REJOINDER 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 Nº 19

REJOINDER SUBMITTED BY THE REPUBLIC OF GUINEA BISSAU

21 NOVEMBER 2012

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CHAPTER I - INTRODUCTION

I. General Introduction and Procedure

1. In accordance with the Order dated 9 August 2012 of the International Tribunal for the Law of the Sea (hereinafter "the International Tribunal" or "ITLOS") the Republic of Guinea-Bissau (hereinafter "Guinea-Bissau") has the honour to submit the following Rejoinfer to the Reply of Panama dated 28 August 2012.

2. For ease of cross-reference, these submissions address the various issues raised in the case in the same order as they were addressed in the Reply of Panama dated 28 August 2012.

3. Guinea-Bissau considers that the Reply of Panama is not in accordance with the Rules of the Tribunal which state that "a reply and rejoinder shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them" (art. 65 n° 3 of the Rules of the Tribunal).

4. The Memorial of Panama has 78 pages; the Counter-Memorial of Guinea-Bissau has 69 pages, so it is not admissibile that Panama submits a Reply with 99 pages; which is a clear violation of the Rules of the Tribunal.

5. Guinea-Bissau fully accepts the statements of Panama in paragraphs 1 to 7 of its Reply, which confirm the statement of Guinea-Bissau that what constituted the Special Agreement between the Parties was Panama's Arbitration Notification dated 3 June 2011 (which cointaned the proposal to submit the case to the International Tribunal), followed by Guinea-Bissau's acceptance of that proposal by letter dated 29 June 2011.

II. Jurisdiction.

6. Guinea-Bissau strongly rejects the accusation of Panama in paragraph 19 of its Reply that Guinea-Bissau "*«hesitated» and persistently demonstrated a complete lack of cooperation before reaching the present proceedings*".

7. As Guinea-Bissau stated in paragraphs 3 to 5 of its Counter-Memorial, it was Panama that, without previous notice, on 3 June 2011 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").

8. 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.

9. 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*".

10. It is therefore clear that there has been full cooperation of Guinea-Bissau with regard to the present proceedings, which can also be inferred from the fact that Guinea-Bissau has never asked for any extension of the time-limits established by the International Tribunal.

11. On the contrary, Panama has asked twice for that extension, and has even demanded another written pleading, which surely is not very cooperative behaviour.

12. Guinea-Bissau rejects the argument of Panama in paragraph 20 of its Reply, because it is clear that, neither in the notification for arbitration nor in the letters that constitute the Special Agreement, has Panama made any reference to another ship, the IBALLA G, whose existence Guinea-Bissau ignores completely.

13. In fact, 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".

14. 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 of the Sea, which jurisdiction in this case Guinea-Bissau accepts fully".

15. It is therefore clear that ITLOS has jurisdiction only 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.

16. Claims related to the seizure (by creditors) of another ship, the IBALLA G, are completely outside to the scope of this dispute, so the International Tribunal has no jurisdiction over them.

III. Supporting statements presented by Guinea-Bissau.

17. Guinea-Bissau has verified there were some missing pages in the original version in Portuguese of the statements presented with the Counter-Memorial. Therefore the complete version of these statements as well as its translations are now presented as **Annex 1** to this Rejoinder, in order to complete the pages that were presented with the Counter-Memorial.

18. Guinea-Bissau also presents three more supporting statements by three individuals who were wittnesses to this dispute. The supporting statements, with the respective translations to English, are attached as **Annexes 2 to 4** as follows:

(a) **Annex 2** Statement of **Ildefonso Barros,** National Coordinator of the FISCAP

(b) **Annex 3** Statement of **José António dos Reis,** Chief of the Department of Inspection of FISCAP

(c) **Annex 4** Statement of **Mário Dias Sami,** Secretary of State of Fisheries.

19. 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.

IV. Copies.

20. On instruction of the Registrar of the Tribunal, Guinea-Bissau has provided one original Rejoinder, one certified copy of the original Rejoinder 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.

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

CHAPTER II - BACKGROUND

I. Bunkering Activities.

22. In relation to what was stated by Panama in paragraphs 23 and 24 of its Reply, Guinea-Bissau reiterates everything that was stated in paragraphs 76 to 85 of its Counter-Memorial.

23. The conditions of the port of Bissau are certainly not a reason for foreign oil tankers to disrespect the laws of Guinea-Bissau (which are identical to those of all the countries of the sub-region) over the conditions required in order to refuel at sea, which have to be controlled not only due to the economic consequences of predatory fishing, but also due to the high environmental risks this implies.

24. It is absolutely clear that refuelling at sea has nothing to do with the freedom of navigation, as it is a specific economic activity that the coastal State has the right to regulate in the manner it deems most appropriate to the protection of its natural living resources.

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

25. In relation to what is alleged by Panama in paragraphs 25 to 31 of its Reply, Guinea-Bissau cannot fail to note that Panama demonstrates absolute disregard for the protection of the environment and the natural resources of Guinea-Bissau, going as far as to state that Guinea-Bissau's

concern with the environment and with its natural resources is no more than an attempt to deceive the International Court.

26. Unlike Panama, Guinea-Bissau does not grant its flag to tankers so that these may refuel in the exclusive economic zone (EEZ) of other States, thereby disrespecting the laws of these other States, which is why it has still not signed the MARPOL Convention and its Annexes, intended precisely to regulate the pollution caused by shipping.

27. As it is a very poor country, Guinea-Bissau is not in a position to enter into all of the international commitments entered into by other States. Nevertheless, Guinea-Bissau has been a member of the International Maritime Organization since 1977.

28. Guinea-Bissau does not understand how it is possible for Panama to state, as it does in paragraph 27 of its Reply, that Guinea-Bissau's fishing law has nothing to do with the protection of the environment. One need only see that the preamble of Decree 4/96, of 2 September, already attached in part to the Counter-Memorial as Annex 14, expressly states that "Decree-Law 4/96, of 2 August, approved the legal framework for maritime fishing activities and the cultivation of marine species, aiming namely at the conservation, management and rational fruition and enhancement of marine resources, as well as the capping of fishing in light of the productivity levels of available resources ...".

29. Guinea-Bissau is unaware of what Panama is referring to in paragraph 28 of its Reply, as it is certain that the VIRGINIA G. was refuelling ships in the EEZ without the authorization of the Guinean authorities, which were therefore unable to ascertain that there was no risk to the sea.

