

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

THE M/V “VIRGINIA G” CASE  
(PANAMA/GUINEA-BISSAU)  
List of cases: No. 19

JUDGMENT OF 14 APRIL 2014

**2014**

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DU NAVIRE « VIRGINIA G »  
(PANAMA/GUINÉE-BISSAU)  
Rôle des affaires : No. 19

ARRÊT DU 14 AVRIL 2014

Official citation:

*M/V "Virginia G" (Panama/Guinea-Bissau),  
Judgment, ITLOS Reports 2014, p. 4*

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Mode officiel de citation :

*Navire « Virginia G » (Panama/Guinée-Bissau),  
arrêt, TIDM Recueil 2014, p. 4*

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JUDGMENT

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JUDGMENT

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*Present:* *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES; *Registrar* GAUTIER.

In the M/V “Virginia G” case

*between*

Panama,

*represented by*

Mr Ramón García-Gallardo, SJ Berwin LLP, Brussels, Belgium,

*as Agent and Counsel;*

Mr Alexander Mizzi, SJ Berwin LLP, Brussels, Belgium,

*as Co-Agent and Counsel;*

*and*

Ms Janna Smolkina, Ship Registration Officer, Consulate General of Panama, Hamburg, Germany,

*as Counsel;*

Ms Veronica Anzilutti, Consulate General of Panama, Hamburg, Germany,

*as Advisor;*

*and*

Guinea-Bissau,

*represented by*

Mr Luís Menezes Leitão, Full Professor, Faculty of Law, University of Lisbon, Portugal,

*as Agent and Counsel;*

Mr Fernando Loureiro Bastos, Professor, Faculty of Law, University of Lisbon, Portugal, and Fellow, Institute for International and Comparative Law in Africa, Faculty of Law, University of Pretoria, South Africa,

*as Co-Agent and Counsel;*

*and*

Mr Rufino Lopes, Lawyer, Assessor to the Government of Guinea-Bissau,

*as Advisor,*

THE TRIBUNAL,

composed as above,

after deliberation,

*delivers the following Judgment:*

## **I Introduction**

1. By letter dated 5 January 2011, the Vice-President and Minister of Foreign Affairs of the Republic of Panama notified the Tribunal of the appointment of Mr Ramón García-Gallardo as Agent and Mr Alexander Mizzi as Co-Agent of Panama for the purposes of arbitral proceedings or proceedings before the

Tribunal in a dispute with the Republic of Guinea-Bissau concerning the oil tanker *M/V Virginia G* flying the flag of Panama.

2. The Agent of Panama, by letter dated 3 June 2011, notified the Minister of Foreign Affairs, International Cooperation and Communities of Guinea-Bissau of the institution of arbitral proceedings pursuant to Annex VII to the United Nations Convention on the Law of the Sea (hereinafter “the Convention”), in a dispute concerning the *M/V Virginia G*. In that letter, Panama stated “that there is the possibility of submitting this dispute to ITLOS, or a special chamber within ITLOS, as a way of resolving the dispute contentiously, yet in a less costly manner”. Panama further suggested that “the two governments agree to submit the dispute between them concerning the VIRGINIA G to ITLOS through an exchange of letters” on certain conditions indicated in its letter of 3 June 2011.
3. By letter dated 29 June 2011, the Permanent Representative of Guinea-Bissau to the United Nations in New York informed the Agent of Panama as follows:

Upon instructions of my Government I would like to convey to you the agreement of the Republic of Guinea-Bissau with your proposal to transfer the case to the International Tribunal of the Law, whose jurisdiction in this case Guinea-Bissau accepts fully.

My government therefore takes it that your afore-mentioned proposal and this letter constitute a special agreement between the two Parties for the submission of the case to ITLOS.

...

My Government would very much appreciate it to receive your confirmation of this understanding as soon as possible.

4. By letter dated 4 July 2011, Panama informed the Permanent Representative of Guinea-Bissau to the United Nations in New York of the following:

We have noted the agreement of the Republic of Guinea-Bissau to transfer the case to the International Tribunal of the Law of the Sea (ITLOS) and the acceptance of jurisdiction in that respect.



We confirm that our proposal to submit the matter to ITLOS, as contained in our letter dated 3 June 2011, and Guinea-Bissau’s acceptance thereto, as contained in your letter dated 29 June 2011, is sufficient to consider that the two governments have come to a Special Agreement to submit the case to ITLOS, in accordance with article 55 of the Rules of ITLOS.

5. The Agent of Panama, by separate letter dated 4 July 2011, notified the Tribunal of a special agreement, “concluded between the Republic of Panama and the Republic of Guinea-Bissau on . . . 29 June . . . and 4 July 2011”, to submit to the Tribunal the dispute concerning the *M/V Virginia G*. On the same day, the Registrar, pursuant to article 24, paragraph 2, of the Statute of the Tribunal (hereinafter “the Statute”), transmitted to the Minister of Foreign Affairs of the Republic of Guinea-Bissau a certified copy of the letter of notification from Panama dated 4 July 2011.

6. In light of the agreement of the Parties, to submit their dispute concerning the *M/V Virginia G* to the Tribunal for adjudication, and of the notification by the Agent of Panama dated 4 July 2011, the case was entered in the List of cases as Case No. 19 on 4 July 2011.

7. The Registrar, by letter dated 6 July 2011, pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, notified the Secretary-General of the United Nations of the special agreement between the Parties to institute proceedings before the Tribunal.

8. In accordance with article 24, paragraph 3, of the Statute, the Registrar, by note verbale dated 6 July 2011, notified the States Parties to the Convention of the institution of proceedings.

9. On 20 July 2011, the Registrar was notified by the Minister of Foreign Affairs, International Cooperation and Communities of Guinea-Bissau of the appointment of Mr Luís Menezes Leitão and Mr Fernando Loureiro Bastos as Agent and Co-Agent, respectively, of Guinea-Bissau in this case.

10. In accordance with article 45 of the Rules of the Tribunal (hereinafter "the Rules"), on 17 August 2011, the President of the Tribunal held consultations with the Parties at the premises of the Tribunal to ascertain their views with regard to questions of procedure in respect of the case.

11. Having ascertained the views of the Parties, the President, in accordance with articles 59 and 61 of the Rules, fixed by Order dated 18 August 2011 the following time-limits for the filing of pleadings in the case: 4 January 2012 for the Memorial of Panama, and 21 May 2012 for the Counter-Memorial of Guinea-Bissau. On 18 August 2011, the Registrar transmitted a copy of the Order to each Party.

12. Pursuant to article 61 of the Rules, the Tribunal, by Order dated 30 September 2011, authorized the presentation of a Reply and a Rejoinder and fixed the following time-limits for the filing of those pleadings in the case: 21 August 2012 for the Reply by Panama, and 21 November 2012 for the Rejoinder of Guinea-Bissau. On 1 October 2011, the Registrar transmitted a copy of the Order to each Party.

13. Since the Tribunal did not include upon the bench a judge of the nationality of Panama, the Agent of Panama, pursuant to article 17, paragraph 3, of the Statute, informed the Registrar by letter dated 13 December 2011 that Panama had chosen Mr Tullio Treves to sit as judge *ad hoc* in the case. The Registrar transmitted a copy of the letter to Guinea-Bissau on 15 December 2011.

14. Since the Tribunal did not include upon the bench a judge of the nationality of Guinea-Bissau, the Agent of Guinea-Bissau informed the Registrar by letter dated 3 January 2012 that Guinea-Bissau had chosen Mr José Manuel Sérvulo Correia to sit as judge *ad hoc* in the case. The Registrar transmitted a copy of the letter to Panama on 5 January 2012.

15. No objection to the choice of Mr Treves as judge *ad hoc* was raised by Guinea-Bissau, and no objection to the choice of Mr Sérvulo Correia as judge *ad hoc* was raised by Panama. No objection to the choice of the judges *ad hoc* appeared to the Tribunal itself. Consequently, the Registrar informed the Parties by letters dated 9 February 2012 and 14 March 2012, respectively, that Mr Treves and Mr Sérvulo Correia would be admitted to participate in the proceedings as judges *ad hoc* after having made the solemn declaration required under article 9 of the Rules.

16. At a public sitting held on 2 November 2012, Mr Sérvulo Correia and Mr Treves made the solemn declaration required under article 9 of the Rules.

17. By letter dated 19 December 2011, the Agent of Panama requested an extension of the time-limit fixed for the submission of the Memorial of Panama. Having ascertained the views of the Parties, the President, by Order dated 23 December 2011, extended the time-limit for the submission of the Memorial of Panama to 23 January 2012, and the time-limit for the submission of the Counter-Memorial of Guinea-Bissau to 11 June 2012. On 23 December 2011, the Registrar transmitted a copy of the Order to each Party.

18. The Memorial of Panama and the Counter-Memorial of Guinea-Bissau were filed on 23 January and 30 May 2012, respectively.

19. By electronic communication dated 23 July 2012, the Agent of Panama requested an extension of the time-limit fixed for the submission of the Reply of Panama. Having ascertained the views of the Parties, the President, by Order dated 8 August 2012, extended the time-limits for the submission of the Reply of Panama and the Rejoinder of Guinea-Bissau to 28 August and 28 November 2012, respectively. On 9 August 2012, the Registrar transmitted a copy of the Order to each Party.

20. The Reply of Panama was filed on 28 August 2012 and the Rejoinder of Guinea-Bissau on 21 November 2012.

21. In its Counter-Memorial, Guinea-Bissau presented a counter-claim stating that "Panama violated art. 91 of the Convention by granting its nationality to a ship without any genuine link to Panama, which facilitated the practice of illegal actions of bunkering without permission in the EEZ of Guinea-Bissau" and that "Guinea-Bissau is entitled to claim from Panama all damages and costs caused by VIRGINIA G to Guinea-Bissau, which are a result of the granting of the flag of convenience to the ship by Panama".

22. By electronic communication dated 23 July 2012, the Agent of Panama requested the Tribunal to fix a date following the filing of the Rejoinder by Guinea-Bissau for the submission of an additional pleading in reply to the parts of the Rejoinder of Guinea-Bissau concerning the counter-claim. The Registrar informed the Parties on 9 August 2012 that a position on the request would be taken at a later stage after consultations with them. In its Reply, Panama reiterated its request to be authorized to submit an additional pleading which

would only respond to the sections of Guinea-Bissau's Rejoinder concerning the counter-claim.

23. By letter dated 6 October 2012, the Registrar, at the request of the President, informed the Parties that "[b]efore taking a decision on the possibility for Panama to file an additional pleading restricted to the issue of the counter-claim, the Tribunal has to examine whether the counter-claim raised by Guinea-Bissau is admissible under article 98 of the Rules". The Registrar invited each Party to submit its observations on the question of admissibility of the counter-claim pursuant to article 98 of the Rules. Such observations were received on 18 and 19 October 2012 from Guinea-Bissau and Panama, respectively.

24. The Tribunal, by Order dated 2 November 2012, found that the counter-claim presented by Guinea-Bissau was admissible under article 98, paragraph 1, of the Rules. It also authorized the submission by Panama of an additional pleading relating solely to the counter-claim of Guinea-Bissau, and fixed 21 December 2012 as the time-limit for the filing of this pleading. On 5 November 2012, the Registrar transmitted a copy of the Order to each Party.

25. The additional pleading of Panama relating to the counter-claim of Guinea-Bissau was submitted on 21 December 2012.

26. The President, on 1 February 2013, held consultations with the Agent of Panama and the Agent and Co-Agent of Guinea-Bissau at the premises of the Tribunal to ascertain the views of the Parties regarding the conduct of the case and the organization of the hearing.

27. The Tribunal, by Order dated 24 April 2013, fixed 2 September 2013 as the date for the opening of the hearing. The Registrar transmitted a copy of the Order to each Party on 24 April 2013.

28. The Agent of Panama on 2 and 8 July 2013, and the Agent of Guinea-Bissau on 24 June and 22 July 2013, submitted information required under article 72 of the Rules regarding evidence which the Parties intended to produce.

29. On 26 August 2013, the Agent of Panama and the Agent of Guinea-Bissau each submitted materials required under paragraph 14 of the Guidelines Concerning the Preparation and Presentation of Cases before the Tribunal.

30. In accordance with article 68 of the Rules, prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 29 and 30 August 2013.

31. On 30 August 2013, the President held consultations with representatives of the Parties to address a number of procedural matters pertaining to the case. The Agent and Co-Agent of Panama participated through video-conference; the Agent and Co-Agent of Guinea-Bissau were present at the premises of the Tribunal. During the consultations, the President communicated to the Parties a list of questions which the Tribunal wished the Parties specially to address, in accordance with article 76, paragraph 1, of the Rules. These questions were as follows:

1. Can the Parties throw some more light, if possible with examples of relevant practice or specific cases, on the risks posed to the marine environment by bunkering?
2. What are the legal remedies available under the legal system of Guinea-Bissau against the confiscation of a vessel, its cargo and its gasoil?
3. What has been the practice of Guinea-Bissau in implementing article 23 of Decree Law 6-A/2000 with respect to bunkering operations for fishing vessels in its EEZ in general and, in particular, regarding vessels flying the flag of Panama? Have logistical support vessels (bunkering vessels) been required to obtain and keep on board the authorization for carrying out bunkering operation? Or has it been enough for fishing vessels to obtain the authorization for bunkering operation for both fishing vessels and bunkering vessels through telephone or radio? What is the amount to be paid for the authorization and was a payment made in the case of the M/V "Virginia G"?

32. The Parties replied to these questions in the course of the hearing. In addition, written responses to the questions were provided by the Agent of Panama by electronic communication dated 5 September 2013, and by the Agent of Guinea-Bissau by electronic communications dated 4 and 5 September 2013.

33. By electronic communication dated 30 August 2013, the Agent of Panama requested, pursuant to article 71 of the Rules, that Panama be allowed to submit an additional document after the closure of the written proceedings.

Pursuant to the initial deliberations, the Tribunal, having heard the views of the Parties, decided to authorize the submission of the additional document Panama wished to produce. The Registrar informed the Parties of the decision of the Tribunal by letter dated 2 September 2013. The additional document was filed with the Registry on 4 September 2013.

34. From 2 to 6 September 2013, the Tribunal held 8 public sittings. At these sittings, the Tribunal was addressed by the following:

*For Panama:*

Mr Ramón García-Gallardo,  
*as Agent and Counsel;*

Mr Alexander Mizzi,  
*as Co-Agent and Counsel;*

and

Ms Janna Smolkina,  
*as Counsel;*

*For Guinea-Bissau:*

Mr Luís Menezes Leitão,  
*as Agent and Counsel;*

Mr Fernando Loureiro Bastos,  
*as Co-Agent and Counsel.*

35. At the public sittings held on 2 and 3 September 2013, the following witnesses and experts were called by Panama:

Mr Fausto Ocaña Cisneros, chief mate, *M/V Virginia G*, witness  
(examined by Mr García-Gallardo, cross-examined by Mr Menezes Leitão)

Mr José Antonio Gamez Sanfiel, *M/V Virginia G* representative, witness  
(examined by Mr García-Gallardo, cross-examined by Mr Menezes Leitão,  
re-examined by Mr García-Gallardo)

Mr Manuel Samper Pérez, operations manager (Gebaspe SL), witness  
(examined by Mr García-Gallardo, cross-examined by Mr Menezes Leitão,  
re-examined by Mr García-Gallardo)

Mr Pedro Olives Socas, representative of the Panama Ship Registry in Las  
Palmas, witness/expert  
(examined by Mr García-Gallardo, cross-examined by Mr Menezes Leitão,  
re-examined by Mr García-Gallardo)

Mr Alfonso Moya Espinosa, marine engineer/surveyor-consultant, expert  
(examined by Mr García-Gallardo, cross-examined by Mr Menezes Leitão,  
re-examined by Mr García-Gallardo)

Mr Kenneth Arnott, marine engineer/surveyor-consultant, expert  
(examined by Mr García-Gallardo, cross-examined by Mr Menezes Leitão).

36. At the public sittings held on 4 and 5 September 2013, the following witnesses and experts were called by Guinea-Bissau:

Mr João Nunes Cá, fishing observer and inspector, witness  
(examined by Mr Menezes Leitão, cross-examined by Mr García-Gallardo,  
re-examined by Mr Menezes Leitão)

Mr Carlos Nelson Sanó, fishing observer and administrative staff, witness  
(examined by Mr Menezes Leitão, cross-examined by Mr García-Gallardo)

Mr Augusto Artur António da Silva, Minister of National Defence and  
Homeland Freedom Fighters and member of the Inter-Ministerial  
Commission for Maritime Surveillance of Guinea-Bissau at the time of the  
incident, witness  
(examined by Mr Menezes Leitão, cross-examined by Mr García-Gallardo)

Mr Djata Janga, second lieutenant of the navy, naval pilot, commander of  
Squadron Cockpit, witness  
(examined by Mr Menezes Leitão, cross-examined by Mr Mizzi)

Mr Ildefonso Barros, former Secretary-General for Fisheries and former national coordinator of the National Fisheries Inspection and Control Service (Serviço Nacional de Fiscalização e Controlo das Actividades de Pesca), witness

(examined by Mr Menezes Leitão, cross-examined by Mr Mizzi)

Mr Mário Dias Sami, economist, deputy and member of the Permanent Committee of the Popular National Assembly, witness

(examined by Mr Menezes Leitão, cross-examined by Mr García-Gallardo and Mr Mizzi, re-examined by Mr Menezes Leitão)

Mr Hugo Nosoliny Vieira, former national coordinator of the National Fisheries Inspection and Control Service (Serviço Nacional de Fiscalização e Controlo das Actividades de Pesca), witness

(examined by Mr Menezes Leitão, cross-examined by Mr García-Gallardo)

Mr Mussa Mane, lawyer, official of the State Department of Fisheries, expert

(examined by Mr Menezes Leitão)

Mr Adilson Dywyná Djabulá, lawyer, legal adviser to the Secretary of State for Fisheries of Guinea-Bissau and President of the Inter-Ministerial Commission for Maritime Surveillance of Guinea-Bissau, expert

(examined by Mr Menezes Leitão)

Mr Carlos Pinto Pereira, lawyer, professor at the Faculty of Law of Bissau, expert

(examined by Mr Menezes Leitão).

37. In the course of their testimony, the following witnesses and experts replied to questions put by judges pursuant to article 76, paragraph 3, of the Rules: Mr Ocaña Cisneros responded to questions posed by Judge Lucky, Mr Gamez Sanfiel to questions posed by Judge Bouguetaia, Mr Nunes Cá to questions posed by Judge *ad hoc* Treves and Judge Lucky, Mr Nelson Sanó to questions posed by Judge Kulyk, Mr Mane to questions posed by Judge Akl, and Mr Dywyná Djabulá to questions posed by Vice-President Hoffmann, Judge Marotta Rangel and Judge Ndiaye.



38. Messrs Ocaña Cisneros, Gamez Sanfiel, Samper Pérez, Olives Socas, and Moya Espinosa gave evidence in Spanish. Messrs Nunes Cá, Nelson Sanó, da Silva, Janga, Barros, Sami, Nosoliny Vieira, Mane, Dywyná Djabulá, and Pinto Pereira gave evidence in Portuguese. Pursuant to article 85 of the Rules, the necessary arrangements were made for the statements of those witnesses and experts to be interpreted into the official languages of the Tribunal.

39. During the hearing, the Parties displayed a number of exhibits on screen, including photographs and excerpts of documents.

40. During the hearing held on 2 September 2013, with reference to a number of photographs displayed by Panama and showing the *M/V Virginia G*, the Agent of Guinea-Bissau raised an objection, stating that these pictures were different from those included in the written pleadings. On the same day, the Registrar requested the Agent of Panama to communicate to the Registry and to the Agent of Guinea-Bissau an electronic copy of these photographs. Copies were communicated to the Registrar and the Agent of Guinea-Bissau on 3 September 2013.

41. By letter dated 4 September 2013, the Agent of Guinea-Bissau raised an objection to the production of these photographs for the reason that they had not been previously submitted as part of the written pleadings. The Tribunal held deliberations on this issue on 5 September 2013 and decided that only the photographs submitted by Panama in Annex 60 to its Memorial could form part of the case file. The Tribunal decided, however, that no modification should be made to the verbatim record of the hearing during which the photographs were displayed.

42. In the course of the oral proceedings, the President held consultations with the Parties, on 3, 5 and 6 September 2013, to ascertain their views on procedural matters.

43. The hearing was broadcast on the internet as a webcast.

44. Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and documents annexed thereto were made accessible to the public on the opening of the oral proceedings.

45. In accordance with article 86, paragraph 1, of the Rules, the transcript of the verbatim records of each public sitting was prepared by the Registry in the official languages of the Tribunal used during the hearing. In accordance with article 86, paragraph 4, of the Rules, copies of the transcripts of the said records were circulated to the judges sitting in the case, and to the Parties. The transcripts were also made available to the public in electronic form.

46. By letter dated 6 September 2013, the Registrar communicated to the Parties an additional list of questions which the Tribunal wished the Parties specially to address, in accordance with article 76, paragraph 1, of the Rules. These questions were as follows:

#### **Questions to Parties, I**

To Panama:

1. Why were the legal procedures for seeking the release of the vessel not used?

To Guinea-Bissau:

2. Did the Attorney General appeal the decision of the Regional Court of Bissau of 5 November 2009 suspending the confiscation of the vessel and any product on board? When was the appeal lodged and was it lodged in time? Did the appeal have a suspensive effect? What was the decision taken on the appeal?
3. Did Panama or the owner of the vessel appeal the decision of the Interministerial Fisheries Commission to confiscate the vessel? If so, when was the appeal lodged and what was its outcome?

To both parties:

4. What fine, if any, was imposed against the "Virginia G"; to whom was it communicated and what was its amount?

The responses to these questions should include references to the applicable provisions of the laws of Guinea-Bissau.

## Questions to Parties, II

Could the parties submit documents (including copies of invoices) in support of the amount of compensation claimed?

47. The Agent of Panama and the Agent of Guinea-Bissau provided written responses to the additional questions by electronic communications dated 13 September and 14 September 2013, respectively.

## II Submissions of the Parties

48. In the Statement of Claim of 3 June 2011, annexed to the letter of 4 July 2011 by which the Agent of Panama notified the Tribunal of the special agreement between the Parties to submit the dispute concerning the *M/V Virginia G* to the Tribunal, Panama requested the arbitral tribunal to adjudge and declare that:

- (a) the laws or regulations that Guinea-Bissau cited as being applicable to the vessel and its activities were not in fact applicable or enforceable against the vessel in the EEZ of Guinea-Bissau; and if they were, then as applied by Guinea-Bissau are incompatible with UNCLOS;
- (b) the actions of Guinea-Bissau, *inter alia* its interpretation of "fishing related activities" and other laws, rules and concepts on which its actions were based; the forceful treatment of the Master and crew in the EEZ of Guinea-Bissau; the subsequent arrest of the vessel; its detention and the removal of the cargo of gasoil, were incorrect and unlawful, and violated the rights of Panama and the vessel to enjoy the freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation as set out in Articles 56 and 58 UNCLOS and the related provisions of UNCLOS;
- (c) the actions of Guinea-Bissau, *inter alia* the exercise of powers beyond those warranted in terms of Article 73(1); the refusal to acquiesce to the willingness of the vessel's owner to post security in terms of Article 73(2) and the failure by Guinea-Bissau to notify the flag State of the action taken and enforcement measures or penalties subsequently imposed, prejudiced the rights of Panama and the vessel; prevented an effective safeguarding of the interests of Panama and the vessel, including, without limitation, minimising

- the losses; and caused serious financial damages and physical distress;
- (d) the delay or length of time during which Guinea-Bissau held the *Virginia G* under arrest or detention was drastically outside the limits of reasonableness called for by Article 226 – especially in view of the fact that the vessel's owners had expressly requested the setting up and posting of security – and that the length of the detention led to serious damages and losses incurred by the vessel;
  - (e) the authorities of Guinea-Bissau used intimidation and/or force unnecessarily and unreasonably in arresting the *Virginia G* and in their treatment of the crew, and that compensation is due under international law;
  - (f) the confiscation by the authorities of Guinea-Bissau of the cargo of gasoil from on board the vessel was done in an abusive, forceful and illegal manner and that Guinea-Bissau immediately return the gasoil, or gasoil of an equivalent or superior quality; or an amount representing the value of the gasoil so confiscated and sold by Guinea-Bissau;
  - (g) the treatment of the *Virginia G* was discriminatory in comparison to the treatment of other foreign vessels;
  - (h) as a result of the above violations, Panama is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Virginia G*, including all persons involved or interested in its operation, including injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic loss, including loss of profit, with interest thereon;
  - (i) Guinea-Bissau shall pay all damages and losses suffered as a result of all the violations set out above (which amount is indicated herein, but which is not final), with interest thereon; and that in the event of the arbitral tribunal finding against the amount quantified as compensation, that the arbitral tribunal determine the compensation due as it sees fit and proper, with interest thereon.
  - (j) Guinea-Bissau shall pay for all costs of these proceedings, including those incurred by Panama.

