REPLY OF PANAMA

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

M/V "VIRGINIA G"

THE REPUBLIC OF PANAMA *v.* THE REPUBLIC OF GUINEA-BISSAU

Case N°. 19

REPLY OF THE REPUBLIC OF PANAMA
TO GUINEA-BISSAU'S COUNTER-MEMORIAL and COUNTER-CLAIM

28 AUGUST 2012

INDEX

CHAPTER 1
INTRODUCTION and BACKGROUND

I. Introduction

(cf. Counter-Memorial, Chapter I)

A. General Introduction and Procedure

1. On 3 June 2011, the Republic of Panama ("**Panama**") instituted arbitration proceedings against the Republic of Guinea-Bissau ("**Guinea-Bissau**") under Article 286 and Annex VII of the 1982 United Nations Convention on the Law of the Sea (the "**Convention**") in relation to a dispute which had arisen by reason of the arrest, on 21 August 2009, and prolonged detention, by Guinea-Bissau, of the Panama-flagged vessel *M/V VIRGINIA G* (the "***VIRGINIA G***") its captain and crew, as well as the confiscation of the cargo of gas oil on board (the "**Arbitration Notification**").[1]

2. Panama requested the Arbitral Tribunal to adjudge and declare in terms of the points listed (a) to (j) of the said Arbitration Notification, which points have already been set out in Panama's Memorial.[2]

3. In its Memorial, Panama stated that by Exchange of Letters of 29 June 2011 and 4 July 2011 Panama and Guinea-Bissau entered into a special agreement to submit the dispute between the two States relating to the *VIRGINIA G*, and subject to the arbitration proceedings, to the jurisdiction of the International Tribunal for the Law of the Sea (the "**International Tribunal**") in terms of Article 55 of the Rules of the International Tribunal (the "**Special Agreement**").

4. The Special Agreement was notified to the Registrar of the International Tribunal by the Agent of Panama by letter dated the same day, 4 July 2011. The Registrar of the International Tribunal sent a copy of a *Note Verbale* (as sent to Guinea-Bissau) to Panama, wherein reference was made to Guinea-Bissau's agreement to "transfer the case to the International Tribunal whose jurisdiction in this case Guinea-Bissau accepts fully", and to Guinea-Bissau's statement that the "afore-mentioned proposal and this letter constitute a special agreement between the two Parties for the submission of the case to ITLOS."

5. In paragraphs 5 and 6 of its Counter-Memorial, Guinea-Bissau states that what constituted the Special Agreement between the Parties was Panama's Arbitration Notification dated 3 June 2011 (which contained 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, and not Panama's final letter of the 4 July 2011.

6. Panama has no objection in relation to this clarification by Guinea-Bissau, but points out that, in any case, the institution of the proceedings before the International Tribunal was the 4 July 2011, as confirmed by a letter sent by the Registrar of the International Tribunal, dated the same 4 July 2011, pursuant to Article 55 of the Rules of the Tribunal.

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[1] A copy of the Arbitration Notification is available at the Registry of the International Tribunal for the Law of the Sea, or on its website under "Cases", Case No. 19 http://www.itlos.org/index.php?id=171

[2] For the avoidance of repetition, reference is made to paragraph 2 of Panama's Memorial, pp. 3-4.

7. The dispute was, therefore, submitted to the International Tribunal on the 4 July 2011 by Special Agreement between the Parties in terms of Article 24 of Annex VI of the Convention (Statute of the International Tribunal for the Law of the Sea).

8. By Order 2011/3 of 18 August 2011, in accordance with the Special Agreement and in terms of the agreement between the Agents and Counsels for Panama and Guinea-Bissau at a consultation meeting held on the 17 August 2011, the President of the International Tribunal fixed the 4 January 2012 as the date for the submission by Panama of its Memorial (in accordance with Article 59 and Article 60 of the Rules of the International Tribunal).

9. By letter dated 13 December 2011, addressed to the Registrar of the International Tribunal, the Agent and Counsel 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, without objection by Guinea-Bissau.

10. By letter dated 3 January 2012, addressed to the Registrar of the International Tribunal, the Agent for Guinea-Bissau appointed Professor José Manuel Sérvulo Correia as *ad hoc* judge for Guinea-Bissau pursuant to Article 19(1) of the Statute of the Tribunal, without objection by Panama.

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

12. Panama's Memorial, with its accompanying annexes, was submitted on the 23 January 2012 in electronic format and by electronic mail,[3] followed immediately by transmission of the requested paper format in one original, one certified copy and 65 additional copies.

13. By letter dated 3 April 2012, the Registry of the International Tribunal informed the Agent for Panama that Annexes 22, 32, 44 and 55 were to be re-submitted for want of legibility or otherwise incomplete translation. The Annexes were re-submitted on the 12 April 2012 in electronic format and by electronic mail, followed immediately by transmission of the requested paper format in one original, one certified copy and 65 additional copies.

14. By letter dated 31 May 2012, the Registry of the International Tribunal informed the Agent of Panama of Guinea-Bissau's submission of its Counter-Memorial and Annexes. By letter dated 11 June 2012, the Registry of the International Tribunal informed the Agent of Panama of Guinea-Bissau's submission of additions/corrections to Annexes 9, 16 and 19 of its Counter-Memorial, as requested by the International Tribunal.

15. In terms of Order 2011/3 of 18 August 2011, in accordance with the Special Agreement and in terms of the agreement between the Panama and Guinea-Bissau at the consultation meeting held on the 17 August 2011, the President of the International Tribunal fixed the 21 August 2012 as the deadline for the filing of the Reply of Panama.

[3] As permitted in terms of Guideline 10 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal.

16. In terms of Order 2012/2, and on the request of Panama, the International Tribunal extended the time-limit for the submission of the Reply by Panama to the 28 August 2012.

17. This Reply, with its accompanying **Annexes 1 (61) – 5 (65)**, is submitted in accordance with that Order. In this Reply, the annex numbers re-start at 1, with their respective order of submission (that is, subsequent to the annexes submitted with the Memorial) indicated in brackets.

B. Jurisdiction

18. Guinea-Bissau states (Counter-Memorial paragraph 13) that after some hesitation between the Parties as to the appropriate forum for settlement, it was finally decided that the dispute would be referred to the International Tribunal.

19. Panama agrees with what Guinea-Bissau states in the second part of paragraph 13 of its Counter-Memorial, however, it should be clarified that Panama had no hesitation whatsoever in suggesting several options (and forums) for settlement of the dispute. In contrast, it was Guinea-Bissau which "hesitated" and persistently demonstrated a complete lack of co-operation before reaching the present proceedings.

20. In respect of Guinea-Bissau's statement (Counter-Memorial paragraph 16) that the International Tribunal has no jurisdiction over claims related to the *IBALLA G*, Panama replies that it is not requesting the International Tribunal to exercise jurisdiction over claims made against the owners of the *IBALLA G* in relation to her seizure (by creditors), but rather, for the International Tribunal to consider that the damages and losses caused by Guinea-Bissau to the detriment of the owners of the *VIRGINIA G* as a result of the arrest and prolonged detention of the *VIRGINIA G,* affected the operations and solvency of the owners in respect of both the *VIRGINIA G* and ofthe bareboat chartered *IBALLA G*, and that the compensation that the International Tribunal is being requested to includes this additional element of damages and losses.

C. Supporting Statements presented by Guinea-Bissau

21. Panama notes that the supporting statements presented by Guinea-Bissau as Annex 1 to 6 of its Counter-Memorial are missing pages, namely, the pages that would follow pages 11, 15, 24 and 25 of the marked pages (top right) in the Annex bundle.

II. Background

(cf. Counter-Memorial, Chapter III)

A. Bunkering activities

22. In this section, Panama sets out its reply in respect of Guinea-Bissau's statements contained in paragraphs 76 to 85 of its Counter-Memorial. Panama's statements hereunder are in addition to those already presented to the International Tribunal in paragraphs 32 to 43 of its Memorial, and are to be read in conjunction with the relevant sections of this Reply.

23. As an initial observation, Panama has already stated in its Memorial (paragraph 36) that in relation to bunkering activities in the EEZ of Guinea-Bissau, it is has been reported by the European Commission (in 2005) that the Port of Bissau, "does not have suitable facilities or conditions for transhipment, nor fuel, water and ice supplies. EU vessels generally never call into port except for formal inspections. Most refuelling and transhipping provisions is done at sea or in foreign ports (Dakar/Las Palmas mainly) [...] For industrial vessels, whilst it is possible to refuel in Bissau, most refuelling and transhipping provisions is done at sea or in foreign ports, due to the approach difficulties, the high cost and lack of reliable supplies. EU vessels generally do not call into port."[4]

24. Panama remarks that insofar as bunkering services are necessary for fishing activities to be carried out in Guinea-Bissau's EEZ – an industry which is crucial to Guinea-Bissau's economy – Guinea-Bissau should perhaps re-consider its stance in respect of vessels such as the *VIRGINIA G* and encourage their freedom of navigation rather than encumber it with unlawful conditions and disabling sanctions.

1. Guinea-Bissau's environmental protection and conservation concerns

25. Oil tankers and their activities are regulated, *inter alia*, by the MARPOL Convention(s)[5]. Preventive measures are foreseen in respect of pollution by oil from operational measures as well as from accidental discharges (Annex I), and in relation to air contamination caused by sulphur oxide and nitrogen oxide emissions from ship exhausts, including the prohibition of deliberate emissions of ozone depleting substances (Annex VI).

26. Despite its concerns that bunkering raises certain environmental protection and conservation concerns, and may endanger the right of a coastal State over the existing living resources in its EEZ, Guinea-Bissau is not a State party to the MARPOL Convention(s) and Annexes.[6]

27. Panama submits that Guinea-Bissau's contention that it was necessary to regulate the *VIRGINIA* G's activities at national law within the context of protection and conservation of its resources can only be seen as an attempt to mislead the International Tribunal, especially since the law that was enforced against the *VIRGINIA G* was the national Fisheries law of Guinea-Bissau, specifically in respect of the authorisation required for bunkering to be carried out in its EEZ (as it is deemed to be a fishing-related activity). Guinea-Bissau cannot now be heard to raise its "protection and conservation of its resources" concerns for the first time, in its Counter-Memorial.

28. Nevertheless, Panama highlights to the International Tribunal that Panama is a State party to the MARPOL Convention(s) and its Annexes, such that the *VIRGINIA G* is obliged to satisfy a number of stringent requirements. Panama also highlights to the International Tribunal, that,

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[4] Ex-post evaluation of the current Protocol to the Fisheries Agreement between the European Community and the Republic of Guinea-Bissau, European Commission, Directorate General for Fisheries and Maritime Affairs, December 2005. In a similar ex-post evaluation carried out in 2010, it was commented that "No funding has been identified for all supporting equipment required, for example fuel depot, which will be an essential service required to attract vessels."

[5] International Convention for the Prevention of Pollution from Ships (MARPOL) http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-%28MARPOL%29.aspx

[6] http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx

at the material time, the *VIRGINIA G* was in line with all Panama's MARPOL obligations, such that the vessel:

a. Used and transported only fuels with low sulphur content;

b. Held a valid International Oil Pollution Prevention (IOPP) Certificate, and a valid International Air Pollution Prevention (IAPP) Certificate;

c. Had the necessary equipment to avoid fuel discharges emanating from the bilge of the machine room, and from the cleaning of the loading tanks;

d. Had the necessary means to counter accidental discharge (barriers, dispersing agents, etc.);

e. Had an approved Shipboard Oil Pollution Emergency Plan (SOPEP) handbook, containing the procedures to be followed, and the contacts of the competent authorities, in case of pollution;

f. Had civil liability insurance (P&I).

29. The Guinea-Bissau authorities were fully aware of the bunkering activities which were to take place, including the name of the bunkering vessel, the *VIRGINIA G*. Aside from the authorisation aspect, Guinea-Bissau was perfectly able to establish and indicate any necessary protection and conservation measures it deemed necessary. However, Guinea-Bissau did not indicate or impose any such additional measures; it only required the communication of the date and location of the planned bunkering operation, and the name of the bunkering vessel; and these details were duly provided (see paragraphs 104 *et. seq.* of Panama's Memorial).

30. It was, in fact, the *VIRGINIA G*, in terms of its flag's requirements, which had the necessary measures in place to avoid pollution, and which was fully prepared in case of discharge. In this respect, therefore, Panama had due regard to the rights of Guinea-Bissau as the coastal State, in accordance with Article 58(3) of the Convention.

31. Guinea-Bissau does not deny that at the material time there was no spillage or risk thereof.

2. Increased efficiency is not tantamount to increased fishing intensity

32. In paragraph 81 of its Counter-Memorial, Guinea-Bissau contends that bunkering allows "much more intensive fishing than that which is normal". Guinea-Bissau relies on the reasoning of David Anderson (also a former Judge of the International Tribunal) who states that off-shore bunkering increases catching efficiency as the fishing vessel is relieved of the need to make a voyage to and from port in the coastal State, thus intensifying the fishing effort and giving the coastal State a perspective that bunkering has a close connection with fishing and the overall management of the fishery than with navigation. This is evidently the perspective that Guinea-Bissau argues, so that subsequently, but almost as an afterthought, Guinea-Bissau states that the regulation of bunkering is also included in the right of the coastal State to regulate the capture of biological resources in its EEZ (Article 61 of the

Convention). Panama cannot agree with this unreasonably extended (and unsupported) interpretation of Article 61.

33. The activity of fishing, the manner in which it is carried out, the conditions applicable to the activity and the quantities of allowable catch are directly related to fishing vessels, fishing activities and fishing catches, and are strictly regulated at national, regional and international level. In Article 61 of the Convention it is established that (with added emphasis):

> 1. The coastal State shall determine the **allowable catch** of the living resources in its exclusive economic zone.
>
> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the **maintenance of the living resources** in the exclusive economic zone is not **endangered by over-exploitation**. As appropriate, the coastal State and competent international organizations, whether sub regional, regional or global, shall cooperate to this end.

34. Panama contends that bunkering cannot be seen to work against the maintenance of the living resources or contribute to over-exploitation. The allowable catch, and the parameters of fishing missions and operations, are fixed by law (at national and/or regional level) or through participation (of the flag State of the fishing vessels) in inter-governmental fishery organisations responsible for the conservation of certain species (such as ICCAT).[7]

35. Activities such as those of support vessels allow for a more cost-effective operation, not because of increased catches, but by preventing additional expenses for the vessels (such as avoiding additional expenses for fishing vessels having to go in and out of the fishing zone to receive supplies from port, technical assistance, disembarkation of crew, etc.).

36. As against the reasoning of Guinea-Bissau, and, to an extent, that of the author and former ITLOS Judge David Anderson (on whom Guinea-Bissau relies), Panama suggests that in fishing zones where fishing is regulated (according to the Convention), and where fishing vessels abide by those regulations[8] off-shore bunkering cannot be seen as an activity that goes against, or otherwise hinders, the conservation of living resources.

37. Indeed, it does not follow that an increase in efficiency is tantamount to an increase in intensity or quantity.

3. A customs duty or other tax in disguise?

38. In paragraphs 315 to 332 below, Panama submits that the International Tribunal should consider whether there is a hidden and different reason behind Guinea-Bissau's regulation of bunkering activities in its EEZ as set out in its Fisheries law. In particular, Panama submits

[7] The International Commission for the Conservation of Atlantic Tunas.

[8] Indeed, companies that provide bunkering services to fishing vessels in practice require certainty that the vessels they supply hold the appropriate fishing licence from the State concerned. This is mainly to ascertain that the fishing vessels are operating in line with national requirements and, importantly, that they are not engaged in illegal, unreported and unregulated (IUU) fishing activities.

that Guinea-Bissau is, in fact, extending its national fisheries legislation to cover also re-fuelling operations carried out in the EEZ, such that prior authorisation is requested against payment, and that this is, in reality, intended solely to extend a customs-type radius – a situation that was not, in fact, accepted by the International Tribunal in the *Saiga No.2*[9] 1999 judgement[10] yet would appear to still be present, in disguised form, in Guinea-Bissau's Decree Law 6-A/2000, and related subsidiary legislation.

39. The relevant part of Chapter 4 of this Reply (Reply to Statement of Law) sets out the Panama's arguments in this respect. For present purposes, however, the below points should be highlighted.

40. In Counter-Memorial paragraphs 81 *et. seq.* Guinea-Bissau demonstrates a complete lack of understanding of the rights pertaining to a costal State in its EEZ in respect of bunkering, and attempts to justify the regulation of bunkering activities (under Guinea-Bissau law), not under environmental considerations and measures (as it attempts to suggest), but under fiscal measures, such that, in Guinea-Bissau's words: *the costal State has the right to obtain corresponding tax revenue resulting from this activity, inasmuch as bunkering prevents the coastal State from collecting the natural tax for the supply of fuel in its territory [...]*, and that *[i]t is therefore normal for the coastal State to demand that the activity of bunkering in its exclusive economic zone implies the payment of the corresponding licences,*[11] *pursuant to art. 62 of the Convention, a practice which is common to the whole of the African sub-region in which Guinea-Bissau is included [...]* (paragraphs 83 and 84 of the Counter-Memorial).

41. The rights granted to coastal States under Article 56 of the Convention allow 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.

42. In this respect it should be indicated that in point (a) of Article 62(4) of the Convention, it is established that:

> 4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following:
>
> [...]
>
> a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry:

[9] The *M/V Saiga (No.2)* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, judgement of 1 July 1999.

[10] At paragraph 136: "The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the *Saiga*, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.

[11] It is perhaps worth commenting that in correspondence exchanged during the detention of the *VIRGINIA G*, and throughout Guinea-Bissau's Counter-Memorial, the term "licence" and "authorisation" seem to be used interchangeably by Guinea-Bissau. It is important to reiterate, however, that under Guinea-Bissau law (the applicability of which to the EEZ is nevertheless contested by Panama), a bunkering vessel is required to operate under authorisation, not a full licence.

43. Article 62(4)(a) only refers to fishing licences, and might arguably be extended to fishing-related activities such as extraction, transhipment, and discharge of the captures.[12] However, the requirement of licensing and payment of fees cannot be seen to extend to non-fishing activities under the Convention, and any attempt in that respect, especially if found to be clearly motivated by tax revenue benefits, cannot but be considered as an extension of the tax and/or customs radius beyond the territorial seas and the contiguous zone and, therefore, in breach of the EEZ regime provisions contained in the Convention, as already declared by the International Tribunal.

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

44. Panama's reply to Guinea-Bissau's statements as contained in paragraphs 86 to 99 of its Counter-Memorial are contained in the broader Chapter 4.I of this Reply (paragraphs 305 *et. seq.*). Reference is also made to paragraphs 44 to 56 of Panama's Memorial. For present purposes, however, Panama makes the below observations.

45. The basis for Guinea-Bissau's actions against the *VIRGINIA G* on the 21 August 2009 was the alleged practise of fishing related activities in the form of unauthorised sale of fuel to fishing vessels in Guinea-Bissau's EEZ, in accordance with paragraph 1 of Article 52 (as amended) and in conjunction with article 3(c) and Article 23 of Decree Law 6-A/2000.

46. Guinea-Bissau asserts in its EEZ an exclusive competence in relation to the conservation and exploration of its natural resources, living or non-living.[13] In terms of Decree 6-A/2000, and through the application of Act No. 3/85 of 17 May 1985, fishing within the EEZ of Guinea-Bissau by any foreign vessel or ship not authorised by the government is expressly prohibited.

47. Guinea-Bissau also asserts, in its EEZ, an exclusive competence over certain "fishing related operations" termed "activities of logistical support" which would, under Guinea-Bissau legislation, appear to include refuelling services provided at sea.

48. Decree Law 6-A/2000, as the main Fisheries legislation, does not directly define bunkering as a "fishing-related operation". Instead, reference must be made to Guinea-Bissau's subsidiary legislation in order to locate a definition of "fishing-related operation", and, furthermore, whether bunkering is included therein. Bunkering is then defined as a type of logistical support.

49. Guinea-Bissau has extended its jurisdiction in its EEZ to apply and enforce its laws over its natural resources, not only against fishing vessels (as it is entitled to do) but also against vessels such as the *VIRGINIA G* which are not fishing vessels and which do not exploit or utilise the natural resources which are subject to the sovereignty and jurisdiction of Guinea-Bissau in terms of Article 56 of the Convention. Indeed, Guinea-Bissau extends and enforces its rights and jurisdiction over what it calls "activities of logistical support" and "fishing related operations", and Panama submits that such extension and enforcement is not compatible with international law.

[12] In this respect, reference is made to paragraph 288 of Panama's Memorial (p. 50).
[13] Article 10 of the Constitution of Guinea-Bissau.

50. Panama submits that this is a unilateral broadening of the scope of the Convention which restricts freedom of navigation under the Convention.

51. In paragraph 96 of its Counter-Memorial, Guinea-Bissau refers to Article 39 of Decree 4/96, which states that the operations for logistical support operation for vessels that operate in waters under national sovereignty and jurisdiction such as "victuals, fuel, the delivery or receipt of fishing materials and the transfer of crews, and transhipment of catches" must be previously authorised by the Ministry of Fisheries.

52. Panama would, in principle, agree with this article, provided it is applied to fishing vessels which exploit or utilise the natural resources in the EEZ of Guinea-Bissau. Panama would, in fact, consider it to be a logical consequence that the sanction for a fishing vessel not abiding by such a requirement would be, amongst other things, the seizure of the fishery products (Article 52 of Decree Law 6-A/2000). Panama does not, however, accept that such a law should have been applied to the *VIRGINIA G* which is not a fishing vessel, which does not exploit or utilise the natural resources in the EEZ of Guinea-Bissau and which certainly did not have any fishery products on board.

53. As Panama has already submitted in its Memorial, and as it will reiterate in this Reply, Decree Law 6-A/2000 and related subsidiary legislation, as applied by Guinea-Bissau to its EEZ in unilateral extension of the sovereignty and the jurisdiction granted under the Convention, is incompatible with, and in breach of, the provisions on the EEZ set out in the Convention, and, indeed, of the Constitution of Guinea-Bissau.

54. Panama has also submitted to the International Tribunal that, in any case, Guinea-Bissau acted in contravention of the provisions of the Convention, and in bad faith, when applying and enforcing its national law.

* * *

CHAPTER 2
REPLY TO OBJECTIONS TO ADMISSIBILITY

(cf. Counter-Memorial, Chapter II)

55. In this section, Panama sets out its reply in respect of Guinea-Bissau's statements and arguments contained in paragraphs 24 to 75 of its Counter-Memorial.

I. Guinea-Bissau's objections to admissibility are outside the time-limit, and are brought in bad faith

56. In paragraphs 24 to 27 of its Counter-Memorial, Guinea-Bissau claims and contends that it is not precluded from raising objections (to the admissibility of the claims of Panama) by Article 97(1)[14] of the Rules of the Tribunal, which sets a time-limit of ninety (90) days.

57. Panama disagrees with Guinea-Bissau, and contends that Guinea-Bissau is precluded from raising its objections to the admissibility of Panama's claims at this stage, for the reasons set out hereunder.

A. Guinea-Bissau's objections were not brought within the time-limit

58. Panama, respectfully, does not agree with the International Tribunal's finding in the *Saiga No.2* case (at paragraph 53), on which reliance is placed by Guinea-Bissau in its Counter-Memorial (paragraph 25), that "*As stated therein, the article applies to an objection "the decision upon which is requested before any further proceedings on the merits". Accordingly, the time-limit in the article does not apply to objections to jurisdiction or admissibility which are not requested to be considered before any further proceedings on the merits.*" Such an interpretation is, with respect, incorrect and self-defeating, as it would cause the running of the time-limit for such request to be subject to the making of the very request itself. Indeed, there is no reason for a time-limit to start to run once a request is brought.

59. Rather, a logical interpretation, in good faith and based on the ordinary meaning to be given to the terms of Article 97(1) of the Rules of the Tribunal (in the spirit of Article 31(1) of the Vienna Convention on the law of Treaties) would lead to conclude that the text of Article 97(1) indicates and contemplates three distinct circumstances, for each of which the 90-day limit applies.

[14] *Article 97*

1. Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of proceedings.
2. The preliminary objection shall set out the facts and the law on which the objection is based, as well as the submissions.
3. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Tribunal, or the President if the Tribunal is not sitting, shall fix a time-limit not exceeding 60 days within which the other party may present its written observations and submissions. It shall fix a further time-limit not exceeding 60 days from the receipt of such observations and submissions within which the objecting party may present its written observations and submissions in reply. Copies of documents in support shall be annexed to such statements and evidence which it is proposed to produce shall be mentioned.
4. Unless the Tribunal decides otherwise, the further proceedings shall be oral.
5. The written observations and submissions referred to in paragraph 3, and the statements and evidence presented at the hearings contemplated by paragraph 4, shall be confined to those matters which are relevant to the objection. Whenever necessary, however, the Tribunal may request the parties to argue all questions of law and fact and to adduce all evidence bearing on the issue.
6. The Tribunal shall give its decision in the form of a judgment, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.
7. The Tribunal shall give effect to any agreement between the parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits.

60. Whilst wishing to avoid excessive analysis of what should be a straightforward interpretation, Panama submits that the construction and punctuation of Article 97(1) conveys clearly that for each of the three types of objections contemplated, such objection is to be made in writing within 90 days from the institution of proceedings; therefore:

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

61. This reasoning is supported by the construction of the originator of Article 97(1) of the Rules of the Tribunal, that is, Article 79(1) (and the more recent 79(2) and 79(3)) of the Rules of the International Court of Justice, which lends support to Panama's contention that there is a time limit within which an objection to admissibility can be raised and that the time-limit for raising of such objection if brought within the stipulated time-limit, should be dealt with before submissions on the merits (as further explained below), at any rate, in the absence of a clear agreement between the Parties to this case (Article 97(7) of the Rules of the Tribunal).

62. In the present case, the institution of the proceedings took place on the 4 July 2011, and Guinea-Bissau was, therefore, able to raise objections as to admissibility, in writing, by the **2 October 2011**.

63. Guinea-Bissau failed to make any such objection on admissibility within the time-limit stipulated in Article 97(1) of the Rules of the Tribunal.

64. Furthermore, and as will be elaborated hereunder, on no occasion did Guinea-Bissau express any objection to the admissibility of Panama's claims, nor did it reserve any right thereto. It is suggested that Guinea-Bissau's choice of timing for submitting its objections are also clearly in bad faith.

B. Guinea-Bissau acted in bad faith. It failed to use its right under Article 97(1) and deliberately delayed raising its objections to admissibility until after Panama's Memorial. It is now estopped from raising any such objections.

65. It is relevant to highlight that the proceedings currently before the International Tribunal were brought by special agreement between Panama and Guinea-Bissau; they did not come as a surprise to Guinea-Bissau.

66. Indeed, the special agreement was reached after many months of attempts by Panama to engage, with Guinea-Bissau, in discussions for an amicable solution, failing which, a formal initiation of arbitration proceedings under Annex VII of the Convention was initiated.

67. The special agreement was reached by virtue of two letters (or communications) exchanged between Panama and Guinea-Bissau, notified to the International Tribunal on the 4 July 2011.[15] The time-line is set out in further detail hereunder.

68. Guinea-Bissau was fully aware of the claims being raised by Panama in relation to the VIRGINIA G matter well before proceedings were instituted before the International Tribunal. Specifically, but without limitation, Panama communicated its position and concerns to Guinea-Bissau by diplomatic letters dated 28 July 2010, 15 September 2010, 4 October 2010 and 19 October 2010; Guinea-Bissau, however, completely ignored Panama's communications.

69. By letter dated 15 February 2011, and in accordance with Article 283[16] of the Convention ("Obligation to exchange views") Panama once again communicated its position to Guinea-Bissau, and invited Guinea-Bissau to agree to submit the dispute to arbitration under Annex VII of the Convention, failing which, Panama would have no choice but to unilaterally institute compulsory arbitration proceedings under Annex VII.

70. In light of Guinea-Bissau's sustained failure to reply or otherwise react to Panama's proposals, including the formal invitation to submit the dispute to arbitration, by letter dated 3 June 2011, Panama initiated arbitration proceedings in terms of Article 286 of the Convention, attaching a full statement of claim, nominating an arbitrator and indicating that Guinea-Bissau was to appoint a member of the arbitral tribunal within 30 days.