30. In fact, would anyone believe that a vessel which is refuelling clandestinely, without any authorization, would notify the authorities in the event of spillage of pollutants?

31. Nor is it true that there was no risk to the environment, as this risk is obvious as the ship, due to its terrible condition, was at risk of sinking in the port of Bissau, which was the reason it was released.

32. In relation to what is stated by Panama in paragraphs 32 to 37 of its Reply, Guinea-Bissau reiterates what it has already said in paragraphs 81 and following of its Counter-Memorial, inasmuch as it considers that Panama's argument makes no sense when it postulates that the activity of bunkering, which it acknowledges as improving the efficiency of fishing, does not imply a greater intensity and quantity of catches.

33. It is evident that any increase in fishing efficiency will necessarily mean an increase in the intensity and quantity of catches, it therefore being evident that the coastal State has the right to regulate this activity, within the terms of articles 61 and 62 of the Convention.

34. Guinea-Bissau totally rejects Panama's views in paragraphs 38 to 43 of its Reply, as well as the undue citation that Panama makes of the decision of the International Court in the M/V "SAIGA" (No. 2) case.

35. In effect, it should be pointed out that Guinea-Bissau did not apply its customs law to the vessel VIRGINIA G, neither did it intend to obtain tax revenue from it, but merely demanded a prior authorization to regulate the activity of bunkering in the EEZ and sanctioned the VIRGINIA G for not having obtained the required authorizations to carry out a fishing related operation.

36. Panama knows full well that the International Court in the M/V "SAIGA" (No. 2) case did not take any decision on the regulation of the activity of bunkering by the coastal State. Suffice it to read what was written in paragraph 138 of the judgement:

> "The Tribunal has 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 the coastal States and other States with regard to bunkering in the exclusive economic zone. Consequently it does not make any findings on that question"[1].

37. Panama's affirmation that there is an extension of the customs law of Guinea-Bissau to the EEZ therefore makes no sense, what happened was merely the regulation of a fishing related activity, as allowed for in all the legislations of the sub-region of which Guinea-Bissau is part, while the fee charged has nothing to do with the amounts that would be charged in taxation if the fuel were sold in the territory of Guinea-Bissau.

38. In fact, in accordance with Joint Order no. 2/2001, of October, Annex III-1, the annual fee applicable to the supply of fuel is: 4.800 FCFA per unit of Gross Register Tonnage (GRT), for tankers with a capacity of up to 1,500 GRT; and 6,000 FCFA per GRT/Year for tankers with a GRT of over 1,500, with this rate being divided by 2, 4 or 52 if the authorization is requested for six months, three months or one week (**Annex 5**).

39. The VIRGINIA G has a GRT of 857, and the corresponding fee would be charged were it to request a weekly authorization for refuelling, as it did on two occasions.

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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. 138.

40. If the fuel were sold on land the following taxation would be levied: customs import duty, at 40%, 75% and 5 % respectively, for low octane gasoline, high octane gasoline and diesel (articles 4.a and 5.1 of Law 15/97, of 31 March and item 5, lines 1, 2 and 3 of the Annex to Law 15/97, of 31 March), applying to the taxable value of the imported product and industrial duty, at 25% on the global value of the turnover (Law 3/2006 of 2 October. See **Annexes 6 and 7**.

41. It is therefore absolutely evident that the fee charged is not an extension of the Guinean tax legislation to the EEZ, standing merely for a licence to perform the fishing related operation, which Guinea-Bissau has every right to charge in order to control the high environmental costs of the activity of bunkering, in line with the polluter-payer principle, and acting in conformity with the precautionary principle.

42. In fact, these are two fundamental principles of the Law of the Environment, whereby the coastal State in the EEZ has the right to control the performance of bunkering operations in its waters, given that the former may impact, in the absence of adequate measures, its rights over the natural living resources.

43. The requirement to obtain an authorization - as a condition for performing the operation - functions as a deterrent, mirroring the principle "prohibited until permited" once the implications that this activity may have for the marine environment are known.

44. In any case, as Panama acknowledges in paragraph 41 of its Reply, the rights granted to coastal States under Article 56 of the Convention allow for the imposition of a fee, tax, duty, or other form of payment for activities of fishing vessels and the exploitation by fishermen of living resources in the EEZ.

45. And as Panama quotes in paragraph 42 of its Reply, Article 62.2.a of the Convention establishes that the laws and regulations of the coastal State in the EEZ may relate, *inter alia*, to "licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration".

46. If Panama acknowledges that this precept may be extended to fishing related activities, such as the extraction, transhipment and unloading of catches, it is clear that it might also be extended to bunkering activities, wholly related to the fishing activity.

47. It is therefore clear that, contrary to what Panama asserts, Guinea-Bissau has not violated any provision of the Convention.

48. In paragraphs 44 to 54 of its Reply, Panama acknowledges that the legislation of Guinea-Bissau allows it to regulate fishing operations, as well as fishing related operations, precisely in the manner it did.

49. Nevertheless, it postulates that as the VIRGINIA G is not a fishing vessel, but rather an oil tanker, Guinea-Bissau would forfeit the right to apply its legislation to it.

50. It is evident that this argument is clearly unfounded. As the activity of bunkering is instrumental to and supports fishing operations, one naturally has to consider it a fishing related operation, and it is therefore regulated, both under the legislation of Guinea-Bissau and under the legislation of the other States of the sub-region, as was already stated in paragraphs 90 to 92 of the Counter-Memorial and its Annexes 11 to 13, to which attention is hereby directed.

51. Panama's affirmation, in paragraph 53 of its Reply, that Guinea-Bissau would be violating its Constitution makes no sense at all.

52. In fact, the Constitution of Guinea-Bissau refers to the EEZ in two articles: article 10, relating to the nature of the powers exercised by the Guinean State in its EEZ, and article 86.j, ascribing exclusive competence to the National People's Assembly to define the limits of territorial waters and of the EEZ.

53. In its article 10, the Guinean Constitution expressly states that, "in its EEZ, defined by law, the State of Guinea-Bissau exercises exclusive competence in the matters of conservation and exploration of natural resources, living and non-living".

54. The content of this provision is in accordance with the powers internationally acknowledged to coastal States over their EEZ in article 56.1.a of the Convention; we fail to understand how Panama can uphold the contrary.

