Dissenting Opinion of Judge *ad hoc* Sérvulo Correia

1. I have voted in favour of several operative provisions, amongst which I wish to emphasize operative provisions (6) and (7). In operative provision (6), the Tribunal 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. The Tribunal is therefore of the view that regulating the bunkering of foreign vessels fishing in the exclusive economic zone is among those measures which a coastal State may take to conserve and manage its living resources under article 56 read together with article 62, paragraph 4, of the Convention. In operative provision (7), the Tribunal finds that, by boarding, inspecting and arresting the *M/V Virginia G* – a tanker that was refuelling foreign fishing vessels in its exclusive economic zone – Guinea-Bissau did not violate article 73, paragraph 1, of the Convention. These findings are underpinned by the assumption that Part V of the Convention, in particular article 56, taken together with the provisions on living resources in articles 61 to 68, allows coastal States to take the said measures in their exclusive economic zones in order to conserve and manage such resources. In 1999, in the *M/V "SAIGA" (No. 2) Case*, the Tribunal did not find it necessary, in the light of the circumstances, to find as to whether the regulation of bunkering by a coastal State conformed to the Convention. By ruling on this question now, the Tribunal provides – albeit in a decision prudently restricted to fishing-related activities only – a second important contribution to the much-needed clarification as to where bunkering, a growing economic maritime activity, lies within the framework of the fragile system of balances and counterbalances[1] that characterizes the regime governing the exclusive economic zone. Without claiming the gift of prophecy, I would dare to expect that the present Judgment will be considered in the future as a landmark decision because of these findings.

1 To use an expression of Judge Attard. See *The Exclusive Economic Zone in International Law*, Oxford, Clarendon Press, 1987, p. 66.

2. But I was unable to vote in favour of a certain number of other operative paragraphs. Some of these other findings are based on reasoning that, in my opinion, may reverberate in the future, beyond the present case, with negative consequences.

I will now set out the reasons for my disagreement.

A Objection by Guinea-Bissau based on nationality of claims to the admissibility of Panama's claims

3. Arguing that it was "bringing this action against Guinea-Bissau within the framework of diplomatic protection", Panama affirmed that it was taking up "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".[2]

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".[3] But, recalling its Judgment in the *M/V "SAIGA"* (*No. 2*) *Case*, the Tribunal finds that Panama is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in damages to "the *M/V VIRGINIA G*, its crew and cargo on board as well as its ship-owner and every person involved or interested in its operations [because they] are to be treated as an entity linked to the flag State".[4] This is so because, as found in the *M/V "SAIGA"* (*No. 2*) *Case*, "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'".[5]

2 Paragraph 119 of this Judgment.
3 Paragraph 128 of this Judgment.
4 Paragraph 127 of this Judgment.
5 Paragraph 126 of this Judgment.

Accordingly, by means of this Judgment, the Tribunal rejects the objection by Guinea-Bissau based on nationality of claims to the admissibility of Panama's claims.

4. In my view, the objection based on nationality of claims should have been considered well founded in respect of everything apart from damages to the ship and redress on behalf of the members of the crew.

The Draft Articles on Diplomatic Protection were adopted by the International Law Commission (ILC) on 30 May 2006, almost seven years after the Tribunal pronounced its Judgment in the *M/V "SAIGA" (No. 2) Case*. In paragraphs (5), (6) and (7) of the Commentary to draft article 18, particular attention is paid to the Tribunal's Judgment in the *M/V "SAIGA" (No. 2) Case*. The Commentary retains the conception – advanced in the Judgment – that the "substantial and justified" right of the flag State to seek redress for the ship's crew cannot be categorized as diplomatic protection, nor should it be seen as having replaced diplomatic protection. "Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either".[6]

Notwithstanding its acknowledgment of this distinction between the legal concepts of diplomatic protection and protection by the flag State, the ILC also agrees with the suggestion (that it considers implicit in the *M/V "SAIGA" (No. 2) Case* Judgment) that one is "something akin" to the other. Such similarity certainly justifies the inclusion in the Draft Articles on Diplomatic Protection of a provision (article 18) on the protection of ships' crews. This provision recognizes "the right of the State of nationality of a ship to seek redress on behalf of . . . 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".

What I find striking in this provision, when compared with the doctrine of "the ship as an unit", is that the ILC preferred to circumscribe to the members of the crew the proclaimed right of the State of nationality of a ship to seek redress on behalf of persons with other nationalities. Paragraph (6) of the Commentary to article 18 recalls the passage of the Judgment in the *M/V "SAIGA" (No. 2) Case*

6 Paragraph (8) of the Commentary to article 18 of the Draft Articles on Diplomatic Protection.

where the Tribunal stressed that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to flag State. The nationalities of these persons are not relevant". But, save for the exception in favour of the members of the crew, no trace of that doctrine can be found in the said article 18. It is difficult not to understand this silence as meaning that the ILC considered that there was not yet sufficient support for the position according to which the State of nationality of a ship is entitled to claim for damages on behalf of natural or juridical persons of other nationalities (other than members of the crew) involved in the operations of a ship and that the nationalities of such persons are not relevant.

5. With due respect, I think that the Convention gives sufficient guidance to the theory of "the ship as a unit" only in regard to the vessel and its crew.

The most expressive provision of the Convention, in the sense that it explicitly confers *locus standi* on the flag State for the purpose of prompt release, is article 292. But this rule deals only with the release of a vessel flying the flag of that State and its crew. There is no mention of prompt (and provisional) redress, on the initiative of the flag State, of injuries to others holding interests in the operation of the ship.

Articles 94 and 217 of the Convention relate only to the enforcement by flag States of compliance with internal laws on administrative, technical and social matters concerning the ship and its fitness to comply with rules on safety at sea (article 94) and international rules and standards for the prevention, reduction and control of pollution of the marine environment from vessels (article 217). Once again, these are rules concerning only the vessels and crews and no other interests involved in the operation of the ships.

Articles 106, 110, paragraph 3, and 111, paragraph 8, contain provisions on the right to compensation for damage or loss that may have been sustained because of illegal acts committed on the high seas. They relate only to serious restrictions of the freedom of navigation on the high seas. This might explain a swifter resolution for claims for redress arising from unfounded seizure, boarding and stopping or arrest in the course of hot pursuit. But, of these rules, only article 106

confers the right to compensation "for any loss or damage" to the flag State itself (in the event of seizure on suspicion of piracy without adequate grounds). Articles 110, paragraph 3, and 111, paragraph 8, ascribe the right to compensation to the ship. This may be understood to mean that, under these two provisions, the flag State may legitimately seek redress only in relation to damages and losses inflicted on the ship (the crew being considered to form a unit with it).

6. It is true that in modern maritime transport: a multiplicity of interests may be involved in the cargo on board a single ship; persons with interests in a large number of containers may be of many different nationalities; and the large number of States involved in diplomatic protection arising from a single event may represent a source of hardship in dealing with claims for compensation.[7]

But it is no less true that, even when it applies, the right of the State of nationality of a ship to seek redress on behalf of persons with other nationalities does not affect the right of the States of nationality of the interested persons to exercise diplomatic protection proper.[8] Therefore, enlarging the scope of interests able to enjoy the protection of the flag State does not eliminate the risk of "undue hardship".

But, in my view, to dispense with the need for interested persons other than the ship-owner and the members of the crew to have recourse to the diplomatic protection of the States of their nationalities by granting them the protection of the flag State poses other risks on a larger scale. The multiple interests involved in the cargo of a ship are not all necessarily legal and transparent, untainted by any instances of tax evasion or non-compliance with duties arising from national or supra-national regional legislation. The generous, all-embracing protection afforded by a flag State completely unaware of the real nature of the interests involved in an operation may add to the risks of uncontrolled illegality in the global economy.

7 See (*M/V "SAIGA"* (*No. 2*) (*Saint Vincent and the Grenadines* v. *Guinea*), *Judgment,* ITLOS *Reports 1999*, p. 10, at p. 48, para. 107).

8 Draft Articles on Diplomatic Protection, article 18.

7. In conclusion, I voted against operative provision (4) because, in my view, after duly rejecting the objection raised by Guinea-Bissau on the ground of nationality to the admissibility of Panama's claims relating to alleged damages suffered by the vessel and by the members of the crew, the Tribunal should have upheld the part of the same objection where Guinea-Bissau contested the admissibility of claims based on alleged damages to the cargo and other alleged damages and losses suffered by the owners, charterers and "all persons and entities with an interest in the vessel's operations". In my view, Panama was not entitled to seek redress on behalf of such interests as they are not covered by the genuine link between the flag State and the ship.

