Dissenting Opinion of Judge Ndiaye

(*Translation by the Registry*)

(Submitted pursuant to article 30, paragraph 3, of the Statute and article 8, paragraph 4, of the Resolution on the Internal Judicial Practice of the Tribunal)

Having, to my regret, been unable to concur with the Judgment of the Tribunal, I feel it is my duty to state my dissenting opinion. In my view, the owner of the *M/V Virginia G* did not exhaust the local remedies offered to it by Guinea-Bissau. The confiscation of the *M/V Virginia G* does not constitute a violation of article 73, paragraph 1, of the Convention. Fault on the part of the victim is a ground for the dismissal of any claim for compensation on the merits because it played a role in causing the alleged damage. Furthermore, the examination of the causal link between the fault on the part of the owner of the *M/V Virginia G* and the damage in respect of which compensation is claimed shows that the link is not proven. Similarly, the question of jurisdiction and the question of the objections raised by the Respondent should have been handled otherwise, for the following reasons:

I The dispute

1. The dispute submitted to arbitration by the Republic of Panama relates to the Panamanian-flagged tanker *M/V Virginia G*, which, while carrying out refuelling operations, was boarded by the authorities of the Republic of Guinea-Bissau on 21 August 2009 in the exclusive economic zone (EEZ) of Guinea-Bissau.

The *M/V 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).

2. Panama considers that, in this case, Guinea-Bissau breached its international obligations set out in the 1982 United Nations Convention on the Law of the Sea, which breach led to a prejudice being caused to the Panamanian flag and to severe damage and losses being incurred by the vessels and other interested persons and entities because of the detention and the length of the period of the detention.

Guinea-Bissau claims that it has not violated any provisions of the Convention but has merely exercised its rights as a coastal State over its exclusive economic zone.

II Background

3. Guinea-Bissau is located in West Africa, which enjoys exceptionally good climatic and ecological conditions. Its coastal and maritime areas are among the richest fishing grounds in the world. These maritime waters are characterized by high biological productivity thanks to the rising of the deep, nutrient-rich waters which form the basis of the marine food chain. This phenomenon, known as "upwelling", is caused by winds pushing the surface waters away from the land area, allowing waters from the deep ocean to rise to the surface. One of the major features of the region, from Mauritania to Cape Shilling, is the abundance of fisheries resources (see Bioeconomic analysis of the principal demersal fisheries in the northern zone of CECAF, Dakar, COPACE/TECH/82/45, 108 p.).

4. The seven Member States of the Sub-Regional Fisheries Commission (SRFC) cover a total surface area of 1.6 million km^2 with a coastline that stretches over 3 500 km. The total population of these countries is approximately 32 million inhabitants, of whom 70 per cent live near the coastal areas. Fishing is a highly important sector in these countries as it accounts for one quarter of their economic activities. It creates jobs and caters to the food and export needs of countries in the sub-region. The number of direct and indirect jobs generated by this sector is estimated at over one million with about 30 000 fishing boats and over 1 000 industrial vessels, including 700 foreign vessels operating in the exclusive economic zones of these States under fisheries agreements, mainly with the European Union, China and South Korea. The estimated value of the annual catch is USD 1.5 billion while the projected volume of exports amounts to USD 350 million per year.

5. The fishing industry in the sub-region has been going through a crisis since 1990 due to overfishing, over-exploitation by fishermen, industrial fishing companies and especially the highly disturbing incidence of illegal, unreported and unregulated fishing (IUU fishing) (see FAO Fisheries Report No. 722, Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing, Miami, Florida, USA, 23-25 September 2003 (FAO, Rome 2004) at

www.fao.org/DCREP/006/Y5244Eoh.htm/bm 17). The FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing gives a definition of IUU fishing which was adopted for the first time by the Sub-Regional Fisheries Commission in the MCA Convention of 13 September 2012.

6. Those who engage in IUU fishing employ highly advanced technology. More and more surprising innovations are being developed particularly for fish detection, such as the use of aircraft and sonar in purse seine fishing and trawling. The emerging use of mid-water trawls, new fish-netting techniques, fish pumps, the generalization of the use of synthetic fibres, new freezing and fish-processing techniques, parent vessels and factory ships accompanied by many fishing vessels of lesser tonnage that rely on an extensive network of ports of convenience or natural shelters where unloading as well as repairs and crew rotations can be done complete the picture (see FAO, Cooperation among international institutions in relation to fisheries, document COFI/71/g (b), Appendix III, p. 15).

7. It is therefore understandable that losses in Sub-Saharan Africa should amount to USD 1 billion a year (see High Seas Task Force, Closing the Net: Stopping Illegal Fishing on the High Seas, 2006, p. 3, at www.high-seas.org/docs/HSTFFinal.web.pdf).

8. The international community has noted that IUU fishing is profitable to those practising it, who come from a limited number of countries. The world-wide value of IUU catches is estimated between USD 4 billion and USD 9 billion a year, with USD 1.25 billion of this coming from the high seas and the remainder from national jurisdictions (*ibid.*). The fishing effort in the world is 100 million tonnes per year, of which 27 per cent are IUU catches. In West Africa, the practice of IUU fishing is devastating and destructive to the marine economy and ecosystem of the region. One must see it to believe it. Vessels remain at sea for years and never call at ports in the sub-region. They conduct illegal transhipments of their catches to other vessels, receive supplies and rotate their crews at sea.

9. IUU fishing is well organized and does not adhere to the laws or regulations of coastal States. Pirate ships develop their activities with impunity, convinced

of always escaping control given that States cannot afford to establish appropriate fishery policing units and their territorial waters are not monitored.

10. The Environmental Justice Foundation (EJF) in London and Greenpeace conducted a survey in the region and produced an enlightening film (see EJFoundation.org, Greenpeace 2001, Pirate Fishing: The Scourge of West Africa, www.oceanlaw.net). It appears that trawling is a real disaster. Guinea is among the countries where IUU fishing is practised the most in the world. Its waters are not monitored due to a lack of means. Guinea has a 12-nautical-mile territorial sea reserved for local artisanal fishing. These territorial waters are invaded by foreign trawlers that sail out again from 3 am. The stories of fishermen portrayed in the film are horrifying.

11. Trawlers catch all the fish available without consideration of protected species or safety standards. They destroy the nets of local fishermen and collide with their canoes, putting their lives at risk. They use heavy nets that sweep the ocean, destroying not only marine habitat but also nurseries for juveniles, which prevents the fish from reproducing.

12. Crew are trained to sort species and select those with the highest market value. Most of the catch (almost 90 per cent) is thrown back into the sea. It is a truly horrendous sight.

13. Fishing communities are suffering. Populations along the entire West African coast live on fish, which helps to meet their protein needs. Women who have been practising the art of preserving and smoking fish for over 1 000 years now see their businesses ailing. They explain that the fishermen previously brought in fish within half a day, whereas nowadays they stay several weeks at sea for very small catches, if any.

14. Each year, Guinea loses USD 110 million due to the non-payment of licence fees, as well as thousands of jobs. Out of a hundred boats inspected in 2008, more than half were engaged in IUU fishing. These vessels tranship their catches by night to reefers that shuttle between Guinea and the port of convenience of Las Palmas in the Canary Islands. The film shows a refrigerated

cargo ship that had travelled seven times between the Guinean coast and Las Palmas. IUU catches are mixed with legally caught stocks, making them impossible to trace. Illegally caught fish are hence found in Europe in violation of prevailing European laws and regulations. The Council of the European Union adopted Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999. The EU Regulation on illegal fishing, which is based on related FAO instruments, entered into force on 1 January 2010.

15. For 2009-2010, out of 1 300 pirate ships in the West African region, only 58 were detained.

16. Charterers often falsify the technical specifications of their vessels, a practice known as marking. They also "clone" their vessels. For a vessel with a properly established fishing licence, it is not uncommon to find other fishing vessels with the same name and a photocopy of the same licence. These owners also engage in reflagging to escape the control of coastal States in areas within their territorial waters.

17. In the Nouakchott Declaration on IUU fishing, West African sub-regional States underscore the dangers and harm caused by IUU fishing and affirm their full support of the FAO IPOA-IUU and their desire to protect the waters through strict control of the fishing activities of vessels operating in the sub-region. They solemnly call on the international community to lend its support and cooperation to Member States of the SRFC in their fight against IUU fishing (Nouakchott Declaration, adopted on 20 September 2001).

18. Alongside the concerns raised by IUU fishing, the States in the West African sub-region understood the need to take measures to protect marine living resources and to preserve the marine environment by averting pollution risks. They understood that in the field of environmental protection, the *a posteriori* invocation of international responsibility of States for damage

to the marine environment was not the most felicitous approach in so far as that damage may prove to be irreversible or it may be beyond them to restore the *status quo ante*. That is why those States have adopted the precautionary principle to prevent the deterioration of the environment. They have adopted rules governing fishing-related activities such as bunkering of fishing vessels because of its influence on IUU fishing, but also the associated pollution risks. Hundreds of oil-stricken, dying marine mammals are often washed up on West African coasts. It should be pointed out that tankers extensively engage in the practice of emptying their fuel tanks in areas where there is little surveillance, and traces of fuel can be seen over tens of kilometres at sea. These are wilful acts of pollution, a common and insidious form of pollution caused by emptying the fuel and ballast tanks of tankers. In addition, there is the risk of oil slicks that can be caused by shipwrecked tankers and pollution from offshore oil production platforms, not to mention pollution from the dumping of waste.

III Facts

The vessels: flag, certificates and owners

The M/V Virginia G

19. The *M/V Virginia G* is a tanker with a gross tonnage of 857 and a net tonnage of 456. She is registered under the flag of the Republic of Panama. According to the Respondent, "[t]he vessel Virginia G . . . may also have a registration in another country" on account of the "dual ship register method" practised in Panama. According to the Applicant, the Statutory Certificate of Registration held by the vessel was issued by the Panamanian Maritime Authority on 23 August 2007 and was valid until 16 November 2011. The Certificate of Registration currently held by the vessel was issued by the Panamanian Maritime Authority on 5 October 2011 and is valid until 16 November 2016.

20. The *M/V Virginia G* was purchased in January 2000 by Penn Lilac Trading S.A. ("Penn Lilac"), a Panamanian company incorporated on 2 January 1998. According to the Respondent, Penn Lilac "has to be considered as a Spanish company, as its head office and effective place of management are in Sevilla, Spain".

21. At the material time, the captain of the *M/V Virginia G* was Eduardo Blanco Guerrero, a Cuban national. Eleven crew members were on board: seven Cubans, three Ghanaians and one Cabo Verdean.

The Iballa G

22. The *Iballa G* is a tanker with a gross tonnage of 4 182 and a net tonnage of 1 485. According to the Applicant, it flies the flag of the Republic of Panama. According to the Respondent, the *Iballa G* "is not . . . under Panamanian flag". The Statutory Certificate of Registration for the vessel was issued by the Panamanian Maritime Authority on 19 June 2007 and was valid until 23 March 2010.

23. The vessel is owned by Penn World Inc. ("Penn World"), a company having its registered office in Panama. In January 2003, Penn Lilac bought Penn World, and on the same day the *Iballa G* was bareboat chartered to Penn Lilac.

Charterparty agreement and agency commission agreement

24. On 1 January 2009, Penn Lilac concluded a charterparty agreement with Lotus Federation ("Lotus"), an Irish company that sold and supplied gas oil to fishing vessels. Under the terms of the charterparty concluded between Penn Lilac and Lotus, the *M/V Virginia G* and the *Iballa G* were to be made available to Lotus over a period of four years.

25. On 9 January 2002, Penn Lilac entered into an agency commission agreement with Gebaspe S.L. ("Gebaspe"), a Seville-based Spanish company. The Applicant states that "[w]ith Penn Lilac being involved in the sale and supply of fuel to vessels operating on the high seas, and Gebaspe S.L. acting as intermediary between fuel suppliers and owners of commercial fishing vessels, the two companies agreed that Penn Lilac would be represented by Gebaspe before the latter's clients, and that Penn Lilac would then supply those clients (namely, fishing vessel owners) with the fuel requested, through Gebaspe". The *M/V Virginia G* and the *Iballa G* would therefore be represented by Gebaspe.

The events preceding the seizure of the vessels

26. According to the Applicant, on 7 August 2009, the Las Palmas-based Spanish fishing company Empresa Balmar Pesquerías de Atlántico ("Balmar")

engaged the services of Lotus to supply fishing vessels with gas oil, to be delivered by the *M/V Virginia G*.

27. Those fishing vessels were the *Amabal I*, the *Amabal II*, the *Rimbal I* and the *Rimbal II* (collectively "the fishing vessels"). The *Amabal I* and the *Amabal II* were under the Mauritanian flag. Balmar's fishing vessels were registered in Mauritania.

28. On 14 August 2009, Balmar's agent in Guinea-Bissau, Bijagos Lda ("Bijagos"), requested written authorization from FISCAP to carry out refuelling operations in the EEZ of Guinea-Bissau. According to the Applicant, by letter of the same date, FISCAP authorized the refuelling services to be rendered to the fishing vessels. In that letter, FISCAP demanded further 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".

29. On 19 August 2009, the *M/V Virginia G*, which was at the time operating off the coast of Mauritania, received an order to sail to the EEZ of Guinea-Bissau to refuel the fishing vessels there, supplying 297 tonnes of gas oil. According to the Applicant, the total value of the gas oil cargo was USD 216 810.

30. By letter of 20 August 2009, Bijagos informed FISCAP of the coordinates, date and time of the refuelling operations to be carried out by the *M/V Virginia G*. According to the Respondent, the head of FISCAP added a written note to that letter dated 20 August 2009, which read: "Noted. It must further be determined whether the vessel in question holds the related operation authorization for the sale of fuel in the EEZ". The Respondent adds that a letter was immediately sent by the head of FISCAP on 20 August 2009, stating "... FISCAP ... further proposes that Your agency certify whether the vessel supplying fuel is duly authorized for this operation in the EEZ of Guinea-Bissau". The Respondent states that there was no reply to that letter.

31. On 20 August 2009, the *M/V Virginia G* supplied 81 tonnes of gas oil to the *Rimbal I* and 115 tonnes of gas oil to the *Rimbal II*, probably in the EEZ of Guinea-Bissau. The Applicant states that the captains of the two fishing vessels had received confirmation that they were authorized to take delivery of the fuel in question. Observers from the *Serviço Nacional de Fiscalização e*

Controlo das Actividades de Pesca (FISCAP) were on board the *Rimbal I* and the *Rimbal II* in the course of the refuelling operation.

32. After the refuelling operation, the vessels *Rimbal I* and *Rimbal II*, *Amabal I* and *Amabal II* were detained in the port of Bissau. According to the Respondent, the vessels were detained for violations related with irregularities in the provision of fuel, but they held valid fishing licences.

33. According to the Applicant, on 20 August 2009, at 2300 hours, the *Amabal II* informed the captain of the *M/V Virginia G* that the two *Amabal* vessels had been released. On 21 August 2009, 113 tonnes of gas oil were supplied to the *Amabal II*.

Boarding of the vessels in the EEZ of Guinea-Bissau

34. According to the Applicant, on 21 August 2009 at 1900 hours, the *M/V Virginia G* was in the position latitude 11° 48' north and longitude 017° 31.6' west, approximately 60 nautical miles off the Guinea-Bissau coast. After the refuelling of the *Amabal II* was completed, and when the refuelling of the *Amabal I* was about to commence, "two unidentified, Zodiac-type speedboats approached the *Virginia G* at high speed, and without prior notice or radio warning. A group of six (6) unidentified people carrying firearms (AK-type) boarded the *Virginia G* in an assault-like manner".

35. According to the captain, the boarding was carried out by men who bore no identification. The Respondent states that "... all the inspectors were regularly dressed, clearly identified as FISCAP officials, while the Navy infantry were wearing military uniform".

36. The Applicant further states that, during the assault, the crew and the officers were kept at gunpoint. The captain claims that he was prohibited from communicating with the owners of the vessel. According to the Respondent, "[a]s soon as the boarding operation ceased, the use of the vessel's communications was once again authorized". When the captain finally attempted to ask for identification from the men in question, one of them said that he was João Nunes Ca from FISCAP.

37. According to the Applicant, "[the] 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 at that point given the weather conditions, the crew being confined and the lack of nautical maps of the area. The captain, however, eventually obeyed the order, given the behaviour of the FISCAP officials". The Applicant further states that the voyage took place under very difficult conditions. The Respondent states that "[t]he journey took place in conditions considered to be adequate by the specialized sailing crew who accompanied the enforcement officials".

38. The boarding of the *M/V Virginia G* on 21 August 2009 took place at the same time as the boarding of the *Amabal I* and *II*.

The detention of the M/V Virginia G *in the port of Bissau*

39. The *M/V Virginia G* arrived in the port of Bissau on 22 August 2009 at 1400 hours and was anchored outside port. According to the Applicant, the passports of the crew and the *M/V Virginia G*'s documents were confiscated and the crew were prohibited from disembarking and the vessel from leaving.

40. According to the Applicant, the Director of Security and Operations at Gebaspe, Manuel Samper, was informed of the detention. He asked Domingo Alvarenga, from the P&I Club in Guinea-Bissau, Africargo, to assist with obtaining the vessel's immediate release.

41. On 23 August 2009, according to Mr Alvarenga, the Director General of FLSCAP informed him that the *M/V Virginia G* "was found to be in the 'territorial waters' of Guinea-Bissau, rendering refuelling services to fishing vessels without licence or authorization".

42. On 28 August 2009, Mr Alvarenga asked FISCAP for a formal clarification on the detention of the *M/V Virginia G* as well as on the possible solutions for the immediate release of the vessel.

43. According to the Applicant, on 28 August 2009 at 1300 hours, eight FISCAP inspectors went on board the *M/V Virginia G* and carried out an inspection. At the end of the inspection, the captain was asked to sign a report. The Respondent states that the report was signed by the captain, who was extremely cooperative with the inspection.

44. The vessels *Amabal I* and *Amabal II*, which had been detained on 21 August 2009 at the same time as the *M/V Virginia G*, were released on 28 August 2009 following a decision by the Inter-Ministerial Commission for Maritime Surveillance dated 27 August 2009. The Respondent states that that decision was taken "following the request from the Ambassador of Spain" due to "the good cooperation relations between Guinea-Bissau and the Kingdom of Spain in fisheries". The Respondent adds that a fine of USD 150 000 was imposed on each of the fishing vessels, although "the vessels eventually left without paying the fine, due to the [Spanish] Ambassador's insistence".

45. By letter of 31 August 2009, FISCAP informed the owner of the *M/V Virginia G* about a decision taken by the Inter-Ministerial Commission for Maritime Surveillance (CIFM), explaining the reasons for the boarding of the *M/V Virginia G*. It was stated in that letter that the CIFM had taken the decision to

> Confiscate ex-officio the oil tanker *Virginia G* with its gear, equipment and products on board in favour of the State of Guinea-Bissau for the repeated practice of fishing-related activity in the form of unauthorized sale of fuel to ships fishing in our EEZ, namely the *AMABAL II*, in accordance with paragraph 1 of article 52, as currently worded in Decree-Law No. 1-A/2005 in conjunction with article 3 c) and article 23, all of Decree-Law No. 6-A/2000.

46. Mr Alvarenga informed Mr Samper that the FISCAP decision could be appealed within 15 days or it would be possible to negotiate a security for the release of the vessel. By letter dated 4 September 2009, Penn Lilac replied to FISCAP, rejecting the allegations that the *M/V Virginia G* had committed any offence. It asked for a swift solution for the situation, including the fixing of a bond or other security for the immediate release of the vessel, its crew and cargo.