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

I. Guinea-Bissau has the right to contest the admissibility and it is within the time-limit to do so.

55. Contrary to what Panama asserts in paragraphs 54 to 96 of its Reply, Guinea-Bissau has the right to contest the admissibility of the claims of Panama and its right is not precluded by article 97, paragraph 1, of the Rules.

56. In fact, 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"[2].

57. This interpretation of the Tribunal is totally in conformity with the wording of article 97 of the Rules of the Tribunal, even if Panama presents its sentences separately.

58. Panama says that Guinea-Bissau is acting in bad faith by lodging these objections, but it appears evident that it is Panama that is acting in bad faith, by invoking article 79 of the Rules of the International Court of Justice, but without referring that the jurisprudence of this same Tribunal

[2] *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.

clearly indicates that exceptions to admissibility may be presented in the Counter-Memorial, as demonstrated in the "Avena" Case of 2004.

59. In paragraph 24 of the judgement of that case, the International Court of Justice expressly states that:

> "An objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissibile. There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (...). However, apart from these circumstances, aparty failing to avail iteself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits. That is indeed what the United Staes has done in this case; and, for reasons to be indicated below, many of its objections are of such nature that they would in any event problay have had to be heard along with the merits. The Court concludes that it should not exclude from consideration the objections of the United States to jurisdiction and admissibility by reason of the fact that they were not presented within three months from the date of filing of the Memorial"[3].

60. This position is also confirmed by the legal writers. In fact, as Christian Tomuschat says:

> "In other words, a respondent remains free to come up with its preliminary objections in its counter-memorial. This alternative strategy has the advantage of saving time. No separate incidental proceedings, which necessarily entail a delay of many months as a minimum, will then take place. Once a respondent has filed its

[3] *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, International Court of Justice, judgment of 31 March 2004, at para. 24.

counter-memorial without raising preliminary objections, it will in any event be deemed to have acquiesced to the jurisdiction of the Court"[4].

61. It is therefore clear that even in the jurisprudence and doctrine of the ICJ it is well established that Guinea-Bissau can present its objections in its Counter-Memorial.

62. Guinea-Bissau remembers other reasons already presented in the Counter-Memorial for its submission:

Firstly, 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.

Secondly, 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.

Thirdly, in the President's consultations with the representatives of the parties, held on 17 August 2011 at the premises of the Tribunal, it was stated that "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".

63. Therefore, it was a right of Guinea-Bissau to contest, as it did:

1) the nationality of the VIRGINIA G;

2) the right of diplomatic protection concerning foreigners; and

[4] Christian Tomuschat, «Article 36», in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (edits), *The Statute of the International Court of Justice. A Commentary*, Oxford University Press, 2006, p. 589 to 657 (p. 645).

3) the lacking exhaustion of local remedies.

II. The nationality of the *VIRGINIA G.*

64. In paragraphs 99 to 146 of its Reply Panama reafirms the existence of a genuine link with the VIRGINIA G., but the only argumentation provided is the fact that the VIRGINIA G. has the documentation required by Panamian laws which does not constitute any demonstration of the existence of a genuine link.

65. Legal writers state that the genuine link is not only a formal registration, but also requires a real and substantial connection between the vessel and the flag State[5].

66. As Judge Treves writes in his separate opinion in *The Grand Prince* case:

> "A 'registration' of such an artificial character as that which might have existed for the *Grand Prince*, whatever the name it receives, cannot be considered as 'registration' within the meaning of article 91 of the Convention. And it is only this kind of registration that makes a Stae a flag State for the purposes of article 292 of the Convention"[6].

67. Judge Wolfrum also says the same in his declaration in the same case:

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[5] See Maria Gavouneli, «From uniformity to fragmentation in the LOS Convention», in Anastasia Strati, Maria Gavouneli e Nikolos Skourtos, *Unresolved issues and new challenges to the Law of the Sea. Time before and time after,* Martinus Nijhoff Publishers, 2006, pp. 208 to 209, David Anderson, «Freedoms of the high seas in the modern law of the sea», in David Freestone, Richard Barnes and David M. Ong, *The Law of the Sea. Progress and Prospects,* Oxford University Press, 2006, p. 332, 335, 336, 339 and 345, and Alexander Orakhelashvili, *The Interpretation of Acts and Rules of Public International Law,* Oxford University Press, 2008, p. 150 to 151

[6] Judge Treves, Separate Opinion in *The Grande Prince Case (Belize v. France)*, International Tribunal for the Law of the Sea, judgment of 20 April 2001, at para. 2.

"(...) Article 91, paragraph 1, third sentence, of the Convention states that there must be a genuine link between the flag State and the ship. This means the registration cannot be reduced to a mere fiction (...)"[7].

68. Guinea-Bissau has claimed that this situation is a case of a flag of convenience, as there is not any connection between the ship and Panama, as required by article 91(1), first sentence, of the Convention.

69. Panama has contested based on its presence in the Paris Memorandum of Understanding on Port State Control list of States which meet the flag criteria for a low risk, but refers the situation as of 1 July 2012, after the arrest of VIRGINIA G (Reply, paragraph 112).

70. The presence of Panama in this white list occurs only after 2011. In fact, as referred by the UNCTAD Review of Maritime Transport, 2011, between 1999 and 2005 and also in 2008 and 2009 Panama was in the black list of the Paris MOU, which represents a high risk of non-fulfillment of the flag criteria[8].

71. In relation to what Panama states in paragraph 114 of its Reply, Guinea-Bissau considers that this confirms the lack of a genuine link as all that Panama does is to charge an annual fee, acknowledging that the ship audits that it says it performs never take place in its territory, but rather in Seville, Spain.

72. In the same way, in paragraph 115 of its Reply, Panama recognises that contrary to the provisions of article 94.3 of the Convention, instead of

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[7] Judge Wolfrum, Declaration in *The Grande Prince Case (Belize v. France)*, International Tribunal for the Law of the Sea, judgment of 20 April 2001, at para. 3.

[8] See Maria Gavouneli, «From uniformity to fragmentation in the LOS Convention», in Anastasia Strati, Maria Gavouneli e Nikolos Skourtos, *Unresolved issues and new challenges to the Law of the Sea. Time before and time after,* Martinus Nijhoff Publishers, 2006, p. 208 to 209.

taking the measures necessary to ensure safety at sea, it delegates them to a company, PANAMA SHIPPING REGISTRAR, INC, which is not an organ of the State of Panama.

