(Traduction du Greffe)

Affaire No 19, navire « *Virginia G* »

RÉPONSES DE LA RÉPUBLIQUE DE GUINÉE-BISSAU AUX QUESTIONS SOULEVÉES PAR LE TRIBUNAL LE 6 SEPTEMBRE 2013

Questions aux parties, I

2. Le Procureur général a-t-il interjeté appel de la décision du Tribunal régional de Bissau du 5 novembre 2009 suspendant la confiscation du navire et de tout produit se trouvant à son bord ? Quand l'appel a-t-il été interjeté et a-t-il été déposé dans les délais prescrits ? L'appel a-t-il eu un effet suspensif ? Quelle décision a-t-elle été prise en appel ?

Le Procureur général a effectivement fait appel de la décision du Tribunal régional de Bissau suspendant la confiscation du navire (**annexe 1**). L'appel a été déposé dans les temps, le délai prescrit étant de huit jours après que la décision a été notifiée à la partie. Conformément aux articles 279 b) et 296 du Code civil bissau-guinéen, pour les échéances fixées par la loi ou par un tribunal, le premier jour de la période à courir n'est pas compté. Par conséquent, comme le Procureur a reçu notification de la décision le 11 novembre 2009, son appel déposé le 19 novembre 2009, dernier jour du délai, était dans les temps.

L'appel a été effectivement reçu par le Tribunal régional de Bissau. Bien que le juge ait estimé qu'il était hors délai, il a décidé de le soumettre à la Cour suprême de Guinée-Bissau. En fait, il a été décidé de considérer l'appel comme recevable :

> « *Cependant, en raison des intérêts supérieurs et politiques du pays, je vous confie le dossier, une analyse minutieuse et prudente des faits qui y sont exposés ayant montré que les moyens de fait et de droit ayant motivé*

l'ordonnance de rejet demeurent inchangés, puisqu'ils correspondent aux moyens ici exposés.
Il convient toutefois de souligner que, quelle que soit la décision que vous prendrez, à savoir d'infirmer ou de confirmer la décision contestée, la justice sera rendue. »

L'appel a un effet suspensif de la décision comme le prévoit le droit bissau-guinéen pour ce type de recours (*agravos*). En effet, aux termes de l'article 740, paragraphe 1, du Code de procédure civile, « *les appels interjetés immédiatement ont un effet suspensif* » (**annexe 2**)

La Cour suprême n'a pas statué sur l'appel. En effet, le Gouvernement ayant décidé d'accorder la mainlevée de l'immobilisation du navire, il n'était plus besoin de poursuivre la procédure.

3. Le Panama ou le propriétaire du navire a-t-il fait appel de la décision de la Commission interministérielle des pêcheries de confisquer le navire ? Si oui, quand l'appel a-t-il été interjeté et quelle en a été l'issue ?

L'article 52 du décret-loi 6-A/2000, tel que modifié par le décret-loi 1-A/2005, prévoit la possibilité de former un recours judiciaire contre une décision de la Commission interministérielle maritime. La jurisprudence bissau-guinéenne a souvent dit que tout recours judiciaire (y compris les injonctions) contestant une décision administrative imposant des amendes ou d'autres sanctions en vertu de la loi générale sur les pêcheries ne pouvait être formé que dans la période de 15 jours fixée pour le paiement. C'est ce qu'il ressort d'une lecture conjointe des paragraphes 1 et 3 de l'article 60 du décret-loi 6-A/2000.

La décision n° 07/CIFM/09 de la Commission interministérielle de surveillance maritime a été notifiée au représentant du propriétaire du navire le 31 août 2009. Celui-ci n'a pas fait appel de la décision. Au lieu de cela, le 4 septembre 2009, il a adressé une lettre au membre du gouvernement responsable des pêcheries. Dans sa lettre, il affirmait avoir été autorisé à fournir du combustible et demandais un

réexamen de la décision. Il n'a pas reçu de réponse favorable, car les autorités compétentes ont, au contraire, confirmé la décision en cause par une nouvelle décision en date du 25 septembre (décision n° 09/CIFM/09).