Understandably, the Tribunal relies on its jurisprudence as elaborated in the landmark *M/V "SAIGA"* (*No. 2*) Judgment. But the Tribunal is not bound by this and can adapt it gradually to the changing requirements of good governance and legal transparency in the global maritime economy.

B Objection by Guinea-Bissau based on the non-exhaustion of local remedies to the admissibility of certain claims made by Panama in the interests of individuals or private entities

8. I voted against the rejection, in operative provision (5), of the objection raised by Guinea-Bissau, based on the non-exhaustion of local remedies, to the admissibility of certain claims made by Panama in the interests of individuals or private entities.

The Judgment did not consider it necessary to address the arguments of the Parties on the question of whether local remedies were available and, if so, whether they were effective, because of the finding that the claim of Panama as a whole was brought on the basis of an injury to itself.[9]

The Judgment considers that even though "[i]t is a well-established principle of customary international law that the exhaustion of local remedies is a prerequisite for the exercise of diplomatic protection", "[i]t is also established in international law that the exhaustion of local remedies rule does not apply

9 This Judgment, paras. 157 to 160.

where the claimant State is directly injured by the wrongful act of another State".[10] The Judgment proceeds thereafter to examine Panama's claims in order to assess whether they relate to a "direct" violation on the part of Guinea-Bissau of the rights of Panama.[11] The Judgment then asserts that, as the alleged damage to the persons and entities with an interest in the ship or its cargo arises from violation of "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", this amounts to direct injury to Panama. Accordingly, the Tribunal concludes that the claims in respect of such damage are not subject to the rule of exhaustion of local remedies.[12]

With due respect, I am in complete disagreement with the majority's disregard of the concept of "international claim . . . brought preponderantly on the basis of an injury to a national", as used in paragraph 3 of article 14 of the Draft Articles on Diplomatic Protection.

The general principle, stated in paragraph 1 of the said article 14, is that a State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 (non-nationals to whom the State is entitled to extend its protection) before the injured person has, subject to exceptions in draft article 15, exhausted all local remedies. As explained in paragraph (9) of the Commentary to article 14, the role of paragraph 3 of this article is to provide

> that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.

10 This Judgment, para 153.

11 This Judgment, para. 154.

12 This Judgment, paras. 157 and 158.

Paragraph (10) of the Commentary to draft article 14 further states that, in situations of "mixed" claims, it is in practice difficult to decide whether the claim is "direct" or "indirect". Therefore, "in the case of a mixed claim, it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant".[13] According to paragraph (12) of the Commentary to draft article 14, the principal factors to be considered in making the assessment of the preponderance of the direct or indirect character of a claim are the subject of the dispute, the nature of the claim and the remedy claimed. Thus, "*where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect*" (emphasis added).[14]

Adapted to situations where the flag State is able to seek monetary redress for private individuals or juridical persons, this conclusion must be read as meaning that the claim will be classified as indirect.

This is what happens in the present Case, where the claim is brought preponderantly on behalf of private entities, as it is based on alleged damages and losses suffered by them. The only exception lies in the failure of Guinea-Bissau to notify Panama, as the flag State, of the detention and arrest of the *M/V Virginia G*. It appears obvious that the admissibility of a claim by Panama based on the alleged violation of the requirements of article 73, paragraph 4, of the Convention, does not depend upon any previous application by Panama for local remedies, as that segment of the dispute concerns a direct relationship between two States. But the opposite is true with regard to Panama's other claims, as their purpose is to seek monetary redress for damages and losses allegedly incurred by private individuals and/or juridical persons who might have pursued (and to a limited and inappropriate extent did pursue) local remedies in a way that could have made it unnecessary to bring the case to the international *forum*.

13 *Draft Articles on Diplomatic Protection*, Commentary to draft article 14, para. (11).

14 *Draft Articles on Diplomatic Protection*, Commentary to draft article 14, para. (12).

But the Judgment differs from this opinion. According to the majority, whenever a coastal State enforces its laws and regulations in its exclusive economic zone in a manner allegedly not conforming to the Convention and detrimental to a ship, its crew and/or other persons with an interest in that ship, this amounts to a direct injury to the flag State. The flag State is therefore allowed to claim that a direct violation has been committed of its rights to freedom of navigation and other internationally lawful uses of the sea and to the conformity with article 73 of the Convention of the enforcement of the laws and regulations of the coastal State.

In the view of the Tribunal, when this happens, the damage to the persons and entities with an interest in the ship or its cargo arises from the violation of the direct rights of the flag State. Implicitly, the injury to interests of private entities is never to be considered as "preponderant".

Accordingly, the Tribunal adjudges that claims in respect of the damage suffered by such persons and entities are not subject to the rule of exhaustion of local remedies.[15]

9. It appears that the Tribunal is deciding that domestic jurisdictions can be set aside whenever a coastal State is accused of taking steps, in a manner not consistent with the Convention, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone that affect a ship, or its crew, or interests involved in its operation.

If read to mean this (and it will be difficult to do otherwise), the Judgment does not appear compatible with paragraph 1 of article 73 of the Convention, as this provision includes judicial proceedings among the measures appropriate to the exercise of the sovereign rights of the coastal State.

Under article 73, paragraph 1, of the Convention, 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 the institution of judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the

15 This Judgment, paras. 156 to 158.

Convention. Normally, the subjective range of such judicial proceedings will not be left to the free choice, by ship-owners, crews or any person or entity involved or interested in the vessel's operations, between participating in those national law proceedings or immediately resorting to diplomatic protection, either undifferentiated or through international arbitration or international courts or tribunals. In principle, those individuals or private entities will either be under the duty to submit to the proceedings initiated by the national authorities (for instance, criminal proceedings for illegal fishing) or bear the onus of resorting to proceedings appropriate for the defence of alleged rights or vested interests (for instance, lodging a request for prompt release addressed to the competent domestic court).

In short, to resort to the proceedings established by the legislation of the coastal State is not, in the majority of cases, merely an option left to the free will of the individuals or private entities who consider that they have been affected by illegal measures. Without having to renounce pursuit of an international settlement of the dispute as a last-resort solution, they must claim first for the redress that may be provided by the domestic courts.

10. In other words, the right, under article 73, paragraph 1, of the coastal State to institute judicial proceedings must be understood in conjunction with the well-established rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection through an international claim. As considered by the International Court of Justice in the *Interhandel* case, the exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress by its own means, within the framework of its own domestic system".[16]

Although the right of the flag State to seek redress for the crew or the ship cannot be categorized as diplomatic protection, these two kinds of State practice are sufficiently akin that application to flag-State protection of the greater part of the rules on diplomatic protection is justified. That is the case for the exhaustion of local remedies as a prerequisite for international judicial protection by the flag State. No specific interest can be found in the framework of protection by the flag State that should imply a less deferential attitude to the coastal State's judicial jurisdiction than that required in cases of diplomatic

16 *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 6, at p. 27.

protection in the strict sense. We should recall that even for the purpose of prompt release, article 292 of the Convention provides for the submission to an international jurisdiction of the request for release from detention of a vessel flying the flag of another State only as a remedy against non-compliance by the detaining State with the duty of prompt release through its own judicial or administrative proceedings.

To dispense with the exhaustion of local remedies requirement in disputes related to the observance of article 73, paragraphs 1 and 2, of the Convention is not in conformity with this Treaty or with international customary law and would lead, if this doctrine were to be followed in future, to serious disempowerment of coastal States to the unreasonable benefit of flag States and of the private interests that use them as "shells of convenience".

C The question of conformity of the confiscation of the *M/V Virginia G* and the gas oil with article 73, paragraph 1, of the Convention

11. I voted against the finding in operative provision (8) that, by confiscating the *M/V Virginia G* and the gas oil, Guinea-Bissau violated article 73, paragraph 1, of the Convention.

In regard to this question, the Judgment states, in paragraph 257, that, when article 52 of Decree-Law 6-A/2000 as amended by Decree-Law 1-A/2005 provides "for the confiscation of a vessel offering bunkering services to foreign vessels fishing in the exclusive economic zone of Guinea-Bissau[, it] is not *per se* in violation of article 73, paragraph 1, of the Convention".