71. Panama's notification of initiation of arbitration proceedings of the 3 June 2011 proposed that the parties agree to submit **the dispute** concerning the *VIRGINIA G* to the International Tribunal:

> *"Panama reiterates and respectfully submits to the Guinea-Bissau Ministry of Foreign Affairs [...] that there is the possibility of submitting **this dispute** to ITLOS, or a special chamber within ITLOS, as a way of resolving **the dispute** contentiously, yet in a less costly manner.* (added emphasis)
>
> *Panama remains available to discuss this option through its Counsel and Agent. By way of indication, it is suggested that the two governments agree to submit **the dispute** between them concerning the VIRGINIA G to ITLOS through an exchange of letters. [...]"* (added emphasis)

72. The subject-matter of "the dispute" between Panama and Guinea-Bissau was clearly set out in the first three paragraphs of the Arbitration Notification, as follows (with added emphasis):

> i. The dispute being submitted to arbitration by [Panama] relates to the Panamanian flagged oil tanker *Virginia G,* which was arrested by the authorities of [Guinea-Bissau] on 21 August 2009 in the [EEZ] of Guinea-Bissau, whilst carrying out refuelling activities.

[15] Panama's Arbitration Notification dated 3 June 2011 contained a proposal to transfer the case to the International Tribunal, to which Guinea-Bissau replied, in acceptance of such proposal, by letter dated 29 June 2011. This exchange constituted the special agreement between the Parties. Pursuant to Article 55 of the Rules of the Tribunal, Panama notified the International Tribunal of the special agreement on the 4 July 2011, and, on the same date, the Registrar of the International Tribunal replied, stating that the case had been instituted as of the 4 July 2011.

[16] *Article 293*

1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

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

iii. Panama claims that in this case Guinea-Bissau breached its international obligations set out in the 1892 United 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 detention.

73. The full set of documents was sent to the Minister of Foreign Affairs of Guinea-Bissau and, simultaneously, to the Office of the Prime Minister in Guinea-Bissau, to the Permanent Representation of Guinea-Bissau to the United Nations and to the Embassy of Guinea-Bissau in Belgium.

74. On the 29 June 2011, the Ambassador and Permanent Representative of Guinea-Bissau to the United Nations replied to the Agent of Panama, conveying the agreement of the government of Guinea-Bissau to "transfer the case to the International Tribunal of the Law, whose jurisdiction in this case Guinea-Bissau accepts fully." The special agreement was duly notified to the International Tribunal on the 4 July 2011, and the case was considered instituted as of that date.

75. (In the interest of accuracy, Panama did not use the words "[...] proposal to *transfer the case* to the International Tribunal" (emphasis added) as suggested by Guinea-Bissau in paragraph 26 of its Counter-Memorial. In fact, it was Guinea-Bissau who used the phrase in its reply of the 29 June 2011).

76. The special agreement was for the parties to "submit **the dispute** between them **concerning the VIRGINIA G** to ITLOS" to the International Tribunal, in order that the International Tribunal may deal "with all aspects of **the merits** (including damages and costs)". (Added emphasis)

77. This was the wording proposed by Panama and accepted by Guinea-Bissau without reservation. The "**dispute between them concerning the VIRGINIA G"** naturally refers to the merits and circumstances of the *VIRGINIA G* matter: her activities, her arrest and detention and the consequences thereof. This was made clear in the opening section of the Arbitration Notification, the subject matter of which was submitted to the International Tribunal.

78. There was no express or implied agreement between the Parties to the effect that objections as to admissibility should be dealt with within the framework of the merits; and any such extension in interpretation of the special agreement or of the Rules of the Tribunal would, it is submitted, be unreasonable and unjust.

79. Indeed, the International Tribunal should not unreasonably extend the interpretation of an agreement concerning the submission of only the merits for determination by the International Tribunal, where the very Rules of the International Tribunal point toward the peculiarity (requiring a specific agreement) of an objection under Article 97(1) being heard within the framework of the merits. Put another way, if the International Tribunal *shall give effect to any agreement between the parties that an objection submitted under paragraph 1 be*

heard and determined within the framework of the merits (Article 97(7) of the Rules of the Tribunal), so then the International Tribunal should not, in the absence of such agreement, accept too broad an interpretation of the terms of an agreement (such as the Special Agreement) which does not mention or allow for objections to admissibility – and much less for such objections to be heard within the framework of the merits.

80. Although there was no waiver by Guinea-Bissau of its right to raise an objection as to the admissibility of Panama's claims, there certainly cannot be said to have been an express reservation of that right by Guinea-Bissau, or, indeed, an implied agreement between the Parties for objections to admissibility to be dealt with within the framework of the merits.

81. In this context, it is relevant to reiterate that:

- During the 12 months preceding the initiation of arbitration proceedings, Panama made its views and claims abundantly clear (letters dated 28 July 2010, 15 September 2010, 4 October 2010 and 19 October 2010).
- Likewise, in its letter of the 15 February 2011 (Exchange of Views), Panama communicated its position and claims unequivocally, and encouraged Guinea-Bissau to agree to arbitration proceedings, failing which Panama would initiated such proceedings unilaterally.
- On the 3 June 2011, Panama formally initiated arbitration proceedings, annexing a full statement of claim, containing the relevant facts and arguments.
- On the 29 June 2011, Guinea-Bissau accepted to submit the dispute to the International Tribunal.
- Following institution of the proceedings before the International Tribunal, on 17 August 2011 the President of the International Tribunal held a consultation meeting with the Agents and Counsels for the Parties in order to determine procedure and schedule.

82. At no point during, or in between, any of the above stages, leading to the institution of the proceedings before the International Tribunal, did Guinea-Bissau object, or manifest an intention to object, to the admissibility of the claims of Panama.

83. Notwithstanding Panama's contentions (but without prejudice thereto) Article 97(1) of the Rules of the Tribunal still seeks to ensure and protect the right to raise an objection as to admissibility, such that Guinea-Bissau had a full three months, following the institution of the proceedings, to raise a full and formal objection to the admissibility of Panama's claims. It is reasonable to state that Guinea-Bissau was sufficiently informed and prepared to raise the same objections and arguments as it now raises, considering that it was fully aware of Panama's position and claims, having also been notified with a full statement of claim and legal grounds under the Annex VII arbitration procedure.

84. Measured from 4 July 2011, Guinea-Bissau was able, but failed, to raise such objection by the 2 October 2011. In particular, Guinea-Bissau could have reserved its position to raise such objection when consultations on procedure and schedules were held between the President of the Tribunal and the Agents and Counsels for the Parties in Hamburg on the 17 August 2011,

approximately six weeks after institution of the proceedings, and more than six weeks before the 90 days would have lapsed, on 2 October 2011.

85. Panama makes particular reference to the International Tribunal's President's consultations with the representatives of the Parties, held in Hamburg on the 17 August 2011 (the minutes of which are attached as **Annex 1 (61)**). The purpose of the meeting was "to ascertain the views of the parties with regard to questions of procedure in respect of Case No. 19," in particular, (i) the institution of proceedings; (ii) the name of the case; (iii) the number and order of written pleadings and (iv) the fixing of time limits for written pleadings.

86. At no point during the meeting did Guinea-Bissau put on record any objections to the admissibility of Panama's claim on the grounds it now submits to the International Tribunal; nor did Guinea-Bissau indicate any such intention to the President of the International Tribunal or to the Agents and Counsel of Panama. In fact, as stated in the minutes:

> *15. The President of the Tribunal inquired from both Agents if they would like to make any other comment or raise any question related to the conduct of the case. Both Agents stated that they had no additional comment or question in this regard.*

87. However, curiously, Guinea-Bissau deems Panama's claims to be valid and admissible to the extent that it includes, in Chapter VII of its Counter-Memorial, a counter-claim for USD 4,000,000, centred, paradoxically, on one of the very arguments on which Guinea-Bissau bases its objection to the admissibility of Panama's claims.

88. As an additional argument, Panama submits that even the originator of Article 97(1) of the Rules of the Tribunal, that is, Article 79(1) of the Rules of the International Court of Justice (the "ICJ Rules"), provide a time limit for the submission of certain objections, and which certainly does not allow for such submission at the same time as, and as part of, the Counter-Memorial. Article 79(1) of the ICJ Rules states that any such objection shall be made as soon as possible and **not later than three months after delivery of the Memorial**. Guinea-Bissau, therefore, even failed to submit its objections within the time-limit that appears to be considered reasonable by the ICJ Rules - in this case, by 23 April 2012.

89. The wording of Article 79(1) has been amended[17] and it is particularly relevant to note that these amendments entered into force on 1 February 2001, and, therefore, after this same question was considered by the International Tribunal in the *Saiga No.2* judgement. Indeed, the text was changed from *"within the time-limit fixed for the delivery of the Counter-Memorial"* (as adopted on 14 April 1978) to *"as soon as possible, and not later than three months after the delivery of the Memorial."* Article 79(1) reads:

> *Article 79*
>
> *1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing* ***as soon as possible, and not later than three months after the delivery of the Memorial****.*

[17] Amendments entered into force on 1 February 2001, and, therefore, ***after*** the *Saiga No.2* judgement.

90. Moreover, it is relevant to point out the construction and wording of the remaining paragraphs of Article 79 of the ICJ Rules, and the new paragraphs (2) and (3), which, in Panama's view, offer useful guidance on the interpretation of Article 97 of the Rules of the Tribunal, that is, that questions of jurisdiction and admissibility are considered as separate to *"other objection[s] the decision on which is requested before any further proceedings on the merits"*; that there is a time limit within which an objection to admissibility can be raised, and that the raising of such objection should be dealt with before submissions on the merits, except in case of express agreement between the Parties (Article 97(7) of the Rules of the Tribunal and Article 79(10) of the ICJ Rules).

91. Sub-paragraph (2) states that ***following the submission of the application*** *and* ***after the President has met and consulted with the parties****, the Court may decide that* ***any questions of jurisdiction and admissibility shall be determined separately***. If read in conjunction with Article 79(5) of the ICJ Rules and Article 97(3) of the Rules of the Tribunal, it is pertinent to note that despite the considerable time that has passed since Guinea-Bissau filed its Counter-Memorial, containing therein its severely delayed objections to the admissibility of Panama's claims, the President of the International Tribunal has not taken any action in terms of any of the aforementioned Articles. Panama submits that this is another reason for which Guinea-Bissau's objections should be considered as out of time.

> *3. Where the Court so decides, the parties shall submit any pleadings as to* ***jurisdiction and admissibility*** *within the time-limits fixed by the Court and in the order determined by it, notwithstanding Article 45, paragraph 1.*
>
> *4. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached.*
>
> *5. Upon receipt by the Registry of a* ***preliminary objection, the proceedings on the merits shall be suspended*** *and the Court, or the President if the Court is not sitting, shall fix the time-limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.*
>
> *6. Unless otherwise decided by the Court, the further proceedings shall be oral.*
>
> *7. The statements of facts and law in the pleadings referred to in paragraphs 4 and 5 of this Article, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined to those matters that are relevant to the objection.*
>
> *8. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.*
>
> *9. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character.* ***If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.***
>
> *10. Any agreement between the parties that an objection submitted under paragraph 1 of this Article be heard and determined within the framework of the merits shall be given effect by the Court.*

92. In conclusion, Panama submits that a State which, despite abundant opportunity, fails to make any objection to the admissibility of the application within the period prescribed by the Rules of the Tribunal, but on the contrary agrees to authorise the International Tribunal to deal with the dispute and all aspects of the merits, cannot then be heard to raise the

fundamental objection of admissibility for the first time in the course of a Counter-Memorial, and that any such attempt in this regard cannot but be regarded to be in bad faith.

93. Indeed, perhaps "[i]t might indeed be considered bad faith and almost contempt of Court if the State waited until the very last moment and permitted the other party or parties to present the memorial on the merits before it raised its preliminary objection".[18]

94. This view is endorsed by A. A. Cançado Trindade in *The Application of the Rule of Exhaustion of Local Remedies in International Law*, (1982, p.229) and in *Local Remedies in International Law* (2004, p. 381):

> "The ILOAT has also held that, where the issue of timeliness had not been raised by the respondent in the internal appeal, **it was acting in bad faith to raise the issue before the tribunal and therefore the respondent was estopped from contending that the application was inadmissible** because internal remedies had not been exhausted." (*Nielsen,* ILOAT Judgement No. 522 (1982) (UNESCO))." (added emphasis)

*

95. For the reasons set out in the above paragraphs, Panama requests that the International Tribunal rules that Guinea-Bissau failed to raise its objections to the admissibility of Panama's claims within the time prescribed in, and in accordance with, the Rules of the Tribunal, and is, therefore, estopped, or otherwise precluded from raising objections to admissibility, or any other preliminary objection, at this stage, and that the International Tribunal should, therefore, reject Guinea-Bissau's objections and refrain from entertaining or considering them.

96. In the alternative, and without prejudice to Panama's primary submission that the International Tribunal should refrain from considering Guinea-Bissau's objections to the admissibility of Panama's claims, Panama, nevertheless, responds to the submissions made by Guinea-Bissau.

II. Reply to objections raised by Guinea-Bissau

97. In paragraphs 27 to 75 of its Counter-Memorial, Guinea-Bissau objects to the admissibility of Panama's claims, and argues that Panama's claims are not admissible for three reasons:

i. because of the missing "genuine link" between the *VIRIGNIA G* and Panama (the nationality of the *VIRGINIA G*);
ii. because Panama is not entitled to bring an action against Guinea-Bissau within the framework of diplomatic protection; and
iii. because the "local remedies rule" has not been satisfied.

98. In the below sections, Panama shall reply to each of the contentions submitted by Guinea-Bissau

[18] Professor Hambro, *Hague Lectures*, "The Jurisdiction of the International Court of Justice", 76 Hague Recueil (1950–I) 208–9.

A. The nationality of the VIRGINIA G

1. Guinea-Bissau is wrong in claiming that the "genuine link" between Panama and the VIRGINIA G is missing

99. In Chapter II.II of its Counter-Memorial (paragraphs 28 to 51), Guinea-Bissau sets out its first objection to the admissibility of Panama's claims, stating that certain claims advanced by Panama are not admissible because of the missing "genuine link" (in terms of Article 91(1) of the Convention) between the *VIRGINIA G* and Panama. Panama rejects Guinea-Bissau's contentions, for the reasons set out hereunder.

100. It is not contested that the *VIRGINIA G* was, at all relevant times, fully registered under the flag of Panama. The *VIRGINIA G*'s registered owner is the Panamanian company, Penn Lilac Trading S.A. ("Penn Lilac").

101. Panama sets out, in its legislation, the requisites and conditions for granting Panamanian nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Indeed, registration under the Panamanian flag consists of a number of stages involving the owners and the owners' representatives, who are required to submit specific and substantial information, and several documents in fulfilment of all registration requirements, in line with Panama's international obligation. This is evidenced, at least in part, by Annex 9 of Guinea-Bissau's Counter-Memorial, as originally submitted (Marine Circular 5) and as later supplemented (Marine Circular 6).

102. The *VIRGINIA G* was, at all material times, in possession of all valid certificates and documents which certificates and documents, as will be explained below, were found to be in order when confiscated by the same officials who boarded the vessel. The certificates pertaining to the *VIRGINIA G* as indicated below are attached hereto as **Annex 2 (62)**.

103. Vessels which are successfully registered in Panama are issued with the below documents, as was the case with the *VIRGINIA G* at the material time:

- Permanent Registration Certificate
- Radio Licence
- International Tonnage Certificate
- Continuous Synopsis Record
- International Ship Security Certificate
- Minimum Manning Certificate
- Other certificates issued by Recognised Organisations (Ship Classification Societies) on behalf of Panama.

104. Panama also monitors its ships to verify their fulfilment of the requirements under Panamanian law and international law by means of an Annual Safety Inspection.

105. Moreover, as with all countries that have ratified the International Convention for the Safety of Life at Sea (SOLAS), 1974 – to which Guinea-Bissau is not a State party[19] – in order to be constantly aware of the identity of the companies involved in the ship's operation, a Continuous Synopsis Record (CSR) is strictly required, and is governed by stringent rules as to when and how a CSR can be amended or updated. The CSR is a crucial document in monitoring the ship's ownership and operations status, especially in light of global maritime traffic, and the fact that companies who operate ships can be located anywhere in the world.

106. In the words of Guinea-Bissau "the function of the genuine link is to establish an international minimum standard for the registration of ships [...]."[20] Indeed, at the time of arrest, the *VIRGINIA G* was in possession of all statutory and technical certificates attesting its Panamanian nationality. Guinea-Bissau cannot claim ignorance of the certificates carried by the *VIRGINIA G*, or, indeed, their validity, as these were confiscated by the authorities of Guinea-Bissau at the time of the arrest of the *VIRGINIA G* (as confirmed by Guinea-Bissau in Annex 18 to its Counter-Memorial) and returned on the day of her release.

107. At no stage did Guinea-Bissau formally question the "genuine link" between Panama and the *VIRGINIA G*, despite the fact that Guinea-Bissau held all the vessel's documents at its disposal throughout the full duration of detention.

108. Panama did not neglect its duties as a flag State in respect of the *VIRGINIA G*, and has fully taken up this matter before the International Tribunal in order to defend the interests of its nationals, related entities and of its own flag, despite Guinea-Bissau's complete (and admitted) failure to promptly notify Panama, as the flag State, through the appropriate channels, of the action taken and of any penalties subsequently imposed, in terms of Article 73(4) of the Convention.

109. Panama states that the *VIRGINIA G* was, at the material time, fully entitled to fly the flag of Panama, and only the flag of Panama. Panama never suggested that the *VIRGINIA G* had a right to fly another flag; neither was the vessel ever accused of it. Yet Guinea-Bissau insists on making a series of unfounded and frivolous suggestions in paragraphs 42 and 104 to 106 of its Counter-Memorial, relying on unofficial sources.[21]

2. Evidence of full Panamanian nationality – Duties of the flag State

110. Article 94 of the Convention states (with added emphasis):

> *Duties of the flag State*
>
> 1. Every State shall **effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag**.
>
> 2. In particular every State shall:

[19] http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx
[20] Counter-Memorial, paragraph 30, last sentence.
[21] See footnote 16 to Counter-Memorial paragraph 106.

(a) **maintain a register of ships** containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) **assume jurisdiction under its internal law over each ship flying its flag** and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure **safety at sea** with regard, *inter alia*, to:

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. **A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.**

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

111. Panama *does*, and did, effectively exercise its jurisdiction and control in administrative, technical and social matters over the *VIRGINIA G.*

112. Panama also highlights to the International Tribunal, the critical fact of its presence in the **Paris Memorandum of Understanding on Port State Control** list of States which meet the flag criteria for a low risk ship, effective as of 1 July 2012,[22] as well as its presence in the

[22] http://www.parismou.org/inspection_efforts/inspections/ship_risk_profile/flags_meeting_low_risk_criteria/

IMO STCW[23] **"White List"** of countries assessed to be properly implementing the revised STCW Convention.[24]

113. Despite Guinea-Bissau's statement, in paragraph 30 of its Counter-Memorial, that the function of the genuine link requirement is to establish an international minimum standard for the registration of ships, Guinea-Bissau argues that additional conditions, requirements or elements (that go beyond what is specified or required in the Convention) - and that flow from the genuine link requirement – should exist and be fulfilled.

114. In this respect, Panama submits that that it does, in fact, impose such additional conditions and requirements on the owner of the *VIRGINIA G* – Penn Lilac – by requiring:

- Issuance of a Document of Compliance, following the carrying out of an initial audit. This document remains valid throughout successive annual audits conducted in all the offices from which the vessel is operated (in our case in Seville, Spain);
- Issuance of Continuous Synopsis Record;
- Issue of International Ship Security Certificate;
- Annual tax payments.

115. In relation to Guinea-Bissau's interpretation of paragraphs (3) and (4) of Article 94 of the Convention, Panama indicates that:

- In compliance with 94(3), Panama has delegated, to Recognised Organisations, the control and issuance of technical certification of the *VIRGINIA G*, such that the vessel is required to be inspected by qualified inspectors.
- Panama monitors the audits carried out by Recognized Organisations. In the case of the *VIRGINIA G* technical documentation of the vessel was issued by the Recognised Organization PANAMA SHIPPING REGISTRAR INC., and was in force at the material time. This is confirmed by FISCAP (on behalf of Guinea-Bissau) in Annex 18 to the Counter-Memorial.
- In compliance with Article 94(4) Panama also has its own teams of inspectors appointed for the specific purposes of carrying out Annual Safety Inspections, followed by the issuance of an inspection report, which is kept on board and is also sent to the Panama Maritime Authority. At the time of the arrest of the *VIRGINIA G*, the captain provided the corresponding report of the Annual Safety Inspection. This document was, in effect, held by the authorities of Guinea-Bissau for the period of detention of the ship.
- In relation to the argument submitted by Guinea-Bissau regarding the requirement to comply with rules and regulations concerning the management of vessels, the working conditions on board and training of crews (in terms of Article 94(3)), and that the flag State must also exercise jurisdiction over the owners or operators, Panama has already demonstrated how Penn Lilac is subjected to Panama's jurisdiction, and, therefore, subject to statutory controls. It is also relevant to note that Penn Lilac's vessel, the *VIRGINIA G*, operates in international traffic, meaning that in addition to the inspections carried out by Panama, the vessel is also subject to inspection by the port authorities as

[23] International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978.
[24] http://www.imo.org/blast/contents.asp?topic_id=67&doc_id=1026

and when the *VIRGINIA G* visits (Port State Control). These controls verify compliance with international conventions by both the ship and the shipowner or operator. Panama has already demonstrated in its Memorial (Annex 22) that the *VIRGINIA G* underwent a Port State Control inspection on 5 August 2009 in the port of Las Palmas, Canary Islands, (Spain) by an official of the Panamanian registry.

116. Then, Article 94(6) of the Convention states:

> A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

117. In this respect – whilst completely denying Guinea-Bissau's claim that Panama does not exercise full and proper jurisdiction and control with respect to the *VIRGINIA G*, and without prejudice to Panama's submission that, in any case, Guinea-Bissau's objections are time-barred – Panama claims that Guinea-Bissau never manifested its concerns by reporting its doubts to Panama in accordance with Article 94(6) of the Convention despite the fact that Guinea-Bissau held the *VIRGINIA G*'s documents for so many months.

118. Neither did Guinea-Bissau raise an objection to admissibility on this basis in the first stages of interaction between Panama and Guinea-Bissau, or when Annex VI Arbitration proceedings were initiated by Panama, or, indeed, when consultations on procedure were held between the President of the Tribunal and the agents and counsels for the Parties in Hamburg on the 17 August 2011.

119. In other words, if, indeed, Guinea-Bissau was convinced that Panama did not carry out its duties as a flag State, or that there was no genuine link between Panama and the *VIRGINIA G,* then Guinea-Bissau raising the objections at this stage in the proceedings before the International Tribunal can only put into severe doubt Guinea-Bissau's good faith, especially considering that all the *VIRGINIA G*'s documents were held by Guinea-Bissau throughout the full detention period of detention, without Guinea-Bissau once raising any "genuine link" concerns, or, indeed, manifesting its concern in terms of Article 94(6).

3. Additional duties of the flag State

120. Regarding the arguments made by Guinea-Bissau in relation to Article 217 of the Convention, Panama draws the attention of the Tribunal to the following:

121. Article 217(1) provides that: *States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards [..] and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.*

122. In compliance with international standards on the prevention of pollution, as set out in the MARPOL Convention – to which Guinea-Bissau is not a State party – the *VIRGINIA G* meets all international standards for protection of the marine environment, and possesses the following certificates (all in force at the material time), issued on the basis of compliance with this Convention:

- International Oil Pollution Prevention Certificate (IOPP);
- International Air Pollution Prevention Certificate (IAPP);
- International Sewage Pollution Prevention Certificate (ISPP)

123. In terms of Panama's MARPOL obligations, Penn Lilac (as owner) was also obliged to adopt the following measures on board the *VIRGINIA G* in respect of contamination prevention:

- an **oil water separator** installed in the engine room;
- an **oil discharge and monitoring equipment** installed on the bridge to prevent discharges of water contaminated by fuel and oil from the bilge of the room machines; and
- water vessel cleaning cargo tanks;
- the use of low sulphur fuel (gas oil) to reduce air pollution;
- water holding tank to prevent dirty discharge into coastal waters (within 12 miles) from sewage;
- liability policy to cover pollution damage (P & I).

124. From the foregoing, and pursuant to the first and second sentences of paragraph (3) of Article 217 of the Convention, Panama can be said to comply fully with the requirements of the Convention.

125. The third sentence of Article 271(3) allows Guinea-Bissau to verify the condition of the *VIRGINIA G* against the documents she held, and to establish whether or not there was any doubt as to her condition. Indeed, *"These certificates shall be accepted by other States as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates"*.

126. Throughout all the months of detention, Guinea-Bissau held the *VIRGINIA G*'s documents and certificates. They are proven to have been accepted by FISCAP on behalf of the Republic of Guinea-Bissau (Annex 18 to the Counter-Memorial of Guinea-Bissau). During the full detention period, Guinea-Bissau raised not one objection to the validity of the certificates in question, or to the condition of the *VIRGINIA G* as stated on her certifications.

4. The nationality of the crew

127. The argument that the *VIRGINIA G*'s crew were foreigners is not a valid argument. In today's reality, the vast majority of the crews of ships are multi-national, and it is logically unsound

to argue that this would involve the abandonment of the link with the flag State of the vessel. Every crew member on board the *VIRGINIA G* held their respective qualifications and licences, which licences are endorsed by the flag State of Panama.

128. At the time of the arrest of the VIRGINIA G the crew had their licences in force and endorsed by the Government of Panama (examples included as **Annex 3 (63)**). The licences were retained by the Guinea-Bissau authorities during the detention of the ship.

129. Guinea-Bissau, nevertheless, presents additional arguments and proposes standards that go beyond what is required in terms of the Convention, even suggesting that the provisions of the United Nations Convention on the Conditions for Registration of Ships should be given full effect. This particular UN Convention was adopted 26 years ago and is not yet in force; moreover, Guinea-Bissau and Panama are not signatories.

5. Nationality of Penn Lilac

130. Guinea-Bissau also questions the nationality of the company which owns the *VIRGINIA G*, despite it being clear from the vessel's certificates that Penn Lilac is fully registered in Panama, and legally represented by in Panama. In turn, this information is fully supported by the Continuous Synopsis Record, which provides, inter alia, that the ship was registered in Panama on 3 January 2003, and that the vessel's safety management is performed from Seville, Spain.

131. The performance of Safety Management operations and procedures from a State other than that of the State in which the vessel is registered does not imply the neglect of the flag State in the exercise of its jurisdiction and control. For a company to exercise Safety Management operations, it must be in possession of a Document of Compliance, which is obtained by following a successful initial internal audit in the offices where they are located, followed by annual audits on the basis of which the Document of Compliance maintains its validity, or otherwise.

132. It is reiterated that at the time of arrest of the *VIRGINIA G* by the Guinea-Bissau authorities, the *VIRGINIA G* had available on board all valid documentation, which were found to be in order during the inspection of documents made by FISCAP on behalf of Guinea-Bissau (Annex 18 to the Counter-Memorial of Guinea-Bissau).

133. Panama submits, therefore, that it exercised, at the material time, effective jurisdiction and control over the *VIRGINIA G* and over Penn Lilac in line with its obligations as a flag State under international law.

6. P&I Club

134. Protection and Indemnity Companies (P&I Clubs) do not form part of the State, but are private insurance companies that guarantee the civil liability of shipowners for third party claims.

135. The arrest of the *VIRGINIA G* was communicated to the P&I Club Spanish broker and the central P&I Club Navigator, in England, for reporting of the incident to the Guinea-Bissau correspondent, such that the vessel, captain, crew and the company could be attended to in their relations and communications with the Guinea-Bissau government and its agencies.

136. P&I insurance is not issued by the flag State; it is only the requirement of insurance that is imposed by the flag State, in line with a flag State's obligations under international conventions, and in line with requirements of all ports in which a vessel enters, such that the vessel and its owners can meet any liability they may have towards third parties, and to be able to rely on bank guarantees and liability insurance to meet potential claims for breach of international conventions.

137. Guinea-Bissau's absurd suggestion that a non-Panamanian P&I Club membership is an element that points towards the absence of a genuine link between Panama and the *VRIGINA G* cannot be accepted.

7. Registration of vessels in Panama

138. The registration of vessels is regulated by rules, regulations and formalities, under which a ship is registered within the framework of national and international laws in force.