Le propriétaire du navire n'a même pas fait appel de cette décision de confirmation dans le délai prescrit de 15 jours. Au lieu de cela, il a présenté, le 29 octobre 2009, une mesure conservatoire pour suspendre l'exécution de la décision (procédure 74/09). Cette mesure a été accordée sans que l'Etat n'ait été entendu ; c'est pourquoi le Procureur l'a considérée comme nulle et non avenue, et a interjeté appel de cette décision le 19 novembre 2009. Selon l'article 382 1a) du Code de procédure civile, ce type de mesure conservatoire doit être subordonnée à une procédure principale, qui doit être introduite dans un délai de 30 jours.

Le 4 décembre 2009, donc dans le délai prescrit, le propriétaire du navire a introduit la procédure principale en question, appelée procédure de recours en annulation (*recurso contencioso de anulação*) (procédure 96/09). Cette procédure n'a toutefois pas avancé depuis le 11 mars 2010, le demandeur ayant négligé de respecter les formes prescrites. De ce fait, la procédure est encore pendante devant le Tribunal régional de Bissau. Conformément à l'article 382 1a) du Code de procédure civile, il découle de cette situation que toute mesure conservatoire relevant de cette procédure principale est sans effet.

Par ailleurs, le propriétaire du navire a également déposé, le 7 décembre 2009 (affaire 98/2009), une autre mesure conservatoire contre la décision du Secrétaire d'Etat au Trésor de décharger la cargaison. La mesure conservatoire a une fois de plus été accordée, le 4 novembre 2009, sans que l'Etat n'ait été entendu. Cependant, cette fois, la procédure principale (procédure 14/2010) a été introduite en dehors du délai prescrit de 30 jours, à savoir le 18 janvier 2010, ce qui prive la mesure conservatoire de tout effet. C'est probablement parce qu'il le savait que, lorsqu'on lui a réclamé les frais de justice afférents à sa derniére action en date du 3 mars 2010, le demandeur n'a pas payé, ce qui a eu pour effet de suspendre la procédure principale, qui est toujours pendante devant le Tribunal régional de Bissau (**annexe 3**).

Questions aux Parties, II

Les Parties peuvent-elles présenter des documents (notamment une copie des factures) à l'appui du montant des réparations demandées ?

Ainsi qu'elle l'indique au paragraphe 266 de son contre-mémoire, la Guinée-Bissau demande 4 000 000 de dollars des Etats-Unis, montant qu'elle considère comme constituant une compensation adéquate pour les dépenses entraînées par le séjour du « Virginia G » dans le port de Bissau, les dommages causés à l'environnement et le pillage des ressources marines de sa ZEE.

La Guinée-Bissau suppose qu'elle aurait pu obtenir ce montant si le navire avait été vendu aux enchères. De fait, dans l'*Etude sur les transports maritimes*[1] publiée en 2006 par la CNUCED, il est indiqué à la page 45 que les pétroliers d'occasion ont une valeur d'au moins 10 000 000 de dollars E.-U. Compte tenu du mauvais état du « Virginia G », la Guinée-Bissau estimé qu'elle aurait pu obtenir seulement 40% de cette valeur. D'après les derniers renseignements disponibles, il semble toutefois que le navire était dans un état si déplorable que sa valeur s'établissait à 500 000 euros environ (soit 662 100 dollars E.-U.).

L'exploitation du « Virginia G » a toutefois eu une incidence directe sur les frais supportés par la Guinée-Bissau. Ces coûts peuvent être ventilés comme suit :

a) frais de mouillage dans le port de Bissau du 22 août 2009 au 30 septembre 2010 : 152 186 292 francs CFA (**annexes 5 et 6**), soit 307 264 dollars E.-U.

b) salaires des inspecteurs et des militaires affectés à la surveillance du « Virginia G » du 22 août 2009 au 30 septembre 2010 : 64 715 000 francs CFA (annexes 7 et 8), soit 130 600 dollars E.-U.