73. As to why Guinea-Bissau did not previously resort to the provisions in article 94.6 of the Convention, this was naturally due to the fact that actual jurisdiction over the ship was exercised by the Kingdom of Spain - who requested its release - and not Panama.

74. With regard to the lack of an adequate inspection, this seems evident by virtue of the fact that the vessel was at risk of sinking in the Port of Bissau, which was decisive in its release.

75. As Panama acknowledged that it never inspected the ship in its territory and that it delegates this task to a company, it is manifest that it did not fulfil in this case its duties as a flag State, which is contrary to what it proclaims in paragraphs 120 to 126 of its Reply.

76. Contrary to what Panama upholds in these paragraphs, the formal correctness of these documents is not at stake, but rather the effectiveness of the supervision of the vessel, outside of the territory of the State and by a company that is not an organ of this State.

77. As stated, the risk of the ship sinking in the port of Bissau, in itself demonstrates that this supervision was not as thorough as it should have been.

78. What Panama states in paragraphs 127 to 129 does not alter the fact that the absence of a single Panamanian citizen on this ship is a relevant factor for precluding the existence of a genuine link in accordance with international standards.

79. Guinea-Bissau also rejects that the owner of the ship *Penn Lilac* is Panamanian, as opposed to what Panama says in paragraphs 130 to 133,

given that its registered headquarter is in Seville, Spain, it being irrelevant that it is registered in Panama, as what is being discussed is the existence or otherwise of a genuine link.

80. Contrary to what is upheld by Panama in paragraphs 134 to 137, the use of the Spanish P & I Club is a major factor in demonstrating that there is no connection between the ship and Panama.

81. In relation to the paragraphs 138 to 143, Panama insists on considering mere formal requisites to be sufficient, while Guinea-Bissau reiterates that, in view of the facilities conceded by Panama to the registration of foreign vessels, one must consider it demonstrated that there is no genuine link, it also being clear that these records do not come up to acceptable standards.

82. In fact, the PARIS MOU Annual Report 2009 puts Panama in the grey list but with these references:

> page 31- Inspections 2007-2009 – 8,333; Detentions 2007-2009 – 619 (Black to Grey Limit – 662; Grey to White Limit – 544);
>
> page 37- Inspections, detentions and deficiencies 2009: i) Inspections: 2,741; ii) Detentions: 162; iii) Inspections with deficiencies: 1,672; iv) Individual ships: 1,860; v) Inspection percentage with deficiencies: 61,00%;
>
> page 47- Inspection to Panamanian entities in 2009: i) Panama Maritime Documentation Services: 49, with 1 detention; ii) Panama Maritime Surveyors Bureau Inc: 13, with 0 detentions; e iii) Panama Register Corporation: 67, with 2 detentions[9].

83. In the report of 2010 the references to Panama are the following:

> i) Inspections: 2,659; ii) Detentions: 86; iii) Inspections with deficiencies: 1,493; iv) Individual ships: 1,889; v) Inspection percentage with deficiencies 56, 15%;

[9] Accessible at http://www.parismou.org/

84. In the Shipping Industry Flag State Performance Table 2009, Panama has the following references: i) Not in the Paris MOU white list; ii) On the Paris MOU black list; iii) Not in United Nations Coastal Guard Qualship 21; iv) On United Nations Coastal Guard target list (safety)[10].

85. Panama is also on the black list of the International Transport Workers' Federation as a clear case of flag of convenience[11].

86. Contrary to what Panama asserts in paragraphs 146 and 147 of its Reply, 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"[12]. Guinea-Bissau has submited clear evidence that the VIRGINIA G cannot be considered to be of Panamanian nationality.

87. The case before the European Court of Justice, *Commission v. Kingdom of Netherlands* has nothing to do with the interpretation of the Convention, so it cannot be considered as a precedent by the International Tribunal.

88. Guinea-Bissau insists 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 is an essential condition to have a genuine link established between the State and the ship under article 91(1) of the Convention.

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[10] Accessible at http://www.marisec.org

[11] Accessible at http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm

[12] *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.

III. The right of diplomatic protection concerning foreigners.

89. Contrary to what Panama asserts in paragraphs 147 to 154 of its Reply it is clear that the framework of diplomatic protection does not give Panama *locus standi* with reference to claims of persons or entities that are not nationals of Panama.

90. 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).

91. Contrary to what Panama asserts, it is clear that Article 18 of the Draft Articles on Diplomatic Protection is not applicable here.

92. In fact this article refers only 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.

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

94. And it is obvious that if 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, no Panamanian interested is involved in this situation.

95. 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.

96. In fact, 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 the members of the crew and for the owners of ship and cargo. It is undisputed here that none of these persons are nationals of Panama.

97. In this case there were other States such as Spain and Cuba that claimed diplomatic protection for the members of the crew 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.

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

IV. The lacking exhaustion of local remedies.

99. Contrary to what Panama asserts in paragraphs 155 to 187 of its Reply it is clear that the submissions 4, 10, 14 and 15 presented by Panama in the interest of individuals or private entities are inadmissibile, because these

individuals or private entities have not exhausted the local remedies available to them in Guinea-Bissau.

100. 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 as these proceedings, it is clear that the local remedies are not exhausted.

101. 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, as it clear that the coastal State has jurisdiction over the EEZ.

102. The same happens to the cargo: its owner is not identical with the owner of the VIRGINIA G. 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.

103. The decision of the Court was not disregarded based on an "internal" opinion as it was the opinion of the Attorney-General, who is independent of the Government according to Guinea-Bissau's law, who considered the decision to be null and void, owing to the violation of Article 400 n°2 of the Civil Procedure Code.

104. Contrary to what Panama asserts, there is no discretion of the Court in applying this rule, as the hearing of the defendant is mandatory by law and in any case the State decided to appeal of this decision which has suspensive effect of the court order.

105. On the contrary, the State has discretion with regard to releasing the ship, if it at any time considers its presence in the port of Bissau to be dangerous. This does not affect the possibility of the owner's continuing with the proceedings.

106. Guinea-Bissau has no knowledge of any reservation made before it, which was never seen or accepted by anyone in Bissau (see **Annexes 2 and 3**), but if that reservation has occurred, that could not prevent the necessity of exhausting the local remedies in Guinea-Bissau.

107. It is clear that it is Panama that is acting in bad faith, as the objections of Guinea-Bissau are fully admissibile.