139. Panama regulates all matters concerning maritime activities in line with international law, and general knowledge of such regulation is established through the circulation of information about the legal requirements and conditions for the registration of a ship.

140. It is inane for Guinea-Bissau to argue that Panama accept vessels without inquiring into the "link" between the ship and the State without presenting concrete evidence, or rather, by invoking the benefits of registering under the Panamanian flag, such that the benefits are considered by Guinea-Bissau to be tantamount to an untrustworthy registration system.

141. Panama states that Guinea-Bissau's statements are unfounded, and that it is pertinent to highlight the fact that Panama is a member within the largest international maritime organisations and treaties including fishing world-wide organisations (as applicable to Panamanian-flagged fishing vessels). Panama is not listed on the Organisation for Economic Co-operation and Development (OECD) "black list" of uncooperative tax havens by the Committee on Fiscal Affairs, and fully respect anti money laundering and tax treaties. Panama is also listed on the Paris MOU White List and on the IMO STCW White List. Finally, Panama is subscribed to by almost 23% of the world's tonnage.

142. Panama rejects Guinea-Bissau's statements in relation to the Panamanian flag and registration system, and reiterates that Panama:

    i. Is a State party to the most important international treaties in the maritime sector (including, for the purposes of this matter, MARPOL and SOLAS – to which Guinea-Bissau is not a State party), and requires the *VIRGINIA G* to hold an International Oil

Pollution Prevention Certificate (IOPP), an International Air Pollution Prevention Certificate (IAPP) and an International Sewage Pollution Prevention Certificate (ISPP);

ii. Requires the *VIRGINIA G* to adopt certain measures in respect of contamination prevention, including an oil water separator installed in the engine room; an oil discharge and monitoring equipment installed on the bridge to prevent discharges of water contaminated by fuel and oil from the bilge of the room machines; and water vessel cleaning cargo tanks; the use of low sulphur fuel (gas oil) to reduce air pollution; water holding tank to prevent dirty discharge into coastal waters (within 12 miles) from sewage; liability policy to cover pollution damage (P & I);

iii. Obliges its vessels to hold valid compliance certificates (Permanent Registration Certificate, Radio Licence, International Tonnage Certificate, International Ship Security Certificate, Minimum Manning Certificate);

iv. Maintains control over Panamanian vessel-owning companies, their vessels and the individuals and entities involved in their operation (Continuous Synopsis Record);

v. Requires the issuance of a Document of Compliance, following an initial audit of the owning company, as well as annual audits conducted in all the offices from which the vessel is operated;

vi. Requires the issuance of an International Ship Security Certificate;

vii. Carries out technical control of its vessels through Recognized Organisations and its own inspectors (certificates issued by Recognised Organisations (Ship Classification Societies) on behalf of Panama);

viii. Controls the qualifications of the crew in its vessels, in accordance with the STCW provisions;

ix. Monitors its ships to verify their fulfilment of the requirements under Panamanian law and international law by means of an Annual Safety Inspection;

x. Is listed in the Paris Memorandum of Understanding on Port State Control List of States which meet the Flag Criteria for a Low Risk Ship, effective as of 1 July 2012;

xi. Is listed in in the IMO STCW "White List" of Countries Assessed to be Properly Implementing the Revised STCW Convention;

143. A State that fulfils the above criteria in respect of its vessels cannot be accused of lacking a genuine link. The *VIRGINIA G* was, for all intents and purposes, a Panamanian vessel. She was recognised as such by the Guinea-Bissau authorities. Her documents attesting her Panamanian nationality were examined by the Guinea-Bissau authorities and were found to be in order. Guinea-Bissau never raised any objection as to the *VIRIGNIA G*'s nationality.

8. The clarification of the meaning of "genuine link" by ITLOS (Saiga No.2) and by the European Court of Justice

144. Finally, Panama refers to the finding of the International Tribunal in the *Saiga No.2* Case, that *"The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective*

implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States". (Added emphasis)

145. In *Commission v. Kingdom of the Netherlands*[25] The Court of Justice of the European Union agreed with the International Tribunal in the *Saiga No.2 Case*, and confirmed the judgement in the *Factortame* cases,[26] where the court referred to the concept of genuine link (albeit indirectly). The Court of Justice of the European Union stated that legislation in European Member States requiring the participation of nationals in ownership and/or manning as a pre-condition to registration is not necessary for meeting obligations under international law.

146. Against the above background, and contrary to Guinea-Bissau's allegations, it is Panama's submission that Panama has and maintains a genuine link with the *VIRGINIA G*, with the *VIRGINIA G*'s owner and with the *VIRGINIA G*'s operator, and that Panama exercises full and effective jurisdiction over the *VIRGINIA G*.

B. The right of diplomatic protection concerning foreigners

147. In Chapter II.III (paragraphs 52 to 61), Guinea-Bissau sets out its second objection to the admissibility of Panama's claims, stating that certain claims advanced by Panama in the interest of individuals or private entities are inadmissible on account of those individuals or private entities not being of Panamanian nationality and who are, therefore, not entitled to diplomatic protection. Panama rejects Guinea-Bissau's contentions, for the reasons set out hereunder

148. In a series of illogical and contradictory statements, Guinea-Bissau contests the exercise of diplomatic protection by Panama in respect of those individuals and entities which are not of Panamanian nationality (or which, according to Guinea-Bissau's reasoning, lack a genuine link with Panama).

149. Contrary to what Guinea-Bissau states in paragraph 56 of its Counter-Memorial, this *is* a case involving a vessel (or vessels) where a number of nationalities and interests are concerned; but first and foremost, there is the Panamanian nationality of the *VIRGINIA G* to which all those interests are directly connected, irrespective of nationality (on which Guinea-Bissau relies).

150. *[The Convention] considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State.* ***The nationalities of these persons are not relevant*** (added emphasis) – *Saiga No.2 Case,* paragraph 106.

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[25] Judgment of the Court (First Chamber) of 14 October 2004. Commission of the European Communities v Kingdom of the Netherlands in Case C-299/02

[26] JUDGMENT OF THE COURT of 5 March 1996 in Joined Cases C-46/93 and C-48/93 (references for a preliminary ruling from the Bundesgerichtshof and from the High Court of Justice, Queen's Bench Division, Divisional Court): Brasserie du Pêcheur SA v. Federal Republic of Germany and the Queen v. Secretary of State for Transport, ex parte Factortame Ltd and Others.

151. The fact that Penn Lilac had entered into commercial agreements to enter the market of bunkering in West Africa, and the fact that the vessel was chartered out to sellers of gas oil is by no means an uncommon practice. In the international maritime transport, a vessel's owner charters out its vessel not traders and not as owners of the cargo, but as carriers who transport the merchandise from one place to another under a charter contract. Panama does not agree with Guinea-Bissau's reasoning that the fact that Penn Lilac had entered into commercial agreements with different companies to develop its commercial activity somehow diminishes the Panamanian nationality of the *VIRGINIA G* and of Penn Lilac, and that, consequently, Panama has no right to claim for the damages caused to the company and the vessel registered in its country.

152. Article 18 of the Draft Articles on Diplomatic Protection is misinterpreted by Guinea-Bissau, who sees the concept of "injury" literally, rather than in the broader legal sense as understood within the context of State responsibility under international law.

153. Indeed, Article 18 of the Draft Articles on Diplomatic Protection finds its application in this case, and in precisely the opposite manner as would be applied by Guinea-Bissau. In this case the Embassies of Cuba and of Spain intervened in relation to the retention and refusal to return the passports by the Government of Guinea-Bissau to their citizens, taking into account that according to what it is established internationally, a passport belongs to the country of issuance. Contrary to what Guinea-Bissau states, such intervention does not exclude or otherwise prejudice intervention by Panama as the flag State of the *VIRGINIA G.*

154. Article 18 is clear in stating that the right of the State of nationality of the member of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of the ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

C. The exhaustion of local remedies

155. In Chapter II.IV of its Counter-Memorial (paragraphs 62 to 75), Guinea-Bissau sets out its third and final objection to the admissibility of Panama's claims, stating that certain claims advanced by Panama in the interest of individuals or private entities are inadmissible on account of those individuals or private entities not having exhausted the local remedies available to them in Guinea-Bissau. Panama rejects Guinea-Bissau's contentions, for the reasons set out hereunder.

156. Guinea-Bissau states further "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."

157. Guinea-Bissau has taken objection to four of the eighteen submissions presented by Panama to the International Tribunal, specifically, submissions 4, 10, 14 and 15:

> 442. For the abovementioned reasons, or any of them, or for any other reason that may be submitted during the procedure, or that the International Tribunal deems to be relevant:
>
> **Panama respectfully requests the International Tribunal to declare, adjudge and order that:**

[...]

4. The actions taken by Guinea-Bissau, especially those taken on the 21 August 2009, against the VIRGINIA G, violated Panama's right and that of its vessel to enjoy freedom of navigation and other internationally lawful uses of the sea in terms of Article 58(1) of the Convention;

[...]

10. Guinea-Bissau used excessive force in boarding and arresting the VIRGINIA G, in violation of the Convention and of international law;

[...]

14. Guinea-Bissau is to immediately return the gas oil confiscated on the 20 November 2009, of equivalent or better quality, or otherwise pay adequate compensation;

15. Guinea-Bissau is to pay in favour of Panama, the VIRGINIA G, her owners, crew and all persons and entities with an interest in the vessel's operations (including the IBALLA G), compensation for damages and losses caused as a result of the aforementioned violations, in the amount quantified and claimed by Panama, or in an amount deemed appropriate by the International Tribunal;

158. Guinea-Bissau submits that the above claims are "espoused" by Panama in the interest of individuals or private entities that have not exhausted the local remedies available to them in Guinea-Bissau. At the same time, Guinea-Bissau acknowledges that the mentioned claims can be based on international law, but that they are, at the same time, subject to the internal law of Guinea-Bissau, and that since the owner of the ship brought an action before the Court of Bissau with the same foundation of the proceedings before the International Tribunal, then it is clear, in Guinea-Bissau's view, that the local remedies are not exhausted.

159. Panama states, however, that the proceedings brought before this International Tribunal relate to a dispute arising between Panama and Guinea-Bissau, where Panama claims reparation at international law for a direct breach by Guinea-Bissau of its obligations under international law, specifically, but without limitation, under the provisions of the Convention (UNCLOS).

160. The Convention itself provides for compensation to be received by a vessel for loss or damage that may have been sustained as a result of unjustified arrest (Article 111(8)); however, before the International Tribunal, the action has not been instituted by the vessel itself (in rem) but by the State of Panama. Therefore, when Panama claims for compensation for the violation of "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 against the VIRGINIA G" and for "Guinea-Bissau['s] [use of] excessive force in boarding and arresting the VIRGINIA G, in violation of the Convention and of international law",[27] then it is evident that Panama is asserting *its own* rights to ensure, in the person of its subjects, respect for the rules of international law.[28] Put another way, Panama is claiming a violation of

[27] Submissions 4 and 10 of Panama's Memorial, paragraph 442.
[28] The *Mavrommatis Palestine Concessions Case*, P.C.I.J., Series A, No.17

its own right to secure, in respect of vessels flying its flag, freedoms for which the Convention provides.

161. In a similar manner, Panama's claim for compensation in respect of the seizure of the cargo of gas oil and Panama's claim to be compensated for damages and losses sustained by the vessel, her owners, crew and all persons and entities with an interest in the vessel's operations, is a claim for compensation for a violation of Panama's right to ensure respect for the rules of international law, in respect of the vessel, her owners, crew and all persons and entities with an interest in the vessel's operations.

162. Contrary to what Guinea-Bissau states in paragraph 67 of its Counter-Memorial, Panama contends that there *was* a violation in respect of a vessel flying its flag (and endowed with Panamanian nationality) in that the *VIRGINIA G* was boarded and detained in breach of international law provisions, specifically the provisions of Articles 58, 56 and 73 (as more amply set out in Panama's Memorial, and in the relevant sections below).

163. The situation was aggravated when the arrest and detention were carried out using excessive, disproportionate or otherwise unreasonable force or intimidation, which was prolonged beyond any measure of reason, and when the valuable cargo was illegally seized, all of which was in contravention of the provisions of international law (as more amply set out in Panama's Memorial, and in the relevant sections below).

164. Therefore, Panama brings the claims based upon its rights as a flag State, as granted to it, as a State, under the provisions of the Convention. As a flag State, Panama has the duty to safeguard the interests of natural and legal persons who are subject to the protection of Panama and, should the International Tribunal find in favour of Panama's submissions, then Panama will be able to receive compensation for the violations it suffered, and allocate the respective portions of compensation that it may be awarded to the natural and legal persons who suffered damages and losses as a consequence of Guinea-Bissau's breaches of its international obligations.

165. **In the alternative, and without prejudice to the above**, Panama does not agree with Guinea-Bissau in that there was a jurisdictional link on account of a temporary injunction being obtained against Guinea-Bissau's seizure of the vessel and cargo.

166. Guinea-Bissau claims (in paragraph 68 of its Counter-Memorial) that the cargo (belonging to a different person than the owner of the vessel) was under the jurisdiction of Panama as long as it remained on board the *VIRGINIA G*, but that this link was severed before a claim for compensation could arise when the gas oil cargo was discharged in the Port of Bissau. Guinea-Bissau also claims (in paragraph 69 of its Counter-Memorial) that Guinea-Bissau could exercise its territorial jurisdiction over the ship, its crew and cargo as it was in port.

167. Yet, Guinea-Bissau acknowledges that the local remedies rule is excluded in the absence of a link between the vessel, its crew members and cargo, on the one hand, and the coastal State, on the other hand.

168. Panama will have additional opportunity below to present (or reiterate) its views and legal arguments to the International Tribunal in reply to Guinea-Bissau's understanding of the

"legality" of the seizure of the cargo and of the arrest and detention of this *VIRGINIA G*. For present purposes, Panama states that the vessel and her crew were not merely "involuntarily" in the Port of Bissau, as Guinea-Bissau attempts to conveniently portray the circumstances.

169. The vessel was taken there, under force of arms, having been arrested violently and without warning, then ordered to navigate to port under perilous conditions (in complete disregard of the rules of safety at sea), with the crew kept at gun-point and all documents and passports confiscated, then was detained for 14 months. During this time, the gas oil cargo was seized, without basis at law, and in direct defiance of a Court order.

170. It cannot be maintained that the actions of Guinea-Bissau, and their effects, are legitimised by reason of the vessel being in port and, therefore, in Guinea-Bissau's territorial waters. Likewise, Guinea-Bissau cannot argue that the claim for compensation concerning the seizure of the gas oil cargo is separate and independent from Panama's claim relating to its right of navigation and its jurisdiction over the *VIRGINIA G*, when the gas oil cargo was seized violently and abusively, under the "authority" of an administrative order (based on an "internal" opinion (rather than a supporting Court order) executed ten days in advance of the date of issuance), as will be explained in the relevant sections below.

171. The *VIRGINIA G* may have entered the EEZ of Guinea-Bissau to conduct bunkering activity (which, in any case, Panama contends falls within the freedom of navigation and outside the jurisdiction of Guinea-Bissau), however, a Panamanian vessel (and her crew) which is treated in the manner described in Panama's Memorial (and meagrely retorted by Guinea-Bissau) and brought under force to the Port of Bissau in breach of international law of the sea, can hardly be said to have created a voluntary, conscious and deliberate connection between themselves and Guinea-Bissau, such that Panama would be prevented from advancing a claim in respect of a violation of its rights, until local remedies had been exhausted.

172. The *VIRGINIA G* was boarded and arrested outside territorial waters, and in the EEZ of Guinea-Bissau, and the claims of Guinea-Bissau to exercise jurisdiction in that zone are excessive and unfounded. There cannot be an obligation to exhaust local remedies in relation to an act done by the State having no jurisdiction in international law.

173. **In the alternative, and without prejudice to the above**, the local remedies rule cannot apply where there is no effective remedy to exhaust.[29] The texts and cases on the rule of exhaustion of local remedies have been studied by Professor Ian Brownlie[30] who concludes that a fair number of writers and arbitral awards have been willing to presume ineffectiveness of remedies from the circumstances, for example on the basis of evidence that the courts were subservient to the executive.

174. The suspension of the CIFM Decision by the regional Court of Bissau was abusively and unjustly disregarded by Guinea-Bissau, not following a counter-order of the Court, but merely on the basis of an "internal" opinion of the Attorney General of Guinea-Bissau (as admitted by Guinea-Bissau in its Counter-Memorial, and accompanying Annex).

175. The cover letter to the Attorney General's opinion (Counter-Memorial Annex 8) states that:

[29] *Penevezys-Saldutiskis Railway Company Case*, PCIJ, Ser.A/B, N0.76.
[30] Brownlie, I, *Principles of Public International Law, 5th Ed., 1998, p.500*

[...] we deem that the decision to confiscate the offending ship with its tackle, equipment and products found on board to have been correct. We therefore have no reservation in regard to the use of the fuel that this ship was transacting in our EEZ.

176. What Guinea-Bissau then submits is an opinion which far from offers certainty as to the nullity of the Court's order. Indeed, the first paragraph under heading "4. Law" on page 43 of the Counter-Memorial Annex bundle states (with added emphasis):

Dispensing with analysing whether the Ruling that granted the petitioned interim measure was a good one, we care to state that the interpretation of no. 2 of article 400 of the CPC (Civil Procedure Code) which states that "the Court will hear the defendant, if the hearing does not endanger the purpose of the interim measure (...)" *is moot.*

177. Guinea-Bissau's justification, therefore, is that the Court adopted the interim measure without first hearing the opposing party - that is, the government. On this basis, Guinea-Bissau considered that *this violation legally implies that such decision is null [...] and the Attorney General of the Republic of Guinea-Bissau did inform the Government of this state of affairs* (Counter-Memorial paragraph 190).

178. It is absurd and highly abusive for the government of Guinea-Bissau to have chosen to disregard an interim order on the basis of a moot point, when it was in the Court's full discretion to determine whether hearing the defendant would endanger the purpose of the interim measure, and then to have reached the conclusion on the basis of an inconclusive opinion citing a moot point, and finally concluding that this *legally **implies** that such decision is null*. Guinea-Bissau obtained and relied on an opinion of the Attorney General, an "internal legal opinion", so to speak, rather than convincing the Regional Court that the interim order was not validly issued (as is alleged).

179. Therefore, the precautionary remedy purportedly available in Guinea-Bissau was rendered ineffective by virtue of the forceful and unjust manner in which Guinea-Bissau acts above the law, such that the owner of the *VIRGINIA G*. The only viable option was for Panama to submit the matter to international arbitration or the International Tribunal, such that Guinea-Bissau could be challenged on an international level, and in a manner that would be effective.

180. Panama must reiterate (Panama having already provided the International Tribunal with details in its Memorial, paragraph 207 *et. seq.*) that the owner of the *VIRGINIA G* filed a request for the suspension of the confiscation measures before the Court of Bissau. By Order dated 5 November 2011, the Court of Bissau issued a judgement ordering the Secretary of State for Fisheries to "refrain from the practice of any and all acts relating to the confiscation of the vessel *VIRGINIA G* and its products on board and that the applicant's (Penn Lilac) crew is allowed entry to the vessel to proceed with their usual services." (Annex 54 of Panama's Memorial)

181. The operative part of the Judgement stated:

V – Operative part

I find the present provisional proceeding (interim measure) well-founded and consequently I:

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

b) Authorize the applicant and force the defendants to allow the entrance of applicant's staff [crew] in the vessel to proceed with its services of maintenance of the vessel without prejudice to the parties bringing a main action.

c) Authorize the applicant to perform the tasks related to the normal management and maintenance of the vessel.

d) In case the defendants infringe or prevent the fulfilment of the above mentioned, they incur in the penalty of the crime of disobedience, in terms of the criminal law.

e) Determine the personal notification to the defendants and the applicant in these terms.

f) Costs by the applicant with the court fee reduced to ¼ - Article 453 and 446 both from the Code of Civil Procedure.

182. Nevertheless, on the 20 November 2009, the captain of the *VIRGINIA G* was handed a document issued by the Ministry of Finance forward dated to the 30 November 2009 (Memorial Annex 56). It was addressed to the Compañía de Lubricantes y Combustíbles de Guinéa-Bissau (CLC) and stated (with added emphasis):

> By virtue of Decision N° 7 of the Maritime Inspection Interministerial Commission, the Oil Tanker Virginia G was seized ex officio with its gear, engines and cargo, due to the repetitive practice of fishery-related activities, in the form of "non authorized sale of oil to fishery vessels in the EEZ, namely to N/M Amabal 2".
>
> **Notwithstanding the judicial order of suspension of the seizure, and not having the opposition of the Public Prosecutor**, the Government Attorney and Supervisor of Legality, (Ref. n° 716/GPGR/09), for the Government to proceed to "(...) the use of the oil that the vessel traded in our EEZ (...)", we order hereby that the Oil Tanker Virginia G be authorized to discharge its content estimated at 436 tonnes gas oil in your premises.

183. **In the alternative, and without prejudice to the above**, Guinea-Bissau's claims that local remedies ought to have been resorted to are questionable, at minimum, but purportedly grossly contradictory when one takes into consideration Decision No.5/CIFM/2010, dated 20 September 2010 (Annex 58 to Panama's Memorial) wherein Guinea-Bissau itself (through the Ministry of Fisheries)

i. released the *VIRGINIA G*

ii. repealed its previous decision confiscating the *VIRGINIA G*

thus releasing the very subject of the dispute and repealing the original decision of seizure and confiscation, on the basis of which any contestation at national level could have been made.

184. Decision No.5/CIFM/2010 was dated on the occasion of the Spanish National Day, and stated, as translated:

REPUBLIC OF GUINEA-BISSAU

SECRETARY OF STATE OF FISHERIES

INTERMINISTERIAL COMMISSION OF MARITIME SURVEILLANCE

Decision Nº 05/ CIFM/2010

Following the indications of the Excellency, Sir Prime Minister, with regard to the danger which represents for the security of the maritime navigation the long term presence of the vessel VIRGINIA G, seized in our EZZ because of the practice of non-authorized fishing in its form of fishing-related activity without licence.

Taking into consideration our relationship of friendship and cooperation with the Kingdom of Spain in the field of fisheries, knowing that although the vessel has a Panamanian flag, it belongs to a Spanish company;

Therefore, the CIFM decides without more delay:

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

2. To notify the owner of the vessel, or its captain and/or its local representative of this Decision.

3. This Decision enters immediately into force.

Bissau, 20 September 2010

The Inter-ministerial Commission of Maritime Surveillance

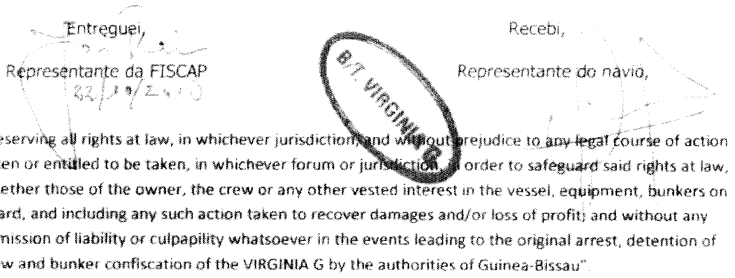
Signatures

185. The *VIRGINIA G* was not, therefore, released by Court order, but by decision of the Ministry of Fisheries (purportedly to mark the occasion of the National Day of Spain). Neither was

there any agreement between the government of Guinea-Bissau and the flag State and/or the owner of the *VIRGINIA G* setting out the terms of her release. It was a unilateral decision by the government of Guinea-Bissau, on its terms, as and when it wanted, irrespective (an in complete disregard) of the pending court proceedings.

186. It is Panama's contention that such action by Guinea-Bissau rendered any local remedies ineffective or unavailable, thus leaving it up to the flag State to request reparation at international law on behalf of the owner of the vessel and its related entities within an international forum.

187. Hence, the owners of the *VIRGINIA G* made a clear reservation upon signing the document acknowledging the release of the vessel (**Annex 5 (65)**), such that:


Entreguei,

Representante da FISCAP

Recebi,

Representante do navio,

"Reserving all rights at law, in whichever jurisdiction and without prejudice to any legal course of action taken or entitled to be taken, in whichever forum or jurisdiction, in order to safeguard said rights at law, whether those of the owner, the crew or any other vested interest in the vessel, equipment, bunkers on board, and including any such action taken to recover damages and/or loss of profit; and without any admission of liability or culpapility whatsoever in the events leading to the original arrest, detention of crew and bunker confiscation of the VIRGINIA G by the authorities of Guinea-Bissau".

Conclusion

188. On the basis of the above arguments, Panama rejects Guinea-Bissau's objections to the admissibility of Panama's claims, and submits to the International Tribunal that Guinea-Bissau's objections are (a) **outside the time-limit, and are/or brought in bad faith, such that they should be dismissed, rejected or otherwise refused**, and (b) in the alternative, and without prejudice to Panama's primary submission, that Panama's claims are fully admissible.

* * *

CHAPTER 3
REPLY TO STATEMENT OF FACTS

(cf. Counter-Memorial, Chapter IV)

189. In Chapter IV of its Counter-Memorial (paragraphs 100 to 205) Guinea-Bissau submits its statements and understanding of the facts as set out by Panama in its Memorial.

190. In this section, Panama submits its reply and understanding to Guinea-Bissau's statements for consideration by the International Tribunal, and reserves the right to present additional replies and clarifications to Guinea-Bissau's views on the facts.

191. At the outset, Panama considers it necessary to object to the triviality with which Guinea-Bissau has, in certain instances, presented its views on the facts, merely hazarding guesses at scenarios which Guinea-Bissau considers to be the case without offering evidence or legal basis for consideration. On occasion, Guinea-Bissau also makes *non sequitur* statements, or irrelevant and absurd remarks. Examples include:

i. *Penn Lilac Trading S.A. although incorporated in Panama has to be considered as a Spanish company* (paragraph 103);

ii. *The vessel VIRGINIA G, although registered in Panama, may also have a registration in another country* (paragraph 104);

iii. *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* (paragraph 105);

iv. *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* (paragraph 107);

v. *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 authorities of Guinea-Bissau themselves* (paragraph 113);

192. Panama objects to this approach, and submits, further, that in certain parts of its Counter-Memorial, Guinea-Bissau is also in breach of Rule 8 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal. Panama, therefore, reserves its right to request the International Tribunal to reject or otherwise declare as inadmissible any additional fact or other information Guinea-Bissau may attempt to present in its Rejoinder which is not indicated or which is otherwise absent from its Counter-Memorial.

A. The nationality of the VIRGINIA G and the owning company Penn Lilac

193. In paragraphs 103 to 117 of its Counter-Memorial, Guinea-Bissau makes a number of statements which, with respect, are incorrect, unfounded and, at times, illogical.

194. The main points raised in paragraphs 103 to 108 of the Counter-Memorial would appear to relate to the nationality of the *VIRGINIA G*, that of her owner, Penn Lilac and the crew on board.

195. Panama has already set out its views on this matter in its reply to the "genuine link" objection raised by Guinea-Bissau. In this respect, Panama reiterates that it disagrees with Guinea-Bissau, and refers the International Tribunal to Panama's reply in paragraphs 99 to 154 above.

196. In paragraphs 109 to 112 of its Counter-Memorial, Guinea-Bissau takes objection to the agreements presented by Panama concerning the *VRIGINIA G*, her owners, Gebaspe SL, the *IBALLA G* and Lotus Federation. Panama emphasises that these agreements are relevant in order for Panama to identify (i) the individuals and entities concerned with the operation of the *VIRGINIA G*, and (ii) the extent of losses and damages caused to such entities and individuals as a result of the measures taken by Guinea-Bissau on and after 21 August 2009.

197. Panama states that, contrary to Guinea-Bissau's defence – for instance, that such agreements *eased to be in force with the arrest of the VIRGINIA G, which makes its invocation irrelevant* – the reference to these agreements is particularly relevant should it be determined that the arrest and prolonged detention of the *VIRGINA* was unjustified and that Guinea-Bissau is responsible to provide compensation as reparation for the injury it caused to Panama's vessel and the affected individuals and entities.

198. Guinea-Bissau's statement in paragraph 113 of its Counter-Memorial does not add any value to its arguments.

199. Panama's reply in relation to Counter-Memorial paragraphs 114 to 117 (obtaining of prior authorisation) are included in point F below, as well as in Chapter 4 of this Reply and in the Statement of Law in Panama's Memorial, to which the Tribunal is requested to refer.