49. In paragraph 442 of its Memorial, Panama requested the Tribunal to adjudge and declare that:

1. The International Tribunal has jurisdiction under the Special Agreement and under the Convention to entertain the full claims made on behalf of Panama;
2. The claims submitted by Panama are admissible;
3. The claims submitted by Panama are well founded;
4. The actions taken by Guinea Bissau, especially those taken on the 21 August 2009, against the *VIRGINIA G*, violated Panama's right and that of its vessel to enjoy freedom of navigation and other internationally lawful uses of the sea in terms of Article 58(1) of the Convention;
5. Guinea Bissau violated Article 56(2) of the Convention;
6. Guinea Bissau violated Article 73(1) of the Convention;
7. Guinea Bissau violated Article 73(2) of the Convention;
8. Guinea Bissau violated Article 73(3) of the Convention;
9. Guinea Bissau violated Article 73(4) of the Convention;
10. Guinea Bissau used excessive force in boarding and arresting the *VIRGINIA G*, in violation of the Convention and of international law;
11. Guinea Bissau violated the principles of Article 224 and 110 of the Convention;
12. Guinea Bissau violated Article 225 of the Convention as well as the SUA Convention, as well as the fundamental principles of safety of life at sea and collision prevention;
13. Guinea Bissau violated Article 300 of the Convention;
14. Guinea Bissau is to immediately return the gas oil confiscated on the 20 November 2009, of equivalent or better quality, or otherwise pay adequate compensation;
15. Guinea Bissau is to pay in favour of Panama, the *VIRGINIA G*, her owners, crew and all persons and entities with an interest in the vessel's operations (including the *IBALLA G*), compensation for damages and losses caused as a result of the aforementioned

- violations, in the amount quantified and claimed by Panama, or in an amount deemed appropriate by the International Tribunal;
16. Guinea Bissau is to pay interest on all amounts held by the International Tribunal to be due by Guinea Bissau;
  17. Guinea Bissau is to reimburse all costs and expenses incurred by Panama in the preparation of this case, including, without limitation, the costs incurred in this case before the International Tribunal, with interest thereon;
  18. Guinea Bissau is to compensate Panama, the *VIRGINIA G*, her owners, crew and all persons and entities with an interest in the vessel's operations (including the *IBALLA G*) in the form of any other compensation or relief that the International Tribunal deems fit.

Without prejudice to additional claims for damages, losses and costs as may be submitted for the International Tribunal's consideration in relation to this case.

50. In paragraph 507 of its Reply, Panama made the following submissions:

[I]n addition to Panama's submissions presented in Chapter 5 of its Memorial,

Panama respectfully requests the International Tribunal to:

- A. Declare, adjudge and order that Guinea-Bissau's objections to the admissibility of Panama's claim are outside the time-limit and/or are brought in bad faith such that they should be dismissed, rejected or otherwise refused;
- B. Dismiss, reject or otherwise refuse Guinea-Bissau's counter-claim on the basis that Guinea-Bissau has no legal basis under international law and under the Convention to bring the counter-claim, given the existence of the required links between Panama and the *VIRGINIA G*, or, in the alternative, on the basis that Guinea-Bissau's counter-claim is unfounded in fact and at law, and that the counter-claim is frivolous and vexatious;

- C. Dismiss, reject or otherwise refuse each and all of the submissions of Guinea-Bissau, as set out in Chapter IX of Guinea-Bissau's Counter-Memorial, and declare, adjudge and order that:
1. Panama did not violate Article 91 of the Convention;
  2. In connection with Submission B above, Panama is not to pay in favour of Guinea-Bissau compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial; and
  3. Panama is not to pay all legal costs and other costs that Guinea-Bissau has [incurred] in relation to this case.
- D. Declare, adjudge and order that Guinea-Bissau's Decree Law 6-A/2000, as was applied to the [VIRGINIA] G (and as applied in general) in the EEZ of Guinea-Bissau, is a unilateral extension of the scope of the Convention, restricting the freedoms under the Convention, and, in effect, an extension by Guinea-Bissau of a type of tax and/or customs-duty radius, in violation of the Convention.

*Without prejudice to additional claims for damages, losses and costs as may be submitted for the International Tribunal's consideration in relation to this case.*

51. In paragraph 118 of its additional pleading in response to Guinea-Bissau's counter-claim, Panama made the following submissions:

[I]n addition to Panama's submissions presented in Chapter 5 of its Memorial and Chapter 8 of its Reply:

Panama respectfully requests the International Tribunal to:

- A. Declare, adjudge and order that Guinea-Bissau is estopped from claiming that Panama violated Article 91 of the Convention;
- B. Declare, adjudge and order that Panama did not violate Article 91 of the Convention and that a genuine link does exist, as between Panama and the VIRGINIA G;
- C. Dismiss, reject or otherwise refuse Guinea Bissau's counter-claim on the basis that Guinea Bissau has presented an unsubstantiated, invalid, frivolous, disproportionate and vexatious claim absent of any evidence, reasoning, legal argumentation or facts on the basis of which (a) the International Tribunal is validly able to consider the

counter-claim and (b) Panama is able to adequately present a defence in this respect.

- D. Dismiss, reject or otherwise refuse each and all of the submissions of Guinea-Bissau, as set out in Chapter IX of Guinea-Bissau's Counter-Memorial, and Chapter IX of Guinea-Bissau's Rejoinder, and declare, adjudge and order that Panama is not responsible for, and is not to pay in favour of Guinea-Bissau, (i) compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial, and (ii) legal costs and other costs that Guinea-Bissau has incurred in relation to this case.
- E. Declare, adjudge and order that Guinea-Bissau is to [bear] legal costs and other costs that Panama has incurred in relation to this case and this counter-claim.

*Without prejudice to additional claims for damages, losses and costs as may be submitted by Panama for the International Tribunal's consideration in relation to this case.*

52. In paragraph 268 of its Counter-Memorial, Guinea-Bissau made the following submissions:

[T]he Government of the Republic of Guinea-Bissau asks the International Tribunal to dismiss the Submissions of Panama in total and to adjudge and declare that:

- 1- Panama violated Article 91 of the Convention;
- 2- Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by [Guinea]-Bissau, or in an amount deemed appropriate by the International Tribunal;
- 3- Panama shall pay all legal and other costs the Republic of Guinea-Bissau has incurred with this case.



53. In paragraph 236 of its Rejoinder, Guinea-Bissau made the following submissions:

[T]he Government of the Republic of Guinea-Bissau insists on asking the International Tribunal to dismiss the Submissions of Panama in total and to adjudge and declare that:

- 1- Panama violated Article 91 of the Convention;
- 2- Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by Guinea-Bissau, or in an amount deemed appropriate by the International Tribunal;
- 3- Panama shall pay all legal and other costs that the Republic of Guinea-Bissau has incurred in relation to this case.

54. In accordance with article 75, paragraph 2, of the Rules, the following final submissions were presented by the Parties at the conclusion of the last statement made by each Party at the hearing:

*On behalf of Panama:*

1. SUBMISSIONS IN RELATION TO THE CLAIM

Panama respectfully requests the International Tribunal to declare, adjudge and order that:

1. The International Tribunal has full jurisdiction under the Special Agreement and under the Convention to entertain the full claims made on behalf of Panama;
2. The claims submitted by Panama are admissible;
3. The claims submitted by Panama are well founded;
4. The actions taken by Guinea Bissau, especially those taken on the 21 August 2009, against the *VIRGINIA G*, violated Panama's right and that of its vessel to enjoy freedom of navigation and other internationally lawful uses of the sea in terms of Article 58(1) of the Convention;
5. Guinea Bissau violated Article 56(2) of the Convention;
6. Guinea Bissau violated Article 73(1) of the Convention;

7. Guinea Bissau violated Article 73(2) of the Convention;
8. Guinea Bissau violated Article 73(3) of the Convention;
9. Guinea Bissau violated Article 73(4) of the Convention;
10. Guinea Bissau used excessive force in boarding and arresting the *VIRGINIA G*, in violation of the Convention and of international law;
11. Guinea Bissau violated the principles of Article 224 and 110 of the Convention;
12. Guinea Bissau violated Article 225 of the Convention as well as the SUA Convention, as well as the fundamental principles of safety of life at sea and collision prevention;
13. Guinea Bissau violated Article 300 of the Convention;
14. Guinea Bissau is to immediately return the gas oil confiscated on the 20 November 2009, of equivalent or better quality, or otherwise pay adequate compensation;
15. Guinea Bissau is to pay in favour of Panama, the *VIRGINIA G*, her owners, crew and all persons and entities with an interest in the vessel's operations, compensation for damages and losses caused as a result of the aforementioned violations, in the amount quantified and claimed by Panama in Paragraph 450 of its Reply (p. 84), or in an amount deemed appropriate by the International Tribunal;
16. As an exception to Point 15, the amount of moral damages requested in paragraph 470 of the Reply as due to Panama for moral damages is withdraw[n] and replaced by a request for a declaration of "satisfaction" / apology to the attention of the Republic of Panama, for the derogatory and unfounded accusations against the *VIRGINIA G* and her flag State and as regards all aspects of the merits of *VIRGINIA G* dispute as from 21 August 2009;
17. Guinea Bissau is to pay interest on all amounts held by the International Tribunal to be due by Guinea Bissau;
18. Guinea Bissau is to reimburse all costs and expenses incurred by Panama in the preparation of this case, including, without limitation, the costs incurred in this case before the International Tribunal, with interest thereon; or

19. In the alternative to the previous paragraph 15, Guinea Bissau is to compensate Panama, the *VIRGINIA G*, her owners, crew (or spouse or dependant in the case of Master Guerrero), charterers and all persons and entities with an interest in the vessel's operations in the form of any other compensation or relief that the International Tribunal deems fit.

## 2. SUBMISSIONS IN RELATION TO THE COUNTER-CLAIM

Panama respectfully requests the International Tribunal to:

- A. Declare, adjudge and order that Guinea-Bissau's objections to the admissibility of Panama's claim are outside the time-limit and/or are brought in bad faith such that they should be dismissed, rejected or otherwise refused;
- B. Dismiss, reject or otherwise refuse Guinea-Bissau's counter-claim on the basis that Guinea-Bissau has no legal basis under international law and under the Convention to bring the counter-claim, given the existence of the required links between Panama and the *VIRGINIA G*, or, in the alternative, on the basis that Guinea-Bissau's counter-claim is unfounded in fact and at law, and that the counter-claim is frivolous and vexatious;
- C. Dismiss, reject or otherwise refuse each and all of the submissions of Guinea-Bissau, as set out in Chapter IX of Guinea-Bissau's Counter-Memorial, and declare, adjudge and order that:
  - [-] Panama did not violate Article 91 of the Convention;
  - [-] In connection with Submission B above, Panama is not to pay in favour of Guinea-Bissau compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial; and
  - [-] Panama is not to pay all legal costs and other costs that Guinea-Bissau has incurred in relation to this counter-claim.
- D. Declare, adjudge and order that Guinea-Bissau's Decree Law 6-A/2000, as was applied to the *VIRGINIA G* (and as applied in general) in the EEZ of Guinea-Bissau, is a unilateral extension of the scope of the Convention, restricting the freedoms under the Convention, and,

in effect, an extension by Guinea-Bissau of a type of tax and/or customs-duty radius, in violation of the Convention.

*On behalf of Guinea-Bissau:*

I- SUBMISSIONS IN RELATION TO THE CLAIM.

For the reasons given in writing and in oral argument, or any of them, or for any other reason that the International Tribunal deems to be relevant, the Government of the Republic of Guinea-Bissau respectfully requests the International Tribunal to adjudge and declare that:

- 1- The International Tribunal has no jurisdiction about claims related to the vessel IBALLA G.
- 2- The claims submitted by Panama are inadmissible due to the nationality of VIRGINIA G, the absence of a right of diplomatic protection concerning foreigners, or the lacking exhaustion of local remedies, and should therefore be dismissed.

Alternatively, that:

- 1- The actions of the Republic of Guinea-Bissau did not violate the right of Panama and of the vessels flying her flag to enjoy freedom of navigation and other internationally lawful [uses] of the sea, as set forth in terms of Article 58(1) of the Convention.
- 2- Guinea-Bissau laws can be applied for the purpose of controlling the bunkering to fishing vessels in the Exclusive Economic Zone.
- 3- Guinea-Bissau did not violate Article 56(2) of the Convention.
- 4- Guinea-Bissau did not violate Article 73(1) of the Convention.
- 5- Guinea-Bissau did not violate Article 73(2) of the Convention.
- 6- Guinea-Bissau did not violate Article 73(3) of the Convention.
- 7- Guinea-Bissau did not violate Article 73(4) of the Convention.

- 8- Guinea-Bissau has not used excessive force in boarding and arresting the VIRGINIA G.
- 9- Guinea-Bissau did not violate the principles of Article 224 and 110 of the Convention.
- [10-] Guinea-Bissau did not violate neither Article 225 of the Convention nor the SUA Convention, not even the principles of safety of life at sea and collision prevention.
- 11- Guinea-Bissau did not violate Article 300 of the Convention.
- 12- The Republic of Guinea-Bissau has no obligation to immediately return to Panama the discharged gasoil or to pay any compensation for it.
- 13- The Republic of Guinea-Bissau has no obligation to pay in favour of Panama, the VIRGINIA G, her owners, crew and any persons or entities with an interest on the vessel's operations any compensation for damages and losses.
- 14- The Republic of Guinea-Bissau has no obligation to give apologies to the Republic of Panama.
- 15- The Republic of Guinea-Bissau has no obligation to pay any interest.
- 16- The Republic of Guinea-Bissau has no obligation to pay costs and expenses incurred by Panama.
- 17- The Republic of Guinea-Bissau has no obligation to pay any compensation or relief to Panama, the VIRGINIA G, her owners, charterers or any other persons or entities with interest in the vessel's operation.

## II- SUBMISSIONS IN RELATION TO THE COUNTER-CLAIM.

The Government of the Republic of Guinea-Bissau respectfully requests the International Tribunal to adjudge and declare that:

- A- Panama violated Article 91 of the Convention.
- B- Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by Guinea-Bissau in Paragraph 266 of its Counter-Memorial, or in an amount deemed appropriate by the International Tribunal.
- C- Panama is to reimburse all legal and other costs the Republic of Guinea-Bissau has incurred with this case.

### III Factual background

55. The *M/V Virginia G* was an oil tanker flying the flag of Panama at the time of its arrest on 21 August 2009. It held a Statutory Certificate of Register issued by the Panama Maritime Authority on 23 August 2007 and valid until 16 November 2011. A further Statutory Certificate of Register was issued for the vessel by the Panama Maritime Authority on 5 October 2011 and is valid until 16 November 2016.

56. According to Panama, the *M/V Virginia G* is owned by Penn Lilac Trading S.A. (Penn Lilac), a company incorporated in Panama in 1998. In January 2000, Penn Lilac bought the vessel and in January 2002 concluded an agency commission agreement with Gebaspe SL (Gebaspe), a Spanish company acting as intermediary between fuel suppliers and owners of commercial fishing vessels. In 2009, the vessel was chartered out to Lotus Federation (Lotus), an Irish company selling and supplying gas oil to fishing vessels, and remained chartered out to that company at the time of the arrest.

57. At the time of the arrest, the captain of the vessel was Mr Eduardo Blanco Guerrero, a national of Cuba. There were eleven crew members on board, seven of whom were nationals of Cuba, three of Ghana, and one of Cape Verde (now “Cabo Verde”).

58. On 7 August 2009, Empresa Balmar Pesquerías de Atlántico (Balmar) contracted the services of Lotus for the provision of gas oil by the *M/V Virginia G* to the following fishing vessels operated by Balmar: *Amabal I*, *Amabal II*, *Rimbal I* and *Rimbal II*. The fishing vessels were flying the flag of Mauritania.

59. On 14 August 2009, Balmar’s agent in Guinea-Bissau, Bijagos Lda (Bijagos), submitted a written request for authorization from the National Fisheries Inspection and Control Service (Serviço Nacional de Fiscalização e Controlo das Actividades de Pesca) (hereinafter “FISCAP”), a national agency operating under the auspices of the Ministry of Fisheries of Guinea-Bissau, to carry out refuelling operations in the exclusive economic zone of Guinea-Bissau. By letter of the same date, FISCAP acknowledged receipt of the letter from Bijagos and stated:

The content of your letter has been analysed and in conclusion the FISCAP authorizes the supply of fuel to the respective vessels under the following conditions:

1. To indicate before the operation:
  - a. The coordinates of the operation of the supply of fuel;
  - b. Date, time and name of the ship with which the vessels AMABAL I, . . . AMABAL II, RIMBAL I and RIMBAL II will perform the operation.

60. By letter dated 20 August 2009, Bijagos informed FISCAP of the coordinates, date, and time of the refuelling operations to be carried out by the *M/V Virginia G*. According to Guinea-Bissau, FISCAP responded to Bijagos by letter sent on the same day and stating that

the content of your correspondence was analysed and in conclusion FISCAP, although it has received the information requested, further proposes that your agency certify whether the vessel supplying fuel is duly authorised for this operation in the EEZ of Guinea-Bissau.

In its Counter-Memorial, Guinea-Bissau stated that "[t]his correspondence never received a reply". During the hearing, Panama stated that the letter of FISCAP of 20 August 2009 was "never seen by the *Virginia G*" and that it was "never presented by the Guinea-Bissau administration in reply to the many communications sent to the ship owners"; instead, according to Panama, it "appeared for the very first time in the Counter-Memorial".

61. According to the Memorial of Panama, on 20 August 2009, the *M/V Virginia G* supplied gas oil to *Rimbal I* and to *Rimbal II* in the exclusive economic zone of Guinea-Bissau. The *Amabal II* was supplied with gas oil on 21 August 2009.

62. On 21 August 2009, before proceeding to refuel the *Amabal I*, the *M/V Virginia G* was approached, at 19:00 hrs at latitude 11° 48' N and longitude 017° 31.6' W, approximately 60 miles off the coast of Guinea-Bissau, by speedboats carrying FISCAP officials. The officials boarded the vessel and ordered the captain to sail to the port of Bissau, where the *M/V Virginia G* arrived on 22 August 2009 at 14:00 hrs. The views of the Parties differ on the circumstances of the arrest of the *M/V Virginia G* and the situation of the vessel thereafter. The positions of the Parties are reflected in paragraphs 333 to 339, 350 to 358 and 365 to 372.

63. Together with the *M/V Virginia G*, the fishing vessels *Amabal I* and *II* were also arrested and brought to the port of Bissau. Those fishing vessels were released on 28 August 2009.

64. On 27 August 2009, the Inter-Ministerial Commission for Maritime Surveillance of Guinea-Bissau (*Comissão Interministerial da Fiscalização Marítima*) (hereinafter "CIFM") adopted the following decision 07/CIFM/09:

Confiscate ex-officio the tanker VIRGINIA G, with its gear, equipment and products on board in favor of the State of Guinea Bissau for the repeated practice of fishing related activities in the form of "unauthorized sale of fuel to ships fishing in our EEZ, namely the N/M AMABAL [II], in accordance with paragraph 1 of Article 52, as currently worded in Decree No. 1-A/2005 in conjunction with Article 3 c) and Article 23, all of Decree-Law No. 6-A/ 2000.

FISCAP notified the ship-owner of the CIFM decision by letter dated 31 August 2009.

65. After the arrest of the *M/V Virginia G*, the owner of the vessel, Penn Lilac, contacted the company Africargo, the representative of its P&I Club (Navigator) in Guinea-Bissau, and requested its assistance in obtaining the release of the vessel.

66. By letter dated 4 September 2009 addressed to the FISCAP Coordinator, the Director-General of Africargo, representing the owner of the *M/V Virginia G*, transmitted a communication by which Penn Lilac requested to be informed

on the way to settle this difficult and unpleasant situation, as soon as possible or to observe the procedures established in the law and the establishment of the necessary guarantee for the release of the vessel, of the crew and of the product on board.

67. The FISCAP Coordinator responded to the Director-General of Africargo by letter dated 11 September 2009. In the letter, he confirmed the grounds for the arrest of the *M/V Virginia G* referred to in the decision taken by the CIFM on 27 August 2009 and concluded that "the decision of the Inter-ministerial Commission for Maritime Surveillance to sanction VIRGINIA G is legal, fair and adequate".



68. In a letter dated 14 September 2009 addressed to FISCAP, the Director-General of Africargo transmitted a communication from Penn Lilac requesting "[t]he cancellation of the proceedings [instituted] against our vessel VIRGINIA G and the release of the vessel, crew and product on board". The ship-owner also stated that "we insist on the defenselessness caused to us by not knowing which procedure to follow, and we require you to inform us on that point".

69. By letter dated 23 September 2009, the FISCAP Coordinator notified Africargo that the president of the CIFM had taken the following decision:

*Considering that it has been more than 30 days since the notification of the CIFM decision (seizure ex-officio of the ship and the products on board), without any claim from the representative of the oil tanker Virginia G, however, we will proceed to the sale of the product on board by public auction, if within 72 hours from the date of this notification there is no reaction from its representative.*

70. On 25 September 2009, the CIFM adopted the following decision (09/CIFM/09), which was communicated on the same day by the FISCAP Coordinator to the representative of the ship-owner:

To confiscate the oil tanker VIRGINIA G and all the product on board owing to a violation of subsection 1 of Article 52 in its wording in DL [Decree Law] 1-A/2005 and due to the lack of any reaction after the notification of decision number 07/CIFM/09 dated 27 August of the current year.

71. By letter dated 28 September 2009 addressed to FISCAP, the Director-General of Africargo transmitted a communication from Penn Lilac requesting,

to avoid the intervention of the competent courts including the international courts, once this administrative review is exhausted, ... [t]he cancellation of the proceedings against our vessel VIRGINIA G and the release of the vessel, crew and cargo on board.

72. On 5 October 2009, Africargo received a letter from the FISCAP Coordinator dated 30 September 2009, stating that:

[A] public tender/auction is launched for the sale of fuel on board of the vessel VIRGINIA G. We invite you, in case you are interested, to participate in the public tender, whereby according to our legislation, in case of confiscation of product, the vessel's owner or its legal representative has the pre-emption right.

73. On 28 October 2009, the ship-owner lodged a request for interim measures before the Regional Court of Bissau asking for the suspension of the implementation of decisions 07/CIFM/09 and 09/CIFM/09 taken by the CIFM. On 29 October 2009, the ship-owner was ordered by the court to pay court fees, which were duly paid. By an order dated 5 November 2009, the court decided to

[o]rder the suspension and warn the defendants (FISCAP, the Inter-ministerial Commission for Fisheries) to refrain from the practice of any and all acts concerning the confiscation of the vessel Virginia G and any product onboard until final decision in the declaratory process that will be brought.