CHAPTER V- STATEMENT OF RELEVANT FACTS.

108. Guinea-Bissau reaffirms that in its Counter-Memorial it has set out its version of facts, as they effectively occurred.

109. 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.

110. Guinea-Bissau reafirms that 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 Seville, Spain, as it is recorded by the Instituto Marítimo Español and in the maritime websites.

111. Guinea-Bissau reafirms that 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.

112. 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.

113. 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.

114. 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, viz. 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.

115. 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.

116. As has already been referred to, 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 the contract 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.

117. In paragraphs 193 to 199 of its Reply Panama doesn't refer anything relevant to contest these facts.

118. Guinea Bissau reafirms that it is irrelevant the presence of fishing observers from FISCAP on board the recipient vessels. As already referred in paragraphs 117 to 120 of its Counter-Memorail 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 fact that the agency *Bijagós* informed the fishing vessels of the existence of a licence is not relevant, given that this is not an official communication, besides having been obtained days after the seizure of the ship.

120. According to article 16 of Decree-Law no. 6-A/2000, of 22 August, which approves the General Fishing Law (GFL), the captains or masters of industrial and small-scale fishing vessels must permanently keep the respective fishing licence on board.

121. Logistical support vessels must also keep on board their respective authorizations for carrying out fishing related operations, and the failure to keep the authorization or licence on board constitutes a fishing violation that is liable to a fine of up to twice the annual value of the respective authorization or licence (article 56.1- GFL).

122. Guinea-Bissau rejects the affirmations of Panama in paragraphs 205 to 215 of the Reply and reafirms that suspicions and rumours should not be presented before the courts but only facts, its being unacceptable to make accusations without any proof, exhibiting only press cuttings.

123. As referred to before, Hugo Nosoliny Vieira awaits trial in freedom and has his right to be presumed innocent before trial, and the accusations have nothing to do with the case relating to VIRGINIA G. Panama has not given any evidence of receiving from him any verbal authorization and in any case, the owner of VIRGINIA G. should know that, according to the law of the fisheries, he should have a written authorization to present before the authorities.

124. If he decided to perform the fishing related operation without a written authorization, the authorities have full right to apply the law in this case.

125. If the owner of VIRGINIA G. has accusations against Hugo Nosoliny Vieira, he should have presented them before the courts of Bissau.

126. 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, its being the responsibility of injured parties to file criminal charges.

127. Guinea-Bissau totally rejects the statements of Panama in paragraphs 216 to 230 which are completely false.

128. As related by Minister Artur Silva, the decision of releasing the vessels AMABAL I and AMABAL II was due to the good relations with the Kingdom of Spain and does not constitue any discriminary treatment with regard to VIRGINIA G.

129. VIRGINIA G. is an oil tanker and its infraction to the laws of Guinea-Bissau was much more serious as the ones practised by the previously mentioned two vessels.

130. Guinea-Bissau is totally unaware of the grounds to the accusations presented by Panama and Panama does not present any evidence of such accusations.

131. In paragraphs 231 and 232 of its Reply Panama does not give any explanations for the incoherences referred by Guinea-Bissau in paragraphs 115 and 116 of its Counter-Memorial. It is clear that documents added by Panama in Annex 18 of its Memorial 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.

132. Panama continues without explaining why 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.

133. In paragraphs 233 to 235 of its Reply Panama makes contradictory statements. It afirms that an authorization is not, or should not be required in the EEZ, but at the same time affirms that VIRGINIA G. has required this authorization "in accordance with the practice established and accepted in Guinea-Bissau".

134. There is not any practice established and accepted in Guinea-Bissau to allow oil tankers to perform bunkering activities without permission, so when referring to such "practice", Panama recognises thath the VIRGINIA G. was infringing the laws of Guinea-Bissau.

135. In paragraphs 236 to 249 of its Reply Panama insists on a description of the facts which is completely false and is denied both by the statements of Inspector João Nunes Cá (Annex 1 of the Counter-Memorial) and of Chief-Inspector Pedro Cardoso Nanco (Annex 2 of the Counter-Memorial), and also by the photographs taken upon boarding the vessel (Annex 7 of the Counter-Memorial).

136. As is now recognised by Panama, in a enforcement operation on the exclusive economic zone the inspectors have to resort to military personnel armed with AK 47s, 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.

137. 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.

138. The force used was adequate and proportional as no member of the crew was injured or needed any medical assistance during the arrest of the ship.

139. The alegation of Panama, that Guinea-Bissau, in the arrest operations, was in violation of art. 225 of the Convention is completely false.

140. In fact, 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 of the Counter-Memorial), while the official notice (Annex 18 of the Counter-Memorial) states that the sea was calm and visibility was good.

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

142. There was not at any time any risk of endangering the environment which it is in the interests of Guinea-Bissau to preserve. Panama in paragraph 249 of its Reply makes the absurd afirmation that the risk to the environment results from having guns pointed in the vicinity of potentially explosive gases. So, according to Panama, it is possible for a vessel to transport potentially explosive gases in the EEZ without authorization, but it is forbidden for the coastal State to send soldiers to control that ship?

143. Guinea-Bissau reaffirms that 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.

144. In paragraphs 250 to 253 of ita Reply Panama affirms that it severely doubts the authenticity of the photographs provided by Guinea-Bissau in relation to the uniforms claimed to be used (at the material time) by FISCAP representatives as the content of the photographs does not correspond with the circumstances witnessed by the Virginia G's captain and crew at the time of the arrest.

145. This is a very serious accusation as the photographs refer to the uniforms used at that time by FISCAP representatives and which are the uniforms they use at any time. It is therefore obvious that the statements of the crew of the VIRGINIA G are completely false.

146. In paragraph 254 of its Reply Panama claims it expected to receive a minute-by-minute report but it is obvious that the official notice as well as the photographs taken are sufficient evidence of the events.

147. Referring to paragraphs 255 and 256 of the Reply, Guinea-Bissau refirms that the document that the captain was asked to sign corresponds to the official notice, required by art. 45, no.3 of Decree-Law 6-A/2000.

148. The captain was not obliged to sign that official notice and could always, in any case, have formulated his observations. He has chosen to sign it as he has understood it clearly because the Portuguese language is fully comprehensible for any Spanish-language reader, given the proximity of both languages. Denying that proximity is a clear sign of bad faith by Panama.

149. The argumention of Panama in paragraphs 257 to 263 of its Reply is completely incorrect according to the laws of Guinea-Bissau.