47. By letter dated 11 September 2009, FISCAP replied to the letter sent on 4 September 2009, listing the grounds for the boarding of the *M/V Virginia G*. According to that letter, the refuelling operation on 20 August 2009 constituted "in itself a continued practice of the infraction of the General Law of Fisheries, namely, the realization of fishing-related operations without authorization; the

aforementioned behaviour is punished by article 52 of the General Fisheries Law (LGP), as worded in DL 1-A/2005".

48. By letter dated 14 September 2009, Penn Lilac replied to FISCAP's letter of 11 September 2009 to dispute the contents and to request the release of the vessel, crew and cargo.

49. According to the Applicant, "... by letter dated 15 September 2009, the vessel's P&I Club agent delivered a letter to the Inter-Ministerial Commission of Maritime Surveillance, where an extension to the legal period was required before legal proceedings were commenced, pending a reply from FISCAP to the letter dated 14 September 2009".

50. By letter of 23 September 2009, FISCAP informed the owner of the *M/V Virginia G* that "[c]onsidering 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".

51. By letter of 25 September 2009, Penn Lilac was informed by FISCAP of the confiscation of the vessel and all cargo on board owing to the stated violation of the Guinea-Bissau fishing laws, as the owner had not responded to the notification. According to the Applicant, Penn Lilac replied by letter dated 28 September 2009, denying the alleged failure to respond to the notification of confiscation and once again requesting FISCAP to release the vessel, its crew and the cargo. According to the Applicant, "the 72-hour ultimatum imposed therein also had not lapsed when the notice of confiscation was served by FISCAP letter dated 25 September 2009".

52. According to the Applicant, by letter dated 30 September, received by Africargo on 5 October 2009, FISCAP stated that "the vessel's gas oil would be auctioned by public tender, and that the owners were invited to partake of the auction, adding that under the law of Guinea-Bissau, they had pre-emption

rights". The owner of the vessel was informed that the FISCAP representatives had told the captain "that they had taken this measurement/sounding since no reaction/reply had been sent to the Ministry of Fisheries/FISCAP's letter wherein the option was granted to convert the confiscation to a fine of six hundred thousand US Dollars (US$ 600 000). This letter was never received by the owner (Annex 4) or by its law firm or, indeed, by the P&I Club who had been in constant contact with FISCAP throughout the previous weeks and months".

53. On 27 October 2009, FISCAP representatives again boarded the *M/V Virginia G* and inspected its cargo tanks. The captain was informed that on 28 October 2009 "the vessel would have to be docked at the port, and that the crew would have to abandon the vessel".

54. Between 28 October and 5 November 2009, the *M/V Virginia G* remained anchored in the bay of Guinea-Bissau, guarded by armed soldiers.

55. In the meantime, Penn Lilac had filed a request for the suspension of the confiscation measures before the Regional Court of Bissau. By order dated 5 November 2011, the Regional Court of Bissau ordered 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 Trading) crew is allowed entry to the vessel to proceed with their usual services".

56. According to the Respondent, "... this decision was void, as it was passed without having heard the competent authorities in the case". For this reason, adds the Respondent, "the Attorney General of the Republic [of Guinea-Bissau] decided to appeal against the ruling granting the interim measure, and this appeal has the effect of suspending enforcement thereof".

57. On 6 November 2009, armed soldiers once again boarded the *M/V Virginia G* and the captain was forced "to berth the vessel against a pier so that the cargo of gas oil on board could be discharged". Penn Lilac's attorneys took steps which made it possible "to avert the action of the military. The vessel was returned to anchor on 12 November 2009". Between that date and 19 November 2009, the vessel remained anchored and guarded by armed soldiers.

58. On 20 November 2009, according to the Applicant, armed soldiers forced the captain to berth the vessel at the pier for discharge of the gas oil on board the *M/V Virginia G*.

59. According to the applicant,

> [t]he captain was handed a letter signed by the Secretary of State for Finance, José Carlos Varela Casimiro, forward-dated to 30 November 2009 (Annex 56) and addressed to the Compañía de Lubricantes y Combustíbles de Guinea-Bissau (CLC) . . . However, the letter stated:
>
> By virtue of Decision No 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. No 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.

60. According to the Applicant, the captain of the *M/V Virginia G* obeyed the orders under coercion and proceeded with berthing manoeuvres. "The *M/V Virginia G*'s tanks were left completely dry".

Situation of the owner during the 14 months of detention

61. According to the Applicant, the owners of the vessel, having lost the use of the *M/V Virginia G*, ran into serious financial difficulty. The charter contract with Lotus was rescinded. Gebaspe and Hidrocasa, whose main source of income was their contract with Penn Lilac, were declared bankrupt.

62. On 6 September 2009 at 0200 hours, while it was berthed in the Reina Sofía pier of the port of Las Palmas, the *Iballa G* was seized by creditors, for

failure by Penn Lilac to pay its creditors and crew members. The *Iballa G* was detained in the port of Las Palmas.

Release of the vessels

63. With regard to the *M/V Virginia G*, according to the Applicant, "[b]y a unilateral decision dated 20 September 2010 (Decision No. 5/CIFM/2010), . . . the Guinea-Bissau Secretary of State for Fisheries issued a release order for the vessel without penalty, revoking the decision to confiscate/seize the vessel (Annex 58), and stating:

> 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 EEZ 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."

64. According to the Respondent, it was decided to release 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, together with the persistent request by the Embassy of Spain for its release . . .". According to the Applicant, "it was Guinea-Bissau's unlawful and unjustified measures that caused the *M/V Virginia G* to deteriorate to such an extent".

65. According to the captain of the *M/V Virginia G*, the crew members recovered their passports in January 2010, and some of them returned home. The captain states that those who remained suffered from poor conditions on board. The vessel was released in October 2010.

66. Upon the release of the *M/V Virginia G*, its owners immediately commenced preparations to repair the vessel to put it back in service, following a preliminary survey by Panama Shipping Registrar Inc. to determine the scope of the repairs that needed to be carried out.

67. The *M/V Virginia G* started operating again in December 2010 by virtue of a charterparty agreement entered into with another gas oil provider on 10 December 2010. According to the Applicant, the gas oil cargo transported by the *M/V Virginia G* was never returned.

IV Jurisdiction

68. The present proceedings between Panama and Guinea-Bissau were introduced by notification of a special agreement. It is by the exchange of letters of 29 June and 4 July 2011 that the Republic of Panama and the Republic of Guinea-Bissau agreed to submit the dispute between the two States relating to the *M/V Virginia G* to the jurisdiction of the International Tribunal for the Law of the Sea and to transfer to the Tribunal the arbitration proceedings initiated by Panama by its notification of 3 June 2011.

69. The notification "to submit [the] dispute to the Tribunal . . . regarding a damages claim for the arrest of vessel VIRGINIA G" was made on 4 July 2011:

> Dear Registrar,
>
> Pursuant to article 55 of the Rules of the Tribunal, I have the honour to notify the International Tribunal for the Law of the Sea of a Special Agreement to submit a dispute to the Tribunal, concluded between the Republic of Panama and the Republic of Guinea-Bissau on dates 29 June 2011 and 4 July 2011 regarding a damages claim for the arrest of vessel VIRGINIA G. Please find enclosed a copy in pdf of our Notification of submission of the VIRGINIA G dispute to arbitration dated 3 June 2011.

The address for service to which all communications concerning the case are to be sent in accordance with article 56, paragraph 1, of the Rules is as follows: SJ Berwin LLP – Kurfurstendamrn 63-10707 Berlin – Germany – Tel. number: +49 (0)30 88 71 71 50 – Fax number: +49 (0)30 88 71 71 66 – Email: berlin©siberwin.com.

Could you also please send any communication to my following emails: ramon.garciagallardo@sjberwin.com and brussels@sjberwin.com

Yours faithfully,

Ramón García-Gallardo
Counsel/Agent for the Republic of Panama

70. The dispute is submitted to the International Tribunal for the Law of the Sea on the following conditions:

1. That the dispute shall be deemed to have been submitted to the International Tribunal for the Law of the Sea upon agreement between the two governments and on a date so agreed.
2. That the written and oral proceedings before ITLOS shall comprise a single phase dealing with all aspects of the merits (including damages and costs).
3. That the written and oral proceedings shall follow the timetable set out in a schedule to be agreed by the governments.
4. That ITLOS shall address all claims for damages and costs and shall be entitled to make an award on the legal and other costs incurred by the successful party in the proceedings before it [see Notification of submission of the VIRGINIA G dispute to arbitration dated 3 June 2011, p. 3].

[Letter from the Permanent Mission of the Republic of Guinea-Bissau to the United Nations dated 29 June 2011]

Dear Sir,

I refer to your letter of June 2011, notifying my country, Guinea-Bissau, that you have instituted Annex VII Arbitral Tribunal against Guinea-Bissau in the dispute concerning the M/V Virginia G. Upon instructions of my Government I would like to convey to you the agreement of the

Republic of Guinea-Bissau with your proposal to transfer the case to the International Tribunal of the Law, whose jurisdiction in this case Guinea-Bissau accepts fully.

My government therefore takes it that your afore-mentioned proposal and this letter constitute a special agreement between the two Parties for the submission of the case to ITLOS.

My Government equally takes it that having acquiesced to your proposal to submit the case to ITLOS, the Annex VII Arbitral Tribunal will therefore be determined and no further steps are needed to be taken by Guinea-Bissau for appointment of the arbitrator it should appoint within 30 days.

My Government would very much appreciate it to receive your confirmation of this understanding as soon as possible.

Sincerely Yours,

Signed (illegible)

João Soares da Gama
Ambassador,
Permanent Representative

[Letter of 4 July 2011]

Dear Ambassador de Gama,

We thank you for your letter dated 29 June 2011 (with the reference number in caption) of which we acknowledge delivery.

We have noted the agreement of the Republic of Guinea-Bissau to transfer the case to the International Tribunal of the Law of the Sea (ITLOS) and the acceptance of jurisdiction in that respect.

> We confirm that our proposal to submit the matter to ITLOS, as contained in our letter dated 3 June 2011, and Guinea-Bissau's acceptance thereto, as contained in your letter dated 29 June 2011, is sufficient to consider that the two governments have come to a Special Agreement to submit the case to ITLOS, in accordance with article 55 of the Rules of ITLOS.
>
> To this end, we shall notify the Register a certified copy of your letter dated 29 June 2011 and a copy of this letter.
>
> We will also approach the President of ITLOS H.E. José Luis Jesus in order to ask him to convoke the parties for a consultation meeting by teleconference. Should it be convenient for all parties, we will suggest to hold the consultation as early as possible.
>
> Yours sincerely,
>
> **Ramón García-Gallardo**
> Counsel/Agent for the Republic of Panama

71. It is the special agreement which provides the basis for the jurisdiction of the Tribunal. The dispute as to the merits is submitted to the Tribunal on behalf of Panama as Applicant and Guinea-Bissau as Respondent. The Parties have accepted the jurisdiction of the Tribunal in the present case. They have discussed in substance all the questions to be presented to it. That conduct on the part of the Parties would also suffice to provide a basis for the Tribunal's jurisdiction.

V Admissibility

72. In its Counter-Memorial, Guinea-Bissau raised three objections to the admissibility of the claims of Panama. The first concerns the nationality of the *M/V Virginia G*, the second relates to the right of diplomatic protection concerning foreigners and the third to the failure to exhaust local remedies.

73. The Republic of Panama questions the right of the Republic of Guinea-Bissau to raise objections to admissibility, adducing the jurisdictional act (the special agreement of 4 July 2011) and the Rules of the Tribunal (article 97, para. 1).

74. According to Panama, the Respondent is precluded, first, because the jurisdictional act prevents it from raising an objection to admissibility and it acted in bad faith.

75. The act in question provides that:

> The written and oral proceedings before ITLOS shall comprise a single phase dealing with all aspects of the merits (including damages and costs).

76. Panama contests the Tribunal's finding in the *M/V "SAIGA" (No. 2) Case* (para. 53) on which reliance is placed by Guinea-Bissau. The Tribunal states that "as stated therein, the article applies to an objection 'the decision upon which is requested before any further proceedings on the merits' ". It follows that 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.

77. In the view of Panama, such an interpretation is 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 justification for the time-limit to start running upon the filing of the request. 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, would lead to the conclusion that the text of article 97(1) indicates and contemplates three distinct circumstances, for each of which the 90-day limit applies.

78. Panama considers that this reasoning is supported by the construction of the provision on which article 97 is based, that is article 79(1) of the Rules of the International Court of Justice, which lends support to Panama's contention that there is a time-limit within which objections to admissibility can be raised and that the time-limit for raising such an objection, if it is brought within the stipulated time-limit, must be considered before the pleadings on the merits, at any rate in the absence of a clear agreement between the Parties to this case.

79. In the present case, the proceedings were instituted on 4 July 2011, and Guinea-Bissau was, therefore, able to raise objections as to admissibility, in

writing, by 2 October 2011. Furthermore, Panama continues, on no occasion did Guinea-Bissau express any objection to the admissibility of Panama's claims, nor did it reserve any right to do so. It is suggested that Guinea-Bissau's choice of timing for submitting its objections is also clearly in bad faith. It failed to exercise its right under article 97(1) and deliberately delayed raising its objections to admissibility until after Panama's Memorial was filed. It is now precluded from raising any such objections.

80. 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 authorize the International Tribunal to adjudicate 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.

81. Guinea-Bissau disputes this interpretation. It asserts its right to contest the admissibility of Panama's claims. In its view, it does not necessarily follow from acceptance of the Tribunal's jurisdiction that the claims advanced by Panama are automatically admissible for the purpose of the present proceedings. The distinction is generally recognized in international law between, on the one hand, admissibility of a State's claims before an international tribunal and jurisdiction and, on the other, the merits. Guinea-Bissau submits that it is not precluded from raising objections to admissibility of the claims of Panama by article 97, paragraph 1, of the Rules of the Tribunal. It cites the Tribunal's decision in the *M/V "SAIGA" (No. 2) Case* (para. 53 cited above).

82. Guinea-Bissau advances three arguments for its submission. First, in the Special Agreement concluded by the exchange of letters, Guinea-Bissau did not waive any objection as to the admissibility of the claims, neither was there any reason for any such waiver.

83. Second, the purpose of the Special Agreement, namely choosing the Tribunal for the proceedings instead of an Annex VII arbitration, excluded any such waiver. In fact, in the letter of 29 June 2011 Guinea-Bissau agreed with Panama's "proposal to transfer the case to the International Tribunal". Hence

the dispute as a whole has been transferred to the Tribunal while no waiver as to any objection to admissibility was agreed.

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

85. Therefore, states Guinea-Bissau, it is its right to submit certain procedural issues relating to the admissibility of the claims of Panama in its Counter-Memorial, which is its first written pleading.

86. In considering the question of admissibility, reference should be made to the jurisdictional act of 2011 concluded between the two Parties to the dispute, whereby they decided to submit the dispute to the Tribunal, and to the procedural rules which they wished to see applied.

87. The Tribunal's first duty, when called upon to interpret and apply the provisions of the jurisdictional act, is to endeavour to give effect, according to their natural and ordinary meaning, to those provisions viewed in their context. If the relevant words in their natural and ordinary meaning make sense in their context, that should be the end of the matter (*Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 8).

88. The provisions of the jurisdictional act about which the Parties differ read as follows:

> The written and oral proceedings before ITLOS shall comprise a single phase dealing with all aspects of the merits (including damages and costs).

89. The relevant words here with regard to the discussion on admissibility are "a single phase dealing with all aspects (including . . .". Proceedings on preliminary objections were long considered a distinct phase of the case. It was in 1952, with regard to the *Ambatielos case*, that the International Court of Justice said: "[The Court] decided that, in future, these proceedings would be

treated as an incident of proceedings on the merits and not as a separate case." (*Ambatielos* (*Greece v. United Kingdom*), *Merits, Judgment, I.C.J. Yearbook 1952-1953*, p. 89).

90. In 1972, that decision was embodied in article 79, paragraph 1, of the Rules of the ICJ. That provision is reflected in article 97, paragraph 1, of the Rules of the Tribunal. Given this and bearing in mind the relevant words, the jurisdictional act should be interpreted as meaning that the Parties wish the objections to admissibility to be joined to the merits, the wording "single phase dealing with all aspects of the merits (including damages and costs)" indicating the joinder of the preliminary objections to the merits.

91. Indeed, endorsing the practice, article 97, paragraph 7, of the Rules embodies this approach. It reads: "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".

92. Joinder to the merits would also be the result of an examination of the nature of the objections to admissibility in question. They are in fact so closely related to the merits or to points of fact or of law bearing upon the merits that one could not consider them separately without touching upon the merits (see *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B No. 75*, pp. 55-56; *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), *Second Phase, Judgment, I.C.J. Reports 1970*, p. 4; *Certain Norwegian Loans* (*France v. Norway*), *I.C.J. Reports 1956*, p. 73; *Right of Passage over Indian Territory* (*Portugal v. India*), *Preliminary Objections, Judgment, I.C.J. Reports 1957*, pp. 150-152).

93. In other words, joinder to the merits is required inasmuch as a decision on the objections requires consideration of the whole or virtually the whole of the merits, in short the essential points of the claims of Panama, because what Guinea-Bissau is challenging is not the admissibility of the application in the light of procedure, but the right which provides the basis for the application. These are preliminary objections of substance.

94. A judicial decision in favour of an application based on this type of objection in itself results in putting an end to the dispute as a whole, because the findings of law emanating from said decision on the objection completely eliminate the adversarial contest which had arisen from the dispute. These preliminary objections of substance are entirely in keeping with the well-

established principle, under the theory of international litigation, that each party to an international dispute is entitled to assert before the tribunal called upon to resolve the dispute any arguments it deems appropriate, provided they are relevant to the dispute. This principle underlies a number of provisions in the statutes and rules of international jurisdictions. For example, article 88, paragraph 1, of the Rules of the Tribunal provides: "When, subject to the control of the Tribunal, the agents, counsel and advocates have completed their presentation of the case, the President of the Tribunal shall declare the oral proceedings closed . . .".

95. It happens that rules adopted by international jurisdictions are adopted in the light of preliminary procedural objections. "However, it is of fundamental importance to note that the issues raised by a . . . (preliminary) objection (of substance), while they can be characterized as 'issues of the merits' as much as those raised by the application instituting the proceedings in respect of the interpretation and application of the legal norm invoked in that application, remain distinct from the merits of the case of which the tribunal is seized by that same application, said merits having as their identifying element the allegations and submissions around which the application itself takes shape" (see G. Sperduti, "La recevabilité des exceptions préliminaires de fond dans le procès international", *Rivista di Diritto internazionale*, 1970, Vol. 53, pp. 461-490; esp. p. 485).

Examination of the objections

96. The Government of Guinea-Bissau maintained that Panama's claims were inadmissible in several respects. The first objection to admissibility pertains to the nationality of the *M/V Virginia G*.

97. Guinea-Bissau contests in particular:

1. The nationality of the *M/V Virginia G*;
2. The right to exercise diplomatic protection of foreigners; and
3. Non-exhaustion of local remedies.

98. In its view:

> . . . According to submission no. [4] in its Memorial (p. 81), Panama claims that the actions taken by Guinea-Bissau, especially those taken on the

21 August 2009, against the VIRGINIA G, violated Panama's right and that of its vessel to enjoy freedom of navigation and other internationally lawful uses of the sea in terms of Article 58(1) of the Convention. Guinea-Bissau alleges that Panama claims are not admissible because of the missing "genuine link" (article 91(1) of the Convention) between VIRGINIA G and Panama.