B. FISCAP Observers

200. Concerning paragraphs 118 to 120 of Guinea-Bissau's Counter-Memorial, Panama replies that no suggestion or statement was made, in its Memorial, to the effect that FISCAP observers were empowered, or expected, to perform enforcement measures. Panama, however, disagrees with Guinea-Bissau statement that the presence of FISCAP observers on board fishing vessels is irrelevant to the matter at hand.

201. Rather, it is Panama's view that the presence of the FISCAP observers on board the Balmar fishing vessels (as required under Guinea-Bissau law, and in line with Article 62(4)(g) of the Convention) is important in establishing the manner in which the verbal communication of the authorisation to proceed with re-fuelling is communicated in practice.

202. Indeed, as set out in Panama's Memorial, it is prohibited to fish in Guinea-Bissau in the absence of a FISCAP observer on board, and it is that same FISCAP observer on board the Fishing Vessels who normally communicates by radio with the on-land FISCAP offices (in the morning and again in the evening) as to the situation and actions carried out.

203. The exchange of correspondence that took place between Balmar (the consignee of the gas oil) and two of its vessels a few days after the arrest of the VIRGINIA G (attached as Annex 42 to Panama's Memorial) is worth reiterating:

Question	***Reply from fishing vessel***	***Reply from fishing vessel***
Good morning, I need you to answer a few questions: *First:*		
Did the agency inform you that we had the permission to refuel?	*Yes, we were informed by telephone*	*Yes, we were informed by telephone*
The observers, were they aware that we were on our way to refuel?	*Yes, we told them as we were navigating towards the tanker, after receiving the notification*	*Yes, we informed them when the oil tanker called us by phone and we headed towards the meeting point*
Did the observers communicate the area of refuelling, by radio to FISCAP?	*Yes, by radio*	*Yes, at the end of the operation*

204. According to the statements of the captain, it is evident that the operation had been authorised to proceed. Had there been any doubt as to any aspect of the authorisation for the re-fuelling operation, this would have, or should have, been notified to the FISCAP observers on board by the FISCAP authorities on-land. The on board observers would have informed the captains and, consequently, the captains would have suspended the bunkering operations.

C. The relevance of the press articles in relation to Hugo Nosoliny Vieria, the Director-General of FISCAP

205. In relation to paragraph 121 of Guinea-Bissau's Counter-Memorial, Panama submits that paragraphs 83 to 95 and Annex 15 of its Memorial are – contrary to what Guinea-Bissau suggests – relevant and important in that they provide the International Tribunal with a context, a time-line and a background to the circumstances existing at the time in Guinea-Bissau and, therefore, as connected to the matter at hand.

206. In Panama's view it is critical to highlight that Hugo Nosoliny Vieria was the Director of FISCAP and the person who initially signed the bunkering authorisation. He was also the person on whom the issuance of the authorisation document (following verbal confirmation) depended, and also the person who authorised the seizure and confiscation of the *VIRGINIA G.*

207. Hugo Nosoliny Vieria was arrested on 17 December 2009 as a precautionary measure, together with other high civil servants, and was accused of embezzlement of public funds, diversion of funds of the Ministry of Fisheries to private accounts and irregular concessions of licences to foreign vessels.

208. Guinea-Bissau does not deny this situation; it in fact confirms such events and purports to offer clarifications as to the status of the investigations relating to illegal granting of fishing licenses and embezzlement of public funds.

209. It is, of course, comforting to be informed that Guinea-Bissau's investigation institutions appear to be functioning; however, this does not mean that the *VIRGINIA G* events can be forgotten, or written off.

210. It is, in fact, Panama's suggestion that the investigations launched were, to some extent, provoked by the occurrences on and after the 21 August 2009. Guinea-Bissau attempts to set aside the issue, but Panama emphasises that the accusations against were made *after* the arrest of the *VIRGINIA G.*

211. In other words, the internal misappropriation and embezzlement practices for which Hugo Nosoliny Vieria was accused (and awaits trial) existed at the time when the *VIRGINIA G* requested authorisation, and at the time when information on the date and location of the bunkering vessel and the fishing vessels was communicated to Hugo Nosoliny's offices.

212. The strong indication, therefore – as the owner of the *VIRGINIA G* can attest – was that Hugo Nosoliny Vieria retained the actual document of authorisation (having already communicated the verbal authorisation) in order to put pressure for payment on his terms – personal payments. He did not pass on the document to the agent, who usually handles the obtaining of authorisations, as a manner of forcing the owner of the *VIRGINIA G* to pay commissions to them. The owner of the *VIRGINIA G* absolutely refused to make any such payments, and suffered the consequences thereof. The owner of the *VIRGINIA G* absolutely refused to make any such payments, and suffered the consequences thereof.

213. This practice of misappropriation and embezzlement of public funds is, in fact, the subject of investigations against Hugo Nosoliny Vieria.

214. In light of Guinea-Bissau's confirmation as to the prosecutions carried out in Guinea-Bissau (paragraphs 130 to 132 of the Counter-Memorial) Panama reiterates what it stated in paragraphs 83 to 95 of its Memorial, and suggests that the information contained therein has an increased value in offering the International Tribunal a more clear picture of the licensing and authorisation systems in Guinea-Bissau's at the material time – which are likely to have been different to what is suggested in print, no less in Guinea-Bissau's laws.

215. The relation of events as witnessed by José Antonio Gamez Sanfiel and Manuel Samper (Memorial Annex 4) is further evidence of the what, in reality, happened in Guinea-Bissau.

D. The arbitrary and discriminatory treatment of vessels by Guinea-Bissau

216. Concerning paragraphs 122 to 133 of Guinea-Bissau's Counter-Memorial, Panama states that the Consul of Spain also intervened between the authorities of Guinea-Bissau and the VIRGINIA G, such that that he was kept informed at all times and, in return, he was informing the vessel of actions taken by him.

217. Panama states that Guinea–Bissau's statement (Counter-Memorial paragraph 126) that its Minister of Fisheries, Carlos Musa Baldé, was not in Guinea-Bissau at the time of the Interministerial Maritime Enforcement Commission meeting is irrelevant. However, Panama suggests that at the time, Minister Musa Baldé was attending the Vigo Fisheries Fair (Spain). Panama suggests that Carlos Musa Baldé held meetings with high-ranking officials from the Spanish Ministry of Fisheries, and that he verbally assured them that, on his return to Guinea-Bissau, the matter would be resolved in view of the investment by Spain in Guinea-Bissau for the development of artisanal fisheries.

218. However, on his return to Guinea-Bissau, Minister Musa Baldé "persecuted" the *VIRGINIA G*, but not the two Balmar fishing vessels.

219. According to what the owner of the Balmar fishing vessels, José Baldos, told the owners/operators of the *VIRGINIA G*, the release of the Balmar vessels took place after their owners paid an amount of money in a Portuguese bank account, which was not an official Guinea-Bissau account, but, rather, was in the name of private individuals.

220. The owners of the *VIRGINIA G*, whilst desirous of reaching an amicable arrangement with the Guinea-Bissau authorities, were not prepared to acquiesce to dubious, probably illegal, arrangements, which, apparently, were acceptable to certain Guinea-Bissau high-officials at the time.

221. It is interesting to note also how Guinea-Bissau's officious statements are in contradiction with statements such as those of the Minister of National Defence, Artur Antonio Augusto da Silva (Annex 5 of the Counter-Memorial). Guinea-Bissau appears to have been surprisingly flexible with the Balmar fishing vessels, flagged in Mauritania, with crews of different nationalities. These fishing vessels benefited – as clearly stated by Guinea-Bissau – from favourable treatment in view of the relationship between Guinea-Bissau and Spain.

222. Mr da Silva's statement is a clear reflection of the discriminatory and arbitrary approach adopted by Guinea-Bissau, such that: *We thus released the Amabal I and Amabal II on 20.8.2009 without formality, based on the trust and good relationship between Guinea-Bissau and the Kingdom of Spain in the area of fisheries*, [...] and, following the re-arrest of the same vessels *on 28.08.2009, after much thought and aware of the fact that the Amabal I and Amabal II belonged to the former Consul of Spain* [Hamadi Bursarai Emhamed] *and taking into account our good cooperation relations with the Kingdom of Spain, we eventually made a political decision to release them.*

223. Panama submits that this unscrupulous, discriminatory, unpredictable and arbitrary approach, which Guinea-Bissau confidently submits as evidence in this matter before the International Tribunal, is highly indicative of disingenuous conduct by Guinea-Bissau, and a clear indication as to how and why the *VIRGINIA G* circumstances developed as they did when the owners of the *VIRGINIA G* refused to oblige to the apparently normal manner of resolving such issues.

224. The information gathered by the owners of the *VIRGINIA G*, and stated in declarations of the witnesses thereto have already been submitted by Panama in paragraphs 176 – 179 of its Memorial

225. On the 31 August 2009, the captain of the *VIRGINIA G* informed Manuel Samper that the fishing vessels *AMABAL I* and *AMABAL II*, which had been arrested at the same time as the *VIRGINIA G*, had been released. Moreover, from what the captain could make of a local radio news bulletin, the military mentioned that the oil tanker *VIRGINIA G* had been arrested owing to an infringement of national law; however no mentioned was made of the *AMABAL I* and the *AMABAL II*.

226. José Antonio Gamez Sanfiel and Manuel Samper, therefore, contacted the owner of the *AMABAL I* and *AMABAL II* (José Baldo) who informed him over the phone that he had obtained the release of the vessel after paying one hundred thousand Euro (€100,000) into the personal Portuguese bank account (Banco Espíritu Santo) of Carlos Musa Baldé (Guinea-Bissau Minister of Fisheries), through Hamadi Bursarai Emhamed as intermediary. The vessels were released after the amount was paid, but not before the military stole 10 tons of fish from the AMABAL vessels.

227. This news angered Manuel Samper, firstly because it was becoming clear that the real reason for the arrest of the *VIRGINIA G* was unlikely to be that claimed by Guinea-Bissau authorities; secondly, because Balmar had negotiating behind the back of Penn Lilac/Gebaspe. Manuel Samper told José Baldo that this was unacceptable, to which Mr Baldo replied: "No estamos en el mismo saco que ustedes" – *you cannot compare our situation to yours*.

228. After a somewhat strong exchange of words, José Baldo asked José Antonio Gamez Sanfiel and Manuel Samper whether the conversation was being recorded. José Antonio Gamez Sanfiel and Manuel Samper replied that it was not, and that they were respectable persons who do not do this sort of thing. This last exchange ended the conversation (see Annex 4 of the Memorial).

229. Panama understands that Guinea-Bissau has laws and Tribunals, as they indicate in paragraph 128 of their Counter Memorial, but given the circumstances surrounding the case, or at least the serious doubts as to the effectiveness of administrative transparency, Panama is not surprised that the *VIRIGNIA G* could not, and did not, believe that it would be treated justly, and according to law.

230. The faith in the Guinea-Bissau administration's integrity was especially tested when a Judge of the Court of Bissau issued a suspension Order to the Decision of the CIFM to seize the vessel, despite which the Government refused to abide by it on the basis of its own Advocate General's opinion. Indeed, a decision – dated 30 November 2009, but served on the captain of the vessel, and thus given effect to, on the 20 November 2009, ten days in advance – was issued by the Secretary of State for Finance (Memorial Annex 56), disregarding the order of the Court, and stating:

> *By virtue of Decision N° 7 of the Maritime Inspection Interministerial Commission, the Oil Tanker Virginia G was seized ex officio with its gear, engines and cargo, due to the repetitive practice of*

fishery-related activities, in the form of "non authorized sale of oil to fishery vessels in the EEZ, namely to N/M Amabal 2".

Notwithstanding the judicial order of suspension of the seizure,[31] *and not having the opposition of the Public Prosecutor, the Government Attorney and Supervisor of Legality, (Ref. n° 716/GPGR/09), for the Government to proceed to "(...) the use of the oil that the vessel traded in our EEZ (...)", we order hereby that the Oil Tanker Virginia G be authorized to discharge its content estimated at 436 tonnes gas oil in your premises.* (Added emphasis)

E. Delayed delivery

231. Panama fails to see the value of Guinea-Bissau's statements in paragraphs 134 and 135 of its Counter-Memorial. Guinea-Bissau is correct in saying that Annex 18 of Panama's Memorial is a document dated (14) September 2009, after the arrest of the *VIRGINIA G*. The document does not purport to be otherwise. It is, in fact, a statement made after the arrest of the *VIRGINIA G* by the seller of the gas oil. Guinea-Bissau is attempting to strike out this item of evidence; however, as a statement, it has equal evidentiary value as the statements included by both parties in the Annexes to their respective written submissions.

232. Should it be relevant to the International Tribunal, the reason for the delay (which was communicated to Mr. Hamadi - Memorial Annex 34) in the supplying of fuel to the Balmar fishing vessels was that at the date arranged for this supplies, the *VIRGINIA G* was supplying fuel in the area of Mauritania. This delay does not result in any infringement, as the information requested by FISCAP on the 14 August 2009 (Memorial Annex 19) was duly communicated.

F. The request for authorisation

233. It is Panama's contention (as already set out in its Memorial) that such authorisation is not, or should not be, required in the EEZ, bunkering being a freedom of navigation and internationally lawful use of the sea.

234. Nevertheless, Panama has shown (Memorial paragraphs 104 *et. seq*) how its vessel, the *VIRGINIA G*, did request the authorisation in August 2009 in accordance with the practice established and accepted in Guinea-Bissau, and Panama is in disagreement with Guinea-Bissau's statements in paragraphs 136 to 144.

235. Panama shall address this matter further in the section below, as part of Statement of Law dealing with Guinea-Bissau's breach of Article 56(2).

G. The violent and disproportionate treatment when boarding the *VIRGINIA G*

236. In relation to paragraphs 147 to 157 of Guinea-Bissau's Counter-Memorial, Panama retorts that it did not claim that "in an enforcement operation on the high sea the inspectors should not resort to military personnel armed with AK 47 rifles". Panama appreciates that that

[31] Added emphasis.

enforcement operations can be risky, and that Guinea-Bissau is keen on preventing, or deterring attacks on its personnel.

237. The submission of Panama to the International Tribunal, however, is different; that is, that Guinea-Bissau failed to respect international law rules (especially under the Convention) when approaching and boarding the vessel, and during their time on board. Specifically, Guinea-Bissau personnel, whether maritime inspectors, sailing crew or protection squad, approached the vessel at high speed, unannounced, and boarded the *VIRGINIA G* as though in an ambush, holding the crew and officers at gun-point for an extended duration of time.

238. The situation might have been mitigated had the violent mannerisms not persisted once it was established that the crew of the *VIRGINIA G* posed no threat, and that there was no criminal activity underway; which, in fact, Guinea-Bissau did not allege.

239. Had the Guinea-Bissau officials exercised their right of visit according to the provisions of the Convention, by advance radio warning, or using acoustic or visual signals; had the military limited themselves to verifying whether the inspectors required protection, rather than engaging and intimidating and threatening the crew, including confining the crew in restricted quarters at gun-point; had the captain and other officers not been similarly held at gun-point on the bridge of the vessel and, in effect, coerced into obeying orders, and intimidated into signing documents or making statements, then the inspection might be said to have been carried out according to the Convention, or at least within the parameters of reasonableness, and without any threat for all persons on board, both crew and Guinea-Bissau officials, the vessel itself and the environment.

240. Rather, the Guinea-Bissau officials did not exercise their right of visit according to the Convention. They carried out surveillance from a distance and a proceeded at speed to board the vessel without prior warning. Guinea-Bissau does not deny this in its Counter-Memorial, nor do the statements attached as Annexes 1 – 6 state otherwise.

241. Guinea-Bissau's officials persisted in their violent disposition beyond any reasonable measure (both in terms of time and in terms of proportionality). As set out in Panama's Memorial, and as confirmed by the statements of *VIRGINIA G* crew members who were witnesses to the event, the crew was confined to the accommodation quarters and were kept there at gunpoint. Similarly, the officers on the bridge were kept there at gunpoint.

242. Guinea-Bissau does not deny that its officials acted in a violent, abusive and disproportionate manner. Rather, it appears to make a blanket denial, and even attempts to justify its officers' actions, in paragraph 153 of its Counter-Memorial: *The existence 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.*

243. Guinea-Bissau relies on Article 224 of the Convention, but conveniently does omits any mention of the subsequent Article 225, which states:

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

244. This Article falls under Part XII of the Convention, entitled "Protection and Preservation of the Marine Environment", and it is, perhaps, curious that Guinea-Bissau invokes its marine environment protection concerns (even stating such concerns as a basis for the need for a bunkering authorisation in its EEZ (Chapter III.I of the Counter-Memorial)), and, in addition, claims that that *[w]hat 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 (Counter-Memorial Paragraph 157), when, in fact, the Guinea-Bissau authorities on board themselves treated the *VIRGINIA G* in such a manner that defied the most basic of rules of safety of life at sea, the safety of navigation, and the preservation of the surrounding marine environment. Panama here refers to the perilous overnight journey that took place from the EEZ to the Port of Bissau, which was not as Guinea-Bissau makes it out to be.

245. Indeed, a FISCAP official gave the captain orders to sail to the Port of Bissau. The captain protested at the order, stating that it was a dangerous voyage to embark upon; that the crew were not manning their posts and that no proper nautical map of the area was available. The captain, however, eventually obeyed the order, given the threatening behaviour of the FISCAP officials.

246. The voyage took place under very difficult conditions, endangering the crew, the ship and the environment, and this for the following reasons:

a. The captain was ordered to sail at night, in very poor visibility conditions. He was not allowed to use any of the communications equipment normally used to transmit signals to alert ships in the vicinity of the *VIRGINIA G*;

b. The crew was highly anxious and the captain feared that in case of emergency it would not have been possible to engage in the planned emergency and security plans/protocols. Given that the vessel in question was a tanker, laden with gas oil, the circumstances were considerably aggravated, and the risks heightened.

c. The emergency plans/protocols established a series of actions and controls that would not have been executable by the crew since the crew was detained in the accommodation quarters. The usual posts were not manned (main engines, auxiliary engines, equipment, etc). In other words, the crew could not have carried out their tasks whilst the vessel was sailing (under orders of the FISCAP officials), and the normal operational parameters were not being monitored or controlled. This situation was inherently dangerous and could, of itself, have led to a serious emergency situation.

d. The journey was made without the use of navigational charts of the Guinea-Bissau Port and its approach. This amounted to unsafe navigation and substantially increased the possibility of running aground in areas of low depth, potentially resulting in the loss of the vessel, human life and irreparable damage to the environment.

e. No adequate pilot was on board to provide the captain with guidance and advice on the approach and arrival in the bay of Guinea-Bissau. The *VIRGINIA G* officers protested,

and one FISCAP official stated that he was a pilot. However, he did not have the experience required for this particular voyage. The only nautical map produced was a torn and outdated one. The Pilot also admitted to not being able to perform the requested manoeuvres, such that the captain of the *VIRGINIA G* took over the navigation of the vessel.

247. It is claimed that the vessel was advised by a military pilot, Mr Djata Inaga, who, in his declaration (Annex 6 to Guinea-Bissau's Counter-Memorial) confirms that the Captain was not prepared to take the risk of navigating under the conditions. Mr Inaga, admits that his map was inadequate, and that the Captain himself offered to provide him with navigation chart n° 1724 - a far better navigational chart to navigate through the canal of River Geba – as well as a portable VHF radio: the most basic of resources which the Guinea-Bissau officials lacked. Any experienced mariner knows that for a journey of this kind, it is necessary to have the most recent publications and updated charts. The fact that the *VIRGINIA G* did not suffer an accident is to the credit of her captain.

248. Indeed, Panama emphasises that the real danger to the environment was not the *VIRGINIA G* (which was certified and properly manned in terms of Panama's international obligations), or even the allegedly illegal supply of fuel. Panama rejects Guinea-Bissau's pious statement in paragraph 157 of its Counter-Memorial, that *[w]hat 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.*

249. Rather, it is Panama's view that the real danger to the environment was caused by Guinea-Bissau itself, specifically through its officials' forceful and threatening manner of boarding the vessel; their abusive and threatening order to the captain to sail to the Port of Bissau by night, in unsafe conditions and for many hours, and their conscious and deliberate alteration of the manning situation (i.e. the arrest at gun-point of the crew, removed from their position), on board a laden oil tanker, with guns pointed in the vicinity of potentially explosive gasses.

H. The Photographs and the Notice of Infringement (auto de noticia) (Counter-Memorial, Annex 7 and 18)

250. Panama disagrees with Guinea-Bissau's statement that the FISCAP inspectors were identified as FISCAP officials, and, likewise, severely doubts the authenticity of the photographs provided by Guinea-Bissau (in its Counter-Memorial) in relation to the uniforms claimed to be used (at the material time) by the FISCAP representatives. 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.

251. The photographs presented by Guinea-Bissau in Annex 7 of its Counter-Memorial, particularly photographs 1 to 13 and 17 to 20 may very well show the uniforms and craft that the FISCAP officials use in their duties, and the FISCAP officials wearing those uniforms on board the craft. However, the said photographs are in no way proven to be linked to the events of the 21 August 2009.

252. Photographs 14 to 16, although they purport to have been taken on board the *VIRGINIA G,* are not evidence of Guinea-Bissau's contention that the FISCAP officials were identifiable as

such at the moment of the assault-type arrest. In fact, as stated by the captain and crew of the *VIRGINIA G,* the Guinea-Bissau officials only identified themselves well after the boarding. In fact, photographs 14 to 16 appear to have been taken well after the *VIRGINIA G* was boarded, particularly since there is no crew to be seen.

253. This is nothing but a feeble and disingenuous attempt by Guinea-Bissau to provide purported evidence of the events of the 21 August 2009.

254. Under normal circumstances, it is reasonable to expect that, following an arrest, a full and detailed, minute-by-minute report is drawn up, immediately, and by the official in charge, describing the events in full detail. In this case, a one and a half page, standard-form, fill-in-the-blanks document – clearly designed for circumstances relating to fishing vessels which are active within or outside the territorial waters of Guinea-Bissau – was simply drawn up. The captain was made to sign the document under coercive circumstances, and yet, Guinea-Bissau claim that the captain made no reservation or statement thereon.

255. Panama, therefore, denies the statements of Guinea-Bissau in paragraphs 158 to 161. The captain of the *VIRGINIA G* has already provided his statement as to how he was made to sign the notice of infringement (auto de noticia) (Counter-Memorial Annex 18) under coercion. The signed notice of infringement was kept by the Guinea-Bissau officials, who did not provide a copy to the Captain; similarly, no copy of the document of inspection (presented as Annex 19 to the Counter-Memorial of Guinea-Bissau (28 August 2009)) was given to the captain of the *VIRGINIA G.*

256. Guinea-Bissau's suggestion that Portuguese is fully comprehensible to any "Spanish reader" is absurd, unacceptable and a clear indication of Guinea-Bissau's style. The captain of the *VIRGINIA G* was not able to understand the contents of the report he was made to sign under threat (never mind his freedom to make any reservation or declaration thereon) and was not able to communicate the entire report to the owners of the *VIRGINIA G* as no copy was made available to him, or to Panama, as the vessel's flag State.

I. The confiscation of the cargo of gas oil, and the disregard for the court judgement prohibiting it

257. In relation to Guinea-Bissau's contentions in paragraphs 162 to 165 of its Counter-Memorial (which are a feeble retort to Panama's Memorial, paragraphs 141 to 157), and Guinea-Bissau's apparently obvious conclusion that the *operation of the unloading of the diesel oil performed by the authorities in conformity with the Guinean laws was therefore* ***perfectly legal*** (added emphasis), Panama states that this is a matter dealt with in Panama's reply to the Statement of Law (particularly in relation to Guinea-Bissau's violation of Article 300 of the Convention). Panama also refers the International Tribunal to paragraphs 207 to 222 of its Memorial.

258. Panama, however, reiterates to the International Tribunal, that Guinea-Bissau proceeded to confiscate the cargo of gas oil *notwithstanding the judicial order of suspension of the seizure* (Memorial Annex 56). Guinea-Bissau confirms its disregard of the Bissau Court order,

stating (in Counter-Memorial paragraph 163) that *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.* This is in contradiction with what Guinea-Bissau later states in its Counter-Memorial (paragraphs 190 to 192) that the interim measure had already been suspended when the unloading of the gas oil was decreed. Guinea-Bissau presented the Attorney General's opinion (Counter-Memorial Annex 8), dated 13 November 2009 – 7 days before the confiscation took place (20 November 2009) on the strength of a letter dated a further 10 days in advance (30 November 2009), with no reference whatsoever to the appeal and suspension of the interim order, but merely to the non-opposition of the Public Prosecutor.

259. The reasons given by Guinea-Bissau for the alleged nullity of the interim order or measure, suspending the seizure and confiscation of the *VIRGINIA G* and of the cargo on board, obtained from the Court of Bissau, are dubious, at best.

260. The cover letter to the Attorney General's opinion (Counter-Memorial Annex 8) states that *we deem that the decision to confiscate the offending ship with its tackle, equipment and products found on board to have been correct. We therefore have no reservation in regard to the use of the fuel that this ship was transacting in our EEZ.*

261. What Guinea-Bissau then submits is an opinion which far from offers certainty as to the nullity of the Courts order. Indeed, the first paragraph under heading "4. Law" on page 43 of the Counter-Memorial Annex bundle states:

> *Dispensing with analysing whether the Ruling that granted the petitioned interim measure was a good one, we care to state that the interpretation of no. 2 of article 400 of the CPC (Civil Procedure Code) which states that "the Court will hear the defendant, if the hearing does not endanger the purpose of the interim measure* ([text not provided])" *is moot.*

262. Guinea-Bissau's justification, therefore, is that the Court adopted the interim measure without first hearing the opposing party; that is, the government. On this basis, Guinea-Bissau considered that *this violation legally implies that such decision is null [...] and the Attorney General of the Republic of Guinea-Bissau did inform the Government of this state of affairs* (Counter-Memorial paragraph 190).

263. It is absurd and highly abusive for the government of Guinea-Bissau to have chosen to disregard the interim order on the basis of a moot point, and to have reached the conclusion that such moot point *legally implies that such decision is null,* rather than to challenge it before the same Court of Bissau. Guinea-Bissau obtained and relied on an opinion of the Attorney General, an "internal legal opinion", so to speak, rather than convincing the Regional Court that the interim order was not validly issued (as is alleged).

J. 14 months of detention – the procedural, administrative, legal and financial efforts made to solve the situation

264. In paragraphs 166 to 205, Guinea-Bissau presents a series of scant, unstructured and unsupported retorts to the facts, as understood by Panama, and as amply set out in paragraphs 158 to 206 of the Memorial together with Panama's supporting Annexes. Panama stands by its statements contained in its Memorial, denies the statements of Guinea-Bissau in paragraphs 166 to 205, and refers the International Tribunal to Chapter 2 thereof, particularly paragraphs 158 to 206.

265. Guinea-Bissau attempts to disregard the relevance of the information, facts and supporting documents (Annexes) presented by Panama in paragraphs 159 to 179 of its Memorial. Panama submits that it is for the International Tribunal to consider and determine the relevance of the statements and supporting information provided by Panama.

266. In relation to Counter-Memorial paragraph 167 (location of P&I Club), Panama has already submitted that the location and nationality of the *VIRGINIA G*'s P&I Club cannot be deemed to have an impact on the connection between a vessel and its flag State (see paragraphs 134 to 137 above).

267. In relation to Counter-Memorial paragraphs 168 to 171, Guinea-Bissau simply dismisses the statement of the captain of the *VIRGINIA G* concerning João Nunes Cá as "pure fantasy", when, in fact, the captain was very clear in reporting a most serious and questionable suggestion by Guinea-Bissau's official – in fact, Guinea-Bissau calls it an "illegal solution" (paragraph 170). The captain stated that *[o]n 31 August 2009, João Nunes Cá visited the vessel twice, and told me that he would look at the owner "with good eyes" if he called him, and he provided me with a telephone number to find a solution "a la Africana". I told the owners about this, and I was told to say that any communication had to be made through our P&I Club.*

268. If anything, the "contradiction" in paragraph 184 of Panama's Memorial would suggest that João Nunes Cá was operating on parallel paths, suggesting one "solution" to the owners via the captain, and another "solution" within his offices, in a formal meeting with the *VIRGINIA G*'s P&I Club representative.