74. On 19 November 2009, the Attorney General of Guinea-Bissau lodged an appeal against the order of 5 November 2009 before the Regional Court. By order dated 18 December 2009, the Regional Court rejected the Attorney General's appeal because it was filed after the expiry of the time-limit applicable. However, the Regional Court, "due to the superior and political interests of the country", decided to submit the appeal to the Superior Court of Guinea-Bissau. According to Guinea-Bissau, the Superior Court did not consider the appeal because there was "no need [for] the continuation of these proceedings" due to the "decision of the Government to release the vessel".

75. The Attorney General, by letter dated 13 November 2009, transmitted to the Prime Minister the opinion of the Public Prosecution Service in relation to the decision of the Regional Court of Bissau granting the interim measure requested by the owner of the *M/V Virginia G*. In that letter, the Attorney General stated: "we deem the decision to confiscate the offending ship with its tackle, equipment and products found on board to have been correct. We therefore have no reservation in regard to the use of the fuel that this ship was transacting in our EEZ."

76. The Secretary of State of the Treasury, Ministry of Finance of Guinea-Bissau, addressed to the "Compañía de Lubricantes y Combustibles de Guinéa-Bissau (CLC)" the following letter dated 30 November 2009:

By virtue of Decision N° 7 of the [CIFM], the Oil Tanker Virginia G was seized ex officio with its gear, engines and cargo, due to the repetitive practice of [fishing] related activities, in the form of "non authorized sale of oil to fishery vessels in the EEZ, namely to N/M Amabal 2".

Notwithstanding the judicial order of suspension of the seizure and not having the opposition of the Public Prosecutor, the Government Attorney and Supervisor of Legality, (Ref. n° 716/GPGR/09), for the Government to proceed to "(...) the use of the oil that the vessel traded in our EEZ (...)", we order hereby that the Oil Tanker Virginia G be authorized to discharge its content estimated at 436 tonnes gas oil in your premises.

77. According to Panama, this letter was presented to the captain of the *M/V Virginia G* on 20 November 2009, *i.e.* 10 days before the letter's actual date.

78. On 20 November 2009, the gas oil cargo of the *M/V Virginia G* was unloaded in accordance with the order of the Secretary of State of the Treasury, Ministry of Finance of Guinea-Bissau.

79. On 7 December 2009, the ship-owner lodged a request for interim measures before the Regional Court of Bissau against the 30 November 2009 order of the Secretary of State of the Treasury, Ministry of Finance of Guinea-Bissau. On 16 December 2009, the Regional Court ordered "the immediate return of the unloaded oil to the claimant's vessel". The order was notified to the ship-owner on 18 December 2009. On 18 January 2010, the ship-owner lodged an action on the merits before the Regional Court against the said order of the Secretary of State at the Ministry of Finance.

80. The Parties concur that the case did not proceed but offer different explanations for this. Guinea-Bissau states that the ship-owner was notified by the court to pay judicial costs on 3 March 2010 and that the action was suspended as a result of the non-payment of the fees. Panama contends that the ship-owner was never notified to pay the court fees. It adds that, in view of the

suspension of the case "and the fact that the vessel was later released . . . , the shipowner's efforts have been futile".

81. On 4 December 2009, the ship-owner also lodged an action on the merits against the decisions of the CIFM. According to Panama, the required court fees were paid on 11 December 2009 and a statement was submitted to the court by the ship-owner on 25 February 2010. A document to this effect was produced by Panama. Panama states that "[p]rocedural issues were raised by Guinea-Bissau, and were replied to by Penn Lilac (in accordance with the Court's instructions)". It further states that

**the court has issued an order for CIFM to file a rejoinder to the Penn Lilac's reply; however, according to the latest information available on this case, the CIFM was never notified of that order. Pending this, the case has not continued since February 2010.**

Referring to the action on the merits, Guinea-Bissau contends that "this action has not progressed since 11 March 2010, due to the negligence of the applicant to promote its terms". It further contends that the case is "still pending".

82. On 20 September 2010, the CIFM took the decision to release the vessel. The decision reads as follows:

Following the indications of his Excellency the Prime Minister regarding to the danger to the security of the maritime navigation caused by the long presence of the vessel VIRGINIA G, seized in our [EEZ] because of the practice of non-authorized fishing in its form of fishing-related activity without licence;

Taking into consideration our relationship of 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;

Therefore, the CIFM decides without more delay:

1. To order the release of the vessel VIRGINIA G and to consider repealed the previous Decision which orders its confiscation.

2. To notify the owner of the vessel, or its captain and/or its local representative of this Decision.
3. This Decision enters immediately into force.

The decision was notified to the representative of the ship-owner by the FISCAP Coordinator by letter dated 6 October 2010.

83. After the release of the *M/V Virginia G*, the ship-owner asked Panama Shipping Registrar Inc. to conduct a "Condition survey and internal audit" of the vessel. The vessel started operating again in December 2010 after having undergone repairs.

84. As regards the situation of the crew, the crew members' passports were taken by the authorities of Guinea-Bissau when the vessel arrived in the port of Bissau on 22 August 2009. One crew member left for Spain on 24 December 2009, after his passport was returned to him. The passports of the other crew members were returned in January 2010 and some of them left Guinea-Bissau after that date. Several crew members remained on the vessel until its release in October 2010.

#### IV Jurisdiction

85. Both Panama and Guinea-Bissau are States Parties to the Convention. Guinea-Bissau ratified the Convention on 25 August 1986 and the Convention entered into force for Guinea-Bissau on 16 November 1994. Panama ratified the Convention on 1 July 1996 and the Convention entered into force for Panama on 31 July 1996.

86. The Parties agree that the case was brought before the Tribunal by means of a special agreement concluded by an exchange of letters between them. They have expressed different views, however, regarding the relevant correspondence constituting the special agreement.

87. In its Memorial, Panama states that the Parties entered into a special agreement to transfer the arbitration proceedings concerning the dispute relating to the *M/V Virginia G* to the Tribunal by an exchange of letters of 29 June and 4 July 2011.

88. In its Counter-Memorial, Guinea-Bissau points out that such agreement resulted from the notification of Panama of 3 June 2011 and the letter of Guinea-Bissau of 29 June 2011.

89. In its Reply, Panama declares that it "has no objection in relation to this clarification by Guinea-Bissau, but points out that, in any case, the institution of the proceedings before the International Tribunal was the 4 July 2011".

90. In its Rejoinder, Guinea-Bissau states that it fully accepts this statement of Panama which confirms the view of Guinea-Bissau "that what constituted the Special Agreement between the Parties was Panama's Arbitration Notification dated 3 June 2011 . . . followed by Guinea-Bissau's acceptance of that proposal by letter dated 29 June 2011".

91. The Tribunal observes that the dispute was originally brought to an Annex VII arbitral tribunal by means of the Notification and the "Statement of claim and grounds on which it is based" submitted by Panama to Guinea-Bissau on 3 June 2011. It further observes that Panama and Guinea-Bissau agree that the proceedings before the Tribunal were instituted on the basis of a special agreement concluded by an exchange of letters.

92. The Tribunal finds that the basis of its jurisdiction in this case is the special agreement between the Parties, which transferred the dispute to the Tribunal, together with articles 286, 287 and 288 of the Convention and article 21 of the Statute.

## V Admissibility

93. Guinea-Bissau raises several objections to the admissibility of the claims of Panama. Panama contends that Guinea-Bissau is precluded from raising objections to the admissibility of Panama's claims.

94. Guinea-Bissau submits that in the special agreement it "did not [waive] any objection as to the admissibility of the claims, neither was there any reason for any such waiver". It emphasizes that the special agreement "excluded any such waiver". Guinea-Bissau maintains that, in its letter of 29 June 2011, it "agreed with Panama's 'proposal to *transfer the case* to the International Tribunal' ". Thus, according to Guinea-Bissau, "the dispute as a whole has been

transferred to the Tribunal while no waiver as to any objection to the admissibility was agreed”.

95. Relying on a finding of the Tribunal in the *M/V “SAIGA” (No. 2) Case* (see *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 33, para. 53), Guinea-Bissau further submits that it “is not precluded from raising objections to admissibility of the claims of Panama by article 97, paragraph 1, of the Rules”.

96. Panama relies on the terms of the special agreement in support of its argument that Guinea-Bissau is not entitled to raise objections to the admissibility of Panama’s claims. In its view, the special agreement was concluded by the Parties in order to “‘submit the dispute between them concerning the *Virginia G*’ to the International Tribunal in order that the International Tribunal may deal ‘with all aspects of the merits (including damages and costs)’”. Panama maintains that this wording was accepted by Guinea-Bissau without reservation and refers to the merits of the case. It adds that “[t]here was no express or implied agreement between the Parties to the effect that objections as to admissibility should be dealt with within the framework of the merits”. Panama also argues that, pursuant to article 97, paragraph 7, of the Rules, a specific agreement between the Parties is required for an objection submitted under article 97, paragraph 1, to be heard within the framework of the merits and that, therefore, the Tribunal “should not, in the absence of such agreement, accept too broad an interpretation of the terms of an agreement (such as the Special Agreement) which does not mention or allow for objections to admissibility”.

97. Panama argues that article 97, paragraph 1, of the Rules provides for a time-limit of 90 days from the institution of proceedings to make objections to the admissibility of the application, and that Guinea Bissau has failed to respect this time-limit. Expressing disagreement with the finding of the Tribunal in the *M/V “SAIGA” (No. 2) Judgment*, Panama asserts that article 97, paragraph 1, “conveys clearly that for each of the three types of objections contemplated, such objection is to be made in writing within 90 days from the institution of proceedings”. According to Panama, Guinea-Bissau could have raised objections to admissibility within the 90-day time-limit prescribed in article 97 paragraph 1, but failed to do so. In its view, Guinea-Bissau is therefore estopped or otherwise precluded from raising objections to admissibility.

98. The Tribunal considers that the Parties have the right to raise objections to admissibility, subject to any restrictions that may be clearly established under the terms of the special agreement and the Rules (see *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, at p. 32, para. 51). The terms of the special agreement do not impose any restrictions on the possibility for a Party to raise objections to admissibility.

99. The Tribunal will now consider the contention of Panama that Guinea-Bissau is precluded from raising objections to admissibility because they were not raised within the time-limit prescribed in article 97, paragraph 1, of the Rules. This provision reads:

Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of proceedings.

100. The Tribunal recalls that in the *M/V “SAIGA” (No. 2) Case* it observed that article 97 of the Rules

deals with objections to jurisdiction or admissibility that are raised as preliminary questions to be dealt with in incidental proceedings. As stated therein, the article applies to an objection “the decision upon which is requested before any further proceedings on the merits”. Accordingly, the time-limit in the article does not apply to objections to jurisdiction or admissibility which are not requested to be considered before any further proceedings on the merits. In the present case, this is confirmed by the fact that the parties agreed that the proceedings before the Tribunal “shall comprise a single phase dealing with all aspects of the merits (including damages and costs) and the objection as to jurisdiction . . .”.

*(M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, at p. 33, para. 53)

As in the *M/V “SAIGA” (No. 2) Case*, in the present case, the Parties also agreed that the proceedings before the Tribunal “shall comprise a single phase dealing with all aspects of the merits (including damages and costs)”.



101. Accordingly, the Tribunal concludes that Guinea-Bissau is not precluded in the present case from raising objections to the admissibility of the claims of Panama.

## VI Objections to admissibility

### *Genuine link*

102. Guinea-Bissau objects to the admissibility of the claims of Panama by contending that there was no genuine link between the *M/V Virginia G* and Panama. According to Guinea-Bissau,

[t]he requirement of a genuine link between the flag State and the ship qualifies the right of every State provided in article 91(1), first sentence, of the Convention to “fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag”.

Guinea-Bissau further states that “the function of the genuine link is to establish an international minimum standard for the registration of ships”. For Guinea-Bissau, “the genuine link is not only a formal registration, but also requires a real and substantial connection between the vessel and the flag State”. Guinea-Bissau maintains that “the registration of the VIRGINIA G under the flag of Panama does not meet the condition of an effective jurisdiction of the flag State” and that “neither the ship owner nor the manning of the ship are of Panamanian origin, which are essential conditions to have a genuine link established between the State and the ship under article 91(1) of the Convention”. It adds that this situation “is a case of a flag of convenience, as there is not any connection between the ship and Panama”. Referring to article 92, paragraph 2, of the Convention, Guinea-Bissau concludes that “[i]n cases of lack of a genuine link between the flag State and the ship, the coastal State should not be bound to acknowledge the right of navigation of such ship in its exclusive economic zone”.

103. Guinea-Bissau states that

[f]rom the conception of the “genuine link” it follows that a flag State can only then effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as required under article 94(1) of the Convention, when it can exercise appropriate jurisdiction and control also over the *owners* of the ships.

It adds that, in the case of a bareboat charter, control should be exercised by the flag State over the charterer or operator of the vessel. According to Guinea-Bissau, the same applies to the additional obligations in environmental matters provided in article 217 of the Convention, which the flag State can only implement if it exercises effective jurisdiction and control over the ship-owner or operator. Guinea-Bissau concludes that “a basic condition for the registration of a ship is that also the owner or operator of the ship is under the jurisdiction of the flag State” which can result from, for example, the nationality or residence or domicile of the owner or operator of the ship. In this regard, Guinea-Bissau makes reference to the United Nations Convention on Conditions for Registration of Ships of 7 February 1986.

104. Panama contends that it “has and maintains a genuine link with the *VIRGINIA G*, with the *VIRGINIA G*’s owner and with the *VIRGINIA G*’s operator” and that it “exercises full and effective jurisdiction over the *VIRGINIA G*”. It also emphasizes that “[i]t is not contested that the *VIRGINIA G* was, at all relevant times, fully registered under the flag of Panama” and that the vessel was recognized as such by the Guinea-Bissau authorities, in particular, since the documents attesting its nationality were examined by the authorities of Guinea-Bissau and were found to be in order.

105. Panama maintains that the required genuine link existed between it and the *M/V Virginia G* for a number of reasons. It points out that its legislation sets out the conditions for granting Panamanian nationality to ships, for the registration of ships in its territory, and for the right to fly its flag, and that ship-owners are required to submit substantial information and documentation to fulfil all registration requirements, in line with Panama’s international obligations. In addition, Panama states that vessels which are registered in Panama are issued with the required documents and technical certificates as was the case of the *M/V Virginia G*. Panama further maintains that pursuant to article 94 of the Convention it “*does, and did, effectively exercise its jurisdiction and control in*

administrative, technical and social matters over the *VIRGINIA G*" and that the owner of the *M/V Virginia G*, Penn Lilac, which is fully registered and legally represented in Panama, is also subject to its jurisdiction. Panama explains that it has imposed on the owner of the *M/V Virginia G* additional conditions such as the requirement of a continuous synopsis record, in accordance with the International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974), to which Panama is a party.

106. Panama further explains that, in compliance with article 94, paragraph 3, of the Convention, it has delegated to recognized organizations the control and issuance of technical certification for the *M/V Virginia G* and that it monitors its ships including the *M/V Virginia G* by means of an annual safety inspection, pursuant to paragraph 4 of that article. Panama states that the *M/V Virginia G* meets all international standards for protection of the marine environment as set out in the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), to which Panama is a party, and that it possesses the required certificates under that convention. It contends that manning a ship with a multi-national crew is a common practice in maritime shipping and that all crew members on board the *M/V Virginia G* held their respective licences, which were in force.

107. The Tribunal will now consider the question whether the right of a State to grant its nationality to a ship depends on the existence of a genuine link between the State and the ship.

108. Article 91 of the Convention provides:

*Article 91*

*Nationality of ships*

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

109. The Tribunal observes that under article 91, paragraph 1, of the Convention a State enjoys a right to grant its nationality to ships and recalls that in the *M/V “SAIGA” (No. 2) Case* it recognized this exclusive right of the flag State when it stated:

Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law.

*(M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at pp. 36–37, para. 63)*

110. The Tribunal considers that article 91, paragraph 1, third sentence, of the Convention requiring a genuine link between the flag State and the ship should not be read as establishing prerequisites or conditions to be satisfied for the exercise of the right of the flag State to grant its nationality to ships.

111. The Tribunal observes in this respect that article 94 of the Convention requires the flag State to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”. Paragraphs 2 to 5 of that article set out the different measures which the flag State is required to take to exercise effective jurisdiction and control, including such measures as are necessary to ensure safety at sea, which must conform to generally accepted international regulations, procedures and practices. Paragraph 6 of that article outlines the procedure to be followed where another State “has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised”. As stated by the Tribunal in the *M/V “SAIGA” (No. 2) Case*, “[t]here is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the

flag of the flag State” (*M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, at p. 41, para. 82).

112. As further stated in the *M/V “SAIGA” (No. 2) Case*,

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

(*M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, at p. 42, para. 83)

The Tribunal reaffirms the above statement.

113. In the view of the Tribunal, once a ship is registered, the flag State is required, under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices. This is the meaning of “genuine link”.

114. The Tribunal notes that, on the basis of information available to it, there is no reason to question that Panama exercised effective jurisdiction and control over the *M/V Virginia G* at the time of the incident.

115. The Tribunal observes that Panama’s legislation sets out the conditions for granting Panamanian nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Under Panamanian law, ship-owners are required to take specific actions, to carry out certain activities and to submit substantial information and documentation to fulfil all these requirements, in line with Panama’s international obligations. The Tribunal in this regard notes that the *M/V Virginia G* obtained the required documents and technical certificates. It further notes that Panama imposes on owners of vessels specific conditions such as the requirement of a continuous synopsis record, in accordance with the International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974).

116. The Tribunal also notes that Panama exercises its right to delegate the conduct of an annual safety inspection and the issuance of technical certificates to one of the recognized organizations (Panama Shipping Registry Inc.) in accordance with relevant IMO conventions. The Tribunal finds in this regard that the *M/V Virginia G* meets the international standards set out in the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).

117. In light of the above, the Tribunal concludes that a genuine link existed between Panama and the *M/V Virginia G* at the time of the incident.

118. For the above reasons, the Tribunal rejects the objection raised by Guinea-Bissau to the admissibility of the claims of Panama based on the alleged lack of genuine link between Panama and the *M/V Virginia G*.

### *Nationality of claims*

119. Panama argues that it "is bringing this action against Guinea Bissau within the framework of diplomatic protection" and that it "takes the cause of its national and the vessel *VIRGINIA G* with everything on board, and every person and entity involved or interested in her operations, which, it is claimed, has suffered injury caused by Guinea Bissau".

120. In support of its position, Panama refers to paragraph 106 of the Judgment in the *M/V "SAIGA" (No. 2) Case*, where the Tribunal stated:

The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.

(*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *ITLOS Reports 1999*, p. 10, at p. 48, para. 106)

121. Panama also relies on article 18 of the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006, which provides:

*Article 18*

*Protection of ships' crews*

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

122. Guinea-Bissau contends that "the framework of diplomatic protection does not give Panama *locus standi* referring to claims of persons or entities that are not nationals of Panama" and that "Panama is therefore not entitled to bring this action against Guinea-Bissau within the framework of diplomatic protection". Guinea-Bissau further contends that "there is not a single person or entity related to the vessel VIRGINIA G which is of Panamanian nationality" and that "Panama asserts protection before the Tribunal for all crew's members and for the owners of ship and cargo" while "[i]t is undisputed here that none of these persons are nationals of Panama".

123. In relation to the *M/V "SAIGA" (No. 2) Case*, Guinea-Bissau maintains that

this is not a case involving vessels where a number of nationalities and interests are concerned, therefore the judgment of the *M/V SAIGA No. 2 Case* quoted by Panama is not applicable. In fact, neither the owner nor even a single member of the crew of VIRGINIA G is of Panamanian nationality.

124. As regards article 18 of the Draft Articles on Diplomatic Protection, Guinea-Bissau further maintains that this article

only refers to the right of the State of nationality of a ship to seek redress on behalf of the crew members of that ship, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act, which is not the case here.

125. The Tribunal considers that the request of Panama is to be understood in the light of the object of its claim, namely, claims made in respect of alleged violations of provisions of the Convention which resulted in damage caused to, *inter alia*, the ship, the ship-owner, persons and cargo on board.

126. In this regard, the Tribunal recalls its finding in the *M/V "SAIGA" (No. 2) Case* that, under the Convention, the ship is to be considered as a unit "as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States" (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 48, para. 106).

127. The Tribunal finds that the *M/V Virginia G* is to be considered as a unit and therefore 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. Therefore, 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.

128. The Tribunal observes that, in accordance with international law, the exercise of diplomatic protection by a State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of a ship who are not nationals of that State. As stated by the Tribunal in the *M/V "SAIGA" (No. 2) Case*, "[a]ny of these ships could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such person is a national, undue hardship would ensue" (*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 48, para. 107).

129. Accordingly, the Tribunal rejects the objection raised by Guinea-Bissau to the admissibility of Panama's claims based on the fact that the owner of the vessel and the crew are not nationals of Panama.



*Exhaustion of local remedies*

130. The Parties differ on the applicability of article 295 of the Convention on the exhaustion of local remedies and also on whether, if applicable, the requirements of article 295 have been fulfilled.

131. Guinea-Bissau contests the admissibility of certain claims espoused by Panama in the interest of individuals or private entities, because these individuals or private entities have not exhausted the local remedies available to them in Guinea-Bissau.

132. In the view of Guinea-Bissau, as the Parties to this dispute have not agreed to exclude the local remedies rule in their special agreement, article 295 of the Convention has to be taken into account in the proceedings.

133. Referring to certain claims made by Panama in the interests of individuals or private entities alleging the violation of the rights of Panama and the *M/V Virginia G*, Guinea-Bissau argues that "[a]lthough these claims can be based in international law they are at the same time subject to the internal law of Guinea-Bissau, which has rules about the [responsibility] of the State". Therefore, according to Guinea-Bissau, if there are violations of the rights of private entities as a result of its action, these entities should first have to bring actions before the courts of Guinea-Bissau.

134. On the jurisdictional link between Guinea-Bissau and relevant natural and juridical persons, Guinea-Bissau argues that "such link has been established by the *VIRGINIA G*, when the ship came voluntarily into the exclusive economic zone of Guinea-Bissau for the purpose of bunkering foreign fishing vessels". By conducting such activities within the exclusive economic zone of Guinea-Bissau, according to Guinea-Bissau, the *M/V Virginia G* has established "a voluntary, conscious and deliberate connection" with Guinea-Bissau and therefore can be subject to its jurisdiction.

135. Regarding the question whether the requirements of article 295 of the Convention have been fulfilled, Guinea-Bissau is of the view that the owner of the *M/V Virginia G* did not exhaust the local remedies available in Guinea-Bissau. Guinea-Bissau maintains that the legal remedies available for a ship-owner under its legal system against the confiscation of a vessel, its cargo and its gas oil are twofold. The first is for a ship-owner to submit to the criminal

branch of the Bissau courts a request for the immediate release of the vessel, pursuant to article 65 of Decree-Law 6-A/2000, dated 22 August 2000, on fishing resources and the right to fish in the maritime waters of Guinea-Bissau (hereinafter “Decree-Law 6-A/2000”). The second is an appeal to the Bissau courts against the decision of the CIFM under article 52 of Decree-Law 6-A/2000 of Guinea-Bissau.

136. Guinea-Bissau argues that “[i]n the case of *Virginia G* none of this occurred because the ship owner didn’t pay the fine, didn’t appeal in time against the decision of the CIFM, and did not request the prompt release of the vessel through payment of a bond” and that “they decided to apply to another forum because they did not want to pay the costs, and afterwards they did not pay the judicial costs of the proceedings”.

137. In respect of the request for the immediate release of the vessel, Guinea-Bissau points out that no such request was ever made by the owners of the *M/V Virginia G*, “as they always attempted to handle the matter with FISCAP, the enforcement entity, and not with the court, which was the competent entity for setting a security deposit”.