Two parallel paths lead the Tribunal to this finding. On the one hand, it 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. And on the other hand, the Tribunal is of the view that the aforementioned laws and regulations afford the authorities of Guinea-Bissau flexibility in sanctioning violations of them.[17]

17 This Judgment, para. 257.

I agree with both assertions but must nevertheless remark that, for the purpose of flexibility in shaping the penalty of confiscation, the crucial factor as regards conformity with the Convention – in particular with articles 73, paragraph 1, 56, paragraph 2, and 58, paragraph 3 – resides in the possibility of converting the confiscation into a fine.

The existence of remedies in the domestic legal system is an undeniable requirement of the rule of law and of the availability of effective redress. But the way to ensure that a penalty as severe as confiscation of a vessel and its cargo will not result in circumstances where it is manifestly unnecessary is to provide in law for less onerous alternatives. In my opinion, the Tribunal failed to pay sufficient attention to the fact that the legal system of Guinea-Bissau offers an alternative of this kind in the form of the admissibility of a settlement for converting into a fine the sanction of confiscation, which is decreed to be *prima facie*. I think that it is easy to understand in the context that the expression *ex officio*, in article 52, paragraph 1, of Decree-Law 6-A/2000, as amended by Decree-Law 1-A/2005, means *prima facie* in the sense that confiscation becomes mandatory when the appropriate procedural steps are not taken to convert it into a fine. And confiscation can also become mandatory when the fine imposed is not paid within the time limit.

If this aspect of the coastal State's legislation had been given the consideration it deserved, the question of the contribution to the injury would also probably have been regarded as meriting much greater attention for the purpose of reparation.

12. For a better understanding of the flexibility that softens the apparent rigidity of the penalty of confiscation of vessels in the national legislation of Guinea-Bissau, consideration must be given to article 52, paragraph 1, of Decree-Law 6-A/2000, as amended by Decree-Law 1-A/2005, together with several other provisions of the same law. This need to understand the individual meaning of each of a set of several legal provisions by forming with them, in a first interpretative step, a sub-system in accordance with functional or teleological reasoning, is shown by Comparative Law to be commonly felt. In any case, this is a feature of Portuguese legal drafting techniques and has been absorbed by other national legal systems with a shared historical background, such as that of Guinea-Bissau.

In logical and functional sequence, it is preferable to start with paragraph 1 of article 46 of Decree-Law 6-A/2000, according to which the unilateral implementation of sanctions in response to infringement of fisheries legislation through indictment by a public attorney and the decision of a judge can be replaced by a settlement (*transação*) reached under article 62, paragraphs 2 to 6, of the same Decree-Law.

Paragraph 2 of article 62 of Decree-Law 6-A/2000 determines, in turn, that the member of Government in charge of fisheries may, if specifically authorized by the Interministerial Fisheries Commission, settle on behalf of the State during the court procedure regarding these infringements.

Paragraph 5 of the same article 62 lays down that the amount of the fine may not fall below the legal minimum limit. This provision should be read in connection with paragraphs 2 and 4 of article 54, according to which fines for serious fishing offenses vary from a minimum of one hundred and fifty thousand US dollars to a maximum of one million US dollars. Paragraph 4 of article 54 states that "when levying each fine, due account shall be taken of all pertinent circumstances, as well as the vessel's features, the offender and the type of fishing practiced". Insofar as, according to article 3, paragraphs 2 and 3, for the purpose of Decree-Law 6-A/2000, "fishing" also means fishing-related operations, including logistical support activities for fishing vessels at sea, the expression "the type of fishing practiced" at the end of paragraph 4 of article 54 must be interpreted as including the type of fishing-related operation carried on.

Returning to article 62, attention must also be paid to its paragraphs 4 and 5, which mean that, once a settlement concerning a fine has been reached, and the fine has been paid within a fortnight, all the proceedings against the offender are cancelled.

Finally, mention must be made of paragraph 2 of article 52 of Decree-Law 6-A/2000. The drafting of this provision is not absolutely clear, but I think that, in the context of the other provisions examined here, its purpose is to remind those operating the legal system that the confiscation referred to in paragraph 1 of article 52 can be converted into a fine on the sliding scale cited above and

established in paragraph 2 of article 54. As seen below (when I deal with the question of the contribution of the ship-owner to the injury), this was the interpretation followed by the administrative authorities of Guinea-Bissau in the case of the *M/V Virginia G*.

13. In the light of the provisions of Decree-Law 6-A/2000, it appears that the legal rules of Guinea-Bissau on the application of penalties for offences against fisheries legislation offer flexibility in terms of the relative severity of sanctions. Central to this flexibility is the possibility of conversion into a fine of the penalty of confiscation of the vessel and its cargo, applicable *prima facie* in the case of activities being carried out in the exclusive economic zone without the legally required authorization (article 52, paragraph 2, of Decree-Law 6-A/2000).

Another manifest element of flexibility consists of the possibility of fixing the fine on a sliding scale from 150,000 US Dollars to 1,000,000 US Dollars, taking into due account all the relevant circumstances, as well as the vessel's features and the type of fishing or fishing-related activity carried on (article 54, paragraphs 2 and 4, of Decree-Law 6-A/2000).

14. I will now move on to the Tribunal's finding that the confiscation of the *M/V Virginia G* and the gas oil was in violation of article 73, paragraph 1, of the Convention.[18]

Three basic assumptions underlie this finding:

(i) The failure to request permission for bunkering in writing and the non-payment of the corresponding fee were due to omission on the part of the agent of the bunkered fishing vessels and more 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 by the *M/V Virginia G*;[19]

(ii) 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

18 Paragraph 271 of this Judgment.

19 Paragraphs 268 and 269 of this Judgment.

committed or to deter the vessels or their operators from repeating this violation and, therefore, such confiscation was not reasonable;[20]

(iii) The principle of reasonableness, affirmed in paragraph 2 of article 73 of the Convention as a requirement for the bond fixed by coastal States – which means that due regard has to be paid to the factual particularities of the case and the gravity of the violation – applies generally to enforcement measures under article 73 of the Convention.[21]

In the following paragraphs, I explain my reasons for disagreeing with these assumptions.

15. With due respect for the prevailing view, I do not share the exculpatory stance taken towards the exercise by the *M/V Virginia G* of fishing-related operations in the exclusive economic zone of Guinea-Bissau without having obtained the legally required permit and without having this on board as the law also dictates.

The question cannot be reduced to a simple misunderstanding of the proper procedure. Nautical charts are not the only source of knowledge that ship-owners, operators and masters of vessels must provide themselves with before starting fishing or fishing-related operations in a certain exclusive economic zone. The minimum diligence required (and the respect due to the sovereign rights of the coastal State) require basic knowledge beforehand of the domestic laws and regulations that must be complied with according to article 73, paragraph 1, of the Convention. P&I agents are surely in a position to provide this information when requested by the firms they represent. And the evidence gathered in the proceedings shows that there are in Bissau freelance legal practitioners who are familiar with the fisheries legislation of their country and could have been asked for advice at the proper time.

Article 33 of Decree 4/96 of 2 September lays down that "the ship-owners of industrial fishing vessels must have and maintain an agent domiciled in Guinea-Bissau, who has a permanent establishment in Bissau and who is duly qualified to represent them in relations with the Ministry of Fisheries and with

20 Paragraphs 269 and 270 of this Judgment.

21 Paragraph 270 of this Judgment.

other competent administrative and judicial departments, namely in relation to administrative and judicial procedures".

It is to be presumed that, if the ship-owner had complied with this requirement, the necessary permission would have been properly requested.

The application for this permission should have been filed with the Ministry of Fisheries, no less than 20 days in advance (article 20, c), of Decree 4/96 and article 23, paragraph 1, of Decree-Law 6-A/2000). And it was subject to payment of a fee (article 23, paragraph 2, of Decree-Law 6-A/2000).

The captain or master of the vessel was legally bound to keep this fishing license (meaning the document certifying the permission) on board. The existence aboard of means of communication by e-mail and fax (evidenced, for instance, by Annexes 25 and 26 of the Memorial and Annex 18 of the Counter-Memorial) made it very easy to have at least a reproduction of the original document duly kept by the agent.