269. In relation to Counter-Memorial paragraphs 172 to 175, Panama retorts that the contents of the letter do not differ from the statements of fact and of law submitted by Panama in its Memorial. Panama was very clear in how the authorisation process proceeds in Guinea-Bissau, and that the document evidencing the authorisation is kept by the on-land agent, with only verbal confirmation being transmitted to the vessels in question, themselves on standby at the notified location, at the notified time.

270. Moreover, Panama's contention that the requirement of an authorisation against payment for providing bunkering services in the EEZ of a coastal State is beyond the jurisdiction of such coastal State in its EEZ is consistent with the position set out by the owner of the *VIRIGNIA G* at all stages. However, Guinea-Bissau acts in a disingenuous manner when it suggests that the *VIRGINIA G* was not concerned, or otherwise disregarded the environmental aspects of bunkering at sea. It has already been demonstrated that under Panama's international treaty

obligations, the *VIRGINIA G* was suitably equipped and prepared for any environmental issues that may have arisen.

271. The decision to confiscate the vessel was definitely not motivated "as always mentioned, by ecological concerns other than tax evasion and unfair competition against Guinean oil companies", and was certainly not justified, or justifiable, on that basis. Panama suggests, elsewhere in this Reply, that Guinea-Bissau's true motivations for imposing a requirement of prior authorisation for bunkering, against payment, and sanctioned by serious (in fact, disastrous) consequences is purely related to revenue interests it seeks to obtain from non-fishing activities, by non fishing vessels – which is incompatible with the provisions of the Convention.

272. In relation to Counter-Memorial paragraphs 176 to 184, Panama states that it was, in fact, Guinea-Bissau's "attitude" that denied the owner of the *VIRGINIA G* full and proper administrative remedies, irrespective of the judicial remedies sought (and, in any case, impeded by the government of Guinea-Bissau, as explained in Panama's Memorial and in this Reply).

273. The manner in which the "administrative" stage was managed by Guinea-Bissau leaves little doubt that Guinea-Bissau acted in an abusive manner, and in bad faith. Not only did the "administration" act in such a manner as to prejudice Panama's and the vessel's rights, but it misapplied its own laws in confiscating a vessel which was not a fishing vessel and a cargo which was not "fisheries products" (as explained in paragraph 392 *et. seq.* below); moreover, in complete disregard of the interim measure the owner of the *VIRGINIA G* managed to obtain from the Court of Bissau.

274. Panama underscores Guinea-Bissau's statement in paragraph 176 of its Counter-Memorial, that the owner of the VIRGINIA G "systematically wrote letters to FISCAP". Indeed, as stated further on in this Reply, the owner of the *VIRGINIA G*, through its P&I Club representative reacted via correspondence with FISCAP in relation to the arrest and detention of the vessel and her crew, on at least the following occasions:

- 28 August 2009 (Memorial Annex 37), which letter was stamped as received by FISCAP;
- 4 September 2009 (Memorial Annex 41), which included a request to set a security or bond for the release of the vessel, which letter was stamped as received by FISCAP. FISCAP even replied, on the 7 September 2009 and again on the 11 September 2009, with direct reference to the letter of the 4 September 2009.
- 14 September 2009 (Memorial Annex 44), which letter appears to be stamped as received by FISCAP;
- 15 September 2009 (Memorial Annex 45), **wherein an extension to the legal period was required before legal proceedings were commenced**, pending a reply from FISCAP to the owner's letter dated 14 September 2009;

275. It is curious, therefore, that FISCAP received the abovementioned letters and, moreover, twice replied to the one dated 4 September 2009 - making direct reference to its contents - yet alleged that the owner of the vessel failed to react to the measures taken and that on the basis of such lack of reaction the vessel and its product on board would be confiscated.

276. The fact that the confiscation of the vessel and its "fisheries products" is (purportedly) allowed at law does not make the decision of the CIFM "therefore legal", if the application of that law is incorrect, abusive and in bad faith, which Panama submits is the case (as set out in more detail in the Statement of Law in its Memorial, and in the respective sections of this Reply).

277. In relation to Counter-Memorial paragraphs 185 and 186 (refusal to return passports), Panama sets out its reasons for its disagreement with Guinea-Bissau's views in paragraphs 366 to 370 below, in addition to the arguments already set out in its Memorial.

278. In relation to Counter-Memorial paragraphs 187 to 193 (disregard of Court Order suspending the seizure of the vessel and cargo), Panama sets out its reasons for its complete disagreement with Guinea-Bissau's views in paragraphs 392 to 423 below.

279. In relation to Counter-Memorial paragraphs 194 to 197, Panama has already explained in its Memorial, and reiterated in this Reply, how the arrest unlawful and/or unjustified arrest and prolonged detention of the *VIRGINIA G* seriously affected the operations and solvency of the owners in respect of both the *VIRGINIA G* and the bareboat chartered *IBALLA G,* causing damages and losses, and severe hardship to the crew. Reference is made to paragraphs 223 to 242 of Panama's Memorial.

280. Guinea-Bissau cannot disassociate itself from the effects of its unlawful and unjustified actions, as may be decided by the International Tribunal. In particular, Guinea-Bissau cannot be heard to state that it acted lawfully by confiscating the passports of the crew to control unauthorised entries into national territories, when the crew was forced into the territory of Guinea-Bissau, precisely "by virtue of the decision to confiscate the vessel". If, by "unauthorised entries into national territories" Guinea-Bissau is actually referring to the entry of the crew, on board the *VIRGINIA G,* in the EEZ of Guinea-Bissau, then that is a different argument, and one which would see Guinea-Bissau's extension of sovereignty vehemently challenged.

281. In relation to Counter-Memorial paragraphs 198 to 205 (, Panama states that contrary to what Guinea-Bissau claims, the journey that the *VIRGINIA G* was ordered to make from the location of its arrest to the Port of Bissau was dangerous, and placed at great risk the crew, the vessel and the environment, and this for the reasons already stated in Panama's Memorial (paragraphs 126 to 140), and in this Reply (paragraphs 244 to 249 above), as confirmed by the captain in his statement (Memorial Annex 1).

282. During, and because of, the prolonged detention, the conditions on board the *VIRGINIA G* deteriorated, such that the situation on board the vessel became arduous and inhumane. Panama provides a more detailed description of this aspect of the detention in paragraphs 223 to 242 of its Memorial, with particular reference to the relevant parts of Annexes 1 to 6 of the Memorial.

283. Yet Guinea-Bissau, again, attempts to disassociate itself from the effects of its unlawful and unjustified actions, stating that the well-being of the crew and the conditions on board are the exclusive responsibility of the shipowners.

284. What Guinea-Bissau fails, or refuses, to acknowledge is that the actions and measures taken by Guinea-Bissau against the *VIRGINIA G* were not only unlawful and unjustified, but also well beyond any measure of reason in terms of proportionality and duration. This conclusion by Panama is particularly supported by the fact that Guinea-Bissau released the vessel without any charges or penalties; however the vessel had, by then, been detained for 14 months, apparently for no ultimate purpose to Guinea-Bissau.

285. The reasons given by Guinea-Bissau for releasing the vessel *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* are disingenuous, considering that the condition of the vessel was caused by the prolonged detention of Guinea-Bissau itself, for no apparent and ultimate reason, seeing that the vessel was released without charge.

286. Panama reiterates that arrest and detention of the *VIRGINIA G* meant that the contract under which it was chartered (to Lotus Federation) was rescinded. The owners quickly ran into serious financial difficulty, having lost a main source of income, whilst still having to pay the expenses related to the *VIRIGNIA G*, such as wages, legal costs, provisions, office employees, banks, port fees, agents, suppliers and so forth. In fact, the owner of the *VIRGINIA G* became bankrupt. The *IBALLA G* was also arrested for failure of its bareboat charterers, the now bankrupt Penn Lilac, to pay its creditors and crew.

287. Indeed, Guinea-Bissau cannot be permitted to disassociate itself from the effects of its unlawful and unjustified actions, when such actions caused such serious consequences to the vessel, her crew, her owners. The financial prejudice that could be caused by an idle vessel were recognised by the Court of Bissau as a most valid reason for issuing the interim order preventing the seizure of the vessel and its cargo. Guinea-Bissau's statements in paragraphs 198 to 200 of its Counter-Memorial are, therefore, rather audacious; given that it completely disregarded the interim order of the Court.

288. Panama strongly denies and rejects Guinea-Bissau's statements in paragraph 201 that *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*.

289. This statement summarises Guinea-Bissau's complete lack of understanding (or deliberate disregard) of the applicable rules and regulations at international level; maritime practices and inspection procedures, as will be indicated hereunder.

290. Firstly, Panama retorts that its procedures for registering and certifying the *VIRGINIA G* are fully in line with Panama's international obligations, and that its methods are thorough and in full compliance with the requirements of the applicable international conventions, including MARPOL and SOLAS, which, it is noted, Guinea-Bissau has not signed. All relevant certification to this effect has been provided to the International Tribunal in annex. Moreover, all relevant certification was held by Guinea-Bissau during the full period of detention, and Guinea-Bissau failed to raise its concerns (if, indeed, the situation was so serious) in terms of Article 94(6) of the Convention.

291. Secondly, Panama has already described, with supporting evidence, that it was Guinea-Bissau's unlawful and unjustified measures that caused the *VIRGINIA G* to deteriorate to such an extent. Particular reference is also made to the two Class Condition Surveys/Internal Audit carried out by Panama's surveyor Capt. Pedro Olives Socas, first after the arrest of the vessel (September 2009), and again before her release (October 2010) (see section "Punto 8" of the damages reports attached hereto as **Annex 4.1 (64)**).

292. In September 2009, Capt. Pedro Olives Socas's conclusion and recommendation was as follows:

> *According to this Class Condition Survey carried out at Bissau Road in this date on board the M/T Virginia G our conclusions are that the ship is in order to work and the ship maintains adequate stability, watertight integrity, able to navigate safely and complies with safety standards.*
>
> *When the ship will be release Penn Lilac Trading has to inform Panama Shipping Registrar for to carry out a new Condition Class Survey.*

293. In October 2010, Capt. Pedro Olives Socas's conclusion and recommendation was as follows:

> *According to this condition survey and internal audits our conclusions are that the ship is not in good conditions and very important repairs must be carried out and spare part must be supplies.*
>
> *For to enter in Class and that the new Statutory Certificates can be issued it is necessary to carried out all necessary repairs and to supply the spare parts*
>
> *Penn Lilac Trading has to informs to Panama Shipping Registrar for the control of the repairs works*

294. Whether one can "attach any credibility" to the Condition Survey Reports carried out by Capt. Pedro Olives Socas is for the International Tribunal to decide, contrary to what Guinea-Bissau states in paragraph 203 of its Counter-Memorial. However, Panama states that Guinea-Bissau continues to demonstrate how problematic its manner can be, either through its ignorance of international laws and regulations, or through a deliberate disregard thereof.

295. Thirdly, the reference to the accident reports prepared by Capt. Pedro Olives Socas in relation to the vessels TORNADO and SASANQUA increases Capt. Pedro Olives Socas, rather than discredits him.

296. The accident reports, which can be obtained via a simple internet search, are a consequence of the obligation of the vessel and its flag State to let the international community know the factors which lead to maritime accidents (factors which are the cause of the accidents or which contribute to them).

297. As Guinea-Bissau should know – and in application of the International Treaty for Maritime Accidents, according to IMO Resolution A.849(20)[32] – every State is obliged to investigate accidents which concern or involve vessels flying their flag, via, amongst others, and inspection carried out by their inspectors. One of the aims of such a procedure is to improve, where needed, the laws and regulations in order to avoid further accidents of the same nature.

298. The fact that inspector Capt. Pedro Olives Socas had inspected the vessel *VIRGINIA G* and prepared the report produced by the Panama in Annex 59 of its Memorial (and again, with an additional report, as part of **Annex 4.1 (64)** to this Reply), shows that it has been prepared by a competent inspector, recognised by Panama.

299. Lastly, Guinea-Bissau states that Panama is unlikely to have *made a single inspection of the vessel, which always operated between Seville and the West African Coast, having probably never gone to Panama.*

300. Had Guinea-Bissau raised its doubts and concerns with Panama, as provided in Article 94(6) of the Convention, Panama would have gladly offered Guinea-Bissau the clarifications it may have required. In the absence of such a request, Panama, nevertheless, states that:

    a. the *VIRIGNIA G* had its certificates in force, having been inspected by recognised inspectors appointed by the Government of Panama to inspect vessels and to issue the corresponding technical certificates;

    b. the *VIRIGNIA G* had in force its Security Annual Inspection as carried out by recognised inspectors appointed by the Government of Panama;

    c. the *VIRIGNIA G* never made trips between Seville and the West Coast of Africa, it always went between the Canary Islands and the West Coast of Africa.

301. Guinea-Bissau should also be aware that in international maritime traffic inspections by the flag State take place in different ports and not necessarily in the ports of the flag State itself. Panama has a team of recognised inspectors, and a team of its own inspectors who travel to the port where the particular vessel is located. In addition to this, every vessel, irrespective of its flag, is subject to the inspections by Port State Control.

302. As set out in Panama's Memorial (Annex 22) on 5 August 2009 (16 days before her arrest) the *VIRGINIA G* was subject to an inspection by Port State Control in the port of Las Palmas (Canary Islands, Spain). The vessels was neither found to be in the condition stated by Guinea-Bissau, not to have lacked sufficient security such that it posed a danger to the crew, the port or the environment. It was confirmed to have all equipment in order and certificates in force, as further confirmed 16 days later by the Guinea-Bissau authorities themselves (Annex 18 to the Counter-Memorial). Therefore, Guinea-Bissau's claim that the vessel was in "extremely deficient condition" or "terrible condition" might have been true at the time of release and as a result of the vessel's detention by Guinea-Bissau; however, it absolutely cannot be said to have been the case before or at the time of the arrest on 21 August 2009.

* * *

[32] **Code for the Investigation of Marine Casualties and Incidents** http://www.ismcode.net/accident_and_near_miss_reporting/849final.pdf

CHAPTER 4
REPLY TO STATEMENT OF LAW

(cf. Counter-Memorial, Chapter V)

303. In this section, Panama addresses the statements and arguments of Guinea-Bissau in Chapter 3 of its Counter-Memorial (paragraphs 206 to 249), presented in reply to Chapter 3 of Panama's Memorial (paragraphs 251 to 412). Despite the absence of sub-headings in the Counter-Memorial, Panama has attempted to organise its replies under separate sub-headings, in accordance with the main arguments submitted by Guinea-Bissau.

304. In any case, at the outset, Panama considers it necessary to object to the lack of due consideration given by Guinea-Bissau in presenting its legal arguments to the International Tribunal, on occasion, merely denying Panama's contentions, or reaching illogical conclusions, without even an attempt at explaining its reasons. Panama objects to this approach, and reserves its right to request the International Tribunal to reject or otherwise declare as inadmissible any legal arguments or other position Guinea-Bissau may present in its Rejoinder which is not indicated or which is otherwise absent from its Counter-Memorial.

I. Violation of Article 58 of the Convention: freedom of navigation and other internationally lawful uses of the sea

305. Panama rejects Guinea-Bissau's contention (Counter-Memorial, paragraph 209) that Guinea-Bissau has not violated Article 58 of the Convention as it considers bunkering to be an economic activity which is not included in freedom of navigation or other internationally lawful uses of the sea.

306. Panama fully reiterates its contention (as set out in its Memorial, paragraphs 255 to 295) that the bunkering services provided by the *VIRGINIA G* in the EEZ of Guinea-Bissau, and subject to this dispute, fall within the category of freedom of navigation and other internationally lawful uses of the sea related to that freedom in terms of Article 58(1).

307. In order to avoid unnecessary and excessive repetition of the contentions that Panama has already set out in detail in its Memorial, Panama will, in this part, address the arguments raised by Guinea-Bissau in its Counter-Memorial (paragraphs 209 *et. seq.*), whilst referring the International Tribunal to the full arguments set out in paragraphs 257 to 295 of its Memorial, as well as the arguments set out above in Chapter 1.II.A and 1.II.B.

308. In this manner, Panama re-submits to the International Tribunal that Guinea-Bissau did violate Article 58 of the Convention in denying Panama and its vessel, the *VIRGINIA G,* freedom of navigation.

309. Panama considers it relevant to refer to the Separate Opinion given by Judge Budislav Vukas in relation to the judgement of the International Tribunal in the *Saiga No.2* case.[33] The clarity of language is such that direct quotations will be reproduced hereunder (with added emphasis where deemed relevant) for consideration by the International Tribunal.

[33] http://www.itlos.org/index.php?id=64&L=0

310. Reference is first made to paragraph 16 of Judge Vukas's Separate Opinion as this is linked to the context of the case at hand:

(c) The relevant provisions of the Convention

16. Since the first initiatives for the extension of sovereignty/jurisdiction of coastal States, which eventually resulted in the establishment of the régime of the exclusive economic zone, coastal States envisaged the protection of their rights in respect of the natural resources of the sea. This was the main purpose for the adoption, and the essential element of the content of the 1952 Declaration on the Maritime Zone (the Santiago Declaration), the 1970 Montevideo Declaration on the Law of the Sea, the 1970 Declaration of the Latin American States on the Law of the Sea, the 1971 Report of the Subcommittee on the Law of the Sea of the Asian- African Legal Consultative Committee, the 1972 Declaration of Santo Domingo, the Conclusions in the 1972 General Report of the African States Regional Seminar on the Law of the Sea, and of several other instruments adopted by various organizations and groupings of States *[footnote excluded]*.

Rights over natural resources in the proposed zone were also the dominant concern of coastal States in the work of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction *[footnote excluded]*.

During the drafting of Part V of the Convention, the majority of States participating in UNCLOS III did not have in mind the protection of other economic activities of coastal States except the resource-related ones. An early proposal of 18 African States, to insert in the future Convention a provision on the jurisdiction of coastal States for the purpose of "control and regulation of customs and fiscal matters related to economic activities in the zone", and a similar proposal by Nigeria, *[footnote excluded]* were reflected in the 1974 Conference document listing the various trends of the States participating in UNCLOS III (Main Trends Working Paper). However, due to the expressed opposition of several delegations, *[footnote excluded]* customs regulation in the exclusive economic zone was not mentioned in the drafts of the Convention.

The following paragraph relative to article 59, written by the most authoritative commentators of the Convention, **confirms that in conceiving economic sovereign rights and jurisdiction of the coastal State, UNCLOS III never reasoned beyond their resource contents**:

> On *issues not involving the exploration for and exploitation of resources*, where conflicts arise, the interests of other States or of the international community as a whole are to be taken into consideration. (emphasis added) *[footnote excluded]*

17. It appears from all the above mentioned that the drafting history and the content of Part V of the Convention **do not provide valid reasons for considering bunkering of any type of ships as an illegal use of the exclusive economic zone**. In this respect, a note circulated at the beginning of the fifth session of UNCLOS III by the President of the Conference should be recalled. Pleading for a consensus on the régime of the exclusive economic zone, the President wrote:

> A satisfactory solution must ensure that the sovereign rights and jurisdiction accorded to the coastal State are compatible with well-established and long recognized rights of communication and navigation which are indispensable to the maintenance of international relations, *commercial* and otherwise. (emphasis added) *[footnote excluded]*

Thus, the President did not see a strict separation of *ius communicationis* and *ius commercii*. It should be stressed that it was only after this President's appeal that the final formula of article 58, paragraph 1, was included in the draft of the Convention (Informal Composite Negotiating Text).

Bunkering should, although as a rather new activity at the time it was not expressly mentioned at the Conference, **be considered an "internationally lawful use of the sea" in the sense of article 58, paragraph 1, of the Convention. It is related to the freedom of navigation "and associated with the operation of ships".** This claim is not difficult to defend from the point of view of navigation as well as international law. Supply of bunkers is the purpose of the navigation of a tanker, and refuelling is essential for further navigation of the ship to which gas oil has been supplied. This close relationship of bunkering and navigation with the terms used in article 58, paragraph 1, forces me to recall here article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, to which the parties often referred in their pleadings: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

311. Reference is now made to other parts of Judge Vukas's Separate Opinion:

3. As the basic disagreement between the parties is the alleged violation of the right of Saint Vincent and the Grenadines under "Articles 56(2) and 58 and related provisions of the Convention", the opposite claims of the parties should **primarily be analysed and evaluated on the basis of the provisions of the Convention**.

The fact that Saint Vincent and the Grenadines as well as Guinea are States Parties to the Convention does not suffice for the application of Part V of the Convention concerning the exclusive economic zone in "an area beyond and adjacent to the territorial sea"(article 55) of Guinea. Namely, unlike the case of the continental shelf (article 77, paragraph 3) and as the contiguous zone (article 33, paragraph 1), the rights of the coastal State over the exclusive economic zone depend on an express proclamation of the zone by the respective coastal State. Guinea proclaimed its exclusive economic zone by Decree No. 336/PRG/80, which entered into force on 30 July 1980.

312. Guinea-Bissau's (amended) proclamation would appear to be contained in national legislation Act No.3/85 of 17 May 1985. Reference is made to the below extract, and to Annex 8 of Panama's Memorial for the full text.

Act No. 3/85 of 17 May 1985 on delimitation of the territorial waters, the contiguous zone and the continental shelf

[...]

Article 3

1. The exclusive economic zone shall extend, within the national maritime frontiers, for a distance of 200 nautical miles measured from the straight baselines established by the above-mentioned Act.

2. The State of Guinea-Bissau shall have the exclusive right to explore and exploit the living and natural resources of the sea and the continental shelf, slopes and sea-bed within the exclusive economic zone.

Article 4

Fishing within the exclusive economic zone by any foreign vessel or ship not authorised by the Government of the Republic of Guinea-Bissau is expressly prohibited.

Article 5

Violations of article 4 shall be punished under the terms of the law.

Article 6

Any legislation which is at variance with this Act shall be revoked.

Article 7

This Act shall enter into force immediately.

313. Judge Vukas continues:

4. Having established its exclusive economic zone, Guinea put in force the specific legal régime of the zone, consisting of its rights and jurisdiction, and of the rights and freedoms of other States, governed by the relevant provisions of the Convention (article 55). The legal régime of the zone is automatically applied once the zone is proclaimed; it does not need internal, municipal rules in order to be operative. The ratification of the Convention, and the proclamation of the zone, suffice for the application of all the rules on the exclusive economic zone contained in the Convention. Of course, States are entitled to incorporate the provisions of the Convention into their internal laws and regulations, i.e. to transform into their domestic law the rules set out in the Convention. They may also formulate additional domestic rules **to the extent that they are not contrary to the Convention** and **other relevant international rules**.

5. Considering, therefore, that since 1980, beyond and adjacent to the territorial sea of Guinea, there has existed the exclusive economic zone of that State, I do not agree with the Judgment which bases its scrutiny of the legality of the arrest of the Saiga on the laws and regulations of Guinea.[34] The Judgment has neglected the relevant provisions of the Convention directly applicable to the parties. This approach cannot be justified by the mere fact that, after referring to the relevant provisions of the Convention (see supra paragraph 1), Guinea also claimed that:

> Guinean laws can be applied for the purpose of controlling and suppressing the sale of gasoil to fishing vessels in the customs radius ("rayon des douanes") according to Article 34 of the Customs Code of Guinea.

Although in the course of the proceedings Guinea referred to the Customs Code and some other laws, the main purpose of these references was the claim that neither their content nor their application to the Saiga violated the Convention.

[34] Panama submits that Guinea-Bissau is, in effect, suggesting that the same approach be adopted by the International Tribunal in this Case No.19.

6. In my opinion, **it is indispensable to commence the inquiry concerning the legality of the actions of Guinea by analysing the relevant provisions of the Convention**.

As demonstrated in paragraph 1 above, the parties have opposite views concerning the content and the application of "Articles 56(2) and 58 and related provisions of the Convention". The main provision on the rights of "other States" in the exclusive economic zone is article 58, paragraph 1, which provides that all States enjoy, "subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention."

Article 56, paragraph 2, states that the coastal State, in exercising its rights and performing its duties under this Convention in the exclusive economic zone, "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention".

Although not specifically indicated in the submissions of Saint Vincent and the Grenadines, the "related provisions of the Convention" are particularly those which determine the rights and duties of the coastal State, as their application could interfere with the freedom of navigation of ships flying its flag.

314. Panama reiterates its contention that bunkering activities in the EEZ are part of the freedom of navigation and other internationally lawful uses of the sea. Panama also reiterates that national legislation such as that of Guinea-Bissau (Decree Law 6-A/2000, a principal point of contention in the present case), violates Article 58 of the Convention, insofar as it is considers bunkering activities in its EEZ to be fishing-related activities subject to national regulation and control.

In reality, Guinea-Bissau seeks to collect taxes / customs duties under the guise of its Fisheries law

315. In addition, and without prejudice to Panama's abovementioned contention, Panama submits that Guinea-Bissau's manifest acknowledgement of the financial benefits of regulating bunkering in its EEZ (or even the losses it claims to suffer); its constant reliance (in its Counter-Memorial) on certain reasoning in the limited number of cases, authors and legislation, and Guinea-Bissau's request for payment from bunkering vessels for the issuance of its consent, is, in reality, a manifestation of a situation where the authorisation or consent is given the same treatment as a licence, and one whereby Guinea-Bissau **imposes a form of tax or customs duty on bunkering activities carried out in its EEZ**.

316. It is Panama's view that Guinea-Bissau's true justifications for regulating bunkering activities in its EEZ is to be found principally in paragraphs 83, 84 and 210 of its Counter-Memorial. Indeed, Guinea-Bissau contends that *a 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* – an apparent admission that bunkering activities in its EEZ fall outside its territory.

317. Guinea-Bissau also reaches the conclusion that *[i]t is therefore normal for the* coastal *State to demand that the activity of bunkering in its exclusive economic zone implies the payment of*

the corresponding licences,[35] *pursuant to art. 62 of the Convention, a practice which is common to the whole of the African sub-region in which Guinea-Bissau is included, the international practice of States being an important element in interpreting the Convention.*

318. In paragraph 210 of its Counter-Memorial, Guinea-Bissau casually reiterates that *bunkering is considered in all the region of West Africa as a fishery-related activity, subject to the authorisation of the coastal State.* Guinea-Bissau's statement is, however, manifestly inadequate in suggesting that the International Tribunal should consider that an alleged regional tendency would be sufficient to conclude that "[…]subsequent development[s] of customary law can clarify and/or amend any previous solution" (as Judge Vukas submitted in his Separate Opinion). Moreover:

> 20. In respect to Guinea's claims and its own legislation, it is interesting to note that an overview of the practice of States, prepared in 1994 by the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs, pointed out the case of an African State which is quite opposite to the tendency of Guinea. The following quotation demonstrates the attitude of Namibia, which amended its legislation in order to follow the content of the régime of the exclusive economic zone under the Convention:
>
> > It may be noted that in 1991 Namibia adopted an amendment to section 4(3)(b) of the Territorial Sea and Exclusive Economic Zone Act of Namibia (1990), which had provided for the right to exercise powers necessary to prevent the contravention of fiscal law or any law relating to customs, immigration and health in its exclusive economic zone. The amendment deletes the reference to such right, which, under article 33 of the Convention, belongs to the contiguous zone and not to the exclusive economic zone, so that the Act may conform with the Convention.

319. Indeed, whilst acknowledging the possibility of a development of such rules by a constant practice of States, Judge Vukas's conclusion was: "the non-existence of additional international rules concerning the rights and duties of coastal and/or other States in the exclusive economic zone beyond those in the Convention."

320. Guinea-Bissau's statement and reference to the specific extracts of the *Saiga No.2* judgement in paragraphs 212 to 214 of its Counter-Memorial confirms, rather than contradicts, Panama's remark in paragraph 259 of its Memorial. Panama did not state that the International Tribunal did not consider bunkering in its *Saiga No.2* decision, but that:

> 259. The Saiga cases[36] were an opportunity for the International Tribunal to consider the legal consequences of such bunkering activities.[37] In the Saiga No.2 Case, rival contentions were made by both St. Vincent and the Grenadines and Guinea. However, the customs jurisdiction context of the dispute ultimately made it unnecessary for the International Tribunal to make any general findings about the legal aspects of bunkering in the EEZ, despite invitations by the Parties.

321. Guinea-Bissau relies on the reasoning of David Anderson (Counter-Memorial paragraphs 93 and 94), who writes that *[...] in 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*

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[35] Although this should probably read "authorisations".