138. Regarding the appeal against the decisions of the CIFM, Guinea-Bissau notes that “[t]he owner of the vessel did not even lodge an appeal from this confirmatory decision in the legal deadline of 15 days”. Instead of doing so, according to Guinea-Bissau, “he presented on 29 October 2009 an interim measure to suspend the enforceability of the decision”. Guinea-Bissau argues that “[t]his interim measure was granted without hearing the State, so the Public Prosecutor considered it null and void and appealed from this decision on November 19, 2009”. Guinea-Bissau further submits that while the owner of the vessel initiated the main action, called an appeal for annulment proceedings, which had to be presented within 30 days from the date of the decision ordering the interim measures, “this action has not progressed since 11 March 2010, due to the negligence of the applicant to promote its terms”. Therefore, according to Guinea-Bissau, “this action is still pending in the Regional Court of Bissau”.

139. In addition to this, Guinea-Bissau states that “the owner of the vessel also submitted on December 7, 2009 . . . another interim measure against the decision of the Secretary of State of the Treasury to unload the cargo”. Guinea-Bissau argues that “[t]his interim measure was once more granted without

hearing the State”. However, according to Guinea-Bissau, “this time the main action . . . was presented outside the deadline of 30 days . . ., which makes the interim measure without any effect”. Guinea-Bissau points out that “[p]robably knowing that, when notified to pay the judicial costs . . ., the applicant failed to pay, which led to the suspension of the main action, which is still pending in the Regional Court of Bissau”.

140. Guinea-Bissau explains that it decided to release the *M/V Virginia G* on 20 September 2010 because of the fact that “the authorities found out that the safety conditions of the vessel were appalling, and that it was at risk of sinking in the Port of Bissau, together with the persistent request by the Embassy of Spain for its release”. It adds that “the State has discretion with regard to releasing the ship, if it at any time considers its presence in the port of Bissau to be dangerous” and that “[t]his does not affect the possibility of the owner’s continuing with the proceedings”.

141. In response to the objection of Guinea-Bissau, Panama argues that the rule on exhaustion of local remedies does not apply in this case, “first because the rule of exhaustion is superseded by the special agreement”. According to Panama, “this special agreement of itself precludes Guinea-Bissau from raising objections; and this would be particularly true in relation to the objection based on non-exhaustion of local remedies”.

142. Panama also states that in these proceedings it is claiming “a violation of its own right to secure, in respect of vessels flying its flag, freedoms for which the Convention provides”. According to Panama,

[t]he breaches or violations of the Convention carried out by Guinea-Bissau relate first and foremost to the flag State. Indeed, the damages caused by Guinea-Bissau and claimed by Panama are a consequence of Guinea-Bissau’s breach of international obligations towards Panama and stem as a direct consequence therefrom.

In this case, therefore, the primary right that has been violated is the right of Panama to freedom of navigation. Another violation is related to lawful rights such as the right to operate a ship. Panama submits that such a right belongs essentially to Panama under articles 56, 58, 73, and 90 of the Convention, and

that it “brings the claims based upon its rights as a flag State, as granted to it, as a State, under the provisions of the Convention”.

143. Panama further submits that it would allocate the respective portions of compensation that it might be awarded, should the Tribunal find in its favour, to the natural and legal persons who suffered damages and losses as a consequence of Guinea-Bissau’s breaches of its international obligation.

144. Panama denies the existence of a jurisdictional link between Guinea-Bissau and the vessel, its crew members and cargo. Although the *M/V Virginia G* may have entered the exclusive economic zone of Guinea-Bissau to conduct bunkering activity, Panama claims that such activity falls within the freedom of navigation and outside the jurisdiction of Guinea-Bissau. The vessel and its crew were then taken to the port of Bissau under force of arms, having been arrested violently and without warning. Therefore, the vessel and its crew can hardly be said to have created “a voluntary, conscious and deliberate connection” between themselves and Guinea-Bissau.

145. Panama also disagrees with the argument of Guinea-Bissau that there was a jurisdictional link on account of a temporary injunction being obtained against Guinea-Bissau’s confiscation of the vessel and cargo.

146. Finally, Panama argues that the local remedies rule does not apply in the present case because there is no effective remedy to exhaust.

147. Panama notes that the ship-owner “could not reasonably have made recourse to the ‘prompt release’ action under Article 65 of Decree-Law 6-A/2000 since the conditions for providing security/guarantees were (i) unknown, (ii) partial towards Guinea-Bissau, (iii) unreasonable and (iv) prohibitive, thus preventing effective access to this remedy”.

148. Panama points out that the owner of the *M/V Virginia G* sought a local remedy by filing a request for the suspension of the confiscation measures before the Regional Court of Bissau and that the court, by order dated 5 November 2009, indeed issued a judgment, which among others ordered the Secretary of State for fisheries to “refrain from the practice of any and all acts relating to the confiscation of the vessel *VIRGINIA G* and its products on board”. However, the order of the Regional Court of Bissau suspending the CIFM decision, according to Panama, was “abusively and unjustly disregarded by Guinea-Bissau, not following a counter-order of the Court, but merely on the basis of an ‘internal’ opinion of the Attorney General of Guinea-Bissau”. Consequently, in the view

of Panama, when the remedy available to the owner of the *M/V Virginia G* in Guinea-Bissau was rendered ineffective by virtue of “the forceful and unjust manner in which Guinea-Bissau acts above the law”, the only viable option was for Panama to submit the matter to international arbitration or to the Tribunal.

149. Panama further states that the *M/V Virginia G* was eventually released not by the court order, but by the decision of the Ministry of Fisheries on the occasion of the National Day of Spain. It was “a unilateral decision by the government of Guinea-Bissau, on its terms, as and when it wanted, irrespective . . . of the pending court proceedings”. Panama contends that “such action by Guinea-Bissau rendered any local remedies ineffective or unavailable, thus leaving it up to the flag State to request reparation at international law on behalf of the owner of the vessel and its related entities within an international forum”.

150. The Tribunal will now consider whether the rule that local remedies must be exhausted applies in the present case and, if so, whether the requirements under article 295 of the Convention have been fulfilled.

151. The first question the Tribunal needs to examine is whether the special agreement between Panama and Guinea-Bissau precludes Guinea-Bissau from raising the objection based on the non-exhaustion of local remedies. With respect to this question, the Tribunal already concluded in paragraph 101 that the special agreement does not preclude Guinea-Bissau from raising objections to the admissibility of the claims of Panama. Therefore, Guinea-Bissau is not precluded from raising such objection based on the non-exhaustion of local remedies.

152. The next question the Tribunal has to examine is the nature of the claims made by Panama.

153. It is a well-established principle of customary international law that the exhaustion of local remedies is a prerequisite for the exercise of diplomatic protection. This principle is reflected in article 14, paragraph 1, of the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006, which provides that “[a] State may not present an international claim in respect of an injury to a national . . . before the injured person has . . . exhausted all local remedies”. It is also established in international law

that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State.

154. The Tribunal thus has to consider whether the claims of Panama relate to a “direct” violation on the part of Guinea-Bissau of the rights of Panama. If the answer is in the affirmative, the rule that local remedies must be exhausted does not apply.

155. It should be recalled in this respect that the Tribunal in the *M/V “SAIGA” (No. 2) Case*, faced with a similar situation, proceeded to examine the nature of the rights which Saint Vincent and the Grenadines claimed had been violated by Guinea (see *M/V “SAIGA” (No. 2) (Saint Vincent and Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 45, para. 97). The Tribunal will follow the approach of the *M/V “SAIGA” (No. 2) Case* in the present case.

156. The rights which Panama claims have been violated by Guinea-Bissau are set out in its final submissions referred to in paragraph 54. The Tribunal notes that most provisions of the Convention referred to in the final submissions of Panama confer rights mainly on States. The Tribunal further notes that in some of the provisions referred to by Panama, however, rights appear to be conferred on a ship or persons involved. The term “ship” in those provisions can be understood to denote persons with an interest in that ship, such as an owner or operator of it.

157. When the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant. In the present case, the Tribunal is of the view that the principal rights that Panama alleges have been violated by Guinea-Bissau include the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of the coastal State and its right that the laws and regulations of the coastal State are enforced in conformity with article 73 of the Convention. Those rights are rights that belong to Panama under the Convention, and the alleged violations of them thus amount to direct injury to Panama. Given the nature of the principal rights that Panama alleges have been violated by the wrongful acts of Guinea-Bissau, the Tribunal

finds that the claim of Panama as a whole is brought on the basis of an injury to itself.

158. The Tribunal considers that the claim for damage to the persons and entities with an interest in the ship or its cargo arises from the alleged violations referred to in the preceding paragraph. Accordingly, the Tribunal concludes that the claims in respect of such damage are not subject to the rule of exhaustion of local remedies.

159. In light of the above conclusion, the Tribunal does not consider it necessary to address the arguments of the Parties on either the question of a jurisdictional link or the question whether local remedies were available and, if so, whether they were effective.

160. The Tribunal, therefore, rejects the objection of Guinea-Bissau, based on the non-exhaustion of local remedies, to the admissibility of the claims made by Panama in the interests of individuals or private entities.

## VII Articles 56, 58 and 73, Paragraph 1, of the Convention

161. The Tribunal will now turn to the question whether Guinea-Bissau violated the Convention when it arrested, and later confiscated, the *M/V Virginia G*. To answer this question the Tribunal will have to ascertain whether Guinea-Bissau under the Convention had, as it claims, jurisdiction to regulate bunkering of foreign vessels fishing in its exclusive economic zone, whether the relevant laws and regulations of Guinea-Bissau are in conformity with the Convention and whether their application in the case of the *M/V Virginia G* violated the Convention.

162. Panama defines bunkering as "the term used in the shipping industry to describe the selling of fuel from specialised vessels, such as oil tankers, which supply fuel (such as light fuel, gas oil and marine diesel) to other vessels whilst at sea". Guinea-Bissau considers the description by Panama of the economic activity of bunkering "to be in general correct".

163. Panama points out that "the activity of providing bunkering services in the EEZ of a coastal State is neither dealt with specifically in the Convention, nor settled by international case law".

164. Panama submits that "it was, and is, unlawful for Guinea Bissau to exercise sovereign rights and jurisdictional rights not attributed to it under the Convention". It maintains that the extent to which Guinea-Bissau's "sovereignty and jurisdiction were extended to the activities of the *VIRGINIA G* and the resulting denial of freedom of navigation was not consistent with the provisions of the Convention".

165. Panama argues that "the bunkering services provided by the *VIRGINIA G* in the EEZ of Guinea Bissau fall within the category of freedom of navigation and other internationally lawful uses of the sea related to that freedom in terms of Article 58(1)."

166. In addition, Panama considers that the requirement of authorization and the imposition of fees for refuelling vessels in the exclusive economic zone of Guinea-Bissau as provided for in its laws and regulations are contrary to the freedoms set out in article 58 of the Convention.

167. Panama argues that "[p]rincipal among the rights of other States in the EEZ of a coastal State, are the freedoms accorded to all States in terms of Article 58 of the Convention". In this context Panama maintains that

the exclusion of the freedoms listed in Article 87(d), (e) and (f) from Article 58(1), and their express embodiment and articulation in Article 56(1) indicates that the freedom of the seas should only be limited where the rights are recognised expressly to a coastal State in terms of Article 56(1).

168. Panama states that "Article 58(1), by referring to Article 87, appears to want to equate the freedoms exercisable in the EEZ to those of the high seas, even applying the provisions of articles 88 to 115 of the Convention."

169. Panama further argues that

in respect of the three freedoms (navigation, overflight and communication) in case of a dispute, the shift should be in favour of those freedoms



and “other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships”.

170. Panama maintains that the bunkering activity carried out by the *M/V Virginia G* is a “commercial activity for which vessels, including fishing vessels, in the EEZ of West African coastal States offer a particular market for selling gas oil”, and that the supply of bunkers to vessels is, therefore, the very purpose of the navigation of that vessel. It explains that it is because of the inherent connection between bunkering and navigation, that bunkering activities should be considered to be more intimately linked with the freedom to navigate and other internationally lawful uses of the sea in the sense of article 58, paragraph 1, of the Convention.

171. Panama maintains that, in accordance with article 56, paragraph 2, of the Convention, a coastal State, in exercising its rights and performing its duties under the Convention in the exclusive economic zone, must have due regard to the rights and duties of other States, among which are the freedoms accorded to all States in terms of article 58 of the Convention.

172. Panama observes that “Decree Law 6-A/2000 infringes the provisions of the Convention because it grants Guinea-Bissau with certain sovereignty rights and jurisdiction which are not granted to coastal States under the Convention”.

173. In this context, Panama questions the lack of distinction in Decree-Law 6-A/2000 between fishing vessels and non-fishing vessels as well as “a broad definition of ‘fishing-related activities’ which include ‘logistical support activities’ and which are defined . . . in subsidiary legislation rather than in Decree Law 6-A/2000 itself”. Panama maintains that a bunkering vessel is neither a fishing vessel nor, by definition, a vessel engaged in exploring, exploiting or utilizing the natural resources in the exclusive economic zone of Guinea-Bissau in the context of the rights and jurisdiction accorded to Guinea-Bissau under Part V of the Convention. Panama explains that “[b]unkering activities to fishing vessels within an EEZ is a very ancillary activity that cannot be considered as a related fishing activity”.

174. According to Panama, Decree-Law 6-A/2000 of Guinea-Bissau is not in conformity with the principles and purposes of the international legal regime concerning the exclusive economic zone. Panama states that the main purpose of the establishment of the exclusive economic zone, as *a sui generis* zone, is to enable coastal States to control and manage their marine resources. It further argues that “Article 56 (1) of the Convention confers certain sovereign rights and a defined jurisdiction . . . in favour of Guinea Bissau, in its EEZ, for the purpose of exploring and exploiting, conserving and managing living or non-living resources”. Panama states that articles 61 and 62 of the Convention articulate the manner in which a coastal State can regulate the conservation and utilization of its living resources.

175. Panama questions the qualification of bunkering in the exclusive economic zone as a fishing-related activity subject to national regulation and control. It takes the view that

[t]he material scope of Guinea Bissau’s rights and jurisdiction over living resources in its EEZ relate to their conservation and management and to the exploration and exploitation or utilisation of such living resources, and it is perhaps reasonable that these terms can even be described as “sufficiently wide to embrace all normal enterprisory and governmental functions that pertain to living resources.” However, it would also be reasonable to state that even a wider interpretation would necessarily preserve the fundamental link to the living resources themselves.

176. According to Panama,

Guinea Bissau’s practice appears to be that of extending its interpretation of fishing activities and fishing related activities to include bunkering . . . the only reasonable interpretative extension in classifying certain related activities as fishing related activities, or logistical support activities, should be limited to those activities which are actually and strictly related to fishing, rather than to general services rendered to any vessels as a most basic necessity—such as bunkering.

Panama disagrees with this approach advanced by Guinea-Bissau.

177. As to the argument advanced by Guinea-Bissau that bunkering of fishing vessels is commonly treated as a fisheries-related activity in West Africa, Panama considers the statement to be inadequate in suggesting that the Tribunal could deem an alleged regional tendency sufficient to establish the existence of a legal norm. According to Panama, a majority of States throughout the world do not consider vessels engaged in fishing-related activities to be fishing vessels. Panama acknowledges that

a fishing vessel might well be subject to specific rules by virtue of its location in the EEZ of Guinea Bissau and by virtue of the fishing activities it carries out. However, it does not necessarily follow... that the rules applied to that fishing vessel would apply also to the bunkering vessel, in this case, the *VIRGINIA G*.

178. Panama states that

Guinea-Bissau's manifest acknowledgement of the financial benefits of regulating bunkering in its EEZ... and Guinea-Bissau's request for payment from bunkering vessels for the issuance of its consent, is, in reality, a manifestation of a situation where the authorisation or consent is given the same treatment as a licence, and one whereby Guinea-Bissau **imposes a form of tax or customs duty on bunkering activities carried out in its EEZ.**

179. Panama further states that

the unilateral extension by Guinea-Bissau of the scope of the Convention through its national fisheries legislation to cover also re-fuelling operations carried out in the EEZ, such that prior authorisation is requested **against payment**, is, in reality, intended solely to extend a customs-type radius: a situation that was not, in fact, accepted by the International Tribunal in the *Saiga No.2* 1999 judgement yet would appear to still be present, in disguised form, in Guinea-Bissau's Decree Law 6-A/2000.

180. In this context Panama refers to a passage in the Joint Order No 2/2001 of 1 October 2001 of the Minister of Fisheries and the Sea and the Minister of Economy and Finance which reads: "Considering the Government's Policy of encouraging and promoting private initiative in order for the private sector to make a positive contribution towards the country's economic and social development".

181. To underline the necessity of bunkering fishing vessels in the exclusive economic zone of Guinea-Bissau, Panama further observes that "bunkering services rendered in this area are . . . particularly important owing to the general lack of bunkering facilities and gas oil product in the area" and that "the Port of Bissau, 'does not have suitable facilities'".

182. In respect of the environmental concerns invoked by Guinea-Bissau to justify its regulating of bunkering, Panama argues that "the risks during the bunkering operations are minimal" and that "vessels like the *Virginia G* do not supply heavy fuel oil but just gas oil . . . (a clean and volatile product) [which] has not caused relevant marine environmental problems". Panama further points out that "Guinea-Bissau's contention that it was necessary to regulate the *VIRGINIA G*'s activities at national law within the context of protection and conservation of its resources" cannot be sustained, "especially since the law that was enforced against the *VIRGINIA G* was the national Fisheries law of Guinea-Bissau . . . Guinea-Bissau cannot now be heard to raise its 'protection and conservation of its resources' concerns for the first time, in its Counter-Memorial".

183. In addition, in the view of Panama, the principle of sustainable fisheries, invoked by Guinea-Bissau, does not support the case presented by that State. Panama reasons that the arguments presented by Guinea-Bissau are contradictory and that Guinea-Bissau is not even a member of the International Commission for the Conservation of Atlantic Tunas.

184. Relying on the legislative history of the exclusive economic zone concept, Panama finally denies that coastal States enjoy a residual authority in the exclusive economic zone. Panama states that "[t]here is no residual authority in a coastal State to make laws which themselves violate or result in a violation of the Convention".

185. Guinea-Bissau argues that it “has not violated Article 58 of the Convention as bunkering is an economic activity, which is not included in freedom of navigation or other internationally lawful uses of the sea”.

186. Guinea-Bissau points out that “the EEZ has a *sui generis* status, but in this status the interests of the coastal state in the preservation of maritime resources and the regulation of fisheries prevail over the economic interest of bunkering activities carried out by tankers”.

187. Guinea-Bissau stresses that

[a]ccording to an evolutionary interpretation of the Convention, . . . the regulation of bunkering of fishing vessels in the exclusive economic zone is admissible owing to the sovereign rights and jurisdiction of the coastal State, recognized in articles 56, 61, 62 and 73 of the Convention.

188. Guinea-Bissau states therefore that its laws and regulations and their implementation *vis-à-vis* the activities of *M/V Virginia G* are in accordance with the Convention and other rules of international law. Guinea-Bissau argues that as

the activity of bunkering is instrumental to and supports fishing operations, one naturally has to consider it a fishing related operation, and it is therefore regulated, both under the legislation of Guinea-Bissau and under the legislation of the other States of the sub-region.

189. According to Guinea-Bissau “Guinea-Bissau, in article 3, paragraphs 1 and 2 and paragraph 3(b) and (c), as well as article 23 of Decree-Law No. 6-A/2000, established the qualification of bunkering as a fishing-related operation”.

190. The relevant articles of Decree-Law 6-A/2000 of 22 August 2000 read:

Article 3 of Decree-Law 6-A/2000:

[Translation into English provided by Panama  
in Annex 9 to its Memorial]

ARTICLE 3  
(Definition of fishing)

1. Fishing is understood to be the act of catching or harvesting by any means of biological species whose normal or most frequent habitat is water.
2. Fishing includes the prior activities whose direct purpose is that of fishing, such as detecting, the discharge or collection of devices used to attract fish, and fishing related operations.
3. For the purposes of the above point, fishing related operations means:
  - a) The transshipment of fish or fishery products in the maritime waters of Guinea Bissau;
  - b) The transport of fish or any other aquatic organisms which have been caught in the maritime waters of Guinea Bissau until the first landing;
  - c) Activities of logistic support to fishing vessels at sea;
  - d) The collection of fish from fishermen.

Article 23 of Decree-Law 6-A/2000  
[Translation into English provided by Panama  
in Annex 9 to its Memorial]

ARTICLE 23  
(Fishing related operations)

1. Fishing related operations are subject to the authorisation of a member of the Government responsible for Fisheries.
2. The authorization mentioned above is subject to payments or compensation as well as any other conditions as may be established by the department of the Government responsible for Fisheries, namely regarding the areas or location for the conduct of the fishing related activities and the mandatory presence of observers or inspectors.

191. Guinea-Bissau points out that these rules are "entirely in conformity with the legislative practice of the region". This was further elaborated upon in the testimony of Mr Dywyná Djabulá, an expert called by Guinea-Bissau, who stated:

Bunkering at sea is provided for in the Convention on Access and Exploitation of Fishery Resources of 1993. This Convention analyzes the legislation of the member States, one of which is Guinea-Bissau. There are others: Senegal, Cape Verde, Sierra Leone. The Convention says that the States themselves are responsible for regulating bunkering at sea. By regulating this matter, the legislation of these States adopts a broad notion of fishing vessel and fishing activities as such. When we speak of fishing vessels in the broad sense, we also include in this notion vessels that provide logistic support, such as vessels supplying fuel. The broad sense of fishing includes not only the actual catching of fish but also the supply of ships at sea, and the legislation of Guinea-Bissau also goes in that direction.

192. Guinea-Bissau states that it

totally disagrees that the bunkering activity carried out by the *Virginia G* in the exclusive economic zone of Guinea-Bissau falls within the freedom of navigation and other international lawful uses of the sea in terms of article 58(1) of the Convention, and that it required no prior authorization against payment.

193. Guinea-Bissau further states that

the freedom of navigation of ships with a flag of third States through the exclusive economic zone of coastal States should not include the right to be involved in the economic activity of bunkering of fishing vessels, ... given that the activity has a much stronger connection with the exercise of fishing than with the freedom of navigation.

194. Guinea-Bissau argues that "the maritime freedoms benefitting other states in the EEZ may be restricted as far as necessary to ensure the rights of the coastal State (art. 58, no. 3 of the Convention)".

195. In this context Guinea-Bissau also argues that "as bunkering may endanger the right of the coastal State over the existing living resources in its exclusive economic zone, it must be regulated by the latter".

196. According to Guinea-Bissau, "the conditions required in order to refuel at sea . . . have to be controlled not only due to the economic consequences of predatory fishing, but also due to the high environmental risks this implies".

197. Guinea-Bissau maintains that "[t]he precautionary principle in environmental law obliges the coastal States to take all appropriate measures to avoid any risks to the environment, as it is the case of an oil tanker sailing in the EEZ".

198. In this respect, Guinea-Bissau points out that "the performance of the flag States is not sufficient to prevent the uncontrolled exploitation of marine living resources" and considers that "[t]he regulation of bunkering as a fishing-related activity is a direct consequence of the use of the precautionary approach by Guinea-Bissau".

199. Guinea-Bissau rejects Panama's assertion that Guinea-Bissau's fishing law has nothing to do with the protection of the environment. It argues that bunkering has very serious environmental risks and that for this reason its regulation by coastal States is permitted by articles 61 and 62 of the Convention, which the Tribunal did not consider in the *M/V "SAIGA" (No. 2) Case*. Guinea-Bissau states:

Is it possible to assume that no oil spills caused by bunkering have occurred in West African countries? The answer must be in the negative, but it is not possible to confirm it with examples. This is the reason why Guinea-Bissau applies a precautionary approach in its fisheries law.

200. Rejecting the conclusion drawn by Panama from the fact that Guinea-Bissau does not have facilities for the fuelling of vessels in its ports, Guinea-Bissau states that this does not preclude its right to control the manner in which this operation is carried out in its exclusive economic zone.