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

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

. . . The requirement of a genuine link between the flag State and the ship qualifies the right of every State provided in article 91(1), first sentence, of the Convention to "fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag". In this respect, the function of the genuine link is to establish an international minimum standard for the registration of ships, certainly an important function in a time of increasing numbers of open registers.

. . . From the conception of the "genuine link" follows that a flag State can only then effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as required

under article 94(1) of the Convention, when it can exercise appropriate jurisdiction and control also over the owners of the ships. In the case of a bare boat charter, mutatis mutandis, control is necessary over the charterer or operator. This results from several provisions of the Convention: for instance, article 94(4)(a) obliges the flag State to survey the ships flying its flag. Surveying the ships by a qualified surveyor in the flag State and abroad is a necessary but not a sufficient condition for an effective exercise of the flag State's jurisdiction and control. In order to take action necessary to remedy the situation if, for example, a ship flying its flag would not conform with its rules and regulations on manning of ships, labour conditions and training of crews as provided in article 94(3), the flag States must have jurisdiction over the owner or operator of the ship as well. Otherwise its administrative and/or criminal sanctions, if necessary, would be practically ineffective.

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

. . . Every shipping register has to conform with certain basic conditions of the genuine link. According to what has been mentioned before with respect to the legal obligations of the flag State under articles 94 and 217 of the Convention, a basic condition for the registration of a ship is that also the owner or operator of the ship is under the jurisdiction of the flag State. Nevertheless international law, no doubt, leaves it to the flag State to determine the basis of this jurisdiction, which can be, for example, nationality or residence or domicile of the owner or operator of the

ship. But it is not possible that no link exists all between the ship and the flag State.

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

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

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

. . . In relation to the ownership, art. 8(2) of the UN Convention states that:

> "the laws and regulations of the flag State shall include appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation. These laws and regulations should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag".

. . . In relation to manning of the ship, art. 9(1) of the UN Convention states that:

> "subject to the provisions of article 7, a State of registration, when implementing this Convention, shall observe the principle that a satisfactory part of the complement consisting of officers and crew of ships

> flying its flag be nationals or persons domiciled or lawfully in permanent residence in that State".

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

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

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

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

. . . In cases of lack of a genuine link between the flag State and the ship, the coastal State should not be bound to acknowledge the right of navigation of such ship in its exclusive economic zone. This results by analogy with the rule of Article 92(2) of the Convention, which states:

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

. . . As a procedural consequence the other State may hence contest an asserted violation of this right as inadmissible in a dispute submitted to the Tribunal, because only such claims are admissible in the pending proceedings before the Tribunal, which have a valid basis in international law.

> . . . Contrary to what Panama asserts, in the M/V SAIGA Case No. 2 the Tribunal considered "that the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties". Guinea-Bissau submits evidence that the VIRGINIA G cannot be considered of Panamanian nationality.
>
> . . . As Brownlie refers:
>
> > ". . . It is possible to postulate a general principle of genuine link relating to the *causa* for conferment of nationality (and converse for deprivation), a principle distinguishable for that of effective link".
>
> . . . Guinea-Bissau alleges therefore that the registration of the VIRGINIA G under the flag of Panama does not meet the condition of an effective jurisdiction of the flag State. In fact, neither the ship owner nor the manning of the ship are of Panamanian origin, which are essential conditions to have a genuine link established between the State and the ship under article 91(1) of the Convention.
>
> . . . Panama is in fact very well known for accepting the registry of any ship without asserting the existing of a link between the ship and the State. As we can see in the Merchant Marine Circular no 5 of the Panama Maritime Authority (Annex 9) there is no verification of whatsoever link between Panama and ships that are registered under Panama's flag."
> [Counter-Memorial of the Republic of Guinea-Bissau, paras. 28 to 47]

99. With regard to the non-exhaustion of local remedies, Guinea-Bissau explains:

> . . . Contrary to what Panama asserts in paragraphs 155 to 187 of its Reply it is clear that the submissions 4, 10, 14 and 15 presented by Panama in the interest of individuals or private entities are inadmissible, because these individuals or private entities have not exhausted the local remedies available to them in Guinea-Bissau.
>
> . . . Although these claims can be based in international law they are at the same time subject to the internal law of Guinea-Bissau, which has

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

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

. . . The same happens to the cargo: its owner is not identical with the owner of the VIRGINIA G. The administrative order to discharge the gas oil in Bissau was issued under the territorial jurisdiction of Guinea-Bissau and could be impeached there, as it was a previous court order against that discharge.

. . . The decision of the Court was not disregarded based on an "internal" opinion as it was the opinion of the Attorney-General, who is independent of the Government according to Guinea-Bissau's law, who considered the decision to be null and void, owing to the violation of Article 400 No 2 of the Civil Procedure Code.

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

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

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

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

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

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

. . . Guinea-Bissau reaffirms that Penn Lilac Trading, S.A., although incorporated in Panama has to be considered as a Spanish company, as its head office and effective place of management are in Seville, Spain, as it is recorded by the Instituto Marítimo Español and in the maritime websites.

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

. . . 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.

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

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

> . . . The existence of a charter party of the VIRGINIA G and IBALLA G between Gebaspe SL and Lotus Federation is totally irrelevant for this case. Guinea-Bissau is totally unaware of these companies, has nothing to do with such contract, and was never notified of its existence and content.
>
> . . . As has already been referred to, the contract listed as Annex 13 of the Memorial of Panama does not allow for any payment to Penn Lilac as it is specifically stated therein that the contract will cease with the immobilization of the ship (clause 17), and so it ceased to be in force with the arrest of the VIRGINIA G, which makes its invocation irrelevant.
>
> . . . In paragraphs 193 to 199 of its Reply Panama doesn't refer anything relevant to contest these facts.
>
> . . . Guinea-Bissau reaffirms that it is irrelevant the presence of fishing observers from FISCAP on board the recipient vessels is irrelevant. As already referred in paragraphs 117 to 120 of its Counter-Memorial fishing observers who are on fishing vessels cannot perform enforcement operations, a legal competence of FISCAP's inspectors, the only entities competent to perform enforcement activities.
>
> . . . The fact that the agency *Bijagós* informed the fishing vessels of the existence of a licence is not relevant, given that this is not an official communication, besides having been obtained days after the seizure of the ship.
> [Rejoinder of Guinea-Bissau, paras. 99 to 119]

100. The Tribunal has once again missed an opportunity to give a decision embodying a response to this fundamental question which has needed answering since 1955. It could have established the legal status of the concept of genuine link. It has again shied away from examining the potential relevance of the constituent elements of the genuine link, just as it did in the *M/V "SAIGA" (No. 2) Case*.

101. In its Judgment of 14 April 2014, the Tribunal explains:

> 153. It is a well-established principle of customary international law that the exhaustion of local remedies is a prerequisite for the exercise of

diplomatic protection. This principle is reflected in article 14, paragraph 1, of the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006, which provides that "[a] State may not present an international claim in respect of an injury to a national . . . before the injured person has . . . exhausted all local remedies". It is also established in international law that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State.

154. The Tribunal thus has to consider whether the claims of Panama relate to a "direct" violation on the part of Guinea-Bissau of the rights of Panama. If the answer is in the affirmative, the rule that local remedies must be exhausted does not apply.

155. It should be recalled in this respect that the Tribunal in the *M/V "SAIGA" (No. 2) Case*, faced with a similar situation, proceeded to examine the nature of the rights which Saint Vincent and the Grenadines claimed had been violated by Guinea (see *M/V "SAIGA" (No. 2)* (*Saint Vincent and Grenadines* v. *Guinea*), *Judgment, ITLOS Reports 1999*, p. 10, at p. 45, para. 97). The Tribunal will follow the approach of the *M/V "SAIGA" (No. 2) Case* in the present case.

156. The rights which Panama claims have been violated by Guinea-Bissau are set out in its final submissions referred to in paragraph 54. The Tribunal notes that most provisions of the Convention referred to in the final submissions of Panama confer rights mainly on States. The Tribunal further notes that in some of the provisions referred to by Panama, however, rights appear to be conferred on a ship or persons involved. The term "ship" in those provisions can be understood to denote persons with an interest in that ship, such as an owner or operator of it.

157. When the claim contains elements of both injury to a State and injury to an individual, for the purpose of deciding the applicability of the exhaustion of local remedies rule, the Tribunal has to determine which element is preponderant. In the present case, the Tribunal is of the view that the principal rights that Panama alleges have been violated by Guinea-Bissau include the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas in the exclusive eco-

> nomic zone of the coastal State and its right that the laws and regulations of the coastal State are enforced in conformity with article 73 of the Convention. Those rights are rights that belong to Panama under the Convention, and the alleged violations of them thus amount to direct injury to Panama. Given the nature of the principal rights that Panama alleges have been violated by the wrongful acts of Guinea-Bissau, the Tribunal finds that the claim of Panama as a whole is brought on the basis of an injury to itself.
>
> 158. The Tribunal considers that the claim for damage to the persons and entities with an interest in the ship or its cargo arises from the alleged violations referred to in the preceding paragraph. Accordingly, the Tribunal concludes that the claims in respect of such damage are not subject to the rule of exhaustion of local remedies.
>
> 159. In light of the above conclusion, the Tribunal does not consider it necessary to address the arguments of the Parties on either the question of a jurisdictional link or the question whether local remedies were available and, if so, whether they were effective.

102. With regard to the other two objections, it should be noted that Panama stated that it was bringing this action "within the framework of diplomatic protection", which has its own requirements. The conditions for its exercise are the exhaustion of local remedies and "clean hands".

103. According to Panama,

> . . . 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).
>
> . . . 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).

. . . [*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.

. . . 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 or 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.

. . . 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.

. . . 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 or 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.

. . . 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 Slate 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.
[Reply of the Republic of Panama, paras. 148 to 154]

104. In the view of Guinea-Bissau,

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

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

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

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

. . . Article 18 of the Draft Articles on Diplomatic only refers to the right of the State of nationality of a ship to seek redress on behalf of the crew members of that ship, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act, which is not the case here.

. . . Contrary to what Panama asserts, this is not a case involving vessels where a number of nationalities and interests are concerned, therefore

the judgment of the *M/V SAIGA No. 2 Case* quoted by Panama is not applicable. In fact, neither the owner nor even a single member of the crew of VIRGINIA G is of Panamanian nationality.

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

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

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

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

. . . Panama is therefore not entitled to bring this action against Guinea-Bissau within the framework of diplomatic protection.
[Counter-Memorial of the Republic of Guinea-Bissau, paras. 52 to 61]

105. As regards the exhaustion of local remedies, Panama explains:

. . . 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 reme-

dies available to them in Guinea-Bissau. Panama rejects Guinea-Bissau's contentions, for the reasons set out hereunder.

. . . 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".

. . . 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:

. . . 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:

. . .

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

. . .

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

. . .

. . . 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;

. . . 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;

. . . 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

. . . 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).

. . . 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", 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. Put

another way, Panama is claiming a violation of its own right to secure, in respect of vessels flying its flag, freedoms for which the Convention provides.

. . . 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.

. . . 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).

. . . 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).

. . . 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.

. . . 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.

. . . 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, it crew and cargo as it was in port.

. . . 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.

. . . 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 vessels and her crew were not merely "involuntarily" in the Port of Bissau, as Guinea-Bissau attempts to conveniently portray the circumstances.

. . . 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.

. . . It canned 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.

. . . 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.

. . . 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.

. . . In the alternative, and without prejudice to the above, the local remedies rule cannot apply where there is no effective remedy to exhaust. The texts and cases on the rule of exhaustion of local remedies have been studied by Professor Ian Brownlie 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.

. . . 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).

. . . 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.

. . . 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.

. . . 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).

. . . 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).

. . . 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.

. . . 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 judgment 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 the Panama's Memorial).
[Reply of the Republic of Panama, paras. 155 to 180]

106. Guinea-Bissau states:

. . . Guinea-Bissau further contests the admissibility of certain claims espoused by Panama in the interest of individuals or private entities, because these individuals or private entities have not exhausted the local remedies available to them in Guinea-Bissau.

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

Article 295
Exhaustion of local remedies

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

. . . 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.

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

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

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

c) Guinea-Bissau is to immediately return the gas oil confiscated on 20 November 2009, of equivalent or better quality, or otherwise pay adequate compensation (Memorial, page 86, submission 14);

d) Guinea-Bissau is to pay in favour of Panama, the VIRGINIA G, her owners, crew and all person and entities with an interest in the vessel's operations (including the IBALLA G), compensation for damages and losses caused as a result of the aforementioned violations (Memorial, page 78, submission 15).

. . . Although these claims can be based in international law they are at the same time subject to the internal law of Guinea-Bissau, which has rules about the responsibility of the State. As the owner of the ship brought an action before the court of the Bissau with the same foundation of these proceedings, it is clear that the local remedies are not exhausted.

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

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

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

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

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

. . . In fact, such link has been established by the VIRGINIA G, when the ship came voluntarily into the exclusive economic zone of Guinea-Bissau for the purpose of bunkering foreign fishing vessels. The VIRGINIA G was chartered especially for bunkering activities off the coast of West Africa, including bunkering in the mentioned zones of Guinea-Bissau, and its gas oil cargo should serve, and actually did serve, this purpose.

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

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

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

> Therefore it is clear that local remedies are not exhausted according to Article 295 of the Convention.
> [Counter-Memorial of the Republic of Guinea-Bissau, paras. 62 to 75]

107. Diplomatic protection proceeds from the personal jurisdiction of the State. The link of allegiance is the link of nationality. This legal institution, which is customary in nature, may manifest itself in purely procedural actions or in litigation: a government may take action through its diplomatic agents (like Spain or Cuba in this case) or the State may espouse an individual claim which gives rise to an action by which the State appropriates the claim and brings the dispute before an international court or tribunal (like Panama in this case); the national can be a natural person, a legal person or the vessel.

108. By their very nature, diplomatic protection and international responsibility are closely linked. The latter has its origins in an internationally wrongful act while the former has its origins in damage suffered by a national of a State. The State takes up the damage suffered by the national whom it will represent in an international forum, as the individual does not enjoy international immediacy. He must have satisfied both of two necessary conditions. First, he must have exhausted all local remedies. Diplomatic protection is then subject to a final judicial decision. And the individual is also under an obligation to act in a certain manner: his conduct must be irreproachable. This is also known as having "clean hands".

109. The local remedies rule represents a procedural condition which draws the individual into the proceedings. It requires him in the case of dispute first to seek a solution in the domestic legal system.

110. The rule is fundamental because it makes the proceedings subject to the conduct of the individual in domestic law. It is inseparable from diplomatic protection and constitutes a customary rule of international law, which is to say it is binding on all States.

111. Diplomatic protection is an international claim linked to State responsibility and the rule allows State sovereignty to be respected. Where damage has been caused to an individual, that individual must seek to obtain reparation from the courts or tribunals of the State alleged to be responsible. It has been asserted that the international responsibility of the State was linked to the application of the rule:

> The respondent State has availed itself of the opportunity of redressing the alleged wrong by its own means and within the framework of its own domestic legal system. [A. Trindade, "Origin and historical development of the rule", RBDI, 1976, p. 499-527]

112. In the *Mavrommatis case*, the Permanent Court stated:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.
> [*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J.*, p. 12].

113. Similarly, in the *Case concerning the Electricity Company of Sofia and Bulgaria*, the Permanent Court stated:

> The local remedies rule implies the exhaustion of all appeals, including appeals to the Court of Cassation, a decision by which alone renders the judgment final either by annulling the judgment of the Court of Appeal and sending the case back for a re-trial, or by rejecting the appeal.
> [*Judgment, P.C.I.J., 1939, Series A/B, no. 77,* p. 79)]

114. In the *Interhandel case*, the ICJ stated:

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.
> [*Interhandel* (*Switzerland v. United States of America*), *Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27]

115. In the *Case concerning Elettronica Sicula*, the Court speaks of "an important principle of customary international law" (*Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America v. Italy*), *Judgment, I.C.J. Reports 1989,* p. 42).

116. The fundamental basis for the rule is ensuring respect for the sovereignty of the State because, according to the Court, direct intervention by the State of nationality would be a violation of "an important principle of customary international law". Such intervention could also be viewed as interference in

the internal affairs of a State. For that reason, the rule features prominently in treaty relations between States.

117. The rule is a necessary precondition for the implementation of diplomatic protection. The victim must exhaust all judicial, administrative, ordinary-law or extraordinary remedies in order to obtain a final, non-reviewable decision.

118. The rule is both a condition for the international action of the State and a condition for invoking the international responsibility of a State, hence its fundamental and mandatory character.

119. In its third report on international responsibility, article 15 of the draft codification stipulates:

> An international claim brought for the purpose of obtaining reparation for injuries alleged by an alien . . . shall not be admissible until all the remedies established by municipal law have been exhausted.
> [ILC Yearbook, 1958, Vol. II, p. 57]

120. In the second report on diplomatic protection, in 2001, the Special Rapporteur John Dugard outlined developments relating to the rule.

121. Article 10 of the draft codification provides:

> 1. A State may not bring an international claim arising out of an injury to a national . . . before the injured national has . . . exhausted all available local legal remedies in the State alleged to be responsible for the injury.
>
> 2. "Local legal remedies" means the remedies which are as of right open to natural or legal persons before judicial or administrative courts or authorities whether ordinary or special. [Article 10 of the ILC second report on diplomatic protection, at www.un.org]

122. Articles 12 and 13 make the rule a condition for the admissibility of the application, or the international claim, on the one hand, and a necessary precondition for invoking the international responsibility of a State, on the other.

123. In the present case, the Tribunal did not directly address this question. Instead, it applied itself to recharacterizing the dispute by transforming Panama's espousal of individual claims (international dispute) into direct damage suffered by that State, thereby turning it into a purely inter-State dispute, so as then to rule on the applicability of the local remedies rule.

> The Tribunal wishes to underline, therefore, that its task in the present case is to deal with a dispute relating to bunkering activities in support of foreign vessels fishing in the exclusive economic zone of a coastal State [Judgment, para. 207]. The Tribunal points out that, as noted earlier, the *M/V Virginia G*, flying the flag of Panama, provided gas oil to foreign vessels fishing in the exclusive economic zone of Guinea-Bissau and was arrested for that activity by the authorities of Guinea-Bissau [Judgment, para. 206].

Panama itself set out the terms of the dispute as follows:

> Panama is bringing this action against Guinea-Bissau within the framework of diplomatic protection. Panama takes the cause of its national and the vessel VIRGINIA G with everything on board, and every person and entity involved or interested in her operations, which, it is claimed, has suffered injury caused by Guinea-Bissau.
>
> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law [Memorial, paras. 15 and 16].

124. The procedure is strangely reminiscent of the approach taken in the *M/V "SAIGA" (No. 2) Case* (para. 99 et seq.), where the Tribunal explained that a prerequisite for the application of the rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage. According to the Tribunal, the existence of that jurisdictional connection must be determined in the light of the findings of the Tribunal on the question whether the Respondent's application of its laws was permitted under the Convention. In the event of a negative response, it would follow that no jurisdictional connection existed and that, consequently, the rule that local remedies must be exhausted does not apply in the present case.

125. The Tribunal cannot recharacterize the dispute because it would be acting *ultra vires*. Such recharacterization would, first of all, make the arguments put forward by the Respondent in its defence entirely irrelevant and, in doing so, would breach the principle of equality of the parties.

126. Such an approach is contrary to the principle of equality of arms, which governs all *inter partes* proceedings; it runs counter to the basic principles of due process, which are fundamental to all proceedings brought before international courts or tribunals.