[36] *The M/V Saiga (Prompt release) case*, Judgement of 4 December 1997, ITLOS Reports 1997, p.16 and the *The M/V Saiga (No.2) (merits)*, Judgement of 1 July 1999, ITLOS Reports 1999, p.10.

[37] Referring to the broader question of the rights of coastal States and other States with regards to bunkering in the EEZ.

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.[38]

322. However, Guinea-Bissau conveniently omits to include the immediately following paragraph:

> *At the same time, it is clear that the coastal State is not free to regulate bunkering in any way it chooses, e.g. by applying its customs legislation to the foreign bunkering-vessel. This was the ruling in the Saiga (No.2) Case.* ***The scope of the legislation, in order to escape the charge of amounting to exorbitant or "creeping" jurisdiction, should be confined to fisheries or resource activity in the EEZ.*** (Added emphasis)

323. It would appear that certain (not all) West African coastal States, such as Guinea-Bissau, took heed of the International Tribunal's "warning" in the *Saiga No.2. Case* such that legislation was amended or introduced to give what, in effect, remains a tax or customs duty (imposed beyond the area of maritime sovereignty) the guise of a "consent" for a fishing-related activity, against payment, and with disastrous repercussions for the bunkering vessel concerned should any doubt arise as to whether the vessel had the authorisation.

324. Without prejudice to Panama's contentions, it would arguably be acceptable for a coastal State to request to be *informed* of an intended bunkering operation in its EEZ – a situation that, in fact, already results from the licensing obligations of the fishing vessels themselves. However, it is altogether another issue for the coastal State to encumber a mere consent or authorisation with considerable fees and sanctions.

325. This observation finds further support when read in conjunction with Guinea-Bissau's unequivocal statement (in paragraph 83 of its Counter-Memorial) that *a 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.*

326. Indeed, Guinea-Bissau relies on Judge Zhao's conclusion in his Separate Opinion in the *Saiga No.2 Case* that *[t]he 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 it is free on the high seas is legally not tenable.*

327. Panama, in addition, refers to the other sections of Judge Zhao's separate opinion, where it is stated that *[b]unkering by its very nature is a means of evading customs duties of coastal States* and that *[t]he coastal States of West Africa were also well aware of the problem of "the control and regulation of customs and fiscal matters related to economic activities" in the exclusive economic zone, as the proposal of 18 African States at the Third United Nations Conference on the Law of the Sea and an earlier proposal by Nigeria demonstrate.*

328. Panama does not agree with Judge Zhaos's reasoning leading him to conclude that "bunkering should not be encouraged, let alone without restraint." Indeed, whether bunkering

[38] Anderson, D. *Modern Law of the Sea : Selected Essays,* Leiden, Koninklijc Brill, 2008, pp. 226

should be deemed a freedom of navigation is one question; whether and how the vessel is "restrained" in its activities (e.g. environmental safeguards, certification, preventive measures, etc.) is another question, and whether that activity should be, in effect, "taxed" by the authorities of coastal States is a third question, and Guinea-Bissau fails to distinguish between the three.

329. It might, therefore, be suggested that the unilateral extension by Guinea-Bissau of the scope of the Convention through its national fisheries legislation to cover also re-fuelling operations carried out in the EEZ, such that prior authorisation is requested **against payment**, is, in reality, intended solely to extend a customs-type radius: a situation that was not, in fact, accepted by the International Tribunal in the *Saiga No.2* 1999 judgement[39] yet would appear to still be present, in disguised form, in Guinea-Bissau's Decree Law 6-A/2000.

330. Against this background, Panama submits to the International Tribunal that, contrary to Guinea-Bissau's categorical conclusion in paragraph 225 of its Counter-Memorial, it is clear that Guinea-Bissau has not only failed to present the International Tribunal with a rational and supported position as to why bunkering in the EEZ should not be considered as a freedom of navigation under the Convention, but has also provided a justification which is not compatible with international law, and, therefore, an additional ground on which the International Tribunal should, in Panama's view, consider Guinea-Bissau's Fisheries laws (Decree Law 6-A/2000 and other related legislation) to be incompatible with the Convention.

331. Decree Law 6-A/2000 infringes the provisions of the Convention because it grants Guinea-Bissau with certain sovereignty rights and jurisdiction which are not granted to coastal States under the Convention. Decree Law 6-A/2000, under the guise of a mere authorisation requirement, in effect alters legitimate and free activities and operations by means of a gross generalisation of the concept of Guinea-Bissau's "maritime waters", a lack of distinction between fishing vessels and non-fishing vessels and a broad definition of "fishing-related activities" which include "logistical support activities" and which are defined (possibly, hidden away) in subsidiary legislation rather than in Decree Law 6-A/2000 itself – a questionable legislative approach given Guinea-Bissau's insistence that bunkering in its EEZ is particularly hazardous and, therefore, subject to authorisation, and that a lack thereof is considered as a severe fishing infraction to the legislation in force (*infracção de pesca grave à legislação em vigor* (Counter-Memorial Annex 18)).

332. Therefore, if the International Tribunal were still to consider that Guinea-Bissau's legislation (specifically Decree Law 6-A/2000 and other related legislation) – requiring the prior consent of Guinea-Bissau for the bunkering of fishing vessels engaged in fishing in the EEZ – is not *a priori* beyond the scope of the sovereign rights and jurisdiction of Guinea-Bissau recognised by the Convention, then Panama submits further that the requirement of **payment** for the issuance of Guinea-Bissau's authorisation or consent under Decree Law 6-A/2000 **is** beyond the scope of the sovereign rights and jurisdiction of Guinea-Bissau as recognised by the Convention, specifically, but without limitation, Articles 56, 61, 62 and 73 of the Convention; and this, as stated unequivocally by Guinea-Bissau, which seeks, in its own words, to *obtain the corresponding tax revenue resulting from this activity, inasmuch as bunkering prevents*

[39] At paragraph 136: "The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the *Saiga*, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.

the coastal State from collecting the natural taxes for the supply of fuel in its territory. (Counter-Memorial paragraph 83).

II. Violation of Article 56(2) and Article 73 of the Convention

333. Contrary to what Guinea-Bissau states in paragraphs 226 and 227 of its Counter-Memorial, Panama maintains that Guinea-Bissau, (a) did not have the rights, under the Convention, to make the activity of bunkering in its EEZ subject to a prior authorisation and/or subject to payment (as set out in the Memorial, and in the above section); or (b) in the alternative, even if the International Tribunal finds that Guinea-Bissau did have the right to make the activity of bunkering in its EEZ subject to a prior authorisation and/or subject to payment, then in exercising its rights and performing its duties under this Convention in the EEZ, Guinea-Bissau did not have due regard to the rights and duties of Panama and did not act in a manner compatible with the provisions of this Convention.

334. Guinea-Bissau claims that it behaved appropriately, and that it fails to see how its behaviour "clashes" with the rights of Panama or with the Convention. It is submitted, with respect, that Guinea-Bissau's lack of comprehension or respect for the provisions of the Convention is made manifestly clear not only through its behaviour on and after August 2009, but also in the contents and presentation of its Counter-Memorial, notably, the numerous blanket denials (arguably in breach of Rule 8[40] of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal), the lack of evidence brought in support of its scant denials and the telegraphic declarations (Annex 1-6 of the Counter-Memorial).

335. Without prejudice to the legal arguments set out in paragraphs 297 to 295 of its Memorial, and paragraphs 305 to 332 of this Reply, Panama submits that if the International Tribunal were to find that the bunkering activities performed by the *VIRGINIA G* in the EEZ of Guinea-Bissau were, in fact, activities that Guinea-Bissau was entitled to regulate as fishing activities, or fishing related activities, then it is submitted that Guinea-Bissau, nevertheless, violated the Convention in the manner described in each of sub-sections A to D below.

A. Violation of Article 56(2) of the Convention

336. It is Panama's contention that the *VIRGINIA G* did, in fact, have the authorisation to provide bunkering services to the *AMABAL II* on the 21 August 2009, in the EEZ of Guinea-Bissau (Memorial Annex 19 and Annex 20), and that, therefore, the requirements of the law of Guinea-Bissau were respected and fulfilled by the *VIRGINIA G*, her captain and owners.

337. Panama contends that Guinea-Bissau was not justified in enforcing its laws and regulations, and that, in any case, such enforcement was carried out in a manner not compatible with the Convention, having acted in an unjustified, incorrect, inconsistent and arbitrary manner and in violation of Article 56(2).

[40] 8. A party should in its pleading deal specifically with each allegation of fact in the pleading of the other party of which it does not admit the truth; it will not be sufficient for it to deny generally the facts alleged by the other party.

338. By correspondence dated 14 August 2009, Balmar's agent in Guinea-Bissau, Bijagos Lda ("Bijagos"), requested authorisation from FISCAP to carry out refuelling operations in the EEZ of Guinea-Bissau.

339. By letter dated the same 14 August 2009 (reference N° 180/GCFISCAP/09, signed and stamped by Hugo Nosoliny Vieria, the Director General of FISCAP), FISCAP authorised the refuelling services to be rendered to the Fishing Vessels (Annex 19 to Panama's Memorial).

340. The letter of authorisation made reference to the request by Bijagos, and demanded information in relation to the coordinates of the refuelling operation, as well as the date and time of refuelling and the name of the fuel oil tanker which would render the service.

341. Bijagos replied by letter dated 20 August 2009, informing FISCAP that the coordinates of the refuelling operations would be "17,35 and 12,00", and the service would be carried out at 1600hrs on the 21 August 2009, by the *VIRGINIA G.* The letter was received and stamped by FISCAP (Ref: 1106/2009) on the same date (Annex 20 to Panama's Memorial).

342. Indeed, the information required by Article 39 of Guinea-Bissau law Decree 4/96 (as pointed out by Guinea-Bissau in paragraph 96 of its Counter-Memorial) were fulfilled:

i. A precise description of the planned operations;
ii. 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;
iii. Identification of the vessels that will benefit from the operations of logistical support or transhipment of catches.

343. It is reiterated that the accepted practice is for the authorisation to be transmitted both verbally and in writing, and that the documentation relating to the authorisation and the rendering of refuelling services can sometimes be unsynchronised. In this case, the agent of the fishing vessels communicated the authorisation to the fishing vessels, who then informed the FISCAP observers on board, and the *VIRGINIA G.* All was done verbally, using telephone and radio. The documents in Annex 19 and Annex 20 of Panama's Memorial were obtained after the arrest, when the parties involved were investigating the situation, as fully explained in paragraphs 158 *et. seq.* of Panama's Memorial.

344. It is, therefore, useful to reiterate the exchange of correspondence that took place between Balmar (the consignee of the gas oil) and two of its vessels, a few days after the arrest of the *VIRGINIA G*, when Balmar was trying to ascertain certain important facts. The correspondence has already been included in this reply, as well as attached as Annex 42 to Panama's Memorial (two e-mails marked "Documento N° 1" and "Documento N°.2"), however it is being reproduced hereunder – translated to English – for ease of reference:

Question	*Reply from fishing vessel*	*Reply from fishing vessel*
Good morning, I need you to answer a few questions: *First:*		
Did the agency inform you that we had the permission to refuel?	*Yes, we were informed by telephone*	*Yes, we were informed by telephone*
The observers, were they aware that we were on our way to refuel?	*Yes, we told them as we were navigating towards the tanker, after receiving the notification*	*Yes, we informed them when the oil tanker called us by phone and we headed towards the meeting point*
Did the observers communicate the area of refuelling, by radio to FISCAP?	*Yes, by radio*	*Yes, at the end of the operation*

345. Similarly, the captain of the *VIRGINIA G* confirms, in his statement (Annex 1 to Panama's Memorial), that he was given confirmation that the authorisation had been issued:

> *On the* [20 August 2009] *I communicated with the RIMBAL vessels, which confirmed to me that they had confirmation from the Agent that the authorization had been issued for the bunker operations, as confirmed by the representatives on board. I informed the fishing vessels about the quantities that were to be supplied.*

346. It is Panama's contention that Guinea-Bissau's statements in paragraph 138 of its Counter-Memorial are intrinsically incorrect, and misleading. Annex 19 to Panama's Memorial confirms that the refuelling was authorised subject to certain conditions, which were fulfilled when the information requested (coordinates, date, time and name of the supply vessel) was provided (Annex 20 to Panama's Memorial). However, Guinea-Bissau is completely incorrect in going a step further, stating that *"said vessel naturally requiring a licence to perform this activity."*

347. The *VIRGINIA G* did not require a licence under Guinea-Bissau law to perform bunkering activities in the EEZ of Guinea-Bissau. If at all (without prejudice to Panama's contention that bunkering in the EEZ is a freedom of navigation and internationally lawful use of the sea) the *VIRGINIA G* required an *authorisation*, which was, as always, requested and obtained by the fishing vessels, for both the fishing vessels and the bunkering vessels. Copies of authorisations obtained for the *VIRGINIA G* (and attached to Panama's Memorial as parts of Annexes 42 and 43) clearly indicate the name of the owners of the fishing vessels "Afr[i]peche" acting on behalf of the "fishing vessel" (sic!) *VIRGINIA G.*

348. The conditions for the supplying of fuel were imposed in a document issued by FISCAP (Ref n° 180 GCFSICAP/09) on 14 August 2009. The conditions were fulfilled when the information required – a suspensive condition – was provided. Had other conditions been required, they would have, and should have, been indicated along with the other conditions.

349. The perception that Guinea-Bissau tries to establish in paragraph 142 is that of an asymmetry of authorisations in connection with the holding of a physical authorisation document and is completely outside of the scope of any practice, uses and customs in Guinea-Bissau and, generally, at sea. As already explained by Panama in its Memorial, authorisations are arranged by the on-land agents of the fishing vessels. The authorisations are kept by the agents in their offices, whilst the vessels are at sea; however, the vessels are informed by the agent by radio or phone when the authorisations is granted, or otherwise. The actual document is only obtained at a later stage.

350. As indicated by the captains of the Balmar vessels, and as confirmed by the captain of the *VIRGINIA G*, the bunkering operation had been authorised by the authorities of Guinea-Bissau, and this information was communicated between all vessels concerned in the presence of the FISCAP observers on board – who at the same time, communicated it to the authorities of Guinea-Bissau. There was no reply from the Guinea-Bissau authorities to the effect that bunkering should be halted for lack of authorisation.

351. The statements made by Guinea-Bissau in paragraphs 139 to 141, and the supposed supporting documents provided by Guinea-Bissau in Annex 16 and 17 to its Counter-Memorial proposes an odd and unusual situation. It is as though Mr Hugo Nosoliny Vieria is asking for confirmation of the existence of an authorisation he himself gave.

352. The documents cannot be seen to be credible, and Panama suggests that Annex 16 and 17 of the Counter-Memorial, as presented, were created *ex post facto.* In fact, the owners of the *VIRGINIA G* received Annex 16 from Bijagos, without any handwritten note.

353. When Guinea-Bissau states (paragraph 142 of the Counter-Memorial) that the captain of the *VIRGINIA G* "candidly acknowledged that he did not have the necessary authorisation to perform the operation", Panama submits that what Guinea-Bissau means, or even, what the captain meant, is that the captain was not in possession of a physical authorisation document. This would appear to be supported by the statement in the official notice annexed to Guinea-Bissau's Counter-Memorial as Annex 18, and would be in line with the practice that the authorisation is transmitted by radio or telephone, whereas the document is obtained *ex post facto*. However, in this case – as the owner of the *VIRGINIA G* can attest – Hugo Nosoliny Vieria retained the actual document of authorisation (having already communicated the verbal authorisation) in order to put pressure for payment on his terms. He did not pass on the document to the agent, who usually handles the obtaining of authorisations, as a manner of forcing the owner of the *VIRGINIA G* to pay commissions to them. This practice of misappropriation and embezzlement of public funds is, in fact, the subject of investigations against Hugo Nosoliny Vieria.

354. On the basis of Panama's contentions in its Memorial (paragraphs 297 to 322) and in the immediately preceding paragraphs of this Reply, Panama submits, therefore, that contrary to Guinea-Bissau's contention in paragraph 146 of its Counter-Memorial, that the arrest should not have occurred as there was no violation of the Guinea-Bissau Fisheries laws by the *VIRGINIA G* in the EEZ of Guinea-Bissau.

355. The suggestion that the *VIRGINIA G* was "found" by chance as part of a "routine mission" (which is the phrase used by Guinea-Bissau: see Annex 15 paragraph 10 and Annex 18, first

line) cannot be believed. The FISCAP authorities knew about the *VIRGINIA G* through the authorisation process. They knew where she would be and when she would be there.

B. Violation of Article 73 of the Convention

356. Article 73(1) of the Convention states that the coastal State "may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with laws and regulations adopted by it in conformity with this Convention."

357. In its Memorial, Panama questioned whether the laws and regulations of Guinea-Bissau were adopted *and* executed in accordance with the provisions of the Convention. Based on the evidence relating to the arrest and detention of the *VIRGINIA G* and her crew, and the confiscation of the cargo of gas oil from on board the vessel, Panama submitted, and re-submits, to the International Tribunal that Guinea-Bissau violated its obligations because its domestic legislation, as adopted and as enforced in practice, is not in conformity with the Convention.

358. In order to avoid unnecessary repetition, Panama refers the International Tribunal to paragraphs 323 *et. seq.* of its Memorial. In relation to Guinea-Bissau's statements and arguments made in paragraphs 228 to 249 of its Counter-Memorial, Panama makes the following observations for consideration by the International Tribunal.

1. Violation of Article 73(2)

359. In paragraphs 326 *et. seq.* of its Memorial, Panama submits that Guinea-Bissau violated Article 73(2) as it both failed to cooperate in the fixing of a reasonable bond, and prevented or impeded a reasonable bond from being fixed. Panama refers the International Tribunal to the mentioned part of its Memorial, to which it adds the below statements.

360. Apart from failing to address the points raised by Panama in this section, Guinea-Bissau demonstrates an unacceptably casual and contradictory approach to what it considers (or would have considered) to be a reasonable bond or security, and the method in which such security could have been made.

361. Indeed, in paragraph 229 of its Counter-Memorial, Guinea-Bissau states that the setting of a bond or security is to be requested from the courts. At the same time, in paragraph 232, Guinea-Bissau states that *as from the time the authorities decided to auction the vessel, giving the 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 Article 73(2) of the Convention*. (Added emphasis)

362. It is Panama's submission that this paragraph demonstrates concretely the irrational and insuperable attitude and manner of the Guinea-Bissau authorities, which presented the owners of the *VIRGINIA G* with constant obstacles every time an effort was made to resolve the matter and obtain the release of the *VIRGINIA G*.

363. Guinea-Bissau evidently considers or deems that the title over the vessel passes to the State upon confiscation, and that the only way in which the "previous" owner of the vessel concerned can get the vessel back is to purchase it at auction by improving on the highest bid.

364. This contorted view of what Guinea-Bissau considers to "meet the objectives contemplated in Article 73(2) of the Convention" is then further corrupted by Guinea-Bissau's statement in paragraph 233 of its Counter-Memorial (keeping in mind Guinea-Bissau's confidence in its Courts, as the competent entity (Counter-Memorial, paragraph 229)): *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* (added emphasis).

365. Panama suggests that, in reality, it was the owner of the *VIRGINIA G* who prevented or frustrated Guinea-Bissau from obtaining what it wanted and how it wanted. Nevertheless, the Guinea-Bissau authorities applied the "law of force" rather than the "force of law" and proceeded to disregard (rather than challenge) a decision of the Bissau Tribunal in order to confiscate the cargo of gas oil in an abusive and illegal manner and without legal basis under the law of Guinea-Bissau or under international law (as further explained in paragraph 392 *et. seq.* below).

2. Violation of Article 73(3)

366. In paragraphs 340 *et. seq.* of its Memorial, Panama submits that Guinea-Bissau violated Article 73(3) by creating a situation of *de facto* imprisonment. It appears that Guinea-Bissau (Counter-Memorial paragraphs 197 and 234 to 238) has misunderstood the contentions set out by Panama in the relevant section of its Memorial, that although the crew were not actually placed in a prison, the confiscation of their passports for a protracted period of time and the inability (in the interim) to leave Guinea-Bissau constituted *de facto* imprisonment and a serious violation of their fundamental rights.

367. The very reason given by Guinea-Bissau for its confiscation of the crew's passports is questionable: *the passport of the crew of arrested vessel are taken at the time of 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.*

368. It is recalled that the crew was held in Guinea-Bissau, on board the *VIRGINIA G,* against their will and without trial for over four months until their passports were returned in early January 2010. Their presence in Guinea-Bissau was not required following the verification of their passports, and Guinea-Bissau had no reason to keep them confiscated.

369. Moreover, the intervention of the diplomatic mission of the crew's country of nationality should not have been required, if, indeed, the passports are normally *immediately returned as soon as the holder manifests the desire to leave the country.*

370. Panama draws particular attention to the situation of Chief Mate Fausto Ocana Cisneros, who needed to leave Guinea-Bissau for urgent personal reasons, but faced enormous difficulty in

obtaining his passport from the Guinea-Bissau authorities. Reference is made to the statement provided as Annex 2.

3. Violation of Article 73(4)

371. Guinea-Bissau's justifications for not notifying Panama of the actions taken against the *VIRIGNIA G*, which obligation to notify is clearly stated in Article 73(4), are without basis and are in clear breach of Guinea-Bissau's obligations under the Convention. The obligation to promptly notify the flag State is not subject to the discretion of the arresting State. It is a clear, direct and immediately applicable obligation on the arresting State.

372. Panama was, and remains, the flag State of the *VIRGINIA G*, and is entitled to protect the rights of its nationals and entities connected thereto, which right was effectively denied through Guinea-Bissau's failures to adhere to its obligations under the Convention, particularly, but without limitation, under Articles 56(2) and 73(4). Panama's contentions are set out in paragraph 353 *et. seq.* of its Memorial.

373. In paragraph 239 of its Counter-Memorial, Guinea-Bissau presents an unacceptable and disingenuous interpretation of Article 73(4) in order to justify its failure. Guinea-Bissau states that it did not violate Article 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".

374. Yet the wording of Article 73(4) is unequivocal, and includes none of the elements set out by Guinea-Bissau's interpretation: *In cases of arrest or detention of foreign vessels, the coastal state shall promptly notify the flag State, through the appropriate channels, of the action taken and of any penalties subsequently imposed* (added emphasis). The Convention clearly requires the coastal State to promptly notify the flag State, and not the country of nationality of the crew, and much less that the crew of a vessel have to be citizens of the country of the flag of the vessel.

375. Guinea-Bissau knew that Panama was the flag State of the *VIRGINIA G*; Guinea-Bissau stated so in its Decision 05/CIFM/2010 (Annex 58 of the Memorial).

376. Throughout all the months of detention, Guinea-Bissau held the *VIRGINIA G*'s documents and certificates. They are proven to have been accepted by FISCAP on behalf of the Republic of Guinea-Bissau (Annex 18 to the Counter-Memorial of Guinea-Bissau). During the full detention period, Guinea-Bissau neither raised a single objection to the validity of the certificates in question, nor did it report its (apparent) doubts to Panama in accordance with Article 94(6) of the Convention.

377. Guinea-Bissau's reasons for failing to notify Panama under Article 73(4) are clearly unfounded and misleading.

378. In effect, Guinea-Bissau prevented Panama from intervening at a sufficiently early stage. As stated in an *obiter dictum* of the International Tribunal in the *Camouco Case*, there is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification

may have a bearing on the ability of the flag State to invoke article 73, paragraph 2, and article 292 in a timely and efficient manner.

379. In this respect, it is relevant to refer to paragraphs 76 and 77 of the International Tribunal's judgement in the *Juno Trader Case,*[41] wherein it was stated that Guinea-Bissau **did not contest that it failed to notify Saint Vincent and the Grenadines** in terms of Article 73(4) of the Convention:

> 76. In the present case it is not contested that the notification to the flag State, as provided for in article 73, paragraph 4, had not been made. The connection between this paragraph and paragraph 2 of the same article has been noted by the Tribunal in the "Camouco" Case. The Tribunal stated:
>
> > [T]here is a connection between paragraphs 2 and 4 of article 73, since absence of prompt notification may have a bearing on the ability of the flag State to invoke article 73, paragraph 2, and article 292 in a timely and efficient manner.
> > (ITLOS Reports 2000, pp. 29-30, para. 59).
>
> 77. The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law. The requirement that the bond or other financial security must be reasonable indicates that a concern for fairness is one of the purposes of this provision.

380. In the *Juno Trader Case*, Guinea-Bissau did not attempt the same arguments (as it does here with Panama) as a justification for not notifying Saint Vincent and the Grenadines; that is, that Guinean-Bissau did not recognise the flag State, or that the crew was foreign, or that the operator or manager was based elsewhere than in the territory of the flag State, therefore lacking a genuine link. Guinea-Bissau simply did not contest the allegation, as there was nothing to contest – it either notified, or it did not.

381. In the case of the *VIRGINIA G*, Guinea-Bissau failed to notify Panama, and thereby prejudiced Panama's rights. The reasons provided by Guinea-Bissau - inasmuch as it did not find a single person or entity related with Panama; that the owner of the vessel was Spanish (which is not the case), that the captain crew were not Panamanian - are absurd in light of the clear language of Article 73(4), where the Convention clearly requires the coastal State to promptly notify the flag State, and only the flag State.

382. In the circumstances, and against the above background, Panama submits to the International Tribunal that Guinea-Bissau manifestly violated the provisions of the Convention, in particular, but without limitation, Article 73(4).

C. Violations of other provisions of the Convention and other rules of international law

383. Panama submits that Guinea-Bissau's six blanket denial paragraphs are hardly an attempt to set out its reasons for not agreeing with the contentions of Panama, as set out in 39 paragraphs and sub-paragraphs (Memorial paragraph 367 *et. seq.*). Panama once again refers

[41] *The "Juno Trader" Case (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Judgment of the International Tribunal for the Law of the Sea, 18 December 2004.

the International Tribunal to the relevant section in its Memorial, that is, paragraph 367 *et. seq.*, to which it adds, or reiterates the following observations.

384. Guinea-Bissau appears to be under the impression that adopting an intimidating manner and a relative excessive use of force is the acceptable starting point, or default position at international law in the "legitimate exercise of authority, which represses violations committed in its EEZ, [and] does not constitute violence." (Counter-Memorial paragraph 244)

385. Guinea-Bissau even states (Counter-Memorial paragraph 153) that "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." (Added emphasis)

386. Panama submits, once again, that such statements by Guinea-Bissau demonstrate its complete lack of understanding, or deliberate misapplication (also in breach of Article 300 of the Convention), of the provisions of the Convention, especially in that the use of force, or of forceful measures, is justified only when the circumstances permit (and, even then, within the limits of proportionality), and not as a preventive measure, as Guinea-Bissau seems to suggest.

387. The International Tribunal has already stated the essential principles in relation to the use of force in the arrest of ships (*Saiga No.2 Case*, paragraphs 115 and 156), as already referred to in Panama's Memorial, paragraph 383.

388. Indeed, "although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognised signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered."

389. Moreover, the use of force, or forceful measures, is even less justified when the suspect vessel and its crew neither offers resistance nor resorts to use of force. This much is admitted by Guinea-Bissau (Counter-Memorial paragraph 152), in that its protection squad is made up of Navy infantry whose function 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.

390. It is not contested that the *VIRGINIA G* and her crew threatened no use of force. Yet a relative use of force, or forceful measures, were used by the Guinea-Bissau officials, far beyond – in Guinea-Bissau's own words - "the act of boarding", and as better described in Panama's Memorial in paragraphs 367 to 395 and as fully indicated by the

testimonials/statements presented by some of the crew members on board the *VIRGINIA G* at the material time.

391. Panama suggests that in the context of the *VIRGINIA G* arrest, the enforcement measures adopted by the Guinea-Bissau officials were applied in contravention of each of the principles of international law relating to the arrest of ships (as explained in the *Saiga No.2 Case* extract above).

D. Violation of Article 300 of the Convention

392. Panama has already stated in its Memorial (paragraph 396 *et. seq.*) that Guinea-Bissau demonstrated a high level of disregard and/or a severe lack of understanding of its obligations under the Convention. The simplistic approach with which Guinea-Bissau has presented its views in its Counter-Memorial (see for instance, paragraphs 226, 227 and 228 of the Counter-Memorial) suggests that Guinea-Bissau continues to demonstrate a high level of disregard and/or a severe lack of understanding of its obligations under the Convention.