201. Turning to the fee to be paid for bunkering authorization in its exclusive economic zone, Guinea-Bissau emphasizes that the underlying objective is strictly of an environmental nature and the revenue that is obtained is intended only to finance State policies concerning marine pollution.



## 202. Guinea-Bissau states that

the coastal State has the right to obtain the corresponding tax revenue resulting from this activity, inasmuch as bunkering prevents the coastal State from collecting the natural taxes for the supply of fuel in its territory, and also in accordance with the "polluter pays principle".

## 203. In the view of Guinea-Bissau,

[i]t is therefore normal for the coastal State to demand that the activity of bunkering in its exclusive economic zone implies the payment of the corresponding licences, pursuant to art. 62 of the Convention.

204. Guinea-Bissau emphasizes that, contrary to Panama's position, "Guinea-Bissau never extended its tax legislation to the EEZ, given that it merely charges a small amount for the issue of the refuelling licence, which is well below what it would obtain by way of tax revenue if the refuelling had taken place on land".

205. This issue was further elaborated upon in the testimony of Mr Dywyná Djabulá, where he stated:

There is a difference in terms of the law between bunkering at sea and bunkering on land. Bunkering in the port, according to current law, is regarded as a commercial activity, and as such it is subject to more of a tax charge. There it will have to pay an import tax; in terms of gas oil it would be a tax of 5% of the value of the product. It would also have to pay an industrial tax, which is 25% on the income, i.e. the amount it earns from this activity. In the case of bunkering at sea it is different. Our law takes account of the aspect of conserving resources, the environment, because as this activity causes environmental damage because of fuel spillages, waste that may occur during the transfer, and the time that fishing vessels actually remain in the fishing area means that they fish more because they do not interrupt their fishing activity to go to port to refuel and therefore they catch more fish, which has environmental effects. Even in the joint ordinance it says that we must take account of the environmental aspect, and this activity must be conditioned. So the charge that is made takes account of the principle of environmental protection. The idea of this charge is to influence the work of the agents in this activity and make them think twice, and if they do not want to pay then they

will not bunker at sea. If they want to continue bunkering at sea they have to pay this amount to fund environmental policies, the consequences of a spillage and the funding of policies and remedying the damage that can be caused. It is a very small amount in fact, but it can be raised if it is not enough to deter this kind of activity.

206. The Tribunal points out that, as noted earlier, the *M/V Virginia G*, flying the flag of Panama, provided gas oil to foreign vessels fishing in the exclusive economic zone of Guinea-Bissau and was arrested for that activity by the authorities of Guinea-Bissau.

207. The Tribunal wishes to underline, therefore, that its task in the present case is to deal with a dispute relating to bunkering activities in support of foreign vessels fishing in the exclusive economic zone of a coastal State.

208. The question to be addressed by the Tribunal is whether Guinea-Bissau, in the exercise of its sovereign rights in respect of the exploration, exploitation, conservation and management of natural resources in its exclusive economic zone, has the competence to regulate bunkering of foreign vessels fishing in this zone. To answer this question, the Tribunal needs to analyze the relevant provisions of the Convention and the practice of States in this regard.

209. The Tribunal holds that Part v of the Convention, in particular article 56 of the Convention read together with the provisions on living resources in articles 61 to 68 of the Convention, gives sufficient guidance concerning the question whether coastal States have the competence to regulate bunkering of foreign vessels fishing in their exclusive economic zones.

210. Article 56 of the Convention reads as follows:

1. In the exclusive economic zone, the coastal State has:
  - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
  - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    - (i) the establishment and use of artificial islands, installations and structures;
    - (ii) marine scientific research;
    - (iii) the protection and preservation of the marine environment;
  - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

211. The Tribunal observes that article 56 of the Convention refers to sovereign rights for the purpose of exploring and exploiting, conserving and managing natural resources. The term "sovereign rights" in the view of the Tribunal encompasses all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures.

212. The use of the terms "conserving" and "managing" in article 56 of the Convention indicates that the rights of coastal States go beyond conservation in its strict sense. The fact that conservation and management cover different aspects is supported by article 61 of the Convention, which addresses the issue of conservation as its title indicates, whereas article 62 of the Convention deals with both conservation and management.

213. The Tribunal emphasizes that in the exercise of the sovereign rights of the coastal State to explore, exploit, conserve and manage the living

resources of the exclusive economic zone the coastal State is entitled under the Convention, to adopt laws and regulations establishing the terms and conditions for access by foreign fishing vessels to its exclusive economic zone (articles 56, paragraph 1, and 62, paragraph 4, of the Convention). Under article 62, paragraph 4, of the Convention, the laws and regulations thus adopted must conform to the Convention and may relate to, *inter alia*, the matters listed therein. The Tribunal notes that the list of matters in article 62, paragraph 4, of the Convention covers several measures which may be taken by coastal States. These measures may be considered as management. The Tribunal further notes that the wording of article 62, paragraph 4, of the Convention indicates that this list is not exhaustive.

214. The Tribunal is aware of the decision made by the Arbitral Tribunal in the Filleting within the Gulf of St. Lawrence arbitration between Canada and France which stated in respect of the list in article 62, paragraph 4, of the Convention: "Although the list is not exhaustive, it does not appear that the regulatory authority of the coastal State normally includes the authority to regulate subjects of a different nature than those described" (*Dispute concerning Filleting within the Gulf of St. Lawrence between Canada and France, Decision of 17 July 1986, ILR 82(1990)*, p. 591, at p. 630, para. 52).

215. The Tribunal, however, is of the view that it is apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing. The Tribunal observes that such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone since this enables them to continue their activities without interruption at sea.

216. In reaching this conclusion the Tribunal is also guided by the definitions of "fishing" and "fishing-related" activities in several of the international agreements referred to below. They all establish the close connection between fishing and the various support activities, including bunkering. The Tribunal takes note, in this regard, of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009). Article 1, paragraph (d), of that agreement defines: "fishing related activities" as "any operation in support of, or in preparation for, fishing, including... the provisioning of personnel, fuel, gear and other supplies at sea". Article 2, paragraph 6, of the Convention on the Determination of the Minimum Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission

(2012) constitutes another example. It states: "Fishing vessels: Any vessel that is used for fishing or for that purpose including support vessels, commercial vessels, and any other vessel participating directly in fishing activities". The Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (1992), the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (2001), the Southern Indian Ocean Fisheries Agreement (2006), the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (2000) and the Convention for the Conservation of Southern Bluefin Tuna (1993) follow the same example.

217. The Tribunal is of the view that the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention read together with article 62, paragraph 4, of the Convention. This view is also confirmed by State practice which has developed after the adoption of the Convention.

218. The Tribunal acknowledges that the national legislation of several States, not only in the West African region, but also in some other regions of the world, regulates bunkering of foreign vessels fishing in their exclusive economic zones in a way comparable to that of Guinea-Bissau. The Tribunal further notes that there is no manifest objection to such legislation and that it is, in general, complied with.

219. In this context, the Tribunal refers again (see paragraph 216) to several international agreements concluded to control and manage fishing activities. The Tribunal notes, in this regard, that they include supply of fuel to fishing vessels in the definition of "fishing-related activities".

220. The Tribunal will now consider the scope of the competence of coastal States to regulate bunkering of foreign vessels in their exclusive economic zones. To do so it will have to establish to what extent bunkering is covered by the freedom of navigation or other internationally lawful uses of the sea under article 58 of the Convention.

221. Article 58 of the Convention reads:

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

222. The Tribunal is of the view that article 58 of the Convention is to be read together with article 56 of the Convention. The Tribunal considers that article 58 does not prevent coastal States from regulating, under article 56, bunkering of foreign vessels fishing in their exclusive economic zones. Such competence, as noted in paragraph 213, derives from the sovereign rights of coastal States to explore, exploit, conserve and manage natural resources.

223. The Tribunal emphasizes that the bunkering of foreign vessels engaged in fishing in the exclusive economic zone is an activity which may be regulated by the coastal State concerned. The coastal State, however, does not have such competence with regard to other bunkering activities, unless otherwise determined in accordance with the Convention.

224. As to the arguments of the Parties concerning the right of a coastal State to regulate bunkering of fishing vessels for the purpose of protecting the marine environment, the Tribunal considers it unnecessary to scrutinize the relevant arguments and facts presented by the Parties. In the view of the Tribunal, it suffices to point out that Guinea-Bissau incorporated its regulations on bunkering in its legislation on fishing rather than in legislation concerning the protection of the marine environment.

225. The Tribunal will now turn to the next question, whether the legislation of Guinea-Bissau concerning bunkering of fishing vessels conforms to articles 56 and 62 of the Convention.

226. In considering the relevant national law of Guinea-Bissau, the Tribunal recalls the Judgment of the Permanent Court of International Justice in the *Case concerning Certain German Interests in Polish Upper Silesia* where the Court stated:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.

(*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J. Series A, No. 7, p. 19*)

227. As already indicated in its Judgment in the *M/V "SAIGA" (No. 2) Case*, the Tribunal observes that, under several provisions of the Convention, it is called upon to determine whether, in enacting or implementing its law, a State Party has acted in conformity with the Convention (see *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at p. 52, para. 121*).

228. The relevant provisions of Guinea-Bissau's legislation are articles 3 and 23 of Decree-Law 6-A/2000, the texts of which are reproduced in paragraph 190, as well as article 39 of Decree 4/96, which reads:

Article 39  
(Logistical support and transshipment operations)

[Translation into English provided by Guinea-Bissau  
in paragraph 96 of its Counter-Memorial]

1. Logistical support operations for vessels that operate in waters under national sovereignty and jurisdiction, such as provisioning with victuals, fuel, the delivery or receipt of fishing materials and the transfer of crews, and transshipment of catches must be previously and specifically authorised by the Ministry of Fisheries.
2. Requests for the authorization of the operations considered in the previous number must be made at least ten (10) days prior to the expected date of entry in the waters under the sovereignty and jurisdiction of Guinea-Bissau of the vessels that should perform said operations and include the following information:
  - a) A precise description of planned operations;
  - b) Identification and characteristics of the vessels used for logistical support or transshipment of catches and the time to be spent in the waters of Guinea-Bissau;
  - c) Identification of the vessels that will benefit from operations of logistical support or transshipment of catches.
3. In no event may the beneficiaries of operations of logistical support or transshipment of catches be vessels that do not hold a valid fishing licence.
4. The Minister of Fisheries may decide that the operations of logistical support or transshipment of catches take place in a defined area and at a given time and in the presence of qualified maritime enforcement officers.

229. The Tribunal takes note of the arguments advanced by Panama, in particular the argument that the scope of the jurisdiction claimed by Guinea-Bissau is defined too widely. The Tribunal, however, holds that the definition of fishing-related activities contained in article 3 of Decree-Law 6-A/2000 establishes in sufficiently clear terms that the legislation of Guinea-Bissau only encompasses activities which directly support fishing activities in its exclusive economic zone.



230. The Tribunal wishes now to address the question relating to the payment of fees which are imposed by Guinea-Bissau for granting authorization for bunkering.

231. Panama alleges that the payment in question constitutes a tax rather than a fee, whereas Guinea-Bissau asserts that this payment constitutes a fee.

232. In this context the Tribunal refers to its Judgment in the *M/V "SAIGA" (No. 2) Case*, where it stated in paragraph 127:

The Tribunal notes that, under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea (articles 2 and 21). In the contiguous zone, a coastal State

may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

(article 33, paragraph 1)

In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (article 60, paragraph 2). In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above.

(*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment*, *ITLOS Reports 1999*, p. 10, at p. 54, para. 127)

233. The Tribunal upholds this finding, which applies to laws on taxes as it does to laws concerning customs.

234. In view of the explanation provided by Guinea-Bissau (see paragraphs 201 to 204), the Tribunal is satisfied that the charging of fees by Guinea-Bissau is not guided by its fiscal interests but is for services rendered in connection with the authorization of bunkering. Consequently, the Tribunal considers that the imposition of the fee by Guinea-Bissau does not constitute an attempt to extend its tax and customs legislation to the exclusive economic zone, as claimed by Panama.

235. With reference to the question of the procedure for obtaining an authorization for bunkering, the Tribunal holds that this – if properly followed – is not unduly burdensome for an applicant. In particular, the Tribunal does not consider it an undue burden for bunkering vessels to obtain such authorization in writing.

236. For these reasons, the Tribunal holds that the relevant national legislation of Guinea-Bissau conforms to articles 56 and 62, paragraph 4, of the Convention.

237. The Tribunal will now turn to the question whether the *M/V Virginia G* obtained the required authorization for bunkering.

238. Panama argues that if the regulation by the coastal State of bunkering of fishing vessels in the exclusive economic zone is considered to be compatible with the Convention, then the *M/V Virginia G* held an authorization under the laws and regulations of Guinea-Bissau to provide bunkering services to the *Amabal II*.

239. Panama maintains that “the *VIRGINIA G* did, in fact, have the authorisation to provide bunkering services to the *AMABAL II* . . . , and that, therefore, the requirements of the law of Guinea Bissau were respected and fulfilled by the *VIRGINIA G*, her captain and owners”.

240. Panama describes the procedure for bunkering as follows:

The location, or way point, for refuelling is generally agreed a few weeks or days in advance, between the owners/operators of the *Virginia G* and her customers, taking into account the particular routes of the vessels. Contractual arrangements are made on-shore . . . Instructions and orders are then executed by email, radio, telephone, or other means, between the agents of the vessels and the captains of the vessels, in coordination with onshore staff.

241. Panama adds that “[t]he green light – or the communication or confirmation that authorization has been obtained – is done by phone and radio. It would, indeed, defeat the very purpose of offshore bunkering if the tanker were requested to visit port to obtain the original”. It further states that “the customary practice whereby the owner of the fishing vessels procures the necessary

authorisation for the *VIRGINIA G* is, of itself, indicative of the reliance on the fishing licence held by the fishing vessel".

242. Panama states that "the owners of the *VIRGINIA G* still ensured that the requirements set out by the Guinea Bissau authorities were respected, and this in line with Article 58(3) of the Convention". According to Panama, "an authorisation was obtained for the *VIRGINIA G* to provide bunkering services" and "[t]he Guinea Bissau authorities authorised and were fully aware of the *VIRGINIA G*'s August 2009 mission". It states that:

Authorisation was, therefore, granted in terms of Guinea Bissau law...subject to certain operational and logistical formalities which could only be fulfilled closer to the date of the refuelling operation. The information that was required was the location, date, time and name of the oil tanker which would refuel the Fishing Vessels.

243. According to the information provided by Guinea-Bissau, in response to the questions posed by the Tribunal on 30 August 2013, Guinea-Bissau's legislation on the supply of fuel consists of Decree-Law 6-A/2000 of 27 June 2000, revised by Decree-Law 1-A/2005 of 27 June 2005, Decree 4/96 and Joint Ordinance 1/2013 of 31 January 2013.

244. Guinea-Bissau points out that the *M/V Virginia G* had obtained a formal document to carry out the fishing-related operation previously but did not obtain the same authorization in August 2009. From this Guinea-Bissau concludes that the *M/V Virginia G* was perfectly aware of the need for formal authorization. Guinea-Bissau rejects the argument advanced by Panama that it was the practice of the *M/V Virginia G* to obtain authorization communicated only by phone:

The law of Guinea-Bissau thus clearly states that any and all bunkering operations have to be specifically authorised by the Minister of Fisheries, with the identification of the recipient vessel, and such an authorization may not be used for the provisioning of vessels other than those for which it was granted.

245. According to Guinea-Bissau, “[t]here is not any practice established and accepted in Guinea-Bissau to allow oil tankers to perform bunkering activities without permission”.

246. Guinea-Bissau emphasizes that “pursuant to art. 39, no. 2 of [Decree 4/96], authorizations must be requested in writing... and the authorization must take the form of a written document” and “the law of Guinea-Bissau requires a formal document to perform the operation of fuelling vessels, which is usually requested by the recipient vessels on behalf of the supply vessel, and the authorization must state which vessels are to be fuelled”. “It is not possible at all for ships performing fishing-related operations to be authorized to operate by a phone call or by radio.”

247. This was confirmed in the answer of Guinea-Bissau to Question 3 posed by the Tribunal on 30 August 2013. It was reiterated that on previous occasions the *M/V Virginia G* had followed this procedure. Guinea-Bissau presented documents indicating that the requested payments were made and the written authorization received by the agent representing the fishing company for which the *M/V Virginia G* was providing bunkering operations in May and June 2009.

248. On the basis of the evidence before it the Tribunal finds that, when it was arrested, the *M/V Virginia G* did not have the written authorization required by the legislation of Guinea-Bissau for bunkering.

249. The Tribunal will now turn to the sanctions provided for under the laws and regulations of Guinea-Bissau, in particular article 52 of Decree-Law 6-A/2000 as amended by Decree-Law 1-A/2005. This provision reads in its relevant part:

Article 52

[Translation by the Registry]

1. All industrial or artisanal fishing vessels, whether national or foreign, carrying out fishing activities in national maritime waters without having obtained the authorisation required under Articles 13 and 23 of this law will be confiscated ex-officio, with their gear, equipment and fishery products, and vest in the State by decision of the member of Government responsible for fisheries.

250. The Tribunal notes that article 52 of Decree-Law 6-A/2000 as amended by Decree-Law 1-A/2005 provides for a sanction against fishing vessels having violated fisheries regulations. They will be confiscated *ex-officio*, with their gear, equipment and fishery products, in favour of the State by the decision of a member of Government responsible for fisheries.

251. The Tribunal notes that article 73, paragraph 1, of the Convention provides for the possibility of the coastal State sanctioning violations of laws and regulations concerning living resources in its exclusive economic zone but makes no reference to confiscation of vessels.

252. Article 73, paragraph 1, of the Convention reads:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, 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.

253. The Tribunal notes that many coastal States provide for measures of confiscation of fishing vessels as a sanction for the violation of the relevant laws and regulations on the conservation and management of marine living resources in their exclusive economic zones (see "*Tomimaru*" (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at p. 96, para. 72). It is the view of the Tribunal that article 73, paragraph 1, of the Convention has to be interpreted in the light of the practice of coastal States on the sanctioning of violations of fishing laws and regulations.

254. In this respect, the Tribunal refers to the following statement in its Judgment in the "*Tomimaru*" Case:

75. It is the view of the Tribunal that confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention.

76. ... Such a decision [to confiscate] should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the

Convention; nor should it be taken through proceedings inconsistent with international standards of due process of law.

(*"Tomimaru" (Japan v. Russian Federation)*, *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at p. 96, paras. 75 and 76)

255. In respect of the case before it, the Tribunal has found that as coastal States under article 56 of the Convention have sovereign rights for the purpose of conserving and managing marine living resources such sovereign rights also encompass the competence to regulate bunkering of foreign vessels fishing in the exclusive economic zone (see paragraph 217). Article 73, paragraph 1, of the Convention provides that the laws and regulations of coastal States concerning the management of living resources may encompass the necessary enforcement measures. Since the laws and regulations on fisheries of Guinea-Bissau treat fishing and support activities alike, it follows in the view of the Tribunal that the relevant laws and regulations of Guinea-Bissau also provide for the possibility of confiscating bunkering vessels.

256. The Tribunal emphasizes that, according to article 73, paragraph 1, of the Convention, the coastal State may take such measures "as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention." It is within the competence of the Tribunal to establish whether the legislation promulgated by Guinea-Bissau for the exclusive economic zone is in conformity with the Convention and whether the measures taken in implementing this legislation are necessary (see paragraph 266).

257. As indicated in article 52 of Decree-Law 6-A/2000 as amended by Decree-Law 1-A/2005, confiscation is "ex-officio". If this were to be read as meaning that confiscation takes place, irrespective of the severity of the violation and without possible recourse to judicial means, the Tribunal might be led to question whether such measure was necessary within the meaning of article 73, paragraph 1, of the Convention. In the view of the Tribunal the laws and regulations of Guinea-Bissau afford its authorities flexibility in sanctioning of violations of its fishing laws and regulations. The Tribunal further notes that the laws and regulations of Guinea-Bissau offer several possibilities for the applicant to mount a legal challenge to confiscation in such a case. Therefore, the Tribunal holds that providing for the confiscation of a vessel offering bunkering services to foreign vessels fishing in the exclusive economic zone of Guinea-Bissau is not *per se* in violation of article 73, paragraph 1, of the Convention.

Whether or not confiscation is justified in a given case depends on the facts and circumstances.

258. The Tribunal will now turn to the confiscation of the *M/V Virginia G* and the gas oil on board by Guinea-Bissau, while taking into account the fact that the vessel was later released.

259. Panama contends that:

If it were to be held that Guinea-Bissau did have the right within its EEZ to pre-authorize and impose fees for bunkering, as it in fact did, Panama claims that Guinea-Bissau none the less breached its duties under international law and under UNCLOS by acting in bad faith and abusively in direct reference to this authorization.

260. Panama further states that "in any case, such enforcement was carried out in a manner not compatible with the Convention, having acted in an unjustified, incorrect, inconsistent and arbitrary manner and in violation of Article 56(2)".

261. According to Panama, "Guinea Bissau violated its obligation as its domestic legislation and practices resulted in an abuse of what is permitted within the framework of Article 73(1)".

262. According to Guinea-Bissau, its actions were "in full conformity with art. 73 (1) of the Convention . . . confiscation is considered by various authors to be a legitimate reaction to such violation". "The arrest occurred due to the violation of the fishing law committed by the vessel VIRGINIA G in the exclusive economic zone of Guinea- Bissau, the sanction applicable being that which is allowed for in Guinean domestic law." Guinea Bissau argues that it was perfectly legitimate to impose the sanction provided for in its law for bunkering without authorization.

263. On the issue of confiscation the Tribunal heard the testimony of Mr Carlos Pinto Pereira, an expert called by Guinea-Bissau. He stated that the decision to confiscate the vessel and the fuel therein constitutes an administrative act, subject to appeal under article 52, paragraph 3, of Decree-Law 1-A/2005. He reiterated that bunkering was subject to authorization by the member of the Government responsible for fisheries under article 23, paragraph 1, of Decree-Law 6-A/2000 and emphasized that the penalty in cases

of lack of licence or permit was confiscation, which operates *ex-officio*; and the measure should be applied by the member of the Government responsible for fisheries, who chairs the CIFM. In his testimony Mr Pereira stated that in his view Decision No. 07/CIFM/09 of 27 August 2009 and Decision No. 09/CIFM/2009 of 25 September 2009 against the *M/V Virginia G*, which ordered and confirmed respectively the measures of confiscation, merely applied the law.

264. The Tribunal has found (see paragraph 217) that coastal States have jurisdiction to regulate the bunkering of foreign vessels fishing in their exclusive economic zones and to provide for the necessary enforcement measures.

265. The Tribunal notes that article 73, paragraph 1, of the Convention refers to the right of coastal States to board, inspect and arrest the vessels concerned. Therefore, the Tribunal finds that neither the boarding and inspection nor the arrest of the *M/V Virginia G* violated article 73, paragraph 1, of the Convention.

266. The Tribunal has already stated (see paragraph 256) that the enforcement measures taken have to be “necessary” to ensure compliance with the laws and regulations adopted by the coastal State in conformity with the Convention. In respect of the *M/V Virginia G*, the Tribunal notes that the vessel did not have written authorization (see paragraph 248) for bunkering as required by the legislation of Guinea-Bissau and it had not paid the fee prescribed, amounting to a value of €112.00.

267. In the view of the Tribunal, breach of the obligation to obtain written authorization for bunkering and to pay the prescribed fee is a serious violation.

