 Keith Michel, *War, terror and carriage by sea* (LLP 2004) 204-205; Hudson, Madge and Sturges (n 68) 359.

72 Miller (n 68) 105. See also Hudson, Madge and Sturges (n 68) 342; Wilhelmsen (2019) (n 3) 166; Arnould (n 68) 1293-1294.

73 Miller (n 68) 105.

74 Hudson, Madge and Sturges (n 68) 365-366; Arnould (n 68) 1317.

75 *Panamanian Oriental SS Corp* v *Wright* (*The Anita*) (1971) 1 Lloyd's Rep 487; Arnould (n 68) 1317-1318.

the carriage of goods for that purpose.[76] Elephant breached the rules of the Nigerian Customs and Excise Management Act, which appear to be included in both concepts.

Further, the detainment must be "by reason of" infringement. This suggests a causal link between the actual infringement and the detainment.[77] It is more unclear to what extent it is relevant that the regulation that was infringed was motivated by overriding political security reasons typical for war or times of crisis. From a Nordic perspective this seem to be a question of combination of detainment due to a political act, which is covered according to clause1.2, and detainment by reason of infringement of customs regulation, which is excluded in clause 4.1.4. In the UK regulation, this issue is regulated through the principle of "proximate cause".[78] The question here is thus whether the expression "by reason of" involves a question of proximate cause. This issue was discussed in the *B Atlantic* case:[79]

> The case concerned a substantial quantity of narcotics that was deliberately planted on board a vessel in harbour in Venezuela. On discovery of the drugs, the vessel was impounded as part of judicial proceedings.[80] It was argued that the secreting of drugs constituted a malicious act that was covered by the war risk insurance clause 1.5, which provided cover for 'any terrorist or any person acting maliciously or from a political motive'. If so, the question was whether this malicious act was the proximate cause of the loss, and not the detention by reason of infringement of customs regulations, which was excluded. The Appeal Court considered whether the phrase 'by reason of' the infringement involved a question of proximate cause, but argued that 'by reason of' then begged the question of 'why' the vessel was detained, and this question was not identical to the question of proximate cause.[81] The Supreme Court

76 Arnould (n 68) 1320.

77 Miller (n 68) 191.

78 Wilhelmsen and Bull (n 4) 128; Miller (n 68) ch. 28; Arnould (n 68) ch. 22.

79 *Atlasnavios Navegacao Lda* v *Navigators Insurance Co Ltd* (*The B Atlantic*) (2019) A.C. 136 (2018) 2 Lloyd's Rep 1; here referred from Miller (n 68) 154, 191.

80 Miller (n 68) 154.

81 Miller (n 68) 191.

> rejected the argument that the proximate cause was the malicious act rather than the infringement, as the malicious act could not be distinguished from the infringement. The court further stated that as 'a matter of construction, the analysis of the present Clauses falls into three stages. The first stage, if clause 1.5 is capable of applying at all, is that there was a loss caused by a "person acting maliciously". Assuming that there was, the second stage is that the means by which loss arose was the vessel's consequent detainment and the fact that this lasted for a continuous period of six months. Only on this basis were the owners able to treat the vessel as a constructive total loss under clause 3. The third stage involves the question whether such detainment was by reason of any infringement of customs regulations within clause 4.1.5.'[82] It is 'possible that a loss may both be caused by a person acting maliciously within clause 1.5 and at the same time arise from detainment by reason of infringement of customs regulations within clause 4.1.5.'[83] '[W]hile the general aim in insurance law is to identify a single real, effective or proximate cause of any loss, the correct analysis is in some cases that there are two concurrent causes. This is particularly so where an exceptions clause takes certain perils out of the prima facie cover'.[84] The court concluded that even 'if it had been possible to view the loss as caused by a person acting maliciously within clause 1.5, it would still have been excluded by clause 4.1.5 as arising, at least concurrently, from detainment by reason of infringement of customs regulations.'[85]

It appears from this that a loss can be proximately caused, both by a peril insured against and by a peril that is excluded, but even so, the exclusion prevails. Applied to the *Team Tango* case, this would mean that even if the detainment was proximately caused by a political act and was therefore covered, it would still be excluded, since the detainment was also proximately caused by infringement of customs regulation.

The exclusion is silent as to who the infringement must be committed by, but there is no implied implication that the infringement must be

82 *The B Atlantic* 41. See also Miller (n 68) 191.

83 *The B Atlantic* 42.

84 ibid 43.

85 ibid 55.

one committed by the ship-owner itself or by its servants or agents.[86] The clause is not needed in order to exclude smuggling by ship owners themselves, and smuggling by the crew is generally excluded as barratry.[87] In the *B Atlantic* case, the Supreme Court considered whether there could be situations where the exclusion should not be applied, and mentioned three possible scenarios: First, where there was a seizure on a knowingly false basis, where no smuggling took place, or the authority has planted the drugs on board. Second, where a malicious third party planted the drugs on board in order to blackmail the owner. Third, where a malicious third party planted the drugs to inform the authorities about this in order to get the vessel detained.[88] Apart from such situations, it does not matter whether or not the owner is acting in good faith.[89] Based on this, the assured in the *Team Tango* case would not be covered when the vessel was detained due to infringement of customs regulations by the receiver of the goods.

7 Some reflections

The amendment of the cover for interventions by foreign states in NP in 2019 was aimed at clarifying the existing regulation. Even so, the *Team Tango* case illustrates that the distinction between a war risk intervention and a marine risk intervention may be extremely difficult in cases when import regulation is motivated by political considerations of security. This can be the case for many commodities, regardless of the country being in a state of war or in a time of crisis. Import of weapons is normally prohibited, whether or not there is an ongoing war. The main point here appears to be that a breach of a trading regulation is not a war risk, but instead is a criminal offence that normally is covered as a ma-

86 ibid 33; Miller (n 68) 191.

87 Miller (n 68) 191-192.

88 *The B Atlantic* 33-37; Miller (n 68) 192.

89 Hudson, Madge and Sturges (n 68) 366; Arnould (n 68) 1319.

rine risk. This may be deduced from the Commentary when it states that if an overriding political motive is detected this will be decisive, even if the intervention is "formally" based on a regulatory breach; if the legal basis for the intervention clearly is a material regulatory breach, this is not a war risk. However, the question appears clearer if such double motive is analyzed in light of the provisions on combination of causes. It seems fair that if the overriding political motive appears to be the dominant cause, the war risk insurer is liable, whereas if the breach of import regulation is the dominant cause, this is a marine risk situation. In the *Team Tango* case, the principles of causation as applied in previous cases appear to support the decision by the arbitration tribunal.

Another aim of the 2019 amendment was to strengthen the cover for intervention by foreign states. But this was never meant to provide the assured with the extra cover for war risk *losses*; the main point was to provide ordinary hull and loss of hire cover for such intervention, to the extent that it was not caused by a war risk. The Commentary to Clause 2-8 here remarks:

> The standard cover provided by the Plan is not intended to provide the kind of "political risk" cover that would more fully protect owners of vessels trading to countries that have a more or less dysfunctional political system. Solutions for such vessels are available in the market and it is a matter for the assured to decide what level of more specific cover they deem appropriate. It is not natural to spread this risk over all assureds that do not trade in these areas.[90]

Thus, the NP provides a better cover than the UK conditions, in that intervention by a foreign state due to i.a. breach of trading regulation is covered as a marine peril, but it does not extend the cover for losses caused by such interventions.

[90] Commentary (2019) 44.