Then, in accordance with article 31 of Decree-Law 6-A/2000, if it had been authorized to operate in the exclusive economic zone of Guinea-Bissau, the *M/V Virginia G* should have made known by radio to the authorities of Guinea-Bissau the moment when it was entering the EEZ.

In short, there was systematic violation of a series of applicable legal rules and not "a misinterpretation of the correspondence between the representatives of the fishing vessels and FISCAP" arising from the fact that the agent for the fishing vessels to be refueled had applied for permission on behalf of these vessels (as they also needed it for this operation), but not on behalf of the tanker. It should be emphasized that the permission for the tanker should have been requested for a specified period of time of permitted operation, in addition to indicating the specific operations (article 21, paragraph 1 and 3, of Decree 4/96).

An attitude of indifference (if not the arrogance displayed in the correspondence from Mr. Gamez Sanfiel, the ship-owner, to the FISCAP authorities) is clearly reflected in the e-mail sent by the Master of the *M/V Virginia G* to Mr. Gamez when the vessel was proceeding under arrest to the port of Bissau: "The authorities tell me that permission is required to carry out such operations" (Annex 26 to the Memorial). This surely evidences something different, and

much more serious, than a simple "misinterpretation".[22] Indifference to the coastal State's laws and regulations or negligent ignorance of these is quite a different thing from a "misinterpretation" of correspondence not exchanged with the *M/V Virginia G*.

16. I cannot agree with the finding that "the confiscation of the vessel and the gas oil on board in the circumstances . . . was not necessary either to sanction the violation committed or to deter the vessels and their operators from repeating this violation".[23]

In my view, for this purpose, the fundamental question lies in the extent of the competence of the Tribunal to adjudge upon the necessity of the measures taken by the coastal State within the framework of paragraph 1 of article 73 of the Convention.

The source of my disagreement resides in the position taken in paragraph 256 of this Judgment, especially insofar as concerns the measures taken by the coastal State in implementing the legislation adopted by it in conformity with the Convention to conserve and manage the living resources in its exclusive economic zone. The Tribunal emphasizes that it is within its competence to establish whether the measures taken to ensure compliance with that legislation are necessary.

Like any other jurisdictional bodies whose decisions are final and not open to appeal, the Tribunal has the "*Kompetenz Kompetenz*", that is to say, the power to define its own competence. But this does not correspond to discretion: in ruling on its competence, the Tribunal must be guided by the Convention and other rules of international law not incompatible with the Convention (article 293, paragraph 1, *ex vi* article 297, paragraph 1(a), of the Convention).

Taking into account paragraph 1 of article 73 together with article 56, paragraph 1, of the Convention, it seems incontestable that the powers for the purpose of exploring and exploiting, conserving and managing the living resources in the exclusive economic zone belong to the coastal State as a sovereign member

22 This Judgment, para. 269.

23 This Judgment, para. 269.

of the international community. And the measures that may be necessary to ensure compliance with the laws and regulations adopted in this exercise of sovereignty in conformity with the Convention are also a manifestation or element of State sovereignty.

The circumstance that the sovereign rights of a coastal State in its exclusive economic zone involve a concept not reducible to territorial sovereignty does not exclude these rights from the broad notion of sovereignty in international law.[24] And this notion encompasses discretionary power within areas delimited by international law.[25] Exploration, exploitation, conservation and management of the living resources in the exclusive economic zone, the adoption of laws and regulations for such purposes and the taking of measures as may be necessary to ensure compliance with those legal norms are the material form taken by the exercise of sovereignty. These rights are therefore exercised in an environment of non-subordination to other subjects of international law. And all these legislative and executive sovereign measures benefit from the presumption of legal regularity.[26]

As with any other treaty, the sovereignty of the States parties to the Convention is voluntarily limited to the extent of the obligations they undertake thereunder. The considerable powers recognized by article 73, paragraph 1, as belonging to the coastal State must be accommodated with the freedom of navigation in order for the enforcement capabilities of that State not to cause unnecessary interference with the rights of other States in the exclusive economic zone.[27] Anyway, as they are sovereign, the rights of the coastal State derive from the fact that these powers belong originally to the State, which is independent in deciding how they are structured and implemented through the domestic legislation and administrative policies. As should be expected, the essential features of the exclusive economic zone regime, with particular reference to its elements of sovereignty and discretion, give rise to a number of complexities when confronted with dispute settlement procedures. The first consequence of this is that, within the framework of the Convention, the general concept of

24 See James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, 2012, pp. 205 and 206.

25 *Idem*, pp. 447 and 448.

26 See Daillier/Pellet, *Droit international public*, 7th ed., Paris: L.G.D.J., 2002, pp. 430 and 431.

27 See David Attard, *The Exclusive Economic Zone in International Law*, op. cit., pp. 178 and 179.

compulsory dispute settlement could not go so far as to affect certain fundamental interests such as the coastal State's sovereign rights.[28]

But this question also has repercussions on a second level, of particular importance in the present case: that of the degree or intensity of the interference of international jurisdiction with sovereign rights and with the jurisdiction of coastal States. My view on this subject coincides with that expressed by Judge Wolfrum in his dissenting opinion in the Judgment in the *"Camouco" Case* (*Panama* v. *France*), *Prompt Release*, 7 February 2000. In his words, "it is first and foremost the right of the coastal State to enforce its laws" and (referring to the prompt release of a vessel under article 292, paragraph 1, in connection with article 73, paragraph 2, of the Convention) "the Tribunal must not unnecessarily impinge upon the enforcement rights of the coastal State concerned in accordance with article 73, paragraph 1, of the Convention".[29]

As Judge Wolfrum then opined,

> without prejudice to the international limitations . . . coastal States enjoy considerable discretion in laying down the content of laws concerning the conservation and management of marine living resources in their exclusive economic zone and of the corresponding laws on enforcement.

And

> these discretionary powers or margin of appreciation on the side of the coastal State limit the powers of the Tribunal on deciding whether a bond set by national authorities was reasonable or not. It is not for the Tribunal to establish a system of its own which does not take into account the enforcement policy by the coastal State in question.[30]

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28 See Orrego Vicuña, *The Exclusive Economic Zone – Regime and Legal Nature under International Law*, Cambridge University Press, 1989, pp. 121 to 123.

29 "*Camouco*", dissenting opinion of Judge Wolfrum, para. 8.

30 *"Camouco"*, dissenting opinion of Judge Wolfrum, para. 11.

17. The reasoning expressed in the cited dissenting opinion relates to the accommodation of the Tribunal's competence with the margin of appreciation or discretionary powers of coastal States to establish, within the framework of article 73, paragraph 2, of the Convention, their systems on the release of ships and crews and to implement such legal provisions through judicial decisions or administrative acts.[31]

In my view, these legal arguments are (if possible) even more pertinent when the questions to be dealt with concern the powers of the coastal States both to legislate on the sanctions applicable to breach of fisheries laws and to fix, in specific cases, the severity of the penalties between the upper and lower limits established in law. In effect, when we move from the area of prompt release, under paragraph 2 of article 73 of the Convention, to that of the measures that may be taken, under paragraph 1 of that same article, to ensure compliance with the laws and regulations adopted by the coastal State, we find a change both in the standards applicable by the Tribunal and in the degree or level of the control that it may exercise.

In paragraph 2, the benchmark is that of *reasonableness* (of the bond or other security). In paragraph 1, two benchmarks are set: the *conformity* of the laws and regulations of the coastal State with the Convention and the *necessity* of certain measures adopted by it in order to ensure compliance with such laws and regulations.

The difference in the degree of control arises from the dissimilarity of the decisions that are requested from the Tribunal. Under paragraph 2 of article 73, taken together with article 292 of the Convention, the Tribunal is asked to make its own decision on the posting of a bond or other financial security, as a substitute measure when the coastal State's authorities omit to decide on this or when their decision is deemed to be unreasonable. In contrast, under paragraph 1 of article 73, the Tribunal is not competent to decide on alternative measures to those taken by the coastal State, but is merely called on to adjudge on the necessity or not of certain measures taken in order to ensure compliance with the laws and regulations adopted in conformity with the Convention.

31 *"Camouco"*, dissenting opinion of Judge Wolfrum, para. 12.

In my view, the variability of the standards of control and of the kinds of decisions requested from the Tribunal means that, when the Tribunal proceeds under paragraph 1 of article 73 of the Convention, it is more restrained by the margin of appreciation or discretionary power of the coastal State than when it intervenes under article 292 and therefore adjudges on the reasonableness of the bond or other security.