268. Nevertheless, in the view of the Tribunal, mitigating factors exist in respect of the *M/V Virginia G*. The Guinea-Bissau authorities should have taken into account that the agent of Balmar, for whose fishing vessels (*Amabal I*, *Amabal II*, *Rimbal I* and *Rimbal II*) bunkering services were to be supplied by the *M/V Virginia G*, had informed FISCAP on 20 August 2009 of the coordinates, date and time of the refuelling operations. The agent of Balmar, however, failed to follow the required procedure for applying for an authorization in writing. The Tribunal notes, in this regard, that the fishing vessels (*Amabal I* and *Amabal II*) arrested together with the *M/V Virginia G* were only fined and not confiscated although having committed a violation of similar gravity under the laws of Guinea-Bissau. The Tribunal further notes that the two other



fishing vessels (*Rimbal I* and *Rimbal II*) having received bunkering services from the *M/V Virginia G* on 20 August 2009 were neither arrested nor fined at all.

269. In the opinion of the Tribunal, it appears from the above facts that the failure to obtain a written authorization was rather the consequence of a misinterpretation of the correspondence between the representatives of the fishing vessels and FISCAP than an intentional violation of the laws and regulations of Guinea-Bissau. Therefore, in the view of the Tribunal, the confiscation of the vessel and the gas oil on board in the circumstances of the present case was not necessary either to sanction the violation committed or to deter the vessels or their operators from repeating this violation. In that respect, the Tribunal notes the statement made in the order of 5 November 2009 of the Regional Court of Bissau in the context of interim measures proceedings that “the harm alleged by the applicant is comparably higher in relation to the economic and social damage than what the loss, even temporary, will mean to the defendants”.

270. There is another consideration to be taken into account by the Tribunal in evaluating the confiscation action by Guinea-Bissau in this case. The Tribunal recalls that in the “*Hoshinmaru*” Case – in the context of the procedure under article 292 of the Convention – it found that “the requirement stipulated in article 73, paragraph 2, of the Convention, [is] that the bond [the coastal State] fixes is reasonable in light of the assessment of relevant factors” (“*Hoshinmaru*” (*Japan v. Russian Federation*), *Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 18, at p. 47, para. 88). In the view of the Tribunal the principle of reasonableness applies generally to enforcement measures under article 73 of the Convention. It takes the position that in applying enforcement measures due regard has to be paid to the particular circumstances of the case and the gravity of the violation. For these reasons, the enforcement measure against the *M/V Virginia G* was, in the view of the Tribunal, not reasonable in light of the particular circumstances of this case.

271. The Tribunal, therefore, finds that the confiscation by Guinea-Bissau of the *M/V Virginia G* and the gas oil on board was in violation of article 73, paragraph 1, of the Convention.

### VIII Article 73, paragraphs 2, 3 and 4, of the Convention

272. The Tribunal will now deal successively with the issue of whether Guinea-Bissau violated article 73, paragraphs 2, 3 and 4, of the Convention.

#### *Article 73, paragraph 2*

273. Article 73, paragraph 2, of the Convention provides: “Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.”

274. In relation to this provision Panama argues that Guinea-Bissau “violated Article 73(2) as it both failed to cooperate in the fixing of a reasonable bond, and prevented or impeded a reasonable bond from being fixed”. Panama notes in this regard that the owner of the *M/V Virginia G* on several occasions requested the Guinea-Bissau authorities to fix “the necessary bond for the release of the vessel, its crew and cargo” and that “[these] requests were never replied to”.

275. Panama points out that “under the law of Guinea-Bissau, the shipowner was entitled to make use of several co-existing procedures to challenge the decisions and actions of the Guinea Bissau authorities and to seek to release the VIRGINIA G and her crew”. However, according to Panama “such procedures and remedies were in effect and in practice either (i) inaccessible/ prohibitive conditioned, or (ii) hindered/stalled by the Guinea-Bissau administration, or (iii) ultimately ineffective, as a result of which the shipowner’s efforts were futile”.

276. Panama argues in this regard that

[t]he shipowner could not reasonably have made recourse to the "prompt release" action under Article 65 of Decree-Law 6-A/2000 since the conditions for providing security/guarantees were (i) unknown, (ii) partial towards Guinea-Bissau, (iii) unreasonable and (iv) prohibitive, thus preventing effective access to this remedy.

277. According to Panama the security/guarantee to be established by a local Guinea-Bissau court under article 65 of the above Decree-Law "would be tied up in favour of Guinea-Bissau for the duration of the case, which can be excessive" and that "[t]he way in which the security/guarantee calculation is made is unreasonable and would in practice only allow economic operators with ample financial liquidity to access this remedy" and would not "be 'reasonable', affordable or feasible for a small shipowner seeking release of a vessel, crew and cargo".

278. Panama states that the ship-owner did not use article 65 of Decree-Law 6-A/2000 because he was not in a position to use such procedure since the amount of the security was, firstly unknown, and, secondly, would have been prohibitively unaffordable to a company in increasingly serious financial difficulty as a result of the unfounded arrest and detention.

279. Panama observes that under the circumstances "the shipowner was attempting to seek to establish a reasonable bond – via administrative channels... – but was completely disregarded by the Guinea-Bissau authorities".

280. Guinea-Bissau for its part argues with reference to the setting of the security deposit that

this has to be requested from the competent entity, something that the owners of the VIRGINIA G. never did as they always attempted to handle the matter with FISCAP, the enforcement entity, and not with the court, which was the competent entity for setting a security deposit.

281. In support of its position, Guinea-Bissau makes reference to article 65, paragraph 1, of Decree-Law 6-A/2000 cited in paragraph 287.

282. Guinea-Bissau argues that if the owner of the *M/V Virginia G* did not request the fixing of a reasonable bond under article 65 of the above Decree-Law, "that is surely not Guinea-Bissau's fault".

283. The Tribunal notes that article 73, paragraph 2, of the Convention concerning enforcement of laws and regulations of the coastal State imposes three obligations on the coastal State detaining or arresting a foreign fishing vessel within its exclusive economic zone in the exercise of its authority under this article. Article 73, paragraph 2, requires that arrested vessels and their crews be released upon posting of bond or other security, that such release be done promptly and that the bond or other security be reasonable.

284. The Convention does not define in article 73, paragraph 2, how the coastal State is to comply with these obligations, thus leaving it for the coastal State to determine the most appropriate procedure in accordance with its national law.

285. The Tribunal observes that the practice of coastal States varies in this regard. In some coastal States the bond or other security is determined by the competent court on the basis of an application submitted by the owner or captain of a detained or arrested vessel. In other coastal States it is the executive branch that determines the bond or other security.

286. The Tribunal notes that in the case of Guinea-Bissau the release of fishing vessels and their crews upon the posting of a bond is regulated by article 65 of Decree-Law 6-A/2000. Pursuant to this article the authority to take a decision on this matter is entrusted to the competent court. Guinea-Bissau law in this regard does not depart from other States' practice.

287. Article 65, paragraph 1, of Decree-Law 6-A/2000 provides that:

[Translation into English provided by Guinea-Bissau  
in paragraph 230 of its Counter-Memorial]

Upon the decision of the competent court, the fishing vessels or craft and their crew will be immediately released, upon request of the shipowner, the captain or the master of the vessel or craft or of its local representative,

before the trial, provided that the payment of sufficient security deposit is made.

According to article 65, paragraph 2, of Decree-Law 6-A/2000, such court order "shall be issued within a maximum of 48 hours after the filing at court of the petition to have ship and crew released".

288. In the view of the Tribunal these provisions of article 65 of Decree-Law 6-A/2000 meet the first two requirements established by article 73, paragraph 2, of the Convention. They provide the detained or arrested fishing vessel with the possibility of being released by a decision of the competent court following receipt of a request to this effect from the ship-owner, the captain or the master of the ship upon the posting of a bond or other financial security as established by the court. They also guarantee the promptness of a decision by the court, as the latter is required to issue its order within a maximum of 48 hours after the filing of the petition to have ship and crew released.

289. The issue of the amount of the bond is addressed in article 65, paragraphs 3 and 4, of Decree-Law 6-A/2000. These paragraphs provide that "[t]he amount of the bond shall not be lower than the costs of seizure and apprehension, possible repatriation of the crew plus the amount of the fine for which the perpetrators of the infringement are liable" (paragraph 3) and that "[i]n the case of infringements for which this decree prescribes or authorizes confiscation of the catches, fishing gear and ship, the court may add the value of the catches, fishing gear and ship to the amount of the bond" (paragraph 4).

290. The Tribunal notes that article 66 of Decree-Law 6-A/2000 provides that the bond determined by the court pursuant to article 65 "will be immediately restituted . . . [i]f a decision is handed down whereby the accused are deemed to be not guilty".

291. The question arises whether the amount of the bond to be determined by the Guinea-Bissau court pursuant to the above provisions may be reasonable, as required by the Convention. It is evident that the exact amount of bond will vary depending on the particulars of each case and cannot be determined in advance. In the present case, in the view of the Tribunal, article 65,

paragraphs 3 and 4, of Decree-Law 6-A/2000 provide sufficient guidance on how the bond will be determined by the Guinea-Bissau court.

292. The Tribunal stated in the “*Hoshinmaru*” Case:

The Tribunal has expressed its views on the reasonableness of the bond in a number of its judgments. In the “*Camouco*” Case it stated: “the Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or impossible under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form” (*ITLOS Reports 2000*, p. 10, at p. 31, para. 67). In the “*Monte Confurco*” Case it added that: “This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them” (*ITLOS Reports 2000*, p. 86, at p. 109, para. 76). In the “*Volga*” Case it stated that: “In assessing the reasonableness of the bond or other security, due account must be taken of the terms of the bond or security set by the detaining State, having regard to all the circumstances of the particular case” (*ITLOS Reports 2002*, p. 10, at p. 32, para. 65). In the “*Juno Trader*” Case the Tribunal further declared that: “The assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties” (*ITLOS Reports 2004*, p. 17, at p. 41, para. 85). (“*Hoshinmaru*” (*Japan v. Russian Federation*), *Prompt Release, Judgment*, *ITLOS Reports 2005–2007*, p. 18, at p. 45, para. 82)

293. As the *M/V Virginia G* was confiscated with its gear, equipment and products on board, pursuant to article 52 of Decree-Law 6-A/2000, as amended by Decree-Law 1-A/2005, for allegedly carrying out fishing-related activities without having obtained the necessary authorization in accordance with articles 13 and 23 of Decree-Law 6-A/2000, the amount of the bond could have been quite significant. Under the Decree-Law, as noted in paragraph 289, it may include the value of the ship. Article 52, paragraph 2, of the Decree-Law in this regard provides that regardless of the confiscation “the courts must apply the fines set

out in Article 54 (2)", which states that the minimum fine is US\$ 150,000 and the maximum US\$ 1,000,000.

294. It may, however, be assumed, in the view of the Tribunal, that the competent court of Guinea-Bissau in determining the amount of the bond will be guided by the provisions of article 73, paragraph 2, of the Convention, which require that the bond be reasonable. It should also be noted that, if the bond determined by the Guinea-Bissau court does not appear to be reasonable, the procedures provided for in article 292 of the Convention may be instituted and it would then be for the Tribunal to decide whether, under the circumstances, the bond established by the Guinea-Bissau court was reasonable.

295. The Tribunal therefore is not convinced by the arguments of Panama that the procedures of article 65 of Decree-Law 6-A/2000 concerning the release of ships and their crews upon the posting of a bond or other financial security are unreasonable and unaffordable and therefore could not have been used in the present case. In undertaking activities within the exclusive economic zone of Guinea-Bissau the owner of the *M/V Virginia G* should have been familiar with the applicable laws of that State. The fact that the owner of the *M/V Virginia G* for financial or other reasons decided not to use the existing procedure under article 65 of Decree-Law 6-A/2000 for the prompt release of the vessel cannot serve as a basis for a claim that Guinea-Bissau violated the provisions of article 73, paragraph 2, of the Convention.

296. For these reasons, the Tribunal considers that the applicable law of Guinea-Bissau concerning the prompt release of arrested fishing vessels and their crews upon the posting of reasonable bond or other security is consistent with the provisions of article 73, paragraph 2, of the Convention. Therefore, the Tribunal finds that Guinea-Bissau did not violate article 73, paragraph 2, of the Convention.

### *Article 73, paragraph 3*

297. Article 73, paragraph 3, of the Convention states that:

Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

298. Panama points out "that the crew was held in Guinea Bissau, on board the *VIRGINIA G*, against their will and under military guard, without lawful trial for over 4 months – until their passports were returned in early January 2010" and that "[t]heir presence in Guinea Bissau was not needed and no criminal charges were leveled against them".

299. Panama acknowledges that "the law of Guinea Bissau does not appear to provide for imprisonment as a penalty or punishment for the violation of its fisheries law (Decree[-Law 6-A]/2000)". Panama however argues that

although the crew were not, in effect, placed in prison, the confiscation of their passports for more than four months and the resulting inability to leave Guinea Bissau constituted a *de facto* imprisonment or arbitrary detention and a serious violation of their fundamental rights.

According to Panama, Guinea-Bissau was thus in breach of article 73, paragraph 3, of the Convention and general international law.

300. In this connection Panama "draws particular attention to the situation of Chief Mate Fausto Ocaña Cisneros, who needed to leave Guinea-Bissau for urgent personal reasons, but faced enormous difficulty in obtaining his passport from the Guinea-Bissau authorities".

301. For its part, Guinea-Bissau states that it

did not violate art. 73 (3) of the Convention inasmuch as it did not apply any measures involving prison or corporal punishment to the crew of the *VIRGINIA G*, it being absurd that Panama should wish to classify the temporary apprehension of passports or the failure to provide a security deposit as *de facto* prison.

Guinea-Bissau stresses in this regard that its authorities "did not apply any penal sanction on the members of the crew" as it is not allowed in Guinea-Bissau law.



302. Guinea-Bissau states "that the conditions in which the crew of the *Virginia G* were kept in the port of Bissau did not constitute a violation of their human rights" and that "the best proof of this assertion is the fact that there were no claims of any physical harm during the time the crew stayed in the port of Bissau" and "[n]o one asked for medical assistance at any time in Guinea-Bissau".

303. Guinea-Bissau contends that "[t]he passports were delivered upon request" and that in any case "a delay in the restitution of a passport can never be considered to be equivalent to a measure of imprisonment, it therefore being clear that there was no violation of art. 73([3]) of the Convention".

304. Guinea-Bissau points out that "[t]he members of the crew could have left Guinea-Bissau whenever they wanted to, as the guards were preventing the vessel from leaving and not holding the members of its crew, who were always free to leave when they wanted". According to Guinea-Bissau "the only reason the crew did not leave Guinea-Bissau immediately was precisely that the ship owner had no funds to pay for tickets for them to leave".

305. The Tribunal finds it appropriate to underline that the wording of article 73, paragraph 3, of the Convention is precise. It states that "coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment... or any other form of corporal punishment".

306. Having analyzed the relevant provisions of Decree-Law 6-A/2000, the Tribunal concludes that penalties that may be imposed under that Decree-Law for its violation do not include imprisonment or any other form of corporal punishment.

307. Article 42, paragraph 4, of Decree-Law 6-A/2000 on preventive measures provides that "[i]f it is absolutely necessary to ensure the execution of sentences that can be pronounced" in cases where it is plausible that an offence has been committed, any fishing vessel seized for that reason and its crew "may be conducted to the most convenient port of Guinea-Bissau and be held there until the end of the procedures and processes legally established". Article 65, paragraph 1, of the Decree-Law, however, states that the crew members, as noted above, "will be immediately released, upon request of the shipowner, the captain or the master of the vessel or craft or of its local representative,

before the trial, provided that the payment of sufficient security deposit is made".

308. The Tribunal is of the view that measures of confinement taken by Guinea-Bissau with regard to the crew members during a short period of initial detention of the *M/V Virginia G* at sea and the subsequent stay of the vessel in the port of Bissau, cannot be interpreted as imprisonment since, in particular in the latter case, the crew members were free to leave the ship.

309. The Parties provide conflicting information regarding the reasons for which the crew members were unable to leave Guinea-Bissau immediately. Panama states that it was due to "the confiscation of their passports for more than four months" while Guinea-Bissau argues that "the only reason the crew did not leave Guinea-Bissau immediately was precisely that the ship owner had no funds to pay for tickets for them to leave".

310. Whatever the reasons which prevented the crew members from leaving Guinea-Bissau during a certain period of time after the arrest of the *M/V Virginia G*, the Tribunal is of the view that the temporary holding of their passports cannot be considered imprisonment within the meaning of article 73, paragraph 3, of the Convention.

311. For the reasons stated above the Tribunal finds that in the present case there was no penalty of imprisonment imposed on members of the crew of the *M/V Virginia G* and that Guinea-Bissau therefore did not violate article 73, paragraph 3, of the Convention.

*Article 73, paragraph 4*

312. Article 73, paragraph 4, of the Convention provides: "In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

## 313. Panama states that

Guinea Bissau violated Article 73(4) in failing to notify Panama, as the flag state of the vessel, of the boarding, arrest, detention and confiscation of the gas oil of the *VIRGINIA G*, thus denying Panama a fair and just opportunity to promptly intervene in safeguarding its interests and those of its nationals.

## 314. Panama points out in this respect that

there is also a connection between paragraphs (2) and (4) of Article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke Article 73(2) and other measures under the Convention (for instance Article 292) in a timely and efficient manner.

315. Panama notes that "Article 73(4) imposes the obligation to notify flag States not only in respect of the initial action taken against the vessel in question, but also every time important new measures are taken against the vessel, as indicated by the words 'penalties subsequently imposed'" and that "[t]his is, perhaps, especially true where the freedom of the vessel and its crew is concerned".

316. With reference to Guinea-Bissau's statement that it did not violate article 73, paragraph 4, of the Convention as there are no Panamanian persons or entities associated with the vessel, Panama points out that "the wording of Article 73(4) is unequivocal, and includes none of the elements set out by Guinea-Bissau's interpretation".

317. Panama therefore concludes that "Guinea-Bissau's reasons for failing to notify Panama under Article 73(4) are clearly unfounded and misleading", as "[t]he Convention clearly requires the coastal State to promptly notify the flag State, and not the country of nationality of the crew, and much less that the crew of a vessel have to be citizens of the country of the flag of the vessel".

318. For its part Guinea-Bissau contends that it "did not violate art. 73 (4) of the Convention, inasmuch as it did not find a single person or entity related with Panama", as "[t]he owner of the vessel was Spanish, the captain and most of the crew was Cuban, there also being Ghanaians and one Cape Verdean".

319. Guinea-Bissau further contends that

[i]t is clear that art. 73 (4) of the Convention has to be interpreted in connection with art. 91, such obligation concerning communication in cases of flags of convenience ceasing as from the time that the State that has an effective connection with the vessel assumes diplomatic protection.

320. Guinea-Bissau states that

[c]ontrary to that which Panama upholds, [it] never recognized the vessel's connection with Panama, the interpretation of the document attached by Panama as Annex 58 being clear, in the sense of stating that although it flew the flag of Panama the vessel is Spanish, as it belonged to a Spanish company.

321. Guinea-Bissau points out in this regard that

[b]oth Spain and Cuba immediately assumed the diplomatic protection of the owner and of his crew, which is, therefore, why no notification was made to Panama, which had no connection with the vessel, and does not even have any diplomatic representation in Bissau.

322. Before proceeding to answer the question whether Guinea-Bissau violated article 73, paragraph 4, of the Convention, the Tribunal finds it necessary to determine whether the fact that the vessel's owner and its crew are not nationals of the flag State has any bearing on the issue of the existence of a genuine link between the flag State concerned and the ship flying its flag, a requirement contained in article 91, paragraph 1, of the Convention.

323. The Convention provides in article 91, paragraph 1, that “every State shall fix the conditions for the grant of its nationality to ships” and does not impose in this regard any limitations on the nationality of ship-owners or crew.

324. The Tribunal notes that Guinea-Bissau acknowledges that the *M/V Virginia G* carried out bunkering activities in its exclusive economic zone on several occasions prior to the events in question in the present case, and that on two occasions, in May and June 2009, the required authorizations were requested and received for such operations for the benefit of vessels belonging to the company *Afripêche*. On neither of those occasions did Guinea-Bissau call into question the exercise of proper jurisdiction and control by Panama over the *M/V Virginia G* or raise this issue with Panama, as provided for in article 94, paragraph 6, of the Convention.

325. On the basis of the information presented to it by the Parties the Tribunal does not find any grounds to conclude that Panama did not exercise effective jurisdiction and control over the *M/V Virginia G* and thus was in violation of the provisions of article 94 of the Convention.

326. It follows from the above that Guinea-Bissau was bound in the present case by the provisions of article 73, paragraph 4, of the Convention.

327. The Decree-Law 6-A/2000 is precise in this respect by stating in article 46, paragraphs 1 and 2, that “[o]nce the inspectors have drafted a report on an infringement by a ship or fishing vessel, they shall immediately notify the member of Government in charge of fisheries” and that the latter shall “notify thereof the Minister of Foreign Affairs and of the Communities, who shall advise the Government of the flag State of the ship or vessel”. Thus the applicable law of Guinea-Bissau reiterates the requirements set out in article 73, paragraph 4, of the Convention.

328. The Tribunal finds that, 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 this vessel and its cargo, Guinea-Bissau violated the requirements of article 73, paragraph 4, of the Convention and thus deprived Panama of its right as a flag State to intervene at the initial stages of actions taken against the *M/V Virginia G* and during the subsequent proceedings.

## IX Other relevant provisions of the Convention and the SUA Convention

329. In its final submissions, Panama requests the Tribunal to declare, adjudge and order, *inter alia*, that Guinea-Bissau violated the principles of articles 110 and 224; article 225; and article 300 of the Convention. In addition, Panama requests the Tribunal to declare that Guinea-Bissau used excessive force in boarding and arresting the *M/V Virginia G*, in violation of the Convention and of international law, and that Guinea-Bissau violated the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988) (hereinafter the "SUA Convention") as well as fundamental principles of safety of life at sea and collision prevention.

330. For its part, Guinea-Bissau in its final submissions requests the Tribunal to adjudge that it did not violate any of the above provisions of the Convention, nor did it violate the SUA Convention or the principles of safety of life and collision prevention.

331. Given the diverging views of the Parties the Tribunal will deal successively with each of the above claims by Panama in order to determine whether the actions taken by Guinea-Bissau against the *M/V Virginia G*, its crew and its cargo violated the above provisions of the Convention, the SUA Convention or the principles of safety of life and collision prevention.

### *Articles 110 and 224*

332. The Tribunal will now turn to articles 110 and 224 of the Convention, which provide as follows:

#### *Article 110* *Right of visit*

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
  - (b) the ship is engaged in the slave trade;
  - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
  - (d) the ship is without nationality; or
  - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
  3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
  4. These provisions apply *mutatis mutandis* to military aircraft.
  5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

#### *Article 224*

##### *Exercise of powers of enforcement*

The powers of enforcement against foreign vessels under this Part may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

333. Panama refers to article 224 of the Convention "which although belonging to a specific section of the Convention, can be used to extract a principle which would be difficult not to apply to all actions of enforcement against foreign vessels". Panama contends that Guinea-Bissau "failed to respect international law rules (especially under the Convention) when approaching and boarding the vessel, and during their time on board".

334. Panama contends that "the Guinea-Bissau officials did not exercise their right of visit according to the Convention" as "they carried out surveillance from a distance and proceeded at a speed to board the vessel without prior warning".

335. Panama points out in this regard that "[a]s witnessed by Captain Blanco Guerrero and his crew, the *VIRGINIA G* was boarded unannounced, by men who bore no identification" despite the fact that "[t]he *VIRGINIA G* was visibly flying the Panamanian flag and could easily be identified by its IMO number, painted on the front of the bridge, and by its name on the bow and on the stern".

336. Panama contends that "[i]n the circumstances...Guinea Bissau violated its obligations in terms of principles set out in the Convention, namely, but without limitation, under Articles 110 and 224, and under general international law".

337. Guinea-Bissau states that it "did not violate arts. 224 and 110 of the Convention, as the ship was arrested by uniformed officials in conformity with its rights, as a coastal State, to monitor activity in the EEZ".

