COUNTER-MEMORIAL OF GUINEA-BISSAU

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

M/V "VIRGINA G"

THE REPUBLIC OF PANAMA V. THE REPUBLIC OF GUINEA-BISSAU

CASE N° 19

COUNTER-MEMORIAL OF THE REPUBLIC OF GUINEA BISSAU

28 MAY 2012

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CHAPTER I - INTRODUCTION, JURISDICTION, AND PROCEDURAL ISSUES

I. General Introduction.

1. By its Order 2011/3 dated 18 August 2011, the International Tribunal for the Law of the Sea (hereinafter "the Tribunal" or "ITLOS") fixed the dates for the filing of the Memorial and the Counter-Memorial in the present case. By its Order 2011/8, dated 23 December 2011, these dates were further extended. The Republic of Guinea-Bissau (hereinafter "Guinea-Bissau") submits this Counter-Memorial, pursuant to those Orders, in response to the Memorial of the Republic of Panama (hereinafter "Panama") dated 23 January 2012. 2

2. In accordance with article 62 (2) of the Rules of the Tribunal, Guinea-Bissau sets out in this Counter-Memorial the grounds of facts and law on which its case is based. Guinea-Bissau also responds to the statement of facts and law made by Panama in its Memorial.

II. Procedure.

3. On 3 June 2011, Panama addressed to Guinea-Bissau a written notification instituting arbitral proceedings under article 286 and Annex VII to the 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or "the Convention"). The proceedings were in relation to a dispute, arising from the arrest of the VIRGINIA G by the maritime authorities of Guinea-Bissau in its Exclusive Economic Zone (EEZ) on the 21th August 2009 when the vessel was carrying out an operation to supply fuel to four fishing vessels (RIMBAL I, RIMBAL II, AMABAL I and AMABAL II) (at Latitude 11 48' 0N, Longitude 17 31 6 W).

4. In the same written notification, Panama suggested that the two governments agree to submit the dispute between them concerning the VIRGINIA G to ITLOS through an exchange of letters. In this case the submission of the dispute to ITLOS should be on the following conditions:

a) That the dispute shall be deemed to have been submitted to the ITLOS upon agreement between the two governments and on a date so agreed;

b) That the written and oral proceedings before ITLOS shall comprise a single phase dealing with all aspects of the merits (including damages and costs);

c) That the written and oral proceedings shall follow the timetable set out in a schedule to be agreed by the governments;

d) That ITLOS shall address all claims for damages and costs and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before it.

5. Guinea-Bissau answered by a letter of 29 June 2011 accepting Panama's proposal to transfer the case to ITLOS "whose jurisdiction in this case Guinea-Bissau accepts fully", adding that "the afore-mentioned proposal

and this letter constitute a special agreement between the two Parties for the submission of the case to ITLOS". The proposal was therefore the notification of Panama of 3 June 2011 and not the letter of Panama of 4 July 2011

6. The dispute was, therefore, submitted to ITLOS by Special Agreement in terms of Article 24 of Annex VI of the Convention (Statute of ITLOS) but this Special Agreement is constituted by the notifications of Panama of 3 June 2011 and the letter of Guinea-Bissau of 29 June 2011 and not by the letter of 4 July 2011.

7. On 17 August 2011, consultations were held between the President of the Tribunal and the Parties. In the Minutes of the consultations signed by both parties it was decided that the Memorial of Panama should be filed until 4 January 2012 and the Counter-Memorial of Guinea-Bissau should be filed until 21 May 2012. It was also decided that each Party would appoint a judge *ad hoc*.

8. By Order 2011/3 of 18 August 2011, in accordance with Article 59 and Article 60 of the Rules of ITLOS, the President of the Tribunal fixed the 4 January 2012 as the date for the submission by Panama of its Memorial and the 21 May 2012 as the date for the submission by Guinea-Bissau of its Counter-Memorial.

9. By letter dated 13 December 2011, addressed to the Registrar of the Tribunal, the Agent for Panama appointed Professor Tullio Treves as *ad hoc judge* for Panama in terms of Article 17 (3) and 19 (1) of the Statute of the Tribunal.

10. By letter dated 4 January 2012, addressed to the Registrar of the Tribunal, the Agent for Guinea-Bissau appointed Professor José Manuel

Sérvulo Correia as *ad hoc judge* for Guinea-Bissau in terms of Article 17 (3) and 19 (1) of the Statute of the Tribunal.

11. By Order 2011/8 of 23 December 2011, on the request of Panama, the President of the International Tribunal, having asked the views of Guinea-Bissau, extended the date for the submission by Panama of its Memorial to 23 January 2012 and the date for the submission by Guinea-Bissau of its Counter-Memorial to 11 June 2012.

12. This Memorial, with its accompanying annexes, is submitted in accordance with that Order.

III. Jurisdiction.

13. It appears that in spite of some initial hesitations from both Parties as to the appropriate forum for the settlement of the dispute, the case is treated as having been brought before the Tribunal by means of a special agreement between Panama and Guinea-Bissau, which agreement is reflected in their respective letters dated 3 June 2011 and 29 June 2011.

14. In its notification of arbitration of 3 June 2011 Panama defined the scope of the dispute as follows:

> "The dispute being submitted to arbitration by the Republic of Panama ("Panama") relates to the Panamanian flagged oil tanker *Virginia G*, which was arrested by the authorities of the Republic of Guinea-Bissau (Guinea-Bissau) on 21 August 2009 in the Exclusive Economic Zone, whilst carrying out refueling operations.

The *Virginia G* remained detained at the port of Bissau until 22 October 2010 (for 14 months) and started operating again in December 2010 (16 months after its detention commenced).

Panama claims that in this case Guinea-Bissau breached its international obligations set out in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which breach led to a prejudice being caused to the Panamanian flag and to severe damages and losses being incurred by the vessel and other interested persons and entities because of the detention and the length of the period of the detention".

15. By its letter of 3 June 2011 Panama also proposed to submit the dispute to ITLOS and Guinea-Bissau, by its answer of 29 June 2011, agreed with the "proposal to the transfer the case to the International Tribunal of the Law, which jurisdiction in this case Guinea-Bissau accepts fully".

16. ITLOS has therefore jurisdiction about the case related to the arrest and detention of VIRGINIA G. and all claims arising from the detention and the length of the detention. However, contrary to what Panama asserts, the Tribunal cannot exercise jurisdiction about claims related to the vessel IBALA G.

17. ITLOS has also to consider that Guinea-Bissau signed the Convention at 19 December 1982 and ratified it at 25 August 1986 with the following statement:

"The Government of the Republic of Guinea-Bissau declares that, as regard article 287 on the choice of a procedure for the settlement of disputes concerning the interpretation or application of the United Nations Convention on the Law of the Sea, it does not accept the jurisdiction of the International Court of Justice and consequently will not accept that jurisdiction with respect to articles 297 and 298".

IV. Language.

18. Guinea-Bissau accepts that the official languages of the Tribunal are English and French. As most of the supporting documents are in Portuguese, Guinea-Bissau has provided translations in English of the relevant documents or extracts therefrom.

19. Guinea-Bissau certifies that the translations submitted are accurate. Guinea-Bissau will, however, furnish further translations or clarifications as may be required by the Tribunal.

V. Supporting Statements.

20. Supporting statements have been prepared by six individuals who were witnesses to this dispute. The supporting statements, with the respective translations to English, are attached as **Annexes 1 to 6** as follows:

(a) **Annex 1** Statement of **João Nunes Cá,** Inspector of fishing activitites.

(b) **Annex 2** Statement of **Pedro Cardoso Nanco,** Chief Inspector of maritime operations

(c) **Annex 3** Statement of **João Pedro Mansamba,** Observor of fishing activitites.

(d) **Annex 4** Statement of **Carlos Nelson Sanó,** Administrative employee and former inspector on fishing activities;

(e) **Annex 5** Statement of **Artur Silva,** Minister of the Government of Guinea-Bissau.

(f) **Annex 6** Statement of **Djata Ianga,** Navy Pilot.

21. Guinea-Bissau reserves its right to submit statements from addition persons and/or to request more detailed statements from the above mentioned persons for submission to the Tribunal, as may be required.

VI. Copies.

22. On instruction of the Registrar of the Tribunal, Guinea-Bissau has provided one original Memorial, one certified copy of the original Memorial and sixty five copies, in terms of Articles 64 and 65 of the Rules of the Tribunal and Guideline 10 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

23. Guinea-Bissau will furnish additional Copies as may be required by the Tribunal.

CHAPTER II- OBJECTIONS TO THE ADMISSIBILITY OF THE CLAIMS OF PANAMA

I. Guinea-Bissau's right to contest the admissibility.

24. Having accepted that the Tribunal has jurisdiction, it does not necessarily follow, however, that the claims advanced by Panama are automatically admissible for the purpose of the present proceedings. The distinction between the admissibility of State claims before an international tribunal from the jurisdiction on the one hand and the merits on the other hand is generally recognised in international law.

25. Guinea-Bissau submits that is not precluded from raising objections to admissibility of the claims of Panama by article 97, paragraph 1, of the Rules. As the Tribunal decided in the M/V Saiga No.2 Case:

> "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"[1].

26. Guinea-Bissau advances the following arguments for the afore mentioned submission:

First, in the Special Agreement concluded by the exchange of letters, Guinea-Bissau did not wave any objection as to the admissibility of the claims, neither was there any reason for any such waiver.

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[1] *The M/V Saiga (no.2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, at para. 53.