18. The conformity with the Convention, under paragraph 1 of article 73, of the relevant municipal legal provision is not in question in the case *sub judice*, as the Tribunal "holds that providing for the confiscation of a vessel offering bunkering services to fishing vessels in the exclusive economic zone of Guinea-Bissau is not *per se* in violation of article 73, paragraph 1, of the Convention".[32]

But particular attention must be paid to the benchmark of *necessity*, taken together with the merely declaratory nature of the pronouncements of the Tribunal on the measures taken by the coastal State to ensure compliance with its laws and regulations issued in the exercise of sovereign rights in the exclusive economic zone.

In my opinion, the benchmark of *necessity* (meaning the necessary character of the measures taken in order to ensure compliance) is not only different from, but also more objective than, the benchmark of reasonableness in paragraph 2 of article 73 of the Convention. It cannot be regarded as synonymous with reasonableness and neither can it be considered as synonymous with proportionality. *Necessity* is at most just one of the various dimensions of the legal concept of proportionality. If proportionality is to be admitted as a general principle of law, and, accordingly, as a source of international law, then *necessity* is precisely one of its three sub-principles, consisting of the duty to use the least onerous means to reach a legitimate end. If there are at least two means, both equally suitable and efficient for attaining the end aimed at by a competent authority, then the means equally effective but less onerous or intrusive to other interests, subordinate but also deserving legal protection, must be chosen. *Necessity* implies that unnecessary sacrifices of rights are not permitted.[33]

32 This Judgment, para. 257.

33 See Robert Alexy, *A Theory of Constitutional Rights*, Oxford University Press, 2002, pp. 65, 68, 398 and 399.

Judicial control of *necessity* under paragraph 1 of article 73 of the Convention is confronted, in my view, by a double-edged difficulty:

(i) this relatively open-textured norm does not give us the answer for situations where a given measure is unnecessary or excessive in respect of the objective of ensuring compliance with the laws and regulations adopted by the coastal State in conformity with the Convention;

(ii) in contrast to the situation under paragraph 2 of article 73 and paragraph 4 of article 292 of the Convention, the Tribunal is not called upon to determine a measure to replace that which it has judged to be unnecessary, as the kind of measures referred to in paragraph 1 of article 73 appertain exclusively to the discretionary powers of the coastal State; therefore, in normal conditions, where excess or abuse is not manifest, the Tribunal does not have the tools enabling it, without interfering with the State's margin of appreciation, to compare the measure taken with any other equally suited to attaining the objective being pursued in order to ascertain which of them is less onerous.

19. In short, under paragraph 1 of article 73 of the Convention, certain evaluative reasoning, assessments and operations that have to be undertaken in order to identify the measures to be taken concern the coastal State's margin of appreciation or discretion. This is so, in the first place, when it evaluates the comparative suitability and effectiveness of several alternative measures and possibly concludes that at least two of them are equal from these perspectives. Secondly, there is also an evaluation to be effected as to the comparative intrusiveness or oppressiveness of the equally suitable and effective measures.

Paragraph 1 of article 73 of the Convention does not present an exhaustive list of measures: it merely provides some examples. And even in relation to these, no rigid prerequisites are stated for their adoption. The concept of "judicial proceedings" is indeterminate. The practice of States shows that the expression "as may be necessary to ensure compliance with the laws and regulations" includes sanctions and that confiscation is one of them. But it falls within the coastal State's discretion to establish in its laws when confiscation will apply and, in specific cases, depending on the flexibility allowed by the normative system, to decide whether confiscation, or a less severe penalty, is called for.

In cases such as that before the Tribunal, it may seem easy to assess confiscation as being more onerous than a fine. But this is only apparent, because it depends on the real value of the vessel and its cargo and on the maximum value of the fine as established by law. But if the Tribunal ventures into the discretionary area reserved for the coastal State and decides – either explicitly or implicitly – that a fine would be sufficient in the circumstances, a paradoxical situation will be created. The Tribunal does not have the competence to impose a fine in the stead of the State's competent authorities. And so a ship-owner who should at least have paid a fine will suffer no sanction. The situation becomes even stranger when, after all, the ship-owner is granted compensation from which it would be fair to deduct the value of a fine, but this cannot be done because the Tribunal is not competent to fix the fine.

But it becomes even more evident that the Tribunal should not have adjudged on the legality of the penalty of confiscation when we consider the reasoning involved in assessing the suitability and effectiveness of the different penalties. That this evaluation falls within the State's margin of discretion becomes all the clearer when we consider the factors that cannot logically be ignored in this reasoning.

As it usurps this power from the coastal State, the Tribunal should at least never lose sight of a number of factors which are obviously relevant to assessing the suitability and effectiveness of confiscation as a penalty:

(i) the essential importance of fisheries resources to the very fragile economy of Guinea-Bissau;

(ii) the exponential pressure of illegal fishing and fishing-related activities in the exclusive economic zone of Guinea-Bissau;[34]

34 A telling detail resulted from the hearing of Mr Nosoliny Vieira as a witness. Asked by the Agent of Panama if he had been on board the *VIRGINIA G*, he said that he had been there once, escorting the members of the Parliamentary Committee of Agriculture and Fisheries, who had decided to visit the port of Bissau because, at that time, five ships were there under arrest. See *ITLOS/PV.13/C19/5, 04/09/2013 p.m.*, p. 28.

(iii) the need for deterrence through harsh penalties given the lack of means of permanent control by Guinea-Bissau; this country has only one patrol ship (Cacine) and lacks both aviation resources and radar equipment for the surveillance of its vast exclusive economic zone; control is mainly exercised by using small "zodiac" craft like the two used in the arrest of the *M/V Virginia G*, which represent a serious and potentially fatal risk for their crews, particularly during the monsoon season from April to October;

(iv) the importance of the prior authorization in writing required for refuelling operations, not so much because of the collection of a modest fee, but because, under article 39, paragraph 4, of Decree 4/96, of 2 September 1996, when he grants this authorization, the Minister of Fisheries (or any authority to whom he delegates powers) can define the area and the time for this operation and provide for the presence of an inspector of the fisheries control department (FISCAP), these factors representing an important tool for management of the living resources in the zone.

20. By what I have said, I have not sought to argue that the discretion of the coastal State in adopting the measures necessary to ensure compliance with the laws and regulations adopted in conformity with the Convention is exempt from all control by the Tribunal. The question is not one of total absence of control but one of the relative degree or intensity of judicial review.

I start by remarking that, in the case *sub iudice*, the role of the Tribunal is not to assess the reasonableness or proportionality of the penalty, but rather its *necessity*.

It is not easy today to maintain a distinction between *reasonableness* and *proportionality* as general principles of public law. The concept of *reasonableness* comes to us from the legal tradition of the English-speaking world. In the sense of the "strong unreasonableness principle" or "*Wednesbury* test", it means that control of the executive's discretion by the courts is admissible when "there

may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".[35]

In recent decades, British courts have broadened the concept of *unreasonableness*, as grounds for judicial control of executive discretion, to include improper purpose, irrelevant considerations and bad faith.

And in the last years, a clear tendency has emerged favouring the development of a single test of the illegality of public law based on the proportionality principle. Learned authors assert that, today, "the challenge for the courts is to develop the proportionality principle – whether on its own or beside *Wednesbury* – in a manner that allows the level of intensity to be adjusted to suit the circumstances of the case under consideration without interfering with the discretion afforded to the decision-maker as part of the process of administration".[36]

The proportionality test originated in the legal culture of continental Europe and comprises the dimensions of suitability, necessity and proportionality in the narrow sense. Some legal writers also include the rule of legitimate ends. The proportionality test applies in various fields. But it is primarily useful in providing a pattern to measure the legality of the exercise of discretion.[37]

I see no reason why these conceptual tools should not be considered suitable for increasing objectivity and reducing subjectivity in the field of control by international courts and tribunals of States' discretion or the margin of appreciation of States.

For the case *sub iudice*, proportionality in its narrow sense consists of balancing the harm caused by the penalty to the offender against the public interest prejudiced by the infringement. But, in paragraph 1 of article 73 of the Convention, the scope of the evaluative appreciation reserved for coastal States is not that

35 *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223.

36 See Peter Leyland/Gordon Anthony, *Administrative Law*, 6th ed., Oxford University Press, 2009, pp. 285 to 287, 308 and 309.