150. In fact, the Regional Court of Bissau issued only a provisional order without hearing the defendant, which is forbidden by art. 400 n°2 of the Civil Procedure Code, so the Attorney General, who is an independent entity, with the function of ensuring the law of the State, considered the decision as null and void.

151. The Attorney-General presented an appeal to this decision, which has legally suspensive effect, so the order of the Regional Court of Bissau was suspended.

152. Therefore the operation of unloading the gas oil did not violate the decision of the Regional Court of Bissau, insofar as this decision was appealed by the Public Prosecutor Office, an appeal which has the effect of legally suspending enforcement of the said decision.

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

154. Guinea Bissau totally rejects the insistence of Panama in it previous accusations, contained in paragraphs 264 to 302 of its Reply.

155. Inspector João Nunes Cá absolutely denies in his statement (Annex 1 of the Counter-Memorial) having proposed what Panama says, and it is totally inconsistent that Panama accuses him of being "operating on paralell paths".

156. As stated by him in his statement (Annex 1 of the Counter-Memorial) 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 —which therefore makes it perfectly clear that he could never have proposed any illegal solution as the vessel could be released only upon the decision of the Interministerial Maritime Enforcement Commission.

157. It is also clear that the fee charged does not indicate any extension of Guinean customs law to the EEZ, merely standing for a licence to carry out fishing related operations, which Guinea-Bissau has every right to charge in order to control the high environmental costs of the activity of bunkering in line with the polluter-payer principle, and acting in conformity with the principle of precaution.

158. With regard to the fact that the vessel was released without charges or penalties, it has already been stated that the penalties were applied, and the decision to annul them was based on the risk of the ship sinking in port, and also due to diplomatic pressure from the Kingdom of Spain.

159. It should be pointed out that a State as poor as Guinea-Bissau is naturally subject to external pressure due to the need for external development aid, and also needs to protect its natural resources against any risk of ecological disaster.

160. In relation to the ship's condition, it seems clear that it was not in an appropriate condition, or it would never have run the risk of sinking in the port of Bissau; Panama clearly did not perform the necessary inspections given that it acknowledges that the ship only navigated between the Canary Isles and the West Coast of Africa.

161. The 2010 report of the ABUJA MOU Port State Control organization has the following references to Panama:

p. 27 – Table 2: Inspection Data by Flag: Panama: i) Number of Inspections: 331; ii) Number of Ships with Defects: 46; iii) N° of Defects: 288; iv) Detained: 10;

p. 33 – Table 3: Inspection Data by Classification Society: i) Panama Maritime Documentation Services; number of inspections: 1; ii) Panama Register Corporation: number of inspections: 7; number of ships with defects: Port State Control Inspections 2010 – 4[13].

162. It is therefore clear that Panama does not have a good record relative to inspections to vessels, so Guinea-Bissau reafirms that reports made on behalf of Panama are not credible.

[13] Accessible at http://www.abujamou.org

CHAPTER V- STATEMENT OF LAW.

163. Guinea-Bissau does not accept the declaration of Panama in paragraph 304 of its Memorial. Guinea-Bissau has fully respected the rules of the Tribunal. What is not acceptable is the continuous changes by Panama to the foundations of the case during the proceedings as well as its claims for damages.

164. Guinea-Bissau totally rejects the allegations of Panama that it has violated the Convention or the general international law. In fact it is the Reply of Panama which violates art. 65 n°3 of the Rules of the Tribunal as it has much more extension than the Memorial and the Counter-Memorial.

165. Guinea-Bissau reafirms that it has not violated Article 58 of the Convention as bunkering is an economic activity, which is not included in freedom of navigation or other internationally lawful uses of the sea for the reasons already explained in paragraphs 209 to 217 of the Counter-Memorial.

166. The opinion of Judge Vukas, quoted by Panama in paragraphs 310 to 313 of its Reply, is an historical interpretation of art. 58, when an evolutive interpretation should be adopted by the International Tribunal instead, according to the recente developments of its juriprudence in environmental matters[14].

[14] See Alan Boyle, "The environmental jurisprudence of the International Tribunal for the Law of the Sea", *The International Journal of Marine and Coastal Law*, vol. 22, n° 3, p. 379-380 and Haritini Dipla, «The role of the ICJ and ITLOS in the Law of the Sea», in Anastasia Strati, Maria Gavouneli and Nikolos Skourtos, *Unresolved issues and new challenges to the Law of the Sea. Time before and time after,* Martinus Nijhoff Publishers, 2006

167. Jean Marc Sorel and Valérie Boré Eveno are in favour of this evolutive interpretation of the international law:

> "The Court confirmed its position distinctly in the case of the *Aegean Sea Continental Shelf* by interpreting a provision as it should be understood at the time of the conflict and not at the time when it was drafted. Recent case law does not seem to contradict this evolution, provided that transformations in the law are genuine, that they are accepted by the parties, and that a form of *opinion juris* in favour of this evolution has already emerged (nonetheless without a need for the recognition of a genuine customary law norm requirement which, if this were the case, would be imposed in any event). Other international courts have also followed the way of evolutive interpretation. This was the case of the DSB which in the *Shrimp* case had the opportunity to interpret in an evolutive manner, on the basis of effectiveness, the concept of exhaustible natural resources in the light of the prevailing law"[15]

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

169. As David M. Ong says:

> "The influence of the 1982 UNCLOS is especially pertinent in respect of marine environmental protection. The Convention is the first major undertaking among states to protect the world's oceans in their entirety against all potentially poluting maritime activitites, as opposed to the largely piecemeal, regional and specific activity-related international

[15] Commentary on Olivier Corten and Pierre Klein (ed.), *The Vienna Conventions of the Law of Treaties. A Commentary,* I, p. 834. About the evolutive interpretation see also Pierre-Marie Dupuy, "Evolutionary Interpretation of treaties: between memory and prophecy", in Enzo Cannizzaro (editor), *The Law of treaties beyond the Vienna Convention,* Oxford University Press, 2011, p. 123 to 137 and Malgosia Fitzmaurice, "Dynamic (evolutive) interpretation of treaties and the European Court of Human Rights", in Alexander Orakheslashvili and Sarah Williams (editores), *40 years of the Vienna Convention on the Law of Treaties,* British Institute of International and Comparative Law, 2010, p. 55 to 95

law, making processes that previously charachterised developments in this file on international environmental law. In this respect, the 1982 UNCLOS follows the trend in international legal and policy instruments addressing *global* environmental concerns, as opposed to regional and/or issue specific matters"[16]

170. For this reason, the ITLOS may want to avail itself of this opportunity to improve on its interpretation of article 58 of the Convention, taking advantage of the evolution that International Law has undergone since the 1970's, with the appearance and consolidation of Environment Law in terms that could not have been considered during the negotiation of the United Nations Convention on the Law of the Sea.