127. This recharacterization of the dispute transforms its nature from that set out in the application, according to which Panama is bringing the action "within the framework of diplomatic protection. Panama takes the cause of its national and the vessel *M/V Virginia G* with everything on board, and every person and entity involved or interested in her operations, which, it is claimed, has suffered injury caused by Guinea-Bissau" (Memorial, para. 15).

128. As we know, for a claim to be admissible, it must arise directly out of the application or must have been implicit in the application (see *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67).

129. Furthermore, article 24, paragraph 1, of the Statute of the International Tribunal for the Law of the Sea provides:

> Disputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated.

130. Similarly, article 54, paragraph 1, of the Rules provides that:

> When proceedings before the Tribunal are instituted by means of an application, the application shall indicate the party making it, the party against which the claim is brought and the subject of the dispute.

131. The Tribunal has ruled (*The M/V "Louisa" Case*, para. 143) that while the subsequent pleadings may elucidate the terms of the application, they must not go beyond the limits of the claim as set out in the application. In short, the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character.

132. In this regard, reference can be made to the PCIJ and ICJ jurisprudence in which those courts have been called upon to interpret those provisions in their respective Statutes and Rules concerning the "dispute".

133. The Permanent Court of International Justice stated:

> [U]nder Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein.
> [*Prince von Pless Administration, Order of 4 February 1933, P.C.I.J Series A/B No 52*, p. 14]

134. It added in the *Société Commerciale de Belgique* case:

> [T]he liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute.
> [*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J Series A/B No 78*, p. 17]

135. The International Court of Justice confirmed this jurisprudence in *Certain Phosphate Lands in Nauru* and in *Oil Platforms.* In the latter case, it declared:

> It is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings "transform the dispute brought

> before the Court into a dispute that would be of a different nature". (*Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 265, para. 63)
> [*Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Judgment, I.C.J. Reports 2003,* p. 213, para. 117]

136. There are no special circumstances in the present case to justify a departure from that jurisprudence.

137. The Tribunal, interpreting article 24, paragraph 1, of its Statute and article 54, paragraphs 1 and 2, of its Rules, has concluded that those provisions are essential from the point of view of legal security and the good administration of justice (see *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69).

138. For these reasons, the Tribunal cannot allow a dispute brought before it by an application to be transformed, in the course of the proceedings, into another dispute which is different in character.

139. The Tribunal may accept jurisdiction to interpret the submissions of the parties presented to it, which allows it, where it deems necessary, to refrain from responding to them (*Monetary Gold Removed from Rome in 1943* (*Italy v. France, United Kingdom and United States of America*), *I.C.J. Reports, 1954*, p. 88). On the other hand, it may neither modify the nature of a dispute nor rule *ultra petita* or grant the parties more than what they have claimed in their submissions (*Asylum* (*Colombia v. Peru*), *Judgment, I.C.J. Reports 1950*, p. 402; see also *Corfu Channel* (*United Kingdom v. Albania*), *Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949, p. 244*).

140. As regards the confiscation of the *M/V Virginia G* and its cargo,

> On 27 August 2009, the Inter-Ministerial Commission for Maritime Surveillance of Guinea-Bissau (*Comissão Interministerial da Fiscalização Marítima*) (hereinafter "CIFM") adopted the following decision 07/CIFM/09:
>
> > Confiscate ex-officio the tanker VIRGINIA G, with its gear, equipment and products on board in favor of the State of Guinea-Bissau

> for the repeated practice of fishing related activities in the form of unauthorized sale of fuel to ships fishing in our EEZ, namely the N/M AMABAL [11], in accordance with paragraph 1 of Article 52, as currently worded in Decree No. 1-A/2005 in conjunction with Article 3c) and Article 23, all of Decree-Law No. 6-A/2000.

FISCAP notified the ship-owner of the CIFM decision by letter dated 31 August 2009 (Judgment, para. 64).

141. It might be considered that the *M/V Virginia G* was confiscated *ope legis*, pursuant to the fisheries laws and regulations of the coastal State. Article 52, paragraph 1, of Decree-Law 6-A/2000 (as amended by Decree-Law 1-A/2005) provides:

> 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 authorization in terms of Article 13 and 23 of this law, will be seized ex officio, with their gear, equipment and fishery products in favour of the State, by the decision of a member of the Government responsible for Fisheries.

142. If there were violations of the rights of private entities as a result of this action, these entities should bring independent actions before the courts of the State of Guinea-Bissau.

143. The same applies to the cargo. Its owner is not the owner of the *M/V Virginia G*. As Panama states (Memorial, para. 68), the cargo belongs to an Irish company, *Lotus Federation*. It was under the flag State's jurisdiction as long as it remained on board the ship. But this link had been severed before a claim to compensation could arise, when the gas oil was discharged in the port of Bissau on 30 November 2009. The administrative order to discharge the gas oil in Bissau was issued under the territorial jurisdiction of Guinea-Bissau and the validity of that order could be challenged at that level.

144. Moreover, the local remedies rule is not excluded on the ground that there is no jurisdictional link between the vessel, its crew and the cargo, on the one hand, and the coastal State, on the other. That link is proven by the fact

that an application was made to the Court of Bissau for an order for provisional measures to halt the confiscation of the vessel and its cargo and that that Court made an order to that effect.

145. The system of local remedies in Guinea-Bissau is well developed. Decree-Law 6-A/2000 on fisheries and the Code of Civil Procedure cast light on the subject.

146. Three remedies are available to the owner of the vessel. First of all, prompt release, a procedure that can be combined with a request for a settlement ("*transação*"). Second, an action brought before the Regional Court of Bissau for judicial review of the administrative decision on confiscation. That action can be accompanied by a request for a settlement ("*transação*") and a request for a provisional measure to suspend execution of the administrative decision on confiscation. Lastly, a third remedy is a request to the Inter-Ministerial Fisheries Commission for conversion of the administrative decision on confiscation into a fine, the amount of which is fixed by settlement ("*transação*").

147. With regard to prompt release, article 65 of Decree-Law 6-A/2000 provides:

> 1. By order of the competent court, ships or fishing vessels and their crews will be immediately released, before the hearing, at the request of the ship owner, the Captain or the master of the ship or vessel, or his local representative, provided enough bond is posted.
>
> 2. The court order mentioned in the preceding paragraph shall be issued within a maximum of 48 hours after the filing at court of the petition to have ship and crew released.
>
> 3. The amount of the bond shall not be lower than the costs of seizure and apprehension, possible repatriation of the crew plus the amount of the fine for which the perpetrators of the infringement are liable.
>
> 4. In the case of infringements for which this decree prescribes or authorizes confiscation of the catches, fishing gear and ship, the court may add the value of the catches, fishing gear and ship to the amount of the bond.

148. The bond will be immediately returned if a decision is handed down acquitting the accused or, where the court finds the perpetrator(s) guilty of the offence, if the fines imposed on them have been paid in full, together with costs and other procedural expenses and any default interest, in accordance with the order and within thirty days. Fines for fishing offences are laid down in article 54, paragraph 2, of the Decree-Law.

149. The second remedy is an action brought before the Regional Court of Bissau for judicial review of the administrative decision on confiscation. An action for annulment may be brought against any administrative act, such as the decision on the confiscation of the *M/V Virginia G*. The action can be turned into a settlement as "the member of the Government responsible for Fisheries may, upon express authorization by the Inter-Ministerial Fisheries Commission, reach a settlement on behalf of the State in the course of the judicial proceedings relating to the offences covered by this decree-law" (article 62, para. 2).

150. Another possibility is to submit, at the same time as an action on the merits of the administrative decision on confiscation, a request for an urgent provisional measure suspending the immediate execution of that decision ("*executoriedade*"). The conditions that must be fulfilled are: a) the presumption that the claim is well founded ("*fumus boni iuris*"), b) the concern to preserve the integrity of the law in question, and c) the balancing of the parties' interests so that the damage caused to the opposing party by the provisional measure is no greater than the damage that would result from the immediate execution of the administrative decision (article 401, para. 1, of the Code of Civil Procedure). As the defendant, the State may appeal against the decision suspending the execution of the administrative decision ("*agravo*"), which is an appeal against a judicial decision which does not rule on the substance of the main action (article 401, para. 2, of the Code of Civil Procedure).

151. For there to be an action for a provisional measure there must also be a main action. The provisional-measure proceedings can be initiated before the main proceedings, at the same time or afterwards. However, the provisional measure ceases to have effect if the main action has not been brought within thirty days of the measure being granted or if it is not enforced for more than thirty days through the fault of the applicant (article 382, para. 1, of the Code of Civil Procedure). Since an appeal against a provisional measure ordered by a court or tribunal automatically falls under the jurisdiction of a higher court

and is urgent, that appeal has suspensive effect on the provisional measure (article 740, para. 1, of the Code of Civil Procedure).

152. The third remedy is a request made to the Inter-Ministerial Commission to convert the decision on confiscation into a fine, the amount of which is fixed by settlement. It is regulated by article 62 of the Decree-Law. Once the fine has been fixed, the case file is sent to the Regional Court of Bissau by the Public Prosecutor's department. The Regional Court assesses the grounds on which it is based. Nevertheless, as soon as this action has been brought, the person concerned may seek to settle in accordance with article 62, paragraph 2, of the Decree-Law.

153. In the present case, the prompt release procedure under article 65 of the Decree-Law would seem to be the most effective remedy as it can be effected within 48 hours through the posting of a bond, which can be the subject of a settlement. The owner of the *M/V Virginia G* did not explore this option. It is wrong now to claim that the expense incurred would have been prohibitive.

154. The owner did not turn to the competent authorities. Instead, it turned to FISCAP, which is simply a surveillance division which identifies infringements and draws up reports which it transmits to the Minister responsible for fisheries, who sends the case file to the court or tribunal having jurisdiction through the Public Prosecutor, unless a settlement is reached.

155. Under article 60 of the Decree-Law, fines in respect of infringements of the law must be paid within 15 days of the sentence being pronounced or the fine being imposed by the Inter-Ministerial Fisheries Commission. The deadline may be extended by the same period at the request of the owner of the vessel. Upon the expiry of that deadline the confiscation becomes definitive (article 60, para. 3). The owner of the *M/V Virginia G* had been warned by its representative in Bissau (Mr Alvarenga, Africargo), who had informed it that: a) the case was the responsibility of the Inter-Ministerial Commission and not of FISCAP (statement by Mr Samper, Annex 4 of the Memorial of Panama, p. 5); b) it had 15 days to appeal against the decision on confiscation or to reach a settlement (*ibid.*); c) Penn Lilac should contact its lawyers as the deadline of 15 days would expire shortly (*ibid.*, p. 6).

156. In addition it was to the owner's "great surprise" to learn, by notification of 23 September 2009, that the deadline had expired without any action from it and that, if it did not act within the next 72 hours, the cargo would be sold at public auction (*ibid*., p. 7).

157. It was only when it was informed that the gas oil was to be discharged that the owner turned to a court for the first time to apply for a provisional measure suspending the administrative decision on confiscation, that is to say on 29 October 2009 (Republic of Guinea-Bissau's answers to the questions put by the International Tribunal for the Law of the Sea on 6 September 2013, p. 3). In addition, it was not until 4 December 2009 that the owner initiated the main appeal proceedings against the administrative decision on confiscation (*ibid*., p. 3-4), i.e. the deadline fixed in article 60 of the Decree-Law had expired some time previously. In the face of such curious conduct, it is easier to understand the statement made by the owner's representative, where he explains (Annex 5 of the Memorial of Panama, Mr Gamez Sanfiel):

> We did not want to use the mechanism of prompt release under article 292 of UNCLOS because we had been led to believe that a solution to the matter was possible, However, as time went by, the costs of the Virginia G's maintenance whilst under detention increased dramatically and it disabled the company from commencing legal proceedings, starting by asking the Republic of Panama to take up our cause in the matter.

158. These comments show that the owner of the *M/V Virginia G* did not exhaust the local remedies offered to him by the Republic of Guinea-Bissau on account of serious financial difficulties encountered by his company.

159. One of the fundamental rules of diplomatic protection is and remains the local remedies rule. The individual must exhaust all legal remedies available such that, if he does not obtain satisfaction, the State of which he is a national can take up his case. Before exercising its diplomatic protection, that State must ensure that its injured national has actually exhausted the legal remedies offered by the State alleged to be responsible.

160. That rule is both a procedural condition for the international claim and a basic substantive condition for invoking the international responsibility of the State. It is accepted in both the literature and the jurisprudence. The Tribunal should have adhered to these findings and dismissed the Republic of Panama's claims on the ground of absence of *locus standi*.

161. Instead, the Tribunal finds that the confiscation of the *M/V Virginia G* and the gas oil on board was in violation of article 73, paragraph 1, of the Convention (para. 281 of the Judgment).

The *M/V Virginia G* was subject to this procedure between 22 and 29 May 2011 and on 15 June 2011. In August 2011, it was in breach of Guinea-Bissau's legislation because it failed to carry out formalities of which it was aware, hence its boarding. Consequently, the seizure of the *M/V Virginia G* does not constitute a violation of article 58 of the Convention because bunkering of fishing vessels in the EEZ falls within the jurisdiction of the coastal State. It is a fishing-related activity.

162. The confiscation of the *M/V Virginia G* by Guinea-Bissau is a manifestation of the exercise by that country of the powers conferred on it by article 73 of the Convention, paragraph 1 of which leaves it to the national legislature to define both fishing offences and the penalties applicable to perpetrators of such offences. It is therefore for the national court hearing the matter to determine the penalty to be applied in the light of the legislation in force, the evidence produced before it and the circumstances of the case. The only limit placed on the exercise of a coastal State's power to impose sanctions is laid down in paragraph 3 of article 73, which precludes imprisonment and any corporal punishment.

163. Consequently, the coastal State has not only the right to regulate bunkering activities in its exclusive economic zone, but also the right to provide in its national legislation applicable to the exclusive economic zone for the confiscation of vessels found to have committed infringements. This is, moreover, recognized by the Tribunal (para. 255 of the Judgment). The – rather surprising – question raised by the Tribunal is as follows: does the action taken by Guinea-Bissau constitute a violation of article 73, paragraph 1, of the Convention in this case?

The confiscation of the *M/V Virginia G* was carried out by Guinea-Bissau in the exercise of its sovereign rights to protect and conserve its living resources and it is fully consistent with the provisions of article 73, paragraph 1, of the Convention, which do not contain any rules precluding confiscation where a fishing vessel is engaged in illegal fishing in the exclusive economic zone of the coastal State. It is no accident that article 73, paragraph 1, of the Convention provides:

> 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 the laws and regulations adopted by it in conformity with this Convention.

If there were to be restrictions, the Convention would have made express provision for them, as it did in paragraph 3 of the same article with regard to imprisonment or any other form of corporal punishment. These views are fully confirmed by uncontested State practice, as national fisheries legislation providing for confiscation is widespread.

Curiously, taking a teleological approach – which looks to the underlying aim – the Judgment explains that "[i]t is within the competence of the Tribunal to establish . . . whether the measures taken in implementing th[e Guinea-Bissau] legislation are necessary" (para. 256 of the Judgment), forgetting that the Tribunal is not a court of appeal. The process allows it to find "mitigating factors in respect of the *M/V Virginia G*" (para. 268) and to conclude that "in the view of the Tribunal, the confiscation of the vessel and the gas oil on board in the circumstances of the present case was not necessary either to sanction the violation committed or to deter the vessels or their operators from repeating this violation" (para. 269) and that "[t]he Tribunal, therefore, finds that the confiscation by Guinea-Bissau of the *M/V Virginia G* and the gas oil on board was in violation of article 73, paragraph 1, of the Convention" (para. 271 of the Judgment).

164. The Tribunal states that it is clear from the legal instruments that it has reviewed that the regulation of bunkering of foreign fishing vessels is among those measures which the coastal State may take in its exclusive economic

zone to conserve and manage its living resources under article 56, read together with article 62, paragraph 4, of the Convention, as activities in support of those vessels are likely to increase their capacity and to have a direct effect on stock condition and productivity.

165. On the issue of confiscation the Tribunal heard the testimony of Mr Pereira, an expert called by Guinea-Bissau, who stated that the decision to confiscate the vessel and the gas oil therein constitutes an administrative act, subject to appeal under article 52, paragraph 3, of Decree-Law 1-A/2005. He confirmed that under article 23, paragraph 1, of the Decree bunkering was subject to authorization by the member of the Government responsible for fisheries and emphasized that the penalty in cases of lack of licence or permit was confiscation, which operates *ex officio*, and that the measure should be applied by the member of the Government responsible for fisheries, who chairs the Inter-Ministerial Commission for Maritime Surveillance. In his testimony, Mr Pereira stated that in his view Decision No. 07/CIFM/09 of 27 August 2009 and Decision No. 09/CIFM/2009 of 25 September 2009 against the *M/V Virginia G*, which ordered and confirmed respectively the measures of confiscation, merely applied the law. They constitute an administrative act which can be challenged before the courts. Guinea-Bissau adds that it fails to see "how this decision clashes with the rights of other States or with the Convention".

166. Nevertheless, the Tribunal – which considers the confiscation of the *M/V Virginia G* to be an infringement of article 73, paragraph 1 – notes that that article of the Convention refers to the right of coastal States to board, inspect and arrest vessels that do not comply with their laws and regulations. Therefore, the Tribunal finds that neither the boarding and inspection nor the arrest of the *M/V Virginia G* violated article 73, paragraph 1, of the Convention.

167. Furthermore, the Tribunal explains that in respect of the case before it, it has found that coastal States have a normative jurisdiction under article 56 of the Convention for the purpose of conserving and managing marine living resources and that such jurisdiction encompasses the right to regulate bunkering of foreign vessels in the exclusive economic zone. Article 73, paragraph 1, of the Convention provides that the laws and regulations in question may encompass the necessary enforcement measures. Since the laws and regulations on fisheries of Guinea-Bissau treat fishing and support activities alike, it follows, in the view of the Tribunal, that the relevant laws and regulations of Guinea-Bissau also provide for the confiscation of bunkering vessels.

168. In respect of the *M/V Virginia G*, the Tribunal notes that the vessel did not have the written authorization required for bunkering and it had not paid the fee amounting to EUR 112. Regulation of bunkering is an important measure for monitoring support services provided to foreign fishing vessels in the exclusive economic zone with a view to better management of fisheries resources. In the view of the Tribunal, breach of the obligation to request written authorization for bunkering and to pay the prescribed fee is a serious violation. However, according to the Tribunal, it does not have the same degree of seriousness as, for example, overfishing or unauthorized fishing. The Tribunal does not understand the fact that bunkering is the ultimate facilitator for overfishing in that it enables fishing vessels to pursue their activities without interruption at sea with no need to return to the ports of the coastal State to refuel, on the one hand, and to unload their catch in accordance with their fishing licence, on the other.

169. Curiously, the Tribunal finds what it calls "mitigating factors in respect of the *M/V Virginia G*": applications for the required licence on other occasions, and a lack of knowledge of the procedure to be followed. These two "factors" are contradictory since if the licence had previously been applied for and obtained, the agent must have known the procedure to be followed. The Tribunal lastly states that although the enforcement measure taken against the *M/V Virginia G* could be appropriate in the case of illegal fishing in the exclusive economic zone of Guinea-Bissau, it is not reasonable in light of the particular circumstances of this case because confiscation was not necessary either to sanction the violation committed or to deter the vessels or their operators from repeating this violation. The Tribunal therefore finds that the confiscation of the *M/V Virginia G* and the gas oil on board was in violation of article 73, paragraph 1, of the Convention.