37 See Matthias Klatt/Moritz Meister, *The Constitutional Structure of Proportionality*, Oxford University Press, 2012, pp. 8 to 13.

of the commutative justice of every measure taken, penalties included, but the *necessity* of ensuring compliance. The prime indicator of a penalty's usefulness in ensuring compliance with laws and regulations is its suitability as a deterrent. An assessment is required of the effectiveness of every conceivable sanction to induce compliance. This will not consist of abstract reasoning, because the relevant factors must be taken into account. The most relevant factor here appears to be the paucity of means of control available to the coastal State and the consequent need for recourse to sanctions so harsh that they dissuade operators from committing the offence because of the great unlikelihood of being caught in the act.

As Judge Jesus stated in his separate opinion in the *"Tomimaru" Case* (*Japan* v. *Russian Federation*)*, Prompt Release*,

> 2. Faced with an increase in illegal, unreported and unregulated fishing in their waters, coastal States have been resorting to harsh measures, in order to better protect their resources from being plundered and to avoid overexploitation. In many cases, it is believed that fines imposed have not acted as a significant deterrent, as might have been expected, for effectively controlling and preventing illegal fishing.
>
> 3. As a result, one of the measures taken, not so infrequently, by a vast number of coastal States is confiscation of the fishing vessel because of illegal fishing.

The prominent role of confiscation as an indispensable tool for deterrence could not have been described more clearly.

Seen from this angle, the determination of the sanction is a question of discretionary policy choice. And the universal tendency is to find that the courts should not overturn policy choices merely because they believe that a different way of doing things would be better. They should not substitute their judgment for that of the administration.[38] When this problem arises in the context of the jurisdiction of international courts or tribunals, States occupy the place held by legislative and administrative authorities in relation to the limits on interference by national courts in such bodies' discretion. The choice of the type of penalties necessary to dissuade ships from violating the laws and regulations adopted by the coastal State in conformity with the Convention in the

38 See Paul Craig, *EU Administrative Law*, Oxford University Press, 2006, p. 658.

exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone falls within the sphere of the discretion or margin of appreciation of the State. The limit on this discretion is stated in paragraph 3 of article 73 of the Convention when it forbids certain kinds of penalties.

21. It should not be forgotten that paragraph 1 of article 73 of the Convention does not have recourse to reasonableness as the yardstick for a test (a combined reading of paragraphs 1 and 2 makes this quite clear) and confines a broad idea of proportionality to one of its sub-principles: that of *necessity*.

This is a way of preserving the margin of appreciation intrinsic to the sovereign rights of coastal States, leaving them less vulnerable to interference from judges or arbitrators.

Under paragraph 1 of article 73, judicial deference is only excluded when it is manifest or absolutely clear that a less intrusive or onerous measure would have been equally suitable and effective in attaining the legal aim. But only in extreme cases is it possible to reach such a conclusion where the policy choices are of a discretionary nature. In the event of uncertainty as to the underlying empirical premises, assumptions are only made that are most favourable to the optimization of the sovereign right of the coastal State.[39]

Looking at the empirical circumstances in this case, that is, at Guinea-Bissau's lack of resources for permanent monitoring of its vast exclusive economic zone, a zone subject to heavy pressure from illicit fishing and fishing-related activities, I fail to see how it can be concluded that Guinea-Bissau committed a manifest error of appreciation by considering the penalty of confiscation necessary because of its effect as a deterrent.

39 See Matthias Klatt/Moritz Meister, *The Constitutional Structure of Proportionality*, cit., p. 80.

D Contribution to the injury

22. I voted against operative provisions (16) and (17), whereby the Tribunal awards compensation from Guinea-Bissau to Panama.

I have no objection to giving satisfaction to Panama in the form of a judicial declaration on the breach of Guinea-Bissau's obligation to notify Panama of the arrest of the vessel and its confiscation. But, for the reasons stated above, I do not agree with the finding that Guinea-Bissau violated Panama's rights by confiscating the *M/V Virginia G* and its cargo. In my opinion, as the confiscation was valid, no internationally wrongful act has been committed that places Guinea-Bissau under an obligation to pay compensation for any 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.[40]

23. I must nonetheless note that, even if the confiscation had constituted a violation of article 73, paragraph 1, of the Convention, Guinea-Bissau should be exempted from any duty to compensate, out of regard for the principle reflected in article 39 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, submitted by the ILC to the General Assembly of the United Nations in 2001.

Article 39 states:

> CONTRIBUTION TO THE INJURY
>
> In the determination of reparation, account shall be taken of the contribution to the injury by *wilful or negligent* action or *omission* of the injured State or *any person or entity in relation to whom reparation is sought* (emphasis added).

In my opinion, this is what happened in the case *sub iudice*, with the particularity that, without the wilful or at least negligent omission of the ship-owner, the alleged injury would not have taken place. Because this contribution accounts for the entirety of the damage and other losses taken into account by the Judgment, there remains none to be imputed to Guinea-Bissau.

40 This Judgment, para. 434.

I regret that the Tribunal did not pay due consideration to the fact that neither the ship-owner, nor the charterer, nor the ship's management company ever resorted to any of the domestic legal system remedies that would have enabled them to cut short the detention of the vessel in the port of Bissau and would have prevented the loss of the gas oil that constituted its cargo.

24. In the first place, a domestic procedure for prompt release might have been instituted.

According to paragraph 1 of article 65 of Decree-Law 6-A/2000,

> 1. By order of the competent court, ships or fishing vessels and their crews will be immediately released, before the hearing, at the request of the ship owner, the Captain or the master of the ship or vessel, or his local representative, provided enough bond is posted.

Incidentally, either the word "bond" or the expression "security deposit" are not, in my opinion, a totally faithful translation of the Portuguese word "*caução*", employed in that provision. In Portuguese legal terminology, "*caução*" is a guaranty that can be offered through a deposit of cash, of shares, bonds or other securities, precious stones or metals, pledge, mortgage or bank guarantee.

According to paragraph 2 of article 65 of Decree-Law 6-A/2000,

> 2. The court order mentioned in the preceding paragraph shall be issued within a maximum of 48 hours after the filing at court of the petition to have ship and crew released.

According to paragraph 3,

> 3. The 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.

Finally, according to paragraph 4,

> 4. In 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 (emphasis added in the word *may*).

Panama's allegation 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 the remedy", does not seem credible.

Panama cannot arrive at these conclusions if prompt release was never requested. And if Panama, having requested prompt release from the Regional Court of Bissau, had had their pessimistic expectations confirmed, then they could have sought prompt release from the International Tribunal for the Law of the Sea under article 292 of the Convention.

It can therefore be considered as absolutely certain that the failure to seek prompt release constitutes a contribution by the ship-owner to the injury.

The fact that Guinea-Bissau did not notify Panama of the detention, an illegality in itself, did not prevent the ship-owner from asking the Panamanian authorities to file a prompt release request with the Tribunal.

The swiftness of the confiscation decision also did not hinder recourse to the prompt release remedy. As the ship-owner filed an action in October 2009 seeking the annulment, by the Regional Court of Bissau, of the administrative decision of confiscation, the change of ownership of the vessel was never finalized and a prompt release request was therefore admissible, according to the jurisprudence of the International Tribunal for the Law of the Sea.

25. Secondly, the ship-owner might also have taken the initiative of negotiating a settlement ("*transação*") regarding a fine.

In paragraph 12 of this dissenting opinion, I have examined, one by one, in a functional sequence, the provisions of the law of Guinea-Bissau that allow a settlement for the purpose of converting a penalty of confiscation into a fine, on a sliding scale between a lower limit of 150,000 US Dollars and an upper limit of 1,000,000 US Dollars.

The ship-owner could have attempted this, and had more than one procedural vehicle at his disposal for this purpose:

(i) The ship-owner could have applied directly to the Interministerial Commission for Fisheries for conversion of the administrative decision of confiscation into a fine, agreed upon through a settlement negotiated under the aegis of the court competent to judge on the offence.

Under article 62, paragraph 1, of Decree-Law 6-A/2000, powers to apply fines for offences against the Fisheries Law belong to the Interministerial Commission for Fisheries. Once the fine is applied, the file is sent to the competent court (Regional Court of Bissau, Criminal Division, Section for Offences) through the Attorney General's Office (article 62, paragraph 1, "*in fine*"). This means that the application of a fine is provisional and that the Court will have to assess the respective grounds. But, as soon as the proceedings are instituted in the Court, the interested party may seek a settlement (article 62, paragraph 2).