Second, the purpose of the Special Agreement, namely choosing the proceedings before the Tribunal instead of arbitration in accordance with Annex VII for the settlement of the dispute, excluded any such waiver. In fact, in the letter of 29 June 2011 Guinea-Bissau agreed with Panama's "proposal to *transfer the case* to the International Tribunal" (emphasis added). Hence the dispute as a whole has been transferred to the Tribunal while no waiver as to any objection to the admissibility was agreed.

Third, in the President's consultations with the representatives of the parties, held on 17 August 2011 at the premises of the Tribunal "both Agents agreed that the written pleadings should start with a memorial to be submitted by Panama followed by a counter memorial to be submitted by Guinea-Bissau".

27. Therefore, it is a right of Guinea-Bissau to submit certain procedural issues relating to the admissibility of the claims of Panama in its Counter-Memorial, which is its first written pleading. As it will be elaborated in the following, Guinea-Bissau contests in particular:

1) the nationality of the VIRGINIA G;

2) the right of diplomatic protection concerning foreigners;

3) the lacking exhaustion of local remedies.

II. Objection to the admissibility of the claim relating to the nationality of the *VIRGINIA G.*

28. According to submission no. 3 in its Memorial (p. 81), Panama claims that 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. Guinea-Bissau alleges that Panama claims are not admissible because of the missing

"genuine link" (article 91 (1) of the Convention) between VIRGINIA G and Panama.

29. Pursuant to article 58(1) of the Convention the flag State enjoys the freedom of navigation referred to in article 87 in the exclusive economic zone. Article 58(2) refers additionally to articles 88 to 115 and other pertinent rules of the Convention. Article 90 provides in particular the right of every State "to sail ships flying its flag" and, concomitantly with this, according to article 92(1), first sentence, the ship shall be subject to the "exclusive jurisdiction" of the flag State in that zone. The right of navigation (article 90) and the status of the ship (article 92(1)) relate only to ships having the nationality of the flag State. Pursuant to article 91(1), second sentence, ships have the nationality of the State whose flag they are entitled to fly. The provision proceeds in its third sentence:

"There must exist a genuine link between the State and the ship".

30. The 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". In this respect, the function of the genuine link is to establish an international minimum standard for the registration of ships, certainly an important function in a time of increasing numbers of open registers.

31. From the conception of the "genuine link" 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. In the case of a bareboat charter, *mutatis mutandis,* control is necessary over the charterer or operator. This results from several provisions of the Convention: for instance, article 94(4)(a) obliges the flag State to survey the ships flying its flag. Surveying the ships by a qualified surveyor in the flag State and abroad is a necessary but not a sufficient condition for an effective exercise

of the flag State's jurisdiction and control. In order to take action necessary to remedy the situation if, for example, a ship flying its flag would not conform with its rules and regulations on manning of ships, labour conditions and training of crews as provided in article 94(3), the flag States must have jurisdiction over the owner or operator of the ship as well. Otherwise its administrative and/or criminal sanctions, if necessary, would be practically ineffective.

32. Moreover, the duties of the flag State set forth in article 94 are not the only ones of interest in this context. The Convention provides in article 217 additional obligations in environmental matters, to which the flag State can only live up if it is exercising effective jurisdiction and control over the ship owner or operator as well: the flag State shall provide for the effective enforcement of rules, standards, laws and regulations concerning the protection of the marine environment, "irrespective of where a violation occurs" (article 217(1), second sentence). In case of a violation it shall, where appropriate, institute proceedings (article 217(4)) including penalties (article 217(8)), or enable such proceedings upon request of another State (article 217(6)). Again jurisdiction over the Master and crew of the ship, especially if they are foreigners like in the case of the VIRGINIA G appears by no means sufficient for the exercise of these obligations.

33. Every shipping register has to conform with certain basic conditions of the genuine link. According to what has been mentioned before with respect to the legal obligations of the flag State under articles 94 and 217 of the Convention, 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. Nevertheless international law, no doubt, leaves it to the flag State to determine the basis of this jurisdiction, which can be, for example, nationality or residence or domicile of the owner or operator of the ship. But it is not possible that no link exists all between the ship and the flag State.

34. This is confirmed by the 1986 United Nations Convention on Conditions for Registration of Ships[2], which was adopted under the auspices of UNCTAD in order to ensure or strengthen the genuine link and in order to exercise effective jurisdiction over ships. Although not yet in force, this UN Convention is an important example for the general view that the flag State must exercise effective jurisdiction and control not only over the ship, but also over its owner or operator.

35. In fact, article 7 of the UN Convention demands the participation by nationals in the ownership and/or manning of the ship, expressing that

> "a State of registration has to comply either with the provisions of paragraphs 1 and 2 of article 8 or with the provisions of paragraphs 1 to 3 of article 9, but may comply with both".

36. In relation to the ownership, art. 8 (2) of the UN Convention states that "the laws and regulations of the flag State shall include appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. These laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag".

37. In relation to manning of the ship, Art. 9 (1) of the UN Convention states that "subject to the provisions of article 7, a State of registration, when implementing this Convention, shall observe the principle that a satisfactory part of the complement consisting of officers and crew of ships flying its flag be nationals or persons domiciled or lawfully in permanent residence in that State".

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[2] UN Doc. TD/RS/CONF/23 (13 March 1986); also in: International Legal Materials, Vol. 26 (1986), p. 1229.

38. Neither of these conditions was met by VIRGINIA G. In fact this vessel belongs to Penn Lilac. This company, although incorporated in Panama has to be considerer as a Spanish company, as its head office and effective place of management are in Sevilla, Spain, as it is related by the Instituto Marítimo Español[3], and in the maritime websites[4].

39. Besides that there is not a single member of the crew who is of Panamanian nationality or is domiciled in Panama. They are all from Cuba, Ghana and Cape Verde.

40. As stated by Panama in paragraph 162 of its Memorial and it is confirmed by its Annex 29, when the vessel was arrested by the authorities of Guinea-Bissau, Manuel Samper informed the P & I Club of Spain and not the one of Panama.

41.Therefore it misses the genuine link between VIRGINIA G and Panama.

42. In 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. This results by analogy with the rule of Article 92(2) of the Convention, which states:

> "A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality".

43. As a procedural consequence the other State may hence contest an asserted violation of this right as inadmissible in a dispute submitted to the

[3] See http://www.ime.es/directorio_maritimo/actividad.php?id_actividad=17&p=9
[4] See for instance http://www.shipspotting.com/gallery/photo.php?lid=486426 and http://www.portworld.com/companies/details/9278/

Tribunal, because only such claims are admissible in the pending proceedings before the Tribunal, which have a valid basis in international law.

44. Contrary to what Panama asserts, in the M/V SAIGA Case No. 2 the Tribunal considered "that the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties"[5]. Guinea-Bissau submits evidence that the VIRGINIA G. cannot be considered of Panamanian nationality.

45. As Brownlie refers:

> "It is possible to postulate a general principle of *genuine* link relating to the *causa* for conferment of nationality (and converse for deprivation), a principle distinguishable for that of effective link"[6].

46. Guinea-Bissau alleges therefore 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. In fact, 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.

47. Panama is in fact very well known for accepting the registry of any ship without asserting the existing of a link between the ship and the State. As we can see in the Merchant Marine Circular no 5 of the Panama Maritime Authority (**Annex 9**) there is no verification of whatsoever link between Panama and ships that are registered under Panama's flag.

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[5] *The M/V Saiga (no.2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, at para. 66.

[6] BROWNLIE, *Principles of Public International Law*, 6th ed., 2003, p. 388.

48. This is also related in press releases, such as the one of PRLog of 22MAY08 (**Annex 10**) in which the registry of ships in Panama is described as following:

> "The panama register of ships will also allow ships to operate international trade without taxation as its only territorial and will not tax the income of ships involved in international navigation or trade. The panama ship register will not discriminate the citizenship or nationality of anyone willing to register a vessel under the Panama Flag.
>
> Once a ship owner uses the panama register of ships, it will be able to use a mechanism called dual panama ship register. This ship register method will allow a foreign ship that has a previous registration of two years in a foreign country to register in the panama ship register at the same time without a cancellation of the registration of the previous country. This panama ship register system is also possible to be applied in the opposite way. This is only allowed with a certification of consent that originally had the register of ships or ships.
>
> The panama ship register dual system can be of great advantage for shipping companies, ship owners and merchant shipping companies who have no ship register under the open registry.
>
> It is important to mention other great advantages of the panama register:
>
> a) there is no minimum tonnage requirement for vessel registration allowing any type of vessel to use the panama register of ships;
>
> b) the panama ship register allows the registration under a Panamanian corporation. This will give protection to the vessel and anonymous ownership. You will be able to use a bulletproof asset protection structure (corporation + foundation) to register and ensure that your vessel's income and ownership will always be safe and anonymously protected;
>
> c) Panama register of ships done by the use of a Panamanian Corporation will allow changing ownership with ease and will not pay taxes on the sale! This will basically be the sale, trespass of the shares

> and name of the corporation to a new owner and can be done in a few hours".

49. Therefore Panama register of ships is a typical case of "flag of convenience" which practice and dangerous effects to the economy of coastal States, environment and maritime resources, are very well known and reported by several international entities, such as FAO[7], WWF[8], and ITF[9].

50. Specially this practice has very pernicious environmental effects, as stated by Franz Fischler, former European Union Fisheries Commissioner:

> "The practice of flags of convenience, where owners register vessels in countries other than their own in order to avoid binding regulations or controls, is a serious menace to today's maritime world".

51. As reported by independent sources, 86% of the ships with Panamanian flag belong to foreign companies (4,949 of 5,764)[10].