393. In addition to the contentions set out by Panama in paragraphs 396 *et. seq.*, Panama makes the following additional observations for consideration by the International Tribunal, in relation to the unlawfulness in the confiscation of the cargo of gas oil and Guinea-Bissau's clear bad faith and abuse of its rights.

394. Guinea-Bissau states that under its national law, fishing-related operations include re-fuelling or bunkering under the general heading of "logistical support" and that an authorisation is required in this respect. This matter has been dealt with at length above, but is being repeated for the specific purposes of this section.

395. A breach of this obligation would, under the law of Guinea-Bissau, appear to entitle the relevant authorities to take enforcement measures in terms of Article 52 of Decree Law 6-A/2000, which states (as translated, with added emphasis):

> 1. All industrial or artisan fishing vessels, whether national or foreign, which carry out fishing activities within the limits of national maritime waters, without having obtained the authorisation in terms of Article 13 and 23 of this law, will be seized ex-officio, with its gear, equipment and **fisheries products** in favour of the State, by the decision of a member of the Government responsible for Fisheries.
>
> 2. Regardless of the confiscation provided for in the previous paragraph, the courts must apply the fines set out in Article 54(2) of this law.
>
> 3. The decision taken in terms of paragraph 1 can be appealed.
>
> 4. The Inter-Ministerial Fisheries Commission will decide how to dispose of the confiscated property and products in terms of the provisions of this law, which will revert to the Government.

396. In applying its fisheries law to the *VIRGINIA G*, FISCAP's letter dated 31 August 2009 notified the vessel's owners of the Maritime Inspection Interministerial Commission (CIFM) Decision No. 7/CIFM/09 (Memorial Annex 38) to (as translated, with added emphasis):

> "Confiscate ex-officio the oil tanker VIRGINIA G with its gear, equipment and **products** on board in favour of the State of Guinea-Bissau owing to the repeated practise of fishing related activities in the form of unauthorised sale of fuel to fishing vessels in our EEZ, specifically to the AMABAL 2, and **in accordance with paragraph 1 of Article 52, in its wording as set out in DL No. 1-A/2005**, and in conjunction with article 3(c) and Article 23 of DL No. 6-A/2000."

397. By letter dated 23 September 2009 (Memorial Annex 47), that is **23 days later**, FISCAP informed the owner of the *VIRGINIA G*, through its P&I Club Africargo, that (as translated, with added emphasis):

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

398. By letter dated 25 September 2009 (Memorial Annex 48), that is **within 48 hours**, FISCAP informed the owner of the *VIRGINIA G*, through its P&I Club Africargo, of its decision to (as translated, with added emphasis) to:

> "Confiscate the oil tanker VIRGINIA G and all the **product** on board owing to the breach of paragraph 1 of Article 52, in its wording as set out in DL No. 1-A/2005, and owing to the lack of reaction to the notification of decision No. 07/CIFM/09 dated 27 August 2009."

399. **Firstly**, Panama contends that Article 52(1) was deliberately, arbitrarily and capriciously misinterpreted and misapplied by the Guinea-Bissau authorities when the specific term "fisheries products" ("produtos de pesca") was widened to "products on board" ("produtos a bordo"), with the clear intention of applying the rule to a non-fishing vessel which had no fisheries products on board.

400. In all three letters abovementioned, FISCAP, or specifically its Director Hugo Nosoliny Vieira, corrupted the meaning of Article 52(1) to include products other than fisheries products, with the apparent intention of including within its scope the cargo of gas oil on board the *VIRGINIA G*.

401. It is reasonable to say that Article 52(1) is clear in that the only "product" that is subject to confiscation would be the fisheries products on board. It is submitted that this provision, properly applied in the context of fisheries, would allow the coastal State to conserve and manage such living resources in its EEZ by preventing any proven illegal fishing operators from making profit or otherwise benefiting from illegally gained catches.

402. However, the powers accorded under Article 52(1) of Decree Law 6-A/2000, being interpreted in accordance with Article 56 the Convention, do not extend – and should not be permitted to be arbitrarily and capriciously extended – to include resources which are neither fisheries products nor resources obtained by a non-fishing vessel from the EEZ of Guinea-Bissau, which claims to enforce its rights under its national law and, purportedly, under Article 73 of the Convention.

403. By boarding, inspecting, arresting and detaining the *VIRGINIA G*, Guinea-Bissau had already exercised the rights it is granted under the Convention – even if Panama is challenging the very existence of those rights, and, alternatively, their execution in accordance with the Convention.

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

405. **Secondly**, Panama states that FISCAP was incorrect in stating that no reaction had been lodged by the owner of the *VIRGINIA G*, and that on this basis, the Guinea-Bissau authorities would proceed with the confiscation of the gas oil product on board and/or sale of the product on board by public auction.

406. The owner of the *VIRGINIA G*, through its P&I Club representative, did, in fact, correspond with FISCAP in relation to the arrest and detention of the vessel and her crew, on at least the following occasions:

- 28 August 2009 (Memorial Annex 37), which letter was stamped as received by FISCAP;
- 4 September 2009 (Memorial Annex 41), which included a request to set a security or bond for the release of the vessel, which letter was stamped as received by FISCAP. FISCAP even replied, on the 7 September 2009 and again on the 11 September 2009, with direct reference to the letter of the 4 September 2009.
- 14 September 2009 (Memorial Annex 44), which letter appears to be stamped as received by FISCAP;
- 15 September 2009 (Memorial Annex 45), wherein an extension to the legal period was required before legal proceedings were commenced, pending a reply from FISCAP to the owner's letter dated 14 September 2009;

407. It is curious, therefore, that FISCAP received the abovementioned letters and, moreover, twice replied to the one dated 4 September 2009 - making direct reference to its contents - yet alleged that the owner of the vessel failed to react to the measures taken and that on the basis of such lack of reaction the vessel and its product on board would be confiscated.

408. It is even more curious that the person who signed the first notification of confiscation (31 August 2009); the two replies to the letter from the owners (7 and 11 September 2009) and the subsequent letters informing the owners of the effective confiscation of the vessel and its product on board, was the same Hugo Nosoliny Vieira - who, it is recalled, was the very same person who received, and granted, the request for authorisation for the *VIRGINIA G* to provide bunkering services in the EEZ of Guinea-Bissau.

409. Therefore, the 30 day deadline mentioned in the FISCAP letter dated 23 September 2009 had not, in fact, expired, when notice of the impending confiscation was served by FISCAP letter dated 23 September 2009, and the 72-hour ultimatum imposed therein also had not lapsed when the notice of confiscation was served by FISCAP letter dated 25 September 2009.

410. Indeed, on the 6 November 2009, armed soldiers boarded the *VIRGINIA G* and violently forced the captain to berth the vessel for discharge of the gas oil cargo. On this occasion it was possible for the captain to inform the owners, and, through the efforts of attorneys, it was possible to prevent the unloading. The vessel was returned to anchor on 12 November 2009.

411. On 20 November 2009, armed soldiers again boarded the vessel and threateningly (brandishing fire arms in an intimidating manner), ordered the captain to berth the vessel for discharge of the product on board.

412. The captain was handed a letter signed by the Secretary of State, José Carlos Varela Casimiro, **forward-dated 30 November 2009** (Memorial Annex 56) and addressed to the CLC (Compañía de Lubricantes y Combustíbles de Guinéa-Bissau). The captain promptly informed the officers that there was an order from the Bissau Court prohibiting them from taking the product from the vessel. However, the letter stated (translated, with added emphasis):

> By virtue of Decision N° 7 of the Maritime Inspection Interministerial Commission, the Oil Tanker Virginia G was seized ex officio with its gear, engines and cargo, due to the repetitive practice of fishery-related activities, in the form of "non authorized sale of oil to fishery vessels in the EEZ, namely to N/M Amabal 2".
>
> **Notwithstanding the judicial order of suspension of the seizure**, and **not having the opposition of the Public Prosecutor, the Government Attorney and Supervisor of Legality**, (Ref. n° 716/GPGR/09), for the Government to proceed to "(...) the use of the oil that the vessel traded in our EEZ (...)", we order hereby that the Oil Tanker Virginia G be authorized to discharge its content estimated at 436 tonnes gas oil in your premises."

413. Finally, Panama recalls that by letter dated 30 September 2009 (Memorial Annex 50), FISCAP informed the owners of the *VIRGINIA G* that a public auction had been initiated for the sale of the gas oil and, as though to deliberately amplify the injustice, that the owners had the right of first refusal to purchase the product confiscated according to Guinea-Bissau legislation (which was not quoted for reference).

414. Guinea-Bissau has never explained the whereabouts of the cargo of gas oil which was unlawfully confiscated. It can only be stated that the gas oil was never returned or compensated for by Guinea-Bissau.

1. The Public Prosecutor's / Attorney General's opinion

415. The reasons given by Guinea-Bissau for the alleged nullity of the interim order or measure, suspending the seizure and confiscation of the *VIRGINIA G* and of the cargo on board, obtained from the Court of Bissau, are dubious, at best.

416. The cover letter to the Attorney General's opinion (Counter-Memorial Annex 8) states that:

> *[...] we deem that the decision to confiscate the offending ship with its tackle, equipment and products found on board to have been correct. We therefore have no reservation in regard to the use of the fuel that this ship was transacting in our EEZ.*

417. What Guinea-Bissau then submits is an opinion which far from offers certainty as to the nullity of the Court's order. Indeed, the first paragraph under heading "4. Law" on page 43 of the Counter-Memorial Annex bundle states (with added emphasis):

> *Dispensing with analysing whether the Ruling that granted the petitioned interim measure was a good one, we care to state that the interpretation of no. 2 of article 400 of the CPC (Civil Procedure Code) which states that "the Court will hear the defendant, if the hearing does not endanger the purpose of the interim measure* (...)" *is moot.*

418. Guinea-Bissau's justification, therefore, is that the Court adopted the interim measure without first hearing the opposing party - that is, the government. On this basis, Guinea-Bissau considered that *this violation legally implies that such decision is null [...] and the Attorney General of the Republic of Guinea-Bissau did inform the Government of this state of affairs* (Counter-Memorial paragraph 190).

419. It is absurd and highly abusive for the government of Guinea-Bissau to have chosen to disregard an interim order on the basis of a moot point, when it was in the Court's full discretion to determine whether hearing the defendant would endanger the purpose of the interim measure, and then to have reached the conclusion on the basis of an inconclusive opinion citing a moot point, and finally concluding that this *legally **implies** that such decision is null*. Guinea-Bissau obtained and relied on an opinion of the Attorney General, an "internal legal opinion", so to speak, rather than convincing the Regional Court that the interim order was not validly issued (as is alleged).

420. Panama submits that it is reasonable to conclude that these are all clear examples where Guinea-Bissau has benefited from its own wrongful acts to the prejudice of its owner, and against international law and against the general principle of equity *nullus commodum capere de sua injuria propria.*

421. Panama, submits, moreover, that Guinea-Bissau's first justification for confiscating the gas oil cargo in terms of Article 52(1) of Decree 6A/2000 was not applicable to a cargo of gas oil, this not being "fisheries products" and that, therefore, such enforcement measure was not in accordance with national law and was applied in bad faith and against international law provisions.

422. In addition, Guinea-Bissau cannot be said to have given the owner of the vessel and the flag State of Panama the proper opportunity to defend their interests, and that, therefore, the second justification for the decision to confiscate the vessel and the gas oil on board, as well as the execution of such decision, was not in accordance with national law and was applied in bad faith and against international law provisions.

423. Finally, Panama submits that Guinea-Bissau abused its rights in all aspects of the arrest and detention of the *VIRGINIA G,* and particularly in the manner in which the cargo of gas oil was confiscated. Guinea-Bissau, therefore, acted in direct violation of Article 300 of the Convention.

Conclusion

424. On the basis of the above arguments, taken in conjunction with the arguments set out in Chapter 3 of Panama's Memorial, Panama retains its position and submits to the International Tribunal that Guinea-Bissau violated the Convention and the general principles of international law. Guinea-Bissau acted illegally and in violation of its international obligations, and that as a consequence of its wrongful acts, it is responsible for the injury caused, as set out in the next section.

* * *

CHAPTER 5
REPLY TO ARGUMENTS ON DAMAGES AND OTHER COSTS

(cf. Counter-Memorial, Chapter VI and Chapter)

425. In this section of the Reply, Panama reiterates the substance of the statements set out in its Memorial (Chapter 4) in setting out the bases of the claim by Panama for the award of compensation for losses and damages suffered by the several entities and individuals involved in the dispute, both material and non-material. Panama also provides a revised estimate of damages, whilst reserving its right to provide further revised amounts.

426. Panama rejects Guinea-Bissau's statements as set out in Chapter VI of its Counter-Memorial, and states that it is presenting additional details and supporting evidence hereto as part of (but without restriction) the written stages of the proceedings.

427. Panama's claims for damages are organised under the following principal categories:

(a) Loss, damages and costs suffered by the owners of the *VIRGINIA G*, and by other operators and entities with an interest in the vessel's operation;

(b) Loss, damages and costs suffered by the owners of the *IBALLA G*, and by other operators and entities with an interest in the vessel's operation;

(c) Loss, damages and costs suffered by the owners and/or agents or the *VIRGINIA G* and by the owners of the gas oil on board, as a consequence of the unlawful confiscation of the cargo of gas oil from on board the *VIRGINIA G*;

(d) Loss, damages and costs suffered by the Republic of Panama

(e) Loss, damages and costs suffered by the crew of the *VIRGINIA G*

(f) Interest

(g) Legal costs

I. Basis of claim for compensation

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

429. Indeed, in international relations as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility.[42] "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form."[43]

[42] I. Brownlie, *Principles of Public International Law* (Oxford 1998, 5th Ed.), p.435

[43] *Factory at Chorzów* case, Jurisdiction, 1927, PCIJ, Series A No. 9, p.21

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

431. As provided in Article 1 of the International Law Commission's Articles on State Responsibility (the "Law Commission's Articles",)[44] a breach of international law by a State entails its international responsibility:

> Every internationally wrongful act of a State entails the international responsibility of that State.

432. Indeed, when a State commits an internationally wrongful act against another State, international responsibility is established "immediately as between the two States."[45]

433. "Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation."[46]

434. The International Court of Justice has applied this principle on several occasions, for instance, in the *Corfu Channel* case[47] and in the *Gabčíkovo-Nagymaros Project* case.[48]

435. Arbitral Tribunals have also repeatedly affirmed the principle, for instance,[49] in the *Rainbow Warrior* case the Arbitral Tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility."[50]

436. The principle that every internationally wrongful act of State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognised both before and since Article 1 above was formulated by the Commission.[51]

437. As set out in the second part of the Law Commission's Articles, the international responsibility of a State which is entailed by an internationally wrongful act involves legal consequences.

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[44] Draft Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), http://www.un.org/law/ilc

[45] *Phosphates in Morocco*, Preliminary Objections, 1938, PCIJ, Series A/B No. 74, p.10 at p.28. See also J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press), p.77.

[46] The *Spanish Zone of Morocco Claims*, RIAA ii. 615 at 641, per Judge Huber, in I. Brownlie, *Principles of Public International Law* (Oxford 1998, 5th Ed.), p.437.

[47] ICJ Reports 1949, p. 4 at p. 23.

[48] *Hungary v. Slovakia*, ICJ Reports 1997, p.7 at p.38, para 47.

[49] Other instances can be found in J. Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press), pp. 77 and 78.

[50] *New Zealand v. France*, RIAA, vol. XX, p.217 (1990), p.251, para. 75.

[51] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press), p.78.

438. One of the core legal consequences of an internationally wrongful act is to make full reparation for the injury caused by such internationally wrongful act.

439. In the *Saiga (No. 2)* judgement,[52] the International Tribunal stated that reparation may also be due under international law as provided for in article 304 of the Convention, which provides:

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

440. The guiding principle was laid down by the Permanent Court of International Justice in the *Factory at Chorzów* case, and was set in the following terms:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself. Differences relating to reparation, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[53]

441. In the merits phase of the same case, the Court articulated the obligation and forms of reparation in more detail:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

442. This principle has been restated in Article 31 of the Law Commission's Articles:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether **material or moral**, caused by the internationally wrongful act of a State. (Added emphasis)

443. In relation to material compensation claimed by Panama in Section II.B.1 and part of Section II.B.2 (paragraph 458) below, Article 36 of the Law Commission's Articles states:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

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[52] The *M/V Saiga (No.2)* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea, judgement of 1 July 1999, at para. 169.

[53] *Factory at Chorzów* case, Jurisdiction, 1927, PCIJ, Series A No. 9, p.21

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

444. Panama submits that the damage caused by Guinea-Bissau to Panama and to its vessel (*VIRGINIA G*), her owners, operators, crew and all other interested entities and individuals cannot be made good by satisfaction or restitution, and that the only form of reparation is compensation, with the exception of the cargo of gas oil confiscated on the 20 November 2009, and in respect of which Panama has submitted a request to the International Court to order Guinea-Bissau either to return the gas oil so confiscated (of equivalent or better quality) in terms of the principle of restitution, or otherwise to pay compensation (Submission 14, Chapter 5, Memorial of Panama).

445. In so far as it is required to assess and establish financial damage (including loss of profit), Panama refers the International Tribunal to Section II.B.1 and the relevant part of Section II.B.2 (paragraph 458) below wherein Panama quantifies the material damages (together with supporting reports) claimed for Panama, as the flag State, the *VIRGINIA G*, her owners, operators, crew and all other interested entities and individuals.

446. In relation to moral, or non-material damages, Panama sets out the relevant arguments and quantifications of compensation claimed by Panama in the respective Sections II.B.2 (paragraph 459 *et. seq.*) and II.B.3 below

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II. Heads and Quantification of damages

A. Heads of damages claimed

447. On the basis of the facts set out in Chapter 2 of Panama's Memorial, and in connection with the legal arguments submitted in Chapter 3 of the Memorial and the replies submitted in this Reply, Panama's claim for reparation for injury caused Guinea-Bissau in the form of compensation for damages, losses and cost suffered by the *VIRGINIA G*, its owners, crew, Panama (as the flag State) and other entities as a result of the actions of Guinea-Bissau on and after the 21 August 2009, are classified under a number of headings.

448. The main headings under which Panama will claim reparation for injury in the form of compensation by Guinea-Bissau are as follows, without limitation:

(a) **Loss, damages and costs suffered by the owners of the *VIRGINIA G*, and by other operators and entities with an interest in the vessel's operation:** loss, damages and costs suffered by Penn Lilac Trading S.A., Gebaspe SL, Hidrocasa SL, resulting from the arrest and duration of detention of the *VIRGINIA G* and other losses and costs incurred or suffered by Penn Lilac Trading S.A., Gebaspe SL, Hidrocasa SL during and after the period of detention of the *VIRGINIA G*, and loss of earnings and profit

caused as a consequence of the unlawful actions of Guinea-Bissau (*damnum emergens* and *lucrum cessans*), including, without limitation:

i. loss of *VIRGINIA G* as a main source of income, including loss of charter party income;

ii. Bunkering, agency fees and port fees in the Port of Bissau;

iii. Salaries and maintenance of the crew during detention in the Port of Bissau;

iv. Salaries and maintenance of the crew after release of the vessel until it was put back into operation;

v. Travel expenses for the crew to return home and to reconstitute the crew again after the vessel's release;

vi. Travel expenses, legal expenses and expert report expenses

vii. Maintenance of Protection and Indemnity Insurance during detention

viii. The inspection, repairs and re-certification of the *VIRGINIA G*;

(b) **Loss, damages and costs suffered by the owners of the *IBALLA G*, and by other operators and entities with an interest in the vessel's operation:** loss, damages and costs suffered by Penn Lilac Trading S.A., Gebaspe SL, Hidrocasa SL, resulting from the arrest and lay up of the *IBALLA G* as a consequence of the unlawful arrest and detention of the *VIRGINIA G* by Guinea-Bissau (*damnum emergens* and *lucrum cessans*);

(c) **Loss, damages and costs suffered as a consequence of the unlawful confiscation of the cargo of gas oil from on board the *VIRGINIA G*:** Losses incurred by Penn Lilac Trading S.A. and/or Louts Federation resulting from the unlawful and abusive confiscation of the cargo gas oil from on board the *VIRGINIA G* on the 20 November 2009 by the Guinea-Bissau authorities.

(d) **Loss, damages and costs suffered by the Republic of Panama** resulting from Guinea-Bissau's detention of the *VIRGINIA G* and the arrest and lay up of the *IBALLA G* and loss and damage resulting from Guinea-Bissau's failure to promptly notify Panama of the measures taken against the *VIRGINIA G*, and in general, losses and damages caused by Guinea-Bissau to the registry and flag of Panama, including its image and reputation.

(e) **Loss, damages and costs suffered by the crew of the *VIRGINIA G*:** including moral damages suffered by the crew as a result of their detention (confiscation of passports) and ill-treatment on and after the 21 August 2009, namely, but without limitation:

i. Violent treatment and ill-treatment during the arrest on the 21 August 2009;

ii. Unlawful detention of the captain and crew (confiscation of passports and constant guarding by armed soldiers) and the resulting dire conditions on board the *VIRGINIA G*:

(f) **Interest:** on any principal sum payable under the rules on reparation in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

(g) **Legal costs:** In the Arbitration Notification, Panama requested the arbitral panel to order that Guinea-Bissau pay for all costs of the proceedings, including those incurred by Panama. The same request will be made of the International Tribunal, that is, to depart from the general rule under Article 34 of the Statute of the International Tribunal in light of the circumstances of the case.

449. The list, categories, type and quantification of damages listed above and below is indicative and not exhaustive. Panama reserves the right to add and amend the categories and heading of damages as may be necessary to ensure fair, complete and adequate reparation by Guinea-Bissau.

B. Quantification

450. The amount of compensation sought by Panama from Guinea-Bissau as reparation for all the consequences of Guinea-Bissau's illegal acts suffered by the *VIRGINIA G*, its owners, crew and cargo owners, all related entities (including the *IBALLA G*) as well as to Panama as the flag State is **provisionally estimated at €5.636.222,54** under the following headings, as set out above, and as explained below:

1. Headings (a), (b) and (c)	**€4.221.222,54**
2. Heading (d)	**€1.200.000,00** (provisional and part-estimate)
3. Heading (e)	**€65.000,00**
4. Heading (f)	**€150.000,00** (provisional estimate)

451. In addition, Panama requests the International Tribunal to award interest on the amounts that the International Tribunal may order Guinea-Bissau to pay, in terms of Heading (g).

*

1. Headings (a), (b) and (c)

Loss, damages and costs suffered by the owners of the VIRGINIA G, IBALLA G, and by other operators and entities with an interest in the vessels' operation, including as a consequence of the unlawful confiscation of the cargo of gas oil from on board the VIRGINIA G

452. In respect of the quantification under headings (a), (b) and (c), Panama submits two reports **(Annex 4.1** and **4.2)** to the International Tribunal, as follows:

a. **Annex 4.1** is a damages report commissioned by the owners of the *VIRGINIA G* prepared by economist and auditor **Alfonso Moya Espinosa**, (the "Moya Report") a member of the Registry of Auditors of Spain. This report is based on documentary evidence evidencing payments by the owners and operators and managers of the *VIRGINIA G,* and includes and is also based on a Condition Survey and Internal Audit prepared by Panama Shipping Registrar Inc.

b. **Annex 4.2** is a report commissioned by Panama prepared by an independent expert, **Kenneth Arnott** of BRAEMAR (an international marine surveying and technical consultancy based in *London*) (the "Arnott Report") who presents his expert review and opinions, based on his experience and expertise, on the categories and quantification of damages, losses and costs, in particular on the basis of the Class Surveys carried out in September 2009 and in October 210, and on the basis of the Moya Report (with the only discrepancy, requiring further clarification, being that detailed in point 6.18.3, regarding the number of days over which loss of profit has been calculated).

453. Reference is, therefore, made to the attached reports (**Annex 4.1 and 4.2**), quantifying revised losses, damages and costs suffered by the owners and/or operators of the *VIRGINIA G*, *IBALLA G*, and by other operators and entities with an interest in the vessels' operation, including as a consequence of the unlawful confiscation of the cargo of gas oil from on board the *VIRGINIA G*, in the amount of four million and two hundred and twenty one thousand and two hundred and twenty two Euro and fifty four cents **(€4.221.222,54)**.

454. The Moya Report and the Arnott Report were both prepared following a review of the voluminous compilation of documents relating to each cost category, and the extensive individual items therein. A list of documents and corresponding amounts is being presented as the first part of Annex 4.

2. Heading (d)
Loss, damages and costs suffered by the Republic of Panama

455. In its Memorial, and in the relevant sections of this Reply, Panama has demonstrated and submitted that Guinea-Bissau violated or otherwise breached the provisions of general international law and of the Convention, particularly, but without limitation:

i. Article 58;
ii. Article 56(2);
iii. Article 73;
iv. The general rules of international law, in using excessive force in boarding and arresting the *VIRGINIA G*;
v. Article 224 and Article 110;
vi. Article 225; and
vii. Article 300

456. As a result of its violation and/or breach of its obligations under international law, Guinea-Bissau thus violated or otherwise denied the rights of Panama, as the lawful flag State of the *VIRGINIA G*. In particular, but without limitation, Guinea-Bissau:

i. Violated the right of Panama and of its vessel to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, in terms of Article 58 and related provisions of the Convention;

ii. Violated the rights of Panama and of its vessel in terms of Article 56(2), especially considering that the *VIRGINIA G* was in line with its obligations in terms of the Convention;

iii. Violated the rights of Panama and of its vessel in terms of Article 73 of the Convention;

iv. Violated the rights of Panama and of its vessel not to be subject to unnecessary and unreasonable force, in accordance with the requirements of the Convention and general international law;

v. Violated the rights of Panama and of its vessel in terms of Article 224 and Article 110 of the Convention;

vi. Violated the rights of Panama and of its vessel not to be put in a situation which endangers the safety of navigation, of life at sea or expose the marine environment to unreasonable risk, in terms of Article 225 of the Convention, or of the Safety of Maritime Navigation (SUA) Convention, or, in general, under international law;

vii. Violated the rights of Panama and of its vessel not to be treated in a manner that constitutes an abuse of right.

457. The injury caused by Guinea-Bissau in respect of Panama includes both material and moral damages.

458. **Material damages**: Guinea-Bissau's violation of Panama's rights has caused, and might yet cause or result in, significant losses for Panama.

i. Panama may have suffered losses and damages in respect of vessels flying its flag which may have been precluded from exercising freedom of navigation rights within the EEZ of Guinea-Bissau. In other words, any inability of ships flying the flag of Panama to bunker off the coast of Guinea-Bissau, particularly in the EEZ, would lead to a loss of registrations in the future. **Panama reserves its right to assess, quantify and claim, as against Guinea-Bissau, an amount that would represent adequate compensation in this respect.**[54]

ii. Panama suffered losses and damages as a result of Guinea-Bissau's failure to promptly notify Panama, as the flag State, of the *VIRGINIA* G's arrest. This absence of prompt notification had a bearing on the ability of Panama, as the flag State, to invoke its rights under the Convention in safeguarding the interests of its flag, its vessel and its subjects. **Panama reserves its right to assess, quantify and claim, as against Guinea-Bissau, an amount that would represent adequate compensation in this respect.**

iii. Panama has been also required to take steps to protect its own rights and the rights of the *VIRGINIA G*, her owners, operators, crew and all other entities and individuals with an interest therein, in particular, but without limitation: (i) by submitting and continuing the proceedings in this Case No.19 before the

[54] Reference is, however, made to the I'm Alone case, where Canada was awarded US$25,000 compensation as a material amend in respect of the violations by the United States - *S. S. "I'm Alone"* (Canada v. United States), award: June 30, 1933, and January 5, 1935.

International Tribunal, and (ii) the institution of arbitration proceedings (as demonstrated in the Arbitration Notification).

a. In this respect, Panama has requested the International Tribunal (Memorial of Panama, Chapter 5, Submission 17) to order Guinea-Bissau to reimburse all costs and expenses incurred in the preparation of this case, including, without limitation the costs incurred in this case No. 19 before the International Tribunal, which include legal costs, with interest thereon.

b. An approximate amount of legal costs incurred thus far has been indicated in the Moya Report and in the Arnott Report (approximately €150,000.00 – sub-section 5 below) as having been advanced by the owner of the *VIRGINIA G*. However, part of these costs will be attributable to Panama as expenses incurred in relation to the arbitration and the present proceedings before the International Tribunal. **As a final amount can only be quantified at the conclusion of the current case, Panama reserves its right to assess, quantify and claim, as against Guinea-Bissau, an amount that would represent adequate compensation in this respect.**

459. **Moral damages:** Panama is also entitled to full reparation for the non-material damage in respect of Guinea-Bissau's violations listed in points (i) to (vii) above as reiterated in (i) to (vii) below, as set out in the relevant sections of Panama's Memorial and Counter-Memorial.