(ii) The ship-owner filed for judicial review of the administrative decision of confiscation, asking the Regional Court of Bissau to quash this allegedly invalid decision.

And the ship-owner included in the main case for annulment of the confiscation decision a request for interim relief in the form of a provisional measure staying execution of the decision of confiscation. But, even if the provisional measure thereby granted had not been set aside as a consequence of an appeal by the Attorney General to a higher Court, the requested suspension would not have meant the release of the vessel. The vessel was detained because it had transgressed the Fisheries Law and would only have been released through a prompt release procedure or through judicial acquittal from any penalty or the payment of a fine.

A transgression having been committed (as the present Judgment recognizes), an acquittal could not reasonably be expected. Therefore, what the ship-owner could and should have done was to introduce in the main case for annulment a request for the negotiation of a settlement on a fine pursuant to article 62 of Decree-Law 6-A/2000.

26. The ship-owner never applied for a prompt release procedure.

If he was not, his P&I agent and his lawyers surely were aware that such a request had to be submitted to a court in Bissau, under article 65 of Decree-Law 6-A/2000.

He also admits that he did not want to (or could not, because of financial constraints) seek a prompt release in the International Tribunal for the Law of the Sea.

The ship-owner also never made a proper request for a settlement on a fine. This omission was intentional.

In a written statement, attached as Annex 4 to the Memorial, Mr Samper Perez, safety-operation manager of Penn Lilac/Gebaspe – Owner/Agent of the *M/V Virginia G*, declares that their P&I Agent informed them that the decision of confiscation could be appealed within 15 days *or negotiated into a fine for release of the vessel* (emphasis added).[41]

In his oral statement, Mr Gamez Sanfiel, the ship-owner, said that he rejected an offer from a Guinean lawyer to negotiate an agreement on a fine.[42]

Annex 38 to the Memorial contains a copy of an e-mail sent to Penn Bunker by the P&I Agent Mr Alvarenga and dated 31 August 2009, in which he informs Penn Bunker of notification of the decision of confiscation. He states that the decision is appealable within a period of 15 days "for defense or *to negotiate the sanction to convert into a payment* of equivalent value to the release of the ship" (emphasis added).

41 Annex 4 to the Memorial, p. 5.

42 ITLOS/PV.13/C19/2, 02/09/2013, p. 16.

Annex 45 to the Memorial contains a copy of a request by the P&I Agent on behalf of the vessel for a 15-day extension of the initial term of 15 days.

Annex 47 to the Memorial contains a copy of notification of a decision of the President of the Interministerial Committee observing that 30 days had elapsed without any application from the *Virginia G* and giving the ship-owner a further 72 hours to initiate proceedings in order to avoid the sale of the product on board by public auction.

But the ship-owner did not act within the initial 15-day period or its successive extensions to request the negotiation of a settlement. This term of 15 days, extendable for a further 15 days at the request of the ship-owner or its representative, is established in article 60, paragraphs 1 and 2, for the purpose of the payment of fines.

It is therefore quite clear that the ship-owner was given the opportunity to request a settlement on a fine, but that he chose not to take it.

On this account, a second decision from the Interministerial Commission confirmed the confiscation.

27. It seems indisputable that a prompt release decision (from either the Municipal Court or ITLOS) or a settlement on a fine would have enabled the ship to leave Bissau and the waters under the jurisdiction of Guinea-Bissau. Not having even attempted to achieve any of these solutions, the ship-owner is not in a position to claim for damages arising from the confiscation of the vessel and its detention in the port of Bissau until September 2010.

It must also be taken into consideration that – as already explained – under Decree-Law 6-A/2000, the sanction of confiscation applies *prima facie* to fishing vessels (including vessels performing fishing-related operations) which carry out their activities in the exclusive economic zone of Guinea-Bissau without the necessary permission. And this *prima facie* sanction will only be avoided if it is converted into a fine through a settlement negotiated under the aegis of a court.

This being so, even if the confiscation were objectively an internationally wrongful act because manifestly unnecessary, the wilful or, at least, negligent omission of the ship-owner (in relation to whom reparation is sought) would have to be taken into account in determining the reparation.

Article 39 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts is important in the case *sub judice* because it provides a clear indication that the wilful or negligent omission of any person or entity in relation to whom reparation is sought cannot be ignored in the determination of reparation. But this provision addresses itself directly to situations where the injury is simultaneously the effect of the conduct of a State against whom reparation is claimed and of a person or entity in relation to whom reparation is sought. We may call this kind of situation "concurrent faults".[43] Several national legal systems deal with it in the private law rules on liability. Two forms are usually identified: contribution of the injured individual or entity to the occurrence of the damaging fact and culpable failure to prevent or attenuate the damaging consequences.[44] These situations are also acknowledged and regulated in the Administrative Law systems of certain countries. The general rule is that, depending on the circumstances, the administrative authorities are not under an obligation to compensate when the injured person or entity, by wilful or negligent omission, failed to avert the injury through the use of legal instruments at his or her or its disposal.[45]

But the situation just described is specific because, instead of a situation of concurrent faults, the conduct of the injured person appears as the cause *per se* of the injury. In the Commentary to article 39 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, a footnote envisages this situation:

> 660. It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general

43 *"Concorrência de culpas"*, in Portuguese.

44 See the German Civil Code (BGB), § 254, paras. 1 and 2.

45 See Margarida Cortez, *Responsabilidade Civil da Administração por Actos Administrativos Ilegais e Concurso de Omissão Culposa do Lesado*, Universidade de Coimbra, 2000, p. 257.

> requirement of proximate cause referred to in article 31, rather than by article 39.[46]

In my opinion, the present case is one where – taking into consideration that the arrest of the ship was legal – the injury arising from the allegedly unlawful confiscation results entirely from the wilful omission of the ship-owner. Either through recourse to the mechanism of prompt release or by settling on a fine for the infraction, the ship-owner would have averted the vessel's long stay at the port of Bissau. In the event of a settlement, the case would have been closed and the initial confiscation would not have been confirmed. In the case of prompt release, even if the confiscation had been confirmed at a later stage, the gas oil would not have been lost because the ship would no longer have been in the waters of Guinea-Bissau or under its jurisdiction.

But, even if the situation were to be classified as concurrent faults, I fail to see how the Tribunal could ignore the contribution of the ship-owner to the injury and could therefore not determine reparation in a lesser amount.

28. In my view, the contribution to the injury has not been negated by the fact that, on 4 December 2009, the ship-owner lodged an action on the merits for the annulment of the administrative decision of confiscation. Two years or more would have elapsed before a final judgment would have been pronounced in that case. It must be recalled that a judgment by the Regional Court of Bissau would be subject to appeal to a higher court.

And an eventual final judgment by a domestic court quashing the decision of confiscation would not even have implied the release of the *M/V Virginia G*. Confiscation, on the one hand, and detention of a vessel as a consequence of its arrest, on the other hand, are different legal situations resulting from distinct authoritative decisions. Precisely for that reason, the decision by the Interministerial Commission for Maritime Surveillance (CIFM) on 20 September 2010 expressly comprised both the repeal of the previous decision of confiscation and an order for release for the vessel. Simply repealing the confiscation would have meant the continued detention of the ship.

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46 See James Crawford, *Les articles de la C.D.I. sur la responsabilité de l'Etat – Introduction, texte et commentaires*, Paris: Pedone, 2003, p. 289.

Therefore, the judicial annulment of confiscation would not *per se* have brought an end to the detention of the *M/V Virginia G*.

In order to ascertain the immediate logical purpose of the filing – on 4 December 2009 – of this main action seeking annulment of the confiscation, it must be taken into consideration that, on 5 November 2009, the ship-owner had obtained from the Regional Court of Bissau a provisional or interim measure ordering the competent authorities to refrain from any and all acts concerning the confiscation of the *M/V Virginia G* and all products on board "until the declaratory process that will be brought is definitively decided".[47] In order to prevent this provisional measure from lapsing, a connected main action had to be filed within a time limit of 30 days. And that was what the ship-owner did when, on 4 December 2009, he lodged the action on the merits for annulment of the decision of confiscation.