III. Objection to the admissibility of the claim relating to the right of diplomatic protection concerning foreigners.

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[7] ARIELLA D'ANDREA, *The "Genuine link" concept in responsible fisheries: legal aspects and recente developments*, 2006, FAO Legal Papers Online # 61, available at www.fao.org/legal/prs-ol/lpo61.pdf

[8] MATTHEW GIANNI / WALT SIMPSON, *The Changing Nature of High Seas Fishing. How flags of convenience provide cover for illegal, unreported and unregulated fishing*, 2005, availabe at http://www.wwf.org.uk

[9] INTERNATIONAL TRANSPORT WORKERS' FEDERATION, *Flags of Convenience Campaign*, available at http://www.itfglobal.org/flags-convenience/index.cfm

[10] MATTHEW GIANNI, *Real and Present Danger. Flag State Failure and Maritime Security and Safety*, 2008, p. 6.

52. In its Memorial (paragraphs 15-21) Panama claims that it has *locus standi* in this action against Guinea-Bissau within the framework of diplomatic protection, invoking the UN Draft Articles on Diplomatic Protection.

53. However the framework of diplomatic protection does not give Panama *locus standi* referring to claims of persons or entities that are not nationals of Panama.

54. In fact Article 1 of the (UN) Draft Articles on Diplomatic Protection expressly states that

> "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State *to a natural or legal person that is a national of the former State* with a view to the implementation of such responsibility" (emphasis added).

55. Article 18 of the Draft Articles on Diplomatic 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.

56. Contrary to what Panama asserts, 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.

57. Besides that Panama itself states (Memorial paragraphs 65-68) that Penn Lilac entered into an agency commission agreement with Gebaspe SL, a Seville-based Spanish Company (as Penn Lilac) and Gebaspe SL chartered the ship to Lotus Federation, an Irish company.

58. As in this case there is not a single person or entity related to the vessel VIRGINIA G which is of Panamanian nationality, Panama is not entitled to present claims for damages in respect of anyone involved in this case.

59. No State may claim protection of persons in international law who are not its own nationals. In the case pending on the merits before the Tribunal, Panama asserts protection before the Tribunal for all crew's members and for the owners of ship and cargo. It is undisputed here that none of these persons are nationals of Panama.

60. In this case there were other States such as Spain and Cuba that claimed diplomatic protection for the crew's members who are their nationals and demanded the release of the ship, which is a clear demonstration that Panama has nothing to do with this case.

61. Panama is therefore not entitled to bring this action against Guinea-Bissau within the framework of diplomatic protection.

IV. Objection to the admissibility of the claim relating to lacking exhaustion of local remedies.

62. Guinea-Bissau further 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.

63. The requirement of the so-called "local remedies rule" is provided in article 295 of the Convention which reads:

Article 295

Exhaustion of local remedies

> "Any dispute between States Parties concerning the interpretation or application of this Convention may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law."

64. 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 on the merits of the dispute.

65. Panama has alleged the following claims in the interest of individuals or private entities contending the violation of these rights and ensuing liability for damages or compensation for loss:

a) The right of Panama and the VIRGINIA G "to enjoy freedom of navigation and other internationally lawful uses of the sea" (Memorial, page 77, submission 4).

b) Guinea-Bissau used excessive force in boarding and arresting the VIRGINIA G (Memorial, page 77, submission 10).

c) 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 (Memorial, page 77, submission 14).

d) Guinea-Bissau is to pay in favour of Panama, the VIRGINIA G, her owners, crew and all person and entities with an interest in the vessels's operations (including the IBALLA G), compensation for damages and

losses caused as a result of the aforementioned violations (Memorial, page 78, submission 15).

66. Although 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 responsability of the State. As the owner of the ship brought an action before the court of the Bissau with the same foundation of these proceedings, it is clear that the local remedies are not exhausted.

67. In fact, there is no violation of the freedom of the ship to navigate according to international law if the ship is arrested for violation of the coastal State rights in the EEZ. If there are violations of the rights of private entities as a result of this action, these entities should have to bring independent actions before the State's courts.

68. The same happens to the cargo: its owner is not identical with the owner of the VIRGINIA G. As Panama expressly states in its Memorial (para. 68) the cargo belongs the Lotus Federation, an Irish Company. It had been under the flag State's jurisdiction as long as it remained on board the ship. But this link had been severed before a claim to compensation could arise, when the gas oil was discharged in the Port of Bissau on 30 November 2009. The administrative order to discharge the gas oil in Bissau was issued under the territorial jurisdiction of Guinea-Bissau and could be impeached there, as it was a previous court order against that discharge.

69. Although the VIRGINIA G was not voluntarily in the Port of Bissau, Guinea-Bissau could exercise its territorial jurisdiction over the ship, its crew and the cargo while it was in port because, as it is alleged and will be stated below, the detention of the ship was in conformity with international law.

70. Besides that, taking the value of the gas oil into account, the alleged violation of the flag State's right to navigation is by no means preponderant to the claim concerning the cargo. Therefore the claim to compensation concerning the gas oil cargo is separate and independent from the Panama's claims relating to its right of navigation and its jurisdiction over the ship. It can be based on a direct breach of internal law, as it was dully exercised before the courts of Guinea-Bissau.

71. The local remedies rule is not excluded in this case by the absence of a link between the ship, its crew's members and cargo, on the one hand, and the coastal State, on the other hand. In this case it is clear that link exists as a temporary injunction against the confiscation of the vessel and the cargo was brought before the Bissau court and issued by it.

72. In fact, 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. The VIRGINIA G was chartered especially for bunkering activities off the coast of West Africa, including bunkering in the mentioned zones of Guinea-Bissau, and its gas oil cargo should serve, and actually did serve, this purpose.

73. The ship did not merely sail in transit through these maritime zones but entered them in order to conduct certain activities of an economic nature within the EEZ of Guinea-Bissau. By conducting these activities the ship has established a voluntary, conscious and deliberate connection with the coastal State and therefore can be subject to its jurisdiction.

74. In the light of the coastal State's jurisdiction over its exclusive economic zone, the presence of the ship in its territorial sea or internal waters deems to be no longer necessary in today's international law for the ship to be subject to the jurisdiction of the coastal State. In fact, if a foreign oil tanker comes voluntarily and intentionally to the exclusive economic

zone for economic purposes, it has to be considered that the tanker has established a sufficient link with the coastal State.

75. Guinea-Bissau claims therefore that the owner of VIRGINIA G did not exhaust the local remedies available in Guinea-Bissau. In fact, it has obtained a temporary injunction against the confiscation of the vessel and cargo and there is still an action pending in the court of Bissau relating to this situation. The owner of the cargo could also impeach the decision of confiscation of the oil cargo in the courts of Guinea-Bissau. Therefore it is clear that local remedies are not exhausted according to Article 295 of the Convention.

CHAPTER III- BACKGROUND.

I. Bunkering activities.

76. Guinea-Bissau considers the description of the economic activity of bunkering, given in paragraphs 32 and following of the Memorial of Panama, to be in general correct. Various issues must however be added.

77. Firstly, one must stress that the activity of bunkering is an exclusively economic activity, there being an international association for the representation of its business members, the International Bunker Industry Association[11].

78. Furthermore, as this very organization recognises, this activity has numerous environmental costs for the coastal State, dramatically affecting the marine environment, the quality of the air and the quality of life of the coastal populations, who are affected by the resulting pollution.

79. Inasmuch 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. The coastal State naturally has the right to adopt measures necessary for the protection and conservation of its resources, even having an obligation to protect the environment (art. 56, no. 1, and art. 192 and following of the Convention).

[11] See http://www.ibia.net

80. For this reason, 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).

81. But besides this, the practice of bunkering allows much more intensive fishing than that which is normal. In fact, as David Anderson writes:

> "(...) bunkering and supply on the fishing grounds increases the catching efficiency of fishing vessels. In a typical situation a fishing vessel breaks off from fishing for a short time, receives bunkers and other supplies and immediately resumes fishing in the same EEZ. The fishing vessel is relieved of the need to make a voyage to and from port, e.g., in the coastal state. It avoids the need for navigation and intensifies its fishing effort. In that sense, from the perspective of the coastal state, bunkering has a closer connection with fishing and the overall management of the fishery than with navigation"[12].

82. The regulation of the activity of bunkering is also included in the right of the coastal State to regulate the capture of biological resources in its EEZ, according to art. 61 of the Convention.

83. Similarly, 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".

84. It 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, a practice which is common to the whole of the African sub-region in which Guinea-

[12] DAVID ANDERSON, *Modern Law of the Sea. Selected Essays*, Leiden, Koninklijke Brill, 2008, pp. 224-225.

Bissau is included, the international practice of States being an important element in interpreting the Convention.

85. The fact that Guinea-Bissau does not enjoy the conditions necessary for the fuelling of vessels in its ports does not preclude its right to control the manner in which this operation is carried out in its EEZ, for the reasons given above.

II. Guinea-Bissau, its fisheries industry and its maritime and fisheries laws.

86. Relating to paragraphs 44 and following of the Memorial of Panama, the following facts must also be added:

87. As results from the Country Brief of the World Bank[13], "Guinea-Bissau **is one of the poorest countries in the world**, ranking 164 out of 169 countries on the United Nations Human Development Index 2010. Guinea-Bissau has a population of about 1.6 million, with an economy based primarily on farming and fishing activities, which represent about 46 percent of GDP. Agriculture generates 80 percent of employment and 90 percent of exports (primarily through cashew nuts, the main export). The country has poor infrastructure and weak social indicators, and more than two-thirds of the population live under the poverty line".

88. However, this Country Brief also states that "**the country has the natural resources and the geography to grow at a reasonable rate.** It has an abundance of high-quality land and favorable rainfall. Its rich

[13] Available at http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/GUINEABISEXTN/0,,menuPK:356680~pagePK:141132~piPK:141107~theSitePK:356669,00.html

mineral deposits, exotic bio-diversity, and fishing and tourism potential could provide diverse sources of income".