171. As stated above, Guinea-Bissau never extended its tax legislation to the EEZ, given that it merely charges a small amount for the issue of the refuelling licence, which is well below what it would obtain by way of tax revenue if the refuelling had taken place on land.

172. Contrary to what Panama asserts, Guinea-Bissau's Fisheries laws (Decree Law 6-A/2000 and other related legislation) are totally compatible with the Convention.

173. In effect, its objective is strictly of an environmental nature and the revenue that is obtained with the issuing of the authorization is merely residual and is intended to finance State policies concerning the prevention and fight against marine pollution and to minimise its impact. Also for scientific marine research, which will improve our knowledge of the concrete implications of the activities undertaken in relation to fishing related operations on maritime ecosystems and generally of the rational management of living marine resources.

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[16] David M. Ong, «The 1982 UN Convention on the Law of the Sea and marine environmental protection», in Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (ed.), *Research handbook on international environmental law*, Edward Elgar, 2010, p. 567- 585 (568-569)

174. As David M. Ong argues:

> "On the second front, relating to jurisdictional issues, the Convention has confirmed the coastal states' assertion of sovereign rights and jurisdiction over the exploration and exploitation of natural ressources within vast swathes of sea-bed and the superjacent waters within the following maritime jurisdiction zones, namely, the territorial sea, contiguous zone, exclusive economic zone (EEZ) (...). The 1982 Convention provides coastal states with formal recognition of their right, and indeed duty, under international law to protect the marine environment in the large areas of sea-bed and superjacente waters that are now within their sovereign and jurisdictional scope, if not actual territorial domain"[17].

175. The precautionary principle in environmental law obliges the coastal States to take all appropriate measures to avoid any risks to the environment, as it is the case of an oil tanker sailing in the EEZ[18].

176. If Guinea-Bissau did not control the situation of unauthorized bunkering in the EEZ could even be held liable as coastal State according to international environmental law[19].

177. Nothing in the Convention prohibits Guinea-Bissau from having the fishing legislation that it has, and there are no grounds for Panama's position to the contrary.

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[17] David M. Ong, «The 1982 UN Convention ...», p. 569.

[18] See Gerhard Hafner and Isabelle Buffard, «Obligations of prevention and the precautionary principle», p. 521 to 534, in *The Law of International Responsability,* Oxford University Press, 2010, Arie Trouwborst, *Precautionary rights and duties of States,* Martinus Nijhoff, 2006, p. 122 to 161, Harald Hohmann, *Precautionary legal duties and principles of modern international environmental law. The precautionary principle: international environmental law between exploitation and protection,* Graham & Trotman/Martinus Nijhoff, 1994, p. 190 to 203.

[19] See Céline Nègre, «Responsibility and international environmental law», p. 803 a 813, in *The Law of International Responsability,* Oxford University Press, 2010

178. Guinea-Bissau's fishing legislation is absolutely essential for the preservation of its fishing resources, and there are a number of studies that assure that excessive fishing is placing these resources at risk.

179. It is absolutely evident that this fishing legislation does not constitute any extension of the customs law of Guinea-Bissau to the EEZ.

180. Nevertheless, there is still clear fiscal evasion and unfair competition with that State's companies if an oil tanker sets up a fuel sales outlet in the EEZ of a State, without applying for any licence from this State, nor meeting the requisites that it establishes to grant such licence.

181. Contrary to what Panama asserts in paragraphs 333 to 383 of its Reply, Guinea-Bissau reafirms that there was also no violation of arts. 56 (2) and 73 of the Convention.

182. 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, which does not clash with the rights of other States or with the Convention.

183. Panama insists that the VIRGINIA G. had the authorization required at law, which is completely false, neither has Panama produced documentary evidence of the existence of such an authorization.

184. The affirmation of Panama in paragraph 352 of its Reply that the documents presented by Guinea-Bissau cannot be seen to be credible is very serious, and Panama suggests that Annex 16 and 17 of the Counter-Memorial, as presented, were created *ex post facto*. Panama afirms the

owners of the Virginia G received Annex 16 from Bijagós, without any handwritten note.

185. So Panama considers a document received from a private entity, the Bijagós agency, as an official one, when the documents from the competent public entity of the administration of Guinea-Bissau, the FISCAP, does not deserve to receive any credibility from.

186. This a clear demonstration of how Panama behaves in relation to the public entities of the administrations of the coastal States.

187. It is Guinea-Bissau who considers *ex post facto* the argumentation of Panama in paragraph 353 of its Reply which intends now to blame Hugo Nosoliny Vieira for not having the requested authorization for bunkering in the EEZ.

188. Irrespective of the previous contacts between the owners of VIRGINIA G. and Hugo Nosoliny Vieira, about which Guinea-Bissau is totally unaware, it is clear that the VIRGINIA G. could not exercise the activity of bunkering in the EEZ without having the proper written authorization.

189. Guinea-Bissau's actions were also in full conformity with art. 73 (1) of the Convention, which expressly legitimates its action, and there was no abuse of discretion in applying its law.

190. In addition Guinea-Bissau 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.

191. 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 the 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".

192. If the owner of VIRGINIA G. did not request to fix a reasonable bond, that is surely not Guinea-Bissau's fault.

193. Besides that, 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.

194. As referred, 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.

195. In addition, Guinea-Bissau 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.

196. 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 wished 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.

197. The passports were delivered upon request and, in any case, a delay in the restitution of a passport can never be considered to be equivalent to a measure of imprisonment. It is, therefore, clear that there was no violation of art. 73 (4) of the Convention.

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

199. 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.

197. It is clear that art. 73 (4) of the Convention has to be interpreted in connection with art. 91, such that any obligation concerning communication in cases of flags of convenience ceases as from the time, when the State that has an effective connection with the vessel assumes diplomatic protection.

198. It is totally false that Guinea-Bissau violated other rules of the Convention or other rules of international law, contrary to what Panama refers to in paragraphs 383 to 391 of its Reply.