La Guinée-Bissau ignore naturellement l'impact exact des activités menées sans autorisation par le « Virginia G » dans sa ZEE en ce qui concerne les dommages

[1] Disponible à l'adresse http://unctad.org/fr/Docs/rmt2006_fr.pdf

causés à l'environnement du fait des déversements d'hydrocarbures qui ont pu se produire et du pillage des ressources marines. D'après la FISCAP, ces dommages peuvent être estimés comme suit (**annexe 9**) :

a) pillage des ressources marines résultant d'une opération non autorisée de ravitaillement en combustible : 800 000 dollars E.-U.

b) déversement éventuel de gazole en mer : 15 000 000 de dollars E.-U.

Par conséquent, la Guinée-Bissau maintient que le montant de 4 000 000 de dollars E.-U. demandé au paragraphe 266 de son contre-mémoire constitue une indemnisation adéquate.

S'agissant des frais supportés par la Guinée-Bissau dans le cadre de la procédure engagée devant le Tribunal, selon les comptes détaillés tenus par le Ministére des pêches (**annexe 10**), la Guinée-Bissau a déjà dépensé à ce stade 237 285, 67 euros au titre de l'instance, des dépenses additionnelles d'un montant de 14 149,23 euros étant prévues. Le montant total des dépenses s'élèverait donc à 251 434,90 euros.

Annex 1
Appeal, Prosecutor's Office of the State, Guinea-Bissau, to the Regional Criminal Court of Bissau (in Portuguese) (not reproduced) - English translation

Republic of Guinea-Bissau

Public Prosecutor of the Republic

Prosecutor's Office of the State

Proc. No. 74/2009

To His Honour, the Judge

of the Regional Crime Court of Bissau

APPEAL Of "AGRAVO"

Having been possible to take knowledge of an action of maritime transgressing against the Guinean State, involving a vessel identified with the name of Virginia-G, the Public Prosecutor's Office required the confidence of the referred case (Proc. No. 74/2009), through the Inter-ministerial Committee of Maritime Surveillance.

After analysing the case records, it was confirmed that it was a interim measure interposed by PENN LILAC TRADING, ship-owner of the Virginia-G vessel against the decision of the Inter-ministerial Committee of Maritime Surveillance, issued on September 25th, 2009, based on Article 52 of Law No. 6-A/00 of August, requiring the suspension of the effectiveness of the act.

In this context, the Public Prosecutor's Office, disagreeing with the judge's case decision, comes to aggravate it, under Article 401, paragraph 2, of the Code of Civil Procedure, with the following arguments:

I

Regarding the legality, or not, of the decision of the inter-ministerial committee of maritime surveillance, the question of the present cause, the logic imposes to relegate the discussion back to its own headquarters, in the exact extent that such is the matter of an action, which has a different nature from this obviously instrumental action;

II

Thus, one should, in this part and this part alone to agree with His Honour, the Judge, regarding the urgency and speed used in the conduction of the action subject of this application for a review, being that such is imposed by law;

III

What does not correspond to the present climate, is that His Honour, the Judge, wrongly cloaked himself with the referred urgency and speed to reduce to zero all the legal requirements relative to interim measures. Firstly:

A

Weighing, though, the desired speed of interim measures, the rule remains to be the respect for the adversarial principle. This is, therefore, what clearly emerges from Article 400, paragraph 2 of the Code of Civil Procedure. That means that, only when the accused's hearing puts at risk the effectiveness of the action, one can order the interim measure without hearing the accused, and not when the court sees fit;

IV

Moreover, the hearing claimed, not only does not jeopardize in any way the effectiveness of the action, it would also allow His Honour to balance and weigh the arguments and finally decide, according to the Law and for the sake of the Guinean justice;