89. Due to this situation, revenue resulting from fishing activity, the preservation of its fishing resources, and the protection of the marine environment are absolutely essential for the country, and it should be pointed out that the *Bijagós* Archipelago is classified as a Biosphere Reserve by UNESCO.

90. Precisely for this reason, Guinea-Bissau, in art. 3, no.1, no.2 *in fine* and no.3, b) and c), as well as art. 23 of its Decree-Law 6A/2000 of 22AUG200, established the qualification of the activity of bunkering as a fishing-related operation, a situation which is entirely in conformity with the legislative practice of the region.

91. The qualification of the fuelling of fishing vessels as a fishing-related operation is indeed to be found in art. 3 c) of the *Code de la Pêche Maritime* of Guinea-Conacry, approved by Law 1/95/13/CTRN, dated 15MAI95 (**Annex 11**), art. 5 c) of the *Code de la Pêche Maritime* of Senegal, approved by Law no. 98/32, dated 14APR98 (**Annex 12**), and art. 4 c) of the *Code des Pêches* of Mauritania approved by Law 2000-25, dated 24JAN00 (**Annex 13**).

92. This practice is in fact fully recognised by scholars of International Law, who expressly reject that a flag state may dispute this qualification.

93. In fact, as David Anderson writes:

> "(...) a support vessel which is fulfilling its purpose of supporting another vessel is impressed *pro tanto* with the characteristics of the supported vessel's activity at the material time. In this perspective, a tanker whilst it is bunkering a fishing vessel engaged in fishing in the

EEZ is impressed with the recipient vessel's piscatorial characteristics"[14].

94. And the author adds that:

"(...) in the light of recent trends it appears unlikely, in all the circumstances, that legislation requiring the prior consent of the coastal state for the bunkering of fishing vessels engaged in fishing in the EEZ would be found *a priori* to go beyond the scope of the sovereign rights and jurisdiction of the coastal state recognised in articles 56, 61, 62 and 73 of the Convention. The ordinary meaning of the term "sovereign rights" in its immediate context is wide. There exists a body of state practice, in forms of legislation and the absence of protest against the application of such laws, which supports the interpretation"[15].

95. Contrary to what is stated by Panama, fishing-related operations also obey the provisions in Decree 4/96, dated 02SEP96 (**Annex 14**), which establishes the general policy principles on the use of national halieutic resources.

96. Art. 39 of this legislation states the following:

Article 39

(Logistical support and transhipment operations).

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 transhipment 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

[14] See DAVID ANDERSON, *op. cit.*, p. 226.
[15] See DAVID ANDERSON, *op. cit*, p. 226.

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 transhipment 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 transhipment of catches.
3. In no event may the beneficiaries of operations of logistical support or transhipment 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 transhipment of catches take place in a defined area and at a given time and in the presence of qualified maritime enforcement officers.

97. 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.

98. Furthermore, pursuant to art. 39, no. 2 of said legislation, authorizations must be requested in writing, with all of the information mentioned above, and the authorization must take the form of a written document.

99. Finally, according to art. 23, no.2 of Decree-Law 6-A/2000, such authorization is subject to a consideration, it therefore being evident that the ship would have to have a receipt for the payment of the authorization.

CHAPTER IV- STATEMENT OF RELEVANT FACTS.

100. In this section, Guinea-Bissau sets out its version of facts, as they effectively occurred.

101. Guinea-Bissau reserves all its rights to introduce and rely on any new facts not mentioned in this Counter-Memorial, as may be required to be introduced and developed throughout the process of this case.

102. The facts as described in the Memorial of Panama in paragraphs 59-250 have to be amended as follows:

103. Penn Lilac Trading, S.A., although incorporated in Panama has to be considered as a Spanish company, as its head office and effective place of management are in Sevilla, Spain, as it is related by the Instituto Marítimo Español and in the maritime websites.

104. The vessel VIRGINIA G, although registered in Panama, may also have a registration in another country. In fact, the dual Panama ship register method will allow a foreign ship that has a previous registration of two years in a foreign country to register in the Panama ship register at the same time without a cancellation of the registration of the previous country.

105. As the ship was built in 1982, she surely had previous registrations before being registered in Panama in 2007, naturally to have a flag of convenience.

106. After being built, the ship VIRGINIA G had a lot of different names. In fact, she was first called KOTOBUKI MARU until 16 July 1995, then BLUE WAVE until 12 My 1999, then VIRGINIA DEL CRISTO until 2 July 1999 and finally VIRGINIA G since 2 July 1999 and there is a reference to a registration in the Russian Maritime Shipping Register[16].

107. As Penn Lilac Trading, S.A, has to be considered as a Spanish company, the owner and the manager of the ship are not Panamanians.

108. There is not a single member of the crew who is of Panamanian nationality or is domiciled in Panama. They are all of Spanish, Cuban, Ganese and Cape Verdean nationality.

109. Guinea-Bissau ignores the existence of any agency commission agreement between Penn Lilac and Gebase SL or any other entity. Annex 11 of the Memorial of Panama is not evidence of such an agreement.

110. Guinea-Bissau considers that the situation of the vessel IBALLA G is totally strange to these proceedings. As Annex 12 of Panama states, IBALLA G belongs to another company, Penn World Inc. Panama has not furnished any evidence whatsoever relating to the fact Penn Lilac has acquired this company, and in any case, this fact is irrelevant, as well as the fact that the ship was bareboat chartered to Penn Lilac.

111. The existence of a charter party of the VIRGINIA G. and IBALA G. between Gebaspe SL and Lotus Federation is totally irrelevant for this case. Guinea-Bissau is totally unaware of these companies, has nothing to do with such contract, and was never notified of its existence and content.

[16] See http://www.shipspotting.com/gallery/photo.php?lid=486426

112. In any case, the contract listed as Annex 13 of the Memorial of Panama does not allow for any payment to Penn Lilac as it is specifically stated therein that it will cease with the immobilization of the ship (clause 17), and so it ceased to be in force with the arrest of the VIRGINIA G, which makes its invocation irrelevant.

113. Guinea-Bissau is totally unaware if the vessel VIRGINIA G did or did not violate the laws of other coastal States of West Africa. But, if it did not, this could have been due to having managed to elude the enforcement of potentially illegal activities by these States or even by the authorities of Guinea-Bissau themselves.

114. As mentioned above, the fuelling of fishing vessels is considered in the whole region in which Guinea-Bissau is included to be a fishing-related operation, thereby subject to prior authorization of the authorities, and the national authority of Guinea-Bissau is the member of Government responsible for Fisheries (art. 23, no. 1 of Decree-Law no. 6-A/2000, dated 22AUG and art. 39, no. 1, *in fine* of Decree-Law no. 4/96, dated 02SEP).

115. The practice that may have been followed by the vessel VIRGINIA G is its own affair. As underscored above, 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.

116. If the vessel does not obtain the legally required authorization, it is naturally subject to the risk that the authorities may apply the sanction allowed for in the law, which consists precisely in the arrest and confiscation of the vessel.

117. The ship VIRGINIA G was perfectly aware of the authorizations that it should have, so much so that it requested these authorizations on two

occasions and operated under them in May and June of 2009 to the benefit of the vessels of the company *Afripêche*, but did not, however, obtain the same authorization in August (See the Annexes 42 and 43 of the Memorial of Panama).

118. The fact that there were fishing observers from FISCAP on board the recipient vessels is irrelevant. Fishing observers who are on fishing vessels cannot perform enforcement operations, a legal competence of FISCAP's inspectors, the only entities competent to perform enforcement activities.

119. The fishing observers cannot draw up an official notice of a fishing violation, and consequently they cannot arrest any vessel for carrying out illicit fishing (art. 47, no. 2 of Decree no. 4/96, dated 02 SEP). Their basic function on board is to observe if fishing is undertaken within the boundaries of the ship's license (art. 48 of Decree no. 4/96). If they become aware of a violation committed by the vessel, they merely take note of the fact, and may use the vessel's communication systems to communicate with FISCAP's land service (art. 48 of Decree no. 4/96). Based on this information FISCAP may order the vessel to come into port for inspection purposes or organise, in the event of resistance to the order to dock, an enforcement mission at sea led by an inspector. At the end of their period of work on board the vessel, the maritime observer draws up a travel log, whose contents may be used as means of proof in the event of administrative or judicial proceedings for fishing violations (art. 47, no. 2 *in fine* of Decree no. 4/96).

120. On the other hand, FISCAP's inspectors are enforcement officials who perform routine operations at sea. They have the power to draft official notices of fishing violations and to arrest a vessel in cases of founded suspicion thereof (art. 37, no. 2; art. 40, no. 1, a); art. 41 and 42 of Decree-Law no. 6-A/2000).

121. Guinea-Bissau totally rejects and considers unacceptable the affirmations by Panama made in paragraphs 83 to 95 in its Memorial. Panama should recall that suspicions and rumours are not presented before the courts but only facts, it being unacceptable to make accusations without any proof, exhibiting only press cuttings.

122. In relation to the situation of the vessels AMABAL I and AMABAL II, these were indeed arrested for violations related with irregularities in the provision of fuel, but they had valid fishing licences and their violation was therefore much less serious than that committed by the VIRGINIA G, an oil tanker that sailed to the waters of Guinea-Bissau's EEZ to sell fuel to fishing vessels without being authorized for such purpose.