170. The Tribunal should have realized that the confiscation measure is not only proportionate but also appears the most appropriate "for the repeated practice of fishing related activities in the form of unauthorized sale of fuel to ships fishing in our EEZ . . ." (decision 07/CIFM/09 of 27 August 2009). Need it be reiterated that article 73, paragraph 1, of the Convention leaves it to the national legislature to define both fishing offences and the penalties applicable to perpetrators of such offences? It is therefore for the coastal State to

determine the penalty to be applied in the light of the legislation in force, the evidence available to it and the circumstances of the case. Furthermore, it should be stated that the confiscation of a foreign fishing vessel recognized as having infringed fisheries laws and regulations in the exclusive economic zone is a perfectly lawful sanction from the point of view of international law and is expressly provided for in the national legislation of many countries (see below, Practice). Confiscation is part of the normal exercise by the coastal State of its sovereign rights. It is a sanction for infringements of the laws and regulations of that State. Coastal States do not hesitate to apply the especially severe penalty of confiscating vessels whenever necessary to suppress infringements of their national fisheries legislation, in particular repeated offences. This case concerns the right of a developing country, in the absence of universally recognized international legislation, to protect the economic assets from which it derives most of its resources. In the *Fisheries Jurisdiction* cases, the Minister for Foreign Affairs of Iceland stated: "the vital interests of the people of Iceland are involved" (letter from the Minister for Foreign Affairs of Iceland dated 29 May 1972. Quoted in *I.C.J. Reports 1973*, p. 7).

VI Treaty law

171. Panama claims that Guinea-Bissau has violated article 58 of the Convention relating to "freedom of navigation and other internationally lawful uses of the sea". It contends that the bunkering services provided by the *M/V Virginia G* in the EEZ of Guinea-Bissau 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) (para. 261 of the Memorial of Panama).

172. Guinea-Bissau totally rejects the allegations of Panama that it has violated the Convention or general international law. It claims that bunkering is considered a fishery-related activity, subject to the authorization of the coastal State, throughout the entire West African region (paras. 208 and 210 of the Counter-Memorial of Guinea-Bissau).

173. In the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters and of the seabed and its subsoil, and with regard to other economic activities, such as the production

of energy (article 56 of the Convention). The coastal State thus enjoys broad powers but is also subject to a number of obligations.

174. It should be noted that when the International Law Commission invoked the concept of "sovereign rights" in respect of resources of the continental shelf in 1956, it stated in its commentary that the rights conferred upon the coastal State

> cover all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connection with the prevention and punishment of violations of the law.
>
> The rights of the coastal State are exclusive in the sense that, if it does not exploit the continental shelf, it is only with its consent that anyone else may do so.
> [ILC Yearbook, 1956, Vol. II, p. 298, Commentary on draft article 68]

175. This characterization by the ILC applies to the interpretation of the very concept of "sovereign rights" in relation to the resources of the exclusive economic zone. In the Convention, jurisdiction with regard to the prevention and suppression of infringements of the law is provided for in article 73, paragraph 1 of which provides:

> 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 the laws and regulations adopted by it in conformity with this Convention.

176. The Tribunal examined whether Guinea-Bissau violated the provisions of the Convention when it seized and then confiscated the *M/V Virginia G*. It sought to determine whether Guinea-Bissau has normative jurisdiction under the Convention to regulate bunkering in its exclusive economic zone and whether the laws and regulations of Guinea-Bissau, as well as the manner in which they are implemented, are consistent with the Convention.

> . . . Panama defines bunkering as "the term used in the shipping industry to describe the selling of fuel from specialised vessels, such as oil tankers,

which supply fuel (such as light fuel, gas oil and marine diesel) to other vessels whilst at sea". Guinea-Bissau considers the description by Panama of the economic activity of bunkering "to be in general correct".

. . ..Panama points out that "the activity of providing bunkering services in the EEZ of a coastal State is neither dealt with specifically in the Convention, nor settled by international case law".

. . . Panama submits that "it was, and is, unlawful for Guinea Bissau to exercise sovereign rights and jurisdictional rights not attributed to it under the Convention". It maintains that the extent to which Guinea-Bissau's "sovereignty and jurisdiction were extended to the activities of the *VIRGINIA G* and the resulting denial of freedom of navigation was not consistent with the provisions of the Convention".

. . . Panama argues that "the bunkering services provided by the *VIRGINIA G* in the EEZ of Guinea Bissau 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)."

. . . In addition, Panama considers that the requirement of authorization and the imposition of fees for refuelling vessels in the exclusive economic zone of Guinea-Bissau as provided for in its laws and regulations are contrary to the freedoms set out in article 58 of the Convention.

. . . Panama argues that "[p]rincipal among the rights of other States in the EEZ of a coastal State, are the freedoms accorded to all States in terms of Article 58 of the Convention". In this context Panama maintains that

> the exclusion of the freedoms listed in Article 87(d), (e) and (f) from Article 58(1), and their express embodiment and articulation in Article 56(1) indicates that the freedom of the seas should only be limited where the rights are recognised expressly to a coastal State in terms of Article 56(1).

. . . Panama states that "Article 58(1), by referring to Article 87, appears to want to equate the freedoms exercisable in the EEZ to those of the high seas, even applying the provisions of articles 88 to 115 of the Convention."

. . . Panama further argues that

> in respect of the three freedoms (navigation, overflight and communication) in case of a dispute, the shift should be in favour of those freedoms and "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships".

. . . Panama maintains that the bunkering activity carried out by the *M/V Virginia G* is a "commercial activity for which vessels, including fishing vessels, in the EEZ of West African coastal States offer a particular market for selling gas oil", and that the supply of bunkers to vessels is, therefore, the very purpose of the navigation of that vessel. It explains that it is because of the inherent connection between bunkering and navigation, that bunkering activities should be considered to be more intimately linked with the freedom to navigate and other internationally lawful uses of the sea in the sense of article 58, paragraph 1, of the Convention.

. . . Panama maintains that, in accordance with article 56, paragraph 2, of the Convention, a coastal State, in exercising its rights and performing its duties under the Convention in the exclusive economic zone, must have due regard to the rights and duties of other States, among which are the freedoms accorded to all States in terms of article 58 of the Convention.

. . . Panama observes that "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".

. . . In this context, Panama questions the lack of distinction in Decree-Law 6-A/2000 between fishing vessels and non-fishing vessels as well as "a

broad definition of 'fishing-related activities' which include 'logistical support activities' and which are defined . . . in subsidiary legislation rather than in Decree Law 6-A/2000 itself". Panama maintains that a bunkering vessel is neither a fishing vessel nor, by definition, a vessel engaged in exploring, exploiting or utilizing the natural resources in the exclusive economic zone of Guinea-Bissau in the context of the rights and jurisdiction accorded to Guinea-Bissau under Part V of the Convention. Panama explains that "[b]unkering activities to fishing vessels within an EEZ is a very ancillary activity that cannot be considered as a related fishing activity".

. . . According to Panama, Decree-Law 6-A/2000 of Guinea-Bissau is not in conformity with the principles and purposes of the international legal regime concerning the exclusive economic zone. Panama states that the main purpose of the establishment of the exclusive economic zone, as *a sui generis* zone, is to enable coastal States to control and manage their marine resources. It further argues that "Article 56 (1) of the Convention confers certain sovereign rights and a defined jurisdiction . . . in favour of Guinea Bissau, in its EEZ, for the purpose of exploring and exploiting, conserving and managing living or non-living resources". Panama states that articles 61 and 62 of the Convention articulate the manner in which a coastal State can regulate the conservation and utilization of its living resources.

. . . Panama questions the qualification of bunkering in the exclusive economic zone as a fishing-related activity subject to national regulation and control. It takes the view that

> [t]he material scope of Guinea Bissau's rights and jurisdiction over living resources in its EEZ relate to their conservation and management and to the exploration and exploitation or utilisation of such living resources, and it is perhaps reasonable that these terms can even be described as "sufficiently wide to embrace all normal enterprisory and governmental functions that pertain to living resources." However, it would also be reasonable to state that even a wider interpretation would necessarily preserve the fundamental link to the living resources themselves.

. . . According to Panama,

> Guinea Bissau's practice appears to be that of extending its interpretation of fishing activities and fishing related activities to include bunkering . . . the only reasonable interpretative extension in classifying certain related activities as fishing related activities, or logistical support activities, should be limited to those activities which are actually and strictly related to fishing, rather than to general services rendered to any vessels as a most basic necessity – such as bunkering.

Panama disagrees with this approach advanced by Guinea-Bissau.

. . . As to the argument advanced by Guinea-Bissau that bunkering of fishing vessels is commonly treated as a fisheries-related activity in West Africa, Panama considers the statement to be inadequate in suggesting that the Tribunal could deem an alleged regional tendency sufficient to establish the existence of a legal norm. According to Panama, a majority of States throughout the world do not consider vessels engaged in fishing-related activities to be fishing vessels. Panama acknowledges that

> a fishing vessel might well be subject to specific rules by virtue of its location in the EEZ of Guinea Bissau and by virtue of the fishing activities it carries out. However, it does not necessarily follow . . . that the rules applied to that fishing vessel would apply also to the bunkering vessel, in this case, the *VIRGINIA G*.

. . . Panama states that

> Guinea-Bissau's manifest acknowledgement of the financial benefits of regulating bunkering in its EEZ . . . 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**.

. . . Panama further states 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 yet would appear to still be present, in disguised form, in Guinea-Bissau's Decree Law 6-A/2000.

. . . In this context Panama refers to a passage in the Joint Order No 2/2001 of 1 October 2001 of the Minister of Fisheries and the Sea and the Minister of Economy and Finance which reads: "Considering the Government's Policy of encouraging and promoting private initiative in order for the private sector to make a positive contribution towards the country's economic and social development".

. . . To underline the necessity of bunkering fishing vessels in the exclusive economic zone of Guinea-Bissau, Panama further observes that "bunkering services rendered in this area are . . . particularly important owing to the general lack of bunkering facilities and gas oil product in the area" and that "the Port of Bissau, 'does not have suitable facilities' ".

. . . In respect of the environmental concerns invoked by Guinea-Bissau to justify its regulating of bunkering, Panama argues that "the risks during the bunkering operations are minimal" and that "vessels like the *Virginia G* do not supply heavy fuel oil but just gas oil . . . (a clean and volatile product) [which] has not caused relevant marine environmental problems". Panama further points out 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" cannot be sustained, "especially since the law that was enforced against the *VIRGINIA G* was the national Fisheries law of Guinea-Bissau . . . Guinea-

Bissau cannot now be heard to raise its 'protection and conservation of its resources' concerns for the first time, in its Counter-Memorial".

. . . In addition, in the view of Panama, the principle of sustainable fisheries, invoked by Guinea-Bissau, does not support the case presented by that State. Panama reasons that the arguments presented by Guinea-Bissau are contradictory and that Guinea-Bissau is not even a member of the International Commission for the Conservation of Atlantic Tunas.

. . . Relying on the legislative history of the exclusive economic zone concept, Panama finally denies that coastal States enjoy a residual authority in the exclusive economic zone. Panama states that "[t]here is no residual authority in a coastal State to make laws which themselves violate or result in a violation of the Convention".

. . . Guinea-Bissau argues that it "has not violated Article 58 of the Convention as bunkering is an economic activity, which is not included in freedom of navigation or other internationally lawful uses of the sea".

. . . Guinea-Bissau points out that "the EEZ has a *sui generis* status, but in this status the interests of the coastal state in the preservation of maritime resources and the regulation of fisheries prevail over the economic interest of bunkering activities carried out by tankers".

. . . Guinea-Bissau stresses that

> [a]ccording to an evolutionary interpretation of the Convention, . . . the regulation of bunkering of fishing vessels in the exclusive economic zone is admissible owing to the sovereign rights and jurisdiction of the coastal State, recognized in articles 56, 61, 62 and 73 of the Convention.

. . . Guinea-Bissau states therefore that its laws and regulations and their implementation *vis-à-vis* the activities of *M/V Virginia G* are in accordance with the Convention and other rules of international law. Guinea-Bissau argues that as

> the activity of bunkering is instrumental to and supports fishing operations, one naturally has to consider it a fishing related operation, and it is therefore regulated, both under the legislation of Guinea-Bissau and under the legislation of the other States of the sub-region.

. . . According to Guinea-Bissau "Guinea-Bissau, in article 3, paragraphs 1 and 2 and paragraph 3(b) and (c), as well as article 23 of Decree-Law No. 6-A/2000, established the qualification of bunkering as a fishing-related operation".

. . . The relevant articles of Decree-Law 6-A/2000 of 22 August 2000 read:

> Article 3 of Decree-Law 6-A/2000:
> [Translation into English provided by Panama
> in Annex 9 to its Memorial]
>
> ARTICLE 3
> (Definition of fishing)

1. Fishing is understood to be the act of catching or harvesting by any means of biological species whose normal or most frequent habitat is water.

2. Fishing includes the prior activities whose direct purpose is that of fishing, such as detecting, the discharge or collection of devices used to attract fish, and fishing related operations.

3. For the purposes of the above point, fishing related operations means:

a) The transhipment of fish or fishery products in the maritime waters of Guinea Bissau;
b) The transport of fish or any other aquatic organisms which have been caught in the maritime waters of Guinea Bissau until the first landing;
c) Activities of logistic support to fishing vessels at sea;
d) The collection of fish from fishermen.

Article 23 of Decree-Law 6-A/2000
[Translation into English provided by Panama
in Annex 9 to its Memorial]

ARTICLE 23
(Fishing related operations)

1. Fishing related operations are subject to the authorisation of a member of the Government responsible for Fisheries.

2. The authorization mentioned above is subject to payments or compensation as well as any other conditions as may be established by the department of the Government responsible for Fisheries, namely regarding the areas or location for the conduct of the fishing related activities and the mandatory presence of observers or inspectors.

. . . Guinea-Bissau points out that these rules are "entirely in conformity with the legislative practice of the region". This was further elaborated upon in the testimony of Mr Dywyná Djabulá, an expert called by Guinea-Bissau, who stated:

Bunkering at sea is provided for in the Convention on Access and Exploitation of Fishery Resources of 1993. This Convention analyzes the legislation of the member States, one of which is Guinea-Bissau. There are others: Senegal, Cape Verde, Sierra Leone. The Convention says that the States themselves are responsible for regulating bunkering at sea. By regulating this matter, the legislation of these States adopts a broad notion of fishing vessel and fishing activities as such. When we speak of fishing vessels in the broad sense, we also include in this notion vessels that provide logistic support, such as vessels supplying fuel. The broad sense of fishing includes not only the actual catching of fish but also the supply of ships at sea, and the legislation of Guinea-Bissau also goes in that direction.

. . . Guinea-Bissau states that it

> totally disagrees that the bunkering activity carried out by the *Virginia G* in the exclusive economic zone of Guinea-Bissau falls within the freedom of navigation and other international lawful uses of the sea in terms of article 58(1) of the Convention, and that it required no prior authorization against payment.

. . . Guinea-Bissau further states that

> the freedom of navigation of ships with a flag of third States through the exclusive economic zone of coastal States should not include the right to be involved in the economic activity of bunkering of fishing vessels, . . . given that the activity has a much stronger connection with the exercise of fishing than with the freedom of navigation.

. . . Guinea-Bissau argues that "the maritime freedoms benefitting other states in the EEZ may be restricted as far as necessary to ensure the rights of the coastal State (art. 58, no. 3 of the Convention)".

. . . In this context Guinea-Bissau also argues that "as bunkering may endanger the right of the coastal State over the existing living resources in its exclusive economic zone, it must be regulated by the latter".

. . . According to Guinea-Bissau, "the conditions required in order to refuel at sea . . . have to be controlled not only due to the economic consequences of predatory fishing, but also due to the high environmental risks this implies".

. . . Guinea-Bissau maintains that "[t]he precautionary principle in environmental law obliges the coastal States to take all appropriate measures to avoid any risks to the environment, as it is the case of an oil tanker sailing in the EEZ".

. . . In this respect, Guinea-Bissau points out that "the performance of the flag States is not sufficient to prevent the uncontrolled exploitation of

marine living resources" and considers that "[t]he regulation of bunkering as a fishing-related activity is a direct consequence of the use of the precautionary approach by Guinea-Bissau".

. . . Guinea-Bissau rejects Panama's assertion that Guinea-Bissau's fishing law has nothing to do with the protection of the environment. It argues that bunkering has very serious environmental risks and that for this reason its regulation by coastal States is permitted by articles 61 and 62 of the Convention, which the Tribunal did not consider in the *M/V "SAIGA"* (*No. 2*) *Case*. Guinea-Bissau states:

> Is it possible to assume that no oil spills caused by bunkering have occurred in West African countries? The answer must be in the negative, but it is not possible to confirm it with examples. This is the reason why Guinea-Bissau applies a precautionary approach in its fisheries law.

. . . Rejecting the conclusion drawn by Panama from the fact that Guinea-Bissau does not have facilities for the fuelling of vessels in its ports, Guinea-Bissau states that this does not preclude its right to control the manner in which this operation is carried out in its exclusive economic zone.

. . . Turning to the fee to be paid for bunkering authorization in its exclusive economic zone, Guinea-Bissau emphasizes that the underlying objective is strictly of an environmental nature and the revenue that is obtained is intended only to finance State policies concerning marine pollution.

. . . Guinea-Bissau states that

> the coastal State has the right to obtain the corresponding tax revenue resulting from this activity, inasmuch as bunkering prevents the coastal State from collecting the natural taxes for the supply of fuel in its territory, and also in accordance with the "polluter pays principle".

. . . In the view of Guinea-Bissau,

> [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, pursuant to art. 62 of the Convention.

. . . .Guinea-Bissau emphasizes that, contrary to Panama's position, "Guinea-Bissau never extended its tax legislation to the EEZ, given that it merely charges a small amount for the issue of the refuelling licence, which is well below what it would obtain by way of tax revenue if the refuelling had taken place on land".

. . . This issue was further elaborated upon in the testimony of Mr Dywyná Djabulá, where he stated:

> There is a difference in terms of the law between bunkering at sea and bunkering on land. Bunkering in the port, according to current law, is regarded as a commercial activity, and as such it is subject to more of a tax charge. There it will have to pay an import tax; in terms of gas oil it would be a tax of 5% of the value of the product. It would also have to pay an industrial tax, which is 25% on the income, i.e. the amount it earns from this activity. In the case of bunkering at sea it is different. Our law takes account of the aspect of conserving resources, the environment, because as this activity causes environmental damage because of fuel spillages, waste that may occur during the transfer, and the time that fishing vessels actually remain in the fishing area means that they fish more because they do not interrupt their fishing activity to go to port to refuel and therefore they catch more fish, which has environmental effects. Even in the joint ordinance it says that we must take account of the environmental aspect, and this activity must be conditioned. So the charge that is made takes account of the principle of environmental protection. The idea of this charge is to influence the work of the agents in this activity and make them think twice, and if

> they do not want to pay then they will not bunker at sea. If they want to continue bunkering at sea they have to pay this amount to fund environmental policies, the consequences of a spillage and the funding of policies and remedying the damage that can be caused. It is a very small amount in fact, but it can be raised if it is not enough to deter this kind of activity.

177. Article 73 confers broad discretionary powers on the coastal State. It lays down a set of rights and obligations the coastal State must assume, including the obligation promptly to release arrested vessels and their crews upon the posting of reasonable bond or other security. Here lies a close link with article 292 of the Convention relating to the prompt release of the vessel and an example of compulsory jurisdiction.