338. Guinea-Bissau points out that in the present case officials from three different entities took part in the enforcement operation, namely, maritime fishing inspectors; sailing crew (pilot and his mate); and a protection squad (armed forces personnel, Navy infantry).

339. Guinea-Bissau argues that "[t]he exercise of enforcement powers in enforcement operations is expressly allowed for in the Convention (art. 224), with the enforcers naturally having the right to use the force they consider appropriate and proportional to the danger of the operation".

340. The Tribunal observes that Panama does not contend that Guinea-Bissau violated articles 110 and 224, which apply to specific Parts of the Convention, but that it violated principles extracted from these articles, namely that enforcement against foreign vessels may only be exercised by officials or by warships or other ships clearly marked and identified as being on government service and authorized to that effect and that the boarding of a vessel must be carried out with all possible consideration. The question therefore arises as to whether these two articles set out principles to be observed by the coastal State



in carrying out its enforcement activities pursuant to article 73, paragraph 1, of the Convention in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in its exclusive economic zone.

341. The Tribunal points out that in the *M/V "SAIGA" (No. 2) Case* it considered the issue of requirements applicable to enforcement activities by addressing in detail the question of the use of force during such activities. The relevant parts of the Judgment in the *M/V "SAIGA" (No. 2) Case* are cited in paragraphs 359 and 360 of the next section of the present Judgment dealing with the alleged excessive use of force by Guinea-Bissau.

342. The Tribunal considers it important to reiterate that general international law establishes clear requirements that must be complied with by all States during enforcement operations, including those carried out pursuant to article 73, paragraph 1, of the Convention. These requirements provide, in particular, that enforcement activities can be exercised only by duly authorized identifiable officials of a coastal State and that their vessels must be clearly marked as being on government service. The Tribunal observes in this connection that, for the reasons explained below, the fact that some of these requirements of general international law are incorporated in articles 110 and 224 of the Convention, does not imply that these two articles set out their own principles applicable to the enforcement activities undertaken pursuant to article 73, paragraph 1.

343. In this connection the Tribunal finds it appropriate to underline that article 224 of the Convention relates to powers of enforcement against foreign vessels exercised by the coastal State under Part XI of the Convention concerning protection and preservation of the marine environment. The Tribunal is of the view that it may not be claimed that this article, although it reflects, as noted above, some requirements of general international law, sets out principles applicable to the enforcement activities exercised by the coastal State pursuant to article 73, paragraph 1, of the Convention.

344. As to article 110 of the Convention, according to article 58, paragraph 2, of the Convention, article 110 is applicable to the exclusive economic zone in so far as it is not incompatible with Part V of the Convention. The Tribunal observes that article 110 authorizes a warship of any State which encounters a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96 of the Convention, to send a boat under the command of an officer to that ship and to proceed to a further examination on board the

ship, which must be carried out with all possible consideration. However, such boarding and examination may be undertaken only if the ship is suspected of committing one of the five acts specifically referred to in article 110, paragraph 1, none of which has anything to do with alleged violations of fishing regulations within the exclusive economic zone.

345. In the view of the Tribunal article 110 of the Convention cannot be interpreted to imply that it establishes a principle providing that under the Convention enforcement activities in the exclusive economic zone can only be exercised by a warship. The Convention leaves it for the coastal State to decide which authorities under its national law will be responsible for exercising enforcement activities pursuant to article 73, paragraph 1, of the Convention in accordance with general principles of international law referred to above.

346. The Tribunal notes in this regard that in accordance with article 40 of Decree-Law 6-A/2000 the competence for the verification of infringements is assigned in Guinea-Bissau to enforcement agents, acting under the supervision of the government department responsible for fisheries. Pursuant to articles 41 and 42 of Decree-Law 6-A/2000, these agents have the authority, *inter alia*, to

[Translation by the Registry]

[o]rder any fishing vessel, which is found in the maritime waters of Guinea-Bissau to stop performing the manoeuvres necessary to facilitate the visit to the boat in safe conditions, ... [v]isit any fishing vessel both at sea and in port, ... [o]rder that they are shown the fishing license, the fishing logbook or any other document relating to the vessel or the catches found on board

and

if agents have fundamental reasons to believe that a breach of this law and its regulations has been committed, they may seize, on a preventive basis . . . [a]ny fishing vessel with gear or catch on board, as well as any instruments that are suspected to have been used in the commission of the offence.

347. As to the provision of article 110, paragraph 2, of the Convention stating that examination on board is to be carried out with all possible consideration, the Tribunal finds that article 110 does not establish principles applicable to the exclusive economic zone. In this respect, article 56, paragraph 2, of the Convention is *lex specialis* and requires that, in exercising its rights and performing its duties in the exclusive economic zone, the coastal State "shall have due regard to the rights and duties of other States". This requirement is to be interpreted to imply that in the exercise of its powers pursuant to article 73, paragraph 1, of the Convention, which includes boarding and inspection of foreign fishing vessels, the competent authorities of the coastal State shall proceed with all possible consideration.

348. The Tribunal therefore finds that neither article 110 of the Convention nor article 224 of the Convention is applicable to the enforcement activities undertaken by the coastal State pursuant to article 73, paragraph 1, of the Convention. The Tribunal consequently concludes that Guinea-Bissau did not violate principles of articles 110 and 224 of the Convention as these articles do not by themselves establish any principles applicable to enforcement activities under article 73, paragraph 1, of the Convention.

349. At the same time the Tribunal points out that, as noted above, article 56, paragraph 2, of the Convention requires the coastal State in exercising its rights and duties in the exclusive economic zone to have due regard to the rights and duties of other States and thus to proceed with all possible consideration. This matter is addressed by the Tribunal in the subsequent part of the present Judgment where the Tribunal deals with the question of whether excessive force was used by Guinea-Bissau in boarding and arresting the *M/V Virginia G*.

*Alleged excessive use of force*

350. Panama states that "Guinea-Bissau violated the principle that the use of force should be avoided, and that even when it cannot be avoided, it should not exceed what is reasonable and necessary" and that "the use of force, or forceful measures, is even less justified when the suspect vessel and its crew neither offers resistance nor resorts to use of force".

351. In this connection Panama contends that

[t]he use of force and intimidation used during the boarding and inspection was unjustified and went drastically beyond what was reasonable. The FISCAP officers boarded the vessel without identifying themselves, they acted in a forceful, inconsiderate and intimidating manner, brandishing weapons, and confined the crew at gunpoint even though no resistance was made by the crew.

352. Panama points out that "[t]he captain was made to sign documents at gunpoint" and "was not permitted to immediately communicate with the owner of the *VIRGINIA G* thus isolating the captain from immediate assistance and preventing him from carrying out his full duties towards the owners of the vessel".

353. Panama notes that "[t]he forceful and intimidating manners of the officials when visiting the *VIRGINIA G* during its prolonged period of detention worsened the already stressful and apprehensive situation amongst the crew on board".

354. Guinea-Bissau states that "[t]here was never any violence or threats made to the crew, it being clear that the legitimate exercise of authority, which represses violations committed in its EEZ, does not constitute violence".

355. Guinea-Bissau points out that "all the inspectors were regularly dressed, clearly identified as FISCAP officials, while the Navy infantry were wearing military uniform".

356. Guinea-Bissau further points out that "[t]here was no excessive use of force, as the officials merely arrested the vessel and ordered it to go to the port of Bissau, there being no danger on this journey, it being absurd to consider this situation as an excessive use of force".

357. Guinea-Bissau states that "[t]he captain was not obliged to sign it [the relevant document] and could always, in any case, have formulated his observations".

358. On the issue of the prohibition of the use of communications equipment by the crew, Guinea-Bissau observes that "this only took place during the boarding operation precisely to avoid the leaking of information concerning enforcement in the area where the boarding took place" and that "[a]s soon as the boarding operation ceased, the use of the vessel's communications was once again authorised, which permitted the Captain to make the communications he wanted, having, as he states, freely sent a fax and an e-mail".

359. The Tribunal notes that it dealt with the issue of the use of force in the *M/V "SAIGA" (No. 2) Case*. The Tribunal stated in that case that:

155. ... Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. "I'm Alone" case (Canada/United States, 1935)*, *U.N.R.I.A.A.*, Vol. III, p. 1609; *The Red Crusader case (Commission of Enquiry, Denmark – United Kingdom, 1962)*, *I.L.R.*, Vol. 35, p. 485). The basic principle concerning the use

of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Article 22, paragraph 1(f), of the Agreement states:

1. The inspecting State shall ensure that its duly authorized inspectors:

...

(f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

(*M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at pp. 61 and 62, paras. 155 and 156*)

360. It follows from the above that the use of force in enforcement activities at sea is not generally prohibited. However, as stated by the Tribunal in the *M/V “SAIGA” (No. 2) Case*, “the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances” (*M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at pp. 61 and 62, para. 155*).

361. Although the information provided by the Parties is conflicting, it appears that the boats used by FISCAP inspectors were clearly marked, inspectors who boarded the *M/V Virginia G* were dressed in a way identifying them as FISCAP officials and the Navy infantry were wearing military uniform. During boarding, the use of force did not go beyond what was reasonable and necessary in the circumstances and after the initial stage of detention the captain was not prevented from communicating with the owner of the vessel.

362. The Tribunal is of the view that the information provided to it by the Parties does not indicate that excessive force was used against the *M/V Virginia G* and its crew. The Tribunal considers that the standards referred to by the Tribunal in the *M/V "SAIGA" (No. 2) Case* were met and therefore does not find that Guinea-Bissau used excessive force leading to physical injuries or endangering human life during the boarding and sailing of the *M/V Virginia G* to the port of Bissau.

*Article 225 and the SUA Convention*

363. The Tribunal will now turn to article 225 of the Convention and the SUA Convention.

364. Article 225 of the Convention, concerning the duty to avoid adverse consequences in the exercise of the powers of enforcement, provides the following:

In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

365. Panama states that "[t]he FISCAP officials violently ordered the captain to sail the vessel to the Port of Bissau in highly perilous circumstances" such as *inter alia* "[sailing] at night, with near zero visibility caused by the rain"; "[captain] was not allowed to use any of the communications equipment normally used to transmit signals to alert ships in the vicinity of the *VIRGINIA G* (according [to] the International Collision Regulations)"; "[t]he journey was made without the use of navigational charts of the Guinea Bissau Port and its approach" which

amounted to unsafe navigation and substantially increased the possibility of running aground in areas of low depth, potentially resulting in the loss of the vessel, human life and irreparable damage to the environment. . . . No adequate pilot was on board to provide the captain with guidance and advice on the approach and arrival in the bay of Guinea Bissau;

and "since the crew was detained in the accommodation quarters", "the crew could not have carried out their tasks whilst the vessel was sailing" which "could, of itself, have led to a serious emergency situation".

366. Panama contends that

by ordering the navigation of the vessel to the Port of Bissau... in the perilous circumstances described... the FISCAP officials severely disregarded the most basic rules of safety of life at sea, thus endangering the crew, themselves, the vessel and the environment,... but also the very purpose of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).

367. Panama notes in this regard that "the main purpose of the SUA Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force and acts of violence against persons on board ships".

368. Panama argues that in the circumstances "Guinea Bissau violated its obligations in terms of the Convention, namely, but without limitations, under Article 225 and under the SUA Convention".

369. Guinea-Bissau argues that it "did not violate art. 225 of the Convention, as it did not put the safety of navigation in danger nor did it create any risk for the ship, which could perfectly remain moored in the port of Bissau".

370. Guinea-Bissau points out that

the journey took place in conditions considered to be adequate by the specialized sailing crew who accompanied the enforcement officials, there never being any danger for them, for their crew and much less for the environment as is clearly seen from the statement of the naval pilot Djata Ianga (Annex 6 of the Counter-Memorial), while the official notice (Annex 18 of the Counter-Memorial) states that the sea was calm and visibility was good.



371. Guinea-Bissau observes that

[t]he pilot Djata Ianga used the navigation [chart] of the VIRGINIA G., as the one he has was more adequate for smaller ship, and he managed to undertake the voyage in perfect conditions of safety which is clear from the fact that the vessel arrived in the port of Bissau without any damage whatsoever.

372. Guinea-Bissau concludes that "[t]here was not at any time any risk of endangering the environment which it is in the interest of Guinea-Bissau to preserve".

373. The Tribunal observes that, although article 225 of the Convention is found in Part XII of the Convention concerning protection and preservation of the marine environment, it has general application, as it states that "[i]n the exercise under this Convention of their powers of enforcement against foreign vessels", States shall observe the requirement of this article, namely: not to endanger the safety of navigation or otherwise create any hazard to a vessel, or bring a vessel to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk. It follows from article 225 that all these requirements are applicable to enforcement activities undertaken pursuant to 73, paragraph 1, of the Convention and should have been complied with by the authorities of Guinea-Bissau in the present case.

374. Given the conflicting assertions by the Parties regarding the conditions under which the *M/V Virginia G* was brought to the port of Bissau, the Tribunal concludes that it has not been presented with sufficient evidence to establish convincingly that any of the provisions of article 225 of the Convention was violated. The *M/V Virginia G* navigated to the port of Bissau guided by an experienced pilot well acquainted with navigational requirements in that area, the sailing conditions may not have been perfect but proved to be adequate and the vessel safely arrived in port without any damage to it or the environment.

375. Consequently, the Tribunal concludes that the requirements of article 225 of the Convention were met in the present case and that Guinea-Bissau did not violate article 225 or the fundamental principles of safety of life at sea and collision prevention.

376. As to the SUA Convention, the Tribunal observes that this convention, to which both Panama and Guinea-Bissau are parties, was concluded in light of "the worldwide escalation of acts of terrorism in all its forms" and as part of the measures taken by the international community to combat terrorism in all its manifestations. Article 2 of the SUA Convention provides:

1. This Convention does not apply to:
  1. a warship; or
  2. a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
  3. a ship which has been withdrawn from navigation or laid up.
2. Nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Consequently, as is evident from its article 2, the SUA Convention does not apply to enforcement activities lawfully exercised by coastal States in their exclusive economic zones.

377. The Tribunal therefore concludes that the SUA Convention is not applicable in the present case.

#### *Article 300*

378. The Tribunal will now consider article 300 of the Convention.

379. Article 300 of the Convention, concerning good faith and abuse of rights, provides: "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".

380. Panama states that "Guinea-Bissau not only violated its obligations under the provisions of the Convention" cited by Panama, "but also the more general Article 300 in respect of each of its actions in relation to the *VIRGINIA G*, her crew, owners, Panama and all affiliated entities".

381. Panama points out that Guinea-Bissau "acted in direct violation of Article 300 of the Convention" by "abus[ing] its rights in all aspects of the arrest and detention the *VIRGINIA G*, and particularly in the manner in which the cargo of gas oil was confiscated".

382. Panama claims in this regard that "[t]he manner in which Guinea Bissau (FISCAP and military officials) treated the vessel and crew from the very outset demonstrated a great deal of bad faith, a situation that was also recognised by the Regional Court of Bissau".

383. According to Panama, "[t]he most telling evidence of Guinea Bissau's bad faith was, however, the manner in which the confiscation of the cargo of gas oil was carried out and justified in complete and blatant disregard of a court order expressly prohibiting such action".

384. Panama contends that article 52(1) of Decree-Law 6-A/2000

was deliberately, arbitrarily and capriciously misinterpreted and misapplied by the Guinea-Bissau authorities when the specific term "fisheries products" ("produtos de pesca") was widened to "products on board" ("produtos a bordo") with the clear intention of applying the rule to a non-fishing vessel which had no fisheries products on board.

385. Panama argues that

the powers accorded under Article 52(1) of Decree Law 6-A/2000, being interpreted in accordance with Article 56 [of] the Convention, do not extend – and should not be permitted to be arbitrarily and capriciously extended – to include resources which are neither fisheries products nor resources obtained by a non-fishing vessel from the EEZ of Guinea-Bissau.

386. Panama states that

the gas oil on board the *VIRGINIA G*, was, therefore, **not the product envisaged in terms of Article 52(1) of Decree Law 6-A/2000** and, moreover, was neither a resource subject to the sovereignty, jurisdiction and other rights and duties under Article 56 [of] the Convention nor subject to enforcement in terms of Article 73 of the Convention.

387. Guinea-Bissau states that it “did not violate art. 300 of the Convention as it always exercised its rights in good faith and in a non-abusive manner”.

388. Guinea-Bissau points out that “[a]s it is confirmed by the witnesses of Guinea-Bissau, there was never any violence or any threat made to the crew, it being clear that the legitimate exercise of authority, which represses violations committed in its EEZ, does not constitute violence”.

389. Guinea-Bissau notes that “[t]here was no excessive use of force, as the officials merely arrested the vessel and ordered it to go to the port of Bissau, there being no danger on this journey, thus making it absurd to consider this situation as an excessive use of force” and that “there were no physical injuries during the operation or during the journey of the *Virginia G* to the port of Bissau”.

390. Guinea-Bissau further points out that “there was no use of excessive force during the arrest of the *Virginia G*” and “[t]herefore, there was no violation of human rights or violation of the due process of law”.

391. Guinea-Bissau states that “[t]he seizure of the diesel was therefore perfectly legal, with regard to Guinea-Bissau’s domestic legislation” since

in accordance with art. 52, no. 1 of the General Fisheries Law, Decree-Law No. 6-A/2000, as amended by Decree-Law No. 1-A/2005, the performance of a fishing-related operation without authorization in the EEZ is sanctioned by the confiscation of the vessel and of all of its products.

392. Guinea-Bissau points out that

[a]lthough in fact diesel is not a fishing product, it is actually covered by the general concept of vessel, and as article 23 of Decree-Law 6-A/2000 brings fishing related operations under that same legislation, it is evident that the vessels that perform such operations are covered by that legislation, including oil tankers which fuel fishing vessels.

393. Guinea-Bissau notes that "it is evident that diesel is covered in the seizure of the ship, something which is permitted by article 52 of Decree-Law 6-A/2000, which allows for the seizure of the vessel with all of its fixtures, fittings and fishing products".

394. Guinea-Bissau concludes that "it is clear that if the whole ship can be seized, naturally the diesel that is inside it is not excluded from this act".

395. Before proceeding to the examination of the question of whether article 300 of the Convention was violated in the present case, the Tribunal finds it necessary to refer to its jurisprudence on the issue in the *M/V "Louisa" Case*.

396. In that case, the Tribunal found that "it is apparent from the language of article 300 of the Convention that article 300 cannot be invoked on its own" and that "[i]t becomes relevant only when 'the rights, jurisdiction and freedoms recognized' in the Convention are exercised in an abusive manner" (*The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment of 28 May 2013, para. 137).

397. The Tribunal notes that, according to Panama, Guinea-Bissau abused its rights "in all aspects of the arrest and detention of the *VIRGINIA G*, and particularly in the manner in which the cargo of gas oil was confiscated". It is worth noting in this regard that Panama does not question the validity of article 52, paragraph 1, of Decree-Law 6-A/2000, on the basis of which the confiscation of the vessel and gas oil took place, but contends that it "was deliberately, arbitrarily and capriciously misinterpreted and misapplied".

398. In the view of the Tribunal, it is not sufficient for an applicant to make a general statement that a respondent by undertaking certain actions did not act in good faith and acted in a manner which constitutes an abuse of rights without invoking particular provisions of the Convention that were violated in this respect.

399. The Tribunal considers that it is not for it to make assumptions and that it is the duty of an applicant when invoking article 300 of the Convention to specify the concrete obligations and rights under the Convention, with reference to a particular article, that may not have been fulfilled by a respondent in good faith or were exercised in a manner which constituted an abuse of right.

400. The Tribunal notes that Panama invoked article 300 of the Convention in general terms, in other words on its own, without making reference to the specific obligations and rights under the Convention that were not fulfilled by Guinea-Bissau or were exercised in a manner that constituted an abuse of right.

401. For these reasons, the Tribunal is of the view that, in the present case, it is not required to deal with the alleged violation of article 300 of the Convention.

## X Counter-claim

402. The Tribunal will now turn to the counter-claim raised by Guinea-Bissau.

403. Guinea-Bissau submitted a counter-claim in its Counter-Memorial in which it contends that this case involves damages caused to Guinea-Bissau as a result of Panama's alleged violation of article 91 of the Convention by granting its nationality to a ship which had no genuine link with it. Guinea-Bissau maintains that, by conferring its nationality on the *M/V Virginia G*, Panama facilitated the practice of the illegal action of bunkering of fishing vessels without permission in the exclusive economic zone of Guinea-Bissau along with all the potential risks deriving from such an activity.

404. Guinea-Bissau further contends that it was "prevented from auctioning the ship, as was its right, due to the poor conditions it was in, caused by the inefficient supervision of Panama of the vessels to which it grants flags of convenience". As a consequence, Guinea-Bissau states that it was obliged to release the ship without obtaining adequate compensation for "damage caused to the environment, the loss of tax revenue and the plundering of its marine resources".

405. Panama maintains that Guinea-Bissau is precluded from bringing the counter-claim since

Guinea-Bissau's apparent concerns as to whether a genuine link exists between Panama and the *VIRGINIA G* were never manifested or raised (by Guinea-Bissau as against Panama), whether before the events of August 2009 (during the [*VIRGINIA G*]'s previous missions) or at any stage of the arrest and prolonged 14-month detention of the vessel, or,

indeed, at any time before Guinea-Bissau submitted its Counter-Memorial on 28 May 2012.

406. Panama further argues that, "without prejudice to the above, a genuine link does exist between Panama and her vessel the *VIRGINIA G*, and Panama is not in breach of Article 91 of the Convention". It also maintains that no compensation for "*damage caused to the environment, the loss of tax revenue and the plundering of its marine resources*" is due by Panama to Guinea-Bissau since Guinea-Bissau neither has fulfilled the requirements of causality nor is justified in making such claims for compensation.

407. The Tribunal recalls that, as stated in paragraph 117, a genuine link existed between Panama and the *M/V Virginia G* at the time of the incident and, therefore, concludes that the counter-claim presented by Guinea-Bissau is unfounded.

## XI      **Reparation**

408. In light of the findings reached by the Tribunal in paragraphs 271 and 328, the Tribunal will now turn to the issue of reparation.

409. Panama maintains that its claim for reparation

principally in the form of compensation, is based on Guinea Bissau's responsibility at international law, specifically, but without limitation, under the provisions of the Convention, and under existing and further rules on the responsibility of States for the consequences of their unlawful actions, in terms of Article 304 of the Convention.

410. Panama submits that

on the basis of the facts and legal arguments set out in the above sections, and on the basis of general international law, case law and the Law Commission's Articles, Guinea Bissau is liable to provide reparation

which will wipe out all the consequences of its illegal acts suffered by the *VIRGINIA G*, its owners, crew and cargo owners, as well as to Panama.

411. Panama further submits that

Guinea-Bissau is liable to compensate Panama as well as all physical and legal persons for all the consequences of its unlawful actions and its abuse of right . . . In accordance with the general rules of international law, it is submitted that Guinea-Bissau is internationally responsible to Panama for the violations of international law occasioned by its actions in respect of the vessel *VIRGINIA G*, its owners, crew and cargo owners, as well as the rights of Panama and other interested parties.

412. Panama points out in its Memorial that it was agreed under the attachment to the special agreement between it and Guinea-Bissau that the Tribunal would address all claims for damages and costs and would be "entitled to make an award on the legal and other costs incurred by the successful party".