123. In any case, a fine of 150,000 USD was imposed on each of the fishing vessels AMABAL I and AMABAL II, as soon as the violation was determined, with the vessels being arrested while the Guinean authorities dealt with the respective proceedings, having eventually decided to acquiesce to the request presented by the Embassy of Spain, due to the good cooperation relations between Guinea-Bissau and the Kingdom of Spain in fisheries

124. The release of the vessels only took place on 28AUG09, after the decision of the Interministerial Maritime Enforcement Commission dated 27AUG, following the request from the Ambassador of Spain (minutes. no. 10/CIFM/09, as **Annex 15**).

125. In these minutes it is expressly stated that "with regard to the request of the Ambassador of the Kingdom of Spain concerning the release of the fishing vessels AMABAL I and AMABAL II, arrested for committing a serious fishing violation, the CIFM said that it upheld its previous decision, i.e. to impose a fine of USD 150,000 per vessel", although, in the meantime, the vessels eventually left without paying the fine, due to the Ambassador's insistence.

126. The accusations levied by Panama against the previous Minister of Fisheries, Carlos Musa Baldé, do not make any sense, it being certain that, as stated in **Annex 15**, the decision to release the vessels was up to the Interministerial Maritime Enforcement Commission, in a meeting where he was not present as he was out of the country at the time and where he was replaced by the Minister of National Defence, Artur Silva (cf. his statement in **Annex 5**), the only grounds for this decision being the request by the Ambassador of Spain.

127. The statement presented by Panama as Annex 4 does not constitute proof of any act performed by the Minister of Fisheries, as the deponent merely alleges third party statements which are not produced, and even so states that said third parties would only have contacted a supposed intermediary, Hamadi Busarai Emhamed, former honorary consul of the Kingdom of Spain in Guinea-Bissau and head of the agency *Bijagós*, which is a private agency, un-related to the State of Guinea-Bissau.

128. As is obvious, no third party crime can be ascribed to the State of Guinea-Bissau that has laws and courts to curb such behaviour, it being the responsibility of injured parties to file criminal charges.

129. In accordance with the rules in force in Guinea-Bissau no payments relating to revenue from fishing authorizations may be made to entities other than the Treasury. As all fishing operators know, the Treasury has an account with the BCEAO-Central Bank of West African States, into which said revenue must be paid.

130. It is true that the Public Prosecutor Service of Guinea-Bissau investigated various government heads, which only demonstrates that Guinea-Bissau's criminal investigation institutions function normally and that the shipowner of the VIRGINIA G could have filed criminal charges.

131. The Public Prosecutor Service's inquiry has nothing to do with the VIRGINIA G. case described by Panama, relating rather to a variety of different accusations, such as illegal granting of fishing licences and embezzlement of public funds. This is in fact mentioned in the news attached by Panama as Annex 15, reference to the oil tanker VIRGINIA G being solely found in statements made by its owner, which are not credible.

132. Although the inquiry did involve custody of some officials, which lasted for a week, it did not lead to proof of any violation committed by anyone. Minister Carlos Mussa Baldé was never accused. Cirilo Vieira was tried and acquitted. Hugo Nosoliny Vieira and Malai Saná await trial in freedom.

133. In relation to vessels belonging to the Spanish company *Balmar Pesquerias de Atlântico*, the AMABAL I, AMABAL II, RIMBAL I and RIMBAL II, it should be stated that the fishing vessels AMABAL I and AMABAL II fly the flag of Mauritania and not of Spain, even though all of their crew is Spanish.

134. Guinea-Bissau is totally ignorant of the relations described in Annex 16 of the Memorial of Panama, while Annex 17 of this Memorial is a simple *pro forma* invoice relating to the purchase of diesel, which, besides being incorrectly dated 2008, refers to its delivery in Bissau. Regarding the documents added by Panama in Annex 18 of its Memorial, these are dated SEP09 and are thus subsequent to the arrest of the vessel VIRGINIA G, and cannot be used to prove the facts alleged by Panama.

135. Even based on the assumption that the date of delivery stated on the invoice is 15AUG09, we fail to understand why it is that the delivery took place many days later and not in Bissau, but in the EEZ of Guinea-Bissau, nor are we told what the vessel was doing in this EEZ for so many days,

and how it could intend to carry out fuelling operations in the EEZ of Guinea-Bissau without advising the date thereof to the authorities.

136. Contrary to what Panama states, it is completely false that the oil tanker VIRGINIA G ever had any authorization to perform the fishing-related operation that it did, neither do the documents attached as Annexes 19 and 20 to the Memorial of Panama demonstrate this, said correspondence being incomplete and therefore deceptive.

137. In fact, Panama's Annex 19 is nothing more than a reply to a request from the fishing vessels themselves to be fuelled, this being a request that they must make before the fuelling procedure.

138. As set out in Panama's Annex 19, this fuelling was authorised, but conditional to the coordinates and the name of the supply vessel being advised, said vessel naturally requiring a license to perform this activity.

139. As soon as he received the reply from the fishing vessel, attached by Panama as Annex 20 and stating that the fuelling vessel was the VIRGINIA G, the head of FISCAP made a note dated 20/08/09 in this correspondence (**Annex 16**), which says the following:

> "Noted. It must further be determined whether the vessel in question holds the Related Operation authorization for the sale of fuel in the EEZ ".

140. Precisely for this reason a letter was immediately sent on 20AUG09 (**Annex 17**), 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*"

141. This correspondence never received a reply, and the vessel VIRGINIA G proceeded to supply fuel without having the due fishing-related authorization, issued by the Minister of Fisheries, pursuant to art. 23 of Decree-Law 6-A/2000, which it knew it needed to have, given the fact that it had previously operated in the EEZ of Guinea-Bissau with the required licences - which is sufficiently proven in documents attached by Panama as Annexes 42 and 43.

142. Precisely for this reason, as stated by João Nunes Cá (**Annex 1**) as soon as the inspectors boarded the vessel, the captain thereof candidly acknowledged that he did not have the necessary authorization to perform the operation.

143. Guinea Bissau is totally unaware of the activity of the VIRGINIA G before having made the planned operation and does not consider it relevant for these proceedings, Panama manifestly not providing however any consistent proof of what it states.

144. If the VIRGINIA G in AUG09 was indeed fuelling other ships in Guinea-Bissau without having obtained the necessary authorization, this would demonstrate the existence of other violations, the only one for which the respective sanction was applied was however the fuelling of the AMABAL II.

145. The description of the facts given by Panama is completely false and is denied both by the statements of Inspector João Nunes Cá (**Annex 1**) and of Chief-Inspector Pedro Cardoso Nanco (**Annex 2**), and also by the photographs taken upon boarding the vessel (**Annex 7**).

146. 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.

147. Panama cannot claim that in a enforcement operation on the high sea the inspectors should not resort to military personnel armed with AK 47, insofar as they perform risky enforcement operations on foreign vessels conducting illegal activities and, at times, even criminal ones in the EEZ, which can threaten the physical integrity of the inspectors.

148. There have been cases in Guinea-Bissau of enforcement inspectors who boarded a vessel unarmed and who were attacked by their crew and thrown overboard.

149. For this reason, currently in an enforcement operation members from three different entities take part: maritime fishing inspector(s); sailing crew (pilot and his mate); and a protection squad (armed forces personnel, Navy infantry).

150. **The maritime inspectors** are purely civilian, FISCAP officials, whose function it is to control the legality of the activity of the fishing vessels at sea.

151. **The sailing crew** is made up from military personnel from the Navy who take part in the enforcement operation only as navigation staff. In the event of the arrest of a vessel, they may replace the pilot, if the order to steer the vessel into the port of Bissau is not complied with.

152. **The protection squad** is made up from Navy infantry whose function it is to ensure the protection of the vessel and all participants in the mission

during the act of boarding, if the use of force is threatened by third party vessels.

153. The 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.

154. As stated by João Nunes Cá (**Annex 1**) all the inspectors were regularly dressed, clearly identified as FISCAP officials, while the Navy infantry were wearing military uniform.

155. In relation to the prohibition of the use of communications by the crew, 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, given that other ships would be monitored, as explained by Chief-Inspector Pedro Cardoso Nanco (**Annex 2**).

156. As 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.

157. The journey took place in conditions considered to be adequate by the specialised 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**), while the official notice (**Annex 18**) states that the sea was calm and visibility was good. What causes serious damage to the environment is the illegal fuelling of vessels, carried out in the waters of the EEZ by oil tankers like the VIRGINIA G.

158. In relation to the document that the captain was asked to sign, this corresponds to the official notice, and art. 45, no.3 of Decree-Law 6-A/2000 (Annex 9 to the Memorial of Panama), expressly states that:

> "The official notice shall be signed by the enforcement officials, by any witnesses and, as insofar as possible, by the author of the violation who may formulate his observations and shall be transmitted to the Government department responsible for Fisheries, for the purpose of the formal proceedings allowed for in the following article".

159. The captain was not obliged to sign it and could always, in any case, have formulated his observations. He nevertheless signed the Official Notice (**Annex 18**), and, although this is in Portuguese, which is the official language of Guinea-Bissau, it is fully comprehensible for any Spanish-language reader, given the proximity of both languages.

160. The Captain's statements in Panama's Annex 27 are completely false, it being sufficient to see that he states that there was no official detention notice, whereas not only does it exist, but it was signed by him, it being clear that there can be no stress or anxiety among the crew, other than that which corresponds to that of being caught while violating the law of the State in which they found themselves.

161. What Panama states in paragraphs 143 to 145 of its Memorial is also false, given that the Inspection report dated 28AGO09 was signed by the Captain, who in fact was extremely co-operative with the inspection (**Annex 19**).