178. Jurisdiction means that the coastal State has discretion to regulate the activities within its competence, subject to compliance with the Convention. Under article 56, paragraph 1(b), the coastal State has jurisdiction in its exclusive economic zone with regard to: the establishment of artificial islands and various structures, scientific research, and the protection and preservation of the marine environment, this latter right authorizing the coastal State to take measures to avert pollution risks. The exclusive rights enjoyed by the coastal State in its exclusive economic zone are a matter of principle. They mean that it alone may administer and regulate the exploitation of fisheries resources and connected activities. It may decide that it will be the sole beneficiary. However, this also gives it the right to enter into agreements granting third parties fishing rights in the EEZ or rights to carry on economic activities there subject to specific conditions. Article 62 of the Convention relates to the fishing industry in respect of utilization of the living resources in the EEZ. It provides that the aim of the coastal State is to "promote the objective of optimum utilization of the living resources in the exclusive economic zone". This is a management role which is thus conferred on the coastal State by virtue of its sovereign rights. The article provides for the granting to foreign fishing vessels of fishing licences for operations in the EEZ. Paragraph 4 lists the operations that may be monitored and regulated by the coastal State through its laws and regulations. It should be noted that many day-to-day fishing-related activities or operations do not appear on the list: logistical support, filleting, transhipment of catches and bunkering.

179. It should be observed that the United Nations Conference on the Law of the Sea was not a technical conference. The Convention itself takes the form of a kind of "constitution for the oceans". It is for the United Nations system's specialized agencies to concern themselves with the technical details under the chapter headings established by the Convention. Thus, the following have been drawn up under the auspices of the FAO: the Code of Conduct for Responsible Fisheries; the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing; the 1993 Compliance Agreement and the Port State Measures Agreement.

180. It was at UNEP that the 1995 Straddling Fish Stocks Agreement was drawn up. UNCTAD produced the 1986 United Nations Convention on Conditions for Registration of Ships. The 2001 Convention on the Protection of the Underwater Cultural Heritage was drawn up within UNESCO. IMO produced the MARPOL Convention (Prevention of Pollution from Ships) and the SOLAS Convention (Safety of life at sea) etc.

181. Aware of this fact, at a very early stage the West African States approached the competent international organizations, in particular in the field of fisheries, to examine with them the problems that were a cause of concern. These countries gradually drew up their national legislation on fishing and related activities in the light of the practices observed in their respective exclusive economic zones, in particular storage, processing of fishing products before their first landing, bunkering, supplying of fishing vessels, and all other activities of logistical support for fishing vessels at sea.

182. The robust international practice in the form of national legislation on these subjects has not suffered any challenge whatsoever, showing that this legislation lies well within the sovereign rights conferred on the coastal State by articles 56, 61, 62 and 73 of the Convention.

183. According to Panama, it was unlawful for Guinea-Bissau to exercise sovereign rights and jurisdictional rights not attributed to it under the Convention and . . . Guinea-Bissau deprived the *M/V Virginia G* of the exercise of the freedoms guaranteed by paragraph 1 of article 58 of the Convention by requiring it to obtain a licence to carry out bunkering activities in its EEZ.

184. Guinea-Bissau contends that it has not violated Article 58 of the Convention as bunkering is an economic activity which is not included in freedom of navigation or other internationally lawful uses of the sea. We will need to focus on this question below.

185. These provisions, negotiated forty years ago, have given rise to practices that could not be foreseen by the United Nations Convention on the Law of the Sea. This justifies the subsequent international conventions drawn up within the specialized agencies and the regional agreements drawn up in regional fisheries management organizations.

VII Case-Law

186. I will examine the *Dispute concerning filleting within the Gulf of St. Lawrence* and the *M/V "SAIGA"* cases.

1) *Dispute concerning filleting within the Gulf of St. Lawrence between Canada and France, Decision of 17 July 1986*

187. In the *Dispute concerning filleting within the Gulf of St. Lawrence* by the French trawlers referred to in article 4(b) of the Agreement between Canada and France on their Mutual Fishing Relations, signed at Ottawa on 27 March 1972, a dispute arose between the two countries pertaining to the interpretation of the said agreement.

The dispute emerged in January 1985 when the trawler "La Bretagne", registered in St. Pierre and Miquelon, which had been authorized to fish outside the Gulf of St. Lawrence in 1984, applied for a licence in 1985 to conduct fishing operations both within and outside the Gulf. After having acceded to this request on 4 January 1985 in respect of fishing outside the Gulf, Canadian authorities accompanied this licence with an "Amendment No. 1" dated 24 January 1985, which stated that: "In accordance with the current Canadian prohibition against the filleting of traditional groundfish species at sea, the 'La Bretagne' is permitted to process groundfish species in the Gulf of St Laurent to the headed, gutted form only".

188. Canadian authorities based their decision on the "equal footing" clause in Article 4(b) of the 1972 Agreement. Since conclusion of that agreement

regulations have been adopted under two laws of 1970 on fisheries and on the protection of coastal fisheries essentially targeting foreign fishing vessels.

189. The first law defines a "fishing vessel" as "any vessel used, fitted or designed for the catching, processing or transporting of fish", while the word "fisheries" is understood as referring to "areas where and periods during which fishing and its related activities, particularly . . . packaging, transport and processing, take place".

190. Though most of the debate focused on the interpretation of the 1972 Agreement, the Tribunal stated that it was "obliged to also take into account any relevant rules of international law applicable between the Parties . . . In their oral submissions, both Parties indeed used provisions of UNCLOS as argument to support their respective views". On this basis, the Tribunal undertook a description of the evolution of international law of the sea since the conclusion of the 1972 Agreement.

191. On the question of the extent of the coastal State's rights in respect of fishing and related activities, the Tribunal explained that:

> While it is true, as Canada has rightly observed that Article 56 of the Convention recognizes the sovereign rights of the coastal State, not only in the exploitation of natural resources but also as regards the management of these resources, it however does not seem that this management authority, that the Convention constantly associates with the idea of conservation, has precisely any other purpose than the conservation of resources; it is above all an administration function that the coastal State is considered better equipped to exercise, but which however remains a general interest function.
> [para. 52 of the award, RGDIP, 1986, p. 713]

192. These views of the Tribunal have been criticized by various legal scholars. For example, R. Churchill and V. Lowe write:

> In the Franco-Canadian Fisheries arbitration (1986) the tribunal suggested that the coastal State's competence to prescribe legislation for foreign fishing vessels in its EEZ was limited to conservation measures *stricto sensu* and therefore could not include measures to regulate fish processing. This seems an unjustifiably narrow reading of article 62(4), which

> speaks of foreign vessels complying with the coastal State's "conservation measures and the other terms and conditions established in [its] laws and regulations", and many of the illustrative list of eleven permissible types of measures go beyond conservation".
> [R. Churchill & V. Lowe, *The Law of the Sea*, 53rd edition, Manchester University Press, 1999, p. 291-292; see also, W.T. Burke, *The New International Law of Fisheries*, Clarendon, Oxford, 1994, p. 48; B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, Nijhoff, Dordrecht, 1989, p. 67]

193. Regarding the exploitation of living resources provided for in Article 62 of the 1982 Convention, the Tribunal considered that this article sets down both the rights and obligations of the coastal State applicable to foreign nationals exploiting living resources in the area. Even if this list is not exhaustive, it does not appear that the regulatory power of the coastal State includes the authority to regulate matters of a different nature from those described therein. In the opinion of the Tribunal, a possible regulation on filleting at sea cannot *a priori* find its justification in the powers vested in the coastal State by the new rules of the Law of the Sea (para. 54 of the award).

194. Under these circumstances, the Tribunal was of the opinion that Canada could exercise its regulatory authority over French trawlers covered by Article 4(b) of the 1972 Agreement only if it did so reasonably, i.e. without rendering impossible the exercise of the fishing rights of vessels stipulated in the Agreement (*ibid.*).

195. Were this case to be brought before the Tribunal today, it would likely adopt a less restrictive approach, given the practices of coastal States observed since then. ITLOS rightly takes the view in the present case that it is apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing. The Tribunal observes that such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone since this enables them to continue their activities without interruption at sea (para. 215 of the Judgment).

2) The *M/V "SAIGA"* cases

196. In the *M/V "SAIGA"* cases, the issue of the law applicable to bunkering at sea was put to the International Tribunal for the Law of the Sea. The *Saiga*, an oil tanker flying the flag of Saint Vincent and the Grenadines, is based in Dakar (Senegal). It was engaged in selling gas oil as bunker to fishing vessels off the Guinean coast.

197. On the morning of 27 October 1997, the *Saiga*, having crossed the northern maritime boundary between Guinea and Guinea-Bissau, entered the EEZ of Guinea, approximately 32 nautical miles from Guinea's island of Alcatraz. It supplied gas oil to three fishing vessels on the same day: the *Giuseppe Primo*, the *Kritt* and the *Eleni S*.

198. On 28 October 1997, the *Saiga* was arrested by Guinean Customs patrol boats in the southern limit of the EEZ of Guinea. Guinea asserted that the *Saiga* was engaged in smuggling activities, which constitutes an offence punishable under the Customs Code of Guinea, and that detention had taken place following the exercise by Guinea of its right of hot pursuit under article 111 of the Convention.

199. The Tribunal considered the question of "bunkering of fishing vessels" as an activity the regulation of which can be assimilated to the regulation of the exercise by the coastal State of its sovereign rights to explore, exploit, conserve and manage living resources in the EEZ.

200. It states:

> It can be argued that refuelling is by nature an activity ancillary to that of the refuelled ship. Some examples of State practice can be noted. Article 1 of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific of 23 November 1989 defines "driftnet fishing activities" as inter alia "transporting, transhipping and processing any driftnet catch, and cooperation in the provision of food, fuel and other supplies for vessels equipped for or engaged in driftnet fishing".

201. As documented by Saint Vincent and the Grenadines, Guinea-Bissau, in its Decree-Law No. 4/94 of 2 August 1994, requires authorization of the Ministry of Fishing for operations "connected" with fishing, and Sierra Leone and Morocco routinely authorize fishing vessels to be refuelled offshore (*M/V "SAIGA" Case,* para. 57).

202. As Rothwell & Stephens write, "[n]onetheless, despite this equivocal analysis, both state practice and a plain reading of the LOSC suggest coastal state powers of fisheries regulation do extend to include incidental matters such as bunkering or processing fish caught within the EEZ" (Donald R. Rothwell & Tim Stephens, *The International Law of the Sea*, Hart, Oxford and Portland 2010, p. 300-301).

203. The Tribunal considered that it had reached a decision on the issue that needed to be decided "without having to address the broader question of bunkering in the exclusive economic zone. Consequently, it does not make any findings on that question" (*M/V "SAIGA" (No. 2) Case*, para. 138). Not only is the Convention silent on this issue, it falls well short of existing practice.

VIII Practice

204. The establishment of the coastal State's sovereign rights over the EEZ has given rise to the phenomenon of IUU fishing. The size of the maritime areas to be covered and the difficulty for countries without any naval force to conduct effective surveillance for pirate vessels have encouraged IUU fishing, which is multi-faceted. It can mean unlicensed fishing or licensing fishing in excess of the allocated quotas (e.g. Cabo Verde). While developed coastal States are able to protect their fisheries, others must have recourse to regulation and cooperation agreements with maritime powers (e.g. the cooperation agreement between France and the Republic of Seychelles signed on 19 December 2006 to combat IUU fishing and the 2005 cooperation agreement between France and Madagascar on maritime surveillance).

205. Many vessels have been caught in the act of unauthorized activity in the EEZ. On 8 October 1986 the French navy sunk a trawler flying the Panamanian flag which was engaged in unauthorized lobster fishing in the EEZ of the Kerguelen Islands and refused to be boarded by the captain of the patrol boat

Albatros. Similarly, the prompt release proceedings before this Tribunal bear witness to the reality of this activity, which is ravaging fish stocks throughout the world.

206. For that reason, there is a trend towards stricter controls on navigation in the EEZ. Many developing countries have been led to regulate access and transit for foreign fishing vessels in their EEZ. They fear that fishing vessels which are not authorized to fish in their EEZ are taking advantage of their transit to engage in IUU fishing there.

207. Those States base that view on the fact that vessels supposed to be in transit are often discovered fishing at anchor at night.

208. Similarly, States assume the "right" to give formal notice to leave their EEZ immediately to vessels which are considered to be dangerous owing to pollution risks they pose for the coastal maritime area and the coastline (e.g. the Malaga Agreement of 26 November 2002 between France and Spain following the shipwrecks of the *Erika* and the *Prestige* in 1999 and 2001 respectively).

209. There is extensive regulation of fishing and related activities in the EEZ. More than sixty States in the world have laws and regulations on the subject. At global level there is, within the framework of the FAO, the 1993 Compliance Agreement, the Code of Conduct for Responsible Fisheries and the Port State Measures Agreement.

210. At regional level, some multilateral high seas fisheries conventions adopted even before the concept of the EEZ was established lay down provisions on related activities. For example, the Convention on Conduct of Fishing Operations in the North Atlantic defines the term "vessel" to include "any fishing vessel and any vessel engaged in the business of processing fish or providing supplies or services to fishing vessels" (UNTS 1051 (1984) p. 102).

211. The Wellington Treaty of 1987, concluded by the United States and a number of countries in the Western Pacific concerning fisheries in that region, defines fishing and its related activities as "any operations at sea directly in support of, or in preparation for any fishing activity" (ILM 26 (1987) p. 1048).

212. The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific defines related activities as including "transporting, transhipping and processing any driftnet catch, and cooperation in the provision of food, fuel and other supplies for vessels equipped for or engaged in driftnet fishing" (29 ILM (1990) p. 1449).

213. Related activities are also included in the scope of the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean of 11 February 1992, the Convention for the Conservation of Southern Bluefin Tuna and the Honiara Agreement of 30 November 1994 concerning Cooperation in the Management of Fisheries of Common Interest. Article 1 of that Agreement defines "related activities" to mean "refuelling or supplying fishing boats" (see United Nations Publication, Law of the Sea: Current Developments on State Practice No. IV (1995), p. 188). These various legal instruments apply to maritime areas within national jurisdiction, as well as to the high seas in the Pacific and Indian Oceans.

214. In West Africa, there is the 1993 Convention on the Minimal Conditions for Access, as amended, which entered into force on 13 September 2013. In this region, fishing-related operations include transhipment of fishing products in maritime waters under national jurisdiction, storage, processing or transportation of fishing products before their first landing, bunkering or supplying of fishing vessels, or any other activity of logistical support for fishing vessels at sea.

215. Article 2, paragraph 7, of the (MCA/SRFC) Convention defines support vessels as "vessels which transport fuel and food for ships carrying out fishing activities". Furthermore, article 7, paragraph 5, provides that "any activity of factory vessels, support vessels and reefers must be regulated" and that "the original fishing licence shall be kept on board the fishing vessel at all times" (article 7, para. 6).

216. National legislation on the subject has been collected and published by DOALOS and the FAO, which in 1993 published a legislative study entitled "Coastal State Requirements for Foreign Fishing Vessels". With regard to the definition of fishing vessel, the FAO study states that:

> The trend now seems to be to include fishery support vessels, including motherships, transport ships and refuelling ships in that definition, in addition to vessels actually engaged in fishing
> [see FAO, Legislative Study No. 21, Rev. 4 (1993), chap. 12, "Coastal State Requirements for Foreign Fishing", p. 713].

217. In other words, in the legislation of coastal States that regulate fishing by foreign vessels in their EEZ, the rules also apply to transport vessels, supply tankers and logistical support vessels in general.

218. Under this approach the coastal State can apply its fisheries legislation to fishing vessels and to logistical support and supply vessels. This enables it to exercise more effective monitoring to ensure compliance with the laws and regulations it has adopted in conformity with the Convention.

219. For example, Section 1824 of the United States Fisheries Code provides that:

> no foreign fishing vessel shall engage in fishing within the exclusive economic zone . . . unless such vessel has on board a valid permit issued under this section for such vessel.

220. The Code defines "fishing" to include "any operation at sea in support of, or in preparation for" (the catching of fish). The implementing regulation defines "support" as "any operation by a vessel assisting fishing by foreign or US vessels, including supplying water, fuel, provisions, fish processing equipment, or other supplies to a fishing vessel". The Code also defines the term "fishing vessel" to include any craft which is used for "aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation or processing" (US Code, Title 16 – Conservation, Chapter 38 – Fishery Conservation and Management, section 1802 Definitions para. 17).

221. In implementing the Convention, Japan has prohibited the transhipment and loading of fish without prior authority. Similarly, Japan requires authorization for the bunkering of fishing vessels operating in its exclusive economic zone.

> Where a foreigner intends to conduct activities accompanying fishing and other activities in connection with fishing . . . he/she shall obtain the approval of the Minister . . . for each of the vessels to be used for such activities.

222. Similarly, the Republic of Korea's Act on the Exercise of Sovereign Rights on Foreigners' Fishing within the EEZ of 1996 provides that "a foreigner . . . shall obtain a licence for each vessel from the competent Korean Minister". The Act defines the term "fishery activity" to include "the keeping, storing and processing of fishery products, the transporting of the catch and its products, the supplying of materials necessary for vessels, and other acts as stipulated by. . . . Ordinance" (Act No. 5158 of 8 August 1996, as amended).

223. South Africa's Marine Living Resources Act of 1998 extends to "refuelling or supplying fishing vessels, selling or supplying fishing equipment or performing any other activity in support of fishing".

224. Similar definitions can be found in the national legislation of coastal States throughout the world: the Seychelles (The Fisheries Act 1986), Australia (Fisheries Management Act 1991), Barbados (Marine Boundaries and Jurisdiction Act 1978, Section 2), Canada (Coastal Fisheries Protection Act), Grenada (Fisheries Act 1986), Guinea-Bissau (Decree-Law No. 4/94), Sierra Leone (Fisheries (Management and Development) Decree 1994: the term "related activities" is defined to mean transhipping, processing and refuelling or supplying fishing vessels), Trinidad (Archipelagic Waters and EEZ Act 1986, section 2). Such rules can be found in every region of the world.

National legislation on bunkering of vessels

225. The information provided below is based on the laws and regulations on bunkering of vessels available on the FAO website (http://faolex.fao.org). Fifty-two States are listed: Antigua and Barbuda, Bahamas, Barbados, Brunei Darussalam, Canada, China, Cook Islands, Denmark, Dominica, Eritrea, Fiji, Gambia, Ghana, Grenada, Guyana, Indonesia, Ireland, Kenya, Kiribati, Korea (Republic of), Latvia, Malaysia, Malta, Marshall Islands, Mauritania, Mauritius, Micronesia, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent

and the Grenadines, Samoa, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Tanzania, Tonga, Trinidad and Tobago, Turkey, Tuvalu, United Kingdom, United States of America, Vanuatu. The legislation surveyed covers several regions: Africa (13); Asia (18); Latin America and the Caribbean (10); eastern Europe (1); western Europe and other States (10).

Terminological clarifications

226. In rare instances the legal instruments include terminological clarifications:

- Under the United Kingdom's "Merchant Shipping Regulations 2010", "bunkering operation means the transfer between ships of a substance consisting wholly or mainly of oil for consumption by the engines of the ship receiving the substance";
- Section 3 of the "Order on bunkering operations and ship cargo transfer to oils in the Danish territorial Sea (2003)" includes the following definitions: "Bunkers: fuel oils and other petroleum products necessary for the operations of a ship". "Bunkering operations: Transfer of bunkers to a ship"; "Bunker ship: An oil tanker which delivers bunkers to a receiving ship".