413. In its final submissions, Panama makes the following claims for reparation:

14. Guinea Bissau is to immediately return the gas oil confiscated on the 20 November 2009, of equivalent or better quality, or otherwise pay adequate compensation;
15. Guinea Bissau is to pay in favour of Panama, the *VIRGINIA G*, her owners, crew and all persons and entities with an interest in the vessel's operations, compensation for damages and losses caused as a result of the aforementioned violations, in the amount quantified and claimed by Panama in Paragraph 450 of its Reply (p. 84), or in an amount deemed appropriate by the International Tribunal;
16. As an exception to Point 15, the amount of moral damages requested in paragraph 470 of the Reply as due to Panama for moral damages is withdraw[n], and replaced by a request for a declaration of "satisfaction" / apology to the attention of the Republic of Panama, for the derogatory and unfounded accusations against the *VIRGINIA G*



- and her flag State and as regards all aspects of the merits of VIRGINIA G dispute as from 21 August 2009;
17. Guinea Bissau is to pay interest on all amounts held by the International Tribunal to be due by Guinea Bissau;
  18. Guinea Bissau is to reimburse all costs and expenses incurred by Panama in the preparation of this case, including, without limitation, the costs incurred in this case before the International Tribunal, with interest thereon; or
  19. In the alternative to the previous paragraph 15, Guinea Bissau is to compensate Panama, the *VIRGINIA G*, her owners, crew (or spouse or dependant in the case of Master Guerrero), charterers and all persons and entities with an interest in the vessel's operations in the form of any other compensation or relief that the international Tribunal deems fit.

414. In point 15 of its final submissions, Panama requests the payment of compensation for damages and losses in the amount “quantified and claimed by Panama in Paragraph 450 of its Reply”. In its Reply, Panama seeks compensation as follows: €4,221,222.54 for the “[l]oss, damages and costs suffered by the owners of the *VIRGINIA G*, *IBALLA G*, and by other operators and entities with an interest in the vessels' operation, including as a consequence of the unlawful confiscation of the cargo of gas oil from on board the *VIRGINIA G*”; €65,000.00 for “[l]oss, damages and costs suffered by the crew of the *VIRGINIA G*, including moral damages”; and €1,200,000.00 for “[l]oss, damages and costs suffered by the *Republic of Panama*”. In addition, Panama claims €150,000.00 for interest at the rate of 8% “in respect of the claims for material damages”.

415. However, in respect of the claim for damages suffered by Panama, its Agent stated during the hearing on 6 September 2013 that it had been decided “following instructions from [the] flag State . . . not to consider any more the claim of moral damages reflected in a quantum”. Consequently, point 16 of Panama's final submissions states that the reparation sought by Panama in paragraph 470 of its Reply (€1,200,000) for the moral injury suffered “is withdraw[n], and replaced by a request for a declaration of ‘satisfaction’/apology to the attention of the Republic of Panama, for the derogatory and unfounded accusations against the *VIRGINIA G* and her flag State”.

416. Panama submitted substantial written material to the Tribunal in support of its claims for reparation, those claims having been categorized according to the various losses, damage and costs incurred from the arrest and detention of the *M/V Virginia G*.

417. To support its compensation claims, Panama produced a report by Mr Alfonso Moya Espinosa, marine engineer/surveyor-consultant, and a report by Mr Kenneth Arnott, marine engineer/surveyor-consultant.

418. In reply to a question posed by the Tribunal to the Parties on 6 September 2013 asking them to submit documents to substantiate the amount of compensation claimed, Panama stated the following:

An increment of 10% was applied to the calculated costs, damage and losses. This percentage was added as a lost business-related consideration to reflect the future business lost as a result of the negatively affected reputation of the vessel and her owner as a result of the published falsehoods, and the arrest and detention.

419. With regard to the above claims of Panama, Guinea-Bissau, in its final submissions, states:

- 12- The Republic of Guinea-Bissau has no obligation to immediately return to Panama the discharged gasoil or to pay any compensation for it.
- 13- The Republic of Guinea-Bissau has no obligation to pay in favour of Panama, the VIRGINIA G, her owners, crew and any persons or entities with an interest on the vessel's operations any compensation for damages and losses.
- 14- The Republic of Guinea-Bissau has no obligation to give apologies to the Republic of Panama.
- 15- The Republic of Guinea-Bissau has no obligation to pay any interest.
- ...
- 17- The Republic of Guinea-Bissau has no obligation to pay any compensation or relief to Panama, the VIRGINIA G, her owners, charterers or any other persons or entities with interest in the vessel's operation.

420. Guinea-Bissau adds that the quantification of the damages claimed by Panama is “incomprehensible, with no proof being provided of this quantification, there even being an increase of 10% to the amounts presented, without the amounts nor the increase appearing to be minimally justified”.

421. Guinea-Bissau denies that Panama has the right to present its claims for reparation and “reaffirms its rejection of the possibility of claims being presented for damages after the Memorial, which is totally contrary to art. 62 of the Rules of the Tribunal, as well as to the rights of the defence”.

422. In Guinea-Bissau’s view, Panama is not entitled to assert claims for damages on behalf of anyone, because no person or entity related in any way to the *M/V Virginia G* was of Panamanian nationality. The vessel’s owner, Penn Lilac Trading, is headquartered in Spain, which makes it Spanish in nationality.

423. Guinea-Bissau states that it “is totally unaware” of the existence of the damages claimed by Panama as referred to in paragraphs 413 and 414. Guinea-Bissau argues that Panama “does not present any proof thereof, but only unfounded allegations” and that “therefore such allegations must be considered to be unproven”. Guinea-Bissau adds that “[i]f such damage did exist, this is due to the financial problems of the shipowner . . . and which therefore had nothing to do with the arrest of the VIRGINIA G”.

424. Guinea-Bissau further contends that certain items of damage are not the result of “the arrest of the *Virginia G* which is the only case over which the Tribunal has jurisdiction” and that “the only direct losses resulting from the arrest of the *Virginia G* are those allegedly caused to the ship, its owner and the crew”. Guinea-Bissau adds that “Panama, however, has claimed damages for losses allegedly suffered by other entities, such as Gebaspe and Penn World, which have nothing to do with the *Virginia G*.”

425. Regarding the validity of certain Panamanian claims, Guinea-Bissau states that:

Contrary to the reports provided by Panama, there is not one single piece of evidence of losses, expenses paid and damage suffered by Penn Lilac. Panama failed to exhibit one single invoice of Penn Lilac’s costs or losses to these proceedings. What it has attached to the reports presented in Annex 4.2 of the Reply of Panama are “invoices of Penn Lilac”, which are internal documents, irrelevant for any public body, such as the tax

authorities. It is therefore clear that an international tribunal cannot rely on such documents in a decision about damages. Therefore we have just received questions from the Tribunal asking for the invoices from the parties.

426. The Tribunal will now turn to its review of the issue of reparation.

427. Reparation may be due under general international law, as provided for in article 304 of the Convention:

The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

428. The Tribunal expressed its view concerning the rules on reparation under international law in paragraph 170 of its Judgment in the *M/V "SAIGA" (No. 2) Case*, where it stated:

It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47*).  
(*M/V "SAIGA" (No. 2)*, (*Saint Vincent and the Grenadines v. Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 65, para. 170)

429. The Tribunal notes that the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Draft Articles on State Responsibility"), in article 1, reaffirm: "Every internationally wrongful act of a State entails the international responsibility of that State". The ILC Draft Articles on State Responsibility, in article 31, paragraph 1, further provide: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".

430. The Tribunal observes that the Seabed Disputes Chamber of the Tribunal, in its Advisory Opinion, stated that several of the ILC Draft Articles on State Responsibility are considered to reflect customary international law (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 56, para.169). Reference was made in the Advisory Opinion to article 31 of the ILC Draft Articles on State Responsibility (see paragraph 194, *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at p. 62, para. 194). The Tribunal adds that article 1 of the ILC Draft Articles on State Responsibility also reflects customary international law.

431. The Tribunal recalls that it found (see paragraph 271) that Guinea-Bissau violated article 73, paragraph 1, of the Convention, by confiscating the *M/V Virginia G* and its cargo. Guinea-Bissau further violated paragraph 4 of that article by the failure to notify the flag State of the action and further measures taken. The Tribunal notes that the violation of article 73, paragraph 1, infringed the rights of the *M/V Virginia G* including all persons involved in its operation. The Tribunal further notes that the violation of article 73, paragraph 4, infringed the rights of Panama directly. The Tribunal notes that, as it found in paragraph 265, neither the boarding and inspection nor the arrest of the *M/V Virginia G* was in violation of the Convention. The above considerations have to be taken into account when assessing the damage claimed.

432. On the issue of entitlement to reparation for damage suffered, the Tribunal noted in its Judgment in the *M/V “SAIGA” (No. 2) Case*:

In the view of the Tribunal, Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation. Damage or other loss suffered by the *Saiga* and all persons involved or interested in its operation comprises injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit.

(*M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at pp. 65–66, para. 172)

433. On the issue of the form of reparation, in the same Judgment, the Tribunal noted:

Reparation may be in the form of “restitution in kind, compensation, satisfaction . . .” . . . Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. . . . Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.

(*M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, *ITLOS Reports 1999*, p. 10, at p. 65, para. 171)

434. The Tribunal takes the view that, in light of its findings and in conformity with its jurisprudence set out above, Panama in the present case is entitled to reparation for damage suffered by it. Panama is also entitled to reparation for damage or other loss suffered by the *M/V Virginia G*, including all persons and entities involved or interested in its operation, as a result of the confiscation of the vessel and its cargo.

435. Considering that the confiscation of the *M/V Virginia G* and its cargo has been found to be a violation of article 73, paragraph 1, of the Convention, the Tribunal will now assess the claims made by Panama. In the view of the Tribunal, only damages and losses related to the value of the gas oil confiscated and the cost of repairing the vessel are direct consequences of the illegal confiscation.

436. Concerning in particular the issue of the loss of profit, the Tribunal is of the view that Panama failed to establish the direct nexus between the confiscation of the *M/V Virginia G* and the damage claimed by Panama as loss of profit. In taking this decision the Tribunal is guided by the following considerations.

437. The contract with Lotus Federation, the Irish company that chartered the *M/V Virginia G*, was terminated on 5 September 2009 by a statement of termination between Lotus Federation and Gebaspe which acted as intermediary between Penn Lilac (the owner of the vessel) and the former company which states that “the parties consider the contract as terminated and *declare not to have anything to claim to each other with regards to the said contract* (emphasis added by the Tribunal)”. This means that no loss of income may be claimed for any period between the arrest of the vessel on 21 August 2009 and the date of termination of the contract on 5 September 2009, and that this contract may

not be used as the basis for any calculation of lost profit after the termination date of the contract.

438. As to the question of whether the owner of the *M/V Virginia G* is entitled to compensation for any loss of profit for a period between 5 September 2009 and December 2010 when the vessel again became operational, the Tribunal points out that the *M/V Virginia G*, as found in this Judgment, was arrested for the violation of the laws and regulations of Guinea-Bissau and that the procedures laid down in article 65 of Decree-Law 6-A/2000 are expeditious and ensure the prompt release of the arrested or detained vessel upon posting of a bond or other financial security and therefore meet the requirements of article 73, paragraph 2, of the Convention. The Tribunal has found unconvincing in this regard the arguments of Panama that the procedures set out in article 65 of Decree-Law 6-A/2000 are unreasonable and unaffordable and therefore could not be used in the present case. Therefore the Tribunal concludes that as the available procedures under the laws and regulations of Guinea-Bissau have not been used by the owner of the vessel to secure its release, Panama cannot claim on behalf of the owner of the vessel any loss of profit.

439. With reference to the other claims made by Panama in paragraphs 450 to 453 of its Reply, the Tribunal concludes that Panama in this respect does not satisfy the requirement of a causal nexus between the confiscation of the *M/V Virginia G* and the claims made.

440. As regards the claim of Panama to an additional 10 per cent of the total amount of the compensation, the Tribunal considers that the injury referred to in paragraph 418, consisting mainly in loss of reputation, lacks a causal link with the action taken by Guinea-Bissau. The alleged damage is too indirect and remote to be financially assessable. Accordingly, Panama's claim for an additional 10 per cent of the compensation cannot be upheld.

441. As far as the value of the gas oil is concerned, the Tribunal, having examined the evidence and documentation provided by Panama, comes to the conclusion that the *M/V Virginia G* was carrying a cargo of 532.2 tonnes of gas oil at the time of its confiscation. Panama, in its final submissions, requests either the return of the gas oil confiscated or the payment of adequate compensation and thus has left it for the Tribunal to decide on the form of reparation. The Tribunal considers that the return of the gas oil would not be practical, as implementing this would entail various complexities including additional costs. The Tribunal therefore finds that, in the circumstances of this case,

compensation will constitute an adequate form of reparation. Taking into account a price of US\$ 730 per tonne of gas oil noted in the invoice submitted by Panama, the Tribunal considers that the amount of US\$ 388,506.00 for the value of the gas oil is adequate, plus the interest determined in paragraph 444.

442. With regard to the repairs to the vessel, the Tribunal considers that not all damage repaired in respect of which Panama claims compensation satisfies the requirement of a causal link with the confiscation of the vessel. After a careful scrutiny of the invoices provided by Panama, the Tribunal considers that the amount of €146,080.80 is adequate, plus the interest determined in paragraph 445.

443. With respect to Panama's claim that the interest should be calculated at the rate of 8 per cent on all amounts owed in principal, the Tribunal notes that the question of awarding interest was addressed in paragraph 173 of its Judgment in the *M/V "SAIGA" (No. 2) Case*. This paragraph states:

The Tribunal considers it generally fair and reasonable that interest is paid in respect of monetary losses, property damage and other economic losses. However, it is not necessary to apply a uniform rate of interest in all instances. . . . In determining this rate, account has been taken, *inter alia*, of commercial conditions prevailing in the countries where the expenses were incurred or the principal operations of the party being compensated are located.

(*M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, at p. 66, para. 173)

444. The Tribunal will now deal with the interest rates in the present case in light of its findings in the *M/V "SAIGA" (No. 2) Case*. As regards the value of the gas oil, the interest rate, in the view of the Tribunal, should be based on the average US Dollar LIBOR (London Interbank Offered Rate) interest rate of 0.862 per cent for the period 2010 to 2013 plus 2 per cent. In light of this finding and based on information obtained by the Tribunal, the interest rate is 2.862 per cent, compounded annually. It shall run from 20 November 2009, the date of the confiscation of the gas oil, until the date of the present Judgment.



445. As regards the costs of repair, the interest rate should equally be based on the average Euro LIBOR (London Interbank Offered Rate) interest rate of 1.165 per cent for the period 2011 to 2013 plus 2 per cent. In light of this finding and based on the information obtained, the interest rate is 3.165 per cent, compounded annually. It shall run from 18 March 2011, the date of the last invoice on the list submitted by Panama, until the date of the present Judgment.

446. In accordance with its decisions referred to above, the Tribunal decides to award Panama compensation in the total amount of US\$ 388,506.00 and €146,080.80 with interest, as indicated below:

- (a) value of 532.2 tonnes of gas oil confiscated at a price of US\$ 730 per tonne in the amount of US\$ 388,506.00; with interest at the rate of 2.862 per cent, compounded annually and payable from 20 November 2009 until the date of the present Judgment;
- (b) costs of repairs to the vessel in the amount of €146,080.80; with interest at the rate of 3.165 per cent, compounded annually and payable from 18 March 2011 until the date of the present Judgment.

447. As noted above, in its final submissions Panama seeks reparation in the form of satisfaction or an apology to Panama for the violation of its rights and for the derogatory and unfounded accusations against the *M/V Virginia G* and its flag State.

448. The Tribunal observes that satisfaction can take the form of a judicial declaration. The Tribunal has declared in paragraphs 271 and 333 that Guinea-Bissau acted wrongfully and violated Panama's rights by confiscating the *M/V Virginia G* and its cargo and by breaching the obligation to notify Panama of the arrest of the vessel and subsequent actions taken against it. The Tribunal considers that the above declarations constitute adequate reparation.

## XII Costs

449. In its final submissions, Panama requests the Tribunal to "declare, adjudge and order that . . . Guinea-Bissau is to reimburse all costs and expenses incurred by Panama in the preparation of this case, including, without limitation, the costs incurred in this case before the International Tribunal, with interest thereon". For its part, Guinea-Bissau, in its final submissions, requests

the Tribunal "to adjudge and declare that . . . Panama is to reimburse all legal and other costs the Republic of Guinea-Bissau has incurred with this case".

450. The rule in respect of costs in proceedings before the Tribunal, as set out in article 34 of its Statute, is that each party bears its own costs, unless the Tribunal decides otherwise.

451. In the present case, the Tribunal sees no need to depart from the general rule that each party shall bear its own costs.

### XIII Operative provisions

452. For the above reasons, the Tribunal

(1) Unanimously,

*Finds* that it has jurisdiction over the dispute concerning the oil tanker *M/V Virginia G*.

(2) Unanimously,

*Finds* that Guinea-Bissau is not precluded from raising objections to the admissibility of the claims of Panama.

(3) Unanimously,

*Rejects* the objection raised by Guinea-Bissau to the admissibility of the claims of Panama based on the alleged lack of genuine link between Panama and the *M/V Virginia G*.

(4) By 22 votes to 1,

*Rejects* the objection raised by Guinea-Bissau to the admissibility of Panama's claims based on the fact that the owner of the vessel and the crew are not nationals of Panama;

IN FAVOUR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, LUCKY, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge ad hoc* TREVES;

AGAINST: *Judge ad hoc* SÉRVULO CORREIA.

(5) By 14 votes to 9,

*Rejects* the objection raised by Guinea-Bissau, based on the non-exhaustion of local remedies, to the admissibility of the claims made by Panama in the interests of individuals or private entities;

IN FAVOUR: *President* YANAI; *Judges* NELSON, AKL, WOLFRUM, COT, LUCKY, PAWLAK, TÜRK, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge ad hoc* TREVES;

AGAINST: *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, CHANDRASEKHARA RAO, NDIAYE, JESUS, KATEKA, GAO, BOUGUETAIA, *Judge ad hoc* SÉRVULO CORREIA.

(6) Unanimously,

*Finds* that Guinea-Bissau did not violate Panama's right in terms of article 58, paragraph 1, and article 56, paragraph 2, of the Convention by regulating bunkering of foreign vessels fishing in the exclusive economic zone of Guinea-Bissau.

(7) By 22 votes to 1,

*Finds* that by boarding, inspecting and arresting the *M/V Virginia G*, Guinea-Bissau did not violate article 73, paragraph 1, of the Convention;

IN FAVOUR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, NDIAYE, JESUS, COT, PAWLAK, TÜRK,

KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES;

AGAINST: *Judge* LUCKY.

(8) By 14 votes to 9,

*Finds* that by confiscating the *M/V Virginia G* and the gas oil on board, Guinea-Bissau violated article 73, paragraph 1, of the Convention;

IN FAVOUR: *President* YANAI; *Judges* NELSON, AKL, WOLFRUM, COT, LUCKY, PAWLAK, TÜRK, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge ad hoc* TREVES;

AGAINST: *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, CHANDRASEKHARA RAO, NDIAYE, JESUS, KATEKA, GAO, BOUGUETAIA, *Judge ad hoc* SÉRVULO CORREIA.

(9) Unanimously,

*Finds* that Guinea-Bissau did not violate article 73, paragraph 2, of the Convention.

(10) By 20 votes to 3,

*Finds* that Guinea-Bissau did not violate article 73, paragraph 3, of the Convention;

IN FAVOUR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, WOLFRUM, NDIAYE, JESUS, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judges ad hoc* SÉRVULO CORREIA, TREVES;

AGAINST: *Judges* AKL, COT, LUCKY.

(11) Unanimously,

*Finds* that 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, Guinea-Bissau violated the requirements of article 73, paragraph 4, of the Convention.

(12) Unanimously,

*Finds* that Guinea-Bissau did not violate principles of articles 110 and 224 of the Convention.

(13) Unanimously,

*Finds* that Guinea-Bissau did not use excessive force leading to physical injuries or endangering human life during the boarding and sailing of the *M/V Virginia G* to the port of Bissau.

(14) Unanimously,

*Finds* that Guinea-Bissau did not violate article 225 of the Convention and that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation is not applicable in the present case.

(15) Unanimously,

*Finds* that the counter-claim presented by Guinea-Bissau is unfounded.

(16) By 14 votes to 9,

*Decides* to award Panama compensation in the amount of US\$ 388,506.00 with interest, for the confiscation of the gas oil, as indicated in paragraph 446 (a);

IN FAVOUR: *President* YANAI; *Judges* NELSON, AKL, WOLFRUM, COT, LUCKY, PAWLAK, TÜRK, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge ad hoc* TREVES;

AGAINST: *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, CHANDRASEKHARA RAO, NDIAYE, JESUS, KATEKA, GAO, BOUGUETAIA, *Judge ad hoc* SÉRVULO CORREIA.

(17) By 13 votes to 10,

*Decides* to award Panama compensation in the amount of € 146,080.80 with interest, for the costs of repairs to the *M/V Virginia G*, as indicated in paragraph 446 (b);

IN FAVOUR: *President* YANAI; *Judges* NELSON, AKL, WOLFRUM, COT, LUCKY, TÜRK, GOLITSYN, PAIK, KELLY, ATTARD, KULYK; *Judge ad hoc* TREVES;

AGAINST: *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, CHANDRASEKHARA RAO, NDIAYE, JESUS, PAWLAK, KATEKA, GAO, BOUGUETAIA, *Judge ad hoc* SÉRVULO CORREIA.

(18) By 18 votes to 5,

*Decides* not to award Panama compensation for the loss of profit;

IN FAVOUR: *President* YANAI; *Vice-President* HOFFMANN; *Judges* MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, WOLFRUM, NDIAYE, JESUS, PAWLAK, TÜRK, KATEKA, GAO, BOUGUETAIA, GOLITSYN, KELLY, ATTARD, KULYK; *Judge ad hoc* SÉRVULO CORREIA;

AGAINST: *Judges* AKL, COT, LUCKY, PAIK, *Judge ad hoc* TREVES.

(19) Unanimously,

*Decides* not to award Panama compensation for its other claims, as indicated in paragraphs 439 and 440.

(20) Unanimously,

*Decides* that each Party shall bear its own costs.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this fourteenth day of April, two thousand and fourteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of the Republic of Panama and the Government of the Republic of Guinea-Bissau, respectively.

(*signed*) SHUNJI YANAI  
President

(*signed*) PHILIPPE GAUTIER  
Registrar

*Judge* NELSON, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) L.D.M.N.

*Judge* GAO, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) Z.G.

*Judges* KELLY and ATTARD, availing themselves of the right conferred on them by article 125, paragraph 2, of the Rules of the Tribunal, append their joint declaration to the Judgment of the Tribunal.

(*initialled*) E.K.

(*initialled*) D.A.

*Judge* KULYK, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) M.K.

*Judge ad hoc* TREVES, availing himself of the right conferred on him by article 125, paragraph 2, of the Rules of the Tribunal, appends his declaration to the Judgment of the Tribunal.

(*initialled*) T.T.

*Judge* AKL, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*initialled*) J.A.

*Judges* COT and KELLY, availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their joint separate opinion to the Judgment of the Tribunal.

(*initialled*) J.-P.C

(*initialled*) E.K.

*Judge* LUCKY, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*initialled*) A.A.L.

*Judge* PAIK, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his separate opinion to the Judgment of the Tribunal.

(*initialled*) J.-H.P.

*Vice-President* HOFFMANN, *Judges* MAROTTA RANGEL, CHANDRASEKHARA RAO, KATEKA, GAO and BOUGUETAIA availing themselves of the right conferred on them by article 30, paragraph 3, of the Statute of the Tribunal, append their joint dissenting opinion to the Judgment of the Tribunal.

(*initialled*) A.H.

(*initialled*) V.M.R.

(*initialled*) P.C.R.

(*initialled*) J.L.K.

(*initialled*) Z.G.

(*initialled*) B.B.



*Judge* NDIAYE, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(*initialled*) T.M.N.

*Judge* JESUS, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(*initialled*) J.-L.J.

*Judge ad hoc* SÉRVULO CORREIA, availing himself of the right conferred on him by article 30, paragraph 3, of the Statute of the Tribunal, appends his dissenting opinion to the Judgment of the Tribunal.

(*initialled*) J.M.S.C.