162. As is stated by the shipowner of the vessel, he had the possibility of resorting to Guinean courts, having even obtained the suspension of the unloading of the diesel oil, ordered by the Secretary of State of Fisheries, in

spite of the fact that it had been seized in accordance with the laws of Guinea-Bissau, as a consequence of the violation committed.

163. The fact that this unloading was later undertaken, corresponded to a decision by the Minister of Finance, based on an opinion of the Attorney-General of the Republic of Guinea-Bissau (**Annex 8**).

164. This did not violate the decision of the Court of Bissau, insofar as this decision was appealed by the Public Prosecutor Service, an appeal which has the effect of legally suspending enforcement of said decision.

165. The operation of unloading the diesel oil performed by the authorities in conformity with the Guinean laws was therefore perfectly legal.

166. Guinea Bissau is totally unaware of the veracity of the exchanges of e-mails and telephone conversations mentioned by Panama in paragraphs 159 to 179 of its Memorial, and described in Annexes 4, 5, and 28 to 36 thereto, and considers all this correspondence and supposed conversations to be totally irrelevant for this case.

167. It should be pointed out, however, that the P&I Club of Spain was contacted and not that of Panama, once again demonstrating the total lack of connection by Panama to this case and the violation of art. 91 of the Convention.

168. The authorities of Guinea-Bissau never requested illegal payments from the shipowners and, if these made such a payment to false intermediaries, this is their exclusive responsibility.

169. Inspector João Nunes Cá absolutely denies in his statement (**Annex 1**) having proposed any "*a la Africana*" (African-style) solution, and it would be pure fantasy for anyone to state that a Guinean Inspector would call himself John Mimo and speak in Spanish, a language which is totally unknown in that region of Africa.

170. As appears in his statement (**Annex 1**) Inspector João Nunes Cá only visited the vessel in the company of the Ambassador of Cuba — who wanted to exercise diplomatic protection over his citizens — it being clear that he could never propose any illegal solution as the vessel could only be released upon the decision of the Interministerial Maritime Enforcement Commission.

171. This is in fact correctly stated by Panama in paragraph 184 of its Memorial, the contradiction with the previous affirmations being clear.

172. The letter written by Penn Lilac and attached by Panama as Annex 41 confirms the lack of authorization of the VIRGINIA G, inasmuch as it blames the *Bijagós* Agency for the fact, it being clear that the Captain of the VIRGINIA G was very well aware of the authorizations that he had to obtain, so much so that he obtained them in June.

173. This is clearly explained by FISCAP in Annex 43 to the Memorial of Panama, and in fact it is also recognised in the reply from Penn Lilac, attached by Panama as Annex 44, which once again casts the blame on the *Bijagós* Agency which it accuses of having led to an offence, this being a situation to be resolved between Penn Lilac and the *Bijagós* Agency, which has absolutely nothing to do with the State of Guinea-Bissau.

174. And in said reply it goes as far as to deny the jurisdiction of the State of Guinea-Bissau in its exclusive economic zone, considering that the fuelling of fishing vessels in the waters of the EEZ by oil tankers is an act

incapable of affecting the natural resources in sea waters, thereby demonstrating total thoroughlessness in the programming of operations with such a major environmental impact.

175. This only demonstrates how justified was the decision to confiscate the vessel, motivated, as was always mentioned, by ecological concerns, other than tax evasion and unfair competition against the Guinean oil companies.

176. From the description of the facts given by Panama, we underscore the totally incorrect behaviour of the owner of the VIRGINIA G in this case, who systematically wrote letters to FISCAP, complained to the press, but only engaged a lawyer on 01OCT09, more than one month after the arrest of the vessel, when he should have done so immediately.

177. With this attitude, he seriously prejudiced his defence in the case. Suffice it to see that, 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.

178. The procedure unfolds in two stages: an administrative stage and a judicial one, which comes later. In the administrative stage, the competent administrative entity, the CIFM, considers the violation, investigated by FISCAP, and takes a decision on it.

179. This stage begins with the drafting of the official notices by the inspector who led the mission, where the captain is reserved the right of making his observations, contesting the violation which he is charged of committing (art. 45, no. 3 of Decree-Law no. 6-A/2000).

180. After the CIFM's decision, the shipowner has a period of 15 days to complain, lodge an appeal to the court or to pay the fine (art. 60, no. 1 and 2, Decree-Law no. 6-A/2000).

181. If an appeal is lodged before a court against such decision, the judicial stage ensues.

182. In the case of the VIRGINIA G, the captain signed the official notice of violation without contesting anything (**Annex 18**), and the shipowner wrote letters to FISCAP, the body levying the charges, but did not present any defence to CIFM, only resorting much later to the court.

183. In the case of the violation described above, the confiscation of the vessel and of all of its cargo is the sanction allowed at law, meaning that the decision of the CIFM, which decreed it is therefore legal.

184. Nevertheless, the owner of the vessel obtained an interim measure against the decision, managing to suspend the unloading.

185. In relation to the refusal to return the passports described in Annex 46 to the Memorial of Panama, this was because once again the petitioner addressed FISCAP, which was incompetent for the purpose, as he should have petitioned the CIFM.

186. The passports were subsequently returned at the request of the Ambassador of Cuba, extending diplomatic protection to his citizens (viz. the statement of Carlos Nelson Sanó attached as **Annex 4).**

187. In relation to the decision to auction the vessel, this took place because the decision to confiscate it became definitive, given that the owner of the vessel allowed the deadline for appealing against the decision of the CIFM to lapse and did not ask the court to set any security deposit.

188. It is true that subsequently the owner of the vessel applied to the Regional Court of Bissau for an interim measure, which was immediately granted, but this decision was void, as it was passed without having heard the competent authorities in the case, which should not have happened, in accordance with the laws in force in the Republic of Guinea-Bissau.

189. As can indeed be read in the judicial decision attached by Panama as Annex 52 to its Memorial, the petitioner of the measure having requested it, the Court agreed to grant said measure without hearing the opposing party, which violated the adversarial principle expressly laid down in art. 3 of the Civil Procedure Code of Guinea-Bissau.

190. This violation legally implies that such decision is null, as it bears thereon, and the Attorney General of the Republic of Guinea-Bissau did inform the Government of this state of affairs.

191. For this reason, the Attorney General of the Republic decided to appeal against the Ruling granting the interim measure, and this appeal has the effect of suspending enforcement thereof.

192. This being so, the enforcement of the interim measure had been suspended when the unloading of the diesel oil was decreed, the actions of the authorities being in perfect conformity with the laws of Guinea-Bissau.

193. And naturally there was no act of violence in the unloading of the diesel oil, this being performed with the full co-operation of the vessel's crew.

194. Guinea-Bissau obviously has nothing whatsoever to do with the financial situation of Penn Lilac and much less with the arrest of another of its vessels, the IBALLA G., which is not even under Panamanian flag, for non-payment to its crew, when anchored in a port of the Canary Isles. It is up to Penn Lilac to assume the risks of infringing the existing rules with regard to the sale of fuel in the EEZ, and all the States of the region sanction this violation with the confiscation of the offending vessel.

195. Guinea-Bissau is totally unaware of all the facts stated by Panama in relation to Penn Lilac and its creditors, Panama furthermore failing to provide any proof thereof, much less that they are due to the actions of Guinea-Bissau regarding the ship VIRGINIA G.

196. Once the vessel had been confiscated, naturally it was up to Penn Lilac to decide what its crew should do, and, if it stayed in Bissau, it was because their employer decided to; the members of the crew were never under detention, being freely able to abandon Guinea-Bissau, provided that they left the vessel there.

197. The passports of the crew of arrested vessels are taken at the time of the arrest, to control any unauthorised entries in the national territory, by virtue of the decision to confiscate the vessel, but are immediately returned as soon as the holder manifests the desire to leave the country, as naturally happened in this case, at the request of the Ambassador of Cuba.

198. There was never any danger for the crew of the vessel, whose voyage was accompanied by experienced sailors, and the conditions in which it stayed on in the vessel are the exclusive responsibility of the shipowners. It

is these who have to pay the salaries and guarantee the supply of water and food to the people they hire. As regards mosquitoes, they exist in that region of Africa, it being up to the visitors to take the appropriate protection to avoid malaria.

199. It is not true that the vessel did not receive provisions, including 25,000 litres of drinking water as Panama eventually admits in paragraph 190 of its Memorial, and stating that it had been necessary to use rainwater for any activity by the crew is mere fantasy.

200. It is true that Guinea-Bissau decided to release the vessel on 20SEP10, which was due to 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 (decision no. 05/CIFM/2010, dated 20SEP and the respective minutes, attached by Panama as its Annex 58).

201. The shipwrecking risk of the vessel was naturally due to the terrible conditions in which the vessel was operating and to the thoroughlessness with which Panama granted its navigation certificate, probably without having made a single inspection of the vessel, which always operated between Seville and the West African coast, having probably never gone to Panama.

202. No Guinea-Bissau official ever operated on the vessel, so that it has no responsibility for the extremely deficient conditions of safety that it was in, this responsibility being totally up to the maritime authorities of Panama, who did not ensure proper inspection of the vessel.

203. Guinea-Bissau does not attach any credibility to the unsigned report, attached by Panama as Annex 62, allegedly drafted by Pedro Olives Socas, of Spanish nationality and resident in the Canary Isles, whom Panama

usually calls on to write reports relating to serious accidents occurring with vessels under Panamanian flag.

204. This was specifically what happened with the reefer vessel TORNADO, which collided with the fishing vessel Navigator off Noaudhibou, Mauritania, on 04MAY07[17].

205. It was also what happened with the vessel SASANQUA, which suffered a fire in the engine room in the middle of the Atlantic on 07JUL07[18].