460. In addition, Panama is also entitled to full reparation for all moral damages and losses caused by Guinea-Bissau to the reputation of the Panamanian registry and flag as a result of all the aspects of the merits of the *VIRGINIA G* dispute, as from the 21 August 2009.

461. Reference is made to the decision of *Re Letelier and Moffitt*. In this case the Chile-United States of America International Commission awarded moral damages to the United States in the amount of US$780,000, for the benefit of the families of victims of the acts of Chile which the United States claimed to be unlawful.[55]

462. The Separate Opinion of Professor Orrego Vicuna on the question of moral damages is of particular relevance:

> *After a long line of consistent decisions it has been established that human life cannot be subject to valuation, but only the economic loss and moral suffering of the family as well as other related aspects can be the matter of compensation. (...) Compensation for moral damages is clearly included among the important principles of international law in the matter. Being this damage non-material by its very nature the determination of the amount of compensation is a most difficult question requiring that both the standards of justice and reasonableness be met.*

[55] Dispute concerning responsibility for the deaths of *Letelier and Moffitt* (United States, Chile). Paragraph 41: *In considering the compensation for moral damages the Commission* ***has taken into account the significant steps undertaken by the Chilean Government*** *and Congress to remedy human rights problems as well as the efforts undertaken towards financial reparation at the domestic level for families of victims.*

463. Reference is also made to the France-New Zealand Agreement of 9 July 1986 concerning the sinking of the vessel *Rainbow Warrior* by French agents in New Zealand, made pursuant to a ruling by the United Nations Secretary General. The Agreement and the Secretary-General's ruling provided for France to pay US$7 million as compensation to New Zealand for "all the damage which it has suffered" (including the material and non-material damage). Of this sum US$3 million appears to be in respect of the non-material damage suffered by New Zealand.

464. New Zealand asserted that:

> *it is not claiming material damage in the sense of physical or direct injury to persons or property resulting in an identifiable economic loss, but it is claiming legal damage by reason of having been victim of a violation of its treaty rights, even if there is no question of a material or pecuniary loss. Moreover, New Zealand claims moral damage since in this case there is not a purely technical breach of a treaty, but a breach causing deep offence to the honour, dignity and prestige of the State"* (Paragraph 108).
>
> *Accordingly, both parties agree that in inter-State relations, the concept of damage does not possess an exclusive material or patrimonial character. Unlawful action against non-material interests, such as acts affecting the honour, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State (cf. Soerensen, Manual cit., p. 534)"* (Paragraph 109).

465. The 1986 Agreement contained a provision for arbitration of any dispute arising out of the agreement. A dispute did arise and was submitted to arbitration. In relation to monetary compensation for moral and legal damage, the Tribunal held (with added emphasis):

> ***The Tribunal next considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage****. As already indicated, the breaches are serious ones, involving major departures from solemn treaty obligations entered into in accordance with a binding ruling of the United Nations Secretary-General. It is true that such orders are unusual but one explanation of that is that these requests are relatively rare, for instance by France in the Carthage and Manouba cases (1913) (11 UNRIAA 449, 463), and by New Zealand in the 1986 process before the Secretary-General, accepted by France in the First Agreement. Moreover, such orders have been made, for instance in the last case* (paragraph 118)[56]

466. In its Draft Articles on State Responsibility the International Law Commission (ILC) has also recognised that "**[t]he injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular, moral damage, caused by that act, if and to the extent necessary to provide full reparation**" (draft Article 45(1)). **Satisfaction may take a number of forms, including: "in cases of gross infringement of the rights of the injured State damages reflecting the gravity of the infringement.**" (draft Article 45(2)(c))

[56] Rainbow Warrior (New Zealand v. France) France-New Zealand Arbitration Tribunal; 30 April 1990, 82 ILR p. 499 at 575 (emphasis added)

467. In its Commentary, the ILC emphasised that such a remedy was of an exceptional nature as indicated by the phrase "in case of gross infringement of the rights of the injured State". The ILC further explains that such a remedy is "given to the injured party over and above the actual loss, when the wrong done was **aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party**".

468. As an illustration of the practical applicability of the reference to "damages reflecting the gravity of the infringement", the ILC refers to the *Rainbow Warrior* case, in particular the decision of the Secretary-General to award $7 million as "exceeding by far the value of the material loss".

469. Panama submits that this is a case in which gross infringements of its rights have occurred, for which it is entitled to claim damages for non-material loss. Individually and cumulatively Panama submits that the "gross infringements" in the sense envisaged by the ILC are the following:

i. The unlawful and unjustified denial of the right of Panama and of its vessel to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, in terms of Article 58 and related provisions of the Convention;

ii. The violation of the rights of Panama and of its vessel in terms of Article 56(2), especially considering that the *VIRGINIA G* was in line with its obligations in terms of the Convention;

iii. The denial of Panama's rights by Guinea-Bissau's failure to promptly notify Panama of the arrest of the *VIRGINIA G* and the measures taken (Article 73(4), as well as the overall violations of Panama's rights by Guinea-Bissau under Article 73;

iv. The unlawful method of boarding by the Guinea-Bissau officials, and the unnecessary and unreasonable force, in contravention of the requirements of the Convention and general international law;

v. The violation of the rights of Panama and of its vessel in terms of Article 224 and Article 110 of the Convention;

vi. The placing in danger of Panama's vessel and her crew, and the disregard for the safety of navigation, of life at sea in terms of Article 225 of the Convention, or of the Safety of Maritime Navigation (SUA) Convention, or, in general, under international law;

vii. The treatment in bad faith of Panama and of the *VIRIGNIA G,* her owners, operators, managers, crew and all other related entities and individuals in a manner that constitutes an abuse of right in terms of Article 300 of the Convention, especially, but without limitation, in relation to the seizure of the cargo before any charges had been brought or conviction obtained, and the unjustified disregard of the interim order of the Court of Bissau.

470. **Consequently, under this heading, Panama:**

i. reserves the right to assess, quantify and claim, as against Guinea-Bissau, an amount that would represent adequate compensation in respect or **material losses** and damages suffered by Panama;

ii. claims **€ 1.200.000,00** as an amount representing moral damages that is just and reasonable for Panama to be awarded as compensation by Guinea-Bissau for its violations as set out in points (i) to (vii) above; and

iii. reserves the right to assess, quantify and claim, as against Guinea-Bissau, an amount that would represent adequate compensation in respect of **moral losses and damages** suffered by Panama's registry and flag as a result of all the aspects of the merits of the *VIRGINIA G* dispute, as from the 21 August 2009.

3. Heading (e)

Loss, damages and costs suffered by the crew of the VIRGINIA G, including moral damages

471. The captain and the crew were subject to the following losses relating to deprivation of liberty:

- During the course of the arrest on 21 August 2009 and subsequently the captain and crew were subject to the excessive and/or unreasonable use of force as a result of Guinea-Bissau's abuse of rights. Specifically, the crew was held at gun-point, and restricted to the accommodation quarters during the arrest of the *VIRGINIA G* and during her forced voyage to the Port of Bissau between the 21 and 22 August 2009. The captain, in addition, was forced to take on responsibilities of a serious nature, such as being forced to sign documents at gun-point and sailing the *VIRGINIA G* to the Port of Bissau under perilous conditions.

- The passports of the members of the crew were unlawfully retained for until January 2010. Specifically, but without limitation, Chief Mate Mr Ocaña Cisneros faced incessant and unreasonable administrative hurdles and difficulties, and it took four months of considerable personal and diplomatic effort to retrieve his passport.

- In addition, the actions of Guinea-Bissau placed the owner of the *VIRGINIA G* in a severe financial situation, eventually leading to its bankruptcy. In respect of the captain and crew, this resulted in the following hardships:

  - There were serious delays in payment of the crew's salaries. This caused serious problems for breadwinner crew members, whose families depended entirely on the money sent to them for subsistence in their home country.

  - The owners did not, and could not, send money and provisions on a frequent enough basis as the company was facing serious financial difficulties.

  - Provisions had to be heavily rationed, and there were days when there was no food and potable water on board. Rain water would be used as the only source of potable water.

  - Rain water was also used for washing, cleaning and even cooking. It was collected in plastic containers, previously used for refuse.

- There was insufficient fuel for subsistence on board, such that the crew was denied basic amenities on board, including lack of light at night. On some occasions, the crew had to purchase ice as the only way of preserving the food on board.

- The idle vessel deteriorated quickly, especially the main engine, auxiliary generator and the vessel's equipment. The company could not adopt a lay-up policy due to the uncertainty as to how long the situation would last.

- The area was infested with mosquitoes, causing several of the crew to contract malaria.

- The crew was kept on board under military guard - effectively imprisoned, with their passports confiscated. Members of the crew were constantly anxious of forceful measures that the military might enforce.

472. In the *I' am Alone* case, the Commissioners recommended the payment of $25,666.50 to be paid by the United States to the Canadian Government "for the benefit of the captain and the members of the crew" who were on board the vessel when it was sunk (one crew member drowned, the others were rescued).[57]

473. Further guidance can be obtained from the practice of international human rights courts and tribunals, in particular the Inter-American Court of Human Rights and the European Court of Human Rights[58]. Their practice reflects the fact that although general international law requires the restoration of the *status quo ante* (*restitutio in integrum*), in cases of human rights violations and personal injury a restorative act alone will usually be insufficient, if not impossible. Reparation therefore usually involves indemnification in the form of pecuniary compensation. Such compensation will seek to indemnify both patrimonial damages, such as destruction of property or loss of earnings, **and non-patrimonial damages, including 'emotional' or 'moral' harm.**[59]

474. For both the European Court of Human Rights and the Inter-American Court, the quantification of such damage is determined primarily by principles of equity.[60]

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[57] S. S. "I'm Alone" (Canada, United States), award: June 30, 1933, and January 5, 1935. The Commissioners recommended the payment of $10,185 as compensation to the surviving spouse and family in respect of the crew member who drowned, $7,906 for the captain of the vessel, and between $907 and $1323 to the other seven crew members.

[58] Article 50 of the European Convention on Human Rights 1950: *"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."* Article 63 (1) of the American Convention on Human Rights 1969 (Pact of San José): *"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."*

[59] Maal case, 1 June 1993, 10 R.I.A.A, 732. PLUMLEY, Umpire. "(...)*The umpire has been taught to regard the person of another as something to be held sacred, and that it could not be touched even in the lightest manner, in anger or without cause, against his consent, and if so done it is considered an assault for which damages must be given commensurate with the spirit and the character of the assault and the quality of the manhood represented in the individual thus assaulted. (....) And since there is no proof or suggestion that those in discharge of this important duty of the Government of Venezuela have been reprimanded, punished or discharged, the only way in which there can be an expression of regret on the part of the Government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefor in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practiced upon this subject and its high desire to fully discharge such obligation.*"

[60] Godínez Cruz Case, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8 (1989). Paragraph 25: "*As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.*" Paragraph 36: *The expression "fair compensation," used in Article 63 (1) of the Convention to refer to a part of the reparation and to the "injured party," is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award*

475. Neither Court has gone so far as to elucidate the content of such 'principles of equity', certain general principles applied by the Courts may be identified:

476. Where the harm caused is minimal, the judgment may be sufficient compensation. In other cases, the judgment may be counted against the amount of compensation to be paid.[61]

477. Compensation will be payable on evidence of emotional or psychological harm, but also if no physical or psychological harm has been evidenced. In such cases the harm can be said to be strictly "moral". Therefore, an individual who has been unlawfully detained in violation of a protected right will be entitled to compensation even if he/she could not show any evidence of psychological or mental harm. In practice, an individual's award is increased where emotional or psychological harm is shown.[62]

478. Reparation is generally considered to be compensatory, but not punitive, in nature.[63]

479. Usually awards of 'moral' or 'non-pecuniary' damages have been in the form of a single lump sum, which takes into account prevailing costs of living and involved the identification of a *per-diem* rate in cases of unlawful imprisonment. Both the European and Inter-American Courts have indicated levels of payment across a range.[64]

480. Panama claims the following damages in respect of damages suffered by the crew members occasioned by the excessive use of force against them and their unlawful detention.

481. Panama acknowledges that the hardships suffered by the captain and crew of the *VIRGINIA G* are not as serious as the instances quoted above for guidance – there having been no serious physical injuries or deaths. However, it is submitted that the principles can be applied to this case, in relative terms.

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damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time. Paragraph 37: *Because of the foregoing, the Court believes, then, that the fair compensation, described as "compensatory" in the judgment on the merits of January 20,1989, includes reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of Saúl Godínez Cruz"*. Velasquez Rodriguez Case, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989 Inter-Am.Ct.H.R. (Ser. C) No. 7 (1990). Paragraph 26: *"Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."* Paragraph 27. *"As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity."*

[61] Reinhardt and Simone-Kaid v. France, E.Ct. H.R. Judgment of 31 March 1998. Paragraph 109. "*Mr Slimane-Kaïd claimed 6,000,000 French francs (FRF) as compensation for non-pecuniary damage and the sixteen months he had spent in detention*". (...) The Court .. "*holds by twenty votes to one that the present judgment in itself constitutes sufficient just satisfaction for the alleged non-pecuniary damage.*"

[62] Van Mechelen and Others v. The Netherlands (Article 50), E.Ct.H.R. Judgment of 30 Oct 1997 "*During their detention they had had no opportunity to ensure normal living conditions for themselves and their families*"(...)"*In the circumstances the Court considers the sums suggested by the Government appropriate compensation for non-pecuniary damage. It accordingly awards to Mr Johan Venerius, Mr Willem Venerius and Mr Pruijmboom NLG 25,000 each.*"

[63] Godinez Cruz Case, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8 (1989) Paragraph 36. "*The expression "fair compensation," used in Article 63(1) of the Convention to refer to a part of the reparation and to the "injured party," is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time.*"

[64] European Court of Human Rights: Leterme v. France 29/4/98 (unreasonable length of compensation proceedings): FF 200,000; Selcuk and Asker v. Turkey 24/4/98 (destruction of home): £ 10,000; Clooth v. Belgium 5/3/98 (unlawful detention) BeF 125,000 (calculated on the basis of 200 Bef/day for 625 days); Inter-American Court of Human Rights: Velasquez Rodriquez (disappearance): 250,000 Honduran Lempiras; Godinez Cruz (disappearance): 250,000 Honduran Lempiras; Aloeboetoe (deprivation of life); awarding the families of men kidnapped and killed by soldiers moral damages of approximately US$29,000, and awarding the family of a victim who survived a few days before dying a slightly higher amount because of the suffering the deceased endured); Gangaram Panday (illegal detention): US$10,000.

482. **Consequently, under this heading, Panama claims €65,000.00 for the captain and crew (as allocated hereunder), as an amount that is just and reasonable to be awarded as reparation for Guinea-Bissau's actions, or other amount as the International Tribunal may deem fit.**

- **€40,000.00** for the captain, for the hardship suffered on and after the 21 August 2009;
- **€25,000.00** for the crew members, for the hardship suffered on and after the 21 August 2009;

4. Heading (f)
Interest

483. In terms of the arbitration proceedings brought by Panama against Guinea-Bissau, as submitted to the International Tribunal under the Special Agreement, Panama claims interest in respect of the claims for material damages. Interest is claimed on the sum awarded by the International Tribunal at the rate of 8%.

5. Heading (g)
Legal Costs
(cf. Counter-Memorial, Chapter VIII)

484. In terms of the Special Agreement between Panama and Guinea-Bissau, it was agreed that the International Tribunal shall address all claims for damages and costs and shall be entitled to make and award on the legal and other costs incurred by the successful party in the proceedings before it.

485. This amount, however, can only be finally quantified at the conclusion of the current case, and Panama, therefore, reserves its rights to quantify the amount at a later stage. By way of indication only, the Moya Report and the Arnott Report provide an estimate of legal costs incurred so far as being in the region of €150,000.00.

*

Conclusion

486. Panama submits that on the basis of the facts and legal arguments set out in its Memorial and in the above sections, and on the basis of general international law, case law and the Law Commission's Articles, Guinea-Bissau is liable to provide reparation in the form of compensation which will wipe out all the consequences of its illegal acts suffered by the *VIRGINIA G*, its owners, crew and cargo owners, as well as to Panama.

487. In Chapter 8 below, Panama requests the International Tribunal to declare, adjudge and order that Guinea-Bissau is to pay in favour of Panama, the *VIRGINIA G*, her owners, crew and all persons and entities with an interest in the vessel's operations (including the *IBALLA G*), compensation for damages and losses caused as a result of Guinea-Bissau's actions, in the amount quantified and claimed by Panama and/or in an amount deemed appropriate by the International Tribunal.

* * *

CHAPTER 6
REPLY TO COUNTER-CLAIM

(cf. Counter-Memorial, Chapter VII)

488. In Chapter VII (paragraphs 256 to 266) of its Counter-Memorial, Guinea-Bissau presents a counter-claim against Panama in the amount of USD 4,000,000 on the basis of Panama's alleged violation of Article 91 of the Convention, and the alleged resulting *damage caused to the environment, the loss of tax revenue and the plundering of its marine resources.*

489. Panama replies that Guinea-Bissau's counter-claim is not only absurd, frivolous and vexatious, but unfounded in fact and at law. Guinea-Bissau makes a mere general statement of what it considers it would have obtained had the *VIRGINIA G* been auctioned. Panama submits that no compensation for damages or losses are due by it to Guinea-Bissau, and that the International Tribunal should reject the counter-claim altogether.

490. Guinea-Bissau does not even begin to argue, let alone prove, how Panama might have granted its nationality to "a ship" without any genuine link to Panama, and the causal link between the alleged lack of genuine link and the alleged resulting *damage caused to the environment, the loss of tax revenue and the plundering of its marine resources* apparently attributable to the *VIRGINIA G.*

491. In this respect, Guinea-Bissau has, effectively, denied Panama the opportunity of presenting a fully informed defence to Guinea-Bissau's counter-claim as part of this Reply, as would normally be the case, having first received a counter-claim based on a statement of fact and statement of law, in reaction to which the respondent (in this case Panama) would have had the full and proper opportunity to defend its position.

492. It is mainly for this reason that Panama has already requested the Tribunal:

i. to order that any reply to be presented by Guinea-Bissau to Panama's defence on the counter-claim be contained in Guinea-Bissau's Rejoinder; and

ii. to fix an additional date, following the 28 November 2012 deadline for submission of Guinea-Bissau's Rejoinder, by which date Panama may submit final submissions in reply only to the sections of Guinea-Bissau's Rejoinder concerning the counter-claim.

493. This request is made with the view of allowing both parties the same four stages of the written proceedings with respect to the counter-claim, especially having seen the grossly inadequate submission of Guinea-Bissau's counter-claim. Panama submits that an additional opportunity to present a rejoinder-type document in relation only to the counter-claim is essential in preserving Panama's rights and interests as a party to this case.

494. In any case, Panama sets out its reply to Guinea-Bissau's statements and claims, whilst reserving all its rights to present additional replies and supporting evidence.

495. Panama denies Guinea-Bissau's claim that Panama granted its nationality to a ship (assuming that Guinea-Bissau's reference to "a ship" is a reference to the *VIRGINIA G*) without any genuine link to Panama (Counter-Memorial paragraph 257). Panama refers the International

Tribunal to the explanations and bases for its denial set out in paragraph 97 *et. seq.* of this Reply (that is, Panama's reply to Guinea-Bissau's objection to the admissibility of Panama's claims on the ground of alleged lack of genuine link).

496. Panama submits that should the International Tribunal reject Guinea-Bissau's objection to the admissibility of Panama's claims on the ground of alleged lack of genuine link between Panama and the *VIRGINIA G*, as set out in Chapter II of Guinea-Bissau's Counter-Memorial, then the alleged legal basis for this counter-claim would no longer exist, thus rendering the counter-claim unfounded and inadmissible.

497. In any case, Panama submits the following comments and statements (even if, to some extent, a repetition of Panama's arguments set out in paragraphs paragraph 97 *et. seq.* of this Reply) in reply to Guinea-Bissau's statements and claims set out in paragraphs 263 to 266 of its Counter-Memorial.

498. **Firstly**, Panama highlights that Guinea-Bissau's apparent concerns on a lack of genuine link between the *VIRGINIA G* and Panama was never manifested or raised (by Guinea-Bissau as against Panama) at any stage of the arrest or detention of the vessel.

499. On the contrary, the *VIRGINIA G*'s documents and flag were accepted by the Guinea-Bissau officials as being in order (Annex 18 of Guinea-Bissau's Counter-Memorial). Moreover, Guinea-Bissau never demonstrated its concerns by reporting its doubts to Panama in accordance with Article 94(6) of the Convention, as it would have been entitled to do, given the apparently serious concerns it has in relation to the Panamanian flag.

500. If, indeed, Guinea-Bissau was convinced that Panama did not carry out its duties as a flag State, or that there was no genuine link between Panama and the *VIRGINIA G,* or that the *un-seaworthy* vessel was in such *poor condition that the risk of sinking in the port of Bissau arose*, then Guinea-Bissau raising the objections at this stage in the proceedings before the International Tribunal, even more as the reason and legal basis for a counter-claim, can only serve to support Panama's submission that Guinea-Bissau's counter-claim is frivolous and vexatious, and unfounded in fact and at law.

501. It is Panama's submission that Panama has a genuine link with the *VIRGINIA G*, with the *VIRGINIA G*'s owner and with the *VIRGINIA G*'s operator, and that Panama exercises full and effective jurisdiction over the *VIRGINIA G* (as already explained in paragraph 97 *et. seq.* of this Reply).

502. **Secondly**, Panama states that:

i. Any amount of costs that may have been incurred by Guinea-Bissau (of which no proof is submitted) were solely attributable to Guinea-Bissau's violations of the provisions of international law and of the provisions of the Convention (as fully set out in Panama's Memorial) and are in no way attributable to Panama, the *VIRGINA G,* her owners, crew or any related individual or entity;

ii. In any case, the amount of USD 4,000,000 claimed by Guinea-Bissau is ludicrous and exaggerated, and is a clear demonstration of Guinea-Bissau's frivolity in seeking

to secure a claim of USD 4,000,000 against the *VIRIGNIA G,* when Guinea-Bissau itself caused any such costs to be incurred, or, at any rate, failed to mitigate them. Panama contends that:

a. Guinea-Bissau was not obliged to keep the vessel for such a duration. Guinea-Bissau demonstrated a complete lack of co-operation with the owners of the vessel despite repeated requests to set up a security for the release of the *VIRGINIA G*;

b. Guinea-Bissau failed to notify Panama, as the flag State, through the appropriate channels, of the action taken and of any penalties subsequently imposed on the vessel (in terms of Article 73(4)), thus prohibiting the possibility of a timely intervention by the flag State, as is its right under international law;

c. The value attributed to the *VIRGINIA G* by Guinea-Bissau is unrealistic and unfounded, and, in any case, in complete contradiction to Guinea-Bissau's statement that the vessel was "un-seaworthy" and "in such poor condition that the risk of it sinking in the port of Bissau arose".

d. It is unacceptable for Guinea-Bissau to claim damages for a situation it caused itself, as will hopefully be demonstrated by Panama in the main proceedings (and as set out in its Memorial and Reply) to the satisfaction of the International Tribunal.

503. **Thirdly**, as to Guinea-Bissau's concluding paragraph, that the amount claimed *would have constituted adequate compensation for the damage caused to the environment, the loss of tax revenue and the plundering of its marine resources,* Panama replies as follows, whilst reserving its rights to provide further:

i. Neither Panama nor the *VIRGINIA G* were informed, let alone faced with claims, for damage to the environment resulting from the operation of the *VIRGINIA G*. In any case, the vessel had the required P&I cover to make good for any such claims proven to be attributable to it. However, no such claims were ever made;

ii. Guinea-Bissau's loss of tax revenues concerns (allegedly arising from non-fishing activities, carried out by non-fishing vessels, in the EEZ) have no basis in the Convention, as Panama has already set out in paragraphs 38 to 43 and 315 to 332 of this Reply. This claim by Guinea-Bissau is further support for Panama's contention that Guinea-Bissau is unilaterally extending the scope of the Convention to include rights not attributed to the coastal State in restriction of the freedoms granted to States in terms of Article 58 of the Convention (and as already expressly not permitted by the International Tribunal in the *Saiga No.2 Case*).

iii. The *VIRGINIA G* is not a fishing vessel; the crew is not a fishing crew; the vessel has no fishing equipment, and the vessel at no time had any fisheries products on board. It is perplexing, therefore, how Guinea-Bissau can state that the *VIRGINIA G* "plundered" its marine resources and that Panama should, therefore, indemnify

Guinea-Bissau for this amount. It is especially bold of Guinea-Bissau to make such claims when Guinea-Bissau itself, in effect, "plundered" the cargo of gas oil, based on a deliberate misinterpretation, misapplication and broadening of the term "fishery products" ("produtos de pesca") to "products on board" ("produtos a bordo") (see paragraphs 392 *et. seq.* of this Reply), and in complete disregard of an order of the Court of Bissau suspending such confiscation.

504. Against the above background, and subject to further submissions by Panama – in respect of which all rights are reserved – Panama vehemently denies the claims and statements submitted by Guinea-Bissau in its counter-claim.

Conclusion

505. In Chapter 8 below, Panama requests the International Tribunal to dismiss, reject or otherwise refuse Guinea-Bissau's counter-claim on the basis that Guinea-Bissau has no legal basis under international law and under the Convention to bring the counter-claim, given the existence of the required links between Panama and the *VIRGINIA G*, or, in the alternative, on the basis that Guinea-Bissau's counter-claim is unfounded in fact and at law, and that the counter-claim is frivolous and vexatious. Panama will also request the International Tribunal to declare, adjudge and order is not to pay in favour of Guinea-Bissau compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial

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CHAPTER 7
REPLY TO ARGUMENT ON LEGAL COSTS

(cf. Counter-Memorial, Chapter VIII)

506. In keeping with the general order of the Chapters as presented by Guinea-Bissau in its Counter-Memorial, Panama has included this Chapter 7, but refers the International Tribunal to Chapter 5 (and paragraphs 484 and 485 therein) of this Reply.

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CHAPTER 8
SUBMISSIONS

507. For the abovementioned reasons, or for any of them, or for any other reason that may be submitted during the procedure, or that the International Tribunal deems to be relevant, and in addition to Panama's submissions presented in Chapter 5 of its Memorial,

PANAMA RESPECTFULLY REQUESTS THE INTERNATIONAL TRIBUNAL TO:

A. Declare, adjudge and order that Guinea-Bissau's objections to the admissibility of Panama's claim are outside the time-limit and/or are brought in bad faith such that they should be dismissed, rejected or otherwise refused;

B. Dismiss, reject or otherwise refuse Guinea-Bissau's counter-claim on the basis that Guinea-Bissau has no legal basis under international law and under the Convention to bring the counter-claim, given the existence of the required links between Panama and the *VIRGINIA G*, or, in the alternative, on the basis that Guinea-Bissau's counter-claim is unfounded in fact and at law, and that the counter-claim is frivolous and vexatious

C. Dismiss, reject or otherwise refuse each and all of the submissions of Guinea-Bissau, as set out in Chapter IX of Guinea-Bissau's Counter-Memorial, and **declare, adjudge and order that**:

1. Panama did not violate Article 91 of the Convention;
2. In connection with Submission B above, Panama is not to pay in favour of Guinea-Bissau compensation for damages and losses as claimed by Guinea-Bissau in its counter-claim as set out in Chapter VII of its Counter-Memorial; and
3. Panama is not to pay all legal costs and other costs that Guinea-Bissau has i
4. ncurred in relation to this case.

D. Declare, adjudge and order that Guinea-Bissau's Decree Law 6-A/2000, as was applied to the *VIRIGNIA G* (and as applied in general) in the EEZ of Guinea-Bissau, is a unilateral extension of the scope of the Convention, restricting the freedoms under the Convention, and, in effect, an extension by Guinea-Bissau of a type of tax and/or customs-duty radius, in violation of the Convention.

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

28 August 2012

Ramón García-Gallardo
Agent for Panama

Alexander Mizzi
Co-Agent for Panama

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