199. Article 220, n° 6 of the Convention exprelly states that "where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone committed a violation referred to in paragraph 3, resulting in a discharge causaing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, thta State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws".

200. As is is confirmed by the wittnesses of Guinea-Bissau, there was never any violence or any threats made to the crew, its being clear that the legitimate exercise of authority, which represses violations committed in its EEZ, does not constitute violence.

201. 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, thus making it absurd to consider this situation as an excessive use of force.

202. 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.

203. 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 remain perfectly moored in the port of Bissau.

204. 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.

205. Contrary to what Panama states in paragraphs 393 to 414 and 421 to 423 of its Reply, it is evident that diesel is covered in the seizure of the ship, something which is permitted by article 52 of Decree-Law 6-A/2000, which allows for the seizure of the vessel with all of its fixtures, fittings and fishing products.

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

207. Panama's interpretation of this provision does not make any sense: it is clear that if the whole ship can be seized, naturally the diesel that is inside it is not excluded from this act.

208. The seizure of the diesel was therefore perfectly legal, with regard to Guinea-Bissau's domestic legislation.

209. Contrary to what is stated by Panama in paragraphs 415 to 423 of its Reply, it is reiterated that the Attorney-General of the Republic is a magistrate, as such absolutely independent from the Government, and the Government acted in good faith, based on a legal opinion provided by him.

210. Contrary to what Panama asserts Guinea-Bissau did not violate the Convention and the general principles of international law, so it cannot be held lilabe for damages.

CHAPTER VI- DAMAGES.

211. Guinea-Bissau reafirms that is totally unaware of whether the damages referred to in paragraphs 425 to 488 of the Reply of Panama ever existed, as Panama does not present any proof thereof, but only unfounded allegations, and therefore such allegations must be considered to be unproven.

212. For this very reason, in paragraph 425 of its Reply Panama admits once more that it does not even know what damage there was, and provides a revised estimate of the damages naturally increasing the revised "estimate" without any grounds.

213. Guinea-Bissau reafirms its rejection of the possibility of claims being presented for damages after the Memorial, which is totally contrary to art. 62 of the Rules of the Tribunal, as well as to the rights of the defence.

214. The claims for damages are based on reports which do not deserve any credibility, and it is clear that if such damages did exist, they are due to the financial problems of the shipowner, having, therefore, nothing to do with the arrest of the VIRGINIA G.

215. Guinea-Bissau reafirms that it considers the quantification set out in paragraphs 448 to 485 of the Memorial in relation to the damage to be incomprehensible, with no proof being provided for this quantification, there even being an increase in the amounts presented, without the amounts nor the increase appearing to be minimally justified.

216. As has already been said, 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

217. Contrary to what Panama asserts in paragraphs 488 to 505 of its Reply, Guinea-Bissau is entitled to present a counter claim according to art. 98 of the Rules of the Tribunal.

218. Guinea-Bissau has claimed 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.

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

220. 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".

221. Guinea-Bissau is, therefore, entitled to claim from Panama all damages and costs caused by VIRGINIA G to Guinea-Bissau, which are the result of the granting of the flag of convenience to the ship by Panama.

222. Guinea-Bissau informed Panama of its intention to present a counter-claim and considered that Panama had already had the opportunity to contradict, so no additional pleading is required.

223. If Panama considers Guinea-Bissau's counter-claim "not only absurd, frivolous and vexatious, but unfounded in fact and in law", there is no reason for Panama's being allowed to present any other written pleading.

224. Guinea-Bissau reafirms there is no genuine link between VIRGINIA G. and Panama, which is not only a defence to Panama's claims, but also a reason to present this counter-claim.

225. The reason for not presenting this argument before it is only due to the fact that the negotiations to release the vessel were conducted between Guinea-Bissau and Spain without any intervention of Panama, as there should have been in relation to a vessel of its flag. But Panama decided to require an arbitration only long after the release of VIRGINIA G, decided by Guinea-Bissau exclusively based in the situation of the ship and the negotiations with the Kingdom of Spain.

226. Panama insists in affirming that the documents provided were considered to be in order, which is not the question here, but only the fact that Panama granted its flag to a vessel with no relation at all with Panama.

227. It is clear that if Guinea-Bissau could not auction the vessel, due to its condition, for which it made no contribution at all, it is the full right of Guinea-Bissau to claim damages from Panama, and the amount claimed is surely very modest, compared to the claims of Panama, which are being raised constantly in opposition to the rules of the International Tribunal.

228. The fact that the ship is not a fishing vessel is totally irrelevant, given that by supplying fuel at sea it is performing a fishing related operation, putting at risk the use of the marine resources and their environmental protection by Guinea-Bissau.

229. As is obvious, the amount asked for by Guinea-Bissau for the damages caused by the VIRGINIA G. case is entirely in accordance with what it would have obtained if it had been able to auction the vessel, as was its right, and we fail to understand how can Panama state that this amount is excessive when it claims much higher damages without providing any grounds for them.

230. As already been referred to, 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.

231. It is also obvious that 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 resulted in 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.

232. Guinea-Bissau was therefore prevented from auctioning the ship, as was its right, owing to the poor conditions it was in caused by the inefficient supervision of Panama of the vessels to which it grants flags of convenience. It was 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.

233. Panama cannot question that with the auction of the ship, Guinea Bissau would certainly have obtained revenue of at least 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.

234. The counter-claim of Guinea-Bissau cames therefore within the jurisdiction of the Tribunal and it is completely founded on fact and in law.

CHAPTER VIII- LEGAL COSTS

235. According to the Special Agreement, the International Tribunal "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

236. 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 insists on asking the International Tribunal to dismiss the Submissions of Panama in total and to adjudge and declare that:

1- Panama violated Article 91 of the Convention;

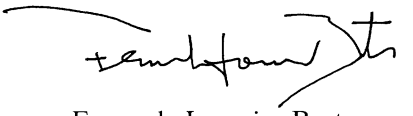
2- Panama is to pay in favour of Guinea-Bissau compensation for damages and losses caused as a result of the aforementioned violation, in the amount quantified and claimed by Guinea-Bissau, or in an amount deemed appropriate by the International Tribunal;

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

21 November 2012

Luís Menezes Leitão

(Agent for Guinea-Bissau)



Fernando Loureiro Bastos

(Co-agent for Guinea-Bissau)