The request for stay of execution of confiscation as a provisional measure had an understandable purpose that was both immediate and pragmatic: to prevent the Government from seizing the gas oil constituting the vessel's cargo. But, even if that interim order had not been in turn hindered by the lodging of an appeal by the Attorney General, the stay of execution of the measure of confiscation would have had no impact at all on the detention of the vessel in the port of Bissau.

In short, neither the success of an interim measure staying execution of the decision of confiscation nor even a favourable final judgment quashing the decision of confiscation would have meant the release of the ship from the port of Bissau. These hypothetical judicial decisions, as sought by the ship-owner, would in no way have vitiated the facts that (as the Tribunal acknowledges in the present Judgment) a breach of law had been committed by the vessel and that, if confiscation was not necessary as a sanction, then a fine should be imposed in its place. And only after the payment of this fine would the vessel have been free to leave.

Therefore, only by resorting to prompt release proceedings or to an expedited settlement on a fine, might the ship-owner have obtained the release of the vessel shortly after its arrest. Those were the alternatives for avoiding the injury

47 This Judgment, para. 73.

for which reparation is sought. On the other hand, the procedural strategy adopted by the ship-owner was inevitably ineffectual.

The evidence produced in the proceedings shows, in my opinion, that this was not as inconsistent as it might, *prima facie*, seem and that, on the contrary, it was intentional. The ship-owner expected that Spanish diplomatic protection would influence the Guinea-Bissau authorities to return his vessel to him without him having to incur the expense of a guarantee or a fine. The basis for this expectation, which proved justified, was Spain's status as a donor State supporting programs to improve the artisanal fisheries sector in Guinea-Bissau. And, as the ship-owner was unwilling, or unable, at that time to disburse the money required to post a bond or other guarantee ("*Caução*") or to pay a fine, his procedural strategy was to gain the time needed for diplomatic pressure brought to bear by Spain (he is a Spanish national and the ship is managed from Spain) to take effect. For that purpose, the interim measure staying execution was enough and did not require him to post any guarantee. The main action for annulment of the decision of confiscation was necessary to prevent the interim measure from lapsing. And it also did not involve the disbursement of any sizeable sum. But, given the essence of the claims, these proceedings would never have led to the release of the vessel unless the ship-owner had included in them a request for a settlement on a fine, which he did not.

From the way in which the ship-owner conducted himself, I have no doubt in concluding that the damage might have been averted if he had not contributed to it by wilfully omitting to bring the appropriate judicial proceedings to obtain the release of the *M/V Virginia G*.

29. It is also worth remarking that article 39 of the Draft Articles on Diplomatic Protection reflects a rule of international customary law. It is a well established rule that, in the determination of reparation, account must be taken of the contribution to the injury by wilful or negligent action or omission of any person or entity in relation to whom reparation is sought.

It is a generally recognized principle of law that the injured party is required reasonably to mitigate the damage it has incurred. As the International Court of Justice has pointed out:

> It would follow from such a principle [of mitigation] that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for the damage which could have been avoided.[48]

Curiously, an example offered in paragraph (4) of the Commentaries to Article 39 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts describes an hypothetical situation very close to that in the present case:

> For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

Taking into consideration that the ship did not belong to Panama but to a ship-owner and that the omission is attributable to this ship-owner in relation to whom reparation is sought, the hypothetical example corresponds to the real case. And it is not easy to understand why the Tribunal – without identifying it by name – applies the factor of contribution to the injury in relation to compensation for any loss or profit for the period of detention of the vessel, but ignores it with reference to the claims for compensation for the value of the gas oil confiscated and especially for the cost of repairing the vessel.[49]

Taking into account that, if the ship-owner had resorted to prompt release proceedings or to a settlement on a fine, the ship might have been released shortly after its arrest and that, in such a case, there would have been no seizure of the gas oil nor any damage resulting from the detention of the vessel, the injury in question becomes entirely attributable to the ship-owner. In reality, rather than amounting to concurrent faults, the situation then comes

48 See *Case concerning the Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 55.

49 This Judgment, para. 438.

under the general requirement of proximate cause referred to in article 31 of the Draft Articles.[50]

Such a situation is not new in the international settlement of disputes. Brigitte Bollecker-Stern reports at least two decisions in very similar situations.

The first of these is the judgment pronounced by the Commission created by Article VII of the Jay Treaty of 19 November 1794 between the United States and Great Britain in the case *Evesham v. Great Britain*.

As quoted by Brigitte Bollecker-Stern, the Commission decided that

> [t]heir not availing themselves of these opportunities to obtain compensation in the ordinary course of juridical proceeding for such a length of time, and under such advantages, brings their case within the terms of a loss and damage occasioned by manifest delay or negligence or willful omission of the claimant. I am therefore of opinion that the memorialists are not entitled to compensation under this article.[51]

The same author also cites the *British Claims in Spanish Morocco* arbitral award.[52] According to the translation from the French by the Registry:

> [h]eld that the victim's fault exonerated the government of all responsibility: the twenty-seventh claim concerned an ordinary theft committed to the detriment of British nationals: the Moroccan authorities, having failed to take action to prosecute the perpetrators, would normally have been held liable for the theft and, as such, required to pay compensation, such failure amounting to an internationally wrongful act (*délit international*). Yet, in the circumstances, the arbitrator, Max Huber, finding that

50 See footnote 660 in the Commentaries to the Draft Articles.

51 Brigitte Bollecker-Stern quotes *Moore International Arbitration*, III, p. 3100. See *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pedone, 1973, pp. 313 and 314.

52 According to information from the Registry, the award appears in French at pp. 615–742, *Reports of International Arbitral Awards*, Vol. II, 1 May 1925. But it has been taken from another source, which remains unidentified. Brigitte Stern notes that the award was pronounced by the arbitrator Max Huber. Max Huber was a President of the Permanent Court of International Justice.

> it was because of the 15-day delay by the owner of the stolen property in reporting the theft that no criminal proceedings were undertaken, considered that the fault on the part of the victim was the reason for, and excused, the conduct on the part of the Spanish Government and precluded the wrongfulness that would otherwise have characterized it had the victim not been at fault.

The similarity between the omission of the ship-owner in the present case and the inertia of the victims dealt with in the cases reported by Brigitte Bollecker-Stern is inescapable. In all three, it was the culpable omission of the victims that constituted the cause of the injury. If they had acted with the expected procedural diligence, the damages would never have materialized.

Therefore, even if confiscation had been illegal for being an unnecessarily harsh sanction, no compensation should have been afforded for the benefit of a ship-owner who could have averted the damages by resorting in due time to the remedies available in the coastal State's legal system.

E The causal link to the costs of repairing the vessel

30. The Tribunal takes the view that Panama is entitled to compensation for the cost of certain repairs to the vessel, regarding these as a direct consequence of an illegal confiscation.[53]

In my view, no costs of repairing the vessel can be considered as connected through a causal link to the confiscation of the vessel. Any damage suffered by the vessel as a consequence of its stay at the port of Bissau between August 2009 and September 2010 resulted from the arrest and consequent detention of the vessel and not from its confiscation. Confiscation is an additional measure, signifying a change in ownership of the ship. But if the ship is simply detained, continuing to belong to the ship-owner, it still cannot leave the port. If the ship and its cargo had not been confiscated, the vessel would still have remained immobilized in the port of Bissau until its release by the detaining authorities. And, excluding recourse to a procedure for prompt release – which the ship-owner wilfully declined to use – only a final decision on a fine and payment of it might have put an end to the criminal proceedings, thus allowing the ship to leave.

53 This Judgment, paras. 434 and 442.

In the event that the ship-owner had been successful in the lawsuit for annulment of the confiscation, the judgment of the Regional Court of Bissau quashing that administrative decision would not have put an end to the detention consequent to the arrest of the ship. The preservation of Penn Lilac's ownership would not have changed the fact that this ship was in detention because of a transgression. And the arrest took place before the confiscation was decided. When the authorities of Guinea-Bissau repealed the decision of confiscation for the sake of the "ties of friendship and cooperation with the Kingdom of Spain in the field of fisheries", they could still have legally converted the sanction of confiscation into one of a fine and maintained the detention until the fine was paid.

There was accordingly no causal link between the confiscation and the damage suffered by the ship due to its one-year stay in a port with a severe climate. This damage is causally linked to the arrest and detention of the ship, which the Tribunal considers to have been legal.

(*signed*) José Manuel Sérvulo Correia