Date of adoption

227. Many of the surveyed laws were drafted prior to adoption of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"): Fiji (1977), Guyana (1977), Namibia (1981), Nauru (1978), Nigeria (1967), Pakistan (1908), Trinidad and Tobago (1969), Tuvalu (1978);

- Others were drawn up after the Convention was adopted but before it entered into force: Bahamas (1988), Canada (1985), Dominica (1987), Grenada (1989), Kenya (1989), Malaysia (1985), New Zealand-Tokelau (1988), Saint Kitts (1984), Saint Lucia (1984), Saint Vincent and the Grenadines (1986), Samoa (Fisheries Act 1988), Tonga (1988), United Kingdom (British Indian Territory) (1991), United Kingdom (Montserrat) (1989);
- A number of other instruments were adopted after the entry into force of the Convention: Antigua and Barbuda (2006), Brunei Darussalam (2009), Cook Islands (2005), Denmark (2003), Eritrea (1998), Gambia (2007), Ghana (2002), Indonesia (2004), Ireland (2007), Kiribati (2010),

Korea (Republic of) (1996), Latvia (2002), Malta (2001), Marshall Islands (1997), Mauritania (2000), Mauritius (2005 and 2007), Nauru (2006), New Zealand (1996), Nigeria (Act No. 5 2003), Papua New Guinea (1998), Philippines (1998), Samoa (Shipping Act 1998), Sierra Leone (1994), Singapore (2005), Solomon Islands (1998), South Africa (1998, 2003, 2009), Tanzania (2003), United Kingdom (1995, 2010, 2012), United Kingdom (Law of Pitcairn, Henderson, Ducie and Oeno Island) (2001), Vanuatu (Laws of the Republic of Vanuatu, Chapter 315 Fisheries, 27 March 2006).

Subject-matter

228. The aim of the majority of the legislation is to preserve living resources and to regulate fisheries in the exclusive economic zone (EEZ). Nevertheless, certain instruments have other objectives:

- regulation of bunkering as the primary purpose: Denmark (2003), Micronesia (Micronesian Maritime Authority Reefers and Fuel Tankers Licensing Regulations);
- maritime delimitation: Grenada (1989), Guyana (1977);
- utilization of maritime resources: (Fiji), Mauritius (2005), Nauru (1978), Trinidad and Tobago (Archipelagic Waters and Exclusive Economic Zone Act, 1986, Act No. 24 of 11 November 1986), United Kingdom (British Indian Territory) (1991);
- regulation of technical questions relating to safety of navigation and prevention of oil pollution: China (1982), Ireland (2008), Latvia (2006), Micronesia (1993), Namibia (1981), Nauru (2006), Nigeria (1967), Pakistan (1908), Samoa (1998), Singapore (2005), Solomon Islands (1998), South Africa (2003), Trinidad and Tobago (1969), Turkey (2003), United Kingdom (1995, 2010).

Fishing activities and logistical support

229. Where it regulates fishing activities, the relevant national legislation provides terminological clarifications:

230. *Fishing*. This notion has a broad purport in many instruments. For example, "'Fishing' means fishing for, catching, taking or harvesting fish . . . and includes the . . . refuelling or supplying of other vessels or any other activity in support of fishing operations" (Gambia, Fisheries Act, 2007, 2. Interpretation). The term can also mean "the catching, taking, killing of fish . . . any other operation in support of, or in preparation for [fishing]": United States of America (16 USC Sec. 1802, (15)); Guyana (Chapter 100:01, Maritime Boundaries Act, 1977, para. 2); Kiribati (An Act for the Conservation, Management and Development of Kiribati Fisheries Control of Foreign Fishing and for Connected Purposes, 2010, 2. Definition); Malaysia (Act 317, 2. Interpretation); Malta (Act No. II of 2001, 2. Interpretation, (c)); Tonga (Fisheries Act 1989, 2. Interpretation); Vanuatu (Laws of the Republic of Vanuatu, Chapter 315, Fisheries, 1. Interpretation (e)). Article 4(c) of Law No. 2000/025 establishing the Fisheries Code of Mauritania assimilates fishing with "the supplying of fishing vessels or any other activity of logistical support for fishing vessels at sea". Along similar lines, the Micronesian Maritime Authority Reefers and Fuel Tankers Licensing Regulations (2.4.) include "refuelling or supplying fishing vessels" in fishing.

231. *Fishing vessels*. The definitions used often include "operations" or "activity" "in support of fishing operations", "in support of or in preparation of any activity in relation to a fishing vessel" or "related activities to fishing": Antigua and Barbuda (2006), Bahamas (1988), Barbados (1993), Cook Islands (2005), Dominica (1987), Eritrea (1998), Gambia (2007), Ghana (2002), Guyana (1977), Indonesia (2004), Kiribati (2010), Malaysia (1985), Malta (2001), (USA Sec. 1802), Mauritania (2000), Mauritius (2007), New Zealand (1996), Papua New Guinea (1999), Senegal (1998), Solomon Islands (1998), Tanzania (2003), Tonga (1989). The laws of the United Kingdom (British Indian Ocean Territory, 1991), Trinidad and Tobago (Archipelagic Waters and Exclusive Economic Zone Act 1986) and Malta (2001) respectively use the wording: "fishing boat . . . or any operations ancillary thereto", " 'fishing craft' . . . includes any vessel used in support or ancillary to fishing operations"; "fishing vessel and activities ancillary thereto". Under section 2(1) of the Canadian Coastal Fisheries Protection Act (R.S.C. 1985): " 'fishing vessel' includes any ship or boat or any other description of vessel used in or equipped for (a) fishing . . . (c) provisioning, servicing, repairing or maintaining any vessels of a foreign fishing fleet while at sea". Under the Micronesian Maritime Authority Reefers and Fuel Tankers Licensing Regulations 2.5: " 'Fishing vessels' means any vessel, boat, ship

or other craft . . . equipped for . . . fishing; (b) aiding or assisting one or more vessels at sea in the performance of activity related to fishing, including, but not limited to preparation, supply, refuelling, storage . . .".

232. *Activities*: "related activities in relation to fishing". The expression appears in several pieces of legislation: Ghana (2002), Mauritania (2005) "[activities] assimilated to fishing"), Mauritius (2007), Micronesia (1993), Saint Kitts and Nevis (1984), Saint Lucia (1984), Saint Vincent and the Grenadines (1990), Samoa (1988), Seychelles (1986), Sierra Leone (1994), Solomon Islands (1998), South Africa (1998), Tonga (1989), United Kingdom (Montserrat, 2000), Vanuatu (Laws of the Republic of Vanuatu, Chapter 315, Fisheries, Act 55 of 2005). With minor variations in wording, these instruments include "refuelling or supplying fishing vessels or performing other activities in support of fishing operations" within the meaning of "related activities in relation to fishing". Under article 5(c) of Senegal's Maritime Fisheries Code, "fishing-related operations include . . . bunkering or supplying of fishing vessels, or any other activity of logistical support for fishing vessels at sea". The same provision appears in the Fisheries Code of Mauritania (article 4(c)).

Licences for bunkering

233. Bunkering of vessels at sea is subject to a licence issued by the adjacent coastal State.

- This may be an "appropriate licence" required in "fisheries waters" (inland waters, territorial sea and the exclusive economic zone of the Gambia and other inland or marine waters): Gambia (Fisheries Act 2007), Saint Vincent and the Grenadines (Fisheries Act, 1990, para. 2): "waters of the exclusive economic zone, territorial sea, archipelagic waters and internal waters".
- Several States lay down in their legislation the requirement of a "foreign fishing licence" in fishing zones, in the exclusive economic zone or in archipelagic waters: Bahamas (Fisheries Act 1988), Brunei Darussalam (Fisheries Order 2009), Cook Islands (Marine Resources Act 2005), Denmark (2003), Eritrea (1998), Fiji (1978), Gambia (2007), Grenada (1986), Kenya (1989), Kiribati (2010), Korea (Republic of) (1996), Malaysia (1985), Malta (2001), Mauritius (2007), New Zealand (1988), Philippines (1988), Saint Lucia (1984), Saint Vincent and the

Grenadines (1990), South Africa (Marine Resources Act 1998), Tanzania (2003), Tonga (1989), Trinidad and Tobago (Archipelagic Waters and Exclusive Economic Zone Act 1986), Tuvalu (1982), United Kingdom (Montserrat) (2000), Vanuatu (2005). In some cases it is specified that this must be a "valid foreign fishing licence": Antigua and Barbuda (2006), Barbados (1993), Cook Islands (2005), Eritrea (1998), Marshall Islands (1997), Saint Kitts (1984), Saint Vincent and the Grenadines (Chapter 52 Fisheries Act, 1990, paras. 12 and 13), Samoa (1988), Seychelles (1986), Solomon Islands (1998), Tonga (1989).

234. Other States require "licences or permits" for foreign fishing vessels*:* Canada (Coastal Fisheries Protection Act, R.S.C. 1985, fishing zones, territorial sea and internal waters of Canada), section 6; Ghana (Fisheries Act 2002), para. 61: "a foreign fishing vessel shall not enter the fisheries waters of Ghana unless authorized . . . by the terms of a licence or permit". The permit must be valid ("valid permit"): Mauritius (Act No. 27 of 2007, para. 38); Micronesia (Micronesian Maritime Authority Reefers and Fuel Tankers Licensing Regulations, para. 3, "Permit required"); Tonga (Fisheries Act 1989, para. 6), United States of America (Sec. 1824).

235. In some cases, a licence or permit is required for "fishing-related" activities: Eritrea (Proclamation No. 104/1998 (The Fisheries Proclamation), article 19 "Other licences"); Kiribati (An Act for the Conservation, Management and Development of Kiribati Fisheries Control of Foreign Fishing and for Connected Purposes, 2010, para. 12, "Foreign fishing vessels", c) "load or unload fuel or supplies in Kiribati waters"); Mauritius (The Fisheries and Marine Resources Act 2007, para. 34, "foreign fishing boat or foreign fishing vessel for fishing or any related activity within the maritime zones"; Micronesia (Micronesian Maritime Authority Reefers and Fuel Tankers Licensing Regulations); Vanuatu (Laws of the Republic of Vanuatu, chap. 315, Fisheries, para. 9, "Foreign vessels licences", 3) d) "related activities [to fishing operations]".

Sanctions

236. Violation of these requirements gives rise to "enforcement measures" relating to the conservation and exploitation of living resources in areas under the State's jurisdiction, which include boarding, inspection, seizure and confiscation of the vessel by the State and the institution of proceedings to enforce

its "laws and regulations". In English, the words used are "forfeiture", "detention" and "confiscation": Eritrea (Proclamation No. 104/1998, article 34), Fiji (Marine Spaces Act [Cap 158A], para. 18, "Forfeiture of vessels, etc"), Gambia (Fisheries Act, 2007), Ghana (Fisheries Act, 2002, Sub-Part X – Detention, Sale, Release and Forfeiture of Property), Kenya (Chap. 378, The Fisheries Act, para. 19), Korea (Republic of) (Act on the Exercise of Sovereign Rights on Foreigners' Fishing, para. 23), Malaysia (Act 317, para. 52), Malta (Act No. II 2001, para. 35), Mauritania (Fisheries Code, article 66), Mauritius (The Fisheries and Marine Resources Act 2007, paras. 58, 71), Saint Vincent and the Grenadines (Chap. 52, Fisheries Act, 1990, paras. 39 and 42), Samoa (Fisheries Act 1988, para. 22), Senegal (Fisheries Code, article 64), Sierra Leone (Fisheries (Management and Development) Decree, 1994, Part X Sale, Release and Forfeiture of Retained Property), Solomon Islands (Shipping Act 1998, Part XI, Arrest, Forfeiture, para. 206, and Forced Sale of Vessels), South Africa (Act 1998, paras. 53 and 55), Tonga (Fisheries Act 1989, Part VIII, Sale, Release and Forfeiture of Retained Property), Vanuatu (Laws of the Republic of Vanuatu, Chap. 315, Fisheries, Part 12, Sale, Release and Forfeiture of Seized Property), Guinea-Bissau (Decree-Law 6-A/2000).

Release of the vessel

237. There is provision in some cases for the release of a vessel detained on grounds of infringement of legislation governing fisheries or access to fishing areas: Eritrea (The Fisheries Proclamation No. 104/1998, article 34 "Release of vessels, etc. on bond"), Fiji (Marine Spaces Act [Cap 158A], para. 19, "Security for release of foreign vessels"), Gambia (Fisheries Act, 1997, para. 81, "Release on bond"), Ghana (Fisheries Act, 2002, Sub-Part X – Detention, Sale, Release and Forfeiture of Property), Malta (Act No. II of 2001, para. 24 2) b), "reasonable bond"), Mauritania (Law No. 2000-025 establishing the Fisheries Code, Section 2 "Provision of a security"), Mauritius (The Fisheries and Marine Resources Act 2007, para. 65, "Security for release of seized items"), Saint Vincent and the Grenadines (Chap. 52, Fisheries Act, 1990, para. 38, "Release of vessel, etc., on bond"), Samoa (Fisheries Act 1998, para. 16, "Release of vessel, etc., on bond"), Senegal (Maritime Fisheries Code, chapter 3 "Payment of a security"), Sierra Leone (The Fisheries Management and Development, Decree, 1994, para. 71 1), "bond or other form of security as it may determine"), Solomon Islands (Shipping Act 1998, para. 210, 10 b)), Tonga (Fisheries Act 1989, para. 30 3) a) and para. 39, "Release of seized, vessel, etc., on receipt of a bond or other form of security acceptable"), Trinidad and Tobago (para. 31, "Release of arrested crafts and their crews"), Guinea-Bissau (article 65 of Decree-Law 6-A/2000).

238. To sum up, the trend observed by the FAO in 1993 has consolidated and intensified since then. There exists considerable uniformity as regards the inclusion of fishing-related operations in the laws and regulations of coastal States. On the matter of bunkering, some States regulate it, others do not. Even though every coastal State is legally entitled to do so, this is a matter for its discretion.

IX Fishing licences and bunkering

A) *Fishing licences*

239. Access to the fisheries resources of the maritime areas under jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC) in West Africa is dependent upon obtaining beforehand a fishing licence issued by the Member State in question. The Republic of Guinea-Bissau is a member of the SRFC.

1) Applications for fishing licences

240. For access to fisheries resources, applications for licences are to be submitted by individuals or corporate entities in conformity with national legislation or the provisions stipulated in agreements and other applicable arrangements.

241. Applications for fishing licences for industrial fishing vessels must contain the basic information specified in the Convention on the Minimal Conditions for Access of 13 September 2012 (MCA/SRFC Convention), without prejudice to the additional information required by national legislation (article 6, para. 2).

242. That basic information concerns the applicant, the vessel, the type of fishing and the mode of conservation. For the applicant the information includes: company name, company identification number, trade register number, name of company executive, date and place of birth, profession, taxpayer account number, address, number of employees (permanent and temporary), name and address of co-signatory and turnover.

243. For the vessel, the following information must be given: type of vessel, registration number, new name, former name, date and place built, nationality

of origin, date taken to flag (provisional, deadline, final), length, width, depth, type of construction material, draught, make of main engine, type, HP, propeller (fixed, controllable, nozzle), transit speed, call sign, call frequency, list of means of navigation, detection and transmission, radar, echosounder, sonar, VHF radio, BLU, automatic pilot, (Net sound), telex, course recorder, scanmar.

244. As far as type of fishing is concerned, there is inshore and deepwater demersal fishing, on the one hand, and inshore and deep-sea pelagic fishing, on the other.

245. For pelagic fishing, the following information must be provided: fishing option (seiner, trawler), type of gear (pelagic trawls or seine), length of trawl, length of headline, pocket mesh opening, length of seine, dimension of mesh, height of seine, longliner (tuna), longliner (swordfish), cane, surface longliner, number of canes, number of hooks, size of hooks.

246. For demersal fishing: fishing option (shrimp, fish and cephalopods or bottom longliner), type of gear, fish trawl, shrimp trawl, length of trawl, length of headline, spiny lobster pot option, deep crab pot option.

247. With regard to the mode of conservation: ice, cooled sea water, freezing (brine and dry), total cooling power, freezing capacity in tonnes per 24 hours and hold capacity.

248. As regards the conditions for the issue of fishing licences, the (MCA/SRFC) Convention provides that licences are to be issued after the competent administration of the State concerned has verified that the legislation on the registration and marking of vessels in force in that Member State has been complied with. Licences are issued only if the conditions required by that legislation are satisfied by the vessel applying for the licence and, in order to be issued licences, industrial fishing vessels must be equipped with a vessel monitoring system (VMS).

249. Article 7 also provides that any activities by factory vessels, support vessels and reefers must be strictly regulated and that the original fishing licence must be kept on board the fishing vessel at all times (paras. 5 and 6).

250. The validity period of fishing licences may vary according to national legislation. However, in order to have a better knowledge of the catches taken from maritime areas under the jurisdiction of Member States and to ensure that the population has access to sufficient regular supplies of fishing products, the validity period must take into account the imperatives of responsible and sustainable management of fisheries resources (article 8 of the MCA/SRFC Convention).

251. The Convention also provides that any industrial fishing vessel operating in the area covered by it is bound to provide declarations of catches in a logbook containing the following information: name of vessel, nationality, fishing licence number, trip duration, daily data (day, month, year), data on deployment of fishing gear (time, position, depth), data on retrieval of fishing gear (time, position, depth) and special comments (targeted species, rejects) by the vessel captain.

252. Article 14 introduces a declaration of entry to and exit from the maritime area under the jurisdiction of the Member State. It provides that any fishing vessel entering or exiting the maritime area must communicate information on its entry to and exit from that maritime area by radio or by any other means to the relevant department of the Member State concerned. The declaration must be made at least 48 hours before the vessel enters or exits the maritime area and must contain the following basic information: the origin and destination of the vessel; the location of the vessel when the entry or exit declaration is made; declaration of quantities of fish on board by species; the reason for entering the maritime area.

253. With regard to fishing vessels on innocent or transit passage, "when on passage through the maritime area under the jurisdiction of a Member State, unauthorized fishing vessels must stow their fishing gear whilst navigating through the said maritime area". These vessels are regulated by paragraph 1 of article 58 of the Convention.

254. The Convention includes provisions on compliance with international conventions on maritime safety and protection of the maritime environment. Fishing vessels authorized to operate in maritime areas under the jurisdiction of the Member States must comply with the relevant provisions of international conventions on maritime safety and protection of the maritime environment of the International Maritime Organization (IMO) and with the provisions of the International Labour Organization (ILO) on employment in

the fisheries sector (C. 188, 2007) (see article 18 of the MCA/SRFC Convention). Under article 13 of Guinea-Bissau's Decree-Law No. 6-A/2000, fishing activities may be carried out only after a licence has been issued by the authorities of that country.

255. As regards the issue and nature of the licence, the exercise of any activity is subject to the prior issue of a fishing licence which must be drawn up on a template document by the Government department responsible for fisheries and signed by the persons responsible for fisheries, the economy and finance. The licence will be issued to a vessel on behalf of its owner and will be valid in relation to the fishing activities mentioned therein.

256. Article 52 of Decree-Law 6-A/2000 defines the policing powers which may be exercised by Guinea-Bissau pursuant to the provisions of that Decree-Law where fishing vessels conduct unauthorized fishing activities.

257. Thus, all fishing vessels, whether national or foreign, which engage in fishing activities within the limits of national maritime waters without having obtained the licence provided for in articles 13 and 23 will be seized ex officio, with their, equipment and fishery products on behalf of the State, by a decision of a member of the Government responsible for fisheries. Regardless of confiscation, the courts must apply the fines set out in article 54(2) of the Decree-Law. The decision on confiscation can, however, be appealed. The Inter-Ministerial Fisheries Commission will decide how to dispose of the confiscated property and products, the proceeds accruing to the Government, in accordance with the provisions of the Decree-Law.