V

It is well known that, is that it is up to the Public Prosecutor's Office to represent the State (Article 20, paragraph 1, Code of Civil Procedure). Especially as it is not the defense of a right or property managed by an autonomous entity, in which the Public Prosecutor's Office could intervene, by advising, and even so, in case of disagreement the position of the Public Prosecutor's Office would be predominant. In the present case, the prosecutor should intervene primarily, because it is a right and property managed by the State and not by an autonomous entity (see Article 20, paragraph 2, Code of Civil Procedure);

VI

This is to say that the citation the Public Prosecution Office was not only necessary in this case as mandatory, failing which the entire process after the petition would prove void, pursuant to Article 194 b) of the Code of Civil Procedure.

VII

To the nullity of this evidence, consequence of the vices from which the action of His Honour suffers, is still added the fact that, regardless of the need to allow the intervention of the Public Prosecutor as a defender of the public interests, through the Prosecutor's Office of the State, it is the Constitution which imposes that:

The Public Prosecution's Office is the organ of the State, in charge of reviewing the legality, and representing the public and social interest before the courts and is the holder of criminal proceedings (Article 125, paragraph 1)

VIII

The described precept has in the case in strife two lines of force in favor of the nullity of the whole process. Otherwise, let us consider the following:

A) As for the role of the review of legality:

1 - As already noted, the urgency of the interim measures does not dispense the legality. Quite the opposite. It is the law that says that this type of process should be expeditious, and it is the law that shows how such urgency must be processed (supremacy of the rule of law and preference of the law, as two variants that embody the principle of legality). That being so, it becomes legitimate to ask: who controls legality? The Judge? Since the Public Prosecutor has been marginalized.

2 – The Law states that it competes to the Public Prosecution Office the review of the legality and not to the Judge that applies it and reviews it at the same time. And how can the Public Prosecution Office review the legality if it has not been cited of the existence of the action.

The citation of the Public Prosecutor and the notifications are mandatory, because only so can he perform his duties as fiscal of the legality. In any other way, this is not possible!

3 - Not being cited or notified of the decision, one cannot fulfil the constitutional sense expressed in the article quoted above, thus resulting in the preponderance of the findings of the judge claims against the constitutional impositions, what is nonetheless a strange novelty in law and against the sacrosanct principles of the existent States.

B) On holding of criminal proceedings entrusted to the Public Prosecutor:

1 – First, one can witness here, what is in Latin summarized by the expression: **venire contra factum proprium non valet**;

2 - This happened because we deem that the consideration of the question on the crime courts is not consistent with the jurisdiction of that forum;

3 - There is no doubt that the object of the action is an administrative act. Now, despite the strange wording of Article 121, paragraph 2, point b), CRG, it is clear that the spirit of the law is to allow the creation of administrative courts for the trial of the matter of administrative litigation, and never the trial of any issue regarding crimes;

4 - It is in this sequence that it is transiently determined, in the Organic Law of the Courts, that the matters of administrative litigation should be appreciated in the ordinary courts (Article 80);

5 - However, the assignment of this matter to the ordinary courts should not be read as if It could be assigned to any court, section or chamber, but for the competent forum and in this case, never the crime court, as His Honour, the Judge wants to believe, but the civil court;

6 - In doing so and in an imprudent way, His Honour, The Judge allowed us to access to another strange novelty, which is:

Starts and ends the process that, according to him, is a crime, forgetting that it is Article 125, paragraph 1 of the Constitution of the Republic, which states that: the Public Prosecutor is the holder of criminal proceedings.

Where is the holding of the criminal proceedings?

7 - In fact, when the applicant requests the suspension of the administrative act, he expressly says that what is litigated revolves around an administrative act, at no time tried as a criminal act;

8 - Plus, when he interposes the interim measure, he demonstrates, although in an implicit form, that the question must be assessed in civil and not criminal courts

XIX

Regarding the providence itself, the fulfilment of one of its requirements has not been demonstrated – the serious probability of the existence of the right (*fumus bonni iuris*).