[17]http://www.amp.gob.pa/newsite/spanish/casualty/REPORTES%20DE%20ACCIDENTES/1.%20TORNADO%20_AMP_.pdf

[18]http://www.amp.gob.pa/newsite/spanish/casualty/REPORTES%20DE%20ACCIDENTES/SASANQUA%20informe%20(AMP).pdf

CHAPTER V- STATEMENT OF LAW.

206. Contrary to what Panama asserts, Guinea-Bissau in the Special Agreement has only accepted the jurisdiction of the Tribunal regarding to the allegation that Guinea-Bissau breached its international obligations set out in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), so the rules of the Convention are the only rules that can be applied by the Tribunal.

207. Guinea-Bissau does not accept the declaration of Panama in paragraph 254 of its Memorial. Article 62 of the Rules of the Tribunal states that "a memorial shall contain: a statement of the relevant facts, a statement of law and the submissions". It is not acceptable to continuously change the foundations of the case during the proceedings.

208. Guinea-Bissau totally rejects the allegations of Panama that it has violated the Convention or the general international law.

209. Guinea-Bissau 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.

210. As stated before, bunkering is considered in all the region of West Africa as a fishery-related activity, subject to the authorization of the coastal State.

211. As quoted before, legal writers have considered that the regulation of this activity in the EEZ is admissible due to the sovereign rights and jurisdiction of the coastal state recognised in articles 56, 61, 62 and 73 of the Convention[19].

212. Contrary to what Panama asserts, the Tribunal has considered bunkering in its decision in the M/V SAIGA case n°2, paragraph 130. The Tribunal stated that:

> "The main public interest which Guinea claims to be protecting by applying its customs law to the exclusive economic zone is said to be the "considerable fiscal losses a developing country like Guinea is suffering from illegal off-shore bunkering in its exclusive economic zone". Guinea makes references also to fisheries and environmental interests. In effect, Guinea's contention is that the customary international law principle of "public interest" gives it the power to impede "economic activities that are undertaken [in its exclusive economic zone] under the guise of navigation but are different from communication"[20].

213. The Tribunal also stated that:

> "In their submissions, both parties requested the Tribunal to make declarations regarding the rights of the coastal States and of other States in connection with offshore bunkering, i.e. the sale of gas and oil to vessels at sea. The Tribunal notes that there is no specific provision on the subject in the Convention. Both parties appear to agree that, while the Convention attributes certain rights to coastal States and other States in the exclusive economic zone, it does not follow automatically that rights not expressly attributed to the coastal State belong to other States or, alternatively, that rights not specifically attributed to other States belong as of right to the coastal State. Saint Vincent and the Grenadines asks the Tribunal to adjudge

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[19] See DAVID ANDERSON, *op.cit.*, p. 226.

[20] *The M/V Saiga (no.2) (Saint Vicent and the Grenadines v. Guinea)*, International Tribunal fot the Law of the Sea, judgment of 1 July 1999, at paragraph 130.

and declare that bunkering in the exclusive economic zone by ships flying its flag constitutes the exercise of the freedom of navigation and other internationally lawful uses of the sea related to the freedom of navigation, as provided for in articles 56 and 58 of the Convention. On the other hand, Guinea maintains that "bunkering" is not an exercise of the freedom of navigation or any other of the internationally uses of the sea related to freedom of navigation, as provided for in the Convention, but a commercial activity. Guinea further maintains that bunkering in the economic exclusive zone may not have the same status in all cases and suggests that considerations might apply, for example, to bunkering of ships operating in the zone, as opposed to the supply of oil to ships that are in transit"[21].

214. And the Tribunal concluded that:

"The Tribunal considers that the issue that needed to be decided was whether the actions taken by Guinea were consistent with the applicable provisions of the Convention. The Tribunal reached a decision on that issue on the basis of the law applicable to the particular circumstances of the case, without having to address the broader question of the rights of coastal states and other States with regard to bunkering in the exclusive economic zone. Consequently, it does not make any findings on that question"[22].

215. In his Separate Opinion in the M/V SAIGA Case Judge Zhao has expressly asserted:

"3. (...) The interpretation that freedom of navigation includes bunkering and all other activities and rights ancillary to it is incorrect. The view that bunkering is free in the exclusive economic zone because is free on the high seas is legally not tenable.

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[21] *The M/V Saiga (no.2) (Saint Vicent and the Grenadines v. Guinea)*, International Tribunal fot the Law of the Sea, judgment of 1 July 1999, at paragraph 137.
[22] *The M/V Saiga (no.2) (Saint Vicent and the Grenadines v. Guinea)*, International Tribunal fot the Law of the Sea, judgment of 1 July 1999, at paragraph 138.

"4. In short, bunkering should not be encouraged, let alone without restraint. On the contrary, the following conditions are generally required for bunkering: (1) For States wishing to undertake bunkering activities in the exclusive economic zone to enter into agreement with the coastal State; and (2) for fishing vessels to obtain licences or approval for bunkering from those States. Unless it is conducted in accordance with those two conditions, there is no legitimate status for bunkering in the law of the sea".

216. As I. A. Shearer refers:

"In that earlier phase of the case the majority of the Tribunal held that the arrest of a vessel by Guinea for an infringement in its EEZ of its customs laws in bunkering a fishing vessel was, at least "plausibly" or "arguably", a matter connected with the rights of jurisdiction over living resources in its EEZ and thus covered by UNCLOS Article 73 (without the applicability of which there would be no right Saint Vincent and the Grenadines to claim prompt release)"[23].

217. Barbara Kwiatkowska also sustains there was "assimilation in the M/V Saiga Judgement of bunkering of fishing vessels into the coastal State fishery rights in the EEZ"[24].

218. Guinea-Bissau accepts 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.

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[23] See I. A. SHEARER, «The International Tribunal for the Law of the Sea and its potential for resolving navigation disputes», in DONALD R. ROTHWELL and SAM BATEMAN, *Navigational Rights and Freedoms and the New Law of the Sea*, 2000, p. 273.

[24] See Barbara Kwiatkowska, «The Saint Vicent and the Grenadines v. Guinea M/V Saiga Cases before the International Tribunal for the Law of the Sea», in Donald R. Rothwell e Sam Bateman, *Navigational Rights and Freedoms and the New Law of the Sea*, 2000, p. 287

219. The evolution of the international law since the approval of the Convention imposes its interpretation according to the aim of environmental protection.

220. Guinea-Bissau totally accepts the statements of Panama in paragraphs 267 to 269 of its Memorial.

221. Guinea-Bissau totally rejects that the activity of bunkering should be considered as a freedom falling within freedom of navigation and other internationally lawful uses of the sea, which is not accepted by the legal writers.

222. In fact, Symeon Karagiannis expressly refers that:

> *"esquissée par la Guiné dans l'affaire du «Saiga» (et, dans les conditions que l'on vues, non rejetée a priori par le Tribunal de Hambourg), une idée pourrait être retenue: l'avitaillement ne serait pas une activité autonome mais, bien au contraire, une activité rattachable à l'activité principale du navire avitaillé au moment de son avitaillement. Il est, par exemple, manifeste que, sous cet angle, l'activité principale, dans une zone économique exclusive, d'un navire de pêche, dûment fourni d'une licence de pêche délivre par l'État côtier, n'est pas tant la navigation que l'exploitation des ressources biologiques de l'Etat côtier"*[25].

223. As bunkering has very serious environmental risks, its regulation by the coastal states is permitted by Articles 61 and 62 of the Convention, which the Tribunal has not considered in the M/V SAIGA case.

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[25] SYMEON KARAGIANNIS, «L'article 59 de la Convention des Nations Unies sur le Droit de la Mer (ou les mystères de la nature juridique de la zone economique exclusive), Revue Belge de Droit International, volume 37, 2004, p. 325-418 (373).

224. As Sicco Rah and Tilo Wallrabenstein state:

> "The *M/V SAIGA Case* dealt with the application of national custom laws. It could have been conceived as having an environmental dimension, though. Refueling in a resource rich area presents environmental risks and Guinea might have contended that its power to regulate refueling was linked to its authority to regulate fishing in the EEZ. Since Guinea did not claim its actions were taken to protect its marine resources and coastal environment, ITLOS did not address these issues. Otherwise the Tribunal might have concluded that because the coastal State could regulate the harvesting of resources in this zone, it could also regulate the refueling of fishing vessels engaged in this harvesting"[26].

225. It is therefore clear that the law of Guinea-Bissau and its application to the activities of VIRGINIA G are in accordance with the Convention and other rules of international law.

226. Contrary to what Panama states, there was also no violation by Guinea-Bissau of arts. 56 (2) and 73 of the Convention.

227. Rather, in relation to art. 56 (2) of the Convention, Guinea-Bissau behaved appropriately by demanding the appropriate authorization established at law, which the oil tanker VIRGINIA G. did not have, and decreed the sanction allowed for in its law for this violation, and we fail to see how this decision clashes with the rights of other States or with the Convention.

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[26] See Sicco Rah and Tilo Wallrabenstein, «Sustainability needs judicial support: what does the International Tribunal for the Law of the Sea (ITLOS) offer in this respect?», in Peter Elmers and Rainer Lagoni, *International Maritime Organisations and their contribution towards a sustainable marine development,* 2006, pp. 285-315 (305-306)

228. Guinea-Bissau's actions were in full conformity with art. 73 (1) of the Convention, which expressly legitimates its action, and again we fail to understand on what basis Panama maintains that the former abused this discretion, as confiscation is considered by various authors to be a legitimate reaction to such violation[27].

229. Guinea-Bissau also did not violate art. 73 (2) of the Convention by applying the sanction of confiscation allowed for in its law. Regarding the setting of the security deposit, 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.