B) ***Bunkering***

258. Bunkering is the generic term designating the sale of fuel by tankers at sea. It may be heavy fuel, gas oil or marine diesel. These vessels also supply food, fresh water and other provisions.

259. The primary function of bunkering is to increase the ongoing efficiency of the activities of its various beneficiaries by making up for the general absence of refuelling installations in a certain region or the lack of access to that region's ports. Today it is a highly lucrative economic activity.

260. A significant number of foreign fishing vessels operate in the West African region. They come from great distance. Bunkering at sea is highly beneficial for them in that it allows them to carry out their activities without entering ports.

261. There are many beneficiaries of bunkering. They can include warships, passenger transport vessels, cargo vessels and fishing vessels. There is thus the generic activity of bunkering and specific categories of it. A distinction must therefore be drawn between the different forms of bunkering and the rules governing them. Container ships do not have any need for bunkering in general. Their bunkers allow them to navigate freely. Bunkering with heavy fuel for merchant vessels is, in most cases, governed by merchant marine codes. The transhipment of fuel between two vessels is also regulated by merchant marine codes.

262. As regards bunkering of vessels in transit, this activity is essentially linked to navigation and can thus be understood as being covered by a freedom to use the sea for other internationally lawful purposes within the meaning of article 58, paragraph 1, of the Convention. Consequently, there is a functional distinction based on the nature of the activity in which the recipient is engaged.

263. In exercising its sovereign rights in its exclusive economic zone, the coastal State is entitled to regulate fishing operations by foreign vessels utilizing its living resources by granting them fishing licences. The conditions governing the grant of the licence may also cover the regulation of bunkering of those vessels where they are operating in the exclusive economic zone. If the coastal State is able to regulate operations relating to the utilization of the living resources of the exclusive economic zone, it goes without saying that it can also do so in respect of bunkering of fishing vessels engaged in such utilization, since bunkering is a fishing-related operation, not an activity related to navigation in this case. Bunkering increases the effectiveness of fishing in the exclusive economic zone considerably. It enhances its intensity and the quantity of catches, which may exceed the quotas allocated in the fishing vessel's licence. It is therefore logical for the coastal State to regulate bunkering in accordance with articles 61 and 62 of the Convention relating to the conservation and utilization of living resources.

264. Similarly, in accordance with paragraph 5 of article 211 of the Convention the coastal State is entitled to adopt international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and to take measures to minimize the threat of accidents liable to cause pollution of the marine environment in its exclusive economic zone. In this case bunkering relates more to merchant vessels and the pollution-prevention procedures developed within the framework of the IMO.

265. On the other hand, the Convention (article 56) does not permit the State to regulate navigation in its exclusive economic zone. Bunkering of vessels in transit is exempt from the national legislation of the coastal State as it is a freedom recognized by article 58, paragraph 1, of the Convention.

266. As Judge Anderson observed in his Separate Opinion in the *M/V "SAIGA" (No. 2) Case* (p. 137):

> Today, bunkering is conducted under all manner of different circumstances and may involve distinct types of recipient vessels, including passenger vessels, warships, cargo ships and fishing vessels. For example, immediately before and after taking on bunkers, a recipient vessel may be exercising the freedom of navigation. In such a case, its bunkering could well amount to an "internationally lawful use of the sea" related to the freedom of navigation and "associated with the operation of ships" within the meaning of article 58, paragraph 1, of the Convention. To take a different example, a fishing vessel may be engaged in fishing in the EEZ with permission and subject to conditions established in the laws and regulations of the coastal State, consistent with the Convention (in particular, its article 62, paragraph 4). Here, the accent is not so much on the navigation of the fishing vessel as upon its efficient exploitation of the stocks in accordance with the terms of its licence. Yet again, a fishing vessel may also be in need of bunkers whilst navigating in transit between its home port and some distant fishing grounds.

267. In the present case, the bunkering operation in question concerns a) a foreign fishing vessel; b) operating in the exclusive economic zone; c) holding a proper (i.e. valid) fishing licence; d) respecting the time and location for bunkering communicated to the authorities of the coastal State; and e) subject to checks by inspectors.

268. From a legal point of view, bunkering can be seen as a sale contract between the bunkering company and the operator of the vessel to be bunkered. The bunker fuel is usually loaded by the seller/supplier in Las Palmas, on board a specialized tanker owned or chartered by it and appropriate arrangements for delivery or supply are made with the clients operating along a specific route, in this case between the Canary Islands and Angola (oil-producing country).

269. The waypoint for the fuel bunkering is agreed several weeks in advance according to the client's needs and the route taken by the vessel.

270. The contractual arrangements are made between the offices of the bunkering company and the offices of the operator of the recipient vessels. The logistical details in the form of the location for bunkering and compliance with formalities are generally decided by radio, telephone or email by the captain of the bunker vessel, the captain of the recipient vessel and their respective maritime agents on land, who deal with the administrative formalities.

271. What is the procedure for authorizing bunkering in the exclusive economic zone of the coastal State? The principles of the general fisheries policy are laid down in the provisions of Decree No. 4/96 of 2 September 1996. Bunkering is included among fishing-related operations in article 39 concerning "logistical support and transhipment operations". Logistical support operations such as provisioning with victuals, fuel, the delivery or receipt of fishing materials and the transfer of crews, and transhipment of catches must be specifically authorized in advance by the Ministry of Fisheries.

272. Requests for authorization must be made at least ten (10) days prior to the expected date of entry of the vessels that are to perform those operations. Those requests must include the following information: a precise description of planned operations; identification and characteristics of the vessels used for logistical support or transhipment; and identification of the vessels that will benefit from operations of logistical support or transhipment of catches.

273. In no event may the beneficiaries be vessels that do not hold a valid fishing licence. The Ministry of Fisheries may decide that the operations will take place in a defined area and at a given time and in the presence of qualified maritime enforcement officers.

274. Requests for authorization must be made in writing and be accompanied by all the required information, and the authorizations themselves must take the form of a written document (para. 2 of article 39).

275. Lastly, there is a charge for authorization pursuant to article 23, paragraph 2, of Decree-Law No. 6-A/2000, and the vessel must be in possession of a payment receipt.

1) Thus, in Guinea-Bissau for example (as in all countries of the SRFC), fishing-related operations require authorization from the authority responsible for fisheries. The interested party must submit his request in advance and the assisting vessel must have a fishing licence. The request for bunkering authorization must be submitted 10 days before the commencement of the planned operation.
2) The applicant or his maritime agent sends the request to the Minister responsible for fisheries, applying for authorization for bunkering at sea and identifying the beneficiary fishing vessels and companies and the characteristics of the bunker vessel (the tanker).
3) The request is received by the Minister, who assigns it to the Directorate-General for Industrial Fisheries for the necessary procedures to be carried out: checking the conformity of documentation; issue of a *pro forma* invoice and payment of the invoice into the account of the Public Treasury.
4) The applicant makes payment of the charge into the Public Treasury account with the Central Bank of West African States (BCEAO).
5) Once these formalities have been carried out, the authorization is printed out, proof of payment and other documents are enclosed and it is all sent to the Director-General for Industrial Fisheries.
6) The Director-General confirms that the formalities and the payment are in order, adds his signature and submits the document to the Minister for signature, who thus grants authorization.
7) The authorization is then communicated to the owner of the tanker or to his local representative. This procedure is followed for every vessel, irrespective of its flag.

276. Paragraph 2 of article 73 of the Convention states: "arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security".

277. As was explained above, the owner of the *M/V Virginia G* did not turn to the court having jurisdiction to determine and set the bond or the security. Instead, it attempted to handle the matter with FISCAP, not with the court. The owner of the *M/V Virginia G* prevented the prompt release procedure being applied by filing for an interim measure from the court (Rejoinder, para. 194). After the vessel and its cargo were seized, the owner, although notified, chose not to take any measures against this seizure such as the payment of a bond. It seems that it had no financial capacity to do so. It only requested and obtained the suspension of the unloading of the diesel oil ordered by the Secretary of State of Fisheries after the seizure of the ship (PV4, p. 8, lines 35-39).

278. The seizure of the gas oil was perfectly legal under Guinea-Bissau's law. It is evident that the gas oil is covered in the seizure of the ship in accordance with article 52 of the Decree-Law. It seems that the owner of the *M/V Virginia G* did not explore the appropriate legal remedies offered to it by the coastal State, which did not therefore violate article 73, paragraph 2, as was recognized by the Tribunal (para. 257 of the Judgment).

279. With regard to paragraph 3 of article 73, it is clear from the case file that the authorities of Guinea-Bissau did not apply to the crew any penal sanctions which are not provided for by law; they only penalized the owner of the vessel by confiscating the vessel, which is a lawful sanction. No measures involving imprisonment or corporal punishment were taken against the crew. The Tribunal was therefore right to conclude that Guinea-Bissau did not violate article 73, paragraph 3, of the Convention.

280. As regards paragraph 4 of article 73, since the Tribunal confirmed the link of allegiance between the *M/V Virginia G* and Panama, it seems that Guinea-Bissau violated paragraph 4 by "failing promptly to notify" the flag State of the action taken.

IX Reparation

281. Paragraph 434 reads as follows:

> [t]he Tribunal takes the view that, in light of its findings and in conformity with its jurisprudence set out above, Panama in the present case is entitled to reparation for damage suffered by it. Panama is also entitled to reparation for damage or other loss suffered by the M/V Virginia G, including all persons and entities involved or interested in its operation, as a result of the confiscation of the vessel and its cargo.

282. The Tribunal continues:

> [c]onsidering that the confiscation of the *M/V Virginia G* and its cargo has been found to be a violation of article 73, paragraph 1, of the Convention, the Tribunal will now assess the claims made by Panama. In the view of the Tribunal, only damages and losses related to the value of the gas oil confiscated and the cost of repairing the vessel are direct consequences of the illegal confiscation. (Judgment, para. 435)

283. It is clear that the damage which was alleged and then accepted by the Tribunal does not really stem from confiscation – which means a transfer of ownership – but rather from seizure made in accordance with article 73, paragraph 1, of the Convention. Panama takes the view that in this case Guinea-Bissau breached its international obligations set out in the Convention, which breach led to a prejudice being caused to the Panamanian flag and to severe damage and losses being incurred by the vessel and other interested persons and entities because of the fact and length of the detention. Guinea-Bissau contends that certain items of damage are not the result of "the arrest of the *Virginia G* which is the only case over which the Tribunal has jurisdiction" and that "the only direct losses resulting from the arrest of the *Virginia G* are those allegedly caused to the ship, its owner and the crew". It adds that "Panama, however, has claimed damages for losses allegedly suffered by other entities, such as Gebaspe and Penn World, which have nothing to do with the *Virginia G*" (para. 424 of the Judgment). Guinea-Bissau also states that it "is totally unaware" of the existence of the damages referred to in paragraphs 413

and 414 (of the Judgment) and argues that Panama "does not present any proof thereof, but only unfounded allegations" and that "therefore such allegations must be considered to be unproven". It adds that "[i]f such damage did exist, this is due to the financial problems of the shipowner . . . and which therefore had nothing to do with the arrest of the *VIRGINIA G*".

284. Seizure means the lawful detention of the vessel in port, with release being subject to a judicial or administrative decision, and is independent of confiscation. In the present case, the owner of the *M/V Virginia G* neither explored the remedy of requesting release pursuant to the article of Decree-Law 6-A/2000 nor challenged the seizure measure before the administrative court having jurisdiction, and certainly did not seek to reach a negotiated settlement. Its representative stated before the Tribunal that he had not intended to initiate a prompt release procedure because he did not have the financial capacity to post a bond. He also stated that he had rejected the proposal made to him by a lawyer in Bissau to negotiate a settlement by posting a bond. Furthermore, the owner's agent informed him that he had 15 days and that that deadline could be extended for the same period on request with a view to reaching a settlement on payment of a fine. As the owner of the vessel did not respond, a second decision was taken by the Inter-Ministerial Commission confirming the confiscation, which was executed in respect of the gas oil. The owner of the *M/V Virginia G* lodged an appeal against the decision on confiscation, which was dismissed. Its conduct fully justifies the attitude taken by Guinea-Bissau. In the *"Tomimaru" Case*, the Tribunal ruled that the decision of the Supreme Court of the Russian Federation brought to an end the procedures before the domestic courts. It noted also that no inconsistency with international standards of due process of law had been argued and that no allegation had been raised that the proceedings which had resulted in the confiscation were such as to frustrate the possibility of recourse to national or international remedies. The Tribunal also considered that a decision by it would have contradicted the decision which concluded the proceedings in the appropriate domestic fora and encroached upon national competences, thus contravening article 292, paragraph 3, of the Convention (see *the "Tomimaru" Case*, paras. 79 and 80).

285. In the present case, the claimant failed to explore the legal remedies offered to him, giving rise to a second decision by the Inter-Ministerial Commission confirming the confiscation measure, which is entirely lawful and cannot be interpreted as an illegal act for which reparation may be granted.

This means that the reparation for the damage caused to the *M/V Virginia G* does not really satisfy the causal link criterion and no compensation can be awarded to the Applicant.

286. This is for the following reasons: first, as to the question of whether the owner of the *M/V Virginia G* is entitled to compensation for any loss of profit for a period between 5 September 2009 and December 2010 when the vessel again became operational, the Tribunal points out that the *M/V Virginia G* was arrested for the violation of the laws and regulations of Guinea-Bissau and that the procedures laid down in article 65 of Decree-Law 6-A/2000 are expeditious and ensure the prompt release of the arrested or detained vessel upon posting of a bond or other financial security and therefore meet the requirements of article 73, paragraph 2, of the Convention. The Tribunal has found unconvincing in this regard the arguments of Panama that the procedures set out in article 65 of Decree-Law 6-A/2000 are unreasonable and unaffordable and therefore could not be used in the present case. Therefore the Tribunal concludes that as the available procedures under the laws and regulations of Guinea-Bissau have not been used by the owner of the vessel to secure its release, Panama cannot claim on behalf of the owner of the vessel any loss of profit (para. 438).

287. Second, with reference to the other claims made by Panama in paragraphs 450 to 453 of its Reply, the Tribunal concludes that Panama in this respect does not satisfy the requirement of a causal nexus between them and the confiscation of the *M/V Virginia G* (para. 439 of the Judgment).

288. As regards the claim of Panama to an additional 10 per cent of the total amount of the compensation, the Tribunal considers that the injury referred to in paragraph 418, consisting mainly in loss of reputation, lacks a causal link with the action taken by Guinea-Bissau. The alleged damage is too indirect and remote to be financially assessable. Accordingly – states the Tribunal – the claim cannot be upheld (para. 440 of the Judgment).

289. Lastly, with regard to the repairs to the vessel, the Tribunal considers that not all damage repaired in respect of which Panama claims compensation satisfies the requirement of a causal link with the confiscation of the vessel (para. 442 of the Judgment).

290. The legal regime governing fault on the part of the victim in causing damage is long settled in the jurisprudence and literature.

291. In the *Maninat* case, the arbitrator considered that a lack of precision in the claim – where it stems from inaction on the part of the claimants – constitutes fault the consequence of which is a refusal of any compensation: "[b]y their own inattention and inaction, they have deprived the umpire of all opportunity to know anything of this branch of their alleged injuries" (*Maninat* case, *R.I.A.A., X*, p. 82). Similarly, the negligence of the victim before a court was examined in *the Gentini case*, where the judge explained that "[t]he principle of prescription finds its foundation in the highest equity, the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and therefore if he has lost, having only his own negligence to accuse" (*Gentini* case, *R.I.A.A., X*, p. 558).

292. Similar views dictated the solution in the *Evesham case*, where the claimants had allowed a very long period of time to elapse, after the damage which had been caused to them, without acting: "[t]heir not availing themselves of these opportunities to obtain compensation in the ordinary course of judicial proceedings for such a length of time, and under such advantages, brings their case within the terms of a loss and damage occasioned by manifest delay or negligence or wilful omission of the claimant. I am therefore of opinion that the memorialists are not entitled to compensation under this article" (*Evesham v. Great Britain, award of 6 July 1797, Moore International Arb., III*, p. 3 100).

293. Again, in *British Property in Spanish Morocco*, it was held that the victim's fault exonerated the government of all responsibility. The twenty-seventh claim concerned an ordinary theft committed to the detriment of British nationals. The arbitrator Max Huber, finding that it was because of the 15-day delay by the owner of the stolen property reporting the theft that no criminal proceedings were undertaken, considered that the fault on the part of the victim was the reason for, and excused, the conduct on the part of the Spanish Government and precluded the wrongfulness that would otherwise have characterized it had the victim not been at fault (R.I.A.A., II, p. 616). In the *Case Concerning Barcelona Traction*, the Spanish Government claimed that all Spain's actions were caused by the previous conduct of Barcelona Traction. In his argument, Prof. Weil stated: "the bankruptcy judgment for which Spain is criticized so strongly is actually attributable to Barcelona Traction's refusal to pay the creditors what is owed to them; the damage purportedly resulting from the seizure of the subsidiaries' assets is attributable to the company's

structure; the manner in which the bankruptcy proceedings progressed is attributable to the decision taken by Barcelona Traction to evade the Spanish judicial system; the issue of the new bonds is due to the misappropriation of funds of the bankrupt company etc. Thus, both in detail and as a whole, the situation about which the Belgian Government complains is due to action by Barcelona Traction" (C.R. 69/39, p. 59).

294. Adopting this point of view, Roth writes: "international arbitral tribunals have often, and rightly so, declared claims for compensation to be unfounded because the injured party had failed to exhaust the legal remedies available to him in the responsible State in order to obtain, through that remedy, compensation for the damage suffered. At the same time, claims for interest or for payment of compensation for lost profits have frequently been rejected on account of the wrongful conduct of the victim" (quoted in Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale*, Paris, Pédone, 1973, p. 314; footnote 866. All these case references come from this source; esp. p. 313-314 and p. 319-320).

295. Fault on the part of the victim is a ground for the dismissal of any claim for compensation on the merits because it played a role in causing the alleged damage. Furthermore, the examination of the causal link between the fault on the part of the owner of the *M/V Virginia G* and the damage for which reparation is claimed is highly perplexing, to say the least.

296. These positions were codified in article 39 of the United Nations International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly Resolution 56/83 of 12 December 2001), which reads as follows:

> Article 39
> Contribution to the injury
>
> In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

297. All in all, it can be held that:

(a) the owner of the *Virginia G* did not exhaust the local remedies offered to it by Guinea-Bissau and Panama's claims had to be dismissed on the ground of absence of *locus standi*;
(b) the confiscation of the *Virginia G*, which was carried out in accordance with the national legislation of Guinea-Bissau, does not constitute an infringement of article 73, paragraph 1, of the Convention;
(c) the inaction on the part of the victim played a role in causing the alleged damage. Fault on the part of the victim in the loss or damage is a ground for the dismissal of any claim for compensation on the merits.

On these grounds, the Tribunal should have simply dismissed the Applicant's claims.

298. Moreover, the conduct of the owner of the *M/V Virginia G* must preclude any entitlement to reparation for it. A general principle of law states that "no one can be heard to invoke his own turpitude". Where this takes the form of repeated occurrences, there is no longer a case that holds up. Justice must follow from certainty not approximation.

Other dissenting opinions

299. I should like to associate myself generally with the thrust of the Joint Dissenting Opinion of Vice-President Hoffmann and Judges Marotta Rangel, Chandrasekhara Rao, Kateka, Gao and Bouguetaia. I also endorse the Dissenting Opinion of Judge Jesus and the Dissenting Opinion of Judge *ad hoc* Sérvulo Correia. In particular, I endorse paragraphs 45 to 52 of the Joint Dissenting Opinion.

(*signed*) Tafsir M. Ndiaye