X

The appeal to the alleged lack of competence of the administrative authorities to proceed to the confiscation, besides not corresponding to our administration model, which is executive, is contrary to the provisions of the General Law of Fisheries (paragraph 1 of Article 52) and therefore cannot justify the fulfilment of "fumus bonni iuris".

XI

This is not about doing justice, but about the practice of an administrative act that could even be practiced by the Minister of Fisheries and nobody else. Simply as a matter of prudence of the Public Administration, it was decided to create a commission in order to allow better weighting before the practice of administrative acts, which are perfectly appreciable in court like any administrative act.

XII

Nowhere in the Constitution of the Republic of Guinea-Bissau exists a reservation of jurisdiction on confiscation. Also, because it is a simple administrative act.

XIII

It is in this sense that the General Law of Fisheries (LGP) assigns to the Minister responsible for fisheries the competence to confiscate ex officio "all industrial or crafting fishing vessels, domestic or foreign, engaged in fishing activities within the limits of national maritime waters without having the competent fishing authorization, in conformity with Articles 13 and 23 ... "

XIV

The applicant was caught in the act of practice of fishing related operations without being authorized to do so, according to the Article 23 of the LGP.

XV

The applicant did not join to the case files any license or authorization that allowed him to proceed with the refueling of other fishing vessels.

XVI

And the fact that supplied ships have authorization for this purpose brings no advantage to the applicant, since according to Article 23 of the LGP, the ship to supply and the supplier require both authorizations.

XVII

Now if the vessel of the applicant is not licensed to practice the fishing related operation in question, it will not escape the confiscation.

XVIII

If so, there is no semblance of a right not to be confiscated, because the confiscation is really imposed by the LGP, contrary to what one seems to want in the precautionary measure, where the judge considers not to have been proved the possibility of applying administrative fine instead of the confiscation.

XIX

Regarding the lack of the adversarial principle before the confiscation, it arises from the LGP, which imposes that the confiscation is ex officio, giving the person concerned the possibility of judicial appeal.

XX

In fact, the assumption of the confiscation - absence of license or authorization - waives any more delay with procedural formalities.

On these terms and on other in law, this aggravation ought to be upheld and, consequently:

Be annulled all pleadings practiced without the intervention of the Public Prosecutor, either as the defender of the public interest, or as fiscal of the legality, for the welfare of the whole Rule of Law and the proper administration of Justice.

The G.A.E.

(signature)

João Biague

(illegible stamp)

Annex 2
Articles 279 and 296 of the Civil Code (in Portuguese) (not reproduced) - English translation

Civil Code

Article 279
(Computation of the term)

The following rules shall apply for fixing a term in case of doubt:

a) If the term is to refer to the beginning, middle or end of the month, it is understood as such, respectively, the first day, the 15th and last day of the month; if it is set at the beginning, middle or end of the year, it is understood, respectively, the first day of the year, the 30th June and 31st December;
b) In order to count any period nor the day nor the hour are included, if the term is hours, whichever is the event from which the period begins to run;
c) The period fixed in weeks, months or years after a certain date, ends at 24 hours of the day falling within the last week, month or year, to that date, but if in the last month there is no corresponding day, the period ends on the last day of that month;
d) It is, respectively, considered a term of one or two weeks, the term designated by eight to fifteen days, as it is one or two days the term designated as 24 or 48 hours;
e) The period that ends on a Sunday or holiday is transferred to the first working day; just like Sundays and public holidays are treated the judicial vacations, in case the act subject to term has to be practiced in court.