230. In fact, art. 65, no.1 of Decree-Law 6-A/2000 expressly states, in conformity with art. 292 of the Convention, that:

> "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".

231. As Jianjun Gao states, ITLOS' practice has been that the reasonableness of the security deposit has to be articulated with the seriousness of the violation committed by its petitioner:

> "furthermore, when determining the gravity of the alleged offences, the international tribunal may take into account not only the damage of the particular offence on the detaining State, but also the damage of such offence generally on the international community. Take IUU

[27] See Bernard H. Oxman e Vincent P. Bantz, «Un droit de confisquer? L'obligation de prompte mainlevée des navires», in La mer et son droit: Melánges offerts a Laurent Lucchini et Jean-Pierre Queneudec, 2003, pp. 479-499 ; e Laurence Blakely, «The end of the Viarsa saga and the legality of Australia´s vessel forfeiture penalty for illegal fishing in its exclusive economic zone», Pacific Rim Law and Policy Journal, volume 17, 2008, pp. 677-705.

fishing for example. Although seriously damaging the marine living resources, there is a tidy profit to be made from illegal fishing; on the other hand, effective enforcement of conservation measures is in the general interest, but the cost of combating illegal fishing is considerable for the coastal State"[28].

232. In any case, as from the time that the authorities decided to auction the ship, giving right of first refusal to the previous owner, he could have obtained its immediate release, paying to the State what resulted from the auction, which meets the objectives contemplated in art. 73 (2) of the Convention.

233. It was the owner of the VIRGINIA G. who prevented this solution by filing for an interim measure from the Court, which was illegally decreed without hearing the authorities, thereby suspending the auction and considerably delaying the resolution of the issue.

234. Guinea-Bissau also 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.

235. There was never any imprisonment and much less corporal punishment of the vessel's crew, the only seizure declared being that of the vessel. The 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.

[28] See Jianjun Gao, «Reasonableness of the bond under article 292 of the LOS Convention: practice of the ITLOS», Chinese Journal of International Law, volume 7, 2008, no. 24.

236. And 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 (4) of the Convention.

237. As Philippe Gautier states, it has recently been the practice of a number of States, as demonstrated by Spanish legislation, to criminally sanction the very members of the crew for fishing violations committed on the high sea, especially when a flag of convenience is used, as was the case here:

> "*une tendence plus récente consiste pour un Etat à vouloir sanctionner des activités de pêche non règlementée en haute mer, commises par des navires battant d'Etat tiers, en poursuivent pénalement ses nationaux embarqués à bord desdits navires. L'Espagne a ainsi adopté en 2002 un décret sur l'application de sanctions pénales en matière de pêche à l'égard de citoyens espagnoles travaillant à bord de navires immatriculés sous un pavillon de complaissance*"[29].

238. Now, the authorities of Guinea-Bissau did not apply any penal sanction on the members of the crew, neither is this allowed for in the law, and they only sanctioned the owner of the vessel with its confiscation, which is the sanction admitted at law.

239. Guinea-Bissau also did not violate art. 73 (4) of the Convention, inasmuch as it did not find a single person or entity related with Panama. The owner of the vessel was Spanish, the captain and most of the crew was Cuban, there also being Ghanaians and one Cape Verdean.

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[29] See Philippe Gautier, em «L'Etat du pavillion et la protection des intérêts liés au navire», in Marcelo G. Kohen, *Promoting justice, human rights and conflict resolution through international law. La promotion de la justice, des droits de l'homme et du réglement des conflits par le droit international. Liber Amicorum Lucius Caflish,* 2007, p. 735.

240. Both 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, while the States that had a genuine connection with the vessel and its crew immediately assumed their representation.

241. It 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.

242. Contrary to that which Panama upholds, Guinea-Bissau never recognised 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.

243. It is totally false that Guinea-Bissau violated other rules of the Convention or other rules of international law.

244. There 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.

245. There 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.

246. Guinea-Bissau 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.

247. Guinea-Bissau 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.

248. And Guinea-Bissau did not violate art. 300 of the Convention as it always exercised its rights in good faith and in a non-abusive manner.

249. It is therefore perfectly clear that Panama's accusations against Guinea-Bissau are totally unfounded.

CHAPTER VI- DAMAGES.

250. Guinea-Bissau is totally unaware if the damages referred to in paragraphs 413 to 441 of the Memorial of Panama ever existed, as Panama does not present any proof thereof, but only unfounded allegations, and therefore such facts must be considered to be unproven.

251. For this very reason, in paragraph 435 of its Memorial Panama admits that it does not even know what damage there was, with Guinea-Bissau rejecting the possibility of claims being presented for damage at a later date, which would be contrary to art. 62 of the Rules of the Tribunal.

252. If such damage did exist, this is due to the financial problems of the shipowner, which in fact is confessed by Panama in paragraph 378 of its Memorial, and which therefore had nothing to do with the arrest of the VIRGINIA G.

253. As is evident, the financial situation of a Spanish company is something that is its own affair, the State of Guinea-Bissau having nothing to do with it, this being no reason for the laws that are in force in its country ceasing to apply due to concern over the financial health of foreign companies that own vessels that illegally operate in its exclusive economic zone.

254. Guinea-Bissau considers the quantification set out in paragraphs 436 to 441 of the Memorial in relation to the damage to be 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.

255. Guinea-Bissau totally rejects the possibility of the attachment by Panama of other reports subsequent to the delivery of its Memorial, which totally violates art. 63 of the Rules of the Tribunal.

CHAPTER VII- COUNTER-CLAIM

256. According to art. 98 of the Rules of the Tribunal "a party may present a counter-claim that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal".

257. Guinea-Bissau claims 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 by the vessel VIRGINIA G.

258. This counter-claim is directly connected with the subject matter of the claims of Panama.

259. This counter-claim comes within the jurisdiction of ITLOS as both governments agreed by Special Agreement to "submit the dispute between them concerning the VIRGINIA G to ITLOS" and "that ITLOS shall address all claims for damages and costs and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before it".

260. Therefore 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.

261. As Robin Churchill wrote:

> "The International Tribunal for the Law of the Sea was given the opportunity to address these shortcomings in The "Saiga" (N° 2) Case,

brought by St. Vincent (a flag of convenience State) against Guinea, but declined to do so, possibly because of the controversial nature of the issue and more probably because of the way the issue was raised by Guinea. In The *Grand Prince Case*, on the other hand, the Tribunal showed itself willing to view more critically the registration procedures used by States (in this case the procedures of Belize, another flag of convenience State) and to decline to recognize the nationality of a ship in the case of a defective registration. It is thus possible that if given the opportunity, the Tribunal may in future help Article 91 more effective"[30].

262. The same opinion has been expressed by David Anderson:

"this case demonstrates that, in appropriate circumstances, the ITLOS will reject an application for relief made on behalf of a State where the Tribunal is not satisfied as to the existence of legal links or where the evidence of nationality lacks cogency"[31].

263. Guinea-Bissau considers that by granting a flag of convenience to the VIRGINIA G, without there being the least connection between this vessel and Panama, the latter facilitated the fact that an un-seaworthy vessel could conduct fishing-related operations in its waters.

264. When Guinea-Bissau decided to arrest the vessel in conformity with its laws it was obliged to keep the vessel under surveillance in the port of Bissau, which had high occupation costs, both of the berth, and of its official and military personnel, and the ship was in such a poor condition that the risk of it sinking in the port of Bissau arose.

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[30] Robin Churchill, «10 years of the UN Convention on the Law of the Sea – towards a global ocean regime? A general appraisal», *German Yearbook of International Law*, volume 48, 2005, p. 105.

[31] David Anderson, «Freedoms of the high seas in the modern law of the sea», in David Freestone, Richard Barnes e David M. Ong (edits), *The Law of the Sea. Progress and prospects,* 2006, p. 339.

265. And Guinea-Bissau was therefore 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, having been obliged to release it without obtaining the adequate revenue as payment against the plundering of its marine resources which the operation of the VIRGINIA G led to, its high environmental costs and tax evasion.

266. With the auction of the ship, Guinea Bissau would certainly have obtained at least revenue of USD 4,000,000, which would have constituted an adequate compensation for the damage caused to the environment, the loss of tax revenue and the plundering of its marine resources, and therefore Panama should indemnify Guinea-Bissau for this amount.

CHAPTER VIII- LEGAL COSTS

267. According to the Special Agreement, the International Tribunal is "shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before it". It is requested that the Tribunal award the legal and other costs incurred by Guinea-Bissau in the proceedings before the Tribunal. These costs will be substantiated to the Tribunal in accordance with any orders as to costs, which it may make.

CHAPTER IX- SUBMISSIONS

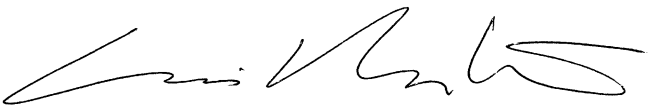
268. For the above mentioned reasons or any of them or for any other reason that the Tribunal deems to be relevant, the Government of the Republic of Guinea-Bissau asks the International Tribunal to dismiss the Submissions of Panama in total and to adjudge and declare that:

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 Guine-Bissau, or in an amount deemed appropriate by the International Tribunal;

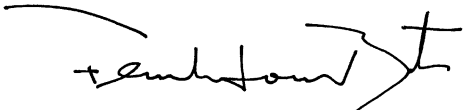
3- Panama shall pay all legal and other costs the Republic of Guinea-Bissau has incurred with this case.

28 May 2012



Luís Menezes Leitão

(Agent for Guinea-Bissau)



Fernando Loureiro Bastos

(Co-agent for Guinea-Bissau)