Article 296
(Calculation of time limits)

The rules in Article 279 shall apply in the absence of a specific provision to the contrary, the terms and conditions laid down by law, by the courts or by any other authority

Annex 2 (continued)
Articles 382, 401, 740 of the Civil Procedure Code (in Portuguese) (not reproduced)
- English translation

Civil Procedure Code

Article 382
(Cases of measures' expiration)

1. Interim measures become ineffective:
a) If the applicant does not propose the action, from which the measures are dependent within 30 days from the date on which he is notified of the decision ordering the measures required or if, having proposed the action, the process is stopped for more than 30 days, because of the applicant's negligence in promoting the respective terms from which the progress of the cause depends on;
b) If the action is dismissed as unfounded by sentence with the force of res judicata;
c) If the defendant is acquitted of the proceedings and the applicant does not propose new action within the period prescribed in paragraph 2 of Article 289;
d) If the right one aims to protect is extinguished.
2. The seizure required as dependent from the condemnatory action is also void if obtained sentence with the force of res judicata, the applicant does not promote execution within the following six months, or, if the execution is promoted, the process is stopped for more than thirty days because of the execution creditor's negligence.
3. When the precautionary measure has been replaced by a guarantee, it would become void on the same terms that would void the measure replaced.
4. The substitution by guarantee does not prejudice the right of appeal against the decision that ordered the measure nor the faculty to deduct embargoes against it.

Article 401
(Grant of Interim Measure)

1. An interim measure is enacted, provided that the evidence shows a serious likelihood of the existence of the right and shows to be founded fear of his breach, unless the loss resulting from the measure exceeds the damage that it wants to avoid.
2. The applied may aggravate the order that grants the interim measure, or oppose embargoes to this under applicable articles of 405 and 406.
3. The interim measure decreed can be replaced at the request of the defendant, by adequate bond, whenever this one, after hearing the plaintiff, proves sufficient to prevent damage.

Article 740
(Appeals with suspensive effect)

1. The appeals that come up immediately in their own cases have suspensive effect.
2. For the others, suspensive effect only occurs when:
a) The appeals from orders that have applied fines;

b) The apeals of orders that may have ordered delivery of money or imprisonment; the court being safe with a deposit or bond;
c) The appeals from decisions that have ordered the cancellation of any registration;
d) The appeals to which the Judge has ordered for this purpose;
e) All the other that the law expressly grants this same purpose
3. The judge can only assign suspensive effect to the appeal, pursuant to paragraph d) above, when the applicant has requested it in the application for requiring the appeal and after hearing the appeallee, recognizes that the immediate execution of the order is likely to cause irreparable damage to the applicant or difficult to repair

Annex 9
Declaration, 9 September 2013, FISCAP Guinea-Bissau (in Portuguese) (not reproduced)
- English translation

Republic of Guinea-Bissau

Ministry of Fisheries and Halieutic Resources

National Service of Fiscalization and Control of Fishery Activities

Cabinet of FISCAP Coordinator

DECLARATION OF FISCAP

The National Coordination of FISCAP declares without any reservation that the oil tanker, VIRGIA G, in the year two thousand and nine, 2009, was transporting around four hundred thousand liters of fuel, gas oil, in the waters under jurisdiction of Guinea-Bissau.

In the perspective of ocurring damages caused by the spillage of the fuel transported by the referred oil tanker, without any legal authorization for transhipment or unloading issued by the national authorities, the FISCAP, aware of the ecological, environmental and economic consequences that may cause in our sea, resulting in emerging damages from the operation, namely the destruction of marine ecosystems, loss of biodiversity and extinction of essential catches for the fishery activity, due to the pollution from these activity, in the calculation of the real value of environmental, ecological and economic damages, estimates the following monetary value:

First, for the not presentation of the transhipment autorization in the waters under jurisdiction of Guinea-Bissau, it is estimated around eight hundred thousand american dollars 800.000 USD;

Second, for the eventual spillage of oil, it is estimated around fifteen million american dollars 15.000.000 USD.

Done in the day nine of the month of September two thousand and thirteen.

[*Stamp with the references*: Guinea-Bissau Fiscap 140
Protect Surveil Control]

Coordinator of FISCAP
[*Illegible Signature*]
Ingenieur Pedro Mendes Viegas